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

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

# BRIEF AND APPENDIX OF CROSS-RESPONDENT JERSEY CITY EDUCATION ASSOCIATION IN RESPONSE TO CROSS-PETITION FOR CERTIFICATION

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## PRELIMINARY STATEMENT

Pending before this Court are a Petition for Certification filed by Defendant Jersey City Education Association ("JCEA") and a Cross-Petition filed by Plaintiffs Rozenblit and Rim ("Taxpayers"). While the parties disagree on much, they agree on two points: first, that this is a case of statewide importance worthy of this Court's attention, Pet. at 6-8; Cross-Pet. at 3, 12; see R. 2:12-4, and second, that if this Court grants JCEA's petition to review the statutory question decided sua sponte by the Appellate Division, this Court should likewise hear the question that was in fact briefed in the proceedings below but that was decided only by the Chancery Division, Pet. at 8, 16-20; Cross-Pet. at 4.[1] That question is whether a leave provision in the labor contract between the Jersey City School District ("District") and JCEA violates the New Jersey Constitution's ban on public gifts to private parties.

The Chancery Division concluded that the challenged leave provision is no "gift" because (1) the provision was not given away for free by the District, but bargained in exchange for valuable consideration, Pe29; and (2) the provision advances

[1] References to "Pet." are to JCEA's Petition for Certification; references to "Cross-Pet." are to Plaintiffs' Cross-Petition for Certification. References to "Pa" are to the Plaintiffs' appendix in the Appellate Division. References to "Pe" are to the appendix to JCEA's Petition for Certification.

important public purposes, including ensuring harmonious labor relations, consonant with the aims of the Employer-Employee Relations Act, the landmark New Jersey statute pursuant to which the contract and its leave provisions were negotiated, Pe26-27. Because the parties agree that if certification is granted, the constitutional issue should be part of the review, the balance of this submission is directed to the merits of the constitutional question.[2]

## STATUTORY AND FACTUAL BACKGROUND

### A. The Employer-Employee Relations Act

In 1968, the Legislature established a comprehensive system of public-sector labor relations when it enacted the Employer-Employee Relations Act ("EERA"), N.J.S.A. 34:13A-1 to -21. Under this system, if the majority of employees in a bargaining unit choose to be represented by a union, the union so chosen serves as the exclusive representative of all of the employees, including those who decide not to join the union. Id. 5.3. As the exclusive representative, the union has both the authority to negotiate a labor contract (called a "collective negotiations agreement" or "CNA") that binds all employees in the unit to its terms and the authority to act as the employees' agent on matters of contract administration, which include investigating –

[2] JCEA addressed the merits of the statutory question in its Petition for Certification filed October 21, 2019.

and, where appropriate, settling – the myriad day-to-day grievances and disputes that arise under a CNA. Id. 5.3.

In the preamble to EERA, the Legislature "declared as the public policy of this State" that "the best interests of the people . . . are served by the prevention or prompt settlement of labor disputes" and that "the voluntary mediation" of employer-employee disputes would best "promote permanent . . . employer-employee peace and the health, welfare, comfort and safety of the people of the State." Id. 2. The law states that a system premised on collective negotiations and resolution of disputes is a "necessity" to carry out these goals. Ibid.

In addition to conferring significant authority on the union serving as the exclusive representative, EERA also imposes a significant duty on the union. Specifically, EERA imposes the duty of fair representation – a duty that the union owes not only to its own members, but to all employees in the represented bargaining unit, including those who choose not to join the union and even those who oppose the union. D'Arrigo v. N.J. State Bd. of Mediation, 119 N.J. 74, 79 (1990). The duty requires the union, in the exercise of both its negotiation and its administration authority, to act "with complete good faith, with honesty of purpose and without unfair discrimination against a dissident employee or group of employees." Lullo v. Int'l Ass'n of Fire Fighters, Local 1066, 55 N.J. 409, 427

(1970); see also N.J.S.A. 34:13A-5.7. The union breaches this duty when its "'conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.'" Belen v. Woodbridge Twp. Bd. of Educ., 142 N.J. Super. 486, 491 (App. Div. 1976) (quoting Vaca v. Sipes, 386 U.S. 171, 190 (1967)).

