SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001611-17

MOSHE ROZENBLIT, and,
WON KYU RIM,

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, CHANCERY DIV.
GENERAL EQUITY, HUDSON COUNTY

Hon. Barry P. Sarkisian, J.S.Ch.
Sat below

PLAINTIFFS'-APPELLANTS' CORRECTED OPENING BRIEF

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Preliminary Statement

This case challenges the constitutionality of a government practice that spends taxpayer dollars to employ two full-time public school teachers *not* to educate Jersey City's youth, but instead to work under the exclusive direction and control of the Jersey City Education Association ("JCEA"), a private labor organization, for its own private benefit. No controls, limits, or other rules of accountability are imposed on the JCEA's use of these taxpayer resources. In exchange for the spending of taxpayer money, the District does not receive legally sufficient consideration. And the purpose of the "release time" provisions at issue, as the record makes plain, is to advance JCEA's own private interests, not those of the Jersey City School District ("District") or city and state taxpayers.

That practice violates the New Jersey Constitution's anti-subsidy provisions, collectively known as the "Gift Clause," which were designed to prevent the use of public funds for private activities that are not controlled by the state. The language of the Constitution is plain and unambiguous: "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, § 3, ¶ 2; *see also* art. VIII, § 3, ¶ 3 ("No … appropriation of money shall be made by the State or any county

or municipal corporation to or for the use of any society, association or corporation whatsoever."); art. VIII, § 2, ¶ 1. The Framers of these provisions understood basic principles that are axiomatic in our republic: Public dollars should be spent only for public purposes, and when public money is spent, the government should maintain control over those expenditures and receive adequate consideration for them. Absent these constitutional requirements, public expenditures could result in the allocation of taxpayer funds to private, special interests. Unfortunately, "release time" is precisely what the Gift Clause was intended to prevent: public aid to private, special interests. [1]

The court below erred by holding that the release time provisions at issue, over which the public lacks sufficient control, for which the public receives inadequate consideration, and which serve to benefit the interests of a private labor union, do not violate the New Jersey Constitution's Gift Clause. It also erred by imposing on the Plaintiff Taxpayers an incorrect burden of proof, indeed, the highest burden of proof known to law—beyond a reasonable doubt—in this public interest,

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[1] The practice of release time is not limited to the Jersey City School District. It exists throughout the state, burdening both public resources, and in many cases, efficient government operations. *See* STATE OF NEW JERSEY COMMISSION OF INVESTIGATION, "UNION WORK, PUBLIC PAY: THE TAXPAYER COST OF COMPENSATION AND BENEFITS FOR PUBLIC-EMPLOYEE UNION LEAVE," May 2012 at 13, available at: goo.gl/omF7nk.

civil case challenging the constitutionality of government action. Applying such a burden of proof violates the fundamental fairness required by due process of law and drastically curtails the ability of taxpayers to vindicate their rights under the Gift Clause.

For these reasons, the decision below should be reversed with direction to enter judgment in favor of the Plaintiff Taxpayers.

Procedural History

Taxpayers Moshe Rozenblit and Won Kyu Rim filed suit on January 4, 2017 (Pa24). The Jersey City Board of Education (JCBE) answered the complaint on January 22, 2017 (Pa76). JCEA, upon a stipulated extension, moved to dismiss on March 9, 2017 (Pa86), pursuant to R.4:6-2(e). The Chancery Division denied that motion on May 30, 2017 (Pa1). JCEA then answered the complaint (Pa88), and the case proceeded to discovery.

Upon completion of discovery, Taxpayers and JCEA filed cross-motions for summary judgment. By a letter opinion of October 31, 2017, the Chancery Division denied Taxpayers' motion and granted JCEA's motion (Pa11). Taxpayers timely appealed (Pa410). JCEA timely cross-appealed (Pa414).

Statement of Facts

Plaintiffs Moshe Rozenblit and Won Kyu Rim are citizens of the United States and residents of the State of New Jersey.

Pa26 ¶ 5. Plaintiff Rozenblit pays property taxes and sales taxes in Jersey City, and pays income tax to New Jersey. *Id.* Plaintiff Rim pays income tax to New Jersey. Pa102. The District and the release time benefits bestowed on the JCEA are financed by the District, which receives State income tax revenue and local District tax revenue. Pa27 ¶ 17. Thus, Plaintiff Taxpayers finance the practice of "release time" to JCEA. Pa29 ¶ 33.

Defendant JCEA is a labor organization that represents teachers, attendance counselors, and teachers' assistants in the District. Pa111 ¶ 5. JCEA is an affiliate of the New Jersey Education Association and the National Education Association. *Id.* ¶ 6. The JCEA and its parent organizations are private entities that exist to advocate for the interests of their members. *Id.* ¶ 7.

In June 2015, the District and the JCEA reached a preliminary accord to enter into a collective bargaining agreement (CBA). *Id.* ¶ 8. The release time provisions challenged in this case are §§ 7-2.3 and 7-2.4 of the CBA, in an article entitled "Association Rights." *Id.*

As part of the CBA, the JCEA President and his designee "shall be permitted to devote *all* of his/her time to the Association business and affairs." Pa112 ¶ 9 (emphasis added). The JCEA President is Ron Greco. *Id.* ¶ 11. His designee is Tina

Thorp, the Second Vice President and Grievance Chair of the JCEA. *Id.* ¶ 12. Thus, under the terms of the CBA, both Greco and Thorp are permitted—in fact, required—to devote *all* their working hours to JCEA "business and affairs." *Id.* ¶ 13.

While on full-time release, Greco and Thorp receive their ordinary District salaries, benefits, and pensions, just like teachers who are performing instruction duties. *Id.* ¶¶ 10, 14. In base pay alone, Greco makes $105,580 per year. *Id.* ¶ 15. Ms. Thorp makes $102,280 per year. *Id.* This money is paid for by taxpayer funds. *Id.* Over the term of the CBA, release time costs taxpayers roughly $1.1 million. *Id.* ¶ 16.

Pursuant to the terms of the CBA, Greco and Thorp devote all their time to JCEA business, not to District business. *Id.* ¶ 13. No one in the District controls or directs the activities of either Greco or Thorp. *Id.* ¶ 17. Neither Greco nor Thorp need permission before they engage in JCEA business and affairs. Pa112-13 ¶ 18. The District places no prohibitions on the activities they may engage in while conducting "Association business and affairs." Pa113 ¶ 19.

Neither Greco nor Thorp are required to report to the District. *Id.* ¶ 20. Both regularly report to JCEA offices instead, and neither is required to clock in or clock out. *Id.* ¶ 21. Although every other District employee receives a formal evaluation from a supervisor, including all senior management,

no formal evaluation is conducted for either Greco or Thorp. *Id.* ¶ 22. Neither Greco nor Thorp have a District supervisor, *or any supervisor, whatsoever*. *Id.* ¶ 23. The District has no formal accounting mechanism for tracking Greco's or Thorp's activities. *Id.* ¶ 27.

There are no scheduled interactions between Greco and Thorp and the District. *Id.* ¶ 24. The District has no say in who becomes the JCEA President or his designee. *Id.* ¶ 25. Greco and Thorp cannot be removed from their positions by the District. *Id.* ¶ 26.

Release time is used for activities that advance the private interests of JCEA and its membership, including contract negotiations between JCEA and the District, filing grievances against the District, and representing JCEA members in disciplinary proceedings brought by the District. Pa113-14 ¶ 28. Not only do these activities advance JCEA's private interests, they are adverse to the District in cases where release time employees represent JCEA interests in an adversarial setting. *Id.*

The JCEA also engages in political activities. Pa114 ¶ 29. It provides financial support to candidates, *Id.* ¶ 30, and prepares written endorsements for school board members in school board elections, *Id.* ¶ 31.

