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 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.

JOINT REPLY BRIEF OF DEFENDANTS-APPELLANTS ELITE STAFFING, INC., METRO STAFF, INC., AND MIDWAY STAFFING, INC.

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TABLE OF POINTS AND AUTHORITIES

ARGUMENT

The State refuses to look the plain text of the Illinois Antitrust Act ("IAA") in the eye. That text states that the IAA's definition of "Service"—a word used throughout the IAA to describe the markets that are within the scope of the IAA—shall not "include labor which is performed by natural persons as employees of others." 740 ILCS 10/4. As every court to interpret that language before this case has agreed (including the U.S. Court of Appeals for the Seventh Circuit), this language means what it says: the IAA does not reach individual labor. That should be the beginning and end of the Court's analysis.

But the State asks this Court to ignore the IAA's plain language and instead: (1) limit the IAA's labor services carveout to union activities, even though the carveout of individual labor from the definition of "Service" is distinct from the IAA's union exemption; (2) interpret the IAA in the same manner as federal and some other states' laws, even though the IAA was carefully drafted to be different; and (3) use public policy to override the IAA's plain text, which is impermissible. The State's arguments are not persuasive on their own terms, but the Court need not reach them because the IAA's plain text is clear: individual labor is carved out from the "Services" the IAA covers.

I. The Parties Agree On the Issue Before This Court.

As a threshold matter, the Parties agree that the issue before this Court is whether the IAA reaches restraints on employees' individual labor, not whether it reaches the services staffing agencies provide to their clients. (Br. at 1, 21.) Accordingly, this Court should address that issue, and not the modified question posed by the appellate court *sua sponte*. (*cf.* Opening Br. at 23-26.)[1]

[1] The State argues in the alternative that, if this Court were to address the Appellate Court's modified question, then Defendants have forfeited any argument for reversal under that

Additionally, because this appeal is before the Court under Rule 315 (A206, Order Granting Pet. For Leave to Appeal), this Court is not limited to answering the Trial Court's certified question and can instead address the streamlined issue presented in Defendants' Opening Brief. *See Schrock v. Shoemaker*, 159 Ill. 2d 533, 537 (1994) (under Rule 315, "the scope of our review is not limited to determining whether the appellate court answered the [Rule 308] certified questions correctly."). Regardless, the Trial Court's certified question and the issue presented by Defendants (Opening Br. at 2) ask the same thing and lead to the same answer: the exclusion of "labor which is performed by natural persons as employees of others" from the definition of the "Services" covered by the IAA means that the IAA does not reach agreements on the terms of employee labor, including the State's claims alleging employer coordination on wages and hiring.

II. The State Ignores the IAA's Plain Text Definition of "Service."

This case addresses the meaning of "Service" throughout the IAA. In responding to that question, the State does not rely on the IAA's plain text definition of that term, but instead focuses on unrelated IAA provisions, federal law, and policy arguments. (*See* Br. at 1-2, 19-21, 24-38.) Only then does the State look to "[b]asic principles of statutory construction" to "confirm" its (incorrect) policy-driven reading. (Br. at 38.) While the State's arguments do not support its reading, the key problem with the State's approach is that it fails to "first look to the plain language of that statute." *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 26 (2013). Here, that text is straightforward and determinative.

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question. (Br. at 21-22.) The Court need not reach this argument because both the State and Defendants agree on the issue before this Court. In any event, the State's argument is incorrect. The question under any framing is how to interpret the IAA's definition of "Service." Defendants squarely addressed that question in their Opening Brief.

The IAA prohibits "fixing . . . the fee charged or paid for any *service*," "limiting . . . the sale or supply of any *service*," or "dividing . . . markets . . . for any . . . *service*." 740 ILCS 10/3(1)(a)-(c) (emphasis added). The IAA then broadly defines "Service" to "mean any activity, not covered by the definition of 'commodity,' which is performed in whole or in part for the purpose of financial gain." 740 ILCS 10/4. Immediately thereafter, the IAA provides the carveout at the heart of this appeal, which explains that: "'Service' shall not be deemed to include labor which is performed by natural persons as employees of others." *Id.* In other words, the definition's plain text carves out individual labor from its broader definition of services. That carveout is incorporated into the IAA's provisions that prohibit fixing service fees, limiting the sales of services, or dividing service markets. The plain text thus provides that agreements about individual labor are not barred by the IAA.

