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## Between Public and Private: Care Workers, Fissuring, and Labor Law

**ABSTRACT.** In the childcare and home-care sectors of the “care economy,” wages are low and working conditions are poor, driving high turnover and inadequate access to care. This Note introduces the concept of “public-private fissuring” and identifies it as one mechanism that devalues care. Although states set wages and regulate working conditions, care workers covered by the National Labor Relations Act (NLRA) cannot bargain with these public entities under National Labor Relations Board supervision, inhibiting meaningful bargaining. To address this challenge, this Note argues that states should recognize their implicit joint-employer relationship with these workers, enabling care workers to bargain with the state over state-controlled employment conditions without impeding their ability to bargain with private employers under the NLRA.

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## INTRODUCTION

Writing for the majority in the 2014 case *Harris v. Quinn*, Justice Alito referred to the personal assistants providing in-home care to Illinois Medicaid beneficiaries as “quasi-public employees” or “partial-public employees,”<sup>1</sup> contrasting them with “full-fledged state employees.”<sup>2</sup> Alito’s distinction rested on the extent of state authority: while the State of Illinois hires, supervises, and fires “full-fledged public employees,” its involvement with “quasi-public employees” is limited to paying their wages and otherwise regulating the work, with individual consumers or contracting agencies in charge of hiring, firing, and supervision.<sup>3</sup>

Justice Alito’s characterization of the home-care workers was revelatory, exposing a perception of these workers as less than “real” public employees. This perception carried the day despite the fact that these home-care workers performed difficult, critical work that would later be recognized as “essential.”<sup>4</sup> In response to Alito’s majority opinion, Justice Kagan countered that the home-care workers were, in fact, public employees—they had a joint-employment relationship with the state and consumers.<sup>5</sup> Under this relationship, the state and consumers shared control over the workers’ conditions, and both could be recognized as employers.<sup>6</sup>

This Note addresses the predicament that labor law creates for care workers like those in *Harris v. Quinn*, who often find themselves trapped between categories of “public” and “private” sector, at the nexus of the public welfare state

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1. 573 U.S. 616, 646 (2014).

2. *Id.* at 639.

3. *Id.* at 642-43. Because the home-care workers were merely “quasi-public employees,” their union could not charge “agency” or “fair share” fees, as a union for “full-fledged public employees” could. *Id.* at 620, 645-46. On that basis, decades-old precedent upholding the payment of agency fees—fees paid by nonmembers to the union for bargaining and enforcing contracts on their behalf—in the public sector properly did not apply to the “quasi-public employee” home-care workers. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211 (1977), *overruled by Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). As Justice Kagan noted in her dissent, Justice Alito’s distinction between “full-fledged” and “partial” employees was one without precedent, a “label of [the majority’s] own devising.” *Harris*, 573 U.S. at 660 n.1 (Kagan, J., dissenting).

4. During the COVID-19 pandemic, when governors “issued shutdown orders across the country . . . , they exempted home care aides as essential workers.” Paula Span, *Navigating Home Care During the Pandemic*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2020/06/06/health/coronavirus-home-care-nursing.html> [<https://perma.cc/HN3Y-DQU7>].

5. *Harris*, 573 U.S. at 660.

6. See *infra* Part II.

and the “private” labor market. While these workers perform ostensibly “private” work—occurring in a private childcare center, nursing home, or the home itself—public programs such as Medicaid and the Child Care and Development Fund (CCDF) pay care workers’ wages and regulate their hours and working conditions. State government “shape[s] the structure of the industry and the terms and conditions of work.”<sup>7</sup>

Despite extensive state involvement in the care economy, low wages and poor working conditions for care workers have created a crisis with wide-ranging social and economic effects.<sup>8</sup> Low-wage, overwhelmingly female, and disproportionately made up of immigrants and people of color, the care workforce is a key location in struggles for social and economic equality.<sup>9</sup> Moreover, care work represents the future of the U.S. economy: the care economy generated 74% of low-wage job growth in the 2000s,<sup>10</sup> and this trend is likely to continue given demographic pressures and the difficulty of outsourcing or automating these jobs. Home care is growing particularly rapidly, projected to add almost 1.2 million jobs in the next decade for a rate of growth about four times greater than the national average.<sup>11</sup> While growing more slowly than home care, childcare faces extensive job shortages, which 78% of surveyed providers attributed to the low

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7. Eileen Boris & Jennifer Klein, *Organizing Home Care: Low-Waged Workers in the Welfare State*, 34 POL. & SOC’Y 81, 83 (2006).
  8. Lydia DePillis, Jeanna Smialek & Ben Casselman, *Jobs Aplenty, but a Shortage of Care Keeps Many Women from Benefiting*, N.Y. TIMES (July 12, 2022), <https://www.nytimes.com/2022/07/07/business/economy/women-labor-caregiving.html> [<https://perma.cc/P6QN-5QDF>] (“A dearth of child care and elder care choices is causing many women to reorganize their working lives and prompting some to forgo jobs altogether, hurting the economy at a moment when companies are desperate to hire, and forcing trade-offs that could impair careers.”); Eliza Shapiro & Patrick McGeehan, *Big New Obstacle for Economic Recovery: Child Care Crisis*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2020/07/10/nyregion/nyc-school-daycare-reopening.html> [<https://perma.cc/NFJ9-AEFK>]; Liz Donovan & Muriel Alarcón, *Long Hours, Low Pay, Loneliness and a Booming Industry*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/2021/09/25/business/home-health-aides-industry.html> [<https://perma.cc/8ENM-5YJL>].
  9. For demographic statistics on the care workforce, see *U.S. Home Care Workers: Key Facts*, PHI 2-3, <https://phinational.org/wp-content/uploads/legacy/phi-home-care-workers-key-facts.pdf> [<https://perma.cc/6CPJ-S5UG>].
  10. Gabriel Winant, Opinion, *Manufacturing Isn’t Coming Back. Let’s Improve These Jobs Instead.*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/2021/03/17/opinion/health-care-jobs.html> [<https://perma.cc/4UGQ-UKYU>].
  11. *Supporting and Sustaining the Home Care Workforce to Meet the Growing Need for Long-Term Care*, AM. PUB. HEALTH ASS’N (Oct. 24, 2020), <https://www.apha.org/Policies-and-Advocacy/Public-Health-Policy-Statements/Policy-Database/2021/01/13/Supporting-and-Sustaining-the-Home-Care-Workforce> [<https://perma.cc/RA6M-7NFM>].

wages of the sector.<sup>12</sup> Over the past year, the sector has shed 126,700 workers—more than 10% of the prepandemic workforce.<sup>13</sup> Consequently, quality of and access to childcare are often poor, leading women to drop out of the paid workforce and take up caregiving burdens. Low wages and poor working conditions are not just issues for care workers—they are issues for society as a whole.

One issue driving conditions in the care economy is what this Note calls *public-private fissuring*. Through public-private fissuring, the state separates itself from labor-law responsibilities for care workers but retains extensive control over wages, working conditions, and work outcomes. Typically, labor law enables workers to bargain with entities that control the workers' terms and conditions of employment. However, public-private fissuring prevents care workers from making direct claims on the state through collective bargaining, which contributes to the poor wages and working conditions in the care economy. Although the term “fissuring” arose in the private sector, this Note argues that its logic extends to employment—such as care work—which straddles both the “public” and “private” sectors. Through fissuring, the state obscures its role in shaping terms and conditions of employment and avoids bargaining responsibility.<sup>14</sup>

This Note focuses on how public-private fissuring affects care workers covered by the National Labor Relations Act (NLRA), rather than those workers who are exempt from the Act.<sup>15</sup> In the care economy, workers generally fall into two categories: those employed by private employers—home-care agencies, nursing homes, and childcare centers—and those who work directly with clients,

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12. Claire Cain Miller, ‘Can’t Compete’: Why Hiring for Child Care Is a Huge Struggle, N.Y. TIMES (Oct. 9, 2021), <https://www.nytimes.com/2021/09/21/upshot/child-care.html> [<https://perma.cc/9V4N-UJ9V>].

13. Heather Long, ‘The Pay Is Absolute Crap’: Child-Care Workers Are Quitting Rapidly, a Red Flag for the Economy, WASH. POST (Sept. 19, 2021, 6:00 AM EDT), <https://www.washingtonpost.com/business/2021/09/19/childcare-workers-quit> [<https://perma.cc/N8ZN-E6GV>].

14. For a historical perspective on fissuring and care work, see Gabriel Winant, *The Fissured Welfare State: Care Work, Democracy, and Public-Private Governance*, in THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY 334, 342-43 (Angela B. Cornell & Mark Barenberg eds., 2022).

15. Ironically, while care workers excluded from the coverage of the National Labor Relations Act (NLRA)—those considered independent contractors and domestic workers—have often avoided this fissuring problem through innovative, state-level solutions, public-private fissuring looms especially large for NLRA-covered workers, who have been able to bargain solely with private entities. See *infra* Section I.C.

often called independent provider (IP) or consumer-directed home-care workers and home-based or family childcare workers.<sup>16</sup> The workers in this first category generally fall under the coverage of the NLRA and are the focus of this Note.

Public-private fissuring is especially pernicious for NLRA-covered workers because the fissuring occurs over the jurisdictional divide between the federal NLRA and state-based, public-sector labor law. The NLRA enables care workers to bargain with the *private entity* but does not grant the National Labor Relations Board (NLRB) jurisdiction over the *public entity*. Accordingly, these care workers cannot collectively bargain with the powerful public entities that set reimbursement rates and regulate working conditions. As a result, although these public entities have significant control over employment conditions, they have thus far remained beyond the reach of collective bargaining.

To address this challenge, this Note proposes that states can and should authorize comprehensive bargaining relationships between NLRA-covered care workers and public entities, a proposal this Note calls a *joint-employer solution*. The concept of the joint employer is not new; in the private sector, a more robust joint-employer standard has emerged as one response to the problem of fissuring. However, this Note proposes that public-sector labor law recognize a joint-employer relationship with care workers, even though those workers are also directly employed by private entities and covered by the NLRA. Here, just as a broad joint-employer standard has responded to fissuring in the private sector, so too can a joint-employer standard serve as an answer to public-private fissuring. By recognizing the implicit public-employment relationship between care workers and the state in addition to the explicit private-employment relationship between care workers and agencies, this policy would allow care workers to collectively bargain with the state—mitigating the pernicious effects of public-private fissuring.

The joint-employer solution would operate for NLRA-covered care workers as follows. First, these care workers would continue to bargain with their private employer—the home-care agency, nursing home, or childcare center—under NLRB jurisdiction, as they do under current NLRB doctrine.<sup>17</sup> However, be-

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16. Of the 2.2 million home-care workers, 1.4 million work for private agencies, while another 800,000—or a little more than a third of the total workforce—are independent providers. *U.S. Home Care Workers: Key Facts*, *supra* note 9, at 4. In childcare, centers account for 27% and home-based workers 47% of the nearly 1 million workers, down significantly from pre-pandemic numbers. *Occupational Outlook Handbook: Childcare Workers*, U.S. BUREAU OF LAB. STAT. (Sept. 8, 2022), <https://www.bls.gov/ooh/personal-care-and-service/childcare-workers.htm> [<https://perma.cc/BC8J-8ZDK>].

17. See *infra* Section II.A.1.

cause the NLRB does not have jurisdiction over the public entities that set reimbursement rates and regulate working conditions, bargaining under NLRB jurisdiction alone is inadequate. Second, then, this Note argues that states should authorize workers to bargain simultaneously with those public entities. This proposal creates a joint-employer relationship because workers would bargain with two entities: the agency (or center) and the state. Unlike traditional conceptions of the joint-employer relationship, however, this relationship would traverse jurisdictional boundaries, as workers would bargain under both the federal NLRA and state labor law.

No state has enacted such a collective-bargaining scheme for NLRA-covered workers, a fact which is especially striking given that a number of states have recognized a joint-employer relationship with NLRA-*exempt* care workers.<sup>18</sup> Beginning with the election of 74,000 home-care workers in Los Angeles County in 1999, more than a dozen states have enabled bargaining between public entities and NLRA-exempt workers as the result of innovative organizing strategies from care workers and their unions, especially the Service Employees International Union (SEIU).<sup>19</sup> As this Note describes, states face fewer barriers to regulating the labor relationships of care workers not covered by the NLRA. Reform efforts and the academic literature have primarily focused on these home-based, NLRA-exempt care workers.

Comparatively less attention has been paid to NLRA-covered workers at home-care agencies, nursing homes, and childcare centers, despite the fact that they have been similarly locked out of a bargaining relationship with the state. This Note fills that gap by identifying public-private fissuring as a key issue and proposing a joint-employer solution for NLRA-covered care workers to address that challenge. Against the backdrop of the care-economy crisis, this Note argues that the creation of a bargaining relationship between public entities and workers covered by the NLRA is both possible and desirable. The joint-employer

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18. One Washington bill from 2008 that did not become law proposed something similar for workers at childcare centers. See *infra* notes 200-204 and accompanying text.

19. See *infra* Section I.C; Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1390 (2008). Home-based childcare workers have also won those rights in a similar number of states. See Helen Blank, Nancy Duff Campbell & Joan Entmacher, *Getting Organized: Unionizing Home-Based Child Care Providers, 2013 Update*, NAT'L WOMEN'S L. CTR. 1 (Feb. 2014), [https://nwlc.org/wp-content/uploads/2015/08/nwlc\\_gettingorganized2013update.pdf](https://nwlc.org/wp-content/uploads/2015/08/nwlc_gettingorganized2013update.pdf) [<https://perma.cc/GH5S-7SKU>]. Most recently, in California, 40,000 home-based childcare workers first won those rights and then won a contract with the state. Don Thompson, *California Inks Contract with New 40,000-Member Child Care Union*, L.A. TIMES (July 23, 2021, 5:05 PM PT), <https://www.latimes.com/california/story/2021-07-23/california-inks-contract-with-new-40-000-member-child-care-union> [<https://perma.cc/T8AT-X3FS>].



standard this Note proposes would provide NLRA-covered workers with a direct means of raising their wages and improving their working conditions, which in turn would improve quality of and access to care. This makes the joint-employer standard a powerful legal means of addressing public-private fissuring.

This Note proceeds as follows. Part I characterizes the structure of the care economy as “fissured,” as states separate themselves from labor-law responsibility while extensively regulating and funding the work. Public-private fissuring partially drives low wages and poor working conditions in the care economy because it separates workers from direct employment by the powerful public entities that control their working conditions. The jurisdictional divide between public and private labor law exacerbates this fissuring, as the NLRB cannot compel bargaining between care workers and these public entities.

Part II proposes that states recognize their joint-employer relationship with NLRA-covered care workers to overcome public-private fissuring. As this Part discusses, the joint-employer standard has emerged as a central response to the problem of fissuring in the private sector. This Note applies the joint-employer standard to NLRA-covered care workers and proposes that states allow these workers to bargain collectively with public entities over reimbursement and subsidy rates, pass-throughs, training and development programs and incentives, and other vital workplace issues. It sketches the key elements of what this regime might encompass.

Part III analyzes the potential NLRA preemption objection. NLRA preemption is expansive, and past state attempts to regulate labor relations have often run afoul of the doctrine. However, this Note shows that states can authorize collective bargaining between public entities and NLRA-covered workers without issue.

Finally, Part IV considers other practical and policy concerns. Consistent with the NLRA, NLRB precedent, and labor-law policy objectives, a joint-employer standard for NLRA-covered workers can confront public-private fissuring at the root and begin to address crisis conditions in the care economy.

## I. PUBLIC-PRIVATE FISSURING

Despite extensive public expenditure through Medicaid and other programs, the wages of care workers are among the lowest in society. The median wage for home health and personal-care aides in 2021 was \$14.15 per hour, or about \$29,430 per year.<sup>20</sup> Childcare workers similarly earned an hourly wage of \$13.22,

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20. *Occupational Outlook Handbook: Home Health and Personal Care Aides*, U.S. BUREAU OF LAB. STAT. (Apr. 18, 2022), <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides.htm> [<https://perma.cc/QH8A-GJFN>].

annualized to around \$27,490.<sup>21</sup> Because of these low incomes, many workers qualify for means-tested programs, including Medicaid itself. Nearly one in five home-care workers lives below the poverty line.<sup>22</sup> In studies across several states, sizeable numbers of childcare workers report food and housing insecurity and postponing education and medical treatment.<sup>23</sup> Poverty rates for childcare workers range from a low of 10.9% in Virginia to a high of 34.4% in Florida.<sup>24</sup> These wages and working conditions have created a sector-wide crisis, driving high rates of turnover, unequal and inadequate access to care for those in need, and lower rates of paid labor-force participation as people—primarily women—drop out of the workforce to take up caregiving responsibilities.<sup>25</sup>

This Part develops the concept of *public-private fissuring* in the care economy as a key factor in this crisis. “Fissuring” refers to processes by which entities that benefit from work separate themselves from “direct” employment of workers, often so they can avoid labor- and employment-law responsibilities.<sup>26</sup> I describe fissuring in the care economy as “public-private” because, unlike traditional fissuring, it crosses the lines between the “public” and “private” sectors. Public entities in the care economy retain control over the work—largely through setting reimbursement rates and creating regulations for entities that receive public dollars—but have delegated some authority to private actors, such as home-care agencies.<sup>27</sup> By severing the state from direct provision of services, this organization of care work has prevented workers from collective bargaining with the state over the policies of two key public programs, Medicaid and the Child Care and Development Fund (CCDF), which shape working conditions for entire sectors

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21. *Occupational Employment and Wages, May 2021: Childcare Workers*, U.S. BUREAU OF LAB. STAT. (Mar. 31, 2022), <https://www.bls.gov/oes/current/oes399011.htm> [<https://perma.cc/FR5S-HTYS>].

22. Donovan & Alarcón, *supra* note 8.

23. Megan Cerullo, *Child Care Workers, Crucial to Economic Recovery, Earn Poverty Wages in 40 States*, CBS NEWS (Feb. 23, 2021, 1:03 PM), <https://www.cbsnews.com/news/child-care-workers-poverty-wages> [<https://perma.cc/8DJB-UV4L>].

24. Caitlin McLean, Lea J.E. Austin, Marcy Whitebook & Krista L. Olson, *Early Childhood Workforce Index 2020*, CTR. FOR THE STUDY OF CHILD CARE EMP. 24 (2021), <https://cscce.berkeley.edu/workforce-index-2020/report-pdf> [<https://perma.cc/N4FA-BHTB>].

25. See Monica Potts, *The Crisis in Home Care*, NEW REPUBLIC (Apr. 22, 2021), <https://newrepublic.com/article/161920/home-healthcare-elderly-care-crisis> [<https://perma.cc/6TUS-GX7B>]; MK Falgout, *Only Bold Action from Congress Will Solve the Child Care Crisis*, CTR. FOR AM. PROGRESS (Jan. 13, 2022), <https://www.americanprogress.org/article/only-bold-action-from-congress-will-solve-the-child-care-crisis> [<https://perma.cc/CYT2-F2BV>].

26. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 3-5 (2014).

27. While public power structures all markets and sectors, the focus of this Note is on the care sectors. There may be other sectors in which a similar analysis is applicable.

of the care economy. This Part conceptualizes public-private fissuring and argues that it has contributed to the crisis in the care economy.

A. *The Public-Private Structure of the Care Economy*

“Care is essential.”<sup>28</sup> This refrain born from the COVID-19 pandemic is undoubtedly true: at various stages in their lives, people require care when they cannot care for themselves, particularly when they are young, old, sick, or disabled. Care in this sense is understood as labor that contributes to the well-being or development of other people, which often occurs face to face and requires skills in interaction and communication.<sup>29</sup> Such care is necessary for the reproduction of social life.<sup>30</sup> The “care economy,” as the sectors of economic and social life that create and maintain the well-being of others are known, is vast and growing but plagued by low wages for care workers.<sup>31</sup>

Because of care’s essential character, federal and state governments have played a central role in creating and securing labor markets for these services, on both the supply and demand sides.<sup>32</sup> Programs such as Medicaid and the CCDF “bring[] government directly into the lives of the most marginal citizens.”<sup>33</sup> However, these programs remain limited; for instance, the United States expends only about half the European average on childcare as a percentage of gross domestic product.<sup>34</sup> And critically, these programs rely on a model of partially private markets and limited demand-side subsidies rather than direct government provision of the essential services.<sup>35</sup>

Medicaid and childcare programs share several key features. First, they are federalized: the national government creates requirements for states and provides some funding, but states have significant autonomy in designing and running their programs. This federalism permits significant disparities between

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28. *E.g.*, *About*, CARE IS ESSENTIAL, <https://careisessential.org/about> [<https://perma.cc/UD5T-VDV5>].

29. *See generally* PAULA ENGLAND, *COMPARABLE WORTH: THEORIES AND EVIDENCE* (1992) (theorizing the care economy).

30. Nancy Fraser, *Contradictions of Capital and Care*, 100 *NEW LEFT REV.* 99, 99 (2016).

31. For theories of the care penalty, see Paula England, *Emerging Theories of Care Work*, 31 *ANN. REV. SOCIO.* 381 (2005).

32. EILEEN BORIS & JENNIFER KLEIN, *CARING FOR AMERICA: HOME HEALTH WORKERS IN THE SHADOW OF THE WELFARE STATE* 5 (2012).

33. JAMILA MICHENER, *FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS* 9 (2018).

34. *See* Kimberly J. Morgan, *Promoting Quality and Equality Through Early Education and Care*, in *POLITICS, POLICY, AND PUBLIC OPTIONS* 117, 121 (Ganesh Sitaraman & Anne Alstott eds., 2021).

35. *Id.* at 117.

states.<sup>36</sup> Second, they are means-tested, supporting only the families and individuals who qualify. Because this funding flows to the lower brackets of the income distribution, these programs often represent the only viable option for those who need paid care.

Finally, and most significantly for this discussion, these programs operate through a complex interaction between public and private actors. To ensure that qualifying people receive care, the federal and state governments subsidize and regulate the activities of private actors. Medicaid does not directly provide home care to its beneficiaries; rather, it provides access by ensuring that “health care providers receive payment for services offered to low-income and disabled patients who qualify for Medicaid assistance.”<sup>37</sup> This model exists as an alternative to the direct provision of services by the public sector, which is the norm in K-12 education.<sup>38</sup> Instead, in the health-care and childcare sectors, public and private are especially melded.<sup>39</sup> However, the extent of public involvement is often “subterranean” or “submerged”: what appears as wholly private sits at the nexus of public power.<sup>40</sup>

This submerged power, however, is incredibly significant. Medicaid has monopsony power in the long-term care market<sup>41</sup>—it “is the market,” and its policies set standards for the entire sector.<sup>42</sup> Payments from Medicaid and other public programs<sup>43</sup> constitute two-thirds to three-quarters of the home-care sector’s

36. MICHENER, *supra* note 33, at 13-14.

37. California *ex rel. Becerra v. Azar*, 501 F. Supp. 3d 830, 833 (N.D. Cal. 2020).

38. Winant, *supra* note 14, at 344.

39. Public power undergirds ostensibly private markets, but public expenditure and regulation are especially extensive in these sectors. JACOB S. HACKER, *THE DIVIDED WELFARE STATES: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES*, at xiii (2002).

40. *Id.* (“The politics of private social benefits, I argue, is ‘subterranean’ politics . . .”); SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* 4 (2011).

41. Kevin Quinn & Martin Kitchener, *Medicaid’s Role in the Many Markets for Health Care*, 28 *HEALTH CARE FIN. REV.* 69, 79 (2007).