The JCEA is *not* obligated to perform *any* function for, or provide any service to, the District under either the CBA or any other policy or procedure. *Id.* ¶ 32. And the District has conducted no studies to determine what value the District receives in return for release time. *Id.* ¶ 33. That is because, of course, there is none.

Because the District does not track release time, or require JCEA to provide any accounting of release time activities, the District does not know how the vast majority of release time is used. In the instance where the District does know, it does not direct release time activities, and has no control over them. The District's employees—Greco and Thorp—who are "loaned" full-time to the JCEA at taxpayer expense, are not accountable to the District; although they are paid by the District and its taxpayers, *they do not work for the District, they work for JCEA.*

Standard of Review

Questions of law are reviewed *de novo*. *Toll Bros., Inc. v. Township of W. Windsor*, 173 N.J. 502, 549 (2002). The lower court's application of legal rules to its factual findings is also subject to *de novo* review. *State v. Harris*, 181 N.J. 391, 416 (2004). This Court reviews *de novo* mixed questions of law and fact, and fact-findings for clear error. *State v. Reevey*, 417 N.J. Super. 134, 146 (App. Div. 2010). "[W]here no

evidentiary hearing has been held," this Court "may exercise *de novo* review over the factual inferences drawn from the documentary record" by the lower court because it is within this Court's authority to "conduct a *de novo* review of both the factual findings and legal conclusions … [when] there was no evidentiary hearing and no credibility determinations were made." *Id.* at 146-47.

In essence, this Court applies "the same standard as the motion judge." *Globe Motor Co. v. Igdalev*, 225 N.J. 469, 479 (2016) (cleaned up). Under R. 4:46-2(c), therefore, "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law," then summary judgment should be granted. *Globe Motor Co.*, 225 N.J. at 479.

Argument

I. IN THIS PUBLIC-INTEREST CIVIL ACTION BROUGHT BY TAXPAYERS CHALLENGING THE CONSTITUTIONALITY OF A GOVERNMENT CONTRACT, THE PROPER BURDEN OF PROOF IS PREPONDERANCE OF THE EVIDENCE, NOT BEYOND A REASONABLE DOUBT. (Pa14-16.)

The court below devoted almost a fifth of its written opinion to discussing the burden of proof applicable to a question under the New Jersey Constitution. Pa14-16. The court concluded that Plaintiff Taxpayers "must show that the release-

time provisions in the aforementioned contract are repugnant to the constitution beyond a reasonable doubt." Pa16. That legal conclusion was wrong for at least four reasons. This Court should reverse on this point alone.

A. This case does not challenge a statute or the implementation of a statute, and therefore does not warrant a heightened burden of proof. (Pa14-15.)

New Jersey courts apply the "beyond a reasonable doubt" rule in cases where a litigant alleges that a *statute* passed by the *legislature* is unconstitutional. *See Booth v. McGuinness*, 78 N.J.L. 346, 370 (1910) (first use of the "reasonable doubt" standard in a constitutional case, holding "that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt.") (internal quotation marks omitted). Thus in *Gangemi v. Berry*, on which the court below heavily relied, the New Jersey Supreme Court concluded that a "*legislative act* will not be declared void unless its repugnancy to the constitution is clear beyond reasonable doubt." 25 N.J. 1, 6 (1957) (emphasis added). The reason is that the legislature is a co-equal branch with the judiciary, and courts out of respect presume the legislature acts within its constitutional responsibilities unless the opposite conclusion is inescapable. *Friedland v. Podhoretz*, 174 N.J. Super. 73, 89 (Law. Div. 1980).

But the *contract* between JCEA and the District at issue here is not a "legislative act." Nor is it the product of a co-equal branch of government that is owed any type of deference. Instead, the JCEA contracted with the District to decommission two teachers and essentially turn them over to the JCEA full-time at taxpayer expense. This contractual arrangement is not a statute; it is a garden-variety government contract, subject to challenge under the state constitution's Gift Clause.

The court below committed reversible error when it asserted that Plaintiff Taxpayers challenge the "constitutional validity of … N.J.S.A. 18A:30-7." Pa.15. They do nothing of the sort. They challenge the constitutional validity of release time provisions contained in a collective bargaining agreement executed between JCEA and the Jersey City Department of Education.

N.J. Stat. Ann. 18A:30-7 reads as follows:

> Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.

This statute, which deals primarily with sick leave, permits boards of education to pay salaries for absences that are not

taken as sick leave, so long as such leave does not exceed 15 days in any one year. Plaintiffs do not challenge this statute.

The statute is simply *irrelevant* to the Gift Clause analysis. It does not address, let alone mandate, release time or any other payment. And that is assuming that release time is akin to a payment "by individual consideration"—which it is not, as described in detail below. Nothing in this case disturbs the statute. If this Court were to rule that the release time provisions at issue here violate the Gift Clause, and grant all the relief Taxpayers request, it does not affect the ability of the District or any other contracting party to continue to bargain for, and add to their contracts, release time provisions that *do* comply with the Gift Clause. Nor is it necessary to define the scope of this statute to determine whether *this* release time provision violates the Gift Clause.

Thus the "reasonable doubt" standard does not apply. This is not a challenge to a *legislative act*, but a challenge to a local government act that violates the state Constitution—specifically, it involves a contract between a government body and a private entity under which the governmental body gives or lends its money or credit to the private entity without adequate safeguards in place to bring the provision in compliance with the Gift Clause. *Gangemi* is not applicable.

Gangemi involved a direct challenge to a state statute. The plaintiff in that case challenged the absentee voting statute—a legislative act. 25 N.J. at 6. The Court, deferring to the legislature, applied the reasonable doubt standard and upheld the statute. *Id.* at 10. It took pains to explain that the reasonable doubt standard applies to evaluating a "constitutional limitation upon the exercise of *legislative power.*" *Id.* (emphasis added); *see also* Pa.14-15 (quoting same). But this case does not challenge any statute at all.

The limited class of cases in which courts apply the reasonable doubt standard involve facial challenges to state statutes. *See, e.g., Garden State Equal. v. Dow*, 434 N.J. Super. 163, 186-87 (Law Div. 2013) (involving "a statutory scheme" that the court could not "invalidate" unless the statute's "repugnancy to the Constitution [wa]s clear beyond a reasonable doubt."); *State v. Trump Hotels & Casino Resorts, Inc.*, 160 N.J. 505, 509 (1999) (challenge to the constitutionality of a *legislative act*—the Casino Control Act.).

The same was true of *In re P.L. 2001, Chpt. 362*, 186 N.J. 368 (2006). That case involved a challenge to the Probation Officer Community Safety Unit Act which created "in the heart of the judiciary a law enforcement unit comprised of no less than two hundred probation officers." *Id.* at 372. The Act directed the state Supreme Court to promulgate rules for this "new armed

unit" of "probation officers" to be "trained by police authorities." *Id.* at 372-73. That statute was challenged under the Separation of Powers Clause. The issue in that case, like the others, was the constitutionality of a *legislative act*.

In all of these cases, the plaintiffs had brought a facial challenge to the constitutionality of a state statute. That is simply not the case here.[2] Nor is government contracting an "*implementation*[] of a legislative act." Pa14 (emphasis added). The court below held that the District "in negotiating the terms of the [CBA]," was *implementing* N.J.S.A. 18A:30-7. Pa15. That is incorrect.

