



# CTR

# docket report

Spring 2020

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## The fight rages on...

**C**IR started this year with big plans, and we intend to see them through. We brought two major new cases that challenge the power of government agencies to pick and choose whose rights they will defend. One challenges a California law prohibiting public officials from criticizing unions. The other challenges a racial set-aside program for federal government contracts. The coronavirus has affected the way we are working, but it will not change our determination – or our ability – to overturn these unconstitutional laws.

*Barke v. Banks* challenges an egregiously unconstitutional California law designed to silence criticism of unions by duly elected public officials. The case is vital to restoring free speech in California, but its impact reaches well beyond the state's borders. California's law is part and parcel of legislation being pushed nationwide at all levels of government.

Just this March, Congress created the Paycheck Protection Program, which made federal funds available to businesses that have shut down in an effort to check the spread of the coronavirus. Buried in that law was a union-demanded condition: any business that accepted the aid had to agree to remain "neutral" in future union organizing efforts.

What members of Congress might not have understood is that union officials interpret remaining "neutral" as remaining silent. Small business owners are being forced to give up their right under the First Amendment to counter claims about the benefits of unionization. So union advocates are free to speak, but critics must keep quiet. The result is anything but neutral. *Barke v. Banks* challenges this kind of viewpoint discrimination.

Like *Barke*, *Ultima Services v. USDA* challenges a law that allows the government to play favorites when it comes to protecting people's rights. *Ultima* challenges a set-aside program that allows the SBA to award federal contracts to minority business owners solely on the basis of race. The program was created in the 1970s to address lingering issues of discrimination in certain industries connected to government contracting. But with each passing decade, it becomes less and less reasonable to believe that American industry is hostile to minority business owners or that the federal government participates in such discrimination.

Over time, the program has become a tool to arbitrarily favor business owners of certain races, while denying others the right to compete. The program that was once used to dismantle rigid barriers to minorities is now used to shut down women-owned entrepreneurial startups. Yet Congress has never seen fit to narrow the program.

Together with you we will continue the battle to restore individual rights.

-Terence J. Pell, President

# Barke v. Banks

*Cooperating Counsel: Sheppard Mullin Richter & Hampton LLP and Mark Bucher, California Policy Center*

Every month, Rodger Dohm, a board member for the Ramona Unified School District, briefs his constituents at a public school board meeting. When the floor is opened, the board must be prepared for questions about any aspect of school operations.

What the public does not know is that school officials cannot make any statement that puts them at odds with any union that represents district employees. Even purely factual statements about the union's policies – such as the financial impact of its demands for higher salaries or the educational tradeoffs of its position on teacher tenure – can trigger a costly unfair labor practice charge.

Dohm and thousands of other public officials in California are being silenced daily by a law designed to suppress criticism of unions. California Government Code Section 3550 empowers union officials to bring charges against public employers that “deter or discourage” union membership. Because any statement that puts the unions in a bad light might “discourage” someone from membership, the extent of what the law prohibits is limited only by the ambitions of union leaders.

Section 3550 strikes at the heart of the First Amendment by silencing speech based on its point of view. Public officials who support government employee unions and the positions that they take remain free to advocate for those policies. But

officials who criticize union positions face the threat of an unfair labor practice charge.

The law's speech restrictions are uniquely dangerous because they ensure that public officials cannot communicate important information to their constituents. Representative democracy depends on the free exchange of information between elected officials and the people that they represent. So courts have rightly afforded public officials strong First Amendment protections. But California's law undermines open political speech.

CIR is challenging this assault on the freedom of speech on behalf of seven elected officials, including Rodger Dohm. Section 3550's expansive language has made it dangerous for each of them to communicate with their constituents on issues of significant public concern.

If Dohm informs his constituents about some of the unions' more controversial positions – on topics such as California's homelessness crisis or union support for sanctuary cities – he could reasonably discourage public employees with opposing views from joining. Such statements could trigger a charge.

Even worse, Section 3550's vague and inherently shifting standards do not offer realistic guidance about what speech is off-limits. No official can be sure what they can and cannot say, so many public officials are justifiably afraid to make *any* comments that could later be construed as discouraging union membership.



*Plaintiff  
Rodger  
Dohm*

*continued on page six*



*UTLA President  
Alex Caputo-Pearl*

*Scott Heins/Bloomberg via Getty Images*

## *I've got you in a stranglehold baby...*

California unions quickly learned what a powerful weapon they have in Section 3550. Frustrated by school administrators' efforts to keep faculty informed of their rights, California unions have deployed Section 3550 to challenge administrators' simple factual descriptions and personal opinions that they deemed threatening to their organizing efforts. Two complaints now pending before the Public Employment Relations Board illustrate the breadth of 3550's threat to free speech.

