S191944

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, [redacted],

Petitioner and Appellant,

v.

LOS ANGELES COUNTY EMPLOYEE RELATIONS COMMISSION,

Respondent,

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721,

Real Party in Interest and Respondent.

PETITION FOR REVIEW

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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ISSUES PRESENTED

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?

3. Did the court below err by directing a specific procedure to protect any asserted privacy right rather than remand to the parties to meet and confer to establish any necessary procedures to protect any privacy right?

WHY REVIEW SHOULD BE GRANTED

Petitioners, Real Party in Interest below, seek review by this Court of the published decision in this matter. The Decision below is attached as Exhibit A. Review is necessary to resolve a plain conflict between the decision of the court below and well-settled state administrative agency decisions interpreting seven California labor

laws governing public employer relations. The decision is further contrary to well-settled decisions issued by the National Labor Relations Board ("NLRB"), federal courts of appeal enforcing NLRB decisions, other federal laws regulating labor relations, and similar laws in numerous other states all 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 full union membership or some other status.

The decision below negatively impacts labor relations between all public employers and public employee unions in California, including State employees, County employees, City employees, School District and University employees, Court employees, and all other varieties of public employees in California. The decision affects thousands of public employers and millions of public employees[1]. The decision below, unless overturned, will also impact all private sector labor relations in the state.

The California Public Employee Relations Board ("PERB"), the state administrative agency responsible for implementing the labor relations statutes for most public employees in California, has consistently ruled over the past twenty years that unions are entitled to the home addresses and home telephone numbers of the employees they represent in order to effectively represent them. Similarly, the

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[1] According to the Center for the Continuing Study of the California Economy, as of Oct. 2008, there were 487 full time public employees per 10,000 residents, which translates into 1.84 million public employees in California. http://www.ccsce.com/PDF/Numbers-oct08-govt-employees.pdf.

NLRB has uniformly enforced the same rule for 50 years nationwide in the private sector.

The Court of Appeal decision below ignores that precedent and replaces it with an improvidently and unilaterally ordered "opt-out" notice procedure that the court below borrowed from civil discovery procedures in class action litigation. Ignoring the statutory obligation of unions to represent all employees in a bargaining unit, regardless of dues paying status, the court below stripped unions of rights they have possessed for fifty years and gives unions fewer rights than third-party class action plaintiff attorneys.

The Court below, purportedly following *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1 ("*Hill*") found that public employees have a reasonable expectation that their employers will not provide their unions with this contact information despite the twenty years of California precedent requiring public employers to provide precisely this information. The opinion below also failed to credit the needs of unions for the contact information of the employees they represent when conducting the balancing of interests under *Hill*.

Accordingly, the Petition for Review should be granted to resolve these important public policy issues and to reconcile the conflict between the opinion below and the decisions of all other jurisdictions which have considered this issue. (Cal. Rule of Court 8.500(b)(1).)

STATEMENT OF THE CASE

This case arises as a result of the Court of Appeal Second Appellate District's reversal of a Los Angeles Superior Court decision. The trial court denied Los Angeles County's Petition for a Writ of Mandamus that sought to overturn a decision issued by the County's administrative labor agency, ERCOM. ERCOM[2], the administrative agency, found the County had committed an unfair labor practice by not providing to the Service Employees International Union, Local 721 ("Union" or "SEIU") the home addresses and phone numbers of employees represented by the Union.

The Los Angeles Superior Court denied the County's Petition finding the County had waived its constitutional privacy argument by not raising it below; and, analyzing privacy rights under *Hill*, found that the needs of the Union for the information far outweighed any privacy interests of employees against disclosure. The Court of Appeal overturned ERCOM and the trial court and inserted a discovery style "opt in" procedure, which neither party briefed or requested, and remanded to the trial court with instructions to implement that procedure.

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[2] The Los Angeles Employee Relations Commission ("ERCOM") is the L.A. County equivalent of PERB. Normally the Public Employee Relations Board ("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 in 2001 (cities, counties, and special districts), 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).)

A. THE INITIAL LABOR DISPUTE

SEIU Local 721[3] filed an unfair labor practice charge with ERCOM against the County of Los Angeles over the County's failure to provide to SEIU the home addresses and phone numbers of employees represented by SEIU. SEIU is the exclusive representative of 24 separate bargaining units in L.A. County, consisting of more than 55,000 County employees.

While bargaining in 2006 for a successor MOU, SEIU exercised its statutory right under the Meyers-Milias-Brown Act ("MMBA"; Gov. Code. § 3500 et. seq.) to request information from the County. SEIU requested the names, home addresses, and home telephone numbers of all bargaining unit members SEIU represents in the County, including fair share payers, fee payers, and religious objectors.

In every public sector or private 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. All employees have the choice of joining the union and becoming full members or just paying the agency fee, the equivalent of dues without joining. Employees who affirmatively dissent from union membership may be classified as either agency fee payers, or religious objectors. Employees that fail to either assent or dissent from union membership are designated as fair share fee payers and non-members by default.[4]

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[3] Then known as SEIU Local 660, see AA 0024. (Appellant filed an Administrative Record (AR), Appellant's Appendix (AA), and documents that were judicially noticed (JN).)

[4] "Bargaining unit non-members" is the term Real Party in Interest will use to include all "agency fee payers, religious objectors, and fair share

Regardless of the status of employees, SEIU is required to represent all of them equally and fairly. The County provided no evidence that even one of the 14,000 bargaining unit non-members requested the County not disclose their contact information to the Union.[5]

Desiring to communicate with all the employees it represents, SEIU sent several information demands to the County seeking this contact information in 2006 for non-members. The County refused to provide SEIU non-member bargaining unit contact information unless each employee affirmatively assented in writing to provide this information to SEIU. SEIU then filed unfair practice charges.

During the ERCOM administrative hearing, the Union's witnesses testified that the Union needed the addresses and telephone numbers of bargaining unit non-members for many reasons: to send the same communications to non-members as to members; to present surveys and updates about bargaining proposals; to communicate with non-members during layoff situations and grievance investigations; to inform non-members about educational advancement, workforce development, and cultural events.[6]

ERCOM issued a decision finding the County had committed an unfair labor practice and ordered the County to provide to the Union the requested contact information. (AA, pp. 109-111). ERCOM held that since it is required to interpret the County's Employee

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fee payers" of whom there are a total of about 14,500 out of 55,000 represented employees. (AA p.00041 "ERCOM Hearing Officer Report" p. 8-9.) Of the 14,500 bargaining unit non-members, 373 are religious objectors, 2,187 agency fee payers, and 11,952 fair share payers. (Id.)

5 See, AA p. 00041 – "ERCOM Hearing Officer Report" p. 19, fn. 19.

6 2 AR 40 at 493-97, 502-03, 516-17, 522-23, 528.

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. The County's reconsideration motion was denied.

B. 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 raising the privacy of non-members before ERCOM. Second, the court found that even on balancing the factors under *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.

