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
UNION OF ORGANIZED CIVILIAN EMPLOYEES' 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"). Under the Public Health Benefits Act, 3 L.P.R.A. § 729(h), PRPB gives its civilian employees a $100 per month allocation for purchasing health insurance. The statute 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 exercised their First Amendment rights, communicating 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's and the Union's concerted practice penalizes those who exercise their First Amendment right not to be part of the Union or assist it.

On September 16, 2022, the Union moved to dismiss the Amended Complaint under Fed. R. Civ. P. 12(b)(6) (Dkt. 37). The Union argues Plaintiffs (1) failed to plead a cause of action under Section 1983, (2) the Union is not a state actor, (3) it has qualified immunity, (4) some claims are time-barred, and (5) contractual remedies have not been exhausted.[2] The instant response follows.

II. Applicable Pleading Standard

When ruling on a motion to dismiss for failure to state a claim, a court "must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences therefrom in

[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).

[2] The Union also included an argument against class certification Union's Mot. to Dismiss at 21-22. Plaintiffs, however, intend to move for class certification after the necessary discovery. All parties have already agreed to this. *See* Joint Proposed Schedule at 3-4 (Dkt. 53).

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)). "[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).

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.*

The Amended Complaint pleads factual conduct that shows Defendants' liability and Plaintiffs' right to the relief they requested. The additional employment contribution of $25 per month was stripped away 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. paras. 13, 14. Those who remained dues-paying members, on the other hand, continued receiving that additional employer contribution. Am. Compl. para. 18. PRPB and the Union keep withholding the additional employer contribution from Plaintiffs and class members solely based on their non-membership 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 that the United States Supreme Court in *Janus* held. Am. Compl. para. 7; *Janus*, 138 S. Ct. at 2486.

The Union, however, dismisses Plaintiffs' factual First Amendment claims as "conclusory", referencing an inapplicable standard of retaliation for speaking out on a matter of public concern while totally ignoring *Janus*. Union's Mot. to Dismiss, at 7-10. The Union alleges Plaintiffs have no First Amendment claim because they need to show they engaged in constitutionally protected conduct and that such conduct was a substantial factor for Defendants' retaliatory action. *Id.* But the Union misses the mark. This case is not about retaliatory action taking place after exercising freedom of speech on a matter of public concern. It is about retaliation 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.

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]

[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).

The *Elrod* court 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). *Branti* placed on the public employer the burden of showing the discrimination is necessary to ensure effective performance of the specific employee position involved. *Id.*

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 a 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 *supra* p. 4-6.

B. *The Union violates its duty of fair representation by discriminating against nonmembers.*

Under federal and state collective bargaining laws, a union is the exclusive representative for all employees in the bargaining unit —including nonmembers—as soon as it is certified as the exclusive bargaining representative.[4] The Supreme Court has repeatedly made clear that the duty of fair representation requires unions to represent nonmembers fairly:

[4] PRPB recognized the Union as the exclusive representative of its civilian employees, as defined in the current collective bargaining agreement, under 3 L.P.R.A. § 1451.

> The [duty of fair representation] is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all the employees in a unit . . . [D]esignating a union as the exclusive representative of nonmembers substantially restricts the nonmembers' rights. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were not subject to the duty to represent all employees fairly.

Janus, 138 S. Ct. at 2469 (quoting *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 198 (1944))

Exclusive representation forces a public employee to accept the union as their agent for dealing with the government employer. This is true no matter if the union adequately represents the employee's interests. *Emporium Capwell Co. v. Western Addition Cmty Org.*, 420 U.S. 50, 70 (1975); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("[T]he duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.") Unions must act without discrimination against any portion of its constituency, and may not discriminate on the basis of union membership status in negotiating the terms of a labor contract. *See Emporium Capwell*, 420 U.S. at 65 (discussing the "long and consistent adherence to the principle of exclusive representation tempered by safeguards for the protection of minority interests.") The Union's demand for PRPB to suspend the additional employer health insurance contribution to those who withdraw their union membership is blatant discrimination against its own bargaining unit members. Far from representing them fairly, the Union punishes any employee who exercises their First Amendment right not be part of a labor union or to subsidize it. The Union violates Plaintiffs' and class members' constitutional rights by breaching the duty of fair representation it owes to nonunion bargaining unit members.[5]

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

[5] The Union also violates its duty of fair representation by allowing only its members to leave work early in the event of a lack of air conditioning. Am. Compl. para. 107; Exh.2.

