UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

VANESSA E. CARBONELL, et al., individually and as representatives of the requested class, **Plaintiffs,** **v.** **ANTONIO LÓPEZ FIGUEROA, et al.,** **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.**

RESPONSE IN OPPOSITION TO
DEFENDANTS LÓPEZ'S & MULERO'S MOTION TO DISMISS

TO THE HONORABLE COURT:

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 classes they seek to represent, through the undersigned counsel, and respectfully state and pray as follows:

I. Introduction

Plaintiffs and class members filed an Amended Class Action Complaint (Dkt. 22) on August 18, 2022 under 42 U.S.C. § 1983 invoking the First and Fourteenth Amendment protections of the United States Constitution against Defendants Antonio López Figueroa ("López"), in his personal capacity and official capacity as Commissioner of the Puerto Rico Police Bureau ("PRPB"), Jojanie Mulero Andino ("Mulero") in her personal capacity and official

capacity as Human Resources Director of PRPB, and the Union of Organized Civilian Employees ("the Union") (collectively, "Defendants"). PRPB employs Plaintiffs and class members as civilian workers, who are part of a bargaining unit the Union exclusively represents. Under the Public Health Benefits Act, 3 L.P.R.A. § 729(h), PRPB provides its civilian employees with a monthly contribution of $100 to spend on a health insurance plan of their choosing. The same statute also allows PRPB to award an additional contribution on top of the $100 per month.

Before the U.S. Supreme Court's ruling in *Janus v. AFSCME Council 31*, 138 S. Ct. 2448 (2018), PRPB awarded its civilian employees, exclusively represented by the Union, an additional employer contribution of $25 for purchasing health insurance.[1] Plaintiffs and class members, at different times since *Janus*, exercised their First Amendment rights and communicated to PRPB their objection to membership in the Union and to payroll deductions in its favor. After informing the Union of Plaintiffs' and class members' demands, the Union demanded that PRPB suspend its additional employer contribution in retribution for Plaintiffs and class members dropping their membership and financial support of the Union. PRPB complied, resulting in reduced health insurance benefits for Plaintiffs and class members due to their nonmembership in the Union. PRPB's and the Union's concerted practice of only awarding the additional employer contribution to union members constitutes unlawful coercion to join the Union, penalizing anyone who exercises their First Amendment right not to be part of it or assist it.

On October 18, 2022, Defendants López and Mulero, in their personal capacities, moved to dismiss Plaintiffs' Amended Complaint under Fed. R. Civ. P. 12(b)(6) (Dkt. 57). They allege

[1] On June 27, 2018, the U.S. Supreme Court held it unconstitutional for public-sector unions and employers to collect/deduct union dues or fees from public-sector employees without their affirmative consent and knowing waiver of their First Amendment rights. *Janus v. AFSCME Council 31*, 138 S. Ct. 2448, 2486 (2018).

(1) that Plaintiffs failed to state a Section 1983 claim against them in their personal capacities, and (2) that they are both entitled to qualified immunity. The instant response follows.[2]

II. Applicable Pleading Standard

When ruling on a motion to dismiss for failure to state a claim, a district court "must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in the plaintiff's favor, and determine whether the complaint, so read, limns facts sufficient to justify recovery on any cognizable theory." *Rivera v. Centro Medico de Turabo, Inc*., 575 F.3d 10, 15 (1st Cir. 2009) (citing *LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 508 (1st Cir. 1998)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 550 (2007)). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . ." *Twombly*, 550 U.S. at 555 (internal citations omitted). "[A] well-pleaded complaint may proceed even if ... a recovery is very remote and unlikely." *Ocasio-Hernandez,* 640 F.3d at 13 (citing *Twombly*, 550 U.S. at 556) (internal quotation marks omitted). Thus, "[t]he relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw from the facts alleged in the complaint." *Id.*

III. Defendants' Conduct Violates the Constitution.

A. *The Constitution protects public sector employees' right to abstain from union membership and dues payments without the penalty of discriminatory terms of employment.*

[2] López's and Mulero's Motion to Dismiss (Docket 57) appears to be filed exclusively in their personal capacities, while their initial Motion to Dismiss (Docket 33) appears to have been filed only in their official capacities. The instant Response in Opposition addresses the arguments presented in the Motion to Dismiss at Docket 57.

