U.S. COURT OF APPEALS CASE NO. 06-15431

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HELIX ELECTRIC, INC.

Plaintiff and Appellant,

v.

DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; DONNA DELL, an individual in her capacity as Labor Commissioner of California; JOHN REA, an individual in his capacity as Acting Director of the Department of Industrial Relations of California; COUNTY OF SACRAMENTO; AND PUBLIC WORKS COMPLIANCE PROGRAM

Defendants-Appellees.

APPELLANT'S OPENING BRIEF

On Appeal From The United States District Court
For The Eastern District of California
District Court Case 05-cv-2303

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff and Appellant Helix Electric, Inc. ("Helix") has no parent corporation, and no publicly-held corporation owns at least ten percent of Helix's stock.

DATED this 6th day of April, 2006.

By:_____

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JURISDICTIONAL STATEMENT

Jurisdiction of this action is conferred on the District Court by 42 U.S.C. § 1983, 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3) and (a)(4), 29 U.S.C. § 141, et seq., and 28 U.S.C. § 2201-2202. This action arises under the Constitution and other laws of the United States of America. Helix seeks redress against persons acting under color of state law to, *inter alia*, (a) secure a declaration of rights concerning the meaning and application of 29 U.S.C. § 175a; (b) secure a declaration of rights concerning the preemption of California Labor Code § 1776(e) by federal law; (c) secure a declaration of rights concerning the constitutionality of § 1776(e); and (d) to restrain and enjoin Defendants-Appellees from an unconstitutional and preempted application of § 1776(e).

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1292(a)(1), because it arises from the District Court's denial of Helix's motion for a preliminary injunction. This appeal is timely because pursuant to 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A), Helix's notice of appeal was filed within 30 days of the entry of the underlying order. The District Court's order was entered on February 27, 2006, (EOR, 43.001)[1], and Helix filed its notice of appeal on March 10, 2006. (EOR, 44.001.)

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[1] "EOR" refers to the Excerpts of Record. The citation includes the tab and page number, separated by a decimal point. Each tab is paginated internally.

STATEMENT OF ISSUES FOR REVIEW

Did the District Court abuse its discretion by denying Helix's motion for a preliminary injunction, when Helix's motion – if granted – will prevent the State of California and the County of Sacramento from releasing the home addresses of Helix's employees to the Public Works Compliance Program?

STATEMENT OF THE CASE

This appeal arises from the denial of Helix's motion for a preliminary injunction by the Honorable Frank C. Damrell Jr. (the "District Court").

On November 14, 2005, Helix filed a complaint in the Eastern District of California seeking declaratory and injunctive relief. Helix sought, *inter alia*, (a) a declaration that Defendant-Appellee Public Works Compliance Program ("PWCP") is not a "labor-management committee" under 29 U.S.C. § 175a, nor is PWCP's conduct within the scope of activities permitted for "labor-management committees"; (b) a declaration that California Labor Code § 1776(e), by permitting "labor-management committees" to obtain the home addresses of employees on public works projects, is preempted by federal law; and (c) an injunction preventing Defendants-Appellees from enforcing or complying with Labor Code § 1776(e) with respect to PWCP's request for the addresses of Helix's employees.

On November 22, 2005, Helix filed a motion for a temporary restraining order and order to show cause re: entry of a preliminary injunction, seeking the above-described relief. On the same day, the District Court granted Helix's motion for a temporary restraining order, and set a briefing schedule regarding the preliminary injunction. On December 5, 2005, PWCP requested Helix post a bond as a condition of the temporary restraining order. On December 12, 2005, the District Court denied PWCP's motion.

On December 30, 2005, Helix filed a motion with the Honorable Magistrate Kimberly J. Mueller requesting limited and expedited discovery regarding PWCP's status as a "labor-management committee." On January 13, 2006, Magistrate Mueller permitted Helix to take the deposition of the person(s) most knowledgeable from PWCP regarding its formation and operations, and limited Helix's deposition(s) to two hours. Shortly thereafter, Helix took the depositions of two individuals – Kevin Abram and A.C. Steelman.

On February 24, 2006, the District Court denied Helix's motion for a preliminary injunction. (EOR, 43.001.) On March 9, 2006, Helix received notice from Ray Thompson, counsel for Defendant-Appellee County of Sacramento, that PWCP had renewed its request for Helix's employee addresses in light of the Court's Order. Thompson expressed an intent to begin the process of releasing those addresses to PWCP on Monday, March 13, 2006.

On March 10, 2006, Helix filed a notice of appeal. (EOR, 44.001.) On the same day, Helix also asked the District Court for an injunction pending appeal. On March 13, 2006, the District Court denied Helix's request. On March 14, 2006, Helix asked this Court for an injunction pending appeal. On March 23, 2006, this Court – the Honorable Circuit Judges Kozinski and Thomas presiding – granted Helix's request for an injunction pending appeal.

STATEMENT OF FACTS

This case involves an attempt by an entity calling itself the Public Works Compliance Program ("PWCP") to obtain the home addresses of the employees of Helix Electric, Inc. ("Helix") pursuant to California Labor Code § 1776(e), ostensibly in order to further PWCP's ability to monitor Helix's compliance with California prevailing wage laws. PWCP claims it is a "labor management committee" under 29 U.S.C. § 175a. PWCP was created by representatives of the International Brotherhood of Electrical Workers (the "IBEW"), Local 340 chapter, together with representatives of the Sacramento chapter of the National Electrical Contractors Association ("NECA"), a group of contractors that are signatory to a collective bargaining agreement with the IBEW.

A more detailed description of the parties and the underlying dispute follows below.

A. Helix Electric, Inc.

Helix is a non-union electrical contractor that performs work throughout the state of California. Helix performs work on both public and private projects. Helix, as a non-union employer, is a competitor of the contractors who are members of NECA.

B. International Brotherhood of Electrical Workers

According to its website, the IBEW is one of the largest unions in the AFL-CIO, and represents approximately 750,000 members who work in fields such as utilities, construction, telecommunications, broadcasting, manufacturing, railroads and government.

For many years, the IBEW has engineered a campaign of harassment and organizing against Helix throughout California and Nevada. Helix management has seen an increase in the intensity of this campaign over the past two years. (EOR, 7.002-003.) In particular, Helix management has received dozens of documents and literature that the IBEW has sent to or given to Helix employees and customers. (Id.) Helix management has also been informed of numerous instances where representatives of the IBEW directly contacted Helix employees outside of work, including making unwanted visits to their homes. (Id.) These include situations where Helix employees felt threatened and intimidated by the actions of the IBEW representatives who visited their homes. (Id.)

Local 340, the IBEW chapter in the greater Sacramento area, has been at the forefront of these activities. For example, the following statement was taken from Local 340's website:

> HELIX CAMPAIGN
>
> The mailer from our Organizers regarding organizing efforts and Helix Electric has gone out to 2,500 IBEW members living

> in our jurisdiction. To date, we have only received 75 responses. If you have not done so, please take the time to fill out the questionnaire and return it to the Business Office. Thanks to all of the members who have already done so. The information you are providing on Helix Electric is invaluable to our organizing efforts. We need at least forty (40) Local 340 volunteers to help with this IBEW statewide effort. (EOR, 7.005.)

Further, Local 340 announced the following in a letter from its "Organizing Department" to its members:

> As you have heard at recent Membership Meetings, or may have read in recent Labor Bulletin articles, the IBEW locals in California and Nevada have committed to work together to address the problems large non-signatory contractors, such as Helix Electric, present to the fair competitive bidding process.
>
> Helix Electric currently has three large projects in our jurisdiction. The company continues to actively bid multi-million dollar electrical projects and the sheer mention of Helix being on the bidder's list has been enough reason for our signatory contractors not to bid. (EOR, 7.007.)

There is no dispute regarding the above facts. All of the above evidence was presented in Helix's moving papers before the District Court, and none of it was rebutted or objected to by PWCP.

C. Public Works Compliance Program

According to PWCP, its "sole function is to ensure compliance with the prevailing wage laws on public works construction." (EOR, 25.002.) It presently consists of three employees, none of whom are members of organized labor or representatives of management. (EOR, 25.003; EOR, 38.012, 38.030.)

PWCP's primary employee is Kevin Abram, who was hired in September, 2003, and who investigates whether contractors are complying with prevailing wage law in several Northern California counties. (EOR, 26.001-002.) PWCP hired a part-time secretary, a woman named Esther Carney, to assist Abram with word processing in approximately early 2005. (EOR, 38.012, 38.029.) PWCP also recently hired a man named Patrick Kennedy, who assists developers and contractors in the Sacramento area with the permitting process. (EOR, 38.029.)

PWCP does not hold meetings. (EOR, 38.012.) PWCP has no board of directors, and no officers. (EOR, 38.011-012.) It does not appear to have any legal form or structure (i.e., corporation, partnership, etc.). (EOR, 38.022-023.) There is no document in the record which purports to memorialize the creation of PWCP. (EOR, 38.027-028.) Nor is there any document that purports to address or memorialize the governance or operation of PWCP. (EOR, 38.011.)

