United States Court of Appeals
For The Eighth Circuit
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April 30, 2025

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RE: 25-1480 MN Chapter of Assoc. Builders, et al v. Nicole Blissenbach, et al

Dear Counsel:

The amicus curiae brief of the National Federation of Independent Business Small Business Legal Center has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

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CRJ

Enclosure(s)

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District Court/Agency Case Number(s): 0:25-cv-00550-JRT

NO. 25-1480

In the United States Court of Appeals for the Eighth Circuit

Minnesota Chapter of Associated Builders and Contractors; Builders Association of Minnesota; and J & M Consulting, LLC

Plaintiffs-Appellants,

v.

Nicole Blissenbach, in her official capacity as Commissioner of the Minnesota Department of Labor and Industry; Keith M. Ellison, in his official capacity as Attorney General of Minnesota,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
District Court No. 0:25-cv-00550-JRT

AMICUS BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT[1]

Amicus curiae National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) has no parent corporation, and no publicly held corporation owns 10% or more of its stock. NFIB Legal Center is a nonprofit, tax-exempt public-interest law firm organized under Section 501(c)(3) of the Internal Revenue Code.

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No party's counsel authored this brief, in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting this brief. No person, other than the amicus curiae, its members, or its counsel, contributed money intended to fund preparing or submitting this brief.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

NFIB Legal Center is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(2). It is upon that authority that the NFIB Legal Center submits this brief.

SUMMARY OF ARGUMENT

The challenged Misclassification of Construction Employees law ("Statute") violates the United States Constitution in several ways, as Appellants rightly argue. But most troubling, it creates massive, punitive penalties for noncompliance while failing to define essential terms.

To understand how such penalties came to be part of legislation like this and what the State's reason behind them might be, one might normally turn to legislative history to get some insight. But if the Court does that, it will only find havoc: as the hour approached midnight on May 19, 2024, amidst a tumult of yelling and over a

formal constitutional protest and dissent by the minority, the Minnesota Legislature rammed the Statute through as a small part of a 1,400-plus-page Frankenstein's monster of an omnibus bill—all with less than an hour left in the legislative session.

Nobody read the final bill, nor could they possibly have a constructive debate over every provision contained therein. This is because the bill plainly violated Minnesota's constitutional Single Subject and Title Clause, combining many different subjects other than the Statute, like taxation, criminalization of firearms, mandatory health insurance coverages, and even regulations of mixed martial arts and Uber and Lyft. The Statute has no unity of purpose that would foster a reasoned discussion, which reveals why the Single Subject and Title Clause exists in the first place. Minnesota laws are not allowed to be made this way, for good reason.

The Minnesota Legislature's unwise haste and disregard for state constitutional norms has its consequences: nobody could read the final version of the Statute, much less debate it, so its provisions turned out rotten. If the Statute stays in place, small business owners who hire independent contractors will struggle to apply it and be forced to change their business practices in costly ways. Independent contractors, who are themselves small business owners, will be reduced to subordinate employees. These same contractors, whose courses of dealing with subcontractors have been established for decades, will suffer disruption in those relationships as

well. The Court should reverse in favor of Appellants and enjoin the enforcement of the Statute.

ARGUMENT

I. The Minnesota Legislature passed the Statute as part of a 1,400-page omnibus bill that combined nine other omnibus bills and at least thirteen discrete subjects in the final hour of the 2024 legislative session without any discussion.

The Statute is just one section of one article of the 93rd Minnesota Legislature's House File 5247, a "Jumbo Omnibus Bill" that spanned more than 1,400 pages and had 73 articles.[2] There was no debate on the final form of the bill. Its haphazard passage plainly violated the Minnesota Constitution. So to the extent the Court looks to the Statute's legislative history to try to understand the State's interest here, that history demonstrates total failure by the full Minnesota Legislature to consider the potential harm to Appellants done by the Statute, as Appellants have described. Appellants' Br. 7-18, 46-54.

