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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Jeffrey I. Barke, et al.,

Plaintiffs,

v.

Eric Banks, et al.,

Defendants.

Case No.: 8:20-cv-00358-JLS-ADS

Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss

Hearing Date: July 10, 2020
Hearing Time: 10:30 am
Location: Courtroom 10A
Judge: Hon. Josephine L. Staton

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INTRODUCTION

The complaint in this case challenges California Government Code section 3550,[1] which provides that a "*public employer* shall not deter or discourage public employees or applicants to be public employees" from joining, authorizing representation by, or financially supporting employee organizations. § 3550 (emphasis added). Plaintiffs are seven individuals who serve on the governing boards of local government entities—school and community college districts, cities, and special districts. Those entities are all public employers subject to section 3550. Plaintiffs are not. Because of this distinction, try as they might, Plaintiffs cannot establish that they have standing, nor can they establish that this case is ripe for adjudication.

To establish standing and constitutional ripeness—even in a First Amendment case such as this one—Plaintiffs must establish a concrete personal injury, in the form of a credible threat of adverse state action against them. But section 3550 does not apply directly to them, and the enforcement scheme for section 3550—unfair practice charges adjudicated by the California Public Employment Relations Board (PERB or Board)—forecloses actions against individuals. As a result, there is no threat of adverse state action against Plaintiffs.

Even if Plaintiffs had standing, however, their pre-enforcement challenge to section 3550 fails to meet prudential ripeness standards. Prudential ripeness requires evaluation of two factors: the case's fitness for judicial resolution, and the hardship to the parties of withholding a decision. The issues raised in the complaint are not fit for judicial resolution because the proper application of section 3550 to public employers based on Plaintiffs' speech may depend on a range of factual circumstances that cannot be adequately assessed in the

[1] All further undifferentiated statutory references are to the California Government Code.

hypotheticals presented by Plaintiffs' pre-enforcement challenge. Moreover, given that more than two years have elapsed between section 3550's enactment and the filing of the present suit, as well as the existence of other restrictions on public employers' speech that Plaintiffs do not challenge, Plaintiffs cannot demonstrate serious hardship. And withholding judicial decision will appropriately allow the state authorities—including the expert labor relations agency, PERB, where cases involving section 3550 are currently pending before the Board itself—to interpret the statute's meaning.

Because these defects in standing and ripeness deprive the Court of subject-matter jurisdiction, the complaint should be dismissed.

BACKGROUND

I. Legal Background

A. PERB and Its Pre-Section 3550 Jurisdiction

PERB is the expert, quasi-judicial agency with exclusive initial jurisdiction over California's major public sector labor relations statutes. *Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* 35 Cal. 4th 1072, 1085-1086 (2005). PERB's jurisdiction includes eight comprehensive bargaining statutes, each applying to a different segment of California's public sector workforce. *See* §§ 3540-3549.3 (Educational Employment Relations Act (EERA); public schools and community colleges); §§ 3560-3599 (Higher Education Employer-Employee Relations Act (HEERA); public universities); §§ 3500-3511 (Meyers-Milias Brown Act (MMBA); cities, counties, and special districts); §§ 3512-3524 (Ralph C. Dills Act; State of California); §§ 71630-71639.5 (Trial Court Employment Protection and Governance Act); §§ 71800-71829 (Trial Court Interpreter Employment and Labor Relations Act; court interpreters); §§ 3524.50-3524.81 (Judicial Council Employer-Employee Relations Act); Cal. Pub. Util. Code §§ 99560-99570.4 (Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act).

These statutes protect public employees' rights to form, join, and participate in the activities of employee organizations, and to be represented by employee organizations of their choosing. *See, e.g.*, §§ 3502, 3543. Each statute makes it illegal for public employers to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by" the applicable statute. *See* §§ 3506.5(a), 3543.5(a).

One of these statutes, HEERA, includes a safe harbor for the "expression of any views, arguments or opinions . . . unless such expression contains a threat of reprisal, force, or promise of benefit." § 3571.3.[2] This provision does not appear in the other PERB-administered statutes, but the Board has long held that the principle applies across all of them. *See* *City of Oakland*, PERB Decision No. 2387-M, 25-26 (2014); *Rio Hondo Community College District*, PERB Decision No. 128, 18-19 (1980). Still, the safe harbor for non-coercive speech is not unlimited. The Board has explained that it does not protect an employer that engages in "advocacy on matters of employee choice such as urging employees to participate or refrain from participation in protected conduct, statements that disparage the collective bargaining process itself, implied threats, brinkmanship or deliberate exaggerations." *Hartnell Unified School District*, PERB Decision No. 2452, 25 (2015).

