STEWART WEINBERG, Bar No. 031493
MANUEL A. BOÍGUES, Bar No. 248990
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: sweinberg@unioncounsel.net
mboigues@unioncounsel.net

Attorneys for *Amicus Curiae*
Berkeley Federation of Teachers, AFT Local 1078

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(SAN FRANCISCO DIVISION)

YVETTE FELARCA, LORI NIXON, LARRY STEFL,

Plaintiffs/Petitioners,

v.

BERKELEY UNIFIED SCHOOL DISTRICT, DONALD EVANS, JANET LEVENSON, et al.,

Defendants/Respondents..

No. 3:17-cv-06282-VC

NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE PROPOSED AMICUS CURIAE BRIEF OF BERKELEY FEDERATION OF TEACHERS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Date: January 18, 2018
Time: 10:00 a.m.
Ctrm.: 2, 17th Floor
Place: San Francisco Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102

Judge: Hon. Vince Chhabria

TO EACH PARTY AND ATTORNEYS OF RECORD IN THIS ACTION:

PLEASE TAKE NOTICE that on January 18, 2018, at 10:00 a.m., or as soon thereafter as this matter can be heard in Courtroom 2 of the United States District Court, Northern District of California, San Francisco Division, on the 17th Floor at 450 Golden Gate Avenue, San Francisco, California, the Berkeley Federation of Teachers, AFT Local 1078 ("Union") will move for leave to file an *amicus curiea* brief in support of Plaintiffs Felarca, Nixon, and Stefl. The Union met and conferred with the parties to this litigation about the Union's motion. Plaintiffs and

Defendants have responded that they consent to this motion. Intervenor, Judicial Watch, Inc., responded that it does not consent.

I. STANDARD FOR MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

"District courts frequently welcome *amicus* briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Sonoma Falls Devs., LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003.) This standard is met here.

II. STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Berkeley Federation of Teachers, AFT Local 1078 ("Union") is a labor organization affiliated with the California Federation of Teachers and the American Federation of Teachers, and serves as the collective bargaining representative of 920 teachers (K-12, Adult School, and Child Development), counselors, substitutes, school psychologists, Adaptive PE teachers, librarians and speech pathologists serving Berkeley public school students.

The Union has an interest in this case because it concerns the potential disclosure of information that interferes with the personal safety and the constitutionally protected privacy and associational rights of employees represented by the Union. The Union is especially concerned about Intervenor's effort to use the California Public Records Act as a vehicle to jeopardize the safety of public employees and/or to chill protected speech and silence the exchange of opinions among all members of the Union. Although Plaintiffs Felarca and Stefl are both teachers and in the bargaining unit represented by the Union, they are only in one of the various classifications of public school educators and staff who are included in the bargaining unit.

The Union submits this *amicus* brief in support of Plaintiffs' impending Motion for a Preliminary Injunction in the event that the meet and confer process ordered by the Court on November 9, 2017 is not successful.

III. *AMICUS CURIEA'S* EXPERTISE WILL BENEFIT THIS COURT

The attached *amicus* brief consists primarily of statutes and cases that are not addressed in Plaintiffs' Motion for a TRO or Defendant's Opposition, but which provide further support for

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

the principles raised by the parties regarding the need to protect employees of the Defendant School District from unwarranted intrusion into their privacy by the Intervenor in this matter. First, the proposed *amicus* brief underscores that the California Public Records Act is not a vehicle that can be used to trump the Constitutional Right of Privacy that is enjoyed by Californians. Second, the *amicus* brief focuses on expressed exemptions in the California Public Records Act that are aimed at protecting individual privacy interests. In particular, the brief focuses on the exemption applicable to personnel, medical and similar records, the exemption protecting from disclosure the personal addresses, home telephone numbers, personal cellular telephone numbers, birthdates, and personal email addresses of public employees, as well as the public interest exemption. Finally, the *amicus* brief provides this Court an argument on the right of unionized employees "to pursue their lawful private interests privately and to associate freely" and to engage in such protected activity free of unlawful interference by the Government.

In essence, the Union seeks to bring to the Court's attention the important privacy interests at stake in this case, particularly for all union activists working in the California public sector who are not parties to the case but who will nonetheless be harmed if there is precedent that allows a self-described conservative organization to use the California Public Records Act to obtain their identities and/or their private communications expressing opinions on political or social issues of public concern that are unrelated to the "public's business" conducted by the public agency that is their employer.

