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MOSHE ROZENBLIT; and QWON KYU RIM,

Plaintiffs,

vs.

MARCIA V. LYLES, in her official capacity as Superintendent of the Jersey City Board of Education; VIDYA GANGADIN, in her official capacity as President of the Jersey City Board of Education; JERSEY CITY PUBLIC SCHOOLS OF THE CITY OF JERSEY CITY; JERSEY CITY BOARD OF EDUCATION; and JERSEY CITY EDUCATION ASSOCIATION, INC.,

Defendants.

SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, GENERAL EQUITY – HUDSON COUNTY

Docket No. C-2-17

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT JERSEY CITY EDUCATION ASSOCIATION, INC.'S MOTION TO DISMISS

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Plaintiffs Moshe Rozenblit and Qwon Kyu Rim, who are respectively Jersey City and New Jersey taxpayers ("Taxpayers"), file this Response in Opposition to Defendant Jersey City Education Association's ("JCEA") Motion to Dismiss:

INTRODUCTION

At issue in this case is a taxpayer-funded practice called "release time" that diverts two full-time public school teachers away from their extraordinarily important job of educating Jersey City's youth, and instead pays them with tax dollars to spend their time working exclusively for a private labor organization, the JCEA. Virtually no limits, controls, or accountability are imposed on the JCEA's private use of these public resources. The District receives insufficient consideration in return for these public expenditures. Indeed, the purpose of "release time" is to advance the interests of the JCEA, not the Jersey City School District ("District"), or city and state taxpayers.

This arrangement violates the New Jersey Constitution's "Gift Clause," a series of provisions that forbid the government from spending public funds on private enterprises and activities, or allocating public funds to special interests. N.J. CONST. art. VIII, § III, ¶¶ 2, 3. The activities the Gift Clause was designed to prevent describe precisely what is done on release time: public aid to private, special interests. The Taxpayer Plaintiffs have brought this action to vindicate the New Jersey Constitution's Gift Clause protections and to end the unlawful expenditure of taxpayer dollars that they are obligated to replenish.

In their complaint, Taxpayers have plainly and timely stated a claim for relief from this Court. Accordingly, the JCEA's motion should be DENIED.

BACKGROUND

Plaintiffs Moshe Rozenblit and Qwon Kyu Rim are citizens of the United States and residents of the State of New Jersey. Plaintiff Rozenblit pays property taxes and sales taxes in Jersey City, and pays income tax to the State of New Jersey. Compl. ¶ 5. Plaintiff Rim pays income tax to the State of New Jersey. The New Jersey City School District ("District") and the release time benefits bestowed on the JCEA are financed by State income tax revenue and local District tax revenue. *Id.* ¶ 17. Thus, Plaintiff taxpayers finance the practice of "release time," to the JCEA.

Defendant JCEA is a labor organization that represents District certified personnel (teachers), attendance counselors, and teachers' assistants in the District. *Id.* ¶ 14. JCEA is an affiliate of the state New Jersey Education Association and the National Education Association. *Id.* at ¶ 10. The JCEA and its parent organizations are private entities that exist to advocate for the interests of their members, not the public. To advance these private interests, the JCEA engages in, among other things, political activities, lobbying and other forms of advocacy. *Id.* ¶¶ 2, 10.

In June 2015, the District and the JCEA reached a preliminary accord to enter into a collective negotiations agreement ("CNA" attached as Ex. 1 to Compl.). The release time provisions challenged in this case are in §§ 7-2.3 and 7-2.4 of the CNA, in an article entitled "Association Rights." *Id.* ¶ 21.

As part of the CNA, the JCEA President and his designee "shall be permitted to devote *all* of his/her time to the Association business and affairs." CNA 7-2.3; Compl. ¶¶ 19, 20 (emphasis added). The JCEA president is Ron Greco. His designee is Tina Thorp. Mot. to Dismiss ("MTD") at 12. Thus, under the terms of the CNA, both Mr. Greco and Ms. Thorp are

permitted—in fact, required—to devote *all* of their working hours to JCEA business.

While on full-time release, Mr. Greco and Ms. Thorpe still receive their ordinary District salaries, benefits, and pensions, just like teachers who are performing ordinary instruction duties. Id. In base pay alone, Mr. Greco makes $105,580 per year. Ms. Thorpe makes $102,280 per year. Id. at 13. This money is paid for by taxpayer funds. Compl., ¶¶ 5, 17, 18. Over the term of the CNA, release time costs taxpayers roughly $1.1 million. Id. ¶ 31, MTD at 13.