United Teachers Los Angeles is using Section 3550 to embroil eleven charter schools in a costly legal battle over comments made by school officials in response to its aggressive organizing campaign. Several administrators with

the Alliance Charter School company took notice of the UTLA's aggressive organizing tactics on Alliance campuses. They sent out emails informing teachers of their rights and describing some of the costly realities that UTLA-membership could entail.

One email informed teachers that they had no obligation to speak to paid organizers who made unsolicited visits to their homes seeking signatures for union membership. Some emails noted that UTLA has vigorously opposed charter schools. Others were sent by former teachers in UTLA-represented schools explaining that the union did not produce material improvements in their classrooms.

These administrators had no reason to expect that their emails would provoke legal action. Under

the National Labor Relations Act, employers retain their First Amendment right to express their views about union claims so long as they do not threaten employees with reprisal or force.

The emails fell far short of anything resembling threats. In fact, they were crystal clear about the teachers' right to unionize. The emails assured teachers that they would receive the full support of the school if they voted to unionize. Indeed, they encouraged teachers and staff to treat one another with respect regardless of differing views about unionization. Still, they triggered a complaint.

But Alliance Schools are not the only ones facing unfair labor practice charges.

The University of California was charged with unfair

labor practices for sharing a letter informing university staff of their right to not pay agency fees following the Supreme Court's decision in *Janus v. AFSCME*. The letter was a straightforward factual description of the Supreme Court's decision. Even that was enough to trigger a complaint.

In a dizzying opinion, the PERB interpreted Section 3550 narrowly to avoid the First Amendment problem, but proceeded to apply the law in the broad fashion demanded by the unions. The PERB judge *claimed* that 3550 only applies to threats or coercion and therefore does not offend the First Amendment. But she ruled *against* UC on the grounds it had "disparaged" the union. So 3550 *does* in fact violate the First Amendment.

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# Celeste Bennett: Barred for Race

*Ultima Services v. USDA, filed March 4, 2020*

Celeste Bennett had a great idea, built an impressive company, and worked hard to make her vision a reality. With a background in private industry, she brought an entrepreneurial drive to government contracting. Her company, Ultima Services Corporation, provided high quality administrative work for the government offices it served. Now, because of a racially discriminatory federal law, the business that Bennett spent nearly two decades building could be gutted.

In 2004, Ultima began contracting with the Natural Resources Conservation Service, an agency of the U.S. Department of Agriculture. The agency helps farmers and ranchers implement conservation efforts. Ultima provided staff to perform administrative services – the work that makes the NRCS’s programs run, such as data collection, community outreach, and other essential administrative tasks.

As more NRCS offices began using administrative contracts, Ultima competed for – and won – many of them. Eventually, it was serving offices around the country. Under Bennett’s leadership, Ultima per-

formed exemplary work for the agency, which regularly renewed its contracts.

But Ultima’s progress was abruptly cut short in 2017, when the USDA started awarding NRCS contracts under Section 8(a), a racial set-aside program. Because it is not a minority-owned business, Ultima could not compete for these contracts. In the last three years, the bulk of the contracts that once made up Ultima’s business were replaced through the 8(a) program. What is more, the new 8(a) contractors will keep the administrative staff that Ultima spent time and money recruiting and training, which they can use to pad their records when they compete for future contracts.

CIR is representing Ultima in a federal challenge to Section 8(a). In CIR’s view, the 8(a) program violates the Fifth Amendment, which prohibits the government from discriminating on the basis of race. The courts have created an exception to this rule for racial preferences that are narrowly drawn to serve a compelling state interest, such as remedying the government’s own past discrimination. But the courts are clear; the government



*CIR Client Celeste Bennett*

may not simply award benefits proportionally on the basis of race as if government spending was a pie to be divided up among racial groups based on their percentage in the population.

Although Section 8(a) purports to set aside contracts for “socially disadvantaged individuals” regardless of race, the law and implementing regulations were written to ensure that minority-owned contractors would constitute the vast majority of eligible businesses. The law defines “socially disadvantaged individuals” as those who have been subject to racial discrimination or cultural bias. Even more telling, the regulations

*presume* that members of specified racial and ethnic minority groups *are* socially disadvantaged.

The 8(a) program was supposed to help small business owners who had been excluded from participating in certain industries – such as unionized building construction – because of racial discrimination. As written, though, the program benefits all members of specified racial groups regardless of whether they work in an industry historically characterized by racially discriminatory business practices. Moreover, it has been decades since

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# Second time's the charm...