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[2] In full, section 3571.3 provides: "The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization."

The public employers bound by these statutes are the entities themselves. §§ 3501(c), 3540.1(k).[3] Accordingly, unfair practice charges—alleged statutory violations—may be filed only against an employer (or an employee organization), not an individual. Cal. Code Regs. tit. 8, § 32602(b). The Board has specifically held that an individual member of a public employer's governing board cannot be a respondent to an unfair practice charge. *Santa Maria-Bonita School District*, PERB Order No. Ad-400, 5-6 (2013).

Unfair practice charges may be filed by employees, employee organizations, or employers, and are initially investigated by PERB's Office of the General Counsel. Cal. Code Regs. tit. 8, §§ 32602(b), 32620. If the charge states a prima facie case, the General Counsel issues a complaint. *Id.*, § 32640. The case proceeds to a formal hearing, in which the charging party prosecutes the case, *id.*, § 32178, after which an administrative law judge issues a proposed decision, *id.*, §§ 32680, 32215. If the parties file exceptions to the proposed decision, the Board itself will render a final decision. *Id.*, §§ 32300, 32320. Unless adopted by the Board, proposed decisions are not precedential. *Id.*, § 32215. Judicial review of final Board decisions following an administrative hearing occurs in the Court of Appeal. §§ 3509.5, 3542(b)-(c).

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[3] Section 3501(c) defines "public agenc[ies]" subject to the MMBA as "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not." Section 3540.1(k) defines "[p]ublic school employer[s]," as "the governing board of a school district, a school district, a county board of education, a county superintendent of schools," and certain charter schools, auxiliary organizations, and joint powers authorities.

B. Section 3550 and Related Legislation

Section 3550 became effective January 1, 2018. S.B. 285, 2017-2018 Leg., Reg. Sess. (Cal. 2017). As originally enacted, the statute provided that "[a] public employer shall not deter or discourage public employees from becoming or remaining members of an employee organization." *Id.* The definition of "public employer" included the employers subject to the existing PERB-administered statutes (as well as certain public transit districts that are not within PERB's jurisdiction). § 3552(c). For those employers already subject to a PERB-administered statute, the Legislature entrusted jurisdiction over section 3550 to PERB. § 3551.

Section 3550 took its current form when it was amended by Senate Bill 866, effective on June 27, 2018, to state:

> 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.

S.B. 866, 2017-2018 Leg., Reg. Sess. (Cal. 2018). This amendment was part of a broader legislative package designed to address the impact of *Janus v. American. Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), which prohibited the collection of agency fees from non-union-members. For instance, Senate Bill 866 also added a new requirement that public employers meet and confer with any employee organization certified or recognized as an exclusive representative of their employees before "disseminat[ing] mass communications to public employees or applicants to be public employees concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization." § 3553.

C. Adjudication of Section 3550 Cases

The Board has adopted regulations implementing section 3550. As relevant here, those regulations make it an "unfair practice" for a public employer to violate section 3550, Cal. Code. Regs. tit. 8, § 32611(a), and direct that alleged violations of section 3550 be processed under the Board's unfair practice rules, *id.*, §§ 32038, 32602(a). Thus, the rule that an unfair practice charge may not be filed against an individual applies to violations of section 3550. *Id.*, § 32602(b).

The Board itself has not yet interpreted section 3550, but PERB administrative law judges have issued four proposed decisions addressing alleged violations of the statute. Two involved allegations that employers distributed communications regarding employees' rights under *Janus* to refrain from financially supporting an employee organization. In one of these cases, the ALJ found that the employer did not violate section 3550. *Gridley Unified School District*, 44 Pub. Emp. Rep. for Cal. ¶ 130 (Jan. 28, 2020) (Defs.' Req. Judicial Notice (RJN) Ex. A, at 22). In the other case, the ALJ found that merely informing employees of *Janus* did not violate section 3550, *Regents of the University of California*, 44 Pub. Emp. Rep. for Cal. ¶ 34 (July 22, 2019) (RJN Ex. B, at 69), but that under the totality of the circumstances, the employer violated section 3550 by "sending a message to employees that [the employer], rather than the Unions[,] is the exclusive source of important information regarding their rights to engage in or refrain from engaging in protected activity," *id.* at 75. This "had the natural and probable consequence of deterring and discouraging employees from authorizing dues deductions and/or membership in their unions." *Id.*

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Another section 3550 case involved employers who expressed their opposition to an employee organization that was attempting to organize the employees; the ALJ found no violation, concluding that section 3550 prohibits only coercive communications. *Alliance Marc & Eva Stern Math & Science High School*, 44 Pub. Emp. Rep. for Cal. ¶ 128 (Jan. 24, 2020) (RJN Ex. C, at 218).