Pursuant to the terms of the CNA, Mr. Greco and Ms. Thorpe devote all their time to JCEA business, not to District business. Each day, they report to JCEA offices in Jersey City. Compl. ¶ 27, MTD at 13. While on full time release, they solicit grievances against the District and represent JCEA members against the District in disciplinary actions. *See* MTD at 14.

On information and belief, Mr. Greco and Ms. Thorpe also engage in lobbying and political activities while on release time, including supporting and opposing candidates for the District school board. *See* John Heinis, *JCEA Endorses Thomas, Veribello and Valentin for Nov. School Board Race*, HUDSON COUNTY VIEW, Aug. 18, 2016.[1]

The only limitations placed on the JCEA's use of release time is that it not "disrupt the educational process," and that Ms. Thorpe notify the school principal when conducting JCEA business "during school time."[2] CNA § 7-2.4.

The District has no formal accounting mechanism for tracking Mr. Greco's or Ms. Thorpe's activities. Compl. ¶ 22. The District places no controls on the activities of Mr. Greco or Ms. Thorpe. Id. ¶ 37. In other words, while on release time, District teachers perform the union's own private business at taxpayer expense without any accountability to either the District

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1 http://hudsoncountyview.com/jcea-endorses-thomas-verdibello-and-valentin-for-nov-school-board-race/.

2 At this stage, it is unclear what JCEA business is being conducted *at the school* as well as *why* JCEA business is being conducted, and with *whom,* while school is *in session.*

or taxpayers.

STANDARD OF REVIEW

Defendant JCEA faces a high bar in arguing that this case should be dismissed at this early stage. A motion to dismiss for failure to state a claim should only be granted in "the rarest of instances," *Printing Mart–Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 772 (1989), and should be denied if the basic elements of a cause of action can be discerned from even an obscure statement in the complaint. *Craig v. Suburban Cablevision, Inc.*, 140 N.J. 623, 626 (1995); see also, *Vasquez v. Pacific Assocs. Corp.*, No. A-4284-14T1, 2017 WL 164479, at *2 (N.J. Super. Ct. App. Div. Jan. 17, 2017) ("[t]he essential test is simply "whether a cause of action is 'suggested' by the facts."). The facts in a complaint must be taken as true, and construed liberally, and Plaintiffs are entitled to "every reasonable inference of fact." *Printing Mart–Morristown*, 116 N.J. at 746.

The stringent standard for granting a motion to dismiss was specifically addressed in the context of an alleged Gift Clause violation in *New Jersey Citizen Action, Inc. v. Cnty. of Bergen*, 391 N.J. Super. 596 (App. Div. 2007). In that case, a grassroots advocacy group challenged a county improvement board's lending to a hospital management corporation, arguing that the loans were given without adequate consideration and that the county exercised insufficient control over how the loaned money could be spent. Id. at 600, 603. The trial court granted the defendant's Rule 4:6-2(e) motion to dismiss for failure to state a claim. Id. at 599. The Appellate Division reversed, citing the high bar defendants face in bringing a dismissal motion. It found that there were significant factual allegations in the complaint to suggest a cause of action, and that plaintiffs were "entitled to an opportunity to prove" them. Id. at 607.

This Court should do likewise. Taxpayers have properly alleged that the challenged release time provisions violate the New Jersey Constitution because they do not serve a public

purpose (Compl., ¶¶ 1, 2,19, 36), because the government has insufficient control over release-time employees (Id. at ¶¶ 2, 22, 24, 25, 26, 37), and because the payments for these employees are not supported by adequate consideration (Id. at ¶¶ 1, 3, 38). Taking Taxpayers' allegations as true, as this Court must, that is enough to deny defendant's motion. And in any event, this case raises a host of factual issues that Taxpayers should be afforded an opportunity to prove.

ARGUMENT

I. Rule 4:69-6 is inapplicable, and, in any event, its enlargement provision governs a taxpayer action challenging the constitutionality of union release time.

Rule 4:69-6 is inapposite to a taxpayer action challenging the constitutionality of the union release time provision. But even if it does apply, its enlargement provision squarely governs. Thus defendant's argument that the case is barred by the statute of limitations must be rejected.