The County appealed the trial court's decision. Neither the County, nor SEIU, addressed or raised in their appelate briefs an "opt out" procedure or any other kind of notification procedure.

C. THE DECISION OF THE COURT OF APPEAL

On December 14, 2010, the Court of Appeal issued an opinion reversing and remanding to the trial court with directions to enter a new order denying the petition and directing the County to give non-member County employees notice and an opportunity to object before disclosure of their personal information to the Union. (12/14/03 Opinion ("Op."), p. 3.) The court 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:

> Our Supreme Court recognizes that privacy notices and opt-out procedures sufficiently strike a balance between the right to the information and the rights of third parties to control the dissemination of their personal information. Non-member County employees, like those unwillingly thrust into litigation, are entitled to the same procedural protections. County employees have a reasonable expectation of their personal information they provided their employer for remaining confidential and not disseminated without notice. (Op., p. 2.)

The Court of Appeal determined that non-member County employees had a reasonable expectation of privacy under *Hill* that their Union would not be given their home addresses and home telephone numbers. (Op., pp. 9-10.) The Court of Appeals short circuited the *Hill* analysis and imposed an opt-out procedural notice borrowed from class action litigation. (Op., pp. 11-13.) Likening the Union to class action plaintiffs, the court determined that since an opt-out procedure balances the right of privacy against the right to discovery, such a procedure should be used by Unions seeking addresses and telephone numbers of the employees they represent. (Op., pp. 11-14.)

At the end of its Opinion, the Court of Appeal overruled PERB's decision in *Teamsters Local 517 v. Golden Empire Transit* (2004) (PERB Dec. No. 1704-M) – 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. (Op., p. 14.)

D. DECISION OF THE COURT OF APPEAL AFTER THE PETITION FOR REHEARING WAS GRANTED

The Union filed a timely Petition for Rehearing, in which the Union asserted that (1) the Court of Appeal decision was based on an issue not raised or briefed by either party; (2) the court failed to address the material issue of whether the County had waived a privacy defense; (3) the Court of Appeal issued an improper remedy; and (4) the court failed to comply with the *Hill* balancing procedure.

The Court of Appeal granted the Petition for Rehearing and on Feb. 24, 2011, the Court of Appeal filed an Opinion essentially identical to its Dec. 14, 2010 Opinion. The Court denied a request to depublish the Opinion.

LEGAL ARGUMENT

A. REVIEW SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE DECISION BELOW AND LONG-ESTABLISHED PRINCIPLES UNDER SEVEN CALIFORNIA LAWS REGULATING PUBLIC EMPLOYEES, THE NATIONAL LABOR RELATIONS ACT AND THE FEDERAL APPELLATE COURTS THAT UNIONS ARE ENTITLED TO THE HOME ADDRESSES AND TELEPHONE NUMBERS OF THE EMPLOYEES THEY REPRESENT.

1. The Union Needs Contact Information to Represent the Members of the Bargaining Units

The Union had multiple legitimate reasons to contact non-members at home for representational purposes, such as, bargaining updates, grievances that may impact them, union elections, job

promotional opportunities, eligibility for and availability of benefits such as health care, workforce development, as well as other representational issues. The reasons all relate to the Union's right and duty to represent all bargaining unit members as the exclusive representative of the employees.[7]

2. The Court Of Appeal's Decision Creates A Conflict In The Law Concerning Whether Employers Are Required To Provide Unions The Home Addresses And Phone Numbers Of Employees Represented by a Union

With the exception of the Court of Appeal's opinion below, PERB, the NLRB, and all federal courts that have reviewed NLRB decisions, have all held that unions are entitled to have the home addresses and telephone numbers of the employees they already represent. For over fifty years in the private sector and twenty years in California, courts have found that employers are required to provide this information to unions.

a) For Twenty Years PERB Has Compelled Public Employers to Provide This Contact Information to Public Employee Unions

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

[7] Moreover, contacting employees away from the job site serves important purposes. Some employees may be concerned about talking to or communicating with union representatives at the jobsite due to possible retaliation. And with far flung unit members, some of whom work in the field or at home, it is not practical to locate them at work sites.

telephone numbers of employees the union represent, irrespective of the member's dues status.[8]

In 1986, PERB issued specific regulations requiring certain public employers to provide to unions the home addresses of State employees under the Ralph C. Dills Act (Dills Act) and the Higher Education Employer-Employee Relations Act (HEERA). (8 C.C.R. § 40165 and 51027.)

PERB issued two decisions in 1998 finding school district employers were required to provide to unions the home addresses and home phone numbers of employees represented by the union except for those employees who had already invoked the privacy provision (Gov. Code § 6254.3(b)) of the Public Records Act. (*California School Employees Assoc. v. Bakersfield City School Dist.* (1998) PERB Dec. No. 1262, pp.17-21; *California School Employees Assoc. v. San Bernardino City Unified School District* (1998) PERB Dec. No.

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[8] PERB now administers seven different labor laws governing public employees in California and under all of those laws: employers must provide eligibility lists with all employee addresses to unions involved in PERB elections and employers must provide names, addresses and phone numbers to unions in their representative capacity. The statutes administered by PERB are the Educational Employment Relations Act (EERA) of 1976 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), establishing collective bargaining for state government employees; and the Higher Education Employer-Employee Relations Act (HEERA) of 1979 extending the same coverage to the California State University and University of California System; the Meyers-Milias-Brown Act (MMBA) of 1968 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); the Trial Court Employment Protection and Governance Act (Trial Court Act) and the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act).

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* (2004) PERB Dec. No. 1704, pp. 5-8.)

PERB's rulings generally rest on of NLRA decisions requiring employers to provide to private sector unions this information. PERB's reliance on NLRA authorities and decisions is not to disregard California law, as the Court below suggested in its opinion at 14-15, rather it is to give 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, 616-17.)[9]

b) The NLRB Has Required Employers to Provide Contact Information to Unions For Fifty Years

The NLRB has repeatedly held since the 1960s that unions are entitled the names, telephone numbers, and home addresses of the employees the Union represents. (*Kroger Co.*, 226 NLRB 512 (1976); *Autoprod, Inc.*, 223 NLRB 773 (1976); *Harco Laboratories, Inc.*, 271 NLRB 220 (1984) (addresses); *Show Industries Inc.*, 305 NLRB 72 (1991) (addresses and phone numbers); *Urban Shelters and Healthcare Systems*, 313 NLRB 1330 (1994) .)

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[9] 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. (*Ass'n of County Eng'g Admin'rs v. County of Los Angeles* (1981) ERCOM UFC 22.2, p. 4; *Vallejo Fire Fighter's Union v. City of Vallejo supra* at 616-17.)

c) The Courts of Appeals Have Unanimously Enforced Board Decisions Requiring Employers to Provide Contact Information to Unions

Every Circuit Court of Appeals to have considered the question has held that employers must provide to unions the contact information of the employees represented by the union. *See,* Prudential Insurance Co. v. NLRB *(2nd Cir. 1969) 412 F.2d 77, River Oak Center for Children, Inc. v. NLRB* (9th Cir. 2008) 273 F.Appx. 677; *NLRB v. New Assocs.*(3d Cir. 1994) 35 F.3d 828; *NLRB v. CJC Holdings, Inc.* (5th Cir. 1996) 97 F.3d 114, 117.)