The fourth case involved an employer's statement at an employee orientation repeatedly emphasizing that employees did not have to attend the union's presentation and suggesting that employees' decision to join the union would have no effect on their terms and conditions of employment. *County of Orange In-Home Supportive Services Public Authority*, 44 Pub. Emp. Rep. for Cal. ¶ 70 (Sept. 30, 2019) (RJN Ex. D, at 240-41). The ALJ concluded that section 3550 did not prohibit speech unless it is coercive, *id.* at 258-60, and found that although the employer's statements were factually accurate, they were, under the circumstances, "subtly coercive" in violation of section 3550, *id.* at 265.

Of these cases, *Regents* is currently pending before the Board itself. The Board in that case has taken the rare step of granting oral argument, which is scheduled for June 11, 2020. RJN, Exs. E & F.[4] The Board has asked the parties alleged violations of section 3550 under its existing framework for evaluating allegations of interference with employee rights; (2) the proper statutory construction of section 3550 in light of HEERA section 3571.3; and (3) "the relevance (if any) of (a) the definition of 'deter' in subdivision (a) of § 16645[5];

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[4] The Board has discretion whether to hold oral argument, Cal. Code Regs. tit. 8, § 32315, and has done so once in the last five years. *See* *County of San Bernardino (Office of the Public Defender)*, PERB Decision No. 2423-M, 9 (2015). More often the Board denies oral argument, finding that "the issues . . . are sufficiently clear to make oral argument unnecessary." *Trustees of the California State University (Northridge)*, PERB Decision No. 2687-H, 2, n. 3 (2019).

[5] Before section 3550 was enacted, state law already prohibited the use of state funds to "assist, promote, or deter union organizing"; section 16645 defines

(b) the employer's motive; (c) the truthfulness or misleading nature of the employer's communication or conduct; (d) the specific context in which the communication or conduct occurred; and (e) any other potentially relevant circumstances." RJN Ex. E, at 278. The Board also invited amicus briefs from non-parties. *Id.* at 278-279.

In addition, the parties in *Alliance* have received extensions of time to file exceptions to the proposed decision with the Board itself. RJN, Ex. G.

II. Plaintiffs' Complaint

On February 21, 2020, more than two years after section 3550 took effect, Plaintiffs filed their complaint and a motion for preliminary injunction in this case. Plaintiffs allege that they are elected or appointed members of the governing boards of various local public agencies—cities, school districts, and special districts—subject to section 3550. Compl. ¶¶ 10, 12-18, ECF. No. 1. Arguing that section 3550 conflicts with their First Amendment speech rights, Plaintiffs seek to prohibit Defendants (PERB's four current appointed members and its general counsel) from enforcing section 3550 against them and other similarly situated officials. Compl. ¶ 6.

Plaintiffs assert that "the effect of Section 3550 is to chill the ability of elected representatives to communicate facts and opinions about unions and unionization out of fear that their statements may later be deemed to 'discourage' or 'deter' unionization." Compl. ¶ 30. They allege that they "have *at times* limited discussion of issues in public (including during meetings of their boards) that might call attention to controversial union positions, opting instead to avoid any

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that phrase to mean "any attempt by an employer to influence the decision of its employees in this state or those of its subcontractors regarding either of the following: (1) Whether to support or oppose a labor organization that represents or seeks to represent those employees. (2) Whether to become a member of any labor organization."