For the foregoing reasons, the Union respectfully requests that the Court grant this motion and accept the proposed *amicus curiae* brief.

Dated: December 1, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/S/ Manuel A. Boígues
By: MANUEL A. BOÍGUES
Attorneys for *Amicus Curiae*
Berkeley Federation of Teachers, AFT Local 1078

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

TABLE OF CONTENTS

Page

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

TABLE OF AUTHORITIES

Page

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

TABLE OF AUTHORITIES (cont'd)

Page

Constitutions

Federal Statutes

State Statutes

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves an impending Motion for a Preliminary Injunction by Plaintiffs Yvette Felarca, Lori Nixon, and Larry Stefl (collectively "Plaintiffs"), who are teachers and staff at the Martin Luther King, Jr. Middle School in Berkeley, California (the "MLK Middle School"), seeking to enjoin Defendants Berkeley Unified School District, Donald Evans, and Janet Levenston (collectively "Defendant School District") from providing documents to Intervenor, Judicial Watch, Inc. (hereinafter "Intervenor"), a self-described conservative organization based in Washington, D.C., in response to a troublesome request for documents that Intervenor made under the guise of the California Public Records Act ("CPRA").

In their Motion for a Temporary Restraining Order, Plaintiffs argued, and this *Amicus* party agrees, that the disclosure of documents in response to Intervenor's CPRA request would violate the privacy rights of the Defendant School District's employees and chill their freedom of speech, freedom of association, and right to engage in union activities. The Defendant School District filed an Opposition to Plaintiffs' Motion for a TRO on the basis that it intended to comply with Intervenor's CPRA request by only providing such information that is required by law, which it explained would include only emails related to the public business of the Defendant School District, and that it would adequately protect Plaintiffs' privacy interest by redacting all teacher identifying information. While this *Amicus* party also agrees with the Defendant School District that Intervenor is not entitled to any teacher identifying information and that at most Intervenor should be provided only emails that relate to the public business of the Defendant School District, this *amicus* brief is submitted to emphasize additional privacy protections that must be considered when evaluating what documents, if any, should be provided in response to Intervenor's CPRA request based on the facts in this particular case.

The preliminary injunction that Plaintiffs may seek would serve to protect the privacy interests of the Defendant School District's employees and there is no public interest that would be advanced by the wholesale production of documents to Intervernor. This *Amicus* party therefore respectfully requests that the Court grant Plaintiffs' request for a Preliminary Injunction.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

II. SUMMARY OF FACTS AND PROCEDURAL HISTORY

The *Amicus* party submitting this brief is the Berkeley Federation of Teachers, AFT Local 1078 ("Union"), a local employee organization that is recognized by the Defendant School District as the collective bargaining representative of 920 teachers (K-12, Adult School, and Child Development), counselors, substitutes, school psychologists, Adaptive PE teachers, librarians and speech pathologists serving Berkeley public school students. Plaintiffs Felarca and Stefl are teachers employed by the Defendant School District who are in the bargaining unit represented by the Union.

The CPRA request submitted to the Defendant School District by Intervenor on September 1, 2017 asked for three categories of documents: (1) Plaintiff Felarca's personnel file; (2) all records of communications between the Defendant School District's Superintendent and any other District officials and/or staff of the MLK Middle School that mention "Felarca," "Antifa," "By All Means Necessary," and/or "BAMN"; and (3) all records of communications among the staff/faculty of the MLK Middle School that mention the same terms as the second category.

On October 25, 2017, the Defendant School District advised teachers at the MLK Middle Schools that they had the choice to conduct a search of their own emails for the terms included in Intervenor's CPRA request or that they could have the Defendant School District search the emails for the terms from the central server. On October 30, 2017, Plaintiffs filed a Motion for a Temporary Restraining Order and/or Preliminary Injunction. The Defendant School District filed its Opposition to the Motion on November 3, 2017.

On November 9, 2017, this Court issued an Order denying Plaintiffs' request to enjoin the Defendant School District from gathering documents responsive to Intervenor's CPRA request but granting Plaintiffs' request to temporarily enjoin the Defendant School District from providing any such documents to Intervenor until at least December 19, 2017. The Court also ordered Plaintiffs and Defendants to meet and confer over Plaintiffs' objections to the disclosure of documents pursuant to the First Amendment, the CPRA, or other laws.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

III. ARGUMENT

A. THE CALIFORNIA CONSTITUTIONAL RIGHT OF PRIVACY TRUMPS INTERVENOR'S FISHING EXPEDITION FOR THE PRIVATE INFORMATION OF PUBLIC EMPLOYEES

In 1968, the California Legislature enacted the California Public Records Act ("CPRA"). Cal. Gov. Code § 6250 *et seq.* The CPRA was modeled after the federal Freedom of Information Act ("FOIA"), which had been enacted a year earlier. 5 U.S.C. § 552 *et seq.* The purpose of the CPRA and FOIA was to allow the public to scrutinize and hold the government accountable.