The trial court cited *Franklin v. New Jersey Dep't of Human Servs.*, 111 N.J. 1 (1988), for the proposition that in cases challenging implementations of a legislative act, plaintiffs must meet the reasonable doubt standard. But *Franklin* involved administrative rule-making, which *is* a "quasi-legislative" act. *Bailey v. Council of Div. of Planning & Dev. of Dep't of Conservation & Econ. Dev.*, 22 N.J. 366, 373 (1956). The *Franklin* plaintiffs challenged a *regulation* promulgated under the state statutes dealing with providing shelter to dependent

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[2] Whatever may constitute a legislative act, a *contract* between a private entity and the government is *not* a legislative act. Government contracting is *not* a legislative function. *See Government of Virgin Islands v. Lee*, 775 F.2d 514, 520 (3d Cir. 1985). And some attenuated "nexus" to a statute, Pa15, does not transform a non-legislative act into a legislative act.

children. 111 N.J. at 2, 5, 20. The statute was clear: it directed the Commissioner of Human Services to "adopt 'all necessary rules and regulations'" ... to accomplish the purposes of this act." *Id.* at 5 (citation omitted). Pursuant to this statute, the Commissioner enacted a "regulation," which is, by definition, an implementation of legislative *authority*. Thus, it is unremarkable that the *Franklin* Court would apply the reasonable doubt standard in evaluating the constitutionality of an agency regulation promulgated through the legislatively-directed rule-making process. 111 N.J. at 8.

That is not the case here. A government contract like the CBA is not an implementation of a legislative act. A government contract is not a *regulation* under any definition of that term. In fact, Taxpayers are not aware of a single instance where courts applied the reasonable doubt standard outside the context of constitutional challenges to statutes or to agency *regulations*. *See, e.g., Shannon v. Department of Human Servs.*, 157 N.J. Super. 251, 256 (App. Div. 1978).

However a legislative act or an implementation of a legislative act is defined, one thing is clear: a contract between a school district and a union is neither. *Gangemi*'s reasonable doubt standard is not applicable. By applying that burden of proof to Plaintiff Taxpayers, the court below committed reversible error.

B. Unlike *Gangemi*, where the Constitution was silent as to legislative authority, in this case, the Constitution *expressly* prohibits gifts to private enterprises. (Pa14-16.)

The court below also erred in finding that the Constitution is *silent* with respect to subsidies to private industries and enterprises. It is not.

Gangemi's reasonable doubt standard applies only when the state constitution is *silent* on an issue, not when it speaks directly to an issue. *See State v. Buckner*, 223 N.J. 1, 15 (2015). In this case, all parties agree that the Gift Clause test, as clarified and enunciated in *Roe v. Kervick*, 42 N.J. 191 (1964), applies to evaluate the constitutionality of the release time provisions at issue in this case.

Like *Gangemi*, *Buckner* involved the constitutionality of a state statute—the Judicial Recall Statute, which was alleged to violate the Retirement Clause of the New Jersey Constitution. 223 N.J. at 17. Also like *Gangemi*, the Court in *Buckner* held that that the constitutional provision at issue was "silent" as to recalls; it only mentions retirements. *Id.* at 15. That meant that *Gangemi*'s reasonable doubt standard applied—because nothing in the Constitution spoke directly to the question raised by the plaintiffs in that case. But that is not the case here. Here, the meaning of the relevant constitutional provisions is well-established. *Trump Hotels* also confirms

Taxpayers' reading. There, the Casino Control Act was challenged as unconstitutional under the Casino Amendment of the New Jersey Constitution. 160 N.J. at 528. The Court held that the Casino Amendment was ambiguous, "unclear," and "susceptible to more than one interpretation." *Id.* at 527. Here, by contrast, the Gift Clause test is settled law; all parties agree that the test is supplied by *Kervick*, 42 N.J. 191.

The court below seemed to think that only if the Gift Clause specifically bars *this type of release time provision*, could the CBA be unconstitutional. Pa15. But of course, that cannot be the standard. The Constitution provides a *conceptual* framework to use when determining whether monetary allocations from governmental to private entities are prohibited. That evaluation is governed by the test of *Kervick*, as discussed in detail below, Section II.

Given the clarity of the Gift Clause, the high evidentiary bar is not supported in the case law.

C. The highest form of proof known to law—beyond a reasonable doubt—is more appropriate in the criminal context, not in civil disputes, particularly where the party bearing the burden is a private party and not the government. (Pa14-16.)

The burden of proof "in a civil action" is on the plaintiff "to prove every essential element of her claim or claims by a preponderance of the credible evidence." *Mogull v. CB Commercial Real Estate Grp., Inc.*, 162 N.J. 449, 465 (2000).

That remains true of cases challenging the constitutionality of governmental actions, *McDonough v. Jorda*, 214 N.J. Super. 338, 346-47 (App. Div. 1986), as well as evaluation of contract disputes, *Globe Motor Co.*, 225 N.J. at 482; *Bello v. Lyndhurst Bd. of Educ.*, 344 N.J. Super. 187, 194 (App. Div. 2001). The preponderance standard plainly applies here.

The U.S. Supreme Court has said that the "decisive difference between criminal culpability and civil liability" is the burdens of proof: beyond a reasonable doubt in criminal cases and preponderance of the evidence in civil cases. *Leland v. Oregon*, 343 U.S. 790, 805 (1952). The Court observed that the reasonable doubt standard "historically has been reserved for criminal cases" and courts "should hesitate to apply it too broadly or casually in noncriminal cases." *Addington v. Texas*, 441 U.S. 418, 428 (1979) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

When government uses its full authority to prosecute a criminal defendant to deprive her of liberty, the defendant's interest is of "transcending value" which requires the government to prove "guilt beyond a reasonable doubt." *In re Winship*, 397 U.S. at 364. Indeed, "*no man* shall lose his liberty unless *the Government* has borne the burden of convincing the factfinder of his guilt" under the "*indispensable*"

"standard" of beyond reasonable a doubt. *Id.* (emphasis added) (cleaned up).

In "a civil proceeding," "the authorities are quite clear that it need not be beyond reasonable doubt." *Oriel v. Russell*, 278 U.S. 358, 364 (1929). Indeed, "the ordinary rule in civil actions" is that the plaintiff has the burden "to prove its case by a fair preponderance of the evidence" because there is "no logical support for a rule" in civil cases that "make[s] it more difficult for the injured party to establish civil liability" by imposing the "beyond a reasonable doubt" standard. *Newark Live Poultry Co. v. Fauer*, 118 N.J.L. 556, 559-60 (1937) (cleaned up).

In this civil action, the preponderance standard applies to evaluate whether the release time provisions of a public contract between the JCEA and the District violated the Gift Clause.

D. By applying the beyond a reasonable doubt standard to a public interest constitutional challenge, the trial court violated Taxpayers' procedural due process rights. (Pa14-16.)

Forcing Taxpayers to prove that a particular provision in a government contract violates the constitution "beyond a reasonable doubt" violates their procedural due process rights under the federal and state constitutions.

Before a court determines that there is an interference with a person's life, liberty, or property, it must examine whether the procedures protecting that interest are constitutionally sufficient under the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976) (*see In re Polk*, 90 N.J. 550, 560-69 (1982) (applying *Mathews* in determining what standard of proof comports with state and federal due process)): (1) the private interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Matthews*, 424 U.S. at 335.

In *Polk*, the New Jersey Supreme Court applied these factors to determine what evidentiary standard was required by due process in cases before administrative agencies. It first addressed the private interest involved—in that case, the temporary loss of a professional license, 90 N.J. at 562-65—and found that this was "no[t] [a] fundamental constitutional liberty interest." *Id.* at 564. As to the second *Mathews* factor, it found that the government interest—regulating the practice of medicine—was extraordinarily weighty. *Id.* at 566. As to the third *Mathews* factor, it found that the preponderance

standard "does not result in an undue risk of incorrect factfinding." *Id.*

But in this case, the factors weigh in the opposite direction. First, taxpayers have a constitutional interest in ensuring that no "appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever." N.J. CONST., art. VIII, § 3, ¶ 3. Taxpayers have an important constitutionally-protected property interest in ensuring their taxpayer dollars do not fund illegal subsidies. Second, the government interest in allocating funding, while significant, exists only within the confines of the Constitution. The government has no general interest to act in whatever manner it claims to be beneficial. The taxpayer's interest, by contrast, in vindicating the Constitution through a lawsuit like this, is exceptionally high. Taxpayers are the primary intended beneficiaries of the Gift Clause and taxpayer standing rules; depriving them of a realistic opportunity to vindicate their rights undermines the purpose of this important constitutional provision. Third, there is a significant risk of error caused by applying the extreme reasonable-doubt standard to cases such as this, particularly because *this is not an evidentiary*

question, but a legal one, and applying the reasonable-doubt standard is simply a "category error."[3]

The *Mathews* analysis thus indicates that the reasonable doubt standard should not apply to evaluations of the legal question of whether a local government contract is constitutional under the state Constitution's Gift Clause.

