ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

150 WEST STATE STREET
TRENTON, NJ 08608
Telephone: (609) 392-8172
Telecopier: (609) 392-8933

570 Broad Street, Suite 1402
Newark, New Jersey 07102
Telephone: (973) 623-1822
Telecopier (973) 623-2209

www.zazzali-law.com

ANDREW F. ZAZZALI (1899-1969)

ANDREW F. ZAZZALI, JR.
ROBERT A. FAGELLA**
KENNETH I. NOWAK***
RICHARD A. FRIEDMAN
PAUL L. KLEINBAUM*
EDWARD H. O'HARE*
COLIN M. LYNCH**
SIDNEY H. LEHMANN (1945-2012)

OF COUNSEL
JAMES R. ZAZZALI***

MARISSA A. McALEER**
EDWARD M. SUAREZ, JR.
JAMES R. ZAZZALI, JR.
CRAIG A. LONG**
RAYMOND M. BALDINO**
ALVINA SWATI
ALBERT J. LEONARDO**

COUNSEL
KATHLEEN NAPRSTEK CERISANO
JASON E. SOKOLOWSKI
DANIEL GEDDES‡‡

*Also admitted Pennsylvania
**Also admitted New York
***Also admitted New York & D.C.

‡‡Workers Compensation Law Attorney

Please Reply to Trenton

November 18, 2019

Via Hand Delivery
Heather Joy Baker, Clerk
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 West Market Street
P.O. 970
Trenton, NJ 08625

Re: Moshe Rozenblit, et al, v. Marcia Lyles, et al,
Supreme Court of New Jersey Dkt. No.: 083434

Dear Ms. Baker:

Enclosed please find an original and four (4) copies of Petitioner/Cross-Respondent's Reply Brief, and an original and four (4) copies of Certification of Service of same.

Could you please file the original documents, and return one copy of each marked "filed" in the stamped, self-addressed envelope provided for your convenience.

Thank you for your cooperation.

Very truly yours,

Richard A. Friedman

RF/mw
Encl.

cc: Justin A. Meyers, Esq.
Jonathan Riches, Esq.
Michael J. Gross, Esq.
David I. Solomon, Esq.
Mark Miller, Esq.
Raymond M. Baldino, Esq.
John M. West, Esq.
Jason Walta, Esq.
Leon Dayan, Esq.
Aileen O'Driscoll, Esq.

21326-2307

SUPREME COURT OF NEW JERSEY
DOCKET NO. 083434
APP. DIV. DOCKET NO. A-1611-17T1

JERSEY CITY EDUCATION ASSOCIATION, Petitioner/Cross-Respondent v. MOSHE ROZENBLIT and QWON KYU RIM, Respondents/Cross-Petitioners	CIVIL ACTION On Petition for Certification of the Final Order of the Superior Court, Appellate Division Sat Below: Hon. Jose L. Fuentes, J.A.D. Hon. Francis J. Vernoia, J.A.D. Hon. Scott J. Moynihan, J.A.D.

REPLY BRIEF ON BEHALF OF PETITIONER JERSEY CITY EDUCATION ASSOCIATION

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
150 W. State Street
Trenton, New Jersey 08608
Tel: (609) 392.8172
Fax: (609) 392.8933

NATIONAL EDUCATION ASSOCIATION
1201 16th Street, N.W., 8th Floor
Washington, D.C. 20036
Tel: (202) 822.7035
Fax: (202) 822.7033

BREDHOFF & KAISER P.L.L.C.
805 15th Street N.W., Suite 1000
Washington, D.C. 20005
Tel: (202) 842.2600
Fax: (202) 842.1888

On the Brief: RICHARD FRIEDMAN, ESQ., JASON WALTA, ESQ., JOHN M. WEST, ESQ., LEON DAYAN, ESQ.

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PRELIMINARY STATEMENT

In their response to the Petition for Certification, the plaintiff taxpayers ("Taxpayers") offer no response to the position that was actually articulated by Petitioner Jersey City Education Association ("JCEA") on the statutory-authority question that the Appellate Division decided. They respond only to their own straw-man caricature of that position, according to which JCEA contended that the Employer-Employee Relations Act ("EERA"), by itself, grants to school districts the general power to set the terms and conditions of employment of their employees. Resp. at 9. But the position of JCEA, as clearly set forth in its Petition, is that it is not EERA, but "the Education Code[] which, in Chapters 11 and 27, grants to school districts the general power to 'make rules' governing teachers' employment, including 'the terms' thereof," such as salary and compensation. Pet. at 8-9 (emphasis added); see also id. at 2-3 (citing N.J.S.A. 18A:11-1(c)and 18A:27-4 as the specific Chapter 11 and 27 provisions conferring power).

