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

MOSHE ROZENBLIT, and, WON KYU RIM,	CIVIL ACTION
Plaintiffs-Appellants,	ON APPEAL FROM
v.	SUPERIOR COURT, CHANCERY DIV. GENERAL EQUITY, HUDSON COUNTY
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	Hon. Barry P. Sarkisian, J.S.Ch. Sat below
Defendants-Respondents.	

PLAINTIFFS'-APPELLANTS' REPLY BRIEF

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Preliminary Statement

The New Jersey Constitution's Gift Clause places prudent limitations on the use of public resources for private activities. This is especially true when public aid is directed to organizations purportedly involved in *quasi-public* purposes, but actually engaged in *private* business.

In its Brief, the Jersey City Education Association ("JCEA") misconstrues the requirements that must be satisfied under the Gift Clause when public resources are expended. JCEA also recasts *how* release time is used in this case, in a way that ignores the reality of an arrangement that primarily, and unconstitutionally, benefits a private organization at taxpayer expense.

The arguments JCEA offers as to why the release time provisions satisfy the Gift Clause's three *conjunctive* requirements all fail. First, the speculative and indirect benefits JCEA identifies as substantial consideration do not count as consideration *at all* under the Gift Clause, which requires an "unimagined, substantive and veritable" exchange of value. *Wilentz v. Hendrickson*, 133 N.J. Eq. 447, 475 (Ch. 1943). Second, the benefits that JCEA claims flow to the District in reality benefit JCEA primarily, not the public. Third, the release time employees' performance of administrative duties over which the District has minimal oversight does not

constitute the strict control that the Gift Clause requires when public expenditures are made.

What's more, the U.S. Supreme Court's recent decision in *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (June 27, 2018), dispels a primary premise on which JCEA relies to argue that release time does not violate the Gift Clause. In that case, the Court held that no payment could be made to a public-sector union to finance collective bargaining activities, unless a government employee "affirmatively consents to pay." *Id.* at 2486. In this case, JCEA contends that release time is part of total compensation to all District employees, whether or not they belong to the union. But if that were true, then JCEA would be forcing nonunion employees to finance the collective bargaining activities of JCEA without the legally required affirmative consent, and that is prohibited under *Janus*. In other words, release time *cannot* be part of "total compensation" to all District employees, as JCEA contends, because that is prohibited by the First Amendment. Instead, this Court must examine the release time provisions for legal sufficiency on their own. So examined, release time is not part of compensation to all District employees; instead it is a subsidy to JCEA.

For this subsidy to a private organization, the District has provided inadequate consideration, over which the District

lacks control, and for which the primary beneficiary is a private labor union, rather than the community at large. That violates the Gift Clause.

Argument

I. THE GIFT CLAUSE REQUIRES THAT ALL PUBLIC EXPENDITURES BE SUPPORTED BY "SUBSTANTIAL" CONSIDERATION, "STRICT" CONTROL, AND SERVE "PRIMARILY" PUBLIC PURPOSES— REQUIREMENTS THAT ARE ABSENT HERE (Pa16-20)

A. The purported benefits that JCEA contends constitute valuable consideration for the release time expenditures are speculative, indirect, and constitutionally inadequate

This Court has set forth the plain requirement that in order to satisfy the Gift Clause, public expenditures must be "based upon a substantial consideration." *New Jersey State Bar Ass'n v. State*, 387 N.J. Super. 24, 53 (App. Div. 2006). The Gift Clause also requires that "consideration must be unimagined, substantive and verifiable." *Wilentz*, 133 N.J. Eq. at 475. Likewise, consideration must be "ascertainable." *City of E. Orange v. Bd. of Water Comm'rs,* 79 N.J. Super. 363, 372 (App. Div. 1963), *aff'd*, 41 N.J. 6 (1963).

Here, the benefits are instead speculative, indirect, unascertainable, and thus are insufficient as a matter of law. What's more, JCEA cannot rely on release time as part of overall compensation to all District employees, because such a reading of the collective bargaining agreement ("CBA") would render it unlawful under the First Amendment. As a result, there is not

legally sufficient consideration for the substantial release time expenditures at issue.

1. The release time provisions must be independently tested for consideration and legality

JCEA contends that the purported consideration provided by JCEA to the District for the release time provisions cannot be tested for legal sufficiency on their own, but must be viewed in light of the other contractual provisions between JCEA and the District. JCEA Br. at 30–31 ("For it is clear that the CNA, taken in its entirety, is an exchange of various kinds of monetary and monetary [*sic*] compensation as consideration for the millions of hours of labor annually devoted to the unquestionably public purpose of educating Jersey City students.").

This is incorrect. Taxpayers' challenge is not to the entire collective bargaining agreement, but to a discrete and unlawful portion of it. Taxpayers contend that the release time provisions, and the release time provisions alone, violate the Gift Clause. As such, *those* provisions ought to be enjoined, and the remaining lawful portions kept intact. *See Naseef v. Cord, Inc.*, 90 N.J. Super. 135, 143 (App. Div. 1966), aff'd, 48 N.J. 317 (1966) ("It is true that if a contract contains an illegal provision, if such provision is severable the courts

will enforce the remainder of the contract after excising the illegal portion.").

