SCOTT A. KRONLAND (SBN 171693)
DANIELLE E. LEONARD (SBN 218201)
MATTHEW J. MURRAY (SBN 271461)
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
E-mail: skronland@altber.com
dleonard@altber.com
mmurray@altber.com

Attorneys for Intervenor-Defendants California Teachers Association, SEIU California State Council, California Federation of Teachers, California School Employees Association, and California Labor Federation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Jeffrey I. Barke, *et al*.,

Plaintiffs,

v.

Eric Banks, *et al.*,

Defendants,

and

California Teachers Association, *et al.*,

Intervenor-Defendants.

CASE NO.: 8:20-cv-00358-JLS-ADS

INTERVENOR-DEFENDANT UNIONS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: July 10, 2020
Hearing Time: 10:30 a.m.
Location: Courtroom 10A

Judge: The Hon. Josephine L. Staton

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTRODUCTION 1
BACKGROUND 2
A. Public Sector Collective Bargaining in California 2
B. Government Code Section 3550 3
C. Plaintiffs' Motion for a Preliminary Injunction 5
ARGUMENT 6
I. Plaintiffs have no likelihood of success on the merits 6
A. Plaintiffs do not have standing 6
1. There is no reasonable likelihood that the government will enforce Section 3550 against Plaintiffs 7
2. Plaintiffs have not established that they have concrete plans to violate Section 3550 8
3. Section 3550 is not applicable to Plaintiffs as individuals 11
B. Plaintiffs' claims are not ripe 14
C. Section 3550 is consistent with the First Amendment 16
1. As applied challenge 16
2. Facial challenge 21
II. Plaintiffs face no irreparable harm 24
III. The balance of hardships and public interest weigh firmly against a preliminary injunction 25
CONCLUSION 25

TABLE OF AUTHORITIES

Federal Cases

Alaska Right to Life Political Action Committee v. Feldman,
504 F.3d 840 (9th Cir. 2007) 15, 16

Babbitt v. United Farm Workers National Union,
442 U.S. 289 (1979) 15

Bailey v. Callaghan,
715 F.3d 956 (6th Cir. 2013) 18

Blair v. Bethel School District,
608 F.3d 540 (9th Cir. 2010) 20

Bond v. Floyd,
385 U.S. 116 (1966) 20

California Teachers Association v. State Board of Education,
271 F.3d 1141 (9th Cir. 2001) 22, 23, 24

City of El Cenizo v. Texas,
890 F.3d 164 (5th Cir. 2018) 20, 21

City of San Juan Capistrano v. Caifornia Public Utilities Commission,
937 F.3d 1278 (9th Cir. 2019) 18

Garcetti v. Ceballos,
547 U.S. 410 (2006) 14, 19, 21

Gospel Missions of America v. City of Los Angeles,
419 F.3d 1042 (9th Cir. 2005) 23, 24

Janus v. AFSCME, Council 31,
138 S.Ct. 2448 (2018) 8

Johnson v. Stuart,
702 F.2d 193 (9th Cir. 1983) 7

Laird v. Tatum,
408 U.S. 1 (1972) 8

Leonard v. Clark,
12 F.3d 885 (9th Cir. 1994) 11, 12, 14

Lopez v. Candaele,
630 F.3d 775 (9th Cir. 2010) ..... *passim*

Maryland v. King,
567 U.S. 1301 (2012) (Roberts, C.J., in chambers) 25

Miller v. Town of Hull,
878 F.2d 523 (1st Cir. 1989) 20

Minnesota State Board for Community Colleges v. Knight,
465 U.S. 271 (1984) 18

Nevada Commission on Ethics v. Carrigan,
564 U.S. 117 (2011) 19

Pleasant Grove City v. Summum,
555 U.S. 460 (2009) 17

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 20

Reynolds v. Sims,
377 U.S. 533 (1964) 18

Rust v. Sullivan,
500 U.S. 173 (1991) 17

Small v. Avanti Health Systems, LLC,
661 F.3d 1180 (9th Cir. 2011) 25

Thomas v. Anchorage Equal Rights Commission,
220 F.3d 1134 (9th Cir. 2000) (en banc) ..... *passim*

Tschida v. Motl,
924 F.3d 1297 (9th Cir. 2019) 20

Utah Education Association v. Shurtleff,
565 F.3d 1226 (10th Cir. 2009) 19

Velez v. Levy,
401 F.3d 75 (2d Cir. 2005) 20

Virginia v. American Booksellers Association, Inc.,
484 U.S. 383 (1988) 22

Virginia v. Hicks,
539 U.S. 113 (2003) 22

Walker v. Texas Division, Sons of Confederate Veterans, Inc.,
576 U.S. 200 (2015) 17

Waters v. Churchill,
511 U.S. 661 (1994) 19

Williams-Yulee v. Florida Bar,
575 U.S. 433 (2015) 20

Winter v. Natural Resources Defense Council, Inc.,
555 U.S. 7 (2008) 6

Wood v. Georgia,
370 U.S. 375 (1962) 20

Ysursa v. Pocatello Education Association,
555 U.S. 353 (2009) 18

State Cases

Boling v. Public Employment Relations Board,
5 Cal.5th 898 (2018) 3, 13

City of San Jose v. Operating Engineers Local Union No. 3,
49 Cal.4th 597 (2010) 3

Coachella Valley Mosquito & Vector Control District v. California Public Employment Relations Board,
35 Cal.4th 1072 (2005) 2

Inglewood Teachers Association v. Public Employment Relations Board,
227 Cal.App.3d 767 (1991) 12, 13

State Administrative Decisions

County of Riverside,
PERB Decision No. 2119-M (June 24, 2010) 13, 14

San Diego Unified School District,
PERB Decision No. 137 (June 19, 1980) 13

Santa Maria-Bonita School District,
PERB Order No. Ad-400 (July 9, 2013) 12, 13

State Statutes

Cal. Civ. Code §2316 ..... 13, 23
Cal. Civ. Code §2317 ..... 13, 23
Cal. Educ. Code §8358 17
Cal. Gov. Code §3501 ..... 2, 4
Cal. Gov. Code §3502 2
Cal. Gov. Code §3505 ..... 3, 13
Cal. Gov. Code §3506 ..... 3, 5, 13
Cal. Gov. Code §3506.5 ..... 3, 5, 17
Cal. Gov. Code §3509 3
Cal. Gov. Code §3509.5 3
Cal. Gov. Code §3540 2
Cal. Gov. Code §3540.1 ..... 2, 4
Cal. Gov. Code §3541.3 3
Cal. Gov. Code §3541.5 3
Cal. Gov. Code §3543 2
Cal. Gov. Code §3543.2 3
Cal. Gov. Code §3543.5 ..... *passim*
Cal. Gov. Code §3543.7 3
Cal. Gov. Code §3550 ..... *passim*
Cal. Gov. Code §3552 4
Cal. Gov. Code §3553 11
Cal. Health & Safety Code §11998.1(f)(3) 17
Cal. Pub. Util. Code §21241 17

