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.

REPLY 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

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INTRODUCTION

There is nothing in the County's Answer Brief ("AB") that effectively addresses the fundamental issue about the proper application of the privacy rights analysis under *Hill v. National Collegiate Athletic Association* (1994), 7 Cal.4th 1 ("*Hill*"). The County fails to adequately address two of the three elements necessary to make a constitutional privacy showing under *Hill*. Even if *Hill* balancing is conducted, the balance tilts substantially in favor of disclosure of employee contact information to the employees' union. The County's Answer Brief does not address numerous arguments supporting the Union's need for contact information, or the significant disruption to labor relations and election procedures that would occur should the decision of the court below stand. The County's argument that the Meyers-Millias Brown Act (Gov't Code section 3500 et seq.) doesn't require employers to disclose contact information and that ERCOM should not follow PERB and NLRB decisions ignores a considerable body of precedent directly to the contrary. Fundamentally an employee who works in a public sector environment where unions represent the employees should expect that the union will receive contact information in order to represent them.

ARGUMENT

A. COUNTY EMPLOYEES WOULD NOT SUFFER AN INVASION OF PRIVACY UNDER *HILL* BECAUSE TWO OF THE THREE ELEMENTS FOR A CONSTITUTIONAL PRIVACY SHOWING ARE NOT MET, AND, IF MET, ANY BALANCING TILTS SUBSTANTIALLY IN FAVOR OF DISCOSURE OF CONTACT INFORMATION TO UNIONS

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 Most Employers To Disclose Employee Contact Information To Unions

The County acknowledges the reasonable expectation requirement under *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1 ("*Hill*") requires an examination of the customs, practices, and community norms.[1] The County, however, claims that 50 years of labor jurisprudence showing that employers typically provide employees' home addresses and phone numbers to the employees' union should be ignored for three reasons. (AB, p. 17.)

a) State Laws Mandating That Specific Agencies Keep Records Confidential Do Not Undercut The Prevailing Labor Relations Norm Toward Employer Disclosure of Contact Information To Unions

The County argues that various non-labor and non-employment statutes, such as the Information Practices Act, the Motor Vehicle Code, and Health and Safety Code, containing provisions against the dissemination of contact information to the *public*, diminishes the PERB, NLRB, and Court of Appeal

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[1] 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; *International Federation of Professional and Technical Engineers, Local 21 v. Superior Court* (2007) 42 Cal.4th 319, 331 "*Local 21*"; *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272.) 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.)

decisions, which show that the prevailing norm requires employers to disclose contact information to unions. (AB, p. 17-18, fn. 66.)

While the Legislature is capable of prohibiting agencies from disclosing contact information, the absence of statutory limitations on most public and private employers' obligations to disclose employee contact information to their employees' union, supports the notion that employees would expect their employers to disclose this information to their union. The Legislature knows how to limit employer disclosure of contact information, as it has done for narrow groups of employees under the California Public Records Act.[2]

The County's reference to certain specific statutes do not undercut employees' reasonable expectations that their contact information would be disclosed to their unions. (AB, p. 18, fn. 66.) The Information Practices Act cited by the County does not apply to "local agencies", like cities and counties. (Civil Code § 1798.3(b)(4).)[3] The statutes cited in footnote 66 of the Answer Brief prohibit various governmental agencies from disseminating contact information in their records to members of the *public* generally, but unions stand in a far different relationship to represented employees than the general public does to other people's DMV, election, or health records. Since the *Hill* analysis concerning a reasonable expectation of privacy is to be judged by "customs, practices, and physical setting surrounding particular activities," statutes prohibiting the

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[2] Gov't Code § 6254.3 applies to certain types of employees who affirmatively request nondisclosure in advance, but not most public employees under the MMBA, HEERA, ALRA, and other public employee statutes. (See OB, fn. 6 and fn. 17.)

[3] Even were the Information Practices Act applicable to the County, which it isn't, an "agency" is permitted to disclose "personal information", such as employee addresses and phone numbers, to a "person" where the transfer is necessary for the transferee to perform its constitutional or statutory duties. (Civ. Code § 1798.25(c).) PERB and NLRB decisions hold that in order for unions to comply with their statutory duties to represent all employees, employers must disclose the addresses and phone numbers of represented employees to their union. (*California School Employee Associations v. Bakersfield City School Dist.* (1998) PERB Dec. No. 1262, p. 17 and other cases cited in OB pp. 23-28.)

dissemination of contact information *to members of the public* are far less relevant in this context than 50 years of labor law jurisprudence requiring employer disclosure to unions representing employees.

The statutes cited by the County support, at most, the argument under the first element of the *Hill* privacy test that addresses and phone numbers may be considered subject to a legally protected privacy interest, (*Hill*, *supra*, 7 Cal. 4th at 35-40), which is a point that SEIU never contested. Since none of those statutes specifically prohibit employers from disclosing contact information to employees' unions, they actually support the analysis under *Hill* that employees would reasonably expect their employer to disclose their contact information to their union.

b) Among States with Public Sector Labor Relations, the Prevailing Norm Is Toward Disclosure Of Employee Contact Information To Unions

The County claims that decisions from other states arise from unique statutory schemes and therefore are not relevant to showing the prevailing norm. (AB, p. 18.) Just as the Court in *Local 21, supra,* 42 Cal.4th at 332 fn. 5 found case law and practice in other jurisdictions relevant to determine whether public employees had a "reasonable" expectation of privacy in their salaries, case law in other jurisdictions is relevant to show whether public employees have a "reasonable" expectation their employers' would disclose their addresses and phone numbers to their unions.

