IN THE COURT OF APPEALS FOR THE STATE OF OREGON

IBEW LOCAL 89, a labor organization, Respondent, v. OREGON LEGISLATIVE ASSEMBLY, Respondent below, v. KIMBERLY WALLAN and SARAH DALEY Petitioners	Employment Relations Board No. RC00121 Court of Appeals No. A176604

BRIEF OF *AMICUS CURIAE* OREGON LEGISLATORS AND LEGISLATIVE ASSISTANTS IN SUPPORT OF PETITION FOR REVIEW OF ERB ORDER

Appeal from June 8, 2021 Order
Certifying Exclusive Representative

September 7, 2022

Steve Elzinga, OSB No. 123102
Sherman, Sherman,
Johnnie & Hoyt LLP
693 Chemeketa Street NE
Salem, OR 97301
Tel: 503-364-2281
steve@shermlaw.com

Attorneys for *Amicus Curiae*

Daniel Hutzenbiler
McKanna Bishop Joffe, LLP
1635 NW Johnson Street
Portland Oregon 97209
Ph: 503.226.6111
Email: dhutzenbiler@mbjlaw.com
Attorneys for Respondent IBEW Local 89

Denise G. Fjordbeck
Attorney-in-Charge
Civil/Administrative Appeals
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Ph: 503.378.4402
Email: denise.fjordbeck@doj.state.or.us
Attorneys for Respondent Oregon Legislative Assembly

Rebekah Millard, OSB No. 121199
James Abernathy, OSB No. 161867
Freedom Foundation
P.O. Box 552
Olympia, WA 98507
Ph: 360.956.3482
Email: rmillard@freedomfoundation.com
Email: jabernathy@freedomfoundation.com

Attorneys for Petitioners

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I. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amici are a group of Oregon Legislators, both elected members of the Senate and of the House of Representatives, as well as Legislative Assistants who oppose compelled association of Oregon Legislative Assistants with the International Brotherhood of Electrical Workers, Local 89 ("IBEW") and prohibiting Legislators from negotiating employment terms directly with their own staff. *Amici* group members are as follows:

Senators Lynn Findley (Dist. 30, Vale); Bill Hansell (Dist. 29, Athena); Tim Knopp (Dist. 27, Bend); Dennis Linthicum (Dist. 28, Klamath Falls); Kim Thatcher (Dist. 13, Keizer); Chuck Thomsen (Dist. 26, Hood River);

Representatives Shelly Boshart Davis (Dist. 15, Albany, Millersburg, Tangent); Vikki Breese Iverson (Dist. 55, Prineville); Jami Cate (Dist. 17, Lebanon); Jessica George (Dist. 25, Keizer); Christine Goodwin (Dist. 2, Roseburg); Bobby Levy (Dist. 58, Echo); Rick Lewis (Dist. 18, Silverton); Lily Morgan (Dist. 3, Grants Pass); E. Werner Reschke (Dist. 56, Southern Klamath & Lake Counties); Anna Scharf (Dist. 23); David Brock Smith (Dist. 1, Port Orford); Duane Stark (Dist. 4, Grants Pass); Suzanne Weber (Dist. 32, Tillamook); Boomer Wright (Dist. 9, Coos Bay); and

Legislative Assistants Sarah El Ebiary (LA2), Bryan Iverson (LA4), Diane Linthicum (LA4), Becky Mitts (LA1), Shelia Megson (LA4), Renee Perry (LA4), Whitley Sullivan (LA4), and Lenora Swift (LA3).

Amici join Petitioners in asking the Court to overrule the Employment Relations Board's ("ERB") order certifying IBEW as the exclusive representative of Oregon Legislative Assistants ("LAs"), including LAs who do not wish to join.

II. SUMMARY OF ARGUMENTS IN SUPPORT OF PETITION FOR REVIEW OF THE ORDER CERTIFYING IBEW AS THE EXCLUSIVE REPRESENTATIVE FOR LEGISLATIVE ASSISTANTS.

Amici seek to bring two legal issues to the attention of the Court. First, to subject LAs—especially LAs from minority parties—to exclusive representation in the highly unique situation of a partisan Legislature violates their freedom of speech and freedom of association under the First Amendment to the US Constitution. Second, subjecting the Oregon Legislative Assembly ("Legislature") to mandatory collective bargaining for LAs inserts the Executive branch into the Legislative function. This is a violation of the separation of powers guaranteed by the Oregon Constitution.

