No. 128763

IN THE
SUPREME COURT OF ILLINOIS

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL,	)	On Appeal from the Appellate Court of Illinois, First District, Fifth Division, No. 1-21-0840
Plaintiff-Appellee,	)	
v.	)	There Heard on Appeal from the Circuit Court of Cook County, Illinois, Chancery Division, No. 2020-CH-05156
ELITE STAFFING, INC., METRO STAFF, INC., and MIDWAY STAFFING, INC.,	)	
Defendants-Appellants.	)	The Honorable RAYMOND MITCHELL, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE STATE OF ILLINOIS

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NATURE OF THE ACTION

The General Assembly enacted the Illinois Antitrust Act ("Act"), 740 ILCS 10/1 *et seq.* (2020), against the backdrop of federal antitrust law to provide the State with a strong tool to promote competition—which rewards innovation and efficiency, results in higher-quality goods and services at lower prices, and produces better paying jobs with more attractive benefits. This appeal concerns the scope of that tool: namely, whether the Act—in an undisputed break from federal law—leaves Illinois employees without protection when their employers collude to restrict the terms of their labor.

The State of Illinois, through its Attorney General, brought an action against three competitor staffing agencies (collectively, "Agency Defendants") and their common client, alleging that they violated the Act. The State alleged that Agency Defendants conspired to pay their employees the same below-market wage and to prevent them from switching among the agencies in search of better working conditions. Agency Defendants moved to dismiss the complaint, arguing, among other things, that the Act excepts all agreements between employers regarding the terms of their employees' labor, including the type alleged here. Following a hearing, the circuit court denied the motions to dismiss. Upon Agency Defendants' request, the circuit court certified two questions of law for interlocutory appeal under Supreme Court Rule 308, only one of which is at issue in this appeal.[1] That question concerns

[1] The other certified question, which concerns whether the Act imposes *per se* liability for conspiracies among competitors that are facilitated by a vertical

whether the Act provides a wholesale exception from state antitrust liability for restraints that employers place on the terms of their employees' labor, including through conspiracies not to compete on employees' wages and working conditions.

The appellate court granted leave to appeal both certified questions. Relevant here, it held that the Act does not except Agency Defendants' challenged conduct, although it *sua sponte* modified the question to address the staffing industry specifically. Agency Defendants sought, but were denied, rehearing. This Court granted them leave to appeal.

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noncompetitor, is at issue in a separate appeal before this Court, docketed as appeal No. 128767. This brief will refer to all defendants in the underlying proceeding (the staffing agencies and their client) as "defendants" and to appellants in this appeal as "Agency Defendants."

ISSUE PRESENTED FOR REVIEW

As certified by the circuit court: Whether the definition of "Service" under section 4 of the Act, 740 ILCS 10/4 (2020), which states that service "shall not be deemed to include labor which is performed by natural persons as employees of others," applies to the Act as a whole and thus excludes all labor services from the Act's coverage.

JURISDICTION

On July 19, 2021, Agency Defendants filed with the appellate court a timely application for leave to appeal two questions that the circuit court had certified on June 17, 2021, as suitable for immediate appeal under Rule 308. C881; A21; *see* Ill. Sup. Ct. R. 308(b).[2] The appellate court granted them leave to appeal both questions, C834, and thus had jurisdiction over the interlocutory appeal under Rule 308.

On June 3, 2022, the appellate court entered its judgment, answering both certified questions. A1. Agency Defendants filed a timely petition for rehearing on June 24, 2022, A163; *see* Ill. Sup. Ct. R. 367(a), which the appellate court denied on June 27, 2022, A20. On August 1, 2022, Agency Defendants filed a petition for leave to appeal the appellate court's judgment on the first certified question, A183, which was timely because it was filed within 35 days of the order denying rehearing, Ill. Sup. Ct. R. 315(b). This Court granted the petition on September 28, 2022, A206, and has jurisdiction over this appeal under Rule 315.

[2] This brief cites the one-volume common law record as "C__," Agency Defendants' opening brief in this Court as "AT Br. __," the appendix attached to that brief as "A__," the Staffing Services Association of Illinois and American Staffing Association's *amicus curiae* brief in this Court as "Amicus Br.__," and Agency Defendants' opening brief in the appellate court as "App. Ct. Br.__."

STATUTES INVOLVED

§ 4. As used in this Act, unless the context otherwise requires:

* * *

"Service" shall mean any activity, not covered by the definition of "commodity," which is performed in whole or in part for the purpose of financial gain.

"Service" shall not be deemed to include labor which is performed by natural persons as employees of others.

* * *

740 ILCS 10/4 (2020).

§ 5. No provisions of this Act shall be construed to make illegal:

(1) the activities of any labor organization or of individual members thereof which are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States;

* * *

740 ILCS 10/5 (2020).

STATEMENT OF FACTS

The Illinois Antitrust Act

The Act "promote[s] the unhampered growth of commerce and industry throughout the State by prohibiting restraints of trade which . . . act or tend to act to decrease competition between and among persons engaged in commerce and trade." 740 ILCS 10/2 (2020). "'[T]rade or commerce'" includes "all economic activity involving or relating to any commodity or service." *Id*. § 4. The Act applies to trade and commerce across a broad span of markets and industries. *Id*. § 2. At issue in this appeal is the market in which individuals "sell" their labor (find jobs) and employers "buy" that labor (hire workers), which Agency Defendants refer to as the market for "labor services."[3]

Among other things, the Act prohibits "engag[ing] in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person" for certain purposes, including allocating markets and fixing prices for commodities and services. 740 ILCS 10/3(1) (2020). Such conduct is *per se* unlawful, meaning that it is illegal regardless of its "competitive and economic purposes and consequences." 740 ILCS 10/3(1), Bar Comm. Cmts.-1967; *see Gilbert's Ethan Alley Gallery v.*

[3] *See* U.S. Dep't of Treas., *The State of the Market Labor Market Competition* 3 (Mar. 7, 2022), https://bit.ly/3Mutkxh (describing labor market); *see Bd. of Educ. of Richland Sch. Dist. No. 88A v. City of Crest Hill,* 2021 IL 126444, ¶ 5 (judicial notice of "readily verifiable" information on government website is appropriate).

Ethan Allen, Inc., 162 Ill. 2d 99, 105-06 (1994) (relying on Bar Committee comments when interpreting Act); AT Br. 2 n.2 (same).

Section 5 of the Act, entitled "Exceptions," lists certain commodities and services that are excluded from liability under the Act. 740 ILCS 10/5 (2020). These exceptions are to be "strictly construed and narrowly applied." 740 ILCS 10/5, Bar Comm. Cmts.-1967. Relevant here, section 5(1) excepts from liability "the activities of any labor organization or of individual members thereof which are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States." 740 ILCS 10/5(1) (2020) ("labor union exception").

The Bar Committee directs that this exception "should be read together" with a specific provision in section 4. 740 ILCS 10/5, Bar Comm. Cmts.-1967. That section, entitled "Definitions," defines "'[s]ervice'" as "any activity . . . which is performed in whole or in part for the purpose of financial gain." 740 ILCS 10/4 (2020). It then adds that "'[s]ervice' shall not be deemed to include any labor which is performed by natural persons as employees of others." *Id*. According to the Bar Committee, this latter sentence "together" with the labor union exception "protects both management and labor in bargaining collectively over terms and conditions of employment." 740 ILCS 10/5, Bar Comm. Cmts.-1967.

The State's Antitrust Action

In 2020, the State brought a civil action against temporary staffing agencies Elite Staffing, Inc., Metro Staffing, Inc., and Midway Staffing, Inc., and their common client, Colony Display, LLC, alleging violations of the Act. C26 (redacted complaint); C319 (unredacted complaint). The staffing agencies hire employees for temporary placement at third-party client locations, including Colony. C322 ¶ 18.[4] They are not party to any joint venture or business collaboration with each other or together with Colony. C322 ¶ 24. Instead, they are competitors, and each agency has a separate contract to provide temporary workers to Colony, which designs, manufactures, and installs customized fixtures and displays for various businesses. C322-23 ¶¶ 17-20. Most of Colony's workers are temporary: at any given time, it employs approximately 75 to 100 full-time employees, while utilizing between 200 to 1,000 temporary workers. C322 ¶ 17.

Under the terms of each agency's contract with Colony, the temporary workers are employees of, and paid by, the respective agency. C323-24 ¶¶ 18,

[4] This brief describes the facts as alleged by the State, which are accepted as true at the motion to dismiss stage. *Masters v. Murphy*, 2020 IL App (1st) 190908, ¶ 11. Agency Defendants improperly assert their view of the facts in their Statement of Facts—such as by submitting that "all involved . . . can benefit from coordination" on wages and hiring and that their conduct has "potential procompetitive effects," AT Br. 3-4—notwithstanding the State's allegations that this conduct was anti-competitive and harmed employees, C319 ¶ 1; *see* Ill. Sup. Ct. R. 341(h)(6) (statement of facts should be provided "without argument"); *Ittersagen v. Advoc. Health & Hosps. Corp.*, 2021 IL 126507, ¶ 37 (disregarding argumentative portions of statement of facts).