The Amended Complaint pleads factual conduct that shows Defendants' liability and right to the relief they requested. López and Mulero stripped away the additional employment contribution of $25 per month from Plaintiffs and class members—at the Union's request—as and after they individually withdrew their union membership and objected to union payroll deductions in the wake of *Janus*' recognition of public employees First Amendment right to reject union membership and subsidization. Am. Compl. at paras. 13, 14. Those who remained dues-paying members, on the other hand, continued receiving that additional employer contribution. Am. Compl. para. 18.

Defendants keep withholding the additional employer contribution from Plaintiffs and class members solely based on their nonmembership in the Union. Am. Compl. para. 19. Providing this extra money exclusively to union members is an incentive for nonmembers to join the Union to better afford healthcare, purchase superior health insurance, or both, which the Union admits. Am. Compl. para. 105. The ensuing coercion Plaintiffs and class members face to become full-fledged dues-paying members of the Union violates their First Amendment right of non-association and of being free from subsidizing a labor organization. Am. Compl. para. 7; *Janus*, 138 S. Ct. at 2486.

López and Mulero, however, contend that Plaintiffs and class members do not have a valid First Amendment claim because they "rely exclusively" on *Janus*. Mot. to Dismiss at 7 (Dkt. 57). They seem to argue that the validity of the unlawful coercion claim depends on an interpretation of the Supreme Court's ruling in *Janus*. But they miss the mark. This case is about retribution that occurred directly because of Plaintiffs' and class members' specific exercise of their *Janus* First Amendment rights of non-association with the Union. Am. Compl. paras. 11, 12, 13, 14, 105. The constitutional rights Plaintiffs and class members claim *predate* any rights recognized in *Janus*.

Two distinct lines of cases have developed involving public sector employees' First Amendment claims. The "free speech" category of cases—which the Union alludes to—involve claims of public sector employees targeted for retaliation for speaking out on matters of public concern. *See Pickering v. Bd. of Educ*., 391 U.S. 563 (1968). The Supreme Court held that line of cases does not apply when *Janus* First Amendment rights are being exercised as here. *See Janus,* 138 S. Ct. at 2473 (rejecting the *Pickering* framework where the government compels speech). Even if *Janus* had not already decided this issue, the second category of cases—known as "patronage" cases—involving retaliation of public sector employees based on their political association control this matter. *See Elrod v. Burns*, 427 U.S. 347 (1976).[3]

The Supreme Court in *Elrod* held that a public sector employee could not be dismissed from employment because of political party affiliation. *Elrod*, 427 U.S. at 362-63. The Court stated that conditioning public employment on political affiliation could survive a constitutional challenge only if it furthered a vital government interest by a means least restrictive of First Amendment freedoms. *Id.* It held that party affiliation would be a permissible basis for discrimination only in government positions involving policymaking. *Id.* at 372. The Supreme Court later clarified that the ultimate question was not whether the position involved policymaking, but "whether the [public employer] can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The *Branti* court placed on the public employer the burden of showing that the discrimination is necessary to ensure effective performance of the specific employee position involved. *Id.*

[3] Collective bargaining has "powerful political and civic consequences", resulting in First Amendment violations when employees are compelled to subsidize unions. *Janus*, 138 S. Ct. at 2464 (internal citations omitted).