II. THE TRIAL COURT ERRED IN FINDING THAT THE RELEASE TIME PROVISIONS AT ISSUE COMPLY WITH THE GIFT CLAUSE BECAUSE THE RELEASE TIME EXPENDITURES ARE NOT SUPPORTED BY "STRICT" CONTROL, "SUBSTANTIAL" CONSIDERATION, AND A "PRIMARILY" PUBLIC PURPOSE. (Pa16-20.)

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. N.J. CONST., art. VIII, § 3, ¶¶ 1-3. The purpose of these constitutional prohibitions is to prevent aid to private corporations not constituting public agencies controlled by the state. *City of Camden v. South 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).

Kervick, the "seminal" Gift Clause case, set forth a two-part test for determining whether an expenditure violates the

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[3] "A category error, or 'type-trespass,' occurs when we place an entity in the wrong class or category of things, resulting in a fundamental failure of analysis. Examples of category errors include inquiring into the gender of a rock or into which day of the week is reptilian." *Del Campo v. Kennedy*, 517 F.3d 1070, 1078 n.11 (9th Cir. 2008).

Constitution. First, "the provision of financial aid [must be] for a public purpose, and, second, … the means to accomplish [that public purpose must be] consonant with that purpose." *Bryant v. City of Atlantic City*, 309 N.J. Super. 596, 612 (App. Div. 1998) (citing *Kervick*, 42 N.J. at 212).

Under prong one of this test, a public purpose is 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) (citation omitted).

Under prong two, the Court must examine whether the government: (1) retains sufficient control over the public expenditure, *see New Jersey Citizen Action, Inc. v. Cnty. of Bergen*, 391 N.J. Super. 596, 604 (App. Div. 2007), 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).

These are *conjunctive* requirements. 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*** *is not directly related to the function of government.* An expenditure will *also* violate the Gift Clause if the means of accomplishing the public

purpose are not consonant with that public purpose because the government *lacks sufficient control* over the expenditure ***or*** the government *does not receive adequate consideration* for the money spent.

A failure of *any* of these four requirements is enough to establish a Gift Clause violation. As the record establishes, the release time provisions at issue fail all four.

A. The release time provisions fail the Gift Clause's strict control requirement because release time is used as the JCEA pleases, without any direction from and insufficient accountability to the Jersey City School District, as the District admits. (Pa18-20.)

Of the four requirements necessary for the District's expenditures on release time to avoid a Gift Clause violation, failure to establish adequate— indeed *any* control—is the plainest. *Kervick* and its progeny stand for the proposition that when a public entity spends public resources that expenditure must be reasonably related to achieving a public purpose and "confined to the execution of that purpose through a reasonable measure of control by a public authority." *Kervick*, 42 N.J. at 222. In other words, "the 'public money' lent must be 'assigned to bringing the public purpose to fruition' and the private entity's 'business activity' must be '*so strictly pointed* in that direction, that for practical purposes [the private entity] represents the *controlled means* by which the government accomplishes a proper objective." *New Jersey Citizen*

Action, Inc., 391 N.J. Super. at 604 (citations omitted) (emphasis added).

When a public contract is involved, the government must ensure that "sufficient controls" are placed in the agreement "to insure that the governmental functions and purposes referred to ... will be met." *Bryant*, 309 N.J. Super. at 614. Simply stated, the public funds cannot "be loaned to a private agency to be used as the agency pleased." If that occurs, "the Constitution would stand in the way." *Kervick*, 42 N.J. at 222. And the Gift Clause precedent makes no distinction between loans and direct public expenditures. *See Bryant*, 309 N.J. Super. at 614.

In this case, it is plain that the District does not control release time in any meaningful way. And the JCEA—a private agency—can use release time as it pleases. The five examples of "control" the trial court identified in its Order (Pa19) are woefully inadequate to ensure that any purported public purpose of release time will actually be carried out. *Bryant*, 309 N.J. Super. at 614.

Furthermore, the decision below asserts that "the legislature has statutorily limited the amount of control the

District might have over the JCEA and its release employees."[4] Pa19. But of course, even if that were true for publicly-financed union activities—which it is not—the legislature cannot abrogate the requirements of the Constitution. If the control prong of the Gift Clause means what the Framers said and what the Supreme Court has held, then the release time provisions fail as a matter of law for want of any meaningful public control.

1. The record below shows that the District exercises virtually no control over the JCEA's use of release time, as the District admits. (Pa18-20.)

To ensure that public money is put to public use, the Gift Clause requires "strict" control over government expenditures. *New Jersey Citizen Action, Inc.*, 391 N.J. Super. at 604. The record establishes that not only does the District fail to exercise strict control, it imposes *no control whatsoever* on the activities of release time employees. The trial court erred in finding otherwise.

The trial court ignored the District's *admission* that it does not control or direct the activities of release time employees. In two separate requests for admissions, this precise point was put directly to the District. Pa188 at RFA 5;

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[4] Citing N.J.S.A. 34:13A-5.4(a)(2) (providing that public employers cannot "dominat[e]" or "interfer[e] with" a Union's administration) *Id.*

Pa191 at Resp. 5: "Admit that you do not control or direct the activities of the JCEA President while using release time hours." Response: "Admitted." Pa188 at RFA 6; Pa191 at Resp. 6: "Admit that you do not control or direct the activities of the JCEA President's designee or other JCEA members using release time hours." Response: "Admitted." On the question of control, these admissions are fatal. *As a matter of law*, they establish that the release time arrangement violates the Gift Clause.

The record also establishes that there are simply *no indicia of public control* over the release time employees under the Agreement or anywhere else. Neither the JCEA president, Ron Greco, nor his designee, Tina Thorp, need permission from anyone in the District before they engage in JCEA "business and affairs." Pa112-13 ¶ 18. No one at the District directs the activities of either Greco or Thorp. Pa112 ¶ 17. Nor does the District place any prohibitions whatsoever on their activities. Pa113 ¶ 19. Neither Greco nor Thorp are required to report to the District on a regular basis. *Id.* ¶ 20. Instead, both report to the JCEA offices. *Id.* ¶ 21. While there, neither Greco nor Thorp is required to punch a time clock, or identify either their arrival or departure time, or otherwise account for their working hours. *Id.* Indeed, they provide *no accounting of*

any kind about their daily activity or how they spend release time. *Id.* ¶ 27.

While *every other* public employee in the school district has a direct supervisor, no one in the District supervises the work of either Greco or Thorp. *Id.* ¶ 23. They simply have *no* supervisor.

Although *every other* employee in the District receives a formal evaluation from their employer, *no* performance evaluation of any kind is provided to Greco or Thorp. *Id.* ¶ 22. There are no regularly scheduled interactions between the release time employees and the District. *Id.* ¶ 24.

Although *every other* employee in the District is subject in some way to the District's decision to hire or fire, the District has *no* say in who becomes the JCEA President or his designee, and the District cannot remove either Greco or Thorp from their jobs. *Id.* ¶¶ 25-26.

