CASE NO. 20-56075

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY BARKE, et al.

Plaintiffs and Appellants,

v.

ERIC BANKS, et al.

Defendants and Appellees.

Appeal from the United States District Court
Central District of California, Case No. 8:20-cv-00358-JLS-ADS
Hon. Josephine Laura Staton

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This appeal presents a narrow but important question under the First Amendment: Whether elected members of representative bodies of various "public employers," as that term is defined under California Government Code Section 3552, including city councils and school boards, have standing to challenge a statute that prohibits those "public employers" from "deterring" or "discouraging" unionization or union membership by its employees? California Government Code Section 3550 ("Section 3550") prohibits such speech or conduct, including any discussion of facts or opinions relating to unions or the unionization process. Section 3550 states:

> A public employer shall not deter or discourage public employees or applicants to be 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. This is declaratory of existing law.

Short of self-censorship, Section 3550 gives elected officials no guidance as to how to distinguish between protected, "individual" speech and sanctionable, "official" speech that may be imputed to the "public employer," or how to distinguish between acceptable and punishable statements concerning unions, unionization or the positions taken by labor organizations during collective bargaining. It does not, for example, differentiate between statements made during

a reelection campaign and statements made during a public meeting of the employers' governing board. It does not create a safe harbor for statements of fact or opinion, in contravention of existing California law, which permits public employers and unions to express their views as to any labor-management issue as long as the statements are not coupled with a threat or a promise of benefit.

Because it censors only one side of the debate over public employee unions, there can be no serious dispute that Section 3550 constitutes blatant content and viewpoint discrimination. There is no dispute that Section 3550 was enacted in response to *Janus v. A.F.S.C.M.E.*, the U.S. Supreme Court's 2018 landmark decision, which held that public employers may no longer compel public employees to pay "agency fees" to public unions. (4-ER-637.) Immediately after *Janus* was decided, the California Legislature amended Section 3550 to specifically prohibit public employers from saying or doing anything that might "deter or discourage" an employee "from authorizing dues or fee deductions to an employee organization."

Plaintiffs are elected members of various local California government bodies, including city councils, school boards, and community college and special purpose districts. Though this lawsuit, they sought a declaration that Section 3550 violates the First Amendment by abridging the freedom of speech of elected

officials and by chilling their ability to discharge their duties to represent and to act upon the will of their constituents.

1. The district court held that Plaintiffs lack Article III standing because Section 3550 applies only to "public employers," and therefore "the only appreciable chill is that felt by Plaintiffs when speaking as duly authorized agents of their public employers." (1-ER-12.) Thus, reasoned the district court, "when Plaintiffs speak in their official capacity, the First Amendment does not apply, and when Plaintiffs speak in their individual capacity, Section 3550 does not apply." (*Id*. (citations omitted)).

This a model of circular reasoning because it bases a conclusion on an assumption that is as much in need of proof as the conclusion itself. It assumes that Plaintiffs get to decide where to draw the "dividing line" between protected individual speech and potentially sanctionable official speech. Under Section 3550, Plaintiffs do not get to decide where that line is drawn, even when they purport to speak in their personal capacity, because they cannot control *post hoc* determinations by a trier of fact that would impute their statements to the public employer.

A. The district court conceded "that in some instances" what Plaintiffs say "might be construed by PERB [the California Public Employment Relations Board] as running afoul of the Section" based on a *post hoc*

determination "that their speech would be imputed to the public employer." (1-ER-11–12.) Having acknowledged the chilling effects of "such a line-drawing issue," the district court held that "it is irrelevant which side of the 'line' Plaintiffs are ultimately determined to have occupied when making a potentially offending statement," because the government speech doctrine permits the state to regulate Plaintiffs' speech whenever they speak in their "official capacity." (1-ER-12 [*citing Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)]).

This misapprehends the nature and scope of the "government speech" doctrine. Elected officials work for "the public itself," not the state, and it is the public that has "the power to hire and fire." *Jenevein v. Willing*, 493 F.3d 551, 557 (5th Cir. 2007). Virtually every court to consider the issue has held that *Garcetti* has no application to elected officials, because – unlike public employees – elected officials have an obligation to speak on public issues. *See infra* at pp. 41-44. Were *Garcetti* to apply, speaking on political issues would be subject to regulation by the state as part of the elected representative's "official duties," something which even PERB concedes would be outside the reach of Section 3550. (*See* 3-ER-467 ["Private speech by an individual—including campaign speech—cannot reasonably be viewed as the speech of a public employer under section 3550", *citing Boling v. Pub. Employment Relations Bd.*, 5 Cal. 5th 898, 919 (2018)].) Because Plaintiffs must speak on issues of public concern that are often

both political and controversial in nature, and because they allege (or could further allege) that such speech could result in unfair practice charges and resulting disrepute, Plaintiffs face a credible threat of direct injury.

B. The district court never acknowledges that elected officials are accorded unique First Amendment rights and speech and debate privileges, and that any law that regulates the substance of what an elected official may say – whether directly or indirectly – is subject to the most exacting scrutiny, particularly where, as here, the state seeks to exert control over speech, not in its capacity as employer, but as sovereign. These protections "would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

While the district court did not consider the risk of self-censorship based on the lack of any statutory parameters as to what may be deemed to constitute speech that would "deter" or "discourage" unionization, it did not need to conduct this analysis to grasp why *any* "deterrents to the uninhibited discharge of [Plaintiffs'] legislature duty" constitutes injury-in-fact, *Tenney*, 341 U.S. at 377, upon both Plaintiffs' right to speak and the right of their constituents to hear what they have to say.

These considerations should have figured prominently in the district court's Article III and ripeness analysis, particularly given the district court's acknowledgement that Section 3550 regulates speech of elected officials. Instead, it hinged its decision on *Leonard v. Clark,* 12 F.3d 885 (9th Cir. 1993), a case which did not involve the constitutionality of a state law aimed at censoring speech by public agencies or their elected representatives. It concerned a collective bargaining agreement ("CBA") between a municipality and a firefighters' union, which (as alleged) interfered with the ability of union representatives to express their opinions about the CBA without jeopardizing the union's economic rights under that agreement. As this Court held, the "only chill implicating the First Amendment is on the speech of these agents when they act under authority from their [union]." Unlike *Leonard*, Plaintiffs do not have the unilateral and conclusive authority to decide when their statements are made in their personal capacity versus their official capacity.

2. The district court dismissed the Complaint, without leave to amend, and entered judgment, with prejudice, based on its conclusion that Plaintiffs' claims were not ripe for adjudication. The district court viewed the reputational harm or other negative consequences of enmeshing a public agency in a protracted, time-consuming, and costly administrative proceedings based on statements by Plaintiffs as little more than "Plaintiffs' 'speculation about potential governmental

action.'" (1-ER-13.) The threat of a restraining order, backed by the power of contempt, cannot be ignored as a "non-particularized" risk of harm.

The district court pirouettes around these non-speculative risks by claiming that Plaintiffs "fail to lay out their plans to contravene the law with the requisite specificity," or that they "have not explained, in concrete detail, that they intend to violate Section 3550." (1-ER-15.) This misapprehends the nature of Plaintiffs' injury: they cannot know, and therefore are left "wholly at the mercy of the varied understanding of [their] hearers, and consequently of whatever inference may be drawn as to his intent and meaning," which "blankets with uncertainty whatever may be said" and "compels the speaker to hedge and trim." *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

Plaintiffs' allegations as to injury-in-fact are neither conclusory nor speculative: In particular, Plaintiffs allege that PERB has brought and will continue to bring Section 3550 enforcement actions based on statements by those deemed to have spoken in their "official" capacity (3-ER-126); that their speech could be imputed to their representative bodies based on hindsight judgments in Section 3550 enforcement proceedings (4-ER-641); and that the public employers could be held liable for these statements (*id.*). Based on legal guidance from the California School Board Association and the League of California Cities concerning Section 3550, Plaintiffs have refrained from answering any questions

"about the *Janus* case, [Section 3550], or whether to join or stay in a union," and have withheld public comment as to certain topics relating to unions based on the perceived threat anything they say might be imputed to their public employer. (4-ER-638–39.)

The district court is required to accept Plaintiffs' allegations as true, and to draw all reasonable inferences in their favor, including particularized facts which, if proven at trial, would establish the chilling effects of Section 3550 on the exercise of their First Amendment rights, i.e., injury-in-fact. It is also required to apply a "relaxed standing analysis" in order to avoid the chilling effects of a sweeping restriction on speech.

Instead, the district court purported to decide the validity of these allegations by, among other things, evaluating the evidence presented in Plaintiffs' declarations. To the extent that the district court found the evidence wanting, it should have reserved judgment until hearing a motion for summary judgment. To the extent that it believed that the allegations were insufficient to establish subject matter jurisdiction, then the district court should have granted leave to amend, or permitted jurisdictional discovery. By dismissing the Complaint without leave to amend, the district court committed reversible error.

