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., and MIDWAY STAFFING, INC., Defendants-Appellants.	On Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0840 There Heard on Appeal from the Circuit Court of Cook County, Illinois Chancery Division, No. 2020 CH 05156 The Honorable Raymond Mitchell, Judge Presiding

BRIEF OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The United States enforces the federal antitrust laws and has a strong interest in their correct application. In particular, the United States enforces Section 1 of the Sherman Act, 15 U.S.C. § 1, against firms that agree with one another to fix wages or allocate workers, including agreements not to hire, solicit, and/or otherwise compete for employees (hereafter "no-poach" agreements).[1] The United States has filed amicus briefs and statements of interest addressing such agreements.[2] The United States has also filed amicus briefs on the scope and application of federal antitrust law's labor exemptions.[3]

This appeal involves the application of the Illinois Antitrust Act ("IAA") to alleged wage-fixing and no-poach agreements. The IAA provides 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

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[1] *See, e.g.*, *United States v. Manahe*, No. 2:22-cr-00013-JAW (D. Me. Jan. 27, 2022); *United States v. Patel*, No. 3:21-cr-00220 (D. Conn. Dec. 15, 2021); *United States v. Hee*, No. 2:21-cr-00098-RFB-BNW (D. Nev. Mar. 30, 2021); *United States v. Surgical Care Affiliates, LLC*, No. 3:21- cr-00011-L (N.D. Tex. July 8, 2021).

[2] *See, e.g.*, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 20-55679 (9th Cir. Nov. 19, 2020), ECF No. 14; *Markson v. CRST Int'l, Inc.*, No. 5:17-cv-01261-SB (SPx) (C.D. Cal. July 15, 2022), ECF No. 637; *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, No. 1:21-cv-00305 (N.D. Ill. Dec. 9, 2021) (Doc. 91); *Seaman v. Duke Univ.*, No. 1:15-cv-00462-CCE-JLW (M.D.N.C. Mar. 7, 2019), ECF No. 325; *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-00798-JFC (W.D. Pa. Feb. 8, 2019), ECF No. 158.

[3] *See, e.g.*, *The Atlanta Opera, Inc., et al.*, No. 10-RC-276292 (N.L.R.B. Feb. 10, 2022).

law by the federal courts as a guide in construing this Act." 740 ILCS 10/11 (emphasis added). This appeal involves a question as to which "the construction of the federal [antitrust] law[s] by the federal courts" could serve as a useful "guide in construing" the IAA: The certified question concerns the scope of the IAA's exemption for "labor which is performed by natural persons as employees of others," 740 ILCS 10/4, a statute bearing textual similarity to the Clayton Act's exemption for the "labor of a human being," 15 U.S.C. § 17.

The United States files this brief under Ill. Sup. Ct. R. 345 and 28 U.S.C. § 517 to address how federal antitrust law would apply to the question before this Court.[4]

ISSUE PRESENTED

Whether Section 4 of the Illinois Antitrust Act, 740 ILCS 10/4, exempts wage-fixing and no-poach agreements between employers from Illinois antitrust liability.

STATEMENT OF FACTS

This appeal and a companion appeal (No. 128767) arise out of a State enforcement action under the IAA against Defendants Elite Staffing, Inc., Metro Staff, Inc., Midway Staffing, Inc. (the "Staffing Agencies") and Colony Display LLC. The Staffing Agencies "compete with one another to recruit,

[4] Defendant Staffing Agencies argue that this Court should not look to federal law in construing the IAA. *See* Staffing Agencies Br. 15–17. The United States does not take a position on this issue.

select, and hire employees that will be staffed at third-party client locations on a temporary basis." A29 (Compl. ¶ 18).[5] Colony manufactures and installs displays for retail and hospitality businesses. It employs "75-100 full-time employees and between 200 and 1,000 temporary workers at any given time." A29 (Compl. ¶ 17). Colony separately contracted with each of the three Staffing Agencies to provide it with temporary workers at its facilities. A29–30 (Compl. ¶¶ 18–20). The Staffing Agencies employed and paid each of the temporary workers assigned to Colony locations. A29–30 (Compl. ¶¶ 18, 22).

