UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

VANESSA E. CARBONELL; **ROBERTO A. WHATTS OSORIO;** **ELBA Y. COLÓN NERY;** **BILLY NIEVES HERNÁNDEZ;** **NÉLIDA ÁLVAREZ FEBUS;** **LINDA DUMONT GUZMÁN;** **SANDRA QUIÑONES PINTO;** **YOMARYS ORTIZ GONZÁLEZ;** **CARMEN BERLINGERI PABÓN;** **MERAB ORTIZ RIVERA;** **JANET CRUZ BERRIOS,** individually and as representatives of the requested class, **Plaintiffs,** **v.** **ANTONIO LÓPEZ FIGUEROA,** in his official capacity as Commissioner of the Puerto Rico Police Bureau; **MICHELLE MOURE**, in her official capacity as Human Resources Director of the Puerto Rico Police Bureau; **UNION OF ORGANIZED CIVILIAN EMPLOYEES,** **Defendants.**	**CIVIL NO. 22-1236 (WGY)** **Constitutional Violation Action (42 U.S.C. § 1983), Declaratory Judgment, Injunctive Relief, Compensatory, Nominal, and Punitive Damages. Jury Trial Demanded.**

REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Come now, Plaintiffs Vanessa E. Carbonell ("Carbonell"), Roberto A. Whatts Osorio ("Whatts"), Elba Y. Colón Nery ("Colón"), Billy Nieves Hernández ("Nieves"), Nélida Álvarez Febus ("Álvarez"), Linda Dumont Guzmán ("Dumont"), Sandra Quiñones Pinto ("Quiñones"), Yomarys Ortiz González ("Ortiz González"), Carmen Berlingeri Pabón ("Berlingeri"), Merab Ortiz Rivera ("Ortiz Rivera"), and Janet Cruz Berrios ("Cruz") (collectively, "Plaintiffs"), on their own behalf and that of the class they seek to represent, through the undersigned counsel, and

pursuant to Civil Local Rule 7(c), reply to Defendants Antonio López Figueroa's ("López") and Michelle Moure's ("Moure") Opposition to Plaintiffs' Motion for Summary Judgment, as follows:

I. Introduction

On January 19, 2024, Plaintiffs filed a Motion for Summary Judgment against López and Moure in their official capacities as Commissioner and Human Resources Director of the Puerto Rico Police Bureau ("PRPB"), respectively (Dkt. 107). On March 13, 2024, López and Moure filed an "Opposition to Plaintiffs' Motion for Summary Judgment" (Dkt. 134).[1] PRPB [2] thinks it has no duty to foster equal treatment between members of Defendant Union of Organized Civilian Employees ("the Union") and nonmembers when it comes to taxpayer-funded employment benefits. PRPB not only professes this belief—it now brazenly admits to practicing what it preaches: PRPB discriminates against nonunion employees solely for their decision to decline Union association—unabashedly so.[3] It does so by awarding Union nonmembers a reduced amount of taxpayer-funded benefits for procuring health insurance. But as radical as the concept of equal treatment might seem to PRPB, for decades that concept has been enshrined as a constitutional right of freedom of association for public sector employees.

PRPB still tries to deny the existence of this constitutional right by arguing the U.S. Supreme Court's ruling in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018) did not prohibit public sector employers from granting additional taxpayer-funded employment benefits to employees for maintaining union membership, and that the resulting unequal treatment between

[1] López and Moure embedded an untimely motion of summary judgment within their Opposition. *See* Dkt. 134 at 4-5. *See also* Motion to Strike at Dkt. 137. This reply only addresses arguments in PRPB's Opposition to Plaintiffs' Motion for Summary Judgment.

[2] López and Moure will be collectively referred to as "PRPB" for purposes of this reply brief.

[3] PRPB admitted to all of Plaintiffs' 264 Statements of Uncontested Material Facts. *See* Opp'n at 4. This includes admitting to slashing Plaintiffs' health insurance employer contribution solely for disaffiliating from the Union. *See* Statements of Uncontested Material Facts ("SUMFs") 154, 162, 168, 172, 176, 180, 184, 187, 190 (Dkt. 107-2). PRPB even admits subjecting union nonmembers to worse treatment than union members, simply for dropping their union membership. *See* SUMF 164 (Dkt. 107-2).

union members and nonmembers is permissible. *See* PRPB's Opposition ("Opp'n") at 3-4. PRPB then cites a slew of post-*Janus* cases to argue that if *Janus* does not apply to union nonmembers being forced to continue paying dues because of agreements they had made as union members, it also cannot apply to employer discrimination between union members and nonmembers in awarding employment benefits based solely on an employee's union membership status.[4] Opp'n at 8. PRPB even theorizes that Plaintiffs' claims for equal treatment without regard to union membership status somehow rely on an interpretation of *Janus* that is "not supported by its text nor by subsequent case law." Opp'n at 8. But PRPB's arguments are unmoored from reason and legal precedent.

