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' REPLY BRIEF

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INTRODUCTION

Elected public officials, including Plaintiffs[1], are holding their tongues for fear that their speech, which they must engage in to do their jobs, will be imputed to the public employers that they represent, resulting in PERB leveling unfair practice charges for violation of Section 3550 based on after-the-fact judgments that their statements "deter" or "discourage" unions or unionization. This violation of their First Amendment rights is the chilling effects of this law, which cannot be permitted to stand.

It is worth restating what Defendants hope to avoid: "When 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). Because 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), 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

[1] Defined terms in this Reply Brief shall have the same meaning as in Appellants Opening Brief ("AOB").

injury as a result of the statute's operation or enforcement." *Id.* (internal citations and quotations omitted).

Plaintiffs have demonstrated "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Lopez*, 630 F.3d at 785. Both PERB and the Unions admit that Plaintiffs' "individual" speech is not governed by Section 3550, and thus cannot be restricted by that statute. (PERB Br. 1 ["Plaintiffs face no such threat because the law they are trying to challenge does not apply to them;" "Plaintiffs are not public employers subject to section 3550."]; Un. Br. 11 ["Section 3550 does not apply to Plaintiffs."].) Yet, in the face of that concession, PERB openly admits that it may impute liability to the employers that Plaintiffs represent based on statements by Plaintiffs if it contends that those statements are made in circumstances suggesting that Plaintiffs have actual or apparent authority to speak on behalf of the employer. (PERB Br. 24 ["Under standard agency principles, Plaintiffs' speech could be the basis for a finding that a public employer violated section 3550."]; *id.* 1-2 ["Plaintiffs speech may be imputed to a public employer under standard agency principles of actual or apparent authority."].)

This creates a "realistic danger of sustaining a direct injury," and causes Plaintiffs to self-censor, because PERB's expansive, ad hoc, or idiosyncratic application of agency principles to fact-specific scenarios threatens Plaintiffs'

ability to speak freely. Plaintiffs are all elected officials who speak on controversial issues in the course and scope of their duties – during legislative debates, when answering constituent questions, and on the campaign trail. The essence of their job is to espouse and represent their viewpoints, for which they were elected. The possibility that PERB may via post hoc judgments impute Plaintiffs' speech to their governing bodies even if Plaintiffs were offering their own opinions and not speaking on behalf of the employer, chills Plaintiffs' speech. Put another way, even though Plaintiffs may not be named personally in a PERB complaint alleging violations of Section 3550, the threat that PERB may impute liability to the employers that they represent based on their individual speech, creates a risk of direct injury, both in terms of the law's chilling effects (should they not speak) and the reputational injury of having their words form the basis of PERB charges (should they choose to speak).

These threats might be potentially avoidable (or at least subject to some set of neutral principles) had Section 3550 contained the same, bright line language at issue in *Leonard v. Clark*. There, this Court held that speech may be imputed only where the speaker "(1) ha[s] authority to represent the [employer], *and* (2) claim[s] that they are speaking for [the employer]." 12 F.3d 885, 889 (9th Cir. 1993) (emphasis in original). In that case, the "individual plaintiffs' speech could be affected only if, as individual [elected officials], they wished to claim authority to

speak for the [employer] when they did not possess it." *Id.* Those are sufficiently bright lines that would allow Plaintiffs the ability to decide for themselves whether their speech would be imputed. PERB expressly disavows such a bright line test. As long as that remains the law and PERB's position, Plaintiffs face a credible threat of direct injury.

Of course, if unfair practice charges were brought against Plaintiffs' employers based on Plaintiffs' speech, Plaintiffs would suffer a direct injury – they would suffer injury to (i) their personal reputations (*see* 3-ER-560); (ii) their ability to serve as effective elected officials (*see* 3-ER-572–74; 3-ER-567, 69; 3-ER-548–49, 550–51; 3-ER-559–61; 3-ER-526, 530–31; 3-ER-521–23; 3-ER-517–19); and (iii) their ability to get re-elected (*see* 3-ER-548–49, 550–52; 3-ER-559–60, 561). A reputational injury like the foregoing is an injury-in-fact sufficient to bring a First Amendment challenge, *Meese v. Keene*, 481 U.S. 465, 472-73 (1987); *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). Indeed, the Supreme Court's most recent Article III standing case confirmed that "[v]arious intangible harms can also be concrete," including, "for example, reputation harms." *TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472, at *7 (U.S. June 25, 2021).

