Case Nos. 08-55671, 08-55708

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, ex rel. EDMUND G. BROWN, JR.,

Appellant/Cross-Appellee,

v.

SAFEWAY INC., ALBERTSON'S, INC., RALPHS GROCERY COMPANY, FOOD 4 LESS FOOD COMPANY, VONS COMPANIES, INC.,

Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Central District of California, D.C. No. 2:04-cv-00687-AG-SS

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF APPELLEES/CROSS-APPELLANTS ON THE APPLICATION OF THE NON-STATUTORY LABOR EXEMPTION

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America has no parent corporation and no publicly held company owns 10% or more of its stock.

The Council on Labor Law Equality has no parent corporation and no publicly held company owns 10% or more of its stock.

Respectfully submitted,

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IDENTITY OF *AMICI CURIAE* AND AUTHORITY TO FILE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members as *amicus curiae* in cases involving issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in numerous cases before this Court. *See, e.g.*, *Equal Employment Opportunity Comm'n v. Fed. Express Corp.*, 543 F.3d 531 (9th Cir. 2008); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974 (9th Cir. 2007).

The Council on Labor Law Equality ("COLLE") is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act ("NLRA" or the "Act"). COLLE's single purpose is to follow the activities of the National Labor Relations Board and the courts as they relate to the Act. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a broad cross-section of industry. COLLE has participated as *amicus curiae* in many cases before the United States Courts of Appeal. *See, e.g.*, *Bath Marine Draftsmen's Ass'n v.*

NLRB, 475 F.3d 14 (1st Cir. 2007); *Pall Corp. v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002).

The Appellant/Cross-Appellee State of California does not oppose the filing of this *amici curiae* brief, and the Appellees/Cross-Appellants consent to the filing of this *amici curiae* brief.

STATEMENT OF THE CASE AND INTEREST OF *AMICI CURIAE*

This case is important to the Chamber and COLLE because the district court's decision would inhibit employers' ability to defend against targeted strikes by a union or coalition of unions in the context of multi-employer or coordinated bargaining. In bargaining with multiple employers in a particular industry, a union or group of unions will typically identify one employer, usually the most financially vulnerable employer, as the target of a strike or threatened strike in order to force that employer to capitulate to the union's bargaining demands. If that employer capitulates and enters into an agreement on the union's terms, the union will then seek to impose that agreement on the other employers in the industry. This tactic is known as a "whipsaw" strike.

In order to defend against whipsaw strike tactics, employers often enter into some form of mutual aid pact. A mutual aid pact may include an agreement to lockout employees in the event of a whipsaw strike, in order to equalize the pressure of a strike for all employers and the union, and it may also include cost

sharing provisions to help a struck employer withstand union bargaining demands that could be imposed on other members of the group. The National Labor Relations Board (the "NLRB" or the "Board") and the courts have long held that these types of mutual aid pacts are permitted under federal labor law.

When employers with common bargaining concerns enter into a mutual aid pact, the non-statutory labor exemption (the "Exemption") protects the agreement from antitrust scrutiny. In this case, the district court held that the Exemption did not apply to a mutual strike assistance agreement ("MSAA") in the retail food industry in Southern California. In doing so, the district court misapplied the Supreme Court's decision in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), and imposed a higher standard than is warranted under *Brown* and its progeny. The district court erroneously required the employers to prove that the mutual aid pact was "necessary" or "critical" to the multi-employer bargaining process. *California v. Safeway Inc.*, No. CV 04-0687-AG-SS, 2008 WL 615508, at *3 (C.D. Cal. Mar. 6, 2008); *California ex rel. Lockyer v. Safeway Inc.*, 371 F. Supp. 2d 1179, 1187, 1195 (C.D. Cal. 2005).[1] This standard is inconsistent with *Brown* and unfairly exposes employers to antitrust liability for mutual aid pacts that are entered into as a defensive measure in collective bargaining. As long as a mutual aid pact relates

[1] For purposes of this brief, the district court's 2005 decision on the employers' motion for summary judgment and its 2008 decision on the employers' renewed motion for summary judgment are treated as the same decision, since the 2008 decision did not alter the court's original 2005 decision.

