Case No. S191944

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF LOS ANGELES, CHIEF EXECUTIVE OFFICE,

Petitioner and Appellant,

v.

LOS ANGELES COUNTY EMPLOYEE RELATIONS COMMISSION,

Defendant and Respondent,

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721,

Real Party in Interest and Respondent.

OPENING BRIEF ON THE MERITS

Appeal from the Court of Appeal
Second Appellate District, Division Three, Case No. B217668
Superior Court of California, County of Los Angeles
Superior Court Case No. BS116993
Honorable James C. Chalfant

David A. Rosenfeld, Bar No. 058163
Alan G. Crowley, Bar No. 203438
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
Telephone: (510) 337-1001
Facsimile: (510) 337-1023
drosenfeld@unioncounsel.net
acrowley@unioncounsel.net

Attorneys for Real Party in Interest and Respondent
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721

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David A. Rosenfeld, Bar No. 058163
Alan G. Crowley, Bar No. 203438
Vincent A. Harrington, Bar No. 071119
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501
Telephone: (510) 337-1001
Facsimile: (510) 337-1023
drosenfeld@unioncounsel.net
acrowley@unioncounsel.net

Attorneys for Real Party in Interest and Respondent
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721

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STATEMENT OF THE ISSUES PRESENTED

This Court granted review on the following issues:

1. May a public employer provide to the Union that represents the employees the home addresses and phone numbers of bargaining unit members without violating the right of privacy set out in the California Constitution, Cal. Const., art I, § 1, where the Union needs the information to comply with its statutory duty to represent the employees and where state and federal law has long required employers in both the public and private sector to provide addresses to unions in elections and to provide names and addresses after a union is certified as the employees' bargaining representative under seven California laws regulating public employment?

2. When a Union requests employee contact information from a public employer does the Union's need for the information to represent the employees outweigh any privacy right where the expectation of privacy is minimal and the invasion of any protected right is minimal?

INTRODUCTION

This case arises from the refusal by the County of Los Angeles ("County") to provide names, home addresses, and home phone numbers of County employees to the union that represents them, Service Employees International Union, Local 721 ("SEIU" or the "Union"). Pursuant to the Meyers-Milias-Brown Act (Gov. Code § 3500 et seq. ("MMBA")), SEIU is the certified employee organization representing approximately 55,000 County employees.

The County is obligated to meet and confer in good faith with SEIU regarding wages, hours, and other terms and conditions of employment, and this obligation requires the County to provide necessary and relevant information to SEIU, such as the addresses and telephone numbers of employees represented by SEIU. (*Teamsters Local 517 v. Golden Empire Transit District* (2004) PERB Dec. No. 1704-M; *Broad Co. v. NLRB* (9th Cir. 1999) 172 F.3d 660 [it is well-settled that information concerning names, addresses, telephone numbers, as well as wages, and other terms and conditions of employment of Union employees is presumptively relevant so the union can comply with its duty to fairly represent members and non-members alike].) The County refused to provide this information to SEIU on the ground that employee contact information is confidential and protected from disclosure to the Union under the California Constitution.

Following an unfair practice charge filed by SEIU with the Los Angeles Employee Relations Commission ("ERCOM"), ERCOM found that the County had committed an unfair labor practice by not

providing SEIU the home addresses and telephone numbers of employees represented by the Union. The Los Angeles Superior Court denied the County's petition for a writ of mandamus.

The trial court correctly identified this Court's decision in *Hill v. National Collegiate Athletic Association* (1994), 7 Cal.4th 1 ("*Hill*"), as providing the proper framework for analyzing this case and determined that the needs of the Union for the contact information "significantly outweighed" any privacy interests of employees against disclosure. The Court of Appeal overturned the trial court and decided to impose its own discovery style "opt-out" procedure, a remedy neither party had briefed or requested at any stage, and remanded to the trial court with instructions to implement that procedure.

The Court of Appeal failed to conduct a proper analysis under *Hill*. Two of the three elements necessary to make a constitutional privacy showing under *Hill* are not met, and should any balancing under *Hill* be required, it would tilt substantially in favor of disclosure to the Union. Although the Union concedes that employees may have a legally protected privacy interest in their contact information, employees do not have a reasonable expectation that their employers will not disclose such information to their union, such a disclosure is not a serious invasion of their privacy interest, and the Union's interest in disclosure substantially outweighs any privacy interest employees may have in their contact information.

First, the Court of Appeals erred in assuming that employees have a reasonable expectation that their basic contact information will not be provided to their union representatives. As this Court stated in

Hill, a "reasonable expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." (*Hill*, *supra*, 1 Cal.4th at 37; see also *International Federation of Professional and Technical Engineers, Local 21 v. Superior Court* (2007) 42 Cal.4th 319, 331.) The "customs, practices, and physical settings, surrounding particular activities may create or inhibit reasonable expectations of privacy." (*Hill*, 7 Cal.4th at 36; *Local 21*, 42 Cal.4th at 331.) The customs and norms applicable here have been established by a long history of legal obligations imposed on employers to provide employee contact information to labor organizations. Ignoring this history and common labor practices throughout California and the United States, the Court of Appeal's decision conflicts with well-settled state administrative agency decisions interpreting seven California labor laws governing public employee relations, well-settled decisions issued by the National Labor Relations Board ("NLRB"), decisions by federal courts of appeals enforcing NLRB decisions, and decisions under similar laws in numerous other states. These decisions all uniformly hold that unions are entitled to the names, home addresses, and home telephone numbers of the employees they represent.

Second, the Court of Appeal erred in concluding that the disclosure of addresses and telephone numbers constitute an invasion of privacy sufficiently serious in its nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. (See *Hill*, 7 Cal.4th at 37; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 373 [contact information "involves no reveleation of personal or business

secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life."].)

Third, the Court of Appeals erred by failing to balance the unions competing interest in disclosure. Under *Hill*, if disclosure threatens serious invasion of a privacy interest in which there is a reasonable expectation of privacy, the Court is required to balance the strengths of (i) the individuals' privacy interest and the information to be disclosed versus (ii) requesting parties' interest in obtaining the information. (*Hill*, *supra*, 7 Cal.4th at 35-40; *Pioneer*, *supra*, 40 Cal.4th at 370-371.) In light of the duty of fair representation imposed upon unions by the courts and the Union's obligation to communicate with members and non-members alike, the Union's interest in disclosure outweighs the privacy interest at stake.

Thus, the Court of Appeal's decision misapplies the constitutional analysis of privacy expectations under *Hill*, by ignoring the specific context and the evidence of existing practices in the labor relations systems and by failing to balance the relative strengths of the union's interests in disclosure versus the employees' privacy interests. The decision below directly conflicts with well-settled federal and state law uniformly holding that unions are entitled to the names, home addresses, and home telephone numbers of the employees they represent, regardless of whether employees have chosen to become full union members or be represented in some other status.

Finally, the Court of Appeal exceeded its authority under Code of Civil Procedure section 1094, subdivision (f), by ordering the parties and ERCOM to adopt an opt-out procedure of its own invention.

FACTUAL AND PROCEDURAL BACKGROUND

A. FACTUAL BACKGROUND

This dispute arose in 2006 when the County refused to provide SEIU with the names, home addresses, and home phone numbers of all County employees represented by SEIU.

SEIU is the exclusive employee organization representing about 55,000 County employees in a large variety of classifications in 22 separate bargaining units. (1 AR 25.)[1] Each bargaining unit has its own contract or memorandum of understanding ("MOU") as collective bargaining agreements are commonly referred to in the public sector. Different classifications of workers, such as, for example, registered nurses or office clericals, are in different bargaining units with unique MOUs that memorialize the agreement between SEIU and the County concerning wages, hours, and other terms and conditions of employment for each bargaining unit. SEIU has represented most of these bargaining units for decades. Through paid worksite organizers, shop stewards, and rank-and-file volunteers, SEIU represents all the employees in the bargaining units, members and non-members in numerous ways, such as advocating on their behalf before management, filing and processing grievances over violations of the MOUs, and meeting and conferring with the County over any changes in policies or rules that affect employees' working

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[1] The underlying record consists of the Administrative Record ("[Volume] AR [Page]"), Appellant's Appendix ("AA [Page]"), Judicially Noticed documents ("[Volume] JN [Page]"), and the Reporter's Transcript ("RT [Page]").

conditions. (1 AR 96-97, 2 AR 493-494, 516.)

The County and SEIU typically renegotiate all 22 MOUs every three years in a coordinated process. They negotiate the common articles at a "common language" table, fringe benefits at a separate common table, and issues unique to each bargaining unit at "unit" tables. (1 AR 25.) Each "unit" table has representatives from the County and SEIU that negotiate detailed changes to the terms of the MOUs.