22. The contracts provide Agency Defendants with "sole and exclusive authority and control" over hiring, transferring, promoting, and disciplining their temporary workers. C324 ¶ 23 (internal quotations omitted). The contracts do not specify base wages or prohibit the agencies from hiring each other's workers. *See* C323-24 ¶¶ 22-23; C331-32 ¶¶ 55, 57-58.

The State claimed that defendants committed two *per se* violations of section 3(1) of the Act: a no-poach conspiracy and a wage-fixing conspiracy. C335-37 ¶¶ 69-78. It alleged the following. Both conspiracies were unrelated to any separate, legitimate business transaction. C336 ¶ 72; C337 ¶ 77. As to the no-poach conspiracy, Agency Defendants agreed not to recruit, solicit, or hire—or "poach"—temporary employees from one another at Colony's facilities. C324 ¶ 25. That is, they agreed not to approach each other's temporary workers at Colony and offer them better wages or other benefits as incentives to switch agencies. C324-25 ¶ 26. They would also prohibit their temporary workers from voluntarily switching from one agency to another, regardless of the workers' reasons for doing so, and transfer back any workers who managed to switch. *Id.*

Agency Defendants enforced their no-poach conspiracy by communicating with each other through Colony. C325 ¶ 27. For example, many Midway employees wanted to switch to Elite because they were "not happy working for Midway"; they cited "pay issues" and a lack of communication and support from their employer. C327 ¶ 37 (internal

quotations omitted). Midway asked Colony for assistance in "squash[ing]" the transfer of employees. C326-27 ¶¶ 32-33. Colony then "enforced" the no-poaching policy, C327 ¶¶ 34, 36: it informed Elite that hiring other agencies' employees was "bad practice" and not "allow[ed]," and then forwarded the response from Elite, which agreed that its "policy" did not allow transfers, to Midway, C326-28 ¶¶ 34-39. As this incident shows, the no-poach conspiracy eliminated competition among Agency Defendants for temporary employees, which resulted in a lower quality of employment for the workers; the workers could not seek better wages, on-time payment, improved communication from supervisors, or other benefits by switching to another Agency Defendant. C331 ¶ 54.

Regarding the wage-fixing conspiracy, Agency Defendants agreed not to compete on the wages paid to their workers assigned to Colony and instead to pay the same wage set by Colony. C332 ¶¶ 56, 59. As with the no-poach conspiracy, Agency Defendants enforced their wage-fixing conspiracy through Colony. C334 ¶¶ 64-65. For example, Elite accused Metro of paying its temporary workers at Colony more than the agreed wage. C334 ¶ 64. Colony resolved the issue by speaking with Metro and then directing Elite to contact Metro. *Id.*

By setting a fixed wage, rather than competing as to the amount, Agency Defendants suppressed their employees' wages below a competitive rate. C333 ¶ 61. The agreed-upon wage was below the market rate. C320 ¶ 4;

C333 ¶ 63. At one point, for instance, the fixed wage was $10 per hour but, according to a survey done by Elite, the "fair wage" was $13 per hour. C335 ¶ 68. Absent the agreement, Agency Defendants would have had a strong incentive to offer higher wages to attract prospective workers to fulfill Colony's staffing requests. C334 ¶ 66; *see* C333 ¶ 60 (study showing many temporary workers choose staffing agency based on hourly pay rate). Indeed, when Agency Defendants were struggling to provide Colony with sufficient employees, Metro pointed out that "paying a little more . . . would definitely draw more people." C334 ¶ 67.

Based on these allegations, the State sought a declaration that defendants had violated the Act and an injunction to undo the effects of defendants' illegal conduct and prevent recurrence of that conduct. C337-38 ¶ 79. The State also requested treble damages, civil penalties, and costs, disbursements, and attorneys' fees. *Id.*

Circuit Court Proceedings

Defendants moved to dismiss this action under section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2020). C274; C348. Relevant here, Agency Defendants argued that the Act excepts the entire "market for labor services," which includes "labor provided by temporary workers." C348-50; *see* C276. Because, they continued, their alleged conduct "involve[s] the market for labor services," it cannot be challenged under the Act. C349. In support, Agency Defendants focused on section 4's definition of

service, particularly its statement that "'service shall not be deemed to include labor which is performed by natural persons as employees of others.'" *Id.* (quoting 740 ILCS 10/4 (2018)) (cleaned up); *see* C276. They read this definition to "unambiguously convey[ ] the Legislature's intent to exclude labor services from the [Act]," meaning that employers are free to restrain their employees' labor—including by fixing their wages and preventing them from switching jobs—without facing liability under the Act. C349. They also relied on three federal decisions interpreting the Act's definition in support. C349-50; C277-78.

The State responded that the Act does not immunize all conduct involving the "market for labor services," including wage-fixing and no-poach conspiracies, from state antitrust liability. C401-09. It pointed out that the Act directs that it be construed in harmony with similar federal antitrust statutes. C402. The Act's relevant language—contained in section 4's definitions and section 5(1)'s labor union exception—mirrors a provision of the Clayton Act, and it was enacted after the United States Supreme Court held that the Clayton Act's provision excepts only legitimate union activities. C402-06. In asking the court to depart from this interpretation, the State explained, Agency Defendants overread the General Assembly's choice to put one sentence of the Act's equivalent labor union exception in its definitions section and to use slightly different language. C405-06. That choice made no substantive difference: in doing so, the General Assembly sought to match the

modern interpretation of federal antitrust law by specifically prohibiting restraints on services, which federal law did not explicitly reference but had been interpreted as outlawing. *Id.* Additionally, the State continued, the Act should be construed as a whole; indeed, the Bar Committee comments specifically directed that section 4's definition should be "'read together'" with section 5(1)'s labor union exception. *Id.* (quoting 740 ILS 10/5, Bar Comm. Cmts.-1967).

The State added that its interpretation was consistent with basic principles of statutory construction. C407. Reading the Act to protect Illinois workers from restraints on their labor—like fixed wages and prohibitions against switching jobs—aligns with the General Assembly's intent to promote competition in trade and commerce; otherwise, Illinois employers could freely "collude to suppress Illinois workers' wages" and subject them to poor conditions rather than competing to offer better terms of employment. *Id.* Moreover, Agency Defendants' expansive reading of section 4 would render section 5(1)'s more narrow exception for legitimate union activities superfluous and produce the absurd result that Illinois workers would be unprotected from no-poach and wage-fixing conspiracies within their state. *Id.* The three federal decisions reaching the contrary conclusion were incorrect and contained no detailed analysis of the Act. C408-09.

After a hearing, the circuit court denied the motions to dismiss. A25. Relevant here, the court rejected Agency Defendants' contention that the Act

excepts all restraints on the terms of employees' labor from state antitrust liability. A23. It recognized that that the General Assembly intended to "preserv[e] general overall consistency" with federal law in enacting section 5(1)'s labor union exception, which "closely resemble[d]" the Clayton Act's exception. *Id.* (internal quotations omitted). In doing so, the General Assembly presumably "acted with knowledge" that the United States Supreme Court had made clear that the Clayton's Act parallel exception does not exclude all restraints on an employee's labor from antitrust liability. *Id.* The Act's different wording and structure did not "translate to a conclusion that the Illinois legislature intended to provide a blanket immunization" for restraints on the terms of employees' labor "only in Illinois." *Id.* Moreover, the court noted, reading section 4 as excepting all restraints on the terms of employees' labor from the Act "would render the labor union exemption in section 5(1) superfluous." *Id.* The court added that the three federal decisions reaching a contrary conclusion "lack[ed] meaningful analysis" and "any persuasive explanation or reasoning." A24.

Agency Defendants moved under Rule 308(a) for the circuit court to certify two questions for interlocutory appeal, including the question at issue here, which they phrased as:

> Whether the definition of "Service" under Section 4 of the Illinois Antitrust Act ("IAA"), 740 ILCS 10/4, which states that Service "shall not be deemed to include labor which is performed by natural persons as employees of others," applies to the IAA as a whole and thus excludes all labor services from the IAA's coverage.

C618.[5] The court certified both questions, A21, and the appellate court granted leave to appeal, C834.

Appellate Court Proceedings

On appeal, Agency Defendants maintained that the Act "does not reach labor services," again relying on section 4's definition of services and federal cases interpreting that provision. App. Ct. Br. 10-13. They acknowledged that the Act directs courts to consult federal precedent interpreting federal antitrust law when interpreting similar provisions of the Act, and that federal antitrust law excepts only the legitimate activities of labor unions, not all restraints on labor, from its reach. *Id.* at 13-15. Nevertheless, they argued, this federal precedent was "irrelevant"—primarily because the General Assembly placed one sentence of the Act's equivalent labor union exemption in section 4, thereby, in Agency Defendants' view, "broaden[ing]" the Act's exception beyond labor union activities to include all restraints on the terms of an employee's labor. *Id.* at 14-16.