discussion of subjects related to unions." Compl. ¶ 33 (emphasis added). And in the declarations accompanying their preliminary injunction motion, Plaintiffs aver that since section 3550's enactment (or their awareness of it), they have refrained from speaking on matters that might "even tangentially relate to unions," Anderson Decl. ¶ 9, ECF No. 11, or issues "that might call attention to certain union positions or practices," Yarborough Decl. ¶ 9, ECF No. 12; Ferguson Decl. ¶ 12, ECF. No. 9. One Plaintiff "worr[ies] that even publicly mentioning [her] position on fiscal accountability and responsible public employee salaries might be construed as indirectly deterring or discouraging union membership." Ferguson Decl. ¶ 11. Another professes concern that section 3550 could be applied to his campaign speech discussing "union positions that are controversial with . . . employees," Dohm Decl. ¶¶ 13-14, ECF No. 13, or to his speech as a private citizen, *id.* ¶ 15. But this same Plaintiff acknowledges that in 2018—after section 3550 took effect but before he became aware of it—he made campaign statements regarding such topics as "the union's position on Common Core, charter schools, the importance of fiscal restraint, and other union positions that are controversial with . . . employees." *Id.* ¶ 13. Plaintiffs do not allege that an unfair practice charge was filed with PERB, or even threatened to be filed, regarding these statements.

In fact, notwithstanding Plaintiffs' conclusory claim that they "have faced and will continue to face a credible threat of legal proceedings brought by PERB," Compl. ¶ 36, and assertions that they fear exposing their agencies *or themselves* to an unfair practice charge, *e.g.*, Ferguson Decl. ¶ 6; Anderson Decl. ¶ 9; Dohm Decl. ¶ 7, Plaintiffs do not allege that they or any other individual, elected or otherwise, has personally faced an unfair practice charge under section 3550 or any other PERB-administered statute. Plaintiff Laura Ferguson, an elected member of the San Clemente City Council, alleges that the San Clemente City Manager received a letter from the San Clemente City Employees Association (SCCEA)

regarding an inquiry Ferguson made. Compl. ¶ 33; Ferguson Decl. ¶ 14. That letter accused Ferguson of committing an unfair practice by "requesting private information about SCCEA and its members, including its governance, bylaws, candidate endorsement process, and specific information targeting the Association President and Vice President," but it did not refer, directly or implicitly, to section 3550, nor did it threaten to file a charge against Ferguson herself. Ferguson Decl. Ex A.

Plaintiffs also allege that their boards have received substantial legal advice regarding section 3550, some of it conflicting. For instance, some of that advice predicted that section 3550 "will be broadly construed" and that informing employees of the *Janus* decision "may be inconsistent with the intent" of section 3550. Compl. ¶¶ 31-32. But another Plaintiff alleges that the governing board he sits on received a legal opinion that it *could* inform employees of *Janus*. Barke Decl. ¶ 15, ECF. No. 8. Plaintiffs do not allege that any of this advice has suggested that local governing board members could be held personally liable for section 3550 violations, that private or campaign speech by board members could be imputed to the agency, or that purely factual information regarding union positions could give rise to section 3550 liability.

ARGUMENT

Justiciability doctrines, including standing and ripeness, "pertain to a federal court's subject-matter jurisdiction under Article III," and are properly raised under Federal Rule of Civil Procedure Rule 12(b)(1). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d

1117, 1121 (9th Cir. 2014). In reviewing a motion to dismiss, a court may take judicial notice of matters of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (internal quotation marks omitted).

Because Plaintiffs lack standing and their case is not ripe, the Court lacks subject-matter jurisdiction.

For a federal court to have subject-matter jurisdiction, there must be a justiciable "case" or "controversy" under Article III, Section 2, of the United States Constitution; this requires both that a plaintiff have standing and that the dispute be ripe for adjudication. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). The burden of establishing standing and ripeness rests with the plaintiff. *Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009) (citing *Renne v. Geary*, 501 U.S. 312, 316 (1991)). Plaintiffs—individual board members who are not "public employers" subject to section 3550—do not satisfy either requirement.

A. Plaintiffs do not have standing to mount a pre-enforcement challenge to section 3550 because they have not sustained an injury in fact.

To establish standing, plaintiffs must show, among other things, that they have suffered an injury in fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992). At an "irreducible minimum," a party seeking access to the federal courts must show that it "*personally* has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) (emphasis in original) (internal quotation marks omitted).

This requirement is somewhat relaxed in the First Amendment context. "Because constitutional challenges based on the First Amendment present unique standing considerations, plaintiffs may establish an injury in fact without first suffering a direct injury from the challenged restriction." *Lopez v. Candaele*, 630

F.3d 775, 785 (9th Cir. 2010) (internal quotation marks omitted). In these pre-enforcement cases, plaintiffs satisfy the standing requirement by "'demonstrat[ing] a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979)) (alteration in original).