According to A.C. Steelman, the business manager for IBEW Local 340, PWCP was created in approximately 2001 or 2002. (EOR, 38.024.) Steelman testified that PWCP was created as a "public works compliance program" by the Board of Trustees of the Sacramento Electrical Construction Industry Labor Management Cooperation Trust (the "Trust), although he does not recall if the Board adopted a formal resolution. (EOR, 38.024-027.)

The Trust was created in June, 1990, by virtue of an agreement between IBEW Local 340 and the Sacramento chapter of the NECA (the "Trust Agreement"). (EOR, 25.002-003.) NECA is an organization of electrical contractors that are signatory to a collective bargaining agreement with the IBEW. (EOR, 38.036) No non-union entities are part of the Trust. (EOR, 38.036-037.)

The Trust Agreement contemplates the creation of both a Board of Trustees for the Trust, and a separate "Labor-Management Cooperation Committee pursuant to the Labor-Management Cooperation Act of 1978, 29 U.S.C. § 175a." (EOR, 40.004.) The Trust Agreement requires that this "labor-management cooperation committee" be "made up of equal representation of members appointed by Employer(s) and Union(s)." (EOR, 40.005-006.)

Steelman is the Chair of the Board of Trustees for the Trust. (EOR, 38.022.) According to Steelman, the Board of Trustees and the "labor-management cooperation committee" actually function as the same entity – their members are the same, and no separate meetings are held. (EOR, 38.025-026.) Currently, this entity consists of *three* representatives of IBEW Local 340, and only *one* representative of Sacramento NECA. (EOR, 38.032-033.) It was this entity that purportedly created PWCP, meaning by definition PWCP is not the "labor-management cooperation committee" contemplated in the Trust Agreement.

(EOR, 38.022-028.) It should also be noted that the record contains no evidence that this "labor-management cooperation committee" was itself ever even created.

Pursuant to the Trust Agreement, the Sacramento NECA employers fund the Trust. (EOR, 40.010-011.) The Trust, in turn, funds PWCP's operations. (EOR, 26.002-003.) According to PWCP, it "operates independently from the IBEW and NECA," and "neither the IBEW or NECA instructs the PWCP as to its job duties or directs or oversees the work performed by PWCP." (EOR, 25.003; EOR 38.013-014, 38:034-035.)

PWCP has previously claimed that it does not engage in any organizing activities for the IBEW. (EOR, 25.009.) However, Charles Braun, Helix's superintendent on a project for California State University, Chico, was approached by two men at the Chico jobsite on February 1, 2006. (EOR, 42.002.) One man identified himself as James Nichols, and said he was an organizer from the IBEW. (EOR, 42.002.) The second man identified himself as Kevin Abram, an investigator with PWCP. (Id.) The men indicated they were there to speak to Helix's employees, and gave Braun their business cards. (Id.) This was the second time that Nichols and Abram had visited the Chico jobsite together to speak with Helix employees. (EOR, 42.002, 42.007-007.) PWCP has not denied the evidence set forth in the Braun Declaration.

D. The Present Dispute

Helix is currently performing work as a subcontractor on a public works project known as the Juvenile Hall Expansion and Modifications Project, Job Number 20501 (the "Project"). (EOR, 2.004.) The Project is located within the County of Sacramento (the "County"). (Id.) The Project is based upon a signed contract dated March 9, 2005, between the County (the awarding body) and Broward Brothers, Inc. (the general contractor), and is not scheduled to be substantially complete until the fall of 2006. (Id.)

In approximately October, 2005, Helix discovered that PWCP was seeking the home addresses of its employees working on the Project pursuant to California Labor Code § 1776(e), on the ground that PWCP was a "labor management committee" created under 29 U.S.C. § 175a. (EOR, 2.005-006.) Through its counsel, Helix sent a letter to the County contesting the validity of PWCP's status as a labor management committee and requesting that the County refuse to provide the employee addresses. (Id.)

On October 19, 2005, counsel for the County sent a letter to Helix in which it indicated an intent to begin the process of complying with PWCP's request unless presented with good cause to do otherwise. (EOR, 2.006.) During subsequent discussions with the County, Helix was informed by the County that the only way to prevent the release of the employee addresses was an order from a

court. (Id.) On or about October 31, 2005, Helix informed the County that it would be filing a complaint and would be seeking a temporary restraining order to prevent disclosure of the employee addresses. (Id.) Helix filed its complaint on November 14, 2005, and shortly thereafter filed its motion for a preliminary injunction. (Id.)

SUMMARY OF STATUTES AND CONSTITUTIONAL PROVISIONS

This appeal involves the application and interrelationship of three distinct statutes – (1) California Labor Code § 1776(e), (2) the Labor-Management Cooperation Act of 1978, 29 U.S.C. § 175a, and (3) the Taft-Hartley Act, 29 U.S.C. § 186 – as well as the California Constitution's guarantee of privacy. Because Helix's argument relies heavily on the meaning of these laws, their legislative history, and how they interrelate, Helix has provided a summary below.

A. California Constitution's Guarantee of Privacy

Article I, § 1 of the California Constitution guarantees an "inalienable right of privacy" to all people. See White v. Davis, 13 Cal. 3d 757, 773-74 (1975). This provision was added to the California Constitution pursuant to a 1972 ballot proposition. See id. The ballot pamphlet, which was distributed to the voters prior to the election, states:

> **The right to privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes,** our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communication, and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us. **Fundamental to our privacy is**

the ability to control circulation of personal information. Id. (emphasis added).[2]

California courts have made clear that the "inalienable right of privacy" guaranteed by the California Constitution extends to individual home addresses. Planned Parenthood Golden Gate v. Superior Court, 83 Cal. App. 4th 347, 357-59 (2000).

B. California Labor Code § 1776(e)

California Labor Code § 1776(e) allows any member of the public or any public agency to receive copies of certified payroll records of contractors on public works projects, on the condition that the awarding body or Division of Labor Standards Enforcement first "obliterate" the names, addresses, and social security numbers of the employees. (ADD 002.)

However, § 1776(e) contains an exception to the "obliteration" requirement with respect to "joint labor-management committee[s] established pursuant to the federal Labor Management Cooperation Act of 1978 (29 U.S.C. § 175a)." (Id.) Where such a "joint labor-management committee" requests certified payroll records, the awarding body is only required to "obliterate" the names and social security numbers of the employees – *home addresses are left unredacted.*

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[2] See also ADD 039. "ADD" refers to the Addendum of Law, which is attached to Helix's brief pursuant to Federal Rule of Appellate Procedure 28-2.7. The pages of this Addendum are paginated starting at 001. An index is provided on the first page of the Addendum.

(Id.) The statute places *no restrictions on how the addresses are to be used, or to whom they can be disseminated.* (Id.) Section 1776(e) also permits a "joint labor-management committee" to "maintain an action in a court of competent jurisdiction against an employer who fails to comply with" California's prevailing wage laws. (Id.) See also Labor Code § 1771.2 (providing same).

The relevant provisions in § 1776(e), as well as § 1771.2, were added to the Labor Code by amendment in 2001, pursuant to SB 588. (EOR 9.005-008.) SB 588 was introduced by State Senator Burton and was sponsored by the California-Nevada Conference of Operating Engineers. (EOR, 9.010-011.) Other named supporters of SB 588 were the California Labor Federation AFL-CIO and the State Building and Construction Trades Council of California. (EOR, 9.015.)

The Legislative history of SB 588 reveals that its union supporters argued it was needed to help them "determine when contractors are misclassifying and underpaying skilled workers in violation of prevailing wage laws." (EOR, 9.010-011.) The legislative history contains no discussion of why the home addresses of a contractor's employees are necessary or helpful to this endeavor, particularly when the redacted payroll records available to the general public specify each employee's job classification and wage rate.

A year before Governor Gray Davis signed SB 588 into law, a nearly identical bill – AB 2783 (2000) – was vetoed by Governor Davis. (EOR, 9.014-

015.) The only apparent difference between the two bills was that AB 2783 also permitted employee names, in addition to home addresses, to be disclosed to the "joint labor-management committee." Both bills permitted the disclosure of the employee home addresses.

In his Veto Message, Governor Davis indicated he had "a number of concerns" about AB 2783. First, addressing the use of federally-created labor management committees in enforcing California prevailing wage law, the Governor stated as follows:

> [T]he express Congressional intent in enacting legislation that authorized the establishment of joint labor-management committees was to provide a forum in which the representatives of both management and labor could work together cooperatively to ameliorate or eliminate mutual problems. **The enforcement of labor law does not appear to be a task that falls within the purview of joint labor-management committees.** (ADD 006, emphasis added.)

Second, addressing the employee privacy issue, Governor Davis stated that:

> **The bill contains no provisions that limit the uses to which joint labor management committees may put the personal information with which they are entrusted.** The release of personal information to a joint labor-management committee requires **neither the knowledge nor the consent of affected employees.** Although the obvious intent of this legislation is that the information be utilized solely for the purpose of detecting the underpayment of workers on public works projects, **joint labor-management committees are not bound to adhere to this goal, and the privacy of the affected employees is in no way assured.** This is not the case with the

> public agencies charged with the enforcement of California's labor laws. (EOR, 9.014-015, emphasis added.)