to the collective bargaining process and is unobjectionable under federal labor law, the Exemption should apply under the deferential standard articulated by the Supreme Court in *Brown*. Under that standard, the MSAA and other, similar mutual aid pacts should not be subject to antitrust scrutiny. Accordingly, the district court's decision should be reversed on the issue of the applicability of the Exemption.[2]

ARGUMENT

I. Multi-Employer and Coordinated Bargaining Are Vital Aspects of National Labor Policy.

The United States Supreme Court has recognized that successful multi-employer bargaining is a vital part of our national labor policy. *Brown*, 518 U.S. at 240 ("Multi-employer bargaining itself is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor."). Formal multi-employer bargaining, or more informal coordinated bargaining by employers, occurs in many of the nation's major unionized industries, such as construction, trucking, coal, automobile, maritime, retail food, hotel, and professional sports. *See id.* (noting that "multiemployer bargaining accounts for more than 40% of major collective bargaining agreements"). Many of the recent, major collective bargaining negotiations have been handled on a multi-

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[2] The district court's decision on the State's *per se* theory of antitrust liability is beyond the scope of this brief.

employer or coordinated basis. *See* Ronald D. White, *Workers, shippers in deal*, L.A. Times, July 29, 2008, at C1 (discussing tentative agreement between multi-employer unit of 71 shipping and stevedoring companies and the longshoremen's union covering more than 26,000 dockworkers on the Pacific Coast); Susan R. Hobbs & Nora Macaluso, *GM, UAW Tentative Contract Ends Strike, Creates Health Care Trust, Other Changes*, Daily Labor Report, Sept. 27, 2007 (discussing pattern bargaining between the "Big 3" automakers and the United Auto Workers); Susan Hobbs, *UNITE HERE Locals to Coordinate Efforts During Bargaining with Hotels in 2006*, Daily Labor Report, Jan. 17, 2006 (discussing multi-employer negotiations in the hotel industry, involving 100,000 hotel workers in 400 hotels in six major North American cities).

Multi-employer bargaining existed before the passage of the Wagner Act in 1935. *See NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen")*, 353 U.S. 87, 94 (1957). During the debates over the Taft-Hartley amendments in 1947, Congress considered, but ultimately rejected, proposed amendments to outlaw multi-employer bargaining. As the Supreme Court recounted in *Buffalo Linen*, these proposed amendments "were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining." *Id.* at 95.

There are a number of ways in which multi-employer bargaining promotes effective collective bargaining and is therefore consistent with the core national labor policy of preventing industrial strife. In many industries, a single union wields enormous power and leverage because the union has organized many or all of the employers in that industry. Therefore, the employers bargain as a group in order to "bargain 'on an equal basis with a large union.'" *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 409 n.3 (1982) (quoting *Buffalo Linen*, 353 U.S. at 96). Bargaining on a multi-employer basis enables both sides to be more flexible at the bargaining table, as the Supreme Court recognized in *Bonanno*:

> [E]mployers can make concessions 'without fear that other employers will refuse to make similar concessions to achieve a competitive disadvantage,' and a union can act similarly 'without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.'

454 U.S. at 409 n.3 (quoting decision of Court of Appeals). Furthermore, multi-employer bargaining "enhances the efficiency and effectiveness of the collective bargaining process" by focusing the parties on a single contract with common terms. *Id.* Employers and unions both benefit from the efficiencies achieved by negotiating a common collective bargaining agreement for all parties involved.

A review of the district court's decision in this case should start with the proposition that effective multi-employer bargaining – a process that has been

uniformly supported by Congress, the Supreme Court, and the NLRB – is an important aspect of the nation's labor policy. The specific question presented is whether a mutual aid pact among employers, of the type entered into by the employers in this case, is a rational and permissible method of fostering effective multi-employer bargaining. The *amici* submit that it is.