3. The district court's conclusion that amendment would be "futile" reveals three, significant errors. *First*, there is nothing speculative about the risk

that a public employer could be charged with a violation of Section 3550 based on statements by a member of its governing board. At the time of the district court's decision, four different Section 3550 cases were before the California Public Employment Relations Board ("PERB"). *Second*, PERB routinely exercises its remedial powers to enjoin the agency *and* its elected board members from continuing to engage in conduct at issue in the administrative proceedings, thus exposing Plaintiffs to the threat of civil contempt proceedings for violating PERB's cease-and-desist orders. *Third*, Section 3550's unconstitutional vagueness *is* the source of its Article III injury – by deliberately failing to define what statements, whether purely factual or based on opinion, would deter or discourage unionization, it is impossible to know what speech "would be offensive enough to invoke the statute" and, as a result, would "likely to have the effect of chilling some speech that is constitutionally protected." *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996). In the First Amendment context – and in particular a pre-enforcement challenge based on the chilling effects of an overbroad statute which penalizes speech based on the viewpoint expressed – any ripeness concerns are satisfied based on a showing that Plaintiffs not only have suffered harm in the form of chilled speech, but face the threat of injury if they do speak.

While it is almost invariably reversible error (and certain error here) to dismiss a complaint without leave to amend on the first motion to dismiss, the

district court did so on the basis of Article III standing. If a court lacks subject matter jurisdiction, it is powerless to reach the merits, and therefore any dismissal "with prejudice" is clear error.

This Court should reverse the district court, with instructions on remand that the district court vacate its Order, deny Defendants' motions to dismiss, and to conduct a hearing on Plaintiffs' motion for preliminary injunction.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 because Plaintiffs' claims arise under the First Amendment of the United States Constitution. (4-ER-630.) This Court has jurisdiction under 28 U.S.C. § 1291 because Plaintiffs appeal from a final order dismissing the Complaint without leave to amend. Plaintiffs timely appealed on October 15, 2020. (4-ER-674–78; Fed. R. App. P. 4(a)(1)(A).)

ISSUES PRESENTED

1. Did the district court err by concluding that Plaintiffs, who are elected members of various local California government bodies, and thus representatives of the public employers on whose boards they sit, lack Article III standing to bring a First Amendment challenge as to Government Code Section 3550?

2. Did the district court err by concluding that Plaintiffs' First Amendment challenge is not ripe for adjudication?

3. Did the district court err by dismissing the Complaint without leave to amend and then entering judgment on the Complaint with prejudice?

STATEMENT OF THE CASE

I. California Law Governing Public Employee Labor Relations

California has created a comprehensive statutory scheme to protect public employee unionization and the collective bargaining process. These laws prevent public employers and unions alike from threatening or coercing public employees or from otherwise interfering with their right "to form, join, and participate in the activities of employee organizations of their own choosing . . . ." (4-ER-636.) These laws are viewpoint and content neutral – they prohibit unlawful activities from both sides of the bargaining process, whether or not those activities tend to assist or promote unionization or to deter it. *See, e.g.,* Cal. Gov't Code § 16645.

The organizing principle of these statutes is to protect the right of employees to engage in concerted activities *and* to assure that both public employers and labor organizations alike have the right to express their opinions about unions, unionization, collective bargaining, or the positions taken by the parties as to any mandatory topic of negotiations, so long as the statements made are not coupled with a promise of benefit or a threat of retaliation, discrimination, or coercion.

These laws are enforced by PERB, which describes itself as "the expert, quasi-judicial agency with exclusive initial jurisdiction over California's major

public sector labor relations statutes." (1-ER-6.) Unfair practice charges may be filed with PERB by employees, employee organizations, or employers, and are initially investigated by PERB's Office of the General Counsel. (*Id.* citing Cal. Code Regs. tit. 8, §§ 32602(b), 32620.) If the General Counsel initiates administrative proceedings, an administrative law judge (ALJ) conducts a formal hearing and renders a recommended decision and order. (*Id*. citing Cal. Code Regs. tit. 8, §§ 32178, 32680, 32215.) If any of the parties file exceptions to the ALJ's ruling, PERB itself reviews the case and issues a final decision. (*Id*. citing Cal. Code Regs. tit. 8, §§ 32300, 32320.) PERB's remedial powers include authority to restrain the public employer and its representatives (including elected officials) from engaging in the unlawful conduct at issue, and to initiate civil contempt proceedings should there be a violation of its cease-and-desist order. Judicial review of a PERB decision may be sought in the California Court of Appeal. (*Id*. citing Cal. Gov. Code §§ 3509.5, 3542(b)-(c).)

II. Government Code Section 3550

On June 27, 2018, the Supreme Court held in *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018), that the First Amendment prohibits states from compelling public employees to pay "agency fees" to fund union activities, including those relating to collective bargaining. "Agency fees" are fees paid to the union by public employees who are not

members of the union. In anticipation of and in response to that decision, the California Legislature passed a series of measures designed to bolster public union support and to shield union finances from the effects of the Court's ruling. (4-ER-636–37.) One of those measures became what is now Section 3550, which is subject to the enforcement power of PERB. Cal. Gov. Code § 3551.

III. Plaintiffs

Plaintiffs are elected members of local California government bodies, including city councils, school boards, and community college and special purpose districts. These public employers engage on a regular basis with employee representatives in connection with collective bargaining proposals, representation matters, or various public issues on which the union might express a position. (*See, e.g.* 3-ER-566; 3-ER-559; 3-ER-549–50; 3-ER-571; 3-ER-522; 3-ER-526; 3-ER-519.) Plaintiffs are charged with representing their constituencies with respect to issues relating to labor-management issues. Each Plaintiff has occasion to speak on these topics during public hearings, townhall meetings with constituents, and in the course of reelection campaigns or candidate endorsements. (*See* 3-ER-566, 568; 3-ER-522–23; 3-ER-518–19; 3-ER-571, 573; 3-ER-559–60; 3-ER-549–552; 3-ER-526–27, 530–31.). It is not unusual for Plaintiffs to engage directly in labor-management discussions, to comment publicly on bargaining proposals, or to take positions on the terms of a proposed CBA. (3-ER-519; 3-ER-566; 3-ER-559; 3-

ER-549-50; 3-ER-571; 3-ER-522; 3-ER-526, 531.). Each of the Plaintiffs have been delegated the responsibility, as a member of the public entity's governing board, to oversee (or to engage in) collective bargaining negotiations. (*See* 3-ER-566; 3-ER-571; 3-ER-526; 3-ER-559.).

Following enactment of Section 3550, Plaintiffs have refrained from speaking about issues relating to public unions, even remaining silent as to issues bearing on the governing board's interactions with the employees' labor representative and even not responding to constituent or employee questions relating to *Janus*. (*See*, *e.g.*, 4-ER-628–29, 638–41; 3-ER-572–73; 3-ER-567–69; 3-ER-548–52; 3-ER-559–60; 3-ER-526–27, 530–32; 3-ER-522–23; 3-ER-518–19.) Plaintiffs fear that if they speak, they will "face the threat of unfair labor charges against their agencies whenever they share their perspectives or convey factual information about unionization or a union's policy agenda on a host of other important public matters." (4-ER-628–29.) They have further alleged that they would be harmed by "being enmeshed" in such "unfair labor proceedings." (4-ER-640.)

In particular, they have alleged that they would risk injury to (i) their personal reputations (*see* 3-ER-560 (noting threats by employee representatives in response to statements by Plaintiff Ferguson)); (ii) their ability to serve as effective elected officials (*see* 3-ER-572–74 (Section 3550 prohibits Plaintiff Sachs from

"speak[ing] candidly" at meetings on unions issues and from "responding to constituent questions"); 3-ER-567, 69 (same for Plaintiff Barke, and further noting that it hampers his "ability and need to communicate with my constituents"); 3-ER-548–49, 550–51 (same) (Plaintiff Reardon); 3-ER-559–61 (same) (Plaintiff Ferguson); 3-ER-526, 530–31 (same) (Plaintiff Anderson); 3-ER-521–23 (same) (Plaintiff Yarbrough); 3-ER-517–19 (same) (Plaintiff Dohm)); and (iii) and their ability to get re-elected (*see* 3-ER-548–49, 550–52 (describing Plaintiff Reardon's prior campaign speech leading to his election and noting that he no longer makes such speech or espouses such opinions); 3-ER-559–60, 561 (describing Plaintiff Ferguson refraining from taking positions with her constituents on issues she deems important to her representational duties, which also interferes with her ability to provide candid and complete responses as part of her campaign for reelection)).