Again, Governor Davis opted not to veto SB 588 just one year later. He did so despite the fact that it failed to remedy the precise concerns he had raised regarding AB 2783. Namely, SB 588 still deputized federally-created labor management committees to enforce California prevailing wage law, and still provided for the disclosure of private employee information to third parties without employee consent, and with no restrictions whatsoever on how that information is to be used, or to whom it can be released. (EOR, 9.006.)

C. The Labor-Management Cooperation Act of 1978 – 29 U.S.C. § 175a

Title 29, § 175a of the United States Code authorizes the Federal Mediation and Conciliation Service to assist in "the establishment and operation of plant, area and industrywide labor management committees." (ADD 007.) The statute requires that these "labor management committees" (a) "have been organized jointly by employers and labor organizations representing employees in that plant, area, or industry," and (b) "are established for the purpose of improving labor management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern." (ADD 007.)

In passing section 175a, Congress issued the following Statement of Purpose:

> It is the purpose of this section
>
> (1) to improve communication between representatives of labor and management;
>
> (2) to provide workers and employers with opportunities to study and explore new and innovative joint approaches to achieving organizational effectiveness;
>
> (3) to assist workers and employers in solving problems of mutual concern not susceptible to resolution with the collective bargaining process;
>
> (4) to study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the plant, area or industry;
>
> (5) to enhance the involvement of workers in making decisions that affect their working lives;
>
> (6) to expand and improve working relationships between workers and managers; and
>
> (7) to encourage free collective bargaining by establishing continuing mechanisms for communication between employers and their employees through Federal assistance to the formation and operation of labor management committees. (ADD 008.)

Section 175a had its origins in Pub. L. 95-524, which in turn was based on S. 2570. (ADD 016-021.) The vast majority of S. 2570 concerned provisions of the "Comprehensive Employment and Training Act." (Id.) A small portion of the law – the portion that concerned labor management committees and that was later codified at § 175a – was termed the "Labor Management

Cooperation Act of 1978." (ADD 020-021.) This portion was largely the brainchild of Senator Jacob Javits from New York. Senator Javitz had introduced similar legislation regarding labor management committees in 1977, via S. 533. (ADD 029-032.)

In remarks to the Senate on August 22, 1978, regarding the portion of S. 2570 that was later codified at § 175a, Senator Javits explained that "for many years" he "had been almost a lone voice in this 'desert'" in "proclaiming the benefits" of pursuing "innovative means to enlarge the commonality of interests which are outside of collective bargaining between labor and management." (ADD 028.) He continued:

> The collective bargaining process is, of course, our principal means for joint determination of the terms and conditions of employment. But there is a need for a new, supplemental dimension in labor management relations in our country, to wit; **a forum in which an ongoing dialog could be established, to discuss and involve workers in matters not addressed normally in the framework of collective bargaining.** I refer to problems in the workplace – **alcoholism, drug abuse, work hazards, continuing education, culture and the arts, recreation, group activity, participation in plant decisionmaking and working life values.** With the proper safeguards to protect the collective bargaining process, joint labor-management cooperative committees can do much to harmonize the relationship between labor and management in the workplace – and stabilize the labor relations climate – in a particular area and bring out new values. This in turn can help to improve employee morale, reduce tensions in the workplace and foster local and regional economic development. (Id., emphasis added.)

Later, on October 13, 1978, Senator Javits echoed these comments. He explained that:

> Such joint [labor management] committees can do much to enlarge the community of interests between workers and management and assist both in **recognizing mutually beneficial solutions to common problems.** They can constitute an enormously useful form for addressing problems such as **alcoholism and drug abuse, work hazards, obsolescent job skills, and production bottlenecks**, and can help to improve communications **by establishing a dialog between labor and management.** (ADD 024, emphasis added.)

One of the concerns that had been raised by labor groups was that the joint labor management committees proposed by Senator Javitz might have the effect of supplanting the collective bargaining process. Towards that end, Senator Javitz explained in his October 13, 1978 remarks that **"section 8(a)(2) of the National Labor Relations Act must be borne in mind and care must be taken to be sure that no labor-management committee activity will provide any efforts of employers intended to bring about actual domination or control of any labor organization or interfere with any rights protected by the NLRA."** (ADD 025, emphasis added.)

Similarly, in remarks to the Senate on January 31, 1977, regarding S. 533 (the precursor to the "Labor Management Cooperation Act" that was added to S. 2570), Senator Javitz explained that:

> [A] working committee relationship between representatives of labor and representatives of management does not necessarily mean that the union's role will be supplanted or that the collective bargaining process will be vitiated ... **[S]o long as the collective bargaining contract remains sacrosanct and the committees restrict their deliberations to non-contract matters, such as efficient machine usage, attracting new industry, work assignments, day to day shop matters, and so forth,** the union's role in the bargaining process can only be strengthened by participation in labor-management committees. (ADD 035, emphasis added.)

Later in those same remarks, Senator Javitz emphasized that "[c]onsistent with the National Labor Relations Act, the contract between the employees and their employer is sacrosanct. **Matters set forth in the collective bargaining contract, such as wages, hours, vacations, overtime, and other benefits and duties, cannot be placed on the agenda of labor-management committee meetings."** (ADD 035, emphasis added.)

D. The Taft-Hartley Act – 29 U.S.C. § 186

The Taft-Hartley Act makes it a federal crime for employers to make any monetary contribution to representatives of organized labor, or for representatives of organized labor to accept such a contribution. (ADD 010.) This general prohibition was put in place to eliminate corruption in the labor movement,

such as instances where employers buy-off union leaders, or union leaders shake-down employers. See United States v. Phillips, 19 F.3d 1565, 1574 (11th Cir. 1994); United States v. Lanni, 466 F.2d 1102, 1103-04 (3rd Cir. 1972).

The Taft-Hartley Act contains several exceptions to this general prohibition. The first three exceptions "describe payments that do not have the potential for corrupting the labor movement." Phillips, 19 F.3d at 1579. These exceptions cover such things as payments in satisfaction of a judgment or settlement, or payment for services rendered by the employee to the employer (even though the employee happens to serve as a union representative). (ADD 010-011.) The last six exceptions in the Taft-Hartley Act "describe payments that could corrupt the labor movement unless certain protective requirements are met." Phillips, 19 F.3d at 1579. Many of these exceptions address payments by employers to employee trust funds, covering things such as healthcare and educational training programs. (ADD 011.)

The final exception in the Taft-Hartley Act permits payments by employers to "a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978." (ADD 011-012.) This exception was added to the Taft-Hartley Act via Pub. L. 95-524, the same piece of legislation that created labor management committees under 29 U.S.C. § 175a. (ADD 021.)

SUMMARY OF ARGUMENT

The District Court's opinion must be reversed, because the District Court committed several errors of law within its preliminary injunction analysis. These errors concerned (a) the level of privacy afforded to employee home addresses; (b) the permissible composition of "labor management committees" under 29 U.S.C. § 175a; and (c) the permissible powers and activities of such committees. In addition to its errors of law, the District Court also misinterpreted and misapplied the relevant facts, thereby abusing its discretion.

First and foremost, the District Court should have granted Helix's request for a preliminary injunction because the balance of hardships tips overwhelmingly in Helix's favor. Weighing in favor of granting Helix's request for an injunction are the very strong and very serious privacy rights of Helix's employees – rights that will be irreversibly compromised if the District Court's order is not reversed. California and federal courts have repeatedly and firmly held that employees enjoy a right of privacy which protects their home addresses from disclosure. The District Court failed to recognize as a matter of law that such privacy rights even exist.

On the other hand, there is no countervailing interest that would warrant ignoring the privacy rights of Helix's employees. The injunction Helix seeks will not prevent PWCP from monitoring public works projects involving

Helix. PWCP remains free to (a) request redacted versions of Helix's payroll records (i.e. versions that disclose the rate of pay, but not the home address of each employee), as the general public can; and (b) attempt to interview Helix's employees at the jobsite. This approach is more than sufficient to enable PWCP to monitor Helix's compliance with California's labor laws.

Helix is also likely to prevail on the merits. First, the District Court's formulation of what constitutes a "labor management committee" under 29 U.S.C. § 175a is deeply flawed as a matter of law. The plain language and legislative history of § 175a make clear that labor management committees were intended to be vehicles *whereby representatives of labor and management would voluntarily come together to discuss matters of mutual concern to the members of the committee, thereby fostering cooperation and communication.* By holding that PWCP – a "labor compliance program" that is not a committee, does not hold meetings, and whose primary employee is neither a representative of organized labor nor management – nonetheless qualifies as a "labor management committee," the District Court created an absurd result that could have profound implications on the administration of federal labor law.