A public employee's right to free association recognized in *Elrod* and *Branti* is not limited to political associations. It also protects the right to associate with, or refrain from associating with, a labor union. *Janus*, 138 S. Ct. at 2484 (explaining that requiring support of a political party and forced subsidization of union speech are just as unconstitutional as patronage). "The right to eschew association for expressive purposes is likewise protected." *Id.* at 2463. "[I]n the public sector, both collective bargaining and political advocacy and lobbying are directed at the government," and bargaining subjects, "such as wages, pensions, and benefits are important political issues." *Harris v. Quinn*, 573 U.S. 616, 636 (2014); *Knox v. SEIU Local 1000*, 567 U.S. 298, 310-11 (explaining the "powerful political and civic consequences" of a compulsory fee scheme). The requirement that Plaintiffs and class members, in order to obtain the additional employer contribution for health insurance must first join or subsidize the Union, is synonymous with requiring monetary contributions to political candidates the Union supports.

The adverse action necessary to construct a claim for patronage discrimination includes any disparate treatment in terms of employment—even insignificant disparities—when inflicted to punish employees for the exercise of a protected right of association and which cannot be justified by a compelling governmental interest. *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990); *O'Hare Truck Serv. v. City of Northlake*, 518 U.S. 712, 717 (1996) (rejecting a discriminatory award of government contract based on union activity, "if the government could deny *a benefit* to a person because of his constitutionally protected speech or *associations*, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which [it] could not command directly. Such interference with constitutional rights is impermissible.") (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (internal quotes omitted) (emphasis added); *Elrod v. Burns*, 427 U.S. 347, 359 (1976) (same).

The disparate treatment here of awarding fewer healthcare benefits to nonunion employees for not associating with the Union results in a *Janus* "patronage" discrimination claim. Defendants are penalizing Plaintiffs' and class members' exercise of their *Janus* First Amendment right not to be part of the Union or pay its dues. This is exactly like the patronage discrimination the Supreme Court has denounced. *See* cases cited above p. 5-6.

B. *Denying health insurance benefits based on union membership status violates the First Amendment.*

The government employer in *Brannian v. City of San Diego*, 364 F. Supp. 2d 1187, 1194-1195 (S.D. Cal. 2005) provided its employees with an annual lump-sum allocation, known as "flex funds", to spend on various insurance options. *See Brannian*, 364 F. Supp. 2d at 1189. It required employees to choose a health and life insurance plan with their flex funds, allowing them to use any leftover funds on other benefits, such as more insurance plans or, rather, having any excess funds regarded as ordinary taxable income. *Id.*

The problem arose when the union and employer in *Brannian* barred nonunion employees from enrolling in an optional dental plan. *Id.* Union members were the only ones allowed to use the employer-provided flex funds to enroll in the dental plan, resulting in the *Brannian* court ruling that both the government employer and union violated nonunion employees' constitutional rights by limiting dental plan access to union members only. *Id.* This situation starkly resembles the one here, as access to the full health insurance contribution or benefit is reserved for union members.

But as repugnant to the First Amendment as the facts in *Brannian* were, the situation here is even worse. While the *Brannian* nonunion employees still ended up with the same amount of unused flex funds after being unable to use them for purchasing the dental plan, Plaintiffs here never got any additional healthcare contribution from their employer to begin with. If it is unconstitutional to provide all employees with the same cash benefit that can result in extra income

due to nonmembers' inability to use it for buying a dental plan, outright denying a healthcare cash benefit to nonmembers also violates the First Amendment.

"Discriminatory conduct, such as that practiced here [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)). But union membership by itself is not the only thing this unlawful coercion encourages. The practical effect of an increased membership in the Union is more dues extracted from employee's wages flowing into the Union's coffers and ultimately into political matters. "This amounts to more that coercing union membership; it constitutes coercion to subsidize the union itself." *Brannian*, 364 F. Supp. 2d at 1197.