The State alleges that, beginning in March 2018, the Staffing Agencies "agreed, combined, and conspired not to recruit, hire, solicit, or poach temporary workers from each other at Colony locations." A31 (Compl. ¶ 25). Pursuant to this agreement, the Staffing Agencies "would not approach temporary workers employed by another [Staffing] Agency Defendant at Colony locations and offer them better wages or other benefits." *Id.* (Compl. ¶ 26). The Staffing Agencies also agreed not to allow temporary workers to switch agencies. If a temporary worker did manage to switch, the agencies would require that worker to return to the original agency employer. A31–32 (Compl. ¶ 26).

The State alleges that, at roughly the same time, and at the request of Colony, the Staffing Agencies also conspired to fix the wages paid to the

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[5] The facts recited come from the State's Complaint, the allegations of which are accepted as true at the motion-to-dismiss stage. *See, e.g.*, *Long v. City of New Bos.*, 91 Ill. 2d 456, 463 (1982).

temporary workers at Colony locations. Specifically, the Staffing Agencies agreed to pay the workers a below-market, fixed wage set by Colony "with the understanding that all other Agency Defendants also agreed to pay the same wage." A39 (Compl. ¶¶ 4, 56, 63). Although the Staffing Agencies would ordinarily compete to attract workers by offering better wages, A40 (Compl. ¶ 60), they agreed "not to compete over wages for temporary workers assigned to Colony," thereby suppressing those workers' wages below the competitive level, *id.* (Compl. ¶ 61).

The State alleges that Colony participated in the Staffing Agencies' no-poach and wage-fixing conspiracies by facilitating communications between the Staffing Agencies and helping them enforce their agreements. The Staffing Agencies "communicat[ed] with each other through Colony" to enforce the no-poach conspiracy; if one agency violated the agreement "by hiring the temporary employees of another Agency," "a complaint would be made to Colony," and "Colony would then communicate the issue to all of the Agency Defendants and ensure that the conspiracy was enforced." A32 (Compl. ¶ 27). Similarly, Colony facilitated the wage-fixing conspiracy by setting the pay rate that each Staffing Agency followed, A39 (Compl. ¶ 59), communicating the agreement on that wage to each Staffing Agency, A40 (Compl. ¶ 63), and responding to Staffing Agencies' complaints that another Staffing Agency was not abiding by the agreement, A41 (Compl. ¶¶ 64–65).

The State charged the Staffing Agencies and Colony with a per se unlawful no-poach conspiracy, in violation of 740 ILCS 10/3(1) (Count 1); and a per se unlawful wage-fixing conspiracy, in violation of 740 ILCS 10/3(1) (Count 2). A42–44 (Compl. ¶¶ 69–78). Defendants moved to dismiss the complaint, arguing (as relevant here) that the IAA does not apply to agreements regarding labor services and that, even if it did, the alleged agreements were not per se illegal because they involved a vertically-related participant.

The Circuit Court denied the motions to dismiss. A22–25. The court rejected the argument that the IAA "does not apply to labor services," holding that Section 4 of the IAA "was passed in 1965 after the U.S. Supreme Court rendered the key decisions determining the scope of the labor organizations exemptions in section 6 of the federal Clayton Act"—which does not create a "blanket immunization for labor services." A23. Adverting to federal case law construing Section 1 of the Sherman Act, the court also held that "the restraint agreed to by all participants was plainly horizontal," involving "competitors agreeing not to solicit or hire each other's workers and to fix wages, which would be *per se* illegal," and that "the fact that Colony, a common client to the Agency Defendants, participated in the agreements does not recharacterize an agreement that is horizontal in nature as a vertical one." A24.

At Defendants' request, the Circuit Court certified two questions for immediate appeal: (1) "Whether the definition of 'Service' under Section 4 of the [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"; and (2) "Whether the *per se* rule under Section 3(1) of the IAA, 740 ILCS 10/3(1), which states that it applies to conspiracies among 'competitor[s],' extends to alleged horizontal agreements facilitated by a vertical noncompetitor." A21.