EERA also imposes duties on public employers. They have an obligation to "negotiate in good faith" with the exclusive representative of their employees "concerning terms and conditions of employment," N.J.S.A. 34:13A-5.4(a)(5), and "written policies setting forth grievance and disciplinary review procedures," which may provide for "binding arbitration" or other dispute resolution mechanisms, id. 5.3.

**B. Release-Time Arrangements Under EERA**

Operating within the system of public-sector labor relations created by EERA, school districts and other public employers across the state have long bargained for release-time provisions in negotiations with the representatives of their employees.[3] Release-time provisions allow certain employees to take paid leaves of absence from their ordinary duties so that they can serve not only as negotiators but as ombudspersons who sound out their fellow employees – union and nonunion alike –

[3] See N.J. Comm'n of Investigation, Union Work, Public Pay 3-4 (2012), https://www.state.nj.us/sci/pdf/SCIUnionReport.pdf.

and investigate and address workplace grievances with an eye toward accomplishing EERA's purpose of "prevention or prompt settlement of labor disputes," N.J.S.A. 34:13A-2.

New Jersey public employers and unions have negotiated these provisions in reliance on a consistent line of judicial and administrative precedent treating compensated-leave provisions generally and compensated release time specifically as not simply permitted under EERA, but in fact as a mandatory subject of negotiations. See Pet. at 7, 10, 12-13, 13 n.5 (citing authorities).

The compensated release-time provision challenged here is set forth in the CNA between the District and JCEA and is described in JCEA's Petition. See Pet. at 3, Pa44. The provision goes back decades. See Pa12. Originally, the provision authorized releasing one JCEA officer from his teaching duties to perform contract administration work, but in an amendment made in 1998 - notably, at the request of the District – the parties agreed that a second JCEA representative would receive compensated leave to perform release-time duties. Pa345-46.

## THE COLLECTIVELY BARGAINED RELEASE-TIME PROVISION CHALLENGED HERE DOES NOT VIOLATE THE GIFT CLAUSE

The provisions of the New Jersey Constitution on which the Taxpayers sue provide in relevant part that "[n]o county, city, borough, town, township or village shall hereafter give any

money or property, or loan its money or credit, to or in aid of any individual, association or corporation," N.J. Const. art. VIII, § 3, ¶ 2, and that "[n]o donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever," id. ¶ 3.

These provisions together long have been referred to in shorthand as the "Gift Clause," because they take aim not at contracts for mutual consideration between governmental bodies and private organizations, but at true "gifts," i.e., giveaways or donations made without consideration to advance private, rather than public, objectives. This is the teaching of numerous cases, including the case that the Taxpayers acknowledge to be the "seminal" decision in this area, Roe v. Kervick, 42 N.J. 191 (1964). Cross-Pet. at 9.

**A. Roe v. Kervick Establishes that Where the Government Contracts with a Private Organization to Achieve a Public Purpose in Exchange for Consideration, There Is No "Gift."**

In Roe, a state official, concerned that a redevelopment program involving the transfer of state dollars to a private body charged with revitalizing economically depressed areas of the state to reduce unemployment might violate the Gift Clause, brought a declaratory judgment action. 42 N.J. at 197-98. This Court upheld the transfer as lawful, using the occasion to review comprehensively the origins of the Gift Clause and to

enunciate the Clause's objective in definitive terms. The objective of the Clause, the Court explained, was simple: to codify "a fundamental doctrine of government, i.e., that public money should be raised and used only for public purposes." Id. at 207 (emphasis added). The Court took care to observe that public purposes can be, and often are, advanced by private, nongovernmental organizations — including even private, for-profit businesses — such that it would be wrong to read the Clause as a ban against enlisting and compensating private organizations to advance public purposes. Id. at 218, 229. More specifically, the Court held that state and local governments may "employ the services of a third person or corporation to do any lawful act which [the government entities] have the right to have done, and to pay for it." Id. at 217.

