
MOSHE ROZENBLIT and WON KYU
RIM,

Plaintiffs-Appellants,

v.

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

Defendants-Respondents.

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

CIVIL ACTION

ON APPEAL FROM

SUPERIOR COURT, CHANCERY DIV.
GENERAL EQUITY, HUDSON COUNTY

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

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION
IN SUPPORT OF APPELLANTS ROZENBLIT, ET AL., AND REVERSAL**

DEBORAH J. LA FETRA
(*Pro Hac Vice Pending*)
California Bar No. 148875
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7444
Email:
DLafetra@pacificlegal.org

MARK MILLER
New Jersey Bar No. 043952012
Pacific Legal Foundation
8645 N. Military Trail
Suite 511
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006
Email:
MMiller@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

 I. THE GIFT CLAUSE SHOULD BE CONSTRUED TO PROMOTE
 REPRESENTATIVE DEMOCRACY AND PROTECT TAX DOLLARS 4

 II. THE UNION IMPROPERLY ENJOYS TAXPAYER
 SUBSIDIES FOR UNION EMPLOYEES 8

 A. The Union Engages in "Peacemaking"
 Only When It Serves *Union* Goals 8

 B. The District Lacks Control Over
 JCEA Release Time Employees 10

CONCLUSION 17

PROOF OF SERVICE 18

TABLE OF AUTHORITIES

Cases

<i>Atalese v. U.S. Legal Services Group, L.P.</i> , 219 N.J. 430 (2014)	1
<i>Bd. of Educ., Borough of Union Beach v. N.J. Educ. Ass'n</i> , 53 N.J. 29 (1968)	8
<i>Bryant v. City of Atlantic City</i> , 309 N.J. Super. 596 (App. Div. 1998)	3
<i>Cal. Cannabis Coal. v. City of Upland</i> , 401 P.3d 49 (Cal. 2017)	1
<i>Caterpillar v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.</i> , 107 F.3d 1052 (3d Cir.), cert. granted, 521 U.S. 1152 (1997), cert. dismissed, 523 U.S. 1015 (1998)	13-14
<i>Cheatham v. DiCiccio</i> , 379 P.3d 211 (Ariz. 2016)	1
<i>City of Bayonne v. Palmer</i> , 47 N.J. 520 (1966)	4
<i>City of E. Orange v. Bd. of Water Comm'rs</i> , 79 N.J. Super. 363 (App. Div.), aff'd on other grounds, 41 N.J. 6 (1963)	4
<i>Crescent Park Tenants Ass'n v. Realty Equities Corp. of N.Y.</i> , 58 N.J. 98 (1971)	6
<i>Dinicola v. State of Or. and Or. Univ. Sys.</i> , 382 P.3d 547 (Or. App.), rev. denied, 360 Or. 751 (2016)	12
<i>Dinicola v. State of Or., Dep't of Revenue</i> , 268 P.3d 632 (Or. App. 2011), cert. denied, 134 S. Ct. 724 (2013)	12-15
<i>Estate of Kotsovska ex rel. Kotsovska v. Liebman</i> , 221 N.J. 568 (2015)	15
<i>Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders</i> , __ A.3d __, 2018 WL 1832631 (N.J. Apr. 18, 2018)	2
<i>Galvao v. G.R. Robert Constr. Co.</i> , 179 N.J. 462 (2004)	11-12
<i>Gripenburg v. Twp. of Ocean</i> , 220 N.J. 239 (2015)	1

