

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
DAVID A. SCHWARZ (Cal. Bar No. 159376)
3 dschwarz@sheppardmullin.com
JAY T. RAMSEY (Cal. Bar No. 273160)
4 jramsey@sheppardmullin.com
ALEXANDRA M. JACKSON (Cal. Bar No. 327689)
5 ajackson@sheppardmullin.com
1901 Avenue of the Stars, Suite 1600
6 Los Angeles, California 90067-6055
Telephone: 310.228.3700
7 Facsimile: 310.228.3701

8 LAW OFFICE OF MARK W. BUCHER
9 Mark William Bucher (Cal. Bar No. 210474)
10 markb@calpolicycenter.org
18002 Irvine Blvd Ste 108
11 Tustin, CA 92780-3321
Telephone: 714.573.2201
12 Facsimile: 714.573.2297

CENTER FOR INDIVIDUAL RIGHTS
Michael E. Rosman
rosman@cir-usa.org
1100 Connecticut Ave., NW, Suite 625
Washington, DC 20036
Telephone: 202.833.8400
Facsimile: 202.833.8401
(*pro hac vice* application forthcoming)

13 *Attorneys for Plaintiffs*
Jeffrey I. Barke, Ed Sachs, Laura Ferguson,
14 Jim Reardon, Leighton Anderson,
Phillip Yarbrough, and Rodger Dohm
15

16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**

19 Jeffrey I. Barke, Ed Sachs, Laura Ferguson, Jim Reardon, Leighton Anderson, Phillip Yarbrough, and Rodger Dohm,
20

21 Plaintiffs,

22 v.

23 Eric Banks, Erich Shiners, Arthur A. Krantz, and Lou Paulson, in their official capacities as members of the California Public Employment Relations Board (“PERB”); and J. Felix De La Torre, in his official capacity as General Counsel of PERB,
24
25
26

27 Defendants.
28

Case No. 8:20-cv-00358

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF FOR
VIOLATION OF U.S. CONST.,
AMEND. I.**

1 Plaintiffs, Jeffrey I. Barke; Ed Sachs; Laura Ferguson; Jim Reardon; Leighton
2 Anderson; Phillip Yarbrough; and Rodger Dohm (“Plaintiffs”), allege and aver as
3 follows:

4 **INTRODUCTION**

5 1. This is a constitutional challenge to California Government Code
6 Section 3550 (“Section 3550”), which prohibits a “public employer” (as defined by
7 statute) from “deter[ring] or discourag[ing] public employees or applicants to be
8 public employees from becoming or remaining members of an employee
9 organization, or from authorizing representation by an employee organization, or
10 from authorizing dues or fee deductions to an employee organization.” Cal. Gov.
11 Code § 3550.

12 2. According to its legislative history, the ostensible purpose of
13 Section 3550 is to “stop employers from engaging in unfair tactics in an attempt to
14 convince or coerce their employees to withdraw from union membership,” and to
15 “ensure that public employers shall remain neutral when their employees are
16 deciding whether to join a union or to stay in the union.” But Section 3550 does not
17 promote neutrality. It bars speech that “deters or discourages” union membership,
18 not speech that promotes or encourages union membership. Nor does Section 3550
19 protect employee free choice. Existing law already prohibits actions that may
20 interfere with, restrain, or coerce employees in the exercise of representational
21 rights, including the right to choose whether to be unionized or to join a union.
22 Instead, Section 3550 one-sidedly skews public discussion in favor of public
23 employee unions by effectively silencing officials who would voice their opinions
24 about the disadvantages of public sector unionization.

25 3. Plaintiffs are elected members of various local California government
26 bodies, including city councils, school boards, and community college and special
27 purpose districts. After Section 3550’s enactment, elected officials, including
28 Plaintiffs, now face the threat of unfair labor charges against their agencies

1 whenever they share their perspectives or convey factual information about
2 unionization or a union’s policy agenda on a host of other important public matters.
3 Under Section 3550’s sweeping ban, even objectively accurate information about
4 public employee unionization might conceivably “deter or discourage” employees
5 from becoming or remaining union members. Section 3550’s threat of liability,
6 coupled with a complete lack of guidance as to compliance, is already chilling the
7 ability of elected officials, including Plaintiffs, to speak freely about public
8 employee unions and the implications of collective bargaining proposals coming
9 before the city councils or boards on which they serve.