Most of the 22 bargaining units have "agency shop" provisions included in their respective MOUs. (1 AR 25; see also Govt. Code § 3508.5.) An agency shop provision requires all employees in the bargaining unit to pay their fair share of dues but does not require that they join the Union. In every public sector bargaining unit in which there is an agency shop provision, all employees in the unit are required to remit monthly dues or fees to the union. Pursuant to *Chicago Teacher's Union, Local 1 v. Hudson* (1986) 475 U.S. 292, the Union must mail a "*Hudson* notice" to all new County employees in agency shops units and, on a yearly basis, to those employees who are not "members." (AA 29, 1 AR 230-236.) This *Hudson* notice gives the new employees the option of becoming regular status union members, fair share fee payers, agency fee payers, or religious objectors. (AA 30.)[2] All employees have the choice of joining the

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[2] There are differences in these categories. A member has the rights and privileges as well as the burdens of membership. A "fair share payer" pays an amount limited to the dues which are used for representation purposes; an agency fee payer pays the full amount of dues but is not a member. Finally religious objectors do not pay any

Union and becoming full members or just paying the agency fee, the equivalent of dues without joining the Union as a member. Employees who affirmatively dissent from SEIU membership must complete and return one of the two letters attached to the *Hudson* Notice.[3] Employees who affirmatively dissent from union membership may be classified as either agency fee payers or religious objectors. Employees who fail to either assent or dissent from union membership because they have not returned the forms are designated as fair share fee payers, and, therefore, as non-members, by default. (AA 31.)[4] Many of the addresses and phone numbers SEIU has for members and non-members alike are not current as employees will often move and not inform SEIU of their new address. (AA 31.) Regardless of the status of employees, SEIU is required to represent all of employees, members and non-members, equally and fairly.[5]

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money to the union because of religious objections and pay the equivalent of dues to a charity.

[3] Either the "Agency Shop Fee Designation" letter or the "Statement of Religious Objections" letter. (1 A.R. 200-201.)

[4] Out of the 55,000 County employees that SEIU represented in 2007, approximately 40,000 are members and 14,500 are nonmembers. (AA 30-31.) Out of the 14,500 non-members, 11,952 are fair share payers (thus they may not have returned the forms), 373 are religious objectors, and 2,187 are agency fee payers. (Id.) "Non-members" is the term Real Party in Interest will use to represent "agency fee payers, religious objectors, and fair share fee payers" collectively. Ninety percent of employees who return the *Hudson* notice forms and choose a non-member designation still provide SEIU with their home address and phone number. (AA 31.)

[5] Concurrent with its information demand, SEIU made a bargaining proposal during the 2006 MOU negotiations to revise Article 15, common to all 22 MOUs, which would have allowed SEIU to provide

In the summer of 2006, SEIU requested that the County provide it with the addresses and telephone numbers of bargaining unit non-members. As the exclusive bargaining representative of *all* employees in represented bargaining units, SEIU needs to send the same communications to non-members as to members; to communicate to non-members about bargaining proposals and bargaining updates; to inform non-members about educational advancement, workforce development, newsletters, and information about cultural events; and to communicate with non-members during the investigations of grievances. (2 AR 493-494, 502-503, 516.) For some types of communications, it is more efficient for the union to send communications to employees at home for several reasons, because of the size of Los Angeles County and number of represented employees in large and spread-out buildings and because employees often feel more comfortable discussing or responding to questions about work place issues away from the pressures and watchful eyes of the workplace. (2 AR 494, 502.)

The County refused to provide SEIU with the home addresses and phone numbers of the employees that SEIU represents. The County asserted that it considered employee contact information

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Hudson notices directly to the employees instead of having ERCOM mail the notices. Although the parties did not agree during the 2006 MOU negotiations to change the Article 15 *Hudson* notice procedures, and this issue is not under review by this Court, a side issue in the proceedings below was the County's position that SEIU waived its request for information when SEIU withdrew its bargaining proposals to modify Article 15. ERCOM found that SEIU did not waive its demand for the contact information of non-member employees. (AA 45-47.)

confidential and that the Los Angeles Employee Relations Commission ("ERCOM") had not issued a decision exactly on point. (AA 27.) After SEIU's attorneys informed the County in writing that the California Public Employee Relations Board ("PERB")[6] and the National Labor Relations Board ("NLRB") had repeatedly ruled that employers are required to provide this information to unions and that ERCOM was required to follow MMBA precedent, the County still refused to provide the contact information. (AA 27.) Since the County stood steadfast in its refusal to provide to SEIU the addresses and phone numbers, SEIU filed an unfair practice charge with ERCOM on Sept. 25, 2006. (AA 28.)

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[6] PERB now administers seven different labor laws governing public employees in California: the Educational Employment Relations Act of 1976 (EERA) (Gov. Code § 3540 et seq.) establishing collective bargaining in California's public schools (K-12) and community colleges; the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (Dills Act) (Gov. Code § 3512 et seq.), establishing collective bargaining for state government employees; and the Higher Education Employer-Employee Relations Act of 1979 (HEERA) (Gov. Code § 3560 et seq.) extending the same coverage to the California State University and University of California System; the Meyers-Milias-Brown Act of 1968 (MMBA) (Gov. Code § 3500 et seq.) establishing collective bargaining for California's municipal, county, and local special district employers and employees was brought under PERB's jurisdiction in 2001; PERB is also responsible for the administration of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) (Gov. Code § 99560 et seq.); the Trial Court Employment Protection and Governance Act (Trial Court Act) (Gov. Code § 71600 et seq.); and the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) (Gov. Code § 71800.).

B. PROCEDURAL BACKGROUND

1. The ERCOM Decision

ERCOM appointed Hearing Officer Walter Daugherty to hold a hearing to resolve SEIU's unfair practice charge, and the Hearing Officer presided over the parties' presentation of the evidence over three days.[7] ERCOM issued a decision finding the County had committed an unfair labor practice by not providing to SEIU the requested contact information and ordered the County to provide SEIU the information. (AA 109-111.) ERCOM held that since it is required to interpret the County's Employee Relations Order ("ERO") consistent with and pursuant to the policies of the MMBA, decisions of PERB, the NLRB, and federal courts on this issue were highly persuasive. (See AA 35; Govt. Code § 3509(d).) [8]

ERCOM found that a review of NLRB, federal cases, and PERB cases disclosed that courts and administrative agencies have

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[7] The Los Angeles Employee Relations Commission ("ERCOM") is the L.A. County equivalent of the Public Employee Relations Board ("PERB"). Normally the PERB resolves unfair labor practice charges between public employers, public employee unions, and public employees, but when PERB assumed jurisdiction over Meyers-Milias-Brown Act employers (i.e., cities, counties, and special districts) in 2001, the Los Angeles County ERCOM was allowed to continue resolving unfair labor practice complaints in L.A. County "consistent with and pursuant to the policies of" the Meyers-Milias Brown Act ("MMBA"). (Gov. Code. § 3509(d).)

[8] Since the County's Employee Relations Ordinance and parts of the MMBA parallel most of the language contained in the NLRA, PERB and ERCOM have historically found NLRB and PERB decisions to be highly relevant. (*Vallejo Fire Fighter's Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-17.)

long recognized an exclusive union's right to the names, home addresses, and telephone numbers of bargaining unit employees based on the union's role as their collective bargaining agent and its need to communicate with unit employees effectively. (AA 31 & 36, citing *Prudential Ins. Co. v. NLRB* (2d Cir. 1969) 412 F.2d 77; *Harco Laboratories, Inc. and United Electrical, Radio & Machine Workers of America* (1984) 271 NLRB 220; *Teamsters Local 517 v. Golden Empire Transit District* (2004) PERB Dec. No. 1704-M; *Bakersfield School District* (1998) PERB Dec. No. 1262.)

The County argued it could not provide the information to SEIU due to confidentiality concerns, however ERCOM found there was no evidence SEIU would misuse the information and that PERB had already ruled that even if employees requested confidentiality, as none had, the balancing of the union's and employees' interests still required disclosure. (AA 41, citing *Golden Empire Transit District, supra.*)[9] The County asked the full ERCOM board to reconsider its decision, which request was denied on June 23, 2008. (AA 20.)[10]

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[9] The County provided no evidence that even <u>one</u> of the 14,000 bargaining unit non-members requested the County not disclose their contact information to the Union, either in 2006 or during the three day hearing before ERCOM in 2007. (AA 41.) The County failed to produce any evidence of SEIU ever misusing any contact information it had of County employees (over 40,000 out of 55,000 employees) over the more than 30 years that SEIU represented L.A. County employees. (AA 40.)

[10] The County made other arguments to ERCOM which were rejected and which are not relevant to this matter.

2. The Trial Court's Decision

The County filed a petition for writ of administrative mandamus with the Los Angeles Superior Court on September 19, 2008. The Superior Court, Honorable James C. Chalfant, denied the County's Petition on May 18, 2009 on two independent grounds. First, the trial court found the County had waived the privacy issue by not adequately raising the privacy of non-members before ERCOM. (AA 183-85.)[11] Second, the trial court found that, in balancing the factors under *Hill v. National Collegiate Atheletic Association* (1994) 7 Cal.4th 1 ("*Hill*"), the Union's interests in contacting the non-member bargaining unit employees significantly outweighed the non-members' interest in not having their home addresses and telephone numbers disclosed. (AA 185-192.) The trial court found that non-members had a cognizable privacy interest against the disclosure of their contact information (AA 189-190), but the trial court agreed with ERCOM that SEIU had presented numerous valid reasons to contact bargaining unit non-members (AA 190-191). Despite the privacy interests of bargaining unit non-members, the court still found the "Union's interest in contacting its employees *significantly* outweigh[ed] the non-members' interest in not having their home addresses and telephone numbers disclosed." (AA 191 emphasis added.)