III. ARGUMENTS IN SUPPORT OF PETITION FOR REVIEW OF ERB DECISION CERTIFYING IBEW AS EXCLUSIVE REPRESENTATIVE FOR LEGISLATIVE ASSISTANTS.

A. VIOLATION OF THE FIRST AMENDMENT – FREEDOM OF SPEECH AND ASSOCIATION.

A public employee does not forfeit her right to freedom of speech by accepting government employment. *See Abood v. Detroit Bd. Of Ed.,* 431 U.S. 209, 233, 97 S.Ct. 1782, 1798-99 (1977) (overruled on other grounds, *Janus v. American Federation of State, County, and Mun. Employees, Council*, 138 S.Ct.

2448, 201 L.Ed.2d 924 (2018)); *Elrod v. Burns*, 427 U.S. 347, 355-357, 96 S.Ct. 2673, 2680-82 (1976) (plurality opinion); *Cousins v. Wigoda*, 419 U.S. 477, 487, 95 S.Ct. 541, 547 (1975); *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 234 (1973); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-461, 78 S.Ct. 1163 (1958). As public employees who work directly for Elected members of the Oregon Legislature, LAs retain the fundamental right to free expression, especially on matters of public concern.

1. Forced unionization in the unique context of the partisan Legislature burdens LA's freedom of speech.

Collective bargaining with a government employer is "inherently 'political'" speech. *Abood*, 431 U.S. at 226-27; *Janus*, 138 S.Ct. at 2480. This is easily understood because any contract negotiated with a government employer necessarily involves matters of public import – even if just the amount of taxpayer money that will be spent. Here, LAs are being forced to associate with IBEW for purposes of bargaining over matters of political and public concern – core First Amendment activity. *Id., and see Harris v. Quinn*, 573 U.S. 616, 653, 134 S. Ct. 2618, 2642-43 (2014). "[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 913, 102 S. Ct. 3409 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467, 100 S. Ct. 2286 (1980)). Thus, "[p]etitions to the government assume an added [constitutional] dimension when they seek

to advance political, social, or other ideas of interest to the community as a whole," *Borough of Duryea, Pennsylvania v. Guarnieri*, 564 U.S. 379, 395, 131 S. Ct. 2488, 2498 (2011).

Under collective bargaining, the individual employee within a given bargaining unit is no longer free to negotiate wages, hours, and working conditions with the elected official whom the LA servers. Rather, the LA is bound by the terms negotiated for the unit as a whole. Thus, certification of an exclusive representative means that there are, inherently, certain subjects that LAs can no longer negotiate for themselves, such as qualifications, hours, remote status, flex time, etc. All of these, and more, are now subject to bargaining.

As exclusive representative, IBEW's authority is "exclusive" in the sense "that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer." *Janus*, 138 S. Ct. at 2460. Exclusive representation "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *N.L.R.B v. Allis-Chalmers*, 388 U.S. 175, 180, 87 S. CT. 2001 (1967). Those "powers [are] comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville Ry.*, 323 U.S. 192, 202, 65 S.Ct. 226 (1944). As a result, exclusive representatives can, and often do, pursue agendas that do not benefit

individuals subject to their mandatory representation. *See Knox v. SEIU, Local 1000*, 567 U.S. 298, 310, 132 S. Ct. 2277, 2289 (2012); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681 (1953).

Now that IBEW is the exclusive representative, if a LA wishes to have any say on the terms the union negotiates, she must do so through participation in the union. In a typical union, *members* may vote on the contract, as well as voting on their union leadership, and other union-only matters. But union non-members do not have these rights. [1]

This scheme leaves LAs who do not wish to become members of IBEW without any effective means to negotiate their own interests. And there are numerous reasons why a LA might oppose becoming a member of IBEW—especially a LA who is not part of the majority party. For one, IBEW is a political

[1] *Amici* are aware of no public sector labor unions that make an exception to this rule, and IBEW has not manifest an intention to allow direct participation of bargaining unit members who are not also dues-paying members of the union.