The California Legislature recognized that it had to balance the interest in government transparency with a fundamental competing interest, *i.e.*, privacy rights. Thus, in enacting the CPRA the California Legislature first noted that it was "mindful of the right of individuals to privacy." Cal. Gov. Code § 6250. The California Legislature then declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov. Code § 6250.

In balancing the competing interests of access to the "public's business" and individual privacy rights, the CPRA starts by defining "Public Records" as "any writing containing information *relating to the conduct of the public's business*." Cal. Gov. Code § 6252(e) (emphasis added). Thus, the focus is on records that are relevant to government operations. The balance of these competing interests is further achieved through a substantial number of expressed exemptions from disclosure that are contained in the CPRA, approximately 76 of them. Cal. Gov. Code §§ 6253.2 – 6268.

But the California Legislature was not alone in its concern for the individual right to privacy. In 1972, voters in California approved a ballot initiative that added an explicit right to privacy in the California Constitution: "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. 1, § 1 (emphasis added).

In 1994, the California Supreme Court held that "the Privacy Initiative in article I, section 1 of the California Constitution creates a right of action against private as well as

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

government entities." *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 20 (1994). This means that the right to privacy in California applies even where there is no state action. All employees of the Defendant School District therefore have an enforceable privacy interest that is enshrined in the California Constitution regardless of the public's right to information under the CPRA.

In its analysis of the extent of the individual right to privacy, the California Supreme Court noted in *Hill* that although "privacy" is not defined in the Privacy Initiative approved by the voters, "[t]he Ballot Argument in favor includes broad references to a 'right to be left alone,' calling it a 'fundamental and compelling interest,' and purporting to include within its dimensions no less than '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.'" *Id.* at 20-21. While the Court found that those "broad references" provided "little guidance in developing a workable legal definition of the state constitutional right to privacy," the Court went on to note that:

> The principal focus of the Privacy Initiative is readily discernible. The Ballot Argument warns of unnecessary information gathering, use, and dissemination by public and private entities-images of "government snooping," computer stored and generated "dossiers" and " 'cradle-to-grave' profiles on every American" dominate the framers' appeal to the voters. (Ballot Argument, supra, at p. 26.) The evil addressed is government and business conduct in "*collecting and stockpiling unnecessary information ... and misusing information gathered for one purpose in order to serve other purposes or to embarrass* ...." (Id. at p. 27.) "The [Privacy Initiative's] primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy." [citation omitted]

Id. at 21 (emphasis added).

As the Court explained in *Hill*, "[l]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy.')." *Id.* at 35. With respect to "information privacy," which the *Hill* decision noted "is the core value furthered by the Privacy Initiative," the argument in favor of the initiative observed

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

that "the California constitutional right of privacy 'prevents *government and business interests* from [1] *collecting and stockpiling* unnecessary information about us and from [2] *misusing information* gathered for one purpose in order to serve other purposes or to embarrass us.' (Ballot Argument, supra, at p. 27.)." *Id.* at 36-37 (emphasis added).

Here, the California Constitutional Right of Privacy is significant because Intervenor's CPRA request to the Defendant School District does not appear to be designed to obtain any information about the "public's business." Instead, the request from the Intervenor, which is an out-of-state, self-described conservative organization, is focused on the political and associational discussions among Plaintiffs and their colleagues that mention specific political subjects. The terms used in Intervenor's CPRA request do not even tangentially seek "public records" that "contain information relating to the conduct of the public's business" as required by the CPRA. Indeed, it would not be unreasonable for any teacher or staff member at the MLK Middle School who reads Intervenor's CPRA request to conclude that Intervenor is simply intent in "*collecting and stockpiling unnecessary information about us*" and in "*misusing information gathered for one purpose in order to serve other purposes or to embarrass us*."