The State responded that Agency Defendants were incorrect that the General Assembly had chosen to break from federal antitrust law to except all restraints on the terms of employees' labor—which would permit Illinois employers, like the agencies here, to collude to restrain their employees' labor

[5] Although Colony did not file a petition for leave to appeal regarding this question, and thus is not an appellant in this appeal, it joined Agency Defendants' motions to dismiss and motion for Rule 308 certification on this issue below. *See* C342; C618.

without facing state antitrust liability. A121-29. The State explained that Agency Defendants misinterpreted the placement of one definitional sentence in section 4, ignoring, among other things, federal antitrust law construing an equivalent sentence, the Bar Committee's comments, the basic principle that statutes should be read as a whole, and the legislature's intention to subject restraints on services to state antitrust liability. A125-32. Agency Defendants' federal authority—two district court decisions, and dictum from one decision from the United States Court of Appeals for the Seventh Circuit—provided no basis for concluding otherwise. A133-35.

The appellate court ruled in the State's favor, modifying the first question "for clarity and accuracy," A2, because it contained the "erroneous premise" that section 4's definition "necessarily exempts so-called 'labor services' from the Act's coverage," which is "not the case," A5. The court rephrased the question as: "whether the exclusion of individual labor from the definition of 'service' in section 4 of the Act also excludes the labor-related services provided by temporary staffing agencies and therefore exempts such agencies from the Act's coverage." *Id.*

The court determined that the Act does not provide any such exception, so Agency Defendants' alleged no-poach and wage-fixing conspiracies were not shielded from state antitrust liability. *Id.* The court based its conclusion on the Act's plain text, reasoning that the "obvious intention" in providing that "an individual's labor for their employee is not a service" was "to allow

individuals to engage in otherwise anticompetitive behavior regarding their own labor by participating in collective bargaining and related conduct." A6-7. This reading, the court added, was supported by section 5(1), which, like the Clayton Act, excepts legitimate labor union activities, and which the Bar Committee instructed should be read together with section 4's service definition. A7. Finally, the court found, the three federal cases cited by Agency Defendants were "unhelpful" because they were factually distinct or ignored that sections 4 and 5(1) should be read together. A8-A10.

Agency Defendants filed a petition for rehearing under Rule 367, which the appellate court denied. A20. This Court allowed Agency Defendants' petition for leave to appeal, which concerns the first certified question. A206.

ARGUMENT

I. This Court's review is *de novo*.

Rule 308 provides a limited exception to the general rule that only final orders may be appealed. *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21. It permits an appeal where the circuit court certifies that an interlocutory order has "a question of law as to which there is substantial ground for difference of opinion" and on which "an immediate appeal . . . may materially advance the ultimate termination of the litigation." Ill. Sup. Ct. R. 308(a). If a certified question "is dependent upon the underlying facts of a case," any answer provided by the court would be "an advisory opinion" and thus the question should not be reached. *Rozsavolgyi*, 2017 IL 121048, ¶ 21.

Because questions properly certified under Rule 308 must present issues of law, this Court's review is *de novo*. *Id.* On *de novo* review, this Court may affirm the appellate court's judgment on any ground supported by the record and law. *See Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 258 (2006). In the Rule 308 context, this Court's "scope of review is generally limited to the certified question." *Rozsavolgyi*, 2017 IL 121048, ¶ 25. While this Court may choose to review the propriety of the underlying circuit court order if doing so is "need[ed] to reach an equitable result" and is "in the interests of judicial economy," its review will "generally be confined" to the certified question. *Eighner v. Tiernan*, 2021 IL 126101, ¶ 18 (cleaned up). Under these standards, this Court should affirm the appellate court's

judgment—which was consistent with the circuit court's ruling—and hold that the Act does not broadly exempt all restraints that employers place on the terms of their employees' labor, including conspiracies to fix wages and prevent employees from switching jobs.

II. The Act should be construed in harmony with similar federal antitrust law and according to basic tenets of statutory construction.

The General Assembly passed the Act in 1965 to provide the State with a strong tool for antitrust enforcement. *People v. Crawford Distrib. Co.*, 53 Ill. 2d 332, 337 (1972); *see People ex rel. Hartigan v. Moore*, 143 Ill. App. 3d 410, 415 (1st Dist. 1986). Before then, Illinois had a different antitrust statute that was rarely enforced by the State or interpreted by courts. *Crawford Distrib.*, 53 Ill. 2d at 337. There, however, was a robust body of federal antitrust law at the time of the Act's passage, and the General Assembly modeled the Act in large part on the existing federal laws. *People ex rel. Scott v. Coll. Hills Corp.*, 91 Ill. 2d 138, 150-51 (1982); *see McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 136 (1999).

Given this history, the Act instructs that "[w]hen the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act." 740 ILCS 10/11 (2020). Indeed, this Court has long relied on "the [f]ederal antitrust experience," including federal courts' interpretation of analogous federal statutes, as a "useful guide" when

construing the Act. *Crawford Distrib.*, 53 Ill. 2d at 338-39; *see, e.g.*, *Laughlin v. Evanston Hosp.*, 133 Ill. 2d 374, 384 (1990); *Coll. Hills Corp.*, 91 Ill. 2d at 150; *People ex rel. Fahner v. Carriage Way W., Inc.*, 88 Ill. 2d 300, 309 (1981). The Court, in fact, has often begun its analysis of the Act by looking to analogous federal precedent, finding that authority instructive even when the Act's language is "clear." *Crawford Distrib.*, 53 Ill. 2d at 339-40, 343; *see Laughlin*, 133 Ill. 2d at 384 (starting statutory analysis by consulting analogous federal case law); *Coll. Hills Corp.*, 91 Ill. 2d at 150 (same). This approach ensures harmony between federal and state antitrust law, resulting in greater consistency for the businesses subjected to and the people protected by such laws. *See* 740 ILCS 10/11, Bar Comm. Cmts.-1967 (section 11 intended to address businesses' "fear that there might develop a conflict between state and federal law").

Beyond this specific directive, the basic principles of statutory interpretation govern the Court's construction of the Act. The Court's primary goal is to effectuate the legislature's intent. *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 17. To do so, the Court examines the plain and ordinary meaning of the statutory text. *Id.* The Court should interpret the relevant text considering the statute "in its entirety, construing words and phrases in light of other relevant statutory provisions and not in isolation." *Id.* (internal quotations omitted). Where the language is clear, the

Court "may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express." *Id*. at ¶ 18.

In conducting this analysis, the Court "should" interpret the statute "to promote its essential purposes." *O'Connell v. Cnty. of Cook*, 2022 IL 127527, ¶ 22 (internal quotations omitted). The Court will thus reject interpretations that would lead to consequences that the "legislature did not intend," including interpretations that would render provisions absurd or superfluous. *Sigcho-Lopez v. Ill. State Bd. of Elections*, 2022 IL 127253, ¶ 28. And when analyzing the Act, this Court has relied on the Bar Committee's comments to illuminate the legislature's intent, *Laughlin*, 133 Ill. 2d at 386—even when the statutory text is unambiguous, *People ex rel. Scott v. Schwulst Bldg. Ctr., Inc.*, 89 Ill. 2d 365, 372 (1982).

III. This Court should answer the certified question without resolving whether the appellate court properly modified that question.

On *de novo* review, this Court is "not bound by the appellate court's reasoning and may affirm for any basis presented in the record" and supported by law. *Tri-G, Inc.*, 222 Ill. 2d at 412. This Court thus need not resolve whether the appellate court incorrectly modified the certified question *sua sponte*, as Agency Defendants contend. *See* AT Br. 23-26.

At any rate, the appellate court's qualms with the certified question were justified. As the court explained, that question—which was formulated by Agency Defendants, C618—contained the "erroneous premise that

application of section 4's definition of 'service' to the entire Act necessarily exempts so-called 'labor services' from the Act's coverage," A5. That is, the question improperly assumed that, if the definition applies throughout the Act, it necessarily creates the exception Agency Defendants seek. Additionally, the court reasonably sought to define "labor services," given that Agency Defendants "provide[d] no specific definition" for that term, A7, and it does not appear in the Act.