Cal. Stats. 2017, c. 567 (S.B. 285), §1, eff. Jan. 1, 2018 3

Cal. Stats. 2018, c. 53 (S.B. 866), §11, eff. June 27, 2018 3

Tex. Gov. Code §752.051 21

Tex. Gov. Code §752.053 21

State Regulations

8 C.C.R. §32168 3

8 C.C.R. §32300 3

8 C.C.R. §32320 3

8 C.C.R. §32600 3

8 C.C.R. §32602 3

8 C.C.R. §32640 3

8 C.C.R. §32680 3

Other Authorities

Cal. Bill Analysis, S.B. 285, Assembly Committee on Public Employees, Retirement, and Social Security (Jun. 21, 2017) 4

INTRODUCTION

Plaintiffs ask the Court to preliminarily enjoin the California Public Employment Relations Board ("PERB") from "enforcing" California Government Code §3550 "against Plaintiffs," Dkt. 24 ("Mot.") at 2, on the theory that such enforcement would violate the First Amendment. Yet Plaintiffs concede that no such enforcement is possible. Section 3550 regulates "public employers"—i.e., political subdivisions of the State—not individual public employees or officials. Plaintiffs' actual request, therefore, is that the Court enjoin PERB from enforcing Section 3550 against the public entities with which Plaintiffs are affiliated. But there is no basis for doing so. Plaintiffs face no threat of personal liability from PERB's enforcement of Section 3550, and the State's regulation of its own political subdivisions, including their government speech, does not implicate the First Amendment. All the relevant factors weigh against issuing the extraordinary remedy of a preliminary injunction to block enforcement of a statute that the California Governor signed in October 2017.

Plaintiffs do not have a likelihood of success. They have no standing to challenge Section 3550 under controlling Ninth Circuit precedent, because Section 3550 is not enforceable against them and does not regulate their personal speech. Plaintiffs' asserted "feelings" that their personal speech is "chilled" are insufficient to establish injury in fact under Article III. Plaintiffs' pre-enforcement challenge is also not ripe. Plaintiffs' claims are based on speculation, not concrete facts. Section 3550 has never been construed by PERB or by any state court, and no charges under Section 3550 have ever been filed or even threatened against Plaintiffs or the public employers on whose boards Plaintiffs sit. Withholding review does not cause hardship because Section 3550 does not threaten Plaintiffs with personal liability.

Apart from those dispositive threshold issues, Plaintiffs' First Amendment challenge fails on the merits. The First Amendment does not apply to a State's regulation of *government* speech, including the State's regulation of its own political subdivisions. The State is entitled to have a government policy of not deterring or

discouraging union organizing. If the State holds public entities responsible for the actions of their agents—when the agents are acting on behalf of the government rather than in their personal capacity—and does not impose any personal liability on individuals, the State does not infringe on individuals' First Amendment rights.

Plaintiffs have also failed to establish that they will suffer irreparable harm in the absence of preliminary relief. They are not subject to personal liability under Section 3550, so this case is not analogous to cases of true First Amendment "chill." And the balance of hardships and public interest weigh decidedly against the relief Plaintiffs seek, because the harms to unions from the loss of members or financial support that would result from allowing public employers to violate Section 3550 could not be undone. Plaintiffs' preliminary injunction motion should be denied.

BACKGROUND

A. Public Sector Collective Bargaining in California

Labor-management relations for California's public employers and employees are governed by state statutes. *See generally Coachella Valley Mosquito & Vector Control Dist. v. Cal. PERB*, 35 Cal.4th 1072, 1083-86 (2005). As relevant here, the Educational Employment Relations Act ("EERA") (Cal. Gov. Code §3540 et seq.) applies to school and community college districts, *see id.* §3540.1(k) (defining "public school employer" subject to EERA); and the Meyers-Milias-Brown Act ("MMBA") (*id.* §3500 et seq.) applies to cities and local special districts, *see id.* §3501(c) (defining "public agency" subject to MMBA). These statutes advance the State's policy interests in "promot[ing] the improvement of personnel management and employer-employee relations within the various public agencies in the State of California…." *Id.* §3500(a) (MMBA); *see id.* §3540 (purpose of EERA).

Under the EERA and MMBA, public employees "have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Cal. Gov. Code §§3543(a), 3502. When a unit of employees democratically chooses an

organization to serve as the unit's collective bargaining representative, the public employer must meet and confer with that representative in good faith regarding terms and conditions of employment. *Id.* §§3543.2, 3543.7, 3505. Public employers are prohibited from "discriminat[ing]" against or "coerc[ing]" public employees for exercising rights protected by the EERA or MMBA. *Id.* §§3543.5(a), 3506, 3506.5.

State law vests PERB with exclusive jurisdiction to hear and resolve unfair practice charges under these statutes. Cal. Gov. Code §§3541.3(i), 3541.5(a), 3509(a); *see City of San Jose v. Operating Eng'rs Local Union No. 3*, 49 Cal.4th 597, 606 (2010). PERB does not, however, initiate charges on its own. Rather, PERB investigates and adjudicates charges it receives from employees, employee organizations, or covered employers. *See* Cal. Gov. Code §3541.5(a); 8 C.C.R. §32600 et seq. (procedures for processing unfair practice charges); *id.* §32602(b). PERB's General Counsel is responsible for filing complaints against unions or public employers if the General Counsel (or a Board agent he supervises) finds that a charging party's submission "is sufficient to establish a prima facie case" of a violation. 8 C.C.R. §32640(a); *see* Cal. Gov. Code §3541.5.

The complaint is heard by an administrative law judge. 8 C.C.R. §§32680, 32168. An aggrieved party can seek review of the administrative law judge's decision before PERB itself. *Id.* §§32300, 32320. A party aggrieved by a final PERB decision may seek review in the California court of appeal. Cal. Gov. Code §3509.5. California courts grant substantial deference to PERB's interpretation of the laws it administers. *Boling v. PERB*, 5 Cal.5th 898, 911-12 (2018).

B. Government Code Section 3550

Section 3550, adopted in 2017 and amended in 2018,[1] is one of the PERB-administered public sector labor-management relations statutes. Section 3550 provides, in pertinent part:

[1] Cal. Stats. 2017, c. 567 (S.B. 285), §1, eff. Jan. 1, 2018; Cal. Stats. 2018, c. 53 (S.B. 866), §11, eff. June 27, 2018.