Article IV, section 17 of the Minnesota Constitution states: "No law shall embrace more than one subject, which shall be expressed in its title." Minnesota's founders thus imposed two requirements on laws passed by the Legislature: (1) that every law

[2] *See* 2024 Minn. Laws ch. 127, art. 9 §8, https://www.revisor.mn.gov/laws/2024/0/Session+Law/Chapter/127/.

must embrace only one subject (the "Single Subject Clause"), and (2) that the single subject of every law must be expressed in the law's title (the "Title Clause").

The Minnesota Supreme Court has repeated the reasons for these constitutional limitations many times. First, article IV, section 17 exists "to prevent what is called 'logrolling legislation' or 'omnibus bills,' by which a number of different and disconnected subjects are united in one bill, and then carried through by a combination of interests." *Johnson v. Harrison*, 50 N.W. 923, 924 (Minn. 1891); *see also State v. Cassidy*, 22 Minn. 312, 322 (1875) (describing Section 17's purpose as "to secure to every distinct measure of legislation a separate consideration and decision, dependent solely upon its individual merits."). Second, it is designed "'to prevent surprise and fraud upon the people and the legislature' by failing to provide notice of 'the nature of the proposed legislation' and the 'interests likely to be affected' by the legislation." *Otto v. Wright Cnty.*, 910 N.W.2d 446, 456 (Minn. 2018) (quoting *Johnson*, 50 N.W. at 924).

Despite this clear precedent, Minnesota's Legislature has become more and more aggressive in its "omnibus bill" practice in recent years. The Minnesota Supreme Court's "warnings" have also become more and more direct. As former Justice Yetka put it in *State ex rel. Mattson v. Kiedrowski* in 1986, quoted again by the majority in a public warning in *Associated Builders & Contractors v. Ventura* in 2000:

> We should send a clear signal to the legislature that this type of act will not be condoned in the future. Garbage or Christmas tree bills appear

> to be a direct, cynical violation of our constitution * * * . It is clear to me that the more deference shown by the courts to the legislature and the more timid the courts are in acting against constitutional infringements, the bolder become those who would violate them.
>
> * * *
>
> We should publicly warn the legislature that if it does hereafter enact legislation similar to Chapter 13, which clearly violates Minn. Const. art IV, § 17, we will not hesitate to strike it down regardless of the consequences to the legislature, the public, or the courts generally.

Associated Builders & Contractors v. Ventura, 610 N.W.2d 293, 301-02 (Minn. 2000) ("*ABC*") (quoting *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 785 (Minn. 1986) (Yetka, J., concurring). The Minnesota Supreme Court gave the Legislature another public warning just a few years ago in 2018:

> We remain firmly committed to our constitutional duty 'to prohibit infringements by either the legislative or executive branch of the government of [the] constitutional rights vested in the people.' *Mattson*, 391 N.W.2d at 785 (Yetka, J., concurring). We trust that the Legislature has heard, and will heed, these warnings.

Otto, 910 N.W.2d at 459 (Minn. 2018).

The Minnesota Legislature has either not heard or has ignored these warnings. In *Mattson*, Justices Yetka and Simonett were concerned about an omnibus bill that spanned only 273 pages and had 378 sections. 391 N.W.2d at 784 (Yetka, J.). We say "only" because now, thirty-eight years after Justice Yetka's clarion call, the

Legislature gave birth to the Jumbo Omnibus Bill,[3] whose hulking 1,400-plus pages, 73 articles, 1342 sections, and at least *thirteen* discrete subjects make one nostalgic for the time when omnibus bills numbered only hundreds of pages and sections long. *E.g. Mattson*, 391 N.W.2d at 784 (Yetka, J., concurring) (noting the law "contains 378 sections and is 273 pages long"). But "now all bounds of reason and restraint seem to have been abandoned" and "the worm that was merely vexatious in the [20]th century has become a monster eating the constitution in the 2[1st]." *Id.*

In the face of this stern precedent, the Jumbo Omnibus Bill, of which the Statute is only one section of one article of 73 articles, is made up of *nine* discrete omnibus bills, contains at least *thirteen* subjects: transportation (Articles 1-3, 17), labor (Articles 4, 6, 8-11), combative sports (Article 5), state employees (Articles 12, 72-73), housing (Articles 14-16), health occupations and licensing (Articles 18-33, 61, 65), higher education (Articles 34-35), firearms (Article 36), agriculture (Article 37-38), energy (Articles 13, 39-45, 58), human services (Articles 46-55, 62-64, 66-67), healthcare (Articles 56-57, 59-60), and taxes (Articles 68-71).[4] The Legislature did not merely skirt a constitutional picket fence—it razed that fence, burned the stakes, and then burned the ashes.