<i>Hargrove v. Sleepy's, LLC</i> , 220 N.J. 289 (2015)	15
<i>Int'l Ass'n of Machinists and Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Group</i> , 387 F.3d 1046 (9th Cir. 2004)	13-14
<i>Jen Elec., Inc. v. Cty. of Essex</i> , 197 N.J. 627 (2009)	2
<i>Jersey City v. State of N.J. Dep't of Env'tl. Protection</i> , 227 N.J. Super. 5 (App. Div. 1988)	11
<i>Klumpp v. Borough of Avalon</i> , 202 N.J. 390 (2010)	1
<i>Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs</i> , 742 F. Supp. 441 (N.D. Ill. 1990)	11
<i>Lance v. McGreevey</i> , 180 N.J. 590 (2004)	2
<i>Local 195, IFPTE, AFL-CIO v. State</i> , 88 N.J. 393 (1982)	11
<i>Loigman v. Twp. Comm. of the Twp. of Middletown</i> , 297 N.J. Super. 287 (App. Div. 1997)	6-7
<i>Morgan v. Sanford Brown Inst.</i> , 225 N.J. 289 (2016)	1
<i>N.J. Citizen Action, Inc. v. Cty. of Bergen</i> , 391 N.J. Super. 596 (App. Div.), cert. denied, 192 N.J. 597 (2007)	4, 11
<i>Nat'l Fed'n of Indep. Bus. v. Williams</i> , No. 2015CA2017 (Colo. Ct. App., Mar. 2, 2017)	1
<i>Passaic Twp. Bd. of Educ. v. Passaic Twp. Educ. Ass'n</i> , 222 N.J. Super. 298 (App. Div. 1987)	8
<i>Richardson v. Gangadin</i> , 2016 WL 6140791 (N.J. Adm. Oct. 19, 2016)	9
<i>Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.</i> , 78 N.J. 144 (1978)	6-8
<i>Roe v. Kervick</i> , 42 N.J. 191 (1964)	3, 5
<i>Sec. Pac. Nat'l Bank v. Masterson</i> , 283 N.J. Super. 462 (1994)	15
<i>Sinclair v. Merck & Co., Inc.</i> , 195 N.J. 51 (2008)	1

Univ. of Med. and Dentistry of N.J. v. Univ. of Med. and Dentistry of N.J. Council of Am. Ass'n of Univ. Professors Chapters, 223 N.J. Super. 323 (App. Div. 1988) 7

Wright v. State,
169 N.J. 422 (2001) 12

Constitution

N.J. Const. art. I, ¶ 2 5

N.J. Const. art. VIII, § 3, ¶ 2 3

Statutes

N.J.A.C. § 6A:23A-1.1 to -22.15 6

N.J.S.A. § 10:4-12(4) 7

Other Authorities

1 Mill, John Stuart,
Dissertations and Discussions (London 1859) 5

Cruz, David,
Local Control of Jersey City Schools by Spring Said Mayor Fulop, NJTV News (PBS) (Oct. 7, 2015),
<https://www.njtvonline.org/news/video/local-control-of-jersey-city-schools-by-spring-said-mayor-fulop/> 10

Dictionary.com,
Occupation, <http://www.dictionary.com/browse/occupation>
(last visited May 7, 2018) 10

Goldberg, Michael J.,
Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement,
1989 Duke L.J. 903 16

Hamilton, Alexander,
The Federalist No. 30 (C. Rossiter ed., 1961) 5

Harris, Elizabeth A.,
Jersey City Teachers Go on Strike Over Health Insurance,
N.Y. Times, Mar. 16, 2018, <https://www.nytimes.com/2018/03/16/nyregion/jersey-city-teachers-strike.html> 8-9

McDonald, Terrence T.,
Back to School! Jersey City teachers reach deal on new pact, The Jersey Journal, Mar. 19, 2018,
http://www.nj.com/jjournal-news/index.ssf/2018/03/back_to_school_jersey_city_tea.html 9

Neidenberg, Chris,
 JCEA.org, *Returning Control*
(The 5-Year Plan that took 27 years), https://docs.wixstatic.com/ugd/d4e3b9_924af50bbe4c4dac9d59dd3ec3d9bb3b.pdf
 (last visited May 7, 2018) 10

Roth, William V., Jr.,
The "Malmanagement" Problem: Finding the Roots of Government
Waste, Fraud, and Abuse, 58 Notre Dame L. Rev. 961 (1983) 5