JCEA's contention that consideration for release time must be viewed in light of the contract as a whole is also incorrect as a practical matter. Under JCEA's reasoning, any gift or subsidy is permissible as long as it is contained within a larger contract. Even an outrageous contractual provision, say, for example, one that granted a private jet to a JCEA officer for transportation to and from work, would not be a gift if the jet provision were included within a larger contract. That would make *any* arrangement contained in a collective bargaining agreement immune from Gift Clause challenge. That would render the entire Gift Clause inert and inoperable, for all any government agency would have to do to avoid Gift Clause scrutiny is slip a gift (however generous) into a larger contract. Fortunately, under the New Jersey Constitution, a gift hidden within a large contract is still a gift.

Also, in *Janus, supra,* the U.S. Supreme Court foreclosed the argument that release time can lawfully be part of total compensation to all District employees. There, the Court found that the First Amendment is violated when money is taken from nonconsenting employees to support a *public-sector* labor union. *See* 138 S.Ct. at 2486 ("Neither an agency fee *nor any other payment* to the union may be deducted from a nonmember's wages,

nor may *any other attempt* be made to collect such a payment, unless the employee affirmatively consents to pay.").

This means that JCEA's contention that release time "is an exchange of various kinds of … compensation" provided to the District by all District employees, whether or not they belong to JCEA, must fail. JCEA Br. at 30. According to JCEA the release time provisions do not violate the Gift Clause because part of the overall compensation package of *all* District employees is used to finance the activities of the release time employees. *Id.* at 28–29 ("The release time provisions … are part of that overall bargained-for exchange…); *Id.* at 28 ("There can be no question that the millions of hours in labor furnished by JCEA employees constitutes substantial consideration for the amounts paid to them."). But if it is true that release time is "part of overall bargained-for exchange" that in total constitutes "substantial consideration," then under *Janus*, that arrangement violates the First Amendment because it takes resources away from employees who have not affirmatively consented in order to fund release time.

JCEA cannot have it both ways. Either release time is part of overall compensation, which violates the First Amendment rights of non-members, or it is a subsidy to JCEA that must be analyzed independently under the Gift Clause. *Janus* makes it plain that release time is the latter.

2. Even if viewed in isolation, the speculative and indirect benefits identified by JCEA do not constitute valuable consideration under the Gift Clause

JCEA offers only two types of "substantial consideration" that taxpayers purportedly get in exchange for the taxpayer funds spent on release time: [1] "preserving labor peace" and [2] "avoiding grievances and other disruptions in the workplace." JCEA Br. at 31. Neither of these speculative, indirect purposes (if they exist at all) count as lawful consideration under the Gift Clause.

As a threshold matter, JCEA is conflating the public purpose analysis with the consideration analysis. The former asks whether a government expenditure serves a government interest; the latter asks *what value* is received in return for the expenditure. A government expenditure can satisfy the public purpose requirement if directed toward a legitimate government function, but still fail the consideration requirement if there is inadequate value provided in return. In *Wilentz,* 133 N.J. Eq. at 480, the Court noted that the question of whether an expenditure serves a public purpose "is no longer the sole test" under the Gift Clause because even a public purpose "*may not be served in one particular way*"—*i.e.,* "by a gift or a loan of credit to an individual or to a corporation." "It will not do," the court explained, "to say … that because

the purpose is public, the means adopted cannot be called a gift," because that would make the Gift Clause "meaningless … . Gifts of credit to railroads served an important public purpose. That purpose was distinctly before the Legislatures that made them. Yet they were still gifts and so were prohibited." *Id.*

In other words, as noted in Taxpayers' Opening Brief (at 22), the Gift Clause two-pronged test is *conjunctive*. There must be both a public purpose *and* the means must advance that purpose through "strict" control over government expenditures and "substantial consideration" received for them. *New Jersey State Bar Ass'n*, 387 N.J. Super. at 53. In this case, "labor peace" and "avoiding grievances" go to the question of public purpose, *not* consideration.

In any event, neither labor peace nor avoiding grievances count as consideration under the Gift Clause because they are speculative and indirect. Under the Gift Clause, "requisite consideration must be unimagined, substantive and veritable." *Wilentz*, 133 N.J. Eq. at 475. It cannot be speculative and indirect. *See Turken v. Gordon*, 224 P.3d 158, 166 ¶ 33 (Ariz. 2010) ("Although anticipated indirect benefits may well be relevant in evaluating whether spending serves a public purpose, when not bargained for as part of the contracting party's promised performance, such benefits are not consideration under contract law, [or the Gift Clause])."

To the extent they are promoted by the practice of release time at all, in this case, it is obvious that both labor peace and avoiding grievances are speculative indirect "benefits" that *do not* count as consideration.