If, however, this Court chooses to resolve the modified question, it should nevertheless affirm the appellate court's judgment. In their opening brief and petition for leave to appeal, Agency Defendants offered no argument that they would prevail under the modified question, *i.e.*, that the Act excepts the "labor-related services provided by temporary staffing agencies." A5. They, therefore, have forfeited any such argument. Ill. Sup. Ct. R. 341(h)(7) (arguments not raised in opening brief are forfeited); *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶¶ 22-23 (arguments not raised in petition for leave to appeal or opening brief are forfeited).[6]

[6] Far from challenging the appellate court's reasoning under the modified question, Agency Defendants suggest that they agree with the court's conclusion that "the [Act] does not apply to wage- and hiring-coordination as a matter of law." AT Br. 25. But the appellate court said no such thing, and instead clarified that its ruling was limited to "collective bargaining and related conduct," and it was not "express[ing] an opinion" on whether other "types of activities" concerning individual labor were excepted by the Act. A10 n.2.

At bottom, however, because this Court's review is *de novo*, this Court need not address the appellate court's modification of the certified question and should instead answer the originally certified question. Before this Court, Agency Defendants clarify that question as asking whether the definition of services "forecloses claims alleging employer coordination on wages and hiring." AT Br. 2 ("Issue Presented"). The exception that Agency Defendants request, however, is not limited to those agreements. In their view, the Act's definition of "services" excepts "any agreements about the terms of employee labor." *Id.* at 9; *see id.* at 1 (Act excepts all conduct that "restrains individual labor performed by employees"), 4 (reference to "labor services" includes "employer coordination about individual labor"). As now explained, this Court should hold that the Act does not leave Illinois workers unprotected by excepting all restraints that employers place on the terms of their employees' labor from state antitrust liability.

IV. The Act does not provide a broad exception for all restraints that employers conspire to place on the terms of the labor supplied by their employees.

As Agency Defendants recognize, the question whether the Act excepts all restraints that employers place on the terms of their employees' labor is one of first impression in Illinois courts. *See* C888 (application for interlocutory appeal). Federal courts, however, have resolved this question when analyzing analogous federal statutory language upon which the Act was modeled. Given the lack of Illinois precedent on point, and the Act's specific

directive to consult federal authority on similar federal antitrust law, 740 ILCS 10/11 (2020), these federal decisions are a crucial aid in resolving the question before this Court and establish that the Act does not contain a broad exception for employers' restraints on the terms of their employees' labor. This conclusion is confirmed by basic principles of statutory construction, which, among other things, require statutory provisions to be read as a whole and construed to promote the legislature's purpose.

Agency Defendants nevertheless ask this Court to conclude that the General Assembly intended to deprive Illinois employees of critical state antitrust protections—leaving them vulnerable to restraints placed by their employers on the terms of their labor, such as suppressed wages and prohibitions on switching to jobs with better conditions. The circuit court and appellate court correctly declined this invitation, as should this Court.

A. As analogous federal law establishes, the Act does not except all employer restraints on the terms of their employees' labor from state antitrust liability.

The statutory provisions at issue here were based on, and thus should be interpreted consistently with, federal antitrust law. Anticipating difficulties in construing the Act's provisions, the General Assembly included in the statute an express directive to consult federal interpretations of similar federal antitrust law when interpreting the Act. 740 ILCS 10/11 (2020). Because it is well-settled that analogous federal law does not provide a blanket

exception for employers' restraints on the terms of their employees' labor, this Court should apply that same interpretation to the Act.

1. The General Assembly modeled the Act's provisions on individual labor on federal antitrust law.

The Clayton Act, 15 U.S.C. § 12 *et seq*., contains the federal counterpart to the Act's labor union exception (section 5(1)) and definition of service (section 4). The Clayton Act was enacted, in part, to address concerns that another federal antitrust statute—the Sherman Act—was being used to penalize efforts by labor unions to improve employment conditions. *Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 802-04 (1945). Specifically, federal courts had applied the Sherman Act's prohibition against restraints on trade or commerce to union activities, such as strikes and boycotts. *Id.* at 802 & n.4. Following these federal court decisions, unions and their supporters contended that "labor was not a commodity," and pushed Congress to except legitimate union activities from antitrust liability. *Id*. at 801-03. In response, Congress passed the Clayton Act in 1914, providing:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17.

Illinois's Act was passed decades after the Clayton Act. As the Bar Committee noted, the General Assembly "adopt[ed] an approach similar to that used for the federal exemption[ ] . . . , thereby preserving general overall consistency," when crafting Illinois's exemption for labor unions. 740 ILCS 10/5, Bar Comm. Cmts.-1967. Indeed, the Act's phrasing in this respect mirrors the federal labor union exception. For starters, the Clayton Act clarifies that "[t]he labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17. Similarly, the Act provides in section 4 that "labor which is performed by natural persons as employees of others" is not a "service." 740 ILCS 10/4 (2020) (cleaned up). Then, just like the Clayton Act excepts "the legitimate objects" of "labor . . . organizations," 15 U.S.C. § 17, section 5 of the Act excepts "the activities of any labor organizations or of individual members thereof which are directed solely to labor objectives which are legitimate," 740 ILCS 10/5(1) (2020). Thus, the Act mirrors the Clayton Act by first clarifying that a person's own labor is not the type of economic activity regulated by the statute and then providing that legitimate union activities are excluded from antitrust liability.

The minor linguistic and structural differences between the two statutes do not render them substantively different. To start, the Clayton Act refers to "a commodity or article of commerce," rather than a "service," because, as explained, it was enacted in response to federal court interpretations of the Sherman Act; that Act did not explicitly refer to

"services" but instead was interpreted as applying to restraints on services. *See Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435-37 (1932). The General Assembly intended to match this interpretation of the Sherman Act, 740 ILCS 10/4, Bar Comm. Cmts.-1967, and thus specifically mentioned and defined "[s]ervices" in the Act's text, 740 ILCS 10/4 (2020). To be consistent with this terminology, the General Assembly then provided that a person's labor is not a "service" (rather than a "commodity" or an "article of commerce"). *See id.*

Additionally, the federal and state statutes structure their labor union exemptions slightly differently, but this distinction is not substantively meaningful. The Clayton Act contains both statements (a person's labor is not a commodity/an article of commerce, and legitimate union activities are excepted) in a single section. *See* 15 U.S.C. § 17. By contrast, the General Assembly split its parallel provisions into two sections: the statement clarifying that a person's labor is not a service is in the "Definitions" section (section 4), 740 ILCS 10/4 (2020), while the statement providing that legitimate union activities are excluded from liability is contained in the "Exceptions" section (section 5), 740 ILCS 10/5 (2020).

That the General Assembly put the equivalent to the first sentence of the Clayton Act's labor union exception—a sentence that is, as Agency Defendants recognize, "definitional," AT Br. 17—in a separate "Definitions" section makes no substantive difference. Statutes are to be read as a whole.

McDonald, 2022 IL 126511, ¶ 17. Indeed, the Bar Committee emphasized this point with regards to sections 4 and 5(1), explaining that section 4 was "expressly designed to make services . . . subject to the prohibitions of the law," and thus "exemptions should be strictly limited." 740 ILCS 10/4, Bar Comm. Cmts.-1967. The committee then directed the reader to its discussion regarding section 5, *id*., in which it stated that section 5(1)'s "labor exemption should be read together with the provision of [s]ection 4 which states that labor performed as an employee is not a 'service' within the meaning of section 3 of the Act," 740 ILCS 10/5, Bar Comm. Cmts.-1967. The General Assembly's structural choice thus does not create a meaningful difference between the Clayton Act and the Act.

In sum, the Act's relevant provisions in sections 4 and 5(1) are similarly phrased to—and in fact based on—the Clayton Act's labor union exception. This Court should thus "use the construction of the federal law by the federal courts as a guide in construing this Act," 740 ILCS 10/11 (2020), especially given the absence of Illinois precedent on the question here, *see Coll. Hills Corp.*, 91 Ill. 2d at 150, 153; *Crawford Distrib.*, 53 Ill. 2d at 339.

2. Analogous federal law establishes that the Act does not except employers' restraints on the terms of employees' labor from antitrust liability.

As Agency Defendants concede, AT Br. 16, federal courts have concluded that the Clayton Act does not create a blanket exception for employers' restraints on the terms of their employees' labor, notwithstanding

its clarification that a person's labor is not a commodity or an article of commerce. That same interpretation should govern here.

To begin, the United States Supreme Court has long held that the Clayton Act's labor union exception applies only to legitimate labor union activities and thus does not exempt all restraints on labor. In *Allen*, a union conspired with its members' employers—manufacturers of electrical equipment and contractors who installed that equipment—so that the employers would only exchange goods with each other. 325 U.S. at 799-800. As part of the conspiracy, the employers agreed to set their workers' wages and hours at amounts demanded by the union. *Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers*, 145 F.2d 215, 218 (2nd Cir. 1944). The Supreme Court concluded that the Clayton Act's labor union exception, including its "declar[ation] that labor was neither a commodity nor an article of commerce," did not shield the actors from antitrust liability. *Allen*, 325 U.S. at 804. That exception, the Court explained, protected only "the rights of labor to organize to better its conditions through the agency of collective bargaining"—it did not protect agreements restraining labor outside of that context. *Id.* at 806-08. The Court cautioned against reading the labor union exception as "wholly exempting labor from any possible inclusion in the Anti-trust legislation." *Id.* at 804-05; *see id.* at 809 (provision was "special exemption[ ]" from "general legislative plan" to "preserve business competition and to proscribe business monopoly").

