SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
DAVID A. SCHWARZ, Cal. Bar No. 159376
dschwarz@sheppardmullin.com
JAY T. RAMSEY. Cal. Bar No. 273160
jramsey@sheppardmullin.com
ALEXANDRA M. JACKSON. Cal. Bar No. 327689
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067-6055
Telephone: 310.228.3700
Facsimile: 310.228.3701

LAW OFFICE OF MARK W. BUCHER
Mark William Bucher (Cal. Bar No. 210474)
markb@calpolicycenter.org
18002 Irvine Blvd Ste 108
Tustin, CA 92780-3321
Telephone: 714.573.2201
Facsimile: 714.573.2297

CENTER FOR INDIVIDUAL RIGHTS
Michael E. Rosman
rosman@cir-usa.org
1100 Connecticut Ave., NW, Suite 625
Washington, DC 20036
Telephone: 202.833.8400
Facsimile: 202.833.8401
(admitted *pro hac vice*)

Attorneys for Plaintiffs
Jeffrey I. Barke, Ed Sachs, Laura Ferguson, Jim Reardon, Leighton Anderson, Phillip Yarbrough, and Rodger Dohm

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Jeffrey I. Barke, Ed Sachs, Laura Ferguson, Jim Reardon, Leighton Anderson, Phillip Yarbrough, and Rodger Dohm,

Plaintiffs,

v.

Eric Banks, Erich Shiners, Arthur A. Krantz, and Lou Paulson, in their official capacities as members of the California Public Employment Relations Board ("PERB"); and J. Felix De La Torre, in his official capacity as General Counsel of PERB,

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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

The Honorable Josephine L. Staton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal: Statutes, Rules, Regulations, Constitutional Provisions

Other Authorities

I. INTRODUCTION

Neither the PERB Defendants nor the Union-Intervenors (collectively, "Defendants") dispute (1) that Section 3550 prohibits speech which may "deter or discourage" unionization, but does not prohibit speech that encourages unionization; (2) that such viewpoint discrimination violates the First Amendment to the extent it interferes with speech by Plaintiffs made in their "personal" or "individual" capacities; and (3) that the First Amendment protects the speech of elected officials, whether they are campaigning for reelection or expressing their opinions in public hearings or in communications with constituents.

Instead, Defendants argue that "a government employee has no First Amendment right to say whatever she wishes while speaking for the government." (Union Opp. at 19.) Because the government is free to craft the content of its own speech, Defendants contend that the state may regulate what Plaintiffs may or may not say "to the extent that Plaintiffs intend to speak in their official capacities on behalf of the government." *Id*. And, because Section 3550 enjoins speech only by "public employers," as opposed to the members of the governing bodies who decide collectively what that entity will say, Plaintiffs lack standing to bring suit. There are three fundamental flaws with this argument.

First, Defendants claim that while Section 3550 "does not regulate Plaintiffs' right to speak as individuals," it does control their speech "when they are acting as 'agents' under the authority of a public employer," and therefore "does not implicate the First Amendment at all." (Union Opp. at 14.) Defendants do not cite a single decision which applies the government speech doctrine to elected officials (as opposed to public employees), and for good reason: Courts consistently hold that *Garcetti* does not apply to elected officials' speech, at least to the extent it concerns official duties. To do so would conflict with *Bond v. Floyd*, *Republican Party of Minnesota v. White*, and other precedent holding that speech pursuant to a legislator's official duties is of paramount importance under the First Amendment.

Second, while the Free Speech Clause does not prevent the government from managing its own affairs by "determining the content of what it says," *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.,* 576 U.S. 200, 207 (2015), the government may not use purportedly neutral policy judgments as a pretext to engage in viewpoint discrimination. The state may manage its own affairs in ways that draw reasonable subject-matter lines affecting speech. It may, for example, prefer to sell space on its buses for advertising soap but not politicians. *See Lehman v. Shaker Heights*, 418 U.S. 298 (1974). "But a government is not free to draw those lines as a way to discourage or suppress the expression of viewpoints it disagrees with." *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 376 (2009) (Souter, J., dissenting).

Third, Defendants proceed on the basis that Plaintiffs' speech in their "individual capacity" is never implicated under Section 3550, whereas speech imputed to the public employer is never protected by the First Amendment. But this is a tautology rather than a principled distinction between protected individual speech and prohibited "government speech." Without explanation, Defendants suggest that Plaintiffs can police which side of Section 3550 their speech would fall, since "it will be easy for Plaintiffs – like other public employers 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 which they are affiliated." (Union Opp. at 22-23.)

This trivializes the serious threat posed by Section 3550 and misstates the law. Under PERB precedent, agency determinations have nothing to do with Plaintiffs' intent to speak on behalf of the government. In fact, the Unions have it backwards: Actual authority is that which a *principal intentionally confers upon the agent*; apparent authority is that which a *principal allows a third party to believe the agent possesses*. Plaintiffs are in no position to determine or control PERB's hindsight judgment to impute their statements to that principal/public employer, particularly where "[t]he line between official action and private activities

undertaken by public officials may be less clear in other circumstances," and is almost invariably "a question of fact on which PERB's conclusion is entitled to deference." *Boling v. Public Employment Relations Bd*., 5 Cal. 5th 898, 919 (2018). This puts Plaintiffs to a choice between risking an after-the-fact characterization of their statements as "government speech," or saying nothing at all.

The fact that PERB cannot prosecute or hold Plaintiffs "personally liable" under Section 3550 does not alter the fact that PERB's findings depend on the conduct of individuals, including members of the governing bodies of public entities. It is chilling in every sense of that term for the Unions to say that Plaintiffs may "easily" control whether their statements will be imputed when Plaintiffs run that risk every time they speak at a public meeting. The risk of reputational damage based on a censure by PERB for crossing the line clearly constitutes cognizable injury under the First Amendment.