The trial court considered and rejected the only alternative raised by the County, namely, that the County mail notices for SEIU

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[11] SEIU does not assert the waiver issue as a bar to a decision on the merits in this Court. The record adequately presents the issues to this Court which are primarily legal in nature.

to the non-members. (AA 191-192.) Judge Chalfant recognized that "a union is inherently weakened in the bargaining process if it is required to pass information to represented employees through the employer ... [and] such a procedure is a serious invasion of a union's ability to represent employees, both members and non-members." (AA 192.) The County never requested that the trial court consider any type of "opt-out" or "opt-in" procedure, and the trial court did not do so.

3. The Court of Appeal's Decision

The County appealed Judge Chalfant's decision and, on Dec. 14, 2010, the Second Appellate District reversed. The Court of Appeal short-circuited the *Hill* analysis and decided an issue that was not raised by either party, "whether a County employee who is not a Union member has a reasonable expectation under California privacy laws that he or she will be provided notice and an opportunity to object before the County discloses his or her personal information to the Union." (Slip op. at 8.). Neither the County, nor SEIU, had addressed or raised in their appellate briefs an "opt out" procedure or any other kind of notification procedure.[12] The Court of Appeal assumed that there was a privacy issue and, sua sponte, imposed an

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[12] The County also requested the court below judicially notice five volumes of legislative history behind the enactment of the MMBA in support of the County's argument that the County was privileged under Government Code section 3507(a)(8) to adopt local rules prohibiting the disclosure of non-member addresses and phone numbers. The Court of Appeal did not address the parties arguments concerning local rules under Gov. Code § 3507 and that issue is not before this Court.

opt-out procedural notice borrowed from discovery disputes in class action litigation. (Slip op. at 11-13.)

The court below found that non-members have a reasonable expectation that their home addresses and phone numbers will not be disseminated to their union, and the court skipped the step of balancing the relative strengths of the non-member's privacy interest in the information to be disclosed versus the Union's interest in obtaining the information. (Slip op. at 9-14; see *Hill*, *supra*, 7 Cal.4th at 35-40.) Instead of balancing the interests, the court below found that non-members' privacy interests would be accommodated if the County and SEIU sent opt-out notices to the non-members. Likening the Union to class action plaintiff attorneys, the court determined that, since an opt-out procedure balances the right of privacy against the right to discovery, such a procedure should be imposed on unions seeking addresses and telephone numbers of the employees they represent:

> Guided by *Valley Bank* and *Pioneer Electronics*, we hold non-member County employees are entitled to notice and an opportunity to object to the disclosure of their personal information. The privacy concerns here are more significant than in *Pioneer Electronics* because there is no underlying assumption these non-member County employees would want their personal information they provided to their employer as a condition of employment to be further disseminated. While there may be a parallel between union representation and class representation, we cannot assume these non-member County employees would perceive a benefit to having their personal information disclosed to the Union.

(Slip op. at 14.)

The Court of Appeal held that County employees who have not disclosed their personal information to the Union are *entitled* to notice and an opportunity to object before disclosure. (Slip op. at 2, 16.) The court directed the County and SEIU to meet and confer on a proposed notice which includes notice to non-member County employees and an opportunity for the non-member employees to object to disclosure. (Slip op. at 16.) The court then imposed on ERCOM a procedure whereby, "if the Union seeks to challenge the objection, as was the case in [citation omitted], it may do so before [ERCOM], which will weigh the interests of the Union and the person whose privacy interest is at stake." (Slip op. at 15.) Revealing a fundamental misunderstanding about when and why unions communicate with represented employees, the Court of Appeal wrote, "[a]t the end of the day, the Union will be able to communicate directly with those non-members who do not opt-out (or whose objections have been overruled [by ERCOM]) and will no longer be required to communicate to non-members through annual *Hudson* notices," as if *Hudson* notices were the only type of information that Unions conveyed to represented employees. (Slip op. at 15.) At the end of its decision, the Court of Appeal overruled PERB's decision in *Golden Empire Transit, supra* – that unions are entitled to this information under the MMBA – because the Court determined that *Golden Empire Transit* was not decided under California law interpreting the right to privacy under the California Constitution. (Slip op. at 14.)

The Union filed a timely Petition for Rehearing and the Court of Appeal granted the Petition for Rehearing. But on Feb. 24, 2011,

the Court of Appeal filed an Opinion essentially identical to its Dec. 14, 2010 Opinion.

ARGUMENT

A. TWO OF THE THREE ELEMENTS NECESSARY FOR A CONSTITUTIONAL PRIVACY SHOWING UNDER HILL ARE NOT MET AND, IF MET, ANY BALANCING SHOULD HAVE TILTED SUBSTANTIALLY IN FAVOR OF DISCLOSURE TO UNIONS

Under *Hill* and its progeny, a privacy interest showing must be made before balancing the relative strengths of the individual's privacy interest in the information to be disclosed versus the requesting party's interest in obtaining the information. (*Hill*, *supra*, 7 Cal.4th at 35-40; *International Federation of Professional and Technical Engineers, Local 21 v. Superior Court* (2007) 42 Cal.4th 319, 331 ("*Local 21*"); *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370-371; *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286-287) The showing for a privacy interest must include three elements: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy in that interest, and (3) action which is a serious invasion of that privacy interest. (*Ibid.*) Only after all three elements of the test have been addressed and met, does the court weigh the individual's privacy interest in the information to be disclosed against the requesting party's interest in obtaining the information. (*Ibid.*)

No constitutional violation occurs, that is a "defense" exists, if the intrusion on privacy is justified by one or more competing interests. (*Hernandez*, *supra*, 47 Cal.4th at 287 citing *Hill*, *supra*, 7 Cal.4th at 38.) For purposes of this balancing function—and except in the rare case in which a "fundamental" right of personal autonomy is

involved—the defendant need not present a " 'compelling' " countervailing interest; only "general balancing tests are employed." (*Ibid.*)

Two of the three elements necessary to establish a constitutional privacy showing under *Hill* are not met. Although the Union concedes that employees may have a legally protected privacy interest in their contact information, employees do not have a reasonable expectation that their employers will not disclose such information to their union, and such a disclosure is not a serious invasion of their privacy interest. Additionally, because unions are required to represent all bargaining unit members, any balancing of interests under *Hill* should tilt substantially in favor of disclosure to the Union.

1. Employees Do Not Have A Reasonable Expectation That Their Contact Information Will Be Withheld From Their Union Given The Longstanding Custom And Practice Requiring Employers To Disclose Employee Contact Information To Unions

The Court of Appeal's constitutional analysis of privacy expectations under *Hill* ignores the long history of legal obligations imposed on employers to provide employee contact information to labor organizations. The court's rationale for imposing an opt-out procedure rested on its assumption that employees have a reasonable expectation that their contact information will not be shared with their union:

> Employees who provide their home address and telephone number as a condition of employment have a reasonable expectation that the personal information given to their employer will remain

> confidential and not disseminated except as required to governmental agencies or benefit providers. ... Nor have County employees implicitly consented to the release of their personal information to the Union by accepting employment with the County."

(Slip op. at 11.)

The court reached that conclusion by summarily ignoring the long-standing practice established by federal and state precedents requiring employers to provide this type of contact information to unions. By failing to consider the specific context and the evidence of existing practices, the Court of Appeal conflated the union's unique role as the employees' exclusive representative with that of any other third party seeking contact information from the employer. Indeed, the court reduced the role and responsibilities of unions to a role less significant than that of plaintiff attorneys in large class action lawsuits.[13] Thus, the court mistakenly concluded that employees had a reasonable expectation that their employer would withhold such information from the union, when in fact the contrary is true.

As this Court stated in *Hill* and reiterated in *Local 21* and *Hernandez*, "a 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms." (See *Hill*, *supra*, 7 Cal. 4th at 37; *Local 21*, *supra*,

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[13] The Court of Appeal wrote, "The privacy concerns here are more significant than in *Pioneer Electronics* because there is no underlying presumption these non-member county employees would want their personal information disclosed, as might be the case in class-action litigation in which the disclosure might lead to affirmative relief or the vindication of statutory rights." (Slip op. at 14.)

42 Cal.4th at 331; *Hernandez*, *supra*, 47 Cal.4th at 286.) The "customs, practices, and physical setting surrounding particular activities may create or inhibit reasonable expectations of privacy." (*Hill*, *supra*,7 Cal.4th at p.36; *Local 21*, *supra*, 42 Cal.4th at 331; *Hernandez*, *supra*, 47 Cal.4th at 287.)[14] The decision in *Hill* thus recognized that "[t]he protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens." (See *Hill*, 1 Cal.4th at 37 (citing Rest., 2d, Tort, §652D, com. c).)

Indeed, the *Hill* Court singled out just this sort of history when explaining how even a legally protected privacy interest might not support a reasonable expectation of privacy:

> [C]ustoms, practice, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy. (See, e.g., . . . *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia* (3d Cir. 1987) 812 F.2d 105, 114 [no invasion of privacy in requirement that applicants for promotion to special police unit disclose medical and financial information in part because of applicant awareness that such

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[14] In *Local 21*, the Court reasoned that a longstanding government practice of disclosing public employee salary information meant that employees could not have an objectively reasonable expectation that such information would remain private—notwithstanding the more generalized societal norm favoring financial privacy. (See 42 Cal.4th at 331-332 ["To the extent some public employees may expect their salaries to remain a private matter, that expectation is not a reasonable one . . . The 'broadly based and widely accepted community norm[]' applicable to government employee salary information is public disclosure."].)

