No. 20-56075

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY I. BARKE, *et al.*,

Plaintiffs-Appellants,

v.

ERIC BANKS, *et al.*,

Defendants-Appellees,

and

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Intervenor-Defendants-Appellees.

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

DEFENDANTS-APPELLEES' ANSWERING BRIEF

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INTRODUCTION

To meet the injury-in-fact-requirement for standing and ripeness in a pre-enforcement First Amendment case, plaintiffs must show that they personally face a credible threat of adverse state action. In this case, Plaintiffs face no such threat because the law they are trying to challenge does not apply to them.

Plaintiffs are individuals who serve on the governing boards of various California local public entities. The statute they challenge is California Government Code section 3550,[1] which prohibits "public employer[s]" from deterring or discouraging their employees from joining, authorizing representation by, or financially supporting employee organizations. Section 3550 is exclusively enforced in administrative proceedings before the Public Employment Relations Board (PERB or Board), in which individuals cannot be charged with violations. Because Plaintiffs are not public employers subject to section 3550, they cannot establish an injury in fact.

It does not matter that Plaintiffs' speech may be imputed to a public employer under standard agency principles of actual or apparent

[1] Unless stated otherwise, all further statutory references are to the California Government Code.

authority. Under this Court's precedent, agents do not have standing to challenge a restriction on their principal's speech. *See Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993).

Plaintiffs cannot evade this rule by pleading that they fear reputational harm if PERB imputes their speech to a public employer and finds that the employer violated section 3550. The reputational harm cases Plaintiffs rely on are inapposite because they are not pre-enforcement. They also involved direct reputational harm to the plaintiffs, not the type of indirect harms that might result from a finding against a public employer under section 3550. And recognizing this type of harm as injury in fact in a pre-enforcement case would dramatically expand pre-enforcement standing.

In addition to their inability to demonstrate a sufficient injury in fact, Plaintiffs cannot show that their complaint satisfies prudential ripeness standards. Prudential ripeness requires evaluation of a case's fitness for judicial resolution and the hardship to the parties of withholding decision. Neither factor favors Plaintiffs.

First, a case is fit for judicial resolution when there is an adequate factual record, but Plaintiffs have alleged only vague hypothetical

statements they might like to make. A violation of section 3550 based on statements by Plaintiffs would require two specific findings: (1) that they spoke as agents of a public employer; and (2) that their statements were reasonably likely to deter or discourage employees from exercising their rights. These fact-specific questions depend on a range of circumstances that Plaintiffs cannot supply in this pre-enforcement challenge.

Second, any claim of hardship is not credible. Plaintiffs did not file suit until more than two years after section 3550 took effect. The statute does not apply directly to them, and any remedies would be ordered against the public employer. And even if section 3550 were found not to apply when they speak as an employer's agents, Plaintiffs would still be subject to other, longstanding statutory restrictions on public employer speech that they do not challenge.

Plaintiffs have not explained how they would amend their complaint to cure these basic standing and ripeness problems. The District Court correctly dismissed the complaint without leave to amend.

ISSUES PRESENTED

1. Section 3550 only applies to public employers. Plaintiffs are individual members of public employers' governing boards. Does the threat of enforcement of section 3550 against public employers cause Plaintiffs a sufficient injury in fact to establish standing and ripeness?

2. Does Plaintiffs' case satisfy prudential ripeness considerations?

3. Did the District Court abuse its discretion by concluding that granting leave to amend would be futile?

RELEVANT STATUTE

Section 3550 states:

> A public employer shall not deter or discourage public employees or applicants to be public employees from becoming or remaining members of an employee organization, or from authorizing representation by an employee organization, or from authorizing dues or fee deductions to an employee organization. This is declaratory of existing law.

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 to evaluate its own jurisdiction over this case. This Court has jurisdiction over Plaintiffs' appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

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. Pub. Emp. Rels. Bd.*, 35 Cal. 4th 1072, 1085–86 (2005). These include ten comprehensive bargaining statutes, each covering a different segment of the state's public sector workforce. The two statutes relevant to this case are the Educational Employment Relations Act, §§ 3540–3549.3, which applies to public schools and community colleges, § 3540.1(k), and the Meyers-Milias-Brown Act, §§ 3500–3511, which applies to cities, counties, and special districts, § 3501(c).[2]

These statutes protect public employees' rights to form, join, and participate in the activities of employee organizations, and to be

[2] The other statutes apply to employees of public universities, §§ 3560–3599; the State executive branch, §§ 3512–3524; trial courts, §§ 71630–71639.5 & 71800–71829; the Judicial Council of California, §§ 3524.50–3524.81; the Los Angeles County Metropolitan Transportation Authority, Cal. Pub. Util. Code §§ 99560–99570.4; the Bay Area Rapid Transit District, Cal. Pub. Util. Code §§ 28848–28863; and the Orange County Transportation Authority, Cal. Pub. Util. Code §§ 40120–40129.

represented by their chosen employee organizations. *See* §§ 3502, 3543. They make it illegal for the employer 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 the longstanding statutes under PERB's jurisdiction includes an express 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. Although the other PERB-administered statutes do not contain a similar provision, the Board has long held that the same principle applies across all of them. *See* *City of Oakland*, PERB Decision No. 2387-M, slip op. at 25–26 (2014); *Rio Hondo Cmty. Coll. Dist.*, PERB Decision No. 128, slip op. at 18–19 (1980). But this safe harbor is not unlimited. For instance, 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 Cmty. Coll. Dist.*, PERB Decision No. 2452, slip op. at 25 (2015). It also does not prevent the Board from considering an employer's anti-union sentiment as circumstantial evidence of unlawful motive in a case alleging discrimination or retaliation for protected activity. *Cal. Virtual Acads.*, PERB Decision No. 2584, slip op. at 29–30 (2018).

Employees, employee organizations, and employers may allege statutory violations by filing an unfair practice charge against an employer or an employee organization. Cal. Code Regs. tit. 8, § 32602(b). Charges may not be filed against individuals. *Id.*

If PERB's Office of the General Counsel determines that a charge states a prima facie case, it issues an administrative complaint. *Id.* §§ 32620, 32640. The charging party then prosecutes the case in a formal hearing before an administrative law judge. *Id.* § 32178. The ALJ issues a proposed decision that either party may appeal by filing exceptions with the Board itself. *Id.* §§ 32680, 32215, 32300. Unless adopted by the Board, ALJ decisions are not precedential. *Id.* § 32215. Final Board decisions resolving unfair practice complaints are subject to judicial review in the California Court of Appeal. §§ 3509.5, 3542(b)–(c).

B. Section 3550 and Related Legislation

Section 3550 took effect on 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" includes 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 assigned PERB jurisdiction over section 3550. § 3551.

Section 3550 took its current form when it was amended by Senate Bill 866, effective June 27, 2018. 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 held that non-union members in the public sector may not be required to pay agency fees to a union, overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). Among Senate Bill 866's other provisions was a 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(b).

C. Adjudication of Section 3550 Cases

The Board's regulations apply its unfair practice case procedures to alleged violations of section 3550. Cal. Code Regs. tit. 8, §§ 32038, 32602(a), 32611(a). Thus, unfair practice charges alleging violations of section 3550 may not be filed against individuals. *Id.* § 32602(b).

When Plaintiffs filed their complaint, the Board had not yet interpreted section 3550, but several cases involving section 3550 were pending with the Board itself. On March 1, 2021, the Board issued its first two precedential decisions addressing the statute: *Regents of the University of California*, PERB Decision No. 2755-H (2021) (*Regents I*) and *Regents of the University of California*, PERB Decision No. 2756-H (2021) (*Regents II*).

1. *Regents I*

Regents I, PERB Decision No. 2755-H, involved the University of California's communications to its union-represented employees regarding the *Janus* decision. These communications did not involve governing board members or elected officials, but the Board's decision provides some guidance about its substantive interpretation of section 3550.

First, the Board adopted an "even-handed" interpretation of the statute's terms. *Id.* at 25. It concluded that section 3550 "prohibit[s] public employer conduct which tends to influence employee choices as to *whether or not* to authorize representation, become or remain a union member, or commence or continue paying union dues." *Id.* In other words, the Board interpreted the statute as prohibiting employers from discouraging *or* encouraging the protected employee conduct.