organization that takes political positions[2] and endorses political candidates,[3] including candidates for legislative races. Due to IBEW's affiliation requirements, funding from IBEW Local 89 flows to IBEW International (in the past this has been at least $20 per member per month).[4] IBEW International in turn spends money to endorse and promote legislative candidates and majority party candidates in Oregon.[5] Some LAs will not agree with IBEW's positions, spending, or endorsements. In fact, it is very possible that the LA's membership dues to IBEW will result in money supporting the political opponent of his or her

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[2] For example, IBEW 89 recently retweeted support for the federal PRO Act. https://twitter.com/nwlaborpress/status/1362126771672465413?cxt=HHwWioCyyZ_Fn-clAAAA
The PRO Act is widely seen as partisan legislation. Jacob Pramuk, CNBC, *Democrats reintroduce labor rights bill as Covid puts spotlight on workplace safety*, (Feb. 4, 2021 updated 1:37 PM EST) https://www.cnbc.com/2021/02/04/democrats-reintroduce-pro-act-labor-rights-bill-during-covid-pandemic.html

[3] For example, IBEW 89 recently retweeted support for President Joe Biden. https://twitter.com/IBEW/status/1311107627565318146?cxt=HHwWhICwtZrc_rEkAAAA

[4] For example, IBEW Local 89's most recent Form LM-2 filed with the U.S. Dept. of Labor indicates that it paid $288,625 in per capita taxes to IBEW International in FY 2021. See Statement B, Line 56. https://olmsapps.dol.gov/query/orgReport.do?rptId=782226&rptForm=LM2Form.

[5] For example, IBEW International's most recent Form LM-2 filed with the U.S. Dept. of Labor indicates that it contributed $250,000 to the IBEW PAC Education Fund, a "political organization" as defined by 26 U.S.C. § 527(e)(1). See Schedule 16 – Political activities and Lobbying. https://olmsapps.dol.gov/query/orgReport.do?rptId=782151&rptForm=LM2Form. Also, recent Forms 8872 filed by the IBEW PAC Educational Fund with the Internal Revenue Service show both (1) thousands in contributions from IBEW Local 89 to IBEW PAC Educational Fund and (2) thousands in donations from IBEW PAC Educational Fund to Friends of Tina Kotek in 2022.

employer and consequently result in the loss of the LA's own job if the member they work for is not re-elected.

For another, LAs might reasonably object to giving up their own power to negotiate. When IBEW negotiates a contract on behalf of public sector workers, IBEW is engaged in political speech. (*See above* collective bargaining with a government employer is "inherently 'political'" speech. *Abood*, 431 U.S. at 226-27; *Janus*, 138 S.Ct. at 2480.) A LA who disagrees with IBEW's political positions may not wish to join the union and support those political positions.

While this is true for all public employees subject to an exclusive representative, the burden is far heavier when applied to the unique position of LAs in an explicitly partisan workplace. For LAs who work for legislators politically opposed to the positions IBEW espouses, membership in IBEW would require the LA to support political causes that are directly opposed to those of the member for whom the LA works. But this is the reality, because in collective bargaining, "an individual employee lacks direct control over a union's actions," *Teamsters, Local 391 v. Terry*, 494 U.S. 558, 567, 110 S. Ct. 1339 (1990), thus the exclusive representative can engage in advocacy that represented individuals oppose. *See Knox*, 567 U.S. at 310. Unions function as proxies for the employees they represent, and can enter into binding contracts that harm the employees' interests, *see Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 349-40 (1953), like waiving individuals' rights to bring discrimination claims in court, *14 Penn Plaza*

LLC v. Pyett, 556 U.S. 247, 271, 129 S.Ct. 1456 (2009). A represented individual "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180.

Members of political minorities will especially feel the inequality of collective bargaining. The very act of Legislating – the basic purpose of the Legislature — is political. It consists of making policy and law. The Legislature itself is organized around political parties, with majority legislators controlling committees and extra staff for the Democratic and Republican political caucuses. Within this highly charged political context, the political speech of the union takes on even more significance and makes a balanced representation of all LAs' interests even more unlikely. If staff in the minority party prioritized, for instance, reducing inefficient government spending, the interest of the labor union in increasing certain above-market benefits for members of the bargaining unit could come into opposition. Or where staff in the union belonging to the majority party might insist on a no-exceptions vaccination policy for all employees, including those primarily working remotely, staff in the minority party might wish to prioritize individual freedom of choice and reasonable accommodation.