Further, the District Court's holding that "labor management committees" are permitted to enforce state prevailing wage laws is also contrary to § 175a, and could likewise impact the administration of federal labor law. Labor

management committees were intended to address problems that affect the workplace, such as alcoholism, drug abuse, worker hazards, and continuing education – not the payment of wages. If labor management committees are permitted to regulate the affairs of workers and employers who are not even part of the committee – specifically by investigating whether such employers are complying with state prevailing wage laws – there is a substantial risk that the labor movement will be corrupted. Unions and their signatory contractors could extort non-union contractors, all the while avoiding the strict financial reporting requirements that apply to unions and employers, but not labor management committees. Indeed, by permitting "labor management committees" to enforce state prevailing wage laws, Labor Code § 1776(e) conflicts and interferes with the application of federal labor law, and thus is preempted.

Second, the District Court erred when it held that Labor Code § 1776(e) is not preempted by the National Labor Relations Act. The National Labor Relations Board has held that except for limited circumstances not present here, an employer is not required to produce a complete roster of its employees' home addresses to a union who wishes to organize the employer. Because § 1776(e) permits "labor management committees" – by definition entities that always contain representatives of organized labor – to compel the production of such a roster from an employer, it is preempted under both the Garmon and

Machinists doctrines. The District Court erroneously concluded otherwise by ignoring the union aspect of true "labor management committees," and also by giving too much deference to the California legislature's desire to deputize these committees in the enforcement of state law.

Lastly, California Labor Code § 1776(e) violates the right of privacy guaranteed by the California Constitution. California law is clear that private information like home addresses can only be disclosed where there is a compelling need for the information ultimately sought, and no less intrusive means exist for obtaining the information. Section 1776(e) does not – and cannot – meet that stringent test, and thus violates the California Constitution. Section 1776(e) is also unconstitutional because it permits the home addresses of employees to be released to third parties without providing those employees any notice, or obtaining their consent.

As the above makes clear, Helix's appeal presents a number of very serious questions of law. These questions include (1) how far the privacy rights of Helix's employees extend under California and federal law, especially when weighed in the context of prevailing wage enforcement; (2) whether California Labor Code § 1776(e), by permitting the disclosure of employee addresses to third-parties, is even lawful under the California Constitution; (3) whether a one-person compliance monitoring program, with no representatives of labor or management,

can nonetheless be considered a "labor management committee" under 29 U.S.C. § 175a; and (4) whether the enforcement of state prevailing wage laws is a permissible activity for a labor management committee under § 175a.

In sum, a preliminary injunction is necessary here, and the District Court's opinion must be reversed. The balance of hardships tips overwhelmingly in Helix's favor, the District Court committed several legal errors bearing on the merits of this dispute, and Helix's appeal presents many serious and hotly disputed questions of law. There is simply no reason why PWCP should be permitted to rush ahead and violate the privacy rights of Helix's employees at this point in the proceedings, before discovery has taken place and the merits have been resolved on a fully developed record.

ARGUMENT

I.

PRELIMINARY INJUNCTION STANDARDS

A. Appellate Standard of Review

Ordinarily, a district court's decision regarding a preliminary injunction is reviewed on appeal for an abuse of discretion. See Walczak v. EPL Prolong, Inc., 198 F.3d 725, 730 (9th Cir. 1999). However, "a preliminary injunction will be set aside if the district court erred in the legal standards it applied in its review of the probability of success on the merits. A court lacks discretion to apply the law improperly." Wright v. Rushen, 642 F.2d 1129, 1132 (9th Cir. 1981) (citations omitted); see also Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1357 n.3 (9th Cir. 1978) (holding that "appellate courts [can] freely overturn the lower court [decision regarding a preliminary injunction] if it was based on an erroneous conclusion of law").

Also, a district court's decision to deny a preliminary injunction will be set aside if the district court makes clearly erroneous factual findings. A decision is based on clearly erroneous factual findings if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Walczak, 198 F.3d at 730, quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

B. Underlying Test for Preliminary Injunction

In deciding whether such a preliminary injunction is appropriate, courts employ a balancing test, considering the following factors: (a) the moving party's probability of success on appeal, (b) the relative hardships to the parties if injunctive relief is granted (i.e., whether the moving party will suffer irreparable injury absent an injunction versus whether the opposing party would suffer substantial injury were an injunction granted), and (c) the public interest. See Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977); Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991).

The standard for a preliminary injunction forms a continuum. See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983). This continuum represents a sliding scale in which a strong showing on one factor decreases the required showing for the other factors. See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1396-97 n.1 (9th Cir. 1997). The relative hardships to the parties and the public interest are the critical elements in deciding at which point along the continuum a stay or injunction is warranted. See Lopez, 713 F.2d at 1435.

Courts have also explained that where the moving party has raised a "serious question" and the equities tip strongly in his favor, a showing of success on the merits can be less. Id.; see also Regents of Univ. of Calif. v. ABC, Inc., 747

F.2d 511, 515 (9th Cir. 1984). "Serious legal questions" refer to "substantial, difficult and doubtful [questions], as to make them a fair ground for litigation and thus for more deliberative investigation." Republic of Philippines v. Marcos, 862 F.2d 1355, 1361-62 (9th Cir. 1988) (en banc).

II.

THE BALANCE OF HARDSHIPS TIPS OVERWHELMINGLY IN HELIX'S FAVOR

The District Court held that the balance of hardships did not tip in Helix's favor. (EOR, 43.006.) This was wrong as a matter of law, because the District Court failed to recognize the substantial privacy rights of Helix's employees. If the District Court's order is not reversed, the privacy rights of Helix's employees – as well as Helix's rights under federal labor law – will be immediately and irreversibly compromised. On the other hand, if this Court grants Helix's request for a preliminary injunction, PWCP will not be harmed in the slightest, nor has PWCP even alleged that it will be harmed. PWCP will still be permitted to monitor Helix's compliance with California prevailing wage laws. In these circumstances, there is simply no reason whatsoever to rush ahead and permit PWCP to obtain the home addresses of Helix's employees.

A. California and Federal Law Treat Employee Home Addresses As Private Information Entitled to Substantial Protection from Disclosure.

The District Court held that "[t]he disclosure of employee addresses does not, by itself, amount to irreparable injury to [Helix] or [Helix's] employees." (EOR, 43.005.) This was error as a matter of law, as the District Court's opinion did not account for a large body of California and federal law holding that employee home addresses are private information entitled to substantial protection from disclosure.[3]

1. California Law

California courts have made clear that Article 1, Section 1 of the California Constitution creates an "inalienable right" of privacy, and that this right extends to individual home addresses. Planned Parenthood Golden Gate v. Superior Court, 83 Cal. App. 4th 347, 357-59 (2000); see also City of San Jose v. Superior Court, 74 Cal. App. 4th 1008, 1019 (1999) (affirming that employees have a "substantial privacy interest in their home addresses and in preventing unsolicited and unwanted mail").

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[3] See also EOR, 56:004 ("COURT: Mr. Freeman, explain to me the evidence that you presented that demonstrates irreparable harm. MR. FREEMAN: The irreparable harm would be disclosing what is otherwise private information to private parties, the addresses of the employees. COURT: That's it?")

When a party seeking certain information threatens to violate this right to privacy (by, for example, seeking the disclosure of home addresses as part of a larger effort to gather information), that party must show a *compelling need* and that the information sought *cannot be obtained by any less intrusive manner.* See Planned Parenthood, 83 Cal. App. 4th at 357-58; see also Harding Lawson Assoc. v. Superior Court, 10 Cal. App. 4th 7, 10 (1992).

Further, employers do not have the discretion or ability to disregard their employees' privacy rights and voluntarily disclose private information like home addresses to outsiders. Rather, employers are *required by law* to assert and protect the privacy interests of their individual employees. See Board of Trustees of Leland Stanford Junior University v. Superior Court, 119 Cal. App. 3d 516, 525-26 (1981).

2. Federal Law

Federal courts – including the United States Supreme Court and the Ninth Circuit Court of Appeals – have consistently recognized that employees have a substantial privacy interest in keeping their home addresses confidential. Many of these courts reached this result in almost identical circumstances faced by the parties here – an entity seeking disclosure of employee addresses, ostensibly to monitor compliance with prevailing wage law.

In Painting Industry of Hawaii Market Recovery Fund v. United States Dept. of the Air Force, 26 F.3d 1479 (9th Cir. 1994), the Ninth Circuit decided two related cases wherein parties sought the names, addresses, and wage information of employees on federal construction projects pursuant to the Freedom of Information Act. The district court had held that "the employees' modest privacy interest in preventing disclosure of such information when balanced against the significant public interests in monitoring compliance with the Davis-Bacon Act tips decidedly in favor of disclosure." See id. at 1481.

The Ninth Circuit reversed, expressing agreement with those courts "that have considered the issue" and held that "significant privacy interests are implicated by the release of this information." Id. at 1483. The Court explained that "workers on federally-funded construction projects have a substantial privacy interest in information tying their names and addresses to precise payroll figures," id. at 1484 (emphasis added), and that releasing employee address information would constitute a "clearly unwarranted invasion of personal privacy." Id. at 1486 (emphasis added). The Court noted that this was particularly true where those seeking the addresses had "less intrusive means of procuring the information they seek," such as handing out fliers or asking the individual employees to self-report the information. Id. at 1485.