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[3] 2024 Minn. Laws ch. 127, https://www.revisor.mn.gov/laws/2024/0/Session+Law/Chapter/127/.

[4] 2024 Minn. Laws ch. 127, https://www.revisor.mn.gov/laws/2024/0/Session+Law/Chapter/127/.

The manner of the passage of the Jumbo Omnibus Bill is also striking. On May 19, 2024—the last day of the 2024 legislative session in which bills could be passed[5] because the session ended on May 20—the *Tax* Omnibus Conference Committee began its scheduled meeting at approximately 9:45 PM, and after less than nine minutes of consideration passed its Conference Committee Report on H.F. 5247 ("CCR-HF5247") that combined the nine originally distinct omnibus bills into what would become the Jumbo Omnibus Bill.[6] CCR-HF5247 was not posted until 10:49 PM, and its title still read "[a] bill for an act relating to taxation…."[7]

The House took up CCR-HF5247 shortly thereafter, adopted the conference committee report's recommended changes, and passed the bill at approximately 11:14 PM, with a 70-50 vote along party lines, amidst yelling and clamoring by members of the body to be heard on privileged motions and inquiries.[8] After receiving CCR-HF5247 from the House, the Senate took it up at approximately

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[5] Minn. Const. art. IV, §21.

[6] *See* Conf. Comm. Activity H.F. 5247, 93rd Leg. (Minn. 2024), https://www.leg.mn.gov/leg/cc/Default?type=bill&year=2024-93&bill=HF-5247.

[7] Conf. Comm. Rep., H.F. 5247, 93rd Leg. (Minn. 2024), https://www.umlc.org/wp-content/uploads/2025/03/Exhibit-3.pdf.

[8] House Floor Session – part 5 (1:32:00–1:43:37), Minnesota House of Representatives, May 19, 2024, *available at* https://www.house.mn.gov/hjvid/93/898728.

11:36 PM,[9] adopted the conference committee report's recommended changes, and passed the bill at approximately 11:42 PM,[10] with a 34-14 vote along party lines. And so, without any discussion, Frankenstein's monster came to life.

After the Jumbo Omnibus Bill's final passage in the minutes before the legislative deadline, the House legislative minority lodged an official constitutional protest and dissent:

> On Sunday, May 19th Speaker Hortman brought before the House a conference committee report on House File 5242 [sic], an omnibus conference committee report totaling more than 1400 pages that included the contents of nine other conference committee reports in violation of House and Joint Rules.
>
> Speaker Hortman flagrantly defied the Rules of the House, willfully and repeatedly ignoring proper motions, including numerous privileged motions. Her actions were autocratic and unprecedented.[11]

The Jumbo Omnibus Bill, and the Statute as a part of it, is a direct affront to the Minnesota Constitution's Single Subject and Title Clause and a flagrant disregard for the Minnesota Supreme Court's warnings. The manner of the Statute's passage thus reflects a Legislature unconcerned with violating constitutional norms. Instead,

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[9] Minnesota Senate Information, @MNSenateInfo (May 19, 2024, 11:36 PM), https://x.com/MNSenateInfo/status/1792414005711327605.

[10] Minnesota Senate Information, @MNSenateInfo (May 19, 2024, 11:42 PM), https://x.com/MNSenateInfo/status/1792415527815860650.

[11] Minn. H. Journal, 93rd Leg., 119th Day, Sunday, May 19, 2024, page 19,807, https://www.house.mn.gov/cco/journals/2023-24/J0519119.htm.

Minnesota's 93rd Legislature opted to throw as many policy preferences against the wall as it could, "to see what sticks," and let the courts sort it out. Bills passed in that way should get as little deference or presumption in their favor as possible, and should the Court look to legislative history in this matter, it should note the problems with the Statute's passage.