This straightforward reading of what "Service[s]" are and are not covered by the IAA had, before this case, been adopted by every court to interpret the statute. *See O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 (7th Cir. 1997) ("[T]o the extent [the plaintiff]'s claims relate to an alleged market for labor services, they are specifically excluded by § 10/4 . . . ."); *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018) ("[T]he Illinois Antitrust Act specifically excludes claims 'relate[d] to an alleged market for labor services.'") (citing *O'Regan*, 121 F.3d at 1066); *Deslandes v. McDonald's USA, LLC*, No. 17-cv-4857, 2018 WL 3105955, at *9 (N.D. Ill. June 25, 2018) ("[T]he plain language of the statute excludes plaintiff's claim, which alleges that the no-hire agreement artificially suppressed her wage, i.e., the price paid for her service.").

The State attempts to justify skipping the IAA's plain text by pointing to irrelevant instances when this Court has looked to federal antitrust law as a guide for interpreting the

IAA. (*See* Br. at 20.) Although federal law can be a guide to interpreting the IAA when the statutes share "identical or similar" language, 740 ILCS 10/11, that is not the case here, as discussed below. Moreover, the State's cases do not support that the IAA's text should be ignored in favor of mirroring federal antitrust law. Instead, in cases interpreting the IAA, like in all other statutory interpretation cases, the plain text controls. *People ex rel. Scott v. Schwulst Bldg. Center, Inc.*, 89 Ill. 2d 365, 371-73 (1982) (declining to interpret the IAA as consistent with federal law where the definition of "commodity" in the IAA was distinct from federal law, explaining that "when an act defines its terms, those terms must be construed according to the definitions contained in the act"). When, as here, the text is dispositive, the Court need go no further. *See In re D.D.*, 196 Ill. 2d 405, 419 (2001) ("Only when the meaning of the enactment cannot be ascertained from the language may a court look beyond the language and resort to aids for construction.").

In addition to not starting with the text, the State criticizes those courts that did—*O'Regan*, 121 F.3d at 1066; *Butler*, 331 F. Supp. 3d at 797; *Deslandes*, 2018 WL 3105955, at *9—on the grounds that their opinions were thinly reasoned. But the brevity of these courts' treatment of this issue is a testament to the straightforward nature of "the plain language of the statute." *Deslandes*, 2018 WL 3105955, at *9. There simply is no reason to delve into policy arguments and legislative history when the statute is clear. Moreover, the General Assembly's decision not to amend the IAA in response to this decades-spanning line of federal authorities confirms that these cases interpreted the IAA exactly as the legislature intended. (Opening Br. at 20-22.)[2]

[2] Recent action by the General Assembly further confirms that the IAA does not reach the alleged conduct. Namely, the General Assembly recently passed amendments to the Day and Temporary Labor Services Act ("DTLSA") that will require staffing agencies and their

The State also criticizes *O'Regan*'s interpretation of the statute as *dictum*. (Br. at 47.) But that court's holding that the IAA does not prohibit "claims related to an alleged market for labor services" was one of three reasons the claims were dismissed and thus was not dictum. *O'Regan*, 121 F.3d at 1066. That the claim also failed for two other reasons does not make this holding mere *dictum*. *See, e.g.*, *United States v. Sorich*, 523 F.3d 702, 710 n.2 (7th Cir. 2008) ("an alternate ground for a holding is not a *dictum*"); *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (same).[3]

In short, the statutory language is clear. It states that the IAA's definition of "Service" does not "include labor which is performed by natural persons as employees of others." Every court to interpret that language, before this case, agreed this language means what it says. That should be the beginning and end of the Court's analysis.

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clients to coordinate on pay rates. *See* House Bill 2862, 820 ILCS § 175/42 (new) https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=112&GA=103&DocTypeId=HB&DocNum=2862&GAID=17&LegID=&SpecSess=&Session=. Thus, if the State's interpretation of the IAA is adopted, the DTLSA and IAA will directly contradict: conduct *required* under the DTLSA will be *illegal* under the IAA. Pursuant to principles of statutory construction, "[c]ourts assume that the legislature will not draft a new law that contradicts an existing one" and so "courts construe statutory provisions in a manner that avoids inconsistency". *In re Marriage of Lasky*, 176 Ill. 2d 75, 79 (1997). To avoid this contradiction, the IAA must be interpreted not to reach employer coordination regarding labor services.