Defendants fail to acknowledge that "the First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general." *Rangra v. Brown*, 566 F.3d 515, 518 (5th Cir. 2009). In other words, *elected officials are to be treated, for free speech purposes, no differently than a private citizen who engages in private speech*. At no point do Defendants attempt to reconcile their position with caselaw holding that "when a state seeks to restrict the speech of an elected official on the basis of its content, a federal court must apply strict scrutiny and declare that limitation invalid unless the state carries its burden to prove both that the regulation furthers a compelling state interest and that it is narrowly tailored to serve that interest." *Id*.

These are the standards of review this Court must apply in evaluating Plaintiffs' likelihood of success on the merits and the probability of irreparable harm in the absence of preliminary injunctive relief.

II. ARGUMENT

A. Plaintiffs Have Article III Standing And Satisfy Prudential Concerns

Defendants' standing arguments may be summarized as follows: Section 3550 proscribes the speech of "public employers;" it does not expressly include elected officials within the definition of a "public employer"; Plaintiffs do not face risk of prosecution or personal liability; and so Plaintiffs cannot identify any credible threat of injury sufficient to confer standing. These arguments repeat those made by PERB in its motion to dismiss (Dkt. No. 41), and should be rejected for the reasons explained in Plaintiffs' opposition to PERB's motion (Dkt. No. 60).

It's worth restating what Defendants apparently fail to acknowledge: "When there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged." *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984). Because First Amendment challenges "raise unique standing considerations that tilt dramatically toward a finding of standing," *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010), plaintiffs "may establish an injury in fact without first suffering a direct injury from the challenged restriction," *id.* at 785. "In such pre-enforcement cases, the plaintiff may meet constitutional standing requirements by demonstrating a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* (internal citations and quotations omitted).

Plaintiffs can demonstrate "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Lopez*, 630 F.3d at 785. *First*, while elected officials may not be named personally in a PERB complaint alleging violations of Section 3550, PERB has not hesitated to impute liability based on statements by elected officials in public meetings where, in every other legislative proceeding, such speech and debate would be absolutely privileged. *See County of Riverside* (2010) PERB Decision No. 2119-M, 34 PERC 108 (holding that three

members of a county's governing board of supervisors were agents based on statements made during public hearings without conducting a detailed agency analysis); *San Diego Unified School District* (1980) PERB Decision No. 137 (concluding that two board members' comments could be attributed to the district at large because the comments were written on district stationery, the board members identified themselves by their official district titles, and other district managers included the comments in employee personnel files). Plaintiffs cannot control a *post hoc* judgment by PERB that the public employer conferred actual authority (whether intentionally or by negligence) based on what an elected official might have said in the course of representing her constituents, or that the employer "reasonably allows employees to perceive that it has authorized [that elected official] to engage in the conduct in question," whether or not the other members of the governing board subsequently ratified that conduct. *Chula Vista Elementary School District* (2004) PERB Decision No. 1647 (citing *Inglewood Teachers Assn. v. PERB*, 227 Cal.App.3d 767 (1991)).[1]

Second, in both *Riverside County* and *San Diego Teachers' Association*, PERB's cease-and-desist orders specifically enjoined elected board members from engaging in further violations of the law. In *San Diego*, PERB issued a mandatory injunction requiring rescinding, nullifying, and removing letters of commendation written by two members of the board from the personnel files of all teachers who

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

received them. *See* PERB Decision No. 137, at 29. In *Riverside County*, PERB's cease-and-desist order expressly applied not only to the County, but its governing board and its representatives.

Third, a reputational injury stemming from a statute's censure of elected officials by an official order restraining their future conduct is an injury-in-fact sufficient to bring a First Amendment challenge. *Meese v. Keene*, 481 U.S. 465, 472-73 (1987); *Wilson v. Hous. Cmty. Coll. Sys.*, 955 F.3d 490, 496 (5th Cir. 2020) (a public rebuke by a public agency suffices to establish injury in fact); *Babbitt v. Farm Workers*, 442 U.S. 289, 302 n.13 (1979) ("the prospect of issuance of an administrative cease-and-desist order . . . against such prohibited conduct provides substantial additional support for the conclusion that appellees' challenge to the publicity provision is justiciable"). The threat of injury to Plaintiffs is, if anything, more compelling than in *Wilson* or *Meese*.[2] Like *Wilson* and *Meese*, however, Plaintiffs adequately allege that their speech be imputed to the public employer and should charges be filed based on what they said (or didn't say), there is a reasonable danger that Plaintiffs will suffer direct injury, including injury to their personal reputations (*see* Ferguson Decl. ¶ 14 (noting formal threats she received about statements)), their ability to serve as effective elected officials (*see* Sachs Decl. ¶¶ 10, 11, 14, 17 (noting that Section 3550 prohibits him from "speak[ing] candidly" at meetings on unions issues and from "responding to constituent questions"); Barke Decl. ¶¶ 7, 8, 17 (same, and further noting that is hampers his "ability and need to communicate with my constituents"); Reardon Decl. ¶¶ 5, 6, 12, 18 (same); Ferguson Decl. ¶¶ 7, 14, 15, 17 (same); Anderson Decl. ¶¶ 8, 9, 30, 31, 32 (same);

[2] Neither one of these cases involved a sanction in the form of a cease-and-desist order. Here, a finding of liability and cease-and-desist order is more than a public rebuke; it is a pronouncement by a state enforcement agency after a quasi-judicial proceeding that the conduct by an elected official may not only be attributed to the governing board, but could lead to serious consequences, including contempt, should that elected official violate the injunction imposed by PERB.