> 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.… [emphasis added]

The term "public employer" means "an employer subject to," as relevant here, the EERA or MMBA. Cal. Gov. Code §3552(c). The "employers" subject to the EERA and MMBA are political subdivisions of the State, not individuals who sit on governing boards.[2] Plaintiffs concede that they are not "public employers." Mot. at 27 ("Section 3550's reference to a 'public employer' does not expressly enjoin elected officials"; "PERB's jurisdiction extends only to the public employer itself").

Thus, Section 3550 regulates only the government's own activities and thereby implements the State's policy determination that the State and its political subdivisions are benefited when public employees can make their own decisions regarding unionization and union membership free from anti-union pressure from their government employers. *See* Cal. Bill Analysis, S.B. 285, Assembly Comm. on Public Employees, Retirement, and Social Security (Jun. 21, 2017) ("The bill would close the existing loophole for public employers and ensure that public employees remain free to exercise their personal choice as to whether or not to become union members, without being deterred or discouraged from doing so by their employer.").

The PERB Board has not yet issued any decisions interpreting Section 3550. *See* PERB Mot. to Dismiss (Dkt. 41-1) at 13-15. Consolidated cases are pending in

---

[2] Under the EERA, a "'[p]ublic school employer' or 'employer' means the governing board of a school district, a school district, a county board of education, a county superintendent of schools, a charter school that has declared itself a public school employer …, an auxiliary organization [with some exceptions] …, or a joint powers agency [with some exceptions] …." Cal. Gov. Code §3540.1(k). Under the MMBA, a "'public agency' means 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." *Id.* §3501(c).

which the PERB Board has requested briefing on the proper construction of Section 3550. *See* Dkt. 42-1 Exs. E-G. Neither the PERB Board nor its administrative law judges have ever applied Section 3550 to a dispute involving the activities of members of a local government representative body. *See* Dkt. 41-1 at 13-14 (summarizing the four cases in which ALJs have considered Section 3550 charges).

C. Plaintiffs' Motion for a Preliminary Injunction

Plaintiffs are seven individuals who serve on local government boards. *See* Compl. (Dkt. 1) ¶¶12-18. They have moved for a preliminary injunction to prevent PERB "from enforcing … section 3550 against Plaintiffs." Mot. at 2. They argue that Section 3550 violates the First Amendment by "chill[ing] elected officials from voicing their opinions about the advantages and disadvantages of public sector unionization …." Mot. at 10.

Plaintiffs submitted no evidence that they face any threat of personal liability from Section 3550.[3] Nor could they. The statute applies to "public employer[s]," not individual board members. Plaintiffs also have presented no evidence of any instance in which any charging party has filed or threatened to file a PERB charge alleging that a public employer violated Section 3550 because of speech by a member of a local government representative body.

[3] The only evidence Plaintiffs submitted of anyone asserting that anything any Plaintiff did violated state law is a letter from a local union to the San Clemente City Manager asserting that Plaintiff Ferguson's threatening and intimidating official emails seeking private information from the City about local union members likely constituted an unfair practice. Ferguson Decl. Ex. A (Dkt. 9-1). The letter did not make any reference to Section 3550 or to personal liability for Ferguson, but rather requested that the City cease and desist from "attempts to interfere with, intimidate, restrain, coerce, or discriminate against" the union or its members. *Id.* Since the MMBA was first enacted in 1961, state law has provided that "[p]ublic agencies … shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights …." Cal. Gov. Code §3506; *see also id.* §§3506.5, 3543.5(a). This letter alleging violations of Section 3506, which has existed for almost 60 years, is irrelevant to Plaintiffs' challenge to Section 3550.

Instead, Plaintiffs rely entirely on (1) their own assertions that they are personally uncertain of Section 3550's meaning and "feel" that its existence limits their speech, Sachs Decl. (Dkt. 7) ¶¶9-14; Barke Decl. (Dkt. 8) ¶¶6-11, 13, 15-17; Ferguson Decl. (Dkt. 9) ¶¶5-8, 11; Reardon Decl. (Dkt. 10) ¶¶4-6, 9, 12-20, 24; Anderson Decl. (Dkt. 11) ¶¶5-9, 12, 30, 34, 38; Yarbrough Decl. (Dkt. 12) ¶¶4-6, 8-9, 13; Dohm Decl. (Dkt. 13) ¶¶6-8, 12, 14-15, 17; and (2) statements by private management-side attorneys regarding arguments that hypothetically might be made about Section 3550's meaning. Sachs Decl. Ex. A (Dkt. 7-1) (League of California Cites "resource paper"); Sachs Decl. Ex. B (Dkt. 7-2) (employer-side attorney's "blog"); Anderson Decl. ¶¶16-21, 24-29 (California School Boards Association).

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs have failed to make that showing.

I. Plaintiffs have no likelihood of success on the merits.

A. Plaintiffs do not have standing.

As demonstrated in Defendants' pending motion to dismiss, Dkts. 41-1, 52, Plaintiffs lack standing to challenge Section 3550, because they have not established the injury in fact necessary to invoke this Court's jurisdiction. To have standing to bring a pre-enforcement First Amendment challenge, a plaintiff must "'demonstrat[e] a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (citation omitted). "To show such a 'realistic danger,' a plaintiff must 'allege[] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and ... a credible threat of prosecution thereunder.' … The touchstone for determining injury in fact is whether the plaintiff

has suffered an injury or threat of injury that is credible, not 'imaginary or speculative.'" *Id.* at 785-86 (citation omitted).

The Ninth Circuit considers three factors to determine whether plaintiffs bringing a pre-enforcement First Amendment challenge have failed to show "that they face a credible threat of adverse state action sufficient to establish standing": (1) "whether pre-enforcement plaintiffs have failed to show a reasonable likelihood that the government will enforce the challenged law against them"; (2) "whether the plaintiffs have failed to establish, 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. 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.* at 786. Consideration of each of these factors establishes that Plaintiffs lack standing to challenge Section 3550.

1. There is no reasonable likelihood that the government will enforce Section 3550 against Plaintiffs.

As an initial matter, Plaintiffs have failed to establish that the government will enforce Section 3550 against them. Plaintiffs point to no evidence that PERB has ever sought to enforce Section 3550 against them or any other individual member of a local government board. *See Thomas v. Anchorage Equal Rights Comm'n,* 220 F.3d 1134, 1140-41 (9th Cir. 2000) (en banc) (no standing to challenge statute where "the record of past enforcement is limited, was civil only, not criminal, and in any event was in each case precipitated by the filing of complaints by potential tenants," and no such complaints had been filed against plaintiff); *Johnson v. Stuart*, 702 F.2d 193, 195 (9th Cir. 1983) (teachers had no standing to challenge state law prohibiting use of certain textbooks in schools where no teacher had been charged with violating law or denied permission to use any textbook).

