

FACT SHEET: Barke et al. v. Banks et al.

Free Speech Case Challenging California Gag Law

PLAINTIFFS: A group of seven public officials serving on their local school boards or city councils: Jeffrey Barke, Laura Ferguson, Phillip Yarbrough, Rodger Dohm, Ed Sachs, Jim Reardon, and Leighton Anderson.

DEFENDANTS: Eric Banks and other members of the California Public Employment Relations Board (“PERB”), and J. Felix de la Torre, General Counsel of PERB.

STATUS: Case filed in federal district court for the Central District of California on February 21, 2020.

SUMMARY: A 2018 California statute prohibits public employers, including many elected officials, from making statements that might “deter or discourage” public employees or applicants from membership in a public employee union. The plaintiffs, who are all elected public officials, are challenging the law as a violation of the First Amendment of the U.S. Constitution.

PLAINTIFFS' ARGUMENT: California Government Code Section 3550 unconstitutionally censors viewpoints that are critical of public employee unions on the basis of a vague and shifting standard that makes it impossible to know ahead of time what speech is prohibited. The plaintiffs have documented numerous instances where their ability to participate in public discussion over serious issues has been limited because of the statute. The California School Boards Association has issued legal advice counseling Board members to be mindful of their communications with the public and school employees in response to Section 3550. Even objectively accurate, factual statements about union negotiating positions on budgets, salaries, and benefits, or responding to constituent questions about union policies can trigger a complaint.

IMPACT: Because of this unconstitutional statute, school boards and local municipal governments have instructed elected officials to steer clear of public comments on all union-related issues to avoid triggering a complaint. The statute is a gag rule that forces all public employees keep silent on important issues for fear that it might trigger a complaint and lead to years of costly litigation.

CONSTITUTIONAL ISSUE: It is well-settled that federal and state governments may not favor or disfavor speech based on the point of view being expressed. Yet Section 3550 clearly punishes one side of the debate about union policies. It imposes penalties on speech that the unions consider unfavorable while leaving untouched speech that is supportive of the unions.

It is also settled in law that any speech restrictions must make clear what speech is covered so that individuals can reasonably determine in advance what speech is out of bounds. This statute does not make this distinction and public officials are left in the dark about what is permissible and what is not. As a result, the plaintiffs feel they cannot say anything about unions — even stating basic facts — without fear of reprisal.