The unbalance of power becomes especially apparent when the interests of the majority party align with the interests of the union, while the interests of the minority party do not so align. The union has little incentive to promote the interests of LAs who serve members of the minority party, who will also likely

be a minority of LAs in the bargaining unit. As long as the majority party's interests largely align with the union's interest, the union has strong motivation in not pursuing a position in bargaining that would be embarrassing or burdensome to the majority. And in a world of political backscratching, the union has a vested interest in using all its resources to maintain the balance of power and protect the jobs of the majority of its members. If an election cycle results in a change to the majority party (thus the party in power), many LAs would lose their jobs, and the union might lose negotiating power.

This means that the union is likely to be even more aggressive in pushing partisan priorities in negotiations within the Legislature than a public sector union might be elsewhere. Obtaining terms that align with the interests and priorities of the majority party becomes expedient, at the expense of minority interests, just as is often seen in the rough-and-tumble legislative process. The unfairness of this result will leave members of the minority understandably disenchanted with the union – whether or not they decide to join as members. But whether they join or not, they are placed in the highly unfair position of having their interests supplanted by the interests of their political rivals. And yet the LAs can do nothing to negotiate their own interests: they are forced into a representative relationship with IBEW.

To use a term familiar in legislative circles, IBEW *lobbies* the Legislature when it represents the LA bargaining unit. *See* Merriam-Webster's Collegiate

Dictionary 730 (11th ed. 2011) (to "lobby" means "to conduct activities aimed at influencing public officials," and a "lobby" is "a group of persons engaged in lobbying esp[ecially] as representatives of a particular interest group"). IBEW's function is lobbying.[6] The union meets with, and speaks with designated public officials, as an agent of interested parties (the LAs), to influence government policies. LAs are, thus, forced to accept a State-appointed lobbyist – whether or not the LAs feel that their interests are sufficiently similar to those of LAs serving those on the other side of the political aisle.

The ERB's decision to certify IBEW as the exclusive representative for LAs puts LAs into an impossible position: the LA is forced to choose to either support the union political speech with which they disagree, or to "speak" only silence that is contrary to their own interests—having no input on their contract, their union leadership, union policy, or negotiating their terms of employment.

2. Exclusive representation in the unique setting of the Legislature results in forced association.

A form of free expression protected by the First Amendment, "[f]reedom of association ... plainly presupposes a freedom not to associate." *Knox v. Serv.*

[6] An example proves the point. If an association representing LAs, which are not considered state employees for collective bargaining, met and spoke with an elected official to seek higher subsidy rates, or changes to qualification requirements, that would certainly constitute "lobbying." IBEWs function as a representative of LAs is no different – except it is not voluntary – but is rather a State mandated compulsory relationship.

Employees Int'l Union, Local 1000, 132 S. Ct. 2277, 2288 (2012). Mandatory associations are supposed to be "exceedingly rare," and "permissible only when they serve a 'compelling state interes[t] . . . that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Id*. at 2289 (*quoting Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S.Ct. 3244 (1984)). *And see Citizens against Rent Control v. City of Berkeley*, 454 U.S. 290, 294-95, 102 S.Ct. 434 (1981). A state also infringes on associational rights by compelled association. *See Abood v. Detroit Bd. of Ed*., 431 U.S. 209, 233-234 (1977); *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S.Ct. 2448 (2018). Political association is speech in and of itself, because it conveys a message about an individuals' most basic beliefs. Thus, the state cannot compel individuals to associate with special interest groups or advocacy organizations against their will, any more than the government can compel individuals to associate with political parties, *see Elrod v. Burns*, 427 U.S. 347 (1976); *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 116 S.Ct. 2353 (1996) .

When a bargaining unit is designated for collective bargaining, every employee within the unit becomes represented by the elected union, whether or not he or she votes for the union or becomes a union member. *See supra*, at 4-8. Once a State imposes a system for collective bargaining, the exclusive representative gains power at "the loss of individual [employees'] rights."

Commc'ns Ass'n v. Douds, 339 U.S. 382, 401, 70 S.Ct. 674 (1950). Because of this, exclusive representation is an anomaly – it is forced association that is not tolerated in other contexts and imposes significant restrictions on nonmembers' rights. In fact, the Supreme Court has recognized that the imposition of an exclusive representative creates a significant impingement on First Amendment associational freedoms. *Janus,* at 2460 – 2461, 2478. This has a practical effect on individuals within the bargaining unit, since a union may, as a practical matter, effectively subordinate the interests of an individual employee to the collective interests of the majority of employees in the bargaining unit through, for instance, its determination of what grievances to process. *See e.g., Janus* at 2468.