This case is not governed by Rule 4:69-6 because it is a constitutional challenge to unlawful government expenditures, and is not an "action in lieu of prerogative writs." Challenge to an improper or illegal bidding practice falls squarely within the definition of an action for certiorari, mandamus, quo warranto, or prohibition—traditional prerogative writs governed by Rule 4:69-6. The complaint for declaratory and injunctive relief is therefore not an "action in lieu of prerogative writs." See generally Bender, Ch. 11, NEW JERSEY PLEADINGS: ACTIONS IN LIEU OF PREROGATIVE WRITS.[3]

The JCEA cites *Mason v. City of Hoboken*, 196 N.J. 51 (2008), but that case has nothing to do with the important and novel constitutional issue that is presented here. It merely held that denials of public records requests should be appealed within the 45-day time limit of Rule 4:69-6. 196 N.J. at 70. Both *CFG Health Sys., LLC v. County of Hudson*, 413 N.J. Super. 306 (App.

[3] http://bookstore.lexis.com/bstore/sample/bender/1422405605.pdf.

Div. 2010), and *Palamar Constr., Inc. v. Pennsauken Tp.*, 196 N.J. Super. 241 (App. Div. 1983), which the JCEA cites for the proposition that "[c]hallenges to ... a contract" must be filed within 45 days "of the approval action by the local government," MTD at 15, are also inapplicable. Each of those cases dealt with challenges by unsuccessful bidders to a governmental body's award of contracts to another bidder, not a challenge to the constitutionality of government action, as this case involves. Consequently, this action is not subject to Rule 4:69-6.

Even if Rule 4:69-6 applied, it would plainly be appropriate to enlarge the 45-day time period as provided by Rule 4:69-6(c). In *Reilly v. Brice*, 109 N.J. 555 (1988), a taxpayer plaintiff "seek[ing] vindication of the public interest," challenged as illegal a municipal contract with a private party. Id. at 558. The Supreme Court of New Jersey had no trouble concluding that the 45-day limitation is enlarged in order to "'safeguard[] individual rights against public officials and governmental bodies.'" Id. (discussing *Brunetti v. Borough of New Milford*, 68 N.J. 576, 585–87 (1975)). Cases "involving (1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification," it held, are entitled to enlargement under Rule 4:69-6. IbId.

This taxpayer action brought by Mr. Rozenblit and Mr. Rim falls squarely within the precedent set by *Reilly* and *Brunetti*. This case presents the important and novel question of the constitutionality of union release time—a question that can only be resolved after full factual development. The challenged release time provisions were inserted into the collective bargaining agreement between the Board and the Union based upon the self-serving, ipse dixit determination by the contracting parties that it does not violate the Gift Clause of the New Jersey

Constitution. The taxpayer plaintiffs do not seek any private interest—this case will vindicate an important public right for taxpayers to have their tax dollars lawfully spent.

Brunetti made clear that the 45-day period is enlarged when a case involves an important constitutional issue. Enlargement of time is also justified if, as here, a continuing violation of public rights is alleged. *Borough of Princeton v. Board of Chosen Freeholders of Cnty. of Mercer*, 169 N.J. 135, 152 (2001) (enlargement granted in a challenge to solid waste contracts). A continuing violation of public rights exists when public office is held illegally, or when successive payments are made under an illegal contract provision. For example, in *Jones v. MacDonald*, 33 N.J. 132 (1960), the Supreme Court held that the limitations period did not apply to challenge the propriety of a dual officeholder position because each exercise of the officeholder's right to hold office was "a fresh wrong." Id. at 138. Similarly, in *Meyers v. Mayor & Council of the Borough of E. Paterson*, 37 N.J. Super. 122, 128 (App. Div. 1955), the limitations period did not apply because successive payments of salary to the holder of an illegally-created position constituted separate remediable acts. Here, successive payments of salary to the two full-time release-time public officials, as well as the institution of two dual officeholder positions who are granted release time, are precisely the type of conduct that is either not subject to Rule 4:69-6, or is subject to its enlargement provision.

Finally, at least one New Jersey court has specifically addressed the 45-day limitations period in the context of a Gift Clause challenge. In *Riddlestorffer v. City of Rahway*, 82 N.J. Super. 36, 43 (Law Div. 1963), the court held that "even if applicable here," the 45-day limitations period of Rule 4:69-6 (at that time codified as Rule 4:88-15) "should not be a bar to the instant action since a constitutional question ... is presented by the complaint."