Given the prominence of Education Code Chapters 11 and 27 in the Petition, the only explanation as to why the Taxpayers have ignored these provisions is that they cannot rebut the point that the provisions confer the necessary authority.

Like the Taxpayers in their Response, the Appellate Division failed to address Chapters 11 and 27 of the Education

Code. The Appellate Division's lapse seems attributable to the simple fact that, because the Taxpayers never argued to the Appellate Division that New Jersey's school districts lack the statutory authority to provide for release time, JCEA had no occasion to fully brief the point. Yet the Taxpayers, rather than acknowledging that the Appellate Division decided this case on a ground not argued, blame JCEA for that disposition and even go so far as to suggest that, in the proceedings below, JCEA "waived" its ability to refute a "no statutory authority" argument that the Taxpayers never made. Resp. at 10-11 n.2.

We begin by dispelling any notion that there was a waiver, and we then turn to the merits.

ARGUMENT

I. THE TAXPAYERS' "WAIVER" ARGUMENT IS UNFOUNDED

The only claim the Taxpayers brought in this case, and the only argument the Taxpayers made to the Appellate Division on appeal, was that compensated release time violates the New Jersey Constitution's Gift Clause. See Pb21-54. If the Taxpayers had indeed made the statutory argument that they now suggest was before the Appellate Division, one would expect to see at least one citation in their briefs below to Fair Lawn Education Ass'n v. Fair Lawn Board of Education, 79 N.J. 574 (1979), a case that they cite repeatedly in support of the proposition that a political subdivision requires statutory authority independent

of EERA to set the terms and conditions of employment for its employees. But not only is there no citation to Fair Lawn in the Taxpayers' briefs below, there is no citation to any of the statutory-authority cases cited in their Response.

The reality, then, is that the Taxpayers did not make a "no statutory authority" argument below; they made only a Gift Clause argument. And JCEA, in defending release time's constitutionality under the Gift Clause, therefore had no occasion to identify all the sources of statutory authority for school districts to grant release time. Indeed, because it was fundamentally unfair for the Appellate Division, in a case where the Taxpayers' complaint raised only a constitutional claim, to resolve the case against JCEA on a different ground without affording it an opportunity to brief that ground, it would add insult to injury to adopt the Taxpayers' "waiver" argument. Instead, this Court should, in deciding whether to grant review on an issue that is of undisputed statewide importance, give due consideration to the fact that the issue was decided below without the benefit of full adversary briefing.

II. THERE IS AMPLE STATUTORY AUTHORITY FOR SCHOOL DISTRICTS TO PROVIDE PAID RELEASE TIME, AS THEY HAVE DONE FOR DECADES

A. The Education Code Empowers School Districts to Provide Teachers with Compensated Leaves of Absence, and EERA Requires Negotiation over the Subject

In its Petition, JCEA described the well-established relationship between the Education Code and EERA that determines

the scope of collective negotiations between school districts and unions. See Pet. at 2-3, 8-13. The Education Code delegates to school boards the powers that they "may exercise," Fair Lawn, 79 N.J. at 579, while EERA obligates school boards as public employers to negotiate in good faith with a union selected by the majority of their employees over how they exercise those delegated powers that touch on "the terms and conditions of employment," N.J.S.A. 34:13A-3, -5.3.

More specifically, a public employer's duty to negotiate under EERA presumptively extends to all those terms and conditions of employment which "could have been set unilaterally" by the employer "in the absence of" an exclusive representative. Fair Lawn, 79 N.J. at 581. And, as this Court held in the seminal EERA case of Local 195, IFPTE v. State, 88 N.J. 393 (1982), a term that the Education Code otherwise allows a school board to set is removed from the bargaining table only if it is tied to the "determination of governmental policy" or it has been "preempted by statute or regulation," id. at 404.

As noted above, Chapter 27 of the Education Code empowers school boards to "make rules" governing the "terms . . . of employment" and "salaries and time and mode of payment" of their teaching staff. N.J.S.A. 18A:27-4. Thus, when a union is in place, school boards presumptively have both the statutory authority (under the Education Code) to provide — and the

statutory obligation (under EERA) to negotiate — compensation of various forms. See, e.g., Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012); Bd. of Educ. v. Woodstown-Pilesgrove Educ. Ass'n, 81 N.J. 582, 591 (1980).

The Taxpayers misunderstand the flexible nature of this framework when they search the Education Code for express language specifically "grant[ing] the Board power to authorize or fund the release time provisions at issue." Resp. at 8-9, 16-17. As this Court has held, once the Legislature grants general authority to a public employer, it need not "specifically authorize every possible [contractual] provision" that may fairly be understood to fall within that authority in order for negotiations over a covered subject to be required under EERA. State v. IFPTE, Local 195, 169 N.J. 505, 525 (2001). Rather, to avoid imposing "a virtually insurmountable burden," the appropriate inquiry is whether the Legislature specifically foreclosed negotiations over an employment term that is otherwise within the employer's general delegated power to set. Id. at 526. Were school boards on as tight a leash as Taxpayers suggest, they would be disabled from offering such familiar benefits as paid bereavement leave, since there is no specific "bereavement leave" authorization in the Education Code.