If that were not enough, if unfair practice charges were brought *and proved* against the employers that they represent based on Plaintiffs' speech, Plaintiffs

would be subject to a PERB cease-and-desist order. PERB concedes the point: "[T]he Board's typical order refers to the public employer, 'its governing board and its representatives.'" (PERB Br. 47) (emphasis added). As elected members of the governing boards of public governmental agencies, a finding of liability is a pronouncement by a state enforcement agency after a quasi-judicial proceeding that the elected official interfered with employee rights protected under California law. The cease-and-desist order places that employer, its elected officials, and the public on notice that a failure to comply could expose both the employer and the individuals subject to that injunction to state court contempt proceedings. Such a threat is sufficient injury to have standing to challenge Section 3550. *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").

For these reasons, this Court should hold that Plaintiffs have Article III standing to bring suit. Because Plaintiffs' First Amendment rights are being infringed, and because there are sufficient facts to adjudicate these claims now, this Court should further hold that Plaintiffs' suit is ripe for consideration and that prudential considerations do not warrant waiting another day.

Plaintiffs thus respectfully request that this Court reverse the district court, with instructions on remand that the district court (1) vacate its Order, deny Defendants' motions to dismiss, and to conduct a hearing on Plaintiffs' motion for preliminary injunction or (2) allow Plaintiffs leave to amend the Complaint. As set forth in the Opening Brief, the district court did not have the power to dismiss the Complaint "with prejudice" because dismissals for want of Article III standing must be "without prejudice" given that a court with jurisdiction is "powerless" to reach the merits. *See Fleck & Assocs. v. City of Phoenix*, 471 F.3d 1100 (9th Cir. 2006). This point is unrebutted by PERB, and expressly conceded by the Unions. (Union Br. 57.)

ARGUMENT

I. Defendants' Arguments That Plaintiffs Lack Article III Standing Should Be Rejected

PERB and the Unions make a variety of arguments, many overlapping, with respect to Article III standing. None of those arguments have merit.

A. Neither The Plain Terms Of Section 3550 Nor *Leonard* Preclude A Finding Of Standing Here

PERB's and the Union's primary argument, repeated throughout their briefs, is that "Section 3550 regulates 'public employers' – i.e., political subdivisions of the State – not individual public employees or officials" (Un. Br. 1), and so "Section 3550 does not apply to Plaintiffs" (Un. Br. 11). (*See also* PERB Br. 1

["Plaintiffs face no . . . threat because the law they are trying to challenge does not apply to them."].) Because of this, they say, this Court's decision in *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1993) controls and Plaintiffs lack Article III standing. (PERB Br. 22-32; Union Br. 14-19.) Defendants' arguments miss the point and only highlight why Plaintiffs have standing in this case.

As noted above, the fact that the language of Section 3550 purports to govern only public employers is irrelevant because PERB concedes that it may impute Plaintiffs' speech to the employers. (PERB Br. 24 ["Under standard agency principles, Plaintiffs' speech could be the basis for a finding that a public employer violated section 3550."]; *id.* 1-2 ["Plaintiffs speech may be imputed to a public employer under standard agency principles of actual or apparent authority."].) Section 3550 thus applies to Plaintiffs' speech if that speech is imputed to the employers by PERB.[2]

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[2] The Unions cite *Johnson v. Stuart*, 702 F.2d 193 (9th Cir. 2013), for the proposition that a party does not have standing unless they could face an action against them individually. (Union Br. 20.) In *Johnson*, the statute did not apply to the plaintiff teachers, no enforcement had ever been brought against teachers, and "the Attorney General of Oregon ha[d] repeatedly disavowed any interpretation of section 337.260 that would make it applicable in any way to teachers." *Id.* at 195. It was also not a case restricting speech. Here, by contrast, neither PERB nor any other authority has disavowed Section 3550's application to Plaintiffs' speech; to the contrary, PERB and the Unions argued in opposition to the preliminary injunction motion that Section 3550 does apply to Plaintiffs' speech, at least in some, undefinable instances. The Union also cites *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) (Union Br. 15) in support of an argument that an individual board member cannot sue on behalf of the board. *Bender* is inapposite.

The fact that Plaintiffs' speech can, in some circumstances, be imputed to the employers that they represent is not the issue. The issue is that there are no clear guidelines concerning when PERB will impute Plaintiffs' speech to the employers. Without those clear guidelines, Plaintiffs are left to the whims of PERB and its post hoc decision making. That then causes Plaintiffs to self-censor. The arguments made by PERB and the Unions only highlight the confusion.