10 4. Plaintiffs are justifiably concerned that Section 3550’s explicit
11 viewpoint discrimination, coupled with its vague and overbroad terms, leave them at
12 the mercy of whatever hindsight inference may be drawn whenever they engage in a
13 public discussion about unions or unionization. Section 3550 does not, as the
14 sponsors of the law suggest, promote the ability of employees to make informed
15 choices about unionization. It suppresses only one side of that debate, a point all but
16 conceded by the author of Section 3550, who is quoted as saying that “[r]ight now,
17 there is nothing to stop employers from engaging in tactics to discourage employees
18 from becoming union members, or from convincing or coercing their employees to
19 withdraw from union membership.” **Ex. A** [April 24, 2017 Senate Committee on
20 Public Employment and Retirement SB 285 at 4].

21 5. Elected officials have both the right and the obligation to enter the field
22 of political controversy. The protection of political speech is intended not only to
23 secure freedom of expression, but to safeguard the ability of the actions of local
24 elected officials to reflect the will of their constituents. The First Amendment and
25 California law protect the ability of these elected officials to freely discuss and
26 advocate matters of public concern, whether through political or elected activities,
27 so as to discharge their duties as elected representatives. Accordingly, Plaintiffs
28 respectfully request a declaration that Section 3550 abridges the freedom of speech

1 of public employees and that, as applied to those elected to governing boards of
2 public employees in this state, Section 3550 violates the First Amendment of the
3 U.S. Constitution.

4 6. Because “[t]he loss of First Amendment freedoms, for even minimal
5 periods of time, unquestionably constitutes irreparable injury,” *Elrod v. Burns*, 427
6 U.S. 347, 373 (1976), Plaintiffs have suffered and shall continue to suffer
7 Section 3550’s chilling restrictions on core political speech. They are therefore
8 entitled to an immediate and permanent injunction barring the enforcement of
9 Section 3550 as to Plaintiffs and all similarly-situated elected representatives of
10 public employers.

11 **JURISDICTION AND VENUE**

12 7. This action arises under the Constitution of the United States and 42
13 U.S.C. § 1983. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331
14 and 1343.

15 8. Venue in this district is proper under 28 U.S.C. § 1391(b) because
16 Plaintiffs face injury within this district, a substantial part of the events giving rise to
17 Plaintiffs’ claims have occurred or will occur in this District, and all Defendants
18 reside in the State of California and perform their official duties in the State of
19 California, including at PERB offices located in this judicial district.

20 9. This Court has the authority to enter a declaratory judgment and to
21 provide preliminary and permanent injunctive relief under Rules 57 and 65 of the
22 Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

23 **PARTIES**

24 **I. Plaintiffs**

25 10. Plaintiffs are elected members of representative bodies of California
26 “public employers,” as that term is defined under Government Code Section 3552.
27 As relevant here, Section 3552 defines a public employer as “any employer” subject
28 to the Meyers-Milias-Brown Act (“MMBA”) of 1968, establishing collective

1 bargaining for California’s municipal, county, and local special district employers
2 and employees (Cal. Gov. Code § 3500 *et seq.*), and the Educational Employment
3 Relations Act (“EERA”) of 1976, establishing collective bargaining in California’s
4 public schools (K-12) and community colleges (Cal. Gov. Code § 3540 *et seq.*).

5 11. Under Section 3552 and the MMBA, the definition of public employer
6 includes “every government subdivision,” “every district,” “every public agency and
7 public service corporation and every town, city and county and municipal
8 corporation, whether incorporated or not and whether chartered or not.” (Cal. Gov.
9 Code § 3501(c)). Under Section 3552 and the EERA, a “public school employer” or
10 “employer” includes “the governing board of a school district, a school district, a
11 county board of education, [and] a county superintendent of schools.” (Cal. Gov.
12 Code § 3540.1(k)).