Here, the state forces LAs into a mandatory relationship with IBEW. This relationship is one in which IBEW becomes the agent of each LA in negotiating wages, hours, and working conditions. The State compels LAs to accept this private organization, IBEW, to speak and contract for them. LAs cannot be represented by IBEW and, at the same time, not be associated with it, nor can IBEW speak and contract for LAs and, at the same time, deny that those LAs are associated with IBEW.

Not only are LAs mandatory members of the bargaining unit, but collective bargaining is slanted to assist the union with increasing its membership in a variety of ways. For instance, a Legislator has to allow employees time during working hours for union activities, which might even include political speech that results

in the loss of the jobs of some minority party LAs (ORS 243.798); a Legislator has to allow the union the right to meet with new employees (ORS 243.894(1)); a Legislator has to provide the union with detailed lists of personal information about all LAs including name, cellular phone, home phone, email addresses and other forms of electronic communication (ORS 243.894(4)), and must allow the union to use the Legislators' electronic communications systems for the union to communicate with the LAs (ORS 243.894(5)); the Legislator must remain neutral on questions of union membership (ORS 243.672(1)(j)).

The LA members of the *Amici* group oppose the State imposing a private organization of which they are not members to speak on their behalf in petitioning and contracting with the State. They object to the State forcing them to accept and associate with IBEW as their exclusive representative for such speech. They want neither to be forced into an agency relationship with this political organization nor to be affiliated with IBEW's negotiations, contract, and other expressive activities. The LAs merely seek not to have someone else speak for them and not be forced to associate with an organization with which they disagree. They seek to be left alone to make their own decisions regarding political associations.

IBEW is a political organization, and Local 89 is not an exception.[7] As a union representing public sector workers, IBEW – and all its local affiliates

[7] IBEW Local 89 spokespersons have claimed it is "not political." http://www.ibew.org/media-center/Articles/21Daily/2108/210812_Statehouse.

representing public-sector workers – negotiate *public* contracts. These are contracts that affect public spending of taxpayer money. They are inherently political. *Janus*, 138 S.Ct. at 2480. This money is used to fund IBEW International's PAC, including endorsement and funding of candidates.[8] Further, IBEW endorsements appear on publicized information regarding many political candidates, and these endorsements do not always distinguish between IBEW and its specific affiliates.[9]

The crux of the First Amendment violation is the ERB's ordination of IBEW to exclusively speak on LAs behalf, even where the union's speech is diametrically opposed to the LAs actual beliefs and wishes, and the ERB legally considers and accepts IBEWs speech as the LAs' speech nonetheless.[10]

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[8] *See supra at* note 4-5.

[9] For example, *see* http://www.ibew.org/media-center/Articles/20Daily/2007/2020Campaign; http://www.ibew.org/media-center/Articles/16Daily/1606/160608_HillaryClinton; https://nwlaborpress.org/2022/04/a-union-guide-to-oregons-may-2022-primary/.

[10] Nor is it sufficient to argue that LAs still have some expressive rights of their own. The compelled association cases prove the point. For example, in *Wooley*, motorists were free to express messages different from the motto inscribed on the license plates they were required to bear. 430 U.S. 705 (1977). In *United States v. United Foods*, mushroom producers were free to express messages different from the advertising they were compelled to subsidize. 533 U.S. 405 (2001); and, in *Miami Herald Publishing Co. v. Tornillo*, newspapers were free to publish any article they wished in addition to the government-mandated article they were required to publish. 418 U.S. 241, 256–57 (1974). In each of these cases, the compelled association or speech was held unconstitutional because of the *government compulsion* in spite of other methods of speech being potentially available.

3. No interest asserted by the State can justify this compelled speech and forced association in the unique context of the partisan Legislature, and there are numerous means, less restrictive of associational freedoms, that the state could use to achieve any legitimate interest.

The burden on the freedom of speech and association of LAs is not justified by any compelling governmental interest, nor any heightened government interests.