On the first question, the Appellate Court held that "the exclusion of labor from the definition of 'service' in section 4 [of the IAA] is primarily concerned with restraints on the individual labor of natural persons for the purpose of allowing employees and management to engage in collective bargaining and related activities." A10 (¶ 22). The court explained that the labor exemption in the IAA operates "like that of Section 6 of the Clayton Act." A7 (¶ 16) (quoting Bar Comm. Comts-1967 (West 2018)). The court held that the IAA's exemption does not extend to "the hiring and managing services provided by temporary staffing agencies." *Id.*

On the second question, the Appellate Court held that "a vertical party's coordination of a horizontal restraint among competitors does not necessarily transform the otherwise horizontal restraint into a vertical one." A13 (¶ 30). In reaching this conclusion, the court was "guided by Federal case

law" because the relevant portion of state law "is patterned after Section 1 of the Sherman Act" and "Illinois courts have not yet weighed in on the question presented." A12 (¶ 28) (citation omitted). "[T]ak[ing] instruction from federal court decisions," *id.*, the Appellate Court concluded that "the classification of a conspiracy as horizontal or vertical is not determined by the presence of a vertically situated party, but rather by the existence or absence of concerted horizontal action," A16 (¶ 34).

The Staffing Agencies and Colony separately petitioned for leave to appeal to this Court, and the Court allowed both petitions. A206; Staffing Agencies Br. 1 n.1. The Staffing Agencies' appeal concerns only the first certified question (the scope of Illinois's labor exemption); Colony's appeal concerns only the second certified question (whether per se treatment applies).

ARGUMENT

The certified question in this appeal is whether Section 4 of the IAA "excludes all labor services from the [IAA]'s coverage." A2. Under federal law, the answer to that question is clear. *See* 740 ILCS 10/11. While federal antitrust law exempts certain agreements that facilitate collective bargaining, it does not exempt agreements among employers to fix wages or allocate workers. The Staffing Agencies' reading of Section 4, which would exclude *all* employer restraints on labor markets from the IAA's coverage,

Staffing Agencies Br. 10, thus would create a stark disparity between the IAA and federal antitrust law.

A. The federal labor exemptions do not extend to restraints imposed by employers except in the context of collective bargaining.

1. The Sherman Act protects competition in all markets—including labor markets—from unreasonable restraints by both buyers and sellers. The Act "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (internal citations omitted). Consistent with that principle, the Supreme Court has held that the Sherman Act applies to employers' restraints on competition for workers' services. *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2161 (2021) (applying Section 1 to "market for student-athletes' labor"); *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 363–64 (1926) (applying Section 1 to agreements "related to the employment of seamen for service on ships"); *see also, e.g.*, *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684, 690 (2d Cir. 1995) (noting it has been "well-known and settled" since *Anderson* that "employers who were horizontal competitors for labor were prohibited from agreeing upon terms and conditions of employment"); *United States v. Jindal*, No. CV 4:20-CR-00358, 2021 WL 5578687, at *5 (E.D. Tex. Nov. 29, 2021) ("The Supreme Court has made clear that the Sherman Act applies equally to all industries and markets—to sellers and

buyers, to goods and services, and consequently to buyers of services—otherwise known as employers in the labor market.") (citing *Anderson*, 272 U.S. at 361–65).

Section 1 of the Sherman Act categorically proscribes naked agreements among employers to fix wages or allocate workers. Specifically, wage fixing is a form of price fixing. *Anderson*, 272 U.S. at 361–65; *see also Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor."). Worker allocation is a form of market allocation. *Anderson*, 272 U.S. at 362–63. And—outside the extraordinary situation in which "horizontal restraints on competition are essential if the product is to be available at all," *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984)—both types of agreements are per se illegal unless ancillary. *See, e.g., Borozny v. Raytheon Techs. Corp.*, No. 3:21-CV-1657-SVN, 2023 WL 348323, at **7–8 (D. Conn. Jan. 20, 2023) (worker allocation); *United States v. Patel*, No. 3:21-CR-220 (VAB), 2022 WL 17404509, at *8 (D. Conn. Dec. 2, 2022) (worker allocation); *United States v. Manahe*, No. 2:22-CR-00013-JAW, 2022 WL 3161781, at *9 (D. Me. Aug. 8, 2022) (wage fixing and worker allocation); *United States v. DaVita Inc.*, No. 1:21-CR-00229-RBJ, 2022 WL 266759, at *8 (D. Colo. Jan. 28, 2022) (worker allocation); *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, No. 21-cv-00305, 2022 WL 4465929, at *12 (N.D. Ill. Sept. 26, 2022) (worker allocation); *Jindal*, 2021 WL 5578687, at *6 (wage fixing); *United States v. eBay, Inc.*, 968

F. Supp. 2d 1030, 1038–40 (N.D. Cal. 2013) (worker allocation); *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1110–12, 1122 (N.D. Cal. 2012) (worker allocation).