One of the many expressed exemptions in the CPRA applies to "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law." Cal. Gov. Code § 6254(k). The right of privacy under the California Constitution is a right that needs significant consideration as the Plaintiffs and Defendants here meet and confer over what records, if any, may be provided to Intervenor. In that regard, the Union urges that Plaintiffs and Defendants be required to conclude that Intervenor's request is nothing more than an inappropriate fishing expedition under the CPRA to get around the Constitutional Right of Privacy enjoyed by Union members employed by the Defendant School District. The Union believes that is the intent.

For this reason, if Plaintiffs are required to file a Motion for a Preliminary Injunction, the Union respectfully submits that the Court should order that Defendant Berkeley Unified School District not produce any documents to Intervenor.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

B. THE CPRA PRIVACY EXEMPTION REGARDING PERSONNEL, MEDICAL OR SIMILAR FILES PROHIBITS THE DISCLOSURE OF ANY SUCH DOCUMENTS TO INTERVENOR

The right to access public records, even presuming the records are legitimately related "to the conduct of the public's business," is not unlimited. Relevant here is the California Legislature's exemption for "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov. Code § 6254(c). This expressed exemption is important because Intervenor has inexplicably requested the personnel file of a member of the Union, teacher Plaintiff Felarca. The California Legislature's decision to exempt from disclosure the "personnel, medical, or similar files" of public employees where their disclosure would result in an unwarranted invasion of personal privacy needs to be enforced in this instance because it is not unreasonable to imagine that Intervenor could expand its efforts to *collect* and *stockpile* information in personnel files of other employees represented by the Union or their colleagues employed by the Defendant School District and because of the risk of misuse of that information.

The Union first notes that the similar exemption in FOIA regarding "personnel and medical files and similar files" applies when disclosure to the public "would constitute a ***clearly*** unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). In contrast, the California Legislature did not include the term "clearly" in the CPRA exemption for "personnel, medical, or similar files." Without the requirement that there be a showing of a "*clearly* unwarranted invasion of privacy" to prevent disclosure of "personnel, medical, or similar files," the CPRA exemption was apparently meant to be stronger than the federal exemption.

Applying the CPRA protection to personnel, medical or similar records, California courts "weigh the public's interest in disclosure against protection of privacy interests" and consider whether the information in the records will "shed light" on the "public's business" that is conducted by the government agency. *See, e.g., Caldecott v. Superior Court*, 42 Cal.App.4th 212, 231 (2015) (holding that exemption was not applicable to documents regarding a hostile work environment complaint against the superintendent of a school district because of strong public interest in judging how the elected school board dealt with the serious misconduct

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

allegations against the highest ranking administrator); *BVR. Inc. v. Superior Court*, 143 Cal.App.4th 742, 755 (2006) (holding that exemption was not applicable to documents regarding the investigation of sexual harassment and verbal abuse of students by a school district's superintendent because of the public's interest in knowing how the school board and the superintended responded to the allegations). In contrast to the instances where disclosure of personnel records involving serious misconduct by high ranking public officials is appropriate, it has been noted by California courts that the public interest in disclosure does not outweigh privacy interests when "trivial or groundless" charges are involved. *American Fed'n of State, County & Mun. Employees (AFSCME), Local 1650 v. Regents of Univ. of Cal.*, 80 Cal.App.3d 913, 918 (1978).

Moreover, even where disclosure was allowed because the information shed light on the "public's business" involving high ranking public officials, the privacy rights of individuals other than such high ranking officials needs to be protected by redacting portions of personnel files that identify them. *See, e.g., BVR, Inc. v Superior Court, supra*, 143 Cal.App.4th 743, 759 (allowing redaction of personal information, i.e., names, home addresses, phone numbers, and job tiles, of teachers, parents, students, and staff mentioned in the documents because their information was not relevant to the public's interest in obtaining information about the investigation).

Here, Intervenor made a broad request for Plaintiff Felarca's entire personnel file. With such a broad request, there is no reasonable basis upon which it could be found that the public's interest in disclosure of a teacher's entire personnel file outweighs the interest in protecting the teacher's personal privacy. Plaintiff Felarca is not a high ranking official like those individuals who were involved in the *Caldecott* and *BVR, Inc.* court decisions cited above. There is also no evidence of a strong public interest in the disclosure of information that is necessary to shed light on the "public's business" conducted by the Defendant School District. Finally, and significantly, there is no evidence of a need to disclose private information or the identities of any other employees of the Defendant School District, or of the parents or students who may be referred to in the requested personnel record.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

For this reason, if Plaintiffs are required to file a Motion for a Preliminary Injunction, the Union respectfully submits that the Court should order that Defendant Berkeley Unified School District not produce any personnel files to Intervenor.