II. Argument

A. *The constitutional protections prohibiting coercion and discrimination against public sector nonunion employees pre-date Janus.*

Plaintiffs' claims do not depend on any interpretation of *Janus* nor do they have anything to do with any rights first recognized there. *Janus* simply applied preexisting bedrock constitutional principles to the specific facts and issues raised therein. The associational right of public sector employees to freely decline union membership without fear of government discrimination has been recognized *long before* the *Janus* holding. Six years before *Janus*, the U.S. Supreme Court specifically recognized First Amendment protections for public-sector employees that do not want to associate with labor unions. *See Knox v. SEIU Local 1000*, 567 U.S. 298, 309 (2012) ("[T]he ability of like-minded individuals to associate for the purpose of expressing commonly-held views may not be curtailed."); *cf. Roberts v. United States Jaycees*, 568 U.S. 609,

[4] PRPB argues that the U.S. Supreme Court "explicitly limited the reach of *Janus* by noting '[s]tates can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions.'" Opp'n at 6 (quotation omitted). Puerto Rico's labor-relations system expressly forbids government agencies from "coerc[ing] their employees "with regard to their decision" to decline joining a union. *See* 3 *P.R. Laws Ann.* 1452b. Upholding the employees' First Amendment rights here does not change Puerto Rico's labor-relations system.

623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate."); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal*., 475 U.S. 1, 12 (1986) ("[F]orced associations that burden protected speech are impermissible.") *Janus* is simply the latest progeny in a long line of cases finding it unconstitutional to coerce individuals into supporting views they find objectionable or forcing them into association with groups expressing those views. *See Janus,* 138 S. Ct. at 2463 ("Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned."); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[F]reedom of thought . . . includes both the right to speak freely and the right to refrain from speaking at all.") *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 645 (1943) (same). *Janus* only built on the already settled law that public employers' discrimination against employees for not being members of a union is unconstitutional.

PRPB's method of discrimination and coercion involves rewarding Union membership with a larger employer contribution benefit for procuring health insurance. This coercive practice, from a commonsense standpoint, results in employees choosing to associate with and support Union views they find objectionable in order to acquire better healthcare affordability for their families. *See Brannian v. City of San Diego,* 364 F.Supp. 2d 1187, 1195 (S.D. Cal. 2005) (explaining that "[f]rom a commonsense standpoint, subjecting city employees to 'an inescapable choice' of either joining a union or losing the ability to enroll in an insurance plan 'plainly constituted coercion to join the union.'") The "inescapable choice" here is to either join the Union or lose the additional $25 monthly employer health insurance contribution.

Brannian involved a starkly similar situation to the one here, as union members were the only ones allowed to use employer-provided funds to enroll in a dental health plan. Coercing employees to join and support a union by conditioning a taxpayer-funded employer benefit to

union membership, as here, has long been an unconstitutional curtailment of individuals' First Amendment associational rights. *See Brannian,* 364 F. Supp. 2d at 1194-1195 (limiting eligibility for a dental plan only to union members violated nonunion employees' constitutional rights). "Discriminatory conduct, such as that practiced in [*Brannian*, where only union members received retroactive wages and vacation benefits], is inherently conducive to increased union membership. In this respect, there can be little doubt that it encourages union membership, by increasing the number of workers who would like to join and/or their quantum of desire." *See Brannian*, 364 F. Supp. 2d at 1195 (citing *NLRB v. Gaynor News Co*., 197 F.2d 719, 722 (2d Cir. 1952)). The *Brannian* court found that limiting an employment benefit to union members constituted unlawful coercion in violation of the plaintiffs' First Amendment rights.[5] *See Brannian*, 364 F. Supp. 2d at 1197. Simply put, the First Amendment requires government employers to treat members and nonmembers equally in terms of the taxpayer-funded employment benefits they offer. The same finding is required here.