Second, the Board concluded that section 3550, unlike the statutes prohibiting interference with employee rights, proscribes more than threats of reprisal or promises of benefit. *Id.* at 22, 28–34. But the Board made clear that this "more robust protection" applies "only to a narrow set of three types of employee decisions": "authorizing

representation, becoming or remaining a union member, or commencing or continuing to pay union dues or fees." *Id.* at 31.

Third, the Board adopted a two-part burden-shifting test for resolving section 3550 claims. *Id.* at 25. In the first part, the charging party must show a prima facie case that the employer's conduct "is reasonably likely to deter or discourage employee choices on union matters." *Id.* at 24. This objective test looks at the conduct itself and the surrounding context, such as the "mode of communication," "timing," "frequency," "duration," "urgency," and "pervasiveness." *Id.* at 43–44. If the charging party establishes a prima facie case, the burden shifts to the employer to establish, as an affirmative defense, "a legitimate business necessity that outweighs the tendency to deter or discourage." *Id.* at 25. Factors relevant to this analysis include "truthfulness," "whether an employer is responding to a misleading union communication," "employer motive," and "the mode, frequency, and/or timing of a communication." *Id.* at 36–37.

Applying these principles, the Board determined that the University's communications were likely to deter or discourage employees from becoming or remaining union members. *Id.* at 45. This

conclusion required the Board to consider the University's claim that it needed to inform employees of *Janus* because of the resulting changes to their paychecks, and whether this need outweighed the tendency to influence employee choice. *Id.* at 46. Rejecting this defense, the Board found several factors that undermined the University's claim: how quickly the University acted (immediately after *Janus* but well in advance of the next paycheck); the fact that paychecks would be higher (and less likely to cause serious concern); the fact that the communications were sent to union members (who would not see any change to their paychecks); and evidence of the University's anti-union animus. *Id.* at 47–51.

Turning to the remedy, the Board rejected the unions' arguments for a make-whole remedy for lost union dues or staff time devoted to dealing with requests to cease dues deductions. This was based on the "impossib[ility]" of separating "the well-publicized *Janus* decision itself" from the University's communications, although the Board allowed that a make-whole award "may be appropriate" in a case "with different facts." *Id.* at 57. The Board also rejected the unions' requests for attorneys' fees, finding they did not meet the Board's usual standard:

that the opposing party's claim or defense "was without arguable merit and pursued in bad faith." *Id.* at 58 (internal quotation marks omitted).

2. *Regents II*

Regents II, PERB Decision No. 2756-H, dealt with a charge that PERB's General Counsel had dismissed for failure to state a prima facie case. The charge alleged that the University violated section 3550 when it responded to statements by a union seeking to organize a group of unrepresented employees. *Id.* at 2–4. Applying *Regents I*'s test for evaluating a prima facie case, the Board reversed the General Counsel's dismissal and remanded for issuance of a complaint. *Id.* at 8–9. The Board found that an evidentiary hearing was needed to test the parties' competing claims about the accuracy of their communications, and to assess the communications in their context. *Id.* at 9. Like *Regents I*, this case did not involve speech by elected officials or governing board members.

3. Other Cases

While *Regents I* and *II* are the Board's only precedential decisions applying section 3550, PERB ALJs have issued decisions in four other section 3550 cases. None of them involved statements by elected officials or governing board members. *See* 3-ER-381–425; 2-ER-154–84;

2-ER-245–3-ER-379[3]; *Gompers Preparatory Acad.*, 45 Pub. Emp. Rep. for Cal. ¶ 43 (Sept. 23, 2020), *rev'd and remanded for formal hearing*, PERB Decision No. 2765 (2021).

II. Proceedings Below

A. Plaintiffs' Complaint and Motion for Preliminary Injunction

On February 21, 2020—over two years after section 3550 took effect—Plaintiffs filed their complaint and motion for preliminary injunction. Plaintiffs alleged 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. 4-ER-630–33. They asserted that section 3550 is "unconstitutionally vague" (a due process claim, *Hunt v. City of L.A.*, 638 F.3d 703, 710 (9th Cir. 2011)), and unconstitutionally restricts speech based on viewpoint. 4-ER-642–43. Plaintiffs alleged that as a result of section 3550 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 discussion of subjects related to unions." 4-ER-640 (emphasis added). They sought to enjoin

[3] This case is pending before the Board itself. *See* 3-ER-436.

Defendants (PERB's four current Board members and its General Counsel) from enforcing section 3550 against them. 4-ER-625.

B. Motion to Dismiss

The PERB Defendants timely moved to dismiss the complaint for lack of subject-matter jurisdiction. 3-ER-438–39.

After hearing oral argument, 2-ER-24–67, the District Court granted PERB's motion, finding that Plaintiffs lacked standing and that the case was not ripe for review, 1-ER-3–21. Because section 3550 does not apply to Plaintiffs and cannot be enforced against them individually, the court concluded that Plaintiffs had not shown a sufficient injury in fact to justify a pre-enforcement challenge. 1-ER-10–16. The court also concluded that the case should be dismissed on prudential ripeness grounds. This was because Plaintiffs' "ambiguous descriptions" of their purportedly chilled speech provided "the epitome of a sketchy record." 1-ER-19. And, the court explained, Plaintiffs had not demonstrated any hardship from withholding judicial review because "Section 3550 is not directly applicable to Plaintiffs, and they are not subject to enforcement proceedings thereunder." 1-ER-20.

Finally, based on "the inapplicability of Section 3550 to Plaintiffs," the court denied leave to amend as futile. 1-ER-21.

On September 16, 2020, the court entered judgment dismissing the complaint with prejudice. 1-ER-2.

SUMMARY OF ARGUMENT

I. The District Court correctly held that Plaintiffs' challenge to section 3550 failed on standing and ripeness grounds because they have not shown an injury in fact. Although the injury-in-fact requirement is relaxed in pre-enforcement First Amendment cases, Plaintiffs must nevertheless demonstrate "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) (internal quotation marks omitted). Each of the three factors this Court evaluates under *Lopez* weighs against the Plaintiffs here.

First, by its own terms, section 3550 applies only to "public employer[s]," including entities such as school and community college districts, cities, and special districts. Plaintiffs sit on the governing boards of those entities, but as PERB has recognized, an individual

governing board member is not a public employer. Section 3550 therefore does not apply to Plaintiffs.

The fact that Plaintiffs' speech could, in some circumstances, be imputed to public employers under standard agency principles does not alter this conclusion. Under this Court's decision in *Leonard*, 12 F.3d 885, agents do not suffer an injury in fact from restrictions on their principals' speech. Moreover, the speech of a public employer's agents is government speech that is not protected by the First Amendment.

Second, Plaintiffs cannot allege that section 3550 will likely be enforced against them, because such enforcement is not possible. The Board processes alleged violations of section 3550 as unfair practice charges, which cannot be filed against individuals. The possibility that Plaintiffs might experience reputational harm if their public employers are found to have violated section 3550 as a result of Plaintiffs' speech as the employers' actual or apparent agents is also not sufficient. The only cases where reputational harm has been found to be an injury in fact were post-enforcement, not pre-enforcement, and the plaintiffs' speech was directly regulated by the statutes at issue. Likewise, the fact that PERB, after finding a legal violation, typically issues a cease-

and-desist order enjoining the offending public employer, its governing board, and its representatives is not sufficient, because such an order would not injure Plaintiffs personally.

Third, Plaintiffs have not alleged a concrete plan to violate section 3550. This is so primarily because they *cannot* violate a statute that does not apply to them. And even if this were not the case, Plaintiffs' vague allegations regarding future statements they might make do not constitute a concrete plan to violate the law.

II. The District Court also correctly held that the complaint must be dismissed for lack of prudential ripeness. Both of the traditional prudential ripeness considerations support dismissal here.

First, Plaintiffs' claims are not fit for judicial decision because Plaintiffs have not presented an adequately developed factual record. Largely consisting of generalities about hypothetical future statements, their allegations omit critical context that is necessary to make the fact-intensive findings required under section 3550: (1) whether, when making a given statement, an official is acting as an agent of a public employer; and (2) whether the statement is reasonably likely to deter or discourage employee choices on union matters. Absent this context,

Plaintiffs ask the federal courts to decide section 3550's constitutionality in a vacuum.

Second, Plaintiffs face no hardship if the Court declines jurisdiction because section 3550 cannot be enforced against them. This means the statute threatens Plaintiffs with no direct adverse consequences, and their alleged self-censorship is not a constitutionally significant injury.