II. Mutual Aid Pacts Foster Effective Multi-Employer and Coordinated Bargaining.

In order to engage in effective group bargaining, employers must be able to enter into mutual aid pacts in order to maintain the integrity of the employer group and, in many industries, to achieve a balance of power with a union that wields tremendous leverage in the industry. As the Supreme Court held in *Brown*:

> [I]t would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable.

Brown, 518 U.S. at 237 (emphasis in original).

Mutual aid pacts are defensive measures, entered into by employers, in order to blunt the impact of a union's whipsaw strike. A whipsaw strike is a "divide and conquer" strategy in which the union targets one of the employers in the group, usually the most economically vulnerable employer, with the threat of a strike while allowing the other employers to continue to operate. The whipsaw strike

forces the targeted employer to choose between the Scylla and Charybdis of enduring a potentially ruinous strike while its competitors continue to operate or capitulating to union bargaining demands that are not sustainable for the business in the long term. The employers, as a group, have a common interest in defending against the whipsaw strike tactic, or else each in turn will be confronted with the same dilemma. *See Buffalo Linen*, 353 U.S. at 91 (citing NLRB's finding that "the strike against one employer necessarily carried with it an implicit threat of future strike action against any or all of the other [employers]," with the "calculated purpose" of causing "successive and individual employer capitulations").

Mutual aid pacts diffuse the impact of a whipsaw strike by "spreading the pain" among all of the employers in the group. For instance, a mutual aid pact may entail an agreement by all of the employers to lockout their union-represented employees in the event the union strikes one of the employers. This causes all of the employers, as well as the union, to feel an equal amount of pressure to resolve the collective bargaining dispute. Additionally or alternatively, a mutual aid pact may include an agreement among the employers to share costs in the event of a strike. While this may involve a transfer of funds between competitors in an industry, it spreads the economic impact of a whipsaw strike among all of the employers in the group, so that the struck employer is better able to resist union

bargaining demands that will eventually be imposed on the entire industry through the union's "divide and conquer" strategy.

The NLRB and the courts have held that various forms of mutual aid pacts are permitted under federal labor law, including lockout agreements, cost sharing agreements, and temporary worker replacement agreements. These types of mutual aid pacts are permitted in the context of informal coordinated bargaining, as well as formal multi-employer bargaining.[3] *See, e.g.*, *NLRB v. Brown*, 380 U.S. 278, 279-80 (1965) (multi-employer lockout and temporary replacement agreement); *Buffalo Linen*, 353 U.S. at 97 (multi-employer lockout agreement); *Amalgamated Meat Cutters & Butchers Workmen, Local Union No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133, 136-37 (8th Cir. 1979) (agreement between two employers, during coordinated bargaining, to supply temporary replacement workers during a strike); *Air Line Pilots Ass'n Int'l v. CAB*, 502 F.2d 453, 456-57 (D.C. Cir. 1974) (cost sharing pact between airline employers bargaining with same unions); *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366, 368-69 (2d Cir. 1963) (multi-employer cost sharing agreement); *Evening News Ass'n*, 166 N.L.R.B. 219 (1967), *enf'd, Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159, 1160-61 (6th Cir. 1968) (lockout pact between employers

[3] Employers typically engage in coordinated bargaining when their employees are represented by the same union, under collective bargaining agreements with similar terms, but have not entered into a formal multi-employer bargaining relationship with the union.

engaged in coordinated bargaining); *Capital Dist. Sheet Metal*, 185 N.L.R.B. 702, 715-16 (1970) (lockout pact between employers engaged in coordinated bargaining).

Thus, as the NLRB and the courts have recognized, mutual aid pacts in their various forms serve the national labor policy of promoting effective multi-employer bargaining. *See Buffalo Linen*, 353 U.S. at 97 (holding that the NLRB "correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multiemployer bargaining basis from the disintegration threatened by the Union's strike action was lawful"); *Publishers' Ass'n of N.Y. City*, 139 N.L.R.B. 1092 (1962), *aff'd, N.Y. Mailers Union v. NLRB*, 327 F.2d 292, 300-01 (2d Cir. 1964) (supporting Board's approval of employer lockout agreements as "striking a balance between the competing legitimate interests" involved).