In Sheet Metal Workers International Assoc., Local Union No. 19 v. United States Dept. of Veterans Affairs, 135 F.3d 891 (3rd Cir. 1998), the Third Circuit Court of Appeals undertook an extensive analysis of the relevant law on this point and reached a similar result. In Sheet Metal Workers, a union was engaged in monitoring compliance with the Davis-Bacon Act, which governs federal prevailing wage laws. The union sought employee addresses under the Freedom of Information Act, ostensibly to determine whether the Davis-Bacon Act was being complied with. See id. at 894.

The Third Circuit rejected the union's request. The court noted that "[t]he significant privacy concerns attached to the home and employees' interest in avoiding a barrage of unsolicited contact weighs heavily in our consideration." Id. at 904. The court observed with great concern that "[o]nce the union receives this information, there is no bar to others having unlimited access to it." Id. at 905. Faced with the prospect of "unwarranted intrusion" into the lives of the employees by persons such as marketers or solicitors, the court held that "the privacy interest of the employees in the non-disclosure of their names and addresses substantially outweighs the slight public interest put forth by the union." Id.

The Third Circuit's decision drew heavily from the Supreme Court's decision in United States Dept. of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994). There, the Court also denied a Freedom of Information Act

request by a union to obtain employee addresses. The addresses truly needed and requested by the union were addresses of employees who had *not* joined the union, and *not* otherwise agreed to give the union their address. See id. at 494, n.5.

The Court explained that "[w]hatever the reason that these employees have chosen not to become members of the union or to provide the union with their addresses [] it is clear that they have some nontrivial privacy interest in nondisclosure, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure." Id. at 500-01. Concluding that it was "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions," the Court held that the union was not entitled to the addresses. Id. at 501-02; see also Hill v. Colorado, 530 U.S. 703, 716-17 (2000) (observing that the "right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men," and that this right "has special force in the privacy of the home").

B. PWCP Has Not Shown Any Countervailing Harm Should Helix's Motion for a Preliminary Injunction Be Granted.

The only injunctive relief sought by Helix is an order that would prevent PWCP from obtaining the home addresses of Helix's employees from the State of California and the County. PWCP will not suffer any harm if Helix's request for relief is granted, nor has PWCP even alleged that it will suffer any

harm. PWCP will maintain the ability to monitor Helix and other contractors' compliance with California prevailing wage laws. For example, PWCP will still have the opportunity to interview Helix's employees at the jobsite. PWCP will also have the same rights under California Labor Code § 1776(e) that are currently afforded to the general public, i.e., the right to request payroll records that identify the job classification and wage rate for each employee, but redact each employee's name, social security number, and home address.

PWCP has failed to present any evidence that it cannot effectively monitor prevailing wage compliance in this manner. Because PWCP clearly has a "less intrusive means" of contacting the employees, i.e., approaching them at the jobsite, it has no right to the employees' home addresses. Painting Industry of Hawaii Market Recovery Fund, 26 F.3d at 1485; see also Planned Parenthood, 83 Cal. App. 4th at 357-58. Put differently, where such "less intrusive means" exist, there is no "compelling need" to require disclosure of the home addresses. Planned Parenthood, 83 Cal. App. 4th at 357-58.

In sum, the District Court committed legal errors and abused its discretion when it held that Helix did not meet its burden for the issuance of a preliminary injunction. (EOR, 43.006.) Helix's employees have *substantial privacy rights that will be violated* if their home addresses are released to PWCP, whereas PWCP will maintain its ability to monitor Helix's compliance with

prevailing wage laws, even if it does not receive the home addresses. Accordingly, the District Court's decision should be reversed.

III.

HELIX IS LIKELY TO PREVAIL ON THE MERITS

In addition to the balance of hardships weighing overwhelmingly in Helix's favor, Helix also is likely to prevail on the merits. The various reasons why Helix is likely to prevail on the merits are addressed in greater detail below.

A. PWCP Is Not a Labor Management Committee Under Federal Law.

The evidence before the District Court was undisputed that (a) no PWCP employee is a representative of either labor or management; (b) PWCP is not a committee, and does not hold meetings; and (c) PWCP's sole purpose is to monitor compliance with California prevailing wage laws. (See supra at 7-8.) The District Court nonetheless held that PWCP still qualifies as a "labor management committee" under 29 U.S.C. § 175a. (EOR, 43.007-009.) In so holding, the District Court misconstrued the requirements for a labor management committee under § 175a, and thus committed error as a matter of law.

1. Section 175a Requires That Labor Management Committees Actually Consist of Representatives of Both Labor and Management.

The District Court effectively held that a labor management committee under § 175a need not actually consist of representatives of labor and

management. Instead, it reasoned that the requirement that a labor management committee be "organized jointly by employers and labor organizations" means that any single person, or any group of persons, can be a labor management committee under § 175a as long as they are merely *appointed* by labor and management. (EOR, 43.007.) Because PWCP was purportedly created by the Board of Trustees, which itself is composed of representatives of the IBEW and its signatory contractors, the District Court reasoned that PWCP qualifies as a labor management committee under § 175a. (EOR, 43.008.)

The District Court's approach is deeply flawed, and is incorrect as a matter of law. Both the plain language of § 175a, as well as its legislative history, make it perfectly clear that labor management committees *must actually consist* of members of labor and management who meet together to solve problems. It is undisputed that PWCP does not meet these criteria. (See supra at 7-8.) To accept the District Court's interpretation would result in a massive rewrite of § 175a.

First, § 175a refers to the creation of "labor management committees." (ADD 007.) This is reasonably interpreted to require a "committee" consisting of members of "labor" and "management." See The Wilderness Society v. United States Fish & Wildlife Service, 353 F.3d 1051, 1060 (9th Cir. 2003) (holding that words in a statute "will be interpreted as taking their ordinary, contemporary, common meaning"). Additionally, the Congressional statement of purpose

underlying § 175a states that the first purpose of the law was **"to improve communication between representatives of labor and management."** (ADD 008, emphasis added.)

Second, the legislative history clearly contemplates committees that actually consist of members of labor and management. See United States v. Sherbondy, 865 F.2d 996, 1000 (9th Cir. 1988) (observing that prior legislation and legislative history "ordinarily enable[] us better to understand the true meaning of a legislative enactment"). In his remarks to the Senate on October 13, 1978, Senator Javits touted labor management committees as a means to "help [] improve communications **by establishing a dialog between labor and management."** (ADD 024, emphasis added.)

Further, in Senate hearings regarding S. 533, Senator Javits' opening statement encouraged "the establishment of plant, industry, or areawide labor-management cooperative committees, **in which workers and management meet together to discuss common problems and other matters** in an atmosphere of mutual trust, harmony, and equality." (ADD 031, emphasis added.)

The District Court's opinion does not account for any of the above. Instead, the District Court's analysis hinges on a simplistic interpretation of the phrase "organized jointly by" in § 175a. (EOR, 43.007-008.) This phrase does not mean that a "labor management committee" can exist without being comprised of

representatives of both labor and management, as is the case with PWCP. Instead, it is reasonably interpreted to mean only that federal law will not recognize "labor management committees" that are *unilaterally* created by either organized labor or an employer.

As Senator Javitz explained in his various remarks to the Senate, organized labor had a concern that employers might use labor management committees to dominate unions or subvert the collective bargaining process. (ADD 025, 035.) The "organized jointly by" language simply reflects Congress' intent that both sides of the equation – i.e., organized labor *and* management – each be a willing participant in the creation of the committee.[4] The District Court's interpretation of § 175a ignores this simple premise, and instead creates a nonsensical result.

2. A "Subdivision" of a Labor Management Committee Cannot Be Treated the Same As the Labor Management Committee Itself.

A confusing aspect of the District Court's opinion is the District Court's repeated reference to PWCP as a "subdivision" of a labor management

[4] It is worth noting that labor management committees which unions claimed were unilaterally created by employers were the subject of several hotly contested NLRB cases in the 1990's. See, e.g., Electromation Inc. v. Teamsters Local 1049, 309 NLRB 990 (1992). In the Electromation case, the NLRB essentially declared illegal several "action committees" which had been unilaterally created by Electromation, and which consisted of representatives of both Electromation

committee – not a labor management committee itself. (EOR, 43.008-009.) The District Court's opinion can arguably be interpreted to mean that a "subdivision" of a labor management committee has the same rights under federal law as the labor management committee itself. (Id.) This, too, is erroneous as a matter of law.

First, there is no basis in either the plain language or legislative history of § 175a for holding that a "subdivision" of a labor management committee should be treated the same as the labor management committee itself. Nor does the District Court even attempt to justify its reasoning in this regard. To the contrary, permitting a "subdivision" of a labor management committee to stand in the shoes of the committee itself could have dire consequences for the administration of the Taft-Hartley Act.

