NO. 128763

IN THE
SUPREME COURT OF ILLINOIS

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiff-Appellee, v. ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., and COLONY DISPLAY, LLC, Defendants-Appellants.	Appeal from the Appellate Court of Illinois, First Judicial District Heard on Appeal from the Circuit of Cook County, Illinois County Department, Chancery Division Cir. Ct. Case No. 2020 CH 05156 The Honorable Raymond Mitchell

BRIEF OF AMICUS CURIAE RAISE THE FLOOR ALLIANCE, NATIONAL LEGAL ADVOCACY NETWORK AND NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF PLAINTIFF-APPELLEE

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Raise the Floor Alliance

Raise the Floor Alliance (hereafter, "Raise the Floor") has provided direct legal assistance and strategic legal advice for low-wage workers in Illinois since 2007. Since its founding, it has grown substantially to reach marginalized workers in numerous low-wage industries across Illinois. Raise the Floor has provided legal assistance to tens of thousands of low-wage workers throughout Illinois, recovering millions of dollars for workers through litigation and mediation.

Raise the Floor is an alliance of community-based non-profit worker advocacy organizations. This alliance is comprised of ARISE Chicago, Centro de Trabajadores Unidos: Immigrant Workers Project, Chicago Community and Workers Rights, Chicago Workers' Collaborative, Latino Union of Chicago, Warehouse Workers for Justice, and Workers Center for Racial Justice. Raise the Floor works to ensure that low-wage workers have access to quality jobs and are empowered to uphold and improve workplace standards. As part of its mission, Raise the Floor has provided low-wage workers, including temporary laborers, legal support as they have organized to expose injustice and enforce their rights in the workplace.

Raise the Floor, with its partner worker advocacy organizations, also actively shapes policy, having advised the Illinois legislature on amendments to eight different laws to increase and protect the rights of low- wage workers

in Illinois, including the Illinois Day and Temporary Labor Services Act and amendments to the Illinois Wage Payment and Collection Act. Raise the Floor has worked for years to ensure that all workers, including temporary laborers, have access to dignified, family-supporting work.

National Legal Advocacy Network

The National Legal Advocacy Network (NLAN) is a non-profit legal service organization based in Illinois that works with workers' rights organizations throughout the country to address the abuse of workers in low-wage industries through legal advocacy. The temporary staffing industry has been a focus of NLAN's work. In the past year alone, NLAN has represented over ten thousand temporary staffing agency workers in Illinois suffering from wage theft, and race and gender discrimination. NLAN has found that temporary staffing workers are particularly vulnerable to such legal abuses due to the lack of bargaining power created, in part, by no-poach agreements that are the subject of this litigation. NLAN also engages with and represents temporary staffing agency workers in other parts of the country who could be impacted by the precedent set in this case.

The National Employment Law Project

The National Employment Law Project ("NELP") is a non-profit research and policy organization with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable

ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws, and that all employers comply with those laws and do not engage in anti-competitive practices that bind workers to substandard jobs. NELP has submitted amicus briefs in numerous temporary staffing and other subcontracted worker cases, where companies set up structures and impose provisions on workers that carve them out of workplace protections. NELP also advocates for federal and state policies that protect and improve labor standards for temporary and other contingent workers and hold companies that outsource work to labor intermediaries responsible for their subcontracted workers' economic security and ability to make ends meet.

I. INTRODUCTION

This is a case brought by the State of Illinois to combat anti-competitive conduct by three temporary staffing agencies and Colony Display LLC ("Colony"), a company consisting of 75 to 100 full-time employees that designs, manufactures, and installs customized fixtures. Colony contracted with the agencies to provide anywhere from 200 to 1,000 staffing agency workers to perform industrial work at its facilities at any given time. According to the complaint, the three staffing agencies—Elite Staffing, Metro Staff and Midway Staffing—agreed not to poach each other's workers assigned to Colony's facilities, and Colony colluded with the agencies to enforce the no-poach agreement. Colony and the temporary staffing agencies also agreed to pay the agencies' workers a fixed wage set by Colony. The

complaint alleges that these no-poach and wage-fixing agreements violate the Illinois Antitrust Act.