What prevents that counterintuitive result is the recognition that the Education Code's delegation to school

boards of the power to "[m]ake, amend, and repeal rules . . . for the employment, regulation of conduct and discharge of its employees," N.J.S.A. 18A:11-1(c), and to "make rules" governing the "terms . . . of employment" of teachers, including compensation, id. 27-4, is a broad and encompassing delegation, as the language of Chapters 11 and 27 suggests. Given the breadth of that language, the Taxpayers cannot prevail simply by complaining that there is no specific "release time" provision in the Education Code; they must cite some "statute or regulation" that "preempt[s]" release time. Local 195, 88 N.J. at 404. And while they of course claim that the New Jersey Constitution preempts release time – a claim that JCEA has fully addressed in its response to the Cross-Petition – the Taxpayers cite no "statute or regulation" that preempts release time.

B. Section 7 of the Sick Leave Statute Confirms and Buttresses School Boards' Authority to Provide for Release Time

The only statute that the Taxpayers cite in their opposition brief is Section 7 of the Sick Leave Statute, 18A:30-7. Section 7 provides in pertinent part: "Nothing in this chapter [the Sick Leave Statute] 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."

This language, first of all, preempts nothing; it is a savings clause that protects school boards' general powers from any implication that the Legislature, by addressing the topic of sick leave, meant to tacitly curtail those powers. See Pet. at 11. But not only is Section 7, on its face, non-preemptive, its language confirms and buttresses the proposition that other Education Code provisions vest school boards with authority to provide paid leaves of absence. See id. at 11 & n.3.

In particular, Section 7 refers to "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." That wording confirms that the Legislature understood that other legislation, outside the Sick Leave Statute, had previously established the "right" of school boards to make rules governing leaves of absence. And that other legislation plainly includes the basic power-conferring provisions of the Education Code, set out in Chapters 11 and 27, which confer on school boards the power to establish rules governing the employment of their employees and rules setting the terms and compensation of their employees. Section 7's reference to the "right of the board of education" to pay salaries "in cases of absence not constituting sick leave" thus serves as a clear legislative acknowledgment that the discretion to provide varying forms of paid leave falls within the basic

employing authority of school boards, which, in turn, means that paid leave is a mandatory subject of bargaining under EERA.

As set out in the Petition, over the course of four decades, New Jersey courts have repeatedly affirmed that this view of the relationship between the Education Code and EERA is the correct one. The courts have long cited Section 7 in the course of holding that the Education Code "clearly permits a board to provide for payment of salary for absences not for sick leave." In re Hackensack Bd. of Educ., 184 N.J. Super. 311, 318 (App. Div. 1982); see also Pet. at 12-13 (citing more cases). For its part, the Public Employment Relations Commission ("PERC"), has held in numerous post-Fair Lawn decisions, also going back decades, that school boards may, and indeed must, negotiate over release time, see, e.g., Haddonfield Bd. of Educ., P.E.R.C. No. 80-53, 5 N.J.P.E.R. ¶ 10250, 1979 N.J. PERC LEXIS 148 (1979); see also Pet. at 13, 13 n.5 (citing more cases) — holdings that cannot be reconciled with the Appellate Division's understanding of the relationship between EERA and the Education Code.[1]

[1] Although, in its release-time decisions, PERC has not cited Section 7, it has interpreted Section 7 in the broader paid-leave context as reflecting a legislative decision to confer discretion on boards as to such leaves. See, e.g., Bethlehem Twp. Bd. of Educ., P.E.R.C. No. 2003-10, 28 N.J.P.E.R. ¶ 33121, 2002 N.J. PERC LEXIS 64, at *8 (2002) (holding that Section 7 provides school boards with "room for discretion and is not preemptive" as to paid leave for teachers to attend

As also set out in the Petition, the Legislature is presumed to be aware of judicial and administrative interpretation of its statutes; and where the Legislature leaves one statutory provision unamended (such as, here, Section 7) while amending others, see Pet. at 16 (citing amended provisions of Sick Leave statute), that acquiescence is evidence that the longstanding interpretation conforms with the legislative intent, Klumb v. Bd. of Educ., 199 N.J. 14, 24-25 (2009).