3. The Decision also Conflicts With Long Established Administrative Procedures Requiring Employers to Provide Unions the Home Addresses of Employees During an Organizing Drive Before the Union is Chosen as the Representative of the Employees

Most labor relations statutes provide that unions establish their representative status by way of agency conducted elections. All of those statutes require the employer to provide to the union a list of the names and addresses of the employees who are eligible to vote in the election.[10] The union is free to use that list to contact the employees through mail or at home.

The decision below jeopardizes long established rules under PERB and the NLRB that addresses be provided to a Union participating in a supervised election, even before a Union represents any employees. Title 8, California Code of Regulations section 32726,

[10] These rules do not require that the union be provided the phone numbers.

applicable to all elections under all seven of the California labor statutes administered by PERB, states in relevant part:

> (a) At a date established by [PERB], 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.

PERB Regulation 32726 is applicable to all the parties in an election, including intervening unions, and individuals who file decertification petitions.[11] The opinion below effectively overrules these bedrock principles of election procedures. These are generally precertification procedures where none of the employees are yet represented by the union.[12]

The decision below would effectively invalidate these PERB regulations that are at the heart of any election procedure. The Decision below would handicap unions in elections by letting the employer communicate with employees first to see if employees want

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

[12] The same requirement exists under the Agricultural Labor Relations Act, California Labor Code sections 1140 et seq. ("ALRA"); *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* Labor 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. (Title 8, Cal. Code Regs. §§20310(a)(2), 20313.)

to "opt out" of providing the union with their address prior to an election. And then the employer would have effectively conducted a poll of those individuals who may not support the Union by such an "op-out" procedure. The delay occasioned by such a procedure would further disrupt the election process.

The same doctrine has been the law under the National Labor Relations Act since at least 1966 when the NLRB adopted the *Excelsior* list rule which requires employers to provide unions 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.,* 156 NLRB 1236 (1966), approved in subsequent case as substantively valid, *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969).[13] The rule as adopted by the NLRB serves important purposes in Board conducted elections to insure that all parties can accurately determine who is eligible to vote and allows the union and a potential

[13] The NLRA's Excelsior list rule, which requires private sector employers to provide voter lists with employees' home addresses to a union in advance of a union representation election, and that rule's analogs in California law, serve the same objective. This rule is rooted in the notion that employees' rights to freely choose a bargaining representative are best vindicated if all employees can be reached with the arguments both for and against union representation: "[A]n employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice. . . .As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. . . [B]y providing all parties with employees' names and addresses, we maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation." (*Excelsior Underwear, Inc.*, *supra*, at 1240-41.)

rival union to contact the eligible voters.[14] Thus, when an individual employee or rival union seeks an election it receives the same list of employees' names and addresses without the responsibilities of the incumbent to represent the employees.

Since the National Labor Relations Act, the Railway Labor Act, the Agriculture Labor Relations Act, and the seven statutes interpreted by PERB, require the employer to provide the names and address without an opt out procedure, the decision of the Court below will effectively force a wholesale revision of those procedures in incalculable ways.

4. Most Other States That Grant Public Employees Collective Bargaining Rights Require Employers To Provide To Unions Contact Information Or Make The Information A Public Record

California would be an outlier if the decision below were allowed to stand as most other states that provide public sector employee collective bargaining rights require the employer to disclose to unions the names, addresses, and phone numbers of bargaining unit employees.[15]

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[14] The National Mediation Board also requires this for all elections governed by the Railway Labor Act. (45 U.S.C. § 151 et seq., see representation manual, section 2.54 available at http://www.mmb.gov.representation/representation-manual.pdf.)

[15] (*County of Morris v. Morris Council No. 6* (N.J. 2004) 852 A.2d 1126 (The employer was 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 (The public employer was required to 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 (A public employer was 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 (The 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 was a public office within meaning of the public records act and required 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 (In the public employment arena, 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) (The State is obligated to provide the addresses under its duty to bargain in good faith.); Chief Judge of the 11th Judicial Circuit, 18 PERI (LRP) P2074; 2002 PERI (LRP) LEXIS 266 (Ill. 2002) (Public employer must give labor organization a complete list of names and addresses of employees eligible to participate in the election within 7 days after bargaining unit determination and direction of election.); *City of Springfield*, 24 MLC 109, 1998 MLRC LEXIS 17 (Ma. LRC 1998) (Prior to an election the Labor Relations Commission directs a public employer to provide a list of names and addresses of eligible voters and provides the list 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 was 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 (Rule required employers to furnish accurate voting lists of bargaining unit employees prior to election.

The opinion below directly conflicts with every decision from the PERB, the NLRB, the Courts of Appeal, and other state jurisdictions' decisions in both election procedures and representation matters.

B. REVIEW SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT BELOW FAILED TO RECOGNIZE THE REASONS WHY THE UNION NEEDS THAT EMPLOYEE CONTACT INFORMATION OUTWEIGHS ANY REASONABLE PRIVACY INTEREST OF THE EMPLOYEES WHOM THE UNION REPRESENTS

The opinion below conflicts with this Court's decision in *Hill*, by failing to examine whether the employer first made a privacy interest showing and, if that threshold had been met, next failing to examine the relative strengths of the parties' interests in disclosure. (*Hill*, 7 Cal.4th at 35-40; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370-371.) The opinion below skipped the privacy rights analysis entirely in violation of what is required under *Hill*.

1. The Historical Importance That Courts and Agencies Have Given To Unions Representing Employees Undercuts Any Reasonable Privacy Interest That Employees Would Have In a Union Not Having Their Contact Information

Under *Hill*, the showing for the privacy interest must include (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. (*Hill*, 7 Cal.4th at 35-37.) Only after all three elements of the above test have been addressed and met, does the

court balance the individual's privacy interest in the information to be disclosed against the requesting party's interest in obtaining the information. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286-287.)