First, there is insufficient evidence in the record to conclude that the presence of taxpayer-funded union employees actually does *enhance* "labor peace." Indeed, the opposite may be true. As *amicus curiae* makes clear, if the object of release time is "labor peace," it does not seem to be working, as evidenced most recently by a nearly ten-month period during which the District and JCEA were unable to arrive at a contractual agreement, followed by a strike by JCEA members that shut down public education in Jersey City. Br. *Amicus Curiae* of Pacific Legal Found. ("PLF Br.") at 8-9.

The Supreme Court in *Janus* also did not find the labor union's justification of "labor peace" convincing in striking down agency fees. There the Court found that "[e]xclusive representation of all the employees in a unit and the exaction of agency fees are not inextricably linked." 138 S. Ct. at 2456. The Court went on to observe that, "To the contrary, in the Federal Government and the 28 States with laws prohibiting agency fees, millions of public employees are represented by unions that effectively serve as the exclusive representatives of all the employees [without agency fees]". *Id.* at 2456-57.

Likewise, with release time. Labor peace can be obviously achieved without taxpayers financing union activities. "Whatever may have been the case 41 years ago … it is thus now undeniable that 'labor peace' can readily be achieved through less restrictive means than the assessment of agency fees." *Id.*

The same is true for the purported value of "avoiding grievances." First, there is insufficient evidence in the record that the release time is actually used to avoid grievances. As Taxpayers observe in their Opening Brief (at 51), less than one-third of JCEA's Grievance Chair's time is spent on disciplinary and grievance hearings. Indeed, not only is the record bereft of evidence that release time avoids grievances, but the opposite could be equally true: two full-time union representatives that are available for "free" to union members may actually *increase* costs when filing grievances against the District.

Thus, while it is plain that neither labor peace nor avoiding grievances count as consideration at all under the Gift Clause, it is equally plain that, even if they did, the value is not "substantial" in any sense of that word, and does not satisfy the Gift Clause.

3. Because the value of release time is admittedly unascertainable, it does not constitute consideration and is forbidden by the Gift Clause

Not only must consideration be substantive and direct, it must also be ascertainable. As this Court has held, "An appropriation, directly or indirectly, by the state to a private corporation founded upon a transaction wherein a sufficient Quid pro quo is not easily discoverable and justly ascertainable, is forbidden by … our constitution." *City of E. Orange*, 79 N.J. Super. at 372 (App. Div. 1963), *aff'd*, 41 N.J. 6 (1963) (citation and quotations omitted). But the District admits that release time is not ascertainable. It 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." Plaintiffs'-Appellants' Corrected Appendix ("PA"), 114a (Req. for Admission No. 11), 192a (Resp. No. 11). Thus, 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.

We do know that release time costs taxpayers $1.1 million over the course of the CNA. 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

taxpayers get in return. Without that information, neither the District nor this Court can ascertain the proportionality of consideration or quantify the benefits of release time to the District and its taxpayers. And that means that the granting of release time cannot be supported by adequate consideration, and fails as a matter of law.

In other words, if the District doesn't know *how* release time is used, and hasn't put in place mechanisms to estimate the *value* of release time, as the evidence plainly establishes, then there cannot be substantial consideration, which must be both "veritable" and "ascertainable." *Wilentz*, 133 N.J. Eq. at 475; *City of E. Orange*, 79 N.J. Super. at 372 (App. Div. 1963), *aff'd*, 41 N.J. 6 (1963). Because the District doesn't know in any meaningful way how release time is used and has never attempted to value it, there is inadequate consideration. It would be as if the District sold a valuable piece of public land for $10 to a private company without ever getting it appraised, and then made it impossible for any outside appraiser to access the land to value it. Likewise here, no expert could provide information on the value of release time because the District has made it impossible to do so; it doesn't track, or require any accounting of, release time. That failure is fatal on the question of consideration under the Gift Clause.

Which is precisely why, under *Roe v. Kervick*, release time must be "restricted to the public end by the legislation and contractual *obligation*." 42 N.J. 191, 217 (1964) (emphasis added). Absent actual, contractual obligation on the part of the private party, there is nothing to ensure that the public's business is being done. A lack of contractual obligation, as a matter of law, means insufficient consideration. *See also Turken*, 224 P.3d 165 ¶ 31 (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).

As the record makes plain, the release time provisions do not obligate JCEA to provide *anything* to the District. The plain language of the contract and its interpretation by the District are clear that there are not sufficient contractual obligations under *Roe* for Gift Clause purposes. *See* Pa.44a § 7-2.3 (The JCEA President and his designee "shall be permitted to devote *all* of his/her time to the Association business and affairs;" *see also* Pa.130a, lns. 20–24("Association business and affairs," in the contract, according to the District means "Anything that would be to assist the members of this particular Association.")

Indeed, the District has expressly admitted that there are no contractual obligations provided by JCEA in exchange for

release time. *See* Pa.189a (RFA No. 10), Pa.192a (Resp. No. 10) ("Admit 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." Answer: "Admitted.")

Absent contractual obligation and consideration that is substantial, direct, verifiable, and ascertainable under *Roe*, *Wilentz,* and *City of E. Orange,* there simply cannot be substantial consideration for Gift Clause purposes.