13 12. Jeffrey I. Barke, M.D. is on the Board of Directors of the Rossmoor
14 Community Service District (“RCSD”). A community service district is a public
15 employer under Government Code Section 3550 *et seq.* and the MMBA. *See, e.g.,*
16 *Stationary Eng’rs v. San Juan Suburban Water Dist.*, 90 Cal.App.3d 796 (1979).
17 The RCSD Board voted to appoint Dr. Barke to fill a Board vacancy in May 2019.
18 Prior to serving on the RCSD Board, Dr. Barke served as a board member of the Los
19 Alamitos Unified School District from 2006-2018, which is also a public employer
20 under Section 3550 *et seq.* and the EERA. He is a primary care physician in private
21 practice and a Reserve Deputy for the Orange County Sheriff’s Department.

22 13. Ed Sachs is an elected member of the Mission Viejo City Council. The
23 Mission Viejo City Council is a public employer under Government Code
24 Section 3550 *et seq.* and the MMBA. Mr. Sachs has served on the City Council
25 since November 2014. His term expires in November 2022.

26 14. Laura Ferguson is a member of the San Clemente City Council. The
27 San Clemente City Council is a public employer under Government Code
28 Section 3550 *et seq.* and the MMBA. Ms. Ferguson was elected to the City Council

1 in 2018. Her term in office expires in November 2022. The employees of the City
2 of San Clemente are represented by the San Clemente City Employees' Association
3 (SCCEA). The City and the SCCEA currently operate under a Memorandum of
4 Understanding (MOU) that is in force through June 30, 2020. *See* City of San
5 Clemente, Memorandum of Understanding,
6 [https://www.ocea.org/assets/files/mous/san-clemente-city-employees-association-](https://www.ocea.org/assets/files/mous/san-clemente-city-employees-association-mou.pdf)
7 [mou.pdf](https://www.ocea.org/assets/files/mous/san-clemente-city-employees-association-mou.pdf).

8 15. Jim Reardon was elected to the Board of Trustees of the Capistrano
9 Unified School District ("CUSD") in 2012. His current term ends in 2020. The
10 CUSD is a public employer under Government Code Section 3550 *et seq.* and the
11 EERA. As trustee for CUSD Area 2, Mr. Reardon serves portions of the city of San
12 Juan Capistrano as well as unincorporated areas of Ladera Ranch, Las Flores, and
13 Coto de Caza. The Capistrano Unified Education Association ("CUEA") is the
14 exclusive bargaining representative of CUSD teachers.

15 16. Leighton Anderson is an elected member of the Whittier Union High
16 School District ("WUHSD") Board of Trustees. The WUHSD Board of Trustees is
17 a public employer under Government Code Section 3550 *et seq.* and the EERA.
18 The Whittier Secondary Education Association, an employee organization affiliated
19 with the California Teachers Association and the National Education Association, is
20 the exclusive bargaining representative of WUHSD teachers. *See* WUHSD, Union
21 Contract Info,
22 [https://www.wuhsd.org/apps/pages/index.jsp?uREC_ID=753248&type=d&pREC_I](https://www.wuhsd.org/apps/pages/index.jsp?uREC_ID=753248&type=d&pREC_ID=1160808)
23 [D=1160808](https://www.wuhsd.org/apps/pages/index.jsp?uREC_ID=753248&type=d&pREC_ID=1160808). Mr. Leighton has served as a trustee since 1997. His current term
24 ends in 2022. All three of Mr. Anderson's children attended high school in the
25 WUHSD, and his wife volunteers at one of WUHSD's high schools.

26 17. Phillip Yarbrough is President of the Rancho Santiago Community
27 College District ("Rancho Santiago") Board of Trustees. A community college
28 district is a public employer under Government Code Section 3550 *et seq.* and the

1 EERA. *See, e.g., United Faculty of Contra Costa Community College District,*
2 PERB Decision No. 2652 (June 26, 2019). Mr. Yarbrough was first elected to the
3 Rancho Santiago Board in 1996. He is currently serving his sixth term as an elected
4 member of the Rancho Santiago Board. Mr. Yarbrough formerly taught at both of
5 the district’s community colleges: Santa Ana College and Santiago Canyon College.
6 He is also a board member of the County of Orange Redevelopment Oversight
7 Agency, which is subject to the MMBA. Mr. Yarbrough is a member of the
8 Association of Community College Trustees (“ACCT”) Public Policy Committee.
9 ACCT is a nation-wide, non-profit educational organization of governing boards,
10 representing elected and appointed trustees who govern over community, technical,
11 and junior colleges in the United States.