Plaintiffs rely entirely on their own subjective assertions that they "feel"

inhibited in their speech by the mere existence of Section 3550. *E.g.*, Sachs Decl. (Dkt. 7) ¶17.[4] But "[m]ere '[a]llegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Lopez*, 630 F.3d at 787 (quoting *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972)). As in *Lopez*, Plaintiffs' bald assertions that their speech has been chilled by the existence of Section 3550 do not give them standing: "[S]elf-censorship alone is insufficient to show injury." *Id.* at 792.

2. Plaintiffs have not established that they have concrete plans to violate Section 3550.

Plaintiffs also have not sufficiently established that they will violate Section 3550. "Because 'the Constitution requires something more than a hypothetical intent to violate the law,' plaintiffs must 'articulate[] a "concrete plan" to violate the law in question' by giving details about their future speech such as 'when, to whom, where, or under what circumstances.'" *Lopez*, 630 F.3d at 787 (quoting *Thomas,* 220 F.3d at 1139). "The plaintiffs' allegations must be specific enough so that a court need not 'speculate as to the kinds of political activity the [plaintiffs] desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication.'" *Id.* (citation omitted). Plaintiffs have not satisfied this burden.

Plaintiffs make vague assertions that "it is unclear" to them "which statements about union membership might 'deter or discourage' under Section 3550," and they assert that their uncertainty "has caused [them] to refrain from sharing opinions or responding to constituents," but they provide no detail about the factual contexts in

[4] Plaintiffs do not present any evidence that the public employers on whose boards they sit have limited Plaintiffs' speech. Plaintiff Barke asserts that the Los Alamitos Unified School District Board "adopted a policy that restricted the speech of Board members," Barke Decl. (Dkt. 8) ¶12, but Barke is no longer a member of that Board. *Id.* ¶3. Plaintiff Yarbrough asserts that he was "told by staff" not to speak to union employees about *Janus v. AFSCME, Council 31*, 138 S.Ct. 2448 (2018), but not that he could not speak in his personal capacity or that he would face any personal repercussions if he did so. Yarbrough Decl. (Dkt. 12) ¶¶11-12.

which they allege they would like to speak or the actual statements they claim they would like to make. *E.g.*, Sachs Decl. (Dkt. 7) ¶¶9-11; *id.* ¶17 (asserting that Plaintiff "feel[s] unable to communicate information related to the Supreme Court's decision in *Janus*," without identifying what "information" he wants to "communicate" or how); Reardon Decl. (Dkt. 10) ¶20 (asserting that Plaintiff "worr[ies] that any statement I might make" about a hypothetical bargaining failure or strike "might be construed" as subject to Section 3550).[5]

Such general assertions do not contain sufficient "details about [Plaintiffs' intended] speech such as 'when, to whom, where, or under what circumstances,'" to present a concrete dispute for the Court to adjudicate. *Lopez*, 630 F.3d at 787. Section 3550 only regulates *government* speech—i.e., speech *on behalf of* a "public employer"—and such speech is not subject to the First Amendment at all. *Infra* 17-21. Plaintiffs have provided no details describing any actual statement, and context suggesting the statement would be attributable to the public employer, that they contend is both regulated by Section 3550 and protected by the First Amendment.

Some Plaintiffs also assert that they fear making personal statements that would not implicate Section 3550. *See, e.g.*, Ferguson Decl. (Dkt. 9) ¶¶11, 15-17 ("publicly mentioning my position on fiscal accountability and responsible public employee salaries"; "voic[ing] my approval or disapproval for a specific candidate"; making "public statements against [a union's] preferred candidate"; answering

---

[5] As a further example, Plaintiff Ferguson asserts that, because of the existence of Section 3550, "I avoid comments that truthfully call attention to positions or actions of the union that are unpopular with public employees and thus might discourage them from joining or remaining in the union. I also refrain generally from comments about unions …." Ferguson Decl. (Dkt. 9) ¶7. These generalized assertions do not describe the actual statements that Ferguson claims she wants to make, and they also are devoid of any factual context regarding the circumstances in which she asserts she might make "comments" about unions—in particular, Ferguson does not explain if her hypothetical comments would be made *on her own behalf* or on behalf of the public employer with which she is affiliated.

questions "[w]hile on the campaign trail … about my position towards a candidate backed by the [union]"); Reardon Decl. (Dkt. 10) ¶¶8-9 (campaign statements "publiciz[ing] and criticiz[ing] controversial union positions"); *id.* ¶¶16-18 (statements of personal "beliefs" on policy matters); Anderson Decl. (Dkt. 11) ¶¶29-30, 35 (asking union during local dinner about use of union dues "to campaign against a ballot measure that some segments of [the union's] membership supported"); *id.* ¶36 (public discussion of legislative proposals while serving on statewide taskforces or organizations); Dohm Decl. (Dkt. 13) ¶¶13-14 (campaign statements "appris[ing] voters … of the union's positions on Common Core, charter schools, the importance of fiscal restraint, and other union positions"); *id.* ¶16 (discussion during board meetings of "educational policies on which the union has a position"). Plaintiffs' personal speech as candidates or legislators does not violate Section 3550 because it is not the speech of the "public employer." Plaintiffs have not established (nor could they) that their speech as individuals would be attributed by PERB to the public employer with which they are affiliated. *Infra* 11-14.

Finally, Plaintiff Barke asserts that in June 2018, he asked that the *public employer* on whose Board he then sat "directly communicate with our roughly one thousand employees to educate them about their new rights" under the Supreme Court's then-recent *Janus* decision, but "under rules for communicating with [the school district's] employees, *the Board* first needed to reach out to the union representatives to request a joint communication." Barke Decl. (Dkt. 8) ¶¶14-16 (emphasis added). Section 3550 did not prevent Barke from advocating for his preferred policy position by making this request, because Section 3550 does not limit his personal speech. Limitations on official communications from "the Board" as a whole—i.e., from the "public employer" government entity—do not implicate the First Amendment. *Infra* 17-21. And, in any event, the requirements for mass communications from a "public employer" that Barke criticizes are not found in

Section 3550 (the statute Plaintiffs challenge), but in Cal. Gov. Code §3553(b).[6]

3. Section 3550 is not applicable to Plaintiffs as individuals.

Most critically, Plaintiffs have no standing to challenge Section 3550 because the statute does not apply to their speech as individuals. In *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1994), the Ninth Circuit held that individual leaders of an entity have no standing to challenge a speech limitation that applies by its terms only to that entity. Thus, four union leaders—including the union's president, its secretary-treasurer, a member of its executive board, and a member of its negotiating team—"did not have standing to challenge a portion of their union's collective bargaining agreement" that restricted speech "because the provision at issue 'by its plain language applie[d] only to the Union and not to its individual members.'" *Lopez*, 630 F.3d at 788 (quoting *Leonard*, 12 F.3d at 888-89). While the challenged provision would limit the plaintiffs' ability to speak *in their official capacity on behalf of the union*, the plaintiffs nevertheless had no standing to challenge that provision because they "ha[d] not shown that [the provision] in any way inhibits their freedom to speak as *individuals.*" *Leonard*, 12 F.3d at 888 (emphasis in original).