First, PERB and the Unions state that its understanding of "standard rules of agency apply" (whatever "standard" may mean in the context of a fact-specific application of such law), and that those rules provide sufficient guardrails for Plaintiffs to know when their speech may be imputed to the employers that they represent. (PERB Br. 24-26; Union Br. 16, 36-39.) But neither PERB nor the Unions explain how those "standard rules" might apply. The best we get is PERB's statement that "[t]he test for apparent authority or ostensible authority is

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In that case, a school board was sued and defended itself in the trial court. After the school board suffered an adverse judgment, the board decided not to appeal. A single individual board member then purported to act on the board's behalf and appeal the judgment. The Ninth Circuit held that the individual board member could not pursue the appeal: "Mr. Youngman's status as a School Board member does not permit him to 'step into the shoes of the Board' and invoke its right to appeal. In this case, Mr. Youngman was apparently the lone dissenter in a decision by the other eight members of the School Board to forgo an appeal. Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." *Id.* at 545. There are no similar circumstances here.

whether the perception of agency is reasonable under the circumstances." (PERB Br. 29.) That is hardly a bright line test that gives Plaintiffs any comfort at all. Without a judicial declaration as to the constitutionality or applicability of Section 3550, the parties remain hostage to the discretional vagaries of how current or future members of PERB might apply these "standard rules."

Second, the Unions state that, under PERB's understanding of agency principles, elected officials can speak freely with their own opinions – "Section 3550 does not prohibit Plaintiffs from expressing their own personal policy preferences during legislative or electoral debates or in meetings with constituents." (Union Br. 34. *id.* at 33 ["To the extent there are contexts in which elected officials, when expressing views in performing their official duties, are *not* the 'public employer,' the statute does not apply."].) But PERB, the entity that initiates and adjudicates unfair practice charges, does not concede the point. Indeed, the Union's interpretation would seem to run contrary to "standard" agency principles. Under those principles and the test for apparent or ostensible authority set forth above by PERB, speech made during the course and scope of employment or while performing job duties is imputed to the employer. That is true in many contexts under the law. *Canada v. Boyd Grp., Inc.*, 809 F. Supp. 771, 778 (D. Nev. 1992) (finding employee manager's speech and conduct in a sexual harassment suit to be those of the employer entity itself); *J.M. Tanaka Constr., Inc.*

v. NLRB, 675 F.2d 1029, 1035 (9th Cir. 1982) (noting the NLRB's standard in interference with union relations disputes to impute conduct of a supervisor directly to an employer for a finding of liability). Here, a public official "expressing their own personal policy preferences during legislative or electoral debates or in meetings with constituents" (Union Br. 34) would be engaged in speech in the course and scope of his or her job. Would that speech be imputed or not? Neither the Unions nor PERB offer any clear answers.

Third, amplifying the confusion, the Unions and PERB argue that *Leonard* was applying PERB's definition of "standard agency" principles, but that is clearly not the case. The *Leonard* court included a *cf.* cite to certain Restatement sections, but the actual text of the decision demonstrates that it was applying a strict form of actual authority only. The decision states:

> Article V [of the collective bargaining agreement] by its plain language applies only to the Union and not to its individual members. The individual plaintiffs have not shown that Article V in any way inhibits their freedom to speak as *individuals*. Shaff's deposition testimony indicates that Article V will be triggered only if the plaintiffs speak on behalf of the Union. **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.** Meanwhile, the Union can only "specifically endorse[ ] or sponsor[ ] legislative issues" through its authorized agents. Thus, the only chill implicating the First Amendment here is on the speech of these agents when they act under authority from their principal, the Union. *Cf.* Restatement (Second) of

> Agency §§ 26-27, 33 (1958) (creation and scope of authority).

12 F.3d 889 (bold added; italics in original). The *Leonard* test is thus two pronged: Did the speaker have actual authority to represent the union ***and*** did the speaker specifically state that they were speaking for the union when they spoke? This is confirmed by the next paragraph of the decision, which again confirms the bright line test at issue. The decision continues:

> 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. In both passages, the key is that the representative was affirmatively claiming to be speaking on behalf of the union. But that is not the test under PERB's understanding of "standard agency principles." If PERB forwent its "standard agency principles" and applied the *Leonard* test instead, there likely would be no issue. That is because Plaintiffs would know that their speech would be imputed only if they "(1) ha[d] authority to represent the [employer], *and* (2) claim[ed] that they are speaking for [the employer]." *Id.* at 889 (emphasis in original). Those are guardrails that Plaintiffs could easily navigate within.