State of New Jersey Commission of Investigation,
Union Work, Public Pay: The Taxpayer Cost of Compensation
and Benefits for Public-Employee Union Leave (May, 2012),
<http://www.nj.gov/sci/pdf/SCIUnionReport.pdf> 16

IDENTITY AND INTEREST OF AMICUS

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has supporters across the country, including in the State of New Jersey. Among other matters affecting the public interest, PLF frequently litigates to defend constitutional limitations on government action, including in actions specifically related to taxpayer protection, *Nat'l Fed'n of Indep. Bus. v. Williams*, No. 2015CA2017 (Colo. Ct. App., Mar. 2, 2017), *Cal. Cannabis Coal. v. City of Upland*, 401 P.3d 49 (Cal. 2017), and a state constitution's Gift Clause. *Cheatham v. DiCiccio*, 379 P.3d 211 (Ariz. 2016). PLF has also participated as amicus curiae on a variety of public policy issues in New Jersey state courts. See, e.g., *Morgan v. Sanford Brown Inst.*, 225 N.J. 289 (2016); *Gripenburg v. Twp. of Ocean*, 220 N.J. 239 (2015); *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014); *Klumpp v. Borough of Avalon*, 202 N.J. 390 (2010); *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51 (2008).

PLF is particularly interested in this case because taxpayer money should be used exclusively for public purposes. The public purpose requirement of the Gift Clause reflects the state constitution's overall goals of fairness and accountability. Paying for employees who serve the union for "release time" means

that taxpayers are funding employees whose sole function is to benefit the union. The school district has no effective control over these release time employees, demonstrating that their loyalty and services are devoted to the union, not the taxpayers. This violates the state constitutional prohibition on using public funds to benefit private organizations.

INTRODUCTION AND SUMMARY OF ARGUMENT

New Jersey taxpayers have both a civic duty and a legal right to monitor and, often, to challenge, government expenditures that violate state law, including provisions of the state constitution. See, e.g., *Freedom From Religion Found. v. Morris Cty. Bd. of Chosen Freeholders*, __ A.3d __, 2018 WL 1832631 (N.J. Apr. 18, 2018) (challenge to government program that allocated taxpayer funds to restore churches in violation of state constitution); *Jen Elec., Inc. v. Cty. of Essex*, 197 N.J. 627, 644 (2009) (taxpayers may challenge award of public contracts); *Lance v. McGreevey*, 180 N.J. 590 (2004) (taxpayers' constitutional challenge to appropriations act that relied on borrowed funds from bond sales to fund general expenses.). In this case, New Jersey taxpayers challenge the contract between the Jersey City Education Association (JCEA) and the Jersey City School District, which contains a provision requiring the district to pay full classroom salaries to the union's president and vice-president for the purpose of doing the union's business.

The New Jersey Constitution prohibits such gifts: "No county, city, borough, town, township or village shall here[*in*]after give any money or property, or loan its money or credit to or in aid of any individual, association or corporation[.]" N.J. Const. art. VIII, § 3, ¶ 2. The underlying principle of the "Gift Clause" is that "public money should be raised and used only for public purposes." *Roe v. Kervick*, 42 N.J. 191, 207 (1964). To determine if the expenditure of public funds constitutes a prohibited donation, the court first considers whether the provision of financial aid is for a public purpose, and second, whether the means to accomplish it are consistent with that purpose. *Id.* at 212. Thus, "the funded activity must be one that serves a benefit to the community as a whole and at the same time is directly related to the functions of government." *Bryant v. City of Atlantic City*, 309 N.J. Super. 596, 612 (App. Div. 1998). Where an expenditure confers a private as well as a public benefit, the private one must be merely incidental to the public. *Roe*, 42 N.J. at 223. Its constitutionality thus hinges on its primary objective. *Id.*; *Bryant*, 309 N.J. Super. at 612 ("[t]he funded activity must be one that serves a benefit to the community as a whole *and at the same time* is directly related to the functions of government.") (emphasis added). Applying these general principles, the court must consider whether the government receives adequate consideration to support the transfer of public funds to a private

entity. *N.J. Citizen Action, Inc. v. Cty. of Bergen*, 391 N.J. Super. 596 (App. Div. 2007) (citing *City of Bayonne v. Palmer*, 47 N.J. 520, 522-30 (1966), and *City of E. Orange v. Bd. of Water Comm'rs*, 79 N.J. Super. 363, 371 (App. Div.), *aff'd on other grounds*, 41 N.J. 6 (1963)).