Yarbrough Decl. ¶¶ 5, 6, 9, 13 (same); Dohm Decl. ¶¶ 7, 11, 13, 14, 15, 17), and their ability to get re-elected (*see* Reardon Decl. ¶¶ 5, 6, 12, 17-19 (describing prior campaign speech leading to his election and noting that he no longer makes such speech or espouses such opinions); Ferguson Decl. ¶¶ 11. 17 (refraining from taking positions with her constituencies on issues she deems important about her job, which makes it difficult to campaign)).

Leonard v. Clark, 12 F.3d 885 (9th Cir. 1993) has nothing to do with public elected officers or any enforcement instrumentalities of the state. The issue concerned a term in a collective bargaining agreement between a fire fighters union and a city, which stipulated that, should ***the union*** "endorse or sponsor" legislation that resulted in "any new economic or benefit improvement causing increased payroll costs to the City" beyond those required under the CBA, "such costs shall be charged against applicable salary agreement[s]." *Id.* at 886. Individual fire fighters brought suit, claiming that the provision infringed their First Amendment rights to endorse or sponsor legislation on their own. Some of the plaintiffs were representatives of the union, but they did not base their claimed infringement in their "official capacity" as union leaders. They argued that they opted not to endorse or sponsor legislation themselves, individually, for fear that any new legislation would count against union members.

The Ninth Circuit held that the speech of the individual fire fighters was not chilled: "Plaintiffs are free to endorse legislation as long as they do not (1) have authority to represent the Union, ***and*** (2) claim that they are speaking for it." *Id.* at 889. "The individual plaintiffs' speech could be affected only if, as individual union members, ***they wished to claim authority to speak for the Union*** *when they did not possess it*." *Id.* In *Leonard*, the leaders of the union could still speak freely because there was no chance that their speech would be imputed to the union unless they expressly claimed to be speaking on the union's behalf. Here, the opposite is the case. Plaintiffs face a realistic threat that their speech will be imputed even when

they expressly disclaim any authority to speak on behalf of the school district or city, or their statements are based on their own, personal opinions (as was the case in the Riverside County case). At a minimum, whether Plaintiffs' speech could be imputed to their public employers is, to a large extent, out of the elected officials' control, and in the hands of the union (which would file the charge) and PERB (which will decide whether to impute Plaintiffs' statements to the entities that they serve). The outcome depends on the vagaries of the adversarial process; unlike In *Leonard*, Plaintiffs are not afforded a bright-line test, and therefore the option to decide whether to step over that line. This uncertainty gives rise to the reasonable fear that what they say may redound to the harm of their governing boards, whether intended or not, and therefore result in direct injury.[3]

Defendants also argue that Plaintiffs fail to establish (a) a reasonable likelihood of enforcement of Section 3550 as to the speech that Plaintiffs intend to make; or (b) that Plaintiffs have "concrete plans" to violate Section 3550. But PERB's own actions demonstrate a reasonable likelihood of enforcement. As PERB points out, there have been investigations allowed and charges brought under Section 3550, and those charges have either been ruled upon or are under consideration by PERB itself. (Dkt. No. 41 at 13-15.) Of those four pending complaints, two explicitly allege unfair practices based on purely factual statements about the *Janus* decision and, in one of those cases, the ALJ found that a ***factual***

---

[3] The Unions cite *Johnson v. Stuart*, 702 F.2d 193 (9th Cir. 2013) for the proposition that a party does not have standing unless they could face an action against them individually. (Union Opp. at 7:24-27.) In *Johnson*, the statute did not apply to the plaintiff teachers, no enforcement had ever been brought against teachers, and "the Attorney General of Oregon ha[d] repeatedly disavowed any interpretation of section 337.260 that would make it applicable in any way to teachers." *Id.* at 195. It was also not a case restricting speech. Here, by contrast, neither PERB nor any other authority has disavowed Section 3550's application to Plaintiffs' speech; to the contrary, PERB and the Unions argue in opposition to the preliminary injunction motion that Section 3550 does apply to Plaintiffs' speech, at least in some, undefinable instances.

communication to employees about *Janus* had the "natural and probable consequence of deterring and discouraging employees" from unionization efforts. In other words, a description of the Supreme Court's holding that compulsory agency fees violate the First Amendment's prohibition of compelled speech *was itself the basis for a finding of liability*. (*Id.*) It is even more Orwellian for PERB to maintain that it may suppress Plaintiffs' speech in order to suppress information about the First Amendment rights of public employees. In another case, the ALJ found that factually accurate statements were "subtly coercive," and violated Section 3550. The fact that Section 3550 is an instrumentality to punish speech demonstrates a reasonable likelihood that this law may be used to muffle dissent. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.,* 484 U.S. 383, 392-393 (1988) (injury-in-fact requirement was met, in part, because "plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them"). Plaintiffs do not "have to await the consummation of a threatened injury to obtain preventive relief." *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003).

It is nonsensical to suggest that Plaintiffs have failed to demonstrate "that they have concrete plans to violate Section 3550." (Union Opp. at 8.) Plaintiffs have concrete plans to show up and discharge their duties as elected representatives. What they fear is that by doing their jobs they will expose their school district to a Section 3550 charge. Plaintiffs' 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. They have concrete plans to engage in speech that they fear would violate Section 3550.[4] Some Plaintiffs even identify prior

[4] *See*, *e.g.*, Complaint ¶¶ 3-4, 30-36; Sachs Decl. ¶¶ 11-14, 17; Barke Decl. ¶¶ 8, 11, 13, 14, 16, 17; Reardon Decl. ¶¶ 5, 6, 9, 12, 14, 16, 18, 20; Ferguson Decl. ¶¶ 7, 8, 11, 12, 14; Anderson Decl. ¶¶ 9, 12, 30, 31, 34, 38; Yarbrough Decl. ¶¶ 6, 8, 9, 11, 12, 13; Dohm Decl. ¶¶ 8, 11, 12, 15, 17.

statements that they now would not make for fear of being accused of deterring unionization. *See, e.g.*, Reardon Decl. ¶¶ 8-9, 17-18; Anderson Decl. ¶¶ 29-30; Dohm Decl. ¶¶ 13-14.