Leonard also explained that, because the collective bargaining agreement provision would "be triggered only if the plaintiffs speak on behalf of the Union … the only chill implicating the First Amendment" was "on the speech of these agents when they act under authority from their principal, the Union." *Id.* at 889. While the *union* could "colorably assert a threatened injury to its authority" (which the Ninth Circuit rejected on the merits), the individual plaintiffs could not. *Id.* "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.

---

[6] "If a *public employer* chooses to disseminate mass communications to public employees … concerning public employees' rights to join or support an employee organization, or to refrain from joining or supporting an employee organization, it shall meet and confer with the exclusive representative concerning the content of the mass communication." Cal. Gov. Code §3553(b) (emphasis added).

However, such a 'chill' does not implicate First Amendment rights at all," because the plaintiffs had no right to falsely claim authority to speak for an entity when they did not possess that authority. *Id.* The Ninth Circuit concluded that "[t]he individual plaintiffs [thus] have not alleged the *personal* actual or threatened injury necessary to gain standing in federal court." *Id.* (emphasis in original).

The same reasoning precludes Plaintiffs' claims here. Section 3550 by its plain terms applies only to "public employer[s]." Plaintiffs concede that the law does not apply to them as individuals. Mot. at 27; *see also Santa Maria-Bonita Sch. Dist.*, PERB Order No. Ad-400 (July 9, 2013) ("[School] District falls within the definition of 'public school employer' or 'employer' under EERA," but "an elected official on the governing body of the District … does not"). PERB and the California courts construe labor-relations statutes like Section 3550 to impose liability on a "public employer" only for acts taken by the public employer's actual or ostensible agents, when acting within the scope of the authority that the employer has delegated to that agent. There is no reason to expect Section 3550 would be applied any differently.

For example, *Inglewood Teachers Ass'n v. PERB*, 227 Cal.App.3d 767, 775 (1991), addressed another EERA provision that regulates the actions of "public … employer[s]," Cal. Gov. Code §3543.5. The Court of Appeal agreed with PERB that a school district was *not* responsible for actions taken by a school principal in his individual capacity. The school principal had filed a lawsuit against individual teachers and their union in alleged retaliation for protected activity. *Inglewood Teachers Ass'n*, 227 Cal.App.3d at 779. The Court of Appeal agreed with PERB that traditional agency principles applied, and that, even though the school principal was an agent of the school district for some purposes, his lawsuit did not expose the district to unfair practice liability, because he was not "acting within the scope of his authority when he filed the lawsuit"; the district had not "expressly authorized [him] to file the lawsuit"; "the evidence did not justify a finding that [the principal] had ostensible or apparent authority to file the lawsuit" on the district's behalf; and there

was no evidence that the district "condoned or ratified the lawsuit." *Id.* at 781, 783 (citing Cal. Civ. Code §§2316, 2317); *cf. Boling*, 5 Cal.5th at 904-09, 919 (PERB concluded that "city was charged with the mayor's conduct under principles of statutory and common law agency"; Court affirmed PERB's holding that City violated MMBA provision requiring "designated" "representatives" of public agency to meet and confer, where facts made clear that mayor "directly exercis[ed] his executive authority on behalf of the city" without meeting and conferring).[7]

Plaintiffs cite two instances in PERB's history in which PERB concluded that a public employer had committed an unfair labor practice because of actions taken by members of the employer's governing board. In both cases, the particular facts established that the governing board members were acting as agents of the public employer, not in their personal capacity.[8] *See also Santa Maria-Bonita Sch. Dist.*,

---

[7] The statute in *Boling* "expressly impose[d] the duty to meet and confer on '[t]he governing body of a public agency, or such boards, commissions, *administrative officers or other representatives as may be properly designated by law* or by such governing body.'" 5 Cal.5th at 917 (quoting Cal. Gov. Code §3505) (emphasis in *Boling*). Section 3550 contains no similar language.

[8] *San Diego Unified School District*, PERB Decision No. 137 (June 19, 1980), held that a school district engaged in unlawful reprisals against employees who had participated in a strike under Cal. Gov. Code §3543.5(a), when two board members placed formal letters of commendation in the official personnel files of non-striking employees. The commendation letters were the action "of the employer" because, among other things, the letters were "prepared on official stationary, using the board members' titles," the letters could be "considered as a factor affecting employee promotional opportunities," and "District managerial employees [including the superintendent] authoriz[ed] placement of the letters in personnel folders." *Id.* The letters thus were not simply personal statements from the individual board members.

County of Riverside, PERB Decision No. 2119-M (June 24, 2010), held that a county unlawfully "interfered" with employees' rights under Cal. Gov. Code §3506 when, in direct response to a union organizing campaign by "TAP" employees, three Board of Supervisors members (a majority of the Board) threatened a TAP representative during an official meeting that the Board would eliminate all the TAP employees and replace them with private contractors if the employees insisted on

PERB Order No. Ad-400 (July 9, 2013) (where charge against school district concerned conduct of board member, "the issue … is whether the conduct of the individual may be imputed to the body … by operation of an agency relationship").

Section 3550 thus does not regulate Plaintiffs' right "to speak as *individuals*." *Leonard*, 12 F.3d at 888 (emphasis in original). To the extent that Section 3550 governs Plaintiffs' speech when they are acting as "agents" "under the authority of" a public employer, the statute does not implicate the First Amendment at all; Plaintiffs have no constitutional right to say whatever they wish when speaking as the agent of a public entity. *See id.*; *cf. Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (First Amendment does not apply to public employee when speaking on behalf of employer); *infra* 17-21.

In sum, under all three *Lopez* factors, Plaintiffs have failed to establish Article III injury. Their only claims—that they are subjectively chilled by a concern that their individual speech might be attributed to the entity on whose board they sit (which has never happened under this statute)—is not sufficient under established Ninth Circuit standards to invoke this Court's jurisdiction.

B. Plaintiffs' claims are not ripe.

Plaintiffs' claims do not satisfy constitutional ripeness principles for the same reasons discussed above. *See Thomas*, 220 F.3d at 1138 ("The constitutional component of the ripeness inquiry" often "coincides squarely with standing's injury in fact prong."). Were that not the case, moreover, Plaintiffs' claims would be barred by the "prudential component of the ripeness doctrine." *Id.* at 1141. "In evaluating the prudential aspects of ripeness, [the Court's] analysis is guided by two overarching considerations: 'the fitness of the issues for judicial decision and the

---

unionizing. The Board members threatened to take (and had the power to take) formal action on behalf of the County. It appears from PERB's opinion that the County did not contest that the Board members were acting as the County's agents when making these threats. PERB thus concluded that the *County* "through [its] agents" unlawfully threatened employees with the loss of their jobs. *Id.*

hardship to the parties of withholding court consideration.'" *Id.* (citation omitted). Both considerations militate against ripeness here.

