S241655

In The Supreme Court of the State of California

JAZMINA GERARD, KRISTIANE McELROY AND JEFFREY CARL
Plaintiffs and Appellants,

v.

ORANGE COAST MEMORIAL MEDICAL CENTER
Defendant and Respondent.

On Review From the Court of Appeal For the Fourth Appellate District,
Division Three
4th Civil No. G048039

After An Appeal From the Superior Court of Orange County
Honorable Nancy Wieben Stock, Judge
Case Number 30-2008-00096591

ANSWER TO PETITION FOR REVIEW

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Richard J. Simmons, Cal. Bar No. 72666
Derek R. Havel, Cal. Bar No. 193464
Daniel J. McQueen, Cal. Bar No. 217498
650 Town Center Drive, 4th Floor
Costa Mesa, California 92626-1993
Tel: 714.513.5100

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
*Robert J. Stumpf, Jr., Cal. Bar No. 72851
Karin Dougan Vogel, Cal. Bar No. 131768
Four Embarcadero Center, 17th Floor
San Francisco, California 94111
Tel: 415.434.9100

Attorneys for Defendant and Respondent
ORANGE COAST MEMORIAL MEDICAL CENTER

S241655

In The Supreme Court of the State of California

JAZMINA GERARD, KRISTIANE McELROY AND JEFFREY CARL
Plaintiffs and Appellants,

v.

ORANGE COAST MEMORIAL MEDICAL CENTER
Defendant and Respondent.

On Review From the Court of Appeal For the Fourth Appellate District,
Division Three
4th Civil No. G048039

After An Appeal From the Superior Court of Orange County
Honorable Nancy Wieben Stock, Judge
Case Number 30-2008-00096591

ANSWER TO PETITION FOR REVIEW

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Richard J. Simmons, Cal. Bar No. 72666
Derek R. Havel, Cal. Bar No. 193464
Daniel J. McQueen, Cal. Bar No. 217498
650 Town Center Drive, 4th Floor
Costa Mesa, California 92626-1993
Tel: 714.513.5100

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
*Robert J. Stumpf, Jr., Cal. Bar No. 72851
Karin Dougan Vogel, Cal. Bar No. 131768
Four Embarcadero Center, 17th Floor
San Francisco, California 94111
Tel: 415.434.9100

Attorneys for Defendant and Respondent
ORANGE COAST MEMORIAL MEDICAL CENTER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Plaintiffs and appellants Jazmina Gerard, Kristiane McElroy, and Jeffrey Carl (plaintiffs) urge the Court to review two issues related to the Legislature's enactment of Senate Bill No. 327 (SB 327). Neither raises an important question of law. Nor do plaintiffs claim there is a split of authority among the courts of appeal as to either one. And neither was the basis for the court of appeal's holding below. The Court should deny the petition.

The first issue plaintiffs raise is whether the Legislature can "dictate to the Judiciary how to interpret laws regarding meal period requirements" enacted by a prior Legislature. Obviously, the answer is no. As the court of appeal observed, "[u]ltimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (Slip Op. at p. 8.) In no sense did the court consider itself "bound" by SB 327 in rendering its opinion below.

Plaintiffs' second issue – whether the legislature can "retroactively deprive healthcare workers of their vested rights to millions of dollars of premium pay . . . without due process of law?" – is equally uninteresting. The answer is again an obvious no. In enacting SB 327, the Legislature did no such thing. Nor did the court of appeal say it did.

Curiously, although plaintiffs' petition focuses exclusively on whether SB 327 affects the validity of the meal period waiver provision in

Wage Order No. 5, the court of appeal's holding that the waiver provision was valid did not depend upon SB 327. In reversing its earlier opinion, the court concluded that "[u]pon reconsideration, it appears we erred in *Gerard I*." (Slip Op. at p. 6.) As Gerard notes, "[r]elying on what it termed 'a subtle but critical distinction in administrative law' between when a regulation is 'adopted' and when it is 'effective,' the court reversed itself and held that Section 11(D) *was* effective when adopted[.]" (Petition at 9, original italics.)

That distinction, not SB 327, was the basis for the court of appeal's holding. Plaintiffs' petition raises no issue regarding the correctness of this holding. It focuses only on SB 327, which the court of appeal noted merely "reinforces our conclusion that Section 11(D) is valid." (*Id.*) In other words, classic dicta. The Court should deny review.

ARGUMENT

The first issue plaintiffs ask the Court to review is whether the Legislature can "dictate to the Judiciary how to interpret laws":

> Can the Legislature dictate to the Judiciary how to interpret laws regarding meal period requirements that a prior Legislature had enacted and amended, forcing courts to conclude that employers do not owe their healthcare workers millions of dollars of premium pay already earned and vested under Labor Code Section 226.7?