> disclosure "has historically been required by those in similar positions."].)

(*Hill*, *supra*, 7 Cal.4th at 36-37.)

In *Local 21*, this Court found no reasonable expectation of privacy in public employee salaries at all because (1) the Attorney General had consistently maintained, both before and after the passage of the Privacy Initiative in 1972, that public employee salaries were a matter of public record, (2) the federal, state, and other local governments had consistently disclosed salary information, and (3) the case law and practice in other jurisdictions was overwhelmingly in favor of disclosure. (*Local 21*, *supra*, 42 Cal.4th at 331-332, 338; *Hill*, *supra*, 1 Cal.4th at 42-43.) So too here, the evidence and legal authority similarly weigh in favor of requiring employers to disclose contact information for represented employees to the exclusive representative. In both *Hill* and *Local 21*, the Court looked at the evidence of the existing practices between the parties or similarly situated parties, as well as the established legal authorities, to determine the existing community norm and to make a determination about whether there is a reasonable expectation of privacy.

Well before the California Constitution was amended in 1972 to explicitly include the right to privacy, it has been established that under the National Labor Relations Act (29 U.S.C. § 151 et. seq. ("NLRA")), that employers are required to provide the names and addresses of employees before representation elections and subsequently in the course of a union's representation of employees.

a) Employers Are Required To Provide to a Union a List of Employee Names and Addresses As Part of the Election Process; Unions Are Provided This Information Before They Are Even Selected As the Employees' Bargaining Representative

In 1966, the NLRB adopted the *Excelsior* list rule which requires employers to provide unions or individual petitioners[15] with the list of employees in bargaining unit along with their addresses for the purposes of conducting NLRB supervised elections *even before* a union has been selected as the bargaining representative. (*Excelsior Underwear, Inc.* (1966), 156 NLRB 1236, approved in subsequent case as substantively valid, *NLRB v. Wyman-Gordon* (1969) 394 U.S. 759.) This rule has been a central feature of the election process of the NLRA since its adoption. (See Gorman & Finkin, Basic Text on Labor Law (2d ed. 2004) § 8.9.)

b) Unions Are Provided Names, Addresses, Phone Numbers and Contact Information in Order To Fulfill Their Representation Responsibilities

The NLRB and every Circuit Court of Appeals to have considered this question has repeatedly held since the 1960s that unions are entitled the names, telephone numbers, and home addresses of the employees the Union represents. (See, *e.g.*, *Prudential Insurance Co. v. NLRB* (2nd Cir. 1969) 412 F.2d 77 [noting that "data without which a union cannot even communicate with employees

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[15] When an individual seeks to decertify a union, he or she is entitled to the same *Excelsior* list under federal and state law once an election has been directed or agreed upon.

whom it represents is, by its very nature, fundamental to the entire expanse of a union's relationship with the employees"]; *Kroger Co.*, (1976) 226 NLRB 512; *Autoprod, Inc.* (1976) 223 NLRB 773; *Harco Laboratories, Inc.* (1984) 271 NLRB 220 [names and addresses of employees are "so basically related to the proper performance of a union's statutory duties that any special showing of specific relevance would be superfluous."]; *Show Industries Inc.* (1991) 305 NLRB 72 [addresses and phone numbers]; *Bryant & Stratton Bus. Inst.* (1997) 323 NLRB 410, 410 ["It is well settled that information concerning names, addresses, telephone numbers...is presumptively relevant...."]; *Urban Shelters and Healthcare Systems* (1994) 313 NLRB 1330 [finding employer violated NLRA by failing to provide contact information for bargaining unit members]; *NLRB v. New Assocs.*(3d Cir. 1994) 35 F.3d 828; *NLRB v. CJC Holdings, Inc.* (5th Cir. 1996) 97 F.3d 114, 117 (affirming NLRB order requiring employer to provide employee names and addresses to exclusive bargaining representative); *River Oak Center for Children, Inc. v. NLRB* (9th Cir. 2008) 273 F.Appx. 677; See also National Mediation Board Representation Manual, § 12 [applying same rule under Railway Labor Act (45 U.S. C § 151 et. seq.)].)

In the "specific context" of labor relations, disclosure of contact information to the union is the standard practice and community norm for those who work in the private sector, which is the overwhelming majority of employees. The Court of Appeal summarily dismissed the 50 years of federal decisions on this issue because it "was not decided under California law" (Slip op. at 15), but the court failed to follow the requirements under *Hill* to examine the customs and practices in

the workplace to determine whether employees would have a reasonable expectation of disclosure of contact information to their unions.

c) The Same Disclosure Rules Govern California Public Sector Workers

The custom and practice in the California public sector is the same as under the NLRA. Under every one of the California labor law statutes for public sector employees under which PERB has reviewed this issue, it has held that unions are entitled to the names, home addresses, and home telephone numbers of employees the union represents irrespective of the member's dues status. (*California School Employees Assoc. v. Bakersfield City School Dist.* (1998) PERB Dec. No. 1262; *California School Employees Assoc. v. San Bernardino City Unified School District* (1998) PERB Dec. No. 1270; *Golden Empire Transit District* (2004) PERB Dec. No. 1704-M.)

Copying the NLRB's *Excelsior* list rule, California has established similar rules to provide unions the contact information of employees before a union represents any employees. PERB Regulation 32726[16] is applicable to all the parties in an election,

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[16] California Code of Regulations, title 8, section 32726, which applies to elections under all seven of the California labor statutes administered by PERB, states in relevant part,

> "The employer shall file with the Regional Office a list of names of all employees included in the voting unit ... and shall include the job title or the classification, work location and home address of each eligible voter. . . . (b) . . . proof of service shall be filed with the Regional Office. . . (c) Any party which receives the mailing addresses of eligible voters pursuant to this section shall keep these addresses confidential."

including intervening unions, and individuals who file decertification petitions. These are generally precertification procedures where none of the employees is yet represented by the union.[17]

Although the opinion below was based upon non-members' privacy rights, the rationale relied upon by the court would apply with equal force to employees not yet represented by a union, thus the decision below effectively overrules these bedrock *Excelsior* list principles of election procedures since it requires employers to notify employees with an opt-out notice prior to providing an existing, or incumbent union, the employees' contact information.

PERB issued two decisions in 1998 finding school district employers were required to provide to already certified unions the home addresses and home phone numbers of employees represented

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PERB has analogous regulations for each of the specific labor relations statutes it enforces. (See Cal. Code Regs., tit. 8, § 61115 [local government employees subject to the MMBA]; Cal. Code Regs., tit. 8, § 81115 [trial court employees]; Cal. Code Regs., tit. 8, § 91115 [trial court interpreters]; Cal. Code Regs., tit. 8, § 51027 [higher education employees]; Cal. Code Regs., tit. 8, § 71027 [transit district employees]; Cal. Code Regs., tit. 8, § 40165 [state employees].)

[17] The same requirement exists under the Agricultural Labor Relations Act ("ALRA") (Lab. Code § 1140 et seq.). (*Yoder Bros. v. Teamsters Local 890* (1976) 2 ALRB No. 4.) Although farm workers are employed in the private sector, they are exempt from the National Labor Relations Act. (29 U.S.C. § 152(3).) Thus, the California Legislature adopted the ALRA in 1975 to fill the gap in the NLRA's coverage and ensure that farm workers would be able to organize and bargain collectively. (See Lab. Code § 1140.2.) For ALRA elections, the employer must produce, to the labor organization seeking certification, a complete list of the names and current addresses of all eligible voters. (Cal. Code Regs., tit. 8, §§20310(a)(2), 20313.)

by the union except for those school district employees who had already invoked the privacy provision of the Public Records Act (See Gov. Code § 6254.3(b)). (*Bakersfield City School Dist.*, *supra*, PERB Dec. No. 1262, 17-21; *San Bernardino City Unified School District, supra,* PERB Dec. No. 1270.)

In 2004, PERB issued a decision finding that county, city, and other MMBA jurisdiction employers are required to provide to unions the home addresses and home phone numbers of all unit employees, regardless of dues status or whether employees request in writing that their information not be disclosed. (*Golden Empire Transit District, supra*, PERB Dec. No. 1704-M at 5-8.) In *Golden Empire Transit*, PERB applied its own precedent and "balanced[d] the privacy interests of employees against the union's need for information." (*Id.* at 7-8.) It concluded that the union's need to communicate with employees in its bargaining unit, which it characterized as "fundamental to its role as bargaining representative," outweighed the evidence of a compelling need for privacy of employees in the bargaining unit, even if employees inform the union and employer that they do not want their contact information disclosed to the union. (*Id.*)[18]

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[18] The California Public Record Act does not bar employers from disclosing the home addresses and phone numbers of public employees under the MMBA, but it may bar such disclosures by state agencies, school districts, or the county office of education, if those types of employees affirmatively submit a written request. (Gov. Code § 6254.3) Unlike the procedures created by the Court of Appeal in this case, a covered employer (Dills Act or HEERA) under Gov. Code section 6254.3 is still not required to provide employees any type of notice that their addresses will be disclosed absent objection.

