**LAW OFFICES OF G. MARTIN MEYERS, P.C.**
G. Martin Meyers (271881971)
Justin A. Meyers, *of counsel* (041522006)
35 West Main Street, Suite 106
Denville, New Jersey 07834
(973) 625-0838
gmm@gmeyerslaw.com
justin@gmeyerslaw.com

**Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE**
Jonathan Riches (admitted pro hac vice)
Aditya Dynar (admitted pro hac vice)
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org
*Attorneys for Plaintiffs*

MOSHE ROZENBLIT and WON KYU RIM,

Plaintiffs,

vs.

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

Defendants.

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

**Docket No. C-2-17**

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

*On the Brief:*

Jonathan Riches, Esq. (Pro hac vice granted)
Aditya Dynar, Esq. (Pro hac vice granted)
**Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE**
*Attorneys for Plaintiffs*

Justin A. Meyers, Esq. (041522006)
**LAW OFFICES OF G. MARTIN MEYERS, P.C.**
*Attorneys for Plaintiffs*

## INTRODUCTION

The New Jersey Constitution's Gift Clause was designed to prevent the use of public funds for private enterprises and activities that are not controlled by the state. The framers of these provisions understood that, absent adequate control, public expenditures could result in the allocation of public, taxpayer funds to private, special interests. Unfortunately, the activities the Gift Clause was intended to prevent describe precisely what is done on "release time:" public aid to private, special interests.

At issue in this case is a taxpayer-funded practice that diverts two full-time public school teachers away from the crucial job of educating Jersey City's youth, and instead pays them to work under the exclusive direction and control of the JCEA, a private labor organization, for its own private benefit. The evidence shows that no controls, limits, or accountability are placed 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 parties admit and the evidence makes plain, is to advance JCEA's own interests, not those of the Jersey City School District ("District") or city and state taxpayers.

As a result, the release time provisions under review violate the New Jersey Constitution. They should be enjoined.

## STATEMENT OF FACTS

Plaintiffs Moshe Rozenblit and Won Kyu Rim ("Plaintiff Taxpayers") are citizens of the United States and residents of the State of New Jersey. Pls.' Statement of Undisputed Facts in Support of Pls.' Mot. for Summ. J. ("SOF") ¶ 1. Plaintiff Rozenblit pays property taxes and sales taxes in Jersey City, and pays income tax to the State of New Jersey. SOF ¶ 2. Plaintiff Rim pays income tax to the State of New Jersey. SOF ¶ 3. 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. SOF ¶ 4. Thus, Plaintiff Taxpayers finance the practice of "release time" to JCEA.

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

In June 2015, the District and the JCEA reached a preliminary accord to enter into a collective bargaining agreement. SOF ¶ 8. The release time provisions challenged in this case are §§ 7-2.3 and 7-2.4 of the Collective Bargaining Agreement ("CBA"), under 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." SOF ¶ 9 (emphasis added). The JCEA President is Ron Greco. SOF ¶ 11. His designee is Tina Thorp, the Second Vice President of the JCEA. SOF ¶ 12. Thus, under the terms of the CBA, both Mr. Greco and Ms. Thorp are permitted—in fact, required—to devote *all* of their working hours to JCEA "business

and affairs." SOF ¶ 9.

While on full-time release, Mr. Greco and Ms. Thorpe still receive their ordinary District salaries, benefits, and pensions, just like teachers who are performing ordinary instruction duties. SOF ¶¶ 10, 14. In base pay alone, Mr. Greco makes $105,580 per year. SOF ¶ 15. Ms. Thorpe 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. SOF ¶ 16.

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

Neither Mr. Greco nor Ms. Thorp are required to report to the District. SOF ¶ 20. Both Mr. Greco and Ms. Thorp regularly report to JCEA offices, and neither is required to clock in or clock out. SOF ¶ 21. Although every other District employee receives a formal evaluation from their supervisor, including all senior management, no formal evaluation is conducted for either Mr. Greco or Ms. Thorp. SOF ¶ 22. No one in the District supervises the work of release time employees. SOF ¶ 23. In fact, they do not even have a supervisor. SOF ¶ 23.