IV. Plaintiffs' First Amendment Challenge To Section 3550

Plaintiffs sought declaratory and permanent injunctive relief barring PERB and its General Counsel from enforcing Section 3550 based on their First Amendment rights to free speech. (4-ER-644.) Simultaneous with the filing of the Complaint, Plaintiffs filed a motion for preliminary injunction "prohibiting the enforcement of California Government Code § 3550 against Plaintiffs and other elected public officials, pending final judgment in this case." (3-ER-619.)

The Complaint challenges the constitutionality of Section 3550 on three grounds. *First*, Section 3550 applies only to public employers, not unions, and, even then, prohibits a public employer from deterring or discouraging – but not assisting, promoting, or encouraging – unions or unionization. This constitutes viewpoint and content discrimination, because it regulates speech based on its substantive content, the message it conveys, and who is speaking. *Second*, Section 3550 is unconstitutionally vague because it provides Plaintiffs with no way of knowing when their speech crosses the line into a prohibited utterance because it might deter or discourage unions or union membership. Plaintiffs further averred that Section 3550 cannot be reconciled with longstanding statutory law and PERB precedent, which holds that "[a]n employer may freely express or disseminate its views, arguments, or opinions on employment matters, unless such expression contains a threat of reprisal or force or promise of benefit." *Hartnell Community College District*, PERB Decision No. 2452E, p. 25 (2015).[1] *Third*, Section 3550 is

[1] *See also City of Oakland*, PERB Decision No. 2387-M, p. 25 (2014) (applying the "safe harbor" protections found in NLRA section 8(c) to the MMBA [Meyers-Milias Brown Act], even though the MMBA includes no express "employer free speech" provision); *Rio Hondo Community College District*, PERB Decision No. 128E, at p. 18-19 (1980) ("While this Board is aware that the EERA [Educational Employment Relations Act] contains no provision paralleling Section 8(c) of the NLRA [National Labor Relations Act], we find that a public school employer is nonetheless entitled to express its views on employment related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate. . . . While the protection afforded the employer's speech is not without limits, it must necessarily include both favorable and critical speech

unconstitutionally overbroad because it chills a substantial amount of constitutionally protected expression, including core political speech by elected representatives as to subjects that they have both a right and obligation to express their positions.

V. Section 3550's Chilling Effect On Plaintiffs' First Amendment Rights

Plaintiffs aver that Section 3550 chills them from offering opinions or facts on the merits of unionization – for instance, a summary of the *Janus* decision's prohibition on compulsory agency fees – based on the uncertainty that any *post hoc* characterization of their statements could be deemed to have discouraged union membership, or would be imputed to the public employer.[2] As a consequence, Plaintiffs allege that they have limited or altogether refrained from speaking on these subjects in order to avoid enmeshing themselves and their board in PERB enforcement proceedings or to subject themselves to cease-and-desist orders, and potentially civil contempt proceedings.

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regarding a union's position provided the communication is not used as a means of violating the Act.").

[2] Reporters and commentators were quick to describe the reach of Section 3550, including the extent to which even true statements of fact or accurate recitations of law could run afoul of Section 3550, such as informing public employees about: (1) how to opt out of union membership (*see* 3-ER-495–97), (2) the amount of union dues a public employee must pay (*see* 3-ER-498), or (3) even that public employees do not have to pay union dues if they do not join the union under *Janus* (*see* 3-ER-499–02).

There is nothing theoretical about the possibility of a public employer facing Section 3550 liability based on statements made by an elected member of its board.[3] While on its face Section 3550 limits the speech of "public employers," public employers "speak" through their elected board members or appointed officials. Any violation of Section 3550 must, *a fortiori*, be based on statements made with the actual or apparent authority of the public employer. PERB has not hesitated to hold an employer liable for speech-related unfair labor practices based on statements by elected officials, and to impose cease-and-desist orders on the entity *and* its elected representatives.[4]

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[3] Nor is it a matter of speculation whether PERB will initiate Section 3550 enforcement proceedings based on statements that otherwise would be protected under existing PERB statutory law and precedent. (3-ER-452 citing *Gridley Unified School District*, 44 Pub. Emp. Rep. for Cal. ¶ 130 (Jan. 28, 2020) and *Regents of the University of California*, 44 Pub. Emp. Rep. for Cal. ¶ 34 (July 22, 2019).) Of the four proceedings pending before PERB, two explicitly allege unfair practices based on statements by public officials about the *Janus* decision; in one case, the administrative law judge found that a communication to employees about *Janus* had the "natural and probable consequence of deterring and discouraging employees" from unionization efforts. (*Id.*)

[4] *See, e.g.*, *SEIU Local 721 v. County of Riverside*, PERB Decision No. 2119-M at p. 22-23 (2010) (holding county liable for unlawful interference with rights of employees and union based on statements made by two elected supervisors during a public meeting of the board) ("[T]he County cites no authority, nor have we found any, for the proposition that a public official's statements during a public meeting are immunized from scrutiny under collective bargaining statutes. On the contrary, PERB has held that a local agency may be held liable under the MMBA for the conduct of its governing body in official proceedings" [*citing City of Monterey,* PERB Decision No. 1766-M (2005)]); *San Diego Teachers' Association*, PERB Decision No. 137, at p. 29 (1980) (imputing liability for

For example, in *Boling v. PERB*, 5 Cal. 5th 898 (2018), PERB imputed the mayor of San Diego's personal endorsement of a pension reform "citizens' initiative" for purposes of finding an unfair labor practice, even though neither the mayor nor the city sponsored the ballot initiative. PERB held that the mayor's "imprimatur" could be deemed an attempt by the city to dodge its obligation to meet-and-confer with the unions before making any official endorsements of the initiative. *Id.* at 906. While the California Supreme Court held that the mayor's endorsement constituted an unfair labor practice by the city, it also recognized the inherently fact-specific nature of drawing the "line between official action and private activities undertaken by public officials," which it noted "may be less clear in other circumstances." *Id.* at 919.

"The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 135 (1966). Plaintiffs contend that Section 3550 interferes with both the right of elected officials to speak freely and with the right of the electorate to hear what they have to say. *See, e.g., id.*; *Tenney*, 341 U.S. at 373. "Legislators have an obligation to take positions on

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discriminatory reprisal against striking employees to school board based on letters sent by two board members acknowledging and thanking certain teachers who had not participated in a strike).

controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them." *Bond*, 385 U.S. at 136-37; *see also Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 131 (2011) (Kennedy, J., concurring) ("'[T]he right of citizens to band together in promoting among the electorate candidates who espouse their political views' is among the First Amendment's most pressing concerns.") (quoting *Clingman v. Beaver*, 544 U.S. 581, 586, 125 (2005)); *Velez v. Levy*, 401 F.3d 75, 97-98 (2d Cir. 2005) (restrictions of elected officials' speech "offend[s] the basic purposes of the Free Speech clause—the facilitation of full and frank discussion in the shaping of policy and the unobstructed transmission of the people's views to those charged with decision making."). Section 3550 would undermine a core function of the First Amendment that, in combination with privileges afforded legislative speech and debate, is intended to avoid the chilling effects of legislative self-censorship.

These chilling effects are compounded by Section 3550's lack of any "specific formula" or limiting provisions that might reasonably distinguish between speech that could be imputed and speech that cannot, or between protected and punishable speech. This was precisely the constitutional infirmity identified in *Thomas v. Collins*, 323 U.S. at 535-36, where the effect of the

ambiguous statutory term (there "solicit" union support, here to "deter or discourage" unionization) would "in a very practical sense" prohibit solicitation of union members and memberships, but also to speak of the cause of trade unionism:

> It is not contended that only the use of the word "solicit" would violate the prohibition. Without such a limitation, the statute forbids any language which conveys, or reasonably could be found to convey, the meaning of invitation. . . . General words create different and often particular impressions on different minds. No speaker, however careful, can convey exactly his meaning, or the same meaning, to the different members of an audience.
>
> . . .
>
> No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers, and consequently of whatever inference may be drawn as to his intent and meaning.

As alleged, Section 3550 presents Plaintiffs with the same three choices presented the proponent of trade unionism in *Thomas v. Collins*: "(1) to stand on his right and speak freely [risking penalty]; (2) to quit, refusing entirely to speak; (3) to trim, and even thus to risk the penalty." *Id*. at 536. If they speak, they run the risk of having their speech imputed to the employers that they serve, and be themselves subject to restraining orders. If they remain silent, they deprive those who elected them of their right to hear their positions and to adjudge their points of

view at the ballot box. The third choice is perhaps the worst of alternatives, because it would require that elected officials abdicate their responsibilities to those who elected them without providing any assurance that their statements, however hedged or trimmed, may nonetheless result in public censure in the form of a cease-and-desist order.

VI. Procedural History And The Court's Order

Plaintiffs filed the Complaint against the members of the Board of PERB and its General Counsel on February 21, 2020. (4-ER-627–44.) Thereafter, on May 7, 2020, the district court granted the motion to intervene filed by five unions – the California Teachers Association, SEIU California State Council, California Federation of Teachers, California School Employees Association, and California Labor Federation (collectively, the "Unions"). (2-ER-141–48.) The PERB Defendants filed a motion to dismiss, which was joined by the Unions. (3-ER-438–71.) Plaintiffs also filed a motion for preliminary injunction, seeking an order preliminarily enjoining the application of Section 3550 to elected officials, like Plaintiffs. (3-ER-586–620.)