B. *Later holdings interpreting the applicability of Janus to union members' ability to cancel dues payments obligations have no bearing on this matter.*

PRPB cites a series of holdings decided in the wake of *Janus* to argue that "the ruling in *Janus* was limited to the constitutionality of agency fees and has not been extended to terms and conditions of employment other than that specific one." Opp'n at 6-7. PRPB would have the court believe that Plaintiffs claims should be dismissed just because *Janus* did not address specifically the constitutionality of offering employees different employer-sponsored benefits based on union membership status alone. Their reading of *Janus* is wrong, and irrelevant even if true.

[5] *Brannian* shows that longstanding First Amendment principles require a government employer to treat union members and nonmembers equally when it comes to government-sponsored employment benefits. *Brannian* was decided 13 years before *Janus*, further proving this First Amendment principle did not begin with *Janus*. PRPB, tellingly, does not even address or acknowledge *Brannian* because to do so would destroy the stilted and disingenuous view of *Janus* they presented to the court.

The holdings PRPB cites consider the First Amendment implications—or lack thereof—of employees trying to end their financial commitments to unions they had first made upon joining. None of these cases apply. This matter has nothing to do with employees' obligations to pay membership dues or fees to a union. Nor does it involve employee agreement with or consent to receive reduced employer-sponsored health insurance benefits. Instead, the rulings PRPB references were about agreements employees made when they chose to become union members regarding the duration of their consent to pay union dues through payroll deductions. *See Belgau v. Inslee*, 975 F.3d 940, 950 (9th Cir. 2020) (explaining employees faced no compulsion to pay union dues because they had voluntarily authorized the state government to deduct dues from their wages for an irrevocable one-year period); *Creed v. Alaska State Employees Association*, 472 F.Supp. 3d 518, (D. Alaska 2020) (finding that payroll deduction authorizations employees had signed created contracts between them and the union, and that the First Amendment did not confer a constitutional right to disregard promises made as part of those contracts); *Durst v. Oregon Education Association*, 450 F.Supp.3d 1085, 1090-1091 (D. Or. 2020) (declining to find a constitutional violation because employees voluntarily joined the union and signed dues deduction authorization cards containing a commitment to pay union dues for one academic year); *Bennet v. Council 31 of the AFSCME*, 991 F.3d 724, 732-733 (7th Cir. 2021) (no First Amendment violation because the plaintiff had voluntarily signed a dues deduction authorization form irrevocable for a certain period); *Ramos-Ramos v. Haddock*, 2023 WL 6318066, at *13 (D.P.R. 2023) (concluding that the plaintiffs, prior to resigning from a union, had agreed to become union members and pay its dues).

Unlike cases involving union dues deduction authorization agreements, Plaintiffs never agreed to a reduced employer contribution for health insurance if they disaffiliated from the Union.

The holdings PRPB cites concern contractual relationships between unions and their members-employees for payments of membership dues—not between government employers and its employees concerning eligibility of taxpayer-funded employment benefits. Rather than being held to the terms of a *voluntary* dues deduction authorization for employee payroll deductions in favor of a union, Plaintiffs are *involuntarily* being subjected to worse treatment solely for declining Union membership.

PRPB, when discussing *Ramos-Ramos,* brazenly says the "Court declined to invalidate a Collective Bargaining Agreement which provided different health plans for union members and nonmembers." Opp'n at 7. PRPB then tries to compare the unequal treatment in employer benefits here and the supposedly unequal treatment in *Ramos-Ramos* as to health insurance plan offerings, proclaiming *Ramos-Ramos* "clearly undermines Plaintiffs' constitutional claims for equal treatment. . ." Opp'n at 7. But PRPB misleads the court regarding the basic facts and controversies in *Ramos-Ramos*. The sections of the collective bargaining agreement that the *Ramos-Ramos* plaintiffs had asked the court to invalidate dealt only with mandatory union membership and automatic dues deductions—those sections had nothing to do with health insurance nor with any employment benefit, much less any discrimination between union members and nonmembers in benefits. *See Ramos-Ramos*, 2023 WL 6318066, at *8. Similarly, PRPB's plea not to have the collective bargaining agreement ("CBA")[6] here so "cavalierly [ ] pushed aside" is less than candid. Opp'n at 8. Plaintiffs are not requesting that any part of the CBA be struck down.