Labor management committees are special creatures under federal labor law, in that they are an exception to the Taft-Hartley Act's prohibition on employer payments to unions. Generally speaking, the Taft-Hartley Act makes it a federal crime for employers to make monetary contributions to unions, or representatives of unions. (ADD 010.) This prohibition was put in place to eliminate corruption in the labor movement, such as instances where employers buy-off union leaders, or unions shake-down employers. See United States v. Lanni, 466 F.2d 1102, 1103-04 (3rd Cir. 1972).

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employees and management. Unions had complained that these "action

Certain exceptions to the Taft-Hartley Act exist though. One such exception concerns labor management committees. When Congress authorized the creation of labor management committees in Pub. L. 95-524, it simultaneously provided for the addition of subdivision (c)(9) to 29 U.S.C. § 186. (ADD 021.) This exception permits labor management committees – despite the fact that they consist of representatives of organized labor – to receive monetary contributions from employers, *but only if they conform to the requirements of § 175a.* (Id.)

This last caveat is critical. *If employers are permitted to contribute money to labor management committees who do not conform with § 175a, there is a clear and present danger that the labor movement will be corrupted.* See United States v. Phillips, 19 F.3d 1565, 1579 (11th Cir. 1994) (holding that the last six exceptions in the Taft-Hartley Act "describe payments that could corrupt the labor movement unless certain protective requirements are met"). As Senator Javits explained, "care must be taken to be sure that no labor-management committee activity will provide any efforts of employers intended to bring about actual domination or control of any labor organization or interfere with any rights protected by the NLRA." (ADD 025.)

Under the District Court's formulation, though, a labor management committee funded by an employer could create a "subdivision" consisting solely of

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committees" were being used to subvert the collective bargaining process.

union representatives. This would be permissible, per the District Court's reasoning, because this "subdivision" would have been "organized jointly by" both organized labor and management. (EOR, 43.007-008.) The District Court's logic, then, would permit the employer to funnel monetary contributions to a union (i.e., the "subdivision") via the labor management committee – something that the Taft-Hartley Act prohibits. See Lanni, 466 F.2d at 1108-09 (holding that the Act's prohibition on employer payments "is clearly sweeping in its scope and embraces both direct and indirect payments").

Second, the District Court's holding that a "subdivision" of a labor management committee is the same as the labor management committee itself ignores that California Labor Code § 1776(e) does not permit a "subdivision" of a labor management committee to obtain employee home addresses. Instead, it permits a "joint labor-management committee established pursuant to ... 29 U.S.C. § 175a" to obtain the home addresses. (ADD 002.) Here, *PWCP* is requesting home addresses under § 1776(e), *not* the Board of Trustees/labor management cooperation committee which purportedly created PWCP. (EOR, 2.005-006.) By focusing on whether PWCP is a "subdivision" of a labor management committee, the District Court ignores both the record and the plain language of § 1776(e).

3. Section 175a Does Not Permit Labor Management Committees to Enforce State Prevailing Wage Laws.

The District Court held that PWCP is a labor management committee under § 175a – even though its sole purpose is to monitor compliance with state prevailing wage law – because "enforcement of prevailing wage laws is merely a specific implementation of the broader purposes for which § 175a was enacted." (EOR, 43.011.) Specifically, the District Court reasoned that permitting labor management committees to enforce prevailing wage laws furthers the purposes of § 175a, such as "enhanc[ing] the involvement of workers in making decisions that affect their working lives," and "expand[ing] and improv[ing] working relationships between workers and managers." (EOR, 43.010.) The District Court's holding in this regard was based on an erroneous interpretation of § 175a, and thus should be reversed as a matter of law.

First, there is not a single shred of statutory text or legislative history suggesting that labor management committees are permitted to directly regulate the affairs of employers *who are not even a part of the committee.* Rather, the legislative history of § 175a makes clear that labor management committees were intended to be vehicles whereby representatives of labor and management would *voluntarily* come together to discuss matters of *mutual concern to the members of the committee*, thereby fostering cooperation and communication.

As Senator Javits explained, labor management committees were intended to **"help improve communications by establishing a dialog between labor and management."** (ADD 024, emphasis added.) Once established, this "dialog" would "assist [workers and management] in recognizing **mutually beneficial solutions to common problems."** (Id.) Permitting labor management committees to investigate and harass employers *who are not even a part of the committee* (but are actually hostile to it) can hardly be said to "expand and improve working relationships between workers and managers." (EOR, 43.010.)

Second, there is likewise not a shred of statutory text or legislative history suggesting that labor management committees are permitted to enforce state prevailing wage laws. As the District Court itself admits, "[c]ompliance monitoring efforts are not specifically enumerated in § 175a" as a legitimate purpose for a labor management committee. (EOR, 43.009.) Governor Gray Davis made the same observation when he vetoed AB 2783, the predecessor to the bill that led to Labor Code § 1776(e). (ADD 006.)

Senator Javits, on the other hand, *specifically listed* the types of issues labor management committees were intended to address. He listed various "problems in the workplace," such as **"alcoholism, drug abuse, work hazards, continuing education, culture and the arts, recreation, group activity,**

participation in plant decisionmaking and working life values." (ADD 028, emphasis added.)

Neither Senator Javitz, nor any other member of Congress, listed enforcing state labor laws as being among the permissible activities for labor management committees. Quite the contrary. Senator Javits actually emphasized – at the request of union leaders, no less – that labor management committees *specifically refrain* from addressing topics that are traditionally the subject of collective bargaining, so as to not supplant the collective bargaining process. (ADD 035.) Of course, nothing is more central to the collective bargaining process than wages. As Senator Javits explained, **"[m]atters set forth in the collective bargaining contract, such as wages, hours, vacations, overtime, and other benefits and duties, cannot be placed on the agenda of labor-management committee meetings."** (ADD 035, emphasis added.)

Instead, federal law is clear that it is the job of unions – not labor management committees – to pursue the matters listed above. See 29 U.S.C. § 152(5) (defining "labor organizations" as existing "for the purpose in whole or in part, of **dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.**") (emphasis added). Yet the District Court's opinion – in particular, its incredibly broad interpretation of the purposes of § 175a, such as "enhanc[ing] the involvement of workers in

making decisions that affect their working lives" – would permit labor management committees to undertake activities that are instead the responsibilities of unions. (EOR, 43.010.) This, in turn, could have dire consequences for the administration of federal labor law, as the following section discusses.

In sum, by interpreting § 175a to permit labor management committees to enforce state prevailing wage laws – particularly as against employers *who are not even part of the labor management committees* – the District Court went far beyond the plain language and legislative history of § 175a, and accordingly erred as a matter of law.

B. By Deputizing Labor Management Committees to Enforce State Prevailing Wage Laws, California Labor Code Section 1776(e) Conflicts and Interferes With Federal Law, and Is Thus Preempted.

Implicit in the District Court's holding is that California Labor Code § 1776(e), by permitting labor management committees to enforce state prevailing wage laws, is consistent with federal law. (EOR, 43.010, 43.012.) Helix submits that this is another legal error which warrants reversing the District Court's decision as a matter of law. Contrary to the District Court's holding, § 1776(e) is invalid under principles of both field and implied conflict preemption.

First, "[f]ield preemption occurs when the federal statutory scheme is sufficiently comprehensive to infer that Congress left no room for supplementary regulation by the states." Gadda v. Ashcroft, 363 F.3d 861, 869 (9th Cir. 2004).

"When the federal government completely occupies a given field or an identifiable portion of it ... the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212-13 (1983), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

As described at length above, labor management committees are creatures of *federal* law. Their purpose and permissible activities are "comprehensive[ly]" set forth in 29 U.S.C. § 175a and its legislative history. Gadda, 363 F.3d at 869. There is no basis to "infer" that Congress intended for state legislatures to enact "supplementary regulation[s]" that would expand what labor management committees can do. Id. Yet the California legislature did just that when it passed Labor Code § 1776(e). Because § 1776(e) expands the powers of labor management committees beyond what is set forth in federal law, it is preempted.

Second, implied conflict preemption occurs where a state law, "under the circumstances of th[e] particular case ... stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress – whether that 'obstacle' goes by the name of conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference, or the like." Geier v. Am. Honda Motor Co., Inc., 529 U.S. 861, 873 (2000). The

Court's "ultimate task in any preemption case is to determine whether state regulation is consistent with the structure and purpose of the [federal] statute as a whole." Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

Section 1776(e) is preempted because it "interfere[s]" with the administration of federal labor law, in particular the Taft-Hartley Act. Geier, 529 U.S. at 873. As noted above, an exception in the Taft-Hartley Act permits labor management committees – despite the fact that they consist of representatives of organized labor – to receive monetary contributions from employers, but only if they conform to the requirements of § 175a. (ADD 011-012.) The Taft-Hartley Act was enacted to eliminate corruption in the labor movement, such as instances where employers buy-off union leaders, or unions shake-down employers. See Lanni, 466 F.2d at 1103-04.