The Court below misapplied these requirements. First, the decision below found that non-members had a reasonable expectation of privacy that the County would not disclose to the Union their home addresses and phone numbers. The court below could not have found that employees had a reasonable expectation that their employer would not reveal their home addresses and phone numbers to their unions in light of existing law.

a) Employees Should Have A Normal And Reasonable Expectation That Employers Would Provide To Their Union Their Contact Information

"A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms," and the "customs, practices, and physical setting surrounding particular activities may create or inhibit reasonable expectations of privacy." (*Hill, supra*, 7 Cal.4th at 36, 37.) Considering that court decisions have long held that all private sector employers governed by the National Labor Relations Act and all public sector employers must provide unions their employees' home addresses and home phone numbers, L. A. County employees would

not have a reasonable expectation that their employer would not disclose such information to SEIU.[16]

b) Any Invasion of Employee Privacy Rights by an Employer providing to their union this information is not "Egregious"

Under *Hill*, the privacy invasion complained of must be serious in nature, scope, and the actual or potential impact must constitute an "egregious" breach of social norms, for trivial invasions afford no cause of action. (*Pioneer*, *supra*, 40 Cal.4th at p. 371.) This requires an examination of how privately the information has been treated historically. (*Ibid*; *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, 561.)

First, "contact information is neither unduly personal nor overly intrusive." (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1254.)

Second, and analogously, in the context of class action litigation to enforce employees' rights in the workplace, California have regularly allowed the release of employees' home addresses and contact information to putative class representatives even before a class has been certified. (See e.g., *Puerto*, *supra*, 158 Cal.App.4th at 1254-55; *Lee v. Dynamex* Inc. (2008) 166 Cal.App.4th 1325, 1337-38; *Crab Addison, Inc.*, 169 Cal.App.4th 958. These cases required the

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[16] The court below also presumes that because 12,000 out of 14,000 nonmembers failed to respond to *Hudson* notices, they don't *want* the union to have their addresses and phone numbers. (Opn. pp. 5, 14.) There is no presumption that a court can create from this figure. In fact the NLRB presumes that employees support the union for most purposes in a bargaining unit absent contrary evidence. (*NLRB v. Curtin Matheson Scientific, Inc. (1990)* 494 U.S. 775.

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. (See *Puerto*, 158 Cal.App.4th at p. 1259; *Lee*, 166 Cal.App.4th at pp. 1334-37; *Crab Addison*, 169 Cal.App.4th at p. 958.

The court's finding that disclosing the contact information to the Union is a more serious invasion of privacy than in *Pioneer Electronics* ignores the historical importance that the federal and state governments have given to collective bargaining since the 1930s. (See Op., p. 14.) It ignores the fact that the Union is not an outsider to the whole relationship. The Union's role is protected by state and federal law and it owes duties to the employees whose contact information it seeks.

This Court recently sanctioned the disclosure of public employees' salaries, arguably even more private information than addresses and phone numbers, to *anyone* under a California Public Records Act request. (See *International Federation of Professional and Technical Engineers, Local 21 v. Superior Court* (2007) 42 Cal.4th 319 (salaries of public employees readily discloseable under a CPRA request).[17] In this setting presumably the Union has access to a

[17] The opinion below also placed undue emphasis on a Freedom of Information Act case, the *United States Department of Defense v. Federal Labor Relations Authority* (1994) 510 U.S. 487. That case involved the application of a federal privacy statute which the Court read as prohibiting the disclosure of addresses to unions. There was no balancing of rights or interests because the privacy statute applied if there was "a very slight privacy interest [which] would suffice to outweigh the relevant public interest, *Id.* at 500. The Court did however recognize that a different rule applied to private and public sector unions outside of the federal service. (*Id.* at p. 503.) The balancing test under *Hill* is only invoked if there is a "reasonable" expectation of privacy and since public employees in California, contrary to federal employees,

great deal of information about employees, such as schedules, pay, hours of work, job descriptions, job duties, records of discipline and absenteeism and so on that may involve information which is not public. The obligation of a union to represent all employees in a bargaining unit makes access to this information wholly necessary. 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 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' right not to be union members. The Union mailing a notice about a layoff affecting a non-member or a survey about bargaining issues does not convert the non-member to a member. 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. Providing the Union with the employee contact information does not force the employee to join 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. It furthermore serves to allow communication with employees about job issues irrespective of their choice of membership status. Thus, the court's repeated references to an employee's right not to join a union does not make

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expect their names and addresses to be given to their Union this case supports our position.

the County's disclosure of contact information a serious invasion of their privacy interest.[18]

Even outside the workplace context, any person's privacy interest in their home address is widely recognized as minimal because home addresses are easily obtainable. (See, e.g., *Doe v. Reed* (2010) 130 S.Ct. 2811 (names and addresses of initiative petition signers must be disclosed in response to public records request); Gov. Code § 6254(f)(3) (names and addresses of crime victims must be released upon request for "scholarly, journalistic, political, or governmental purpose," or for private investigation).

In its most recent pronouncement on the subject, this Court agreed 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 360, 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.") Thus, the second element necessary under *Hill* to make a prima facie showing was not met.

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[18] The opinion below presumes non-members do 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." (Op., pp. 13, 14.) However, the courts have found the opposite presumption. (*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 don't want to be contacted by the union which represents them.

Since two of the three elements necessary under *Hill* to make the threshold showing for a protectable privacy interest for the non-members were not met, the Court below should not have inserted an opt-out procedure into the relationship between employees and their unions. Review should be granted to clarify that absent this threshold privacy showing, the Court may not intervene.

2. Given The Historical Importance That Has Been Afforded To Unions To Represent All Of Their Members, Regardless Of Dues Status, Any Balancing Of Interests Under *Hill* Should Have Tilted In Favor Of Disclosure To The Union.

The Court below ignored *Hill* when it failed to conduct a balancing of interests between any non-member's interest in non-disclosure and the Union's interest in obtaining non-members' contact information so as to represent them as required by law. The Court ignored the methodology set forth in *Hill* to balance 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*, 7 Cal.4th at pp. 35-40; *Pioneer*, 40 Cal.4th at 370-71.)

The Union's interest and need for the contact information "significantly" outweighed the employees' interest in non-disclosure. The Court below found no new facts in the record to undercut the trial court's finding that the Union's interest "significantly" outweighed (and all that is necessary is that it even slightly outweighed), the employees' interest. Instead, the Court found that it did not need to

conduct the *Hill* balancing because it imposed an opt-out procedure on the parties, which neither party requested. (See Op. p. 3, fn.1.)[19]

While elevating and conflating the importance of the non-members' right to privacy, the Court ignored the Union's critical need for this contact information.

Additionally, unions can be liable for breach of the duty of fair representation for failing to update unit members about grievances and negotiations that may impact them.[20] Given the size of Los Angeles County, the variety in working hours, and the Union's limited resources, it is not possible to reach many non-members in the workplace, thus, sending them a written notice or calling them at home allows for more efficient and effective representation. And this serves employer interests in minimizing workplace disruptions.

The opinion below creates a bizarre anomaly. The Union has a duty to represent all employees in the bargaining unit without regard to their membership status. Yet the Court of Appeal's new procedure places an obstacle in the way of that representation by erecting a barrier between the Union and those it represents. Neither the

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[19] Since the second reason that the trial court denied the County's writ of mandamus was that *Hill* balancing revealed the Union was still entitled to the home addresses and telephone numbers of non-members, it was a mistake of law for the court below not to resolve this issue, which was briefed and raised by the parties.