On August 25, 2020, the district court granted the motion to dismiss and dismissed the Complaint without leave to amend. (1-ER-3–21.) The district court held that Plaintiffs lacked standing under Article III of the United States Constitution, and further that the Complaint was not ripe for adjudication. (*See*

generally id.) The district court further denied as moot Plaintiffs' motion for preliminary injunction. (1-ER-21.) The district court then entered judgment on the Complaint with prejudice. (1-ER-2.)

SUMMARY OF ARGUMENT

The district court's order hinges on its conclusion that because Section 3550 applies to "public employers," not their elected representatives, Plaintiffs' individual speech is not subject to the statute, Plaintiffs cannot be harmed by the statute's enforcement as a result, and so Plaintiffs cannot allege a cognizable threat of direct injury sufficient to support Article III standing.

That conclusion is incorrect. Statements by representatives of public employers, including elected representatives, can be – and are – imputed to the public employer. Those statements form the basis for unfair labor practice investigations, formal charges, and enforcement proceedings, and – should PERB find that a violation occurred – a restraining order against both the public employer *and* its elected representatives, backed up by the threat of civil contempt proceedings.

Those allegations, included in the Complaint and reiterated in sworn declarations by Plaintiffs, are sufficient to establish Article III standing. But the district court ignored or dismissed those allegations – including particularized descriptions as to how Plaintiffs' speech is being chilled by Section 3550 – thus

violating the basic presumption of truthfulness afforded well-pled factual allegations at the pleading stage. Instead, the district court concluded, without reasoned explanation or factual support, that Plaintiffs may control when they speak for themselves and when they speak for their public entities. Plaintiffs do not have such agency under PERB precedent, because Plaintiffs do not get to decide whether their speech will be imputed to the public employer. Those decisions are left to the vagaries of subjective, hindsight judgments formed during the adversarial process. These uncertainties cause the very chill giving rise to Plaintiffs' injuries.

To the extent the district court believed that Plaintiffs' allegations lacked the requisite particularity, or were insufficiently "concrete," it was required to grant leave to amend. The district court impliedly conceded that its holding depended, at least in part, on Plaintiffs' failure to sufficiently allege "a reasonable likelihood that the government will enforce the challenged law against them" (1-ER-12), or to specify "potential reputational harm" beyond what the district court deemed "speculation about potential government action." (1-ER-13). It reached these conclusions based on its consideration of declarations and evidence outside the Complaint – evidence which the district court dismissed as failing to "provide the necessary details" or "the specific circumstances" relating to Plaintiffs' "proposed future public statements." (1-ER-15, n.10.)

The district court summarily concluded that amendment would be futile "in large part due to the inapplicability of Section 3550 to Plaintiffs, and the Article III issues that flow therefrom." (1-ER-21.) Presumably those "issues" turned on the district court's characterization of the pleadings and the evidence. But even if the district court correctly found lack of injury-in-fact, it was not permitted to reach the merits, and therefore erred when it entered judgment on the Complaint "with prejudice."

STANDARD OF REVIEW

The district court's dismissal of the Complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of Article III standing is reviewed *de novo*. *Rhoades v. Avon Prod., Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007) ("We review *de novo* dismissals under Rules 12(b)(1) and 12(b)(6)."). Because Defendants made a facial attack on Plaintiffs' jurisdictional allegations, all facts alleged in the Complaint must be taken as true (*Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015)), and the Court "must construe the complaint in favor of" Plaintiffs (*Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011)). In addition, the

Court may also consider declarations in support of standing. *Maya*, 658 F.3d at 1067.[5]

Importantly, at the pleadings stage, "conflicts between the facts" cannot be resolved and credibility determinations cannot be made; instead, such issues "must be resolved in" and construed in the plaintiff's favor. *Rhoades*, 504 F.3d at 1160, citing *Mattel, Inc. v. Greiner and Hausser GmbH*, 354 F.3d 857, 862 (9th Cir. 2003). In other words, at the pleadings stage, the question is whether the allegations are sufficient on their face, "not whether the alleged facts will ultimately prove accurate." *Rhoades*, 504 F.3d at 1156. Thus, in *Lujan v. Defenders of Wildlife*, the Supreme Court held that standing is assessed differently at different stages of the case. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," and factual disputes are not resolved. 504 U.S. 555, 561(1992). On summary judgment, the plaintiff's standing must be supported by "affidavit or other evidence," and that evidence "will be taken as true." *Id.* Only at trial can factual disputes be considered and resolved. *Id. See also NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532-33 (9th Cir. 2019) (noting that standing must be

[5] The district court referenced or cited declarations from Plaintiffs submitted in support of Plaintiffs' motion for preliminary injunction. Accordingly, Plaintiffs cite to the evidence in the record that was before the district court.

analyzed throughout the case and affirming decision based on finding of lack of Article III standing at the time of trial); § 3531.15 Raising The Issue, 13B Fed. Prac. & Proc. Juris. § 3531.15, at n. 34 (3d ed. 2004) (noting that when the factual issues overlap with standing issues, courts often defer resolving standing, just as they do for other jurisdictional issues) (collecting cases)).

The district court's dismissal of the Complaint without leave to amend is reviewed for abuse of discretion. *Nat'l Council of La Raza*, 800 F.3d at 1039. Absent a clear showing that amendment would be futile, the failure to grant leave to amend "is not an exercise of discretion," but "merely an abuse of that discretion." *Id.* citing *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment."); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the [Federal Rules of Civil Procedure] require, be 'freely given.'").

ARGUMENT

I. The District Court Erred In Concluding That Plaintiffs Lack Article III Standing

To have Article III standing, a plaintiff must establish three elements: injury-in-fact, causation, and a likelihood that a favorable decision will redress the plaintiffs' alleged injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court held that because Section 3550 applies only to "public employers," "the only appreciable chill is that felt by Plaintiffs when speaking as duly authorized agents of their public employers," and that "when Plaintiffs speak in their official capacity, the First Amendment does not apply." (1-ER-12.) On this basis, the district court concluded that Plaintiffs "fail[ed] to establish a sufficient injury in fact or [a] credible threat" of such injury to "satisfy the demands of Article III." (1-ER-10.)

The district court erred. Plaintiffs face a credible threat that their statements will run afoul of Section 3550, in part because the statute provides no guidance whatsoever as to how that determination would be made, or whether what they say will be imputed to the public employers. The resulting administrative proceedings by PERB could lead to a variety of adverse consequences, from reputational injury (for committing an unfair labor practice), to an injunction preventing them (as a board member or "agent" of the public agency) from making statements of the nature found to have "deterred" or "discouraged" unionization or union

membership, to potential liability and civil contempt proceedings should they be charged with violating PERB's remedial cease-and-desist orders. Because Plaintiffs have refrained from speaking in light of those threats, they have Article III standing to sue.

A. Plaintiffs Adequately Alleged A Realistic Danger Of Sustaining Direct Injury

In general, an injury-in-fact must constitute "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. First Amendment challenges "raise unique standing considerations that tilt dramatically toward a finding of standing." *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010). As a result, plaintiffs "may establish an injury in fact without first suffering a direct injury from the challenged restriction." *Id.* at 785. "In such pre-enforcement cases, the plaintiff may meet constitutional standing requirements by demonstrating a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* (internal citations and quotations omitted). Thus, a plaintiff "does not have to await the consummation of a threatened injury to obtain preventive relief." *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). This relaxed standing requirement in First Amendment cases reflects the wisdom that "[w]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided

whenever possible may be outweighed by society's interest in having the statute challenged." *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984).

First Amendment plaintiffs may demonstrate a "realistic danger" of a direct injury whether or not they have spoken. If Plaintiffs have engaged in speech already that is potentially subject to a prosecution or some other adverse action, then they have standing. *See Lopez*, 630 F.3d at 786. They also have standing if they self-censor – *i.e.*, they would like to speak, but for fear of consequences, do not. *Id.* The "Supreme Court has endorsed" this approach "in an effort to avoid the chilling effect of sweeping restrictions." *Id.* "[I]t might be called a 'hold your tongue and challenge now' approach rather than" an approach "requiring litigants to speak first and take their chances with the consequences." *Id.* (internal citations and quotations omitted).