Amici are workers' rights organizations who know firsthand the conditions suffered by workers who get jobs via temporary and staffing agencies in Illinois and around the country. Amici write to describe the workers, working conditions, and economic harms suffered by workers like the ones engaged by Colony and its staffing agencies, and, in part to refute arguments made by the Staffing Services Association of Illinois ("SSAI") in its amicus brief that laud the purported benefits of temporary staffing. Amici show that the no-poach and wage fixing provisions in this case are not, in fact, "procompetitive," as argued by amicus SSAI.[1]

The reality is that workers placed in temporary staffing jobs, including those working in warehouse and manufacturing facilities like those operated by Colony, often do the same work as direct-hire employees, but for less pay, worse benefits, increased health and safety risks, and no job security. They are disproportionately people of color, which means that jobs placed via temporary staffing agencies are contributing to the racial wealth gap and economic insecurity for communities of color. Though advertised as a path to a good job, in practice these "temp" jobs are usually a dead end, fueling a workforce of "permatemps" stuck indefinitely in precarious employment. Their primary value to the companies that use staffing agencies is to reduce

[1] Brief of Amicus Curiae Staffing Services Association of Illinois ("SSAI Br."), at 7.

labor costs; this is achieved in part by replacing often unionized and well-compensated blue-collar positions with "temporary" jobs that pay workers poverty wages without benefits or job security.[2] Company and staffing agency no-poach and wage fixing agreements like the ones at issue in this case further degrade these workers' low wages and poor working conditions by inhibiting arguably the most effective means these workers have to improve their job quality—quitting or threatening to quit for another job with better pay and working conditions.

The SSAI argues illogically that the Illinois Day and Temporary Labor Services Act ("IDTLSA"), 820 ILCS 175/1 *et seq.*, a statute passed to address the unique vulnerabilities that workers placed in jobs via temporary staffing agencies face and to improve the low-road labor conditions endemic to blue-collar temporary staffing work, somehow conflicts with antitrust requirements. SSAI Br. at 19-30; 820 ILCS 175/2 (legislative findings section describing how temp workers are "particularly vulnerable to abuse of their labor rights" and explaining that current law is inadequate to protect those rights). The IDTLSA was passed to combat the underlying poor working conditions shown in this case, and in no way conflicts with antitrust

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[2] See, e.g., Brittany Scott, *Temporary Work, Permanent Abuse: How Big Business Destroys Good Jobs*, National Staffing Workers Alliance & National Economic and Social Rights Initiative (2017); Brittany Scott, *Opening the Door: Ending Racial Discrimination in Industrial Temp Hiring Through Innovative Enforcement*, Partners for Dignity & Rights (2021), https://fa0fbce7-d85e-4925-af7c-4b7d25478b8c.filesusr.com/ugd/3b486b_1a0b55b0b90b4ca99d63a057406c4b96.pdf.

enforcement. It is both incorrect and illogical to claim that the IDTLSA—a statute intended to improve labor standards for workers in jobs obtained through temporary staffing agencies—makes unnecessary or conflicts with antitrust enforcement aimed at expanding workers' job mobility and opportunities for higher wages. The IDTLSA and the Illinois Antitrust Act can and should work in harmony to improve labor standards and to ensure labor market competition that enhances workers' mobility.[3]

II. ARGUMENT

A. No-poach and wage fixing agreements exacerbate temporary staffing workers' poor working conditions and trap them in underpaid and insecure work.

In 2016 antitrust guidance, the Department of Justice and Federal Trade Commission advised that no-poaching and wage-fixing agreements stifle competition among employers and thereby depress wages and degrade other working conditions for actual and potential employees.[4] In this case, the agreements signed between Colony—the host employer—and the three staffing agencies—Midway, Elite Staffing, and Metro Staff—inhibit arguably the most effective mechanism temporary staffing workers have to improve their job quality: quitting or threatening to quit for another job with better

[3] The Illinois Legislature recently amended the IDTLSA in the *Temp Worker Fairness and Safety Act*, H.B. 2862 (103rd Gen. Assembly 2023).
[4] Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals*, at 3 (Oct. 2016) , https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_guidance_final_10-20-16.pdf.

pay and working conditions. By wage-fixing and colluding not to poach each other's workers at Colony's facility, the three staffing agencies (with Colony's support) derail their workers' ability to move to jobs that they are highly qualified to perform—other, better-paid jobs at Colony's facility.