[3] One of the other grounds for dismissal related to "antitrust standing." *O'Regan*, 121 F.3d at 1066. Antitrust standing is "distinct" from Article III standing because it does not "implicat[e] a court's subject matter jurisdiction," and instead "affect[s] only the plaintiff's ability to succeed on the merits." *Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 269 (3d Cir. 2016); *accord Marion Diagnostic Ctr., LLC v. Becton Dickinson & Co.*, 29 F.4th 337, 347 (7th Cir. 2022). The State's suggestion that the *O'Regan* court "lacked standing" to reach its IAA holding (Br. at 47) should thus be rejected.

III. The IAA's Union Exemption Does Not Subsume the IAA's Definition of "Service."

Rather than interacting with the text of the labor services carveout, the State argues that provision should be read to mean "only" that Illinois' antitrust law does not apply to "legitimate union activity." (*See* Br. at 40 (arguing the labor services carveout should be read "to only except legitimate union activity"); *id.* at 39 (arguing the labor services carveout "protect[s] human beings as laborers when organizing to set the terms of their employment (and employers who bargain with them)").) The State gets to this tortured reading by maintaining that 740 ILCS 10/4's labor services carveout must be read only through the lens of a different provision, 740 ILCS 10/5(1), which provides a union exemption. (Br. at 38-39.) This approach to statutory interpretation fails for two reasons: (1) the face of the labor services carveout does not support the State's reading; and (2) the State's reading would make the labor services carveout almost entirely superfluous. This Court should thus reject the State's interpretation, like other courts have.

A. The Face of the IAA Does Not Support the State's Reading.

The face of the labor services carveout simply does not support the State's reading. That provision says: "'Service' shall not be deemed to include labor which is performed by natural persons as employees of others." 740 ILCS 10/4. Nothing about the text of this provision indicates that its purpose is primarily, let alone "only," related to the union exemption. As noted in Defendants' Opening Brief, this provision uses none of the language that other Illinois statutes use to refer to unions (e.g., "labor organizations," "organized labor," or "labor unions"). (*See* Opening Br. at 10-11.) The State responds to the lack of any reference to a union in the labor services carveout by arguing that "there is no magic-words requirement" for the creation of a union exemption. (Br. at 42.) But the

State is arguing against a straw man—the problem is not that the carveout does not include one specific formulation, but that it provides *no* reference to unions at all.

Indeed, it is particularly odd to read the labor services carveout solely in light of the union exemption because the union exemption does not even use the word "Service." *See* 740 ILCS 10/5(1). The definition and carveout of "Service" in 740 ILCS 10/4 thus has no direct application to the union exemption. The State argues that, to the contrary, the labels of these sections ("Definitions" and "Exceptions") "'support[]' the State's reading," (Br. at 41-42) but it fails to explain why it would make sense to read a definition solely through the lens of a provision that does not use or incorporate that definition.

The State also seeks to justify the absence of any reference to unions in 740 ILCS 10/4 by noting that the first sentence of the federal union exemption (15 U.S.C. § 17) also does not expressly mention unions. (Br. at 42.) But the first sentence of the federal union exemption ("The labor of a human being is not a commodity or article of commerce.") has been read to pertain to unions *because of its context in the union exemption*. This context is not shared by the IAA's placement of its carveout within a broader section of definitions (i.e., 740 ILCS 10/4), and so there is no basis to read 740 ILCS 10/4's carveout like the first sentence of the federal union exemption.[4]

The State argues that *Williams v. St. Joseph Hosp.*, 629 F.2d 448 (7th Cir. 1980), "reinforces" its reading (Br. at 36), but it is wrong. *Williams* read the first line of the federal antitrust exemption narrowly based on the interpretative canon "noscitur a sociis." *Id.* at 453 n.8. That canon states that "[a]ssociated words bear on one another's meaning."

[4] As described below, key textual differences between the federal union exemption and 740 ILCS 10/4's carveout of "Service[s]" provide another reason why it would be improper to read these provisions as meaning the same thing.