III. Finally, the District Court did not abuse its discretion by denying leave to amend as futile. Because section 3550 does not apply to Plaintiffs, the District Court correctly recognized that no set of facts can be proved that would establish standing and ripeness. As a matter of law, Plaintiffs cannot show a sufficient injury in fact to challenge section 3550 pre-enforcement.

Similarly, additional factual allegations would not cure the complaint's prudential ripeness defects. In alleging hypothetical future statements, Plaintiffs cannot provide the factual context necessary to determine whether any statements could be imputed to the public employer, or whether otherwise innocuous statements may nevertheless

"deter or discourage" employees from joining or supporting an employee organization.

STANDARD OF REVIEW

The District Court's rulings that Plaintiffs lacked standing and that their claims are not ripe are reviewed de novo. *Shell Offshore, Inc. v. Greenpeace, Inc.,* 709 F.3d 1281, 1286 (9th Cir. 2013). The denial of leave to amend is reviewed for abuse of discretion. *Missouri ex rel. Koster v. Harris,* 847 F.3d 646, 655–56 (9th Cir. 2017).

ARGUMENT

I. Plaintiffs cannot establish an injury in fact because they are not personally subject to section 3550.

To meet their burdens of establishing standing and ripeness for purposes of Article III subject-matter jurisdiction, plaintiffs must allege they have suffered an injury in fact. *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)); *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138–39 (9th Cir. 2000) (en banc). At an "irreducible minimum," they must show that they "*personally* ha[ve] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Leonard*, 12 F.2d at 888 (internal

quotation marks omitted). The injury "must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (internal quotation marks omitted).

Although a "relaxed standing analysis" applies in pre-enforcement First Amendment cases, plaintiffs "must still satisfy the rigid constitutional requirement that [they] demonstrate an injury in fact to invoke a federal court's jurisdiction." *Lopez*, 630 F.3d at 785–86 (internal quotation marks omitted). Injury in fact can be shown in these cases by "'demonstrat[ing] a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Id.* at 785 (alteration in original) (quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979)). "It is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked *against the plaintiff*." *Libertarian Party of L.A. Cty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013) (internal quotation marks omitted) (emphasis added) (quoting *LSO, Ltd. v. Stroh,* 205 F.3d 1146, 1154–55 (9th Cir. 2000)).

To determine "whether a plaintiff faces such a credible threat in the pre-enforcement context," this Court examines three factors: (1) "whether the law even applies to the plaintiff"; (2) "the likelihood that the law will be enforced against the plaintiff"; and (3) "whether the plaintiff has shown, with some degree of concrete detail, that she intends to violate the challenged law." *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171–72 (9th Cir. 2018) (internal quotation marks omitted) (citing *Lopez*, 630 F.3d at 786).

The District Court correctly concluded that all three factors weigh against Plaintiffs because they are not personally subject to section 3550.

A. By its own terms, section 3550 is not applicable to Plaintiffs.

Section 3550 only applies to "public employer[s]"—those entities defined as employers under California's public sector bargaining laws. § 3552(c). These entities include school and community college districts, cities, and special districts, §§ 3540.1(k), 3501(c), the entities whose governing boards Plaintiffs sit on. But as PERB has recognized, an individual governing board member is not an employer. *Santa Maria-Bonita Sch. Dist.*, PERB Order No. Ad-400, slip op. at 5–6 (2013). This

means that by its own terms, section 3550 does not apply to Plaintiffs. *Lopez*, 630 F.3d at 786.

Of course, the speech and conduct of a public employer's actual or apparent agents can be imputed to the employer. *Inglewood Tchrs. Ass'n v. Pub. Emp. Rels. Bd.*, 227 Cal. App. 3d 767, 780–81 (Cal. Ct. App. 1991); *All. Coll.-Ready Pub. Schs.*, PERB Decision No. 2545, slip op. at 12–13, 15 (2017) (entity that was not public employer could not be liable for unfair practices, but employer could be liable if entity was employer's agent). But this does not mean, as Plaintiffs contend, that section 3550 applies to them. That argument is foreclosed by this Court's decision in *Leonard*, 12 F.3d 885.

1. Under *Leonard*, agents do not suffer an injury in fact from restrictions on their principals' speech.

Leonard involved a provision in a collective bargaining agreement between a city and a firefighters union. The provision restricted the union's right to "specifically endorse[] or sponsor[]" state legislation beneficial to its members. *Id.* at 886. This Court held that the union's individual officials—its elected president, its secretary-treasurer, an executive board member, and a negotiating team member—lacked standing to challenge the provision. *Id.* at 888–89.

In so holding, the Court emphasized that the provision "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. The Court noted that "the Union can only 'specifically endorse[] or sponsor[] legislative issues' through its authorized agents." *Id.* at 889. Thus, the Court concluded, "the only chill implicating the First Amendment here is on the speech of these agents when they act under authority from their principal, the Union." *Id.* And so it was only the union that could "colorably assert a threatened injury." *Id.*

Accordingly, *Leonard* stands for the rule that an agent lacks standing to challenge the constitutionality of a restriction on the principal's speech. That rule applies here. Under standard agency principles, Plaintiffs' speech could be the basis for a finding that a public employer violated section 3550. But this means only the employer faces a threatened injury. As a result, the only "chill implicating the First Amendment here is on the speech of" the employer's agents. *Leonard*, 12 F.3d at 889. 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.

2. ***Leonard* is not distinguishable.**

Plaintiffs make a series of attempts to distinguish *Leonard*. The distinctions they propose are either irrelevant or inaccurate.

For instance, Plaintiffs suggest *Leonard* is distinguishable because it involved a municipal collective bargaining agreement instead of a state statute, and elected union officials instead of elected government officials. Appellants' Br. 14. Neither distinction is legally relevant. Collective bargaining agreements entered into by public entities "constitute state action for purposes of the Fourteenth Amendment." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 n.4 (1986). And Plaintiffs cite no authority supporting their claim that local elected legislators have "unique" First Amendment rights. Appellants' Br. 13. The only case they cite for this proposition, *Tenney v. Brandhove*, 341 U.S. 367 (1951), refers to the Congressional Speech or Debate Clause, U.S. Const. art I, § 6, not the First Amendment.

Plaintiffs' attempt to distinguish *Leonard* based on the agency principles that applied in that case, Appellants' Br. 42–45, fares no

better. Their error is placing too much stock in *Leonard*'s statement that the individual firefighters "are free to endorse legislation as long as they do not (1) have authority to represent the Union, *and* (2) claim that they are speaking for it." 12 F.3d at 889. Plaintiffs take this statement to mean that the individuals in *Leonard* had the benefit of a "bright line" that Plaintiffs do not because PERB applies different agency principles and makes "post hoc" agency determinations. Appellants' Br. 43, 45. This argument misconstrues both *Leonard* and PERB's agency case law.

The full context of the *Leonard* quotation reveals that the Court was referring to standard agency principles of actual and apparent authority, not any unique test of agency applicable in that case:

> Plaintiffs are free to endorse legislation as long as they do not (1) have authority to represent the Union, *and* (2) claim that they are speaking for it. Meanwhile, the Union can only "specifically endorse[] or sponsor[] legislative issues" through its authorized agents. Thus, the only chill implicating the First Amendment here is on the speech of these agents when they act under authority from their principal, the Union. *Cf.* Restatement (Second) of Agency §§ 26–27, 33 (1958) (creation and scope of authority).

Leonard, 12 F.3d at 889 (alterations in original).

The sections of the Second Restatement *Leonard* cited concern actual authority (sections 26 and 33) and apparent authority (section 27). So, as the District Court recognized during oral argument below, *Leonard* "was just reciting the law of agency. It was not talking about some provision in the agreement." 2-ER-48. And because PERB applies the same agency principles *Leonard* noted, *Leonard* is not distinguishable based on the agency principles that apply. *See City of San Diego*, PERB Decision No. 2464-M, slip op. at 13 (2015) (actual authority); *Chula Vista Elementary Sch. Dist.*, PERB Decision No. 1647, slip op. at 8 (2004) (apparent authority).

The fact that PERB determines agency after the fact does not distinguish *Leonard*, either. Nothing in *Leonard* suggests the possibility of an advanced determination of agency relationships. The contract term at issue there adjusted contractually negotiated economic enhancements based on the success of union-sponsored or union-endorsed legislation. *Leonard*, 12 F.3d at 886. That type of adjustment necessarily contemplates that any dispute about agency relationships between the union and individual union officials would be resolved by an arbitrator or judge *after* the triggering legislation was passed. Like

any agency determination, that determination would be based on manifestations made by the principal before or at the time the agent acts. *See* Restatement (Second) of Agency § 33. Accordingly, *Leonard* was not premised on the availability of a bright line or an advanced determination of agency. Plaintiffs' attempts to distinguish *Leonard* on these grounds fail.