12 18. Rodger Dohm is an elected member of the Ramona Unified School
13 District (“RUSD”) Board of Education. He has served as a board member for
14 twelve years. Under the EERA, a public employer includes school districts and the
15 governing board of a school district. The Ramona Teachers’ Association (“RTA”)
16 is the exclusive bargaining representative of teachers in the RUSD. The RTA and
17 the Governing Board of the RUSD are parties to a collective bargaining agreement.
18 [https://www.ramonausd.net/human-resources-4e1a5dda/rta-and-csea-bargaining-](https://www.ramonausd.net/human-resources-4e1a5dda/rta-and-csea-bargaining-agreements-818eefbe)
19 [agreements-818eefbe](https://www.ramonausd.net/human-resources-4e1a5dda/rta-and-csea-bargaining-agreements-818eefbe). [April 3, 2019 RUSD and RTA Agreement, 2017-2020].
20 Pursuant to that agreement, the RUSD Board “shall upon request, place on the
21 agenda of each regular Board meeting early in the agenda any non-negotiable items
22 [i.e., matters not required by law to be negotiated such as compensation, hours of
23 employment, and other terms and conditions of employment] brought to its
24 consideration by the [RTA].” *Id.* at p. 6. Mr. Dohm has five children, all of whom
25 attended or are attending school in the RUSD. He also teaches at a school in the
26 Poway Unified School District (“PUSD”).

27
28

1 **II. Defendants**

2 19. Defendants Eric Banks, Arthur A. Krantz, Lou Paulson, and Erich
3 Shiners are members of the California Public Employment Relations Board
4 (“PERB” or the “Board”). All PERB members are appointed by the Governor and
5 are subject to confirmation by the California State Senate. Board members are
6 appointed to five-year terms, with the term of one member expiring at the end of
7 each calendar year. (There is currently one vacancy on the Board.) The Board has
8 overall responsibility for administering the MMBA and the EERA, among other
9 public employment labor-management statutes (the “Acts”). PERB is a quasi-
10 judicial agency which oversees public sector collective bargaining in California. It
11 administers the Acts to ensure consistent implementation and application, and
12 adjudicates disputes between parties subject to the Acts.

13 20. According to its website (www.perb.ca.gov/the-board/the-board-and-its-duties/), PERB has the power to “conduct secret ballot elections to determine
14 whether or not employees wish to have an employee organization exclusively
15 represent them in their labor relations with their employer; prevent and remedy
16 unfair labor practices and interpret and protect the rights and responsibilities of
17 employers, employees and employee organizations under the Acts; bring an action
18 in a court of competent jurisdiction to enforce PERB’s decisions and rulings; to take
19 such other action as the Board deems necessary to effectuate the purposes of the
20 Acts it administers.”

22 21. The board members of PERB are charged with enforcement of
23 Section 3550 *et seq.* Cal. Gov. Code § 3551 (PERB “shall have jurisdiction over
24 violations of this chapter.”).

25 22. Defendant J. Felix De La Torre is the General Counsel of PERB. The
26 General Counsel is empowered as an agent of the Board to issue a complaint for
27
28

1 violations of Section 3550 under California Code of Regulations, Title 8, Section
2 32640.¹

3 **FACTUAL ALLEGATIONS**

4 **I. Senate Bill 285**

5 23. Section 3550 was introduced as Senate Bill (“S.B.”) 285 by Senator
6 Toni Atkins on February 9, 2017. According to the Legislative Counsel’s Digest,
7 the initial version of S.B. 285 proposed nonsubstantive changes to the definitional
8 provisions of Government Code Section 16645, which (*inter alia*) prohibits a public
9 employer from using state funds to “assist, promote, or deter union organizing.”

10 **Ex. B** [February 9, 2017 Legislative Counsel’s Digest SB 285 at 1 (emphasis
11 added)]. An amended and substituted version of S.B. 285 was introduced on
12 March 14, 2017 as a “gut and amend”, which bore no resemblance to the bill’s
13 original text.

14 24. As amended, this version of S.B. 285 added a new Chapter to the
15 Government Code which “would prohibit a public employer from *detering or*
16 *discouraging* [but not assisting or promoting] public employees from becoming or
17 remaining members of an employee organization.” Ex. A at 3. Rather than limit its
18 reach to public employers or contractors receiving state funds, the revised version of
19 S.B. 285 would apply to every public employer under the jurisdiction of PERB,
20 including counties, cities, districts, the state, schools, transit districts, the University
21 of California, and the California State University, among others.