The United States Supreme Court has also clarified the meaning of the Clayton Act's phrase that "[t]he labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17. When an individual agrees to work for an employer, she engages in "the sale of [her] services to the employer." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502 (1940). Accordingly, when individuals combine for collective bargaining, they "restrain[ ] competition among themselves in the sale of their services to the employer." *Id.* But such agreements are not illegal under federal law because "'the labor of a human being is not a commodity or article of commerce'"—that is, the services that an individual sells to her employer are not commodities or articles of commerce. *Id.* at 503 (quoting 15 U.S.C. § 17). Thus, when individuals choose to *restrain their own labor* by entering into a collective bargaining agreement, they are not engaging in a "restraint of trade or commerce under the Sherman Act." *Id.*[7]

Other federal courts addressing the Clayton Act's labor union exception have reaffirmed that it, including the provision that "'[t]he labor of a human being is not a commodity or article of commerce,'" does not provide a blanket

[7] The legislative history of the Clayton Act confirms this understanding of the labor union exception's first sentence, which was proposed because it was considered "'an outrage' . . . to construe the Sherman Act as applicable to 'men and women who own nothing but themselves and undertake to control nothing but themselves and their power to work.'" *People v. N. Ave. Furniture & Appliance, Inc.*, 645 P.2d 1291, 1289-99 (Co. 1982) (en banc) (quoting 2 *The Legislative History of the Federal Antitrust Law and Related Statutes* 1096 (E. Kintner ed. 1978)).

exception for all agreements restraining the terms of an individual's labor. *Cordova v. Bache & Co.*, 321 F. Supp. 600, 605-07 (S.D.N.Y. 1970) (quoting 15 U.S.C. § 17) (Clayton Act did not except employer conspiracies to fix commissions); *see, e.g.*, *United States v. Hanigan*, 681 F.2d 1127, 1130 (9th Cir. 1982) (Clayton Act's statement that labor is not a commodity or an article of commerce "serves merely to exempt the activities of organized labor from the antitrust laws"); *Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 829 n.9 (5th Cir. 1976) (Clayton Act did not except brokerage firms' agreements to restrict movement of labor force from Sherman Act); *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) (Sherman Act reaches, and prohibits, no-poach agreements between employers).

Cordova's analysis is particularly instructive. There, several brokerage firms contended that the Clayton Act's statement that "'[t]he labor of a human being is not a commodity or article of commerce'" excepted any agreements by "employers with respect to the labor of their employees," including their agreement to reduce their employees' commissions. 321 F. Supp. at 605-06 (quoting 15 U.S.C. § 17). The court rejected this argument, explaining that the "'labor of a human being' . . . can be restrained only by the employees or unions controlling the labor itself," and it was only such labor that is not a commodity or an article of commerce. *Id.* As such, the exception only protects the rights of unions and their members to control *their* "furnishing of [the members'] labor or services," and does not protect all

restraints on labor, including when employers "ban[d] together for joint action in fixing the wages to be paid by each employer." *Id.* The court added that there was "no evidence [before Congress] of the existence of any necessity to protect [such] activity" by employers, and, in any case, if Congress had wanted to exempt such activity from antitrust enforcement, it "would also have provided that compensation offered or paid by employers to employees is not a commodity or article of commerce," but Congress did not do so. *Id.* at 606. Other federal courts have relied on *Cordova* when assessing the Clayton Act's labor union exception and similar state law exceptions to conclude that such language protects only legitimate labor union activity. *See, e.g.*, *Hanigan*, 681 F.2d at 1130 (Clayton Act); *Quinonez*, 540 F.2d at 829 n.9 (Clayton Act); *Doe v. Ariz. Hosp. & Healthcare Ass'n*, No. CV07-1292-PHX-SRB, 2009 WL 1423378, at *9 (D. Ariz. Mar. 19, 2009) (Arizona statute).

This long-settled interpretation of the Clayton Act controls here, given the analogous phrasing of the Clayton Act's and the Act's labor union exceptions. This is particularly true because the Act was enacted in 1965, decades after *Allen* clarified that the Clayton Act does not exempt all agreements restraining employees' labor. *See Laughlin*, 133 Ill. 2d at 383-84 ("When a [s]tate legislature enacts a statute modeled upon a [f]ederal statute, it can be presumed that the legislature did so with the knowledge of the statute's construction by the [f]ederal courts.").

Construing the Act's labor union exception consistently with the Clayton Act accords with practice across the nation. *See Carter-Shields, M.D. v. Alton Health Inst.*, 201 Ill. 2d 441, 456 (2002) (Illinois courts will consider decisions from other jurisdictions in absence of relevant Illinois precedent). Other courts have likewise construed state antitrust statutes harmoniously with the Clayton Act's labor union exception. *See, e.g.*, *Rhodes v. Rains*, 195 Wash. App. 235, 244 (Wash. App. 2016) (Washington's labor exception, including statement that labor is not commodity or article of commerce, follows federal antitrust law and is limited to legitimate union activity). In fact, they have done so even when presented with state statutes that—like the Act—mirror the Clayton Act's labor union exception but use a slightly different structure, and concluded that such minor structural choices do not warrant a material departure from federal law as to the scope of that exception. *See, e.g.*, *People v. N. Ave. Furniture & Appliance, Inc.*, 645 P.2d 1291, 1289-99 (Co. 1982) (en banc) (that Colorado legislature placed statement that labor is not a commodity or an article of commerce in a separate subsection from rest of labor union exception "did not broaden the scope of [that] exemption"); *Doe*, No. CV07-1292-PHX-SRB, 2009 WL 1423378, *8-*9 (construing Arizona labor union exception in conformity with Clayton Act notwithstanding language about labor not being commodity and article of commerce being in a separate subsection from remainder of exception).

In short, under the settled interpretation of analogous federal law, the Act excepts only agreements by workers (or the unions to which they belong) to restrain their own labor to better their working conditions. *See Allen*, 325 U.S. at 804-09; *Cordova*, 321 F. Supp. at 605-06. It does not except all restraints on an employee's provision of labor, such as conspiracies between employers to suppress their employees' wages and to prevent them from switching employers. The Act, therefore, governs conspiracies such as those allegedly committed by Agency Defendants.

3. Agency Defendants incorrectly disregard federal authority construing the Clayton Act.

Agency Defendants acknowledge the General Assembly's directive that federal authority be used as a guide when the Act is "'identical or similar'" to federal antitrust law. AT Br. 16 (quoting 740 ILCS 10/11 (2020)). And they do not dispute that federal courts have held that the Clayton Act excepts only legitimate labor union activities, and that accepting their reading of the Act would constitute a "material" departure from federal law. *Id*. at 16-17. Nevertheless, they contend that this Court should ignore the Act's instruction to consult federal law merely because the General Assembly put one sentence—that labor performed by a natural person as an employee is not a service—in a separate section from the rest of the labor union exception. *Id.* Agency Defendants place too much weight on this structural choice, and their contention should be rejected.

Initially, Agency Defendants selectively quote the Bar Committee's comment that section 4 "'make[s] the Act inapplicable to agreements by either labor or nonlabor groups insofar as they relate to restraint of competition concerning labor itself.'" *Id.* at 17 (quoting 740 ILCS 10/5, Bar Comm. Cmts.-1967). Read in full, the committee's comment clarifies that it was referring specifically to collective bargaining agreements between labor and nonlabor groups:

> The labor exemption should be read together with the provision of Section 4 which states that labor performed as an employee is not a "service" within the meaning of Section 3 of the Act. The effect of this provision is to make the Act inapplicable to agreements by either labor or nonlabor groups insofar as they relate to restraint of competition concerning labor itself. *The Act thus protects both management and labor in bargaining collectively over terms and conditions of employment*.

740 ILCS 10/5, Bar Comm. Cmts.-1967 (emphasis added). The committee thus used "restraint[s] of competition concerning labor itself" to describe collective bargaining agreements regarding an individual's sale of their services, *id.*, and never suggested that the exception applies more broadly to any restraint that employers place on the terms of their employees' labor.