[20] *Tenorio v. NLRB* (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 is sufficient to state a claim for breach of the duty of fair representation.); *Minnis v. Auto Workers* (8th Cir. 1975) 531 F.2d 850, 853-54; *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).

National Labor Relations Act, the Railway Labor Act, the Agricultural Relations Act, nor any of the Acts which PERB administers places such obstacles in the way of union representation. Each affirmatively requires employers to furnish names and addresses and phone numbers to unions that represent groups of workers for use in that purpose.

Had the appellate court done the balancing of the non-members' privacy interest versus the need of the Union for the information, as required by *Hill*, it would have found, that the Union's need for the contact information significantly outweighed any interest non-members had in non-disclosure of their addresses and phone numbers.

For the reasons set forth above, the Court below misapplied the privacy balancing analysis mandated under *Hill* by not examining whether the County made the privacy showing and by not balancing the non-members' privacy right against the Union's need for the information. For this reason as well, review should be granted.

C. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEAL ORDERED A REMEDY WHICH IS PRECLUDED BY TWO DISTINCT PRINCIPLES

The opinion below includes a remedy that exceeds the scope of remedies permissible under Writs of Mandate pursuant to Code of Civil Procedure section 1094.5(f). Additionally, the Court's imposition of 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 CCP section 1094.5(f)

The Court of Appeal's opinion remands to the trial court with directions to enter a new order denying the petition and directing 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. (Op., p. 15-16).

Code of Civil Procedure section 1094.5(f) 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 below could not have ordered the County and the Commission to follow the 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. (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.)

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 appeals 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.[21] 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. Given that, in this case alone, there are over 14,000 non-members who might be sent opt-out notices, the Commission might be inundated with thousands of demands for hearings on objections. 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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[21] 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. PERB Reg. §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,* 158 Cal.App.4th at p. 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.

The Court of Appeal could remand the matter and provide guidance, but it should not have ordered a specific procedure to be followed by the County and ERCOM. Accordingly, this Petition for Review should also be granted for these reasons.[22]

CONCLUSION

For the foregoing reasons, this Court should grant review in this case. Left to stand, the Court's decision below conflicts with settled and longstanding principles of labor relations that employers are obligated to provide to unions the home addresses and phone numbers of unit employees they represent. Review should also be granted to clarify and resolve whether the *Hill* balancing test should be employed

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[22] The opinion below also did not address the trial court's finding that the County had waived its privacy rights argument by failing to adequately raise it before the administrative hearing. The failure to exhaust administrative remedies will preclude a court from reviewing the action. (*Roth v. City of Los Angeles* (1975) 53 Cal.App.3d 679, 687.) Defenses will generally be considered waived unless they are raised in the administrative hearing. (*Pittsburg Unified School District v. Commission of Professional Competence* (1983) 146 Cal.App.3d 964, 980.) While the County may have had standing to raise the privacy rights of non-members, it had the burden of doing so in the three day administrative hearing before ERCOM, not for the first time on a writ of mandamus or on appeal. (*Pittsburg*, 146 Cal.App.3d at p. 980.)

in the labor law context of a union's request for contact information about the employees represented by the union.

Date: April 5, 2011

Respectfully submitted,

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122400/603835

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rules 8.204, 8.490, I certify that the attached **PETITION FOR REVIEW** is proportionately spaced, has a typeface of 14 points and contains approximately 8,093 words, exclusive of the tables of contents and authorities and this certificate.

Executed on April 5, 2011 in Alameda, California.

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

122400/603835

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 April 5, 2011, I served upon the following parties in this action:

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copies of the document(s) described as:

PETITION FOR REVIEW

[X] BY MAIL I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on April 5, 2011.

Marveline Carrell

122400/603835

Filed 2/24/11 Opinion following rehearing

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COUNTY OF LOS ANGELES, Plaintiff and Appellant, v. LOS ANGELES COUNTY EMPLOYEE RELATIONS COMMISSION, Defendant and Respondent; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 721, Real Party in Interest and Respondent.	B217668 (Los Angeles County Super. Ct. No. BS116993)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Reversed and remanded with directions.

Gutierrez, Preciado & House, Calvin House, and Clifton A. Baker; Office of County Counsel, Manuel A. Valenzuela and Lucia Gonzalez Peck, Deputy County Counsel, for Plaintiff and Appellant.

Weinberg, Roger & Rosenfeld, Alan G. Crowley, Jacob J. White, and Ann-Marie Gallegos, for Real Party in Interest and Respondent.

Altshuler Berzon, Scott A. Kronland and Eileen B. Goldsmith for SEIU United Long Term Care Workers, SEIU Local 521, SEIU United Healthcare Workers West and California United Homecare Workers as Amici Curiae on behalf of Real Party in Interest and Respondent.

INTRODUCTION

This case implicates the privacy rights of Los Angeles County employees who are not Union members and their ability to control the dissemination of their personal information to the Service Employees International Union, Local 721 (the Union), which has a statutory duty to represent even these non-member County employees. The County of Los Angeles, Chief Executive Office, appeals from the denial of its petition for writ of administrative mandamus (Code Civ. Proc., § 1094.5), in which it asserted the privacy rights of these non-member County employees and challenged the decision by the Los Angeles County Employee Relations Commission (Commission) that ordered the County to release their names, home addresses, and home telephone numbers to the Union.

The trial court concluded the Commission erred by applying the traditional labor law presumption in favor of disclosure. Nevertheless, the trial court upheld the Commission's decision to disclose the non-members' personal information under California privacy law, applying the balancing test set forth in *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40 (*Hill*). We do not disturb the trial court's determination that the Union is entitled to the personal information. The trial court, however, ordered disclosure of the non-members' personal information without due consideration to procedural protections afforded to third parties whose privacy rights are at stake. (See *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 371-372 (*Pioneer Electronics*).)

In this case of first impression, we conclude non-member County employees who have not disclosed their personal information to the Union are entitled to notice and an opportunity to object before disclosure. When third-party information has been ordered disclosed in civil litigation, our Supreme Court recognizes that privacy notices and opt-

out procedures sufficiently strike a balance between the right to the information and the rights of third parties to control the dissemination of their personal information. Non-member County employees, like those unwillingly thrust into litigation, are entitled to these same procedural protections. County employees have a reasonable expectation that the personal information they provide to their employer will remain confidential and not disseminated without notice. These employees do not forfeit their privacy rights by accepting employment with a public agency whose employees have a collective right to unionize but an individual right not to join. We therefore reverse and remand to the trial court with directions to enter a new order denying the petition but directing the County to give non-member County employees notice and an opportunity to object before disclosure of their personal information to the Union.

FACTS AND PROCEDURAL BACKGROUND

During collective bargaining, the Union asked the County for the personal information of County employees in the bargaining unit who are not Union members. The County refused. The Union filed an unfair employee-relations practice charge with the Commission in which it contended the County violated sections 12(a)(3) and 15[1] of the County's Employee Relations Ordinance (Ordinance). Following a hearing before an administrative hearing officer, the Commission agreed with the Union.