Decisions from other states with developed public sector labor relations procedures are relevant to show the prevailing norm even if those other state statutes vary in some respects from the Meyers-Millias-Brown-Act (Gov't Code § 3500 et seq. ("MMBA")) and the National Labor Relations Act (29 U.S.C. § 151 et. seq. ("NLRA")). Since the Supreme Court ruled in the 1950's that employers

under the NLRA are required to disclose information to unions pursuant to the employers' obligation to bargain collectively with the employees' union and the union's obligation to fairly represent all of its members[4], those decisions influenced state courts interpreting public sector labor relations statutes. Collective bargaining for public sector employees generally did not develop until many decades after the passage of the NLRA, therefore it is quite common for state courts to follow NLRA decisions interpreting similar labor relations provisions. (See OB, pp. 28-30.) While labor relations statutes in other states are somewhat different from California labor relations statutes, review of out of state decisions is still relevant to show the reasonable expectation among public sector employees in states that have established labor laws allowing public employees to form and join unions.

The County points out that Michigan and Louisiana amended their statutes to prohibit disclosure of contact information to unions under public record act statutes.[5] (AB, p. 19.) This highlights that the California Legislature hasn't amended public employee labor relations or public record act statutes to prohibit

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[4] *NLRB v. Truitt Mfg. Co.* (1956) 351 U.S. 149; *NLRB v. ACME Industrial Co.* (1967) 385 U.S. 432.

[5] The court in *Michigan Federation of Teachers & School Related Personnel* (Mich. 2008) 753 N.W.2d 28, 43 issued a decision prohibiting disclosure of contact information under the FOIA exception for privacy, which doesn't balance the union's interests as the exclusive representative. The County's citation to *State ex rel. Keller v. Cox* (Ohio 1999) 707 N.E.2d 931, 934 is misleading and does not undercut the holding cited by SEIU in *State ex rel. District 1199 Health Care and Social Service Union v. Lawrence County General Hosp.* (Oh. 1998) 699 N.E. 2d 1281, 1283. *Cox* was a criminal case in which the criminal defendant sought the personnel files of police officers, which is obviously a distinguishable situation factually and legally. The County's citation to *Angelo Iafrate Construction v. State* (La. App. 2004) 879 So.2d 250, 255, is partially correct and partially incorrect. The statute referenced in the *Angelo* case is Title 44, section 44:11 of Louisiana Revised Statutes, which provides that home telephone numbers and addresses of a public employee shall be confidential only when the employee has requested that it be confidential. After that statute, a Louisiana court held that an employer could withhold the addresses of employees who had not provided authorization in response to a survey, in which the employer had asked employees whether the employees wanted their addresses to be kept confidential or become part of the public record, instructing them that if they wanted to make their addresses part of the public record, they should send in their response. (*Local 100, SEIU v. Smith* (La. App. 2002) 830 So.2d 417.)

disclosure[6], as two states have. It also illustrates that in judging the employees' expectations of privacy those expectations may be considerably different in a state like California where virtually all public employees are represented by unions and where there has been a history of supplying contact information to those unions.

Disclosure of contact information to unions is still required for all private sector employers in California, which are the majority of unionized employees nation-wide; public sector employers in California prior to the court of appeal decision below; agricultural employers in California and, for the most part, public employers in other states that have developed labor relations systems. That there are variations in the practices of other states, does not undercut the broadly established community standard towards disclosure of contact information, especially in California.

c) That Some Federal Employers Are Not Required To Disclose Contact Information To Unions Does Not Undercut The Prevailing Norm

While the Supreme Court in *United States Dept. of Defense v. Federal Labor Relations Authority* (1994) 510 U.S. 487, 497 and 506 ("*Dept. of Defense*") found a statutory prohibition against disclosure of contact information to unions representing employees under the Federal Service Labor Management Relations Act (5 U.S.C. § 7101 et seq.), *Department of Defense* does not apply to the millions of federal employees working for the United States Postal Service. (*United States Postal Service v. National Assn. of Letter Carriers* (D.C. Cir. 1993) 9 F.3d 138, 142.)[7]

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[6] With the exception of Gov't Code section 6254.3, as discussed earlier.

[7] While the County quotes extensively from *Dept. of Defense* in an effort to magnify the employees' privacy interest, *Dept. of Defense* is clearly distinguishable from this case because the balancing under the FOIA didn't consider the needs of unions for the contact information, nor did the balancing weigh the underlying labor relations statutory obligations of the Union to represent all bargaining unit employees. (*Dept. of Defense, supra, 510 U.S. at* 493-495; see also OB, pp. 35, fn. 23)

The County cites to three FOIA cases for the proposition that "home addresses will not contribute significantly to the public's understanding of government activities." (AB, p. 22, fn 83.) Those cases are distinguishable as they only considered whether the public would understand more about the government by having employees' addresses, not whether a union needs addresses of members to service and represent them under a constitutional rights balancing test. Those cases all follow the reasoning under *Department of Defense*, *supra*, 510 U.S. 487, and thus reach the same conclusion about the exemption of addresses under FOIA, but say nothing about the balancing of a union's need for the information under *Hill* balancing or under California labor statutes.

d) This Court's Recent Decisions Demonstrate That Public Employees Should Have A Different Expectation Of Privacy Than Private Sector Employees Because of Government Transparency Statutes

The County contends that "the Court's 2007 decisions on the privacy rights of public employees do not require a different conclusion," than in *Department of Defense*. (AB, p. 21-23.) In *Local 21*, *supra*, 42 Cal. 4th 319 and *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278 (*"POST"*)[8], the Court ordered the disclosure of public employee salary information and police officer training information to newspaper agencies under the California Public Records Act.