Antonin Scalia & Bryan A. Garner, READING LAW 195 (2012). But "[f]or the associated-words canon to apply, the terms must be *conjoined* in such a way as to indicate that they have some quality in common." *Id.* at 196 (emphasis added). "In other words, 'a word is given more precise content by *the neighboring words* with which it is associated.'" *Corbett v. Cnty. of Lake*, 2017 IL 121536, ¶ 31 (2017) (emphasis added; citation omitted). That canon explains why the first sentence of federal antitrust law's union exemption should be read in light of the neighboring words with which it is conjoined—namely, the rest of the federal union exemption. *Williams*, 629 F.2d at 453 n.8. But the State erroneously asserts that this canon somehow "demands reading sections 4 and 5(1) together." (Br. at 36.) Unlike federal antitrust law's union exemption, the IAA does not "conjoin[]" the labor services carveout with its union exemption—those provisions are in different sections.

The State likewise argues that *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970), "supports" its reading (Br. at 35), but again the State takes the wrong rule from this authority. *Cordova* acknowledged that had the federal antitrust statute "stopped" after its first sentence, there would be less of a basis to read that sentence as pertaining to the union exemption. *Id.* at 605. The State attempts to twist this authority by arguing that, like the federal union exemption, 740 ILCS 10/4's carveout of "service" "does not 'stop'" at the end of the definition but continues in "the labor union exception in section 5(1)." (Br. at 36.) But this argument flies in the face of the IAA's statutory text. After defining what is and is not included in the IAA's definition of "Service," 740 ILCS 10/4 continues to define another, entirely unrelated term. Only then does it move on to a new section to address exemptions. The IAA's carveout of "Service[s]" thus does indeed stop without mentioning anything about unions. Because 740 ILCS 10/4's carveout of "Service[s]" does not share

an analogous context with the first sentence of the federal antitrust law's union exemption, there is no reason to read it similarly.

In short, the State's reading of the labor services carveout—i.e., that it means "only" that Illinois' antitrust laws do not apply to "legitimate union activity" (Br. at 40)—finds no support in the plain language of that provision. Furthermore, the State's arguments that the "context" of the provision mandate the State's misreading fail because, like the plain text, the context of 740 ILCS 10/4's carveout of "Service[s]" does not limit that definition's application to unions.

B. The State's Reading Renders the Labor Services Carveout Largely Superfluous.

The State's argument that the labor services carveout should be read solely through the lens of the IAA's union exemption also should be rejected because it renders the carveout almost entirely superfluous. As previously explained (Opening Br. at 11-14), the IAA's union exemption protects unions from antitrust scrutiny. There would be no reason for 740 ILCS 10/4 to also include a unions-only carveout from the definition of services because unions are already protected by the union exemption. Indeed, the State concedes that its reading "potentially creates some redundancy between those sections." (Br. at 39.) The State argues that "this overlap is permissible," *id.*, but other courts have rejected the State's preferred reading of the statute because of this exact redundancy. *See Deslandes*, 2018 WL 3105955, at *9 ("Although plaintiff suggests this is merely an exception for collective bargaining, the statute includes a separate labor exemption.").

The State stretches to propose two ways in which the union exemption does not make the labor services carveout redundant. It then proffers an argument that *Defendants'* reading of the statute is instead redundant. Each argument falls flat.

First, the State argues that its reading of the labor services carveout is not duplicative of the IAA's union exemption because the carveout is necessary to "clarif[y] that the definition of 'service[s]' is consistent with the labor union exception." (Br. at 39.) It argues this clarification is necessary because the labor union exemption "does not explicitly refer to 'services.'" (*Id.*) This argument draws the precisely wrong conclusions from 740 ILCS 10/4's failure to mention unions and 740 ILCS 10/5(1)'s failure to use the word "service." As discussed above, the plain text of 740 ILCS 10/4's carveout does not even mention unions—and so it is a particularly ineffective way to confirm (as the State argues) that the definition of "Service" is consistent with the union exemption. And, instead of supporting the State's reading, the absence of the word "service" in 740 ILCS 10/5(1) shows the labor services carveout is doing something distinct from the union exemption—namely, defining "Service" for its use elsewhere in the IAA—not merely "clarif[ying]" the union exemption, as the State argues. (Br. at 39.)