22
23
24 _____
25 ¹ Cal Code Regs., tit. 8, Section 32640(a) states that a “. . . Board agent shall
26 issue a complaint if the charge or the evidence is sufficient to establish a prima facie
27 case.” See also *Superior Court v. Public Employment Relations Bd.*, 30 Cal. App. 5th
28 158, 191 (2018) (“Typically, a union files a ‘charge’ with PERB alleging an employer
committed an unfair practice and if the allegations are adequate, a complaint is issued
by PERB’s office of general counsel.”).

1 25. Although the Senate and Assembly committee analyses of S.B. 285
2 describe the bill as “requir[ing] public employers to remain neutral in employee
3 efforts to organize for or become members of an employee organization in their
4 workplace,” [See Ex. A at 1], S.B. 285 prohibits public employers from “detering
5 or discouraging public employees from becoming or remaining members of an
6 employee organization.” It does not similarly enjoin public employers from
7 “assisting,” “promoting,” or “encouraging” unions or unionization in the workplace.
8 According to the bill’s author, this one-way version of neutrality was needed, as
9 “[r]ight now, there is nothing to stop employers from engaging in tactics to
10 discourage employees from becoming union members, or from convincing or
11 coercing their employees to withdraw from union membership.” *Id.* at 4. In fact,
12 existing law already provided public employees and applicants with numerous
13 safeguards against employer coercion in the exercise of rights guaranteed under law,
14 Cal. Gov. Code § 3543.5(b), including “the right to form, join, and participate in the
15 activities of employee organizations of their own choosing,” Cal. Gov. Code
16 § 3502, as well as prohibiting employer interference, intimidation, or discrimination
17 because of employee exercise of their rights as an employer. Cal. Gov. Code
18 § 3543.5(a).

19 26. At the same time, Senator Atkins claimed that “S.B. 285 is consistent
20 with existing policy and seeks to build off current law.” **Ex. C** [June 21, 2017
21 Assembly Committee on Public Employees, Retirement, and Social Security SB 285
22 at 3.] In fact, longstanding statutory and decisional law protects the right of public
23 employers to communicate freely with employees on employment matters, including
24 the benefits or disadvantages of unionization, so long as the communication is free
25 of the threat of reprisal or promise of a benefit. These “employer free speech”
26 protections not only safeguard the employer’s right to express its views on
27 employment matters over which it has legitimate concerns. They are necessary in
28 order to facilitate full and knowledgeable debate and enable the exercise of a free

1 and informed employee choice. S.B. 285 would undermine existing free speech
2 protections and potentially expose an employer to an unfair labor charge by merely
3 telling employees that they have a right to resign from union membership or to no
4 longer pay agency fees.

5 27. The pretextual nature of the stated purposes of S.B. 285 is underscored
6 by the timing of S.B. 285's enactment. S.B. 285 was one of a series of bills passed
7 days after the U.S. Supreme Court granted certiorari in *Janus v. AFSCME*, 138 S.
8 Ct. 2448 (2018) which challenged the constitutionality of public employee agency
9 fees. In addition to S.B. 285, California enacted A.B. 83 (enrolled as Cal. Gov.
10 Code § 3524.51 *et seq.*) (permitting unionization of the California Judicial Council
11 staff), S.B. 201 (enrolled as Cal. Gov. Code § 3562) (permitting students who have
12 jobs at state institutions of higher education to unionize), S.B. 550 (enrolled as Cal.
13 Gov. Code § 3543.8) (imposing fee and cost shifting on employers whenever the
14 employer fails to obtain a judgment more favorable than the offer to settle the
15 dispute proposed by the union), and AB 119 (enrolled as Cal. Gov. Code § 3555 *et*
16 *seq.*) (requiring employers to provide certified unions with mandatory access to new
17 employee orientations and requiring employers to provide the exclusive labor
18 representative with the name, job title, department, work location, work, home, and
19 personal cellular telephone numbers, personal email addresses on file with the
20 employer, and home address of new employees within 30 days of hire). Each of
21 these statutes impose significant new collective bargaining obligations on public
22 employers and unprecedented limitations on their ability to communicate directly
23 with their employees.