C. THE CPRA EMPLOYEE PRIVACY EXEMPTION AND THE PUBLIC INTEREST EXEMPTION ALLOW THE NON-DISCLOSURE OF NAMES, HOME ADDRESSES, HOME PHONE NUMBERS, CELLULAR PHONE NUMBERS, BIRTHDATES, AND EMAIL ADDRESSES TO INTERVENOR

The CPRA's expressed exemption of private contact information from the definition of public records is another reason to grant Plaintiffs' Motion for a Preliminary Injunction. The CPRA has long provided that, with limited exceptions, the "home addresses, home telephone numbers, personal cellular telephone numbers, and birth dates of all employees of a public agency shall not be deemed to be public records and shall not be open to public inspection." Cal. Gov. Code § 6254.3(a). There are four limited exceptions to this prohibition, namely that such private information may be disclosed to (1) "an agent, or a family member" of the public employee; (2) "an officer or employee of another public agency when necessary for the performance of its official duties"; (3) "an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and any phone numbers on file with the employer of employees performing law enforcement-related functions, and the birth date of any employee, shall not be disclosed"; and (4) "an agent or employee of a health benefit plan providing health services or administering claims for health services to public agencies and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents." Cal. Gov. Code § 6254.3(a)(1)-(4).

In June of 2017, Section 6254.3 was amended to add that "…the personal email addresses of all employees of a public agency shall not be deemed to be public records and shall not be open to public inspection, except that disclosure of that information may be made as specified in paragraphs (1) to (4), inclusive, of subdivision (a)." Cal. Gov. Code § 6254.3(b). The CPRA also provides a procedure for public employees to opt out of the disclosure of information to employee organizations by sending a written request to the public agency. Cal. Gov. Code § 6254.3(c).

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Here, Intervenor does not fall within any of the four exceptions to the prohibition in the CPRA regarding the disclosure of private contact information about public employees. As a result, Intervenor cannot be provided any of the private information covered by Section 6254.3 of the CPRA. This is significantly important under the facts in this matter, where it is not unreasonable for Union represented employees to fear that the disclosure of such private information to a third-party like Intervenor would put their safety at risk. Indeed, the reality of such concerns is noted in Plaintiffs' Complaint. *See* Complaint, ¶ 38. As a result, the Union urges that Plaintiffs and Defendants be required to apply this exemption when meeting and conferring about what documents, if any, can be provided to Intervenor.

The Union acknowledges that in 2007, the California Supreme Court ruled that the salary information of public employees is not exempt from disclosure because such information sheds light on the public's business. *See International Fed'n of Prof. & Tech Eng'rs, Local 21, AFL-CIO v. Superior Court*, 42 Cal.4th 319 (2007) (allowing the disclosure of names and salaries of public employees earning $100,000 or more per year based on the public's interest in knowing how the government spends its money.) The Court's decision is consistent with Section 6254.8 of the CPRA, which provides that "[e]very employment contract between a state or local agency and any public official or public employee is a public record which is not subject to the provisions of Sections 6254 and 6255." Cal. Gov. Code § 6254.8. But the Union notes that the Californai Supreme Court's decision did not deal with the disclosure of any of the information exempted by Section 6254.3 of the CPRA.

More importantly, as noted in the previous section above, California courts have authorized the redaction of the names of public employees where their disclosure does not shed light on the public's business. *See, e.g., BVR, Inc. v Superior Court, supra*, 143 Cal.App.4th 743, 759. The non-disclosure of information or the redaction of information is expressly authorized by the CPRA's public interest (or catch-all) exemption, which provides that disclosure of information is not required when it can be shown that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Gov. Code § 6255(a). In this case, there is no evidence of any

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

public interest that would be served by the disclosure of the names of teachers, students, or parents in the specific documents requested by Intervenor. On the other hand, there is a significant concern, recognized by Plaintiffs and Defendants, regarding the safety of all members of the school community should the identities of staff, students, or parents be disclosed in the documents requested by Intervenor. Thus, under these facts, the public interest served by non-disclosure of identifying information clearly outweighs the public interest served by disclosure of such information to Intervenor. *See Los Angeles Unified School District v. Superior Court*, 228 Cal.App.4th 222 (2014) (applying the balancing test set forth in Section 6255 and finding that the school district did not have to disclose teacher identifying information).