There are no scheduled interactions between Mr. Greco and Ms. Thorp and the District. SOF ¶ 24. The District has no say in who becomes the JCEA President or his designee. SOF ¶ 25. And Mr. Greco and Ms. Thorp cannot be removed by the District. SOF ¶ 26.

Astonishingly, the District has no formal accounting mechanism for tracking Mr. Greco's or Ms. Thorp's activities. SOF ¶ 27.

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

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

The JCEA is not *obligated* to perform any function *for* the District, under either the CBA, or any other policy or procedure. SOF ¶ 32. JCEA is not obligated to provide any specific services to the District. SOF ¶ 32. And no studies have ever been conducted to determine the value that the District receives in return for release time. SOF ¶ 33.

In other words, while on release time, District teachers perform the union's own private business at taxpayer expense without any obligation to or accountability by the District or its taxpayers.

The District does not track release time nor require the JCEA to provide any accounting whatsoever of release time activities; moreover, the District does not know how release time is used and has no control over how release time is used. Two District employees, Mr. Greco and Ms. Thorp, are released full-time to the JCEA and are not held accountable to the District for their time whatsoever, yet they continue to be paid by the District and its taxpayers even though they do no work *for* the District, but instead work exclusively *for* the JCEA. As a result, their salaries, which amount to roughly $1.1 million over the term of the CBA, are an unconstitutional

gift to the JCEA.

## STANDARD OF REVIEW

To evaluate a motion for summary judgment, this Court's "charge is to determine if there is a genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law." *Rowe v. Mazel Thirty, LLC*, 209 N.J. 35, 41 (2012). In making that determination, this Court must be mindful that "[n]ot every issue of fact is material"; instead, "materiality" is determined by "set[ting] forth the contours of the legal issue presented." *Id.*

The legal issue presented here is whether release time violates the Gift Clause of the New Jersey Constitution. There are no disputed material facts. Because the evidence establishes that release time is an unlawful subsidy under the New Jersey Constitution, New Jersey's taxpayers are entitled to judgment as a matter of law.

## ARGUMENT

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." THE FEDERALIST No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961). But because fallible human beings run the government instead, the Constitution's authors face a difficult task: enabling "the government to control the governed; and in the next place, oblig[ing] it to control itself." *Id.*

Like the framers of the U.S. Constitution, the framers of the New Jersey Constitution recognized that internal and external controls were indispensable to establishing sound government that respects the rights of the governed. This is particularly true of the New Jersey Constitution's anti-subsidy provisions, collectively known as the "Gift Clause." NEW JERSEY CONST., art. VIII, § 3, ¶¶ 1-3. The purpose of this constitutional prohibition is to prevent the government from giving public money to private corporations that are not 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).

As the Supreme Court recognized in its seminal gift clause case, "'[w]hen the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation.'" *Roe v. Kervick*, 42 N.J. 191, 207 (1964) (citation omitted). The only way to avoid such special interest abuse is to faithfully enforce the constitutional requirement that government control the expenditure of public funds.

The text 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...." NEW JERSEY CONST., art. VIII, § 3, ¶ 2; *see also* art. VIII, § 3, ¶ 2.

In *Roe*, the New Jersey Supreme Court set forth a two-part test for determining whether an expenditure violates the State 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 *Roe,* 42 N.J. 191) (emphasis added). 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) (internal quotations omitted). Under prong two of the Gift Clause test, the Court must examine whether the government: (1) retains sufficient control over the public expenditure, *see New Jersey Citizen Action, Inc. v. County 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, and a government expenditure will violate the gift clause if it fails *any* of these tests. In other words, a government expenditure violates the gift clause if it does not serve a public purpose because it does not benefit the community as a whole, *or* it is not directly related to the function of government. An expenditure will also violate the gift clause if the means to accomplish the public purpose are not consonant with the public purpose because the government lacks sufficient control over the expenditure *or* the government does not receive adequate consideration for the money spent.

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

## I. THE RELEASE TIME PROVISIONS AT ISSUE IN THIS CASE VIOLATE THE GIFT CLAUSE BECAUSE THE SCHOOL DISTRICT EXERCISES NO CONTROL OVER THE FULL-TIME RELEASE EMPLOYEES.