PERB's rulings generally rest on NLRA decisions requiring employers to provide to private sector unions this information. PERB's reliance on NLRA authorities and decisions does not derogate or disregard California law, as the Court below suggested, rather it gives effect to the public policies that animate the California public employee labor relations laws. (*Vallejo Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617 [California courts and PERB have historically found NLRB decisions to be highly relevant to interpret parallel language in state labor statutes.].)

The Legislature created PERB as an expert body to address these issues; as a result, its decision, based on its years of experience dealing with this specialized field, "carry the authority of an expertness which courts do not possess and therefore must respect." (*Banning Teachers Association v. Public Employment Relations Board* (1988) 44 Cal.3d 799, 804.) When it comes to California public sector employer-employee relations, PERB sets the norms and thus their decisions should have informed the Court of Appeals about the customs and practices that determine whether employees would have a reasonable expectation that their employer would disclose contact information to their union.

d) The Same Disclosure Rules Apply in Other States Where There Is Public Sector Labor Relations Regulation

Additionally, many other states have required public sector employers to disclose to unions the contact information for

represented employees.[19] This is true even of states that have

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[19] See, *e.g.*, *County of Morris v. Morris Council No. 6* (N.J. 2004) 852 A.2d 1126 [employer ordered to provide list of home addresses of employees within the negotiations unit]; *Kansas Dep't of Social and Rehabilitation Services v. Public Employee Relations Board* (Ks. 1991) 815 P.2d 66 [Kansas Department of Social and Rehabilitation Services could not refuse to supply union with employees' home addresses]; *Webb v. City of Shreveport* (La. 1979) 371 So.2d 316 [no reasonable expectation of privacy as to identity or where we live or work, unless employee makes written request ahead of time to keep contact information confidential]; *Local 100, SEIU v. Rose* (La. 1996) 675 So.2d 115; *Pottle v. School Committee of Braintree* (Mass. 1985) 482 N.E.2d 813 [names, job classifications, and home addresses of school employees were public records and had to be disclosed to the union]; *Michigan State Employees Ass'n v. Michigan Dep't of Management & Budget* (Mi. 1987) 404 N.W.2d 606 [public employer must disclose employees' home addresses to the employee organizations who requested the information under the Michigan FOIA]; *Tobin v. Michigan Civil Service Comm'n* (Mi. 1982) 331 N.W.2d 184 [disclosure of names and addresses of the employees to public employee labor organizations would not violate their common law right of privacy]; *Appeal of State Employees' Ass'n of New Hampshire, Inc.* (N.H. 2007) 938 A.2d 895 [public employer required under New Hampshire regulations to forward a list of names and home addresses of employees to parties appearing on the ballot of a representation election]; *Timberlane Regional Education Ass'n v. Crompton* (N.H. 1974) 319 A.2d 632 [right-to-know law required the disclosure of the names and addresses of substitute teachers employed by school district to union]; *State District 1199 Health Care & Social Service Union v. Lawrence County General Hosp.* (Oh. 1998) 699 N.E. 2d 1281 (hospital required under public records law to provide names, addresses, and job classifications of employees to Union upon request]; *Milwaukee Board of School Directors v. WERC* (Wi. 1969) 168 N.W.2d 92 [names and addresses of municipal employees are a matter of public record]; *Delaware Correctional Officers Ass'n v. Delaware Dep't of Correction*, Del. PERB, ULP 00-07-286 III PERB 2209 (Del. 2001) [state agency is obligated to provide addresses under its duty to bargain in good faith.); *City of Springfield*, 24 MLC 109, 1998 MLRC LEXIS 17 (Ma. LRC 1998) [public employer must

constitutional privacy rights similar to California's. (See, *e.g., King County* (WAS PERC 1988) Decision 3030 [finding refusal to provide employee home addresses an unfair labor practice]; *Webb v. City of Shreveport* (La. Ct. App. 1979) 371 So.2d 316 [finding union organizer could gain access to municipal employee home addresses despite state constitutional right to privacy]; *Local 100, Serv. Employees Intl. Union v. Forrest* (La. Ct. App. 1996) 675 So.2d 1153 [finding same for certified nurses' aides].)

e) In Summary, Under All Labor Relations Systems Employees Expect Their Employers Will Provide Contact Information to Unions

Fifty years of federal law, twenty years of California law, and analogous laws in many other states that most employers have a legal obligation to disclose employee contact information to labor organizations defeats the assumption that employees have an "objective" basis for "expecting" that such information will not be disclosed to a union that already represents them and has a duty to do

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provide list of names and addresses of eligible voters to all competing employee organizations]; *In re. Burlington County Board of Chosen Freeholders*, PERC No. 88-101, 14 NJPER 327, 1988 NJPER (LRP) LEXIS 88 (N.J. 1988); *Teamsters, Local 763 v. King County*, Decision 3030, 1988 WA PERC LEXIS 85 (Wa. 1988) [employer required to give home addresses to union]; *Carter v. Alaska Public Employees Ass'n* (Alaska 1983) 663 P.2d 916; *Greater Community Hosp. v. Public Employment Relations Bd.* (Ia. 1996) 553 N.W.2d 869 [records open to the public should be open for examination by union representatives engaged in collective bargaining negotiations with a public employer]; *Council 74, American Federation of State, County, & Municipal Employees v. Maine State Employees Association* (Me. 1984) 476 A.2d 699 [employers must furnish accurate voting lists of bargaining unit employees prior to election].

so fairly and without discrimination, regardless of whether they choose to become full union members or not. This extensive body of labor relations law expresses a "broadly based and widely accepted community norm" (*Hill, supra*, 1 Cal.4th at 37; *Hernandez, supra*, 47 Cal.4th at 286) contradicting any assertion that employees may have an objectively reasonable expectation that disclosure will not be permitted.

The Court of Appeals erred by considering "community norms" about information privacy in the abstract, rather than in the "specific context" of labor relations systems in which there have long been disclosure requirements.[20] The Court of Appeal dismissed the relevance of those pre-existing legal obligations because "the disclosure question presented here . . . is governed by our state's constitutional right of privacy." (Slip op. at 9). But the constitutional right of privacy is, in turn, based on an "objective" consideration of "community norms," which are evidenced by statutes adopted by elected representatives over numerous decades. As this Court stressed

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[20] For example, the Court of Appeal relied on its own speculation that non-members would not want to be contacted by the Union: "there is no underlying presumption these non-member County employees would want their [addresses and phone numbers] disclosed, as might be the case in class action litigation in which the disclosure might lead to affirmative relief or the vindication of statutory rights. Rather, the opposite is true." (Slip op. at 13, 14.) However, the courts have made the opposite presumption. (See *NLRB v. Curtin Matheson Scientific, Inc.* (1990) 494 U.S. 775.) The NLRB and other agencies which regulate labor-management relations have never presumed that because some individuals chose to pay a fair share rather than become a full member of the union they do not want to be contacted by the union which represents them.

repeatedly in *Hill* and its progeny, the courts must look at just this sort of evidence of context in determining whether an expectation of privacy is reasonable. In this case, as in the *City of Philadelphia* case relied on by the Court in *Hill* and *Local 21*, the decisional history defining "norms and customs" is strong enough to defeat any employee expectation of privacy against disclosure of basic contact information to the union. (*Hill*, *supra*, 7 Cal.4th at 39-40.) Thus, the court mistakenly concluded that employees had a reasonable expectation that their employer would withhold such information from the union, when in fact the contrary is true.[21]

2. The Limited Disclosure Of Contact Information To A Union Is A Not A Serious Invasion Of Privacy

Even if there is a reasonable expectation of privacy, the disclosure of contact information does not constitute an invasion of privacy that is sufficiently serious in its nature, scope, and actual or

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[21] There may be some employees who come to the County having no particular expectation on this issue; some may develop a dispute with their union and later wish that the union not contact them and some may even be hired with an antipathy towards any union. But none of this detracts from the expectation of those who are hired into a setting where there is a collective bargaining representative that they will be governed by the usual customs and practices; that is that their contact information will be made available to the union. Indeed, the fact that the vast majority of bargaining unit employees affirmatively gave the Union their contact information and that not one single bargaining unit employee objected to disclosure, supports the argument that the norm and "custom" is that employees would expect their employer would disclose contact information to their union. We recognize that constitutional rights cannot be waived by the majority, but here the test as established by *Hill* is what is the custom and practice. The expectations of the vast majority reflect and establish those norms and customs.

potential impact to constitute an egregious breach of the social norms underlying the privacy right. (See *Hill*, *supra*, 7 Cal.4th at 37; *Pioneer*, *supra*, 40 Cal.4th at 371; *Hernandez, supra*, 47 Cal.4th at 287.) In determining the seriousness of an invasion of privacy, an examination of how privately the information has been treated historically is required. (*Ibid*; See also *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, 561.)

In *Hernandez*, the Court noted that the, "'offensiveness' elements [is] an indispensable part of the privacy analysis" (*Hernandez, supra*, 47 Cal.4th at 295.) "[A] court determining whether this requirement has been met as a matter of law examines all of the surrounding circumstances, including the 'degree and setting' of the intrusion and 'the intruder's motives and objectives'." (*Ibid; Shulman v. Group W. Productions, Inc.* (1998) 18 Cal.4th 200, 236.) When unions receive such information, it is generally used for limited and legitimate representation purposes and is not otherwise disclosed.