The Gift Clause exists for the express purpose of protecting taxpayers from subsidizing private organizations, directly or indirectly. The provision requires courts to look carefully at the expenditure of public funds to ensure that those expenses remain at all times under the control of accountable public officials. The "release time" provision of the JCEA contract fails this test. As shown below, the school district cannot control the actions of the union president and vice-president in any meaningful way. Moreover, contrary to the decision below, the union's asserted "peacemaking" role exists only so long as it benefits the union. When the union's interests diverge from those of the district, the release time employees work only for the union. For these reasons, as well as those stated by Appellants Moshe Rozenblit and Won Kyu Rim, the decision below should be reversed.

ARGUMENT

I

THE GIFT CLAUSE SHOULD BE CONSTRUED TO PROMOTE REPRESENTATIVE DEMOCRACY AND PROTECT TAX DOLLARS

Representative democracy depends on the ability of the people to hold their elected officials accountable for governmental

actions. See N.J. Const. art. I, ¶ 2. But when officials give public funds to unelected, private organizations, it becomes extraordinarily difficult for voters to determine (1) *whom* to hold accountable and (2) *how* to hold them accountable.

The idea of a rational democracy is, not that the people themselves govern, but that they have security for good government. This security they cannot have by any other means than by retaining in their own hands the ultimate control. If they renounce this, they give themselves up to tyranny.

1 John Stuart Mill, *Dissertations and Discussions* 470-71 (London 1859), *quoted in* William V. Roth, Jr., *The "Malmanagement" Problem: Finding the Roots of Government Waste, Fraud, and Abuse*, 58 *Notre Dame L. Rev.* 961, 984 (1983). That is, the people must be able to hold accountable the government officials who collect and disburse tax dollars.

As Alexander Hamilton observed in Federalist 30, "Money is, with propriety, considered as the vital principle of the body politic." *The Federalist* No. 30, at 188 (A. Hamilton) (C. Rossiter ed., 1961). Control over the purse strings is one of the most potent tools a government possesses. In this respect, there is little difference between the federal government and state or local governments. Taxpayers have a basic, and compelling, interest in tracking the expenditure of tax revenues. *Roe*, 42 N.J. at 206 (genesis of Gift Clause was to prevent "direct loans or gifts of public money or property" that resulted in "serious detriment to

the taxpayer"); see also Chapter 23A of Title 6A of the New Jersey Administrative Code, N.J.A.C. § 6A:23A-1.1 to -22.15 (setting forth the regulatory scheme for school districts' fiscal accountability, efficiency, and budgeting). For this reason, in New Jersey, "the standing of a taxpayer to attack illegal disbursements of public funds or other illegal official action has been long and firmly established." *Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York*, 58 N.J. 98, 102 (1971); see also *Loigman v. Twp. Comm. of the Twp. of Middletown*, 297 N.J. Super. 287, 295-97 (App. Div. 1997) (noting variety of citizen challenges to government action permitted by rules of court and that taxpayer intervention is appropriate where there is alleged governmental corruption, fraud, illegal bidding, "wrongful expenditures," and other "instances of illegalities and *ultra vires* acts").

Under the state constitutional structure, this Court must seek to fulfill the framers' intent for the Gift Clause—to promote accountability and to protect the public fisc. The New Jersey Legislature explicitly incorporated this principle in the Public School Education Act of 1975, determining that "community involvement in educational decisions, insuring some democratic control over such matters, is a significant part of a thorough and efficient system of education in this state." *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 161 (1978).