42. *Id.*

43. Medicare, although beyond the focus of this paper, also provides home care, albeit only if that care is part-time or “intermittent” skilled nursing care. See *Medicare and Home Health Care*, *CTRS. FOR MEDICARE & MEDICAID SERVS.* 6, <https://www.medicare.gov/Pubs/pdf/10969-medicare-and-home-health-care.pdf> [<https://perma.cc/4HZM-P9DR>]. Also created in 1965, Medicare is the largest social program after Social Security and provides health insurance to older people and those with disabilities. Paying benefits worth almost \$800 billion in 2019 alone, and Medicare spending counts for about 4% of U.S. gross domestic product. Richard W. Johnson & Erald Kolasi, *The Direct Impact of Medicare Spending on Employment and Tax Revenue*, *URB. INST.* 1 (Feb. 2021), [https://www.urban.org/sites/default/files/publication/103595/the-direct-impact-of-medicare-spending-on-employment-and-tax-revenue\\_1.pdf](https://www.urban.org/sites/default/files/publication/103595/the-direct-impact-of-medicare-spending-on-employment-and-tax-revenue_1.pdf) [<https://perma.cc/S6J9-XX6T>].

revenue.<sup>44</sup> Similarly, in nursing-home care, Medicaid funding covers 62% of residents.<sup>45</sup> While public spending on childcare is less than on home care and nursing-home care, it still accounts for 37.3% of total childcare spending.<sup>46</sup> In ten states, public spending on childcare constituted more than half of total spending.<sup>47</sup> Because of their size and importance for providers, these programs are central in shaping the care economy.

### 1. Medicaid

Created in 1965, Medicaid accounts for one out of every six dollars spent on health care in the United States.<sup>48</sup> It is the primary source of funding of health and long-term care for “families with dependent children and . . . aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services.”<sup>49</sup> It is a complex<sup>50</sup> joint federal-state program, with the federal government providing funding and granting the states flexibility with program design so long as states meet certain federal requirements, such as those around eligibility, services, administration, and provider compensation. Medicaid provides several types of long-term care, including institutional or “nursing-home” care and home care, which is provided under a waiver in almost all states.<sup>51</sup> To participate in a Medicaid program, a facility must enter into a provider agreement for the applicable program and demonstrate that it meets the conditions for participation.<sup>52</sup>

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44. *Direct Care Workers in the United States: Key Facts*, PHI 9 (2020), <http://phinational.org/resource/direct-care-workers-in-the-united-states-key-facts> [<https://perma.cc/T5RX-M5T6>].
45. *Medicaid's Role in Nursing Home Care*, KAISER FAM. FOUND. (June 20, 2017), <https://www.kff.org/infographic/medicaids-role-in-nursing-home-care> [<https://perma.cc/D4YP-5B9T>].
46. *Child Care in State Economies: 2019 Update*, COMM. FOR ECON. DEV. 30, <https://www.ced.org/assets/reports/childcareimpact/181104%20CCSE%20Report%20Jan30.pdf> [<https://perma.cc/BJ57-W9ZV>].
47. *Id.* at 30-31.
48. *NHE Fact Sheet*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Aug. 12, 2022, 2:06 PM), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NHE-Fact-Sheet> [<https://perma.cc/6S8R-KYSJ>].
49. 42 U.S.C. § 1396-1 (2018).
50. According to one quip about the program, “[i]f you understand one state, then you understand one state.” PAUL OSTERMAN, *WHO WILL CARE FOR US?: LONG-TERM CARE AND THE LONG-TERM WORKFORCE* 108 (2017).
51. *Medicaid's Role in Nursing Home Care*, *supra* note 45 (demonstrating the extensive Medicaid provision of nursing-home care); 42 U.S.C. § 1396n (2018) (authorizing waivers to replace nursing-home care with home care).
52. See 42 U.S.C. §§ 1395cc(a), 1396a(a)(27) (2018).

To pay for care services, states offer Medicaid reimbursement rates to certified service providers, who must meet federal and state requirements, including at least seventy-five hours of training for many home-care workers.<sup>53</sup> Home-care agencies must also sign a provider agreement with the state Medicaid agency that requires them to disclose information, furnish fingerprints, allow unannounced on-site inspections, provide services without discrimination, submit claims within a year of service, accept payment from Medicaid as payment in full, and keep records of services rendered and furnish them on request.<sup>54</sup>

States have significant discretion in setting rates, which shapes worker pay and the services that providers offer.<sup>55</sup> Federal statute sets minimum and maximum rates and requires that payments be “consistent with efficiency, economy, and quality of care and . . . sufficient to enlist enough providers so that care and services are available under the plan.”<sup>56</sup> Beyond that, states often consider a broad set of factors, including acuity—intensity of care needed—and differences in costs by region or locality.<sup>57</sup> Providers may submit their costs and requests to state agencies for consideration, but rates are set by political negotiations between the governor, state administrations, and state legislatures.<sup>58</sup> Critically, worker representatives are often absent from these negotiations, leaving them at

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53. For a description of various ways states can structure provider reimbursement under Medicaid, see *Comparing Reimbursement Rates*, CTRS. FOR MEDICARE & MEDICAID SERVS. (July 6, 2022, 4:23 PM), <https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/LTSS-TA-Center/info/understand-the-reimbursement-process> [<https://perma.cc/D8JF-DG3C>]. All states require at least 75 hours of training for nursing assistants and home health aides, and some require 120 hours or more. *Caring for the Future: The Power and Potential of America’s Direct Care Workforce*, PHI 53 (2021), <http://www.phinational.org/wp-content/uploads/2021/01/Caring-for-the-Future-2021-PHI.pdf> [<https://perma.cc/D9UA-L5Y8>].
54. *Medicaid Provider Agreements Snapshot*, CTRS. FOR MEDICARE & MEDICAID SERVS. 1 (Aug. 2016), <https://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/Medicaid-Integrity-Education/Downloads/ebulletins-medicicaidprovider-agreement.pdf> [<https://perma.cc/MCP5-MPGZ>].
55. See *State Wage Pass-Through Legislation: An Analysis*, U.S. DEP’T OF HEALTH & HUM. SERVS. 2-4 (Dec. 20, 2002), <https://aspe.hhs.gov/sites/default/files/private/pdf/73246/wagepass.pdf> [<https://perma.cc/K66V-VXTZ>].
56. 42 U.S.C. § 1396a(a)(30)(A) (2018).
57. *Application for a §1915(c) Home and Community Based Waiver: Instructions, Technical Guide, and Review Criteria, Version 3.6*, CTRS. FOR MEDICARE & MEDICAID SERVS. 267 (Jan. 2019), [https://wms-mmdl.cms.gov/WMS/help/35/Instructions\\_TechnicalGuide\\_V3.6.pdf](https://wms-mmdl.cms.gov/WMS/help/35/Instructions_TechnicalGuide_V3.6.pdf) [<https://perma.cc/9ANZ-FLAV>]; see also Ralph F. Lollar, *Rate Methodology in a FFS HCBS Structure*, CTR. FOR MEDICAID & CHIP SERVS. 7 (Feb. 2016), <https://www.medicaid.gov/sites/default/files/2019-12/rate-setting-methodology.pdf> [<https://perma.cc/5K7A-4DY8>] (describing acuity and geographic adjustment as factors that rates may incorporate).
58. OSTERMAN, *supra* note 50, at 106.



the mercy of the state.<sup>59</sup> Medicaid payments must compete “against other budgetary and political priorities,” and the care industry and its low-income workers may lose out to better-organized and better-funded elite interests.<sup>60</sup>

Once set, rates impact more than pay: they determine whether providers offer a given service at all. Moreover, the structure of payment (e.g., how some states break rates into fifteen-minute “Taylorized” intervals) often sets expectations for the pace of work.<sup>61</sup>

Reimbursement rates are often notoriously low, making it difficult for workers to make ends meet.<sup>62</sup> On average, Medicaid reimbursement rates average only about 66% of Medicare rates.<sup>63</sup> Even in a high-cost area like New York City, hourly reimbursement rates for home health aides hover between \$15 and \$19 per hour.<sup>64</sup> Moreover, those rates do not directly translate into workers’ wages: they must also cover agency overhead, administrative costs, and workers’ benefits (if workers receive benefits at all). States may also not increase payment rates sufficiently from year to year: from 2008 to 2018, average wages for direct-care workers increased only \$0.03, from \$12.24 to \$12.27.<sup>65</sup>

These Medicaid payment rates are especially significant because Medicaid is the dominant player in the home-care sector, covering 57% of costs for home- and community-based services.<sup>66</sup> Because of its size, “Medicaid sets the industry

59. Under the two predominant models, rates are set by adding or subtracting *X* percent from the previous year’s rates or “pure log-rolling negotiation with the governor and administration.” *Id.* Neither of these methods of deciding on rates gives workers a seat at the table. *See id.*; *see also id.* at 111 (“[H]ome care aides have few [political] allies.”).

60. Martha Hostetter & Sarah Klein, *Placing a Higher Value on Direct Care Workers*, COMMONWEALTH FUND (July 1, 2021), <https://www.commonwealthfund.org/publications/2021/jul/placing-higher-value-direct-care-workers> [<https://perma.cc/Y39C-7W9X>].

61. BORIS & KLEIN, *supra* note 32, at 9; *see, e.g.*, Matthew Moore, Iraida Orr & Megan Leopold, *Reimbursement Rates Under the Medicaid Home and Community Based Services Waivers*, KAN. LEGIS. RSCH. DEP’T (2021) <https://klrd.org/publications/briefing-book-2021/reimbursement-rates-under-the-medicaid-home-and-community-based-services-waivers> [<https://perma.cc/Z9M7-CGHC>].

62. 51% of home-care workers received public assistance in 2014. *See U.S. Home Care Workers: Key Facts*, *supra* note 9, at 6.

63. OSTERMAN, *supra* note 50, at 105.

64. *Certified Home Health Agency Schedule of Medicaid Rates*, N.Y. DEP’T OF HEALTH (May 2006), [https://www.health.ny.gov/facilities/long\\_term\\_care/reimbursement/chha/rates/schedule\\_of\\_medicaid\\_rates.htm](https://www.health.ny.gov/facilities/long_term_care/reimbursement/chha/rates/schedule_of_medicaid_rates.htm) [<https://perma.cc/9XK6-8EZE>].

65. *Caring for the Future: The Power and Potential of America’s Direct Care Workforce*, *supra* note 53, at 33.

66. *Invest in the American Care Infrastructure*, NAT’L DOMESTIC WORKERS ALL. (2021), [https://www.domesticworkers.org/wp-content/uploads/2021/06/WEAF\\_HCBSNational\\_v92.pdf](https://www.domesticworkers.org/wp-content/uploads/2021/06/WEAF_HCBSNational_v92.pdf) [<https://perma.cc/TZG3-AL8B>].

standard for direct care wages.”<sup>67</sup> Commentators have likened Medicaid to “an iron cage” constraining the possibilities for the home-care sector.<sup>68</sup> Reimbursement rates often create a ceiling on home-care workers’ wages.<sup>69</sup>

## 2. *Childcare*

Public funding for childcare and early learning is more fragmented, split among many federal and state funding streams. These programs include Head Start, the federal childcare and dependent-care tax credit, and most importantly, the Child Care and Development Fund (CCDF).<sup>70</sup> Temporary Assistance for Needy Families also provides time-limited assistance for needy families and transfers over \$1 billion per year to the CCDF.<sup>71</sup> The CCDF—like Medicaid in that it is a joint federal-state, means-tested program—provides about \$10 billion per year<sup>72</sup> in subsidies to secure childcare for qualifying children.<sup>73</sup> Despite its size, the CCDF falls short of meeting the needs of low-income families: only about one in seven eligible children receives funding, and many families that need support do not qualify.<sup>74</sup> The program aims to promote parental choice, allowing parents and guardians to choose from a number of options including childcare centers and home-based care.<sup>75</sup>

As with Medicaid, low state reimbursement rates under the CCDF constrain worker income. Under the CCDF, qualifying families choose between center-

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67. Hostetter & Klein, *supra* note 60 (quoting Kezia Scales, Director of Policy Research at PHI).

68. OSTERMAN, *supra* note 50, at 107.

69. See Kristin Easterling, *How a New Federal Minimum Wage Could Affect Home Health*, HOME CARE MAG. (Feb. 25, 2021), <https://www.homecaremag.com/march-2021/new-federal-minimum-wage-home-health> [<https://perma.cc/RT47-UW5N>].

70. See Off. of Child Care, *Federal and State Funding for Child Care and Early Learning*, ADMIN. FOR CHILD. & FAMS. 2-8 (2014), [https://childcareta.acf.hhs.gov/sites/default/files/public/federal\\_and\\_state\\_funding\\_for\\_child\\_care\\_and\\_early\\_learning\\_edited.pdf](https://childcareta.acf.hhs.gov/sites/default/files/public/federal_and_state_funding_for_child_care_and_early_learning_edited.pdf) [<https://perma.cc/NN6B-2KWF>]; Simon Workman, *The True Cost of High-Quality Child Care Across the United States*, CTR. FOR AM. PROGRESS (June 28, 2021), <https://www.americanprogress.org/article/true-cost-high-quality-child-care-across-united-states> [<https://perma.cc/R8L8-MPGL>].

71. *Child Care in State Economies: 2019 Update*, *supra* note 46, at 28.

72. Off. of Child Care, *CCDF Expenditures Overview for FY 2019 (All Appropriation Years)*, ADMIN. FOR CHILD. & FAMS. (Jan. 5, 2021), <https://www.acf.hhs.gov/occ/data/ccdf-expenditures-overview-fy-2019-all-appropriation-years> [<https://perma.cc/634M-RYSV>].

73. Workman, *supra* note 70.

74. *Id.*

75. See Child Care and Development Block Grant Act of 2014, Pub. L. No. 113-186, 128 Stat. 1971.



based care and home-based care.<sup>76</sup> The state sets provider staffing ratios as well as requirements for supervision, safety, credentialing, and more.<sup>77</sup> Providers then determine whether to accept subsidized children, and if they do, the state reimburses the provider at prespecified rates.<sup>78</sup> These rates often set the ceiling on the amount that providers can receive from the state.<sup>79</sup>

Federal requirements allow states broad discretion in setting reimbursement rates, providing only a recommendation that states set reimbursement rates at the seventy-fifth percentile of market rates to ensure that providers offer spots to subsidized families.<sup>80</sup> Most commonly, states ground rates in a market-rate survey—a study of the childcare prices that accounts for provider type, amount of care, age of child, and geographic area.<sup>81</sup> Some states have rate tiers based on provider quality, creating a “base” rate as well as higher rates.<sup>82</sup>

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76. See Off. of Child Care, *Characteristics of Families Served by the Child Care and Development Fund (CCDF) Based on Preliminary FY2019 Data*, ADMIN. FOR CHILD. & FAMS., <https://www.acf.hhs.gov/occ/fact-sheet/characteristics-families-served-child-care-and-development-fund-ccdf-based> [<https://perma.cc/574S-RQCR>] (“CCDF subsidy program emphasizes parental choice; therefore, children are cared for in a wide variety of settings. Nationally, in FY 2019: 75 percent of children receiving subsidies were cared for in a child care center; 20 percent were cared for in family child care homes; 2 percent were cared for in the child’s own home; 3 percent had invalid data or did not report any data.”).

77. *Child Care Licensing & Regulations*, CHILDCARE.GOV, <https://childcare.gov/consumer-education/child-care-licensing-and-regulations> [<https://perma.cc/4QXP-FB99>].

78. Erica Greenberg, Julia B. Isaacs, Teresa Derrick-Mills, Mollie Michie & Kathryn Stevens, *Are Higher Subsidy Payment Rates and Provider-Friendly Payment Policies Associated with Child Care Quality?*, URB. INST. 5 (2018), [https://www.urban.org/sites/default/files/publication/96681/are\\_higher\\_subsidy\\_payment\\_rates\\_and\\_provider-friendly\\_payment\\_policies\\_associated\\_with\\_child\\_care\\_quality\\_1.pdf](https://www.urban.org/sites/default/files/publication/96681/are_higher_subsidy_payment_rates_and_provider-friendly_payment_policies_associated_with_child_care_quality_1.pdf) [<https://perma.cc/U6XM-M64Q>].

79. Karen Schulman, *On the Precipice: State Child Care Assistance Policies 2020*, NAT’L WOMEN’S L. CTR. 12 (May 2021), <https://nwlc.org/wp-content/uploads/2021/05/NWLC-State-Child-Care-Assistance-Policies-2020.pdf> [<https://perma.cc/NX9K-NC97>]. While in many states these subsidies are capped at state-established maximum reimbursement rates, “in some states and localities, these rates may be higher if providers meet observed measures of program quality.” Greenberg et al., *supra* note 78.

80. *The Limitations of Using Market Rates for Setting Child Care Subsidy Rates*, BIPARTISAN POL’Y CTR. 4 (May 2020), <https://bipartisanpolicy.org/report/the-limitations-of-using-market-rates-for-setting-child-care-subsidy-rates> [<https://perma.cc/3QBM-4RWW>].

81. Kelly Dwyer, Victoria Tran & Sarah Minton, *Child Care Subsidies Under the CCDF Program: An Overview of Policy Differences Across States and Territories as of October 1, 2018*, ADMIN. FOR CHILD. & FAMS.: OFF. OF PLAN., RSCH. & EVALUATION 12-13 (Nov. 2019), [https://www.urban.org/sites/default/files/publication/101630/child\\_care\\_subsidies\\_under\\_the\\_ccdf\\_program\\_1.pdf](https://www.urban.org/sites/default/files/publication/101630/child_care_subsidies_under_the_ccdf_program_1.pdf) [<https://perma.cc/EZ3B-AT2Y>].

82. *Id.*

These rates are often low for two reasons. First, the rates suggested by market surveys are often low because they reflect what providers *actually charge* families, rather than the *cost* of providing quality care. Because many families in need of childcare cannot afford it, providers may take payments below cost and rely on grants or donations to make up the difference.<sup>83</sup> This phenomenon skews prices. Second, even assuming that market-rate surveys are reliable, states routinely set the actual rates at lower levels. In fact, only seven states set payment rates at the level the federal government recommends.<sup>84</sup> A recent study reported that “the true cost of licensed child care for an infant is 43 percent more than what providers can be reimbursed through the child care subsidy program.”<sup>85</sup>

Despite these limitations, both beneficiaries and providers are forced to rely on government childcare programs. Because the programs are means-tested, beneficiaries—by definition—cannot afford to pay for the services out of pocket.<sup>86</sup> Because the programs have such large market shares, providers cannot afford to pass on the business. Consequently, these programs’ policies set working conditions in the entire sector. To raise wages and improve working conditions, these programs—and the public spending they implicate—are the only game in town. Although care may occur in private settings, such as a home or center, or have private administrators, the care economy is public power all the way down.

### B. Public-Private Fissuring

Public programs like Medicaid and the CCDF are central in shaping wages and working conditions for care workers. But while the state entities responsible for administering these programs mold the care economy, they do not directly

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83. *The Limitations of Using Market Rates for Setting Child Care Subsidy Rates*, *supra* note 80, at 5-6.

84. Suzanne Murrin, *States’ Payment Rates Under the Child Care and Development Fund Program Could Limit Access to Child Care Providers*, U.S. DEP’T OF HEALTH & HUM. SERVS. 13 (Aug. 2019), <https://oig.hhs.gov/oei/reports/oei-03-15-00170.pdf> [<https://perma.cc/A2P3-UPCL>].

85. Workman, *supra* note 70.

86. The median annual cost of a home health aide in 2015 was \$45,760, a price out of reach for low-income people. Erica L. Reaves & MaryBeth Musumeci, *Medicaid and Long-Term Services and Supports: A Primer*, KAISER FAM. FOUND. 3 (Dec. 2015), <https://files.kff.org/attachment/report-medicare-and-long-term-services-and-supports-a-primer> [<https://perma.cc/6CWZ-WP2U>]. Childcare expenses amount to 35% of low-income families’ earnings. Rasheed Malik, *Working Families Are Spending Big Money on Child Care*, CTR. FOR AM. PROGRESS 3 (June 20, 2019), <https://americanprogress.org/wp-content/uploads/2019/06/Working-Families-SpendingBRIEF.pdf> [<https://perma.cc/W3S7-BWK6>].

provide care or employ care workers. This phenomenon is *public-private fissuring*—the separation of public entities that determine employment conditions from the private entities to which they have delegated the more direct administration of workers.<sup>87</sup> When those public entities are not recognized as joint employers, the result is that workers generally cannot bargain with the state agencies that set reimbursement rates and otherwise shape working conditions. Consequently, workers cannot avail themselves of one of the promises of labor law—collective bargaining.<sup>88</sup>

Fissuring is not inherently a problem for workers. Entities, including the state, may engage in contracting or subcontracting for a host of reasons. In the abstract, these activities may not be concerning—an entity might contract out a service because it lacks the capacity or specialization to effectively or efficiently provide the service itself. However, from the perspective of workers, fissuring becomes problematic when this conduct, intentional or not, inhibits the exercise of their labor rights. Whether fissuring has this effect depends primarily on the legal rules that create categories such as employee, employer, or joint employer.<sup>89</sup> For instance, legal rules around joint employment determine if fissured workers may bargain with, or hold liable for labor violations, a contracting entity.<sup>90</sup> In the case of care workers, public-private fissuring is a problem because of its interaction with existing labor law.

An intuitive solution to the problem of low wages for care workers is collective bargaining, a central promise of labor law. Labor law attempts to enable workers to achieve through collective strength what they could not achieve individually, including bargaining over contracts.<sup>91</sup> To peacefully resolve labor disputes, equalize bargaining power, raise wages, and inject democracy into the

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87. Cf. David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 *ECON. & LAB. RELS. REV.* 33, 34 (2011) (defining fissuring as a situation “where the lead firms that collectively determine the product market conditions in which wages and conditions are set have become separated from the actual employment of the workers who provide goods or services”).

88. For a classic justification of collective bargaining, see Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769, 1822-24 (1983).

89. “Defining more clearly—and broadly—the definition of joint employment would be another approach in this regard.” WEIL, *supra* note 26, at 207.

90. See *infra* Section II.A.

91. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984) (stating that labor law seeks to “equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment”).

workplace,<sup>92</sup> labor law channels workplace conflict through the procedure of collective bargaining.<sup>93</sup> If workers win a union, the employer must bargain with the union over essential terms and conditions of employment.<sup>94</sup> Without collective bargaining, workers “are subject to the unilateral determination by the employer of their wages, hours, seniority, tenure and other conditions of work.”<sup>95</sup>

Collective bargaining fulfills those policy objectives only to the extent that parties with control over terms and conditions of employment are at the bargaining table. Without such parties, the exercise may be fruitless: employees cannot raise their wages, for instance, if the party with control over wage rates is absent. The D.C. Circuit has explained that “the purpose of collective bargaining is to produce an agreement and not merely to engage in talk for the sake of going through the motions.”<sup>96</sup> If employers can avoid the duty to bargain, they may “insulate themselves from their legal responsibility to workers, while maintaining control of the workplace.”<sup>97</sup> As the organization of work has changed since Congress first created the contours of the labor-law regime in 1935, tactics used by employers may “foreclose[] collective bargaining even in situations where it could be productive.”<sup>98</sup>

Here, public-private fissuring—combined with labor-law doctrine—frustrates a central objective of labor law itself by depriving care workers of the ability to bargain with public entities that shape their wages and working conditions.

### 1. *The Concept of Public-Private Fissuring*

Public-private fissuring involves two levels of separation of care workers from the public entities that significantly control their working conditions. The first level of separation is akin to “classical” fissuring identified by David Weil and others—characterized by the separation of the dominant entity from “primary,” “direct” employment of the workers. However, public-private fissuring adds a second, additional level of separation—a jurisdictional divide. In contrast

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92. See National Labor Relations Act, 29 U.S.C. § 151 (2018).

93. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

94. *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962).

95. *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 404 (1947).

96. *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 775 (D.C. Cir. 1969) (quoting *Westinghouse Elec. Corp. v. NLRB*, 387 F.2d 542, 550 (4th Cir. 1967) (en banc)).