Notwithstanding this more relaxed inquiry, plaintiffs mounting a First Amendment challenge must still "show an actual or imminent injury to a legally protected interest." *Lopez*, 630 F.3d at 785. "Even when plaintiffs bring an overbreadth challenge to a speech restriction, i.e. when plaintiffs challenge the constitutionality of a restriction on the ground that it may unconstitutionally chill the First Amendment rights of parties not before the court, they still must satisfy the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction." *Id*. at 785-86 (internal quotation marks omitted).

The Ninth Circuit considers three factors to determine whether "pre-enforcement plaintiffs have failed to show that they face a credible threat of adverse state action sufficient to establish standing": (1) whether the plaintiffs have shown "a reasonable likelihood that the government will enforce the challenged law against them"; (2) whether the plaintiffs have established, "with some degree of concrete detail, that they intend to violate the challenged law"; and (3) "whether the challenged law is inapplicable to the plaintiffs, either by its terms or as interpreted by the government." *Lopez,* 650 F.3d at 786. "Such inapplicability weighs against both the plaintiffs' claims that they intend to violate the law, and also their claims that the government intends to enforce the law against them." *Id.*

All three of these factors weigh against finding that Plaintiffs' face a credible threat of adverse state action. Most fundamentally, Plaintiffs are not "public employers" subject to section 3550. Public employers are those entities defined as employers under the other PERB-administered statutes—such as school

districts, school district governing boards, cities, counties, and special districts, §§ 3540.1(k), 3501(c)—not individual governing board members. This means that by its own terms, section 3550 does not apply to Plaintiffs. And because Plaintiffs cannot show that section 3550 "even arguably applies" to them, they cannot "prove [their] intent to violate" the law. *Lopez* 630 F.3d at 790.

Nor can Plaintiffs plausibly allege that section 3550 will likely be enforced against them. In fact, PERB regulations foreclose unfair practice charges against individuals such as Plaintiffs. Cal. Code Regs. tit. 8, § 32602(b). Plaintiffs do not—and cannot—allege that PERB has ever overlooked this regulatory limitation, either before or after section 3550's enactment. Rather, PERB case law is clear that individual members of a governing board cannot be parties to an unfair practice case. *Santa Maria*, PERB Order No. Ad-400 at 5-6.

The complaint's allegation that one Plaintiff, Laura Ferguson, was "threatened with an unfair practice charge" by the union representing employees of the City of San Clemente, Compl., ¶ 33, does not change this analysis. For one thing, the letter containing this threat did not refer to section 3550 or its "deter or discourage" language. Ferguson Decl. Ex. A. Instead, the letter accused Ferguson of having engaged in acts that "interfere with, intimidate, restrain, coerce, or discriminate against" the union or its members, *id.*, thus invoking statutory provisions that long pre-date section 3550, *see* §§ 3506, 3506.5(a). For another thing, the letter was addressed not to Ferguson but to the San Clemente city manager, which hardly suggests a threat to file a charge against Ferguson personally. But even if the letter could be construed as such a threat, PERB regulations, as noted, do not permit a charge against Ferguson.

Therefore, each of the three *Lopez* factors supports a conclusion that Plaintiffs cannot demonstrate a "credible threat of adverse state action sufficient to establish standing." *Lopez*, 650 F.3d at 786.

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Notably, it makes no difference that the public employers whose governing boards Plaintiffs sit on can be held liable under section 3550. For the purposes of Article III standing, a public entity's individual board members may not "step into the shoes" of the entity. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986) (internal quotation marks omitted).

Nor can Plaintiffs establish standing by claiming that section 3550 has led them to "avoid discussion" of certain issues related to or tangentially related to unionization. *See*, e.g., Compl., ¶ 35. The Ninth Circuit has rejected the argument that "any plaintiff may challenge the constitutionality of a statute on First Amendment grounds by nakedly asserting that his or her speech was chilled by the statute." *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003). To the contrary, "[t]he self-censorship door to standing does not open for every plaintiff." *Id.* Only those potential plaintiffs with an "actual and well-founded fear that the law will be enforced against [him or her]" have sustained the necessary injury in fact to challenge the law's constitutionality. *Id.* (citing *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)) (alteration in original). Because section 3550 cannot be enforced against the Plaintiffs, they do not have standing.

Attempting to evade this standing problem, Plaintiffs cite a case in which PERB found liability based on the conduct of an employer's governing board members. Compl. ¶ 30. This case does not alter the conclusion that individual board members lack standing to challenge section 3550.