Further, contrary to Agency Defendants' arguments, *see* AT Br. 16-17, two federal court decisions—*Cordova* and *Williams*—do not warrant a contrary reading of this structural choice. First, *Cordova* supports the State's (and the lower courts') reading of the Act, not Agency Defendants' interpretation. Agency Defendants emphasize *Cordova*'s comment that the language about labor not being a commodity or an article of commerce would

"'lend support'" for the view that all agreements restraining labor were exempt from antitrust liability if the statute "'stopped'" there. *Id.* at 17 (quoting *Cordova*, 321 F. Supp. at 605). But the Act likewise does not "stop" after such language: it includes the rest of the labor union exception in section 5(1), the exceptions section. In any case, *Cordova* did not condition its analysis on this observation. Instead, it viewed the Clayton Act's labor union provision as a whole, and noted that if Congress had wanted to except employers who fixed their employees' wages, then it would have added language making clear its intent to exclude restraints on the "compensation offered or paid by employer to employees" from the federal statute's coverage. *Cordova*, 321 F. Supp. at 606. That analysis applies with equal force here.

Second, *Williams v. St. Joseph Hospital*, 629 F.2d 448 (7th Cir. 1980), likewise reinforces the State's and lower courts', rather than Agency Defendants', construction of the Act. There, the Seventh Circuit concluded that the Clayton Act's language about labor not being a commodity or an article of commerce refers to labor union activity. *Id.* at 453 n.8. To reach this conclusion, it relied on the rule that statutory provisions should be read in context, *id.*, which here demands reading sections 4 and 5(1) together, *see infra* p. 38. Contrary to Agency Defendants' assertion, it did not rely on the fact that this language is specifically "in the same section" as the rest of the labor union exception. *See* AT Br. 16.

Finally, Agency Defendants are wrong that the Act is "intentionally" and "[m]aterially" "narrower than federal law" in terms of protecting employees from restraints on the terms of their labor. *Id.* at 15-16. They cite the Bar Committee comments in support, *see id.* at 16, but those comments explain that the General Assembly "intended" for the Act to "be given a construction which keeps it consistent with [federal law]," and that the legislature was "very careful[ ]" and acted with "deliberate intention" in the instances when it made the Act different from federal law, 740 ILCS 10/11, Bar Comm. Cmts.-1967. There is no evidence of such "careful[ ]" or "deliberate" departure from federal law concerning the labor union exception. By contrast, in Agency Defendants' two examples of instances where the Act broke from federal law, *see* AT Br. 16, the General Assembly included substantive language that federal law lacked, *see Gilbert's Ethan Alley Gallery*, 162 Ill. 2d at 102-04 (Act, unlike Sherman Act, includes explicit requirement that monopolistic behavior be accompanied by improper purpose); *Crawford Distrib.*, 53 Ill. 2d at 340-41 (Act confers "use and derivative use immunity" but, when Act was enacted, Sherman Act did not) (internal quotations omitted). And the lack of evidence that the General Assembly intentionally departed from federal law is particularly concerning because the exception that Agency Defendants seek is anything but "small[ ]," AT Br. 20, as it would leave Illinois employees vulnerable to all restraints that their employers place on the terms of their labor.

B. Basic principles of statutory construction confirm that the Act's plain text does not except all employer restraints on the terms of their employees' labor.

The conclusion compelled by analogous federal law—that the Act protects Illinois employees from restraints by their employers on the terms of their labor—is also consistent with the Act's plain text and basic tenets of statutory interpretation. Agency Defendants' contrary arguments are unpersuasive.

1. The Act's text protects Illinois workers, not employers who restrain the terms of their employees' labor.

As an initial matter, the Act's plain text, when properly read as a whole, does not except all restraints by employers on the terms of their employees' labor. As explained, statutory provisions should be "construed in connection with every other section"—not in isolation. *O'Connell*, 2022 IL 127527, ¶ 21. Here, sections 4 and 5(1) are the only sections of the Act that reference labor, *see generally* 740 ILCS 10/1 *et seq.* (2020), and they should be read in tandem, 740 ILCS 10/5, Bar Comm. Cmts.-1967. Section 5(1) excepts only to the legitimate labor "activities of any labor organization or of individual members thereof," 740 ILCS 10/5(1) (2020), but unions often work with employers to reach favorable terms on the provision of their members' labor. If section 5(1) stood in isolation, employers could be penalized when entering into collective bargaining agreements with unions, *i.e.*, cooperating with employees who were intentionally placing restraints on the terms of their labor. As the Bar

Committee explained, section 4 solves this problem by excluding such restraints from liability even when non-employees are involved: "[t]he effect of [section 4]" is that, when read with section 5(1), it "protects *both* management and labor in bargaining collectively over terms and conditions of employment." 740 ILCS 10/5, Bar Comm. Cmts.-1967 (emphasis added). As such, read together, sections 5(1) and 4 protect human beings as laborers when organizing to set the terms of their employment (and employers who bargain with them), not all market participants whenever they collude to set employment terms.

Section 4 also serves another important purpose. Because section 5(1) does not explicitly refer to "services," *see* 740 ILCS 10/5(1) (2020), section 4 clarifies that the definition of "service[s]" is consistent with the labor union exception by specifically noting that a person's labor (which, as explained, can only be controlled by the employee herself or to the union to which she belongs, *see supra* p. 30 & n.7) is not a service within the meaning of the Act, *id.* § 10/4. To be sure, this clarification potentially creates some redundancy between those sections. But, as Agency Defendants point out, AT Br. 12, and as the appellate court recognized, this overlap is permissible because legislatures may take a "'belt and suspenders' approach to legislative drafting," A9 (quoting *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 344 (7th Cir. 2017)). That is, sometimes legislatures are potentially "redundant"

when writing a statute to "make sure" the provisions are clear. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020).

Finally, reading section 4 with section 5(1), and to only except legitimate union activity, "promote[s] [the Act's] essential purpose[ ]," which is illuminated by the Bar Committee's comments. *O'Connell*, 2022 IL 127527, ¶ 22. The Committee explained that a "primary purpose" of the Act was to address "the omission . . . of penalties designed to curb restraints with respect to services" from Illinois's prior antitrust statute. 740 ILCS 10/4, Bar Comm. Cmts.-1967. To this end, "the definitions of Section 4 were expressly designed to make services . . . subject to the prohibitions of the law," and "[i]t was the feeling of the draftsmen that exemptions should be strictly limited and that almost all service occupations should be within the reach of the statute." *Id.*; *see* 740 ILCS 10/5, Bar Comm. Cmts.-1967 ("[A]ll of the provisions of Section 5 will be strictly construed and narrowly applied."). Consistent with this legislative objective, the Act should be read to broadly protect Illinois employees and the services they provide to their employers as laborers—not categorically exclude them from state antitrust protection.

2. Agency Defendants' contrary arguments lack merit.

Agency Defendants, for their part, improperly read the Act's definition of "services" in section 4 in isolation. *See* AT Br. 9. They argue that the definition of services is a "carveout" for the type of conspiracies alleged here, *id.*, without considering it in conjunction with section 5(1)—contrary to the

Bar Committee's instruction, 740 ILCS 10/5, Bar. Comm. Cmts.-1967, and contrary to the fundamental rule that statutes must be read as a whole, *O'Connell*, 2022 IL 127527, ¶ 21.

Agency Defendants, moreover, acknowledge that sections 4 and 5(1) have "some overlap" but contend they have distinct objectives. AT Br. 13. In their view, section 4 excepts "all agreements about individual labor," whereas section 5(1) permits unions to coordinate on "more" than the terms of employee labor, including on the sale of commodities. *Id.* at 14 & n.4. But Agency Defendants include no support for the notion that section 5(1) protects unions for "everything they do." *Id.* at 12. Quite the contrary, the Act limits this exception to "legitimate" "labor objectives," 740 ILCS 10/5(1) (2020), and the Bar Committee has made clear that this exception only allows unions to coordinate "restraint[s] of competition concerning labor itself," 740 ILCS 10/5, Bar Comm. Cmts.-1967.

Instead, these sections' different objectives undermine Agency Defendants' construction. Section 4—which they attempt to read as creating an exception to the Act's coverage—is entitled "Definitions," whereas section 5 is entitled "Exceptions." *Compare* 740 ILCS 10/4 (2020) *with* 740 ILCS 10/5 (2020). These titles at the very least "support[ ]" the State's reading of the clear statutory text, or, if the text is ambiguous, "shed light" on the legislature's intended meaning. *Land v. Bd. of Educ. of City of Chi.*, 202 Ill. 2d 414, 429-30 (2002) (internal quotations omitted); *see Mahoney v. Indust.*

Comm'n, 218 Ill. 2d 358, 372 (2006) ("The title of an act can provide guidance in interpreting the statute."); *Banco Popular N. Am. V. Gizynski*, 2015 IL App (1st) 142871, ¶ 57 (declining to interpret section entitled "'Homeowner protection'" in a manner that would not benefit homeowners). Given the stated objectives of the two sections, it is "much more likely" that the General Assembly was reflecting section 5(1)'s exception in the definitions provided in section 4, rather than carving out a new, broad exception in section 4. *See Atl. Richfield Co.*, 140 S. Ct. at 1350 n.5 ("better overall reading" of statute contained "some redundancy" but was consistent with legislative objective) (internal quotations omitted).