This coercion makes clear that the constitutional right under siege here is of the highest order: Individuals' First Amendment right not to subsidize speech they do not wish to support. "Compelling individuals to mouth support for views they find objectionable violates . . . [a] cardinal constitutional command." *Janus*, 138 S. Ct. at 2463. "As Jefferson famously put it, 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.'" *Id.* at 2464. Pressuring employees to join the Union and pay its membership dues has the unlawful purpose of endangering workers' right not to subsidize the Union, in direct violation of the First Amendment. The U.S. Constitution does not tolerate such extreme interference in employees' First Amendment rights.

C. *Discrimination in public employment based on union membership is subject to strict scrutiny.*

Strict scrutiny is the standard of review when benefits of public employment are conditioned on organizational affiliation.[4] The Supreme Court has employed this strict scrutiny standard in cases involving compelled speech and association. *See Janus*, 138 S. Ct. at 2483 (internal citations omitted); *See also Clingman v. Beaver,* 544 U.S. 581, 586 (2005).[5] Under strict scrutiny, the burden on associational rights must be narrowly tailored to serve a compelling state interest. *See id.* The burden of proof is on the defendant [public employer] to show an overriding interest validating an encroachment on an employee's First Amendment rights. *See Elrod*, 427 U.S. at 368. But López and Mulero have articulated no government interest—compelling or otherwise—for increasing the membership rolls of the Union without offending the constitutional right of non-association. Even worse, they have not made any serious argument for why denying a health insurance benefit to employees based only on their nonmembership in the Union is narrowly tailored to achieve any governmental interest. There are lawful ways for unions to encourage membership. But discriminating against nonmembers in employment benefits is not one of them.

The political nature of bargaining with the government dictates that discrimination in benefits due to an exercise of First Amendment rights must undergo the highest form of scrutiny.

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[4] Strict scrutiny has been applied in cases involving patronage practices. *See McCloud v. Testa*, 97. F.3d 1536, 1542 (6th Cir. 1996) ("[T]he government's proffered justifications for patronage must satisfy strict scrutiny."; *Wren v. Jones*, 635 F.2d 1277, 1286 (7th Cir. 1980) ("[U]nder *Branti* and *Elrod*, if political association appears to be the sole basis for dismissal, then a strict scrutiny analysis should be applied.")

[5] The *Janus* court explained "exacting scrutiny" was a lesser level of scrutiny than strict but then defined it the same way strict scrutiny has historically been defined: For an action to be constitutional under an exacting scrutiny standard, it "must serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *See Janus*, 138 S. Ct. at 2464-2465 (internal quotation marks and citations omitted); *Compare Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008) (a government measure that "severely limits associational rights [ ] is subject to strict scrutiny and will be upheld only if it is 'narrowly tailored to serve a compelling state interest.'") (internal citation omitted). The *Janus* court also noted exacting scrutiny had been used in commercial speech cases and questioned whether that test provides sufficient protection for free speech rights. *See Janus*, 138 S. Ct. at 2464-2465. Given the Court's definition of exacting scrutiny, strict scrutiny must be applied here, given that "minimal scrutiny" for commercial speech is "foreign" to the Court's "free-speech jurisprudence." *Id*. at 2465.

Discriminating against Plaintiffs and class members for exercising their First Amendment right not to be part of the Union is a practice that fails strict scrutiny. The purpose of this discriminatory policy is as obvious as it is illegitimate: To coerce union membership by penalizing nonmembership. Neither López nor Mulero have any compelling interest in ensuring that nonunion employees receive less money to cover health insurance costs.