Riddlestorffer's discussion of the 1963 version of Rule 4:69-6 is directly on point, and provides a straightforward way to reject the JCEA's timeliness argument.

Plaintiffs' lawsuit is timely. The JCEA's argument to the contrary lacks merit.

II. Taxpayers have plainly alleged a Gift Clause violation.

The New Jersey Constitution prohibits the expenditure of public funds for private activities over which the government lacks sufficient control, and for which the government receives inadequate consideration. "No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation." N.J. CONST. art. VIII, § III, ¶ 2. The purpose of this constitutional prohibition is to prevent aid to private corporations not constituting public agencies controlled by the state. *City of Camden v. S. Jersey Port Comm'n*, 2 N.J. Super. 278, 295 (Ch. Div. 1948), *aff'd in part, modified in part*, 4 N.J. 357 (1950).

In *Roe v. Kervick*, the "seminal" Gift Clause case, the New Jersey Supreme Court set forth a two-part test for determining whether a government expenditure violates the State Constitution: "First, whether the provision of financial aid is for a public purpose, *and* second, whether the means to accomplish it are consonant with that purpose." *Bryant v. City of Atlantic City*, 309 N.J. Super. 596, 612 (App. Div. 1998) (citing *Roe*, 199 A.2d 834 (1964) (emphasis added)). Under prong one of this test, a public purpose is defined as that which (1) "serves a benefit to the community as a whole," and (2) "at the same time is directly related to the function of government." *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 121 N.J. 196, 217 (1990) (internal quotations omitted). Under prong two of the Gift Clause test, in order to determine whether the means to accomplish the public purpose are consonant with the purpose, the courts will examine, inter alia, whether the government: (1) retains sufficient control over the expenditure, see *New*

Jersey Citizen Action, Inc., 391 N.J. Super. at 604, and (2) whether the expenditure is "based upon a substantial consideration." *New Jersey State Bar Ass'n v. State*, 387 N.J. Super. 24, 53 (App. Div. 2006)

A government expenditure will violate the Gift Clause if it fails *any* of these tests. In other words, a government expenditure violates the Gift Clause if it does not serve a public purpose because it does not benefit the community as a whole, *or* it is not directly related to the function of government. An expenditure will also violate the Gift Clause if the means to accomplish the public purpose are not consonant with the public purpose because the government lacks sufficient control over the expenditure *or* the government does not receive adequate consideration for it. *See New Jersey Citizen Action*, 391 N.J. Super at 604; *New Jersey State Bar Ass'n*, 387 N.J. Super at 53.

A failure of any one of these four requirements is enough to establish a Gift Clause violation. As Taxpayers have alleged in their Complaint, the release time provisions at issue fail not just one Gift Clause requirement, but all four.

A. Release time does not serve a public purpose.

It is axiomatic that public funds should be spent for public purposes, not to promote the private interests of any individual or organization. The release time provisions at issue in this case serve to benefit the JCEA, not the community, and are not directly related to the function of government.

The benefits of release time inure predominantly, if not exclusively, to the JCEA, rather than the District. The plain language of the CNA makes this obvious: "The president of the JCEA, and his/her designee, shall be permitted to devote *all* of his/her time *to the Association business and affairs*." CNA at ¶ 7-2.3 (emphasis added). The CNA does not say that JCEA

release time employees may devote *some* of their time to JCEA business and *some* time to the District and its business. The CNA, in fact, *mandates* that release time employees devote "*all*" of their time to JCEA "business and affairs."[4] The JCEA is a private labor organization, whose mission is to advance the private interests of its members and itself. Because release time employees are obligated under the CNA to devote all of their time to Association business, they are by definition advancing private, rather than public purposes. That alone is sufficient to establish that release time benefits the private interests of the JCEA, rather than the community as a whole.

In fact, some activities of JCEA put the organization in direct opposition to the interests of the District, its public employer. As Defendant JCEA concedes, the CNA itself is the product of negotiations between the District and the JCEA. MTD at 10. During these negotiations, the JCEA is literally on the opposite side of the bargaining table from the District, seeking the best possible deal that JCEA can negotiate for itself and its members.