Twice in its history, PERB has found a public employer liable for the conduct of some of the entity's governing board members. In *County of Riverside*, PERB Decision No. 2119-M (2010), the Board determined that a county was liable for statements by three governing board members during an official public meeting threatening to subcontract the work of temporary employees if those employees continued to pursue union representation. *Id.* at 22-23. And in *San Diego Unified*

School District, PERB Decision No. 137 (1980), the Board found a school district liable for the actions of two of five governing board members who wrote letters on district letterhead praising employees who had refrained from supporting a union strike. The Board in that case concluded that because other district officials placed the letters in employee personnel files, employees "had reasonable cause to believe that the District's personnel were acting with the authority of the employer." *Id.* at 7.

Plaintiffs take these cases to mean that section 3550 harms them because of the possibility that their statements may be imputed to the public employer. Compl., ¶ 30. That line of reasoning misses the point of Article III standing. For pre-enforcement challenges, the "inquiry into injury-in-fact does not turn on the strength of plaintiffs' concerns about a law, but rather on the credibility of the threat that the challenged law will be enforced *against them*." *Lopez*, 630 F.3d at 792 (emphasis added). The fact that an individual governing board member may be deemed an agent of the employer under certain circumstances does not make that individual the employer. *Santa Maria*, PERB Order No. Ad-400 at 6.

The Ninth Circuit found no standing in a closely analogous situation in *Leonard*, 12 F.3d 885. There, the court held that individual union officials lacked standing to challenge the constitutionality of a term of a collective bargaining agreement that restricted their union's right to petition for legislation beneficial to its members. The Court emphasized that the disputed term "by its plain language applies only to the Union and not to its individual members," and that "[t]he individual plaintiffs have not shown that [the term] in any way inhibits their freedom to speak as *individuals*." *Id.* at 888 (emphasis in original). It was only the union, therefore, that could "colorably assert a threatened injury." *Id.* at 889. Thus, under *Leonard*, the fact that *an agent's* speech may trigger a violation of a regulation restricting *the principal's* speech does not give *the agent* standing to challenge the regulation's constitutionality.

The same is true here. Plaintiffs' speech could be the basis for a finding that a public employer violated section 3550, but only the employer faces a threatened injury. As a result, any alleged "chill implicating the First Amendment" would impact the employer. *Leonard*, 12 F.3d at 889.[6] By contrast, when Plaintiffs speak in their personal capacities they remain "free to endorse" any view of unionization they desire. *Id.* Because section 3550 does not "in any way inhibit their freedom to speak *as individuals*," Plaintiffs have "not alleged the *personal* actual or threatened injury necessary to gain standing in federal court." *Id*. at 888-89 (emphasis in original).

Finally, there is no indication that section 3550 places the Plaintiffs at risk of "expulsion from office" or monetary penalties, as did the government officials found to have standing in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 241 & n. 5 (1968), or criminal penalties, as did the officials found to have standing in *City of El Cenizo v. Texas*, 890 F.3d 164, 186 (5th Cir. 2018).

Because section 3550 does not apply to individual governing board members such as Plaintiffs, and its operation cannot personally injure them, they do not have standing to maintain their pre-enforcement challenge. The Court thus does not have jurisdiction over this suit and it must be dismissed.

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[6] It bears noting, however, that public employers cannot claim a constitutional injury based on section 3550. The public employers subject to section 3550 are political subdivisions of the State. "A political subdivision . . . is a subordinate unit of government created by the State to carry out delegated governmental functions." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009). A political subdivision "has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Ibid.* (internal quotation marks omitted).

B. Plaintiffs' claims are not ripe for adjudication.

The ripeness component of Article III's case-or-controversy requirement is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). "[T]he ripeness inquiry contains both a constitutional and a prudential component." *Thomas*, 220 F.3d at 1138 (internal quotation marks omitted). Here, Plaintiffs' claims are unripe under both components.

1. Because Plaintiffs have not shown an injury in fact, they also cannot establish constitutional ripeness.

For the same reasons that Plaintiffs lack standing, the dispute in this case does not satisfy the constitutional ripeness requirements. As the Ninth Circuit has explained:

> [t]he constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong. . . . [B]ecause the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline.

Thomas, 220 F.3d at 1138 (footnote omitted). Thus, in determining whether a pre-enforcement challenge to a statute is ripe for review, the inquiry is the same as that for determining whether plaintiffs have standing: courts look to whether there is a "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 1139 (internal quotation marks omitted).

For the reasons already discussed with respect to standing, therefore, the present suit is not constitutionally ripe for review, and the Court lacks jurisdiction over their claims.