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 an identical 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 extracted dues flowing into the Union's coffers and ultimately into political matters. "This amounts to more than 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.

D. *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.[6] 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).[7] Under strict

[6] 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.")

[7] 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

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 neither the Union nor PRPB has articulated any 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 non-membership in the Union is narrowly tailored to achieve any governmental interest. There are lawful ways for unions to encourage membership. But acting in concert with a government employer to discriminate 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. 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. Defendants have no compelling interest in ensuring that nonunion employees receive less money to cover health insurance costs.

IV. Defendants were state actors acting under color of state law when they ceased providing Plaintiffs and class members with an additional employer contribution for purchasing health insurance.

A. *The Union is a state actor by acting jointly in signing the CBA and planning to take away a health insurance contribution from nonunion employees.*

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.

The Union argues against state action by alleging that Plaintiffs have not shown "how [demanding that PRPB cease the additional employer contribution] constitutes state action by the Union." Union's Mot. to Dismiss at 11. The Union, however, engaged in joint activity with the Police Bureau by negotiating, entering into, and managing a collective bargaining agreement ("CBA") and by agreeing to deprive Plaintiffs and class members of an employer contribution for health insurance—in effect unconstitutionally coercing them to join and subsidize the Union. Unions are state actors if they engage in joint activity with other state actors. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982); *Gonzalez-Morales v. Hernandez-Arencibia*, 221 F.3d 45, 49 (1st Cir. 2000); *Henrikson v. Town of East Greenwich*, 94 F. Supp. 3d 180, 201 n.31 (D.R.I. 2015) (finding that the Town and union are "engaged in a joint action entering into the collective bargaining contract.") The test for state action is "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority . . . and second, whether the private party charged with the deprivation could be described in all fairness as a state actor." *Edmonson v. Leesville Concrete Co*., 500 U.S. 614, 620, (1991) (citing *Lugar*, 457 U.S. at 939-42). Those criteria are easily satisfied here.

Joint action exists where "an examination of the totality of the circumstances reveals that the state has 'so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in [the challenged activity].'" *Albertorio-Santiago v. Reliable Fin. Servs*., 612 F. Supp. 2d 159, 167 (D.P.R. 2009) (internal citations omitted).[8] The Union is a state actor because it acts jointly with PRPB in negotiating a CBA and discriminating against

[8] This matter is distinguishable from *Manhattan Community Access Corporation v. Halleck*, 139 S. Ct. 1921 (2019). In that case, the state action analysis was limited to determining whether a private corporation exercised a traditional or exclusive public function by operating public access television channels. *Id.* at 1926. The Court reasoned that providing a forum for speech is not an activity that only governmental entities have traditionally performed. *Id.* at 1930. Here, however, Plaintiffs and class members are not arguing that any of the defendants are performing a public function traditionally belonging to government. Rather, a finding of state action can be made after conducting a joint action or governmental nexus tests.

nonmembers based on membership status. In doing so, the Union has interfered with Plaintiffs' and class members' constitutional rights in a sweeping and systematic fashion made possible only with PRPB's assistance. Without the Union's directive, the additional employer contribution for health insurance would not have been withheld. Without PRPB's acquiescence with the Union's directive, Plaintiffs, and class members would have received the same employer health contribution as union members and there would have been no discrimination.

By directing PRPB to stop the additional employer contribution, the Union placed itself in a position of interdependence and collaboration with PRPB. Joint action crystallized as soon as PRPB insinuated itself into a position of interdependence with the Union, which must now be recognized as a joint participant in the withholding of an employee benefit as punishment for both not associating with the Union and for exercising their First Amendment rights. *See Perkins v. Londonberry Basketball Club*, 196 F.3d 13 (1st Cir. 1999) (internal citation omitted); *See also Feliciano-Bolet v. P.R. Elec. Power Auth.*, 109 F. Supp. 3d 459, 464 (D.P.R. 2015) (discussing the necessary elements for a finding of joint action between the government and a private actor). The Supreme Court has "consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Lugar*, 457 U.S. at 941. The joint action here is more than enough to regard the Union as a state actor under color of state law. If any private party is a state actor because of its "joint participation with state officials in the seizure of disputed property," it is a labor organization acting in concert with a government agency to coerce employees to join the organization's ranks. The Union is a state actor.