97. *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, 1619 (2015).

98. *Id.* at 1618.

to classical fissuring, public-private fissuring traverses two labor-law jurisdictions: federal, NLRB jurisdiction over the private entity and state labor-law jurisdiction over the public entity.

On the first level, public-private fissuring resembles classical fissuring. Originally coined by Weil to describe a phenomenon in the private sector, classical fissuring is the process by which lead employers “shed” direct employment (i.e., by outsourcing functions to contractors and subcontractors while maintaining substantial control over work outcomes).<sup>99</sup> As Weil describes, fissuring includes contracting, subcontracting, contingent employment, and misclassification schemes.<sup>100</sup> These processes enable employers to “have it both ways,” exercising some control while dodging legal and other responsibility to workers. This is possible because law often “focus[es] regulatory attention on the wrong parties.”<sup>101</sup> Importantly, because rights and duties under U.S. labor law attach to direct employers, fissuring can enable entities to avoid the duty to bargain and other responsibilities.<sup>102</sup> Fissuring can therefore make collective bargaining a “futile . . . experience”—unionized workers cannot bargain with the company that dictates their working conditions.<sup>103</sup> These tactics enable employers to avoid paying minimum wage and other benefits or avoid unionization, which in turn places downward pressure on wages and working conditions for many of the most vulnerable workers.<sup>104</sup>

Although Weil developed the concept to describe the private sector, the logic of public-private fissuring operates similarly.<sup>105</sup> Consider a typical example of classical fissuring: a group of janitors is employed by a small, “primary” employer, even though a larger entity—the client—substantially controls their working conditions and dictates where the janitors actually perform the work.<sup>106</sup> Similarly, under public-private fissuring, a care worker’s “primary” employer is a home-care agency or childcare center, while the state maintains extensive control over wages and working conditions. In this context, fissuring is the simultaneous exercise of, and denial of, control by the state, which structures the terms

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99. WEIL, *supra* note 26, at 4.

100. *Id.* at 10, 94-95; see Charlotte Garden, *The PRO Act and Workplace Fissuring*, CENTURY FOUND. (Nov. 25, 2019), <https://tcf.org/content/commentary/pro-act-workplace-fissuring> [<https://perma.cc/ULZ5-847T>].

101. WEIL, *supra* note 26, at 15.

102. Garden, *supra* note 100.

103. *Id.*

104. WEIL, *supra* note 26, at 19.

105. Winant, *supra* note 14, at 345.

106. Garden, *supra* note 100.

and conditions of work but denies responsibility for the workers. The state agencies that set reimbursement rates and create regulations avoid labor-law obligations to workers, including collective bargaining. Because of this exercise of state power, the care economy is “public work performed in private homes.”<sup>107</sup> However, the public nature of that work is obscured when “the government offloads its role as employer and leaves workers without job security or benefits.”<sup>108</sup>

But unlike classical fissuring, public-private fissuring involves the separation of workers from controlling entities at *two* levels, not just one. Distinct from classical fissuring, public-private fissuring involves the separation of workers from the public entity *across jurisdictions*. The home-care workers in the example above are not only separated from the state agency by a more traditionally “direct” employment relationship; they also exist in different jurisdictions, with the private employer under NLRB jurisdiction and the state entity entirely beyond the Board’s reach.

## 2. *The Importance of Jurisdiction to Public-Private Fissuring*

NLRA-covered care workers have a foot in two jurisdictions: the federal jurisdiction of the NLRB and the state-based jurisdiction of public labor law. Both the NLRB and the state labor board have jurisdiction over one, but not both, of the entities that control care workers’ work. Consequently, neither board can supervise bargaining with both employers. This jurisdictional divide aggravates the pernicious effects of public-private fissuring.

Jurisdiction is a critical issue for workers because it affects the substantive rights that they enjoy, including which parties they can haul to the bargaining table. U.S. labor law draws sharp distinctions between the private sector, which is under federal NLRA jurisdiction, and the public sector, which is left to the patchwork of state labor law.<sup>109</sup> In the private sector, the federal NLRA preempts much of the labor-law field.<sup>110</sup> However, for workers left out of the NLRA—most of whom are in the nonfederal public sector—states may create their own

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107. BORIS & KLEIN, *supra* note 32, at 10.

108. Patrice M. Mareschal & Patricia Ciorici, *Against All Odds: Achieving Collective Action Among Home Care Workers in Oregon*, 62 LAB. HIST. 334, 335 (2021).

109. See *infra* notes 113-121 and accompanying text.

110. See *infra* Section III.A.

labor-law regimes,<sup>111</sup> and often have.<sup>112</sup> Thus, whether a worker is “private” or “public” determines jurisdiction.

The NLRA and state labor law differ in the rights and procedures they afford workers. In many (primarily blue) states, NLRA-exempt public-sector workers enjoy more favorable rights than their private counterparts. These rights include binding card-check procedures to win a union,<sup>113</sup> larger bargaining units that

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111. See, e.g., *Greene v. Dayton*, 81 F. Supp. 3d 747, 751 (D. Minn. 2015) (concluding that the NLRA does not preempt state regulation of domestic workers), *aff'd*, 806 F.3d 1146 (8th Cir. 2015); *United Farm Workers v. Ariz. Agric. Emp. Rels. Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (concluding that the NLRA does not preempt state regulation of agricultural workers); *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 578 (D. Minn. 1977) (“[T]he court has concluded that state regulation [of agricultural laborers] has not been preempted . . .”).
112. Excluded from the original Wagner Act in 1935, public-sector workers did not begin to win collective-bargaining rights from local and state governments until the 1950s and 1960s. Jeffrey H. Keefe, *Laws Enabling Public-Sector Collective Bargaining Have Not Led to Excessive Public-Sector Pay*, ECON. POL'Y INST. (Oct. 16, 2015), <https://www.epi.org/publication/laws-enabling-public-sector-collective-bargaining-have-not-led-to-excessive-public-sector-pay> [<https://perma.cc/5P2U-M2PA>].
113. A number of states require public employers to recognize a union that has secured majority support through card check or similar procedures, rather than solely through a board-supervised election. See Rafael Gely & Timothy Chandler, *Understanding Card-Check Organizing: The Public Sector Experience* (Univ. of Mo. Sch. of L., Legal Studies Research Paper No. 2010-12), <http://ssrn.com/abstract=1625002> [<https://perma.cc/SH4V-TL7T>]. These states include New York, N.Y. COMP. CODES R. & REGS. tit. 4, § 201.8(c) (2022); Illinois, ILL. ADMIN. CODE tit. 80, § 1210.100(b) (2022); New Jersey, N.J. ADMIN. CODE § 19:11-1.2(a)(10) (2022); and Oregon, *Union Representation*, OR. EMP. RELS. BD., <https://www.oregon.gov/erb/Pages/Petition2.aspx> [<https://perma.cc/ZM7V-RXZZ>]. By contrast, under the NLRA, workers may win a union through card check only if the employer voluntarily chooses to recognize the cards. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596 (1969) (“[T]he Board’s election and certification procedures . . . [are] also, from the Board’s point of view, the preferred route.”).



may include a broader array of workers than the NLRA,<sup>114</sup> and binding mediation or arbitration at an impasse.<sup>115</sup> However, state labor law is a “crazy-quilt patchwork,”<sup>116</sup> and in other states NLRA-exempt public-sector workers have *less* favorable rights than NLRA-covered private-sector employees. While the NLRA offers a uniform set of rights,<sup>117</sup> a number of states allow no collective bargaining at all for public-sector workers,<sup>118</sup> and there is wide variation in union density between the nearly 80% public-sector union density of Connecticut and the 5% density of North Carolina.<sup>119</sup> Public-sector unions may not fund their activities through agency or fair-share fees, but private-sector unions may do so in some

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114. Bargaining unit size may cut in both directions; under the NLRA, unions have higher win percentages in smaller bargaining units. See Robert Combs, *Even After ‘Micro Unit’ Ruling, Unions Still Aim Small*, BLOOMBERG L. (Aug. 17, 2021, 5:01 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-even-after-micro-unit-ruling-unions-still-aim-small> [<https://perma.cc/PG7K-KFHD>] (citing data indicating that unions have more success in smaller NLRB elections). However, larger units may facilitate broader union density and higher collective-bargaining coverage. For instance, the Service Employees International Union (SEIU) gained 40,000 new members in a single election when childcare workers in California opted for a union in a statewide 2019 election. Thompson, *supra* note 19. Moreover, once workers win the union, “power in numbers” across an entire state may enhance bargaining power at the negotiating table. Kenneth G. Dau-Schmidt & Benjamin C. Ellis, *The Relative Bargaining Power of Employers and Unions in the Global Information Age: A Comparative Analysis of the United States and Japan*, 20 IND. INT’L & COMPAR. L. REV. 1, 4 (2010).
115. See, e.g., N.Y. CIV. SERV. LAW § 209-a (McKinney 2016). Under the NLRA, an employer can unilaterally implement its last offer once an impasse is reached. See *NLRB v. Katz*, 369 U.S. 736, 741 n.7 (1962).
116. John Lund & Cheryl L. Maranto, *Public Sector Labor Law: An Update*, in PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 21, 21 (Dale Belman, Morley Gunderson & Douglas Hyatt eds., 1996).
117. The NLRA provides a core of rights in Section 7, including the right to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective or other mutual aid and protection.” National Labor Relations Act, 29 U.S.C. § 157 (2018). Section 13 also guarantees the right to strike. *Id.* § 163.
118. Milla Sanes & John Schmitt, *Regulation of Public Sector Collective Bargaining in the States*, CTR. FOR ECON. & POL’Y RSCH. 4-5 (Mar. 2014), <http://cepr.net/documents/state-public-cb-2014-03.pdf> [<https://perma.cc/ZJ8Y-4Z8Y>].
119. Monique Morrissey, *Unions Can Reduce the Public-Sector Pay Gap*, ECON. POL’Y INST. 9 (June 17, 2021), <https://www.epi.org/publication/unions-public-sector-pay-gap> [<https://perma.cc/PE3J-QNQN>].



states under the NLRA.<sup>120</sup> The NLRA also guarantees the right to strike, which many states lack.<sup>121</sup>

Jurisdiction is consequential not only because it determines the rights that workers possess but also because it prevents workers from bringing both public and private employees to the bargaining table—the problem of public-private fissuring. The NLRB does not have jurisdiction over public entities, and state boards generally do not have jurisdiction over private entities.<sup>122</sup> To date, NLRB-covered care workers have been unable to bargain with public entities because the NLRB cannot compel such entities to the bargaining table. Workers whose wages and working conditions depend on both public and private entities have found themselves caught between both regimes and served fully by neither.

Public-private fissuring affects both NLRA-covered workers, who can bargain with private but not public employers, and NLRA-exempt workers, who do not have any federal rights to collectively bargain. However, it affects these two groups somewhat differently.

The first group of workers consists of home-care workers at private agencies, nursing-home workers, and childcare workers at centers, who fall within the ambit of the NLRA by virtue of their status as “employees” of private companies. The NLRB has generally asserted jurisdiction over these workers, even when the state determines at least some of their working conditions.<sup>123</sup>

120. Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857, 859 (2014). Unions may charge fees to nonunion members equal to their share of the costs associated with collective bargaining and contract enforcement. *Id.* The NLRA does, however, allow states to prohibit such fees, which twenty-eight states have done. National Labor Relations Act, 29 U.S.C. § 164(b) (2018); *Right to Work States*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., <https://www.nrtw.org/right-to-work-states> [<https://perma.cc/8ZE2-RWL5>]. The Supreme Court ruled that such fees were unconstitutional in the public sector. *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448 (2018).

121. National Labor Relations Act, 29 U.S.C. § 163; Sanes & Schmitt, *supra* note 118, at 8-9.

122. National Labor Relations Act, 29 U.S.C. § 152(2); *see infra* Section III.B.

123. The Board sometimes asserted jurisdiction in these situations even prior to the more expansive *Management Training* test. *See* *Mgmt. Training Corp.*, 317 N.L.R.B. 1355 (1995); *infra* Section III.B. In 1979, the Board asserted jurisdiction over a home-care agency that generated 90% of its revenue from a state contract. *Ankh Servs., Inc.*, 243 N.L.R.B. 478, 478-79 (1979). In 1989, the Board asserted jurisdiction over a nonprofit corporation providing home care to Medicaid recipients pursuant to a contract with a New York City agency. *Hum. Dev. Ass’n*, 293 N.L.R.B. 1228, 1231 (1989). Similarly, in 1976, the Board asserted jurisdiction over childcare centers that met a threshold of \$250,000 or more in gross annual income, citing the fact that the sector was “expanding markedly and undergoing substantial and rapid change.” *Salt & Pepper Nursery Sch. No. 2*, 222 N.L.R.B. 1295, 1296 (1976). More recently, the Board asserted jurisdiction over employees at a nonprofit that administers Head Start. *NLRB v. Young Women’s Christian Ass’n of Metro. St. Louis*, 192 F.3d 1111, 1113 (8th Cir. 1999). As a result, care workers at agencies and childcare centers can bargain with employers over the terms and conditions they control under Board jurisdiction.

However, bargaining with the private employer is not enough. Because workers covered by the NLRA cannot bargain with public entities under NLRB supervision, states have been able to exert control over care workers while avoiding labor-law responsibility for them—the hallmark of public-private fissuring. Unable to bargain with the public entities best positioned to improve their wages and working conditions, care workers continue to face adverse conditions, and the care crisis worsens.

A second category of workers, consisting of home-based childcare workers and IP home-care workers, is exempt from the NLRA.<sup>124</sup> As with NLRA-covered workers, courts have rejected arguments that these workers are public employees, at least in the absence of a specific statute or executive order on the issue.<sup>125</sup> But unlike NLRA-covered workers, NLRA-exempt workers also have no access

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124. Courts have generally concluded that these workers are either independent contractors, domestic workers, or employees of the individual in whose home they work—leaving them with no federal bargaining rights. Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375, 383-84 (2007). Courts have often determined that home-based childcare providers are independent contractors. Peggie R. Smith, *Laboring for Child Care: A Consideration of New Approaches to Represent Low-Income Workers*, 8 U. PA. J. LAB. & EMP. L. 583, 607 (2006). *But see* State *ex rel.* Dep't of Hum. Servs. v. State Lab. Rels. Bd., No. C.A. 04-1899, 2005 WL 3059297, at \*3 (R.I. Super. Ct. Nov. 14, 2005) (“[F]amily day care home providers are defined as commercial enterprises and are neither considered state employees nor independent contractors under Rhode Island statutory law.”). A California state court also held that home-care workers providing in-home supportive-services programs were not state employees and implied that they were independent contractors. *SEIU, Loc. 434 v. Cnty. of L.A.*, 225 Cal. App. 3d 761, 786 (Ct. App. 1990). If the workers are independent contractors, an added layer of difficulty arises for state regulation: regulatory schemes must deal not only with NLRA preemption but also with the Sherman Antitrust Act. Dmitri Iglitzin & Jennifer L. Robbins, *The City of Seattle's Ordinance Providing Collective Bargaining Rights to Independent Contractor for-Hire Drivers: An Analysis of the Major Legal Hurdles*, 38 BERKELEY J. EMP. & LAB. L. 49, 55-57 (2017). To address that challenge, some states have invoked the state-action doctrine to immunize childcare providers from antitrust liability. *See, e.g.*, 305 ILL. COMP. STAT. ANN. 5/9A-11 (West 2022) (“[T]he State intends that the State action exemption to application of federal and State antitrust laws be fully available to the extent that their activities are authorized by Public Act 94-320.”). Other courts, including the Supreme Court in *Harris v. Quinn*, have concluded that home-care workers fall under the NLRA's domestic-worker exclusion. 573 U.S. 616, 621, 649-50 (2014); *Greene v. Dayton*, 81 F. Supp. 3d 747, 750-51 (D. Minn. 2015), *aff'd*, 806 F.3d 1146 (8th Cir. 2015).

125. Prior to the ultimate legislative victory for home-care workers in California, a state court held that the County of Los Angeles was not a “dual” or “special” employer because it did not direct the home-care providers' activities. *SEIU, Loc. 434*, 225 Cal. App. 3d at 773 (“[T]he county does not exercise control over and direct the activities of the IHSS providers.”). Similarly, a Rhode Island state court reversed the state labor board and held that the providers were not state employees, even though the state controlled significant aspects of the work regime and determined compensation. *State ex rel. Dep't of Hum. Servs.*, 2005 WL 3059297, at \*1. The court reasoned that the state did not control employment because it did not make hiring or firing decisions. *Id.* at \*1.

to bargaining with private employers—meaning that they have no one to bargain with at all.

While exemption may seem bleak, NLRA-exempt status does provide a silver lining. On the one hand, NLRA-exempt workers lack guaranteed, minimum federal labor rights from the NLRA. But on the other hand, their work may be regulated more broadly and creatively by states because states need not fear preemption by the federal NLRA. NLRA-exempt workers start from a lower bargaining floor but may face fewer hurdles in obtaining the holy grail of access to public bargaining. As a federal court explained when upholding a Minnesota statute that recognized IP home-care providers as public employees against a preemption challenge,<sup>126</sup> “Because homecare providers are excluded from NLRA coverage . . . [NLRA] preemption does not apply.”<sup>127</sup> As a result, these workers have engaged in inspiring and creative organizing efforts.<sup>128</sup>

### 3. *The Historical Development of Public-Private Fissuring*

Public-private fissuring is not new, and its consequences have long hindered care workers. Indeed, this form of fissuring emerged as states contracted out care jobs, which had the effect of impeding collective bargaining. For example, home care as an industry grew directly out of state policy, but the state began delegating authority to private entities in the face of unionization. In New York City in the 1960s, home-care workers were public workers, organized by the American Federation of State, County and Municipal Employees (AFSCME) and the Social Service Employees Union.<sup>129</sup> However, the City developed an independent-contractor and agency model for home care because of unionization.<sup>130</sup> As scholars Eileen Boris and Jennifer Klein recount, “[d]espite footing the bill, organizing the service, and even determining appropriate hours of care, governments . . . obscure[d] their own responsibility as employers” through these tactics, which spread to California and Illinois.<sup>131</sup>

As home-care growth exploded in the 1980s, both state and private agencies denied labor-law responsibility for workers.<sup>132</sup> As one worker complained in 1985: “They say we are not state workers. We don’t know who we are.”<sup>133</sup> In

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126. MINN. STAT. § 179A.54 (2022).

127. *Greene*, 81 F. Supp. 3d at 750-51.

128. See *infra* Section I.C.

129. BORIS & KLEIN, *supra* note 32, at 109-10.

130. *Id.*

131. *Id.* at 133.

132. See *id.* at 158-59, 166-67.

133. *Id.* at 166.

Illinois and New York, contracts with government agencies rendered bargaining with private entities over wages meaningless, as the “invisible hand at the bargaining table belong[ed] to the city and state.”<sup>134</sup> In 1991, when the federal minimum wage rose, Illinois home-care workers employed by private vendors found that they could benefit only if the state also raised reimbursement rates.<sup>135</sup> In the 1990s, the state of California repeatedly denied responsibility for home-care workers.<sup>136</sup>

The paid childcare sector has a different pattern of historical development and thus a slightly different structure,<sup>137</sup> but it too shares key features of the fissured public-private welfare state. Today, childcare shares the fissured structure of home care, as public programs sustain private provision of care. When California Governor Arnold Schwarzenegger vetoed labor-law legislation that would have covered home-based childcare workers, he cited potential strain on the state budget, once again denying state responsibility for the workers on which the state depends.<sup>138</sup>

The hallmarks of fissuring are apparent in the care economy: union avoidance and low-wage work. Workers cannot bargain with the entities that effectively set their wages and working conditions. Moreover, federal regulations exempt federally-assisted contracts for services entered into by state governments—such as through Medicaid and the Child Care and Development Block Grant (CCDBG)—from the Service Contract Act, which ordinarily aims

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134. Sam Roberts, *Metro Matters; For Attendants, Poverty at Home and on the Job*, N.Y. TIMES (July 20, 1987), <https://www.nytimes.com/1987/07/20/nyregion/metro-matters-for-attendants-poverty-at-home-and-on-the-job.html> [<https://perma.cc/BZ2S-6B9Q>].

135. Eileen Boris & Jennifer Klein, *Organizing the Carework Economy: When the Private Becomes Public*, in *RETHINKING U.S. LABOR HISTORY: ESSAYS ON THE WORKING-CLASS EXPERIENCE*, 1756-2009, at 192, 205 (Donna T. Haverty-Stacke & Daniel J. Walkowitz eds., 2010).

136. Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Work Force*, 52 WASH. & LEE L. REV. 739, 742 (1995).

137. Long seen as “women’s work” to be performed in the “private sphere” of the home, childcare remained mostly private, as efforts in the immediate post-World War II period and again in 1971 to create federally funded childcare programs failed. Abby J. Cohen, *A Brief History of Federal Financing for Child Care in the United States*, 6 FUTURE CHILD. 26-32 (1996). As married women’s participation in the paid labor force increased from around 20% in 1946 to nearly 60% by 1990, families increasingly sought paid childcare. *Id.* at 34, 36. Several small funding streams predated the CCDF, which Congress created in the early 1990s, well after the turn to privatization of home care in the 1970s and 1980s. *Id.* at 32-34. Even today, Medicaid dwarfs spending on childcare programs, both in absolute terms and as a percentage of its sector.

138. David L. Gregory, *Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers*, 35 FORDHAM URB. L.J. 277, 281-82 (2008).

to ensure fair wages for government contractors.<sup>139</sup> Accordingly, the prevailing-wage standards that protect other contractors do not apply to these care workers. As a result, while some care workers outside the coverage of the NLRA have managed to raise their wages through bargaining, fissured, NLRA-covered workers have failed. Public-private fissuring leaves workers in limbo, caught between the state—which shapes their working conditions—and private entities, which may more proximately direct and administer their work. The structure of labor law enables this process.

### C. *Worker Organizing to Overcome Fissuring*

As discussed in Section I.B.2, public-private fissuring affects both home-based workers, who are exempt from the NLRA, and NLRA-covered workers whose “primary” employer is a private entity. Intuitively, the protection of the NLRA might be thought preferable to exemption from the Act. However, freedom from the uniform protections of the NLRA has afforded home-based workers leeway to win victories at the state level. These home-based workers have pioneered a strategy relevant to NLRA-covered workers: by bargaining with the state, these workers can overcome one of the consequences of fissuring.

Indeed, because of this relative freedom, NLRA-exempt workers have provided the most successful examples of strategies to overcome public-private fissuring. By organizing and engaging in litigation and advocacy, these care workers have created state-level regimes that allow NLRA-exempt workers to bargain with states. Working outside of traditional labor-law categories, NLRA-exempt care workers have won state acknowledgement of an implicit joint-employer relationship.

Through a combination of ballot initiative, executive action, and legislation, at least eleven states have recognized their roles as employers and enabled home-care and childcare workers to organize and bargain collectively.<sup>140</sup> SEIU pioneered this approach with NLRA-exempt home-care workers in California in the 1980s and 1990s.<sup>141</sup> SEIU first argued in court that home-care workers were

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139. 29 C.F.R. § 4.134 (2020). The Service Contract Act requires contractors and subcontractors to pay service employees working on federal projects costing over \$2,500 at least the prevailing wage, as determined by the Secretary of Labor. 41 U.S.C. §§ 6701-6707 (2018).

140. These states include Connecticut, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, and Washington. See Ctr. for the Study of Child Care Emp., Bellwether Educ. Partners & Nat’l Inst. for Early Educ. Rsch., *2020 Report: 50-State Early Educator Policy and Practice Research*, EARLY EDUCATOR INV. COLLABORATIVE 24 (2020), [https://earlyedcollaborative.org/assets/2020/12/EEIC\\_Report\\_50StateEarlyEducatorPolicy\\_2020.pdf](https://earlyedcollaborative.org/assets/2020/12/EEIC_Report_50StateEarlyEducatorPolicy_2020.pdf) [<https://perma.cc/SW6Q-RA2J>].