The complaint crystallizes how important job mobility is to workers' ability to improve their working conditions. Several Midway staffing workers allegedly sought to move to Metro Staff because Midway had not paid them for all hours worked.[5] Metro Staff relayed the workers' request to Colony's CEO, who responded that the workers were not allowed to transfer to Metro Staff. Colony's CEO then notified Midway of the workers' conversations. Midway told their workers that they were not allowed to change employers, thereby cutting off their workers' opportunities to obtain better employment.[6]

The complaint also underscores how the wage-fixing agreement depressed temporary staffing workers' wages. Elite Staffing allegedly raised concerns with Colony that offering forklift drivers $10 per hour was below the going wage of $12 to $13 per hour for this work.[7] Colony's CEO then spoke to all three agencies, and they came to an agreement that $10 per hour "was the

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[5] Compl. ¶ 46. "Metro Staff's on-site supervisor notified Colony's CEO that "four Midway employees have come to me asking if they are able to start with [Metro Staff] on Monday . . . I asked them what the reason for them wanting to switch and they said Midway has owed them hours since they first started working for them."

[6] *Id.* ¶¶ 47-50.

[7] *Id.* ¶ 63.

sweet spot."[8] Implicit in these communications is that the defendants realized they do not need to pay the market wage because they are colluding to fix wages and limiting their workers' opportunities to obtain other employment.

These anti-competitive agreements exacerbate the already poor working conditions of temporary staffing workers. They also close off opportunities for workers to regularize their employment, instead trapping them in underpaid and insecure work.

B. Corporate use of temporary staffing agencies creates a second-tier workforce performing the same work as permanent, direct-hire employees for less pay, inadequate benefits, increased health and safety risks, and hyper-insecure working conditions.

Companies like Colony use temporary staffing agencies to hire and pay the workers they need to run their businesses. Temporary staffing workers like those at Colony work at the host employer's facility with and alongside its permanent, direct-hire workforce. This business model—through which host employers, like Colony, supervise their temp staffing workers and share the right to control the work—allows host employers to control working conditions while more easily disclaiming responsibility for them. It also means that companies using staffing firms to supply their labor often plead ignorance to the unfair or illegal working conditions that their temporary staffing workers face, even when the work is performed on the host

[8] *Id.*

employer's premises, the host employer decided which staffing agency to use and gave it instructions as to training and wages, and where they could impose more accountability and oversight.[9]

As a result of this triangular employment relationship, corporate use of temporary staffing arrangements can create a second-tier workforce that does the same work as permanent, direct-hire employees but for less pay and inferior benefits, and in less safe conditions.[10] Within occupations, temporary staffing workers experience significant wage penalties; for example, the median hourly wage for temporary help agency workers in production occupations in Illinois—which include Colony's temporary staffing workers—is $14.01, 22 percent less than the median hourly wage—$18.05—of all production workers in the state.[11] Temporary staffing workers also experience significant benefits penalties. Contrary to the self-selected data cited by the SSAI in its brief,[12] nationwide data from the Bureau of Labor Statistics showed that only 13 percent of temporary help agency workers received an employer-provided health insurance benefit in 2017, compared

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[9] Laura Padin & Maya Pinto, *Lasting Solutions for America's Temporary Workers*, National Employment Law Project, at 2 (Aug. 2019) https://s27147.pcdn.co/wp-content/uploads/Lasting-Solutions-for-Americas-Temporary-Workers-Brief.pdf.

[10] *Id.* at 2-4, 11.

[11] NELP analysis of Bureau of Labor Statistics, U.S. Dept of Labor, Occupational Employment and Wage Statistics (May 2020).

[12] SSAI claims that a survey of its members found "82% of staffing firms reported offering their temporary and contract employees health insurance." SSAI Br. at 11.

with 53 percent of workers in standard arrangements.[13]

In addition, discrimination and occupational segregation are endemic to jobs placed via temporary staffing agencies. Black and Latinx workers are significantly overrepresented in temporary staffing agency-placed work relative to their overall share of the workforce across the country. Black workers comprise 21.3 percent of temporary help agency workers in Illinois, which is 1.7 times their share of the overall workforce, and Latinx workers comprise 23.0 percent, which is about 1.5 times higher than their share of the workforce.[14] A recent analysis of employment data collected by the Illinois Department of Labor found that 85 percent of blue-collar temporary staffing assignments in the state go to non-white workers, even though non-white workers comprise only 36 percent of the Illinois workforce.[15] And a 2021 study of staffing agencies in the Chicago area—mostly serving manufacturers—showed that 63% engaged in discriminatory employment

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[13] News Release, Bureau of Labor Statistics, U.S. Dept of Labor, Contingent and Alternative Employment Arrangements, at 8 (May 2017), https://www.bls.gov/news.release/pdf/conemp.pdf.