Of the four *conjunctive* requirements necessary for the Jersey City School District's expenditures on release time to avoid a Gift Clause violation, failure to establish adequate— indeed *any* control— is the plainest. *Roe* 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." *Roe,* 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, "[c]learly the Constitution would stand in the way." *Roe*, 42 N.J. at 222.

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 the released employees as it pleases, thereby benefiting from their work without paying for it. Specifically, 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." SOF ¶ 18. No one at the District directs the activities of either Mr. Greco or Ms. Thorp. SOF ¶ 17. Nor does the District place any prohibitions whatsoever on the activities of either Mr. Greco or Ms. Thorp. SOF ¶ 19. Neither Mr. Greco nor Ms. Thorp are required to report to the District on a regular basis. SOF ¶ 20. Instead, both report to the JCEA offices. SOF ¶ 21. While there, neither Mr. Greco nor Ms. Thorp are required to punch a time clock or identify either their arrival or departure time, or otherwise account for their working hours. *Id.* Indeed, the two full-time release employees provide *no accounting of any kind* about their daily activity or how they spend their release time. SOF ¶ 27.

While every other public employee in the school district has a direct supervisor, no one in the District supervises the work of either Mr. Greco or Ms. Thorp. SOF ¶ 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 Mr. Greco or Ms. Thorp. SOF ¶ 22. There are no regularly scheduled interactions between the release time employees and the District. SOF ¶ 24. The District has no say in who becomes the JCEA President or his

designee, and the District cannot remove either Mr. Greco or Ms. Thorpe from their jobs. SOF ¶¶ 25–26.

In short, the evidence establishes that there are simply *no indicia of public control* over the release time employees under the Agreement. The District does not dispute this. *See* SOF ¶ 17. (RFA 5: "Admit that you do not control or direct the activities of the JCEA President while using release time hours." Response: "Admitted."; RFA 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.") As a matter of law, this arrangement fails the requirements of the Gift Clause.

Of course, the District can enter into appropriate contracts to accomplish the extraordinarily important objective of educating Jersey City students. But those contracts must contain sufficient conditions and controls to ensure that objective is met. And it is not enough to say that the contract *in its entirety* is a sufficient means of control. As the Supreme Court made clear in *Roe*, the government may of course 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." *Roe*, 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. Protection,* 227 N.J. Super. 5, 21 (App. Div. 1988).

The provisions at issue here are literally 180 degrees from the contracts approved in *Roe*, *State Dep't of Envtl. Protection*, or any other Gift Clause case Plaintiffs have been able to find.

There is no question who controls release time in this case. The JCEA can use it when and how it sees fit. Not only does the District have no direct control over the JCEA, it does not even retain control over its own employees, who are placed completely at the disposal of a private organization. The JCEA President and Vice President direct their own activities, with no input from, or prohibitions placed on those activities by the District—and 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. SOF ¶ 34. Outside of the context of release time, there are *no* circumstances whereby control over on-duty District 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. SOF ¶ 35.

The plain language of the CBA mandates that release time employees devote "*all* of [their] time to the Association business and affairs." SOF ¶ 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 in either the Agreement or in other rules or regulations promulgated by the District. *See* SOF ¶ 32 (RFA: "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]." *Roe*, 42 N.J.

at 222. In this case, the plain language of the Agreement and the overwhelming weight of the evidence make clear: release time simply eliminates control, in violation of the Gift Clause.

## II. THE DISTRICT RECEIVES CONSTITUTIONALLY INSUFFICIENT CONSIDERATION FOR ITS RELEASE TIME EXPENDITURES BECAUSE THE PROVISIONS AT ISSUE DO NOT OBLIGATE THE JCEA TO PROVIDE ANYTHING TO THE DISTRICT, NOR DOES THE JCEA PROVIDE ANY DIRECT BENEFITS IN EXCHANGE FOR RELEASE TIME.