See also Univ. of Med. and Dentistry of N.J. v. Univ. of Med. and Dentistry of N.J. Council of Am. Ass'n of Univ. Professors Chapters, 223 N.J. Super. 323, 333 (App. Div. 1988) ("A public employer has a unique responsibility to make and implement public policy which is properly decided not by collective bargaining but by the political process.").

A contract containing union release time permits the District and the union to act in concert with virtually unchecked autonomy to spend millions of tax dollars in ways that no one can trace or control, contrary to New Jersey law. Even politically savvy residents of Jersey City who follow the activities of the School District by reading notices in the newspaper, and who register approval or disapproval of District proposals, will not be permitted into negotiations between District officials and the unions, nor will the specific contractual provisions be available for review and comment prior to the meeting at which they are adopted. N.J.S.A. § 10:4-12(4); *see also Ridgefield Park*, 78 N.J. at 163 ("[T]he very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective negotiation, where citizen participation is precluded."). Taxpayers uniquely lack standing to intervene in these matters. *Cf. Loigman*, 297 N.J. Super. at 298 (taxpayers denied ability to intervene in judicial matters arising from public sector labor disputes). This is

precisely the type of "hidden" government activity that prevents accountability for how tax dollars are spent, and also violates the Gift Clause of the New Jersey Constitution.

II

THE UNION IMPROPERLY ENJOYS TAXPAYER SUBSIDIES FOR UNION EMPLOYEES

A. The Union Engages in "Peacemaking" Only When It Serves Union Goals

The decision below relies heavily on JCEA's "peacemaking" role to justify the release time. As recent events make plain, however, JCEA engages in peacemaking only to the extent that such collaboration and cooperation *benefits the union*. See *Ridgefield Park*, 78 N.J. at 165 ("Teachers' associations, like any employee organizations, have as their primary responsibility the advancement of the interests of their members.").

Strikes by public employees, including public school employees, are illegal in New Jersey. *Bd. of Educ., Borough of Union Beach v. N.J. Educ. Ass'n*, 53 N.J. 29, 36-38, 48 (1968); *Passaic Twp. Bd. of Educ. v. Passaic Twp. Educ. Ass'n*, 222 N.J. Super. 298, 303 (App. Div. 1987) ("[P]ublic employees do not have the right to strike . . ."). Nonetheless, on March 16, 2018, JCEA members—teachers and more than 1000 other school workers—went on strike to pressure the Jersey City School District to accept the union's demands related to new contract terms. Elizabeth A. Harris, *Jersey City Teachers Go on Strike Over Health Insurance*,

N.Y. Times, Mar. 16, 2018.¹ A judge quickly ordered the teachers back into their classrooms and, subsequently, the union and the District reached an agreement.² The “release time” employees—the JCEA President and Vice President—chose to encourage their membership to engage in an illegal strike because they perceived the strike to be necessary to achieving the union’s goals. In short, given a choice between acting outside the law to benefit the union and within the law to peacefully resolve differences, the JCEA chose the illegal course of action *to benefit the union*. In a contest between union goals and the District’s goals, “peacemaking” was not a priority.

The strike was only the latest clash between the union and the District, especially District Superintendent Marcia Lyles, whom the union sought to remove from office. *Richardson v. Gangadin*, 2016 WL 6140791 (N.J. Adm. Oct. 19, 2016) (Office of Administrative Law rejected JCEA challenge to renewal of Lyles’ contract). In Jersey City’s 2015 bid to regain control over its schools after the state took over control in 1988 to root out political corruption, patronage, nepotism, and other challenges

¹ <https://www.nytimes.com/2018/03/16/nyregion/jersey-city-teachers-strike.html>.