Defendants argue that prudential considerations require that the Court decline to exercise jurisdiction. In fact, these same prudential considerations decisively tilt in favor of deciding this challenge, particularly where the issue largely turns on questions of law based on the threat of injury should they no longer opt to self-censor. *Canatella v. California*, 304 F.3d 843, 854 (9th Cir. 2002) (when the plaintiff alleges "concrete and particularized harms to his First Amendment rights and demonstrates a sufficient likelihood that he and others may have similar harm in the future," he "satisf[ies] the prudential requirements of standing for a First Amendment overbreadth claim"); *Martinez v. City of Rio Rancho*, 197 F. Supp. 3d 1294, 1305 (D.N.M. 2016) (finding prudential ripeness when party had Article III standing to pursue claim that her speech was chilled).

B. Section 3550's Application To "Public Employers" Does Not Save It From Constitutional Challenge Or Exempt It From Strict Scrutiny

On the merits, Defendants make essentially the same argument that they make as to standing – Section 3550 does not unconstitutionally infringe Plaintiffs' First Amendment rights because it restricts the speech of "public employers," and therefore restricts Plaintiffs' speech only when Plaintiffs' are speaking in their official capacities on behalf of the public employers. Two related arguments are advanced.

First, Defendants argue that when the government speaks, it is entitled to "promote a program, to espouse a policy or take a position" and "it is not barred by the Free Speech Clause from determining the context of what it says." (Union Opp. at 17 (quoting *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015)). Thus, Defendants maintain that the state is free to determine as a matter of government policy not only that it will disassociate itself from any speech that

may "deter" or "discourage" union membership, but also that it may prohibit school boards, community college districts, city councils from engaging in speech which does not favor unions or unionization. This neatly encapsulates why the government speech doctrine is susceptible to dangerous abuse. "[I]f private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017).

Second, Defendants also claim (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)), that the state may regulate the speech of government employees when they speak in their official capacities. (*See* PERB Opp. at 29:3-32:11; Union Opp. 17:1-21:22.) This argument fails because the government speech doctrine does not apply to elected officials like Plaintiffs.

1. Section 3550 does not constitute "government speech"

It should go without saying that the First Amendment contains no general exception for speech the government finds objectionable. The First Amendment likewise contains no general exception that applies whenever the government wants to disassociate itself from offensive communications. The government has never been able to defend viewpoint discrimination simply on the ground that the public might associate a controversial viewpoint with the government. *See, e.g.*, *Good News Club v. Milford Central School*, 533 U.S. 98, 113-114 (2001); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 829 (1995). To the contrary, the entire public-forum doctrine rests on the notion that the government, *even in a forum it controls*, has limited discretion to decide "which issues are worth discussing" and which "views" may be "express[ed]." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

The Supreme Court has exempted viewpoint discrimination from strict scrutiny *only when the government itself is speaking. Walker*, 576 U.S. at 207. In *Walker*, Texas could refuse to approve a license plate design that displayed the

Confederate flag because messages on license plates that it controls constituted government speech. *See id*. at 207-209. As long as it is speaking, the state may refuse to espouse viewpoints with which it does not wish to be associated. *Accord Rust v. Sullivan*, 500 U.S. 173, 180 (1991) (government speech to the public, albeit indirectly through grant recipients, permits state to disassociate itself from contrary views).

The Supreme Court has identified three factors for determining whether the government-speech doctrine applies. First, has the government traditionally used the relevant medium to "speak to the public"? *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009). Second, would the public "routinely—and reasonably—interpret [the medium] as conveying some message on the [government]'s behalf"? *Id*. at 471. Third, does the government "maintain[] direct control over the messages conveyed" in the medium? *Walker*, 135 S. Ct. at 213. When those factors are applied here, it is clear that the government is not engaging in government speech, but censorship in the form of blatant viewpoint discrimination favoring the private speech of unions, who no longer have to compete in the marketplace of ideas by discussing apparently problematic issues, such as the holding in *Janus*.

To begin, California did not enact the Meyers-Milias-Brown Act or the Educational Employment Relations Act to communicate any broad "programmatic message" prescribing the content of employer speech as part of PERB's oversight of the public employer collective-bargaining process. Section 3550 contradicts longstanding statutory law and PERB precedent, which holds that "[a]n employer may freely express or disseminate its views, arguments, or opinions on employment matters, unless such expression contains a threat of reprisal or force or promise of benefit." *See* Dkt. No 60, Opp. to PERB Mot. to Dismiss at 10, n.7 (collecting cases); *Rio Hondo Community College District*, PERB Decision No. 128E, at p. 18-19 (1980) ("While the protection afforded the employer's speech is not without limits, it must necessarily include both favorable and critical speech regarding a

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

Nor is the public likely to "routinely—and reasonably—interpret" statements made by elected officials of a school board "as conveying some message on the [government]'s behalf." The public expects its representatives to reflect the views and opinions of those who elect them; the public does not expect a sanitized or self-censored answer to a question concerning a matter of public policy – especially a controversial one – because the state adopts a "policy" that the public may hear only one side of the debate over public employee unions. Most importantly, the government does not "maintain[] direct control over the message conveyed" through local public employer governance. This is not a situation where the state "retains absolute veto power over the [relevant] content, right down to the wording." *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 563 (2005). Defendants concede as much when they claim that elected officials may "easily" determine (and control) whether they are speaking "in a personal capacity rather than for the public entities with which they are affiliated." (Union Opp. at 22-23.)