III. The Exemption Should Apply to Agreements that Relate to the Collective Bargaining Process and Are Unobjectionable under Federal Labor Law.

Mutual aid pacts that are designed to promote effective multi-employer or coordinated bargaining should be exempt from antitrust scrutiny. While federal antitrust law provides an explicit statutory exemption for concerted union action, the non-statutory exemption is an implied exemption that applies to actions or agreements by and between employers and a union or to actions or agreements by and between employers only. *See Brown*, 518 U.S. at 236-38; *Connell Constr.*

Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622-23 (1975). The Exemption recognizes the intent of Congress when it enacted the federal labor laws and the explicit antitrust exemptions, which was to "prevent judicial use of antitrust law to resolve labor disputes." *Brown*, 518 U.S. at 236. The Exemption furthers the intent of Congress by "limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice." *Id.* at 236-37.

In *Brown*, the Supreme Court specifically held that the Exemption applied to an agreement among employers to take unilateral action – implementation of the terms of the employers' last, best offer – upon reaching an impasse in bargaining with a union. The Court rejected the argument that the Exemption should apply only to agreements between employers and a union, finding that "a multiemployer bargaining process itself necessarily involves many procedural and substantive understandings among participating employers as well as with the union." *Id.* at 243. By way of example, the Court noted that the employers may engage in bargaining tactics, such as unit-wide lockouts or the use of temporary replacement workers, with which the union will not and need not agree. *Id.* at 243-44. Thus, the Court in *Brown* specifically contemplated that these types of mutual aid arrangements between employers would be protected by the Exemption.

Although the Court in *Brown* declined to express a bright-line test for determining whether the Exemption applies to a specific agreement between employers engaged in multi-employer bargaining, there are two fundamental principles embedded in the decision. The first is that the agreement must relate to the collective bargaining process, and the second is that the agreement must be unobjectionable as a matter of federal labor law. These two principles, as discussed more fully below, should guide this Court's review of the MSAA at issue here.

A. The Exemption Protects Agreements That Relate to the Collective Bargaining Process.

In order to be protected by the Exemption, an agreement among employers must relate to the collective bargaining process and the parties to that process. This principle may seem self-evident, but it is the common thread of the four considerations cited by the Court as supporting application of the Exemption in *Brown*: (1) the conduct "took place during and immediately after a collective-bargaining negotiation;" (2) the conduct "grew out of, and was directly related to, the lawful operation of the bargaining process;" (3) the conduct "involved a matter that the parties were required to negotiate collectively;" and (4) the conduct "concerned only the parties to the collective-bargaining relationship." *Brown*, 518 U.S. at 250.

These four considerations are not, as the district court in this case acknowledged, "rigid factors that must be found in every case for the exemption to apply." *Lockyer*, 371 F. Supp. 2d at 1185. Indeed, the Supreme Court in *Brown* explicitly stated that it was not deciding where to draw the line as to the scope of the Exemption. *Brown*, 518 U.S. at 250. The Court suggested, however, that the Exemption might not apply if the agreement among employers was "*sufficiently distant in time and in circumstances* from the collective-bargaining process that a rule permitting antitrust intervention *would not significantly interfere* with that process." *Id.* (emphasis added). As examples of such "sufficiently distant" circumstances, the Court cited cases where the collective bargaining relationship had *collapsed* or where an "extremely long" impasse was accompanied by "instability" or "defunctness" of the multi-employer unit. *Id.* Thus, the Court in *Brown* articulated a concept of relatedness that would apply except only in the most extreme circumstances where the multi-employer bargaining process itself was in danger of collapse or defunctness.