This Court also stated that even in a non-employment class action, a person's reasonable expectations of privacy in her contact information is, at most, modest. (*Pioneer*, 40 Cal.4th at 373 [contact information "involves no revelation of personal or business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life, such as mass-marketing efforts or unsolicited sales pitches."].) Similarly, "contact information is neither unduly personal nor overly intrusive." (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1254; *Crab Addison, Inc.*(2008) 169 Cal.App.4th 958, 974.)

California courts have regularly allowed the release of employees' home addresses and contact information to putative class representatives even before a class has been certified. (*Puerto*, *supra*, 158 Cal.App.4th at 1254-1255; *Lee v. Dynamex Inc.* (2008) 166 Cal.App.4th 1325, 1337-1338; *Crab Addison, supra*, 169 Cal.App.4th at 974.) These cases required the release of employees' contact information to the putative class representatives and class counsel without imposing any mechanism to allow the employees to withhold their contact information. (*Puerto*, *supra*, 158 Cal.App.4th at 1259; *Lee*, *supra*, 166 Cal.App.4th at 1334-37; *Crab Addison*, *supra*, 169 Cal.App.4th at 974.)

The courts in *Puerto, Lee,* and *Crab Addison* found that home addresses and home phone numbers were "relatively non-sensitive." (*Puerto*, 158 Cal.App.4th at 1253; *Crab Addison*, 169 Cal.App.4th at 967.) "We concluded that there was 'no evidence that disclosure of the contact information for these already identified witnesses [was] a transgression of the witnesses' privacy that [was] 'sufficiently serious in [its] nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.'" (*Ibid.*; *Hill, supra*, 7 Cal.4th at 37.) Since there is no dispute that the Union is entitled to the names of the non-members, providing the same contact information to the union as in *Puerto* and *Crab Addison* could not constitute a "serious invasion of privacy" as found by the court below. Disclosing addresses and phone numbers isn't nearly as serious as revealing "personal or business secrets, intimate activities, or similar private information." (*Crab Addison*, *supra*, 169 Cal.App.4th at 969, quoting *Puerto, supra,* 158 Cal.App.4th at 1254.)

In *Crab Addison*, the court even upheld the trial court's order that home addresses and phone numbers be provided to the class action plaintiffs' attorney *without* an opt-in or an opt-out notice. (*Id. at* 958, 974.)

In the employment situation employers obtain personal contact information and require employees to update that information. There is no limit on the County's disclosure of this information either to county employees or to third parties. For example, an employer may disclose contact information to health care providers, pension plan administrators, and others who may communicate with county employees. This would not be a serious invasion of employee privacy for an employer to provide such information to third parties for a special or limited use.[22]

The Court of Appeal's finding that disclosing the contact information to SEIU is a more serious invasion of privacy than disclosing financial information of banking customers to class action attorneys in *Valley Bank* or *Pioneer Electronics* ignores the historical importance that the federal and state governments have given to collective bargaining since the 1930s.[23] The decision ignores the fact

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[22] There are statutory exceptions such as medical privacy which would prevent disclosure of medical records or information. (Civil Code § 56.20.)

[23] The court below also placed undue emphasis on a FOIA case, the *United States Department of Defense v. Federal Labor Relations Authority* (1994) 510 U.S. 487. That case examined whether providing the addresses and phone numbers would advance petitioner's understanding of how the government operated, not whether the union needed the information to contact and represent employees. (Id. at 495.) The Court of Appeal's reliance on dicta concerning employees

that the Union is not an outsider to the work place and employees. Indeed, in this situation, SEIU has been representing the workers in Los Angeles County since the early 1970s. The Union's role is protected by state law and it owes legal and continuing duties to the employees that class action attorneys, as in *Valley Bank* or *Pioneer Electronics,* do not have.

Moreover, given that unions have access to far more sensitive and private information about employees than just their addresses and phone numbers, it does not make sense that employers' providing contact information to unions would be a serious and egregious invasion of privacy, but other information, such as discipline records, records of absenteeism, employees' wages, and criminal investigation records, to name just a few, would not be considered private information sufficient to warrant privacy protections. (See *Raley's Supermarkets & Drug Ctrs.* (2007) 349 NLRB 26 [disciplinary investigations and names of witnesses]; *Korn Indus. v. NLRB* (4th Cir. 1967) 389 F.2d 117 [employee wages]; *Yeshiva Univ.* (1994) 315 NLRB 1245 [attendance records]; *LBT, Inc.* (2003) 339 NLRB 504 [employee evaluations]; *Overnite Transp. Co.* (2004) 343 NLRB 134

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not wanting to be bothered at home, or how a home is a person's castle, should not undercut the federally and state established norms that providing contact information to unions is not a serious invasion of employees' privacy interests. Providing addresses and phone numbers has less relevance to understanding how the Department of Defense functions as a governmental entity than providing contact information to a union to service the represented employees. (Cf. *News-Press v. United States Dep't of Homeland Sec.*, (11th Cir 2007) 489 F.3d 1173 [names and addresses disclosed to the public].)

[investigation of employee criminal records].) In this case, the County regularly disclosed to SEIU all employees' social security numbers (see AA 41), which may reasonably be considered more private to employees than home addresses and telephone numbers. Indeed, if employees may be compelled to support the union financially notwithstanding their individual objections, it is no particular burden on them to share their contact information so that the union can effectively communicate with them about its efforts on their behalf. The obligation of a union to represent all employees in a bargaining unit presumes a duty to provide information to and seek input from all employees.

The privacy analysis required by *Hill*, *Local 21*, and *Herndandez* requires that close attention be paid to the specific circumstances and practices at issue. The Court of Appeal failed to engage in any of the detailed factual and legal analysis necessary to determine employees' reasonable expectations as to disclosure of contact information to their union and to determine whether disclosure of contact information is a serious invasion of privacy. Since two of the three elements necessary under *Hill* to make the threshold showing for a protectable privacy interest for the non-members cannot be met by the County, it is not necessary to proceed to the balancing test established in *Hill*.

3. Because Unions Are Required To Represent All Bargaining Unit Members, Regardless Of Membership Status, Any Balancing Of Interests Under *Hill* Should Have Tilted Substantially In Favor Of Disclosure To The Union

Even assuming a reasonable expectation of privacy and that a serious invasion of privacy would occur upon disclosure of employee contact information to the Union, the Court of Appeal failed to balance the Union's competing interests in disclosure. After determining whether the required privacy showing has been met, under *Hill*, the Court balances the relative strengths of (i) the individual's privacy interest in the information to be disclosed versus the (ii) requesting party's interest in obtaining the information. (*Hill*, *supra*, 7 Cal.4th at 35-40; *Pioneer*, *supra*, 40 Cal.4th at 370-371.) In light of the union's duty of fair representation and its obligation to communicate with members and non-members alike, the union's interest in disclosure outweighs any privacy interest employees may have in their contact information.

Courts have long-recognized the needs of unions to communicate with the employees they represent. As the Third Circuit recognized in *N.L.R.B. v. Hotel, Motel, and Club Employees, Local 568, AFL-CIO* (3d Cir. 1963) 320 F.2d 254, "[t]he comprehensive authority vested in the union, as the exclusive agent of the employees, leads inevitably to employee dependence on the labor organization," and a duty to those employees encompasses a general duty to inform employees about matters affecting their employment. (*Id.* at 258; see also *Golden Empire Transit Dist.*, *supra*, PERB Dec. No. 1704-M at 7 ["The exclusive representative's ability to communicate with its

members is fundamental to its role as bargaining representative."].)

In recognition of the importance to employees of being kept informed of the representational activities of the union, state and federal labor law imposes a responsibility on unions to keep their members informed of matters affecting their employment. As a result of its status as the exclusive bargaining representative, a union owes a duty of fair representation to all employees that it represents, including non-members. (*Jones v. Omnitrans* (2004) 125 Cal. App. 4th 273, 283.) This duty of fair representation requires communication to represented employees regarding matters affecting their employment. (*Hotel, Motel, and Club Employees, Local 568*, *supra*, 320 F.2d at 258; *Yellow Freight System of Indiana* (1999) 327 N.L.R.B. 996, 1006.) In negotiating a collective bargaining agreement, a union violates the duty of fair representation if non-members are left completely uninformed about the status of negotiations. (*Maaskant v. Kern High Faculty Association* (2006) *CTA/NEA*, PERB Decn. No. 1834.) Failure to inform employees about contractual terms affecting their employment may also lead to a finding that the union breached its duty of fair representation. (*Teamsters Local 896* (*Anheuser-Busch*) (1986) 287 N.L.R.B. 565; *Tenorio v. National Labor Relations Board* (9th Cir. 1982) 680 F.2d 598, 601; *Retana v. Apartment Motel, Hotel & Elevator Operators Union Local* 14 (9th Cir. 1972) 453 F.2d 1018, 1024 [failure to communicate with the claimant in processing the grievance suffices to state claim for breach of the duty of fair representation]; *Minnis v. Auto Workers* (8th Cir. 1975) 531 F.2d 850, 853-854; *Robesky v. Qantas Empire Airways, Ltd.* (9th Cir. 1978) 573 F.2d 1082, 1091

["trier of fact could reasonably find that the Union's failure to disclose to appellant that her grievance would not be submitted to arbitration" was arbitrary and thus breach of the duty of fair representation]; *Oxnard Educators Association* (1988) PERB Dec. No. 681, pp.20-22.)