In recognition that the text of the Gift Clause prohibits only the "donation" or "giv[ing]" of governmental money and property to private organizations, the Roe Court further held that transactions between governmental and private organizations that are "contractual in nature" and "based upon a substantial consideration" are neither "donations" nor "gifts," but rather "valid compact[s] based upon an exchange." Id. at 218. The Roe Court added that "the circumstance that some private benefit may be derived" from the receipt of "public money as an incident of its use in the execution of a paramount public purpose will not

bring the statutory authorization for the financial assistance within the constitutional ban," as it does not "water down the consideration received by the State or political subdivision." Ibid. Thus, so long as "a reasonable measure of control" over the private organization's use of the public funds is in place to ensure that the funds are not diverted to an improper nonpublic purpose, a contractual arrangement with a private organization passes constitutional muster. Id. at 222.

Finally, cognizant of "the long-established principle of judicial deference" and the dominant "role of the legislative branch of government" in identifying and responding to social needs, id. at 229, the Roe Court cautioned that "the judiciary should defer to the legislative judgment" that an arrangement between public and private entities "represent[s] a means of accomplishing a valid public purpose," id. at 229-30. Likewise, if the Legislature passes a statutory scheme that permits or even encourages governmental relationships with private entities to realize a specific public purpose, the form and objectives that the Legislature endorses should be considered "presumptively valid," so that the judiciary does not usurp the role of the political branches. Roe, 42 N.J. at 229; see also, e.g., N.J. Mortg. Fin. Agency v. McCrane, 56 N.J. 414, 422 (1970) (declining to "second-guess" a statute that empowered a

state agency to lend funds to private mortgage lenders); Whelan v. N.J. Power & Light Co., 45 N.J. 237, 247 (1965).

In their Cross-Petition, the Taxpayers suggest that the Gift Clause should be treated as if it imposed a virtual ban on any transfer of public funds to a private organization, regardless of whether the organization spends the funds to advance public purposes and regardless of whether the organization has entered into a contract providing consideration in return for the funds. See Cross-Pet. at 8-12. Roe is flatly inconsistent with any such absolutist reading of the Gift Clause; indeed, our research has not uncovered a single post-Roe case in which either this Court or the Appellate Division has concluded that an arrangement between a state or local government entity and a private entity violated the Gift Clause. This perhaps explains why the Taxpayers do not so much seek review to have this Court apply Roe and its progeny as to have this Court revisit its Gift Clause jurisprudence. See Cross-Pet. at 8 ("[T]his cross-petition . . . presents an opportunity to clarify the contours of the New Jersey Constitution's Gift Clause."). As we now show, a straightforward application of Roe yields the result reached by the Chancery Division: that the release-time provisions in the CNA between the District and JCEA are constitutional and do not offend the Gift Clause.

## B. The Chancery Division Faithfully Applied the Holding of Roe to the Facts Here, Properly Concluding that the Challenged Release-Time Provision Is Not an Unconstitutional "Gift."

Under Roe, if the payments of release time to JCEA's two designees serve a "public purpose," are supported by "substantial consideration," and are subject to "a reasonable measure of control," those payments pass constitutional muster. 42 N.J. at 222. As the Chancery Division found, Pe20-29, the payments meet all three criteria and therefore are permissible.

### 1. The Release-Time Provision Promotes the Public Purposes of EERA and Benefits the District.

It is plain, first of all, that the release-time provision serves a public purpose. Indeed, this provision enables JCEA, through its two authorized releasees, to serve the very same public purpose that supports EERA itself — in particular, EERA's provisions authorizing a majority-selected exclusive representative to negotiate agreements and resolve grievances and other workplace disputes on behalf of all the employees in a given bargaining unit. As explained supra p. 3, the public purpose underlying these EERA provisions is "employer-employee peace and the health, welfare, comfort and safety of the people of the State," which the Legislature concluded would be served through the statute's mechanisms for "the prevention or prompt settlement of labor disputes" and "the voluntary mediation" of employer-employee disputes. N.J.S.A. 34:13A-2.