Agency Defendants nevertheless argue that the sections cannot be read in this way because section 4 contains no "union-specific terminology," AT Br. 12-13, but there is no magic-words requirement to this effect. It makes sense that the General Assembly did not mention unions in section 4 because it mirrors the language used by the Clayton Act, which also contains no explicit reference to unions in its first definitional sentence, and because, as explained, section 4, read with section 5(1), serves to protect both management and labor unions in the collective bargaining process. *See supra* pp. 38-39.

Further, Agency Defendants argue that the State's construction of the Act would read section 4 "out of the statute," AT Br. 12, but this is exactly backwards, *see supra* pp. 38-40 (explaining how section 4 clarifies the labor union exception). As the circuit court recognized, "if such a blanket exclusion

for labor services existed [in section 4], it would render the labor union exemption in section 5(1) superfluous." A23. That is, if section 4 did indeed except all "coordination about employee labor" from state antitrust liability, AT Br. 13, there would be no need in section 5(1) to separately list unions as entitled to this exception.

Agency Defendants' understanding of the legislative purpose fares no better. They read the committee's comment that the Act was intended to protect "almost all" service occupations to mean that the Act protects only those in "professional services" and leaves all other Illinois employees unprotected. *Id.* at 18 (internal quotations omitted). They do not define which services qualify as "professional," but presumably, they mean those individuals in typically higher-paying jobs (*e.g.*, medical professionals, accountants, and lawyers) and not those workers in traditionally lower-paying jobs who work as employees for others (*e.g.*, cashiers, janitors, and waiters). This interpretation has no footing in the Act, which instead includes explicit, specific exceptions for certain service occupations, *e.g.*, insurance brokers who participate in joint underwriting regulated by Illinois insurance law. 740 ILCS 10/5(5) (2020); *see* 740 ILCS 10/5, Bar Comm. Cmts.-1967 (noting specific exceptions added to original bill for certain service occupations, including for insurance brokers). And it would produce an inequitable result by leaving Illinois employees in "non-professional" services unprotected from state antitrust liability, which the General Assembly surely did not intend. *See*

Sigcho-Lopez, 2022 IL 127253, ¶ 28 (Court "presumes that the legislature did not intend . . . unjust results.").

Finally, Agency Defendants contend that creating this blanket exception would be a "logical legislative decision" with "potential procompetitive benefits" for employers, AT Br. 19, ignoring that this Court "is not tasked with evaluating and setting public policy," as "that job is reserved for our duly elected legislature," *Managо By & Through Pritchett v. Cnty. of Cook*, 2017 IL 121078, ¶ 13.

Even if it could be considered, Agency Defendants' policy argument should be rejected. For one, their reasoning cannot be squared with the fundamental free-market principle that "competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment," and benefits consumers "because a more competitive workforce may create more or better goods and services." U.S. Dep't of Just. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* 2 (Oct. 2016), https://bit.ly/3Msj8VI. Based on this principle, courts have repeatedly rejected similar arguments that employer conspiracies to restrain labor are pro-competitive. *See, e.g.*, *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2167-68 (2021) (Kavanaugh, J., concurring) ("[P]rice-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."); *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995)

("'[E]mployer conspiracies controlling employment terms . . . tamper with the employment market and thereby impair the opportunities of those who sell their services there.'") (quoting II Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 377c (1995)); *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1161 n.13 (9th Cir. 2011) (Reinhardt, J., concurring in part) ("Depressing wages is not of societal benefit; it simply harms working people and their families, a significant part of the group that has come to be known as 'the middle class,' and which is experiencing enough economic travail without the added unlawful actions of those conspiring to violate the antitrust laws."); *United States v. Jindal*, No. CV 4:20-CR-00358, 2021 WL 5578687, at *5 (E.D. Tex. Nov. 29, 2021) ("When the price of labor is lowered, or wages are suppressed, fewer people take jobs, which always or almost always tends to restrict competition and decrease output.") (cleaned up).

Agency Defendants' policy argument also produces an absurd result. *See O'Connell*, 2022 IL 127527, ¶ 22 (court "must presume that the legislature . . . did not intend absurdity or injustice") (internal quotations omitted). If all restraints on the terms of employees' labor were excepted from liability under the Act, then Illinois workers would be protected from no-poach and wage-fixing conspiracies by their employers only when such conduct occurs in interstate commerce (under federal antitrust law), but not when this conduct occurs solely within Illinois (under state antitrust law). Agency Defendants have pointed to nothing in the Act's legislative history or in the Bar

Committee comments that "it was ever suggested, considered, or legislatively determined" that this group of Illinois employees should be left unprotected. *See Allen*, 325 U.S. at 808. While Agency Defendants may prefer that the General Assembly make this policy choice, which would shield them and any other employer from state antitrust liability when they conspire to suppress their employees' wages and limit their mobility, this Court should not "depart from the law's terms by reading into it exceptions, limitations, or conditions that the legislature did not express." *McDonald*, 2022 IL 126511, ¶ 18.

C. This Court should not ignore analogous federal law and basic principles of statutory construction in favor of three federal decisions interpreting the Act.

Agency Defendants rely heavily on three federal decisions, which, in their view, hold that the Act excepts all employer conspiracies regarding the terms of their employees' labor. AT Br. 9-10. They ask this Court to ignore federal interpretation of federal law (in which federal courts are experts) in favor of federal interpretation of Illinois law (of which this Court is the final arbiter). But while the Act directs Illinois courts to consult federal decisions analyzing analogous federal statutes, 740 ILCS 10/11 (2020), Illinois courts need not defer to decisions by lower federal courts analyzing Illinois statutes, *Hanrahan v. Williams*, 174 Ill. 2d 268, 277 (1996) ("This court is not bound by the Seventh Circuit's interpretation of our statutes.").

Such deference is particularly unwarranted here because Agency Defendants' three cited federal decisions "lack[ed] meaningful analysis" or

"persuasive explanation" as to why the Act would except all employer agreements regarding the terms of their employees' labor. A24 (circuit court order). To start, in *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060 (7th Cir. 1997), the Seventh Circuit held that the plaintiff lacked standing to bring her state antitrust claims against her employer. *Id.* at 1066. The court's discussion of the Act's labor union exception was thus dictum. *See Mitchell v. Doherty*, 37 F.4th 1277, 1282 (7th Cir. 2022) (observation "unnecessary for the outcome of the case" is dictum). Moreover, the court's discussion of the Act's labor union exemption was cursory. It was limited to the statement that, to the extent the plaintiff's "claims relate to an alleged market for labor services, they are specifically excluded by § 10/4 of the Act, which states that 'service shall not be deemed to include labor which is performed by natural persons as employees of others.'" *O'Regan*, 121 F.3d at 1066 (cleaned up). The court included no further analysis, and it certainly did not "unequivocally [hold]" that employers' conspiracies to suppress their employees' wages and prevent them from switching jobs escape liability under the Act. *See* AT Br. 21. Because this dictum was not persuasive, it should not be followed. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2498 (2022) ("Dicta that does not analyze the relevant statutory provision cannot be said to have resolved the statute's meaning."); *Barry v. Cboe Glob. Markets, Inc.*, 42 F.4th 619, 624 (7th Cir. 2022) ("Dictum matters . . . only when it persuades.").

Agency Defendants also cite two federal district courts that primarily relied on *O'Regan*'s dictum. AT Br. 10 (citing *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018); *Deslandes v. McDonald's USA, LLC*, No. 17-cv-4857, 2018 WL 3105955, at *9 (N.D. Ill. June 25, 2018)). But "dicta, even if repeated, does not constitute precedent." *Oklahoma*, 142 S. Ct. at 2498. Further, these decisions are unpersuasive on their own terms. In fact, Agency Defendants recognize that both decisions lack detailed analysis, but insist that the decisions are nonetheless persuasive because the question whether the Act excepts all restraints placed by employers on the terms of their employees' labor is "straightforward." AT Br. 21 n.7. But *Butler* did not address the argument that the Act should be interpreted consistently with federal law, and instead merely stated that "[t]he Seventh Circuit has already said that the Illinois Antitrust Act specifically excludes claims 'relate[d] to an alleged market for labor services.'" 331 F. Supp. 3d at 797 (quoting *O'Regan*, 121 F.3d at 1066) (alteration in original). And while *Deslandes* disagreed that section 4's definition protects only legitimate union activity on the basis that "the statute includes a separate labor exemption," 2018 WL 3105955, *9 (citing 740 ILCS 10/5(1) (2018)), that was the extent of the court's analysis. It did not acknowledge, for instance, the parallel phrasing of section 4's definition and the first sentence of the Clayton Act's labor union exception, or the Bar Committee's instruction that the language in sections 4 and 5(1) be read together. *See* A9-10 (appellate court

agreeing that the "limited analysis" in *Deslandes* was "unpersuasive" and ignored committee direction to read these sections together).