[14] NELP analysis of the U.S. Census Bureau's Quarterly Workforce Indicators data, 2020.

[15] Dave DeSario & Jannelle White, Race to the Bottom: The Demographics of Blue-Collar Temporary Staffing, Temp Worker Justice & Temp Worker Union Alliance Project, at 4 (Dec. 2020), https://3b486b10-76d5-49ba-826e-06eb7b277813.usrfiles.com/ugd/3b486b_e3f99ada82c948c190117b354a995c41.pdf.

practices towards Black and Latinx workers.[16] Most recently, a federal judge in Illinois granted class certification to a group of more than 13,000 Black workers alleging they were turned away from available jobs by three staffing agencies because of their race; the judge noted that the "testimony about specific mechanisms of discrimination, from the upper echelons of staffing-agency management to the staffing-agency dispatchers to the employees facing the effects of discrimination, undoubtedly speaks to the existence of a discriminatory policy among the defendants." *Eagle v. Vee Pak, Inc.*, No. 12-CV-09672, 2023 WL 2198470, at *16 (N.D. Ill. Feb. 23, 2023). Endemic discrimination paired with the significant disparity in wage and benefits between temporary staffing workers and workers in standard arrangements makes it likely that the temporary staffing system exacerbates the racial wealth gap as well.

Temporary staffing workers also face increased health and safety risks in comparison to permanent, direct-hire workers.[17] The Occupational Safety

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[16] Brittany Scott, *Opening the Door: Ending Racial Discrimination in Industrial Temp Hiring Through Innovative Enforcement*, Partners for Dignity & Rights (2021), https://fa0fbce7-d85e-4925-af7c-4b7d25478b8c.filesusr.com/ugd/3b486b_1a0b55b0b90b4ca99d63a057406c4b96.pdf.

[17] In acknowledgement of temporary staffing workers' vulnerability to workplace injury and illness, the Occupational Safety and Health Administration created the Temporary Worker Initiative in 2013 to improve employer accountability and ensure these workers are protected from hazards. U.S. Dep't of Labor, Occ. Safety & Health Admin., *Memorandum for Regional Administrators: Policy Background on the Temporary Worker Initiative* (Jul. 15, 2014), https://www.osha.gov/memos/2014-07-15/policy-background-temporary-worker-initiative.

and Health Administration has expressed concern that some employers may use temporary staffing workers as a way to avoid their health and safety obligations; that these workers get placed in the most hazardous jobs; that they are more vulnerable to workplace hazards and retaliation for reporting these hazards than permanent workers; and that they are not given adequate safety and health training or explanation of their duties by either the temporary staffing agency or the host employer.[18] A study that analyzed workers' compensation claims in Washington State from 2011 to 2015 found that temporary staffing workers experienced twice the rate of injury as permanent workers.[19] Similarly, a *ProPublica* analysis of workers' compensation claims in five states found that temporary staffing workers have a significantly higher risk of getting injured on the job; in California and Florida, the two largest states analyzed, the risk of injury was 50 percent higher for temps than non-temps.[20] Finally, temporary staffing agencies are often used as a corporate shield for illegal labor, including in hiring and assigning migrant adolescents to dangerous jobs on the night shift for the host companies; critically, these abuses continue as the Attorney General of

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[18] U.S. Dep't of Labor, Occ. Safety & Health Admin., *Protecting Temporary Workers*, OSHA Website, https://www.osha.gov/temporaryworkers.

[19]Michael Foley, *Factors Underlying Observed Injury Rate Differences Between Temporary Workers and Permanent Peers*, AM. J. OF INDUSTRIAL MED. (Aug. 2017).

[20] Michael Grabell, Jeff Larson & Olga Pierce, *Temporary Work, Lasting Harm,* PROPUBLICA (Dec. 13, 2013) https://www.propublica.org/article/temporary-work-lasting-harm.