As a result, the Union submits that when meeting and conferring, Plaintiffs and Defendants should be required to redact information found in any of the public records that Intervenor may be entitled to, if any, which identify any employee of the Defendant School District or any student or parent. In addition, any personal home addresses, telephone or cellular numbers, birthdates, and email addresses of public employees cannot be disclosed to Intervenor.

Finally, if Plaintiffs are required to file a Motion for a Preliminary Injunction, the Union respectfully submits that the Court should order that Defendant Berkeley Unified School District not produce any identifying information or personal contact information to Intervenor.

D. DISCLOSURE OF IDENTIFYING INFORMATION TO INTERVENOR WOULD INTERFERE WITH THE CONSTITUTIONAL ASSOCIATIONAL RIGHTS OF PUBLIC EMPLOYEES REPRESENTED BY THE UNION

In California, public employees enjoy the right to bargain collectively as a result of several different statutes enacted by the California Legislature covering specific categories of public employees. *See Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.*, 35 Cal.4th 1072, 1084-86 (2005). School district employees are covered by the Educational Employment Relations Act ("EERA"). *See* Cal. Gov. Code § 3540 *et seq.* Pursuant to the EERA, public school employees enjoy the right to engage in protected activity, which includes forming, joining, and participating in activities of an employee organization for the purposes of representation on all matters of employer-employee relations. Cal. Gov.Code § 3543(a).

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Here, there is no dispute that employees of the Defendant School District use the School District's email system for personal use. As the U.S. Supreme Court explained, "[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency." *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010). In today's digital age, it is highly likely that email systems will be used by members of the Union to communicate with each other and their union building representatives about their union protected activities. Indeed, when an employer permits its employees to use the e-mail system for personal use, the employer creates "a natural gathering place for employees" to communicate concerning wages, hours, and working conditions. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978).

Intervenor's public records request at issue in this case specifically seeks "any and all records of communications" among employees of the Defendant School District that mention Plaintiff Felarca and/or terms that identify a particular political group that Intervenor appears to be keenly interested in. The communications requested by Intervenor will undoubtedly include emails among the teachers and other staff at the MLK Middle School on subjects beyond the political group that is the target of Intervenor's CPRA request. It is more than reasonable to expect that the disclosure of such emails to Intervenor will include discussions among employees regarding their union protected activities, which will identify them as members of the Union. Thus, the Union is concerned about Intervenor's use of the CPRA as an end-around to the constitutional protections afforded to union membership lists.

Membership lists are the most valuable asset held by labor unions. This information has historically been closely guarded by unions in order to protect the associational rights of members and their right to privacy. *See Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) (order requiring production of names and addresses of all members and agents was a denial of due process as entailing likelihood of a substantial restraint upon members' exercise of their right to freedom of association); *Brock v. Local 375, Plumbers Int'l Union of America, AFL-CIO*, 860 F.2d 346, 349 (9th Cir. 1988) (information sought must be relevant and material to the investigation and disclosure of such material cannot

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

"chill" the first amendment rights of free association); *Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1462-63 (9th Cir. 1991) (protective order appropriate where Union made adequate showing that governmental action "would have the *practical effect* 'of discouraging' the exercise of constitutionally protected political rights").

Allowing Intervenor to use the CPRA as a vehicle to obtain emails that identify the Defendant School District's employees who are members of the Union "would have the practical effect `of discouraging' the exercise of constitutionally protected political rights." *NAACP v. Alabama*, *supra*, 357 U.S. 449, 461 (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 393 (1950)). Such information can also be used by anyone else who obtains access to it from Intervenor to interfere with the safety of members of the Union or to harass them in retaliation for their participation in protected activities.

As a result, the Union further submits that when meeting and conferring, Plaintiffs and Defendants must be ordered to redact information found in any of the public records that Intervenor may be entitled to, if any, where the information or topics discussed would identify any employee of the Defendant School District as a member of the Union. If Plaintiffs are required to file a Motion for a Preliminary Injunction, the Union respectfully submits that the Court should order that Defendant Berkeley Unified School District not produce any documents to Intervenor that contain information identifying employees as members of the Union.

IV. CONCLUSION

For the foregoing reasons, *Amicus Curiae* Berkeley Federation of Teachers respectfully submits that the Court should enter a Preliminary Injunction in favor of the Plaintiffs.

Dated: December 1, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/S/ Manuel A. Boigues
By: MANUEL A. BOIGUES
Attorneys for *Amicus Curiae*
Berkeley Federation of Teachers, AFT Local 1078

144385\944015

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001