2. Federal antitrust law contains two exemptions for certain conduct related to labor markets—one statutory and one nonstatutory—but these exemptions do not shield employer wage-fixing and no-poach agreements from antitrust scrutiny.

a. One labor exemption is statutory. After the Sherman Act's passage, "tension" arose "between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment." *H. A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 713 (1981). In particular, courts in the early years of the Sherman Act "enjoined strikes as unlawful restraints of trade when a union's conduct or objectives were deemed socially or economically harmful." *Id.* (quotation marks omitted).

Congress responded by enacting Sections 6 and 20 of the Clayton Act. Section 6 declares that "[t]he labor of a human being is not a commodity or article of commerce" and that, accordingly, the antitrust laws should not be "construed to forbid the existence and operation of labor, agricultural, or horticultural organizations." 15 U.S.C. § 17. Section 20 "prohibits injunctions against specified employee activities" that "occur in the course of disputes 'concerning terms or conditions of employment,' and states that none of the

specified acts can be 'held to be [a] violatio[n] of any law of the United States.'" *H. A. Artists*, 451 U.S. at 714 (quoting 29 U.S.C. § 52). Section 20's protection "is re-emphasized and expanded in the Norris-LaGuardia Act, which prohibits federal-court injunctions against single or organized employees engaged in enumerated activities," *id.*, and allows workers to engage in those activities "without falling afoul of the Sherman Act's prohibition on 'engag[ing] in an unlawful combination or conspiracy.'" *Confederacion Hipica de Puerto Rico, Inc. v. Confederacion de Jinetes Puertorriquenos, Inc.*, 30 F.4th 306, 313 (1st Cir. 2022) (quoting 29 U.S.C. § 105).

Together, the Clayton and Norris-LaGuardia Acts create a "statutory exemption" that "shield[s] legitimate labor conduct from antitrust scrutiny." *Confederacion Hipica*, 30 F.4th at 312. As the Staffing Agencies concede—consistent with governing law—this statutory exemption does not apply to conduct by *employers*, despite Section 6's statement that "[t]he labor of a human being is not a commodity or article of commerce." Staffing Agencies Br. 16; *see, e.g.*, *Mackey v. Nat'l Football League*, 543 F.2d 606, 617 (8th Cir. 1976) (holding that Section 6 did not protect NFL rule restricting "market for players' services"), *overruled on other grounds as recognized in Eller v. Nat'l Football League Players Ass'n*, 731 F.3d 752 (8th Cir. 2013); *Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 829 n.9 (5th Cir. 1976) (holding that Section 6 did not protect brokerage firms' alleged agreement not to hire

workers who had been rejected or fired by other firms); c*f. Maryland and Virginia Milk Producers Ass'n, Inc. v. United States*, 362 U.S. 458, 465 (1960) ("[T]he full effect of § 6 is that a group of farmers [or laborers] acting together as a single entity in an association cannot be restrained 'from lawfully carrying out the legitimate objects thereof.'").

b. Federal courts have also recognized a "nonstatutory" labor exemption to the antitrust laws. This exemption is "implied . . . from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining [and] require good-faith bargaining over wages, hours, and working conditions." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996); *see also Connell Const. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 622 (1975) ("[A] proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded [the] nonstatutory exemption."). Unlike the statutory exemption, the nonstatutory exemption extends to certain agreements among employers, where such agreements are related to collective bargaining. *See, e.g.*, *Brown*, 518 U.S. at 238–39 (nonstatutory exemption applied to "agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer"—a practice that labor law recognized as "an integral part of the bargaining process"); *Clarett v. Nat'l Football League*, 369 F.3d

124, 141 (2d Cir. 2004) (Sotomayor, J.) (nonstatutory exemption applied to NFL rule restricting draft eligibility because "[i]n the context of collective bargaining, . . . federal labor policy permits the NFL teams to act collectively as a multi-employer bargaining unit in structuring the rules of play and setting the criteria for player employment"). But the exemption does *not* protect employer agreements to fix wages or allocate workers, which are unrelated to collective bargaining. *See Brown*, 518 U.S. at 234 (noting that the nonstatutory exemption "applies where needed to make the collective-bargaining process work").