Illinois and the Illinois Department of labor are *presently* investigating temporary staffing agencies for child labor violations.[21]

Citing sources from the 1990s, the SSAI claims that temporary staffing workers prefer the "flexibility" that comes with a temporary assignment. This argument is specious. All of the so-called flexibility is enjoyed by the company that decided to use a staffing agency, which can hire and fire their temporary staffing workers from an assignment with a moment's notice. According to investigative reporting by *ProPublica*, "there is what's known in the industry as a 'DNR', which is short for "Do Not Return."[22] A host employer can write "DNR" on a temporary staffing worker's work slip for any reason, which tells the staffing agency not to send that worker again. Temporary staffing workers who complain about any aspect of any assignment risk getting DNRed. The more DNRs a worker gets, the less likely she is to be assigned in

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[21] *See*, *e.g.*, Talia Soglin & Richard Requena, *State Investigating Hearthside Food Solutions, Elite Staffing for Possible Child Labor Violations*, CHICAGO TRIBUNE (Mar. 31, 2023), https://www.chicagotribune.com/business/ct-biz-hearthside-foods-child-labor-20230401-uzu2a6a4zjg6jdg6qu5evggxbu-story.html. Melissa Sanchez, *Inside the Lives of Immigrant Teens Working Dangerous Night Shifts in Suburban Factories*, PROPUBLICA (Nov. 2020), https://www.propublica.org/article/inside-the-lives-of-immigrant-teens-working-dangerous-night-shifts-in-suburban-factories; Mica Rosenberg, Kristina Cooke & Joshua Schneyer, *Undocumented and Underage: Child Workers Found Throughout Hyundai-Kia Supply Chain in Alabama*, REUTERS (Dec. 2022), https://www.reuters.com/investigates/special-report/usa-immigration-hyundai/; Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 28, 2023), https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html.

[22] *Id.*

the future. In sum, the hyper-precarious nature of temporary staffing work increases temporary staffing workers' vulnerability to exploitative working conditions.

Not surprisingly, recent polling by the global management consultant firm McKinsey & Company found that contract, freelance, and temporary workers would overwhelmingly prefer to have permanent employment.[23] This sentiment was most pronounced among first-generation immigrant (76%), Latinx (72%), Asian American (71%), and Black (68%) respondents. The same study also found that this group of workers was more likely than other respondents to say that they had suffered decreased income in the previous twelve months, and twice as likely as others to say that they could not afford health insurance.[24]

In fact, the only source the SSAI cites from the last 20 years to support its assertion that temporary staffing workers prefer temporary work over traditional positions found the opposite. A Bureau of Labor Statistics survey from May 2017 found that 46.5 percent of temporary help agency workers preferred a traditional job versus 38.5 percent who preferred temporary or

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[23] McKinsey & Company, *Unequal America: Ten Insights on the State of Economic Opportunity* (May 26, 2021), https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/unequal-america-ten-insights-on-the-state-of-economic-opportunity.

[24] *Id.*

other contingent work.[25]

C. "Temp" staffing rarely provides a pathway to permanent employment; it instead entrenches workers as "permatemps," cutting costs for employers and reducing job quality for workers.

SSAI also argues that temporary staffing employment provides a pathway to permanent employment—an argument frequently made by the staffing industry that is overstated. After the Great Recession, the temporary staffing sector exploded, with temporary staffing jobs growing over four times faster than jobs overall.[26] But according to Massachusetts Institute of Technology economist David Autor, who studies the labor market effects of technology and globalization, there is no evidence to support the idea that temp work is leading to lots of direct-hire jobs."[27] Instead, companies like Colony are increasingly sourcing their permanent labor supply from temporary staffing agencies.[28] Around the country, warehouse and

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[25] U.S, Bureau of Labor Stat., Table 11, *Employed Workers with Alternative Work Arrangements by Their Preference for a Traditional Work Arrangement* (May 2017) https://www.bls.gov/news.release/conemp.t11.htm.

[26] Lasting Solutions, *supra* note 2, at 1.

[27] Michael Grabell, Jeff Larson & Olga Pierce, *Temporary Work, Lasting Harm*, PROPUBLICA (Dec. 18, 2013), https://www.propublica.org/article/temporary-work-lasting-harm.