**A**n earlier CIR challenge to Section 8(a) – *DynaLantic Corp. v. Department of Defense* – achieved one of the few legal victories against the racial set-aside program, one that will be exceedingly useful in our newest challenge on behalf of Ultima Services.

In *DynaLantic*, CIR set an important federal district court precedent limiting the use of Section 8(a) to industries with substantial evidence of past racial discrimination. DynaLantic designed and manufactured simulation and training equipment for the U.S. military. In 1995, the Department of Defense sought out bids for new contracts that DynaLantic was ready, willing, and able to perform. There was just one problem. The DoD was only seeking bidders through the 8(a) program, and DynaLantic's owners were white.

CIR challenged the racially discriminatory set-aside law under the Fifth Amendment, particularly as it was applied to the simulation and training industry. There was no doubt that Section 8(a)

avored companies based on race, but the SBA and DoD tried to defend the program as serving a compelling interest.

In 2012, the District Court for the District of Columbia ruled in favor of DynaLantic, finding that the government could not justify applying 8(a) to the simulation field. The court's opinion established a rigorous standard limiting the application of the race-based 8(a) program to the particular industries in which it could be rationally said to address the compelling state interest of remedying past discrimination.

For decades, the government took for granted that it could freely utilize Section 8(a) without first proving that there was a real history of discrimination in the industries to which it was applied. CIR argued that such use of the program was entirely arbitrary. Awarding contracts on the basis of race in industries with no history of discrimination amounted to awarding contracts on the basis of race for its own sake, without serving any compelling state interest. And the district court agreed.

The court's opinion rightly acknowledged that not all industries are alike, and if the SBA wanted to use the 8(a) program, it would need to prove that the government had been involved, actively or passively, in racial discrimination in the relevant industry. The training and simulation industry was only a few decades old at the time, so the SBA could not credibly argue that it was combatting a legacy of racially discriminatory policies by awarding military simulation and training contracts through the 8(a) program.

The powerful precedent CIR set in *DynaLantic* will be of inestimable importance in our new lawsuit on behalf of Ultima Services Corporation. *DynaLantic* was a strong victory, but the case settled before it could be reviewed by the Court of Appeals. With the momentum and precedent from our earlier victory in *DynaLantic*, everything is in place to deliver a fatal blow to the SBA's racial set-aside program in *Ultima*.

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it would be reasonable to assume that *any* American industry routinely discriminates against *all* minority-owned businesses on the basis of race, but the law has never been narrowed.

8(a)'s racial presumptions are particularly ill-suited to new

industries such as administrative services, which has only existed for a few decades. It is hard to imagine that there is a legacy of racial discrimination that needs to be redressed, much less by such an extreme measure as cutting non-minority owned firms out of the competition altogether.

8(a)'s vestigial race-based

presumptions now serve no clear purpose much less a compelling one, and they unfairly exclude business owners like Celeste Bennett. CIR is fighting back. The Constitution does not permit the government to arbitrarily give special advantages to individuals of certain races over others when awarding contracts.

# Many hands make light work:

Lead Counsel: David Schwarz



**D**avid Schwarz is one of the strongest defenders of constitutional liberty in California. In a state that seems day by day to drift leftward to the expansion of government power and the erosion of civil liberties, Schwarz has been a stalwart defender of individual rights. You may be able to tell that we at CIR like his work.

Schwarz is a partner at Sheppard, Mullin, Richter & Hampton, LLP, in Los Angeles, California. He earned his Bachelor of Arts from Columbia and received his J.D. from Duke University School of Law. After earning his J.D., Schwarz clerked on the Ninth Circuit Court of Appeals. During his time in private practice, Schwarz has built an impressive litigation record, arguing before every California Court of Appeal, the California Supreme Court, as well as before the U.S. Court of Appeals for the Ninth Circuit. In addition to his work as an attorney, he is a

scholar for the NYU Classical Liberal Institute.

CIR's ties with Schwarz go back to 2015 when he wrote an amicus brief in support of our clients in *Friedrichs v. CTA*. And in 2017, CIR had the opportunity to return the favor, writing an amicus brief in a Schwarz case *Gerawan Farming v. ALRB*. Schwarz was the lead counsel for Gerawan Farming Inc. in a series of constitutional challenges to a California law that allowed the Agricultural Labor Relations Board to impose a collective bargaining "agreement" on farm workers and their employers.