In order to satisfy the Gift Clause, a public entity must also receive "sufficient consideration" in exchange "for the subsidies received" by the private entity. *New Jersey State Bar Ass'n*, 387 N.J. Super. at 54. The purpose of this requirement is to ensure that there is no donation of public funds to a private association. *See In re Application of N.J. Dist. Water Supply Comm'n*, 175 N.J. Super. 167, 208 (App. Div. 1980) ("[T]here must be consideration between the State and the private entity" in order to satisfy the constitutional provision prohibiting the donation of public funds to private corporations and prohibiting certain associations between public entities and private associations.)

Release time costs taxpayers roughly $1.1 million over the course of the CBA. SOF ¶ 16. In exchange, the District and its 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 plant, constructed on land used by the city for a watershed, with no return to city is presumptively an unconstitutional gift). In fact, this litigation has revealed that the District (as opposed to the JCEA) has received *no* consideration in exchange for release time.

There are two related reasons for this: first, the JCEA is *obligated* to do nothing in exchange for the public's release time expenditures; and second, the JCEA promises to do nothing while on release time. What's more, the District, by its own admission, has never engaged in any studies or analysis to ascertain the value of release time. As a result, it is

impossible for the District to assess that it has received constitutionally sufficient consideration in exchange for these public expenditures.

The Gift Clause requires that any public expenditure be "restricted to the public end by the legislation and contractual *obligation*." *Roe*, 42 N.J. at 217 (emphasis added). The Gift Clause requires contractual obligation 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, 166 ¶ 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 Agreement obligates the release time employees 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." SOF ¶ 9. When asked to define what "Association business and affairs" means, Ms. Williams, the head of all District human resources, responded, "Anything that would assist the members of *this particular Association*." SOF ¶ 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 the 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 Agreement." SOF ¶ 32. That admission is fatal on the question of consideration.

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. "An illusory promise is one in which the 'promisor has committed himself not at all.'" *Id.* (citing J.D. Calamari and Joseph M. Perillo, *Contracts*, § 4-17 at 159 (2d ed.1977)). As the appellate division has noted, "if performance of an apparent promise is entirely optional with the 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 in which the JCEA has provided any legal assurances that it will perform any specific functions for the District (or refrain from performing specific functions for the District). SOF ¶ 32. On the contrary, the Agreement 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, rather than the District. SOF ¶ 13.

The Arizona Supreme Court analyzed a release time provision contained within a school district collective bargaining agreement in *Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 355 (Ariz. 1984). 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 357 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 the JCEA are nonexistent and the costs are substantial. *See City of E. Orange*, 79 N.J. Super. (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.

But even assuming that release time did provide some indirect benefits to the District, there is no way of knowing the value of those benefits because the District has not assessed them. As the District admits, the "District has not conducted any studies or reports that reflect the value, if any, provide[d] to the District in exchange for the release time provisions in the 2013 Agreement." SOF ¶ 33.

As the Court observed in its Order denying the JCEA's Motion to Dismiss, to evaluate the constitutionality of the release time provisions at issue there must be an analysis of the public interest served by release time compared to the impact of the public expenditure. Order at 7. The Court went on to observe that, "This will likely necessitate the citation of the financial impact of the release time provisions, in comparison to the benefits of the release time provisions and the agreement in which they are contained." *Id.* Such an analysis "may include citations to studies and other facts and figures." *Id.* We know that release time costs taxpayers $1.1 million over the course of the CBA. We also know that the District has not provided any assessment, conducted any studies, any reports, or provided any facts or figures that reflect the value of what is received in return. Without such information, the District cannot possibly demonstrate the proportionality of consideration or quantify the benefits of release time to the District and its taxpayers. And without the District knowing this information, the granting of release time cannot be supported by adequate consideration, and thus fails as a matter of law.

Without these modest requirements—contractual obligation, a promise to perform specific services, and a meaningful assessment of the value—there is simply no legal consideration received for the release time expenditures at issue. For that reason alone, the Plaintiff Taxpayers must prevail.

## III. RELEASE TIME VIOLATES THE GIFT CLAUSE BECAUSE THE *PRIMARY* BENEFIT RUNS TO THE JCEA, NOT THE DISTRICT.

Not only has the District failed to put in place the necessary controls or received the necessary consideration to ensure that a public purpose is advanced by release time, but the evidence 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 its taxpayers. *See New Jersey Citizen Action, Inc.*, 391 N.J. Super. at 604 (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 (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., Inc. v. D. Katz & Sons, Inc.*, 121 N.J. 196, 217 (1990) (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).