California Labor Code § 1776(e) interferes with 29 U.S.C. § 186(c)(9) by expanding the powers of labor management committees beyond what was provided for in 29 U.S.C. § 175a. This, in turn, could lead to corruption in the labor movement. For example, under § 1776(e), a labor management committee could harass non-union contractors *who are not even part of the committee* by conducting investigations and filing meritless prevailing wage lawsuits against them. The "labor" half of the labor management committee has its interests served by this approach, because such investigations and lawsuits pressure the non-union

contractors to sign a collective bargaining agreement. The "management" half of a labor management committee also benefits from this conduct, since they are signatory to a collective bargaining agreement with the "labor" half of the committee, and thus are *direct competitors* of the non-union contractors being extorted.[5]

The above scenario is entirely "[in]consistent with the structure and purpose" of the federal statutory scheme governing labor management committees. Gade, 505 U.S. at 98. Again, labor management committees were intended to be vehicles whereby representatives of labor and management would *voluntarily* come together to discuss matters of *mutual concern*, thereby fostering *cooperation* and *communication*. (See supra at 18-21.) They were not intended to be vigilante

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[5] This very case is a perfect example of this phenomenon, and demonstrates that the threats posed by § 1776(e) are not merely hypothetical, but are quite real. In short, the two entities that created PWCP have tremendous incentive to extort Helix. IBEW Local 340 has long been trying to organize Helix's workers, (EOR, 7.002-003), and the Sacramento NECA contractors (who are signatory to a collective bargaining agreement with IBEW Local 340) perceive Helix as a huge threat to the viability of their businesses. (EOR, 7.007.) The fact that these two groups would create an entity to investigate and file claims against Helix is not surprising. It is especially not surprising when one considers that the same law firm represents IBEW Local 340, Sacramento NECA, *and* PWCP. (EOR, 38.002, 38.038-043.) Indeed, this law firm has published a manual titled "Using the California Labor Laws Offensively: Organizing Through Enforcement of State Employment Laws." (EOR, 38.002-003, 38.044-047.) The 2004 version of this manual notes that "[t]he California Labor Code and related employment laws" – which includes § 1776(e) and the special privileges it affords labor management committees – **"are powerful weapons unions should wield to organize workers and to attack non-union employers."** (EOR, 38.045, 38.047.)

groups, free to investigate and extort employers *who are not even a part of the labor management committee.* As discussed in the preceding section, dealing with employers regarding grievances on matters such as wages is the province of *unions*, not labor management committees.[6]

By greatly distorting and expanding both the role and the powers of labor management committees, § 1776(e) "stands as an obstacle to the accomplishment and execution" of Congress's intent in creating labor management

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[6] It must be emphasized that this distinction is highly relevant in light of the financial reporting requirements to which both unions and employers are subject under federal law. See 29 U.S.C. § 401 et seq. ("Labor-Management Reporting and Disclosure Act of 1959"). In short, 29 U.S.C. § 431(b) requires unions to file annual reports detailing their monetary receipts and disbursements. Likewise, 29 U.S.C. § 433(a) requires employers to file an annual report listing any payments or loans made to any union, except the employer does *not* need to disclose payments to *labor management committees* made pursuant to the Taft-Hartley Act. See id. at subd. (a)(1)(B). Violations of these provisions give rise to civil and criminal penalties. See id., §§ 439 and 440. If, as the District Court reasoned, and § 1776(e) permits, the activities of labor management committees and unions are allowed to overlap, these reporting requirements will be rendered meaningless. Employers will fund labor management committees, who in turn will use the money to do what unions do (such as harass and attempt to organize the employer's competitors, as is the case here). The employer will not have to report the contribution, because it was made to a labor management committee – not a union. Similarly, unions will use labor management committees to undertake activities they otherwise would have done in their own name (such as organizing, or filing complaints regarding wages), and finance the activities with employer contributions. The union will not have to report the contribution, because it was received by – and the activities undertaken in the name of – the labor management committee, not the union. By greatly expanding the role of labor management committees, both the District Court's opinion and Labor Code § 1776(e) create a massive loophole in these reporting requirements.

committees, and then making them an exception under the Taft-Hartley Act. Geier, 529 U.S. at 873; see also United Farm Workers of America, AFL-CIO v. Dutra Farms, 83 Cal. App. 4th 1146, 1157 (2000) (surveying federal law and observing that "the judicial tendency has been to further the legislative objectives by interpreting the [Taft-Hartley Act] in ways which strengthen the reach of the statute, and which close loopholes, rather than in ways which narrow the statute's sweep"). Accordingly, § 1776(e) is preempted.

C. By Permitting a Union to Obtain a Roster of Employee Home Addresses, Section 1776(e) Is Also Preempted By the National Labor Relations Act.

The District Court also erred as a matter of law when it held that § 1776(e) is not preempted by the National Labor Relations Act ("NLRA"). (EOR, 43.011-017.) The National Labor Relations Board ("NLRB") has clearly stated that except for limited circumstances (which are not present here), a union attempting to organize an employer cannot compel – and the employer is under no obligation to provide – a roster of employee home addresses. Because § 1776(e) conflicts with this federal rule by giving unions the right to obtain such a roster of employee addresses, it is preempted. The District Court improperly concluded otherwise by ignoring the union aspect of labor management committees, and also

by giving too much deference to the California legislature's desire to deputize federal labor management committees.[7]

1. The NLRB's Decision in *Technology Service Solutions*

In Technology Service Solutions and International Brotherhood of Electrical Workers, AFL-CIO, Local 111, 332 NLRB No. 100 (2000), the NLRB addressed a union's allegation that an employer committed an unfair labor practice by refusing to provide the union with a list of names and addresses of its employees. Id. at 1096.

Surveying prior decisions, the NLRB held that this was not an unfair labor practice, because **"an employer has no obligation to provide the names and addresses of its employees to a union that wishes to organize them."** Id. at 1098 (emphasis added). To the contrary, "[u]nless ordered as an unfair labor practices remedy, an employer's provision of its employees names and addresses to a union is required only when, following the union's filing of an election petition accompanied by a sufficient showing of interest, the [NLRB] directs an election or approves the parties' consent-election agreement." Id. The NLRB explained that

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[7] Because the District Court's NLRA preemption holding was premised on two erroneous legal conclusions, i.e., (a) that labor management committees can exist under 29 U.S.C. § 175a without an organized labor component, and (b) that the California legislature is permitted to deputize labor management committees in the enforcement of state prevailing wage laws, (see infra at 56-58), Helix submits that *de novo* review is appropriate here as well. See Wright, 642 F.2d at 1132.

"application of a lesser standard" would "tend to undermine the careful balance drawn by" prior NLRB decisions. Id. at 1099.

2. *Garmon* and *Machinists* Preemption

The Supreme Court has articulated two distinct preemption theories in connection with the NLRA. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 748-49. These two theories are "Garmon preemption," as expressed in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), and "Machinists preemption," as expressed in Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976).

"Garmon preemption is 'intended to preclude state interference with the [NLRB's] interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.'" Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406, 1412 (9th Cir. 1996), quoting Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 613 (1986). Where a state law "regulate[s] conduct so plainly within the central aim of federal regulation [that it] involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law," thus creating a "potential frustration of national purposes," the state law is preempted Garmon, 359 U.S. at 244.

On the other hand, "Machinists pre-emption preserves Congress' intentional balance between the uncontrolled power of management and labor to

further their respective interests." Bldg. and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 226 (1993). Under this doctrine, a state cannot "deny[ ] one party ... a weapon that Congress meant him to have available," because such a state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Machinists, 427 U.S. at 150, 151.

The Supreme Court's NLRA preemption doctrines have long been centered around reinforcing the "purpose of the [NLRA, which] was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.'" NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971), quoting Garner v. Teamsters Union, 346 U.S. 485, 490 (1953).

3. The District Court's Holding That § 1776(e) Is Not Preempted Ignores the True Nature of Labor Management Committees, and Gives Too Much Deference to the California Legislature.

Federal law could not be more clear – except for limited circumstances not present here, unions seeking to organize an employer cannot compel the production of a roster of employee addresses. This rule is based on the NLRB's "careful balan[cing]" of the respective rights of unions and employers. Technology Service Solutions at 1099. As the Supreme Court has explained, such a rule is the prerogative of the NLRB. Metropolitan Life Ins. Co., v. Mass.

Travelers Ins. Co., 471 U.S. 724, 748 (1985) (holding that the NLRB has "the primary jurisdiction ... to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA").

Section 1776(e) conflicts with and frustrates the enforcement of this rule, and is thus preempted under both Garmon and Machinists. In short, § 1776(e) permits labor management committees to compel the production of a complete roster of employee addresses. As detailed *supra* at Section III.A, labor management committees *always* contain representatives of organized labor. Further, § 1776(e) contains no restrictions on how labor management committees use or disseminate the employee addresses they receive. Thus, by definition § 1776(e) permits unions to compel the production of a complete roster of employee addresses – something the NLRB has plainly stated they cannot do. This, in turn, gives unions an additional weapon to use against employers (and correspondingly deprives employers of a weapon they had).