In examining the public costs of release time state-wide, the New Jersey Commission of Investigation found that engaging in contract negotiations while on taxpayer-funded release time is an "activity which can place [the union] in conflict with the public interest." STATE OF NEW JERSEY COMMISSION OF INVESTIGATION, UNION WORK, PUBLIC PAY: THE TAXPAYER COST OF COMPENSATION AND BENEFITS FOR PUBLIC-EMPLOYEE UNION LEAVE, at 1 (May 2012).[5]

Other uses of release time not only do not serve the interests of the community as a whole, but are directly adverse to those interests. This includes the JCEA using release time to file costly grievances against the District, and to represent members in disciplinary disputes

[4] Nor is it possible to surmise, without factual development, whether alternatives to full-time release time are available or were considered—alternatives such as JCEA hiring employees out of union dues it collects from the approximately 2,700 strong school district workforce.

[5] https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/19802/e542012.pdf?sequence=1&isAllowed=y.

brought by the District. See MTD at 12. In these situations, as in contract negotiations, the release time employee is again on the opposite side of the table from the District in an adversarial setting. In this case, these uses of release time do not benefit the public employer, or the community as a whole, when they are adverse to the employer.

The JCEA contends that one function of full-time release employees is to "preserve and serve labor peace and to avoid grievances and other disruptions in the workplace," which is a public purpose. *Id.* at 23. As a threshold matter, there is nothing whatsoever in the CNA that *obligates* JCEA to perform these functions, nor are there control mechanisms to ensure these functions *will* be performed. On the contrary, the CNA allows full-time release employees to use release time however they see fit to directly pursue JCEA "business and affairs." Even if JCEA's full-time release employees occasionally do use release time to advance "labor peace," as the New Jersey Commission of Investigation observed, "it does not erase the fact that union representatives, first and foremost, are in the business of promoting the interests of private entities and their dues-paying members, not those of the taxpayers." N.J. COMM. OF INVESTIGATION, supra, at 4. Moreover, as outlined above, grievance and disciplinary disputes place the JCEA at odds with the District employer to benefit the private interests of JCEA members, which by definition cannot serve to benefit the community as a whole.

In addition to the reasons stated above, full-time release also is not directly related to the function of government; many uses simply serve no government function whatsoever. For example, release-time employees engage in political and lobbying activities, while receiving taxpayer-funded salaries. See John Heinis, supra. This includes supporting and opposing candidates for the District school board. In other words, release-time employees, while on the

clock and while being paid by taxpayers, actively engage in political activities to affect the outcome of District elections.

For purposes of this motion, the allegations in the complaint are sufficient on these points. But Taxpayer Plaintiffs anticipate that discovery will yield numerous additional examples of political and lobbying activities performed by full-time release employees. Release time employees' engaging in partisan political activities is not directly related to the function of government. In this case, the function of government is educating Jersey City's children.

B. The challenged release time provisions are not consonant with a public purpose.

If and only if there is a public purpose for a government expenditure, the Court must proceed to the second prong of the Gift Clause test, and determine whether the means to accomplish the public purpose are "consonant with that purpose." *Bryant*, 309 N.J. Super. at 612. In other words, the Gift Clause requires not only that each government expenditure serve a public purpose, but also that "the means are restricted to the public end by the legislation and contractual obligation." *New Jersey Citizen Action, Inc.,* 391 N.J. Super. at 603.

The courts have developed at least two requirements to ensure that the means chosen appropriately achieve the public purpose in the Gift Clause context. First, the government must ensure that "sufficient controls" are placed in an agreement "to insure that the governmental functions and purposes referred to … will be met." *Bryant*, 309 N.J. Super. at 614. And, second, the government must receive "sufficient consideration" in exchange "for the subsidies received" by the private entity. *New Jersey State Bar Ass'n*, 387 N.J. Super. at 54. In this case, Taxpayers have alleged that there are neither.

First, there is insufficient control over full-time release employees to satisfy the Gift Clause. The entire purpose of release time is to allow JCEA officers to work *exclusively* for the

JCEA. This is reflected in the plain language of the CNA. CNA, §§ 7-2.3, 7-2.4. The JCEA release time employees do not teach in the District, report to the District, or are otherwise responsible to the District. Id. Nor does the District account for the release time employees' time. Taxpayers' Complaint makes these allegations abundantly clear: "The release time provisions of the Agreement lack sufficient government control to enable the unions to act as an arm of the government for purposes of carrying out a traditional government purpose." Compl. ¶ 37; see also ¶¶ 1, 19, 22, 25, 26. Because the District neither controls nor directs JCEA release time employees, and because the JCEA does not report to or otherwise account for their use of release time to the District, the release time provisions simply cannot advance a public purpose under the Gift Clause.