As further illustration of the concept of "relatedness," in *Local Union No. 189, Meat Cutters v. Jewel Tea Co., Inc.*, 381 U.S. 676 (1965), the Court applied the Exemption to a collectively bargained restriction on the hours of operation of supermarket meat departments. The agreement provided that "[n]o customer shall be served who comes into the market before or after the hours" set in the collective

bargaining agreement, which was negotiated on a multi-employer, multi-union basis. *Id.* at 679-80. Even though this agreement explicitly regulated market hours rather than employees' working hours, the Court held that this agreement was exempt from antitrust scrutiny because it was "so intimately related" to the wages, hours, and working conditions of employees represented by the unions. *Id.* at 689-90. The Court reached this conclusion even though the agreement's "effect on competition is apparent and real." *Id.* at 691. If, however, there had not been a relationship between the restriction on market hours and the legitimate interests of the union, then the restriction would "stand alone, unmitigated and unjustified by the vital interests of the union butchers" and the Exemption would not have applied. *Id.* at 692-93.

In contrast, the Court has held that agreements between a group of employers and a union or unions are not related to the collective bargaining process when they impose anticompetitive restrictions on other competitors in the industry. For example, the Court held that the Exemption did not apply to an agreement that was "but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level." *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 809 (1945). The Court, in two decisions after

Allen Bradley, also did not apply the Exemption because the agreements sought to eliminate competition by other employers who were not party to the negotiations, rather than affect the collective bargaining process among the parties to the negotiations. *See Connell*, 421 U.S. at 625-26 (determining that Exemption did not apply to restrictive subcontracting agreement between union and general contractor that was designed to limit competition; the union had no interest in representing the contractor's employees, but the Court noted that the agreement "might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement"); *United Mine Workers v. Pennington*, 381 U.S. 657, 665-66 (1965) (finding that agreement "to impose a certain wage scale on other bargaining units" was a conspiracy to eliminate competition from the industry and therefore the Exemption did not apply).

Thus, the touchstone for the Exemption is whether the agreement relates to the collective bargaining process between the parties involved in that process, or whether the agreement limits competition by imposing terms on outside employers in order to create a business monopoly. If an agreement relates to the collective bargaining process and the parties to that process, the Court in *Brown* instructed that antitrust courts should not venture to decide what is, and is not, a reasonable or desirable practice in collective bargaining:

> [A]ny such evaluation means a web of detailed rules spun by many different nonexpert antitrust judges and juries,

> not a set of labor rules enforced by a single expert administrative body, namely the Board.

Brown, 518 U.S. at 242.

Other federal Courts of Appeal have adhered to this admonition. For instance, the Second Circuit followed *Brown* when it reversed a district court decision denying application of the Exemption to the National Football League's draft eligibility rule. *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004). The Second Circuit determined that a multi-employer agreement limiting draft eligibility related to the collective bargaining process. *Id.* at 142-43. Although the employers did not incorporate the draft limits into the collective bargaining agreement, the court applied the Exemption because federal labor policy is designed to "ensure the successful operation of the collective bargaining process." *Id.* The Second Circuit cautioned that intrusive scrutiny from antitrust courts would, contrary to *Brown*, "prohibit particular solutions for particular problems" faced in multi-employer bargaining. *Id.* at 143. *See also Ehredt Underground, Inc. v. Commonwealth Edison Co.*, 90 F.3d 238, 241 (7th Cir. 1996) (holding that "a court should not [] scrutinize the labor relations of a firm and determine which steps were unreasonable"). In sum, if an agreement is found to relate to the collective bargaining process, an antitrust court should not go further and dissect the agreement to determine whether it is a reasonable or necessary practice in collective bargaining.

B. The Exemption Protects Agreements That Are Unobjectionable under Federal Labor Law.

Rather than seek to determine whether a particular agreement is a "reasonable" collective bargaining practice, an antitrust court should seek only to determine whether it is unobjectionable as a matter of federal labor law. In doing so, courts should defer to the views of the NLRB, the agency charged with interpreting and administering the NLRA:

> The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of their objectives was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy.

Brown, 518 U.S. at 242. The Supreme Court and the lower courts have followed this deferential approach in applying the Exemption. *See Brown*, 518 U.S. at 238 ("We assume that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy. On that assumption, we conclude that the exemption applies."); *Jewel Tea*, 381 U.S. at 691 (applying the Exemption and finding that the NLRA places beyond the reach of antitrust law labor agreements on matters connected to employee work hours); *Wetterau Foods*, 597 F.2d at 136-37 (applying Exemption to temporary worker replacement agreement because the NLRA sanctions the replacement of striking workers). On the other hand, where the Court has determined that an agreement is inconsistent with federal labor law

or policy, the Exemption has not been applied. *See Connell*, 421 U.S. at 626 ("We conclude that Sec. 8(e) [of the NLRA] does not allow this type of agreement."); *Pennington*, 381 U.S. at 666 ("But there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units ....").