Second, the State argues the carveout protects "employers" who "enter[] into collective bargaining agreements with unions" (Br. at 38) who—it argues—would otherwise be liable for violating Illinois' antitrust laws by negotiating with unions. In other words, the State claims that the union exemption does not protect an employer playing its necessary part in negotiating with a union during collective bargaining process. This deviates from how federal courts interpret the federal union exemption, which the State relies on so heavily. The statutory federal union exemption also does not explicitly protect employers from negotiating with unions, and yet the U.S. Supreme Court has still recognized that negotiations between employers and unions are protected from the antitrust laws "[a]s a matter of logic." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996).

But even if 740 ILCS 10/4's carveout is necessary to protect employers engaged in collective bargaining, the carveout is not limited to that situation, either on its face or according to the Bar Comments. Instead, 740 ILCS 10/4's carveout means that both "labor [and] *nonlabor* groups," like Defendants, may enter into agreements concerning individual labor. 740 ILCS 10/5, Bar Comm. Cmts.-1967 (emphasis added); *accord infra* at 13 (discussing 740 ILCS 10/5, Bar Comm. Cmts.-1967). There is no statutory support for the State's argument that the only "nonlabor groups" covered by the carveout are employers negotiating with unions. (Br. at 35.)

Finally, the State tries to turn this issue around and argue that it is Defendants' (and all prior courts') reading of the statute that suffers from redundancy. (Br. at 42-43.) But, under Defendants' reading, the two sections accomplish distinct legislative goals. As explained in Defendants' Opening Brief, the carveout defines a *what* that is carved out (coordination about employee labor) no matter who engages in it, while the union exemption defines a *who* that is specifically exempt (labor unions) regardless of the particular market impacted. (Opening Br. at 10-11, 17.) Put differently, the carveout protects more than just union members, and the union exemption protects more union conduct than just collaboration on what wages members will accept. Thus, unlike the State's reading, Defendants' reading renders neither provision superfluous.

IV. The IAA's Bar Committee Comments Provide No Reason to Disregard the Plain Text of the Statute.

Faced with plain text that forecloses its argument, the State is left to argue that the Bar Committee Comments say what the statute does not. (Br. at 7, 28, and 35.) Because the plain text of the IAA is determinative, the State's argument here is irrelevant. *In re D.D.*, 196 Ill. 2d at 419. But it is also wrong.

A. The 1967 Bar Committee Comments to 740 ILCS 10/4

The 1967 Bar Committee Comments to 740 ILCS 10/4 explain that the General Assembly updated the 1891 version of the IAA "to make services and real estate subject to the prohibitions of the law." 740 ILCS 10/4, Bar Comm. Cmts.-1967. The Comments continue: "It 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.* "In this connection," the Comments direct the reader to "see the discussion, *infra*, with relation to Section 5 on exemptions generally." *Id.*

The State argues that, because the Comments note "exemptions should be strictly limited" and "almost all service occupations should be within the reach of the statute," the Court should ignore the plain text of 740 ILCS 10/4's carveout. (Br. at 40.) This gets the Comments wrong—the Comments instead can and should be read consistently with the language of 740 ILCS 10/4. The Comments' statement that the amendment "ma[d]e services and real estate subject to the prohibitions of the law" is a direct reference to the introduction of the general definition of "Service": "'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." As the Comments note, services were generally excluded from the 1891 version of the IAA's reach but now, through the amendments, are covered by the IAA. The distinct carveout provision this appeal is concerned with immediately follows the general definition of "Service," and it limits that definition. And so, while the amendment ensured that "almost all" services were within the IAA's reach, it precisely carved out "labor which is performed by natural persons as employees of others."[5]

[5] When quoting the language that the IAA now reaches "almost all service occupations," Defendants are not arguing, as the State asserts, that the carveout only protects "individuals

The State also argues that the Comments "emphasized" that 740 ILCS 10/4's carveout should be read entirely through the lens of 740 ILCS 10/5(1). (Br. at 27-28.) The Comments do no such thing. As noted, the Comments to 740 ILCS 10/4 provide a directive, after providing "that exemptions should be strictly limited" and that "almost all service occupations should be within the reach of the statute," to "see the discussion . . . with relation to Section 5 *on exemptions generally*." (emphasis added). The Comments to 740 ILCS 10/5—which are discussed more *infra*—then discuss "exemptions generally" and provide that "[i]t is assumed that all of the provisions of Section 5 will be strictly construed and narrowly applied." 740 ILCS 10/5, Bar Comm. Cmts.-1967. The 740 ILCS 10/4 Comments' reference to the 740 ILCS 10/5 Comments thus supports the rule "that exemptions should be strictly limited," but it again provides no basis to read away the plain language of 740 ILCS 10/4's carveout.