Second, the District receives insufficient consideration, in fact, no consideration, for the challenged release time expenditures. To satisfy the Gift Clause and ensure that there is no donation of public funds to a private association, "there must be consideration between the State and the private entity." *Application of N. Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167, 208 (App. Div. 1980). Release time costs taxpayers roughly $1.1 million over the course of the CNA. Compl. ¶ 31; MTD at 13.

For this expenditure, Taxpayers receive exactly *nothing* in return. The CNA does not obligate the JCEA to provide *anything* to the District. *Roe*, 42 N.J. at 217 (The Gift Clause requires that the means used to accomplish a public purpose be "restricted to the public end by the legislation and contractual *obligation*.") (emphasis added).

For purposes of this motion, it is sufficient that Taxpayers have plainly alleged this lack of consideration in the complaint: "The benefits of work performed during release time inure entirely to the teachers' unions, while the District receives insufficient consideration in exchange

for this misuse of taxpayer funds." Compl. ¶ 1. Taxpayers contend that the cost of release time is significant, while any benefit received by the District from release time is minimal. Id. ¶¶ 1, 3, 19, 22, 25, 26, 31. As a result, the challenged provisions violate the Gift Clause, and Plaintiffs' allegations are sufficient to defeat a motion to dismiss for failure to state a claim.[6]

C. The JCEA's arguments that release time satisfies the Gift Clause are unconvincing and beyond the scope of a motion to dismiss.

The JCEA raises several arguments in support of its motion to dismiss that are both unconvincing and that address the merits of a Gift Clause violation—which is not proper on a motion to dismiss. Such arguments should be reserved for a motion for summary judgment.

The JCEA first contends that release time is part of a public employee's compensation, just like "military leave" or other "fringe benefits." MTD at 22. This analogy misses the mark. Military leave and similar benefits run *directly* to the employee for services rendered *by the employee*. Release time, by contrast, runs directly to *JCEA*, not to individual employees, and it goes without any accountability, control, or consideration. It would be one thing if all District employees received a certain amount of leave and then voluntarily donated it to the JCEA. In fact, many municipalities have established this practice. But that is not what is happening here. In this case, release time goes directly to JCEA for JCEA to use for its own business and purposes in any manner JCEA deems fit.

JCEA also refashions this same argument slightly to claim that release time does not violate the Gift Clause because it was part of a larger labor agreement arrived at "through the collective negotiations process." MTD at 22, 33. But if that were true, *any* arrangement made during the "collective negotiations process" would be immune from Gift Clause challenge, no matter how abusive or how transparently it handed public resources over to private parties. Even

[6] JCEA brings its motion to dismiss exclusively under R. 4:6-2(e) ("failure to state a claim upon which relief can be granted"). Notice of Mot. to Dismiss on Behalf of JCEA at 2.

a - private jet to carry Ron Greco, the JCEA president, to and from the union hall would not be a gift under that theory, so long as that jet was part of a larger contract made during the collective bargaining process. Fortunately for the state's taxpayers, the New Jersey Constitution does not encompass such an absurd result. A gift hidden in a large contract, arrived at through collective bargaining or otherwise, is still a gift of public resources and therefore unconstitutional.

The underlying factual premise of JCEA's assertion is also untrue. Release time is *not* compensation to all teachers. It is not identified as compensation in the CNA, and it is not treated as compensation by either the JCEA or District teachers. See CNA, Article 7; Schedule A. Release time hours are not provided to individual teachers to use or donate as they see fit. They are provided directly to the union without any individual teacher agreeing to that siphoning of their purported compensation. CNA, §§ 7-2.3; 7-2.4.

The JCEA cites *Cheatham v DiCiccio,* 379 P.3d 211 (Ariz. 2016), from Arizona as authority. But the Arizona Constitution's Gift Clause differs from, and is less exacting than, New Jersey's. For example, Arizona's Gift Clause does not require that a government expenditure be directly related to a function of government or serve to benefit the community as a whole. See *Turken v. Gordon*, 223 Ariz. 342 (2010). Additionally, there is no express "control" requirement in Arizona's Gift Clause. Id. And, of course, the facts in *Cheatham* are quite different from those presented here. *Cheatham* involved different uses of release time that were monitored and assessed differently by the government employer. An out-of-state case from a divided court with a different Gift Clause, a different legal analysis, and a different set of facts, obviously does not control the outcome here.