The court below found that it need not conduct the balancing of interests required by *Hill* because the court's opt-out procedure would obviate any constitutional violation. (Slip op. at 3, fn.1.) The Court of Appeal found no new facts in the record or case authority to undercut the trial court's finding that the union's interest "significantly" outweighed the employees' interest (see AA 191) because the Court of Appeal didn't conduct any balancing of the interests.

The Court below also conflated the idea that providing the Union the home addresses and phone numbers by the County interferes with the right of employees' not to be union members. Receipt of a Union notice about layoffs within the bargaining unit or a survey requesting comments on which issues the Union should raise in collective bargaining would not result in the involuntary conversion of non-members to members. People are sent hundreds of pieces of mail and contacted dozens of times a year by telephone by various organizations, but that does not make them members of those organizations. The trial court briefly addressed this issue and found that, under this argument, employee's privacy interest should be combined with an interest in protecting their right to associate, or not associate, under the First Amendment. (AA 191.) However, when the trial court conducted *Hill* balancing, it found the union's interest in disclosure still "significantly" outweighed the employees' interest

against disclosure even after combining the employees right to privacy and right to not associate. (*Ibid.*)

Providing the Union with the employee contact information does not force the employee to associate with the Union, rather, it allows the Union to fulfill its statutory obligation to communicate with all employees in the bargaining unit, members and non-members. The evidence presented in the proceedings below buttresses that employee contact information serves to allow communication with employees about job issues affecting all employees in the workplace, such as, contract negotiations, grievances, union elections, job promotional opportunities, eligibility for and availability of benefits, workforce development, and other matters pertinent to the Union's representation role. (AA 191; 2 AR 493-497, 502-503, 516.) These matters affect all members of the bargaining unit, irrespective of their choice of membership status. Thus, the court's repeated references to an employee's right not to join a union is irrelevant.

In its decision, the Court of Appeal "recognize[ed that] not all compelled disclosure warrants procedural safeguards." (Slip op. at 13.) The court noted that one example where contact information is disclosed without procedural safeguards is in the context of putative class members in a class action. (*Id.*) The court attempted to distinguish this situation because "there is an assumption that [putative class members] want their information disclosed because the class action involves a vindication of their statutory rights." (*Id.*) Unlike putative class members, however, employees represented by a union have a real, rather than speculative, relationship to the union. Despite that, the Court of Appeal assumed that the employees at issue

do not want their home addresses disclosed because they have chosen not to become members of the union. (*Id.*)[24] Whether or not the Court of Appeal's assumption was warranted, any particular employee's attitude towards the union does not diminish the union's exclusive authority and duty to act on that employee's behalf on matters within the scope of representation. Furthermore, it does not follow from an employee's desire not to be a member of a union that the employee would not want or does not need to be kept informed of union activities that will shape the terms and conditions of that employee's employment. Nor does it follow that an exclusive bargaining representative's duty to keep such an employee informed about the terms and conditions of the employee's employment is diminished simply because the employees is a non-member of the union.

Indeed, the union, as the exclusive bargaining representative, is empowered to negotiate the terms of employment of represented employees and to monitor and enforce those terms. (Govt. Code § 3505.) It is therefore of great importance to represented employees that the union be able to communicate with them regarding the negotiated terms of employment, proposed changes to the collective bargaining agreement, and other labor relations issues that may affect them. (*See Hotel, Motel, and Club Employees, Local 568*, *supra*, 320 F.2d at 258; *Tenorio v. National Labor Relations Board*, *supra*, 680

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[24] The fact that someone adopts non-member status does not demonstrate that they do not want to be represented by the union. (*NLRB v. Vegas Vic, Inc.* (9th Cir. 1976) 546 F.2d 828, 829; *Retired Persons Pharmacy v. NLRB* (2nd Cir. 1975) 519 F.2d 486, 491; *NLRB v. Wallkill Valley General Hosp.* (3d Cir. 1989) 866 F.2d 632, 637.) Those who opt for other status may well support the union and wish to receive information from the union.

F.2d 598, 601.)

Additionally, the law requires unions to inform represented employees about how their dues are spent and to give non-members the opportunity to object. Under *Chicago Teacher Union, Local No. 1 v. Hudson, supra*, 475 U.S. 292, unions have an obligation to regularly disclose to non-member "agency fee" payers information regarding how those fees are spent and to give non-members an opportunity to object.[25] Private sector unions governed by the duty of fair representation have an obligation to provide information about the union security obligation to employees. (See *UFCW Local 648* (2006) 347 NLRB 868; *California Saw & Knife Work* (1995) 320 NLRB 224, 231, enfd. *sub nom. Machinists v. NLRB* (7th Cir. 1998) 133 F.3d 1012.) While SEIU and LA County had an arrangement for many years whereby the County mailed the *Hudson* notices to the employees on a yearly basis, for many unions, the *Hudson* notice is sent directly by the union to non-members. Were the opt-out regime

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[25] In *Hudson*, the Supreme Court began with the understanding that the duty of non-member employees to financially support their collective bargaining representative has an impact on those employees' First Amendment rights. (See *id.* at 301.) The Court therefore set up procedural safeguards to protect nonmembers' employees' rights not to contribute beyond what is necessary to negotiate and administer the collective bargaining agreement. Unions are required to identify to nonmembers fee payers the basis for the union's calculation of the fair share fee by identifying expenditures for collective bargaining for which members and nonmembers alike can be fairly charged. (*Id.* at 306-307.) The Court recognized that while it is the employees' obligation to raise an objection to the fee they are charged, the union, because it controls the information, must provide nonunion employees with sufficient information to gauge the propriety of the fees even before any objection is made. (*Id.* at 306.)

proposed by the Court of Appeal upheld, employers in California would be tasked with sending opt-out notices to employees and, for those who objected to disclosure, the employer would also become responsible for sending *Hudson* notices and potentially all other notices that unions send to all employees they represent.

The Court of Appeal decision below creates an anomaly. The Union has a duty to represent all employees in the bargaining unit without regard to their membership status and to provide *Hudson* notices on a yearly basis. Yet the Court of Appeal's regime places a substantial obstacle in the way of that representation by placing a significant communication barrier between the Union and those it represents. Worse, it allows individuals to opt out and refuse to allow their representative to advise them of issues and concerns which may affect them directly. For example, if the union knows that there will be operational changes affecting a group of workers and wants their input or to advise them of the circumstances, under this rule, employees could refuse efforts by the union to mail them appropriate notices. If they opt out then the union would be precluded from effectively notifying them of some events which may affect them and their representation. Or, the union and the employees would have to suffer the delay occasioned by the union drafting a special notice that the employer would have to send for the union. Such a procedure makes the employer the gatekeeper and puts the union at a substantial disadvantage. As the trial court judge observed, "a union is inherently weakened in the bargaining process if it is required to pass information to represented employees through the employer ... [and] such a procedure is a serious invasion of a union's ability to represent

employees, both members and non-members." (AA 192.)

Employees are free to refuse to read any mail or free not to return calls, but the Union has the right and sometimes even a duty to attempt to contact them. Neither the NLRA, the RLA, the ALRA, nor PERB places such opt-out notice obstacles in the way of union representation. Indeed the essence of the concept of exclusive representation is the obligation and right to represent everyone in the bargaining unit. As extensively discussed above, each of these agencies affirmatively requires employers to furnish names, addresses and phone numbers to Unions to use in representing groups of workers.

Under a *Hill* balancing of the non-members' privacy interest versus the need of the Union for the information the Union's need for the contact information significantly outweighs any interest non-members have in non-disclosure of their addresses and phone numbers.

B. THE COURT OF APPEAL'S OPT-OUT PROCEDURE WOULD DISRUPT LABOR RELATIONS SYSTEMS AND LEAD TO YEARS OF LITIGATION ABOUT IMPLEMENTATION

The Court of Appeal's decision imposing an opt-out procedure purports to balance the policy interests in privacy and access. But it is not the balance actually chosen by administrative agencies charged with making such policy decisions to carry out labor relations systems.

Among the difficulties that would be created by the Court of Appeal's imposition of an opt-out procedure in the specific context of

labor relations is that it would place the employer, who may be deeply hostile to collective bargaining representation, in the role of a communications gatekeeper between a labor organization and workers. There are certain to be disputes about the procedures chosen by employers to effectuate the new constitutional rights created by the Court of Appeal and the precise wording of notices, as well as the timing and nature of the employee response that would be required. Far from "neutrally" protecting the privacy rights of those employees with particular and pre-existing privacy concerns, this procedure cannot help but provide an avenue through which some employers will solicit employees to reveal their views regarding the union, in interference with their protected rights to organize and bargain collectively.[26]

Moreover, although the Court of Appeal analogized the case before it to the situation in which the contact information of absent putative class members is sought through pre-certification discovery, the process by which employee contact information is forwarded to labor organizations does not take place as part of a court proceeding in

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[26] Polling employees on their views regarding unionization is inherently coercive, regardless of how subtly it is done. (See, e.g., *Clovis Unified School. Dist.* (1984) PERB Dec. No. 3889 at 16 [employer's inquiry may be unlawful where employee's "silence could be construed as support for the union"]; *Chula Vista Elem. School. Dist.* (2004) PERB Dec. No. 1647 at 52 [specific words employer uses in polling employees for their views on unionization is immaterial where employer's inquiry conveys disapproval for the union and creates the expectation of an employee response].) Indeed, employers may infringe upon employees' privacy interests by even receiving opt out notices that may reveal the employees' private views concerning unions.

which a judge or referee is available to resolve disputes. To the contrary, the transfer of such information is part of the day-to-day operation of labor relations systems for bargaining units throughout the State and generally occurs within contexts of potentially unequal relationships between employers and individual employees, and without any direct supervision by courts or administrative agencies.