First, Plaintiffs' claims are not "fit" for this Court's review because they are "devoid of any specific factual context." *Id.* The Court "cannot decide constitutional questions in a vacuum." *Alaska Right to Life Political Action Comm. v. Feldman*, 504 F.3d 840, 849 (9th Cir. 2007). "[A] party bringing a pre-enforcement challenge must … 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.* (citation omitted). As explained *supra* 8-11, Plaintiffs have not presented a concrete factual situation to support their claims; and as explained *infra* 17-21, whether the First Amendment applies to particular "speech" Plaintiffs might engage in depends on all the facts. Thus, "the First Amendment challenge presented in this case requires an adequately developed factual record to render it ripe for … review. That record, at this point, does not exist." *Thomas*, 220 F.3d at 1142.

That Section 3550 has never been construed by PERB also weighs against finding Plaintiffs' claims "fit" for review. In *Alaska Right to Life*, for example, a pre-enforcement First Amendment challenge to a state judicial ethics code was not ripe because there was no evidence that the state commission authorized to inquire into potential violations had "contemplated that such an inquiry might be warranted" in the circumstances plaintiffs said raised constitutional concerns; there was no "reason to expect the Alaska Supreme Court to adopt and act upon a recommendation that ran afoul of the First Amendment"; and, importantly, "[t]he fact that Alaska's high court ha[d] not yet had an opportunity to construe the canons at issue … or to apply them to the speech [plaintiffs] hope[d] to solicit further militate[d] in favor of declining jurisdiction." 504 F.3d at 849-50; *see also Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 310 (1979) (adjudication of First Amendment challenge to state statute prohibiting union from "induc[ing] or encourag[ing]" consumer not to purchase or use certain products "by the use of dishonest, untruthful and deceptive

publicity" "should await an authoritative interpretation of that limitation by the Arizona courts"). There are especially strong reasons here for this Court to allow PERB and the California courts the opportunity to interpret Section 3550, because the State is regulating its own political subdivisions.

Second, declining to adjudicate the issues until "a real case arises" will cause Plaintiffs no hardship. *Thomas*, 220 F.3d at 1142 ("[T]he absence of any real or imminent threat of enforcement, particularly criminal enforcement, seriously undermines any claim of hardship."). There is no threat of enforcement against Plaintiffs here—under Section 3550's plain terms, it cannot be enforced against Plaintiffs at all. *Supra* 7-14; *see Alaska Right to Life Political Action Comm.*, 504 F.3d at 851 (plaintiffs faced no hardship from dismissal of their claims on prudential standing grounds where "[n]ot only is there a lack of any credible threat of enforcement, but neither plaintiff is potentially subject to enforcement of the Code. … '[T]he self-censorship door to standing does not open for every plaintiff. The potential plaintiff must have an "actual or well-founded fear that the law will be enforced *against him or her*." ' ") (citation omitted; emphasis in original).

On the other side of the balance, "by being forced to defend [Section 3550] in a vacuum and in the absence of any particular" application of that statute or any allegation by a charging party that the statute has been violated under a concrete set of facts, "[Defendants] would suffer hardship were [the Court] to adjudicate this case now." *Thomas*, 220 F.3d at 1142.

C. Section 3550 is consistent with the First Amendment.

If Plaintiffs had standing and ripe claims, their claims would fail on the merits.

1. As applied challenge. Plaintiffs' primary claim appears to be that Section 3550 is unconstitutional as applied because it restricts their speech. Mot. at 2. But Section 3550 is entirely consistent with the First Amendment. When Plaintiffs speak as individuals, Section 3550 does not apply; the statute regulates the activities of "public employers," not individual governing board members. *Supra* 7-14.

When Plaintiffs speak as agents of the government, the First Amendment does not apply. "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). "[W]hen the government speaks it is entitled to promote a program, to espouse a policy, or to take a position," and "it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). Thus, the State of California is free to determine, as a matter of policy, that the government will not "deter" or "discourage" union membership, just as the government may choose to refrain from "promoting" drug use, "discouraging" voting, or "encouraging" abortion. *See Rust v. Sullivan*, 500 U.S. 173, 180, 193 (1991) (upholding rule prohibiting recipients of federal funds from "encourag[ing], promot[ing] or advocat[ing] abortion as a method of family planning," because "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest").

Through Section 3550, the California Legislature has directed the State's own political subdivisions regarding what messages the *government* will or will not espouse. This is something the Legislature may do.[9] "'Political subdivisions of

[9] Myriad statutes regulate public agencies in ways the Legislature could not, consistent with the First Amendment, regulate individuals acting in their personal capacities. *See, e.g.*, Cal. Gov. Code §3543.5(d) (unlawful for "public school employer" to "in any way encourage employees to join any [employee] organization in preference to another"); *id.* §3506.5(d) (same for "public agency"); Cal. Pub. Util. Code §21241 (transportation department "shall encourage, foster, and assist in the development of aeronautics in this state and encourage the establishment of airports and air navigation facilities"); Cal. Educ. Code §8358(c)(1) ("County welfare departments … shall encourage all [childcare] providers … to secure training and education in basic child development."); Cal. Health & Safety Code §11998.1(f)(3) (Legislature's intent is that within five years "[e]very county public social service agency has established policies that discourage drug and alcohol abuse and encourage treatment and recovery services").

States—counties, cities, or whatever—… [are] subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.'" *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362 (2009) (quoting *Reynolds v. Sims,* 377 U.S. 533, 575 (1964)). "'[T]he State may withhold, grant or withdraw [their] powers and privileges as it sees fit.'" *Id.* (citation omitted). "[A] political subdivision '… has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'" *Id.* at 363 (citation omitted); *see also City of San Juan Capistrano v. Cal. Pub. Utilities Comm'n*, 937 F.3d 1278, 1280 (9th Cir. 2019) ("political subdivisions lack standing to challenge state law on constitutional grounds in federal court").

Thus, the State's regulation of the government speech of its own subdivisions ("public employers") does not implicate the First Amendment at all. *See, e.g.*, *Bailey v. Callaghan*, 715 F.3d 956, 958, 960 (6th Cir. 2013) (rejecting First Amendment challenge to state law that prohibited "public school employer" from "assist[ing]" union "in collecting dues or service fees," because that law "merely directs one kind of public employer to use its resources for its core mission rather than for the collection of union dues. That is not a First Amendment concern.").[10] Plaintiffs' arguments about strict scrutiny and viewpoint neutrality in the context of regulations of *private* speech are thus entirely beside the point.