24 **II. Senate Bill 866**

25 28. S.B. 285's speech prohibitions were extended the following year via
26 S.B. 866, an urgency measure (meaning it would become effective immediately)
27 enacted on June 27, 2018 – the same day the U.S. Supreme Court held in *Janus* that
28 compulsory agency fees violate the First Amendment. As amended by S.B. 866,

1 Section 3550 now reads: “A public employer shall not deter or discourage public
2 employees *or applicants to be public employees* from becoming or remaining
3 members of an employee organization, or *from authorizing representation by an*
4 *employee organization, or from authorizing dues or fee deductions to an employee*
5 *organization. This is declaratory of existing law.” Ex. D [Cal. Gov. Code § 3550*

6 (emphasis added)].
7 29. In addition to expanding the scope of Section 3550, S.B. 866 added
8 Section 3553, which prohibits a public employer from sending out a “mass
9 communication” to its employees or applicants concerning the right to “join or
10 support an employee organization, or to refrain from joining or supporting an
11 employee organization,” unless the employer first meets and confers with the union
12 about the content of the mass communication. Absent agreement, the employer may
13 not deliver its mass communication unless it simultaneously sends an opposing
14 communication provided by the union.

15 **III. The Chilling Effects Of Section 3550 On Elected Representatives Of**
16 **Public Employers**

17 30. Whether viewed alone or as part of a larger set of legislative actions,
18 the effect of Section 3550 is to chill the ability of elected representatives to
19 communicate facts and opinions about unions and unionization out of fear that their
20 statements may later be deemed to “discourage” or “deter” unionization. Under
21 statutory and decisional law, a “public employer” encompasses not only (for
22 example) a school district, but “the governing board of a school district,” “a county
23 board of education, [and] a county superintendent of schools.” (Cal. Gov. Code
24 § 3540.1(k)). Likewise, public agencies subject to the MMBA may be held liable
25 for the conduct of its governing body in official public proceedings, including
26 statements by individual elected officials who sit on their governing boards. *See,*
27 *e.g., SEIU Local 721 v. County of Riverside*, PERB Decision No. 2119-M (June 24,
28 2010).

1 31. Because there are no defined parameters as to conduct that could “deter
2 or discourage” unionization or union membership, elected officials, including
3 Plaintiffs, will choose to avoid any discussion even as to purely factual matters,
4 including the impact of *Janus* on their own employees. Based on that Supreme
5 Court decision, public employers must cease involuntary deductions from paychecks
6 of employees who are not union members. Yet, according to the California School
7 Board Association (“CSBA”), “while informing employees of such change in
8 dues/fees deductions would be consistent with the Court’s order, it may be
9 inconsistent with the intent of the amended State law — Government Code 3550.”
10 *See Ex. E* [California School Board Association, “A Post Janus World: Analyzing
11 the Aftermath of *Janus v. AFSCME*”].

12 32. The CSBA cautioned elected school board officials, including Plaintiff
13 Leighton Anderson:

14 Given the above, it is critically important that board
15 members, as representatives of the District, are aware of
16 these limitations on communications regarding union
17 participation and tailor any comments or responses to
18 questions accordingly. If an employee asks you questions
19 about the *Janus* case, the recent legislation, or whether to
20 join or stay in the union, we strongly recommend that you
refer them to your district or county office of education
staff to answers to those questions. We also recommend
that you be mindful of any comments that you may make
that could be construed as deterring or discouraging union
participation as we expect this limitation will be broadly
construed.

21 **Ex. F** [June 29, 2018 New Legal Guidance: Board Communications in a Post Janus
22 World.]. According to Dr. Barke, the legal representative of the Los Alamitos
23 Unified School District recommended that the Board not discuss *Janus* with any
24 employees. Similarly, a League of California research paper directed individuals
25 relying on that paper, like Plaintiff Ed Sachs, to a law firm’s legal questions and
26 answers blog regarding Section 3550. That firm advised employers, when
27 responding to employee requests to discontinue membership dues deductions, to
28 limit any response “to referring the employee back to the employee organization.”