B. *The Union is a state actor under the governmental nexus test.*

To find state action under the government nexus test, courts consider whether there is such a close nexus between the government and the challenged action that the seemingly private behavior may be treated as that of the State itself. *Rolon v. Rafael Rosario & Assocs.*, 450 F. Supp. 2d 153, 162 (D.P.R. 2006) (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176 (1972)); *See also Brentwood v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001). The Union and PRPB partake in the common enterprise of withholding an employment benefit. The act of withholding said benefit resulted a such partnership between public and private parties and constitute behavior by a single entity: The Government.

V. The Union is not entitled to qualified immunity.

The Union argues it is entitled to qualified immunity—a defense reserved for the government—despite its nature as a private organization. Union's Mot. to Dismiss at 13-14. It relies on *Filarsky v. Delia*, 566 U.S. 377 (2012) to claim this governmental immunity because it "acts on behalf of the government" and "works jointly" with the State, considering PRPB its "government analogue." Union's Mot. to Dismiss at 13-14. But *Filarsky* is distinguishable from this matter, as that case dealt with a private entity retained by a city to help conduct a government investigation into potential wrongdoing. *See Filarsky*, 566 U.S. at 393-394. The *Filarsky* court gave qualified immunity to a private individual only because he was conducting a government investigation for a city, and city government employees performing that type of investigative work were entitled to qualified immunity themselves. *Id.* Nothing of the sort is present here.

To the extent that the Union is arguing for qualified immunity based on its work "on some task for which the government would be afforded immunity" (Union's Mot. to Dismiss at 13-14), the Supreme Court "has held that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity." *Richardson v.*

McKnight, 521 U.S. 399 (1997). Qualified immunity can only apply "for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992). "[T]he rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* The Supreme Court has declined to extend qualified immunity to private actors:

> …[E]xtending [ ] qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.

Wyatt, 504 U.S. at 168.

The Union, as a private organization, is not entitled to qualified immunity. But the Union is still not entitled to qualified immunity even when applying the qualified immunity two-part test for government officials. *See* discussion *infra*. This governmental immunity protects 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). 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)). The Union argues it is entitled to qualified immunity because the ensuing litigation after the Supreme Court's ruling in *Janus* "shows that the law has not clearly been established for the specific allegations of unlawfulness brought by Plaintiffs against the Union." Union's Mot. to Dismiss at 15 (Dkt. 37).[9] But finding an established right negating qualified immunity does not depend on interpreting *Janus*. The clearly established constitutional rights here predate *Janus*.

The duty of fair representation a union owes its bargaining unit members has been the law for at least 55 years. *See Vaca v. Sipes*, 386 U.S. 171, 188-89 (1967). Nonunion employees have a clearly established right for a union not to discriminate against them when it comes to collective

[9] The Union argues for qualified immunity as a state actor *if* qualified immunity also shields the government defendants. Union's Mot. to Dismiss at 13. The Union, therefore, is making an equitable argument for qualified immunity if the government defendants are granted such immunity. While the Supreme Court, as explained, has foreclosed granting qualified immunity in a matter like this, the Union's requested qualified immunity has no basis in law or fact because Defendant López and Mulero have not requested this immunity. *See* PRPB's Mot. to Dismiss (Dkt. 32).

bargaining and contract administration. "A union violates its duty of fair representation by discriminating between members of a bargaining unit on the basis of the person's status as a nonmember of the union." *Roscello v. Southwest Airlines Co.*, 726 F.2d 217, 224 (5th Cir. 1984). The Union's demand for PRPB to cut out Plaintiffs and class members from the additional benefit to purchase health insurance violates the duty of fair representation because it discriminates solely based on membership status. The Union cannot suddenly pretend to be unaware of the clearly and long-established duty of fair representation.

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)). An employee's decision to end its association with a labor union is an exercise of free speech. It is not credible for the Union to claim ignorance of the clearly established constitutional right to withdraw union membership without being penalized. But even if the Union were unaware of this long-established right, a reasonable official in the Union's position would have understood that discriminating against nonunion employees based on union membership violates both its duty of fair representation and the First Amendment. The Union is not entitled to qualified immunity even if the qualified immunity test were applied.