Plaintiffs contend that the established principle that the First Amendment does not apply to government control of the speech of its own agents does not apply here because, Plaintiffs assert, "the State is exerting control over speech not in its capacity

---

[10] *See also Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 273, 282 (1984) (rejecting First Amendment challenge to state law that required "public employers to engage in official exchanges of views with their professional employees on policy questions relating to employment but outside the scope of mandatory bargaining"; explaining that such "'[m]eet and confer' sessions are occasions for public employers, acting solely as instrumentalities of the state, to receive policy advice from their professional employees," and the First Amendment did not preclude the State from regulating that "public employer" speech).

as employer, but as sovereign." Mot. at 22 n.7 (citing *Waters v. Churchill*, 511 U.S. 661, 674-75 (1994) (plurality)). To the contrary, Section 3550 does not "restrict the speech of the public at large." *Waters*, 511 U.S. at 675. It governs the speech of the government itself. *See Utah Educ. Ass'n v. Shurtleff*, 565 F.3d 1226, 1231 (10th Cir. 2009) ("[Plaintiffs'] position rests on the proposition that when Utah regulates *local* public employers' payrolls, it is not managing its internal operations but is acting as a lawmaker with the power to regulate. … This is precisely the proposition the Supreme Court rejected in *Ysursa* ….") (emphasis in original).

Thus, to the extent that Plaintiffs intend to speak in their official capacities on behalf of the government, the State can regulate that government speech. It is well-established that a government employee has no First Amendment right to say whatever she wishes while speaking for the government. *See Garcetti*, 547 U.S. at 418, 421 (while First Amendment may apply when public employee "sp[eaks] *as a citizen* on a matter of public concern," First Amendment does not apply "when public employees make statements pursuant to their official duties"—i.e., when they speak on behalf of the government) (emphasis added). The same is true of any other individual when acting as the government's agent; the State is free to control its own message. *See id.* at 422 ("Official communications have official consequences, creating a need for substantive consistency and clarity."). Members of local governing boards also have no right to leverage the official powers that the government bestows on them, free from any limitation. The Supreme Court has squarely "rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). "[A] legislator has no right to use official powers for expressive purposes." *Id.*

By contrast, Section 3550, by its plain terms, does not prohibit Plaintiffs, acting in their personal capacities, from expressing their own policy preferences regarding unions, or from expressing their own policy views during legislative or

electoral debates. Section 3550 applies only to conduct and speech that is the conduct and speech of the "public employer." For example, Plaintiff Barke has continued to express his own personal views about unions. *See infra* 24.

Plaintiffs rely on inapposite cases that involved speech-restrictive regulations that applied to elected officials (not a State's own political subdivisions) and subjected those elected officials to personal sanctions.[11] None of those cases bear on the State's regulation of the government speech of its own political subdivisions, where individual officials are not subject to any personal liability.

Indeed, the Fifth Circuit case on which Plaintiffs heavily rely, *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018), recognizes the distinction between regulation of elected officials' personal speech, which is subject to First Amendment scrutiny, and regulation of government speech, which is not. *El Cenizo* held that a Texas statute (SB4) providing that "a 'local entity or campus police department' may

---

[11] *See Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002) (state rule prohibited candidates for judicial election "from announcing their views on disputed legal and political issues," on pain of "discipline, including removal, censure, civil penalties, and suspension without pay" for current judges or "disbarment, suspension, and probation" for attorney candidates); *Bond v. Floyd*, 385 U.S. 116, 118 (1966) (Georgia House of Representatives excluded "elected Representative from membership because of his statements … criticizing the policy of the Federal Government in Vietnam …"); *Wood v. Georgia*, 370 U.S. 375, 376 (1962) (elected sheriff held in contempt "for expressing his personal ideas on a matter that was presently before the grand jury for its consideration"); *Tschida v. Motl*, 924 F.3d 1297, 1300-01 (9th Cir. 2019) (state law prohibited elected official who lodged ethics complaint from publicly disclosing that complaint, with criminal sanctions for violations); *Velez v. Levy*, 401 F.3d 75, 97 (2d Cir. 2005) (claim that elected official was removed from office in retaliation for her stated political views); *Miller v. Town of Hull*, 878 F.2d 523, 533 (1st Cir. 1989) (elected officials suspended from positions because of position they took on policy issue); *cf. Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 439-40 (2015) (upholding state law that prohibited candidates for judicial office from personally soliciting campaign contributions or endorsements from attorneys); *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 542 (9th Cir. 2010) (rejecting school board member's First Amendment claim based on his removal from position as vice president of board).

not '*endorse* a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws,'" violated the First Amendment "as applied to elected officials." *Id.* at 182, 184 (quoting Tex. Gov. Code §752.053(a)(1); emphasis in original). Critically, the law defined "local entity" to "include[] not only governmental bodies like city councils and police departments, but also a series of elected officials and 'officer[s] or employee[s]' of the listed bodies." *Id.* (quoting Tex. Gov. Code §752.051(5)(A)-(C)). The statute imposed substantial fines directly on individuals who failed to comply. *Id.* at 175. "If the Attorney General [wa]s presented with evidence that a public officer ha[d] violated the enforcement provisions, [the law] *require*[*d*] the Attorney General to file an enforcement action," and "[p]ublic officers found guilty of violating the law [we]re subject to removal from office." *Id.* (emphasis in original; citations omitted).

The Court invalidated the law at issue "only as it prohibits elected officials" as individuals "from 'endors[ing] a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws.'" *Id.* at 185. The Court's holding did *not* "insulate" government employees and other agents when acting on behalf of the government, "who may well be obliged to follow the dictates of SB4 as 'government speech.'" *Id.* at 184 (citing *Garcetti*, 547 U.S. at 421). As the Court explained, "[i]n the context of *government* speech, a state may endorse a specific viewpoint and *require government agents to do the same*." *Id.* at 185 (second emphasis added). The Court thus left the law fully in force as it applied to local government *entities and their agents*—which is all that Section 3550 regulates.

2. Facial challenge. Plaintiffs also appear to assert a facial challenge to Section 3550 in its entirety, arguing that the statute is vague and overbroad. Mot. at 25-26. That facial attack is similarly meritless. As explained *supra* 7-14, Section 3550 only applies to "public employers," where the First Amendment has no application. Were that not clear on the face of the statute, there can be no dispute that the statutory text easily lends itself to that interpretation, and "[i]t has long been a

tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (citations omitted).

A facial challenge to a state statute on vagueness or overbreadth grounds can succeed only if the statute's "deterrent effect on legitimate expression is both real and substantial, and if the statute is not readily subject to a narrowing construction by the state courts." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1147 (9th Cir. 2001) (brackets, ellipsis, citation omitted); *see Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (to succeed in overbreadth challenge, plaintiff must "show[] that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep'") (citation omitted). "Whether a statute's chilling effect on legitimate speech is substantial should be judged in relation to what the statute clearly proscribes. … [U]ncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications.'" *Cal. Teachers Ass'n*, 271 F.3d. at 1147 (citation omitted).