In addition to misinterpreting *Leonard*, Plaintiffs make a series of misstatements about PERB's case law on agency. For instance, they selectively quote *Chula Vista*, PERB Decision No. 1647, to suggest that PERB applies a subjective, listener-focused test for apparent authority. *See* Appellants' Br. 43 ("PERB precedent imputes an official's speech to the public employer . . . when the listener 'perceive[s] that [the public employer the official serves] has authorized [that elected official] to engage in the conduct in question' . . . ."). The actual quotation makes clear that the Board applies an objective test based on the employer's manifestations: "Apparent authority may be found where *an employer reasonably allows* employees to perceive that it has authorized the agent to engage in the conduct in question." *Chula Vista*, PERB Decision No. 1647, slip op. at 8 (emphasis added); *see also id.* at 9

("[T]he test for apparent or ostensible authority [is] 'whether the perception of agency is reasonable under the circumstances.'"). Other PERB case law is in accord. *City of San Diego*, PERB Decision No. 2464-M, slip op. at 18 ("We understand the rule as an objective one whose inquiry is what employees would reasonably believe under the circumstances.").

In other instances, Plaintiffs' descriptions of Board decisions omit key details. For example, they claim that *San Diego Unified School District*, PERB Decision No. 137 (1980), found a school district liable for nothing more than letters by two individual governing board members praising employees who declined to join a union's strike. Appellants' Br. 26–27 n.4. That claim leaves out several relevant facts: (1) the board members used district letterhead, *San Diego Unified*, PERB Decision No. 137, slip op. at 3; (2) the district's personnel manager placed the letters in employees' personnel files, with the superintendent's approval, *id.* at 4; and (3) the remaining school board members "effectively condoned" the letters by failing to take any corrective action after they learned of them, *id.* at 7.

Similarly misleading is Plaintiffs' assertion that *County of Riverside*, PERB Decision No. 2119-M (2010), involved unlawful threats by two governing board members. Appellants' Br. 26 n.4. In reality, three members—a majority of the employer's five-member board—made the threats at issue. *Riverside*, PERB Decision No. 2119-M, slip op. at 21–23. And although *Riverside* refers to the three board members as the employer's "agents," *id.* at 24, it does not discuss agency principles, because it appears the employer did not dispute the issue.

Plaintiffs further misrepresent PERB case law by citing a non-precedential ALJ decision that cited *Riverside* in finding that an individual school board member acting alone was an actual agent of the school district. Appellants' Br. at 44 (citing *Santa Maria-Bonita Sch. Dist.*, 37 Pub. Emp. Rep. for Cal. ¶ 207 (Apr. 18, 2013)). That ALJ decision is not a statement of PERB policy or case law, because it was not adopted (or even reviewed) by the Board. *See Santa Maria-Bonita,* PERB Order No. Ad-400 (explaining that ALJ's decision was deemed final because neither party filed exceptions); *see* Cal. Code Regs. tit. 8, §§ 32215 (ALJ decisions not precedential unless adopted by Board), 32305 (Board only reviews cases in which exceptions are filed).

In any event, the Board adheres to the rule that its own decisions are not authority for propositions they do not consider. *Cty. of San Bernardino*, PERB Decision No. 2556-M, slip op. at 15 (2018). Reading *Riverside* to mean that a governing board member's statements are always made with the employer's actual authority would be plainly inconsistent with *San Diego Unified*, which found that two board members acted with the district's apparent authority under the specific circumstances of that case. *San Diego Unified*, PERB Decision No. 137, slip op. at 7.

Finally, Plaintiffs misstate *Boling v. Public Employment Relations Board*, 5 Cal. 5th 898 (2018). They claim the case found a city liable for its mayor's "personal endorsement" of a ballot initiative to change terms and conditions of city employment. Appellants' Br. 27. The mayor, however, was the city's chief executive officer and "designated bargaining agent," *Boling*, 5 Cal. 5th at 919, not an individual governing board member like Plaintiffs. In addition, the California Supreme Court, affirming the Board's decision, thoroughly explained how the mayor's conduct went well beyond personal endorsement:

> [He] informed San Diegans that he would place a pension reform measure on the ballot as part of

> his "agenda to streamline city operations, increase accountability and reduce pension costs . . . by the time he leaves office." In his state of the city address, he formally recommended to the city council the "policy" of substituting 401(k)-style plans for defined benefit pensions, as well as the "course of action" of pursuing reform by way of a citizens' initiative measure. He pledged to work with others in city government to achieve this goal, and he did. He and his staff were deeply involved in developing the proposal's terms, monitoring the campaign in support of it, and assisting in the signature-gathering effort. He signed ballot arguments in favor of the measure as "Mayor Jerry Sanders." He consistently invoked his position as mayor and used city resources and employees to draft, promote, and support the Initiative.

Id. As a result, the court concluded, "[t]he city's assertion that [the mayor's] support was merely that of a private citizen does not withstand objective scrutiny." *Id.* And although Plaintiffs highlight the court's observation that "[t]he line between official action and private activities undertaken by public officials" is fact-specific, *id.*, this observation is not unique to collective bargaining statutes or public officials. Agency is widely acknowledged as a fact-specific question. *See*, *e.g.*, *United States v. Fontenot*, 14 F.3d 1364, 1369 (9th Cir. 1994); Restatement (Second) of Agency § 26 cmt. e ("[A]uthority is not static but varies with changing facts.").

Because PERB applies the same basic agency principles this Court relied on in *Leonard*, that case controls here. The fact that Plaintiffs might be found to be actual or apparent agents of a public employer does not give them an injury in fact.

3. The First Amendment does not protect Plaintiffs' rights to speak as agents of a public employer.

Plaintiffs try to argue around *Leonard* by pointing out that while government employees generally have no First Amendment right to speak in their "official capacity" under *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), this rule does not apply to local elected legislators. Appellants' Br. 47–48; *see also Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010) (finding it "uncontested" that a school board member's votes and advocacy were protected by the First Amendment). But whatever right Plaintiffs have to speak in their official capacity as legislators is beside the point. Section 3550 does not apply to all speech by public officials in their official capacities, only that of public employers and their agents. *Cf.* *San Diego Unified*, PERB Decision No. 137, slip op. at 7. And the First Amendment does *not* protect speech by government entities and their agents.

The Constitution "permit[s] the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (citing *Rust v. Sullivan,* 500 U.S. 173 (1991)). In other words, when the government "is speaking on its own behalf" rather than "providing a forum for private speech," free speech principles do not apply. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009). This is because "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Id.* at 467.

Courts have recognized the overlap between the government speech doctrine and the government employee speech doctrine, including in *Garcetti* itself. *See*, *e.g.*, *Garcetti*, 547 U.S. at 421–22 (citing *Rosenberger,* 515 U.S. at 833) ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."); *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1016 (9th Cir. 2000) (citing *Garcetti*'s

precursor, *Pickering v. Board of Education,* 391 U.S. 563 (1968), to support finding that employee had no First Amendment right to use school bulletin boards, which were a medium of government speech); *Urofsky v. Gilmore*, 216 F.3d 401, 408 n.6 (4th Cir. 2000) (citing *Rust,* 500 U.S. 173) (explaining that governmental "restrictions on speech by public employees in their capacity as employees are analogous to restrictions on government-funded speech"); *Anderson v. Valdez*, 845 F.3d 580, 593 (5th Cir. 2016) ("[T]he public employer, like any principal, has an interest in controlling the activities of its agents."). But it is the government speech doctrine that applies in this case, where the State is regulating the speech of local government entities rather than disciplining government employees.

Under the government speech doctrine, the relevant question is whether observers "might reasonably" conclude that the government entity endorsed the speech at issue. *Eagle Point Educ. Ass'n v. Jackson Cty. Sch. Dist. No. 9*, 880 F.3d 1097, 1104 (9th Cir. 2018). This test aligns with PERB's tests for employer liability under the statutes it enforces: actual authority, *City of San Diego*, PERB Decision No. 2464-M, slip op. at 13; ratification, *id.* at 24; and apparent authority, where

the employer "reasonably allows employees to perceive that it has authorized the agent to engage in the conduct in question," *Chula Vista*, PERB Decision No. 1647, slip op. at 8. Thus, section 3550 regulates only government speech.