² Terrence T. McDonald, *Back to School! Jersey City teachers reach deal on new pact*, The Jersey Journal, Mar. 19, 2018, http://www.nj.com/jjournal-news/index.ssf/2018/03/back_to_school_jersey_city_tea.html.

that resulted in failing schools,³ Jersey City Mayor Steve Fulop credited Superintendent “Lyles, her entire team, [and] the great teachers in Jersey City” for putting the city in a position to re-take control. David Cruz, *Local Control of Jersey City Schools by Spring Said Mayor Fulop*, NJTV News (PBS) (Oct. 7, 2015).⁴ The union is notably absent from the mayor’s list of positive contributors. Responding to the news that the state voted to relinquish some control back to the District, release time employee and union president Ron Greco commented that the JCEA did not have “much interaction” with Lyles and “we certainly don’t have a positive relationship with her.” *Id.* The union bitterly refers to the state’s control as “occupation,” a term usually reserved for the “seizure and control of an area by military forces, especially foreign territory.”⁵

B. The District Lacks Control Over JCEA Release Time Employees

The key to this dispute is whether the District retained control over the employees who were performing the union’s business, a theme often repeated in Gift Clause opinions. *N.J.*

³ Chris Neidenberg, JCEA.org, *Returning Control (The 5-Year Plan that took 27 years)*, https://docs.wixstatic.com/ugd/d4e3b9_924af50bbe4c4dac9d59dd3ec3d9bb3b.pdf (last visited Apr. 2, 2018).

⁴ <https://www.njtvonline.org/news/video/local-control-of-jersey-city-schools-by-spring-said-mayor-fulop/>.

⁵ Occupation, Dictionary.com, <http://www.dictionary.com/browse/occupation> (last visited Apr. 2, 2018).

Citizen Action, Inc. v. Cty. of Bergen, 391 N.J. Super. 596, 604 (App. Div.), cert. denied, 192 N.J. 597 (2007) (a loan may be permissible under the state constitution's Gift Clause if it achieves a public purpose and "the loan's 'use [is] confined to the execution of that purpose through a reasonable measure of control by a public authority'" (citation omitted; emphasis added); *Jersey City v. State of N.J. Dep't of Env'tl. Protection*, 227 N.J. Super. 5, 21 (App. Div. 1988) (no Gift Clause violation where the "State retains very substantial and close control"). State control corresponds directly to the government's ability to "safeguard the interests of the public" in public assets, including tax dollars. *Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs*, 742 F. Supp. 441, 445 (N.D. Ill. 1990). See also *Local 195, IFPTE, AFL-CIO v. State*, 88 N.J. 393, 430 (1982) (O'Hern, J., concurring in part and dissenting in part) ("[A]ccountability is best ensured where elected or appointed officials exercise direct control over those who carry out state functions. It stands to reason that private workers are inherently less accountable than public employees.").

In the context of *respondeat superior*, New Jersey courts define "control" to mean "the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, not only what shall be done, but how it shall be done." *Galvao v. G.R. Robert Constr. Co.*, 179 N.J.

462, 472 (2004) (quoting *Wright v. State*, 169 N.J. 422, 436 (2001)).⁶

The importance of “control” was also critical to the decision in *Dinicola v. State of Or., Dep’t of Revenue*, 268 P.3d 632 (Or. App. 2011), *cert. denied*, 134 S. Ct. 724 (2013).⁷ This case did not address the validity of release time directly, instead addressing the issue of whether an employee of the state Department of Revenue who was working as union president while on release time from a job with the agency could recover overtime pay from the agency under the Fair Labor Standards Act. The opinion is helpful here because a union official on release time who is considered an employee of the union for one purpose, would most likely be considered an employee of the union for other purposes. Plaintiff Dinicola worked “almost exclusively as president of Local 503, [though] he formally remained a continuing employee of Revenue in his permanent classification, on release time [H]e received his pay and employee benefits from Revenue rather

⁶ *Galvao* also identified a method for *inferring* control in the absence of direct control, based on who pays, furnishes equipment, and has a right of termination. *Galvao*, 179 N.J. at 472. The inferential approach is not necessary in this case where the union exercises direct control over the release time employees.