141. See Smith, *supra* note 19, at 1405-06.

employees of the county of Los Angeles; after the court ruled against that argument, SEIU had success with the California legislature, which passed a law that authorized and later required each county to recognize its role as an employer and allow workers to collectively bargain.<sup>142</sup> In 1999, 74,000 home-care workers in Los Angeles chose to join SEIU.<sup>143</sup> Oregon created a statewide home-care commission in 2000; Washington followed suit in 2001.<sup>144</sup>

That winning model then spread to NLRA-exempt childcare workers. In 2003, home-based childcare workers won a similar victory in Illinois, where Governor Rod Blagojevich signed an executive order allowing subsidized family childcare and family, friend, and neighbor care providers to organize. The order also required the state to collectively bargain with these 49,000 workers.<sup>145</sup> SEIU won the right to represent the workers, and later that year, the state passed legislation that made them public employees for the purposes of collective bargaining.<sup>146</sup> As this model has spread, over a dozen other states now authorize home-based childcare workers to organize and negotiate with the state, although the specifics vary by context.<sup>147</sup> Most recently, in 2019, after nearly two decades of gubernatorial vetoes, California authorized collective bargaining for childcare workers. The next year, in 2020, the union—Child Care Providers United, a partnership between SEIU and AFSCME locals in California—won an enormous victory, gaining 45,000 members.<sup>148</sup>

Under these schemes and consistent with a joint-employer approach, the state has divided responsibility for determining terms and conditions of employment. The state bargains over wages and benefits, and it delegates to the consumers of the services decisions regarding hiring, firing, and supervision of care

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142. *See id.*; Sachs, *supra* note 124, at 385-87.

143. Sachs, *supra* note 124, at 387; Smith, *supra* note 19, at 1406.

144. Smith, *supra* note 19, at 1406-07.

145. *Id.* at 1411.

146. Deborah Chalfie, Helen Blank & Joan Entmacher, *Getting Organized: Unionizing Home-Based Child Care Providers*, NAT'L WOMEN'S L. CTR. 13 (2007), <https://nwlc.org/wp-content/uploads/2015/08/GettingOrganized2007.pdf> [<https://perma.cc/383P-RDKU>].

147. Blank et al., *supra* note 19, at 1.

148. Hamilton Nolan, *Child Care Workers Are Now a Mighty Force with a Huge New Union. It Only Took 17 Years.*, IN THESE TIMES (July 28, 2020), <https://inthesetimes.com/article/child-care-workers-union-california-seiu-afscme> [<https://perma.cc/BE94-24DQ>].



workers.<sup>149</sup> A series of post-*Harris v. Quinn* cases challenging exclusive representation on First Amendment grounds have failed to dislodge the basic statutory or regulatory schemes.<sup>150</sup>

Thus far, states have not recognized the same relationship with agency- or center-based care workers, despite extensive state involvement in the conditions of work. Instead, these workers have had to pursue alternative means to secure increased funding. For instance, SEIU lobbied the Governor of Washington to establish the Early Childhood Education Career Development Ladder, a statewide program that provided funding to childcare centers in exchange for an agreement to create a progressive wage ladder.<sup>151</sup> In Oregon, in an act of solidarity, home-based childcare workers pushed for higher reimbursement rates for center-based workers outside their immediate union membership; although the union contract did not cover childcare centers, the state increased reimbursement rates for centers to 100% of the rate recommended by the federal government (equal to the seventy-fifth percentile of market rates).<sup>152</sup>

These measures, however, are second-best to formal procedures of bargaining, where workers can make direct demands concerning their working conditions to the state rather than relying on indirect measures. Despite (or perhaps because of) their greater labor protections under the NLRA, NLRA-covered care workers have worse access to bargaining with public entities compared with many of their NLRA-exempt peers. For instance, in California, a childcare worker at a childcare center cannot bargain with the state, while a home-based childcare worker can.<sup>153</sup> Public-private fissuring separates care workers from the regulatory bodies that structure their wages, hours, and conditions of work.

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149. Sachs, *supra* note 124, at 386.

150. See, e.g., *Bierman v. Dayton*, 227 F. Supp. 3d 1022, 1024 (D. Minn. 2017) (homecare providers), *aff'd*, 900 F.3d 570, 572 (8th Cir. 2018); *Jarvis v. Cuomo*, 660 F. App'x 72, 74-75 (2d Cir. 2016) (childcare providers); *Mentele v. Inslee*, No. C15-5134, 2016 WL 3017713, at \*1, \*4 (W.D. Wash. May 26, 2016) (childcare workers), *aff'd*, 916 F.3d 783, 784 (9th Cir. 2019); *D'Agostino v. Baker*, 812 F.3d 240, 242, 243-44 (1st Cir. 2016) (childcare providers); *Hill v. SEIU*, No. 15-CV-10175, 2016 WL 2755472, at \*1, \*3 (N.D. Ill. May 12, 2016) (personal assistants and childcare providers).

151. Smith, *supra* note 124, at 613.

152. Helen Blank, Nancy Duff Campbell & Joan Entmacher, *Getting Organized: Unionizing Home-Based Child Care Providers, 2010 Update*, NAT'L WOMEN'S L. CTR. 12-13 (June 2010), <https://nwlc.org/wp-content/uploads/2015/10/gettingorganizedupdate2010.pdf> [<https://perma.cc/4WYY-8AWG>].

153. CAL. WELF. & INST. CODE §§ 10420.5, 10421 (enabling “family child care providers” to form bargaining units, and defining these providers as “individual[s]” who operate “family child care home[s]” or “provide[] early care and education in their own home or the home of the child”).

Then, because these workers are subject to the NLRA by virtue of their “primary” employer, they are guaranteed only the NLRA’s bundle of rights. However, while the NLRA ensures uniform, federal rights across states for covered workers to bargain with *private* entities, it does not enable them to bargain with *public* entities. As a result, collective bargaining can only be so meaningful.

Fortunately, states have greater latitude to recognize an implicit joint-employer relationship and address the problem of public-private fissuring than previously imagined. Subsequent Parts of this Note pursue this solution as a way for NLRA-covered workers to gain the same access to public bargaining that many NLRA-exempt workers currently enjoy. The next Part begins by sketching the joint-employer standard, while Parts III and IV address barriers and objections to its implementation.

## II. THE JOINT-EMPLOYER STANDARD

While this Note introduces the concept of *public-private* fissuring, the concept of fissuring in general is not new. In the private sector, scholars and reformers have identified fissuring as a pervasive challenge and have proposed solutions to address it. This Note draws on these proposals and suggests they are adaptable to the public-private context: as the problem of fissuring in the private sector has prompted consideration of a joint-employer standard with more teeth, so too should the problem of public-private fissuring prompt a similar joint-employer standard. However, unlike the purely private joint-employer standard that has existed to date exclusively under the NLRB, this Note’s proposed joint-employer relationship would entail the jurisdiction of *both* the NLRB and state labor boards.

In the private sector, a more robust concept of the “joint employer,” embodied by the NLRB’s *Browning-Ferris* standard, has emerged as one of the central solutions to fissuring.<sup>154</sup> As the literature has identified, the concept of joint employment addresses the fragmentation and disintegration of employment structures that fissuring enables by imposing employer obligations on multiple entities.<sup>155</sup> Characterizing powerful entities that control employment terms and conditions as joint employers enables fissured workers to bargain with those entities.

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154. See, e.g., Charles Wynn-Evans, *A Solution to Fissuring? Revisiting the Concept of the Joint Employer*, 50 INDUS. L.J. 70, 71 (2021); Mark Barenberg, *Widening the Scope of Worker Organizing: Legal Reforms to Facilitate Multi-Employer Organizing, Bargaining, and Striking*, ROOSEVELT INST. 15 (Oct. 7, 2015), <https://rooseveltinstitute.org/wp-content/uploads/2015/10/RI-Widening-Scope-Worker-Organizing-201510-2.pdf> [<https://perma.cc/N8HX-CYB3>].

155. Wynn-Evans, *supra* note 154, at 97.



However, the more expansive NLRB joint-employer standard exemplified by *Browning-Ferris* does not, in and of itself, address public-private fissuring. Because *Browning-Ferris* is an NLRB standard, it applies only to entities under NLRB jurisdiction. In public-private fissuring, the public entities that structure the care economy escape the grasp of *Browning-Ferris* because they do not fall within NLRB jurisdiction.

While the NLRB cannot therefore solve public-private fissuring on its own, the Board's expansive joint-employer standard provides an appropriate model for how *states* should address public-private fissuring. While the literature has focused on the joint-employer concept in the private sector, this Note argues that a similar joint-employer construct can address public-private fissuring. This proposal for joint employment is unique because one of the joint employers would be private, under the NLRB, while the other would be public, governed by state labor law.

This Part provides an overview of the joint-employer concept as typically employed in the private sector and then turns to its applicability in employment contexts involving both public and private entities. It draws on two lines of precedent invoking the joint-employer concept. First and foremost, the joint-employer standard has been viewed as a solution to fissuring purely in the private sector, as illuminated by David Weil and others.<sup>156</sup> The NLRB gave this idea legal form in *Browning-Ferris*, which creates a robust private-sector joint-employer standard. Second, and less prominently, joint employment has sometimes been invoked as a description of the state laws that have recognized NLRA-exempt workers' right to bargain with the state, as discussed in Section I.C.

Missing from this discussion, however, is the possibility of a joint-employer solution for *NLRA-covered care workers*, which would enable simultaneous bargaining with both public and private employers. This Part sketches the two existing applications of the joint-employer standard before filling in the gap by outlining a joint-employer standard for NLRA-covered workers.

Implementation of such a standard should start with state legislatures or labor boards recognizing their implicit joint-employer relationship with workers in the care economy. In doing so, they should recognize the right of care workers to collectively bargain with the state over key issues that the state controls, such as reimbursement rates and pass-throughs. Concurrently, a state court or board could petition the NLRB to provide an advisory opinion clarifying that Board jurisdiction does not destroy states' capacity to oversee bargaining between the same group of employees and public entities.<sup>157</sup>

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156. WEIL, *supra* note 26, at 207.

157. See *infra* Section III.C.

### A. Existing Joint-Employer Relationships

#### 1. The Joint-Employer Standard for NLRA-Covered Workers in the Private Sector

Under the NLRA in the private sector, the concept of joint employment has served as one response to the problem of fissuring. In essence, a robust joint-employer standard imposes labor- and employment-law duties on multiple entities that retain control over employment terms and conditions. The joint-employer standard is important because, for basic labor-law questions of bargaining and the exercise of other rights, there is “no more important issue than correctly identifying who is the employer.”<sup>158</sup>

The joint-employer relationship is, in the words of the California Public Employment Relations Board (PERB), “a legal construct for collective bargaining purposes.”<sup>159</sup> It recognizes that because multiple entities may control or codetermine employment terms, meaningful bargaining may require the participation of multiple entities in bargaining. This bargaining can be worthwhile for employees even if, as the D.C. Circuit explained, any one employer is “subject to rather substantial handicaps.”<sup>160</sup> While collective bargaining should not require parties to engage in “a mere ‘exercise in futility,’”<sup>161</sup> the employer does not need to control the full range of bargaining issues. Even if bargaining with one entity does not include the entire range of economic issues, it is not meaningless.<sup>162</sup> Accordingly, joint employment should “encompass the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible.”<sup>163</sup>

Drawing on the common law, the Supreme Court has recognized joint employment under the NLRA for decades.<sup>164</sup> However, over the past decade, the

158. *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156, at 2 (Dec. 14, 2017).

159. *SEIU, Loc. 721*, 43 P.E.R.C. ¶ 87 (Cal. PERB 2018).

160. *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 779 (D.C. Cir. 1969); see also *Jefferson Cnty. Cmty. Ctr. for Developmental Disabilities, Inc. v. NLRB*, 732 F.2d 122, 127 (10th Cir. 1984) (“While . . . the [employer’s] extensive dealings with government agencies impeded somewhat its ability to bargain with a union, ‘no employer enjoys total freedom in this regard.’” (quoting *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 904 (5th Cir. 1978))).

161. *Rural Fire Prot. Co.*, 216 N.L.R.B. 584, 585-86 (1975) (quoting *Herbert Harvey, Inc.*, 424 F.2d at 775).

162. *Pikeville United Methodist Hosp. of Ky., Inc. v. United Steelworkers*, 109 F.3d 1146, 1153 (6th Cir. 1997) (quoting *Mgmt. Training Corp.*, 317 N.L.R.B. 1355, 1357 (1995)), judgment entered *sub nom.* *Pikeville United Methodist Hosp. of Ky., Inc. v. NLRB*, No. 95-6467, 1997 WL 253285 (6th Cir. May 14, 1997).

163. *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, 1611 (2015).

164. *Boire v. Greyhound Corp.*, 376 U.S. 473, 475-76 (1964).

issue has become contentious at the Board. In 2015, the Obama Board clarified its joint-employer test in *Browning-Ferris*,<sup>165</sup> reversing Reagan-era Board precedents *TLI, Inc.*<sup>166</sup> and *Laerco Transportation & Warehouse*<sup>167</sup> on the grounds that they imposed additional requirements on the leading Third Circuit precedent, *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*<sup>168</sup> The Trump Board tried to reverse that standard through adjudication in 2017,<sup>169</sup> but, after an ethics issue, ultimately changed it through rulemaking, which took effect in April 2020.<sup>170</sup> In December 2021, the Biden Board announced that it will engage in rulemaking on the joint-employer issue.<sup>171</sup>

For both Boards, control over one or more terms of employment could trigger joint-employer obligations.<sup>172</sup> These terms of employment include setting wages and hours; hiring, firing, disciplining, supervising, and directing employees; dictating the number of workers; controlling scheduling, seniority, and overtime; assigning work; and determining the manner and method of work.<sup>173</sup>

However, the Obama and Trump Boards disagreed on several points related to the extent of control that could prompt joint-employer obligations. These disagreements included whether the entity must exercise control or whether that authority may be “reserved,” whether control over essential terms and conditions must be “direct and immediate,” and whether that control can be “limited and

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165. *Browning-Ferris*, 362 N.L.R.B. at 1613-14.

166. 271 N.L.R.B. 798 (1984), *aff'd sub nom.* Gen. Teamsters Loc. Union No. 326 v. NLRB, 772 F.2d 894 (3d Cir. 1985).

167. 269 N.L.R.B. 324 (1984).

168. 691 F.2d 1117, 1124 (3d Cir. 1982).

169. *Hy-Brand Indus. Contractors, Ltd.*, 365 N.L.R.B. No. 156 (Dec. 14, 2017).

170. Braden Campbell, *Google Joint Employer Case Spotlights Shifting NLRB Test*, LAW360 (Jan. 7, 2022, 8:46 PM EST), <https://www.law360.com/employment-authority/labor/articles/1453551/google-joint-employer-case-spotlights-shifting-nlr-test> [<https://perma.cc/Z8SW-QNKH>]. “As a result of the IG’s findings, the Trump board was forced to rescind its decision in *Hy-Brand*.” Celine McNicholas, Margaret Poydock & Lynn Rhinehart, *Unprecedented: The Trump NLRB’s Attack on Workers’ Rights*, ECON. POL’Y INST. 5 (Oct. 16, 2019), <https://www.epi.org/publication/unprecedented-the-trump-nlrbs-attack-on-workers-rights> [<https://perma.cc/5TNZ-CSUN>].

171. Marc Theodore, Joshua Fox & Timothy Kelly, *NLRB Plans to Revise Joint-Employer Standard Once Again*, PROSKAUER LAB. RELS. UPDATE (Dec. 15, 2021), <https://www.laborrelation-update.com/uncategorized/nlr-plans-to-revise-joint-employer-standard-once-again> [<https://perma.cc/6ELV-ZQXM>].

172. *Hy-Brand*, 365 N.L.R.B. at 4 (“To be specific, we understand the common law standard as codified by the Act to require direct control over one or more essential terms and conditions of employment to constitute an entity the joint employer of another entity’s employees.”).

173. *Id.* at 20.

routine.”<sup>174</sup> In contrast to the Trump Board, the Obama Board concluded that evidence of indirect or reserved control over a term or condition of employment could confer joint-employer bargaining obligations.

To illustrate the difference in these standards, consider several stylized facts at issue in *Browning-Ferris*. In that case, Browning-Ferris Industries of California, Inc. (BFI), the lead firm and an operator of a recycling facility, contracted with Leadpoint, the supplier firm, “to provide the workers who manually sort the material on the streams (sorters), clean the screens on the sorting equipment and clear jams (screen cleaners), and clean the facility (housekeepers).”<sup>175</sup> Under the contractual arrangement, BFI did not participate in the day-to-day hiring process, but did retain the right to require Leadpoint employees to pass its own standard selection procedures and tests, require that applicants pass drug tests, and proscribe the hiring of workers deemed by BFI to be ineligible for rehire.<sup>176</sup> Moreover, BFI prevented Leadpoint from paying its employees more than BFI employees, BFI reimbursed Leadpoint for labor costs plus a percentage markup, and BFI had to approve Leadpoint employee pay increases. Here, BFI had either indirect control or had reserved (but not exercised) control over employment terms related to hiring, firing, discipline, and wages.<sup>177</sup> For the Obama Board, these factors were sufficient to constitute a joint employer; for the Trump Board, because the control at issue is either indirect or reserved, BFI was not a joint employer.

Because the current NLRB is engaged in creating a new joint-employer regulation that will likely resemble *Browning-Ferris*, I will primarily draw on the 2015 *Browning-Ferris* standard.<sup>178</sup>

174. *Id.* at 9-10.

175. *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, 1600-01 (2015).

176. *Id.* at 1616.

177. *Id.* at 1616-18.

178. To be clear, the *Browning-Ferris* joint-employer standard is the NLRB’s standard, which applies only to entities falling under its jurisdiction. Consequently, it would not apply to the public entities responsible for administering Medicaid and childcare programs, at least not under the auspices of the NLRB. A full treatment of the standard is outside the scope of this Note, but it is both more persuasive and likely to resemble the Biden Board’s ultimate rule. See Robert Iafolla, *NLRB’s ‘Joint Employer’ Standard Set for Regulatory Revamp (1)*, BLOOMBERG L. (Dec. 10, 2021, 5:12 PM), <https://news.bloomberglaw.com/daily-labor-report/nlrbs-joint-employer-standard-set-for-regulatory-revamp> [https://perma.cc/J6UT-HD7P]. Analysts predict that the new rule may resemble, in the words of a management-side labor-law firm, “a significantly revised rule that will be as unforgiving to employers, if not more so, than *Browning-Ferris I*.” *Fourth Time’s the Charm? NLRB Now Set to Change Joint-Employer Standard After Federal Appeals Court Punt Case Back to the Board*, FISHER PHILLIPS (Aug. 10, 2022), <https://www.fisherphillips.com/news-insights/nlrbs-joint-employer-standard-after-federal-appeals-court.html> [https://perma.cc/L2QH-7ACD].

The *Browning-Ferris* standard offers a tool for combatting the deleterious effects of fissuring. Recall that in classical fissuring, a group of contractors or subcontractors cannot bargain with the larger, more powerful entity that may set their contractual terms and even provide their worksite. As Andrew Strom has explained, “[t]he joint employer concept allows workers in these fissured workplaces to bargain with the entities that actually have the power to increase their wages or to provide them with full-time work rather than limiting bargaining to the entity that appears on the worker’s paycheck.”<sup>179</sup>

This approach to bargaining is necessary given modern economic practices. In *Browning-Ferris*, the Board recognized that its “joint-employment jurisprudence [was] increasingly out of step with changing economic circumstances,” such as the rise of the fissured workplace.<sup>180</sup> The disconnect between the previous joint-employer standard and economic reality “undermines the core protections of the Act for the employees impacted by these economic changes,” including the “[f]ederal policy of ‘encouraging the practice and procedure of collective bargaining.’”<sup>181</sup>

State legislatures and labor boards can respond similarly. Like private-sector fissuring, the growth of the care economy represents a set of changing economic circumstances that have undermined the policies and objectives of labor law and collective bargaining.<sup>182</sup> Under a *Browning-Ferris*-like analysis, which considers the exercise of or right to control, whether direct or indirect, as probative of joint-employer status,<sup>183</sup> the state entities that set reimbursement rates and regulate care work resemble a joint employer. Accordingly, states should ensure that workers can bargain with these entities. Drawing on NLRB precedent for guidance on difficult labor-law issues is not uncommon for states—for example, states have drawn on the NLRB’s (shifting) approaches to jurisdictional issues.<sup>184</sup> Importing *Browning-Ferris*’s principles to state labor law would begin to address the challenges associated with public-private fissuring.

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179. Andrew Strom, *The NLRB’s Joint Employer Rule Fails Its Own Test*, ONLABOR (Sept. 17, 2018), <https://onlabor.org/the-nlrbs-joint-employer-rule-fails-its-own-test> [https://perma.cc/6VQH-Y3SY].

180. *Browning-Ferris*, 362 N.L.R.B. at 1599.

181. *Id.* at 1600 (quoting 29 U.S.C. § 151).

182. *See supra* Part I.

183. The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect. *Browning-Ferris*, 362 N.L.R.B. at 1614.

184. *See infra* Section III.B.

## 2. *The Joint-Employer Standard for NLRA-Exempt Care Workers*

Moreover, joint employment has proved a useful concept for some workers entirely outside the NLRB's jurisdiction, notably for NLRA-exempt care workers such as the IP home-care workers in *Harris v. Quinn*. While most of the discussion about joint employment has focused on the standard under the private-sector NLRA, a number of commentators and judges have characterized the collective-bargaining laws covering NLRA-exempt home-care and childcare workers as recognizing a joint-employer relationship. The opinions by the Seventh Circuit and the Supreme Court in *Harris v. Quinn* provide an entry point to this discussion.

The Seventh Circuit characterized the relationship between home-care personal assistants, the state of Illinois, and home-care patients as one of joint employment.<sup>185</sup> Citing NLRA cases, the court explained that “more than one person or company may be an individual’s employer” and that it was in fact “not an uncommon situation for a single individual to find himself with more than one employer for the same job.”<sup>186</sup> The court concluded that “both the home-care patient and the State may be employers if they each exercise significant control over the personal assistants.”<sup>187</sup> Because the state has “significant control over virtually every aspect of a personal assistant’s job” – including setting salaries and work hours, paying for training and wages, setting qualifications for the position, and approving a mandatory service plan – the court had “no difficulty concluding that the State employs personal assistants.”<sup>188</sup> As the state of Illinois was a joint employer, it could charge fair-share fees.<sup>189</sup>

At the Supreme Court, Justice Alito’s majority opinion drew a distinction between “full-fledged state employees” and the home-care workers who were “quasi”-employed by both the state and their patients.<sup>190</sup> Dissenting, Justice Kagan explained that in contrast to Alito’s label, “employment law has a real name – joint employees – for workers subject at once to the authority of two or more employers.”<sup>191</sup> Under this scheme, she explained, Illinois “could have asserted comprehensive control over all the caregivers’ activities” but instead chose

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185. *Harris v. Quinn*, 656 F.3d 692, 698 (7th Cir. 2011), *aff’d in part, rev’d in part, and remanded*, 573 U.S. 616 (2014).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 701.

190. *Harris v. Quinn*, 573 U.S. 616, 640, 646 (2014).

191. *Id.* at 660 n.1 (Kagan, J., dissenting).

to share authority with customers.<sup>192</sup> This division of labor between the individual home-care recipient and the state constituted a joint-employer relationship – and as Kagan took pains to explain, there was “no warrant for holding that joint public employees are not real ones.”<sup>193</sup> “A joint employer remains an employer.”<sup>194</sup>

The Seventh Circuit and Justice Kagan were correct in identifying this relationship as one of joint employment: the state chose to divide its authority and share it with private parties. In this instance, because home-care workers directly providing services to private individuals are not covered by the NLRA, bargaining in Illinois takes place with only one entity, the state. Yet a similar analysis applies to the state and a private employer, with each controlling significant aspects of NLRA-covered care workers’ work. The next Section takes up this issue.