Fourth, amplifying this confusion even further, when PERB and the Union discuss PERB precedent imputing a representative's speech to the employer, both emphasize various aspects of the decision, suggesting a whole panoply of tests that

might apply. As to *San Diego Unified School District*, PERB Decision No. 137 (1980), the Unions emphasized, among other things, that "District managerial employees including the superintendent authorized placement of the letters in personnel folders" (Union Br. 18, n.6), and PERB emphasized that "the remaining school board members 'effectively condoned' the letters by failing to take any corrective action after they learned of them." (PERB Br. 29). As to *County of Riverside*, PERB Decision No. 2119-M (2010), both the Unions and PERB emphasize that it was because the board members who spoke comprised a "a majority of the employer's five-member board" that resulted in the imputation of their speech to the employer (PERB Br. 30), because, in that case, they had the collective "power to take" action. (Union Br. 16, n.6).

So when exactly will Plaintiffs' speech be imputed to the employers that the represent? At a Board meeting if a majority of the Board happens to agree with one of the Plaintiffs' statements? In response to a constituent question if the Board later finds out about the statement and does not explicitly disavow it? The vagaries of these tests are what give rise to the chill in this case, and thus standing under Article III. It may be that application of the strict, two-part *Leonard* test would avoid a constitutional question, but neither the Unions nor PERB concede that such a test applies.

B. There Is A Realistic Threat That PERB Will Institute Unfair Practice Charges Based On The Speech Of Elected Officials Like Plaintiffs

The Unions argue that Plaintiffs' fears are overblown because, according to them, there is no realistic threat that PERB will institute unfair labor practice charges against Plaintiffs based on their speech as elected officials. The Unions state: "No charges under §3550 have been filed or threatened against Plaintiffs. Nor has PERB ever held a public employer responsible for violating §3550 based on the personal speech of the public employer's officials." (Un. Br. 2.) (*See also* Un. Br. 20 ["And PERB also has never sought to enforce §3550 against any public employer based on the personal speech of an individual member of the employer's governing board."].)

Notably, PERB does not make this argument, and it is the agency that institutes such charges. Its failure to disavow the possibility that it will bring unfair labor practice charges against elected officials like Plaintiffs is telling.

In any event, the Union's argument fails under the weight of the facts as alleged here. It is undisputed that PERB has brought charges under Section 3550 – PERB discusses six such charges in its brief. (PERB Br. 10-14.) It is also undisputed that PERB has brought unfair labor practice charges in the past based on different statutes against board members of public employers, like Plaintiffs. PERB again discusses these in its brief. (PERB Br. 28-33, discussing *San Diego*

Unified School District, PERB Decision No. 137 (1980) and *County of Riverside*, PERB Decision No. 2119-M (2010).) There is nothing that would suggest that PERB won't bring charges based on the conduct of elected board members like Plaintiffs, which it has done in the past, (*see, e.g.*, *SEIU Local 721 v. County of Riverside* (2010) PERB Decision No. 2119-M [speech of elected official sitting on board resulted in unfair labor practice charge against public employer and an injunction that applied to both the public employer and the elected official]), in asserting violations of Section 3550, which it is currently doing. (*See, e.g.*, *Alliance Marc & Eva Stern Math & Science High* School, 44 Pub. Emp. Rep. for Cal. ¶ 128 (Jan. 24, 2020).) The law is replete with cases finding that past enforcement is sufficient to show a reasonable likelihood of enforcement going forward. *Lopez*, 630 F.3d at 786–87 ("[a] history of past enforcement against parties similarly situated to the plaintiffs cuts in favor of a conclusion that a threat is specific and credible."); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[t]he prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been 'chimerical.'"); *ACLU v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012) ("[t]he State's Attorney has recently prosecuted similar violations and intends to continue doing so. That's enough to establish a credible threat of prosecution.").

And likewise, *even if* PERB does not ultimately find liability for a violation of Section 3550, the very threat that PERB's General Counsel will accept the charges and issue a complaint causes harm. That harm encompasses investigations, legal fees and costs, and the like – all of which are exceptionally expensive, and not just limited to an individual board member, like Plaintiffs, to endure. This threat also saps the time and energy of the public employer entity, as it faces reputational harm, and is accused of violating labor law governing its relationships with its employees.