[28] "The temp industry…hypes temp work as a bridge to full-time work while, in fact, it operates as a barrier or, at best, a screen that functions as an obstacle that prevents or delays temp workers from transition to the standard workforce. More often than not, however, temps languish in temporary, unbenefited positions for months or, in the case of "perma-temps" for years, because no fixed time period or performance criteria exist to determine when or if a worker will be converted to permanent status." Harris Freeman & George Gonos, *Taming the Employment Sharks: The Case for*

manufacturing industries have given rise to "temp towns"—areas such as Kane County, Illinois where a high concentration of companies obtain labor through temporary staffing agencies. "In temp towns, it is not uncommon to find warehouses with virtually no employees of their own. Many temp workers say they have worked in the same factory day in and day out for years."[29] In fact, one worker who spoke in support of amendments to strengthen the Illinois Day and Temporary Labor Services Act in 2017 said he had been a temp worker for ten years and had never been offered a permanent job.[30]

A recent survey of over 1,000 temporary workers conducted by the National Employment Law Project and worker center partners similarly found that "permatemping" is typical. Seventy-two percent of surveyed workers said they have never been hired into a permanent position when they started as a temp worker, and 35 percent said they have been working the same temp assignment for over a year.[31]

Regulating Profit Driven Intermediaries in High Mobility Labor Markets, 13 EMPL. RTS. & EMPLOY. POL'Y J. 101, 115 (2009).

[29] Michael Grabell, *The Expendables: How the Temps Who Power Corporate Giants Are Getting Crushed*, PROPUBLICA (Jun. 27, 2013).

[30] Will Evans, *Here's One Plan to Stop Exploitation in the Temp Industry*, REVEAL (Jan. 28, 2017).

[31] National Employment Law Project, et al., *Temp Workers Demand Good Jobs: Survey Reveals Poverty Pay, Permatemping, Deceptive Recruitment Practices and Other Job Quality Issues*, at 13 (Feb. 2022), https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf.

Colony's labor structure is a quintessential example of a corporate strategy that appears to rely heavily on outsourcing operations to a large number of "permatemp" workers. Colony's temporary staffing workforce is anywhere from two times to ten times larger than its full time direct-hire workforce at any given time.[32] Colony's high ratio of temporary staffing workers to permanent, direct-hire workers belies any argument that temporary staffing workers have a meaningful opportunity to transition to permanent employment at Colony.

D. Both the text and purpose of the IAA support extending antitrust liability to defendants' anti-competitive employment practices aimed at suppressing wages.

SSAI, as amici, argues that the Illinois Antitrust Act's "labor services" exemption shields from liability the anti-competitive conduct of staffing agencies, because the conduct was "directed at labor of temporary Colony employees," and the harm was suffered by Colony workers. SSAI Br. at 5, 6. This argument fundamentally misunderstands the purpose of the labor exemption, which exists to protect labor organizations from liability for engaging in collective bargaining and related conduct that would otherwise be anti-competitive. *See Yellow Cab Co., Inc. v. Production Workers Union of Chicago and Vicinity, Local 707*, 92 Ill. App. 3d. 355, 357 (Ill. App. Ct. 1980) (explaining that the IAA states that "antitrust laws shall not make illegal the

[32] The complaint alleges that Colony has 75-100 full time employees and between 200 and 1,000 temporary workers at any given time. Compl. ¶ 17.

activities of any labor organization directed solely to legitimate labor objectives"); *see also Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1045 (D.C. Cir. 1995) (describing the nonstatutory labor exemption under federal law as a "doctrine designed to reconcile federal labor and antitrust policies"). Like the federal labor exemption in Section 6 of the Clayton Act, it "prevents the application of the Antitrust Act to legitimate labor objectives and activities of unions or of individual members thereof." 740 ILCS 10/5 Bar Committee Comments--1967 (West 2019) (cited in decision below). It does not exempt staffing agencies from liability for anti-competitive practices solely because they deal in "labor services."

In addition to this textual argument, the SSAI also argues that antitrust liability for staffing agencies that coordinate to suppress wages would contravene the statutory purpose of the IAA, which is to "promote the unhampered growth of commerce and industry throughout the State." SSAI Br. at 8 (citing 740 ILCS 10/2). Since the temp staffing industry encourages competition among agencies to offer lower cost labor to host employers and is therefore "procompetitive," they suggest, the state's legal theory would hamper the growth of commerce and industry in Illinois. SSAI Br. at 8.