Obviously the District can enter into appropriate contracts to accomplish the extraordinarily important objective of educating Jersey City students. But that is not what is happening here. And any contracts the District signs must contain sufficient conditions and controls to ensure that the educational objective is met. As *Kervick* made clear, the government may enter into "[a]ppropriate contracts" with private entities, but those contracts must "fix[ ] the terms … *and*

contain[ ] such stipulations and conditions and reservations of control in the [government entity] as may be necessary to effectuate the public purpose of the act." 42 N.J. at 222 (emphasis added). For example, the State can provide a private developer with a payment for the construction and operation of a public marina (assuming there is a public purpose and valid consideration), but only if "[t]he State retains *very substantial and close control* over the development and operation of the marina." *Jersey City v. State Dep't of Envtl. Prot.*, 227 N.J. Super. 5, 21 (App. Div. 1988).

The provisions at issue here are 180 degrees from the contracts approved in *Kervick, State Dep't of Envtl. Prot.*, or any other Gift Clause case. There is no question who controls release time in this case: the JCEA, and only the JCEA, which can use it when and how it sees fit. The JCEA President and Vice President direct their own activities, with no input from, or prohibitions placed on, those activities by the District. The JCEA also provides no accounting of those activities to the District. *Release time employees cannot be hired or fired by the District, are not evaluated by the District, and are not supervised by anyone in the District.*

That is in stark contrast to normal District and education operations. Pa114 ¶ 34. Outside of the context of release time, there are *no* circumstances under which control over on-

duty personnel is delegated wholesale to a private entity. *Id.* By contrast, release time is so permissive that there is more control over the Chief Talent Officer, Celeste Williams, who is the head of human resources for 42 District schools. Even she must report to and be evaluated by the Superintendent. *Id.* ¶ 35.

Moreover, the plain language of the CBA mandates that release time employees devote "*all* of their working hours to JCEA 'business and affairs' … ." Pa.112 ¶ 13 (emphasis added). That alone is enough to establish a lack of control (as well as lack of public purpose). And the evidence shows that no additional controls are put in place over release time employees or their activities either in the Agreement or in other rules or regulations promulgated by the District. *See Pa.114* ¶ 32 (Pa189 at RFA 7; Pa191 at Resp. 7: "Admit that, apart from the 2013 Agreement, you do not have any additional policies, procedures, rules, or regulations that detail how release time may be used." Response: "Admitted."). A public agreement must be structured to include "reservations of control" in the public entity over a private agency that is "subject also to such rules and regulations of the [public entity] as may be designed to secure compliance with [a public] purpose." *Kervick*, 42 N.J. at 222. In this case the plain language of the Agreement and the

overwhelming weight of the evidence make clear that release time entirely lacks control—which violates the Gift Clause.

2. The reservations of control identified in the decision below are inadequate as a matter of law because they do not ensure that a public purpose will be accomplished. (Pa19.)

Although the Gift Clause requires public control over public expenditures to ensure that a public purpose will be accomplished, *Kervick*, 42 N.J. at 222, the measures of control identified in the decision below do nothing to ensure that the exceedingly important public purpose of educating Jersey City youth will actually be done by the release time employees.

Despite the District's own admissions to the contrary, the order on appeal concludes that the District exercises sufficient control over the release time employees for four reasons: (1) The release time employees must report sick and personal absences to the District; (2) the release time employees must report their physical presence to school administrators when on campus; (3) the release time employees have contact with District personnel, and attend meetings, hearings, and other gatherings where they are in the presence of administrators, including the District scheduling different hearings; and (4) the District "maintains authority to discipline the releasee employees for employment-related misconduct." Pa19.

These factors do not, however, amount to control and they do not ensure that the District's goals and activities will be accomplished.

First, notification does not amount to control. The trial court found that there is sufficient control because release time employees must *report* when they are sick or otherwise take leave, and must *report* their presence to administrators while on campus. As a simple accounting and payroll measure, of course the release time employees must report leaves of absence to District record-keepers. But *reporting* an absence doesn't mean the District is *controlling* an activity. Similarly, reporting physical presence on a campus in no way indicates that District personnel are controlling the activities of release time employees *while* on campus. Schools typically require that *all* visitors report their presence to the front office if they are on campus. But informing a principal that a release time employee is on campus does not equate to the District controlling the employee's activities. On the contrary, once on campus, the release time employees *choose and direct their own activities* without oversight or control. Pa.136.

Second, the trial court found sufficient control because release time employees have contact with District administrators and attend hearings and meetings where administrators are present. Of course they do. Taxpayers are not contending that

the release time employees do not work *among* District employees or school administrators; they are contending that merely because release time employees are *surrounded by* District employees, this does not mean they are doing work *for the District* as required by the Gift Clause. And the Gift Clause is unconcerned with whether public employees work in plain view or outside the view of public employees. Instead it requires only that District representatives actually *control* the activities of release time employees.

In fact, release time employees are *not* in the physical presence of administrators for the *vast* majority of their working days. When asked, "[W]hat percentage of the time would you say are you in the presence of a District employee?" Thorp responded, "Maybe 30 percent." Pa417.[5] In the remaining 70 percent of time that the release time employees spend *outside* the view of the District, the District has no idea what they are doing, because there is no accounting of their time.Pa188 at RFA 4; Pa192 at Resp. 4. Under these facts, there can simply not be adequate constitutional control. Moreover, as the record establishes, during the times in which the release time employees are in the physical presence of District

[5] And according to Greco, Thorp, the grievance chair, who handles all disciplinary proceedings, is in the best position to know this. Pa155.

administrators, they are acting in a capacity that is *adverse* to them and to the District, either by filing costly grievances *against* the District, or representing employees in disciplinary cases brought *by* the District. Pa174-75; Pa134.

Similarly, scheduling a meeting does not mean the District is *controlling or directing the activities* of release time employees either before, during, or after the meeting. Scheduling meetings to which release time employees are invited does not prove that these employees *work for* the District in the sense required by the Gift Clause. Different parties and business interests often schedule meetings for other groups and individuals who do not work for them. The JCEA's argument is tantamount to saying that if the District scheduled a meeting with the Parent-Teachers' Association, the District, *ipso facto*, controls the activities of the PTA. Obviously, that is fallacious.

Likewise, the fact that the release time employees respond to District telephone calls and e-mails is not evidence of control. By way of comparison, attorneys are expected to respond to calls and e-mails from opposing counsel promptly and professionally, but, of course, that does not mean opposing counsel *controls the activities* of an attorney on the other side.

Thus, the fact that release time employees (are invited to) attend meetings scheduled by the District, or that they answer the District's phone calls, simply does not show adequate control by the District to prove that the funding of release time employees—whose activities are not supervised by the District, who are not reviewed for performance by the District, and who cannot be fired by the District—is anything other than a gift of public funds to the JCEA. Pa113 ¶¶ 22-23, 26; Pa322-23 ¶¶ 22-23, 26.

Finally, the trial court found that there is constitutionally sufficient control over the release time employees because "the District maintains authority to discipline the releasee employees for employment-related misconduct." Pa19. If such authority exists at all, it is unclear what that form of discipline would look like, as the record is abundantly clear that the District does *not* measure the release time employee's performance, they cannot hire them, and cannot fire them. Pa130, 136-37, 177. When Celeste Williams, the head of District human resources, was asked "Does the District have any say in determining who becomes the president of the JCEA?," Williams responded, "Not at all." Pa130. She provided the same answer with respect to Thorp. *Id.* When asked, "Can Mr. Greco be removed from his position as the JCEA president … [by the District]," she responded, "No." Pa138.