B. Release time is used however JCEA pleases, without direction from or accountability to the District, thus failing the Gift Clause's "strict" control requirement

JCEA attempts to reshape the Gift Clause's "strict" control test to something else, and something less: "the law does not require strict or onerous controls over the use of time or property by a Union releasee," it claims, "but [only] 'sufficient' ones." JCEA's Br. at 34. Not so. The Gift Clause requires genuine government control over all public expenditures, such that any government expenditure used for private "business activity" is "*strictly pointed*" in the direction of the public use. *New Jersey Citizen Action, Inc. v. Cnty. of Bergen*, 391 N.J. Super. 596, 604 (App. Div. 2007). And any private recipient of such aid "represents the *controlled means* by which the government accomplishes a proper objective."

Id. (emphasis added). But that level of control, indeed, *any* meaningful or "sufficient" control, is absent here.

The "monitors" JCEA contends constitute strict control essentially parrot those that the trial court outlined: (1) The release time employees must report leaves of absence to the District (JCEA Br. at 13; 32); (2) they must report their physical presence to school administrators when on campus (*id.* at 14; 32; and (3) they attend meetings, hearings, and other gatherings where they are in the presence of administrators (*id.* at 15; 32). As Taxpayers observed in their Opening Brief (at 30-36), these monitors are not sufficient under the Gift Clause.

Indeed, JCEA continues to conflate *contact* with District administrators with *control* by the District. These are emphatically not the same thing. To say otherwise is tantamount to arguing that an attorney who has *contact* with opposing counsel, because they speak on the phone and have hearings and meetings together, *controls* the activities of the other lawyer, or that a school district *controls* the activities of the Parent Teacher Association because it reports when meetings will be held on campus, or because the PTA attends meetings with district officials. But *every* reservation of control JCEA identifies amounts only to just this sort of mere notification or contact—not to any actual control, which is required under the Gift Clause.

Even those contacts are exaggerated. JCEA contends that "The releasees have reported that substantial parts of their time during the school day is spent in the physical presence of administrators." (JCEA Br. at 32). But the evidence in the record suggests this is not so. Indeed, the evidence deduced during the depositions established the opposite. When asked, "[W]hat percentage of the time would you say are you in the presence of a District employee?" JCEA Chair of Grievances, Tina Thorpe responded, "Maybe 30 percent." Pa.417a, lns. 11–20. Meetings and contacts are not control as the Gift Clause requires, but even if they could qualify, the kind of meetings shown by the evidence here would be inadequate.

JCEA also contends that the release time employees "attend meetings, hearings, and other gatherings where they are in the physical presence of administrators." JCEA Br. at 32. Again, the evidence refutes this. When asked how often Ms. Williams interacts with Mr. Greco, Ms. Williams responded, "Mr. Greco, very few times…Maybe once a month." Pa.360a, 45:18–25. When asked the same question about her interactions with Ms. Thorp, Ms. Williams responded that, "[I]t all depends on the situation but most cases there's at least two or three E-mails a month." *Id.* at 46:6–10. When asked how many in-person meetings Ms. Williams has with Ms. Thorp, she responded, "[I]t could be two to three times a month. It could be less." *Id.* at 46:13–17.

Of these minimal interactions, none are *required*, and none are scheduled by the District. Celeste Williams, the Chief Talent Officer and head of human resources for the entire District, was asked, "Are there any required scheduled interactions between Mr. Greco and any District personnel?" Her answer: "No." Pa.137a, lns. 17–20. Even generously assuming that mere contact is tantamount to control, which we do not, these hardly amount to frequent enough interactions and meetings to give the District even minimal awareness of the release time employees' activities.

JCEA observes, "the District Administration has not asked [the release time employees] to account for their time in a more formal way such as punching a clock or filling out timesheets." JCEA Br. at 16. But that is just the problem: it shows that the District has no role in determining when, where, or how release time employees conduct their private activities, which violates the Gift Clause's requirements. By contrast, the evidence shows a "[m]ajority of the employees— I would say about 99 percent of the employees sign into a … sign-in book," (Pa.124a, lns. 11–13) or otherwise report their time to the District. That is not true of release time employees, who are paid tax money to engage in activities on their own without District oversight.

The evidence is overwhelming on this point, including *direct admissions* from the District that they have *no* role in

directing the activities of release time employees. *See* Pa.188a (RFA No. 5 & 6); Pa.191a (Resp. No. 5 & 6) (RFA: "Admit that you do not control or direct the activities of the JCEA President while using release time hours." Response: "Admitted."); *and* RFA 6 (RFA: "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.").

JCEA also argues that "the District could discipline the releasees for employment-related *misconduct*." JCEA Br. at 32-33 (emphasis added). Use of the word "misconduct" is telling. It is a tacit admission that the District can *not* discipline for employment-related *performance*. That's because, unlike any other employee in the District, where every other teacher is evaluated three times a year, and nonteaching staff four times per year, Pa.127a, lns. 13-20, release time employees are not evaluated *at all* by the District. That is because they don't owe any *performance to* the District. They are paid by the District, but have no duties *to* the District. This is, of course, unlike any other employment relationship anywhere. *See Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107, 124 (1999) (The employer-employee relationship unequivocally includes the right of an employer to "hire, fire, [and] control employees' schedules."); *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."). But that is because release time employees actually work for JCEA, not the District. Yet their salaries come from taxpayers, who receive nothing in return.