The threat of direct injury need not come in the form of a prosecution or similar action against the speaker or would-be speaker for violation of the statute. As *Lopez* states, "[t]he threatened state action need not necessarily be a prosecution"; rather, there need only be "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 785, 787. For example, in *Meese v. Keene*, 481 U.S. 465 (1987), the Supreme Court held that an elected official had standing to challenge a statute that caused him to self-censor

even though the elected official was under no threat of state prosecution or action against him. In *Meese*, the elected official wanted to exhibit certain Canadian-produced films that had been designated "political propaganda" under the Foreign Agents Registration Act ("FARA"). FARA did not prohibit the elected official from exhibiting the film, but the elected official self-censored because he feared reputational injury flowing from exhibiting a film designated by the federal government as "political propaganda." *Id.* at 467-68. The Court held that the elected official had standing to challenge the statute on First Amendment grounds. The elected official "establishe[d] that the term 'political propaganda' threaten[ed] to cause him cognizable injury. He stated that 'if he were to exhibit the films while they bore such characterization, his personal, political, and professional reputation would suffer and his ability to obtain re-election and to practice his profession would be impaired.'" *Id.* at 473.

Similarly, a reputational injury stemming from a cease-and-desist order or a public censure by a governmental agency based on statements by an elected official is an injury-in-fact sufficient to bring a First Amendment challenge. *Wilson v. Hous. Cmty. Coll. Sys.*, 955 F.3d 490, 496 (5th Cir. 2020) (a public rebuke by a public agency suffices to establish injury-in-fact, even if that rebuke does not interfere with the plaintiff's ability to perform his duties); *Babbitt v. Farm Workers*, 442 U.S. 289, 302 n.13 (1979) ("the prospect of issuance of an

administrative cease-and-desist order . . . against such prohibited conduct provides substantial additional support for the conclusion that appellees' challenge to the publicity provision is justiciable"). It is difficult to imagine any situation where a state enforcement agency's findings of unlawful employee "deterrence" based on the statements by an elected official would ***not*** be seen as an official rebuke, not only of the public employer, but of the speaker.

As set forth above, Plaintiffs allege well-founded fears of the same and similar harms, and have self-censored. As a result, they have Article III standing.

B. The District Court's Finding That Plaintiffs Do Not Face A Credible Threat Of Injury Because Section 3550 Applies Only To Pubic Employers Misapprehends The Law And Plaintiffs' Complaint

Section 3550 does not immunize elected officials from the consequences of their speech even if those individuals are not directly subject to PERB's jurisdiction. Because a public employer can act only through its elected officials, any violation of Section 3550 must be based on the speech or conduct by a representative of the public employer, including potentially the individuals who sit on the governing body. As discussed, PERB precedent establishes that public employers may be held liable based on statements by individuals elected to serve on the governing bodies of a public employer – including statements not made in the course of official proceedings or on behalf of the public employer as a whole. (*See supra*, p. 21-21, n. 4.) Plaintiffs allege (in considerable detail) that, because

of Section 3550's overbroad and vague language, they face a realistic possibility that anything they may say concerning unions may be deemed to "deter" or "discourage" unionization or union membership, and that their statements may be attributed to the public agency. At the pleading stage, those allegations must be accepted as true.[6]

It should be beyond dispute that there is a significant risk of reputational damage whenever a state enforcement agency, such as PERB, initiates proceedings against a public employer based on statements by one or more if its elected officials. It should also be obvious that, apart from the cost, publicity, and distraction of defending against charges of interfering with employee rights, elected officers of public employers face the prospect of being subject to restraining orders by PERB based on their speech or conduct. Once subject to a restraining order, these individuals are also at risk of contempt proceedings. That is a credible threat of future injury sufficient to confer Article III standing. *See*

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[6] *See, e.g.*, 4-ER-628–29 ("After Section 3550's enactment, elected officials, including Plaintiffs, now face the threat of unfair labor charges against their agencies whenever they share their perspectives or convey factual information about unionization or a union's policy agenda on a host of other important public matters."); 4-ER-640–41 ("Section 3550's complete lack of guidance as to the scope of its prohibited conduct, combined with the in terrorem threat of being enmeshed in unfair labor proceedings for statements made at a school board meeting or in communications with teachers, parents, or the public, is already causing them to refrain from commenting on topics that might trigger Section 3550's speech prohibitions.").

Meese, 481 U.S. at 472-73; *Wilson*, 955 F.3d at 496; *Babbitt*, 442 U.S. at 302 n.13.

The district court largely dismissed the relevance of these particularized allegations. Instead, relying on this Court's decision in *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993) and the government speech doctrine to conclude that (i) Section 3550 does not apply to Plaintiffs' individual speech, and so does not restrict their speech in an individual capacity and (ii) because Section 3550 applies only to statements made by Plaintiffs in their "official capacity" as elected representatives, the government speech doctrine allows the state to regulate their speech. As explained below, the district court misapprehended and misapplied *Leonard* and the government speech doctrine.

1. The District Court Misapprehended And Misapplied *Leonard*

The district court relied heavily on *Leonard,* without once acknowledging that this decision neatly encapsulates why Plaintiffs have standing to assert their claims. In *Leonard*, a term in a collective bargaining agreement ("CBA") between a firefighters' union and a city stipulated that, should the union "endorse or sponsor" legislation that resulted in "any new economic or benefit improvement causing increased payroll costs to the City" beyond those required under the CBA, "such costs shall be charged against applicable salary agreement[s]." 12 F.3d at 886. Individual firefighters brought suit, claiming that the provision infringed their First Amendment rights to endorse or sponsor legislation on their own. Some of

the plaintiffs were representatives of the union, and they argued that they refrained from personally endorsing or sponsoring legislation for fear that any new legislation would count against union members.

The Ninth Circuit held that the speech of the individual fire fighters was not chilled: "Plaintiffs are free to endorse legislation as long as they do not (1) have authority to represent the Union, ***and*** (2) claim that they are speaking for it." *Id.* at 889 (emphasis added). "The individual plaintiffs' speech could be affected only if, as individual union members, they wished to claim authority to speak for the Union when they did not possess it." *Id.* Thus, the union representatives – even the President of the union – could say whatever they wanted without fear of harming the union, so long as they did not claim that they were speaking on behalf of the union.

Plaintiffs here do not enjoy the luxury of such a bright line. PERB precedent imputes an official's speech to the public employer not only when the representative expressly states that he is speaking for the public employer (the sole barometer in *Leonard*), but also when the listener "perceive[s] that [the public employer the official serves] has authorized [that elected official] to engage in the conduct in question," whether or not the employer itself or the governing board has approved or ratified that conduct. *Chula Vista Elementary School District*, PERB Decision No. 1647 (2004) (citing *Inglewood Teachers Assn. v. PERB*, 227

Cal.App.3d 767 (1991)). The uncertain nature of this test was on full display in *Santa Maria-Bonita Sch. Dist.*, 37 Pub. Emp. Rep. for Cal. ¶ 207 (Apr. 18, 2013). In that case, the ALJ held that a school district trustee acted as an "actual agent" of the public entity "at least in some capacity," based on nothing more than a finding that an elected official "is one of the public faces of the District, [and that] [h]e and his fellow Trustees preside over Board of Trustees meetings where they make decisions on issues such as budget, personnel, District policy, and negotiated agreements." 37 PERC ¶ 207. The ALJ imputed that board member's actions to the school district, notwithstanding that the Board of Trustees publicly censured him for that same conduct.

Thus, unlike in *Leonard*, whether Plaintiffs' speech could be imputed to their public employers is out of their control, and in the hands of the listener (who might subjectively believe that Plaintiffs are speaking with the apparent authority of the public employer), the union (which would file the charge), the General Counsel of PERB (who initiates the filing of the administrative complaint based on those charges), and PERB (which will decide whether the speech or conduct deterred or discouraged unionization and whether it may be treated as speech of the public employer). The outcome depends on the vagaries of the adversarial process and the hindsight judgments of those who initiate, prosecute, and decide whether to impute the statements of the elected official. Plaintiffs are thus not afforded a

bright-line test, and therefore the option to decide whether to step over that line. This uncertainty makes *Leonard* inapposite and gives rise to the reasonable fear that what they say may redound to the harm of their governing boards, whether intended or not, and therefore result in direct injury.

After ignoring the distinction between the ability of the *Leonard* plaintiffs to decide on which side of the line their speech would fall and the post hoc decision-making vagaries facing Plaintiffs, the district court held, in essence, that where the line is ultimately drawn is irrelevant: "But even assuming that in some instances such a line-drawing issue might arise, it is of no consequence under the facts of this case." (1-ER-12.) Put differently: Plaintiffs assume to take the risk and the risks they face are irrelevant to their First Amendment rights. As discussed below, this analysis is at war with the basic precepts of the First Amendment and illustrates why it is constitutionally intolerable to impose these risks without any means for Plaintiffs to challenge their constitutionality.

2. The Government Speech Doctrine Cannot Apply To Limit The Speech Of Elected Officials Such As Plaintiffs

The district court also reasoned that the government speech doctrine permits the state to regulate Plaintiffs' statements when they speak in their official capacities. The district court stated:

> The only appreciable chill is that felt by Plaintiffs when speaking as duly authorized agents of their public employers, and when Plaintiffs speak in their official

> capacity, the First Amendment does not apply, *see, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes"), and when Plaintiffs speak in their individual capacity, Section 3550 does not apply.)