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[1] Section 12, subdivision (a)(3), codified at section 5.04.240, subdivision (A)(3) of the Los Angeles County Code, states that it is an unfair employee relations practice for the County "[t]o refuse to negotiate with representatives of certified employee organizations on negotiable matters."

Section 15, codified as section 5.04.060, section (A) of the Los Angeles County Code states: "To facilitate negotiations, the county shall provide to certified employee organizations concerned the published data it regularly has available concerning subjects under negotiation, including data gathered concerning salaries and other terms and conditions of employment provided by comparable public and private employers, provided that when such data is gathered on a promise to keep its source confidential, the data may be provided in statistical summaries but the sources shall not be revealed."

A. *Facts*

1. *Union's Limited Communication With Non-Members*

The Union is the certified majority representative for several bargaining units in the County. County employees have the collective right to unionize, but the individual right to refuse to join or participate in a union. (Gov. Code, § 3502; L.A. County Code, § 5.04.070.) As an accommodation of these rights, a public agency may enter into an agency-shop agreement with a major bargaining unit. (Gov. Code, § 3502.5, subd. (a).) " '[A]gency shop' means an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization." (*Ibid.*)

The Memorandum of Understanding (MOU) between the Union and the County is an agency-shop agreement. County employees who do not want to join the Union have three options: (1) decline to join and pay their fair-share fee; (2) decline to join, object to the fair-share fee and instead pay an agency-shop fee; or (3) decline to join, claim a religious exemption, and pay the agency-shop fee to a non-religious, non-labor charitable fund.

Since the agency-shop agreement permits the Union to collect fees from non-members, the Union must send an annual *Hudson* notice,[2] informing County employees of their membership options, the applicable fees, and the reasons they must pay these fees. In the past, the Union prepared the *Hudson* notice, the County prepared the mailing labels, and the Commission mailed the *Hudson* notices.

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[2] As stated in Section 7 of the MOU: "The Union agrees to provide notice and maintain constitutionally acceptable procedures to enable non-member agency shop fee payers to meaningfully challenge the propriety of the use of agency shop fees as provided for in Chicago Teachers Union, Local No. 1, AFT, AFL-CIO et al. v. Hudson, 106 S.Ct. 1066 (1986). Such notice and procedures shall be provided to non-member agency shop fee payers for each year that the agency shop Memorandum of Understanding is in effect."

The *Hudson* notice packet includes a solicitation letter to join the Union and forms to decline to join. Those County employees who affirmatively decline to join the Union must complete and return one of the two forms attached to the *Hudson* notice ("agency shop fee designation" or "statement of religious objections"). These forms request the County employees' name, home address, and home telephone number. County employees who do not respond are by default "fair share fee payers." As of 2007, fair-share-fee payers represented approximately 11,000 of the 14,512 non-member County employees. The Union has home addresses and home telephone numbers for less than half of these non-members.

2. *Collective Bargaining Negotiations Addressing Changes To The Method Of Communicating With Non-Member County Employees*

During negotiations in 2006, the Union proposed a change in Article 15, Section 7 of the MOU, addressing the obligation to provide *Hudson* notices. The proposed change stated: "To facilitate the carrying out of this responsibility, each year the County shall furnish the Union with the names and home addresses of employees in [the] bargaining units covered by agency shop provisions."

The Union wanted the personal information to communicate with the members of the bargaining unit about union activities, layoffs, and other job-related activities. The Union also wanted the information for recruitment. A Union representative testified: "If we had the chance to talk to [the non-members], we could have them as members, as opposed to fee payers or whatever."

The Union made several requests for this personal information during the bargaining process. The County countered, contending the personal information was not relevant to any collective bargaining issue and also asserted the non-members' right to privacy under the California constitution. The County proposed either to continue the current method of mailing *Hudson* notices to non-members or to negotiate an "authorization procedure for employee's to release personal census data . . . ." The

Union rejected these alternatives, withdrew its proposal to modify the *Hudson* notice provision, and filed an unfair employee-relations practice charge.[3]

3. *Union's Unfair Employee-Relations Practice Charge Alleged Right To Personal Information Of Non-Member County Employees*

The Union alleged it needed the personal information of non-member County employees to fulfill its representation duties. The unfair employee-relations practice charge claimed both the National Labor Relations Board (NLRB) and the state's Public Employee Relations Board (PERB) have consistently ruled certified representatives of employees are entitled to the personal information of non-members who are part of the bargaining unit.

B. *Procedural Background*

1. *The Commission Relied On Federal Labor Law And Ordered The County To Disclose The Personal Information Of Non-Member County Employees*

After a three-day hearing, the administrative hearing officer recommended to the Commission that it order the County to disclose to the Union the personal information of non-member County employees. Recognizing this was a case of first impression, the hearing officer relied on NLRB and PERB decisions. Based upon this precedent, the hearing officer concluded non-member County employees' personal information was presumptively relevant to the Union's representation, and the Union had a right to the information.

The hearing officer rejected the County's defense that the disclosure of non-members' personal information would violate their privacy rights. The hearing officer acknowledged privacy interests were at stake, and relied on federal law in which the party asserting the privacy right has the burden to show the need for privacy outweighs the need for the information. Citing *Teamsters Local 517 v. Golden Empire Transit District* (2004) PERB Decision No. 1704-M (*Golden Empire Transit*), the hearing officer concluded the County had not met its burden.

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[3] The unfair employee-relations practice charge was filed by SEIU Local 660. In March of 2007, SEIU Local 721 was designated as the successor.

The hearing officer's findings and recommendation were forwarded to the Commission. After consideration, the Commission adopted the hearing officer's recommendations, denied reconsideration, and thereafter issued an order of affirmation.

2. *The Superior Court Applies California Law But Concludes The Union's Interest Outweighs Non-Members' Right To Privacy*

The County filed a petition for writ of mandamus (Code Civ. Proc., § 1094.5), seeking relief from the Commission's decision on the grounds that disclosure of non-members' personal information violates their right to privacy under California law. The trial court agreed the Commission erred but denied the petition.

The trial court concluded the Commission misapplied the law and should have decided the issue under California privacy law.[4] (See Code Civ. Proc., § 1094.5, subd. (b).) Applying the *Hill* test, the trial court concluded non-member County employees had a right to privacy in their personal information. The County employees who were not Union members met the criteria to establish (a) a legally protected privacy interest in their personal information; (b) a reasonable expectation of privacy that their personal information would not be further disseminated by their employer; and (c) a serious invasion of privacy because the disclosure of the non-members' personal information constituted a "non-trivial" invasion of privacy.