In *Local 21*, the Court found that public employees did not have a reasonable expectation that their salaries would not be disclosed and, even if they did, any invasion of that right to privacy was justified by competing interests. (*Local 21*, *supra*, 42 Cal.4th at 338-340.) The Court also noted that "in light of the strong public policy supporting transparency in government, an individual's

[8] The Court did not engage in *Hill* balancing in the *POST* case, rather it only considered whether the POST commission records were exempt from disclosure under CPRA and the Penal Code as "personnel files". (*POST, supra,* 42 Cal.4th 278.)

expectation of privacy in a salary earned in the public employment is significantly less than the privacy expectation regarding income earned in the private sector." (*Id.* at 331.)

These cases support an argument that public employees should have an expectation that their contact information would be disclosed to unions since private sector employers are required to disclose contact information to their employees' unions. In other words, since private sector employers are required to disclose to unions employee contact information, public sector employees shouldn't have a greater expectation of privacy than private sector employees. (See OB, pp. 23-25.) Considering that the courts have required public sector employers to provide traditionally private information, such as salaries and pension information to newspaper companies,[9] which private sector employers are not required to disclose, it is more reasonable to conclude that public sector employees should have a lower expectation of privacy than private sector employees.

If private sector employers under the NLRB are required to provide unions the home addresses and phone numbers of their employees, public sector employers should be required to do so as well. Since this Court has already found that California public sector employees have a lower expectation of privacy concerning the dissemination of salary and pension information than private sector employees, there's no reason that public sector employees should have a greater privacy protection than private sector employees over the disclosure of their contact information to their unions.

2. The County's Disclosure Of Employees' Home Addresses And Telephone Numbers To Their Employees' Union Is Not A Serious Invasion Of Privacy Because There Is No Danger to The Employees Health and No Disclosure of Embarrassing

[9] *Sacramento County Employees Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440 (SCERS ordered to disclose amount of employee pension benefits).

Information

The County argues that disclosure of home addresses and telephone numbers is a serious invasion of privacy. (OB, p. 24-27.) Many courts, however, have found that unless circumstances of danger or extreme embarrassment exist, disclosure of contact information is not a serious invasion of privacy. (*Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 363.)

The County is correct that some courts have ruled that the disclosure of home addresses and telephone numbers is a serious invasion of privacy, however, that has been under unusual circumstances. In *Planned Parenthood Golden Gate, supra,* 83 Cal.App.4th 347, a litigant sought to discover the names and addresses of staff and volunteers at a Planned Parenthood Clinic. The trial court balanced the competing interests and concluded that the balance favored restricting access to their identities and contact information because of the "unique concerns" (*Id.* at 363), of the "emotionally charged and often violent" abortion debate (*Id.* at 363); because the real-party-in-interest and his counsel had previously engaged in protests at the homes of clinic workers (*Id.* at 363); because disclosure of the information can place the workers in physical danger (*Id.* at 362-363); and because "human experience distinguishes Planned Parenthood's staff and volunteers from potential witnesses in 'routine' civil litigation," explained the court. (*Id.* at p. 364.)[10]

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[10] Other unusual circumstances in which courts have refused to disclose the names, addresses, and telephone numbers of employees or witnesses due to a serious privacy intrusion, were because the information would reveal the identities of non-parties involved in extra marital affairs, which was not necessary to the trial. (*Morales v. Superior Court* (1979) 99 Cal.App.3d 283; *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1254.) Similarly, the intrusion and potential embarrassment resulting from the release of identities, addresses, and telephone numbers of people who were arrested and booked into a County jail, an embarrassing fact for many people, raised the disclosure of that contact information into a serious invasion of privacy. (*Denari v. County of Kern* (1989) 215 Cal.App.3d 488, 496; *Puerto, supra,* 158 Cal.App.4th 1258.) *Life Technologies Corp. v. Superior Court* (2011) 197 C.A. 4th 640 similarly does not aid the County as this case concerns a wrongfully terminated plaintiffs seeking information in employee personnel files.

In this case, there are no factors supporting that the County's disclosure of employee contact information to SEIU would constitute a serious invasion of privacy. Unlike *Planned Parenthood*, SEIU has never directed any negative actions at non-members whom it represents. SEIU has represented members and non-members in the County of Los Angeles for over 30 years and there has never been any history of antagonism between SEIU and the non-members that it represents.[11] There is no danger of any actual or potential threat from SEIU to non-members as there was between some members of the public and Planned Parenthood's staff and volunteers. (*Planned Parenthood*, *supra*, 83 Cal.App.4th at p. 361.)[12]

The County also tries to apply discovery related cases to argue that the County's disclosure of employee contact information to SEIU would constitute a serious invasion of privacy. (AB, p. 28.) The County argues that the court in *Puerto*[13] found there was no serious invasion of privacy, in part, because plaintiffs already new the names of the employees, just not their contact information. (AB, p. 26.) By that logic, it is not a serious invasion of employees' privacy for the County to give SEIU the addresses and phone numbers, since SEIU knows the names of the non-members and members that it represents.