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2. Even if Plaintiffs had shown a sufficient injury in fact to support standing and constitutional ripeness, prudential ripeness concerns would warrant dismissal.

"Even where jurisdiction is present in the Article III sense, courts are obliged to dismiss a case when considerations of prudential ripeness are not satisfied." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1211 (9th Cir. 2006). Courts "evaluating the prudential aspects of ripeness" are "guided by two overarching considerations: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Thomas*, 220 F.3d at 1141 (quoting *Abbott Laboratories*, 387 U.S. at 149). Both factors weigh in favor of dismissal here.

Because "a court cannot decide constitutional questions in a vacuum," the fitness of the issues for judicial decision turns in part on whether there is an adequately developed factual record. *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007). "While pure legal questions that require little factual development are more likely to be ripe, a party bringing a preenforcement challenge must nonetheless present a concrete factual situation . . . to delineate the boundaries of what conduct the government may or may not regulate without running afoul of the Constitution." *Id.* (internal quotation marks omitted).

In *Thomas*, the en banc Ninth Circuit held that a First Amendment challenge to an Alaska law prohibiting housing discrimination on the basis of marital status was nonjusticiable on ripeness grounds. In its discussion of prudential ripeness, the court emphasized that the dispute was "devoid of any specific factual context," with a record that was "remarkably thin and sketchy, consisting only of a few conclusory affidavits." *Thomas*, 220 F.3d at 1141. The court pointed out that the plaintiff landlords "claim that they have refused to rent to unmarried couples in the past, yet they cannot say when, to whom, where, or under what circumstances" and

"pledge their intent to do so in the future, yet again they cannot specify when, to whom, where, or under what circumstances." *Id.* at 1139. The court refused "to declare Alaska laws unconstitutional, in the absence of any identifiable tenants and with no concrete factual scenario that demonstrates how the laws, as applied, infringe their constitutional rights." *Id.* at 1141. In reaching this conclusion, the court rejected the plaintiffs' claim that the issues in the case were purely legal, finding instead that it "rest[ed] upon hypothetical situations with hypothetical tenants." *Id.* at 1142.

This case comes before this Court in a similar posture. With the possible exception of one Plaintiff who believes he must inform employees of *Janus* "whenever" he speaks to employees, Yarbrough Decl. ¶ 13, Plaintiffs do not identify specific statements that they have refrained from making because of section 3550. Instead, Plaintiffs ask the Court to hold section 3550 unconstitutional based primarily on conclusory affidavits that assert vague generalities about hypothetical statements Plaintiffs might wish to make in the future regarding "controversial" union positions, Dohm Decl. ¶ 13, "topics that even tangentially relate to unions," Anderson Decl. ¶ 7, or Plaintiffs' "position[s] on fiscal accountability," Ferguson Decl. ¶ 11.

Moreover, whether any statements Plaintiffs would make are attributable to a public employer may depend on circumstances that are outside Plaintiffs' control and, therefore, cannot be alleged. For instance, would other governing board members agree with Plaintiffs? *Cf.* *County of Riverside*, PERB Decision No. 2119-M at 22-23. Would other officials of the public employer cause employees to view Plaintiffs' speech as the employer's speech? *Cf.* *San Diego*, PERB Decision No. 137 at 7.[7]

[7] These questions are significant because any speech that would reasonably be viewed as speech of the public employer would likely be considered government speech, which is not protected by the First Amendment. *See Eagle*

Thus, as in *Thomas*, the issues are not purely legal; they are based almost exclusively on hypothetical statements Plaintiffs might wish to make in the future under unknown circumstances. Plaintiffs have not provided "an adequately developed factual record to render [this case] ripe for . . . review." *Thomas*, 220 F.3d at 1142.

Declining jurisdiction on prudential ripeness grounds is also appropriate in this case because it will permit state authorities to construe the state law at issue and "perhaps in the process to materially alter the question to be decided." *See Geary*, 501 U.S. at 323 (internal quotation marks omitted)). In *Alaska Right to Life*, the Ninth Circuit concluded that it should decline jurisdiction on ripeness grounds in part because there was an "open question" whether the state would apply the challenged law in the manner alleged by the Plaintiff. 504 F.3d at 850. Declining jurisdiction would give the state supreme court the "first opportunity to construe" the provisions at issue, and to do so in a manner consistent with relevant U.S. Supreme Court authority. *Id.*

So too here. PERB—the expert agency entrusted to enforce section 3550—has not yet had the opportunity to interpret the statute. Decisions by the Board itself in cases currently pending before it will provide precedential authority as to the statute's meaning, which could include guidance on how section 3550 interacts with statutory free speech principles and whether it reaches truthful statements. Those cases may also allow PERB to provide guidance on whether section 3550 prohibits employers from communicating with employees about *Janus*—the closest Plaintiffs come to identifying a specific statement they feel constrained from making. Indeed, as in *Alaska Right to Life*, 504 F.3d at 850, there is an open question whether state authorities will interpret section 3550 as expansively as

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Point Education Association/SOBC/OEA v. Jackson County School District No. 9, 880 F.3d 1097, 1104 (9th Cir. 2018).