II. The Statute imposes massive penalties for noncompliance that would chill the rights of small businesses, including independent contractors.

The state interest, if any, supporting the Statute is the dubious concept that workers benefit from being classified as employees as opposed to independent contractors.[12] But Congress explicitly rejected lumping independent contractors into the National Labor Relations Act to uphold the distinction that Minnesota is trying to destroy with the Statute:

> The legislative history of the Labor Management Relations Act clearly shows that Congress was utterly opposed to having the National Labor Relations Board convert those who had always been understood to be independent contractors into employees. As Judge Borah said, *N.L.R.B. v. Steinberg*, 5 Cir., 182 F.2d 850, 854-855:
>
> '* * * However the legislative history of the Taft-Hartley Law, which was adopted in 1947 as an amendment to the National Labor Relations Act, shows quite clearly that when Congress passed the Labor Act it intended the word 'employee' to mean someone who works for another for hire and this clear expression of Congressional intent we are obligated to follow.'

[12] Brian Basham, *House labor panel approves bill to bar businesses from misclassifying employees*, Minn. H., https://www.house.mn.gov/sessiondaily/Story/18129.

Site Oil Co. v. NLRB, 319 F.2d 86, 93 (8th Cir. 1963).

Contrary to the wisdom of the U.S. Congress, the Statute harms small business owners—a category that includes independent contractors—in its attempt to blur the distinction between employees and independent contractors. Every individual who is involved in an independent contractor relationship, from the hiring business, to the contractor, to even the subcontractor, will face disruption of contracts and hefty costs.

The Statute first punishes small businesses who hire independent contractors by making them subject to vague, hard-to-implement classification standards. If a small business wants to keep its contractors, it must carefully maneuver between fourteen different vague classification factors.[13] If even one of these factors weighs in favor of employee status, a contractor is automatically considered an employee. Minn. Stat. §181.723, subd. 4(b)(1). For example, someone must be able to "realize additional profit or suffer a loss" in order to be considered an independent contractor under the Statute. Minn. Stat. §181.723, subd. 4(a)(14). Yet, as Appellants noted, it is unclear "whether subcontractors and their workers receiving a set hourly rate satisfie[s] the profit and loss factor." Appellants' Br. at 40. As another example, an

[13] In truth, it is far more than fourteen factors—there are, in addition to the fourteen factors, five additional factors listed under Minn. Stat. §181.723, subd. 4(a)(4), and another five factors under subd. 4(a)(9). So small businesses must comply with each of the twenty-four provisions in order to hire or continue to work with an independent contractor.

individual must "incur[] the main expenses and costs related to providing or performing the specific services" under the contract to attain independent contractor status. Minn. Stat. §181.723, subd. 4(a)(12). But the Statute provides no method to determine, nor any metric with which to measure, what the "main expenses and costs" of a project might be—nor what "related to" means. *See* Appellants' Br. at 35-37. Such language is unworkable in practice and forces small businesses to choose between three equally bad options.

First, they can do what the Statute seemingly intends for them to do: throw up their hands and classify all independent contractors as employees, shouldering costs that they cannot afford. These costs will likely include hiring a human resources professional to handle onboarding and maintaining a whole new crop of employees; retaining an accountant to develop new methods for payroll and calculation of overtime; spending time and resources developing and managing a benefits plan, including healthcare, PTO, and other benefits; and consulting an attorney to ensure legal compliance with all of the above, including applicable labor laws. This isn't even to mention the costs of overtime pay and benefits themselves, nor the cost of legal consultations and negotiations that will have to take place if labor organizations enter the workplace based on independent contractors becoming employees eligible for union membership. Small businesses do not plan for their entire business model to be disrupted overnight, and thus, this option will be unworkable for many.

Second, small businesses can try to navigate the regulatory minefield that the Statute presents, hoping that the Government will not find that one of the fourteen factors weighs in favor of an employee relationship, and risking steep penalties if they guess wrong. This option, like the first, will require a business owner to retain an attorney to assist with compliance—including the ongoing need to remain up-to-date with the latest agency and court interpretations of the Statute, given its vagueness. Though it would be risky for a business owner to presume the correct interpretation of something as amorphous as "costs related to providing or performing the specific services," the alternative, as stated above, is to upend one's entire business model. Many businesses will therefore be forced to risk financial ruin in the form of tens or even hundreds of thousands of dollars in fines, plus criminal penalties, all because the Legislature chose to violate the Minnesota and United States Constitutions in passing a vague 1,400-page Statute just before midnight on the last day of the legislative session.