Not surprisingly, the Supreme Court's cases applying the government-speech doctrine do not support Defendants' breathtaking vision of government speech. In each of those cases where such speech was upheld, the government had consciously used a certain medium to advance to the public "its own message" or viewpoint on a particular matter. *Rosenberge*r, 515 U.S. at 833. *Walker* involved license plates, which the State used "to urge action, to promote tourism, and to tout local industries." 576 U.S. at 211. *Summum* involved monuments on public land, which a local government used to "present[] the image of the City that it wishe[d] to project." 555 U.S. at 473. *Rust* involved the use of a grant program conveying the government's viewpoint that abortion is not "an appropriate method of family planning." 500 U.S. at 180.

Here, the government claims to "speak" not in the communication of its

viewpoint to the public, but rather in the exercise of its regulatory powers. The government, moreover, is not speaking; it is telling public officials what they cannot say without actually explaining what, specifically, would offend its "policy" of enjoining certain – but not all – speech concerning unions and unionization. In short, the government seeks not to control its own speech; rather, it seeks to regulate and punish speech through the exercise of its "sovereign" power.

Section 3550's viewpoint discrimination effectively subsidizes private speech unions by suppressing competing voices. This form of censorship is no different from the "discriminatory denial of a tax exemption" "frankly aimed at the suppression of dangerous ideas" as a "limitation on free speech." *Speiser v. Randall*, 357 U.S. 513, 518-519 (1958). The Supreme Court has reiterated that warning in the context of government subsidies. See, e.g., *National Endowment for the Arts v. Finley,* 524 U.S. 569, 587 (1998) (stating that, "[i]f the [NEA] were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case"); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (noting that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas'"); *cf. Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints"). The First Amendment does not countenance such blatant forms of censorship, whether based on the power of the purse of the exercise of the state's powers as "sovereign."

2. The State cannot regulate elected officials' speech under the government speech doctrine

Defendants barely acknowledge the most compelling fact in this case – this is a free speech challenge brought by elected officials who wish to speak on matters of public concern without fear of censure or threat of civil contempt. The central

importance of protecting political speech by our elected representatives cannot be overstated, given the role elected officials play in a representative democracy. *See, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765, 781-82 (2002) (law prohibiting judicial candidates from announcing their views on disputed legal and political issues violated First Amendment); *Bond*, 385 U.S. at 135; *Rangra*, 566 F.3d at 524 *dismissed as moot en banc*, 584 F.3d 206 (5th Cir. 2009). "If the State chooses to tap the energy and the legitimizing power of the democratic process [in the election of public officials], it must accord the participants in that process . . . the First Amendment rights that attach to their roles." *Jenevein v. Willing*, 493 F.3d 551, 558 (5th Cir. 2007).

Courts thus afford the speech rights of elected representatives the highest degree of First Amendment protection. *See Wood v. Georgia*, 370 U.S. 375, 394-95 (1962) ("The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance."). Doing so comports with our form of representative government. *Bond*, 385 U.S. at 135-46. Indeed, "[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them." *Id.* at 136-37. Any restriction on the speech of elected officials is subject to strict scrutiny. *See, e.g.*, *Tschida v. Motl*, 924 F.3d 1297, 1303 (9th Cir. 2019) (applying strict scrutiny to regulation proscribing speech of elected official). *See also City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018) ("The state cannot regulate the substance of elected officials' speech under the First Amendment without passing the strict scrutiny test.").

Defendants argue that strict scrutiny does not apply whenever the state regulates government employee speech. (Union Opp. at 19 (citing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). Under the *Pickering-Garcetti* line of cases, the

First Amendment protects the employee's speech *only when* they speak "as citizens about matters of public concern," in which case "they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti*, 547 U.S. at 419. Affording the government the ability to regulate its employees' speech makes sense when the government is acting as an employer. "But when the state acts as a sovereign, rather than as an employer, its power to limit First Amendment freedoms is much more attenuated." *Rangra v. Brown*, 566 F.3d at 522-53. "*Garcetti* itself, like the Court's other public employee speech cases, recognizes the state's very limited power as sovereign to infringe on First Amendment freedoms." *Id. See also Waters v. Churchill*, 511 U.S. 661, 674-65 (1994) (noting that where the government is acting as a sovereign, rather than as an employer to ensure the efficient operation of a state agency, the government's interests in achieving its goals are generally subordinate to the need to safeguard protected speech).

When the state seeks to regulate the speech of its elected officials, it is acting as a sovereign, not an employer, and so strict scrutiny applies, not the more forgiving standard applicable to government employee speech. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 n. 9 (2018) (noting that "even in public employment, a significant impairment of First Amendment rights must survive exacting scrutiny"); *Rangra*, 566 F.3d at 522-53. Elected officials work for "the public itself," and it is the public that has "the power to hire and fire." *Jenevein*, 493 F.3d at 557. Thus, when the speech of an elected official is at issue, courts do "not draw directly upon the *Pickering-Garcetti* line of cases" – *i.e.*, the government speech doctrine – but "turn to strict scrutiny," requiring that any regulation governing "the elected official's speech to his constituency . . . be narrowly tailored to address a compelling government interest." *Id.* at 558. The Fifth Circuit also noted the distinction between public employees and elected officials in *City of El Cenizo v. Texas:* "The state cannot regulate the

substance of elected officials' speech under the First Amendment without passing the strict scrutiny test. . . . This conclusion does not, however, insulate non-elected officials and employees, who may well be obliged to follow the dictates of SB4 as 'government speech.'" 890 F.3d at 184-85.