Plaintiffs protest that the terms "deter" and "discourage" in Section 3550 are vague and overbroad. Mot. at 25-26. But they focus on the wrong part of the statute. As explained above, Section 3550 applies only to a "public employer." There can thus be no dispute that it is clear what the statute proscribes in the "vast majority of its intended applications"—official actions by the government—and the First Amendment does not apply to those applications at all. *Supra* 17-21.

Plaintiffs assert that it is unclear to them whether Section 3550 might apply to their actions in some hypothetical scenarios—by which they must mean that they purportedly do not know when they are invoking the authority of their office. But that is insufficient to invalidate the statute on its face. Moreover, in the vast majority of cases, it will be easy for Plaintiffs—like other public employees or officials—to determine (and control), pursuant to established agency principles, whether they are

acting in a personal capacity rather than for the public entities with which they are affiliated. *See* Cal. Civ. Code §§2316, 2317 (agency rules); *supra* 12-14.

In any event, for purposes of evaluating this pre-enforcement facial challenge, this Court does not need "to identify all the specific instances in which a [board member] may or may not be" speaking as an agent of a public employer in order to reject Plaintiffs' claims. *Cal. Teachers Ass'n*, 271 F.3d at 1151; *see Gospel Missions of Am. v. City of Los Angeles*, 419 F.3d 1042, 1048 (9th Cir. 2005) ("'[S]peculation about possible vagueness in hypothetical situations not before [us] will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'") (citation omitted, first brackets added).

Thus, in *California Teachers Association*, the Ninth Circuit rejected a facial challenge to a law requiring that children be placed in classrooms "in which the language of instruction used by the teaching personnel is overwhelmingly the English language," and imposing personal liability on teachers who failed to comply. 271 F.3d at 1145. The Court "decline[d] to identify all the specific instances in which a teacher may or may not be providing 'instruction' or presenting the 'curriculum'" and recognized that "[u]ndoubtedly, there will be situations at the margins where it is not clear whether a teacher is providing instruction and presenting the curriculum. In these situations, where legitimate uncertainty exists, teachers may feel compelled to speak in English and may forgo some amount of legitimate, non-English speech." *Id.* at 1145, 1151-52. Despite this "uncertainty" "at the margins"—and the potential for personal liability for teachers—the Ninth Circuit *rejected* the facial challenge, explaining that "[t]he touchstone of a facial vagueness challenge in the First Amendment context … is not whether *some* amount of legitimate speech will be chilled; it is whether a *substantial* amount of legitimate speech will be chilled." *Id.* at 1152 (emphases in original). "Judged in relation to the situations where [the challenged statute] clearly does and does not apply," the Court "d[id] not believe that the situations where [the statute's] application is uncertain will

cause a substantial chilling effect on legitimate speech. In other words, in the vast majority of circumstances, it should be clear when a teacher is providing instruction and presenting the curriculum to students." *Id.*; *see also id.* at 1153-54 (citing cases rejecting facial challenges to statutes containing arguably even less precise language); *Gospel Missions of Am.*, 419 F.3d at 1047-48 (citing cases).

Likewise, any uncertainty about whether Plaintiffs are acting as government agents in hypothetical scenarios would also exist for purposes of other statutes, *see supra* n.9, and will not "cause a substantial chilling effect on legitimate speech," *Cal. Teachers Ass'n*, 271 F.3d at 1152, especially since Section 3550 does not subject Plaintiffs to personal liability. Plaintiffs' hypothesizing does not show the chilling of a "substantial amount of legitimate speech" that would be necessary for success on a pre-enforcement, facial challenge to invalidate the entire statute.

II. Plaintiffs face no irreparable harm.

For all the reasons explained *supra* 7-14, Plaintiffs have not established that they will suffer irreparable harm in the absence of preliminary relief. Section 3550 was signed by the Governor in October 2017. Plaintiffs filed suit almost two-and-a-half years later, in February 2020. There is no reason they suddenly need relief now.

Moreover, Plaintiff Barke's own public statements criticizing unions and advocating policy positions refute his assertions (and cast doubt on the other Plaintiffs' similar assertions) that his speech as an individual is actually being chilled. *See* Murray Decl. (filed herewith) ¶¶2-3 & Exs. A, B (examples of Barke's recent public statements). Barke also admits that he freely advocated to his former Board in support of making mass communications to employees about *Janus*. Barke Decl. (Dkt. 8) ¶14. Section 3550 did not inhibit that individual advocacy.

In addition, Plaintiff Anderson admits that his District Board adopted its own policy providing that the "district" shall not deter or discourage union membership, Anderson Decl. (Dkt. 11) ¶22 & Ex. C (Dkt. 11-3); and Plaintiffs Reardon and Dohm each themselves voted to ratify collective bargaining agreements providing that their

respective "District[s]" will not deter or discourage union membership, *see* Murray Decl. ¶¶4-8 & Exs. C-G. Those policies appear to be essentially identical to Section 3550, and would continue to apply even if Plaintiffs' motion were granted.

To the extent Plaintiffs claim that Section 3550 limits their ability to speak *as an agent of the government*, that is not evidence of irreparable First Amendment harm, because individuals do not have a First Amendment right to speak on the government's behalf.

III. The balance of hardships and public interest weigh firmly against a preliminary injunction.

Finally, the balance of hardships and public interest both favor Defendants. While Plaintiffs face no harm and no possibility that Section 3550 could even hypothetically be enforced against them, enjoining the PERB defendants from enforcing Section 3550 would risk the very harms to unions and employees across the state that the Legislature sought to prevent by adopting that statute. The impacts of unfair anti-union pressures imposed on public employees cannot easily be undone. *See Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1191-94 (9th Cir. 2011) (explaining multiple reasons why "[o]nce the union's support has diminished [among employees as a result of employer action], it will likely suffer irreparable harm").

There is also a significant public interest in the implementation of valid laws duly adopted by the State, and a significant interest against federal courts' intrusions into state law matters where such intrusion is unnecessary, in particular where the State is regulating its own political subdivisions. *See Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (brackets, citation omitted). All these considerations counsel in favor of denying Plaintiffs' motion.

CONCLUSION

For these reasons, Plaintiffs' preliminary injunction motion should be denied.

Dated: June 19, 2020

Respectfully submitted,

By: */s/ Matthew J. Murray*
Matthew J. Murray

SCOTT A. KRONLAND
DANIELLE E. LEONARD
MATTHEW J. MURRAY
Altshuler Berzon LLP

Attorneys for Intervenor-Defendants California Teachers Association, SEIU California State Council, California Federation of Teachers, California School Employees Association, and California Labor Federation