JCEA finally contends that "[t]he Court... will search the record in vain for any allegation that the [release time] officials are misusing their time, or devoting anything less than their best efforts to their duties." JCEA Br. at 33. That may be true. In fact, Taxpayers do not now and never have alleged that release time employees are not hard working, or pursue what they believe are their professional duties. But under the contract, those duties are rendered to JCEA, not to the District. That means they should not be paid by the District, because if and when they are, taxpayer money is being given to JCEA in exchange for nothing. That violates the Gift Clause.

The District is constitutionally required to put in place adequate controls to ensure that public purposes it seeks to accomplish with taxpayer dollars are accomplished. *Roe*, 42 N.J. at 222. In this the District has failed. The question is not whether release time emloyees are working hard or giving their best efforts. The question is whether the District is exercising adequate control over that time and those efforts to

ensure that taxpayer money is not being given as a gift. The answer to *that* question—the only one at issue in this case—is simple: No.

C. The release time provisions do not serve a public purpose because they *primarily* benefit JCEA and are only *tangentially* related to a function of government

The public purpose test of the New Jersey Constitution requires that public expenditures that benefit a private party not serve just *some* public purpose, but *primarily* serve a public purpose. As the New Jersey Supreme Court has made clear, "[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) (emphasis added). In this case, the opposite is true: the *primary* beneficiary of release time is JCEA, not the public. That is made plain by: (1) the language in the CBA ("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*." Pa.44a § 7-2.3); (2) the District's own admissions ("Who receives the primary benefit of Mr. Greco and M[s.] Thorp's services?" According to the District's chief human resources officer, "The JCEA membership does.") Pa.142, lns. 9-12; and (3) the fact that most release time activities are adverse to the District, and those that aren't plainly benefit the private organization. *See* Taxpayers' Op. Br. at 50-55.

JCEA contends that despite these undisputed facts, release time *primarily* serves a public purpose because it purportedly: (1) promotes labor peace; (2) facilitates communication between management and labor; and (3) "improve[es] educational quality." JCEA Br. at 1, 3, 6, 8. Each of these purposes are speculative, unsupported by the record, and presumably would be activities JCEA would engage in in the absence of release time.

The argument that release time "promotes labor peace" continues to fall short. First, this argument is speculative, self-serving, and unsupported by the record. Second, as described above, JCEA, through negotiations conducted by release time employees, and the District were recently unable to agree to the terms of a collective bargaining agreement for nearly ten-month months. JCEA and its release time employees responded to this disagreement by orchestrating a strike by JCEA members that shut down public education in Jersey City. PLF Br. at 8-9. If the purpose of publicly financing release time is to promote labor harmony, that purpose does not appear to be advanced here.

The same is true of JCEA's arguments that release time serves a public purpose because it "facilitat[es] communication between labor and management." JCEA Br. at 1; *see also* 2, 7. This again is entirely speculative. Whether and how much communication would occur between District representatives and employees in the absence of taxpayer-funded union

representatives is unclear from the record. And in any event, as the exclusive collective bargaining representative, JCEA is already obligated to communicate with the District. *See Wilentz*, 133 N.J. Eq. at 449 ("doing or promising to do what one is already legally bound to do, is no consideration.")

Along these same lines, JCEA contends that release time allows for communications to resolve labor issues that "will develop into far more costly disciplinary and contract hearings and arbitrations." JCEA Br. at 2. Whether this is true or not is again speculation, and unsupported by the record. Nor is it relevant to the question of who is the *primary* beneficiary of collective bargaining and grievance dispute communications. On that question—the one germane here—the U.S. Supreme Court has recently spoken.

In *Janus*, the Court confronted the question of whether union speech in collective bargaining and grievance proceedings was "pursuant to [an employee's] official duties." 138 S. Ct. at 2474. There, the Court found that when the union is communicating in collective bargaining and grievance matters, the union is not speaking on behalf of its employer, but rather "the union is speaking on behalf of the employees." *Id.* at 2457. Such communications thus advance the interests of JCEA and its members, not the District or taxpayers.

Finally, contrary to JCEA's claim, there appears to be *no* evidence in the record that release time furthers "a quality education." JCEA Br. at 27. On the contrary, we know from the record that the release time provisions take two experienced educators out of the classroom and place them under the direction and control of JCEA. If anything, that would seem to undermine rather than further the quality of education for Jersey City students.

The purported benefits of release time that JCEA identifies frankly amount to speculative aspirations. Even if accepted, however, as actual outcomes provided by release time employees, the question is not whether such services are occurring, but *whom* they are benefiting. Under the terms of the CBA, the direct admissions by the District, and the fact that many release time hours are spent in activities that are *adverse* to the District, it is plain that the *primary* beneficiary is JCEA, not the public. To the extent that other benefits have been achieved by release time, they are not bargained-for and are incidental to those received by JCEA, and thus insufficient under the Gift Clause.