Additionally, contrary to Agency Defendants' assertion, AT Br. 20-22, the General Assembly has not acquiesced to these three federal courts' interpretations of the Act. Agency Defendants overstate the strength of the presumption of legislative acquiescence, which "is merely a jurisprudential principle" and "not a rule of law." *People v. Perry*, 224 Ill. 2d 312, 331 (2007); *see Blount v. Stroud*, 232 Ill. 2d 302, 325 (2009) (presumption of legislative acquiescence is "not conclusive"). Indeed, this Court has declined to apply this principle in a range of contexts, such as when the referenced judicial interpretations are "contrary to the clear language of the [statute]." *Blount*, 232 Ill. at 325; *see Barrall v. Bd. of Trs. of John A. Logan Cmty. Coll.*, 2020 IL 125535, ¶ 27 n.2 (court will give "little weight to the fact that the legislature did not amend [ambiguous] statute" after appellate court interpreted it). And Agency Defendants have supplied no case where an Illinois court has applied this presumption based on lower federal courts' interpretation of Illinois law. *See* AT Br. 20 (citing *People v. Way*, 2017 IL 120023, ¶ 27; *In re Marriage of Mathis*, 2012 IL 113496, ¶ 25; and *People v. Villa*, 2011 IL 110777, ¶ 36, which all inferred legislative acquiescence to Illinois court decisions interpreting relevant statute); *see also* Amicus Br. 6 (citing instances in which court inferred legislative acquiescence to decisions of this Court and United States Supreme Court).

This Court should not infer legislative acquiescence here. The General Assembly modeled the Act's relevant provisions on federal antitrust law, decades after the United States Supreme Court clarified that the Clayton Act's analogous provision exempted only legitimate labor union activities. *See Allen*, 325 U.S. 804-09. Because the meaning of the Act is clear, especially given this history, that the General Assembly has not amended the Act in response to *O'Regan* and its progeny "is of little weight." *Perry*, 224 Ill. 2d at 331-32.

Contrary to Agency Defendants' assertion, AT Br. 22, the General Assembly's decision to amend the Act to clarify the Attorney General's *parens patriae* authority following *California v. Infineon Technologies AG*, 531 F. Supp. 2d 1124, 1126 (N.D. Cal. 2007), does not compel a different result. In *Infineon*, the California federal district court disagreed with the United States Court of Appeals for the District of Columbia Circuit, but agreed with the Seventh Circuit, the United States Bankruptcy Court for the Northern District of Illinois, and—most notably—an Illinois circuit court when holding that the Illinois Attorney General lacked *parens patriae* authority to bring antitrust lawsuits under the Act on behalf of Illinois residents. *Id.* at 1166-67. Thus, in stark contrast to the circumstance here, multiple courts, including an Illinois court, interpreted the Act before the General Assembly took action in response to those decisions. *See id.* Moreover, unlike the federal decisions cited here, *Infineon* contained detailed analysis of the Act. *See id.* This Court, therefore, should not assume that the General Assembly acquiesced to *O'Regan*,

Deslandes, and *Butler*, and instead should—as the "final arbiter of state law"—construe the Act based on analogous federal law and its text to effectuate the General Assembly's intent. *In re Hernandez*, 2020 IL 124661, ¶¶ 17-18.

V. This Court should decline to reach the Staffing Services Association of Illinois and American Staffing Association's separate argument that the staffing agencies are broadly immune from liability under the Act, which, at any rate, lacks merit.

The Staffing Services Association of Illinois and American Staffing Association, as *amici curiae* in support of Agency Defendants, argue that staffing agencies that provide employees for non-professional and non-clerical work are "implicitly immunized" from state antitrust liability because they are already regulated by Illinois's Day and Temporary Labor Services Act ("IDTLSA"), 820 ILCS 175/1 *et seq*. (2020). Amicus Br. 19-20. But Agency Defendants did not raise this argument in either their petition for leave to appeal or their opening brief in this Court, and have thus forfeited it. *BAC Home Loans Servicing*, 2014 IL 116311, ¶¶ 22-23. And the Associations cannot separately raise this argument because "[a]n *amicus* takes the case as he finds it, with the issues framed by the parties." *Oswald v. Hamer*, 2018 IL 122203, ¶ 41. As it has "repeatedly" done before, this Court should "decline" the Associations' "invitation" to address an "issue[ ] not raised by the parties." *Id.*

Should, however, this Court address this argument, it can easily reject it. Although the United States Supreme Court has recognized that, in some

instances, regulatory statutes that are silent with respect to antitrust laws may "implicitly preclude application of the antitrust laws," that occurs "only where there is a plain repugnancy between the antitrust and regulatory provisions." *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 271-72 (2007) (internal quotations omitted); *see Mass. Furniture & Piano Movers Ass'n, Inc. v. Fed. Trade Comm'n*, 773 F.2d 391, 393-94 (1st Cir. 1985) (recognizing "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored" and finding "no irreconcilable conflict" between antitrust law and state regulatory scheme) (internal quotations omitted). To satisfy this standard, the Associations admit that they must, among other things, show that applying both the Act and the IDTLSA to the staffing agencies' alleged conduct "'would produce conflicting guidance, requirements, duties, privileges, or standards of conduct.'" Amicus Br. 25 (quoting *U.S. Futures Exch., L.L.C. v. Bd. of Trade of the City of Chi., Inc.*, 953 F.3d 955, 967 (7th Cir. 2020)).

They have not come close to doing so. The IDTLSA imposes certain requirements on staffing agencies to protect day and temporary laborers in Illinois because "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." 820 ILCS 175/2 (2020). By setting these requirements, the General Assembly aimed "to protect the labor and employment rights of these workers." *Id.* Contrary to

the Associations' arguments, *see* Amicus Br. 27-30, none of these requirements conflict with the Act's prohibition on employers' restraints on the terms of their employees' labor.

First, the Associations assert that subjecting employers' wage-fixing agreements to liability under the Act would conflict with the IDTLSA's requirement that third-party clients share "'all legal responsibility and liability for the payment of wages'" with the temporary staffing agencies with which they contract. *Id.* at 22 (quoting 820 ILCS 175/85(b) (2020)). But this provision merely ensures that temporary employees will get paid for their work by making clients (in addition to employers) responsible for the wages. It says nothing about allowing employers to collude to fix wages, which makes sense given that the General Assembly was concerned about the pay abuses suffered by temporary workers. *See* 820 ILCS 175/2 (2020).

Second, the Associations are incorrect that applying *per se* liability to no-poach agreements would "upend" the IDTLSA's requirements that staffing agencies assist, rather than impede, their temporary employees' placement in permanent positions. Amicus Br. 29-30. The Associations' arguments on this front are speculative: they cite no authority and attempt to read too much into the IDTLSA. That statute allows staffing agencies to collect placement fees from third-party clients when they place temporary employees into permanent positions with those clients. 820 ILCS 175/40 (2020). It thus incentivizes staffing agencies to promote their employees' "right . . . to accept a permanent

position." *Id.* But it says nothing about prohibiting those employees from switching between staffing agencies in search of better conditions and wages while they are in temporary positions. And while the Associations insist that the placement fee could motivate staffing agencies to poach each other's employees for the purpose of placing them in permanent positions—thus, in their view, justifying the need for a no-poach agreement—it cites nothing to show that the placement fee is large enough that it would motivate employers to invest the substantial resources needed to do so, *e.g.*, interviewing, negotiating contracts, and paying wages and benefits. *See* Amicus Br. 29-30. Finally, there is no basis for the Associations' fear that third-party clients may have to pay multiple placement fees if employees are permitted to transfer between staffing agencies, *see id.* at 29, as the IDTLSA permits only the placing agency (not every agency where the employee has worked) to collect the fee, *see* 740 ILCS 175/40 (2020).

That the IDTLSA's requirements are not "plain[ly] repugnan[t]" with the Act's antitrust protections for employees, *Credit Suisse Secs.*, 551 U.S. at 272 (internal quotations omitted), comes as no surprise given that the General Assembly sought to protect temporary laborers from "abuse of their labor rights," 820 ILCS 175/2 (2020). If it reaches this separate argument, which it should not, the Court should reject the notion that the General Assembly intended to comprise the labor rights of a "particularly vulnerable" group of

employees for the sake of their employers' profit by implicitly repealing their protections under the Act. *Id.*

CONCLUSION

For these reasons, the State of Illinois requests that this Court affirm the appellate court's judgment and answer the first certified question "No."

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May 31, 2023

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Ill. Sup. Ct. R. 341(a) and (b). The length of this brief, excluding the 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, and the certificate of service is 12,989 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on May 31, 2023, I electronically filed the foregoing **Brief of Plaintiff-Appellee State of Illinois** with the Clerk of the Illinois Supreme Court, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL System.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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