The state may point to various interests potentially served by the union. For example, regulation under the Public Employee Collective Bargaining Act is generally for one of the following purposes: (1) the interest in "harmonious and cooperative relationships between government and its employees"; (2) alleviation of "various forms of strife and unrest"; (3) safeguarding employees and the public from "injury, impairment and interruptions of necessary services" by peaceful and equitable adjustment of disputes; (4) protection of the orderly and uninterrupted operation and function of government; (5) promoting "the improvement of employer-employee relations." (ORS 243.656.) Many courts have summarized these as a general state interest in "labor peace." *See e.g., Janus*, 138 S. Ct. at 2465.

There is not, however, any special necessity for labor peace between Legislators and their LAs. Quite the opposite: LAs and their Legislators work in a unique principal/agent style relationship. The LA is, in fact a personal assistant who is intimately involved in the affairs of the Legislator. The state can identify

no evidence that LAs have had labor disputes with the Legislature of a kind that would be a threat to public safety, or even public convenience. LAs have not been known to walk off the job *en masse* – nor with their politically diverse interests is such a thing likely to occur.

If anything, IBEW is likely to exacerbate the stresses between employer and employee for all the reasons described above, *see supra* at 8-14. The fact that so many legislators and legislative assistants felt strongly enough to join this *amicus* brief further shows this.

But assuming there was a legitimate interest served by the imposition of this forced association, "[u]nder 'exacting' scrutiny [a restriction on associational freedom] must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Knox*, 567 U.S at 310. *See also Harris v. Quinn*, 573 U.S. 616, 651 (2014).

Any interest the state might assert could be achieved by creation of a *voluntary* association (under IBEW or otherwise) for LAs who *want* to join. Such an association would represent the interests of member LAs, engage in the equivalent of lobbying for better terms for those LAs, and could advocate as to its members' interest. But it could do so while remaining entirely voluntary and without infringing on the rights of LAs who do not wish to join. LAs would then be free to choose whether or not to avail themselves of these benefits, or choose to remain free of the association, retaining their right to negotiate for themselves.

Or the Legislature might appoint a board, committee or agency *under the control of the Legislature* to oversee LA interests. Such an approach need not involve any outside third party, nor any forced association with such a party. In fact, the Legislature has already evinced interest in this approach by creating a Legislative Administration Committee ("LAC"), which was established as a joint committee that appoints a Legislative Administrator who is authorized by statute to perform administrative service functions for the Legislature, including personnel administration. *See* ORS 173.710 -173.740.

Because any legitimate interest of the state could be adequately served by means far less burdensome to speech and association, the ERB's decision to force all LAs into association with IBEW and its speech must be overruled.

B. VIOLATION OF THE GUARANTEE OF SEPARATION OF POWERS.

This case is not about the value of collective bargaining, or about the importance of maintaining good labor relations between the Legislature and its employees. It is also not about the authority of the ERB to regulate public employment generally. This is a constitutional case. It involves one of the cardinal and fundamental principles of the American constitutional system, the separation of powers doctrine[11] – a doctrine which is also a pillar of the Oregon State Constitution:

[11] "[E]nforcing the separation of powers [is] about safeguarding a structure designed to protect [the people's] liberties, minority rights, fair notice, and the

> The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

Oregon Constitution, Article III, section 1; *Rooney v. Kulongoski (Elections Division # 13)*, 322 Or. 15, 28, 902 P.2d 1143 (1995).

Executive agency decisions may not impair the Legislature's functioning or encroach upon power of the Legislature to administer its own affairs; ultimate power to regulate legislative function belongs exclusively to the Legislature. "[S]eparation of powers seeks to avoid the potential for coercive influence between governmental departments." *Id*. A violation of separation of powers is shown by one department of government unduly burdening the actions of another department in an area of responsibility or authority committed to that other department; or by one department performing the functions committed to another department. *Id*. *See also State ex rel. Dewberry v. Kitzhaber*, 259 Or.App. 389, 313 P.3d 1135 (Or. Ap. 2013); *Cascadia Wildlands v. Oregon Department of State Lands*, 293 Or.App. 127, 427 P.3d 1091 (Or. Ap. 2018).

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rule of law." *Gundy v. United States*, 139 S.Ct. 2116, 2135, 204 L. Ed. 2d 522 (2019) (Gorsuch, J., dissenting).