B. The 1967 Bar Committee Comments to 740 ILCS 10/5

The State also looks directly to the 1967 Bar Committee Comments to 740 ILCS 10/5 to support its misreading of 740 ILCS 10/4's carveout. (Br. at 7, 13.) The Comments confirm that 740 ILCS 10/5(1)'s labor union exemption reflects "an approach similar to that used for the federal exemption[]" for labor unions. *Id.* The 740 ILCS 10/5 Comments also provide that the IAA's labor union exemption, i.e., 740 ILCS 10/5(1), "should be read

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in typically higher-paying jobs." (Br. at 43.) The State appears to be confused by Defendants' reference to "professional services." As Defendants acknowledge, the IAA bars coordination by companies concerning the "professional services" the *companies* offer. (*See* Opening Br. at 18.) For example, neither law firms nor lawn-mowing companies can agree with their competitors on the prices they charge customers. But Defendants have always been clear the carveout covers all "*individual* labor which is performed by *natural* persons as employees of others," 740 ILCS 10/4 (emphases added), i.e., the labor performed by the lawyer for the law firm, or by the person who mows yards for the lawn-mowing company.

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." *Id.* The Comments explain that "[t]he 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," and so "[t]he Act thus protects both management and labor in bargaining collectively over terms and conditions of employment." *Id.*

At the outset, it is important to reiterate that these are Comments concerning *740 ILCS 10/5*. And while those Comments direct that 740 ILCS 10/5(1) should be read "together with" 740 ILCS 10/4, they do not say that 740 ILCS 10/4's carveout only applies in relation to 740 ILCS 10/5(1) or purport to overrule the plain text of 740 ILCS 10/4's carveout. Indeed, it would be very odd if they did, as one would expect any interpretative guidance concerning 740 ILCS 10/4 (especially one that contradicts its plain text) to show up in the Comments about that provision. But, as discussed above, none of those Comments provide any reason to think the carveout does not mean what it says. The State's argument is thus that the plain text of 740 ILCS 10/4's carveout is circumscribed by legislative history *accompanying a different provision*. That is an unacceptable stretch.

The State argues these Comments support its proffered reading in several ways. First, the State points to the Comments' statement that 740 ILCS 10/5(1)'s labor union exemption reflects "an approach similar to that used for the federal exemption[]." (Br. at 26.) But the substantive similarity between the IAA's labor union exemption in 740 ILCS 10/5(1) and the federal labor union exemption says nothing about how to interpret the IAA's distinct "Service[s]" carveout in 740 ILCS 10/4. As discussed below, there is no

federal analogue to the IAA's definition and carveout of "Service[s]," as the federal antitrust laws do not even use the word "Service," and so have no need to define that term.

Second, the State latches on to the Comments' statement that "[t]he Act . . . protects both management and labor in bargaining collectively over terms and conditions of employment." 740 ILCS 10/5, Bar Comm. Cmts.-1967; (*see* Br. at 35, 39.) This language does not support the State's reading. The preceding sentence of the Comments states that the IAA is "inapplicable to agreements by either labor *or nonlabor* groups insofar as they relate to restraint of competition concerning labor itself." 740 ILCS 10/5, Bar Comm. Cmts.-1967 (emphasis added). The Comments highlight "management" as an example of one of the "nonlabor groups" protected by 740 ILCS 10/4's carveout, but they do not support the State's reading that 740 ILCS 10/4's carveout *only* applies to management. (Br. at 35, 39.) Instead, the carveout also applies to other nonlabor groups, like Defendants.

Third, the State argues that the Bar Committee Comments support its argument that 740 ILCS 10/5(1)'s union exemption only extends to agreements "concerning labor itself." (Br. at 41.) This argument is beside the point. Regardless of whether the union exemption only applies to unions' agreements related to labor directly or also to their agreements about other goods or services, the State fails to offer textual support for its reading of 740 ILCS 10/4's carveout. The State's argument also fails on the merits. The union exemption states that unions' activities "which are directed solely to labor objectives which are legitimate" are not illegal. 740 ILCS 10/5(1). Actions may be directed to legitimate *labor objectives* which do not themselves concern an agreement about labor. (*See, e.g.*, Opening Br. at 11-12, 14 n.4.) The Comments acknowledge that agreements "concerning labor itself" may be one sort of protected action directed to legitimate labor objectives, but the

State overreads the Comments to the extent that it argues the Comments limit the plain text of 740 ILCS 10/5(1).