If this Court were to look to other states, however, it should consider the opinion by the Texas Attorney General that found that the Fort Worth Independent School District, which

adopted a policy allowing school personnel to perform duties for the Fort Worth Classroom Teachers Association during working hours, violated the Texas Constitution's Gift Clause. TEX. ATTY. GEN. OP. MW-89, 1979 WL 31300 (1979). That program allowed nine days of release time with full pay each year from every 100 union members in good standing within the Fort Worth School District. The Attorney General found that the program violated the Texas Constitution's Gift Clause because "the school district has neither articulated a public purpose to be served by the released time program nor placed adequate controls on the use of released time to insure that a public purpose will be served." Id. at *2. Unlike the Arizona Gift Clause, the Texas Constitution's Gift Clause is substantially similar to New Jersey's, requiring both a public purpose and government control over public expenditures. Also, like here, the practice the Texas Attorney General found to be unconstitutional involved public school districts. Indeed, here the District's and JCEA's practice of release time is even more expansive than the Texas program – allowing two full-time release employees, rather than a pool of hours. As in Texas, the Jersey City District's practice of release time violates the Gift Clause.

The reality is that while the CNA establishes the salaries and benefits of the District, it also provides the JCEA with an exceptionally generous gift in the form of release time paid for by taxpayer money. This is unconstitutional. Taxpayers, and all citizens of New Jersey for that matter, are entitled to have their resources directed to public purposes, especially the highly important objective of public education. To divest a significant portion of those resources to JCEA's private use, as was done here, violates the Constitution.

To repeat, this is not the proper time for adjudication on the merits. "At this preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." *Printing Mart-Morristown*, 116 N.J. at 746. Questions

of public purpose, control, and the sufficiency of consideration are all factual questions for which discovery is relevant and necessary. This motion is only about whether the allegations in the complaint will, if proven, establish lack of public purpose, lack of government control, and inadequate consideration. It is enough for now that a "cause of action is suggested by the facts," which are assumed to be true, and on which "plaintiffs are entitled to every reasonable inference ... [an examination of which is] undertaken with a generous and hospitable approach." Id. (citations omitted). Because Taxpayers have plainly stated a cause of action that release time is a gratuity enjoyed not by the public, but by JCEA, a private labor organization, in violation of the New Jersey Constitution, Defendant's motion should be denied.

III. N.J.S.A. 18A:30-7 has no bearing on this case.

The JCEA invokes an obscure provision of N.J.S.A. 18A:30-7, dealing with sick leave, to make the claim that "release time is regarded as a mandatorily-negotiable item that is specifically authorized by statute." MTD at 18. Not so. That law does not authorize release time, nor does it govern release time as a mandatory or optional negotiable item.

JCEA's argument also demonstrates why dismissal is plainly improper. Whether the District and the JCEA violated the Constitution by agreeing to insert release time provisions in the CNA is a separate factual and legal question, distinct from whether release time was an item they were required to negotiate. Thus, even if release time is a mandatorily-negotiable item (which it is not) the Board and the Union must still reach an agreement *that satisfies the state Constitution.*

N.J.S.A. 18A:30-7 is silent as to release time. For example, in *Board of Educ. of Piscataway Twp. v. Piscataway Maint. & Custodial Ass'n*, 152 N.J. Super. 235, 249 (App. Div. 1977), the court held that "the contractual provision for extended total disability leave exceeded

the authority of the Board and is invalid and unenforceable." At issue was an extended total-disability benefits provision in a contract between the board of education and a labor union. The board of education argued that "the contractual provision granting such extended benefits to any qualifying employee as a matter of right exceeded its authority." Id. at 241. The court agreed, reasoning that "we need not stake out the boundaries of that which is mandatorily negotiable within the framework" of N.J.S.A. 18A:30-1 et seq. Id. at 246. It was enough for the court to conclude that "[b]y granting its employees extended total disability leave benefits as a matter of right, the board in this case surrendered its statutory obligation to deal with each case on an individual basis." Id.

To resolve the question presented in this case, it is not necessary to stake out the boundaries of N.J.S.A. 18A:30-7. The only question presented here is whether the release time provision is constitutional under the Gift Clause. As a factual matter, it is not yet determined whether release time serves a public purpose, whether the District lacks control of the two full-time release employees, or whether the District receives adequate consideration for their salaries. Determination of those questions has no bearing on the applicability or scope of N.J.S.A. 18A:30-7, because the District and the JCEA have no authority to negotiate release time provisions that are *unconstitutional*.