II. THE PROPER BURDEN OF PROOF IN THIS TAXPAYER CASE CHALLENGING A GOVERNMENT EXPENDITURE, NOT A STATE STATUTE, IS PREPONDERANCE OF EVIDENCE (Pa.14–16)

JCEA asserts (Br. at 20-23) that this Taxpayer case challenging a government expenditure under a local government

contract is both a facial and as-applied challenge to a state statute, thus requiring a "beyond a reasonable doubt" standard of review. But that is not the case, because Taxpayers are not challenging the validity of a state statute, either on its face or as-applied in some particular circumstance.

JCEA misunderstands the difference between a facial and as-applied challenge as well as cases that are neither. JCEA argues that "Plaintiffs' challenge is an as-applied challenge to the validity of N.J.S.A. 18A:30-7 itself, and its implementation here by the District." JCEA Br. at 21. If that were true, this case would be a facial challenge, because it would seek to strike down *the statute*. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010) ("[T]he distinction between facial and as-applied challenges … goes to the breadth of the remedy employed by the Court …"). But Taxpayers have not asked that N.J.S.A. 18A:30-7, or any other statute, be declared unconstitutional. Nor do Taxpayers seek to have that statute narrowed, annulled, or altered in any way. Indeed, N.J.S.A. 18A:30-7 is entirely irrelevant to this case. And no relief Taxpayers requested or this Court would fashion, would disturb that statute.

Nor do Taxpayers challenge the implementation of N.J.S.A. 18A:30-7. That law simply *allows*, but does not mandate, school districts to pay "salary in cases of absence not constituting sick leave." In other words, it is a grant of permission to pay

salary and a limitation on the amount of sick leave that can be offered. Of course, as discussed *supra*, the release time provisions are not—and under *Janus* cannot be viewed as—"salary," because release time is not treated as such by either the District or JCEA, and if it were, it would violate the First Amendment rights of nonunion members. What's more, N.J.S.A. 18A:30-7 does not address, let alone mandate, release time. It is silent on the matter. Thus, a Taxpayer case that challenges a contract that grants release time cannot possibly be viewed as a challenge to the implementation of a statute that does not even mention the practice.

The only case not previously addressed by Taxpayers that JCEA offers in support of its position is *Harvey v. Bd. of Chosen Freeholders of Essex Cnty.*, 30 N.J. 381 (1959). That case is off the mark. In *Harvey*, the plaintiffs challenged the constitutionality of N.J.S.A. 43:10-18.26 under N.J. Const. art. IV, § VII, ¶¶ 7-8. *See* 30 N.J. at 385-86. Unsurprisingly, the Court evaluated the constitutionality of the "legislative act" under the beyond-reasonable-doubt standard. *Id.* at 388. But here, Taxpayers do not challenge any act of the state legislature, or the implementation of any legislative act, so *Harvey* is inapplicable and so is that standard.

III. DECISIONS FROM AN ADMINISTRATIVE AGENCY WITH NO SPECIAL EXPERTISE IN CONSTITUTIONAL LAW ARE OWED NO DEFERENCE BY THIS COURT (Pa.16)

JCEA urges this Court to give "substantial deference" to the Public Employment Relations Commission's ("PERC") interpretation to the Gift Clause question at issue here. JCEA Br. at 38. There is no basis in the law for such deference.

It is well settled that New Jersey courts "do[] not require deference to the agency's interpretation of case law or legal conclusions." *Cianciulli v. Bd. of Trs., Public Emps.' Ret. Sys.*, 244 N.J. Super. 399, 402 (App. Div. 1990). The issue of whether the challenged release time provision violates the Gift Clause is a question of law that *this* Court, *not* PERC, determines. As such, "PERC's interpretation of the law outside of its charge is entitled to 'no special deference.'" *Morris Cnty. Sheriff's Office v. Morris Cnty. Policemen's Benevolent Ass'n, Local 298*, 418 N.J. Super. 64, 74 (App. Div. 2011) (internal citation omitted).

JCEA continues to conflate the issue of an item that is "mandatorily negotiable" with the issue of whether a release time provision is constitutional under the Gift Clause. JCEA Br. at 38. Of course, whether or not "release time is a valid subject of collective bargaining," *id.* at 36, says nothing about the constitutionality of release time as contained in the contractual provision *at issue here*. The District cannot negotiate away the Constitution's requirement to lawfully spend taxpayer money.

JCEA's argument fails for another reason: this case has nothing to do with PERC's "authority to define the *scope* of collective negotiations." *Hunterdon Cent. High Sch. Bd. of Educ. V. Hunterdon Cent. High Sch. Teachers' Ass'n*, 174 N.J. Super. 468, 472 (App. Div. 1980). This case deals with interpreting matters of constitutional law—*i.e.*, subject matter that "is not within [PERC's] area of expertise," but is within this Court's. *Id.* Because constitutional interpretation and adjudication is not within PERC's area of expertise, its decisions regarding constitutional law are owed none of the deference outlined by the court in *Commc'ns Workers of Am. v. Atlantic Cnty. Ass'n for Retarded Citizens*, 250 N.J. Super. 403, 415 (Ch. Div. 1991). Rather, those decisions fall under the standard from *Biancardi v. Waldwick Bd. of Educ.*, 139 N.J. Super. 175, 177 (App. Div. 1976): "[I]t is for the court to decide whether [an agency's] decision … is in accordance with the law."