Having concluded the non-members' right to privacy, the trial court considered the Union's competing interest to represent all County employees for purposes of collective bargaining. The labor law cases, according to the trial court, established a public policy in favor of the Union's right to communicate with all represented employees. On balance, the trial court concluded the public policy interests favoring collective bargaining outweighed any privacy interest non-member County employees might have in nondisclosure. Thus, disclosure of the personal information of non-member County employees did not violate California law.

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[4] Although the trial court concluded the County waived the issue by failing to raise it during the administrative hearing, it decided the petition on the merits.

The County timely appealed from the judgment entered following the denial of the petition.

DISCUSSION

1. *Standard Of Review*

We must determine 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. This is a legal question when, as here, the facts are undisputed. (*Pioneer Electronics, supra*, 40 Cal.4th at pp. 370-371.) On legal issues, the trial court was required to exercise its independent judgment, while examining the administrative record for any errors of law committed by the Commission. (See *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 810-811; *McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 921-922.) On appeal, we are not bound by any legal interpretation of the trial court. Instead, we make an independent review of any questions of law necessary to the resolution of this matter on appeal. (*Union of American Physicians & Dentists v. Los Angeles County Employee Relations Com.* (2005) 131 Cal.App.4th 386, 397.)

2. *Non-Members' State Constitutional Right To Privacy*

As the exclusive representative of County employees, the Union represents all employees in the bargaining unit. The Union and County have a duty to negotiate in "good faith" for the purpose of arriving at a collective bargaining agreement (Gov. Code, § 3505; L.A. County Code, § 5.04.240(A)(3).) To fulfill its good faith bargaining obligation, an agency such as the County must provide the Union published data it regularly has available concerning subjects of negotiation, including salary data and other terms and conditions of employment provided by comparable public and private employers. (L.A. County Code, § 5.04.060(A).) Under federal and state labor law, home addresses of bargaining unit employees constitute information that is necessary to the collective bargaining process. (See *United States Department of Defense v. Federal Labor Relations Authority* (1994) 510 U.S. 487, 493; *Golden Empire, supra*, PERB Dec.

No. 1704-M, at p. 8.) The disclosure question presented here, however, is governed by our state's constitutional right to privacy.

The California Constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const., art. I, § 1.) The phrase "and privacy" was added to the California Constitution by voter initiative (the Privacy Initiative). (*Hill, supra*, 7 Cal.4th at p. 15.) "This provision creates a zone of privacy which protects against unwarranted compelled disclosure of certain private information. [Citations.]" (*Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal.App.4th 347, 357.)

"The text of the Privacy Initiative does not define 'privacy.' The Ballot Argument in favor includes broad references to a 'right to be left alone,' calling it a 'fundamental and compelling interest,' and . . . include[s] . . . 'our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose.' [Citation.]" (*Hill, supra*, 7 Cal.4th at pp. 20-21.) As discussed in *White v. Davis* (1975) 13 Cal.3d 757, the argument in favor of the amendment stated: " '*Fundamental to our privacy is the ability to control circulation of personal information.* [Italics in original.] This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.' " (*Id.* at p. 774.) One of the points that emerged from the arguments in favor of the Privacy Initiative was the "improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party . . . ." (*Id.* at p. 775.) This right to informational privacy that is reflected in our state Constitution also is reflected in our state laws, which regulate the dissemination of personal information. (See, e.g., Civ. Code, § 1798 et seq. [the Information Practices Act of 1977].)

3. *The Reasonable Expectation Of Privacy Under The Hill Test*

As noted, the right to privacy is not absolute – the right to privacy protects the individual's reasonable expectation against a serious invasion. "[W]hether a legally recognized privacy interest exists is a question of law, and whether the circumstances give rise to a reasonable expectation of privacy and a serious invasion thereof are mixed questions of law and fact. [Citation.] 'If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law.' [Citation.]" (*Pioneer Electronics*, *supra*, 40 Cal.4th at p. 370.)

The trial court, in applying the *Hill* test, concluded County employees who are not Union members had a reasonable expectation of privacy that their personal information would remain confidential. "A 'reasonable' expectation of privacy is an objective entitlement founded on broadly based and widely accepted community norms. [Citation.]" (*Hill*, *supra*, 7 Cal.4th at p. 37.)

There is a legally protected privacy interest in one's home, and the home "is accorded special consideration in our [federal] Constitution, laws, and traditions. [Citations.]" (*United States Department of Defense v. Federal Labor Relations Authority*, *supra*, 510 U.S. at p. 501.) The residential privacy interest includes the right not be disturbed in one's home by unwanted advertising and solicitation by mail. (*Rowan v. Post Office Dept.* (1970) 397 U.S. 728, 737.) As the United States Supreme Court stated: "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality . . . ." (*Ibid.*) To avoid this unwanted intrusion, household members may give notice not to be disturbed at home. (*Ibid.*) The privacy interest at stake is not the intrusion resulting from the receipt of bothersome "junk mail," but the right to be "left alone," in one's home. (See *United States Department of Defense v. Federal Labor Relations Authority*, *supra*, at p. 501.) The disclosure of names, addresses, and telephone numbers of association members implicates the privacy interest in the sanctity of the home. (*Planned Parenthood Golden Gate v. Superior Court*, *supra*, 83 Cal.App.4th at pp. 359-360.)

Employees who provide their home address and home 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. (See *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal.App.4th 554, 561.) A public employee does not have a diminished expectation of privacy in his or her personal information. (See *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 950-951.) Nor have County employees implicitly consented to the release of their personal information to the Union by accepting employment with the County.

4. *Procedural Safeguard Of Privacy Notice To Third Parties And An Opportunity To Object Before Disclosure Of Personal Information*

When disclosure of third-party information is compelled, as the trial court held in this case, our Supreme Court in *Pioneer Electronics*, *supra*, 40 Cal.4th at page 373 recognized certain procedural safeguards of advance notice to those persons whose privacy interests are at stake to limit an intrusion of privacy that would otherwise be regarded as serious. These procedural safeguards are intended to minimize the intrusion of a recognized privacy interest. (*Hill*, *supra*, 7 Cal.4th at p. 38.)

The *Pioneer Electronics* court focused on the requisite notice and opportunity to object that should accompany a precertification communication to members of a putative consumer class before disclosure of personal information. The class representative sought discovery of third-party customer information from the company. (*Pioneer Electronics, supra,* 40 Cal.4th at p. 364.) They requested the names and contact information of those customers who wrote to Pioneer Electronics to complain about the product at issue in the lawsuit. (*Ibid.*) Pioneer Electronics refused to disclose the customer information, asserting their customers' right to privacy. (*Ibid.*) The trial court ordered disclosure but required Pioneer Electronics to inform customers and give them a right to object. (*Id.* at pp. 365-366.) The Court of Appeal concluded the notice provision should have been an opt-in notice in which the customers affirmatively consented to disclosure. (*Id.* at pp. 369-370.)