Clearly, the answer is no. No further guidance from the Court is needed. The Legislature cannot "dictate" to courts how they should

interpret statutes or "force" them to conclude anything. Orange Coast did not argue otherwise. Nor did the court of appeal consider itself bound to reach any particular conclusion because the Legislature enacted SB 327. To the contrary, the court affirmed the bedrock principle that "'a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of the statute is an exercise of the judicial power the Constitution assigns to the courts. . . .'" (Slip Op. at p.8, quoting *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244.)

Quoting this Court's opinion in *Western Security Bank, supra,* the court of appeal cited the equally well-established principle that "[n]evertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them." (*Id.*) In other words, settled law. No controversy. There's nothing to review here.

The second issue plaintiffs raise is whether the Legislature can "retroactively deprive healthcare workers" of vested rights without due process:

> Can the Legislature retroactively deprive healthcare workers of their vested rights to millions of dollars of premium pay under Labor Code Section 226.7 without due process of law?

Again, the answer is no. In no context, including this particular case, can the Legislature "deprive individuals of vested rights without due

process." Nor did the Legislature do so by enacting SB 327. It simply made plain that its intent in enacting SB 327 was to clarify existing law. Again quoting *Western Security*, the court of appeal noted an "'amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. . . .'" (Slip Op. at p. 8.) Although neither binding nor conclusive, the Legislature's expressed views are entitled to due consideration. (*Western Security, supra,* 15 Cal.4th at p. 244.) Here, too, the court of appeal applied settled law and this Court's prior guidance.

Notably, even though plaintiffs' petition focuses only on SB 327, the new law was not the basis of the court of appeal's holding. The court held section 11(D) was valid because it reconsidered its "conclusion that section 11(D) conflicts with section 512(a)." (Slip Op. at p. 6.) In doing so, the court acknowledged it "failed to account for a subtle but critical distinction in administrative law – the date and agency regulation order is *adopted* is not the same as the date it becomes *effective*." (Slip Op. at 6, original italics.) Plaintiffs do not challenge the correctness of this conclusion.

CONCLUSION

The Court should deny the petition.

Dated: May 15, 2017

SHEPPARD, MULLIN,
RICHTER & HAMPTON LLP

By _____

ROBERT J. STUMPF, JR.
Attorneys for Petitioner and Defendant
ORANGE COAST MEMORIAL
MEDICAL CENTER

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(1)(d))

The text of this Answer to Petition for Review consists of 925 words, as counted by the computer program used to generate this document.

Dated: May 15, 2017

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
ROBERT J. STUMPF, JR.
Attorneys for Petitioner and Defendant
ORANGE COAST MEMORIAL MEDICAL CENTER

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4 Embarcadero Center, 17th Floor, San Francisco, CA 94111-4109.

On May 15, 2017, I served the following document(s) described as

ANSWER TO PETITION FOR REVIEW

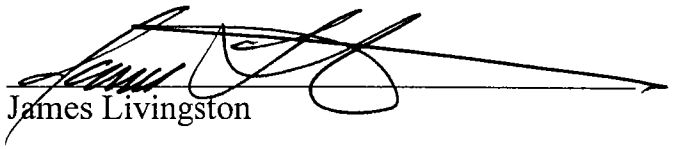
on interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

SEE ATTACHED LIST

☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 15, 2017 at San Francisco, California.



James Livingston

SERVICE LIST

Mark Yablonovich, Esq. Neda Roshanian, Esq. Michael Coats, Esq. Law Offices of Mark Yablonovich 1875 Century Park East, Ste. 700 Los Angeles, CA 90067	*ATTORNEYS FOR PLAINTIFF* 1 copy
Glenn A. Danas, Esq. Robert Friedl, Esq. Capstone Law APC 1875 Century Park East, Ste. 1000 Los Angeles, CA 90067	*ATTORNEYS FOR PLAINTIFF* 1 copy
The Hon. Nancy Wieben Stock Department CX-105 Orange County Superior Court Complex Civil Litigation 751 W. Santa Ana Blvd. Santa Ana, CA 92701	*SUPERIOR COURT* 1 copy
Office of the Attorney General Consumer Law Section 300 S. Spring Street Fifth Floor, North Tower Los Angeles, CA 90013	1 copy
District Attorney County of Orange 401 Civic Center Drive Santa Ana, CA 92701	1 copy
Fourth District Court of Appeal Division Three Office of the Clerk 601 W. Santa Ana Blvd. Santa Ana, CA 92701	*COURT OF APPEAL FOR THE STATE OF CALIFORNIA* 1 copy