It makes no difference that section 3550 regulates the speech of local government entities and not the State itself. Those local entities are not private speakers with First Amendment rights; they are political subdivisions of the State. *Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (explaining that political subdivisions include "counties, cities, or whatever"); *Sato v. Orange Cty. Dep't of Educ.*, 861 F.3d 923, 934 (9th Cir. 2017) (holding that California school districts and county offices of education are "arms 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). "States have extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 706 (9th Cir. 1997) (internal quotation marks omitted). And a political subdivision "has no privileges or immunities under the federal

constitution which it may invoke in opposition to the will of its creator." *Ysursa*, 555 U.S. at 363 (internal quotation marks omitted). As a result, the speech of these entities and their agents is unprotected government speech.

Nor is it the case that an elected legislators' speech can never be government speech. That notion is contrary to this Court's conclusion that a local governing body did not violate the First Amendment by removing one of its members from an internal leadership position in "retaliation" for his expressed views. *Blair*, 608 F.3d at 544 ("The Board's objective in stripping Blair of his leadership position" was "to put in place a vice president who better represented the majority view."). It is also contrary to other courts' holdings that legislators lack a First Amendment right to use the government's channels of communication. *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352, 355 (4th Cir. 2008) (O'Connor, J.) (finding that legislative prayers opening public city council meetings, though delivered by individual councilmembers, were "government speech" by the council itself); *Hogan v. Twp. of Haddon*, 278 F. App'x 98, 102 (3d Cir. 2008) (holding that township commissioner had no First Amendment right to

publicize her views through township's newsletter, website, or cable channel); *see also Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011) ("This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message.").

Because section 3550 only regulates the speech of government entities' actual or apparent agents, any of Plaintiffs' speech subject to section 3550 is not protected.

B. Plaintiffs cannot show any likelihood that section 3550 will be enforced against them because section 3550 *cannot* be enforced against them.

Aside from the fact that section 3550 does not apply to Plaintiffs, Plaintiffs cannot show it will likely be enforced against them. *Lopez*, 630 F.3d at 786. This is because there is no mechanism for doing so. Alleged violations of section 3550 are processed as unfair practice charges, which cannot be filed against individuals. Cal. Code. Regs. tit. 8, §§ 32038, 32602(a)–(b).

Plaintiffs originally pleaded that they feared legal action against *them personally* for violating section 3550. 4-ER-641 ("Plaintiffs have faced and will continue to face a credible threat of legal proceedings brought by PERB"); 3-ER-559; 3-ER-526. They no longer stand by those

claims. Now they argue only that "PERB's own actions demonstrate a reasonable likelihood that Section 3550 will be enforced," Appellants' Br. 51, and that enforcement, in turn, "will lead to a direct injury to Plaintiffs," *id.* at 52.

What Plaintiffs' argument elides is that under *Lopez*, the direct injury that supplies standing *is* the credible threat of enforcement *against the plaintiff*. The speculative possibility of an injury to Plaintiffs if section 3550 is enforced against the public employers they are affiliated with is, by definition, not a direct injury.

As this Court has explained, it is not the case 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." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003). Only a plaintiff with an "actual and well-founded fear that the law will be enforced *against [him or her]*" has sustained the necessary injury in fact. *Id.* (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)) (alteration in original) (emphasis added).

Plaintiffs do not identify a single pre-enforcement case finding an injury in fact where the statute could not be enforced directly against

the plaintiff. Instead, citing *Lopez*, they claim that "[t]he threat of direct injury need not come in the form of a prosecution or similar action against the speaker or would-be speaker for violation of the statute." Appellants' Br. 38. *Lopez* does not support this expansive view of injury in fact.

Although *Lopez* notes that "[t]he threatened state action need not necessarily be a prosecution," 630 F.3d at 786, this observation refers to the type of state action, not its target. *Lopez* cites two cases for this rule, *Meese v. Keene,* 481 U.S. 465 (1987) and *Canatella v. State of California*, 304 F.3d 843, 852 (9th Cir. 2002). In both, the plaintiff was not subject to criminal prosecution but *was* directly subject to the speech restriction. As *Lopez* explains, the plaintiff in *Meese* established standing "by proving harms flowing from the government's designation of three films as 'political propaganda.'" 630 F.3d at 786; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) (noting that the plaintiff in *Meese* was "unquestionably regulated by the relevant statute"). And the plaintiff in *Canatella* "had standing to challenge state bar statutes and professional rules where he had previously been

subject to state bar disciplinary proceedings and could be subject to them in the future." *Lopez*, 630 F.3d at 786.

In *Lopez* itself, the threatened state action was discipline under a school policy. Notably, the plaintiff was generally subject to the policy, but this Court still found no threat of enforcement because the policy's plain language did not apply to the plaintiff's specific speech. *Id.* at 791. And the Court emphasized that 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*." *Id.* at 792 (emphasis added).

Therefore, *Lopez* does not support Plaintiffs' belief that a pre-enforcement challenge can be maintained by someone not personally subject to enforcement. Plaintiffs cannot show the type of direct injury *Lopez* requires.

Even if indirect injuries could suffice, however, the injuries Plaintiffs claim concerning reputational harm and risk of liability under the Board's cease-and-desist orders would still fail.

1. The possibility of reputational harm Plaintiffs cite is not sufficient for injury in fact.

Plaintiffs claim they have shown an injury in fact by citing their fear of reputational harm if the Board imputes their speech to a public employer and finds a violation of section 3550. Appellants' Br. 38–39. This claim falls short of showing an injury in fact.

For one thing, Plaintiffs overstate their pleadings. Neither their complaint nor their declarations allege any fear of reputational harm. They argue in their brief that the risk of such harm if their speech is imputed is "patently obvious," Appellants' Br. 50, and "should be beyond dispute," *id.* at 41, and that it is "difficult to imagine" that a PERB finding in these circumstances would not be seen as an "official rebuke" of Plaintiffs, *id.* at 40. These arguments do not suffice; "standing cannot be inferred argumentatively from averments in the pleadings, . . . but rather must affirmatively appear in the record." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citation and internal quotation marks omitted), *holding modified by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004).

Even if Plaintiffs had alleged a threat of reputational harm, however, that would still not be enough for injury in fact. The cases

they cite, *Meese*, 481 U.S. 465, and *Wilson v. Houston Community College System*, 955 F.3d 490 (5th Cir. 2020), *cert. granted*, --- S.Ct. ---, No. 20-804, 2021 WL 1602636 (U.S. Apr. 26, 2021)), are distinguishable on at least two grounds.

First, neither case found an injury in fact based on a threat of reputational harm from future government action. *Wilson*, 955 F.3d 490, involved a censure issued in response to the plaintiff's speech, and was therefore not a pre-enforcement case. *Meese*, 481 U.S. 465, likewise involved a situation where the government had already acted.

The plaintiff in *Meese* was an attorney and state legislator who wanted to show films the government had already labeled "political propaganda" according to federal law. 481 U.S. at 467–68. The Supreme Court began its standing analysis by reiterating that "[w]hile the governmental action need not have a direct effect on the exercise of First Amendment rights, . . . it must have caused or must threaten to cause *a direct injury to the plaintiffs*." *Id.* at 472 (emphasis added) (citing *Laird v. Tatum,* 408 U.S. 1, 12–13 (1972)). The plaintiff satisfied this standard, the Court found, through "detailed affidavits" establishing that he "could not exhibit the films without incurring a risk

of injury to his reputation and of an impairment of his political career." *Id*. at 473–75.

And as the Supreme Court later made clear, *Meese*'s injury-in-fact finding was based on the case's unique facts. In *Clapper*, the Court explained that *Meese* "involved more than a subjective chill based on speculation about potential government action; the plaintiff in that case was *unquestionably regulated* by the relevant statute, and the films that he wished to exhibit had *already been labeled as political propaganda*." *Clapper,* 568 U.S. at 420 (internal quotation marks omitted) (emphasis added). In other words, *Meese* was not a pre-enforcement case; the government had already applied the statute to label the films the plaintiff wanted to show.