The JCEA's invocation of N.J.S.A. 18A:30-7 is a red herring that should not be entertained.

IV. No deference should be afforded to PERC.

The JCEA also urges this Court to only cursorily scrutinize the challenged release time provision and to give "deference" to the Public Employment Relations Commission ("PERC"). MTD at 2. There is no basis in the law for such an argument.

The JCEA urges this Court to defer to PERC's "repeated conclusion that contract provisions allowing for paid full-time release do not conflict with public policy." MTD at 27. But it is well settled that New Jersey courts "do[] not require deference to the agency's interpretation of case law or legal conclusions." *Cianciulli v. Board of Trustees, Public Emps.' Ret. Sys.*, 244 N.J. Super. 399, 402 (App. Div. 1990). The issue of whether the challenged release time provision violates the Gift Clause is a question of law that this Court, *not* PERC, determines in the first instance after full factual development. "PERC's interpretation of the law outside of its charge is entitled to 'no special deference.'" *Morris Cnty. Sheriff's Office v. Morris Cnty. Policemen's Benevolent Ass'n, Local 298*, 418 N.J. Super. 64, 74 (App. Div. 2011) (internal citation omitted).

While it is true that PERC has "authority to define the *scope* of collective negotiations," *Hunterdon Cent. High Sch. Bd. of Educ. v. Hunterdon Cent. High Sch. Teachers' Ass'n*, 174 N.J. Super. 468, 472 (App. Div. 1980) (emphasis added), this case has nothing to do with the *scope* of collective bargaining negotiations. This case deals with 'interpreting matters of constitutional law:' subject matter that is not within PERC's area of expertise, but is within this Court's. See Id.[7] Because constitutional interpretation and adjudication is not within PERC's area of expertise, its decisions in the area of constitutional law are not given the deference outlined by the court in *Communications Workers of Am. v. Atlantic. Cnty. Ass'n for Retarded Citizens*, 250 N.J. Super. 403, 415 (Ch. Div. 1991). Rather, they fall under the standard from *Biancardi v. Waldwick Bd. of Educ.*, 139 N.J. Super. 175, 177 (App. Div. 1976): "[I]t is for the court to decide whether [an agency's] decision ... is in accordance with the law." In other words, no deference is appropriate here.

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[7] Alternatively, the question of whether this case involves a scope-of-negotiation challenge is itself a factual question that cannot be resolved on a motion to dismiss.

Furthermore, this case is not an *appeal* from a PERC decision. Appeals from certain administrative decisions, including PERC decisions, are given some deference (but certainly not blind deference) by New Jersey courts. *City of Newark v. Newark Council 21, Newark Chapter, New Jersey Civil Serv. Ass'n*, 320 N.J. Super. 8 (App. Div. 1999); *State v. State Troopers Fraternal Ass'n*, 134 N.J. 393, 401 (1993) ("appropriate deference" and "measured review . . . to verify that PERC and the Appellate Division have perceived accurately the Legislature's purpose" in an appeal from a PERC decision). But this case did not arise from a PERC regulatory decision, and there is no PERC decision to which this Court owes any deference. It would be inappropriate and bizarre to substitute for the traditional adjudication of a constitutional dispute (including necessary judicial determination of relevant facts) in *this* case, pertaining to *this* contract, any PERC determination that a release time provision in some *other* contract may have satisfied the Gift Clause in some *other* context.

This case raises a pure constitutional question—subject matter that is exclusively within the subject matter expertise of this Court, not an administrative agency. See *In re City of Camden*, 429 N.J. Super. 309, 328 (App. Div. 2013) ("PERC's interpretation of the statute is entitled to no deference when its interpretation is...contrary to the language of the Act, or subversive of the Legislature's intent." (internal citation omitted).[8]

This Court should reject the JCEA's attempt to defer to unrelated decisions from an administrative agency. The question of the constitutionality of the release time provisions at issue can only be answered after full factual development in *this* case by this Court.

[8] Also, as the *In re City of Camden* court acknowledged, "judicial scrutiny is 'more stringent'" in situations where, as here, "public funds are at stake." 429 N.J. Super. at 328.

CONCLUSION

For the foregoing reasons, Defendant JCEA's Motion should be DENIED.

RESPECTFULLY SUBMITTED this 20th day of April, 2017 by:

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