Consistent with the this approach, the majority of courts, including at least one court in the Ninth Circuit, note that *Garcetti* is inapplicable to the speech of elected officials, but that strict scrutiny must be applied. *See Holloway v. Clackamas River Water*, 2014 WL 6998084, *2-3 (Dist. Or. Dec. 9, 2014); *Rangra*, 566 F.3d at 522-23; *Jenevein*, 493 F.3d at 558; *Zimmerlink v. Zapotosky*, No. 10-237, 2011 U.S. Dist. LEXIS 53186 (W.D. Pa. Apr. 11, 2011), adopted, 2011 U.S. Dist. LEXIS 53189 (W.D. Pa. May 18, 2011); *Melville v. Town of Adams*, 9 F. Supp. 3d 77, 102 (D. Mass. 2014); *Conservation Comm'n of Town of Westport v. Beaulieu*, No. CIV. A. 07-11087-RGS, 2008 U.S. Dist. LEXIS 71438, 2008 WL 4372761, at *4 (D. Mass. Sept. 18, 2008); *Willson v. Yerke*, No. 3:10-CV-1376, 2013 U.S. Dist. LEXIS 180065, 2013 WL 6835405, at *9 (M.D. Pa. Dec. 23, 2013), *aff'd*, 604 F. App'x 149 (3d Cir. 2015). *Zimmerlink* succinctly explains why the government employee speech doctrine cannot apply to the speech of elected officials:

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

2011 U.S. Dist. LEXIS 53186, at **10-11 (internal citations omitted).[5]

[5] Unlike this case where Plaintiffs seek to vindicate their own constitutional rights, a public agency (as a political subdivision of the state) has no standing to sue the state for violations of the First Amendment. *See, e.g.*, *South Lake Tahoe v. Cal.*

As a result, Section 3550 must satisfy the strict scrutiny test, and Plaintiffs' rights to speak as elected officials cannot be cut short by the government speech doctrine. Because Section 3550 does not satisfy strict scrutiny, at least as it relates to Plaintiffs' speech, it is unconstitutional.

C. Plaintiffs Are Likely To Succeed On The Merits Because Section 3550 Cannot Survive Strict Scrutiny

1. Section 3550 is viewpoint discriminatory and fails strict scrutiny

Section 3550 impermissibly limits speech only if it "deters or discourages" union membership but not if it promotes or encourages unions or union membership. (Mot. at 23-24.) A law that leaves elected officials "free to praise" unionization while sanctioning others "for opposing it, cannot survive in a country which has the First Amendment." *See Schacht v. United States*, 398 U.S. 58, 63 (1970). Indeed, viewpoint discriminatory laws routinely fail strict scrutiny. *See, e.g.*, *Tschida*, 924 F.3d at1303. Notably, neither PERB nor the Unions suggest that Section 3550 is viewpoint neutral or that Section 3550 satisfies strict scrutiny. As a result, if the Court finds, as it should, that Plaintiffs have standing and strict scrutiny applies, the Court should find that Plaintiffs are likely to succeed on the merits.

2. Section 3550 is also unconstitutionally vague

"Because First Amendment freedoms need breathing space to survive," when the government is regulating speech, it must "regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 432-33 (1963). When First Amendment freedoms are at stake, "a more stringent vagueness test should apply." *U.S. v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1995). Section 3550 is unconstitutionally vague for at least two reasons: (1) it is vague as to the content of the speech to which is applies; and (2) assuming Section 3550 can be applied to

---

Tahoe Regional Planning Agency, 625 F.2d 231, 233 (9th Cir. 1980); *Santa Paula Elementary School Dist. v. Ventura Cty. Schools Self-Funding Authority*, 2009 WL 10581008, at *3 (C.D. Cal. Oct. 20, 2009).

Plaintiffs' speech made in their official capacities, it is vague as to when Plaintiffs have crossed the line from individual speaker to government speaker.

a. Section 3550 is impermissibly vague as to content

Section 3550's prohibition on speech that may "deter or discourage" union participation is so vague that Plaintiffs and other elected officials have no way of knowing when their speech becomes a prohibited utterance. Purely factual speech could violate the statute. For example, if Plaintiffs mention to a constituent in a private conversation that a public union cannot extract agency fees from that constituent if he chooses not to join the union (an accurate description of *Janus)* someone could very easily understand that statement to "deter or discourage" that person from joining the union or agreeing to pay an agency fee as a non-member – after all, by not joining the union, they don't have to pay union dues or agency fees. If that same statement were made in front of an audience – at a public board meeting, at an election rally, to a news reporter who then broadcasts that statement widely – an entire class of people may have been "deter[red] or discourage[d]."

The Unions offer no substantive response to this argument. PERB responds, but its arguments prove Plaintiffs' point. *First*, PERB concedes that it is "uncertain[]" whether the statute applies to purely factual statements. "The question [*i.e.*, whether purely facture statements might violation section 3550] has been raised in the cases presently pending before the Board. But this uncertainty means only that section 3550 requires interpretation in light of prior statutory and case law; it does not mean that the statute is so vague that it fails to provide a reasonable opportunity to know what it prohibits. *O'Brien*, 818 F.3d at 930." (PERB Opp. at 24:22-28.) A statute that requires interpretation to decide the metes and bounds to which it applies is a statute that runs afoul of the First Amendment. For example, in *Thomas v. Collins*, 323 U.S. 516 (1945), the Supreme Court held that a law restraining when an individual could engage in speech "soliciting" union membership violated the First Amendment because what constituted "soliciting"

was insufficiently defined: "No speaker . . . safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Id.* at 535.