1 *See Ex. G* [August 2, 2018 League of California Cities Resource Paper: Next Steps
2 for Cities after *Janus v. AFSCME* and S.B. 866]; *see also Ex. H* [June 27, 2018
3 Top 10 Questions about Senate Bill 866 – New State Legislation Impacting How
4 Public Employers Communicate with Employees and Manage Employee
5 Organization/Union Membership Dues at 3]. Further, the firm stated: “Does
6 Senate Bill 866 prohibit my agency from informing employees about the cost of
7 being a union/employee organization member?” The answer given: “***Yes. This***
8 ***could be seen as deterring or discouraging an employee from becoming an***
9 ***employee organization member or authorizing dues or fee deductions to an***
10 ***employee organization.***” *Id.* at 5 (emphasis added).

11 33. Plaintiff Laura Ferguson, a member of the San Clemente City Council,
12 was threatened with an unfair labor charge by the San Clemente City Employees
13 Association after she asked the City Manager whether that union used city resources
14 to promote their preferred candidate. All of the Plaintiffs have at times limited
15 discussion of issues in public (including during meetings of their boards) that might
16 call attention to controversial union positions, opting instead to avoid any discussion
17 of subjects related to unions.

18 34. Plaintiffs are legitimately concerned as to the punitive ramifications of
19 a hindsight review of statements made as part of discharging their official duties.
20 Under PERB’s broad remedial mandate, the Board may issue cease and desist
21 orders, obtain injunctions, and ultimately seek contempt sanctions from a court in
22 the event it believes that statements by public officials continue to violate
23 Section 3550. Cal. Gov. Code § 3541.3(i) (authorizing PERB to “take any action in
24 respect of [unfair practice] charges . . . as the board deems necessary to effectuate
25 the policies of this chapter). Section 3550’s complete lack of guidance as to the
26 scope of its prohibited conduct, combined with the *in terrorem* threat of being
27 enmeshed in unfair labor proceedings for statements made at a school board meeting
28

1 or in communications with teachers, parents, or the public, is already causing them
2 to refrain from commenting on topics that might trigger Section 3550’s speech
3 prohibitions.

4 35. There now exists an actual, present, and justiciable controversy
5 between Plaintiffs and Defendants concerning their rights and duties with respect to
6 Defendants’ enforcement powers under Section 3550. Section 3550 is
7 unconstitutional as applied to elected officials like Plaintiffs because it constitutes a
8 blatant form of viewpoint discrimination. Section 3550 is also unconstitutional as
9 applied to Plaintiffs, based on (among other reasons) its vague and overbroad
10 prohibition of core political speech protected by the First Amendment. Given
11 Plaintiffs’ duties as elected officials, as well as the recurring nature of issues
12 pertaining to union, unionization, collective bargaining, and labor-management
13 issues, it is certain that the ongoing restrictions imposed by Section 3550 will recur
14 and continue to chill the ability of Plaintiffs to speak without fear of liability by
15 hindsight judgment. Without a declaration of their rights, Plaintiffs will continue to
16 avoid discussion of any controversial issue that may touch on unions or unionization
17 for fear of exposing themselves and their public agency to liability.

18 36. Conversely, Plaintiffs have faced and will continue to face a credible
19 threat of legal proceedings brought by PERB based on alleged violations of
20 Section 3550 whenever they respond to questions or express opinions on subjects
21 where the answer may later be deemed to “deter or discourage” unionization.

22 37. If Plaintiffs do not obtain the requested relief, Plaintiffs will suffer
23 imminent, immediate, and ongoing injury based on the chilling effects of
24 Section 3550 on their First Amendment rights. In such an event, they will be
25 deprived on their constitutional rights under the First Amendment to the United
26 States Constitution and shall suffer irreparable harm. There is no adequate remedy
27 at law.

28

1 content-neutral purpose cannot cure the constitutional defects of a law, which on its
2 face, discriminates based on content. Further, the “deter or discourage” provision
3 reaches far beyond the stated purpose and is not tailored to serve a compelling state
4 interest. Accordingly, Section 3550 violates the First Amendment of the U.S.
5 Constitution as applied to the state through the Fourteenth Amendment.

6 43. Defendants, acting under color of state law, have enforced and will
7 continue to enforce the challenged law against Plaintiffs and others in violation of
8 their First Amendment rights.

9 44. As a direct and proximate result of Defendants’ unlawful conduct,
10 Plaintiffs have and will suffer irreparable harm, which will continue absent
11 injunctive relief.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26 ///

27 ///

28 ///