### *B. The Joint-Employer Relationship for NLRA-Covered Care Workers*

This Part has described two extant joint-employer standards, outlined in the first two rows of the table below. The first, purely in the private sector and exclusively under NLRB supervision, is the *Browning-Ferris*, NLRA standard. The second, covering NLRA-exempt workers such as those in *Harris v. Quinn*, is a creature of state law.

This Note proposes a third joint-employer relationship for NLRA-covered care workers, described in the third row of the table below. In contrast to the lively debate around joint-employer relationships involving two or more private entities, the law and commentary on joint-employer relationships with a public entity and a private entity is much less developed. However, as described in Part I, states set reimbursement rates or subsidies that largely determine workers’ wages and benefits, as well as a number of other regulations that directly affect these workers.

Unlike the existing joint-employer standards, this proposal would traverse *both* federal and state law. Care workers would bargain with their agency or center under NLRB jurisdiction *and* with a public entity under state labor-board jurisdiction. While a Washington state bill that did not become law proposed something similar,<sup>195</sup> no state has yet authorized this bargaining relationship.

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192. *Id.* at 660.

193. *Id.* at 664.

194. *Id.* at 668.

195. S. 6522, 60th Leg., Reg. Sess. §§ 1, 3(15)(a) (Wash. 2008) <https://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Senate%20Bills/6522-S2.pdf> [<https://perma.cc/3RUC-BEW7>]; H.B. 2449, 2008 Gen. Assemb., Reg. Sess. (Wash. 2008), <https://apps.leg.wa.gov/billsummary/?BillNumber=2449&Year=2007> [<https://perma.cc/K2VM-G4V6>].



SCENARIO	JURISDICTION	STANDARD	DESCRIPTION
<b>1. PURELY PRIVATE-SECTOR WORKERS</b>	NLRB	Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. 1599 (2015).	Workers bargain with two private entities, both of which fall under the NLRB.
<b>2. NLRA-EXEMPT CARE WORKERS</b>	State labor board	IP home-care workers and home-based childcare workers. <i>See, e.g., Harris v. Quinn</i> , 573 U.S. 616 (2014).	The home-care patient and the state are joint employers, <sup>196</sup> but workers only bargain with the state.
<b>3. NLRA-COVERED CARE WORKERS</b>	Both NLRB and state labor board	This Note's proposal	Workers bargain with: 1) the private entity (e.g., childcare center or home-care agency); and 2) the public entity under state labor law.

This Section sketches the outlines of this Note's proposal, which will be further elucidated and defended in Parts III and IV. First, this Section considers whether states should pursue this proposal through legislation or adjudication. Second, it delineates the key elements of the proposal. Third, it considers some second-best alternatives.

### 1. *Creation of the Joint-Employer Relationship*

Here's how this joint-employer relationship would work. On the state, public side, the *state* would enable collective bargaining between workers and the *public* entity. On the federal, private side, these same workers would continue to bargain with the private entity under NLRB jurisdiction. Additionally, the NLRB should issue an advisory opinion clarifying that this arrangement is permissible.<sup>197</sup> Unlike existing conversations about fissuring and joint employers, this proposal for joint employment would straddle both the private and public sectors, or the NLRA and state labor law.

There are two ways a state could create this relationship. The first, and perhaps easiest, would be to pass a statute defining these care workers as public employees for the purposes of bargaining. The second path is for state labor boards to assert jurisdiction over care-worker bargaining with the public entity

<sup>196</sup> *Harris v. Quinn*, 656 F.3d 692, 698 (7th Cir. 2011), *aff'd in part, rev'd in part, and remanded*, 573 U.S. 616 (2014).

<sup>197</sup> *See infra* Section III.C.



through adjudication.<sup>198</sup> The first path is the most straightforward because there is precedent showing that legislatures may define care workers as public employees for the purposes of collective bargaining,<sup>199</sup> while state labor boards have been reluctant to assert jurisdiction over even NLRA-exempt workers.

## 2. Key Elements of the Joint-Employer Relationship

Taking the statutory path would require states to pass statutes recognizing the status of NLRA-covered workers as public employees of the state and authorizing their rights to organize and collectively bargain with the state over workplace issues that the state controls. A public-private joint-employer statute should encompass several key elements, many of them were present in a failed Washington state bill from 2008.<sup>200</sup>

The Washington bill would have created a public-employment relationship with center-based childcare workers. It recognized workers at licensed centers with at least one slot filled by a subsidized child as public employees solely for the purposes of collective bargaining.<sup>201</sup> An initial draft of the bill defined the two appropriate bargaining units and listed mandatory subjects of bargaining, such as subsidies and reimbursement, development and training, mechanisms to provide health insurance and other benefits, and grievances. It did not grant the workers the right to strike.<sup>202</sup> Importantly, for the later discussion of NLRA preemption,<sup>203</sup> it also stipulated that the bill did not modify the rights of employers and employees under the NLRA.<sup>204</sup>

Following this example, a model law should first recognize publicly funded home-care workers at private agencies, childcare workers at childcare centers, and nursing-home workers, otherwise covered by the NLRA, as public employ-

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198. This approach would entail an application of *Browning-Ferris*-like and *Management Training*-like principles.

199. See *supra* Section II.A.2.

200. The Washington House passed the bill on March 9, 2009 by a margin of 65-31. The Senate then passed an amended version by a margin of 46-2 that spring. However, the bill died in conference committee when the House rejected Senate amendments. See Blank et al., *supra* note 152, at 12.

201. S. 6522, 60th Leg., Reg. Sess. §§ 1, 3(15)(a) (Wash. 2008), <https://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Senate%20Bills/6522-S2.pdf> [https://perma.cc/3RUC-BEW7]; H.B. 2449, 2008 Gen. Assemb., Reg. Sess. (Wash. 2008), <https://apps.leg.wa.gov/billsummary/?BillNumber=2449&Year=2007> [https://perma.cc/K2VM-G4V6].

202. See S. 6522, 60th Leg., Reg. Sess. § 2(e).

203. See *infra* Part III.

204. S. 6522, 60th Leg., Reg. Sess. § 4(c).

ees for the purposes of collective bargaining. As a parallel, the law should recognize the state, governor, or state agency as the public employer for the purposes of bargaining. Together, the characterization of the workers as public employees and the governor or agency as public employer constitute a recognition of the state's joint-employer relationship with the workers. As public employees, these care workers would have the right to organize, win a union as exclusive bargaining representative through state procedures, and bargain with the state over critical terms and conditions of employment. Unlike the Washington bill, however, legislation should recognize these care workers' right to strike as a necessary economic tool during negotiations.

Second, the state can draw on its existing public-sector labor law for determination of appropriate bargaining units and mechanisms for representation and certification of the exclusive bargaining representative. Typically, workers would make a showing of at least 30% support for representation within a unit, followed by an election.<sup>205</sup>

Third, the statute should define the scope of collective bargaining to include reimbursement or subsidy rates, pass-throughs, benefits, professional training and development programs and other incentives, health-and-safety workplace requirements, staffing ratios, other economic matters, and grievance procedures. It is critical that states allow care workers to bargain over reimbursement rates, which constrain and set a ceiling on their wages. Workers and the state should also bargain over "pass-throughs," or minima that stipulate what percentage of the reimbursements must go to workers. Minnesota, for instance, has required that private home-care agencies who employ personal-care attendants for people with disabilities spend at least 72.5% of their Medicaid reimbursement on aides' wages and benefits.<sup>206</sup> Bargaining should ensure that sufficient funds are flowing into the sector and set a floor on the percentage of funds that go to labor.<sup>207</sup> Outside of wages, benefits, and hours, bargaining should encompass issues of training and development, staffing and licensing requirements, and health-and-safety standards—issues over which the state has extensive control. Workers

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205. See, e.g., 34 PA. CODE § 95.13 (2020).

206. *Personal Care Assistance Services—A Report to the 2011 Minnesota Legislature*, MINN. DEP'T OF HUM. SERVS. 9 (Feb. 2011), <https://www.leg.mn.gov/docs/2011/mandated/110487.pdf> [<https://perma.cc/8424-EXFU>].

207. State legislatures can ensure funding through legislation. For instance, after the state reached a tentative agreement with NLRA-exempt childcare workers, California Governor Gavin Newsom signed a bill to ensure funding for the agreement. See Mila Myles, *California Child Care Providers Rejoice as Governor Signs Budget Trailer Bill*, AFSCME (July 23, 2021), <https://www.afscme.org/blog/california-child-care-providers-rejoice-as-governor-signs-budget-trailer-bill> [<https://perma.cc/9WA7-6Z27>].

could then still bargain with centers and agencies under NLRB supervision over hiring, firing, supervision, and other issues in their control.

While state legislation seems like the most promising way to implement a joint-employer relationship, there are alternatives. Most prominently, state labor boards could recognize care workers' joint-employer relationship with the state through adjudication. Although state labor boards have been reluctant to recognize these relationships with care workers in the absence of legislation specifically addressing the issue,<sup>208</sup> state labor boards should reconsider their approaches to achieve consistency with the NLRB's joint-employment doctrine announced in *Browning-Ferris*, where the Board reversed previous undue narrowing of the standard. Consistent with the NLRB approach, state labor boards should apply more expansive standards for both joint employment and jurisdiction. This adjudicative approach would entail a) finding that the public entity is a joint employer (similar to *Browning-Ferris*) and b) asserting jurisdiction over the public entity, even though it is a joint employer (similar to the Board's approach in *Management Training*).<sup>209</sup>

### 3. *Alternative Solution: Minimum Standards*

Some states may be concerned that whether by statute or adjudication, the joint-employer approach is a step too far. As an alternative to a full-fledged collective-bargaining scheme, states could take the more incremental approach of empowering workers to participate in creating "minimum standards." One specific form the creation of minimum standards may take is a "wage board" – tripartite institutions involving workers, industry, and the public to set standards.<sup>210</sup> Several recent state proposals embody this approach. For instance, in 2021 Nevada passed SB 340, which created a Home Care Employment Standards Board, consisting of the Department of Health and Human Services director, the Labor Commissioner, three representatives of home-care employees, three representatives of home-care employers, and three people who receive or are representatives of persons who receive services from a home-care employee. While it does not recognize home-care workers as public employees, it does include agency-based workers among the home-care workers, giving them the right to petition for the creation of a board and to elect representatives to develop recommendations around minimum wages, working conditions, and other industry

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208. *SEIU v. Cnty. of L.A.*, 225 Cal. App. 3d 761, 773 (1990); *State ex rel. Dep't of Hum. Servs. v. State Lab. Rels. Bd.*, No. C.A. 04-1899, 2005 WL 3059297, at \*3 (R.I. Super. Ct. Nov. 14, 2005).

209. See *infra* Section III.B.

210. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 64 (2016) (describing how the wage board in New York raised wages and standards for fast-food workers).

standards.<sup>211</sup> Similarly, the Maine Universal Home Care Program, a state ballot initiative that ultimately failed,<sup>212</sup> would have stopped short of full collective bargaining but included avenues for worker participation in setting industry standards. It also included a requirement that agencies expend at least 77% of the funding on direct worker costs. The proposed Universal Home Care Board would have set reimbursement rates for both agency workers and IP workers.<sup>213</sup> While a policy along these lines would not be as comprehensive in addressing conditions in the care economy or building worker power through a union, it would nonetheless represent an improvement from the status quo.

By creating bargaining relationships with care workers, states can address the problem of public-private fissuring. Through statute, states can enable NLRA-covered workers to bargain with the public entities with primary responsibility for their wages and working conditions. While the devaluation of care work has many root causes, workers' inability to avail themselves of a central promise of labor law—collective bargaining through representatives of their choosing—is one important driver. This joint-employer proposal would begin to address the poor wages and working conditions that have driven a crisis in the care economy.

However, this proposal faces a legal issue that appears daunting: NLRA preemption, an expansive doctrine that generally forbids state regulation of NLRA-covered workers. The fundamental issue is that in a public-private joint-employer relationship, both the NLRB and the state labor-relations board will have jurisdiction over one, but not both, of the entities. Because of Section 2(2), the NLRB cannot bring the exempt public entity to the bargaining table; because of NLRA preemption, the state board cannot do the same of the private entity, with some exceptions.<sup>214</sup> This joint-employer situation thus differs from either

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211. S. 340, 81st Sess. (Nev. 2021), [https://www.leg.state.nv.us/Session/81st2021/Bills/SB/SB340\\_EN.pdf](https://www.leg.state.nv.us/Session/81st2021/Bills/SB/SB340_EN.pdf) [<https://perma.cc/DQ78-YP4H>].

212. A version of the proposal was a bill in the legislature that also failed. See An Act to Establish Universal Home Care for Seniors and Persons with Disabilities, H.R. 1864, 128th Leg., 2d Reg. Sess. (Me. 2018), <https://www.maine.gov/sos/cec/elec/citizens/uhcleg.pdf> [<https://perma.cc/27SL-AWKT>].

213. Eileen J. Griffin, Elizabeth C. Gattine, Louise Olsen & Stuart Bratesman, *An Analysis of the Universal Home Care Referendum: Considerations for Implementation within the Context of Maine's Existing LTSS Programs*, MUSKIE SCH. OF PUB. SERV. 41 (2018), <https://digitalcommons.usm.maine.edu/cgi/viewcontent.cgi?article=1112&context=aging> [<https://perma.cc/YTA9-3NA2>]. The proposal would also have classified independent provider (IP) home-care workers as state employees governed by Maine public-sector labor law. *Id.* at 45.

214. Employers may not meet a monetary threshold, or the Board may exercise its discretionary jurisdiction under Section 14(c). For the argument that this provision may enable more significant “unpreemption,” see Benjamin Sachs, *Unpreemption: The NLRB's Untapped Power to*

purely private joint employers or NLRA-exempt joint employers. Here, bargaining under both federal and state boards may appear to be forbidden by the NLRA, and both the NLRA and state labor-relations boards have struggled with this issue.<sup>215</sup> The next Part addresses this concern.

### III. POTENTIAL LEGAL BARRIERS TO THE JOINT-EMPLOYER RELATIONSHIP

Public-private fissuring relies on the categories of labor law to sever the state from the worker. The joint-employer standard outlined above would enable workers to bargain with the state over essential workplace issues, including wages and working conditions, thereby “unfissuring” collective bargaining in the care economy. However, no state has yet recognized the type of joint-employer relationship sketched above.

A key reason why a comprehensive collective-bargaining scheme has not arisen is the perception of legal impermissibility under NLRA preemption doctrine. Even the House Bill Report for the Washington bill which would have authorized collective bargaining between workers at childcare centers and the state cited potential preemption concerns.<sup>216</sup> Other state courts and boards have also cited preemption as a reason for not asserting jurisdiction.<sup>217</sup>

This perception might exist for two reasons. First, NLRA preemption is expansive—perhaps the most expansive preemptive regime in all of U.S. law.<sup>218</sup> Because of the broad sweep of NLRA preemption, states might reasonably fear that attempts to regulate workers who are covered by the NLRA will run afoul of NLRA preemption. Indeed, the Supreme Court has held that a number of state protections for workers violate the NLRA’s implied preemption.

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*Authorize State Experimentation*, ONLABOR (Jan. 11, 2022), <https://onlabor.org/unpreemption-the-nlrbs-untapped-power-to-authorize-state-experimentation> [<https://perma.cc/WU42-L8GT>].

215. See *infra* Section III.A.

216. S. 6522, 60th Leg., Reg. Sess. §§ 1, 3(15)(a) (Wash. 2008), <https://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Senate%20Bills/6522-S2.pdf> [<https://perma.cc/3RUC-BEW7>]; H.B. 2449, 2008 Gen. Assemb., Reg. Sess. (Wash. 2008), <https://apps.leg.wa.gov/billsummary/?BillNumber=2449&Year=2007&Initiative=false> [<https://perma.cc/K2VM-G4V6>].

217. See *infra* Section III.B.

218. See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1154-55 (“Indeed, the prevailing view of contemporary labor law is that although the NLRA is a failed statute, the possibility for state and local innovation is choked off by one of the most expansive preemption regimes in American law.”).

Second, this perception may also exist because the legal status of these care workers is not straightforward: they have a foot in two jurisdictions – one federal and under the NLRB, and the other state-based. NLRB jurisdiction, it might be thought, would extinguish simultaneous state jurisdiction.

Thus, under the current statutory scheme – federal statutory change has remained a historical difficulty in labor law<sup>219</sup> – there are two potential barriers to a public-private joint-employer relationship, one from the NLRB and one from state labor boards. First, the NLRB might determine that its assertion of jurisdiction over the *private entity* preempts state jurisdiction over the *public entity*. Second, states might determine that they do not have jurisdiction over the public entity if they cannot exercise jurisdiction over the private entity as well. In fact, several states have indicated that they will not exercise jurisdiction over public entities if their workers are also jointly employed by a private entity.

However, other states have recognized that public labor boards can exercise jurisdiction in such situations. Indeed, despite some authority to the contrary, there is no legal issue for states seeking to assert joint-employer jurisdiction. As this Part argues, NLRB law poses no barrier to states creating bargaining relationships with NLRA-covered care workers over issues that the state controls. While some states have held that they cannot assert jurisdiction over the public entity in this situation, this position is legally mistaken. However, while the interpretation of the NLRA and Board precedent advanced in this Part shows why preemption is not an issue, the NLRB has not explicitly stated that states may regulate bargaining relationships between care workers and public entities, perhaps muddying the waters.

This Part proceeds as follows. First, it explains the specter of NLRA preemption, explaining why, with some reason, states are often wary of stepping on the NLRB's toes. Second, it fleshes out preemption in this specific context by detail-

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219. Democratic majorities in Congress have failed to pass significant labor-law reform at the federal level dating back to the 1970s. Under President Carter, the Labor Law Reform Bill of 1977-78 failed. H.R. 8410, 95th Cong., 123 Cong. Rec. 23, 711-14 (1977); S. 1883, 95th Cong., 123 Cong. Rec. 23, 738 (1977). Under President Obama, the Employee Free Choice Act, “the most comprehensive pro-labor legislation since the Wagner Act,” also did not become law, despite significant Democratic majorities. Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009). The House passed the Protect the Right to Organize Act (PRO) in 2021, but the bill has since stalled in the Senate. H.R. 842, 117th Cong. (2021-22). See generally Barry Eidlin, *To Pass the PRO Act, We Need to Examine Past Labor Law Reform Failures*, JACOBIN (June 24, 2021), <https://www.jacobinmag.com/2021/06/pro-act-collective-bargaining-labor-law-legislation> [<https://perma.cc/H4VW-GRMZ>] (describing the history of failed labor-law reform attempts). Because of this history, this Note offers solutions that can occur without federal legislative change.



ing NLRB and state labor-board doctrine on workers with close ties to both public and private entities. Third, it draws on that doctrine to rebut potential preemption concerns.

A. *The Problem of NLRA Preemption*

This Note's proposal entails concurrent NLRB and state labor-board jurisdiction over bargaining involving the same set of workers. However, any state regulation of NLRA-covered workers runs into a potentially powerful rejoinder: NLRA preemption. As Benjamin I. Sachs has described, NLRA preemption is "extraordinarily broad" and one of the "most expansive preemption regimes in American law."<sup>220</sup> Under the Supremacy Clause of the U.S. Constitution, federal law invalidates conflicting state and local law.<sup>221</sup> While the text of the NLRA is silent on the issue of preemption, courts have developed sweeping doctrine to determine the metes and bounds of federal law.

Beginning in the 1950s, the Supreme Court developed an expansive preemption doctrine that today consists primarily of two forms of preemption: *Garmon* preemption and *Machinists* preemption. In the 1959 case *San Diego Building Trades Council, Local 2020 v. Garmon*, the Court reversed a state judgment against unions for picketing, determining that picketing by unions fell within the ambit of the NLRA and thus beyond the states' ability to regulate.<sup>222</sup> Writing for the majority, Justice Frankfurter announced the *Garmon* preemption rule: "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."<sup>223</sup> In the 1976 case *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission*, the Court expanded the reach of preemption further, holding preempted a state employment-relations commission's cease-and-desist order against a union for its members' concerted refusal to work overtime during contract negotiations.<sup>224</sup> Justice Brennan wrote that Congress intended to leave self-help economic activities unregulated by the states, "left to be controlled by the free play of economic forces."<sup>225</sup>

The political valence of preemption has largely flipped since the origins of the doctrine. It was Archibald Cox, a foremost labor scholar and labor ally, who

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220. Sachs, *supra* note 218, at 1154-55.

221. U.S. CONST. art. VI, cl. 2.

222. *San Diego Bldg. Trades Council, Loc. 2020 v. Garmon*, 359 U.S. 236, 244 (1959).

223. *Id.*

224. *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 134-36 (1976).

225. *Id.* at 140 (internal quotation marks omitted).



argued forcefully for NLRA preemption doctrine as a means of preventing states from undermining workers' rights under the Act.<sup>226</sup> Indeed, both *Garmon* and *Machinists* invalidated state judgments that violated union members' rights under the NLRA. Since the development of preemption doctrine in those cases, however, NLRA preemption has served to thwart attempts to expand on or provide additional protections for labor rights: as Cynthia Estlund describes, "*Machinists* preemption has usually been wielded against prolabor interventions by states and localities."<sup>227</sup> For instance, the Supreme Court has held preempted a city council's rejection of a taxi-cab company's license renewal during a labor strike,<sup>228</sup> a Wisconsin statute that debarred repeat violators of the NLRA from doing business with the state,<sup>229</sup> and a California statute prohibiting employers from using state funds to "assist, promote, or deter union organizing."<sup>230</sup>

Even beyond these Court decisions, NLRA preemption has had a chilling effect in inhibiting more expansive regimes for workers' rights at the state level. As U.S. labor law has "ossified" at the federal level—the last significant change to the NLRA was in 1959—NLRA preemption doctrine has meant that "the popular impulses that are stymied at the federal level have no outlet at the state and local level either."<sup>231</sup> Many labor-law scholars agree that preemption poses a significant barrier to state and local experimentation and innovation.<sup>232</sup> As Henry H. Drummonds has concluded, federal labor law not only "fail[s] to keep the promises it makes to employees, it further blocks efforts to enact reforms in the

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226. Sachs, *supra* note 218, at 1164-65.

227. Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1575 (2002).

228. *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 612-13 (1986).

229. *Wis. Dep't of Indus., Lab. & Hum. Rels. v. Gould Inc.*, 475 U.S. 282, 283 (1986).

230. *Chamber of Com. v. Brown*, 554 U.S. 60, 62 (2008).

231. Estlund, *supra* note 227, at 1579.

232. See, e.g., Sachs, *supra* note 218, at 1154 ("It would be difficult to find a regime of federal preemption broader than the one grounded in the [NLRA]. Although the statute contains no preemption clause, the Supreme Court has established a series of interlinking doctrines that are intended to foreclose state and local intervention into the rules of union organizing and bargaining. Indeed, the prevailing view of contemporary labor law is that although the NLRA is a failed statute, the possibility for state and local innovation is choked off by one of the most expansive preemption regimes in American law."); Estlund, *supra* note 227, at 1572 (noting that preemption "virtually banish[es] states and localities from the field of labor relations"); see also Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REGUL. 355 (1990) (surveying NLRA preemption doctrine).

states.”<sup>233</sup> As a result, several labor-law scholars and advocates have recommended changes that would loosen the NLRA preemption regime and enable states to be more active in protecting workers’ rights.<sup>234</sup>

Against this backdrop of preemption, it might be feared that the proposed joint-employer solution would run headlong into this sweeping doctrine. Moreover, the NLRB has the preeminent role in defining the limits of its own preemptive force: as the Supreme Court has stated, “the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”<sup>235</sup> This principle may engender in states an elevated unwillingness to step on the Board’s toes. Stated differently, because of the force of preemption, NLRA jurisdiction over the private bargaining activities of care workers *might* preclude state jurisdiction over public bargaining. Indeed, several state labor boards have either suggested or explicitly declared that the preemptive force of NLRA jurisdiction compels this result.<sup>236</sup>

However, this belief is misguided. Although the NLRB has not explicitly indicated that states may enable such activity, the clear reading of the NLRA and Board precedent reveals that the joint-employer proposal does not run afoul of NLRA preemption doctrine. To explain why, it is essential to examine NLRB and state labor-board precedent addressing the jurisdiction of workers, who, like care workers, have close ties to both public and private entities.