She testified that the same is true of Thorp. *Id.* Despite the fact that every other District teacher and employee receives a performance evaluation, Williams, when asked, "does Mr. Greco receive a formal evaluation from anybody in the District based on his work performance?," responded, "Not to my knowledge, no." Pa137. And, again, she said the same of Thorp. *Id.*

This arrangement is unlike any employment relationship anywhere. Indeed, if the employer-employee relationship means anything, it is the right of an employer to "hire, fire, … [and] control employees' schedules." *See Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107, 124 (1999). Yet the record plainly establishes that the District does none of these things for the release time employees. Pa130, 136-38, 176. And the District admits it does not know their schedules and does not control their activities. *See* Pa188, RFA 5; Pa191, Resp. 5: "Admit that you do not control or direct the activities of the JCEA President while using release time hours." Response: "Admitted." Pa188, RFA 6; PA191, Resp. 6: "Admit that you do not control or direct the activities of the JCEA President's designee or other JCEA members using release time hours." Response: "Admitted."

No one is saying that the releasees are not hard-working employees pursuing what they believe are their professional duties. But they work hard *for the JCEA, not the District.*

The Gift Clause requires that the District exercise control over the activities of taxpayer-funded employees and duties. *See Auletta v. Bergen Ctr. for Child Dev.*, 338 N.J. Super. 464, 471-72 (App. Div. 2001) (noting in other employment contexts, the employer had "the right to direct the manner in which the business or work shall be done, as well as the results accomplished"). And it requires that the District put in place adequate controls to ensure that those duties— and thus a public purpose—are accomplished. *Kervick*, 42 N.J. at 222. In the CBA, the District has failed to do so. The resulting relationship between the release time employees and the District is one that does not resemble an employer-employee relationship in any other context simply because there is no actual control over the employees. This arrangement violates the control requirement of the Gift Clause.

3. The trial court erred in finding that there is a distinction between government expenditures and government loans for purposes of Gift Clauses analysis. (Pa19.)

The decision below questioned whether, under the Gift Clause, the amount of government control must be "strict," as is required by *Kervick*, 42 N.J. at 219-20, and its progeny for government *expenditures* rather than government *loans*. Pa19. Neither the plain language of the Gift Clause, nor the cases interpreting it, make any such distinction. The proper test, as

the Supreme Court has iterated time and again, is strict and close control.

The language of the Gift Clause is plain and unambiguous: "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, § 3, ¶ 2 (emphasis added); *see also* art. VIII, § 3, ¶ 3. The Clause, on its face, applies equally to both *giving* and *loaning*—in other words, to direct subsidies or to favorable loans that result in a subsidy not otherwise available. In addition to the clarity of art. VIII, § 3, ¶ 2 of the Constitution, the same series of anti-subsidy provisions speaks directly to *appropriation*: "No … appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever." art. VIII, § 3, ¶ 3. The Framers were plainly as concerned with direct subsidies, as is the case here, as they were with government loans.

The case law also does not require some lesser standard of control over government expenditures than it does for government loans. Indeed, the case with the strongest language pertaining to the control requirement, *State Dep't of Envtl. Prot.*, involved a state payment and lease for the construction and operation of a public marina. There, the Appellate Division

upheld the expenditure under the Gift Clause, but only because it found that "[t]he State retain[ed] *very substantial and close control* over the development and operation of the marina." 227 N.J. Super. at 21 (emphasis added). Similarly, *Bryant* involved the conveyance of city-owned property to a private developer for purposes of redevelopment. The Appellate Division found the deal permissible because it included "controls to maximize the likelihood that the redeveloper will develop Huron North, and that those controls adequately assured that the City's public purposes would be fulfilled." 309 N.J. Super. at 612. Even the very earliest Gift Clause cases did not distinguish between direct financial aid and other types of subsidies. In *Jersey City v. North Jersey St. Ry. Co.*, 78 N.J.L. 72 (1909), for example, the Supreme Court could not "distinguish in principle between direct pecuniary aid, and aid by means of a release from a pecuniary burden." *Id.* at 74. Nor do other states make such a distinction in their Gift Clause analyses. *See, e.g., Kromko v. Arizona Bd. of Regents*, 718 P.2d 478 (Ariz. 1986); *Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354 (Ariz. 1984); *Texas Mun. League Intergovernmental Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W.3d 377, 384 (Tex. 2002).

The purpose of the Gift Clause's control requirement is that it ensures that the public purpose for the government expenditure will be achieved. *Kervick*, 42 N.J. at 222. That is

true whether money is loaned, released, or appropriated. In fact, if anything, the requirement for control is *heightened* when dealing with government expenditures, because there is no promise of repayment or recourse in the event of default. The court below erred in finding a distinction in Gift Clause analysis between the degree of control necessary for government expenditures and government loans. In either case, the control must be "very substantial," "close," and "strict." *State Dep't of Envtl. Prot.*, 227 N.J. Super. at 21; *New Jersey Citizen Action, Inc.*, 391 N.J. Super. at 604.

4. The legislature cannot invalidate by statute the Gift Clause's command that the government exercise control over government expenditures. (Pa19.)

The court below also erred in finding that "the legislature has statutorily limited the amount of control the District might have over the JCEA and its releasee employees." Pa19. In so finding, it cited N.J.S.A. 34:13A-5.4(a)(2), a statute that prevents public employers from "[d]ominating" or "interfering with" a public union's administration. But this statute is not relevant to Gift Clause analysis.

It is axiomatic that the legislature has no authority to change by statute what the Constitution commands. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Thus, even if the legislature wanted to limit the amount of control a school district could exercise over its employees, it could not do so in a way that overrides the demands of the Gift Clause. *See also City of Boerne v. Flores*, 521 U.S. 507, 528-29 (1997) (legislature cannot, by statute, override constitutional command as interpreted by the courts).

But in any event, in this case, the legislature did no such thing. While limits of government control over union activities make sense with regard to *privately-financed* union activities, it is emphatically *not* the rule when it comes to the Constitution's Gift Clause requirements for public control over

public expenditures. When taxpayer money is spent, the Constitution *mandates* that the government control the use to which that money is put—otherwise, the expenditure is a forbidden gift of public resources. *Kervick*, 42 N.J. at 219. Certainly the union has no constitutional right to use the privilege of government financing.

In *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177 (2007), the U.S. Supreme Court rejected a union's argument that it had a First Amendment right to fund its activities with money given to it as a subsidy by the state. It noted that legal restrictions on the union's use of those subsidies were "simply a condition on the union's exercise of this extraordinary power [*i.e.*, the subsidy] … . The notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive." *Id.* at 184. Likewise, here: the control over expenditures of public money that the Gift Clause requires do not amount to interference with the union's legal rights. And claiming that a state statute that limits government control over privately-financed labor union employees is a tacit admission that the release time arrangement under review lacks sufficient control.

Thus, the trial court's reliance on N.J.S.A. 34:13A-5.4(a)(2) is misplaced, and dangerously so. The legislature did not limit the District's control over the release time employees

at issue and the public funds that support them, and could not have done so under the Gift Clause even if the legislature wanted to.

B. There is constitutionally insufficient consideration for the release time expenditures at issue because the JCEA is not *obligated* to provide anything to the District, and release time is a benefit to the JCEA, not "compensation" to all employees. (Pa20.)

The Gift Clause requires that a public entity also receive "sufficient consideration" in exchange for any "subsidies received" by the private entity. *New Jersey State Bar Ass'n*, 387 N.J. Super. at 54. The purpose of this requirement is to ensure that there is no donation of public funds to a private person or company. *See In re North 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 CBA. Pa112 ¶ 16. In exchange, the District, and taxpayers, do not receive legally sufficient consideration. *See City of E. Orange v. Board of Water Comm'rs*, 79 N.J. Super 363 (App. Div. 1963) (lease by city of golf club, constructed on land used by the city for a watershed, with no return to city is presumptively an unconstitutional gift). In fact, the record below shows that the District (as opposed to the JCEA) has received *no constitutionally valid consideration* in exchange for release time.