D. *Both López and Mulero are personally involved in discriminating against Plaintiffs on the basis of their status as nonmembers of the Union.*

López and Mulero argue they are not liable in their personal capacity for the First Amendment violations here because they allegedly are not personally involved in the decision to provide less health insurance benefits to Plaintiffs due to their status as nonmembers of the Union. Mot. to Dismiss at 7-10. They also claim that the Amended Complaint should be dismissed because "it has no descriptions of specific decisions or specific actions" and even needs "specific dates regarding the events on which [the] Amended complaint is grounded on . . ." at the pleading stage. Mot. to Dismiss at 9. López and Mulero even argue that the Amended Complaint needs to allege a "specific order to execute" the discriminatory acts to survive a motion to dismiss. Mot. to Dismiss at 10.[6] López and Mulero rely on *Hegarty v. Somerset County*, 53 F.3d 1367, 1379-80 (1st Cir. 1995) to argue that Plaintiffs need to show "proof" that the conduct here led to the constitutional violation. Mot. to Dismiss at 9. But *Hagerty* is not applicable because it relates to a denial of a motion for summary judgment. *See id.* at 1381. This "proof" standard applies at the summary judgment stage—not at the motion to dismiss stage. The level of specificity and evidence López and Mulero demand is not needed at this early pleading stage.

[6] López and Mulero try to downplay their personal involvement by appearing to argue that any alleged First Amendment violation took place only in their official capacities "because of their positions . . ." Am. Compl. at 10. But the phrase "acting in their official capacities" is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Hafer v. Melo*, 502 U.S. 21, 26 (1991).

Plaintiffs' Amended Complaint does provide enough allegations pleading López's and Mulero's personal involvement in the constitutional violations. Mulero has had direct or constructive knowledge of the practice of withholding the additional employer contribution of $25 per month from those employees who have objected to membership in the Union and to payroll deductions in its favor, and she keeps fulfilling the Union's request of withholding this money. Am. Compl. para. 40. Mulero also failed to respond to Plaintiff Carbonell's written demand that the additional employment contribution be restored as an employment benefit. Am. Compl. para. 47. López, on the other hand, is responsible for the policies and practices of PRPB, including the decision to suspend the additional employment contribution to those employees exercising their First Amendment right not to subsidize a union. Am. Compl. para. 39. López has allowed the denial of this employment benefit to go unabated and has not acted to remedy the unconstitutional practice. Am. Compl. para. 100.

These allegations properly plead that both López and Mulero have caused the First Amendment deprivations in their personal capacity. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right.") (emphasis in original). Neither detailed factual allegations nor evidentiary-like factual showings are required of pleaders. *See Cortés-Ramos v. Martin-Morales*, 956 F.3d 36, 41 (1st Cir. 2020) ("at the pleadings stage, the plaintiff need not actually prove the elements of his claim but rather need only sufficiently allege facts that show the claim is plausible on its face.") *See also Harbourt v. PPE Casino Resorts Maryland, LLC*, 820 F.3d 655, 658 (4th Cir. 2016) (pleading need not "forecast" evidence). López's and Mulero's personal involvement is well pleaded in the Amended Complaint as there is no need to forecast evidence at this early stage by providing proof of specific decisions

or orders given, dates, and so on. López's and Mulero's effort to have the court dismiss any allegation of personal involvement should be rejected.

IV. Neither López nor Mulero are entitled to qualified immunity.

López and Mulero argue they are entitled to qualified immunity, purportedly shielding them from suit and liability for monetary damages under Section 1983. Mot. to Dismiss at 12-15. But they are not. López and Mulero, as discussed below, engaged in conduct that violated clearly established constitutional rights, doing so in a manner that any reasonable official in their positions would have understood to be unconstitutional.

The qualified immunity López and Mulero claim protect public officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (internal quotation marks omitted); *See also Cecort Realty Dev., Inc. v. Llompart-Zeno*, 100 F. Supp. 3d 145, 170 (D.P.R. 2015) (same). It provides "immunity from suit and not a mere defense to liability." *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009) (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Courts conduct a two-part test when weighing a qualified immunity defense:

> In order to determine whether qualified immunity is appropriate, a court must identify: (1) whether the constitutional right asserted by the plaintiff was "clearly established" at the time of the alleged violation; and (2) whether an objectively reasonable official in the same circumstances would have understood that his or her conduct violated that right.