The County argues that *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360 ("Pioneer") is distinguishable because the customers who had complained about product defects had a reduced expectation of privacy, as they had voluntarily disclosed their addresses to the manufacturer of the product in

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11 ERCOM found "no evidence implicating Union members in similar activities," referencing harassment of Code Enforcement Officers by members of the public. (1 AA 40.)

12 If, as the County contends, SEIU's reason for wanting contact information is to persuade non-members to become members (AB, p.29), that would be a legitimate reason.

13 *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1253 (ordering disclosure of addresses and telephone numbers without an opt-in or an opt-out notice

the hope of obtaining some sort of relief. (AB, p. 24.) While the customers in *Pioneer* may have had a reduced expectation of privacy because of their complaints to the manufacturer and because the court ordered an opt-out procedure, nonetheless, *Pioneer* and its progeny are instructive because of their analysis that *in general* there is not a serious invasion of privacy of the disclosure of employees' addresses and telephone numbers, unless unusual circumstances of potential injury or extreme embarrassment exits. That several courts ordered employers to disclose to class action plaintiffs' attorneys the employees' names, addresses, and telephone numbers without either an opt-in or an opt-out notice procedure underscores that the disclosure of employee contact information is generally not considered a serious invasion of privacy. (*Puerto*, *supra*, 158 Cal.App.4th at 1254; *Crab Addison, Inc. v. Superior Court* (2008) 169 Cal.App.4th 958, 974.)

The County also argues the bargaining unit non-members "declined to give their home addresses and telephone numbers to the Union given the chance to do so," therefore, it is not reasonable to suppose that they want the Union to have that information. (AB, p. 26.) First, the evidence in this case shows that 90% of the employees who returned the *Hudson* notice forms to SEIU who chose a non-member designation status (either agency fee payer or religious objector), still submitted forms to SEIU with their home address and telephone number. (AA 31.)[14] Thus the County's conclusion, and the Court of Appeals' assumption, that non-members don't want to give the Union their home addresses is not borne out

[14] Employees who are sent the *Hudson* forms and 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; see OB, fn. 4) Of the 14,500 non-members of SEIU and Los Angeles County, 11,952 are fair share payers (thus may not have returned the forms), 373 are religious objectors, and 2,187 are agency fee payers. (*Id.*) SEIU and the County only know employees chose the religious objector or agency fee status if they fill out the form and return it to the County. Ninety percent of those returned forms have the employees' addresses and phone numbers.

by the evidence in this case. The County's efforts to distinguish this case from *Puerto* and *Crab Addison* based upon the County's assumption that non-members would not want the Union to have their contact information is not an accurate assertion since 90% of the non-members who returned forms to SEIU actually provided their contact information.

Moreover, the courts have held that the fact that someone adopts non-member status does not demonstrate that they don't want to be represented by the union or to be contacted 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 non-member status may well support the union and wish to receive information from the union. Indeed, ERCOM found that not a single County employee, member or non-member, informed the County to not provide their contact information to the Union. (AA 41, fn. 19.)

The County doesn't address the argument that the Union owes more duties to the employees than class action attorneys, as in *Valley Bank*, *Pioneer Electronics*, *Puerto*, and *Crab Addison.* The Court of Appeal's reasoning 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 contact information of complaining customers in *Pioneer,* ignores the general rule that disclosure of contact information is generally not considered a serious invasion of privacy and ignores historical importance that the federal and state governments have given to collective bargaining since the 1930s.[15]

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[15] "Disclosure [of 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." (*Pioneer*, *supra*, 40 Cal.4th at 373; *Puerto, supra,* 158 Cal.App.4th at 1253.)

The County also does not respond to the Union's argument that since the unions often have access to far more sensitive and private information about employees than just their addresses and telephone numbers, and since employees may be compelled to support the Union financially notwithstanding their individual objections, it is no particular burden and certainly not a serious invasion of their privacy for the County to provide their contact information to the Union. (See OB, p. 36.)

The Court of Appeal failed to apply the correct analysis in determining whether the County's disclosure to the Union of employee contact information is a serious invasion of employees' privacy rights. Since there is no evidence of past Union mistreatment towards non-members, embarrassment of non-members who have been contacted by the Union, or evidence that the non-members affirmatively do not want the Union to have their contact information, this Court should hold there was no serious invasion of privacy. As two of the three elements necessary under *Hill* to make the threshold showing for protected privacy interests are not met, 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, And Because The Court Of Appeals Opt-Out Procedure Would Disrupt Labor Relation Systems, Any Balancing Of Interests Under *Hill* Should Have Tilted Substantially In Favor Of Disclosure To The Union

Assuming the employees had (1) a reasonable expectation of privacy and (2) that a serious invasion of privacy would occur upon disclosure of employee and contact information to the Union, the Court of Appeal erred by failing to balance the Union's competing interests in disclosure. (*Hill*, *supra*, Cal.4th at 35-40; *Pioneer*, *supra*, 40 Cal.4th at 370-371.) The balancing should also take into consideration the potential "adverse effects" of the ordered opt-out procedure. (*Pioneer*, *supra*, 40 Cal.4th at 374.) In light of the Union's duty of fair

representation, its obligation to communicate with members and non-members alike, and the disruption to most public employee labor relations systems that would occur if "opt-out" procedures were required before unions obtained basic contact information, the Union's interest in disclosure significantly outweighs any privacy interests employees may have in their contact information.