1. The Gift Clause requires contractual *obligation* for public expenditures, which is absent here. (Pa20.)

There are two related reasons for lack of valid consideration in this case: first, the JCEA is not *obligated* to do anything in exchange for the taxpayer subsidy; and second, the JCEA does not promise to do anything for the public with that release time.

The Gift Clause requires that any public expenditure be "restricted to the public end by the legislation and contractual *obligation*." *Kervick*, 42 N.J. at 217 (emphasis added). The Gift Clause requires contractual obligations to ensure that the public's business will in fact be effectuated by the public expenditure. Absent obligation on the part of the private party, there is nothing to ensure that the public's business is being done. Thus the lack of obligation by the private party demonstrates a lack of lawful consideration under the Gift Clause test. *See also Turken v. Gordon*, 224 P.3d 158, 165 ¶ 31 (Ariz. 2010) (only what a party "*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party" counts as consideration under the Gift Clause (emphasis added)).

The release time provisions at issue do not obligate the JCEA to provide *anything* to the District. The plain language of the CBA obligates JCEA to perform only union, rather than

District, business. The JCEA President and his designee "shall be permitted to devote *all* of his/her time to the Association business and affairs." Pa112. When asked to define what "Association business and affairs" means, Williams, the head of all District human resources, responded, "Anything that would assist the members of *this particular Association*." Pa114 ¶ 36 (emphasis added). In other words, release time does not obligate the JCEA to perform functions for the District; its purpose is to allow the JCEA president and his designee to perform services for a *private* entity.

Indeed, the District expressly admits "that the JCEA is not *obligated* to provide *any* specific services to the District in exchange for the release time provisions in the 2013 [CBA]." Pa189, RFA 10; Pa192, Resp. 10. That admission is fatal on the question of consideration. Absent contractual obligation, under *Kervick*, there simply cannot be substantial consideration for Gift Clause purposes.

Likewise, the JCEA has promised to do nothing in exchange for release time. Contracts may be voided when based on an illusory promise. *See Bryant*, 309 N.J. Super. at 620. As the Appellate Division has noted, "if performance of an apparent promise is entirely optional with a promisor, the promise is deemed illusory." *Id.* Here, the JCEA has committed itself to do *nothing* in return for release time. There is no agreement,

policy, or practice by which JCEA provides any legal assurance that it will perform any specific functions for the District (or refrain from performing specific functions for the District). Pa114 ¶ 32. On the contrary, the CBA requires that the JCEA use release time for Association "business and affairs," and the practice of release time bears this out: it is put to use in service of the JCEA and its members, not the District. Pa112 ¶ 13.

The Arizona Supreme Court analyzed a release time provision contained within a school district collective bargaining agreement in *Wistuber*, 687 P.2d 354. That agreement set forth a number of specific responsibilities that the teacher/union representative would have to fulfill, and the costs of the salary were shared by the union and the district. Additionally, the collective bargaining agreement at issue in *Wistuber* included binding language ("the CTA *shall…*"). *Id.* at 359; *see also id.* at 356 n.3 (specific duties). The Court held that "the duties imposed upon [the teacher] by the proposal are substantial, and the relatively modest sums required to be paid by the District not so disproportionate as to invoke the constitutional prohibition." *Id.* at 358.

The situation here is the opposite of *Wistuber*: the "duties" imposed on JCEA are nonexistent and the costs are substantial. *See City of E. Orange*, 79 N.J. Super. at 371

(Court should "declare without awaiting a trial which cannot possibly change the result" that the transaction constitutes "an unconstitutional gift" where consideration received by municipality is "palpably trifling in comparison to what is given for it by the municipality."). Absent contractual obligation and an express promise to perform *some* commitment in exchange for release time, there is simply no valid consideration. The trial court erred in finding otherwise.

2. Release time is not compensation to *all* employees; it is a gift to the JCEA. (Pa20.)

The court below found sufficient consideration because it determined that "the release provisions of the [CBA] are contractually negotiated provisions of compensation for employees of the District." Pa20. But release time is *not* compensation for all District employees. It looks nothing like compensation and is not treated as compensation by either the District or the JCEA.

The contract itself demonstrates that release time is not compensation to teachers, and is not treated as such by either party. The provisions at issue appear in the MOU section labeled "Association Rights," *not* the sections pertaining to "Teacher Rights" (or even "Other Absences," "Maternity Leave, etc.") Pa43-44, 60-64. The JCEA also does not treat release

time as compensation to all teachers, and neither do individual teachers.

Thus, the trial court's reliance on *Maywood Educ. Ass'n, Inc. v. Maywood Bd. of Educ.*, 131 N.J. Super. 551 (Ch. Div. 1974) (Pa20), is misplaced. There, the court found that pensions, vacation, and military leave were "conditions of employment—a form of compensation withheld or deferred until the completion of continued and faithful service." *Id.* at 556. Here, however, unlike employee compensation packages that include fringe benefits, there are no "conditions of employment" attached to the release time provisions. On the contrary, as the record establishes, JCEA is not obligated to provide *anything* in return for release time, and the release time employees are not accountable to their employer in *any* meaningful way.

Moreover, things like military leave, pensions, or other fringe benefits run directly to the *employee* for services rendered *by* the employee. Release time in this CBA, on the other hand, runs directly to *the JCEA* with *no* 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 for use as release time. And, in fact, many municipalities follow this practice. But that is not what is happening here. Here, release time goes

directly to the JCEA release time employees for JCEA to use for its *own* business and purposes in any manner it deems fit.

C. Release time violates the Gift Clause because the *primary* benefits run to the JCEA, not the District. (Pa17-18.)

Not only has the District failed to impose the constitutionally mandatory controls, or to obtain the necessary consideration to ensure that a public purpose is advanced by release time, the record also establishes that release time fails to serve a public purpose *at all*, because the *primary* benefit of release time runs to the JCEA, not to the District or taxpayers. *See New Jersey Citizen Action, Inc.*, 391 N.J. Super. at 604 (holding that there may be a Gift Clause violation if a loan's "primary objective" 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. That is the entire purpose of the Gift Clause. *See Riddlestorffer v. City of Rahway*, 82 N.J. Super. 36, 45 (Law Div. 1963).

In order to establish a public purpose under the Gift Clause, a government expenditure must: (1) "serve[] a benefit to the community as a whole," and (2) "at the same time [be] directly related to the function of government." *Davidson Bros.*, 121 N.J. at 217 (internal quotations omitted). As the Supreme Court found, "[t]he basic test is whether the municipal

action under attack may fairly be characterized as primarily a public one." *Hoglund v. City of Summit*, 28 N.J. 540, 548 (1959).

1. The plain language of the contract indicates that the primary beneficiary of release time is the JCEA, as the District expressly admits. (Pa17; Pa44; Pa130.)

The release time provisions at issue in this case primarily serve to benefit JCEA, not the District or the community as a whole. The CBA's plain language 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.*" Pa44, § 7-2.3 (emphasis added). The CBA 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 CBA, in fact, *mandates* that release time employees devote "*all*" of their time to JCEA "business and affairs." *Id.* According to the District's representative, "Association business and affairs" means "[a]nything that would be to assist the members of this particular Association." Pa130. That is, *the District recognizes* that the purpose of release time is not to serve the District, but the interests of the JCEA and its membership.

Furthermore, the District expressly admits that the primary beneficiary of release time is the JCEA, not the District. When

asked "Who receives the primary benefit of Mr. Greco and M[s.] Thorp's services?" the District's Chief of Talent, Williams, responded simply and tellingly: "The JCEA membership does." Pa142.

Of course, JCEA is a private organization, whose mission is to advance the private interests of its members. [6]Pa111 ¶¶ 5-7. Because release time employees are obligated under the CBA to devote all their time to JCEA business, and because the District recognizes that JCEA "business and affairs" means matters that assist the JCEA, the provisions under consideration are, as a matter of law, advancing private interests, not public purposes.