The release time provisions at issue in this case primarily serve to benefit the JCEA, not the District or the community as a whole. The plain language of the CBA 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.*" SOF ¶ 9 (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." *Id.* ¶ 36. 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.

Of course, the JCEA is a private labor organization, whose mission is to advance the private interests of its members.[1] *Id.* ¶¶ 5–7. Because release time employees are obligated under the CBA to devote all their time to Association business, and because the District recognizes that Association business means matters that assist the JCEA, the provisions under consideration are advancing private, rather than public purposes.

This observation becomes particularly acute when many release time activities place the JCEA in an *adverse* or *adversarial* relationship to its public employer, the District. For example, release time is used to finance JCEA contract negotiations *against* the District. *Id.* ¶ 28. During these negotiations, the JCEA has its own negotiator, pursuing the 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 District's own negotiator. The District's representative, Ms. Williams, agreed that negotiation disagreements are properly characterized as "adverse." *Id.* ¶ 37. Yet these are funded with District taxpayer money under the Agreement.

[1] The JCEA is also a political organization. Among other activities, the JCEA advocates for the election and defeat of School Board candidates and provide financial support to candidates. SOF ¶¶ 30–31. Mr. Greco and Ms. 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.*

The same is true of grievances and disciplinary proceedings. During the grievance process, the JCEA represents its members in grievances brought *against* District Administrators and supervisors. The JCEA's Vice President, Ms. Thorp, characterized the grievance process as "adversarial." *Id.* ¶ 38. 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 a disciplinary action has been brought. *Id.* ¶ 39.

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 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, the use of release time in these situations is adverse to the public employer's interest. 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.

For the same reasons, full-time release is also not directly related to the function of government. 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—barely two percent—appear to relate to District activities. *See* SOF ¶ 40. From a review of these records it appears that the vast majority of JCEA appointments and scheduled activities are not related at all, let alone *directly* related to, a 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. We can readily determine, however, that they are not primarily engaging in District activities. As the District admits, apart from the Agreement itself, the District does "not have any additional policies, procedures, rules, or regulations that detail how release time may be used." *Id.* ¶ 32. Nor does the District require the JCEA to provide any "accounting to [the District] regarding how release time is used." *Id.* ¶ 27. If the JCEA release time employees can use release time, as they appear to, 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.

It's not that the release time employees are not working while on full-time release. They are. The question for Gift Clause purposes is not whether they are working, but rather *whom* are they working for? As union officers, with fiduciary duties to the JCEA and its membership, and entitled under the Agreement to use all of their time for "Association business and affairs," the current arrangement makes clear that they are conducting private, JCEA business at taxpayer expense, in violation of the New Jersey Constitution.

As the New Jersey Supreme Court has made clear, the question is "whether the [expenditure] under attack may fairly be characterized as primarily a public one." *Hoglund,* 28 N.J. at 548. The primary beneficiary is the JCEA. When asked "Who receives the primary benefit of Mr. Greco and M[s.] Thorp's services?" the District's Chief of Talent, Ms. Williams, responded simply and tellingly, "The JCEA membership does." SOF ¶ 41. That is true—and that is unconstitutional.

## CONCLUSION

In authorizing the release time provisions at issue, the District has not put in place any, let alone any constitutionally adequate, controls over the use of taxpayer money given to JCEA. It has not received legally sufficient consideration. And it has allowed the use of public resources to primarily benefit a private organization. This arrangement violates the New Jersey Constitution's Gift Clause. The Plaintiff Taxpayers' Motion for Summary Judgment should therefore be GRANTED and the release time provisions in Article 7 of the Agreement be permanently enjoined.