C. The 1967 Bar Committee Comments to 740 ILCS 10/11

Finally, the State notes the Bar Committee Comments to 740 ILCS 10/11 express a desire for the IAA to be interpreted consistently with federal law. (Br. at 37.) Defendants agree that federal law may be an appropriate guide for interpretation of the IAA "[w]hen the wording of [the IAA] is identical or similar to that of a federal antitrust law." 740 ILCS 10/11. But the provisions here are simply different from each other, as the Comments specifically recognized would be the case: "While we now have in Illinois a basically Sherman Act type of statute, *it was very carefully made different from the federal act in certain important respects with the deliberate intention in certain situations of achieving a different result.*" 740 ILCS 10/11, Bar Comm. Cmts.-1967 (emphasis added). The Court should respect those distinctions—not override them.

V. The State's Argument that the IAA's Coverage of "Services" Overlaps Entirely with Federal Antitrust Law Ignores Key Textual Differences Between the Statutes.

The State is left to spend much of its brief explaining what federal antitrust law provides and then arguing the IAA should be interpreted to mean the same thing. (*See* Br. at 28-34.) This approach is improper because the plain text of the IAA is determinative. *In re D.D.*, 196 Ill. 2d at 419. In any event, the State's argument begs the key question presented in this appeal by disregarding textual differences between the IAA and federal law—namely that federal law has no analogue to the labor services carveout.

Defendants do not dispute the State's or the Department of Justice's arguments that federal antitrust law "does not exempt agreements among employers to fix wages or allocate workers." (*See* Br. at 28-34; DOJ Amicus Br. at 7.) Likewise, Defendants do not

dispute as a general matter that "[w]hen the wording of [the IAA] is identical or similar to that of a federal antitrust law," Illinois courts should "use the construction of the federal law by the federal courts as a guide." 740 ILCS 10/11; (*see* Br. at 19-21.) But these arguments beg the question of whether the IAA should be read to mean the same thing as federal antitrust law here, even though the two statutes at issue use different language. (*Cf.* DOJ Amicus Br. at 2 n.4 (noting that "[t]he United States does not take a position" on whether the Court should "look to federal law in construing the IAA") (citation omitted).)

The key problem with the State's arguments based on federal law is there is no federal analogue to 740 ILCS 10/4's carveout of individual labor from its definition of "Service." As the State concedes (Br. at 26-27), federal antitrust statutes do not use the term "service." Instead, federal courts have explained that other language used in the antitrust statutes should be read expansively to include services. *See, e.g.*, *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435-37 (1932). Because—unlike Illinois law—the federal antitrust statutes do not use the word "service," they naturally do not have a provision to define that term. The IAA's definition of a term not in the federal antitrust laws thus has no analogue in federal law.

The only analogue even suggested by the State is 15 U.S.C. § 17, which provides:

> 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, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, 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.

The State argues that 740 ILCS 10/4's carveout should be read to mean exactly the same thing as the first sentence of 15 U.S.C. § 17. But these provisions use different language

(15 U.S.C. § 17 does not mention "service" and 740 ILCS 10/4's carveout does not mention "commodit[ies]" or "article[s] of commerce"), have different purposes (740 ILCS 10/4's carveout exists to define a term that does not exist in the federal antitrust statutes), and are found in different contexts (740 ILCS's carveout is in a definitions sections, and 15 U.S.C. § 17 provides various exceptions). There is simply no textual basis to conclude that 740 ILCS 10/4's carveout means the same thing as the first sentence of 15 U.S.C. § 17.

The State still argues the IAA should follow federal law because it was passed after federal decisions clarified the scope of the federal union exception. (Br. at 32.) But while the General Assembly seems to have intended that the IAA's *union exemption*, be interpreted consistently with the federal union exemption, 15 U.S.C. § 17, *see supra* at 7, the State identifies no sign that the General Assembly separately intended the IAA's *labor services carveout*—which, again, has no federal analogue—to be interpreted to mean the same thing as the federal union exemption.