Schwarz will be the lead attorney in CIR's challenge to California's unconstitutional speech restrictions in *Barke v. Banks*. With his extensive background in the Ninth Circuit and a wealth of experience litigating constitutional issues, Schwarz is the right man for the job.

## **Barke v. Banks,** *continued from page two*

The law's vague prohibitions put officials in a bind. Could accurately describing the union's seniority policy deter a young teacher from joining? Could explaining that local budgets cannot cover the cost of both pension increases and new playground equipment cause other teachers to resign from the union?

Officials cannot have an attorney at their side every time they go out in public. Accordingly, they regularly face an impossible dilemma of trying to serve their constituents without violating the unclear demands of the law.

Section 3550 is sometimes sold as a way to ensure that employees cannot be coerced regarding union membership. The reality is that the law has nothing to do with protecting workers from coercion and everything

to do with controlling the opinions of Californians by limiting what they can say and hear. CIR is fighting for freedom of speech for the people of California, all of the people, not just those who share the political views approved by the state.

# CIR's Co-Counsel in *Barke*

## Co-Counsel: Mark Bucher

**M**ark Bucher is CEO of the California Policy Center, one of the leading lights of California's liberty movement. From advancing school choice to demonstrating the absurdity of the state's overreaching regulations, CPC has spent the last ten years fighting to keep California's future free and prosperous. The Center for Individual Rights is teaming up with Mark Bucher to challenge California's union gag law, Section 3550.

Bucher graduated from Biola University with a degree in Mathematics and received his J.D. from Western State University, where he graduated at the

top of his class. In 2010 Bucher founded the CPC with an eye to reforming state policy on education, regulation, and unions.

Throughout his career, Bucher has been involved in protecting Californians from union attempts to misuse the tremendous power that state law affords them. He has personally authored a proposition designed to limit government unions' discretion to spend dues on political activity. For the last ten years, CPC has been documenting the practical consequences of union policies. More recently, it has been instrumental in ensuring that Californians are aware of their rights concerning union mem-



bership following *Janus v. AFSCME*.

Bucher's concern has always been first and foremost improving the lives of the people in his state. CIR

couldn't be more pleased to work with Bucher and CPC as we fight to restore free speech to public officials in California.

### Stranglehold

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The opinion is striking for its determination of what counts as "disparaging" the union. The judge noted that the school's letter was distributed soon after the *Janus* decision, it was published in both Spanish and English, and

it encouraged staff to contact the school's director of labor relations with follow-up questions. From these efforts to ensure that important information was widely accessible and clearly understood, the judge concluded that the school was "disparaging" the union.

With the kind of analysis

employed in this recent PERB decision, there is no limit to the reach of Section 3550. If a judge can find that encouraging follow-up questions in an information letter is the legal equivalent of coercion, the standards of the law are so flexible that any speech can be stifled.

This is what Section

3550 looks like in action. Aggressive unions are already using the law to silence dissenting views. That is why CIR is fighting to disarm California unions of this powerful weapon. Section 3550 is exactly the kind of speech restriction that the First Amendment was designed to prevent.

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# *I don't need a lot of things...*

**C**IR's precedent-setting legal victories are possible only through the generosity of thousands of supporters from across the nation. Their investment in the Center for Individual Rights provides the funds we need to move quickly when individual rights are at stake. Our recent victory against racially restrictive election laws in Guam (*Davis v. Guam*) wouldn't have been possible without the generous contributions of long-time CIR supporters.

The Center for Individual Rights offers supporters the simplicity of a monthly giving program. By choosing this option, you provide a stable source of funding to help CIR advance individual rights and limited government.

The simplest way to set up a monthly, recurring gift to CIR is to use the reply envelope enclosed with this issue of the *Docket Report*. Just check the box for a monthly recurring gift and fill in the remainder of the information. Once we receive it, we will start your monthly gifts

Or you can go to the online donations page on our website, [www.cir-usa.org](http://www.cir-usa.org), and select Donate>Donate Online from the drop-down menu at the top of every page. Once there, select "monthly gift." After you check the monthly gift box, you will have an opportunity to pick the number of months you would like to repeat your



gift.

There is nothing else for you to do.

Your tax-deductible contribution will appear each month on your credit card statement, and each December you will receive a summary statement of your donations during the calendar year. Naturally, you may stop giving at any time.

This method of support makes CIR more efficient, too, allowing us to put more of our time and money into lawsuits and less into paperwork and overhead.

If you have any questions about CIR's Monthly Giving Club, please call Zane Lucow at (202) 833-8400 ext. 122 or email him at [lucow@cir-usa.org](mailto:lucow@cir-usa.org).

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