There are multiple ways in which release time maximizes the benefits of the EERA system to public employers in their capacity as employers. For example, JCEA's releasees have provided the District with substantial information related to its employees' interests and professional needs. Pa148-49, Pa347, Pa377. They have helped to revitalize the District's hiring and professional development programs. Pa347, Pa377. And their participation in the grievance and disciplinary processes has shifted much of the administrative burden to JCEA and has often avoided costly arbitrations. Pa39-41, Pa154-56, Pa347-48.

The releasees thus benefit the District by relieving it of considerable administrative responsibilities and associated costs, allowing District administrators to focus greater attention on the quality of the education being provided to the District's students. See Int'l Ass'n of Machinists, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Grp., 387 F.3d 1046, 1057 (9th Cir. 2004) (holding that employees on release time benefit the employer, not just the union, by "play[ing] an integral role in enforcing the terms of the collective bargaining agreement and in peacefully resolving disputes between labor and management"). Any doubt that the release-time arrangement promotes the District's interests as a public employer is erased once one takes account of the fact that the current arrangement with JCEA, increasing the number of

releasees from one to two, was initiated in 1998 at the District's request. See Pa345-46.

Beyond assisting the District in its capacity as employer, release-time employees also effectuate EERA's public purposes by, among other responsibilities, acting as ombudspersons for employees, identifying and quelling potential disputes before they ripen into real disputes, resolving disputes that do occur, and providing representational services to all employees in the bargaining unit, including those who are not JCEA members.

We underscore those words because the Taxpayers in their Cross-Petition treat JCEA as if it were a purely private for-profit business peddling a commercial product solely in the interests of its own members or shareholders. But the duty of fair representation, described supra pp. 3-4, requires unions to advance the interests of all represented employees without discrimination against those who are not union members. The duty thus differentiates unions from ordinary private organizations, which typically are permitted to favor their own members or shareholders and to do nothing for those who are not members or shareholders. See generally Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part) (noting that the duty of fair representation "requires the union to go out of its way to benefit [nonmembers], even at the expense of its other interests. In the

context of bargaining, a union must seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others."); see also Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 204 (2016) (commenting on the public interests served by the collective negotiations process).

The fact that unions acting pursuant to EERA sometimes must assume an adversarial posture toward governmental bodies' managerial employees, see Cross-Pet. at 13-14, does not in any way detract from the fact that unions are serving EERA's public purposes in representing all employees, member and nonmember alike, without discrimination. That is because the mere fact that a union is challenging the actions of a manager in a particular dispute does not mean that the union is acting contrary to the interests of the government in its sovereign capacity; the government's position as sovereign, as reflected in EERA, is to ensure a fair process and a just resolution of workplace disputes, not a process designed to find in favor of the managerial employee over the line employee in every instance. Indeed, fair treatment of line employees is not only a legitimate public end in its own right, but also a means to the distinct end of advancing the interest of the government qua

employer in attracting and retaining qualified workers who value a fair workplace.

There are, of course, other areas in which legislatures have legitimately determined that it furthers public purposes to empower and provide financial support to an independent body charged with holding accountable the government's own executive decisionmakers. For this reason, the courts have not hesitated to hold that governmental financing of private legal aid organizations, including those empowered to sue the government itself, is for a public purpose and thus meets the "public use" component of the Fifth Amendment. See, e.g., Brown v. Legal Found., 538 U.S. 216, 232 (2003). Closer to home, this Court held in Mount Laurel Township v. Department of Public Advocate, 83 N.J. 522 (1980), that the financing of the Department of the Public Advocate, a body that frequently opposed the state in administrative and judicial proceedings, was consonant with the "public purpose" and other prongs of the Gift Clause analysis, inasmuch as the Public Advocate's work promoted "[t]he vital need to hold the government accountable," id. at 535.

In sum, the release-time provision at issue here advances a public purpose – indeed, multiple public purposes.

**2. Substantial Consideration Supports Both the CNA Taken as a Whole and the CNA's Release-Time Provision Viewed on Its Own.**

Not only does the release-time provision advance a public purpose, it and the CNA of which it is an integral part are supported by substantial consideration.