The State also argues the Court should construe the labor services carveout to mean the same thing as the federal union exemption because other states have construed their union exemptions consistently with federal law. (Br. at 32-33.) But these analogies are not useful because none of those States have provisions that resemble the labor services carveout—instead each statute uses language that closely resembles the federal union exemption. *See, e.g.*, Ariz. Rev. Stat. § 44-1404(A) ("Labor of a human being is not a commodity or an article of commerce."); Colo. Rev. Stat. § 6-4-109(1) ("The labor of an individual is not a commodity, a service, or an article of trade or commerce."); Wash. Rev. Code § 19.86.070 ("The labor of a human being is not a commodity or article of commerce."). The comparison does not support the State's argument.

At bottom, the State's argument to ignore the plain language of the IAA is a call to disregard the General Assembly's actions and instead arrive at an outcome that the Executive desires. This approach should be rejected because it would violate separations-of-power principles. *See People v. Crawford Distrib. Co.*, 53 Ill. 2d 332, 338 (1972).

VI. The State's Policy Arguments Are Irrelevant and Wrong.

Finally—notwithstanding the State's agreement with Defendants that "this Court 'is not tasked with evaluating and setting public policy,' as 'that job is reserved for our duly elected legislature,'" (Br. at 44 (citation omitted))—the State's brief makes various policy arguments. (*Id.* at 44-45.) These arguments are made to the wrong forum: "This [C]ourt may not legislate, rewrite or extend legislation," and so the State's "appeal must be to the General Assembly, and not to this [C]ourt." *DeSmet ex rel. Est. of Hays v. Cnty. of Rock Island*, 219 Ill. 2d 497, 510 (2006) (concerning statute subsequently amended).

Nevertheless, Defendants reiterate that the text of the statute embodies policy aims that can fairly be attributed to the General Assembly. The amendments to the IAA were intended to include "Service[s]" generally within the scope of the law, as they had been previously excluded. 740 ILCS 10/4, Bar Comm. Cmts.-1967. It makes sense that the General Assembly would have been cautious about extending the IAA to reach agreements concerning individual labor because such agreements have only recently been the focus of antitrust enforcement. *See* U.S. Dep't of Just. & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* 4 (Oct. 2016); (*see* Br. at 44); *cf. United States v. Davita Inc.*, No. 1:21-cr-00229, 2022 WL 1288585, at *2 (D. Colo. Mar. 25, 2022) ("the government admits that this is among the first ever criminal prosecutions for allocating a labor market"). Indeed, related to a recent antitrust enforcement action in employment, one court criticized DOJ's attempts "to expand the common and accepted definition of market

allocation in a way not clearly used before." *United States v. Patel*, No. 3:21-cr-220, 2023 WL 3143911, at *9 n.7 (D. Conn. Apr. 28, 2023). Thus, the General Assembly's decision to tread lightly when addressing individual labor was a wise approach.

Finally, the State also argues that following Defendants' policy arguments would lead to the "absurd" result that certain conduct might be prohibited by federal law but not state law. (Br. at 45.) But, as discussed in the Defendants' Opening Brief (Opening Br. at 20-22), and as recognized in the Bar Committee Comments quoted above, there are multiple places where the IAA is narrower than federal antitrust law. This reflects not an absurdity, but an exercise of Illinois' sovereign prerogative to pass its own laws. The State's approach tries to bulldoze over those distinctions and should be rejected.

CONCLUSION

For the foregoing reasons, this Court should answer the first certified question as written by the trial court "Yes" and remand with instructions to dismiss the State's Complaint for failure to state a claim.

Dated: July 31, 2023

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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 pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, notice of filing, the certificate of service, and those matters to be appended to the brief under Rule 342, is 20 pages.

By: */s/ Angelo M. Russo*

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 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.

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on July 31, 2023, the undersigned filed with the Clerk of the Illinois Supreme Court, through the Odyssey efiling system, **JOINT REPLY BRIEF OF DEFENDANTS-APPELLANTS ELITE STAFFING, INC., METRO STAFF, INC., AND MIDWAY STAFFING, INC.**, a copy of which is attached hereto and hereby served upon you.

Dated: July 31, 2023

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that on July 31, 2023, a copy of the within instrument was filed via the Court's approved electronic filing service provider. Additionally, a true and correct copy was served on the below parties by email from avlasak@mcguirewoods.com to the email addresses indicated below pursuant to Illinois Supreme Court Rule 11.

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