### B. NLRB and State-Board Approaches

To determine the merits of preemption concerns, it is first necessary to chart how the NLRB and state labor boards have approached this issue to date. To understand the potential problem facing the NLRB and state labor boards, consider a hypothetical childcare center: the center, a private entity, most proximately employs the workers, but a state agency, a public entity, exerts significant control over labor relations. Because the NLRB does not have jurisdiction over the public entity, and a state labor board does not have jurisdiction over the private entity, neither board can compel all parties to the bargaining table. Both the NLRB and state boards, then, face a question: what should they do when they

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233. Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 101 (2009).

234. Sharon Block & Benjamin I. Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy*, CLEAN SLATE FOR WORKER POWER 80-82 (Jan. 23, 2020), <https://lwp.law.harvard.edu/publications/clean-slate-worker-power-building-just-economy-and-democracy> [<https://perma.cc/85LA-Y5G2>].

235. *Int’l Longshorem’n’s Ass’n v. Davis*, 476 U.S. 380, 390 (1986).

236. See *infra* Section III.B.2.

cannot supervise all bargaining.<sup>237</sup> As one NLRB member explained, this situation produces “tensions that arise under the NLRA.”<sup>237</sup> Past and current boards have struggled with this dilemma.

### 1. *The NLRB Approach*

Under the NLRB’s current approach, the Board takes a broad view of its jurisdiction, asserting it even when workers have both public and private entities as joint employers. The Board settled on this current approach in 1995, with the *Management Training* test.<sup>238</sup> Under that test, the Board will “only consider whether the employer meets the definition of ‘employer’ under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards.”<sup>239</sup> Stated differently, the Board does not care whether employees have close relationships with public entities, so long as the private entity meets

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237. *Mgmt. Training Corp.*, 317 N.L.R.B. 1355, 1362 (1995).

238. *Id.* Another line of cases looks to whether employers are “political subdivisions,” which, under Section 2(2) of the NLRA, would exempt the employee from the NLRA’s coverage. National Labor Relations Act of 1935 §§ 7-8, 29 U.S.C. § 152(2) (2018). The Act does not define “political subdivision”; accordingly, the Board and the Supreme Court have developed the *Hawkins County* test to determine whether an employer is public or private. *NLRB v. Nat. Gas Util. Dist. of Hawkins Cnty.*, 402 U.S. 600, 604 (1971). This disjunctive test asks whether an entity is either 1) “created directly by the state, so as to constitute departments or administrative arms of the government”; or 2) is “administered by individuals who are responsible to public officials or to the general electorate.” *Id.* at 604-05. In applying this test, the Board ignores the existence of public funding and extensive state regulation. *Pa. Virtual Charter Sch.*, 364 N.L.R.B. No. 87 (Aug. 24, 2016); see also Amelia A. DeGory, Note, *The Jurisdictional Difficulties of Defining Charter-School Teachers Unions Under Current Labor Law*, 66 DUKE L.J. 379, 384 (2016) (“To decide its jurisdictional reach, the NLRB applies a test from *NLRB v. Natural Gas Utility District of Hawkins County*, which determines whether an employer is a ‘political subdivision’ exempt from the Act’s protections.” (footnote omitted)). Depending on which state’s labor law the entity would otherwise fall under, unions and employers have found themselves arguing on both sides of jurisdiction at various points. Compare *Pa. Virtual Charter Sch.*, 364 N.L.R.B. No. 87, at 4-5 (union arguing that the school was under NLRB jurisdiction), with *Hyde Leadership Charter Sch.-Brooklyn*, 364 N.L.R.B. No. 88, at 4 (Aug. 24, 2016) (union arguing that the school was under New York State Public Employment Relations Board’s (PERB’s) jurisdiction). Because this test focuses on whether a *single employer*—such as a charter school—is public or private, it is largely inapplicable to care workers at agencies or centers who have close ties to *two entities*, one public and one private.

239. *Mgmt. Training*, 317 N.L.R.B. at 1358 (footnote omitted).

a) the statutory definition of employer<sup>240</sup> and b) the minimal level of gross annual volumes of business.<sup>241</sup> Critically, this test is expansive: a public entity could set wages and a number of other working conditions, but so long as the private entity sets one condition, such as hours, the NLRB will assert jurisdiction.

The Board has trended towards a more expansive test for the assertion of jurisdiction, one that states should follow. For context, the Board had shifted its approach on several occasions before landing on the *Management Training* test in 1995. In the 1960s,<sup>242</sup> the Board first employed the two-part “intimate connection test,” under which it declined to assert jurisdiction if the nonexempt employer provided services to the exempt entity which are intimately connected to the exempted operations of the exempt entity.<sup>243</sup> Under this test, the Board declined to assert jurisdiction over workers at private entities because of their close relations with public or otherwise exempt entities.<sup>244</sup> In the late 1970s and 1980s, in cases such as *National Transportation*<sup>245</sup> and *Res-Care*,<sup>246</sup> the Board adopted the “control test,” under which it would examine both the private employer’s

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240. “[A]ny person acting as an agent of an employer . . . [but] not includ[ing] . . . any State or political subdivision thereof.” National Labor Relations Act of 1935 §§ 7-8, 29 U.S.C. § 152(2) (2018).

241. That amount is \$250,000 and \$100,000 for childcare centers and nursing homes, respectively. *Jurisdictional Standards*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/jurisdictional-standards> [<https://perma.cc/42WS-5ARQ>].

242. *Bay Ran Maint. Corp. of N.Y.*, 161 N.L.R.B. 820, 822 (1966); *Herbert Harvey, Inc.*, 171 N.L.R.B. 238, 239-40 (1968).

243. *Rural Fire Prot. Co.*, 216 N.L.R.B. 584, 588 (1975) (citing *Herbert Harvey, Inc.*, 171 N.L.R.B. at 240). The test was two-pronged: (1) whether the exempt employer retains “substantial control over the services and labor relations of the nonexempt contractor, so that the latter is left without sufficient autonomy over working conditions to enable it to bargain efficaciously with the union,” and (2) if such control is not substantial, whether “the nature of the relationship between the purposes of the exempt institution and the services provided by the nonexempt employer” makes the two employers sufficiently distinct. *Id.* at 585-86.

244. For example, the Board declined to assert jurisdiction over an employer who provided guard services to the City College of New York, *Wackenhut Corp.*, 203 N.L.R.B. 86, 88 (1973), and over an employer that provided blood-bank services to an exempt hospital, *Inter-Cnty. Blood Banks, Inc.*, 165 N.L.R.B. 252, 253 (1967), because of the intimate relationship between the exempt employer’s operations and the contractor employer’s operations. Cases in this vein often concerned nonprofit hospitals exempt from the NLRA before the 1974 amendments, rather than public entities. See, e.g., *Bay Ran Maint. Corp.*, 161 N.L.R.B. at 821. See generally National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, § 1, 88 Stat. 395, 395; *1974 Health Care Amendments*, NLRB, <https://www.nlr.gov/about-nlr/who-we-are/our-history/1974-health-care-amendments> [<https://perma.cc/UT9Q-HDVX>] (detailing the 1974 amendments).

245. *Nat’l Transp. Serv.*, 240 N.L.R.B. 565 (1979).

246. *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986).

control over essential terms and conditions and the public entity's control over the employer's labor relations.<sup>247</sup> In the early 1980s, the Board sometimes employed a joint-employer analysis, and if it determined that a public entity was a joint employer, it would not assert jurisdiction.<sup>248</sup> From this point onward, the Board would not assert jurisdiction over "governmental contractors who lacked final authority over wages and benefits, even if the contractors maintained exclusive power to hire, fire, promote, and demote."<sup>249</sup>

The bright-line test of *Management Training*, decided in 1995, represented an expansion of Board jurisdiction. No longer would the Board refuse to exert jurisdiction if there was an intimate connection between the public and private entity, or if the public entity exerted significant control over the employer's labor relations. Instead, the Board announced it would assert jurisdiction wherever it could, considering only 1) whether the entity meets the definition of "employer" under Section 2(2) of the Act, and 2) whether such employer meets the applicable monetary jurisdictional standards.<sup>250</sup> In so doing, the Board "no longer examines whether a private employer is able to engage in effective or meaningful collective bargaining when asserting jurisdiction."<sup>251</sup> Later reaffirming the rule, the Board explained that it "exempts only government entities or wholly owned government corporations from its coverage — not private entities acting as contractors for the government."<sup>252</sup> While under previous Board standards, the Board would not have asserted jurisdiction if the public entity exerted too much control, *Management Training* enables the Board to assert jurisdiction over a broader swath of employees. This test has withstood changes in Board personnel<sup>253</sup> and has been cited with approval by circuit courts.<sup>254</sup>

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247. *Id.* at 672.

248. *See, e.g., Ara Servs., Inc.*, 221 N.L.R.B. 64, 65 (1975) (concluding that a private employer shared the statutory exemption with a public entity because they were joint employers). In a pair of rulings on childcare workers under the Federal Daycare and Head Start programs, the Seventh Circuit denied the Board's jurisdiction because of its joint-employer finding. *See Lutheran Welfare Servs. Of Ill. v. NLRB*, 607 F.2d 777, 778 (7th Cir. 1979); *NLRB v. Chi. Youth Ctrs.*, 616 F.2d 1028, 1029 (7th Cir. 1980).

249. *Aramark Corp. v. NLRB*, 179 F.3d 872, 876 (10th Cir. 1999).

250. *Mgmt. Training Corp.*, 317 N.L.R.B. 1355, 1358 (1995).

251. *NLRB v. Young Women's Christian Ass'n of Metro. St. Louis*, 192 F.3d 1111, 1116-17 (8th Cir. 1999).

252. *Rsch. Found. of the City Univ. of N.Y.*, 337 N.L.R.B. 965, 968 (2002) (quoting *Aramark*, 179 F.3d at 878).

253. *See Jacksonville Urb. League, Inc.*, 340 N.L.R.B. 1303, 1303 (2003).

254. *See, e.g., Young Women's Christian Ass'n*, 192 F.3d at 1117; *Aramark*, 179 F.3d at 881; *Teledyne Econ. Dev. v. NLRB*, 108 F.3d 56, 58-59 (4th Cir. 1997); *Pikeville United Methodist Hosp. of Ky., Inc. v. United Steelworkers*, 109 F.3d 1146, 1152-53 (6th Cir. 1997).

The Board's approach in *Management Training* is ultimately pragmatic, promoting collective bargaining where it can, even if the Board cannot compel the public entity to the bargaining table. In fact, prior to *Management Training*, some employees were stuck in purgatory, without collective bargaining rights when both the NLRB and state board refused to assert jurisdiction.<sup>255</sup> As the Fourth Circuit explained, tests before *Management Training* could "consign[] the employees of such employers to a no-man's land where they would not be covered by any labor relations statute."<sup>256</sup> Thus, NLRB jurisdiction ensured at least a modicum of collective-bargaining rights. According to the Board, *Management Training's* bright-line rule may also be useful because it offers a more predictable standard than case-by-case adjudication.<sup>257</sup>

*Management Training* improves on previous Board approaches by ensuring that workers can bargain with at least one private entity, but it is an incomplete solution to the dilemma facing care workers. One residual problem<sup>258</sup> is that Board jurisdiction cannot guarantee that workers will be able to bargain with the public entity—the powerful public entities in charge of Medicaid and the CCDF remain elusively beyond the Board's grasp. The majority in *Management Training* acknowledged this limitation as "[t]he fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table."<sup>259</sup> In a later decision, a Board majority explained that *Management Training* saw the Board's lack of jurisdiction over public entities as an "obstacle" that resulted in "limited bargaining."<sup>260</sup> As the Board itself recognized, bargaining with *solely the private entity* is necessarily incomplete. This solution frustrates both collective bargaining and the workers who want to engage in it: as one union representative noted, "[i]t can be very frustrating to negotiate with management and realize what they are offering you is contingent on funding from another source,

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255. See, e.g., *Jackson Cnty. Pub. Hosp. v. PERB*, 280 N.W.2d 426, 435 (Iowa 1979).

256. *Teledyne*, 108 F.3d at 60.

257. *Id.*

258. Board jurisdiction also imposes the general shortcomings of the NLRA. See Sachs, *supra* note 124, at 383–84 (discussing the pathologies of the Act). The worksite unionism of the NLRA requires organization of individual workplaces, a task made difficult in sectors with high turnover and in workplaces with few employees, where such organizing campaigns may be costly. See Smith, *supra* note 124, at 592–94. Employers at such workplaces may also engage in "union-busting" tactics. Leigh Anne Schriever, *The Home Health Care Industry's Organizing Nightmare*, CENTURY FOUND. (Aug. 18, 2015), <https://tcf.org/content/commentary/the-home-health-care-industrys-organizing-nightmare> [<https://perma.cc/4D3H-GKUJ>].

259. *Mgmt. Training Corp.*, 317 N.L.R.B. 1355, 1355, 1358 n.16 (1995).

260. *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, 1619 n.70 (2015).



whether it be legislature or whether it be a third party. It is an out for management.”<sup>261</sup>

Before an examination of how state boards have addressed the public entity side of the issue, it is critical to note that *Management Training* does not state – or even suggest – that NLRB jurisdiction over a private entity extinguishes state jurisdiction over the public entity. Indeed, because the NLRB does not have jurisdiction over the public entity, it could not compel that result.<sup>262</sup> Moreover, *Management Training*’s pragmatic spirit of promoting collective bargaining wherever possible inveighs against such a reading – the potential barrier from the NLRB does not exist. However, some state boards and courts have fallen into that very misreading, characterizing jurisdiction as an all-or-nothing proposition: either a board *must* have jurisdiction over all entities – public and private – to have jurisdiction, or it will not have jurisdiction at all.

## 2. State Labor-Board Approaches

Like the NLRB, state boards face the issue of how to approach workers with close ties to both public and private entities. On the state side, the issue is the mirror image of that presented in *Management Training*: state boards generally have jurisdiction over the public entity but not the private entity. However, unlike the NLRB, these state labor boards also must consider preemption. As detailed above, under *Management Training*, the Board will generally assert jurisdiction over the private entity. How have states treated the public entity?

This Section details the state of this law. Currently, state boards have split over the issue, their approaches falling into three broad categories: first, asserting jurisdiction over a public entity that is a joint employer with an exempt private entity; second, not asserting jurisdiction; and third, declining to decide the issue. Increasingly, however, state boards and courts have taken the first path and mirrored the approach taken in *Management Training*, asserting jurisdiction wherever they can, regardless of relationships with private entities.

Historically, states were often reluctant to assert jurisdiction over these workers, even if the NLRB declined to assert jurisdiction. States mirrored the pre-1986 NLRB approach, under which a board would not assert jurisdiction if it did not have jurisdiction over both joint employers.<sup>263</sup> For instance, in the 1979 case *Jackson County Public Hospital v. Public Employment Relations Board*, the Iowa

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<sup>261</sup>. Winant, *supra* note 14, at 343.

<sup>262</sup>. See *infra* Section III.C.

<sup>263</sup>. The NLRB “has no jurisdiction over joint employers if one of the employers is exempt from the Act, since a collective bargaining agreement is not feasible in such circumstances.” *Lutheran Welfare Servs. of Ill. v. NLRB*, 607 F.2d 777, 778 (7th Cir. 1979).



Supreme Court confronted a joint-employer situation in which the hospital, a public employer, contracted with a private entity to provide food services.<sup>264</sup> Because one entity was public and one private, Iowa's PERB could not "assert jurisdiction in a joint employment situation where one of the joint employers is not a public employer. Power to govern only one of two necessary employers is insufficient for the PERB to perform its regulatory function."<sup>265</sup> In 1985, the Illinois PERB concluded the same, explaining that "[t]he weight of case law under both the NLRA and numerous state Public Employee Relations Acts is that the Board must have jurisdiction over all employers in order to assert jurisdiction."<sup>266</sup> Because the Illinois board could not assert jurisdiction over the private entity, it would not exercise jurisdiction over the public entity.<sup>267</sup> Significantly, the NLRB precedent the states mirrored is no longer good law.<sup>268</sup>

Today, California, Washington, Delaware, and Oregon have stated that they will assert jurisdiction over the public entity. Citing *Management Training* in a recent decision involving nonphysician health-care workers jointly employed by Ventura County and private for-profit medical corporations that contract with the County,<sup>269</sup> the California PERB reasoned that the NLRB "maintains jurisdiction over a private sector entity that qualifies as an employer under the NLRA, irrespective of whether that entity is in a joint employer relationship with a public agency over which the NLRB has no jurisdiction."<sup>270</sup> The PERB analogously held that it is "clear" that the "PERB maintains jurisdiction over a PERB-covered

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264. Jackson Cnty. Pub. Hosp. v. Pub. Emp. Rels. Bd., 280 N.W.2d 426, 427 (Iowa 1979).

265. *Id.* at 435.

266. Ill. Dep't of Cent. Mgmt. Servs., 2 P.E.R.I. ¶ 2007 (Ill. SLRB 1985).

267. *Id.*

268. In the 1986 case *Res-Care*, the Board clarified that it would no longer "require a finding that the exempt entity is a joint employer in order to withhold the assertion of jurisdiction." *Res-Care, Inc.*, 280 N.L.R.B. 670, 673 n.12 (1986). Under *Management Training*, the Board decided that it would no longer make determinations about the extent of meaningful bargaining to assert jurisdiction. Instead, recall that the Board now asserts jurisdiction over the private entity when an employer falls within the meaning of Section 2(2) and meets the required monetary threshold, even if a noncovered employer exists. *Jacksonville Urb. League, Inc.*, 340 N.L.R.B. 1303, 1303 n.4 (2003) (summarizing the test developed in *Management Training Corp.*, 317 N.L.R.B. 1355, 1358 (1995)).

269. One issue that arose in the case was whether the clinics, which the PERB described as "private for-profit medical corporations," were actually public agencies under California statute. *SEIU, Loc. 721*, 43 P.E.R.C. ¶ 87 (Cal. PERB 2018). However, the PERB explained that "[t]he outcome of this case does not turn on such a finding. Rather, [the] holding remains the same even if the Clinic corporations do not meet the criteria to be covered by the MMBA" because the PERB maintains jurisdiction over one of the joint employers, the County. *Id.*

270. *Id.*

entity engaged in a joint employer relationship with a non-PERB-covered entity,” even a private-sector entity.<sup>271</sup> Applying that rule, the PERB found that the public entity – the County – retained the right to control employment terms and conditions and violated California labor law by declining to process the union’s certification petition.<sup>272</sup> The PERB clarified “that PERB also does not lose jurisdiction over an entity such as the County that enters into a single employer or joint employer relationship with an entity over which we do not assert jurisdiction.”<sup>273</sup> On appeal, a California court upheld the PERB’s decision on joint-employer grounds.<sup>274</sup> Notably, the court determined that “[a]lthough the medical directors directly hire Clinic employees and set their salaries, the County has ultimate control over the Clinics’ financial resources that pay for compensation and staffing.”<sup>275</sup> Other states, such as Washington,<sup>276</sup> Delaware,<sup>277</sup> and Oregon,<sup>278</sup> have also signaled that they will assert jurisdiction.

Other states, however, have declined to assert jurisdiction because of preemption concerns. The state perhaps most opposed to asserting jurisdiction is Michigan. There, the law was shaped through a decades-long saga involving the status of group-home employees, which started when the Department of

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271. *Id.*

272. *Id.* The PERB does not attempt to assert jurisdiction over the private entity.

273. *Id.*

274. *County of Ventura v. PERB*, 42 Cal. App. 5th 443, 452 (2019).

275. *Id.* at 451.

276. The Washington Marine Employees Commission (MEC), for instance, reasoned that public-private joint employers offer “a reverse view of the exempt entity situation from that encountered by the NLRB in *Management Training Corp*” and concluded it was “clear” that jurisdiction exists. *Inlandboatmen’s Union of Pac. v. Wash. State Ferries*, 2003 WL 26454346, at \*5 (Wash. MEC Dec. 1, 2003). Like the California PERB, the Washington MEC carefully stipulated that it had jurisdiction only over the public entity – the Washington State Ferries – and not the private entity. *Id.* See also *N. Mason Transp. Ass’n*, 1986 WL 327135, at \*7 (Wash. PERC Oct. 1986) (affirming an order directing an election by holding that a school district was either the sole employer or a dual employer of bus drivers and that, if the district was a dual employer, the private employer was not an essential party).

277. *AFSCME, Council 81 v. Univ. of Del.*, 2009 WL 2005366, at \*3 (Del. Ch. July 1, 2009) (affirming the Delaware PERB’s decision that subcontracted, part-time employees of a private company, which provided dining services to the public university, were employees of a joint employer subject to PERB jurisdiction).

278. *Laborers’ Loc. 483 v. City of Portland*, 2005 WL 6132371, at \*6 (Or. ERB Mar. 21, 2005) (affirming a ruling by an administrative-law judge that employees working with the City of Portland under contractual agreements were not technically City employees and thus were not subject to the Public Employee Collective Bargaining Act). Interestingly, Oregon will also assert jurisdiction but continues to employ a version of the *Res-Care* control test to “determine if the public employer, over which we have jurisdiction, has sufficient control over the terms and conditions of employment to enable it to bargain effectively.” *Id.* at \*5-6.

Mental Health (DMH) contracted with a nonprofit provider called Louisiana Homes, Inc. to provide home-care services.<sup>279</sup> In 1993, after election petitions from AFSCME, the Michigan Employment Relations Commission (MERC) asserted jurisdiction over the workers, reasoning that the NLRB would not assert jurisdiction over them.<sup>280</sup> However, after the Board decided *Management Training* in 1995, a Michigan state court vacated those previous MERC decisions asserting jurisdiction, citing concerns about NLRA preemption. Under *Management Training*, it was “arguable” that the NLRB had jurisdiction, and MERC had to defer to the NLRB accordingly.<sup>281</sup> After the NLRB granted comity to the pre-*Management Training*, MERC supervised elections,<sup>282</sup> the Sixth Circuit upheld the Michigan board’s decision not to assert jurisdiction on the basis that the NLRB and the state board may not assert jurisdiction concurrently.<sup>283</sup> Further decisions in Michigan have affirmed the approach of not asserting jurisdiction.<sup>284</sup> Pennsylvania has also declined to assert jurisdiction over employees who were claimed to be jointly employed by both public and private entities because of preemption concerns.<sup>285</sup>

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279. See Mich. Council 25, *AFSCME v. La. Homes, Inc.*, 480 N.W.2d 280, 281-83 (Mich. Ct. App. 1991).