The County argues that since it provided SEIU with all the information SEIU sought during the bargaining for the 2006 MOU, such as "costing data", SEIU's interest and need for employee contact information is diminished. (AB, p. 27.) This argument presupposes that SEIU has no need to communicate with the employees when collective bargaining negotiations are over. It ignores the reality that unions need to communicate with the employees they represent during the life of a contract to administer and enforce the contract. The employer's obligation to provide the union with information "applies with as much force to information needed by the Union for the effective administration of a collective bargaining agreement already in force as to information relevant in the negotiation of a new contract." (*Prudential Ins. v. NLRB* (2nd Cir. 1969) 412 F.2d 77, 81 citing *NLRB v. Acme Industrial Co.* (1967) 385 U.S. 432 and *Fafnir Bearing Co. v NLRB* (2nd Cir. 1966) 362 F.2d 716.)

This general historical appreciation for a union's need to communicate with members after contract negotiations conclude, was shown in this case by testimony that SEIU needs to send the same communications to non-members as to members to investigate grievances; and, to communicate about educational advancements, work force development, newsletters, and cultural events. (1 AR 493-494, 502-503, 516.) Even if the County had given SEIU all the information that SEIU sought concerning the subjects of negotiations, under PERB and NLRB precedent, the obligation to provide information to the union continues during the entirety of the representation period and even after the MOU's expire.

The County also argues that the privacy balance is undercut because the Union can communicate with members at work, "through bulletin boards", by going to their department, by updating the union's internet website, and by having ERCOM coordinate mailings. (AB, pp. 28, 6.) That unions are provided limited access at the workplace to represent their members, does not weaken the Union's right to also have the Employer provide the employees' home addresses and phone numbers of the employees the union represents. (*California Correctional Officers Association v. California Dept. of Corrections* (1980) PERB Dec. No. 127-S (a union's right of access usually includes work areas, institutional bulletin boards, mailboxes, and other means of communication).) Even if the County provided SEIU with the exact work location of employees, which it doesn't[16], contacting a group of employees by phone or at home may be much more efficient than locating them at their workplace, especially in a large and spread out work place like the County of Los Angeles. (*California School Employee Associations v. Bakersfield City School Dist.* (1998) PERB Dec. No. 1262, p. 18 (Employers must disclose employees' addresses and phone numbers to their union in dynamic employment situations where representation issues may arise quickly and require a quick response.) *citing Prudential Ins., supra*, 412 F.2d at 84.)

For some types of issues, it is more efficient for the Union to communicate with employees at home or by mail because of the size of Los Angeles County and number of represented employees in large and dispersed buildings. Additionally, employees often feel more comfortable discussing or responding to questions about workplace issues away from the pressures and watchful eyes of the workplace. (2 AR 494, 502.) It is also more efficient at times for the Union to

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[16] The County cites to portions of the record wherein a County witness testified that exact employee worksite location information were given to SEIU, but when the County produced an exemplar (1 AR 269-285), the hearing officer clarified that the exemplar exhibit only showed the employee "pay location", not the cubicle, floor, or department where the employee works. (3 AR 680.)

send a letter or make a telephone call to employees' homes instead of sending staff to personally visit each non-member at their worksite, which must coincide with the employees' break or lunch time, or catch them before or after work. For confidential communications that SEIU may not want the employer to review, the employer's worksite mail system may not be appropriate. There also is no guarantee that the non-members have internet access, or regularly visit the SEIU website. While bulletin boards are a means by which the Union may communicate with County employees about some matters, other communications are not appropriate for bulletin boards. Were SEIU to rely only on ERCOM to mail communications to non-members, there would likely be a significant delay between SEIU's submission of material to ERCOM and ERCOM's mailing, and obviously ERCOM would not call employees on behalf of SEIU. Thus, while it is true that SEIU can attempt to contact represented employees at the worksite, such contact may take longer than contacting the employee at home, may not provide the same privacy as a phone call or mailing, and may be very limited in the amount of time that the union can spend with the worker.

Employers should also have an interest in providing employee addresses and phone numbers to unions. Employers usually want their employees to work during working time and not to be distracted by union business. Were addresses and phone numbers not provided to unions, union representatives would have to spend more time in the workplace to meet with workers about a variety of issues. Employers usually prefer that union representatives do not visit the workplace because employers claim union representatives distract employees. Additionally, a responsible employer would want the union to be able to engage in efficient communications between its represented membership, which furthers meaningful communication between union representatives and management. It is easier for unions to assess employees concerns when unions can communicate directly with

employees, away from the workplace, which usually requires home meetings or telephone calls. Employers may also want unions to have employee contact information to avoid, under this paradigm, having to be the intermediary to send union mailers to employees who "opt-out" under the Court of Appeal's decision, especially in jurisdictions without independent employee relations commissions, like L.A. County and L.A. City. Or, in the County's case, the employer should have an interest in avoiding the cost of having ERCOM conduct mailings each time the union is interested in contacting employees who opt out.[17] Thus, employers have an interest in providing employee contact information to their unions that should further tip the scale towards disclosure.