**RESPECTFULLY SUBMITTED** this 29th day of September, 2017.

By:
G. MARTIN MEYERS

**LAW OFFICES OF G. MARTIN MEYERS, P.C.**
*Attorneys for Plaintiffs*

**LAW OFFICES OF G. MARTIN MEYERS, P.C.**
G. Martin Meyers (271881971)
Justin A. Meyers, *of counsel* (041522006)
35 West Main Street, Suite 106
Denville, New Jersey 07834
(973) 625-0838
gmm@gmeyerslaw.com
justin@gmeyerslaw.com

**Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE**
Jonathan Riches (Pro hac vice application pending)
Aditya Dynar (Pro hac vice application pending)
500 East Coronado Road
Phoenix, Arizona 85004
(602) 462-5000
litigation@goldwaterinstitute.org
*Attorneys for Plaintiffs*

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|---|---|
| MOSHE ROZENBLIT and WON KYU RIM,<br><br>Plaintiffs,<br><br>vs.<br><br>MARCIA V. LYLES, in her official capacity as Superintendent of the Jersey City Board of Education; VIDYA GANGADIN, in her official capacity as President of the Jersey City Board of Education; JERSEY CITY PUBLIC SCHOOLS OF THE CITY OF JERSEY CITY; JERSEY CITY BOARD OF EDUCATION; and JERSEY CITY EDUCATION ASSOCIATION, INC.,<br><br>Defendants. | **SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, GENERAL EQUITY – HUDSON COUNTY**<br><br>**Docket No. C-2-17**<br><br>**CERTIFICATION OF SERVICE** |

JUSTIN A. MEYERS, ESQ., certifies and declares as follows:

1. I am an attorney of law of the State of New Jersey. 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 September 29, 2017, I served a true and correct copy of Plaintiffs' Motion for Summary Judgment and accompanying Motion to File Under Seal in connection with the above-mentioned matter to the following parties:

**VIA HAND DELIVERY**

Clerk, Chancery Division
SUPERIOR COURT OF NEW JERSEY
Brennan Courthouse, 2nd Floor
595 Newark Avenue
Jersey City, New Jersey 07306

Hon. Barry P. Sarkisian, P.J. Ch.
SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION
Brennan Courthouse, 2nd Floor
583 Newark Avenue
Jersey City, New Jersey 07306

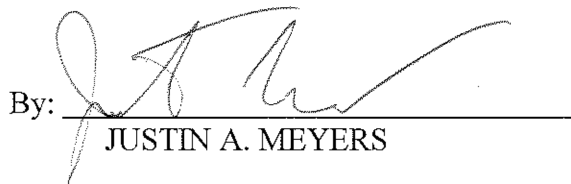
**VIA E-MAIL & U.S. MAIL**

Kim C. Belin, Esq.
FLORIO PERRUCCI STEINHARDT & FADER
1010 Kings Highway South, Bldg. 2
Cherry Hill, New Jersey 08034
Fax: (856) 354-8318
*Counsel for Defendant Jersey City Board of Education*

Flavio L. Komuves, Esq.
ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
570 Broad Street, Suite 1402
Newark, New Jersey 07102
Fax: (973) 623-2209
*Counsel for Defendant Jersey City Education Association*

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

Dated: September 29, 2017

By: 
JUSTIN A. MEYERS

LAW OFFICES OF G. MARTIN MEYERS, P.C.
*Attorneys for Plaintiffs*

LAW OFFICES OF
**G. MARTIN MEYERS, P.C.**
A PROFESSIONAL CORPORATION

35 W. MAIN STREET, SUITE 106
DENVILLE, NJ 07834
e-mail: gmm@gmeyerslaw.com

TELEPHONE: (973) 625-0838

G. MARTIN MEYERS, Esq. *
* Certified by the New Jersey Supreme Court as a Civil Trial Attorney

TELECOPIER: (973) 625-5350

SUSAN S. SINGER, Esq. †
JUSTIN A. MEYERS, Esq. †
THOMAS A. WHELIHAN, Esq. †
† Of Counsel

September 29, 2017

**VIA HAND DELIVERY**

Administration Building
SUPERIOR COURT OF NEW JERSEY
595 Newark Ave.
Jersey City, New Jersey 07306

**Re: Moshe Rozenblit vs. Marcia V. Lyles et al., Docket No. C-2-17**

Dear Sir/Madam:

Enclosed please find an original and one copy of the following documents:

1. Notice of Motion for Summary Judgment;
2. Brief in support thereof;
3. Unopposed Motion to File Exhibit 9 under Seal;
4. Certification of Service;
5. Statement of Material Facts and Exhibits; and
6. Proposed Order granting Leave to File Exhibit 9 under Seal;
7. Proposed Order granting Summary Judgment.