The District Court's holding that § 1776(e) is not preempted by Technology Service Solutions is based upon several errors in logic. First, the District Court relied heavily on the distinction between unions and labor management committees. The District Court held that "PWCP is not a union," nor is it "controlled by a union," (even though three of the four Trustees are union officers). (EOR, 43.012.) It also reasoned that Technology Service Solutions was

inapposite because "Helix is under no obligation to provide a union with the addresses of its employees." (EOR, 43.017.) Instead, it is only obligated to provide a labor management committee with the addresses. (Id.)

The District Court's distinction is not a meaningful one. A *real* labor management committee must *always* consist of members of organized labor. (See supra at Section III.A.1.) When it comes to the gathering of information like employee addresses, what belongs to the labor management committee *by definition also belongs to the union.* This is particularly true in the case of § 1776(e), which places no limitations on how the labor management committees use or distribute the addresses. (ADD 020.)

Although the District Court is correct that PWCP is not a union, and does not consist of any union members, this fact does not lead to the conclusion that § 1776(e) is not preempted. Instead, *it means that PWCP is not a true labor management committee.* If PWCP were a true labor management committee, it would have union membership. In those circumstances, the ability of PWCP – and by extension the IBEW – to obtain a complete roster of the home addresses of Helix employees, would squarely implicate the contrary rule of Technology Service Solutions.[8]

[8] Nor is it even sound, based on the existing record, for the District Court to minimize PWCP's union ties. To date Helix has only conducted very limited discovery, and yet the record is undisputed that (a) the IBEW is engaged in a long-

Second, the District Court's preemption ruling is wrong because it mistakenly relies on California's interest in creating and enforcing minimum labor standards. (EOR, 43.013-014.) Although the District Court is correct that "wages and prevailing wage laws are a subject of traditional state concern," (id.), the District Court's reasoning misses the mark. Section 1776(e) does not establish minimum labor standards. Instead, it empowers a *federally-created entity* – labor management committees – to enforce state labor law, in part by giving them the right to obtain the home addresses of employees on public works jobs. This goes far beyond matters that are traditionally a subject of state concern. As already discussed *supra* at Section III.B, the California legislature cannot expand the powers of a federally-created entity like labor management committees. What labor management committee are permitted to do is a matter of *federal*, not state, concern.

In sum, because the NLRB has held that unions have no right to compel the production of a complete roster of employee addresses under the

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standing effort to organize Helix's employees, (EOR, 7.002-003); (b) PWCP was created and is funded by a Trust consisting of the IBEW and its signatory contractors, (EOR, 26.002-003); and (c) the Board of Trustees for this Trust is currently composed of three IBEW representatives and only one NECA representative, (EOR, 38.032-033.). Further, Helix has presented unrebutted evidence that PWCP has visited its jobsite with the IBEW. (EOR, 42.002-003.) Presumably, PWCP and the IBEW organizers consider their activities complementary or synonymous with each other. Based on this record, permitting

present circumstances, and because Labor Code § 1776(e) conflicts and interferes with that rule by permitting unions to do just that, it is preempted.

D. Section 1776(e) Also Violates the California Constitution's Guarantee of Privacy.

There is one additional reason why Helix is likely to prevail on the merits. PWCP has no right to obtain the home addresses of Helix's employees from certified payroll records, because § 1776(e) violates the California Constitution's guarantee of privacy.[9] As stated earlier, under the California Constitution private data like home addresses can *only* be disclosed where there is a *compelling need* for the information ultimately sought, and *no less intrusive means* exist for obtaining the information. See Planned Parenthood Golden Gate, 83 Cal. App. 4th at 357-59). Section 1776(e) does not – and cannot – meet this stringent test. See supra at Section II.

PWCP to obtain the home addresses of Helix's employees poses a known and undeniable threat to the rule of Technology Service Solutions.

[9] Defendants-Appellees may contend this issue was not presented to the District Court. First, it was expressly presented to the District Court when Helix sought an injunction pending appeal, which the District Court denied. Second, it is a purely legal issue that can and should be considered by the Court. See Arizona Cattle Growers' Assoc. v. United States Fish and Wildlife, 273 F.3d 1229, 1241 (9th Cir. 2001). The parties submitted evidence and argument before the District Court regarding the legislative history of § 1776(e), meaning that no party is prejudiced by the record. (EOR, 11.008-010; EOR, 25.006-008; EOR 29.002-003.) Further, the parties are free to present the Court with additional legal arguments regarding the genesis and scope of § 1776(e). Because the resolution of this issue will have profound implications on this case, it should be considered by the Court.

The legislative history of SB 588 – the bill that led to § 1776(e) – contains no discussion regarding this balancing test, or how the bill complies with the test. (EOR, 9.010-017.) The legislative history only restates the argument that the state agencies entrusted with enforcing California' labor law are understaffed, and that the union sponsors of the bill "are unable to determine when contractors are misclassifying and underpaying skilled workers in violation of prevailing wage laws." (EOR, 9.011.) At most, this evidences a need to enlist private entities in the enforcement of prevailing wage law. It does not address in any way whether there was a compelling need for *employee home addresses to be disclosed* to those entities, or that there were *no less intrusive means* by which those entities could monitor employer compliance with the law.

To the contrary, all indications are that the legislature *knew* that SB 588 inappropriately impinged on employee privacy. Governor Davis justifiably vetoed and criticized AB 2783 (the predecessor bill to SB 588) by observing that it (a) contained no limitations on the labor management committee's use and dissemination of the personal information, and (b) did not provide any notice to the affected employees, or require that they give consent, prior to disclosure. (EOR, 9.014-015.) *Neither of these concerns was addressed or remedied by SB 588*, yet the legislature passed the bill, and Governor Davis inexplicably opted to sign it into law. (EOR, 9.006.)

There is simply no legislative record – nor any sound reason – supporting the notion that the home addresses of employees *must* be disclosed to labor management committees to permit them to monitor employer's compliance with California's prevailing wage laws. For this reason, § 1776(e) violates the California Constitution's guarantee of privacy.[10]

IV.

HELIX'S APPEAL PRESENTS MANY SERIOUS QUESTIONS OF LAW

As the preceding discussions make clear, there are a number of serious questions of law presented in Helix's appeal. They include:

- (1) how far the privacy rights of Helix's employees extend under California and federal law, especially when weighed in the context of prevailing wage enforcement;

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[10] There is an additional reason why § 1776(e) violates the California Constitution. Section 1776(e) permits the home addresses of employees to be released to third parties *without providing those employees any notice, or obtaining their consent.* This is contrary to the right to privacy guaranteed by the California Constitution. (ADD 039 ("Fundamental to our privacy is **the ability to control circulation of personal information.**"), emphasis added.) It is also contrary to United States Supreme Court precedent. See Rowan v. Post Office Dept., 397 U.S. 728, 737 (1970) (affirming that the Court "has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property"). It should be noted that this precise issue – i.e., whether California citizens have the affirmative right to prevent the disclosure of their home addresses to third parties – is the subject of a Court of Appeal decision currently pending review in the California Supreme Court. See Pioneer Electronics (USA), Inc. v. Superior Court, 27 Cal. Rptr. 3d 17 (2005), review granted by Pioneer Electronics v. Superior Court, 32 Cal. Rptr. 3d 3 (2005).

- (2) whether California Labor Code § 1776(e), by permitting the disclosure of employee addresses to labor management committees, is even lawful under the California Constitution;

- (3) whether § 1776(e), by permitting labor management committees to obtain a roster of employee addresses, is preempted by federal labor law;

- (4) whether a one-person compliance monitoring program, with no representatives of labor or management, can nonetheless be considered a "labor management committee" under 29 U.S.C. § 175a;

- (5) whether the enforcement of state prevailing wage laws is a permissible activity for a labor management committee under § 175a; and

- (6) whether § 1776(e), by permitting labor management committees to enforce state prevailing wage laws, conflicts and interferes with federal law, and is thus preempted.

The fact that California Labor Code § 1776(e) arguably violates the California Constitution's guarantee of privacy *by itself* is a sufficiently serious question of law to warrant granting Helix's request for a preliminary injunction. As noted supra at n.10, the California Supreme Court is currently considering a case involving the privacy of home addresses, and whether those addresses can be released to third parties without giving the individual notice or obtaining his or her consent. This Court should not rush ahead and permit PWCP to obtain the confidential home addresses of Helix's employees when the statute that enables PWCP to request the addresses – § 1776(e) – is arguably unconstitutional, and thus unenforceable.

V.

CONCLUSION

For the foregoing reasons, Helix respectfully requests that the Court reverse the District Court's decision, grant Helix's motion for a preliminary injunction, and remand to this action to the District Court for further proceedings.

DATED: April 6, 2006

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By _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, I hereby certify that the attached Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points, and contains 12,662 words, according to the counter of the word processing program with which it was prepared.

DATED this 6th day of April, 2006.

By:_____

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Helix is not aware of any related case pending in the Ninth Circuit Court of Appeals.