VI. None of Plaintiffs' Claims are Time-Barred

The Union argues all but three of Plaintiffs' claims are time-barred. Union's Mot. to Dismiss at 15. They are wrong for at least three reasons. First, each bi-weekly withholding of the additional employer contribution is a violation, which accrues separately and triggers the running of the one-year statute of limitations. *See Brannian*, 364 F. Supp. 2d 1187. Second and third, even

if the Court disagrees that Plaintiffs' alleged violations accrue separately, the discovery rule and the continuing violation doctrine each have the power to render Plaintiffs' claims timely filed.

A. *Each unlawful bi-weekly withholding of the additional employer contribution constitutes a violation sufficient to trigger the running of the statute of limitations.*

The Court should find Plaintiffs' claims are not time-barred because each alleged violation starts a new one-year limitations period. The one-year statute of limitations begins to run when a plaintiff "knows or has reason to know of the injury which is the basis for his claim." *Rodriguez-Garcia v. Municipality of Caguas*, 354 F.3d 91, 96-97 (1st Cir. 2004); 31 L.P.R.A. § 5298(2). The "separate accrual rule" allows a plaintiff to bring a claim arising out of a continuing violation that began before the limitations period, but only allows her to recover damages arising from the wrongful acts that took place within the limitations period. *See Love v. Natl. Med. Enterprises*, 230 F.3d 765, 773 (5th Cir. 2000); *Bankers Tr. Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988). Courts have applied the rule in different legal contexts.[10] One such instance was in *Brannian*, a case much like this one, though that court did not name "the rule of separate accrual" as a justification for its decision. *Brannian*, 364 F. Supp. 2d at 1189. *See* discussion *supra* at Section III.C. The *Brannian* defendants made the decision to offer dental and vision plans only to members of the union in 1987 and employees first experienced unconstitutional union coercion then, but plaintiffs did not file suit alleging the violations of their First Amendment rights until 2002. *Brannian*, 364 F. Supp. 2d at 1189, 1191.

[10] Courts have applied the separate accrual rule in various kinds of cases. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014) ("It is widely recognized that the separate-accrual rule attends the copyright statute of limitations."); *Bankers Trust*, 859 F.2d at 1102 (holding that, for the purpose of the statute of limitations, civil RICO actions are subject to rule of separate accrual); *Heraeus Med. GmbH v. Esschem, Inc.*, 927 F.3d 727, 740 (3d Cir. 2019)(holding that, "under Pennsylvania law, the separate accrual rule applies to continuing misappropriations"); *Bosh v. Sony Music Ent. US Latin, LLC*, 2019 WL 13074597, at *1 (D.P.R. 2019) (holding plaintiff's federal copyright claims not time-barred by the statute of limitations, given the application of the "separate-accrual rule").

The *Brannian* plaintiffs alleged the violations took place annually in June, during the open enrollment periods. *Id* at 1191. The court considered the claims timely filed, ruling that it would only consider the two open enrollment periods, i.e. violations that took place during the year-long limitations period. *Id*. Similarly, here, the Court should consider each of the alleged violations committed within the one year that preceded the filing of the complaint as triggering a separate limitations period and basis for allowance of damages arising from the wrongful acts Defendants committed within that period. The Court should follow *Brannian* by finding Plaintiffs' and class members' claims within one year of the filing date as timely filed and the basis for damages. If the Court finds these plaintiffs' claims to be time-barred, it would allow Defendants to continue their discriminatory policy and practice with impunity. Each plaintiff and class member has suffered violations within the one-year limitations period, though some plaintiffs and class members have suffered longer.[11] Plaintiffs ask the court to review and remedy only those violations. Am. Compl. at 23.

B. *Application of the discovery rule makes Plaintiffs' claims timely.*

The discovery rule tolls the statute of limitations until the plaintiff knew or reasonably should have known that she has a cause of action for her injury. *See Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752, 762 (1st Cir. 1996); *See Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 444 (7th Cir. 2005). Starting in 2018 and without any announcement, Defendants reduced the additional employer contribution by $25 a month, or $12.50 per pay-period, for those employees who resigned their union membership. Am. Compl. paras. 45, 51, 71, 81. The paystubs

[11] Plaintiffs Carbonell, Whatts, Dumont, and Ortiz first fell victim to the withholding and resulting coercion to join the Union in 2018. Amended Complaint paras. 45, 51, 71, 81.

themselves failed to say that the employer contribution has been reduced or why. Exh. 1.[12] Even employees who review every line item on their paystubs every pay-period, may not notice the $12.50 reduction, and even if they did, they might not see it as cause for alarm, and certainly would not see or expect discriminatory action against them.