⁷ The holdings of this case were reaffirmed in subsequent litigation by the same plaintiff. *Dinicola v. Or. and Or. Univ. Sys.*, 382 P.3d 547, 558 (Or. App.), *rev. denied*, 360 Or. 751 (2016).

than directly from the union, and he accrued vacation and sick leave time with Revenue." *Id.* at 636.

These facts, however, were only the beginning of the court's analysis. The court needed to determine whether, as a matter of "economic reality," Dinicola was employed by the state agency or by the union. *Id.* Revenue argued that Dinicola worked directly for and on behalf of the union, that the union provided plaintiff's work site and the tools to perform his job as president, and that the union reimbursed Revenue for Dinicola's salary. *Id.* at 637. On this latter point—the union reimbursement—the court noted that collective bargaining agreements may or may not call for such reimbursement and that it is an insignificant factor in determining whether the agency or the union controls the work of the employee. *Id.* at 637, 639 (Although Dinicola received his pay directly from Revenue, including raises that other Revenue employees in his classification received, and "remained theoretically subject to discipline and termination by Revenue," none of these factors are "decisive or even very important" in determining whether the agency or the union controls the employee.).

The Oregon court considered two federal cases addressing the issue: *Caterpillar v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 107 F.3d 1052 (3d Cir.), cert. granted, 521 U.S. 1152 (1997), cert. dismissed, 523 U.S. 1015 (1998), and *Int'l Ass'n of Machinists and Aerospace Workers, Local Lodge 964*

v. *BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046 (9th Cir. 2004). In *Caterpillar*, the Third Circuit rejected the union's argument that shop stewards, on leaves of absence from their regular jobs, were joint employees of both the union and the employer because the stewards did nothing for the employer's benefit. 107 F.3d at 1055. The mere fact that they "remain on the Caterpillar payroll and fill out the appropriate forms and time sheets to get paid is legally irrelevant." *Id.* Similarly, the Ninth Circuit rejected the argument that the full-time union steward "must be an employee of Goodrich simply by virtue of the fact that he remains on the company's payroll and continues to maintain a formal job classification." *Int'l Machinists*, 387 F.3d at 1057. However, because the steward in that case maintained an office on the employer's worksite, and worked under the company's direct and immediate supervision, the court held that he was, in fact, properly designated an employee. *Id.* at 1059.

The Oregon court took the lesson from these two cases: "[B]oth look to the reality of a specific situation and not to formal titles in determining whether a union member who is doing union work full time remains an employee. . . . Even the fact that the employer paid the employee's full compensation without union reimbursement was not decisive." *Dinicola*, 268 P.3d at 638. Reviewing these and other cases, the Oregon court found that courts "uniformly hold that work that is solely on behalf of the union is

not work for an employer that nominally—or even actually—paid the employee’s wages.” *Id.* Thus, “as a matter of economic reality, [Dinicola] was an employee of Local 503 for purposes of overtime pay under the FLSA during his terms as its president.” *Id.* at 639.

Here, too, this Court must not turn a blind eye to economic reality. See *Hargrove v. Sleepy’s, LLC*, 220 N.J. 289, 315 (2015) (combination of “right to control” and “economic realities” determines who may invoke anti-discrimination and whistleblower statutes); *Estate of Kotsovska ex rel. Kotsovska v. Liebman*, 221 N.J. 568, 595 (2015) (same for Workers’ Compensation Act). The findings below plainly demonstrate that, as a matter of economic reality, JCEA has exclusive control over the taxpayer-subsidized employees on release time.⁸ In short, under *Dinicola’s* analysis, the release time officers clearly are employed by the union to conduct the union’s business.