280. Mich. Council 25, *AFSCME v. La. Homes, Inc.*, 511 N.W.2d 696, 699 (Mich. Ct. App. 1993). MERC previously found that the DMH and Louisiana Homes were joint employers. *La. Homes, Inc.*, 480 N.W.2d at 283. Relying on *Res-Care* and other NLRB precedent, the court of appeals determined that there was a sufficient showing that the NLRB would refuse to assert jurisdiction. *La. Homes, Inc.*, 511 N.W.2d at 221. Thus, before *Management Training*, Michigan law held that MERC could assert jurisdiction only if the NLRB did not assert jurisdiction over one of the joint employers. *Id.*

281. *AFSCME v. Dep’t of Mental Health*, 545 N.W.2d 363, 371 (Mich. Ct. App. 1996). MERC later stayed all further proceedings in anticipation of a Board decision. *Alt. Servs., Inc.*, 344 N.L.R.B. 824, 825 (2005). However, in 1997, the Michigan legislature settled the question by amending its state labor law to exempt adult residential-care workers from classification as state employees, citing costs concerns. See MICH. COMP. LAWS § 423.201(e)(i) (“An individual employed by a private organization or entity who provides services under a time-limited contract with this state or a political subdivision of this state or who receives a direct or indirect government subsidy in his or her private employment is not an employee of this state or that political subdivision, and is not a public employee.”).

282. *Summer’s Living Sys., Inc.*, 332 N.L.R.B. 275, 286 (2000).

283. *Mich. Cmty. Servs., Inc. v. NLRB*, 309 F.3d 348, 350-51 (6th Cir. 2002).

284. “[A]s the Board would arguably exercise jurisdiction in this matter and no showing has been made that the NLRB would decline to assert its jurisdiction, we must defer to the NLRB.” *Cesar Chavez Acad.*, 19 M.P.E.R. ¶ 66 (Mich. ERC 2006).

285. *In re Employees [sic] of Se. Pa. Transp. Auth.*, 48 P.P.E.R. ¶ 59 (Pa. LRB 2017). *But see United Ass’n of Journeymen, Loc. 449 v. Pa. Lab. Rels. Bd.*, 613 A.2d 155, 159 (Pa. Commw. Ct. 1992) (“This Court is further persuaded that the Board must assume jurisdiction under the specific

Additionally, several state boards—such as New York’s<sup>286</sup> and New Jersey’s<sup>287</sup>—have not yet weighed in on the issue. One significant example of a state board that has not weighed in is Illinois’s. In the 1980s, the Illinois board refused to assert jurisdiction if the private entity retained sufficient control over the primary terms and conditions of employment.<sup>288</sup> However, the Illinois board has since explicitly adopted the *Management Training* standard, announcing that it would assert jurisdiction if a public employer controls sufficient matters relating to the employment relationship, regardless of any ties it may have to an exempt entity.<sup>289</sup> Summarizing this shift in approach, it explained:

[T]he better approach to determining jurisdiction in a joint employer situation is to assert jurisdiction over those entities that are clearly within the Board’s authority and allow the joint employers’ employees to bargain terms and conditions of employment to the extent of control the subject employers’ possess . . . . Accordingly, the Board has indicated that the policies of the Act are advanced by allowing collective bargaining to flourish as best as it is able, despite that the Board may lack authority over one of the employers in the joint relationship.<sup>290</sup>

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facts presented in this matter because of the possibility that public employers may evade requirements of the Act by simply delegating some of their employer responsibilities to a private employer.”).

286. In a footnote, the New York PERB indicated that it would not reach an employer’s argument that the NLRB has exclusive jurisdiction—but the opinion also cited the Sixth Circuit decision to deny state-board jurisdiction. *Buffalo United Charter Sch. Educ. Ass’n*, 43 P.E.R.B. ¶ 4009, n.41 (N.Y. PERB 2010) (citing *Mich. Cmty. Servs.*, 309 F.3d 348). This followed a pre-*Management Training* decision holding that New York PERB jurisdiction does not extend to a joint employer if the other employer is a private entity. *Niagara Frontier Transp. Auth.*, 13 P.E.R.B. ¶ 3003 (N.Y. PERB 1980).
287. In New Jersey, the state labor board expressly declined to address whether it would certify a representative in a public-private joint-employer scenario. *Black Horse Pike Reg’l Sch. Dist.*, 35 N.J.P.E.R. ¶ 125, n.4 (N.J. PERC 2009).
288. *Ill. Dep’t of Cent. Mgmt. Servs. & Corr.*, 1 P.E.R.I. ¶ 2028 (Ill. SLRB 1985) (“Even if the Employer and Subcontractor were found to be joint employers, the Board would still not have jurisdiction over these employees. In order for the Board to assert jurisdiction over a joint employer, it must have jurisdiction over each individual employer separately.”).
289. *See* Chief Judge of the 18th Jud. Cir., 14 P.E.R.I. ¶ 2032 (Ill. SLRB 1998), *aff’d sub nom.* Chief Judge of the Eighteenth Jud. Cir. v. *Ill. State Lab. Rels. Bd.*, 726 N.E.2d 147 (2000); *State of Ill., Dep’t of Cent. Mgmt. Servs.*, 18 P.E.R.I. ¶ 2051 (Ill. SLRB 2002).
290. *Ill. Racing Bd.*, 15 P.E.R.I. ¶ 2021 (Ill. SLRB 1999).

In these cases, however, the Illinois Board has dealt with employees employed by alleged joint employers who are public-sector.<sup>291</sup> In 2005, the Illinois Supreme Court took up a case in which AFSCME filed a representation/certification petition and unfair labor-practice charge with the Illinois Board, seeking to represent health-care workers whom AFSCME alleged were jointly employed by both Wexford, a private health-care vendor, and the public Illinois Department of Corrections (DOC).<sup>292</sup> At the time, AFSCME was already the exclusive bargaining representative vis-à-vis Wexford and had negotiated a collective-bargaining agreement with the private entity.<sup>293</sup> AFSCME sought to represent the health-care workers under Illinois public-sector labor law, arguing that the DOC was a joint employer, while both Wexford and the state raised preemption arguments.<sup>294</sup> The Illinois Supreme Court ultimately did not determine “whether it is possible for both the Board and the National Labor Relations Board to assert concurrent jurisdiction over a single group of employees,” instead upholding the Illinois Board’s conclusion that the DOC was not a joint employer under the Illinois Public Labor Relations Act.<sup>295</sup> However, the court noted that the issue of concurrent jurisdiction from both the Illinois Board and NLRB “is both novel and interesting.”<sup>296</sup>

These state-board decisions have raised important arguments on both sides of the issue. Although states have taken divergent approaches to this issue, the better rule – for legal and policy reasons – is for states to assert jurisdiction over public entities even when employees may also have a private employer, as explained below.

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291. *See, e.g.*, Chief Judge of the 18th Jud. Cir., 14 P.E.R.I. ¶ 2032 (alleging joint employers are a chief judge in DuPage County and the Administrative Office of the Illinois Court’s Division of Probation Services); Rend Lake Conservancy Dist., 14 P.E.R.I. ¶ 2051 (Ill. SLRB 1998) (alleging joint employers are the Rend Lake Conservancy District’s Board of Trustees and the state).

292. AFSCME, Council 31 v. Ill. State Lab. Rels. Bd., 839 N.E.2d 479, 482-83 (Ill. 2005).

293. *Id.*

294. *Id.*

295. *Id.* at 484-85. The court noted that the Illinois Board would have “file[d] a petition with the National Labor Relations Board asking whether the Board’s assertion of jurisdiction would violate principles of federal preemption” if it had determined that the DOC was a joint employer. *Id.* at 483.

296. *Id.* at 484; *see also* SETH D. HARRIS, JOSEPH E. SLATER, ANNE MARIE LOFASO, CHARLOTTE GARDEN & RICHARD F. GRIFFIN, JR., *MODERN LABOR LAW IN THE PRIVATE AND PUBLIC SECTORS* 157 (2d ed. 2016) (“Had the court found a joint employer relationship, there would indeed have been a difficult preemption question and related practical complications.”).

C. *Why NLRA Preemption Is Not an Issue*

As the previous Section detailed, a split of opinion exists between states asserting jurisdiction over public-private joint employers and states failing to do so. For instance, claiming that a state board could not assert jurisdiction, a private home-care vendor in an Illinois case argued that once the NLRB has jurisdiction over the employees in question, state boards lack simultaneous jurisdiction because inconsistencies between state and federal law would lead to conflicts.<sup>297</sup> Despite these concerns, however, the states asserting jurisdiction have taken the approach better situated in text, precedent, and policy.

Given the NLRB's inability to compel public entities to the bargaining table, the best option is for states to adopt the Board's approaches in both *Browning-Ferris* and *Management Training*, respectively: first, to find public entities as joint employers of care workers; and second, to assert jurisdiction over those entities and care workers, and enable collective bargaining. Applied to the care economy, this proposal is the joint-employer standard developed in Part II, which would allow care workers to bargain with public entities over key terms and conditions of employment that those public entities control. This approach is consistent with the NLRA, precedent, and labor law's policy objectives.

First, the approach is compatible with the NLRA and NLRB precedent. Under the basic statutory scheme, the NLRA grants the Board jurisdiction over "employees . . . unless [the Act] explicitly states otherwise,"<sup>298</sup> and employers, except for "State or political subdivision[s]."<sup>299</sup> Section 7 of the NLRA vests rights in employees; Section 8 imposes liability on employers and labor organizations for unfair labor practices.<sup>300</sup> Under *Garmon* preemption, "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board."<sup>301</sup>

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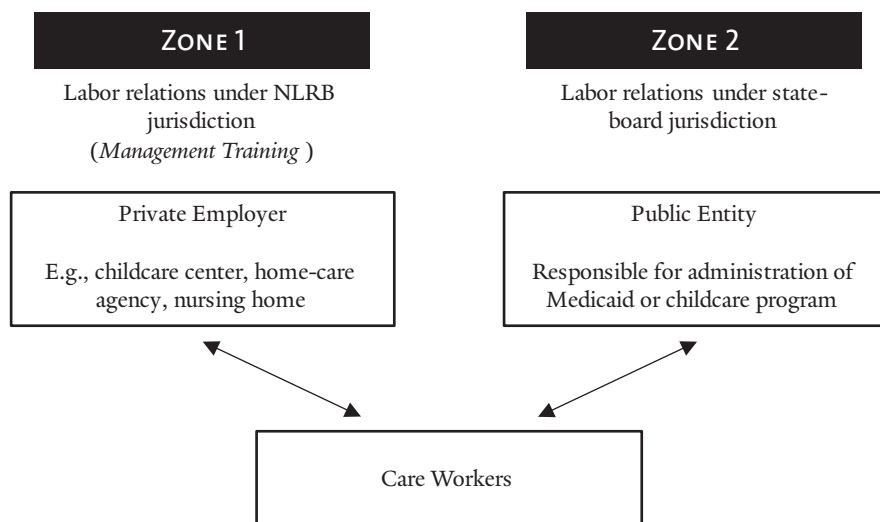
297. Brief of Appellant at 13, *AFSCME, Council 31 v. State Lab. Rels. Bd.*, 216 Ill. 2d 569 (2005) (No. 99074), 2005 WL 3937386.

298. National Labor Relations Act of 1935, 29 U.S.C. § 152(3) (2018).

299. *Id.* § 152(2).

300. *Id.* §§ 157-158.

301. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).



Consider a typical public-private joint-employer scenario: a common set of employees has, what I will call, a *zone of labor relations* with both a private entity (Zone 1) and a public entity (Zone 2). Note that these zones do not overlap—the labor relations between the care workers and their private employer are distinct from their relations with the state. The private agency or center may set hours, hire or fire, or supervise the workers, but the state sets reimbursement rates and imposes requirements. Within each of those zones of labor relations exists labor activities described by Sections 7 and 8 of the NLRA. The Board exercises jurisdiction over Zone 1 (the labor relations between the employees and the private entity under *Management Training*), and the existence of Zone 2 (the fact that employees have labor relations with an exempt entity) does not extinguish the Board’s jurisdiction over Zone 1.<sup>302</sup> Moreover, under *Garmon*, that jurisdiction is exclusive.

However, under the NLRA and *Management Training*, the Board does not have jurisdiction over both Zones 1 and 2. It plainly does not have jurisdiction over Zone 2 (the labor relations between the employee and the exempt, public entity) because it “cannot compel [public entities] to sit at the bargaining table,”<sup>303</sup> even though bargaining is a Section 7 right.<sup>304</sup> For the Board to have jurisdiction over a particular zone of labor relations, those labor relations must arise in connection with *both* a covered employee *and* a covered employer. If the

302. *Mgmt. Training Corp.*, 317 N.L.R.B. 1355, 1357 (1995).

303. *Id.* at 1358 n.16.

304. 29 U.S.C. § 157 (2018).



Board lacks jurisdiction over *either* the employee (for instance, an agricultural worker) *or* the employer, it lacks jurisdiction over that *entire* zone of labor relations. In this example, the Board lacks jurisdiction over the bargaining that would occur in Zone 2, between the care workers and the exempt, public entity.

This Note's joint-employer proposal would authorize bargaining in Zone 2 only, which is outside the Board's jurisdiction. Because Zone 2 is outside the NLRA and the Board's jurisdiction, it escapes NLRA preemption and states are free to regulate within it.

To summarize, the Board's exclusive jurisdiction extends *only to* that zone of labor relations (Zone 1) between both a covered employee and a covered employer. In the case of a joint-employer relationship, however, it does not have jurisdiction over the zone of labor relations between *those same employees and the public entity* (Zone 2). Thus, in that scenario, there exists Zone 2, a zone of labor relations between an employee and an exempt entity, that entirely escapes the Board's exclusive jurisdiction. That zone is precisely the region that states can regulate.<sup>305</sup>

According to the *Davis* characterization of *Garmon*, the court must first “decide whether there is an arguable case for preemption; if there is, it must defer to the Board, and only if the Board decides that the conduct is not protected or prohibited may the court entertain the litigation.”<sup>306</sup> Relying on that principle, a Michigan court declining to assert jurisdiction reasoned that because a) “the labor activity in the instant cases is at least ‘arguably’ subject to the provisions of the NLRA” under *Management Training* and b) states must defer to the NLRB, the state cannot assert jurisdiction.<sup>307</sup>

However, the labor relations between a public entity and worker are not even “arguably” subject to the NLRA. The Board stated in *Management Training* that it has “no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table.”<sup>308</sup> Because the labor relations between the public entity and the workers fall outside the NLRA, they cannot be preempted. By contrast, the labor relations between the private employer and the workers fall squarely within Board jurisdiction. This understanding is implicitly the one favored by California and other states. And as those states have done to avoid

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305. States may well impose their own statutory limits on regulating this relationship, but the source of that law is not the NLRA.

306. *Int'l Longshoremens Ass'n v. Davis*, 476 U.S. 380, 397 (1986).

307. *AFSCME v. Dep't of Mental Health*, 545 N.W.2d 363, 370 (Mich. Ct. App. 1996) (quoting *Davis*, 476 U.S. at 397). Perhaps the court was reacting to the fact that the MERC had asserted jurisdiction over both the public entity and private entity. See *Summer's Living Sys., Inc.*, 332 N.L.R.B. 275, 280 (2000).

308. *Mgmt. Training*, 317 N.L.R.B. at 1358 n.16.

preemption issues, states should limit the extent of the joint-employer relationship solely to bargaining over the terms and conditions that the state controls.

One concern that opponents of simultaneous state jurisdiction have raised is that potential conflicts could arise over workers who are subject to jurisdiction under both federal and state law. For instance, health-care workers are often subject to requirements that they must give advanced notice before going on strike — that notice period could be longer under the NLRA than under state law.<sup>309</sup> However, the union would only need to follow both notice requirements for no conflict to arise.<sup>310</sup> To the extent that there is a true conflict in law — for instance, the NLRA guarantees the right to strike, while state law may not — the NLRA should govern. Representation elections and certification could occur under both the NLRA and state law without conflict.<sup>311</sup>

State assertion of jurisdiction over, and authorization of bargaining between, public entities and care workers promotes the policies of U.S. labor law. The NLRA, for instance, exists in large part to “encourage[e] the practice and procedure of collective bargaining,”<sup>312</sup> while the Board is charged with the duty to “adapt the Act to changing patterns of industrial life.”<sup>313</sup> The state-level question reflects the mirror image of *Management Training*, presenting the issue of whether partial jurisdiction over joint employers “destroy[s] the ability of [covered] employers to engage in effective bargaining over terms and conditions of employment within their control.”<sup>314</sup> Just as the Board concluded in *Management Training*, states should also conclude that incomplete jurisdiction does not preclude effective bargaining.<sup>315</sup> Indeed, states often control important terms of employment over which meaningful bargaining is possible.

Moreover, via *Browning-Ferris*’s recognition of joint employers and *Management Training*’s expansion of jurisdiction, the Board has articulated a policy of facilitating collective bargaining wherever it can. As the Board majority explained in *Browning-Ferris*, “[T]he thrust of *Management Training* was that an employer subject to the Act is required to bargain over the significant terms of

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309. This argument is raised in Wexford’s brief. Brief of Appellant at 13, AFSCME, Council 31 v. State Lab. Rels. Bd., 216 Ill. 2d 569 (2005) (No. 99074), 2005 WL 3937386.

310. Brief of Petitioner-Appellee at 27 n.10, AFSCME, Council 31 v. State Lab. Rels. Bd., 216 Ill. 2d 569 (2005) (No. 99074), 2005 WL 3937385.

311. See *infra* Section IV.B. *In re Employes [sic] of Se. Pa. Transp. Auth.*, 48 P.P.E.R. ¶ 59 (Pa. LRB 2017) raises this concern.

312. National Labor Relations Act of 1935, 29 U.S.C. § 151 (2018).

313. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

314. *Mgmt. Training Corp.*, 317 N.L.R.B. 1355, 1358 n.16 (1995).

315. *Id.*

employment that it *does* control.”<sup>316</sup> Similarly, the Board described its joint-employer standard as “encompass[ing] the full range of employment relationships wherein meaningful collective bargaining is, in fact, possible.”<sup>317</sup> Taken together, these cases advance a clear principle: if the Board can promote bargaining – even partial bargaining – with one private party (*Management Training*) or with several (*Browning-Ferris*), it shall. States should follow that lead.

Consider further the interaction between the principles of *Management Training* and *Browning-Ferris*. Under *Browning-Ferris*, the Board may find a joint-employer relationship even if the private entity has reserved, indirect authority; under *Management Training*, the Board will assert jurisdiction over any entity that meets the definition of employer and the minimum threshold. Applied together, these two standards compel the Board to assert jurisdiction over any private entity with indirect, reserved control – if the private entity is an employer under *Browning-Ferris*, the Board must assert jurisdiction under *Management Training*.<sup>318</sup> Without these standards, workers might be unable to bargain over certain terms and conditions. Worse, they might lack labor-law coverage entirely.

However, those policy goals promoted by *Management Training* and *Browning-Ferris* would be undermined if *Management Training* could be read as extinguishing the possibility of workers *also bargaining with a public joint employer*. A private entity might, for instance, have indirect, reserved control over solely one term or condition of employment, such as supervision. Under the interaction of *Management Training*, *Browning-Ferris*, and the rule adopted by Michigan, the Board would assert jurisdiction over the private entity, with which the workers could bargain over supervision. However, because of the Michigan rule, those workers could not bargain with the public entity, *despite it having direct control over every other term or condition of employment*. This result would undermine the policy of promoting collective bargaining. The more expansive joint-employer and jurisdictional Board rules are most consistent with the Board’s policies, only

316. *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. 1599, 1611 n.70 (2015).

317. *Id.* at 1611.

318. The Board has rejected employer invitations to change its *Management Training* test in light of *Browning-Ferris*; the Board explained that “the fact that the Employer may potentially be a joint employer with an air carrier [under RLA jurisdiction and] beyond our jurisdiction does not change the fact that the Board does not employ a joint-employer analysis to determine jurisdiction.” *Airway Cleaners, LLC*, 363 N.L.R.B. 1575, 1575 n.1 (2016). The Board explained that *Browning-Ferris* did not “modify any other legal doctrine, create ‘different tests’ for ‘other circumstances,’ or change the way that the Board’s joint-employer doctrine interacts with other rules or restrictions under the Act.” *Id.* (quoting *Browning-Ferris*, 362 N.L.R.B. at 1618 n.120). In sum, although the *Browning-Ferris* standard may have enlarged the definition of joint employer for the private entity, it does not affect the *Management Training* test and the Board will continue to assert jurisdiction regardless of a public entity’s joint-employer status.

assuming that Board jurisdiction does not simultaneously foreclose bargaining under state law. Otherwise, as a Pennsylvania court explained, “[public] employers may evade requirements of the [state labor law] by simply delegating some of their employer responsibilities to a private employer.”<sup>319</sup>

Finally, the joint-employer approach is consistent with those taken in other legal contexts. State boards will find a joint-employer relationship between two public entities.<sup>320</sup> Under Title VII<sup>321</sup> and workers’ compensation statutes,<sup>322</sup> courts have recognized joint-employer relationships involving both public and private entities. The Fair Labor Standards Act similarly recognizes public agencies as joint employers, although that statute covers both public and private employers.<sup>323</sup>

Although this analysis indicates that preemption concerns are misguided, the Board has not explicitly stated that state-level collective-bargaining schemes would not be preempted—rather, text and precedent warrant that outcome. To further clarify the issue, in response to a state court or labor-board petition, the Board should explicitly address the matter by issuing an advisory opinion.<sup>324</sup> Under its regulatory authority, the Board can offer an advisory opinion in response to a petition or request for an opinion from a state agency or court.<sup>325</sup> Accordingly, a state could detail its recognition of state joint-employer status and seek the Board’s opinion on whether that scheme runs into preemption issues.<sup>326</sup>

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319. *United Ass’n of Journeymen, Loc. 449 v. Pa. Lab. Rels. Bd.*, 613 A.2d 155, 159 (Pa. Commw. Ct. 1992).

320. *See, e.g., United Pub. Emps., Loc. 790 v. Pub. Emp. Rels. Bd.*, 262 Cal. Rptr. 158, 165 (Ct. App. 1989).

321. *Rivera v. Puerto Rican Home Attendants Servs., Inc.*, 922 F. Supp. 943, 949-50 (S.D.N.Y. 1996) (finding sufficient evidence of joint employment between the City of New York and a private home-care agency to deny a motion to dismiss and let a Title VII claim proceed).

322. *In-Home Supportive Servs. v. Workers’ Comp. Appeals Bd.*, 199 Cal. Rptr. 697, 704 (Ct. App. 1984) (finding a joint-employer relationship involving the state for workers’ compensation purposes).

323. 85 Fed. Reg. 2820, 2859 (Jan. 16, 2020) (to be codified at 29 C.F.R. § 791) (“A joint employer may be an individual, partnership, association, corporation, business trust, legal representative, public agency.”); *see* 29 U.S.C. § 203(a), (d) (2018).

324. In one case involving a potential joint-employer relationship with both a public and private employer, the Illinois State Labor Relations Board indicated it would file a petition with the NLRB asking whether state-board assertion of jurisdiction would violate preemption principles. *AFSCME, Council 31 v. State Lab. Rels. Bd.*, 216 Ill. 2d 569, 573 (2005). Ultimately, because the board and courts determined there was no joint-employer relationship, no petition was filed. *Id.*

325. 29 C.F.R. § 102.99 (2017).

326. Professor Sachs has proposed that states seek advisory opinions for more sweeping forms of labor regulation under which the Board would use its discretionary power to cede jurisdiction

Under the analysis outlined above, the Board should then opine that the state's proposal does not violate NLRA preemption principles. While preemption is not, as this Part shows, a barrier, Board action is important because of the Board's central institutional role in U.S. labor law. As the Supreme Court stated, "It is essential to the administration of the Act that these [preemption] determinations be left in the first instance to the National Labor Relations Board."<sup>327</sup> This action by the Board would provide crucial clarity, thereby indicating to states that the path ahead is clear.