This case, however, is pre-enforcement. Plaintiffs have not spoken, and the government has not taken any action with respect to the statements they intend to make. It has not been determined either whether Plaintiffs would speak as agents of the public employer, or whether the content of their speech would violate section 3550. Both questions are fact-specific. *Inglewood Tchrs. Ass'n*, 227 Cal. App. 3d at 780 (noting that agency is a question of fact); *Regents I*, PERB Decision

No. 2755-H, slip op. at 36–37 (holding that "a variety of contextual factors may be relevant," under section 3550). Thus, although the Board has found a violation of section 3550 based on *Janus*-related communications in one case, its conclusion cannot be mechanically extrapolated beyond those specific factual circumstances. Unlike in *Meese*, there can be no claim that PERB has already labeled Plaintiffs' speech.

Plaintiffs' claims regarding reputational harm are also distinguishable from those in *Meese* and *Wilson* because the government action in those cases directly targeted the plaintiffs' speech. In *Wilson*, the plaintiff was censured for his own speech, while in *Meese* the "political propaganda" label applied to the plaintiff's speech—the films he wanted to show. In this case, by contrast, section 3550 applies to the public employers' speech, not Plaintiffs'. *Leonard*, 12 F.3d at 889. A finding that speech uttered by an individual (governing board member or otherwise) violates section 3550 would require findings that the *employer* engaged in conduct making the individual the employer's actual or apparent agent. *Chula Vista*, PERB Decision No. 1647, slip op. at 8. Any incidental harm to the individual's reputation would not

be the type of direct injury at issue in *Meese* or *Wilson*. *Cf. Allen v. Wright*, 468 U.S. 737, 755 (1984) (holding that a stigmatizing injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct"), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Law Offs. of Seymour M. Chase, P.C. v. F.C.C.*, 843 F.2d 517, 524 (D.C. Cir. 1988) (Williams, J., concurring) (citing *Paul v. Davis,* 424 U.S. 693 (1976)) (observing that reputational injury as a ground for standing "surely cannot encompass the interest of every person of whom an agency speaks critically in the course of an official opinion").

Under Plaintiffs' reasoning, any potential agent of any principal could claim that the possibility of being involved in violating a restriction that applies to the principal causes injury in fact to the agent's reputation. This would directly undercut *Leonard*'s commonsense and straightforward rule that agents lack standing to challenge restrictions on their principals' speech. Because "standing is not an ingenious academic exercise in the conceivable," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566 (1992) (citation and internal quotation

marks omitted), Plaintiffs' attempt to expand *Meese* and undermine *Leonard* must be rejected.

2. The possibility of a cease-and-desist order against a public employer and its agents is not sufficient to show injury in fact.

Plaintiffs also claim they have shown an injury in fact because the Board, after finding a legal violation, typically issues a cease-and-desist order enjoining the offending public employer, its governing board, and its representatives. Appellants' Br. 37. The Board has followed this practice in its only decision to date finding a violation of section 3550. *Regents I*, PERB Decision No. 2755-H, slip op. at 60. But Plaintiffs' claim that this gives them an injury in fact rests on several inaccurate premises.

First, Plaintiffs incorrectly suggest that the Board's orders specifically enjoin public employers' "elected representatives." Appellants' Br. 17, 31. In reality, the Board's typical order refers to the public employer, "its governing board and its representatives." *See Riverside*, PERB Decision No. 2119-M, slip op. at 24. PERB employs this language to refer to the entity's agents, not its elected officials. This much is evident from the use of the same language where the

entity is not run by elected representatives. *See*, *e.g.*, *State of Cal. (Dep't of State Hosps.)*, PERB Decision No. 2568-S, slip op. at 18 (2018) ("the State of California (Department of State Hospitals), and its representatives"); *Sonoma Cty. Superior Ct.*, PERB Decision No. 2532-C, slip op. at 34 (2017) (superior court "and its representatives").

Second, an injunction against the employer and its governing board would not injure Plaintiffs personally. This is why a public entity's individual board members may not "step into the shoes" of the entity to challenge unfavorable rulings. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986). "An order to do something in one's official capacity does not create the kind of injury that can support a suit in federal court consistent with Article III's limitation of the judicial power." *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 171 F.3d 1083, 1089 (7th Cir. 1999).

Third, a cease-and-desist order against a public employer would not place any obligation on individual governing board members, even if they are potentially agents of the employer. The employer can comply with such an order without individual board members' participation by taking steps to ensure that it has not given or created the appearance of

giving them authority to speak on the employer's behalf. *Cf. Turner*, 534 F.3d at 355 (finding that city council lawfully adopted policy requiring legislative prayers delivered by individual councilmembers to be nondenominational); *Hogan*, 278 F. App'x at 102 (approving township's restrictions on commissioner's use of township newsletter, website, or cable channel to publicize views).

Finally, Plaintiffs' claim that a cease-and-desist order would subject them to "potential liability and civil contempt proceedings should they be charged with violating" the order, Appellants' Br. 37, is too speculative for an injury in fact. It is true that a credible threat of administrative proceedings that may result in cease-and-desist orders has been found to support a finding of injury in fact by those directly subject to enforcement—at least when coupled with threats of criminal prosecution (which are absent here). *Susan B. Anthony List*, 573 U.S. at 166 (citing *Babbitt*, 442 U.S. at 302 n.13). And it is conceivable that an agent subject to a cease-and-desist order could satisfy *Lopez* by demonstrating a credible threat of enforcement of the order, and thus challenge the order itself. But that possibility does not mean Plaintiffs can challenge section 3550 now.

Far from demonstrating "a realistic danger of sustaining a direct injury" from section 3550's enforcement, *Lopez*, 630 F.3d at 785, Plaintiffs' argument rests on a speculative chain of possible events: (1) a charge will be filed against one of the public employers whose governing boards Plaintiffs sit on, alleging that a Plaintiff's speech violated section 3550; (2) PERB will find a Plaintiff to be an agent of the public employer; (3) PERB will find that the public employer violated section 3550; (4) PERB will issue a cease-and-desist order; and (5) PERB will seek to enforce the order against a Plaintiff individually for making—as the employer's agent—subsequent statements that violate the order.

The final link in Plaintiffs' chain is particularly tenuous. PERB must obtain a writ of mandate in court to enforce its orders, §§ 3509.5(c), 3542(d), and only then may seek contempt for a violation of the writ, Cal. Code Civ. Proc. § 1097. And, most significantly, the Board narrowly construes its remedial orders and does not enforce them to prosecute separate statutory violations. As the Board has explained, even broadly worded cease-and-desist orders must be read "in conjunction with" the specific findings related to the violation, "as well as the remainder of the decision." *William S. Hart Union High Sch.*

Dist., PERB Decision No. 2595, slip op. at 13 (2018). The Board "will seek to enforce an order only when a respondent's actions are sufficiently similar to the ones litigated." *Id.* at 14. In light of the fact-specific tests for agency and for violations of section 3550, the possibility of contempt would be remote at best. Again, "[s]tanding is not an ingenious academic exercise in the conceivable." *Lujan*, 504 U.S. at 566 (citation and internal quotation marks omitted). Even an "objectively reasonable likelihood" of the claimed harm falls short. *Clapper*, 568 U.S. at 410.[4] Plaintiffs' chain of possibilities does not demonstrate "a realistic danger of sustaining a direct injury as a result of [section 3550's] operation or enforcement." *Lopez*, 630 F.3d at 785.

Indeed, as with their argument regarding reputational harm, Plaintiffs' argument about cease-and-desist orders would dramatically expand the range of plaintiffs able to challenge government action. Courts and administrative agencies routinely enjoin the agents of a party found to have broken the law. *See*, *e.g.*, Fed. R. Civ. P. 65(d)(2) (injunctions bind the entity's "officers, agents, servants, employees, and attorneys"); *Signal Oil & Gas Co. v. Ashland Oil & Ref. Co.*, 49 Cal. 2d

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[4] Plaintiffs' claim that *Clapper* was not a First Amendment case, Appellants' Br. 51, is inaccurate. *Clapper*, 568 U.S. at 407.

764, 779 (1958) (explaining that an injunction against a named corporation "enjoin[s] the corporation and anyone acting on its behalf with knowledge of the order"); *Exela Enter. Sols., Inc.*, 370 NLRB No. 120 (May 3, 2021) (issuing a cease-and-desist order against corporation and "its officers, agents, successors, and assigns"). The mere possibility of such an injunction cannot be grounds for a pre-enforcement challenge by those who might later be found to be the entity's agents.