(1-ER-12.)

There are two fundamental problems with this analysis. *First*, as with the line between individual speech and speech that can be imputed to the public employer, the "line between official action and private activities undertaken by public officials" is not always clear, and subject to the facts. *Boling*, 5 Cal. 5th at 919. When Plaintiffs express their views during legislative or electoral debates, they would seem to be speaking in their official capacities as elected officials, even if espousing their own personal views and not those of the public employer. The same would seem to apply when they speak with constituents or answer questions at board meetings – in each case, they are acting in their official capacity as an elected official, even if expressing their own personal views. When exactly Plaintiffs would not be speaking in their official capacities, and therefore when their speech would be private, is not explained by the district court. That uncertainly gives rise to chilled speech.

Second, the foundation of the district court's reasoning – that the government speech doctrine permits the government to control the speech of its

employees when they act in their official capacities – does not apply to elected officials, like Plaintiffs. (*See* 1-ER-12 citing *Garcetti*). Under the government speech doctrine, the First Amendment protects the employee's speech only when they speak "as citizens about matters of public concern," in which case "they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419. Affording the government the ability to regulate its employees' speech makes sense when the government is acting as an employer. But when the "employee" at issue is an elected representative, the foundations of representative government require that the elected official be able to speak freely.

Put another way, elected officials work for "the public itself," not the state, and it is the public that has "the power to hire and fire." *Jenevein*, 493 F.3d at 557. Accordingly, when the speech of an elected official is at issue, courts do "not draw directly upon the *Pickering*-*Garcetti* line of cases" – *i.e.*, the government speech doctrine. *Id.* at 558. Indeed, the majority of courts, including at least one court in the Ninth Circuit, note that *Garcetti* is inapplicable to the speech of elected officials. *See Holloway v. Clackamas River Water*, 2014 WL 6998084, *2-3 (Dist. Or. Dec. 9, 2014); *Rangra v. Brown*, 566 F.3d 515, 522-23 (5th Cir.), on reh'g en banc, 584 F.3d 206 (5th Cir. 2009); *Jenevein*, 493 F.3d at 558; *Zimmerlink v. Zapotosky*, No. 10-237, 2011 U.S. Dist. LEXIS 53186 (W.D. Pa. Apr. 11, 2011),

adopted, 2011 U.S. Dist. LEXIS 53189 (W.D. Pa. May 18, 2011); *Melville v. Town of Adams*, 9 F. Supp. 3d 77, 102 (D. Mass. 2014); *Conservation Comm'n of Town of Westport v. Beaulieu*, No. CIV. A. 07-11087-RGS, 2008 U.S. Dist. LEXIS 71438, 2008 WL 4372761, at *4 (D. Mass. Sept. 18, 2008); *Willson v. Yerke*, No. 3:10-CV-1376, 2013 U.S. Dist. LEXIS 180065, 2013 WL 6835405, at *9 (M.D. Pa. Dec. 23, 2013), *aff'd*, 604 F. App'x 149 (3d Cir. 2015). As one court held:

> Under *Garcetti*, speech pursuant to a public employee's "official duties" is afforded no protection under the First Amendment. *Bond* [*v. Floyd*, 385 U.S. 116 (1966)] recognized that elected legislators have an "obligation" to speak on political issues. Thus, if *Garcetti* applied to elected officials, speaking on political issues would appear to be part of an elected official's "official duties." But protection of such speech is the "manifest function" of the First Amendment. *Garcetti*, thus, cannot be applied to political speech of elected officials consistently with *Bond*.

Zimmerlink, 2011 U.S. Dist. LEXIS 53186, at **10-11 (internal citations omitted).

Because Plaintiffs regularly speak and must speak on issues of public concern, and because they allege (or could further allege) that such speech could result in unfair practice charges and resulting disrepute, Plaintiffs face a credible threat of direct injury. They thus have standing to challenge Section 3550 under Article III.

C. The District Court's Finding That Plaintiffs Did Not Establish A "Likelihood Of Enforcement Against Plaintiffs" Was Clear Error

The district court found that "Plaintiffs . . . failed to show a reasonable likelihood that the government will enforce the challenged law against them," and so Plaintiffs lacked standing. (1-ER-14.) The district court's analysis improperly conflates three separate issues and, in any event, is wrong as to the application of each one.

First, relying on its analysis that because Section 3550 applies to public employers, rather than the elected officials that sit on their governing bodies, the district court erroneously concluded that there is no reasonable possibility that Section 3550 will be enforced against Plaintiffs. The court explained: "In light of both (1) Section 3550's facial inapplicability to Plaintiffs and (2) the undisputed fact that PERB proceedings are instituted only as against public employers and not their officials," Plaintiffs could not establish a likelihood of enforcement against them. This reasoning is misguided for the same reasons explained in the previous section. Yes, Section 3550 applies to public employers, but Plaintiffs' statements can be imputed to those employers, unfair practice charges can be brought, investigations could follow, and ultimately an injunction could be issued that applies to Plaintiffs' conduct. The prospect of such a proceeding and the disrepute and harm to the elected official that it would entail creates a sufficient threat of direct injury to confer Article III standing.

Second, the district court appeared to recognize that government action against the individual is not a prerequisite to Article III standing in a First Amendment case, noting that in *Meese*, a reputational injury flowing from the operation of a statute which leads to chilled speech suffices. (*See* 1-ER-12–13 discussing *Meese*.) Yet the district court said that Plaintiffs failed to include adequate allegations of "personal, political, and professional reputational harm." (1-ER-13.) The Order reiterated: "Their Complaint includes no allegations of potential reputational harm." (*Id.*) Plaintiffs disagree that their Complaint was insufficient – the Complaint clearly lays out the harm that Plaintiffs fear from unfair practice charges being levelled against the employers they were elected to represent. In any event, it is patently obvious that an elected official will suffer "reputational harm" if his or her speech results in a costly dispute over an alleged unfair labor practice. At the very least, Plaintiffs could have alleged further details in an amended complaint, but the district court did not permit an amendment. This was an abuse of discretion, as explained below.

Third, the district court seemed to hint that the Complaint failed to include allegations making it reasonably likely that Section 3550 charges would be brought. The district court seemed to conclude that the Complaint included no more than "speculation about potential government action." (*Id.* at 11 citing

Clapper v. Amnesty Int'l USA, 568 U.S. 398 (2013))[7].) Again, to the extent the Complaint included insufficient detail, leave to amend should have been granted. PERB's own actions demonstrate a reasonable likelihood that Section 3550 *will* be enforced, including as to purely factual speech, and even when made in an individual capacity (that is, not on the public employer's behalf). As PERB conceded in the district court, there have been investigations allowed and charges brought under Section 3550, and those charges have either been ruled upon or are under consideration by PERB itself. (3-ER-452–54.) Of those four pending complaints, two explicitly allege unfair practices based on purely factual statements about the *Janus* decision and, in one of those cases, the ALJ found that a ***factual*** communication to employees about *Janus* had the "natural and probable consequence of deterring and discouraging employees" from unionization efforts. In other words, a description of the Supreme Court's holding that compulsory

[7] The district court cited *Clapper* for the proposition that Plaintiffs lack standing because they could not show that Section 3550 will be enforced against them. *Clapper* is irrelevant. *Clapper* alleged an unreasonable search and seizure under the Fourth Amendment as to a surveillance program rolled out after September 11. The Court held that plaintiffs lacked standing because they could not establish that their communications were likely to be surveilled under the program. *Clapper* did not involve a First Amendment challenge to a statute that chilled free speech, let alone an elected official's free speech. Further, to the extent *Clapper* distinguished *Meese* and its reliance on reputational injury flowing from a First Amendment violation, it was because the two cases were factually different, not because there was some meaningful difference relevant to this case.

agency fees violate the First Amendment's prohibition of compelled speech was itself the basis for a finding of liability. (*Id.*)

Because Plaintiffs have "an actual and well-founded fear that the law will be enforced," and that enforcement will lead to a direct injury to Plaintiffs, Plaintiffs have established Article III standing to sue ***because they have adequately alleged particularized facts that would support a finding of injury-in-fact.*** *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003).[8]

[8] The district court ignored the import of *California Pro-Life Council, Inc.*, citing it instead for the general proposition that "self-censorship" is not sufficient unless there is an "actual and well-founded fear that the law will be enforced" against the plaintiff, "which is only possible where her 'intended speech arguably falls within the statute's reach'." (1-ER-14.) But nothing in *California Pro-Life Council* affirmatively states that a statute must facially apply to the plaintiffs or their speech; rather, those just happened to be the facts of the case. In *California Pro-Life Council*, the court found standing in a circumstance where the plaintiff self-censored in the face of potential criminal prosecution. In so doing, the Ninth Circuit did not hold that potential prosecution or some other adverse state action against the plaintiff was a prerequisite to standing or that other harms, flowing from the speech, could not suffice for standing. Similarly, the district court cited *Guadalupe Police Officer's Ass'n v. City of Guadalupe*, No. CV 10-8061 GAF (FFMx), 2011 WL 13217670, at *4 (C.D. Cal. Jan. 25, 2011) for the same proposition. The *Guadalupe* case, however, is factually inapposite. In the case, the plaintiffs did not allege any past conduct or plans to engage in future conduct that might violate the statute. And, there were no allegations of prior prosecutions under the restriction at issue or that such prosecutions were likely in the future. Of course, what was missing in *Guadalupe Police Officer's Ass'n* is present here: Plaintiffs have described past conduct and future conduct and Section 3550 violations are currently being brought and prosecuted.