There is no legal difference between speech "soliciting" union membership and speech "deterring or discouraging" union membership – in both cases, the statutes "blanket[] with uncertainty whatever may be said[;] [i]t compels the speaker to hedge and trim." *Id. See also Keyishian v. Board of Regents of University of the State of New York*, 385 U.S. 589 (1967) (finding that "seditious" speech was too vague)[6]; *City of El Cenizo*, 890 F.3d at 182-184 (finding that prohibition on "endorsing" any policy that limits the enforcement of immigration laws too vague because it would effectively prohibit elected officials from expressing their "support of or in favor of an idea or viewpoint," which constitutes "core political speech"); *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir.1996) (finding the statutory term "offensive personality" impermissibly vague where "it would be impossible to know when [] behavior would be offensive enough to invoke the statute" and it "is likely to have the effect of chilling some speech that is constitutionally protected").

Second, PERB argues that a "regulation is not impermissibly vague if it 'allows persons of ordinary intelligence a reasonable opportunity to know what is prohibited.'" (PERB Opp. at 22:14-16.) Yet, as PERB admits, four different ALJs

---

[6] PERB argues that *Keyishian* does not apply because "section 3550's 'deter or discourage' phrase lacks the weighty historical baggage of the term 'seditious,'" arguing that the term seditious has a "particularly fraught history . . . in American law." (PERB Opp. at 25:12-26:5.) If anything, the law's many discussions of what "seditious" meant prior to the *Keyishian* decisions provides more guidance as to what counts as seditious speech. Here, there has been limited guidance as to "deter or discourage," and that guidance, like the guidance as to "seditious" is conflicting. *Keyishian* thus applies in full force.

have described the statute's reach differently – if four ALJs cannot land on a single, consistent interpretation of Section 3550, surely "persons of ordinary intelligence" cannot be expected to know to what speech Section 3550 applies. Two of the cases that ALJs have decided involved communications about *Janus* – the communication in one case did not violate Section 3550, according to one ALJ, but the communication in the other case did violate Section 35550, according to another ALJ. (*See* PERB Opp. at 16:8-24.) Similarly, the other two cases that have resulted in ALJ decisions only muddy the waters further. In both, the ALJs interpreted Section 3550 to apply only to "coercive" statements, even though Section 3550 does not use the word coercive, but applies to language that merely "deter[s] or discourage[s]" unionization. Even then, in applying the non-existent "coercive" statements standard, the ALJs reached different results, one finding that language opposing an employer organization was not "coercive," and the other finding that "factually accurate" statements were, nonetheless, "subtly coercive," and thus violated Section 3550. (*See* PERB Opp. at 16:25-17:11.) The obvious conflicts in just the four cases thus far under Section 3550 only underscore the vagueness of Section 3550.

Third, PERB argues that the Ninth Circuit has upheld "closely analogous" terms, including "promoting," *Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192, 1210-11 (9th Cir. 2013), "impair," *United States v. Kilbride*, 584 F.3d 1240, 1258 (9th Cir. 2009), and "obstruct or unreasonably interfere with," *Cameron v. Johnson*, 390 U.S. 611, 616 (1968). (PERB Opp. at 24:1-6.) In *Minority Television Project*, the Ninth Circuit correctly noted that "promoting a product or service" in the context of a statutory scheme aimed at television advertisements was not vague – everyone knows what a TV commercial hawking a product looks like. In *Kilbride*, the Ninth Circuit held that the word "impair," when used in the phrase email "header information . . . is materially falsified if it is altered or concealed in a manner that would impair the ability of a recipience of the message . . . to identify,

locate, or respond to a person who initiated" the message was not vague, at least insofar as it rejected the defendant's as-applied challenge that "impair" should be interpreted to mean "completely obstruct." "To impair, according to its plain meaning, merely means to decrease." 584 F.3d at 1258. And, in *Cameron*, the Supreme Court found that the phrase "obstruct or unreasonably interfere with free ingress or egress to and from any county courthouses" was not vague in the context of an anti-picketing law. At best, these cases recognize that certain statutory phrases, although potentially vague standing alone, are clear in context. There is no language in Section 3550 that helps to put "deter or discourage" into context.

b. Section 3550 is impermissibly vague as when it applies

Even if the State could constrict Plaintiffs' speech when they speak on behalf of the entities that they serve, Section 3550 is still unconstitutionally vague because it is unclear when Plaintiffs' speech would be attributable to their employers.

As the California Supreme Court acknowledged in *Boling*, the line between official action and private activities undertaken by public officials is not usually easy to discern. The Unions suggest a bright line: "[T]o the extent that Plaintiffs intend to speak in their official capacities on behalf of the government, the State can regulate that government speech . . . [but] 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." (Union Opp. at 19:9-20:3.) This logic more resembles a Mobius Strip than a bright line – when Plaintiffs express their views "during legislative or electoral debates," they are speaking as elected officials – *i.e.*, "in their official capacities." When exactly Plaintiffs would not be speaking in their official capacities is not explained, and cannot be explained. For its part, PERB argues that the test for when Plaintiffs speak on behalf of their employers is an "objective one" that depends on what the listeners would "reasonably believe" under the circumstances. (PERB Opp. at 27:6-26.) But, again, what listeners may

"reasonably believe" is both highly fact-intensive, and subjective, and dependent on credibility determinations or inferences drawn from the evidence. (*See supra* discussing *San Diego Unified School District*, PERB Decision No. 137 (June 19, 1980) and *See County of Riverside*, PERB Decision No. 2119-M (June 24, 2010).[7]