The County claims that employees' privacy right is strong because "the right to be left along at home has a long history under federal and state law." (AB, p. 28-29.) As discussed previously, there is no dispute that addresses and telephone numbers are recognized privacy interests, but whether disclosure is a violation of the constitutional right to privacy depends on an analysis of the *Hill* factors: whether there is a reasonable expectation of privacy, a serious invasion of privacy, and countervailing interests that, on balance, weigh in favor of disclosure. (*Hill*, *supra*, 7 Cal.4th at p. 37; *Pioneer*, *supra*, 40 Cal.4th at 371.) Additionally, the cases cited by the County supporting employees' right to "be left alone at home" were public record act cases that only considered whether disclosing contact information would further the *public's* comprehension of governmental operations, not whether disclosure would further a union's ability to represent and communicate with employees or whether such employees' constitutional rights to privacy were violated.

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[17] The turnover of County employees also provides severe obstacles to a system of having an intermediary mail notices as employees are hired sometimes on a temporary basis.

There is no merit to the County claim that providing the Union the home addresses and telephone numbers interferes with the right of employees not to be Union members, therefore, implicating their rights not to associate. (See OB, pp. 40-42.) A non-member simply receiving a Union notice or telephone call from the Union does not result in the involuntary conversion of non-members to members. Providing the Union with the employee 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. Moreover, as noted above, the fact of non-membership does not mean the employee does not want to be represented by the union or even contacted by the union on some matter affecting the workplace.

Additionally, there is no merit to any concerns that Unions would divulge members' contact information to third parties. There is no evidence of this occurring in the thirty plus years that SEIU has represented County employees, members and non-members. Moreover, unions have fought against third parties seeking information about their members and represented employees on the constitutional ground that providing that information implicates their members' rights of association. (*Dole v. Service Employees Union, Local 280* (9th Cir. 1991) 950 F.2d 1456; *United Farm Workers of America v. Maggio* (1985) 170 Cal.App.3d 391.)

The County also claims that the Union's right to non-members' home addresses and telephone numbers is not directly mentioned in the California Constitution, state statutes, or any judicial decisions. (AB, p. 29.) Again, the County ignores 50 years of labor law under the NLRB, twenty years of decisions under PERB, Court of Appeal decisions, and decisions from other jurisdictions demonstrating that the prevailing norm is that employers routinely provide this contact information to unions. (See OB, pp. 23-30.)

The County also does not challenge the case law clearly establishing the obligation of unions to communicate with the employees they represent, non-members and members alike. (OB, p. 38-44; *NLRB v. Hotel, Motel, and Club Employees, Local 568 AFL-CIO* (3d Cir. 1963) 920 F.2d 254, 258; *Jones v. Omni-Trans* (2004) 125 Cal.App.4th 273, 283; *Yellow Freight Systems of Indiana* (1999) 327 NLRB 996, 1006; see OB, pp. 38-40.)

Nor does the County address how the Court of Appeals opt-out procedure would significantly disrupt labor relation systems and lead to years of litigation about implementation. (OB, pp. 45-49.) In conducting the *Hill* balancing, the Court is to balance the respective interests and to consider the "adverse effects" of the limitations on disclosure. (*Pioneer, supra*, 40 Cal.4th at 374.) Were the Court of Appeal's opt-out system in place, there would be tremendous disruption to numerous aspects of labor relations, including, 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; the timing and nature of the employee response that would be required; the difficulty of implementing this system in the day-to-day operations of labor relation systems with bargaining units throughout the state; the lack of an equivalent of an administrative agency like ERCOM in the 58 counties and thousands of cities of school districts throughout California; and the possibility that employees would understand responses to opt-in notices as employer "polling" of their support or non-support for union representation in the workplace. As the Court of Appeal overturned PERB's decision in *Teamsters Local 517 v. Golden Empire Transit District* (2004) PERB Dec. No. 1704-M, there will be a myriad of unintended and unmanageable consequences and "adverse effects" that should further tip the balance in favor of continuing the practice of disclosing contact information to the unions without a cumbersome opt-out procedure.

One prominent area of automatic disclosure totally ignored by the County is the *Excelsior* List rule first developed under the NLRA and imported into all of California's laws governing public sector employee relations. We described this in our Opening Brief at pages 23 through 26. It generally requires an employer to provide to a union seeking to represent employees, or to a rival union seeking to displace an incumbent, or to an individual employee seeking to oust the union, a list of current employees and their addresses before the election. Thus any worker entering into a unionized worksite can expect at some time that his or her address will be disclosed if an election is conducted. Any employee entering a non-union worksite should expect the same disclosure if there is an election to determine union representation. The County has failed to address this well accepted norm which universally governs.[18]

While the Court of Appeals never balanced the Union's interest in disclosure against the employees' interest in privacy, the arguments raised by the County do not shift the balance away from disclosure. Under *Hill*, the balancing of the relatively minor employee privacy interests against the significant needs of the Union for the information to represent all employees, the interests of employees in receiving such information, interests that employers have in making sure the union has the workers contact information, and the likely disruption to various labor relations systems, significantly tips the balance if favor of disclosure of contact information.