C. Plaintiffs' Allegations That They May Be Subject To A Cease-And-Desist Order From PERB, And Potentially Contempt If They Violate Such An Order, Are Sufficient To Confer Standing

PERB concedes that it issues cease-and-desist orders that, if violated, could lead to contempt sanctions, but then argues that such a possibility cannot give rise to a sufficient injury. The Unions do not make this argument. It is meritless.

First, PERB confusingly argues that while it normally issues an order enjoining speech from the "public employer, its governing board, and its representatives," such an order would not include Plaintiffs here. (PERB Br. 47-48.) But Plaintiffs are members of the governing boards of the employers that they represent. A cease-and-desist order directed at the employers, which includes the employer's "governing board" would apply to Plaintiffs. The Unions make a similar argument, claiming that such a cease-and-desist order would apply to the

Board, speaking as a whole, and not as to individual members. (Union Br. 45.) That argument is contrary to the language of the cease-and-desist orders and, in any event, runs into the same problem that we already face – when exactly would Plaintiffs speech be on behalf of the board generally?

Second, PERB argues that "an injunction against the employer and its governing board would not injure Plaintiffs personally." (PERB Br. at 48.) But that is self-evidently untrue. An elected official who is publicly censured and enjoined from engaging in speech that she made in the past, obviously suffers harm. *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., at 302 n.13 ("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 conduct coupled with a cease-and-desist order from doing it again would ***not*** be seen as an official rebuke, not only of the public employer, but of the speaker. Defendants cite no law suggesting that such an order would not constitute sufficient injury.

Third, PERB argues that any cease and desist order would not limit the Plaintiffs' speech unless they were speaking on behalf of the employers that they represent. (PERB Br. 48-49.) But this just returns us to square one, in the land of vague rules and post hoc decision-making regarding when Plaintiffs are speaking on behalf of the employers that they represent. This time, though, Plaintiffs would not only have the threat of unfair practice charges, but also have the possibility of contempt sanctions.

Fourth, PERB argues that "Plaintiffs' claim that a cease-and-desist order would subject them to 'potential liability and civil contempt proceedings should they be charged with violating' the order" is "too speculative for an injury in fact." (PERB Br. 49.) But why? PERB admits that "it is conceivable that an agent subject to a cease-and-desist order could . . . demonstrat[e] a credible threat of enforcement of the order" sufficient to confer standing (PERB Br. 49), but then claims, without explanation, that Plaintiffs cannot do so in this case. PERB cites no law in support of its ipse dixit conclusions that Plaintiffs could never be subject to a cease-and-desist order or held in contempt for violating it.

Finally, PERB argues that "Plaintiffs' argument about cease-and-desist orders would dramatically expand the range of plaintiffs able to challenge government action." (PERB Br. 51.) Again, why? If an individual is subject to a cease and desist order for the violation of a law, and they neither violated the law

nor should have been subject to such an order, that person has been injured and can sue. PERB again cites no law in support of its novel argument.

D. Plaintiffs' Allegations Of Reputational Harm Are Sufficient To Confer Standing

Both PERB and the Unions argue that Plaintiffs' allegations of reputational harm are insufficient to confer Article III standing. Not so.

Reputational harm is clearly an injury that can give rise to Article III standing. It was reputational harm in both *Meese v. Keene*, 481 U.S. 465 (1987) and *Wilson v. Hous. Cmty. Coll. Sys.*, 955 F.3d 490, 496 (5th Cir. 2020) that gave rise to Article III standing in cases asserting a First Amendment challenge to a speech restriction. Further, as noted above, the Supreme Court's most recent Article III standing case confirmed that "[v]arious intangible harms can also be concrete," including, "for example, reputation harms." *TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472, at *7.