D. Plaintiffs Will Suffer Irreparable Harm

Plaintiffs will suffer irreparable harm if a preliminary injunction is not issued. When First Amendment rights have been infringed, and continue to be infringed, the element of irreparable injury is met. *See, e.g., Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019); *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). This is particularly true when the chilled speech is political speech, for which "timing is of the essence." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).[8]

Neither PERB nor the Unions seriously contends otherwise. Instead, both reassert their argument that, because Section 3550 references only the speech of "public employers," Plaintiffs do not face the threat of injury. This argument fails for all the reasons explained above. PERB also argues again that Plaintiffs have not established irreparable injury because they have not identified statements that they

---

[7] Defendants' reliance on *Cal. Teacher Ass'n v. State Bd. Of Educ.*, 271 F.3d 1141 (9th Cir. 2001) and *United States v. Williams*, 553 U.S. 285 (2008) is unavailing. Neither case addressed when an elected official's speech could be imputed to the public entity on whose governing board they sit. S*ee Cal. Teacher Ass'n*, 271 F.3d at 1152; *Williams*, 553 U.S. at 306.

[8] Citing *Doe v. Harris*, 772 F.3d 563 (9th Cir. 2014) and *DISH Network Corp. v. F.C.C.*, 653 F.3d 771 (9th Cir. 2011), PERB argues that the Court must still consider irreparable harm, the balance of the hardships, and the public interest in First Amendment cases. (PERB Opp. at 32:22-33:2.) Plaintiffs do not contend otherwise, but simply note that those three factors are nearly always satisfied when a plaintiff's First Amendment rights have been, and continue to be, infringed.

intend to make, but haven't, as result of Section 3550. (PERB Opp. at 33:19-26.) This is yet another repeat of PERB's argument (and the Unions' argument) that Plaintiffs have not adequately identified chilled statements. Finally, PERB argues that Plaintiffs' purported delay in filing suit suggests that there can be no irreparable harm. (PERB Opp. at 33:27-34:5, citing *Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015).) *Garcia* is a copyright case, where the district court noted that a copyright holder's delay in enforcing her rights "undercut" her "claim of irreparable harm." 786 F.3d at 746. When constitutional rights are at stake, especially First Amendment rights, delays in filing suit do not "undercut" a finding of irreparable harm because, as the Supreme Court has noted, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. *See also Legal Aid Soc. of Hawaii v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1418 (D. Haw. 1997) *preliminary injunction vacated on other grounds* (In a First Amendment case, the court found "that the delay" in bringing suit did "not undermine Plaintiffs' ability to establish irreparable harm.").

Finally, the Unions argue that Section 3550 is unlikely to cause irreparable harm because one Plaintiff (Barke) has continued to engage in speech regarding unions and unionization and three others (Anderson, Reardon, and Dohm) sit on boards that have adopted policies or agreed in collective bargaining agreements that their "districts" will not "deter or discourage" union membership. (Unions Opp. at 24:14-25:3.) As an initial matter, this argument is quite disingenuous with respect to Plaintiff Barke. The articles they submit (Dkt. No. 58-2 and 58-3) were published when he was not serving on a board or council of any public employer. (Dkt. No. 8, ¶¶ 2-3.) In any event, the argument applies to only four of the Plaintiffs, not all seven, and certainly not all elected officials in California; the argument thus provides no grounds to deny the preliminary injunction given that irreparable harm will certainly flow to the other Plaintiffs and other un-named elected officials. In addition, that Barke has spoken and has yet had a Section 3550 claim levelled at the

board he sits on is no comfort that no such charges could be leveled against his school district, and therefore the threat of injury and irreparable harm remains. Further, that some speech has been made does not mean that all speech is being made; in fact, Barke plainly asserts that his speech has been chilled. *See, e.g.*, Barke Decl. ¶¶ 8, 11, 13, 16, 17. As to Anderson, Reardon, and Dohm, it is well-established that compliance with an unconstitutional law is no barrier to challenging it. *San Francisco County Democratic Cent. Committee v. Eu*, 826 F.2d 814, 822-23 (9th Cir. 1987) (rejecting argument that because party had agreed to comply with the law, he could not challenge the statute's unconstitutionality).

E. The Remaining Factors Favor Entry Of A Preliminary Injunction

When a plaintiff's First Amendment right to speak has been infringed, the balance of the hardships and the public interest favor the entry of a preliminary injunction. *Am. Beverage Ass'n v. City of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019). As the Ninth Circuit noted in *Am. Beverage*, when plaintiffs "raise[] serious First Amendment questions," it "compels a finding that the balance of hardships tips sharply in [plaintiffs'] favor," and the "public interest" favors entry of a preliminary injunction because "it is always in the public interest to prevent the violation of a party's constitutional rights." 916 F.3d at 758 (internal citations omitted).

Defendants do not seriously contest these factors, but instead repeat their argument that Section 3550 does not infringe Plaintiffs' First Amendment rights to speak. That argument should be rejected for the reasons explained. Further, PERB and the Unions exaggerate the purported hardship that they will endure if a preliminary injunction is issued. Section 3550 would still remain enforceable, just not against speech by Plaintiffs and other elected officials. The rest of the statutory scheme governing fair labor practices would also remain in force.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the Motion.

Dated: June 26, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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

DAVID A. SCHWARZ
JAY T. RAMSEY
ALEXANDRA M. JACKSON

LAW OFFICE OF MARK W. BUCHER
Mark William Bucher

CENTER FOR INDIVIDUAL RIGHTS
Michael E. Rosman

Attornevs for Plaintiffs