At bottom, if the agreement relates to the collective bargaining process and is unobjectionable under federal labor law, the Exemption should apply.

IV. The District Court Misapplied the Exemption in This Case.

A. The District Court Applied a Higher Standard Than Is Warranted under the Exemption.

The district court's decision applied a higher standard than is warranted under *Brown*, focusing on the four circumstances noted by the Court in that particular case. While the district court correctly recognized that these four circumstances were not "rigid factors that must be found in every case for the exemption to apply," the court's focus on these considerations resulted in an overly intrusive examination of the MSAA in this case. *See Lockyer*, 371 F. Supp. 2d at 1185.

In applying these four considerations, the district court erred by requiring proof that the MSAA was "necessary" or "critical" to the collective bargaining process, rather than simply "related to" the collective bargaining process. For instance, in considering the timing of the MSAA's revenue sharing provision, the

district court found that this circumstance weighed against application of the Exemption insofar as the two-week tail provision was not "necessary to the collective bargaining process" or that the collective bargaining process "could not function" without this provision. *Lockyer*, 371 F. Supp. 2d at 1187. Likewise, in applying the second *Brown* circumstance ("connection to lawful operation of the bargaining process"), the district court found "no showing that the Supermarkets and the unions *cannot bargain collectively* if revenue-sharing provisions like those in the MSAA were subject to antitrust scrutiny." *Id.* at 1189 (emphasis added). Then, in denying the employer's renewed motion for summary judgment, the district court held that the Exemption should not apply "even if the MSAA was helpful to the collective-bargaining process" because it was not "critical" to the process. *Safeway*, 2008 WL 615508, at *3.

Proof that an agreement is "necessary" or "critical" to the collective bargaining process is a significantly higher standard than was articulated in *Brown*. The district court cited *Brown* for the proposition that the Exemption should protect agreements that are "necessary to make the statutorily authorized collective-bargaining process work as Congress intended." *Lockyer*, 371 F. Supp. 2d at 1195. That is not, however, a fair representation of the standard articulated in *Brown*. Indeed, the Court in *Brown* clearly expressed that the antitrust laws should not be used to forbid "competition-restricting agreements" that are only

"*potentially* necessary to make the process work or its results mutually acceptable." *Brown*, 518 U.S. at 237 (emphasis added). The word *potentially* is key, obviously, and it reflects the notion expressed later in the Court's decision, that antitrust intervention should be permitted only if it would not "significantly interfere" with the collective bargaining process. *Id.* at 250.

The district court's standard requiring proof that an agreement is "necessary" or "critical" to the collective bargaining process simply cannot be squared with *Brown*'s standard of deference – rooted in Congressional intent – which permits antitrust scrutiny only if it would not "significantly interfere" with the collective bargaining process.

B. The District Court Incorrectly Treated Cost Sharing Agreements as Different from Other Mutual Aid Agreements.

The district court also erred in finding that an agreement among employers to share the costs of a whipsaw strike is categorically different from other forms of mutual aid pacts, such as a lockout agreement. *See Lockyer*, 371 F. Supp. 2d at 1190 (finding that "there are significant differences between a lockout, or a production stoppage, and revenue sharing"). This finding was the product of the court's overly intrusive examination of collective bargaining practices, contrary to *Brown*. In reality, agreements among employers to share costs during a strike are no different than other forms of mutual aid pacts that have been held to be lawful under the NLRA and protected by the Exemption.