Seeking to avoid *Meese* and *Wilson*, PERB attempts to distinguish these decisions on two grounds, neither of which has merit. First, PERB states that neither *Meese* nor *Wilson* were "pre-enforcement case[s]." (PERB Br. 43.) That is both irrelevant and untrue. In *Meese*, the politician had yet to make any speech, and so the regulation had yet to be enforced against him – it was thus a pre-enforcement case. In any event, reputational injury is an injury, whether in the post-enforcement or pre-enforcement context, and so that distinction doesn't make

a difference. In the post-enforcement context, the injury will have already occurred; in the pre-enforcement context, it is the threat of the injury that gives rise to standing in First Amendment challenges. Second, PERB argues that the government action in *Meese* and *Wilson* "directly targeted the plaintiffs' speech." (PERB Br. 45.) So too here. Section 3550, under PERB's precedents regarding actual and apparent authority, applies directly to Plaintiffs' speech. At the very least, Section 3550 indirectly targets Plaintiffs' speech, and there is no suggestion in the caselaw that standing turns on whether a regulation directly or indirectly targets an individual's speech. To the contrary, in *Meese*, the regulation did not regulate the plaintiff's speech directly at all, but instead said that if plaintiff wanted to exhibit a certain movie, the movie itself had to be labeled in a certain manner.

Finally, both PERB and the Unions argue that Plaintiffs do not sufficiently allege the potential for reputational harm. (*See generally* PERB Br. 42; Union Br. 41-42.) Plaintiffs believe they have asserted sufficient allegations and that the reputational harm from an unfair labor practice charge is self-evident. But this is a red herring. If the allegations were insufficient, Plaintiffs should be afforded an opportunity to amend.

E. Plaintiffs Adequately Alleged A Concrete Plan To Speak In A Manner That Would Violate Section 3550

Both PERB and the Unions parrot the district court's error that Plaintiffs somehow failed to adequately allege in concrete enough detail that they intend to

violate Section 3550. (*See* PERB Br. 2-3 ["Plaintiffs have alleged only vague hypothetical statements that they might like to make."]; *id.* 18 ["Plaintiffs have not alleged a concrete plan to violate section 3550."]; Union Br. 2 ["Plaintiffs failed to identify any concrete instance of speech they intend to make that would be both prohibited by §3550 and protected by the First Amendment."]; *see also* Un. Br. 7-8, 11-12.)

Plaintiffs disagree. The Complaint and Plaintiffs' declarations provided concrete 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.

Alternatively, PERB seems to suggest that the statements that Plaintiffs might make, including factual statements about the *Janus* decision and its implications, might not violate the prohibitions in Section 3550 because PERB is

construing the statute narrowly and in a manner that avoids constitutional issues. (PERB Br. at 52-55.) First, PERB states that, in *Regents I*, "the Board interpreted [Section 3550] as prohibiting employers from discouraging *or* encouraging the protected employee conduct." (PERB Br. 10 [underline added].) PERB is suggesting that, despite Section 3550's plain language prohibiting only that speech which may deter or discourage union membership, PERB is going to interpret the statute so as to bar speech that either discourages or encourages union membership. But it is well-established that a government body's choice to construe a statute 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).[3]

[3] *See also 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

Second, PERB seems to suggest that it would not bring unfair practice charges as to purely factual speech about *Janus*. PERB states that "[t]he Board expressly rejected the notion that simply informing employees of *Janus* necessarily violates Section 3550." (PERB Br. 53.) At the same time, PERB describes what it considers violations or potential violations of Section 3550 in *Regents I* and *Regents II* that involve purely factual speech informing employees about *Janus*. (*See* PERB Br. 10-13.) Apparently the "factual context" of purely factual statements could tip the same speech into hot territory. PERB's claims that it is interpreting Section 3550 in a manner that would not capture Plaintiffs' speech is directly belied by the cases that it has brought and the rulings that it has made.

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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.").

If Plaintiffs held townhalls tomorrow with large groups of constituents to update their constituents about a variety of issues, and those Plaintiffs were asked at the townhalls about unionization and *Janus*, and Plaintiffs responded, even with purely factual statements regarding *Janus*, let alone their opinion on it, the prospect that a union would file charges with PERB, and PERB's General Counsel will allow those charges to go forward, is quite real. After all, Plaintiffs' comments would deter or discourage union membership and the comments would have been made in the course and scope of their duties as a board member, and thus reasonably likely to be seen by union members in the audience as a statement by the employer itself. It is that risk, and the attendant harms flowing from the unfair labor practice charge, that gives rise to standing in this case.

F. Defendants Misunderstand Plaintiffs' Argument Concerning The Government Speech Doctrine

In their Opening Brief, Plaintiffs addressed the government speech doctrine only because the district court misinterpreted it when holding that Plaintiffs lack Article III standing. (*See* AOB 45-48.) Defendants do not actually contest Plaintiffs' substantive arguments on either the government speech doctrine generally or how it applies (or doesn't apply) in this case. Rather, Defendants misinterpret what Plaintiffs are saying. Referring to Plaintiffs' argument about the government speech doctrine, the Unions state that "Plaintiffs contend [that]. . . they have a First Amendment right to speak *on behalf of* their government agencies"

(Union Br. 28; *see also id.* 29-32), and PERB says effectively the same thing (PERB Br. 33-38).