Please note that Exhibit 9 is being filed under seal. Finally, please charge the fee for this motion to our JACS account #145627.

Thank you for your attention to this matter.

Very truly yours,

G. MARTIN MEYERS

GMM/jm
Encl.

LAW OFFICES OF
**G. MARTIN MEYERS, P.C.**
A PROFESSIONAL CORPORATION

35 W. MAIN STREET, SUITE 106
DENVILLE, NJ 07834
e-mail: gmm@gmeyerslaw.com

TELEPHONE: (973) 625-0838

TELECOPIER: (973) 625-5350

G. MARTIN MEYERS, Esq. *
* Certified by the New Jersey Supreme Court as a Civil Trial Attorney

SUSAN S. SINGER, Esq. †
JUSTIN A. MEYERS, Esq. †
THOMAS A. WHELIHAN, Esq. †
† Of Counsel

September 29, 2017

**VIA HAND DELIVERY**

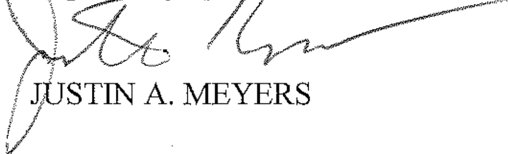
Hon. Barry P. Sarkisian, P.J. Ch.
SUPERIOR COURT OF NEW JERSEY,
CHANCERY DIVISION
583 Newark Avenue
Jersey City, New Jersey 07306

**Re: Rozenblit v. Lyles, et al., Docket No. HUD-C-2-17**

Dear Judge Sarkisian:

Enclosed please find a courtesy copy of Plaintiff's Motion for Summary Judgment and the accompanying unopposed Motion for Leave to File Exhibit 9 under Seal. The Exhibits to Plaintiffs' Statement of Undisputed Material Facts, which were filed in hard copy with the Court, are included on a thumb drive for your convenience.

Respectfully submitted,



JUSTIN A. MEYERS

cc: Flavio Komuves, Esq.
Kim Belin, Esq.
Goldwater Institute

**LAW OFFICES OF G. MARTIN MEYERS, P.C.**
G. Martin Meyers (271881971)
Justin A. Meyers, *of counsel* (041522006)
35 West Main Street, Suite 106
Denville, New Jersey 07834
(973) 625-0838
gmm@gmeyerslaw.com
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**Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE**
Jonathan Riches (admitted pro hac vice)
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500 East Coronado Road
Phoenix, Arizona 85004
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| MOSHE ROZENBLIT and WON KYU RIM,<br><br>Plaintiffs,<br><br>vs.<br><br>MARCIA V. LYLES, in her official capacity as Superintendent of the Jersey City Board of Education; VIDYA GANGADIN, in her official capacity as President of the Jersey City Board of Education; JERSEY CITY PUBLIC SCHOOLS OF THE CITY OF JERSEY CITY; JERSEY CITY BOARD OF EDUCATION; and JERSEY CITY EDUCATION ASSOCIATION, INC.,<br><br>Defendants. | **SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, GENERAL EQUITY – HUDSON COUNTY**<br><br>**Docket No. C-2-17**<br><br>**PROPOSED ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** |

THIS MATTER, having been opened to the Court by G. Martin Meyers, Esq., and Jonathan Riches, Esq., attorneys of record for Plaintiffs Moshe Rozenblit and Won Kyu Rim; and

FURTHERMORE the Court having determined that §§ 7-2.3 and 7-2.4 (the "release-time provisions") of the June 2015 Collective Bargaining Agreement between the New Jersey

Education Association and the Jersey City School District violates the New Jersey Constitution, art. VIII, § 3, ¶¶ 1-3; and

FURTHERMORE the Court having considered all moving papers and, and for good cause shown:

It is, on this ________ day of _______________________, 2017,

ORDERED that §§ 7-2.3 and 7-2.4 of the aforementioned Collective Bargaining Agreement is hereby enjoined and declared null and void.

_________________________________

_____ Opposed

_____ Unopposed