Plaintiffs fear. And on judicial review of PERB's decisions, the California Court of Appeal can consider any constitutional issues implicated by the Board's interpretation. *See Boling v. Pub. Employment Relations Bd.*, 33 Cal. App. 5th 376, 388 (Cal. Ct. App. 2019); *San Diego Mun. Employees Assn. v. Superior Court*, 206 Cal. App. 4th 1447, 1458 (Cal. Ct. App. 2012).

Therefore, declining jurisdiction will give the relevant state authorities the chance to clarify the meaning of the statute.

On the other hand, there will be little hardship to Plaintiffs if this Court declines jurisdiction on prudential ripeness grounds. A plaintiff that has failed to demonstrate a credible threat of enforcement suffers no hardship if jurisdiction is declined. *Alaska Right to Life*, 504 F.3d at 851-852; *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996). This is particularly so where, as here, none of the Plaintiffs "is potentially subject to enforcement" of the statute. *Alaska Right to Life*, 504 F.3d at 851. As in *Alaska Right to Life*, Plaintiffs' only alleged harm is their self-censorship, but "because [they] would not [themselves] have risked civil sanction or criminal penalty, [they have] not 'suffered the constitutionally recognized injury of self-censorship.'" *Id.* (quoting *California Pro-Life Council*, 328 F.3d at 1095).

Any claim of hardship is also undermined by the lapse of more than two years between section 3550's enactment and Plaintiffs' lawsuit. Having waited so long to raise their claim that section 3550 chills their First Amendment rights, Plaintiffs cannot seriously contend that waiting for state authorities to interpret the statute will cause undue hardship.

Moreover, despite Plaintiffs' claims to fear that section 3550 could be interpreted to restrict their private speech or their campaign speech, this fear is unfounded. Private speech by an individual—including campaign speech—cannot reasonably be viewed as the speech of a public employer under section 3550. *See Boling v. Pub. Employment Relations Bd.*, 5 Cal. 5th 898, 919 (2018)

(acknowledging the significance of "[t]he line between official action and private activities undertaken by public officials").

Finally, even a broad declaration that Plaintiffs' speech cannot be the basis for public employer liability under section 3550 would not leave Plaintiffs free to speak uninhibited. They would still be required to navigate the longstanding restrictions on employer speech that "interfere[s] with, restrain[s], or coerce[s] employees" in their exercise of protected rights, which pre-date section 3550 and which Plaintiffs do not challenge. *See* §§ 3506.5(a), 3543.5(a). Under these restrictions, Plaintiffs would not be entitled to engage in "advocacy on matters of employee choice such as urging employees to participate or refrain from participation in protected conduct, statements that disparage the collective bargaining process itself, implied threats, brinkmanship or deliberate exaggerations." *Hartnell Unified School District*, PERB Decision No. 2452 at 25.

Because Plaintiffs will suffer minimal, if any, hardship absent a ruling from this Court, the Court should dismiss their claims for lack of prudential ripeness.

CONCLUSION

Plaintiffs do not have standing to challenge section 3550. They are individuals, not public employers, and are therefore not subject to enforcement of the statute. And PERB's regulations and precedent confirms that they cannot be respondents to an unfair practice charge alleging a violation of section 3550.

Plaintiffs have also failed to plead a ripe case. Largely failing to identify the specific statements they want to make but have self-censored because of section 3550, Plaintiffs have not presented an adequate factual record. Moreover, declining jurisdiction on ripeness grounds will permit the appropriate state authorities to interpret the statute for the first time. Finally, Plaintiffs cannot demonstrate any significant hardship because they have waited so long—more than two years—to bring this challenge to section 3550.

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Because Plaintiffs lack standing and have not presented a ripe case, the Court lacks subject-matter jurisdiction. The complaint must be dismissed.

Dated: April 14, 2020

Respectfully submitted,

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