The Union argues that all but three of the Plaintiffs' claims are time-barred because those plaintiffs did not file their case within one year of the date on which "the Commonwealth allegedly took the decision to no longer pay them the Additional Contribution." Union's Mot. to Dismiss at 16. The Union selects the wrong starting point for accrual. Defendants' decision to create the policy could not have made the statute of limitations run for Plaintiffs because neither the Commonwealth nor the Union announced their decision or informed employees of the creation of a new policy, much less its discriminatory nature until after this lawsuit was filed. Am. Compl. para. 105. Exh. 2. At the point Defendants decided to violate the rights of nonmembers moving forward, the Plaintiffs did not and could not have known about it.

C. *The continuing violation doctrine renders Plaintiffs' claims timely.*

Plaintiffs' claims are timely because some of the alleged discriminatory acts, i.e., withholdings of the additional employer contribution, occurred within the limitations period. *See Rosario Rivera v. Aqueduct and Sewer Auth. of Puerto Rico*, 472 F. Supp. 2d 165, 171 (D.P.R. 2007). The continuing violation doctrine allows "an employee [to] seek damages for otherwise time-barred allegations if they are deemed part of an ongoing series of discriminatory acts and there is 'some violation within the limitations period that anchors the earlier claims.'" *O'Rourke v. City of Providence,* 235 F.3d 713, 730 (1st Cir. 2001) (quoting *Provencher v. CVS*

[12] Plaintiffs' and class members' paychecks are sufficiently referenced throughout the Amended Complaint, including at Am. Compl. para. 40. Plaintiffs and class members respectfully ask the Court to consider Exhibit 1 as extrinsic evidence without converting this Response into a Motion for Summary Judgment.

Pharmacy, 145 F.3d 5, 14 (1st Cir.1998)). This equitable exception "effectively postpones the running of the statute of limitations until the tortious conduct has ceased." *Rodrigue*, 406 F.3d at 444. "The purpose of [the continuing violation] exception is to permit suit on later wrongs where a wrongdoer would otherwise be able to repeat a wrongful act indefinitely merely because the first instance of wrongdoing was not timely challenged." *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 54 (1st Cir.1999).

Continuing violations come in two varieties: serial and systemic. *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 405 (1st Cir.2002). Plaintiffs suffer serial violations when a number of discriminatory acts arise from the same discriminatory animus. *Rivera–Rodrguez v. Frito Lay Snacks Caribbean, a Div. of Pepsico P.R.*, 265 F.3d 15, 21 (1st Cir.2001). A serial violation claim is timely filed if one of the discriminatory acts *occurred* during the limitations period. *Id.* On the other hand, plaintiffs suffer systemic violations "where an employer maintains a discriminatory policy, responsible for multiple discriminatory acts that fall outside the limitations period." *Crowley*, 303 F.3d at 405. A systemic continuing violation claim is timely filed if the alleged *policy* continued into the limitations period. *Rivera–Rodriguez*, 265 F.3d at 21. Here, Plaintiffs allege serial continuing violations.

The First Circuit has several criteria to which it looks when evaluating the sufficiency of a plaintiff's serial continuing violation claim. The court asks first whether "the *subject matter* of the discriminatory acts [is] sufficiently similar that there is a substantial relationship between the otherwise untimely acts and the timely acts;" second, whether *"*the acts [are] isolated and discrete or do they occur with *frequency* or repetitively or continuously;" and third, whether *"*the acts [are] of *sufficient permanence* that they should trigger an awareness of the need to assert one's rights." *O'Rourke*, 235 F.3d at 731. Plaintiffs' claims satisfy these criteria with ease.

First, the "subject matter" of the alleged discriminatory acts are not just "sufficiently similar" but identical to one another. Second, these acts "occur with frequency" and are both "repetitive" and "continuous," not "isolated and discrete" because they happen to each Plaintiff bi-weekly. Finally, courts have held that "if one of the discriminatory acts standing alone is of 'sufficient permanence' that it should trigger an 'awareness of the need to assert one's rights,' then the serial violation exception does not apply." *Phillips v. City of Methuen,* 818 F. Supp. 2d 325, 330 (D. Mass. 2011). The classic example of "sufficient permanence" is a suspension from work. *Id.* at 331. Here, Plaintiffs' alleged violations were not of "sufficient permanence" that they could be expected to make Plaintiffs aware of the need to assert their rights.

