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PHONE: (661) 636-4830 • FAX: (661) 636-4843
E-mail: sls@kern.org • www.schoolslegalservice.org

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BARKE V. BANKS—HOW FAR DOES GOVERNMENT CODE SECTION 3550 GO WHEN DISCUSSING PUBLIC SECTOR UNIONS?

The United States Court of Appeals for the Ninth Circuit recently decided a pre-enforcement challenge to California Government Code section 3550 from a group of elected local officials (which included several school board members) on grounds the statute chills their First Amendment right to speak on issues relating to public-sector unions.[1] Government Code section 3550 provides that "public employer[s] shall not deter or discourage public employees . . . from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization." The named defendant in the case, the California Public Employment Relations Board (PERB), which enforces section 3550, had not taken any action against the local officials or their agency employers. The local officials nevertheless argued that after section 3550's enactment in 2017, they have wholly refrained from speaking about issues relating to public unions for fear of facing an unfair labor practice charge and the resulting harm to their reputation, their ability to serve the public agency effectively, and the ability to be re-elected to public office.[2] Five public-sector unions joined the case with PERB, including the California Teachers Association (CTA) and the California School Employees Association (CSEA).

According to PERB, section 3550 was part of a broad legislative package in 2018 designed to address the impact of the United States Supreme Court's decision in *Janus v. American Federation of State, County & Municipal Employees, Council 31* (*Janus*). In *Janus,* the United States Supreme Court held that the First Amendment barred "States and public-sector unions" from "extract[ing] agency fees from nonconsenting employees."[3] The 2018 amendment added the language prohibiting public employers from deterring or discouraging public employees from authorizing dues or fee deductions presumably to reduce

[1] *Barke v. Banks*, No. 20-56075 (9th Cir. Feb. 7, 2022).
[2] As a specific example, one school board trustee testified that in his 2012 campaign, he stated, "Now more than ever, our school board must focus on education and not union contracts that protect senior staff," and that "I am able to see past the heated rhetoric of education insiders to protect our students and schools." The trustee member claimed he would not be able to make such a statement today because that would give rise to a violation of section 3550 and a charge against the district.
[3] *Janus v. American Federation of State, County & Municipal Employees, Council 31* (2018) 138 S. Ct. 2448, at 2486.

the financial impact of the *Janus* decision on public-sector unions. The public officials argued that section 3550 is so broad that it even prevents them from restating the decision in *Janus*.

The district court dismissed the case based on two grounds argued by PERB and the union defendants. First, the public officials lacked standing to sue because section 3550 is enforceable against public employers, not public officials individually. Further, no evidence was presented of a "concrete plan to violate" section 3550, "let alone one in which it would not be clear whether [the public official] was speaking in their official or individual capacity." Second, and for the same reasons as the first, the case was not constitutionally ripe for review. The public officials had not shown they would suffer any hardship if they could not obtain pre-enforcement review.

The Ninth Circuit agreed with the district court's lack of standing determination and dismissed the case. To have standing to sue, the public officials would need to show (1) they suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury was likely caused by the defendant (PERB); and (3) the injury would likely be redressed by the courts. In other words, self-censorship is a constitutionally sufficient injury so long as it is based on a real and well-founded concern the statute will be enforced. Here, the Ninth Circuit held, section 3550 does not regulate speech by public officials in their individual capacities. The statute only impacts them to the extent their speech can be attributed to their "public employer[s]." As held in *Garcetti v. Ceballos,* "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," and so restrictions on such speech do not affect the employees' individual First Amendment rights.[4] Similarly, section 3550 was held not to regulate public officials' individual speech, and any restriction section 3550 does impose on public officials' ability to speak on behalf of the agency employer does not injure the public officials' individual First Amendment rights.

In arguing against a credible threat that section 3550 would be enforced as feared by the public officials, PERB agreed that much of the speech the public officials want to engage in – such as campaign statements, statements made during debates, and statements to constituents – is individual speech to which section 3550 does not apply. In PERB's view, it is unreasonable to attribute statements by an individual board member during a meeting of the board as a whole, at least where the meeting is attended by multiple board members and there are no other indicators that the board member purports to speak on the board's behalf. The union defendants took the same position, stating "[s]ection 3550 does not prohibit [public officials] from expressing their own personal policy preferences during legislative or electoral debates or in meetings with constituents. Reasonable observers understand the difference between an official expressing personal policy views and an official speaking for or threatening to take action on behalf of the government." Given these concessions, the court held that the public officials failed to establish a credible threat that PERB would enforce section 3550 in a manner inconsistent with PERB's interpretation of the statute.

The Ninth Circuit also declined the public officials' request to clarify the rule that a public official's, or agent's, speech can only be attributed to the public agency employer, or the agent's principal, if the public official/agent both has actual authority to make the statement and expressly claims to be speaking on behalf of the agency/principal. By applying this test, the public officials asserted their concerns

[4] *Garcetti v. Ceballos* (2006) 547 U.S. 410, 421-422.

with section 3550 would be alleviated because they would know when their statements would be attributed to the agency employer. The court noted, however, that the law does not support this proposition given the concept of apparent authority, where a reasonable observer would view the statement made to be a statement of the government. There is, therefore, no "ironclad requirement that an agent have actual authority to make a statement, and claim to have such authority, before the statement can be imputed to the agent's principal."

The Center for Individual Rights (CIR) and the California Policy Center (CPC) represent the seven public officials named in the lawsuit, including the board members, who claim section 3550 prevents elected school officials from debating union positions on issues like tenure, class size, school assignment policies, and other important issues of public concern. Whether CIR and CPC continue their challenge of section 3550 to the United States Supreme Court is yet to be determined. We will keep you updated if review by the Supreme Court is requested and granted.

Please contact Schools Legal Service with any questions you may have about this case or other First Amendment issues that affect public school employers.

Kelly A. Lazerson