New Jersey courts will not validate “sweetheart deals.” *Sec. Pac. Nat’l Bank v. Masterson*, 283 N.J. Super. 462, 470 (1994) (invalidating a lease). In this case, JCEA most certainly negotiated a very sweet deal, enjoying the fruits of the labors of two full-time employees at the union’s beck and call, all at the

⁸ The admissions by the JCEA during the discovery phase of this litigation, detailed in the Appellants’ Opening Brief, confirm the union’s control over its officers.

expense of the taxpayers.⁹ The scope of the problem extends well beyond the two teachers' union officials highlighted by this case. The New Jersey Commission of Investigation found that New Jersey taxpayers contributed *more than \$30 million* in release time to public employee unions.¹⁰

⁹ "Sweetheart deals" typically benefit union leadership and employers at the expense of workers. See Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 Duke L.J. 903, 910-11. The fact that taxpayers, rather than workers, are the losers in a release time contract does not eliminate the "sweetheart" nature of the deal.

¹⁰ State of New Jersey Commission of Investigation, *Union Work, Public Pay: The Taxpayer Cost of Compensation and Benefits for Public-Employee Union Leave* at 3 (May, 2012) (study of union contracts from 2006-2011) and at 14, 22 (JCEA release time cost taxpayers \$4.6 million in salaries and benefits from January 2006 through June 2011, excluding additional costs such as the employer share of federal payroll taxes, pension contributions, and costs of hiring additional teachers to cover the classrooms in which the union officials do not teach), <http://www.nj.gov/sci/pdf/SCIUnionReport.pdf>.

CONCLUSION

New Jersey's taxpayers expect public funds to pay for government that serves them, not union special interests. The state constitution's Gift Clause safeguards precisely this interest. This court should invalidate the "release time" gift of public funds and reverse the decision below.

DATED: June 6, 2018.

Respectfully submitted,



DEBORAH J. LA FETRA
(Pro Hac Vice Pending)
California Bar No. 148875
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7444
Email:
DLafetra@pacificlegal.org

MARK MILLER
New Jersey Bar No. 043952012
Pacific Legal Foundation
8645 N. Military Trail
Suite 511
Palm Beach Gardens, FL 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006
Email: MMiller@pacificlegal.org

*Counsel for Amicus Curiae
Pacific Legal Foundation*

PROOF OF SERVICE

I hereby certify that on this date, an original and four (4) copies of the **BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS ROZENBLIT, ET AL., AND REVERSAL** were sent via Federal Express to be filed with the following:

Clerk of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Judicial Complex
25 West Market Street
Trenton, NJ 08625-0970

I further certify that on this date, two (2) copies of the **BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS ROZENBLIT, ET AL., AND REVERSAL** were sent via the United States Postal Service to the following:

JONATHAN RICHES, ESQ.
(Pro hac vice)
ADITYA DYNAR, ESQ.
(Pro hac vice)
Scharf-Norton Center for
Constitutional Litigation at
The Goldwater Institute
500 East Coronado Road
Phoenix, Arizona 85004

JUSTIN A. MEYERS, ESQ.
(041522006)
G. MARTIN MEYERS
(271881971)
Law Offices of G. Martin
Meyers, P.C.
35 West Main Street, Suite 106
Denville, New Jersey 07834

*Counsel for Plaintiffs, Moshe
Rozenblit and Won Kyu Rim*

KIM C. BELIN, ESQ.
ERIC WIEGHAUS, ESQ.
Florio Perrucci Steinhardt & Fader
1010 Kings Highway South, Bldg. 2
Cherry Hill, New Jersey 08034

*Counsel for Defendant,
Jersey City Board of Education*

FLAVIO L. KOMUVES, ESQ.
(018891997)
RICHARD A. FRIEDMAN
(011211978)
KENNETH I. NOWAK
(021041977)
Zazzali, Fagella, Nowak,
Kleinbaum & Friedman
570 Broad Street, Suite 1402
Newark, New Jersey 07102

*Counsel for Defendant,
Jersey City Education
Association, Inc.*

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

DATED: June 6, 2018.

Respectfully submitted,



MARK MILLER

*Counsel for Amicus Curiae
Pacific Legal Foundation*