C. Even if a threat of enforcement against public employers could suffice under *Lopez*, Plaintiffs have not alleged a concrete plan to violate section 3550.

Because section 3550 does not apply to Plaintiffs and there is no credible threat of enforcement against them, it necessarily follows that they cannot allege an intention to violate the statute. *Lopez*, 630 F.3d at 791 (holding that plaintiff "has not adequately proven his intent to violate the policy because [he] has not shown that [it] even arguably applies to his past or intended future speech"). Still, it bears noting that, as the District Court concluded, Plaintiffs have not adequately alleged the statements they wish to make. Nor does it appear they can sufficiently plead that their statements would be imputed to a public employer.

Plaintiffs have described—very generally—the subjects they claim to avoid speaking about. *See* 4-ER-640 (issues "that might call attention to controversial union positions"); 3-ER-526 (matters that might "even tangentially relate to unions"); 3-ER-522 (issues "that might call attention to certain union positions or practices,"); 3-ER-559 (Plaintiff's "position on fiscal accountability and responsible public employee salaries").[5] Plaintiffs' most specific allegations have to do with informing employees of *Janus*, 3-ER-523, or of unions' positions on various issues, 3-ER-530.

Even if made by the public employer, none of these statements, standing alone, describe arguable violations of section 3550. The Board expressly rejected the notion that simply informing employees of *Janus* necessarily violates section 3550. *Regents I*, PERB Decision No. 2755-

[5] Plaintiffs briefly refer to the District Court's "consideration of declarations and evidence outside the Complaint." Appellants' Br. 32. It is not clear whether Plaintiffs believe this was in error. The declarations the court considered were Plaintiffs', 1-ER-15; Appellants' Br. 34 n.5, and Plaintiffs claim these provided sufficient detail, Appellants Br. 32. (The court also granted the PERB Defendants' request for judicial notice of four PERB ALJ decisions, 1-ER-8 n.5, but did not discuss those decisions or rely on them.)

H, slip op. at 53 n.38.[6] Nor could informing employees of their own unions' positions be "reasonably likely to deter or discourage employee choices on union matters." *Id.* at 24. That would require an unreasonable assumption that employees are ignorant of their unions' actions, and, if only they were properly informed, would turn away from the union. So too with statements regarding one Plaintiff's position on "fiscal accountability and responsible public employee salaries." 3-ER-559. It is not clear why the knowledge that a member of the employer's governing board holds these positions would lead any reasonable employee to abandon their union. Particularly in light of the Board's conclusion that section 3550 also prohibits statements that *encourage* employees to exercise the enumerated rights, *Regents I*, PERB Decision No. 2755-H, slip op. at 25, the type of broad, general statements Plaintiffs allege cannot be, on their own, violative of the statute.

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[6] In making this finding the Board noted that the University would have had to comply with section 3553 because its communications were "mass communications." *Regents I*, PERB Decision No. 2755-H, slip op. at 53 n.38. Plaintiffs have not alleged any intention to, on behalf of a public employer, disseminate a mass communication, which is defined as a "written document, or script for an oral or recorded presentation or message, that is intended for delivery to multiple public employees." § 3553(e).

But even if these statements were enough—or could be amended—to fall within section 3550's subject matter, Plaintiffs still cannot supply the necessary context to establish that they would speak—or appear to speak—on behalf of the public employers whose governing boards they sit on. Plaintiffs sometimes describe where they might make their statements: in public meetings, 3-ER-522, on the campaign trail, 3-ER-518–19, in meetings with union leadership, 3-ER-550, or at public union events, 3-ER-530. But questions of actual and apparent authority are fact-specific. And those questions depend on the actions of other independent actors—the governing boards themselves or other management officials who must take some action that either gives Plaintiffs authority to speak on the employer's behalf or objectively appears to give them that authority. *San Diego Unified*, PERB Decision No. 137, slip op. at 3–4. Plaintiffs have not alleged, and cannot allege, those critical facts.

As a result, even if Plaintiffs could establish the other *Lopez* factors, they do not and cannot allege an intention to violate the statute. *Lopez*, 630 F.3d at 786. They cannot show an injury in fact.

II. The complaint was properly dismissed for lack of prudential ripeness.

"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). Although Plaintiffs erroneously refer at several points to the distinct doctrine of prudential *standing*, Appellants' Br. 55, 56, 60, prudential *ripeness* comes down to "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 v. Gardner*, 387 U.S. 136, 149 (1967)); *see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) ("[P]rudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'"), *abrogated on other grounds by Lexmark Int'l,* 572 U.S. 118.

The District Court correctly concluded that both prudential ripeness factors support dismissal of Plaintiffs' complaint.

A. Plaintiffs' claims are not fit for judicial decision because Plaintiffs have failed to present an adequately developed factual record.

Because "a court cannot decide constitutional questions in a vacuum," the fitness of the issues for judicial decision turns in significant part on whether there is an adequately developed factual record. *Alaska Right to Life Pol. 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 based on marital status was not ripe. 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.

The District Court correctly found that this case, like *Thomas*, involves a "sketchy record . . . with many unknown facts." 1-ER-19 (quoting *Thomas*, 220 F.3d at 1142). Contrary to Plaintiffs' claim that their complaint and declarations "are replete with details about what they would say, when they would say it, to whom they would say it, and in what context they would say it," Appellants' Br. 59, most of their

assertions consist of vague generalities about hypothetical statements they might wish to make in the future. These include topics that "tangentially relate to unions," 3-ER-526; matters that might "call attention to certain union positions or practices," 3-ER-522, (or even "controversial" union positions, 4-ER-640); and one Plaintiff's "position on fiscal accountability and responsible public employee salaries," 3-ER-559. To the extent any specific statements are identified, they are limited to: (1) a general desire to inform employees about the 2018 *Janus* decision, e.g., 3-ER-523; (2) past statements regarding a union's campaign contributions in 2008, 3-ER-530; and (3) general campaign statements, 3-ER-518–19, which were made while section 3550 was in effect but did not draw a threat or the filing of an unfair practice charge. By omitting specific allegations about the statements they want to make, Plaintiffs effectively ask the court to rule "in a vacuum" and strike down section 3550 in the absence of any "concrete factual situation." *Alaska Right to Life*, 504 F.3d at 849.

In finding Plaintiffs' case unfit for judicial review, the District Court also noted that the Board had not yet construed section 3550. 1-ER-19. Although the Board has now done so, its interpretation

underscores the inadequacy of Plaintiffs' factual allegations. Under *Regents I*, PERB Decision No. 2755-H, the question of whether an employer's conduct violates section 3550 is highly fact-specific. *Id.* at 43–44 (explaining that "the likelihood of influencing a reasonable employee" depends on factors such as content, "mode of communication," "timing," "frequency," "duration," "urgency," and "pervasiveness"); *id.* at 36 (explaining that "truthfulness," "whether an employer is responding to a misleading union communication," and "employer motive" are relevant to assessing the employer's defense).

But even if Plaintiffs could provide more specifics about the content of their statements, other significant problems would remain. Their largely hypothetical allegations omit the context necessary to make the fact-intensive determination of whether, when making a given statement, an official is acting as an agent of a public employer. *See* Restatement (Second) of Agency § 26 cmt. e ("[A]uthority is not static but varies with changing facts."); *Fontenot*, 14 F.3d at 1369 ("[T]he question of agency is fact-specific."); *Boling*, 5 Cal. 5th at 919 (explaining that whether an official's conduct may be charged to the employer "will generally be a question of fact"). Whether any

statements Plaintiffs might make would be attributable to a public employer depend on circumstances that are outside Plaintiffs' control and, therefore, cannot be alleged. For instance, would other officials of the public employer cause employees to view Plaintiffs' speech as the employer's speech? *Cf.* *San Diego Unified*, PERB Decision No. 137, slip op. at 7. Plaintiffs cannot provide this necessary context through their hypothetical scenarios.

Plaintiffs suggest that the lack of a meaningful factual record in this case is not important because First Amendment free speech cases inherently present "purely legal" issues. Appellants' Br. 56. They do not.

The issues were not purely legal in *Renne*, 501 U.S. 312, where the Supreme Court explained that "[t]he free speech issues argued in the briefs filed here have fundamental and far-reaching import," and concluded, "we cannot decide the case based upon the amorphous and ill-defined factual record presented to us." *Id.* at 324.