D. The District Court's Conclusion That Plaintiffs Failed To Allege Concrete Plans To Violate Section 3550 Was Clear Error

The district court also found that "Plaintiffs have not explained, in concrete detail, that they intend to violate Section 3550." (1-ER-14.) The district court indicated that "a plaintiff's concrete plan to violate a challenged law must include details 'such as when, to whom, where, or under circumstances." (1-ER-15.) The Complaint and Plaintiffs' declarations provided precisely those details: (1) *When* – at board meetings, responding to constituent questions, at campaign events (4-ER-628–29, 639–41); (2) *To whom* – constituents, other elected representatives, potential voters (4-ER-628–29, 640–42); (3) *Where* – in board rooms, in public meeting halls, in their offices, outside (4-ER-628–29, 639–42); and (4) *Circumstances* – responding to questions, advocating for policies, running for re-election (4-ER-628–29, 639–42). Some Plaintiffs even identified prior statements that they now would not make (but would want to make) for fear of being accused of deterring unionization. (*See, e.g.*, 3-ER-549, 551; 3-ER-530; 3-ER-518–19.) At the very least, if the Complaint were somehow insufficient, leave to amend should have been granted.[9]

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[9] The district court cited *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-29 (9th Cir. 1996) for the proposition that a plaintiff lacks standing, and his suit is not ripe, where the plaintiff does not allege a concrete plan to violate the statute. *San Diego Cty. Gun Rights Comm.* is inapposite. That case did not involve a First Amendment challenge to free speech, where standing requirements are relaxed, but a Second Amendment challenge to a law restricting gun

II. The District Court Abused Erred In Concluding That Plaintiffs' Claims Were Not Ripe For Adjudication

The district court correctly recognized that Article III standing and "ripeness" go hand-in-hand, and that if Plaintiffs have Article III standing, then their dispute is ripe for adjudication. (1-ER-8, 17–18.) "Because the standing analysis merges with the constitutional component of the pre-enforcement ripeness inquiry, the above discussion of standing need not be repeated here. For the same reasons, Plaintiffs are unable to satisfy the three-pronged preenforcement constitutional ripeness inquiry as set forth in *Alaska Right to Life*." (1-ER-18.) Because Plaintiffs have standing to sue under Article III, their dispute is also ripe. The Order should therefore be reversed.

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ownership. Further, in that case, the plaintiffs provided no detail whatsoever regarding their intent or desire to violate the law and, more importantly, any facts that the law was actually being enforced. Here, by contrast, Plaintiffs have set forth detailed examples of how and when they would engage in speech that might violate Section 3550 and have described the very real prosecutions that are already underway for Section 3550 violations. Indeed, the district court's reliance on *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-61 (2014) as an example of a case where a First Amendment plaintiff had standing because it alleged a sufficiently concrete plan to engage in speech that would violate the statute at issue proves Plaintiffs' point here. The plaintiff in *Susan B. Anthony* pointed to past speech it made and an allegation that it intended on making similar speech again, even if in different contexts. So to here: Plaintiffs have identified past statements they made and alleged a desire and intention to make the same or similar statements again.

III. The District Court Erred In Concluding That Prudential Concerns Warranted Dismissal

In addition to dismissing for lack of Article III standing and ripeness, the district court also found that "prudential ripeness present[ed] an additional obstacle" to Plaintiffs' claims (1-ER-18), and that these concerns "further counsel[ed] in favor of dismissal" (1-ER-20). These conclusions were also erroneous.

A. First Amendment Challenges Based On Chilled Speech Satisfy Prudential Standing Considerations

Even when a plaintiff has Article III standing to sue, a court can exercise its discretion to decline jurisdiction under the prudential ripeness doctrine, which looks at "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1141 (9th Cir. 2000). A case is generally fit for judicial decision when sufficient facts have developed for the Court to consider and adjudicate the issues presented. *Id.* at 1141-42. When an issue is primarily and almost purely legal, the case is likely ripe for adjudication. *Id.* *See also American for Med. Rights v. Heller*, 2 F. Supp. 2d 1307, 1311 (D. Nev. 1998) ("This prong of the ripeness test concerns whether the development of additional facts would be pertinent and helpful to the Court's decision in the case"; where the "constitutional [questions] are purely [] legal question[s]," the case is fit for review.). As to "the

hardship to the parties of withholding court consideration," courts focus on whether the plaintiff has already suffered a harm. If so, the hardship imposed in adjudicating the dispute counsels in favor of exercising jurisdiction. *See American for Med. Rights*, 2 F. Supp. 2d at 1311. By contrast, if the harm will occur only in the future, and that harm is too remote or the plaintiff does not face a sufficient threat of injury, a court may opt to decline jurisdiction. *Id.* *See also Thomas*, 220 F.3d at 1142.

In the First Amendment context, when a plaintiff asserts that his speech was chilled, prudential considerations are satisfied because the issue is purely legal and the plaintiff not only has already suffered harm (in the form of chilled speech), but faces the threat of injury if he does speak. *Canatella v. California*, 304 F.3d 843, 853 (9th Cir. 2002). Where, as here, a plaintiff raises an overbreadth challenge to a statute under the First Amendment, and the plaintiff alleges "concrete and particularized harms to his First Amendment rights and demonstrates a sufficient likelihood that he and others may have similar harm in the future," he "satisf[ies] the prudential requirements of standing for a First Amendment overbreadth claim." *Id.* *See also Martinez v. City of Rio Rancho*, 197 F. Supp. 3d 1294, 1305 (D.N.M.

2016) (finding prudential ripeness when party had Article III standing to pursue claim that her speech was chilled).[10]

Indeed, the primary case on which the district court relied – *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840 (9th Cir. 2007) – underscores why Plaintiffs' challenge should proceed. As an initial matter, the case did not involve a First Amendment challenge on overbreadth grounds where the plaintiff's speech had been chilled. As set forth above, in those circumstances, prudential considerations are satisfied. Moreover, the facts of *Alaska Right to Life* are inapposite. In that case, the plaintiff sent a questionnaire to 12 judges seeking re-election, to which none responded substantively and four responded explaining why they were not responding, citing as one reason Alaska's judicial code of conduct. The group then sued the state bar commission charged with enforcing

[10] The district court cited *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010) for the proposition that "even in the First Amendment context, 'for a claim to be ripe, the plaintiff must [present a concrete factual scenario showing they are] subject to a 'genuine threat of imminent prosecution'." (1-ER-19.) The district court misapplied *Wolfson*. The portion of the *Wolfson* opinion that it quoted was the portion describing the general law applicable to pre-enforcement challenges. The following paragraph in *Wolfson* then explicitly notes that the requirements are more relaxed in First Amendment cases. And, in *Wolfson*, the court held that the plaintiff's suit was ripe based on the allegation of self-censorship: "Wolfson has stated an injury of self-censorship and therefore need not await consummation of the threatened injury to bring his claims." 616 F.3d at 1061.

the code of conduct, claiming that it chilled the judge's free speech rights as it related to the questionnaire.

In holding that the challenge was not ripe for review, the Ninth Circuit noted that neither the judges nor the plaintiff requested "a formal advisory opinion" from the state bar commission "on the propriety of responding to the questionnaire." *Id.* at 849-850. Further, even if such an opinion were issued or the commission "had initiated an inquiry against a judge who responded to . . . [the] questionnaire and then recommended sanctions," the Ninth Circuit stated that it "would still lack any reason to expect the Alaska Supreme Court," who is the final arbiter of whether a judge is sanctioned, would "adopt and act upon a recommendation that ran afoul of the First Amendment." *Id.* at 850. To the contrary, "the commentary" to the challenged code of conduct "conclude[d] that 'the Alaska Code should be interpreted in a manner that does not infringe First Amendment rights," which the Ninth Circuit "indicat[ed] a strong likelihood that the Alaska Supreme Court" would not sanction a judge for exercising First Amendment rights. Put simply, in *Alaska Right to Life*, there was no showing that any judge's speech had been chilled and no showing that a "judge would reasonably risk discipline by responding to the questionnaire." *Id.* The facts are opposite here – there are actual PERB charge and cases underway!