By certifying IBEW as the exclusive representative for all LAs, the ERB –which is an Executive agency – assumed jurisdiction over the Legislature and its employees on any matter relating to collective bargaining or a labor dispute.

Direct, unhampered control of LAs by each Legislator is necessary to the effective function of the Legislative branch. The ERB's assumption of jurisdiction – it's decision to subjugate the Legislature to collective bargaining without legislative authorization and over Legislators' objections– impermissibly burdens the Legislative function. Consider, for example, if the Governor determined that Legislators could no longer have LAs *at all*. This would, undoubtedly, constitute a violation of the separation of powers. But it is no less a violation for an executive agency to take over *who, how, when and where* Legislators may have LAs – which is exactly what occurs through mandatory collective bargaining.

1. Legislators must maintain direct, unfiltered control within their offices.

Legislative Assistants make it possible for democratically elected members of the Oregon House and Senate to fulfil the myriad duties that fall to an elected member of the Legislature. In our democratic system of government, directly elected officials are accountable to their constituents for their positions, their votes, and the conduct of themselves and their staff. As the population of the State has grown, so have grown the complexity of the issues that have become

subjects of legislation. Commensurate with this growth, individual Legislators' need for assistants within their offices has also grown. While it is possible for a Legislator to work solo, the realities of the job generally result in Legislators hiring at least one – and often more – assistants. Especially during Legislative session.

A LAs job includes providing administrative support to a legislator, providing Capitol office reception, scheduling; research and a variety of administrative services including constituent customer service; communication; public involvement and outreach. The LA "may have access to confidential information. Confidentiality must be maintained." (*See* https://www.oregonlegislature.gov/la/Documents/Sen.%20Taylor%20LA2%20Recruitment.pdf, last visited September 5, 2022, describing job qualifications for a Legislative Assistant 2). The LA may attend committee meetings. They interface with constituents. They answer emails, take phone calls, and host visits. LAs draft policy positions and make public statements on behalf of Legislators. LAs advise their Members on positions, and help to forge relationships between Member offices. *Id*. Because of the importance of the many tasks delegated to LAs, it is essential for Legislators to have direct, unfettered control, and for them to have uninhibited confidence in their LAs. It is fair to say that the Legislature would grind to a halt without the essential services of LAs. They are, in essence, the agents of their Legislators.

It is essential for each Legislator to be able to rely implicitly on their LAs. This includes the need for full confidence in the LA's political convictions and political positions. Legislators must be able to rely on the loyalty and confidentiality of their LAs. This need for control is not limited to initial hiring and discipline decisions, it must extend to ancillary administrative functions as well. This includes the need for the Legislator to know, understand, and be able to rely on the LA's position on collective bargaining, generally, and any collective bargaining for LAs in particular.[12]

2. Certification of IBEW disrupts Legislators' relationships with their LAs, placing an enormous burden on the task of legislating.

The ERB's certification of IBEW as exclusive representative for LAs effectively inserts a private, political organization between the LA and the Legislator. If a LA wants to negotiate matters of employment with their employer, the exclusive mechanism for doing so is now through the union. Of even more concern, any unresolved conflict over bargaining is reserved to the jurisdiction of an executive branch agency (the ERB).

This loss of control is an unprecedented burden on the Legislative function. *Rooney*, 322 Or. at 28. Furthermore, it was a decision made by the Executive branch through ERB's decision. *See Washington State Bar Ass'n v. State*, 125

[12] This is necessary as a practical matter because positions taken in bargaining with government employees is itself political speech. *Janus*, 138 S.Ct. at 2480.

Wash.2d 901, 890 P.2d 1047 (Sp. Ct. WA 1995) (control of the State Bar was necessary to the judicial branch's essential function, and was compromised by the legislative decision to allow collective bargaining). This becomes even more evident when one considers the political nature of the Legislature – everything is a potentially partisan issue.