At the time an employer hires an employee, the opt-out process envisioned by the Court of Appeals would have to occur. Although in this case the court imposed on ERCOM the unenviable task of balancing the union's need for the contact information against each individual employee's privacy interests, in the remaining 58 Counties and thousands of cities in California, let alone School Districts and all other manner of public employers, there is no equivalent of ERCOM. PERB would be tasked with resolving every employee-union dispute over opt-out notice disputes and providing a forum for balancing union needs for contact information versus individual employee privacy claims in every single instance. Given PERB's existing jurisdiction over seven labor relations statutes, PERB would not have the resources to expeditiously resolve notice disputes between unions and individual employees.

Additionally, employees not yet represented by unions presumably have an even greater privacy right in precluding unions from obtaining their contact information, thus under the paradigm proposed by the Court of Appeals, the *Excelsior* list rules and their state analogues requiring employers to provide unions home addresses prior to union elections would completely stall. All labor relations agencies, from the NLRB to PERB, have tried for decades to strike a

balance between union desires for speedy elections and employer desires to delay union elections.[27] The Court of Appeal opt-out notice procedure threatens disruption of all California public employee union election procedures.

Implementation of the Court of Appeals decision would create a new class of labor disputes. Agencies and unions would litigate whether the government interest in disclosure in certain situations should lead to a different constitutional balance than in other situations. And, these disputes would include new and highly diverse fact-based disputes over the fairness of employer conduct in informing employees (and gathering their responses) regarding their right to opt out of otherwise required disclosures. This might also be understood by employees as an employer solicitation of an employee's assurance of non-interest in union representation. Even if the union eventually obtained this contact information, it would have lost the ability to communicate with non-members for months or years. That lost opportunity can never be recovered.

Accordingly, besides not comporting with the requirements of *Hill*, the Court of Appeal's creation of an opt-out system in order for unions to obtain basic contact information has a myriad of unintended consequences that upsets the balance that the Legislature crafted by

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[27] The NLRB has proposed amendments to election rules, including the timing and provision of expanded *Excelsior* lists with employee phone numbers and emails. (http://www.nlrb.gov/node/525.) (For election procedures under PERB and the NLRB generally, see Zerger et al., California Public Sector Labor Relations (2011) Ch. 5, §§ 5.03, 5.22; Ch. 6, § 6.1; Higgins, Developing Labor Law (5th ed. 2006), Ch. 10, § III.A.1-5.)

enacting public sector labor laws and that PERB, the administrative agency empowered by the Legislature to manage the details, has regulated since the early 1970s. As we mentioned earlier, the Legislature created PERB as an expert body to address these issues; as a result, its decision, based on its years of experience dealing with this specialized field, "carry the authority of an expertness which courts do not possess and therefore must respect." (*Banning Teachers Association v. Public Employment Relations Board* (1988) 44 Cal.3d 799, 804.) Thus, the Court should not let the Court of Appeal's opt-out procedure borrowed from discovery disputes monitored by judges be inserted into well-established labor relations systems.

C. THE COURT OF APPEALS ERRED BECAUSE THE REMEDY ORDERED IS PRECLUDED BY TWO DISTINCT PRINCIPLES

The opinion below suffers from two additional infirmities. First, the Court of Appeal's opt-out remedy exceeds the scope of remedies permissible under mandamus pursuant to Code of Civil Procedure section 1094.5(f). Additionally, the Court of Appeal's imposition of such a remedy on the parties supplants the decision-making authority of ERCOM and tramples on the Union's right to meet and confer with the County over bargainable subjects.

1. The Court's Requirement That The Parties Adopt An Opt-Out Procedure Is Not Permitted In A Writ Proceeding Pursuant To Code Of Civil Procedure Section 1094.5(F)

The Court of Appeal's opinion directs the County and Union to meet and confer on a proposed notice for the trial court's review

which includes notice to non-member County employees, with an opportunity for the non-member employees to object to disclosure. (Slip op. at 15-16.)

Code of Civil Procedure section 1094.5(f) specifically limits the type of remedial order that a trial court can issue to a responding agency. Since the court below reviewed the trial court's decision denying the County's petition for writ of administrative mandate, the court exceeded its statutory authority by dictating to the County and the Commission the precise procedures which it specified. Code of Civil Procedure section 1094.5(f) provides, in part:

> Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, *but the judgment shall not limit or control in any way the discretion legally vested in respondent.*

(Code Civ. Proc. § 1094.5(f) (emphasis added)); see also *English v. City of Long Beach* (1950) 35 Cal.2d 155, 159; *Vollsteddt v. City of Stockton* (1990) 220 Cal.App.3d 265, 277.) The Court of Appeal decision mandates that ERCOM create procedures to hold hearings to resolve opt-out notice disputes. (Slip op. at 15.) This mandate violates C.C.P. § 1094.5(f) by controlling and limiting the discretion of ERCOM.

2. The Opinion Below Supplants The Obligation Of The County And The Union To Bargain

The Court of Appeal's decision imposes on the County and the

Union an opt-out procedure that neither party requested and that does not allow the parties to negotiate an alternative. Under the MMBA, the County must meet and confer with the Union, until a bona fide impasse is reached, over all terms and conditions of employment, including confidentiality issues. (Gov. Code § 3505; *Temple City Education Association v. Temple City Unified School District* (1990) PERB Dec. No. 841; *Modesto City Schools and High School District v. Modesto Teachers Association, CTA/NEA* (1983) PERB Dec. No. 291.) Absent the Court of Appeal's order imposing an opt-out procedure, the Union and County could enter into an agreement that the Union will only use the contact information for representational purposes, or only use mailers, or other limitations or compromises.[28]

Second, the ERCOM rules do not contain procedures to hold hearings concerning objections to opt-out notices, and such a process would be extremely cumbersome. This new procedure created by the opinion below impermissibly treads on the executive authority of the County and ERCOM and mandates an awkward procedure never bargained over by the parties.

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[28] PERB for example compels public employers to provide voter eligibility lists with the addresses of all employees, none of whom are union members, but states that such lists are to be kept confidential. (See Cal. Code of Regs., tit. 8, § 32726.) This Court's action eliminates the bargaining process mandated by law to resolve any privacy or confidentiality concerns through an appropriate mechanism. In *Puerto v. Superior Court, supra*, 158 Cal.App.4th at 1259, the court found that trial courts can enter into protective orders limiting the dissemination of witnesses' contact information by requiring petitioners to keep the information confidential. Similarly unions and employers bargain over confidentiality concerns under the NLRA. (*Detroit Edison Co. v. NLRB* (1979) 440 U.S. 301.)

Although the Court of Appeal was free to provide guidance on remand, it should not have ordered a specific procedure to be followed by the County and ERCOM.

CONCLUSION

For the foregoing reasons, this Court should overturn the Court of Appeal's decision and affirm the trial court's denial of the County's writ of mandamus.

Date: August 15, 2011

Respectfully submitted,

Weinberg, Roger & Rosenfeld
A Professional Corporation

By: _____

David A. Rosenfeld
Alan G. Crowley
Vincent A. Harrington
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501
Telephone: (510) 337-1001

Attorneys for Real Party in Interest and Respondent SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721

128300/631994

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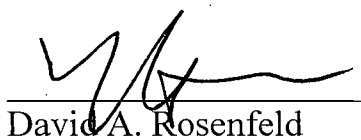

David A. Rosenfeld
Alan G. Crowley
Vincent A. Harrington
Attorneys for Real Party in Interest and Respondent
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091.

On August 15, 2011, I served upon the following parties in this action:

Calvin House
Clifton Baker
Gutierrez, Preciado & House, LLP
3020 E. Colorado Blvd.
Pasadena, CA 91107

Attorneys for Petitioner and Appellant County of Los Angeles, Chief Executive Office

Office of the County Counsel
Manuel A. Valenzuela, Jr.
Lucia Gonzalez Peck
500 W. Temple Street, Room 648
Los Angeles, CA 90012

Attorneys for Petitioner and Appellant County of Los Angeles, Chief Executive Office

Employee Relations Commission
Los Angeles County
374 Kenneth Hahn, Hall of Administration
500 W. Temple Street
Los Angeles, CA 90012

Clerk, Court of Appeal
Second Appellate District, Div. 3
300 So. Spring St., 2nd Floor
Los Angeles, CA 90013

Clerk, Los Angeles Superior Court
Hon. James C. Chalfant
111 North Hill Street
Los Angles, CA 90012

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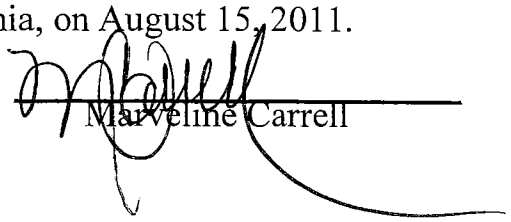

Marveline Carrell