Plaintiffs allege a serial continuing violation because both the discriminatory policy and the discriminatory acts are ongoing through the one-year limitations period, the present and, unless the Court intervenes, the indefinite future. Plaintiffs suffer harm each pay-period when they receive the smaller employer health contribution. This alone is sufficient to trigger the running of the statute of limitations. *See Thomas,* 183 F.3d at 54. Moreover, each bi-weekly violation arises from the same discriminatory animus, rooted in Plaintiffs' First Amendment protected decisions to resign their memberships with the Union.

The Union argues the "termination of benefits constitutes a discrete act" and the continuing violation doctrine does not apply to Plaintiffs' claims. Union's Mot. to Dismiss at 17. But the date Defendants terminated Plaintiffs' benefits is not the violation relevant to accrual of the limitations period because Plaintiffs were not told that their benefits would be reduced or the reason for the reduction until after this lawsuit was filed. Am. Compl. para. 105. Exh. 2.[13] As discussed above,

[13] The social media post in question is sufficiently referenced at Am. Compl. para. 105. Plaintiffs and class members respectfully ask the Court to consider Exhibit 2 as extrinsic evidence without converting this Response into a Motion for Summary Judgment.

the bi-weekly withholdings, were not "discrete acts" as defined by *O'Rourke*. This court should consider Plaintiffs' claims, which they have limited to the one-year limitation period, under the rubric of the continuing violation doctrine and find them timely filed.

VII. Contractual remedies need not be exhausted.

Exhausting state administrative remedies is not a prerequisite to suing under 42 U.S.C. § 1983. *Patsy v. Bd. of Regents*, 457 U.S. 496, 516, 102 S. Ct. 2557 (1982); *Borges Colon v. Roman-Abreu*, 438 F.3d 1, 19 (1st Cir. 2006); *Baez-Cruz v. Municipality of Comerio*, 140 F.3d 24, 30 (1st Cir. 1998)). A plaintiff does not need to first seek redress from state administrative remedies before suing in federal court for violating constitutional rights. "When federal claims are premised on 42 U.S.C. § 1983 . . . the U.S. Supreme Court has "not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 472-473 (1974)*; see also Clark v. Yosemite Cmty. Coll. Dist.*, 785 F.2d 781, 790 (9th Cir. 1986) ("in an action under section 1983, a plaintiff need not exhaust state administrative remedies").

This rule not only applies to state judicial or administrative proceedings: Internal union grievance proceedings also need not be exhausted. It is impermissible to require—as the Union suggests—that Plaintiffs take "initial recourse to available state proceedings, *including union grievance proceedings*, for the enforcement of First Amendment rights protectable in federal court pursuant to section 1983." *Narumanchi v. Bd. of Trs. of Conn. State Univ.*, 850 F.2d 70, 73 (2d Cir. 1988) (emphasis added); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 877-78 (1998) (finding that employees are entitled to have First Amended claims addressed expeditiously in federal court, as opposed to an internal union grievance mechanism). *Bonnell v. Lorenzo*, 81 F. Supp. 2d 777, 788 (E.D. Mich. 1999) ("professors do not need to exhaust either state administrative remedies *or*

remedies provided by collective bargaining agreements prior to their cases being heard in federal courts."), *rev'd on other grounds*, 241 F.3d 800 (6th Cir. 2001) (emphasis added); *Mellody v. Upper Merion Area Sch. Dist.*, 1998 WL 54383, at *4 (E.D. Pa. Jan. 30 1998) (a plaintiff need not exhaust contractual remedies for a First Amendment claim), *aff'd*, 216 F.3d 1076 (3d Cir. 2000); *McReady v. Montgomery Cmty. Coll*., 2020 WL 5849481, at *19-21 (D. Md. 2020) (same).