The proper way to test whether consideration exists in exchange for a contractual promise is to read the contract as a whole. See Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014). And read as a whole, the CNA demonstrates that the challenged release-time provision is backed by substantial consideration of at least two kinds. First, JCEA agreed to "promote to the highest possible degree . . . harmonious employer[-]employee relations," Pa39, and thereby to facilitate the bargained-for, mandatorily negotiable dispute-resolution process for alleged violations of the CNA. Cf. N.J. Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 606-07 (App. Div. 2007); AQN Assocs., Inc. v. Twp. of Florence, 248 N.J. Super. 597, 609 (App. Div. 1991). Second, JCEA's members have committed to performing countless hours of work for the District as teachers, counselors, and other educators in exchange for all the provisions in the CNA that provide employees with wages and benefits, including the provisions establishing the release-time benefit. It should go without saying that the work that JCEA members perform pursuant to their

"contractual obligation to render services to the district" qualifies as a form of "valuable legal consideration." Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 293 N.J. Super. 1, 7 (App. Div. 1996).

But even looking at the release-time provision in isolation, it is abundantly clear that it is backed by substantial consideration. As noted, the District itself requested the 1998 amendment to the provision that authorized payment of a second release-time employee, Pa345-46, which illustrates rather concretely that the District reaps benefits from the releasees' work. Moreover, the releasees' involvement in the grievance and disciplinary processes frequently prevents issues from advancing to formal arbitration, resulting in significant cost savings to the District. Pa17-18, Pa352-53. District administrators told releasees that their peacekeeping activities in school buildings promoted smooth daily operations. Pa347-48. And last but not least, the District's Chief Talent Officer observed that the releasees' conciliatory function helped to "maintain a peaceful, orderly, and efficient delivery of educational services," an outcome with "nonmonetary value" to the District. Pa336. More than ample consideration supports the challenged release-time provision on any view of the facts. The provision therefore is not a "gift."

### 3. EERA and the CNA Supply a Reasonable Measure of Control over Releasees' Activities.

The conclusion that the release-time provision is not a "gift" is also supported by the fact that a "reasonable measure of control," Roe, 42 N.J. at 222, exists to ensure that release-time payments go to their intended public use and are not misappropriated.

As set out above, EERA imposes a duty of fair representation on unions serving as exclusive representatives that is commensurate with their authority to act on behalf of all of the employees in a given bargaining unit. See supra pp. 3-4, 12-13. Thus, if union officers who received release-time payments shirked their contemplated contract administration and other representational responsibilities on behalf of all employees either to malinger or to pursue only private goals, the union would be accountable both in administrative proceedings before the Public Employment Relations Commission, see D'Arrigo, 119 N.J. at 79, and in traditional suits at law, see Farber v. City of Paterson, 440 F.3d 131, 143 (3d Cir. 2006).

Beyond this, JCEA and the District also agreed to several contractual mechanisms by which the District exercises practical control over releasees' activities. Though release-time employees are on leave from their teaching activities, the District retains authority over them as employees, subject to

discipline or termination by the District. Pa168, Pa322-23, Pa352. They are required to report their activities, whereabouts, and use of other CNA-authorized absences, such as sick leave, to District administrators, Pa165-66, Pa168, Pa350-52, and are in frequent contact with District officials via phone and email, Pa352-53, Pa380. District administrators routinely ask the releasees, as the trusted representatives of District employees, to undertake "peacekeeping" activities in their schools. Pa347. The releasees comply with these requests and report the outcome of their efforts to administrators. Pa164-65, Pa179, Pa347-48, Pa352. As the Chancery Division rightly concluded, see Pe28, these measures alone show that the District maintains "significant amount of supervisory authority" that is legally sufficient to constitute a reasonable measure of control.[4]

Furthermore, JCEA, as noted, agreed in the CNA itself to "promote to the highest possible degree . . . harmonious employer[-]employee relations," Pa39, and it agreed as well to honor not only the letter but also the "spirit" of the agreement, Pa42. Thus, in the unlikely event that releasees in

[4] Contrary to Taxpayers' unsupported claims that JCEA uses release time for "electioneering and lobbying activities," Cross-Pet. at 13, the record makes clear that JCEA's releasees engage solely in representational functions during school hours, see Pa324, Pa350, Pa378-79.

the future were to shirk their release-time responsibilities, use their release time for purposes other than representing all unit employees, or otherwise radically depart from the consistent practices the Chancery Division cited in support of its conclusion as to control, JCEA would be subject to contractual remedies that could be initiated by the District as well as to the duty-of-fair-representation remedies described above, see supra pp. 3-4.