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[18] In current rulemaking procedures, the NLRB is seeking to expand this requirement to require employers to provide this list at the beginning of the petitioning process. See Notice of Proposed Rule Making available at http://www.federalregister.gov/articles/2011/06/22/2011-15307/representation-case-procedures. Currently under the California Agricultural Labor Relations Act employers must provide such a list twice. First such a list must be provided if a union submits a Notice of Intent to Organize accompanied by a 10% showing of interest. (8 C. C. R. § 20910.) The list must be provided a second time if the Union files a Petition for An Election. (8 C. C. R. section 20300.)

B. ADMINISTRATIVE AGENCY DECISIONS ORDERING THE COUNTY AND OTHER PUBLIC ENTITIES TO DISCLOSE CONTACT INFORMATION TO UNIONS ARE VALID LAW DESPITE THE LACK OF A SPECIFIC RULE UNDER THE MMBA, NLRA, OR COUNTY CODE ORDERING DISCLOSURE

The County argues that since there isn't a specific statute or County Code positively ordering the County to disclose home addresses and telephone numbers, the Court need not consider this constitutional question. (AB, pp. 10-16.) The County also argues there is no basis under the County Code or the MMBA for ERCOM to order the County to disclose contact information to the Union, and that ERCOM should not have relied on PERB or NLRB precedent. (*Id.*) These arguments were not addressed by the Court of Appeal, although they were raised below.

First, the County argues that its Employee Relations Ordinance (ERO) does not require the County to disclose contact information to the Union under either the "Availability of Data" provision (Section 15 or 5.04.060) or under the "Unfair Employee Relations" provision (Section 12(A)(3) or § 5.04.240(A)(3)).[19] (AB, pp. 10-11.) The County argues that "[b]ecause the evidence did not establish a violation of any provisions of the Employee Relations Ordinance, ERCOM could only have found an unfair practice under its obligation to act "consistent with and pursuant to the policies of the MMBA." (*Id.*) The County is incorrect, as ERCOM found that the Union's right to contact information does not arise solely from Section 15 of the ERO, but from the County's failure to bargain with the Union and "is therefore violative of both Ordinance Section 12(a)(3) and Section 15." (1 AA 17.) Thus, ERCOM found the County had violated two specific provisions of the ERO by failing to disclose contact information to the Union.

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[19] The County and ERCOM refer to the ERO in two different ways (1 AA 38-39), probably because ERCOM is familiar with the original 1975 ERO, which references Sections, whereas the current version of the ERO references Chapters and subsections. (See 1 AR 207).

Second, the County argues the "text" of the MMBA doesn't require disclosure of contact information because Government Code sections 3505 (the meet and confer obligations) only applies to "conditions of employment" and "home addresses and phone numbers" are not matters within the scope of representation. (AB, pp.11-12.) Under the NLRA and MMBA, the duty of employers to disclose information to unions arises out of the employer's obligation to bargain collectively with the employees' representative and the union's duty to fairly represent all of its bargaining unit members. (*Truitt Mfg. Co., supra*, 351 U.S. 149; *Acme Industrial Co., supra*, 385 U.S. 432; *California School Employee Association v. Bakersfield City School Dist.* (1998) PERB Dec. No. 1262, p. 17.) Additionally, "NLRB and PERB have held that unit members' home addresses and phone numbers are presumptively relevant," thus they are mandatory subjects of bargaining. (*Bakersfield City School Dist., supra*, PERB Dec. No. 1262 p. 17; see also OB pp. 23-28.)

Third, the County argues that Government Code section 3507 doesn't require disclosure of contact information and the Legislature "must have meant to bar furnishing confidential information." (AB, p. 12-13.) This section of the MMBA permits public agencies to adopt reasonable rules (often called ERO's), after consultation with unions, which *may* include numerous provisions, including the furnishing of non-confidential information, and any other matters that may be necessary to carry out the purposes of the MMBA. (Gov't Code § 3507.) However, the public employer's obligation under the MMBA to provide information to the union doesn't arise out of section 3507, it arises out of Gov't Code section 3503, the union's right to represent employees, and Gov't Code section 3505, the employer's obligation to bargain with the employees' union. (*Bakersfield City School Dist., supra*, PERB Dec. No. 1262, p. 17.)

Additionally, while the County has not bargained with SEIU and the other County unions to adopt a local rule prohibiting the disclosure of contact information, such a rule would be illegal. Local rules cannot conflict with provisions of the MMBA. (*International Federation of Professional and Technical Engineers, Local 21 v. City and County of San Francisco* (2000) 79 Cal.App.4th 1300; *Los Angeles County Firefighters, Local 1014 v. City of Monrovia* (1972) 24 Cal.App.3d 289.) PERB implicitly found in *Golden Empire Transit District* that Section 3507 did not bar the release of home addresses and telephone numbers to the bargaining representative and held "there is no statutory requirement that prohibits the disclosure of such information." (*Golden Empire Transit District, supra*, PERB Dec. No. 1704-M, p. 8.) Thus, while there isn't a rule in L.A. County prohibiting the disclosure of contact information to unions, such a rule would be an illegal local rule in violation of Government Code section 3509(d).