This argument fails in several respects. First, such a broad reading of the IAA could be used to effectively exempt *any* anti-competitive conduct, as long as the industry in question contributes to the "growth of commerce" of the state. Even if staffing agencies like defendants "add value to their clients'

recruiting and hiring processes," in a way that "promotes the unhampered growth of commerce and industry" in Illinois, these companies must still be held liable where they engage in anti-competitive conduct in restraint of trade. SSAI Br. at 15. Second, staffing agencies contribute very little to the growth of commerce and industry in the state. As discussed above, the industry has in general tended to lower pay and worsen working conditions for blue-collar workers in Illinois and across the country—turning good, full-time, union jobs with benefits and health & safety oversight into bad jobs. And third, the anti-competitive practice the state is challenging is not companies' "use of multiple staffing agencies to meet their temporary staffing needs" in general, as the SSAI suggests. SSAI Br. at 8. The challenged practice is the anti-competitive coordination between the agencies and host employers like Colony to *suppress wages* below the going market rate, and to use no-poach agreements to prevent workers from moving freely between employers in search of higher wages and better conditions.

E. Illinois' Day and Temporary Labor Services Act, which was passed to raise labor standards and enhance accountability in the temporary staffing industry, does not in any way conflict with the Illinois Antitrust Act.

The Illinois Day and Temporary Labor Services Act ("IDTLSA"), 820 ILCS 175/1 *et seq.*, was passed to address the unique vulnerabilities that temporary staffing workers face, improve the low-road labor conditions endemic throughout blue-collar temporary staffing work, and increase both temporary staffing agencies' and host employers' accountability for those

conditions.[33] Decades of deregulation had allowed low-road employers to shift to using temp workers as a permanent substitute for a full-time workforce, cutting labor costs and effectively evading liability for violations of labor and employment law.[34] The modest, but important set of reforms contained in the IDTLSA were designed to set a legal floor for temp workers, protecting workers from some of the most common ways temp agencies exploit them and ensuring that companies cannot escape liability for wage and hour as well as safety violations by outsourcing their employment to staffing agencies.

Specifically, the IDTLSA requires temporary staffing agencies covered by the Act to register annually with the Illinois Department of Labor (IDOL) and to keep records about their workers, requirements aimed at eliminating the large number of unlicensed staffing agencies "that operate outside the radar of law enforcement." 820 ILCS 175/1. It also aims to raise labor standards and improve job quality for temp workers, requiring staffing agencies to provide workers written notice of the terms and conditions of each

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[33] According to the IDTLSA's legislative findings, "[r]ecent studies and a survey of low-wage day or temporary laborers themselves finds that as a group, they are particularly vulnerable to abuse of their labor rights, including unpaid wages, failure to pay for all hours worked, minimum wage and overtime violations, and unlawful deduction from pay for meals, transportation, equipment and other items. Current law is inadequate to protect the labor and employment rights of these workers." 820 ILCS 175/2.

[34] Freeman & Gonos, *supra* n. 21 at 114 (describing the increasing use of temp labor by employers across industries, and the "enormous" overall cost savings for employers since the hourly wage for temp workers ranges "from about three-fourths to slightly more than one-half the hourly wage of new hires employed directly by the user firm who perform the same or comparable work").

assignment, and limits fees charged to workers for work-related costs like food and transportation. 820 ILCS 175/101; 175/15; 175/20.

Critically, the Act also holds host employers (called "third party clients" in the law) responsible for compliance with some of its provisions. Host employers have a duty to verify that any temporary staffing agency with whom they have contracted is registered with the IDOL. 820 ILCS 175/85(a). The IDTSLA also holds these host employers jointly liable with temporary staffing agencies for violations of Illinois' Wage Payment and Collection Act and Minimum Wage Law with regard to temporary staffing workers performing services for them. 820 ILCS 175/85(b).

The SSAI argues both that this joint-liability provision specifically conflicts with wage-fixing prohibitions under the IAA, and more generally that the IDTLSA's "comprehensive" regulation of temp staffing implicitly precludes antitrust liability. Both arguments are meritless.

First, nothing in either of the statutes applied to host employers through the IDTLSA in any way conflicts with antitrust regulation of the employer behavior here. Illinois' Minimum Wage Law establishes a minimum wage of $13 per hour starting on January 1, 2023, and overtime at 1 ½ times the regular rate for all hours over 40 worked in a week. 820 ILCS 105/4(a)(1); 105/4a(1). The Illinois Wage Payment and Collection Act requires that employers make at least semi-monthly payments to their employees of all wages owed. 820 ILCS 115/3. It also requires employers to notify their

employees at the time of hiring of the rate of pay and the time and place of payment, as well as keep records of all employees and the wages paid to each of them each payday. 820 ILCS 115/10.