The true story of *Ramos-Ramos,* as far *as* employer benefits are concerned, is that the employer defendant there offered all employees the *option* of enrolling in an employer-provided health insurance plan, irrespective of union membership status. *Ramos-Ramos*, 2023 WL 6318066,

[6] Only the collective bargaining agreement pertaining to this matter is abbreviated as "CBA."

at *7. Any employee who enrolled in the union, meanwhile, had the *option* of enrolling in a union-provided health insurance plan as a benefit of union membership in which the public employer had no involvement. *Id.* at *8. Unlike union-funded benefits resulting from union membership, PRPB's benefit of awarding an additional contribution for procuring health insurance is an employer-sponsored benefit funded with money from the public fisc. PRPB diverts this taxpayer money to employees that choose to associate with the Union while diverting it away from employees who abstain from Union association. PRPB cannot lean on *Ramos-Ramos* to justify its discrimination against nonunion employees.

C. *PRPB has the power to change the way it awards its contribution benefits—and has done so in the past.*

While PRPB admits to the discriminatory policy against nonunion employees, it professes a powerlessness to enact any change rectifying the unequal treatment. ". . . [T]his difference [in employer contribution benefits] does not constitute intentional discrimination which would entitle Plaintiffs to any kind of legal relief, because it was beyond the powers of the Police Bureau to take remedial action under the Collective Bargaining Agreement to bring about parity in benefits . . ." Opp'n at 10. PRPB also suggests that the CBA establishes the unequal treatment between union and nonunion employees and that PRPB cannot stop it. "[It] was beyond the powers of the Police Bureau to take remedial action under the Collective Bargaining Agreement to bring about parity in benefits . . ." *Id.* In other words, PRPB says its hands are tied and it cannot help its nonunion employees even if now wanted to. But the reality is much different.

The CBA between PRPB and the Union does not state that the additional $25 employer contribution is reserved only to Union members. Rather, it provides for the additional contribution

to be awarded to "members of the Appropriate *Unit*" (emphasis added). SUMF 65.[7] The *appropriate unit* consists of civilian employees, irrespective of union membership status. SUMF 68. This includes Plaintiffs and class members, as all Plaintiffs received the additional $25 employer contribution prior to disaffiliating themselves from the Union in the wake of *Janus*. SUMFs 84, 91, 96, 101, 109, 114, 125, 131, 137, 141, 147. On this point, it is worth examining one employee's experience to show how the employer contribution was awarded before *Janus*. As the only named plaintiff never to have been a Union member, Plaintiff Nieves used to receive the additional $25 monthly employer contribution prior to communicating to the Union his desire to cease nonmember Union fee payments. SUMFs 100, 101, 104. The terms of the CBA made him eligible for this benefit as a bargaining unit member despite not being affiliated to the Union. Any suggestion from PRPB that the CBA excludes nonunion employees from the $25 monthly employer contribution contradicts the CBA's own wording and PRPB's practice before *Janus*.

A comparison of PRPB's past and current actions shows that it is anything but powerless to adopt a policy of equal or unequal treatment in benefits between union and nonunion employees. PRPB, after all, used to award the $25 employer contribution to both union and nonunion Plaintiffs before they withdrew support for the Union. SUMFs 84, 91, 96, 101, 109, 114, 125, 131, 137, 141, 147. PRPB then changed its policy in the wake of *Janus* to award the $25 monthly contribution to Union affiliates only, stripping the benefit from employees that chose to disaffiliate from the Union. SUMFs 85, 86, 92, 93, 97, 98, 104, 106, 110, 111, 115, 117, 126, 128, 132, 134, 138, 142, 144, 148, 150, 259. PRPB's claim of any remedial action being "beyond [its] powers" is nothing short of disingenuous. If PRPB had the power to implement a new post-*Janus* policy of unequal treatment and discrimination against nonunion employees in direct contradiction to the specific

[7] PRPB admits to this fact, showing that the CBA provides for the entire bargaining unit to receive the additional $25 monthly contribution. Opp'n at 4.

terms of the CBA, it is now capable of reversing such practice. But it refuses to do so.

WHEREFORE, for these reasons, Plaintiffs' Motion for Summary Judgment should be granted and PRPB ordered to protect the constitutional rights of all its civilian employees.

CERTIFICATE OF SERVICE

It is hereby certified that the undersigned attorney electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties and attorneys of record. It is further certified that the undersigned attorney served Defendant Union of Organized Civilian Employees via regular mail at: 78 Calle Padial, Caguas, PR 00725.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 3rd day of April, 2024.

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