B. Plaintiffs Have Adequately Identified Chilled Statements

The district court again concluded that "Plaintiffs offer[ed] ambiguous descriptions of how they have 'held their tongues'." (1-ER-19.) This fails for the same reasons as before: The Complaint and Plaintiffs' declarations are replete with details about what they would say, when they would say it, to whom they would say it, and in what context they would say it. *See*, *e.g.*, 4-ER-629, 638–41; 3-ER-572–74; 3-ER-567–69; 3-ER-548–52; 3-ER-559–60; 3-ER-526, 530–32; 3-ER-522–23; 3-ER-518–19. Some Plaintiffs even identify prior statements that they now would not make (but would want to make) because of their belief that the statements run afoul of Section 3550. *See, e.g.*, 3-ER-549, 551; 3-ER-530; 3-ER-518-19. And, more generally, Plaintiffs aver that they are not speaking at all about *Janus* or union issues because of Section 3550. At a minimum, if these allegations are insufficient, leave to amend should have been granted.[11]

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[11] The district court cited *Am.-Arab Anti-Discrimination Comm. v. Thornburgh,* 970 F.2d 501, 511 (9th Cir. 1991) for the proposition that a suit is not ripe absent sufficient factual context on whether a statute would apply to an alleged course of conduct. The case is factually inapposite. In it, there were no facts alleged about the plaintiffs' conduct or planned course of conduct and, more importantly, the challenged law had been supplanted by a new law, the government had expressly disavowed bringing charges under the challenged law as to the plaintiffs, and the government had left the challenged law unenforced. *Id.* at 512. Here, by contrast, Section 3550 is alive and well, Plaintiffs have described past conduct and future conduct, and Section 3550 violations are currently being brought and prosecuted.

C. There Is No Reason To Wait For PERB To Construe Section 3550

The district court also concluded that "Plaintiffs have not demonstrated any hardship" in waiting for PERB to construe the statute, thereby counseling in favor of "withholding judicial review." (1-ER-20.) This conclusion was wrong for at least three reasons.

First, Plaintiffs have already had their speech chilled and, as a result, have already suffered an injury-in-fact. This is not a situation like in *Alaska Right to Life*, where no judge had been shown to suffer an injury and the plaintiff had not self-censored. *See Wolfson v. Brammer*, 616 F.3d 1045, 1060-61 (9th Cir. 2010) (rejecting prudential standing argument: "Wolfson has alleged a hardship through the constitutionally recognized injury of self-censorship. Because we relax the requirements of standing and ripeness to avoid the chilling of protected speech, Wolfson need not await prosecution to seek preventative relief.") (internal citations omitted); *id.* at 1061 ("Wolfson has stated an injury of self-censorship and therefore need not await consummation of the threatened injury to bring his claims.") (citing cases).

Second, this is also not a situation where it is unlikely or hypothetical that some adverse action will come if Plaintiffs speak freely. As evidenced by the cases pending before PERB right now, unfair labor practice charges and investigations have already been brought for purported violations of Section 3550,

including purported violations arising from speech about *Janus*. Further, PERB has in the past already attributed statements made by board members of public employers to the public employers for purposes of unfair labor practices charges.

Third, it is well-established that the potential that an agency or government body may construe a statute narrowly or chose to enforce it narrowly so as to avoid constitutional issues is no reason to deny a plaintiff the opportunity to challenge the statute in court. Any contrary rule would subject would-be speakers to the whims of political change – what if PERB interprets the statute one way today, and changes its tune tomorrow? *U.S. v. Stevens*, 559 U.S. 460, 480 (2010) ("Not to worry, the Government says: The Executive Branch construes § 48 to reach only 'extreme' cruelty, and it neither has brought nor will bring a prosecution for anything less. . . . But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.") (internal citations and quotations omitted); *San Francisco County Democratic Cent. Committee v. Eu*, 826 F.2d 814, 825 (9th Cir. 1987) ("[T]he State contends that the district court should have abstained from adjudicating plaintiffs' first and third counts pending the resolution of litigation in state court raising similar challenges to the Elections Code," but "the State does not advance an interpretation of the Elections Code that would moot the constitutional

questions raised by plaintiffs"; "[n]or could the State do so[:] . . . . Section 11702 is clear on its face."); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 515 (N.D. Cal. 2017) ("As a preliminary matter, a narrow construction does not limit a plaintiffs' standing to challenge a law that is subject to multiple interpretations."); *Frazier v. Boomsma*, 2007 WL 2808559, *9 (D. Ariz. Sept. 27, 2007) ("Even where an attorney general states that the State has no present intent to prosecute an individual due to his understanding of the scope of a disputed statute, courts have been reluctant to find the absence of standing because the attorney general does not bind the state courts, local law enforcement authorities, subsequent attorneys general, or even his own future actions."); *Citizens for Responsible Government v. Davidson*, 236 F.3d 1174, 1192-93 (10th Cir. 2000) ("Colorado has insisted that under the State's construction [of the statute], organizations like [plaintiffs] will not be prosecuted . . . . Such representations, however, are insufficient to overcome the chilling effect of the statute's plain language.").

IV. The District Court Erred By Failing To Grant Leave to Amend And By Dismissing The Complaint With Prejudice Based On Standing

The district court granted Defendants' Motion to Dismiss and "decline[d] to grant Plaintiffs leave to amend." (1-ER-21.) The district court then entered a judgment purported to dismiss the Complaint "with prejudice." (1-ER-2.) The district court erred in both respects.

First, the district court did not have the power to dismiss the Complaint "with prejudice." This Court has held that a dismissal for want of Article III standing must be "without prejudice," because a court that lacks jurisdiction is "powerless" to reach the merits. *See Fleck v. Assocs. v. City of Phoenix*, 471 F.3d 1100 (9th Cir. 2006). As a result, even if some dismissal were appropriate, a dismissal without prejudice must be entered so that the plaintiff can reassert the claims in a court with competent jurisdiction or at a later date, when the facts may have changed. *Id.* *See also Capella Photonics, Inc. v. Cisco Sys.*, No. 14-cv-03346-EMC, 2019 U.S. Dist. LEXIS 152427, at * 10 (N.D. Cal. Sep. 6, 2019) (". . . [t]he Supreme Court has specifically rejected deciding the merits of a case where the court lacks jurisdiction because jurisdiction is a threshold question, and without jurisdiction the court cannot proceed at all in any cause . . . the law universally disfavors dismissing an action with prejudice based on lack of standing, and there is a strong presumption that such a dismissal is improper.") (internal quotations and citations omitted); *Anderson v. Hain Celestial Grp., Inc.*, 87 F. Supp. 3d 1126, 1235 n.3 (N.D. Cal. 2015) ("A dismissal for lack of standing is in essence . . . a dismissal for lack of subject matter jurisdiction, which is always without prejudice.").

Second, the district court should have granted leave to amend. In this circuit, "it is black-letter law that a district court must give plaintiffs at least one

chance to amend a deficient complaint, absent a clear showing that amendment would be futile." *Nat'l Council of La Raza*, 800 F.3d at 1042. *See also Eminence Capital*, 316 F.3d at 1052 ("Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment."); *Foman*, 371 U.S. at 182 ("In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the [Federal Rules of Civil Procedure] require, be 'freely given.'").

The district court did not permit Plaintiffs an opportunity to amend because, in the district court's view, "Plaintiffs' Complaint fail[ed] in large part due to the inapplicability of Section 3550 to Plaintiffs," and so any amendment would be futile in stating facts sufficient to establish Article III standing. (1-ER-21.) Put simply, based on the district court's erroneous ruling that Plaintiffs lack standing because Section 3550 applies to public employers, rather than Plaintiffs specifically, the district court dismissed without leave to amend. Because that ruling is wrong, as explained above, so too was the district court's dismissal without leave to amend. And assuming *arguendo* that the Complaint did not adequately allege that Plaintiff's own statements could lead to charges against the

entities that qualify as "public employers," Plaintiffs should have been leave to amend to correct a pleading error. Moreover, to the extent Plaintiffs have not sufficiently alleged a concrete plan to make statements, that those statements would violate Section 3550, or that Plaintiffs face reputation and other direct harm if unfair practice charges are brought, Plaintiffs should be afforded an opportunity to amend.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal of the Complaint and remand to the district court for further proceedings.

Dated: February 24, 2021 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *_/s/ David. A. Schwarz_*

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STATEMENT OF RELATED CASES

Plaintiffs are not aware of any related cases pending before the Court.

Dated: February 24, 2021 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 13,686 words.

Dated: February 24, 2021 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *<u>/s/ David. A. Schwarz</u>*

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Plaintiff-Appellant's Opening Brief

Signature: s/Pamela Crawford **Date:** February 24, 2021
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