Nor is this case an *appeal* from a PERC decision. Appeals from certain administrative decisions, including PERC decision, are given deference by New Jersey courts. *State v. State Troopers Fraternal Ass'n*, 134 N.J. 393, 401 (1993). But this case did not arise from a PERC regulatory decision, and there is no PERC decision pertaining to JCEA or the District to which this Court owes any deference.

Also, it would be inappropriate and bizarre to substitute, in place of the traditional adjudication of a constitutional dispute (including necessary judicial evaluation of undisputed facts) in *this* case, pertaining to *this* contract, a PERC determination that a release time provision in some *other* contract may have satisfied the Gift Clause in some *other* context.

This case presents a pure constitutional question—subject matter that is exclusively within the expertise of this Court, not an administrative agency. *See In re City of Camden*, 429 N.J. Super. 309, 328 (App. Div. 2013) ("PERC's interpretation of the statute is entitled to no deference when its interpretation is … contrary to the language of the Act, or subversive of the Legislature's intent.") (internal citation omitted). Indeed, "judicial scrutiny is 'more stringent'" in situations where, as here, "public funds are at stake." *Id.* at 328 (internal quotations and citation omitted). This Court should reject JCEA's deference argument.

IV. JCEA'S ARGUMENT THAT THE TRIAL COURT SHOULD HAVE GRANTED ITS MOTION TO DISMISS LACKS MERIT (Pa.3–10)

Motions to dismiss for failure to state a claim are granted in "the rarest of instances." *Printing Mart–Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 772 (1989). Given the nature—and necessity—of a factual inquiry under the *Roe v. Kervick* test, denial of JCEA's motion to dismiss was proper. JCEA offers no

legal authority to support its request that "this Court ... emphasize that the case should have [been] dismissed at an earlier stage." JCEA Br. at 51.

In *New Jersey Citizen Action, Inc.*, 391 N.J. Super. 596, a grassroots advocacy group brought a Gift Clause challenge to the loans given by the county improvement board to a hospital management corporation. *Id.* at 600, 603. The Appellate Division reversed the trial court's grant of defendant's motion to dismiss. *Id.* at 599. It found that there were significant factual allegations in the complaint to suggest a cause of action, and that plaintiffs were "entitled to an opportunity to prove" them. *Id.* at 607.

The court below concluded likewise. Pa.3a Taxpayers properly alleged that the challenged release-time provisions violate the New Jersey Constitution because they do not serve a public purpose (Pa.25a–30a ¶¶ 1, 2, 19, 36), because the government has insufficient control over release-time employees (*id.* ¶¶ 2, 22, 24, 25, 26, 37), and because the payments for these employees are not supported by adequate consideration (*id.* ¶¶ 1, 3, 38). Indeed, preventing sweetheart deals between government bodies and union officials is one of the central functions of the Gift Clause, and one of the most precious protections of taxpayer rights in New Jersey.

At this late stage, after full factual development, and an appeal from summary-judgment motions, JCEA's argument should be rejected.

V. THERE IS NO CONSENSUS AMONG COURTS THAT RELEASE TIME IS PERMISSIBLE UNDER THE GIFT CLAUSE, AND IN FACT, OUT-OF-STATE PRECEDENT DIRECTLY FINDS OTHERWISE (Pa.16)

JCEA also cites a few out-of-state cases to support its argument that release time is permissible under the New Jersey Constitution. Br. at 39-48.

JCEA's reliance on *Cheatham v. Diciccio*, 379 P.3d 211 (Ariz. 2016), an Arizona case, is misplaced for two reasons. First, Arizona's Gift Clause test is different from, and in many respects less exacting than, New Jersey's; and (2) *Cheatham* was decided before *Janus* and was based on a legal premise that is no longer valid; *viz.*, that release time is part of overall compensation to public employees.

The Arizona Constitution's Gift Clause differs from, and is less exacting than, New Jersey's, because there is no express "control" requirement in Arizona's Gift Clause. *See Turken*, 223 Ariz. at 348 ¶ 22.

In the context of release time, that is paramount. One of the primary problems with the use of release time at issue here is that the District admittedly does not control the activities of the release time employees. *See* Pa.188a at RFA No. 5 &6 and Pa.191a at Resp. No. 5 & 6 (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."). But there is no such express control requirement in the Arizona Constitution's Gift Clause, which limits *Turken*'s value as precedent here.