The Supreme Court agreed with the trial court that an opt-out notice was sufficient to protect the privacy interests of the third-party customers. (*Pioneer Electronics*, *supra*, 40 Cal.4th at pp. 372-373.) The complaining customers had a reduced expectation of privacy in the information they voluntarily disclosed to Pioneer Electronics. (*Id.* at p. 372.) Moreover, these complaining customers presumably would want their personal information disclosed to a class plaintiff who might help them obtain the relief they sought from Pioneer Electronics. (*Ibid.*) Nevertheless, before disclosure, the company had to give customers notice and an opportunity to object to the release of their personal information. (*Id.* at p. 373.) Thus, there was no serious invasion of privacy "given that the affected persons readily may submit objections if they choose." (*Id.* at p. 372.)

As the *Pioneer Electronics* court noted, it required similar procedural safeguards in *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, which addressed the disclosure of non-party financial information. (*Id.* at pp. 654-655.) While this information is discoverable in a proper case, a bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he or she reveals to the bank will be used by the bank for internal bank purposes. (*Id.* at p. 657.) Thus, the *Valley Bank* court held "before confidential customer information may be disclosed in the course of civil discovery proceedings, the bank must take reasonable steps to notify its customer of the pendency and nature of the proceedings and to afford the customer a fair opportunity to assert his [or her] interests by objecting to disclosure . . . ." (*Id.* at p. 658.) This procedural device accommodated considerations of both disclosure and confidentiality. (*Ibid.*)

This notice and opt-out procedure is not limited to the disclosure of financial or consumer information, but also has been applied in the employment context when non-party information is sought during discovery. (See *Alch v. Superior Court* (2008) 165 Cal.App.4th 1412, 1416, 1418 [privacy notice sent to non-party writers][5]; *Belaire-*

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[5] *Alch v. Superior Court*, *supra*, 165 Cal.App.4th 1412, a class-action lawsuit brought by television writers alleging discrimination against various networks, studios, and talent agencies, sought non-party information about Writers Guild members. (*Id.* at p. 1417.) The trial court ordered notice of disclosure to Writers Guild members; 47,000

West Landscape, Inc. v. Superior Court, *supra*, 149 Cal.App.4th at pp. 561-562 [discovery of contact information of former and current employees subject to opt-out privacy notice].) Privacy notices to third parties also protect the dissemination of consumer records by record holders. (See, e.g., Code Civ. Proc., § 1985.3, subds. (b), (e).)

We recognize not all compelled disclosure warrants procedural safeguards. But these cases generally fall into two categories – non-party, percipient witnesses whose identity was previously disclosed and have no right to object to disclosure (*Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1248-1249, 1251-1252, 1256-1257), and putative class members (*Crab Addison, Inc. v. Superior Court* (2008) 169 Cal.App.4th 958, 969, 974; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1336-1337). For these putative class members, there is an assumption that they want their information disclosed because the class action involves a vindication of their statutory rights (*Crab Addison*, *supra*, at pp. 972-973). A similar assumption is expressed in *Pioneer Electronics*, but even when the complaining customers might reasonably expect disclosure or "hope" for disclosure, these customers were entitled to written notice and an opportunity to object before disclosure. (*Pioneer Electronics*, *supra*, 40 Cal.4th at p. 372.)

We glean from the discovery cases, in which courts have grappled with the conflicting interests of the right to disclosure and the state constitutional right to privacy, that trial courts are vested with discretion in considering certain procedural safeguards, including opt-out notice requirements, when disclosure involves the release of confidential, third-party information. (See *Valley Bank of Nevada v. Superior Court*, *supra*, 15 Cal.3d at p. 658; see also *Pioneer Electronics*, *supra*, 40 Cal.4th at p. 372.)

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individuals received the privacy notices and 7,700 recipients objected to disclosure of some or all of the requested information. (*Id.* at p. 1418.) The class action plaintiffs asked the trial court to overrule the objections. (*Ibid.*) Thus, the case addresses the next step – disclosure over objection. (*Id.* at p. 1421.) The Court of Appeal ordered disclosure of demographic and work history but noted there were protective orders in place to control the dissemination of this information. (*Id.* at p. 1426.)

These discovery cases recognize procedural safeguards may be warranted even when, for example, contact information is generally discoverable. (*Pioneer Electronics*, *supra*, at p. 372.) Since the interests at stake here are similar, we conclude the trial court failed to adhere to *Valley Bank*, which vested the trial court with discretion to consider procedural safeguards when disclosure involves the release of third-party information.

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 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. Rather, the opposite is true. As in *Valley Bank*, employees would assume the personal information they provided to their employer as a condition of employment would not 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. These County employees, whether by inaction or action, are not Union members, and they have a right not to join the Union. The non-members' failure to voluntarily provide their personal information to the Union might indicate their desire not to join the Union, indifference, or simply a desire not to be bothered at home by unwanted mail and telephone calls. (*United States Department of Defense v. Federal Labor Relations Authority*, *supra*, 510 U.S. at p. 501 ["Employees can lessen the chance of such unwanted contacts by not revealing their addresses to their exclusive representative."].)

We reject the Union's contention that based upon *Golden Empire Transit*, *supra*, PERB Decision No. 1704-M, at pages 7-8, the Union is entitled to personal information even over objection. *Golden Empire Transit* was not decided under California law. Instead, the Board relied on labor law holding this information is presumptively relevant.

Since this is the wrong test, we also reject the Union's reliance on additional authority not decided under California law.

The notice and opt-out procedure used in *Pioneer Electronics* and appropriate here does not deprive the Union of its right to the information, but simply recognizes that before disclosure, the holder of the information (the County) must inform non-member County employees whose privacy interests are at stake. Individual non-member County employees will have an opportunity to object, and if the Union seeks to challenge the objection, as was the case in *Alch v. Superior Court*, *supra*, 165 Cal.App.4th at pages 1419-1420, it may do so before the Commission. At 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) and will no longer be required to communicate to non-members through annual *Hudson* notices.

This opt-out notice procedure does not provide an unfair advantage to the County or a disadvantage to the Union in collective bargaining matters. (See *Pioneer Electronics*, *supra*, 40 Cal.4th at p. 374.) Rather, it recognizes the previously overlooked individual rights of the County employees. If, as the Union represented during oral argument, non-member County employees will not respond to the opt-out notice, the Union will obtain the personal information it wants *and* will do so in accordance with California's privacy laws. In sum, we conclude before the County discloses the personal information of non-member County employees, it must give them notice and an opportunity to object.[6]

CONCLUSION

Since the trial court's order denying the petition does not address procedural safeguards before disclosure, we reverse and remand to the trial court to enter a new order denying the petition but directing the County and Union to meet and confer on a

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[6] Our constitutional analysis obviates the need to address any remaining issues raised by the parties.

proposed notice for the trial court's review, which includes notice to non-member County employees and an opportunity for the non-member employees to object to disclosure. Upon the trial court's approval of the notice, the County shall send the notice to the non-member County employees.

DISPOSITION

The judgment is reversed and remanded for consideration in light of the court's opinion. Each party to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.