Nos. 12-99, 12-312

In The Supreme Court of the United States

UNITE HERE LOCAL 355,

Petitioner,

v.

MARTIN MULHALL, ET AL.,

Respondents.

MARTIN MULHALL,

Petitioner,

v.

UNITE HERE LOCAL 355, ET AL.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

MARK E. LEVITT*
ALLEN, NORTON & BLUE, P.A.
1477 West Fairbanks Avenue
Suite 100
Winter Park, Florida 32789
(407) 571-2152
mlevitt@anblaw.com

Counsel for Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming's parent corporation is Hartman & Tyner, Inc.; and Mardi Gras is not owned, in any part, by a publicly-held company.

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REASONS FOR DENYING THE WRITS

Supreme Court Rule 10 states that a Petition for Writ of Certiorari "will be granted only for compelling reasons." In the present case, both Unite Here ("Union") and Martin Mulhall's petitions should be denied because there is no longer a justiciable case or controversy. In accordance with the considerations enunciated in Rule 10, Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming ("Mardi Gras") contends that the petitions should be denied.

This Court should deny both Petitions for Writs of Certiorari as moot.

A basic principle of Article III is that a justiciable case or controversy must remain "extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (internal quotation marks omitted). "[T]hroughout the litigation," the party seeking relief "'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998) (*quoting Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)). Additionally, there must be a live case at the time of appeal, it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment the Court is reviewing.

Sosna v. Iowa, 419 U.S. 393, 402, 95 S. Ct. 553, 558, 42 L. Ed. 2d 532 (1975); *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S. Ct. 956, 959, 22 L. Ed. 2d 113 (1969).

In *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412, 92 S. Ct. 574, 30 L. Ed. 2d 5657 (1972) (per curiam), this Court stated:

> "The only relief sought in the complaint was a declaratory judgment that the now repealed Fla. Stat. § 192.06(4) is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed."

Id. at 414-415, 92 S. Ct., at 575-576. Likewise, in *Burke v. Barnes*, this Court treated a challenge to the validity of a statute that had expired in the same way as a statute that had been repealed, finding that any issues brought up on appeal were mooted after the bill "expired by its own terms." 479 U.S. 361, 363-364, 107 S. Ct. 734, 93 L. Ed. 2d 732 (1987).

This Court has similarly treated the expiration of injunctions as moot. In *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri*, this Court ruled that, because a lower court's injunction had since "expired by its own terms," there was no "actual matters in controversy essential to the decision of the particular case before [the Court]." 361 U.S. 363, 366, 80 S. Ct. 391, 4 L. Ed. 2d 373 (1960) (*quoting United States v. Alaska*

S.S. Co., 253 U.S. 113, 116, 40 S. Ct. 448, 449, 64 L. Ed. 808 (1920)). It was further noted that the duty of the Court was "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Id.* (*quoting Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895)).

In the present case, the Memorandum of Agreement ("neutrality agreement"), which is the subject of the Union's Petition for Writ of Certiorari, has expired by its terms and is no longer in effect. According to the Union, the neutrality agreement expired on December 31, 2011. *Unite Here Local 355 v. Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming, et al.*, No. 0:12-cv-61135-WPD (S.D. Fla. filed June 7, 2012). While Mardi Gras asserts that the Agreement expired earlier, on October 24, 2011, it is clear that the neutrality agreement has still expired by its own terms prior to the Petition for Writ of Certiorari, rendering moot any judicial remedy by this Court. It should be noted that Petitioner Unite Here has filed a Complaint to Compel Arbitration in the United States District Court for the Southern District of Florida. *Unite Here Local 355 v. Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming, et al.*, No. 0:12-cv-61135-WPD (S.D. Fla. filed June 7, 2012). The Union asserts Mardi Gras has an obligation to arbitrate an alleged violation of the neutrality agreement under its terms. In resolving this issue,

it may be necessary, in that case, for the District Court to determine, among other issues, exactly when the neutrality agreement expired in 2011. Should the District Court find the neutrality agreement was in place at the time of the underlying arbitration demand at issue in the Union's Complaint to Compel Arbitration, it may order Mardi Gras to conduct an arbitration of alleged violations of the neutrality agreement. Should such an arbitration take place, it is speculatively possible for the arbitrator to find a violation of the agreement and the Union could reasonably ask for an extension of the neutrality agreement's term as a remedy. Mardi Gras believes that an arbitrator has no lawful authority to extend the term of the now-expired neutrality agreement, but it is possible that it may occur anyway. This prospect, however, does not cure the mootness issue. As this Court stated in *Local No. 8-6,* when confronted with the issue of a separate action pending in another court, "We cannot agree that the pendency of that litigation gives life to the present appeal. When that claim is litigated it will be subject to review, but it is not for us now to anticipate its outcome." 361 U.S. at 370.

The expiration of the neutrality agreement at issue here removes any element of a live case or controversy. Upon the neutrality agreement's expiration, any injuries claimed by Petitioners will not be redressed even with a favorable judicial decision. Furthermore, there is no live case or controversy as any alleged unlawful action has ceased. If a Writ of

Certiorari is granted, any declaratory judgment issued would violate the principle arrived at in *Local No. 8-6* by "declar[ing] principles or rules of law which cannot affect the matter in issue in the case before it." 361 U.S. at 366. As a result of the neutrality agreement having expired by its own terms, this Court should treat the Petitioners' challenges in conformity with its analysis for repealed or expired statutes and should dismiss both Petitions for Writs of Certiorari as moot.

REASONS FOR GRANTING THE WRITS

If the case is not moot, then the Court should grant the Petitions for Writs of Certiorari in order to resolve a Circuit Court split.

If the Court finds that this case is not moot, then it should grant Unite Here's Petition and Martin Mulhall's Cross-Petition in order to resolve a conflict among the circuits. Specifically, the Eleventh Circuit's decision below conflicts with the Third Circuit and Fourth Circuit precedent. *See Adcock v. Freightliner LLC,* 550 F.3d 369 (4th Cir. 2008); *Hotel Employees & Restaurant Employees, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206 (3d Cir. 2004). In *Adcock*, the Fourth Circuit agreed with the Third Circuit's decision in *Sage Hospitality*, finding that the concessions in that neutrality agreement did "not involve bribery or other corrupt practices." 550 F.3d at 375. *See also Sage Hospitality*, 390 F.3d 206. Furthermore, the Fourth Circuit found that the concessions were

not "a means of bribing representatives of the Union," that "the concessions serve the interests of both Freightliner and the Union," and that "the concessions certainly are not inimical to the collective bargaining process." *Adcock*, 550 F.3d at 375.

In contrast, the Eleventh Circuit found that a neutrality agreement between an employer and a union, which sets ground rules for organizing, may violate Labor Management Relations Act § 302, 29 U.S.C. § 186. *Mulhall v. Unite Here Local 355, et al.*, 667 F.3d 1211 (11th Cir. 2012). The Court reasoned that an employer could improperly influence a union through a neutrality agreement because "innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer." (Pet. 8a). It is well established that a split in the circuits on an important question is proper grounds for the Supreme Court to grant Certiorari to resolve the conflict.

CONCLUSION

For the reasons stated, both Petitions for Writs of Certiorari should be denied as moot. However, if the

case is not moot, then Mardi Gras does not oppose the grant of Certiorari to either Petition.

Respectfully submitted,

MARK E. LEVITT*
ALLEN, NORTON & BLUE, P.A.
1477 West Fairbanks Avenue
Suite 100
Winter Park, Florida 32789
(407) 571-2152

Counsel for Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming

**Counsel of Record*

Nonvember 20, 2012