Arizona's Gift Clause also does not require that a government expenditure be directly related to a function of government or benefit the community as a whole. *Turken*, 223 Ariz. at 348 ¶ 22. Rather, Arizona's public purpose test is relatively permissive. *Cheatham*, 379 P.3d at 217 ¶ 21 ("For Gift Clause purposes, a public purpose is lacking 'only in those rare cases in which the governmental body's discretion has been unquestionably abused.'") (citation omitted). Not so in New Jersey, where the *primary* beneficiary of a public expenditure *must* be the public, rather than a private entity. In fact, some Arizona Justices have actively urged the Supreme Court to adopt a primary purpose test. *See Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 360 (Ariz. 1984) ("Under this 'primary/incidental' benefit test, a court must determine who receives the 'primary' benefit. If it is the government or municipality, the purpose is a public purpose. If it is the private individual or association, the purpose is a private

purpose. In this case, I believe that the [union] receives the primary benefit.") (Cameron, J. dissenting). To date, the Arizona Supreme Court has not done that. But New Jersey has. *Hoglund*, 28 N.J. at 548 ("The basic test is whether the municipal action under attack may fairly be characterized as *primarily* a public one.") (emphasis added). Because the public purpose test is more exacting in New Jersey, JCEA's reliance on *Cheatham* is misplaced.

Third, the Arizona Gift Clause requires that the payment of taxpayer money not be "grossly disproportionate" to the consideration received by the government in exchange. This is not required under New Jersey's Constitution—but New Jersey's requires that the government receive "substantial" consideration in exchange for taxpayer money. *Compare Turken*, 224 P.3d at 164 ¶ 22 ("When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause.") *with New Jersey State Bar Ass'n*, 387 N.J. Super. at 53 ("Prong two requires the court to consider whether: … the transaction, involving the transfer of public money, … is … based upon a *substantial* consideration …") (emphasis added).

Finally, *Cheatham* was based on an understanding of the law that is no longer tenable in light of *Janus*. Specifically, *Cheatham* found that "Under the MOU for Unit 4, release time is a component of the overall compensation package negotiated between

the City and PLEA on behalf of the police officers." 379 P.3d at 215 ¶ 14. JCEA echoes that argument here. *See* JCEA Br. at 41 ("[T]he release time provisions must be assessed in light of the entire [contract]") (internal quotations and citation omitted). But, as described *supra*, *Janus* has now resolved whether release time within a collective bargaining agreement can *ever* be viewed as overall compensation to public employees. It cannot, insofar as it is done without the affirmative consent of employees whose resources are taken and spent to support release-time employees. No such affirmative consent exists here. Because such an arrangement would violate the First Amendment, JCEA's assertion that the release time provisions at issue here qualify as total comspensation lacks merit.

Of course, out-of-state cases, involving a differently-worded constitutional provision and a different legal test that does not include a crucial component that exist in New Jersey's Constitution, as well as different facts, do not control the outcome here.

But, if the Court wishes to look to out-of-state precedent, including in Arizona, on the question of whether release time violates the Gift Clause, more directly on point is *Wistuber*, 687 P.2d at 357, in which the Arizona Supreme analyzed a release time provision contained within a school district collective bargaining agreement. 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. And the district in that case testified that it would have had to hire someone to perform those duties absent the agreement. 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 these duties were "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.

Here, the reverse is true. The duties imposed on JCEA are virtually nonexistent, and the cost to the District is large. Moreover, As *Wistuber* establishes, for consideration purposes, each and every component of a contract must be tested for public purpose and consideration, considering the "reality of the transaction." *Id.* at 357. The reality of this transaction is that although the CBA established the salaries and benefits of Jersey City teachers, it also provided JCEA with a very generous gift.

Equally persuasive is an opinion by the Texas Attorney General[1] that found that the Fort Worth Independent School

[1] Unlike the Arizona Gift Clause, the Texas Constitution's Gift Clause is substantially similar to New Jersey's. It also

District, which adopted a policy allowing school personnel to perform duties for the Fort Worth Classroom Teachers Association during working hours, violated the Texas Constitution's Gift Clause. Tex. Atty. Gen. Op. MW-89, 1979 WL 31300 (1979). That program allowed nine days of release time with full pay each year from every 100 union members in good standing within the Fort Worth School District. The Attorney General found that the program was unconstitutional because "the school district has neither articulated a public purpose to be served by the released time program *nor placed adequate controls* on the use of released time to insure that a public purpose will be served." *Id.* at *2 (emphasis added).

Whether courts in Arizona or Texas would invalidate release time arrangements in their own states is an interesting academic question, but one that we need not answer here. What we do know is that the release time provisions in *this* contract under the *New Jersey* Gift Clause are unconstitutional.

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requires both a public purpose and government control over public expenditures. Also, like here, the practice the Attorney General found to be unconstitutional involved public school districts. Indeed, the District's and JCEA's practice of release time is even more expansive than the Texas program—allowing two full-time release employees, rather than a pool of hours.

RESPECTFULLY SUBMITTED this 6th day of September, 2018 by:

/s/ J. Bar

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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 September 6th, 2018, I served 2 true and correct copies of Plaintiffs'/Appellants' Reply Brief filed with this court on or about September 6th, 2018 to the following via U.S. Mail:

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

Dated: September 6, 2018

By: _____
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