#### IV. OVERCOMING PRACTICAL BARRIERS TO THE JOINT-EMPLOYER RELATIONSHIP

States set reimbursement rates for and extensively regulate care workers, but the jurisdictional requirements of the NLRA preclude the Board from bringing public entities to the bargaining table.<sup>328</sup> This Note has argued that states should recognize their implicit joint-employer relationships with NLRA-covered care workers and allow them to collectively bargain with public entities over these key terms. As the previous Part detailed, NLRA preemption will not prohibit state recognition of the implicit joint-employer relationship states have with care workers. Other practical issues, however, might remain. This Part addresses several of these issues, including working conditions that are jointly determined by both private and public entities, representation and certification, and the possibility of better alternatives. It argues that these practical issues should not be regarded as barriers to the implementation of a joint-employer standard.

##### A. Wages, Prices, and Jointly Determined Working Conditions

One potential practical difficulty with the joint-employer solution concerns the existence of terms and conditions of employment that public and private entities jointly determine. Many of the issues that workers may bargain with the state over, such as minimum staffing ratios, minimum safety requirements, and

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entirely to states. This Note's proposal differs in that the Board would maintain jurisdiction over the bargaining between workers and the private entity, while states would supervise bargaining between workers and the public entity. See Sachs, *supra* note 214.

327. Int'l Longshoremens' Ass'n v. Davis, 476 U.S. 380, 390 (1986) (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959)).

328. Congress could amend the NLRA, but it has been notoriously difficult to achieve labor-law reform. See Richard Trumka & Jeff Merkley, Opinion, *The Senate Cannot Be the Graveyard for Labor Law Reform Again*, MORNING CONSULT (May 19, 2021, 5:00 AM ET), <https://morningconsult.com/opinions/the-senate-cannot-be-the-graveyard-for-labor-law-reform-again> [<https://perma.cc/6GCR-9WH4>].

training requirements, are set solely by the state and would be relatively straightforward for bargaining to encompass. However, the state and private entities jointly determine other essential terms of work.

Wages are perhaps the central jointly determined condition of work. The exact rate of wages is set by a combination of public reimbursement rates and workers' contracts with private entities. For instance, a reimbursement rate of twenty-five dollars per hour for personal care may cover wages, administrative costs, and other overhead performed by an agency—making the exact amount workers receive dependent on their private employer. To clearly define the bargaining responsibilities of each party, the following division of labor should occur: workers should bargain with the state over the reimbursement rate of twenty-five dollars and what is called a “pass through”—the minimum percentage of the reimbursement rate that must furnish workers' wages, benefits, and other forms of compensation. Bargaining over these two issues creates roughly a floor (the pass-through rate multiplied by the reimbursement rate) and a ceiling for wages (the hourly reimbursement rate itself). Those workers can then also bargain with the private entity over the exact wage rate, so long as that wage rate surpasses the pass-through rate. Public and private bargaining can therefore complement, rather than substitute for, one another.

At a glance, bargaining over reimbursement rates may resemble bargaining over prices rather than more traditional wage-and-hour bargaining. Indeed, reimbursement rates are, in fact, prices—they represent the amount that a state entity pays a home-care agency, nursing home, or childcare center for the performance of a particular service. That these rates are prices is not a problem for bargaining, however. There is no legal proscription against such bargaining: the state statute would define these rates as a mandatory subject of bargaining.<sup>329</sup> Wages, after all, are prices too—the price of labor. In fact, because the price that agencies are paid is closely intertwined with wages, effective bargaining requires bargaining over these rates. As the analysis above has shown, wage-and-hour bargaining with private entities alone, rather than the public source of funding, creates public-private fissuring. And because these services are so labor intensive,

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329. Section 8(d) of the National Labor Relations Act of 1935 requires parties to “confer in good faith with respect to wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d) (2018). The Supreme Court has developed three categories of bargaining subjects: mandatory, permissive, and forbidden subjects of bargaining. Wages, hours and working conditions fall in the first category. Permissive subjects are those that the employer can willingly bargain over. 1 *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT*, ch. 16 (John E. Higgins, Jr. et al. eds., 7th ed. 2017) (surveying the categories of subjects of bargaining). Because the proposed bargaining with the public entity would occur through enabling state legislation that would define the subjects of bargaining, whether reimbursement rates are technically mandatory or permissive under the NLRA would not matter.



labor costs constitute most of the reimbursement. Effective collective bargaining in this setting necessitates bargaining over reimbursement and subsidy.

*B. Representation, Certification, and Bargaining-Unit Determination*

One practical issue that arises under this joint-employer proposal is how one labor board – either the state labor board or the NLRB – should treat a bargaining unit created and certified under another board’s supervision and jurisdiction. For instance, if a group of workers chooses a union as their exclusive representative under state law to bargain with the public entity, how should the NLRB treat that union? This issue is important because states may have different procedures for certification – such as allowing card check – and often have larger bargaining units than in the private sector.<sup>330</sup>

At first blush, this problem does not appear to present too many difficulties. Consider a union certified under *state* law to bargain with a *public* entity. The NLRB could then recognize the bargaining representative created under state law for the purposes of bargaining under the NLRA. The union would represent workers in their bargaining with both the public and private employers. The private employer, then, would have a duty to bargain with the union in good faith.<sup>331</sup>

This conclusion finds some support in NLRB precedent. The NLRB has held that it should grant comity to a bargaining representative who achieved its status under a different statutory regime.<sup>332</sup> As the NLRB recently explained, under its successorship doctrine, “the Board has repeatedly asserted jurisdiction over bargaining units previously certified by the [public-sector] PLRB.”<sup>333</sup> As the Sixth Circuit explained in upholding the comity the Board granted to pre-*Management Training*, MERC-conducted elections, “it has been its longstanding policy to recognize as binding the results of state-conducted elections provided that the state

330. See *supra* notes 113-121 and accompanying text.

331. 29 U.S.C. § 158(d) (2018).

332. The D.C. Circuit has recently summarized this case and Board law, stating: “Occasionally, the Board will exercise jurisdiction over a particular bargaining relationship previously under the supervision of a state agency. In such circumstances, the Board generally extends ‘comity’ to the state agency’s elections and certifications, ‘provided that the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements.’ When it extends comity, the Board accords the ‘same effect to the elections and certifications of responsible state government agencies’ as its own.” *Temple Univ. Hosp., Inc. v. NLRB*, No. 21-1111, 2022 WL 2568074, at \*2 (D.C. Cir. July 8, 2022) (quoting *Allegheny Gen. Hosp.*, 230 N.L.R.B. 954, 955 (1977)).

333. *Temple Univ. Hosp., Inc.*, No. 04-RC-162716, 2017 WL 6379903, at \*2 (N.L.R.B. Dec. 12, 2017) (citing cases).



proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements.”<sup>334</sup> In another instance, after Chicago privatized the operation of the Lincoln Park Zoo, the Board and the Seventh Circuit extended comity to the bargaining representative, despite the union having been voluntarily recognized under Illinois public-sector labor law. This suggests that unions created through card-check procedures permissible only in the public sector should nonetheless be recognized by the NLRB.<sup>335</sup> The Third Circuit has reached a similar conclusion.<sup>336</sup>

A recent example from the State of Washington illustrates this principle in a care-work setting. In 2018, a change in Washington’s home-care program shifted the jurisdiction of IP home-care workers from state labor law to the NLRA. Washington Senate Bill 6199, signed into law by Governor Jay Inslee, created a private, consumer-directed employer for IP home-care workers.<sup>337</sup> As part of the rate-setting board, it includes one designee from the exclusive bargaining representative.<sup>338</sup> Importantly, the law changed the jurisdiction of the IP workers from Washington public-sector labor law to the NLRA.<sup>339</sup> Under current NLRB law, the Board would recognize the legitimacy of the union, even though it originated under state law. Accordingly, no challenge so far has overturned that scheme.

Difficulty arises, however, when the relationship between workers and the public employer on one hand, and the workers and the private employer on the other, do not map neatly onto one another. The NLRB and case law that have addressed this issue do so in the *successorship* context, which involves a *new* employer recognizing a previously established union and assuming bargaining obligations. Under NLRB successor doctrine, a bargaining relationship between the new employer and the previously established union arises if “the new employer makes a conscious decision to maintain generally the same business and

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334. Mich. Cmty. Servs., Inc. v. NLRB, 309 F.3d 348, 358 (6th Cir. 2002) (internal quotation marks omitted).

335. Lincoln Park Zoological Soc’y v. NLRB, 116 F.3d 216, 220 (7th Cir. 1997).

336. Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 966 (3d Cir. 1979).

337. S. 6199, 65th Leg., Reg. Sess. (Wash. 2018).

338. *Id.*

339. “Currently, individual providers are under Washington public sector labor law. Under this bill, individual providers would switch to a private employer and would be subject to private federal labor law.” S. COMM. ON HEALTH & LONG TERM CARE, 65TH LEG., REG. SESS., REP. ON SB 6199 at 6 (Wash. 2018), <https://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bill%20Reports/Senate/6199%20SBA%20WM%2018.pdf> [<https://perma.cc/2BRR-87XF>].

to hire a majority of its employees from its predecessor.”<sup>340</sup> It does not matter if a successor employer is a private entity and the previous employer was public.<sup>341</sup>

However, the successorship context differs from a joint-employer relationship because a successor employer generally maintains the same business and, thus, would significantly overlap with the previous bargaining relationship. By contrast, under the joint-employer proposal, the *concurrent* bargaining relationships between workers and the state on one hand, and the private entity on the other, are different in nature.

The bargaining relationships are different because of the size of the bargaining unit and the subjects of bargaining. Consider a hypothetical statewide bargaining unit of childcare workers certified under state law, which is not uncommon.<sup>342</sup> To win certification, a majority of childcare workers would have voted for union representation, and one statewide bargaining unit would result. However, the problem arises as to how this unit would translate to the private sector under the NLRA. While the NLRB generally has discretion to determine what an appropriate unit is, Section 9(b) of the NLRA limits the size of bargaining units to “the employer unit, craft unit, plant unit, or subdivision thereof.”<sup>343</sup> Thus, the largest size of a bargaining unit is the “employer unit,” although employers may *voluntarily* choose to create multiemployer units.<sup>344</sup> In the childcare hypothetical, the largest bargaining unit permissible under the NLRB would either be a center or group of centers, but not every center in the state.

The upshot is that the statewide unit created under state law would not directly translate into bargaining units under the NLRB. One potential option for the NLRB is that it could recognize a bargaining unit *at each center or employer across the entire state*.

However, this solution might produce some odd results. First, it is possible that workers would want a union to bargain with the state but not their private employer, perhaps because the relationships between workers and those entities differ. Thus, imputing the results of the election to bargain with the state to the private context might not reflect workers’ preferences. Moreover, while “the

340. *Lincoln Park Zoological Soc’y*, 116 F.3d at 218 (first citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 37 (1987); and then citing *NLRB v. Burns Int’l Sec. Servs.*, 406 U.S. 272, 278-79 (1972)).

341. *Id.*

342. See, for example, the statewide bargaining unit for IP home-care workers under SEIU 775 in Washington state. The union conducts bargaining with the State of Washington on a statewide basis, which covers all IP home-care workers in the bargaining unit across the state. *Collective Bargaining Agreement*, SEIU 775 (July 2021), <https://seiu775.org/wp-content/uploads/2021/07/State-of-Washington-2021-2023-CBA.pdf> [<https://perma.cc/93HD-MVKS>].

343. National Labor Relations Act of 1935, 29 U.S.C. § 159(b) (2018).

344. See Barenberg, *supra* note 154, at 12-13.

Board has historically accorded comity to certifications by state authorities where due process standards have been met,”<sup>345</sup> imputing the results of an election to bargain with one entity to another might fail to accommodate due-process standards. Second, to win a union in a statewide election, workers need a majority across the whole state. However, at individual centers or employers, workers voting for a union might be in the minority. In an extreme example, a union might prevail in the state overall but not win a single vote in a specific center. It would be odd for the NLRB to then recognize a center-wide bargaining unit given those workers’ preferences.

To be sure, the NLRB has not yet confronted this issue. Perhaps the principle of comity would compel NLRB recognition of the union for bargaining between the workers and the private employer. However, a less ambitious option would require workers to win their union under *both* state law and the NLRA to bargain with both employers. The original, unenacted Washington bill on workers at childcare centers ultimately favored this approach. That bill was silent on whether bargaining units certified by the state could bargain under the NLRA.<sup>346</sup> But a later version explicitly disavowed the possibility, providing that “an organization that represents childcare-center directors and workers in bargaining with the state under this act is precluded from representing workers seeking to engage in traditional collective bargaining with their employer over specific terms and conditions of employment at individual childcare centers.”<sup>347</sup>

While requiring workers to go through both state and NLRB procedures may seem onerous for workers, this proposal would nonetheless benefit workers compared to the status quo. First, for our hypothetical statewide childcare bargaining unit, even if some of those workers never bargain with their private employers, they will nonetheless benefit from bargaining with their public employer. Here, bargaining with the state over reimbursement rates and other issues could significantly improve working conditions. Second, the statewide union won under state law could serve as a gateway for further unionization. Once workers participate in a union, learn of its benefits, and discuss working conditions with each other, it could be easier to then win a union at their individual center or private employer. From the beachhead of a statewide union, the

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345. *Allegheny Gen. Hosp.*, 230 N.L.R.B. 954, 955 (1977).

346. For a discussion of the changes, see H. COMM. ON COM. & LAB. APPROPRIATIONS, 60TH LEG., REG. SESS., REP. ON HB 2449 at 4 (Wash. 2008), <https://lawfilesexternal.wa.gov/biennium/2007-08/Pdf/Bill%20Reports/House%20Historical/2449%20BRH%20APP%2008.pdf> [<https://perma.cc/2ZK2-F6HU>].

347. Engrossed Second Substitute H.B. 2449, 60th Leg., Reg. Sess. (Wash. 2008), <https://lawfilesexternal.wa.gov/biennium/2007-08/Pdf/Bills/House%20Bills/2449-S2.E.pdf> [<https://perma.cc/B6DG-GMSN>].

fight for improved wages and working conditions can progress to NLRB organizing and elections.

C. *The Joint-Employer Solution Compared to Potential Alternatives*

Finally, some might object that while the joint-employer solution might be better than nothing, it is inferior to possible alternatives. However, the joint-employer solution creates a direct, effective, and orderly means of improving wages and working conditions for NLRA-covered care workers. While alternative means of improving these workers' wages and working conditions do exist, these paths are too removed from workers to be effective. Historically, legislatures have underfunded NLRA-covered care workers in state budgets. In one recent case, left without recourse to bargaining with the state, nursing-home workers even went on strike to improve their wages and working conditions.<sup>348</sup> By contrast, bargaining with public entities would provide a more direct and orderly method of improving wages and working conditions while addressing other important workplace issues. Without the ability to bargain with public entities directly, NLRA-covered care workers have relied on several alternative means. However, these alternatives are suboptimal compared to bargaining, either leading to underfunding of workers or potentially disruptive strike waves.

First, care workers can attempt to gain increased funding through the standard state budgetary process. However, because NLRA-covered workers are mostly nonunion, they are a relatively diffuse group and must compete with a number of other state budget priorities. As Kate Andrias and Benjamin I. Sachs have described, these poor and working-class workers cannot easily build countervailing power and have their concerns addressed through the political process.<sup>349</sup> When state legislatures set their budgets, including the amount that social programs will receive, it can be difficult for these largely unorganized workers to have their voices heard. The inability of workers to effectively make budgetary demands on the state is perhaps one reason why Medicaid and the CCDBG are underfunded.

To be sure, NLRA-exempt workers have had legislative success in state enactment of statutes that recognize their right to organize and bargain. However, it is important to note that NLRA-exempt workers struggled to raise their wages through mere budgetary advocacy and saw the need to advocate for labor legislation. Indeed, as this strategy suggests, it is likely more effective to try to win

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348. See *infra* notes 350-353 and accompanying text.

349. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021); Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 168-76 (2013).

higher wages and increased funding for care through bargaining than through state budget battles. In contrast to the state budget, where many well-funded interest groups have priorities and may drown out other groups, bargaining represents an area where workers and unions can concentrate their strength and have their voices heard. Moreover, it is likely easier to win legislative change on a single issue, such as authorizing collective bargaining, than for unorganized workers to influence budget priorities for the entire state each year. Labor legislation not only enables workers to build collective power but also entrenches and institutionalizes that power.

A second strategy NLRA-covered care workers have pursued is using their right to engage in concerted, protected activity to exert pressure on the state. In one recent example of this phenomenon, 4,000 nursing-home workers belonging to SEIU 1199NE in Connecticut, seeking to win more state Medicaid funding, threatened to strike by sending in strike notices in spring 2021.<sup>350</sup> After negotiation between the union, the nursing-home groups, and the state, Governor Ned Lamont pitched—and the groups agreed to—a 4.5% Medicaid rate increase for wages and health benefits in the coming fiscal year and a 6.2% hike in 2022-23. The deal also provided \$13 million for enhanced training and staff development.<sup>351</sup> Critically, a central issue that led to the strike threat was public-private fissuring. Although the collective-bargaining agreements were between nursing homes and SEIU 1199NE, the State of Connecticut was a key actor because of its expansive role in funding the homes through Medicaid.<sup>352</sup> From 2007 to 2021, the state budget for nursing-home funding averaged just 1.1% growth, essentially capping the compensation rates for workers in a state where 80% of nursing-home revenues involve Medicaid recipients.<sup>353</sup>

However, this example is largely an outlier. First, the vast majority of care workers are not unionized.<sup>354</sup> Here, the strike occurred at the confluence of several conditions—a strong union in SEIU 1199NE, a Democratic governor who

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350. *Conn. Offers \$280M to Nursing Homes to Avoid Strikes*, NBC CONN. (May 11, 2021, 4:40 AM), <https://www.nbcconnecticut.com/news/local/conn-offers-280m-to-nursing-homes-to-avoid-strikes/2484988> [<https://perma.cc/97XK-G2QV>].

351. Keith M. Phaneuf & Jenna Carlesso, *Lamont Reaches Deal to Avert Nursing Home Strike*, CONN. MIRROR (May 13, 2021), <https://ctmirror.org/2021/05/13/lamont-sweetens-his-best-and-final-offer-to-avert-nursing-home-strike> [<https://perma.cc/MWV7-QAHG>].

352. *Id.*

353. *Id.*

354. The Bureau of Labor Statistics reports that just 7.1% of health-care and social-assistance workers are unionized. *A Look at Union Membership Rates Across Industries in 2020*, U.S. BUREAU OF LAB. STAT. (Feb. 25, 2021), <https://www.bls.gov/opub/ted/2021/a-look-at-union-membership-rates-across-industries-in-2020.htm> [<https://perma.cc/H56A-B55X>].

had been facing criticism from labor and progressives, and extensive public support for essential workers during the pandemic.<sup>355</sup> Moreover, while the right to strike is an essential right for NLRA-covered workers – a right that the nursing-home workers courageously exercised – strikes can be risky for workers and costly for both the state and care recipients. Critics claim that the strike likely would have disrupted care for nursing-home residents, and the state claimed that it would send in replacement employees, threatening the livelihoods of the workers.<sup>356</sup> Indeed, workers may not win their demands through strikes – a strike in Connecticut involving SEIU 1199NE in 2002 led to then-Governor John G. Rowland hiring replacement workers.<sup>357</sup>

Third, NLRA-covered workers have relied on the solidarity and collective strength of other workers to advocate for their NLRA-covered comrades. In Oregon, for instance, NLRA-exempt home-based childcare workers represented by AFSCME included in their contract a provision that required the Oregon Department of Human Services (DHS) to increase rates for licensed childcare centers receiving subsidies to 100% of the seventy-fifth percentile of market rates.<sup>358</sup> This provision was a remarkable act of solidarity with childcare centers and their workers who were not parties to, and therefore not covered by, the contract.<sup>359</sup>

However, there are several limitations to relying on other workers to bargain on NLRA-covered care workers' behalf. First, this strategy works only in states where NLRA-exempt workers can bargain with the state and have attained some measure of collective power. Second, it relies on the goodwill of another group of workers, many of whom have other priorities. Finally, and most critically, the state is not obligated to bargain over issues that affect a set of workers outside the NLRA-exempt bargaining unit. Thus, the strategy relies on the willingness of both another set of workers and the state itself to engage in these issues, which is an unstable solution.

Perhaps the most compelling evidence against all of these solutions is their historical failure to improve care workers' lot. One insightful data point comes from Oregon, where NLRA-exempt home-care workers who bargain with the

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355. Daniela Altimari, *After Push by Gov. Lamont, Nursing Home Owners and Union Reach Deal to Avoid Disruptive Strike. Nursing Home Workers Will Earn at Least \$20 Per Hour*, HARTFORD COURANT (May 13, 2021, 7:10 PM), <https://www.courant.com/politics/hc-pol-nursing-home-negotiations-20210513-cvm6o2k3fndfgik44ocwse65u-story.html> [<https://perma.cc/56NB-ADLN>].

356. *Conn. Offers \$280M to Nursing Homes to Avoid Strikes*, *supra* note 350.

357. Paul Zielbauer, *Governor Defends Acts During Strike in Connecticut*, N.Y. TIMES (June 26, 2002), <https://www.nytimes.com/2002/06/26/nyregion/governor-defends-acts-during-strike-in-connecticut.html> [<https://perma.cc/ZR9B-EQL8>].

358. Blank et al., *supra* note 152, at 16.

359. *Id.*



state coexist with NLRA-covered home-care workers who cannot.<sup>360</sup> Unionized NLRA-exempt workers who can bargain with the Oregon DHS have reduced their turnover rates to 27% compared to 69% for nonunion private-agency workers, achieved universal health-insurance coverage compared to 40% for agency workers, and won wage increases of 44% from 2006 to 2016 compared to no increase for agency workers. By 2018, unionized home-care workers averaged a wage of \$14.70, compared to \$12.70 at agencies.<sup>361</sup>

In contrast to these indirect methods, bargaining with public entities would enable care workers to have a reliable, predictable, and orderly channel to increase wages, improve working conditions, and resolve disputes. Data from other workers engaged in public-sector bargaining bear out the importance of bargaining for workers. One study examining the effects of legislative measures restricting public-sector collective-bargaining rights in Idaho, Indiana, Michigan, Tennessee, and Wisconsin found that “average school district spending on teacher compensation decreased by about 6%, with spending on teacher salaries falling by about 5% and spending on teacher benefits declining by 9.7% in the five states relative to the rest of the states.”<sup>362</sup> However, enabling care workers to bargain with the state is also unlikely to wreck state budgets. As another study indicates, labor laws enabling public-sector collective bargaining “have not led to excessive public-sector pay.”<sup>363</sup>

## CONCLUSION

For decades, states have shielded themselves from bargaining obligations with workers, despite extensive state control over wages and working conditions—a process this Note describes as public-private fissuring. But unless state funding flowing into the sector is increased, workers and those who rely on care services will continue to suffer. For workers, collective bargaining with the state could provide desperately needed wage-and-benefit increases and improved voice over their working conditions. States can enable and regulate this bargaining without running afoul of NLRA preemption. While recognizing the joint-

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360. See Lina Stepick, *The State of Homecare Work in Oregon: The Need to Invest in Raising Wages and Strengthening Labor Standards*, UNIV. OF OR. LAB. EDUC. & RSCH. CTR. 1-2, 28-29 (Mar. 2021), <https://lerc.uoregon.edu/files/2021/03/EPUB-ORHomecareReport.pdf> [<https://perma.cc/F5SK-QHW6>].

361. *Id.* at 32.

362. Emma García & Eunice Han, *The Impact of Changes in Public-Sector Bargaining Laws on Districts' Spending on Teacher Compensation*, ECON. POL'Y INST. 1 (Apr. 29, 2021), <https://www.epi.org/publication/the-impact-of-changes-in-public-sector-bargaining-laws-on-districts-spending-on-teacher-compensation> [<https://perma.cc/BXF8-MGMW>].

363. Keefe, *supra* note 112.



BETWEEN PUBLIC AND PRIVATE

employer relationship between the state and NLRA-covered employees may be without precedent, so too are the crises facing care workers.