Nor were the issues purely legal in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25 (2010), where the Supreme Court explained that the plaintiffs could not prevail on a preenforcement First Amendment

challenge because it would require "sheer speculation" to determine whether the plaintiffs' generally alleged activities would be prohibited by the relevant statute.

And the issues were not purely legal in the cases Plaintiffs cite, *Canatella* and *Martinez v. City of Rio Rancho*, 197 F. Supp. 3d 1294, 1305 (D.N.M. 2016). In *Canatella*, the plaintiff had previously been disciplined under the challenged state bar statutes and rules of professional conduct. The Court concluded, under those circumstances, that the issues "do not arise in a factual vacuum and are sufficiently framed to render them fit for judicial decision." 304 F.3d at 855. In *Martinez*, too, the challenged statute had already been enforced against the plaintiff in a specific context. 197 F. Supp. 3d at 1300.

In short, First Amendment cases do not inherently raise purely legal issues. Plaintiffs' allegations about hypothetical future statements they might wish to make under unknown circumstances do not provide a sufficiently concrete factual context. Rather, because liability under section 3550 may depend on "gradations of fact" both as to the substantive communications and the application of agency principles, "[a]djudication of the reach and constitutionality of [the

statute] must await a concrete fact situation." *Holder*, 561 U.S. at 25 (internal quotation marks omitted).

B. Plaintiffs face no hardship if the Court declines jurisdiction.

In the prudential ripeness context, hardship "does not mean just anything that makes life harder; it means hardship of a legal kind, or something that imposes a significant practical harm upon the plaintiff." *Colwell*, 558 F.3d at 1128 (internal quotation marks omitted). "Plaintiffs must show that postponing review imposes a hardship on them that is immediate, direct, and significant." *Id.* (internal quotation marks omitted).

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 851–52; *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996). This is particularly so where, as here, no Plaintiff "is potentially subject to enforcement" of the statute. *Alaska Right to Life*, 504 F.3d at 851.

Plaintiffs maintain that they "have already had their speech chilled and, as a result, have already suffered an injury-in-fact." Appellants' Br. 60. This argument misstates the law. In *Alaska Right*

to Life, this Court found that allegations of self-censorship were not sufficient hardship where the plaintiffs "would not [themselves] have risked civil sanction or criminal penalty." 504 F.3d at 851. Specifically, the plaintiffs were an individual and a political action committee who faced no threat of adverse action under the canons of judicial conduct they challenged. They asserted that the canons chilled judicial speech, which in turn injured the plaintiffs' "rights to receive—and in [the committee's] case also to distribute—judicial campaign speech." *Id.* at 847. They alleged that as a result, they had self-censored by deciding not to circulate a questionnaire to judges seeking reelection. *Id.* at 847, 851. But the Court concluded that the plaintiffs' alleged self-censorship was not constitutionally significant because the plaintiffs were not "themselves subject to the challenged canons." *Id.* at 853. The same holds true here: Plaintiffs' self-censorship is not hardship for purposes of prudential ripeness because Plaintiffs are not subject to section 3550.

Plaintiffs' reliance on *Wolfson v. Brammer*, 616 F.3d 1045, 1060–61 (9th Cir. 2010), is misplaced. Unlike in *Alaska Right to Life*, the plaintiff in *Wolfson* challenged judicial conduct rules that applied directly to him. He alleged that he had previously self-censored to

comply with the rules, and would do so again in the future. Because Plaintiffs are not directly subject to section 3550, this case is akin to *Alaska Right to Life*, not *Wolfson*. Plaintiffs' alleged self-censorship is not a meaningful hardship.

Plaintiffs try to establish hardship by exclaiming that "there are actual PERB charge [sic] and cases underway!" Appellants' Br. 58. They argue that, given these pending charges, "this is also not a situation where it is unlikely or hypothetical that some adverse action will come if Plaintiffs speak freely." Appellants' Br. 60–61. But the pending charges have no bearing on the likelihood that charges will be filed against the public employers with which Plaintiffs are associated, based on Plaintiffs' making the type of vague statements they have alleged, or whether those statements would be imputed to the public employers. That likelihood remains conjectural due to the "sketchy record" Plaintiffs have provided. The fact that other section 3550 cases are pending does not assist Plaintiffs in demonstrating hardship.

Any claim of hardship is also undermined by the lapse of more than two years between section 3550's enactment and Plaintiffs' lawsuit. Given their leisurely pace in filing suit, Plaintiffs cannot

seriously contend that waiting for a concrete factual context poses undue hardship.

Finally, it bears noting that section 3550 is not the only restriction that applies when public employers' agents speak on issues related to collective bargaining. When speaking as a public employer's agents, Plaintiffs 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). These restrictions prohibit public employers from engaging 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 Cmty. Coll. Dist.*, PERB Decision No. 2452, slip op. at 25. Thus, even a broad declaration that Plaintiffs' speech cannot be the basis for public employer liability under section 3550 would not necessarily leave Plaintiffs free to speak uninhibited when they speak as a public employer's agents.

Because Plaintiffs face no hardship from withholding immediate review of section 3550, the District Court properly dismissed their claims for lack of prudential ripeness.

III. The District Court did not abuse its discretion by denying leave to amend as futile.

A district court does not abuse its discretion by denying leave to amend when amendment would be futile. "An amendment is futile when no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Harris*, 847 F.3d at 656 (internal quotation marks omitted). Here, the District Court found that leave to amend was futile "in large part due to the inapplicability of Section 3550 to Plaintiffs." 1-ER-21. That conclusion was not an abuse of discretion; it was correct.

No amendment can change the fact that Plaintiffs are not public employers regulated by section 3550, which prevents them from demonstrating that section 3550 applies to them, that it will be enforced against them, or that they intend to violate it. *Lopez*, 630 F.3d at 786. Because Plaintiffs cannot establish a sufficient injury in fact to maintain a pre-enforcement First Amendment challenge, it would be futile to grant them leave to fill in other gaps in their pleadings, such as

the specific statements that would cause a public employer to violate section 3550. Appellants' Br. 64–65.

It would be equally futile to grant Plaintiffs leave to amend to add further "details" about "reputational harm" that might befall them if the Board imputes their speech to a public employer and finds a section 3550 violation. Appellants Br. 50, 51, 52. The mere threat of that type of indirect harm would not establish a sufficient injury in fact for pre-enforcement review. And even if that were not the case, the Court would still be justified in affirming the District Court's denial of leave to amend.

Throughout this litigation Plaintiffs have declined to explain how section 3550 would cause a cognizable injury to their reputations. Neither the complaint nor Plaintiffs' seven declarations accompanying their motion for preliminary injunction contained any such claims. Nor did Plaintiffs' opposition to the motion to dismiss suggest how they might show reputational harm. 2-ER-136 ("To the extent more factual allegations are necessary to provide clarity or further detail, Plaintiffs should be afforded an opportunity to amend."). And when the District Court offered Plaintiffs a chance at hearing to explain what further

allegations "would bring you within *Meese*," they simply insisted that nothing more was necessary. 2-ER-36–37, 50–51.

Plaintiffs' silence persists in their opening brief. Plaintiffs do not suggest what they would plead regarding reputational harm; they only offer the bare assertion that it should be "beyond dispute" that such harm will result if their speech is imputed. Appellants' Br. 41. Plaintiffs' failure to propose specific allegations of reputational harm demonstrates "their inability (or, perhaps, unwillingness) to make the necessary amendment." *Carrico v. City & Cty. of S.F.*, 656 F.3d 1002, 1008 (9th Cir. 2011). In these circumstances, leave to amend is properly considered futile. *Id.*

But even if Plaintiffs could amend to overcome their failure to plead an injury in fact, they still could not amend to plead prudential ripeness. They cannot provide the critical context necessary to determine whether any statements can be imputed to the public employer, or whether otherwise innocuous statements may nevertheless "deter or discourage" employees from joining or supporting an employee organization. Devoid of this essential factual context, Plaintiffs continue to ask that this case be decided in a factual vacuum.

Because no amendment can cure the complaint's fundamental standing and ripeness defects, the District Court did not abuse its discretion by denying leave to amend.

CONCLUSION

Plaintiffs have not alleged the type of personal and direct injury necessary to justify a pre-enforcement challenge to the statute, and they cannot satisfy prudential ripeness requirements. Because dismissal on these grounds is not on the merits, *Harris*, 847 F.3d at 656, the case should be remanded to the District Court to enter judgment dismissing without prejudice.

Date:May 26, 2021

STATE OF CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 20-56075

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