Finally, the County argues that the legislative history of the MMBA prohibits PERB and ERCOM from relying on NLRB decisions to aid in interpreting the MMBA. (AB, pp.13-16.) While the County cites to portions of the legislative history about concerns in the 1960s of not importing "wholesale" the private labor relations model of the NLRA into the public sector labor relations scheme in California, the County does not cite any legislative history showing a specific Legislative intention to prevent public employers from disclosing employee contact information to their employees' unions. Conversely, that the legislative history behind the enactment of the MMBA does not specifically mention the desire of the Legislature to incorporate NLRB decisions ordering employers to disclose contact information to unions, it does not follow that the Legislature intended to preclude this as part of the MMBA. There are many differences between the MMBA and the NLRA, and silence in the legislative history concerning employers' obligations to disclose contact information, does not

undercut PERB's analysis of the MMBA and determination that employers are required to provide this information to unions. PERB's analysis that the MMBA requires employers to disclose employee contact information to union should be respected. Court's historically found PERB and NLRB decisions persuasive as they "carry the authority of an expert which courts do not possess and therefore must respect." (*Banning Teachers Association v. Public Employee Relations Board* (1988) 44 Cal.3^{d} 799, 804.)

Prior to July 1, 2001, jurisdiction over enforcement of the MMBA fell to the Superior Court. That changed as a result of amendments to the MMBA made in 2000 that transferred jurisdiction to PERB. The amended section of the MMBA now reads: "The provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and in accordance with judicial interpretations of this chapter." (Gov't Code § 3510(a).) The 2000 amendments to the MMBA also allowed ERCOM to continue resolving unfair labor practice complaints in L.A. County "consistent with and pursuant to the policies of" the MMBA. (Gov't Code § 3509(d).) Since the County's ERO 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.)[20] Therefore, the MMBA itself required PERB and ERCOM to rely on past PERB and NLRB decisions to determine that employers must disclose employee contact information to unions.

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[20] The County's ERO contains provisions that track the NLRA. Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer to "refuse to bargain collectively with a representative of the employers and section 8(a)(1) of the NLRA makes it unfair labor practice for the employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed under section 7." Section 7 of the NLRA includes the right of employees to "bargain collectively through representatives of their choosing." NLRA section 8(a)(1) and 8(a)(5) are parallel to sections 12(a)(1) of the ERO, County Code 5.04.240(a)(1)), and Section 12(a)(3) of the ERO (County Code 5.04.240(A)(3), respectively. (1 AR 213). Similarly, Government Code section 3505 is parallel to section 8(a)(5) of the NLRA and section 12(a)(3) of the County Code; MMBA section 3503 is parallel to NLRA section 8(a)(1) and 12(a)(1) of the ERO.

The basis for judicial and administrative reliance on NLRB decisions in interpreting the MMBA was established nearly forty years ago in *Vallejo Fire Fighter's Union v. City of Vallejo*, *supra*, 12 Cal.3d 608. The employer in *City of Vallejo* made a similar argument as the County does here regarding the differences between employment relations in the public and private sectors, which this Court rejected. "Although we recognize that there are certain basic differences between employment in the public and private sectors, the adopting of legislation providing for public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions." (*Id.* at 617.)

The County, by citing a few excerpts from the legislative history, seeks to have this Court overrule fifty years of established judicial precedent, and contravene an express statutory provision in the MMBA. This Court, in *City of Vallejo*, endorsed the use of NLRB decisions to aid in interpreting the MMBA. That decision has been subsequently followed by numerous courts.[21] The County's reference to portions of the legislative history do not overcome this clear judicial and legislative history.

For these reasons, it was appropriate for ERCOM and PERB to rely on NLRB precedent as guidance in interpreting similar provisions under the MMBA and the County's ERO. There is no merit to the County's argument that the lack of

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[21] *Voters for Responsible Ret. v. Bd. of Supervisors* (1994) 8 Cal.4th 765 (Court relied on NLRB decisions to analyze MMBA § 3505.1 to decide whether voters could seek a referendum on a county adopted ordinance enabling county employees to join a retirement plan.); *County Sanitation Dist. No. 2. v. Los Angeles County Employees' Ass'n.* (1985) 38 Cal.3d 564 (reliance on NLRA to decide whether public employees in California had the right to strike); *Los Angeles County Civil Service Comm'n v. Super. Ct.* (1978) 23 Cal.3d 55, 63; *Long Beach Police Officer Ass'n v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1005-06; *City of Fresno v. The People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 91-92; *Rialto Police Benefit Ass'n v. City of Rialto* (2007) 155 Cal.App.4th 1295, 1302.

a positive rule in the ERO or MMBA precludes ordering disclosure of contact information. Nor is there merit that Government code section 3507 precludes disclosure since the right to disclosure of contact information is grounded on separate statutes and PERB's obligation to follow existing precedent.

CONCLUSION

The Court should reverse the court below and affirm the trial court's ruling enforcing the ERCOM decision.

Dated: November 7, 2011

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CERTIFICATION OF WORD COUNT

Pursuant to Rules 8.204 (c)(1) and 8.490 of the California rules of court, counsel hereby certifies that the above brief was produced using 14-point Times New Roman font for the main test, with 14-point Cambria font for the headings, and contains 8,337 words, including footnotes, and excluding the cover, the tables, the statement of issues presented, the signature block and this certificate [California Rules of court, rule 8.520(c)]. Counsel relies on the word count of the computer program used to prepare this brief.

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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 November 7, 2011, I served upon the following parties in this action:

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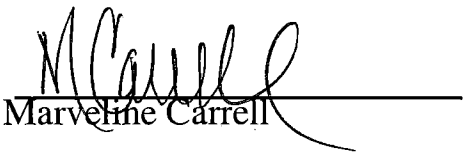
I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on November 7, 2011.



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