Exhaustion of administrative, union and state law remedies are not "categorically" required before an individual may resort to federal court under § 1983. *Patsy v. Bd. of Regents of Fla*., 457 U.S. 496 (1982); *Doe v. Pfrommer*, 148 F.3d 73, 78 (2d Cir. 1998) ("*Patsy's* categorical statement that exhaustion is not required and the expansive view of the federal courts in protecting constitutional rights allow plaintiffs to seek relief under § 1983 without first resorting to state administrative procedures"). *See also Koehler v. New York City*, 2005 U.S. Dist. LEXIS 8901, at *13 (S.D.N.Y. 2005) (same). Plaintiffs, therefore, are rightly seeking redress from this court under 42 U.S.C. § 1983 for the First Amendment violations they have suffered. They were never required to exhaust any internal grievance procedures.

The Union, however, argues Plaintiffs should have first submitted themselves to an internal grievance procedure found in its collective bargaining agreement with the Puerto Rico Police Bureau. The Union even extols the intricacies of the internal grievance proceedings it says Plaintiffs should have followed. Union's Mot. to Dismiss, at 18-19. But "[w]hen appropriate federal jurisdiction is invoked alleging violation of First Amendment rights . . . [a court] may not insist that [plaintiffs] first seek [their] remedies elsewhere no matter how adequate those remedies may be." *Hochman v. Board of Education*, 534 F.2d 1094, 1097 (3d Cir. 1976). The Union, though, cites *Davidson v. Town of Sandwich*, 2017 U.S. Dist. LEXIS 93018 (D. Mass. 2017) in support of its failure to exhaust supposition. Union's Mot. to Dismiss, at 19. That case, however, is

inapplicable because it dealt with a claim involving a violation of a collective bargaining agreement provision. Internal arbitration proceedings were also already underway and had not concluded before the filing of that case. *See Davidson*, 2017 U.S. Dist. LEXIS 93018, at *3-5. But that is clearly not the case here, as there are no administrative proceedings underway, and Plaintiffs are not claiming a violation of any CBA provision.

The Union references a slew of cases saying that a plaintiff's failure to exhaust contractual remedies is excused only if they can show the employer repudiated the CBA's procedures, arbitration would be futile[14], or that the union's breach of an obligation prevented the plaintiff from exhausting those remedies. Union's Mot. Dismiss at 19. But the Union cannot rely on this line of cases, as they were all decided in the context of Section 301 of the Labor Management Relations Act ("LMRA") and did not involve First Amendment claims. *See Hayes v. New England Millwork Distributors, Inc.*, 602 F.2d 15, 18 (1st Cir. 1979); *Vaca v. Sipes*, 386 U.S. 171, 179 (1967); *Glover v. St. Louis-San Francisco R. Co.*, 393 U.S. 324, 332 (1969). Federal labor laws governing the private sector like the LMRA and the National Labor Relations Act ("NLRA"), unlike in these cases, are not at issue. Public sector employees, like Plaintiffs, are excluded from the LMRA and NLRA. The Union, lastly, insists on its internal grievance mechanism as the first stop for Plaintiffs because the controversy "requires an interpretation of the CBA." Union's Mot. to Dismiss, at. 20. But this is not the case. Plaintiffs' claims are solely grounded on the First Amendment and are not contractual. Am. Compl. at 22. No breach of contract claim is even being made, as Plaintiffs' claims do not hinge on anything the collective bargaining agreement might or might not say. Their First Amendment claims of unconstitutional coercion are based on 42 U.S.C. § 1983, resulting in federal jurisdiction with no need to exhaust administrative or internal union grievance proceedings.

[14] Given the Union's animus against Plaintiffs' and class members' exercise of First Amendment rights, participating in any internal grievance proceeding would be futile.

VIII. Conclusion

For these reasons, this Court should deny Defendant Union of Organized Civilian Employees' Motion to Dismiss and award Plaintiffs and class members all requested relief.

WHEREFORE, Plaintiffs respectfully request that Defendant Union of Organized Civilian Employees' Motion to Dismiss 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 14th day of October, 2022.

s/ÁNGEL J. VALENCIA-GATELL
Ángel J. Valencia-Gatell
USDC- PR 300009
ajv@nrtw.org
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
Telephone: (703) 321-8510
Fax: (703) 321-9319

Heidi E. Schneider (*pro hac vice*)
New York Attorney Registration No. 5638382
hes@nrtw.org

Milton L. Chappell (*pro hac vice*)
District of Columbia Bar No. 936153
mlc@nrtw.org
Attorneys for Plaintiffs and the Class They Seek to Represent.