2. The District cannot be the *primary* beneficiary of release time when so many release time activities are *adverse* to the District. (Pa18.)

The court below nonetheless found a valid public purpose for release time, citing the process of collective bargaining itself as serving a public purpose, and recognizing that "the majority of [the release time employees'] time is spent engaging in the disciplinary/grievance hearing process." Pa18.

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[6] The JCEA is also a political organization. Among other activities, the JCEA advocates for the election and defeat of School Board candidates and provides financial support to candidates. Pa114 ¶¶ 30-31. Greco and Thorp personally prepare written political materials that advocate for the election or defeat of School Board candidates that are distributed to the JCEA membership and others. *Id.*

As a threshold matter, the record does *not* support the conclusion that the "majority" of the release time employees' time is spent handling grievances and disciplinary actions. In fact, the JCEA's Grievance Chair, Thorp, was asked how much of her time was spent in the presence of District personnel, including for disciplinary and grievance hearings, and she responded, "Maybe 30 percent." Pa417. As Grievance Chair, Thorp is primarily responsible for filing grievances and attending grievance hearings. If less than one-third of time is spent on this purpose, it cannot be said that the majority of her time is used to advance these purposes.[7]

The trial court's holding that the JCEA's role in disciplinary and grievance procedures primarily serves to benefit the District is troubling when these and other release time activities place JCEA in an *adverse* or *adversarial* relationship to the District. For example, some release time is used to finance JCEA contract negotiations *against* the District during the collective bargaining process itself. Pa113-14 ¶ 28. During these negotiations, JCEA has its own negotiator, pursuing JCEA's interests and the best possible deal that JCEA can negotiate for itself and its members. That negotiator is literally on the opposite side of the bargaining table from the

[7] To the extent this was a factual finding, it was an abuse of discretion.

District's own negotiator. The District's representative, Williams, agreed that negotiation disagreements are properly characterized as "adverse." Pa132-33. *Yet these are funded with District taxpayer money under the CBA.*

The same is true of grievance and disciplinary proceedings. During the grievance process, JCEA represents its members in grievances brought *against* District Administrators and supervisors. The JCEA's Vice President, Thorp, characterized the grievance process, as "adversarial." Pa174. Similarly, during the disciplinary process and at disciplinary hearings, the JCEA represents its members *against* disciplinary charges *brought by* the District, where the District is acting on behalf of the District and the JCEA is acting on behalf of its members against whom discipline was brought. Pa114-15 ¶ 38.

Moreover, just as collective bargaining and disciplinary and grievance representation are not valid consideration under the Gift Clause—because there is no contractual *obligation* to perform these activities—they are also examples of invalid public purpose because they are not negotiated and agreed to in the Agreement. As is plain in the common law and this state's precedent, "parole [*sic*] evidence should not be received to alter or vary the terms of that written contract." *Arnoff Shoe Co. v. Chicarelli*, 135 N.J.L. 141, 144 (1947). A contract that is illegal or *ultra vires* cannot be rescued from invalidity by

admitting parol evidence to try to make the contract say what it does not say. *See, e.g., Berkeley Elec. Coop.,, Inc. v. Town of Mount Pleasant*, 417 S.E.2d 579, 581-82 (1992); *American Empire Ins. Co. v. Hanover Nat'l Bank of Wilkes-Barre*, 409 F. Supp. 459, 464-65 (M.D. Pa. 1976); *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372, 388 (1871).

This case involves a written agreement between JCEA and the District that covers each issue of labor management relations between those parties. The agreement consists only of those obligations specified between the four corners of the Agreement. The other activities the trial court identifies, and that are not mentioned in the agreement, cannot be considered *contractual obligations* for purposes of either contract law or constitutional analysis.

Under the Agreement, release time employees are *required* "to devote *all* of [their] time to the [JCEA's] business and affairs." Pa44 § 7-2.3 (emphasis added). If there are additional obligations imposed on the JCEA's use of release time, they do not appear in the contract. To the extent such activities occur at all, they cannot be considered as part of the public purpose analysis. And even assuming these activities *are* considered, the evidence amply demonstrates that the JCEA is the *primary* beneficiary, not the District.

Of course, it is *right* for JCEA to advocate for its members' private interests—it has a legal and ethical obligation to do so. But doing so on the taxpayer's dime is another matter, as far as the Gift Clause is concerned. In all three of these instances—contract negotiations, the initiation of grievances, and disciplinary proceedings—the use of release time does not primarily benefit the public employer, or the community. In fact, they are adverse to them. Even if there are some *incidental* public benefits to these activities, the *primary* beneficiary of these expenditures is the JCEA, which is pursuing its own interests and objectives and those of its members *opposed to* the District. And the Gift Clause does not permit the *primary* benefit of public expenditures to run to a private organization. *Hoglund*, 28 N.J. at 548.

In addition, to the extent they can be discerned, many uses of release time serve no government function whatsoever. For example, the JCEA President keeps a desk calendar of his meetings and other events. For the 2016 and 2017 calendar years, the vast majority of the entries appear to be plainly related to union activity, or are indeterminate. Only a tiny fraction—hardly 2 percent—appear to relate to District activities. *See* Pa195-317. The vast majority of JCEA appointments and scheduled activities are not related at all, let alone *directly* related, to any government function.

The unfortunate reality, however, is that neither Plaintiffs nor the District can determine *what* release time employees are doing while on full-time release. That is because so much of their time is dedicated to purposes that the District is unaware of, and of which it does not require an accounting. Pa188-89, RFA 5-7, 10-11; Pa191-92, Resp. 5-7, 10-11.

We can readily determine, however, that they are *not* primarily engaging in District activities. The District admits it does "not have any additional policies, procedures, rules, or regulations that detail how release time may be used." Pa189, RFA 7; Pa191, Resp. 7. Nor does it require JCEA to provide any "accounting to [the District] regarding how release time is used." Pa188, RFA 4; Pa191, Resp. 4. If JCEA release time employees can use their release time whenever, wherever, and however they see fit, with no direction or oversight from their District employer, the release time provisions at issue simply cannot be directly related to a function of government.

Conclusion

The question in this case is not whether release time employees are working—but whom they are working for. They work for JCEA—a private entity, whose private interests release time employees advance—not for the District. Yet they are paid for with taxpayer funds. That is a gift to the JCEA of taxpayer dollars. As noted above, when asked "Who receives the primary

benefit of Mr. Greco and M[s.] Thorp's services?" the District's Chief of Talent, Williams, responded simply and tellingly, "The JCEA membership does." Pa142. That is true—and that is an unconstitutional violation of the New Jersey Constitution's Gift Clause.

The Framers of the New Jersey Constitution protected taxpayer dollars against the loaning or giving of subsidies to private entities. Release time, as found in the JCEA union contract, lacks any of the safeguards given under the *Kervick* Gift Clause test to prevent illegal subsidies. Consequently, the release time provisions in the CBA violate the Constitution and must be struck down. This Court should reverse the decision below.

RESPECTFULLY SUBMITTED this 18th day of April, 2018 by:

/s/ Jonathan Riches
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/s/ Justin Meyers
Justin Meyers, Esq.
LAW OFFICES OF G. MARTIN MEYERS

JONATHAN RICHES, ESQ., certifies and declares as follows:

1. I am an attorney of law of the State of Arizona admitted to practice *pro hac vice* in the above-captioned matter. I am counsel for the Plaintiffs in the above-captioned matter, and as such I have full knowledge of the facts set forth herein.

2. On April 18, 2018, I filed 5 copies of Appellants' Corrected Opening Brief and Corrected Appendix via U.S. Mail.

3. On April 18, 2018, I served 2 copies of Appellants' Corrected Opening Brief and Corrected Appendix via Federal Express overnight delivery to:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: April 18, 2018

By:/s/ Jonathan Riches
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