* * *

In view of Roe's clear teaching and the Chancery Division's unassailable application of that teaching to the facts here, it is no wonder that the Taxpayers here would like this Court to revisit its Gift Clause jurisprudence. Cross-Pet. at 8. Under Roe and its progeny, they cannot prevail. Indeed, under no sound or sensible understanding of the prohibition against giving gifts of public funds for private purposes could the release-time provision here be invalidated. This is why in two recent cases arising under state anti-gift provisions analogous to New Jersey's, courts have rejected challenges to release-time provisions in public-sector labor contracts identical to the challenge mounted here. See Cheatham v. DiCiccio, 379 P.3d 211

(Ariz. 2016); Idaho Freedom Found. v. Indep. Sch. Dist., No. CV-OC-2015-15153 (Idaho 4th Dist. Ct. Oct. 25, 2016).[5]

This Court should grant review and follow suit.

## CONCLUSION

The Petition and Cross-Petition should both be granted. On the merits, this Court should reverse the Appellate Division's decision and affirm the Chancery Division's decision.

Respectfully submitted,

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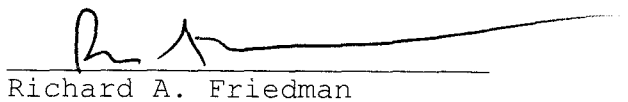
Dated: 11/6/19

[5] Pursuant to Rule 1:36-3, this unpublished opinion is attached as an appendix. We are not aware of any contrary unpublished opinions.

**CERTIFICATION**

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



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

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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|---|---|
| IDAHO FREEDOM FOUNDATION, an Idaho non-profit corporation; and JAMES AULD,<br><br>Plaintiffs,<br>vs.<br><br>INDEPENDENT SCHOOL DISTRICT OF BOISE CITY; NANCY GREGORY, MARIA GREELEY, A.J. BALUKOFF, DAVE WAGERS, TROY RHON, DOUG PARK, BRIAN CRONIN, all in their official capacity as members of the Board of Trustees of the Independent School District of Boise City; DON COBERLY, Superintendent of the Independent School District of Boise City; BOISE EDUCATION ASSOCIATION; and STEPHANIE MYERS, President, Boise Education Association,<br><br>Defendants. | Case No. CV-OC-2015-15153<br><br>MEMORANDUM DECISION AND ORDER RE: 1) DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; 2) PLAINTIFFS' MOTION TO STAY BRIEFING ON MOTIONS FOR SUMMARY JUDGMENT; AND 3) PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED AND SUPPLEMENTAL COMPLAINT, SUBSTITUTE A PARTY, AND AMEND ORDER GOVERNING PROCEEDINGS |

For many years, Defendant Independent School District of Boise City ("District") and the Boise Education Association ("BEA") have operated under the terms of a yearly collective bargaining agreement, called the "Master Contract". The Master Contract is an encompassing document that governs the relationship between the District and BEA, including among other

matters: the rights of the parties and the members of BEA, personnel matters, leave, insurance, compensation, class size, work days, school calendar and grievance procedures.

In this action, Plaintiffs Idaho Freedom Foundation ("IFF") and James Auld ("Auld") present a constitutional challenge to two (2) provisions of the Master Contract dealing with leave for BEA's president and leave for representatives of BEA. Both the District and BEA have moved for summary judgment. In response, Defendants seek to suspend briefing on the summary judgment motions, request leave to file a Second Amended and Supplemental Complaint, and continue the trial.

As explained below, the Court will grant summary judgment as requested by the District and BEA, and deny the relief requested by Plaintiffs.