The ERB granted authority for IBEW to represent LAs in their relations with the Legislature, which both factually and legally associates those individuals with the IBEW and its expressive activities. *See supra* at 10-14. That is the whole point of certification of an exclusive bargaining representative: to establish that IBEW petitions and contracts not only for itself or for its members, but as the representative of and for all LAs. Thus, in all practicality, any Legislators' LA will be represented by a political organization, who may well be the Legislators' political opponent.[13]

There are numerous ways to achieve any legitimate goal the State might have in improving the working conditions for LAs without unduly burdening the Legislature. For example, the Legislature could seek IBEW's advice or meet or

[13]Stated bluntly, the ERB's decision creates an IBEW "faction" within the legislature – similarly-situated individuals forced together into an association to pursue self-interested policy objectives. The problems caused by political factions have been recognized since the nation's founding, see The Federalist No. 10 (J. Madison). The Oregon Legislature is no stranger to the strains caused by political factions. The creation of what amounts to a mandatory faction is even worse than the problems caused by the voluntary factions that spring up naturally, since it involves outside political forces.

confer with its officials, without making IBEW the mandatory representative of all LAs. The State can also solicit the views of LAs themselves, through a variety of voluntary means that do not infringe on their constitutional rights, such as by requesting LA comments in rulemaking, holding public meetings, and conducting surveys (which, indeed, the State has done, repeatedly and successfully, *see e.g.*, Legislative Administration Committee ("LAC"), ORS 173.710 -173.740).

IBEW is a private advocacy organization that takes political positions. *See supra* at 6-10. As the exclusive representative for LAs, IBEW becomes an advocacy group into which their LAs are conscripted involuntarily. It has special privileges in dealing with the government that no others enjoy, and, as a group, it has political influence over and above what any individual LA could hope to assert. This is, at the very least, a wedge between IBEW members and their employers.

But worse, Legislators cannot effectively perform their Constitutional function of making law if they are constantly looking over their shoulder to make sure their actions meet the approval of an Executive Branch agency. Viewed from the employee's perspective, almost any decision that a Legislator might make regarding a LA could potentially become a subject for an Unfair Labor Practice complaint, meaning that the Legislator's actions will be subjected to the review of the ERB. *See*, e.g., ORS 243.672 (1)(g): It is an unfair labor practice for an

employer to "[v] iolate the provisions of any written contract with respect to employment relations…" This will have a paralyzing effect on Legislators.

To be forced to stop within the hurly-burly of a legislative session, to consider the opinion of the ERB with regard to any given action, certainly impairs the Legislative function and encroaches upon the power of the Legislature to administer its own affairs.

IV. CONCLUSION

Amici urge this court to protect the First Amendment rights of LAs, and the coequal authority of the Legislature as a branch of government separate from control of the Executive. The Court should overrule the decision of the ERB.

Respectfully submitted this 7th day of September, 2022.

SHERMAN, SHERMAN, JOHNNIE & HOYT LLP

By */s/ Steve Elzinga*

Steve Elzinga, OSB No. 123102
Sherman, Sherman, Johnnie & Hoyt LLP
693 Chemeketa Street NE
Salem, OR 97301
Tel: 503-364-2281
steve@shermlaw.com

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length: I certify that (1) this brief complies with the word-count limitation in ORAP 8.15(3)(c) and ORAP 5.05(1)(b)(ii) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 6,293 words.

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DATED: September 7, 2022

/s/ Steve Elzinga

Steve Elzinga, OSB No. 123102
Sherman, Sherman, Johnnie & Hoyt LLP

Attorneys for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I certify that I filed this brief with the Appellate Court Administrator on this date. I further certify that service of a copy of this brief will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system:

Daniel Hutzenbiler
McKanna Bishop Joffe, LLP
1635 NW Johnson Street
Portland Oregon 97209
Ph: 503.226.6111
Email: dhutzenbiler@mbjlaw.com

Attorney for Respondent IBEW Local 89

Denise G. Fjordbeck
Attorney-in-Charge
Civil/Administrative Appeals
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Ph: 503.378.4402
Email: denise.fjordbeck@doj.state.or.us

Attorney for Respondent Oregon Legislative Assembly

Rebekah Millard, OSB No. 121199
James Abernathy, OSB No. 161867
Freedom Foundation
P.O. Box 552
Olympia, WA 98507
Ph: 360.956.3482
Email: rmillard@freedomfoundation.com
Email: jabernathy@freedomfoundation.com

Attorneys for Petitioners

DATED: September 7, 2022
/s/ Steve Elzinga

Steve Elzinga, OSB No. 123102
Sherman, Sherman, Johnnie & Hoyt LLP
steve@shermlaw.com

Attorneys for Amicus Curiae