Assuming the other two options are not possible, a small business has no choice but to end its independent contractor relationships, refuse certain jobs for lack of contractors, and then downsize or go out of business due to lack of labor and income. When faced between unreasonable risks on the one hand, and unwieldly costs on the other, this may end up being the default option for many small businesses. This outcome would be unthinkable if the Statute had not contained such vague

provisions in the first place, which itself would not have been possible but for its unconstitutional passage. The Statute thus creates a dire and needless Catch-22 for small business owners.

The Statute does not merely harm those who hire independent contractors—it also harms independent contractors themselves. Independent contractors are small business owners in their own right, and the Statute forces them to choose between becoming someone else's employee or else losing a valued client relationship.

Numerous studies bear out the appeal of being an independent contractor who owns his or her own small business. The Bureau of Labor Statistics has found consistently that "independent contractors overwhelmingly preferred their work arrangement (80.3 percent), whereas 8.3 percent would prefer a traditional work arrangement."[14] It has long been true that, "for many, independent work is the most viable or the only viable option, particularly where they are balancing work with other personal or family obligations."[15] According to the Direct Selling Association's 2020 Consumer Attitudes and Entrepreneurship Study, "77% of Americans are

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[14] *Contingent and Alternative Employment Relationships, July 2023*, U.S. Department of Labor, Bureau of Labor Statistics, p. 5 (Nov. 8, 2024), available at https://www.bls.gov/news.release/pdf/conemp.pdf (accessed Apr. 29, 2025).

[15] Public Comments of Littler Mendelson, P.C.'s Workplace Policy Institute, p. 3 (Oct. 24, 2020), available at https://www.regulations.gov/document/WHD-2020-0007-0001 (comment by Tammy McCutchen) (citing Upwork, "Freelance Forward 2020: The U.S. Independent Workforce Report" (Sept. 2020), available at https://www.upwork.com/i/freelance-forward.

interested in flexible, entrepreneurial/income-earning opportunities."[16] In other words, being an independent contractor is an attractive prospect for those who want to go into business for themselves, while being an employee, accountable to strict rules and schedules not of one's choosing, may be a great deal less attractive. Indeed, just like the businesses with which they contract, an independent contractor's choices are reduced to a handful of disadvantageous options thanks to the Statute.

The Statute also contains risks for independent contractors in their own capacity as small business owners. Appellants describe in detail the punitive penalties attached to misclassification under the Statute. Appellants' Br. 10-13, 48-54. An industry faced with such draconian penalties is certain to make changes to avoid those penalties. But Appellants further explain well how the law upends the longstanding relationships that general contractors typically have with subcontractors given traditional classification rules. *Id.* at 14-18. The Statute is thus a Russian nesting doll of harm that spreads to small businesses at every level of a contract—a small business who hires contractors, a small business who is hired as a contractor and who hires subcontractors, and a small business subcontractor who hires other subcontractors, *ad nauseam.*

[16] Public Comments of Direct Selling Association, (Oct. 26, 2020), available at available at https://www.regulations.gov/document/WHD-2020-0007-0001 (comment by Brian Bennett).

Unless the Court acts, Appellants and their members will have to make drastic changes to comply with the Statute, and those changes will be very painful for the construction industry in Minnesota. And it will be most painful for those independent contractors who will find themselves out of jobs that they might have been able to work under decades of pre-Statute general-subcontractor relationship precedent.

CONCLUSION

For these reasons, *amicus curiae* NFIB Legal Center urges the Court to reverse the district court and direct the entry of a preliminary injunction for the Appellants.

UPPER MIDWEST LAW CENTER

Dated: April 29, 2025

/s/ James V. F. Dickey

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,389 words.

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Dated: April 30, 2025

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25, I hereby certify that I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system on April 30, 2025. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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