Nothing in these laws requires host employers and their contractor staffing agencies to illegally coordinate to suppress wages or prevent workers from moving between agencies. It simply ensures all workers, including temp workers, are protected by basic employment rights, and holds host employers accountable where these rights are violated. There is no conflict between requiring host employers to ensure that staffing agencies adhere to bedrock minimum wage, wage notification, timely wage payment, and record-keeping requirements and prohibiting host employers from colluding with staffing agencies to set their workers' wages.

The SSAI also argues that a host employer must enforce no-poach agreements among its staffing agency vendors in order to comply with certain labor and employment requirements. Wage and benefits thresholds tied to the number of hours worked for an employer, like overtime and health insurance requirements, would be impossible to comply with—so SSAI's argument goes— if temporary staffing workers are switching between or working for multiple staffing agencies at the same workplace, presumably because a host employer cannot possibly be expected to track the hours worked by each of its temporary staffing workers. But the IDTSLA requires exactly that. It requires the host employer to track and report to each

temporary staffing agency the number of hours worked each day by each agency's workers.[35] Host employers are already required to track and record the information that the SSAI now says is too onerous to track and record.

Second, the IDTLSA is not—as the SSAI would have it—a "detailed regulatory regime" so "comprehensive[] and aggressive[]" that it implicitly precludes application of the antitrust laws. SSAI Br. at 24. Citing federal cases dealing with exceptionally complex systems of federal regulation like banking, securities, and telecommunications, the SSAI argues that the IDTLSA implicitly immunizes the entities it regulates from liability under the IAA. *See Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007) (finding implied antitrust immunity because of a conflict with the Securities and Exchange Act); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (declining to find implied antitrust immunity under the Telecommunications Act of 1996).

But the IDTLSA has little in common with federal statues like the Securities and Exchange Act. Whereas the IDTLSA provides basic

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[35] 820 ILCS 175/12 (requiring temporary staffing agencies to keep records regarding each temporary staffing worker's third party client placement, including hours worked, hourly rate of pay, and dates worked, and stating that "the third party client shall be required to remit all information required under this subsection to the day and temporary labor service agency no later than 7 days following the last day of the work week worked by the day or temporary laborer"). Indeed, host employers would likely track time worked by temp agency workers from different agencies for billing or invoice purposes in any event.

employment protections to temp workers in Illinois, bridging the gap between conditions of work in standard employment and the growing and largely unregulated "temp" employment sector, the Securities and Exchange Act comprehensively regulates the issuance of more than $100 trillion worth of securities annually.[36] And even then, the Supreme Court has repeatedly clarified that a finding of implied antitrust immunity is "not favored" and can only be justified by a "convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *U.S. v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975); *see also Credit Suisse v. Billing,* 551 U.S. at 275 (securities law preludes antitrust law only where there is a "clear repugnancy" such that the two laws are "clearly incompatible").

The IDTLSA and the Illinois Antitrust Act can and should work in harmony to improve labor standards and ensure labor market competition that enhances temporary workers' mobility.

III. CONCLUSION

For the foregoing reasons, this Court should affirm the lower court's order denying Defendants' motion to dismiss the complaint.

Respectfully Submitted,

Dated: May 31, 2023

/s/ Kevin Herrera

[36] See Securities & Exchange Commission Website, https://www.sec.gov/about/what-we-do.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rule 345. I further certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 25 pages.

Date: May 31, 2023 */s/ Kevin Herrera*

CERTIFICATE OF SERVICE

I, Kevin Herrera, an attorney, hereby certify that on May 31, 2023, I caused a true and correct copy of the foregoing **Brief of Amicus Curiae Raise The Floor Alliance, National Legal Advocacy Network and National Employment Law Project in Support of Plaintiff-Appellee** to be served by electronically filing on the following counsel of record:

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Under penalties by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this certificate of service are true and correct.

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NOTICE OF FILING

I, Kevin Herrera, an attorney, hereby certify that on May 31, 2023, I caused a true and correct copy of the foregoing **Brief of Amicus Curiae Raise The Floor Alliance, National Legal Advocacy Network and National Employment Law Project in Support of Plaintiff-Appellee** to be served and filed electronically on the Office of the Court of the Illinois Supreme Court.

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