B. A categorical antitrust exemption for employer agreements related to labor markets would decrease labor-market competition and harm workers.

The Staffing Agencies suggest that exempting employer restraints on labor markets from antitrust scrutiny "makes sense." Staffing Agencies Br. 19. Focusing on all potential forms of employer coordination, rather than the wage-fixing and no-poach agreements at issue here, the Staffing Agencies suggest that the General Assembly may have categorically exempted labor services agreements from antitrust scrutiny because "there are potential procompetitive benefits to employer coordination." *Id*.

On the contrary, such a categorical exemption would make *no* sense. That approach would undermine antitrust law's "policy of competition," which rests on the "belief that market forces 'yield the best allocation' of the Nation's resources," in labor markets as in other markets. *Alston*, 141 S. Ct.

at 2147 (quoting *Bd. of Regents*, 468 U.S. at 104 n.27). Indeed, from its very outset, antitrust law has been concerned with the power of business combinations to "depress the price of what they buy"—including workers' labor. 21 Cong. Rec. 2461 (1890) (remarks of Sen. Sherman); *see also* 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman) (observing that a trust can "command[] the price of labor without fear of strikes, for in its field it allows no competitors").

Just as healthy product markets require competition between multiple firms seeking to attract customers by reducing prices or improving quality, healthy labor markets require competition between employers to attract and retain workers by offering better wages, benefits, or other conditions of employment. *See, e.g.*, *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d at 1121 (noting that "in a normal, competitive labor market, [a company] is likely to match or exceed the compensation package offered by its rivals," which "tends to lead to increased compensation levels across the industry, as companies vie for rivals' employees").

Naked agreements to fix wages and allocate workers interfere with healthy labor market competition. Wage fixing allows employers to avoid competing to offer workers better pay—thereby leading to lower wages and lower employment. *See Alston*, 141 S. Ct. at 2167–68 (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."); *Jindal*, 2021 WL 5578687, at *5 ("When the price of labor is lowered, or wages are suppressed [by wage fixing], fewer people take jobs."). Employer agreements to allocate workers through no-poach restraints similarly harm competition in labor markets: These agreements limit workers' ability to switch employers and thereby reduce employers' incentive to offer more-attractive terms of employment. *See, e.g., Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 545 (10th Cir. 1995) (plaintiff employee alleged antitrust injury from no-hire agreement by alleging that "it prevented him from selling his services to the highest bidder"); *Quinonez*, 540 F.2d at 829 n.9 (employers' alleged agreement not to hire employees rejected or discharged by other firms harmed competition by "restrict[ing] the movement of the labor force in the industry"); *see also* Herbert Hovenkamp, Competition Policy for Labour Markets, OECD (2019), https://scholarship.law.upenn.edu/cgi/ viewcontent.cgi?article=3092&context= faculty_scholarship. A blanket antitrust exemption for employer restraints on labor markets would open the door to these "textbook antitrust problem[s]." *See Alston*, 141 S. Ct. at 2167–68 (Kavanaugh, J., concurring).

Nor is such an exemption needed to allow for employer agreements with real "procompetitive benefits." Staffing Agencies Br. 19. Antitrust law already has a mechanism for identifying and upholding restraints that promote, rather than suppress, competition. Horizontal restraints with an inherently anticompetitive "nature and character," *Standard Oil Co. of N.J.*

v. United States, 221 U.S. 1, 64–65 (1911)—such as employer wage-fixing and no-poach agreements—are per se unlawful. Most restraints, however, in labor markets or otherwise, are subject to the rule of reason. *Alston*, 141 S. Ct. at 2151. The rule of reason also applies to a restraint otherwise in the per se category if the defendants can show that the restraint is ancillary to a legitimate, broader collaboration among them and reasonably necessary to achieve the procompetitive objective of the collaboration. Under the rule of reason, a court conducts a "careful analysis" of a restraint's harms and benefits "to ensure that it unduly harms competition before [the] court declares it unlawful." *Id.* at 2160. An employer agreement judged under the rule of reason whose procompetitive benefits outweigh any harm to competition should survive that analysis, without the need for any "labor coordination" exemption.

CONCLUSION

For the foregoing reasons, if this Court looks to federal law for guidance in interpreting the IAA, the Court should conclude that federal antitrust law's labor exemptions do not apply to wage-fixing and no-poach agreements among employers.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 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 3,817 words.

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