A cost sharing agreement, like a lockout agreement, is an important tool for countering union whipsaw strike tactics. It is a legitimate form of employer self-help that diffuses the impact of a whipsaw strike. *See Kennedy*, 319 F.2d at 371 (finding that revenue sharing plan in the railroad industry "was an instrument of self-help properly employed in the process of collective bargaining"); *King Soopers*, No. 27-CA-19325/19326/19327, 2005 WL 545232, at *3 (N.L.R.B.G.C. Feb. 17, 2005) (finding that an employers' "pact to assist each other financially in the event of a Union strike ... constitutes a defensive economic weapon in response to the Union's own use of an economic weapon").

In finding that employer cost sharing agreements are different from lockout agreements, the district court focused on the notion that "[e]mployer lockouts are the flip-side of employee strikes." *Lockyer*, 371 F. Supp. 2d at 1190. But what the court failed to recognize is that an employer cost sharing agreement is analogous to a union "strike fund" that helps prolong a whipsaw strike by making payments to striking employees. Large labor unions maintain enormous strike funds to support employee unity during a long strike. For instance, the UAW boasts of a strike fund goal of at least $500 million,[4] the Machinists' union recently amassed a $140

[4] *United Auto Workers*, http://www.uaw.org/about/works/strikes.html (last visited Dec. 8, 2008).

million strike fund,[5] and the United Food and Commercial Workers ("UFCW") began the Southern California supermarket strike with a strike fund of $70 or $80 million.[6] There is no rationale for treating employer cost sharing agreements as unlawful antitrust conspiracies, while unions are permitted to wage economic warfare with strike funds of this magnitude. *See Kennedy*, 319 F.2d at 372 ("Yet, by some obfuscated reasoning, the appellants insist that the same economic [strike fund] benefits, when accruing to the employer who participates in the strike insurance plan before us, should be outlawed.").

C. The Mutual Aid Pact in This Case Should Be Covered by the Exemption.

The Appellees/Cross-Appellants have thoroughly argued the specific reasons why the Exemption should apply to the MSAA in this case. The *amici* concur in their arguments, and do not seek to repeat them here. The *amici* simply observe that the MSAA meets both of the core elements of the standard expressed in *Brown* – namely, that the MSAA relates to the collective bargaining process and is unobjectionable as a matter of federal labor law.

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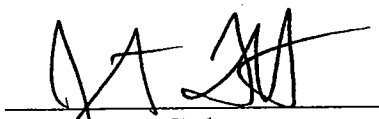
[5] *Union: Boeing Strike Fund Good for Six Months*, Int'l Herald Trib., Sept. 9, 2008, *available at* http://www.iht.com/articles/ap/2008/09/09/business/NA-US-Boeing-Machinists.php.

[6] Kate Berry & David Greenberg, *Strike Draining Union Coffers*, Orange County Bus. J., Feb. 23-Feb. 29, 2004, *available at* http://findarticles.com/p/articles/mi_qa5293/is_/ai_n24276047.

CONCLUSION

For all of the foregoing reasons, *amici curiae* Chamber of Commerce of the United States of America and Council on Labor Law Equality urge the Court to grant the Appellees/Cross-Appellants' appeal to reverse the district court's decision on the Exemption and to properly apply the Exemption to the mutual strike assistance agreement at issue.

Respectfully submitted,



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Dated: December 10, 2008

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 29

I certify that pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached *amici* brief of the Chamber of Commerce of the United States of America and Council on Labor Law Equality is

√ Proportionately spaced, has a typeface of 14 points or more and contains 7000 words or less.

12/10/08
Date

Jonathan C. Fritts
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States and employed in Washington, District of Columbia. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1111 Pennsylvania Avenue, NW, Washington, DC 20004. I am readily familiar with the firm's practice for collection and processing of correspondence for mailing with Federal Express. On December 10, 2008, I placed with this firm at the above address for deposit with Federal Express a true and correct copy of the within document:

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF APPELLEES/CROSS-APPELLANTS ON THE APPLICATION OF THE NON-STATUTORY LABOR EXEMPTION

in a sealed envelope, postage paid fully, addressed to the following parties:

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Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with Federal Express on this date.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 10, 2008, at Washington, District of Columbia.

David R. Broderdorf
Counsel for *Amici Curiae*