Velazquez v. Mun. Gov't of Cataño, 91 F. Supp. 3d 176, 198 (D.P.R. 2015) (quoting *Fletcher v. Town of Clinton*, 196 F.3d 41, 48 (1st Cir.1999))

The second step is satisfied if the right violated was "clearly established," or more specifically, it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ortiz-Resto v. Rivera-Schatz*, 546 F. Supp. 3d 126, 132 (D.P.R.

2021) (quoting *Eves v. LePage*, 927 F.3d 575, 594 (1st Cir. 2019)) (Thompson, J., concurring). "[W]hile helpful, clear violations of the law do not require a case on point." *Ortiz-Resto*, 546 F. Supp. 3d at 132 (quoting *Eves*, 927 F.3d at 595). The First Circuit has expressed a preference for reaching the merits before considering qualified immunity: "The preferred approach is to decide the merits question first, reaching the reasonableness question only if the merits question is resolved against the defendant." *Ortiz-Resto*, 546 F. Supp. 3d at 133 (quoting *López-Erquicia v. Weyne-Roig*, 846 F.3d 480, 484 (1st Cir. 2017)).

López and Mulero argue they are entitled to qualified immunity because "the constitutional violation that Plaintiffs are suggesting" is "not clearly established under the law for a reasonable person to have known it at the time of the conduct at issue." Mot. to Dismiss at 14. Defendants also argue "the alleged constitutional grievance on which Plaintiffs ground their claim does not fall squarely within *Janus's* textual contours" because *Janus*' holding is limited to the practice of extracting compulsory dues. Defendants' Mot. to Dismiss at 15. López and Mulero would have this court believe that the Supreme Court's ruling in *Janus* is the sole authority Plaintiffs rely on for their First Amendment claims. This flawed premise leads them to argue that *Janus* only dealt with forced union deductions and not with discrimination in employment benefits based on union membership status. López and Mulero, in doing so, seek to dispose of the entire Amended Complaint by arguing that *Janus* does not cover Plaintiffs' First Amendment claims. But finding a clearly established right here negating qualified immunity does not depend on interpreting *Janus*. That clearly established right individuals enjoy is for the government to not discriminate against them for exercising a First Amendment right, and its recognition predates *Janus*.

The duty for government not to discriminate on the basis of exercising one's First Amendment right has been clear for at least 50 years. *See 44 Liquormart, Inc. v. Rhode Island,* 517

U.S. 484, 513 (1996) ("government 'may not deny a benefit on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.'") (quoting *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)). And as the Supreme Court has held time and again, freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781 (1988); *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 559 (1985); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 256-257 (1974); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 9 (1986) (plurality opinion); *Janus*, 138 S. Ct. at 2463. The First Amendment protects Plaintiffs' decision to stop subsidizing the Union and its advocacy. An employee's decision to end its association with a labor union, like Plaintiffs did, is a legitimate exercise of free speech. "Freedom of association . . . plainly presupposes a freedom not to associate." *Janus*, 138 S. Ct. at 2463 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

It is not credible for López and Mulero to suddenly claim ignorance of employees' clearly established constitutional right to eschew association with a labor union without penalty. But even if López and Mulero were somehow unaware of this long-established right, a reasonable official in their position would have understood that discriminating against nonunion employees based on union membership status violates the First Amendment. Individuals have a right to exercise their First Amendment rights without having their health insurance benefits axed. Penalizing employees by granting them fewer health insurance benefits solely because they eschew associating with a labor union offends the Constitution. Neither López nor Mulero are entitled to qualified immunity.

V. Conclusion

For these reasons, this Court should deny Defendants López's and Mulero's Motion to Dismiss and award Plaintiffs and class members all requested relief.

WHEREFORE, Plaintiffs respectfully request that Defendants López's and Mulero's Motion to Dismiss at Docket 57 be denied.

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF System, which will send notification of such filing to all appearing parties and counsels using the Court's electronic system.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 8th day of November, 2022.

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