But Plaintiffs are not arguing that the government speech doctrine shields their speech from Section 3550's application when they speak on behalf of the government entities that they represent under the *Leonard* test. If Plaintiffs are truly speaking on behalf of the employers that they represent under the *Leonard* test – *i.e.*, they actually "(1) ha[ve] authority to represent the [employer], *and* (2) claim that they are speaking for [the employer]," *Leonard*, 12 F.3d 889 – then their speech is the employer's speech, not their own, and so Section 3550 applies. That is not what this case is about.

What Plaintiffs are arguing is that the government speech doctrine does not permit the government to regulate their speech when (i) it is not made on behalf of the employers that they represent under the *Leonard* test, but (ii) that speech is nonetheless made within the course and scope of Plaintiffs' duties as elected officials – for example, Plaintiffs' speech during legislative or electoral debates, Plaintiffs' speech in response to constituent questions, and so on. In that regard, as Plaintiffs pointed out, the government speech doctrine – which would generally permit an employer to regulate the speech of its employees – does not apply to elected officials speaking their own opinions. That is because elected officials work for "the public itself," not the state, and so the state cannot regulate their

speech in the same manner as a typical government employer. *Jenevein v. Willing*, 493 F.3d 551, 557 (5th Cir. 2007). Indeed, a majority of courts note that the government speech doctrine does not apply to the speech of elected officials going about their duties. *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).

The only time the government may regulate Plaintiffs' speech is when Plaintiffs are speaking on behalf of the employers that they represent under the *Leonard* test. In that instance, Plaintiffs are acting as the employer itself, not as individuals. The problem in this case is that PERB, by not sticking to the *Leonard* test, and instead choosing a much broader, more ambiguous test of agency, regulates a range of speech protected by the First Amendment.

II. Defendants' Arguments That Plaintiffs' Claims Are Not Ripe For Adjudication And That Prudential Concerns Warrant Dismissal Should Be Rejected

In their Opening Brief, Plaintiffs explained at length why their claims were ripe and why prudential concerns did not warrant dismissal. 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." *Canatella v. California*, 304 F.3d 843, 853 (9th Cir. 2002); *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).

In response, Defendants repeat all of the same arguments as above – (1) Plaintiffs' speech is not governed by Section 3550; (2) Plaintiffs have not sufficiently alleged plans to engage in speech that would violate Section 3550; (3) it is not reasonably likely that the employers that Plaintiffs represent will face unfair labor practice charges based on Plaintiffs' speech; and (4) it is not reasonably likely that Plaintiffs will suffer harm as a result. These arguments all fail for the same reasons discussed above. Put simply, Plaintiffs are reasonably self-censoring – that is an injury that must be remedied immediately.

III. To The Extent The Court Finds That Plaintiffs Have Not Included Sufficient Allegations, The Court Should Reverse And Remand With An Order That The District Court Allow Leave To Amend

The district court entered a judgment purporting to dismiss the Complaint "with prejudice." (1-ER-2.) As set forth in the Opening Brief, the district court did not have the power to dismiss the Complaint "with prejudice" because dismissals for want of Article III standing must be "without prejudice" given that a court without jurisdiction is "powerless" to reach the merits. *See Fleck & Assocs. v. City of Phoenix*, 471 F.3d 1100 (9th Cir. 2006). Neither PERB nor the Unions make any argument to the contrary – the Unions even concede the point. (Union Br. 57.)

Further, to the extent this Court finds that Plaintiffs' allegations concerning the speech they might make or the reputational injuries they might suffer were insufficiently detailed, this Court should hold that the district court erred when it failed to give Plaintiffs 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 v. Cegavske*, 800 F.3d 1032, 1042 (9th Cir. 2015). Defendants argue that any amendment would be futile, returning to their arguments that Section 3550 does not apply to Plaintiffs or restrict Plaintiffs' speech. Because those arguments

fail, for the reasons discussed below, leave to amend should be granted if Plaintiffs' current allegations are somehow deficient.

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: July 16, 2021 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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

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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 6,806 words.

Dated: July 16, 2021 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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