While the Taxpayers ignore this point, they do attempt a response to JCEA's showing that the Appellate Division's construction of Section 7 is nonsensical in making "absence" turn on whether an employee is absent from school property rather than absent from his or her teaching duties. In particular, the Taxpayers contend that the Appellate Division held that what prevents release-time employees from counting as "absent" for Section 7 purposes is not that they are physically on school property, but rather that they are "working each day . . . for the JCEA." Resp. at 16. This is not only a dubious characterization of the Appellate Division's reasoning; it is just as nonsensical as making absence turn on physical location. Military leave, to give just one example, involves serious work.

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convention); see also Hopewell Valley Reg'l Bd. of Educ., P.E.R.C. No. 97-91, 23 N.J.P.E.R. ¶ 28065, 1997 N.J. PERC LEXIS 212, at *4-5, *6 n.1 (1997).

Yet the Taxpayers apparently think that a teacher on military leave is not on a leave of "absence," because he or she is working. That could not be right. In contrast, reading "absence" in Section 7 as absence from one's teaching duties, as we have suggested, Pet. at 13-15, avoids such anomalous results.

* * *

Ultimately, the Taxpayers argue that the Jersey City School District lacks statutory authority to agree to pay release-time employees for their work because they believe that such employees do not provide any valuable services to the District. This is also the basis of their claim that release time violates the Gift Clause. Cross-Pet. at 1-2. The statutory and the constitutional questions both return to the predicate issue of whether release time exists solely to "advance . . . private interests," as the Taxpayers argue, Resp. at 5, or promotes labor peace, collective negotiations, and dispute resolution and thus benefits the District as an employer, as JCEA submits and the Chancery Division found. This Court should certify both questions to resolve this important debate and uphold the statutory and constitutional validity of release time.

Respectfully submitted,

Richard A. Friedman

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN

On the brief:
Jason Walta (*pro hac vice* pending)
NATIONAL EDUCATION ASSOCIATION

John M. West (*pro hac vice* pending)
BREDHOFF & KAISER P.L.L.C.

Leon Dayan (*pro hac vice* pending)
BREDHOFF & KAISER P.L.L.C.

Dated: November 18, 2019

CERTIFICATION

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Richard A. Friedman
ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
Richard A. Friedman, Esq.
Attorney I.D.#: 0112111978
150 W. State Street
Trenton, New Jersey 08608
Telephone: (609) 392-8172
Facsimile: (609) 392-8933
Rfriedman@zazzali-law.com
Attorneys for Petitioner/Cross-Respondent

JERSEY CITY EDUCATION ASSOCIATION, Petitioner/Cross-Respondent v. MOSHE ROZENBLIT and QWON KYU RIM, Respondents/Cross-Petitioners	SUPREME COURT OF NEW JERSEY CIVIL ACTION DOCKET NO.: 083434 On Petition for Certification of the Final Order of the Superior Court, Appellate Division Appellate Division Docket NO. A-1611-17T1 Sat Below: Hon. Jose L. Fuentes, J.A.D. Hon. Francis J. Vernoia, J.A.D. Hon. Scott J. Moynihan, J.A.D.

CERTIFICATE OF SERVICE

I, Meghan Herbert Westbrook, of full age, hereby certify as follows:

1. I am a Legal Assistant employed by the Law Firm of Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys for the Petitioner/Cross-Respondent in the within matter. On November 18, 2019, I served via hand delivery an original and four (4) copies

of the Reply Brief on Behalf of Petitioner Jersey City Education Association on Heather Joy Baker, Clerk of the Supreme Court, Supreme Court of New Jersey, Richard J. Hughes Justice Complex, Supreme Court Clerk's Office, 25 West Market Street, Trenton, NJ 08611.

2. On November 18, 2019, I served via email and regular mail two (2) copies of the Reply Brief on Behalf of Petitioner Jersey City Education Association on the following:

Justin A. Meyers, Esq.
Law Offices of G. Martin Meyers, PC
35 W. Main St., Ste. 106
Denville, NJ 07834
justin@meyerslaw.com

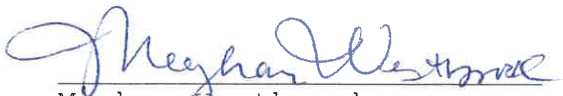
Jonathan Riches, Esq. (*pro hac vice*)
Scharf-Norton Center for Constitutional
Litigation at the Goldwater Institute
500 E. Coronado Road
Phoenix, AZ 85004
jriches@goldwaterinstitute.org

Michael J. Gross, Esq.
Kenney, Gross, Kovats, & Parton
130 Maple Avenue, Building 8
Red Bank, NJ 07701
mjgross@kenneygross.com

David I. Solomon, Esq.
Florio Perrucci Steinhard & Capelli, LLC
218 Route 17, North, Suite 410
Rochelle Park, NJ 07662
dsolomon@floriolaw.com

Mark Miller, Esq.
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
mmiller@pacificlegal.org

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Meghan Westbrook

Dated: November 18, 2019