**Background and Prior Proceedings**

On August 31, 2015, Plaintiffs IFF and Auld filed this action against Defendants the District; members of the District's Board of Trustees, Nancy Gregory, Maria Greeley, A.J. Balukoff, Dave Wagers, Troy Rhon, Doug Park, and Brian Cronin, the District's Superintendent Don Coberly ("Coberly"), and Deputy Superintendent Coby Dennis ("Dennis") (collectively the "District") and Defendants BEA, and its President, Stephanie Myers ("Myers") (collectively "BEA"). Plaintiffs filed the First Amended Complaint for Declaratory and Injunctive Relief on March 15, 2016.

According to the Complaint, IFF

> . . . is a non-partisan educational research institute and government watchdog. . . . IFF's goal is to hold public servants and government programs accountable,

> expose government waste and cronyism, reduce the state's dependency on the federal government and inject fairness and predictability into the state's tax system.

First Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint") at p. 2, ¶ 1. IFF has no members, and no donor or supporter has the right to vote or elect leadership, affect its agenda or control the organization in any way. Affidavit of Daniel Skinner, Ex. 4. Donors and supporters do not have a role in governance and do not pay dues. Aff. Skinner, Ex. 5; Depo. of Fred Birnbaum, pg. 24:20, 25:14-18 and 55:10.

Auld is a donor and supporter of IFF. Amended Complaint at p. 2, ¶ 2. The Amended Complaint asserts that Auld pays taxes to the District. *Id.* Auld resides at 4154 N. Mountain View Drive, Boise, Idaho. Plaintiff James Auld's Answers to Defendants Boise Education Association and Stephanie Myer's First Set of Interrogatories, attached as Ex. C to Affidavit of John M. West, Answer to Interrogatory No. 5, at p. 6 ("[Auld] resides at 4154 N. Mountain View Drive, Boise, ID 83704"). However, Auld is not the owner. The owner is Helb Family Trust. *Id.* Auld and his wife are trustees and beneficiaries of the trust. Taxes on the property are paid by the trust, not Auld personally. Deposition of Auld, at p. 24-25, attached as Exhibit 4 to Affidavit of Daniel J. Skinner.

The District operates 33 elementary schools, eight junior high schools and five high schools and serves about 26,000 students. Affidavit of Coby Dennis at ¶ 0. The School District employs more than 1,700 certificated teachers. *Id.* The District budget for 2015-16 was about $234,000,000, of which about $129,000,000 was spent on instruction. Dennis Aff. at ¶ 7.

BEA is a qualified "local education organization" and the exclusive bargaining representative of professional employees with whom the District must negotiate in good faith to achieve a yearly collective bargaining agreement. Idaho Code § 33-1271, 1272, 1273. Dennis Aff. at ¶ 6. The Idaho Education Association ("IEA") is a statewide organization representing teachers and is the Idaho affiliate of the National Education Association. *See* http://idahoea.org/about-iea/. The BEA works closely with the Idaho Education Association, which conducts an annual Delegate Assembly, usually conducted over a Friday and Saturday. Myers Aff. at ¶ 21. The District allows up to 84 delegates from BEA to attend the Delegate Assembly. At the Delegate Assembly, BEA delegates learn about economic and policy changes that impact the teaching profession, which knowledge makes BEA a more effective organization. *Id.* at ¶¶ 24-26.

At the time of the filing of the lawsuit, the Master Contract was the version in effect for the period July 1, 2015, to June 30, 2016. A copy of the 2015-16 Master Contract is attached as Exhibit 1 to the Dennis Aff. The most recent Master Contract covers the period between July 1, 2016, to June 30, 2017. A copy of the 2016-17 Master Contract is attached as Exhibit 2 to the Dennis Affidavit.

The first provision of the Master Contract is called the "Relationship Compact" and provides as follows:

> The Boise School District and the Boise Education Association have been involved in an ongoing process of interest-based problem solving and negotiations and the model has proven to be highly effective both at the bargaining table and at settling disputes throughout the District. An essential element of this model is the

trust and trustworthiness of the parties. To this end, Boise School District and BEA on behalf of their memberships, wish to formalize a relationship between these organizations, as well as District employees, which will survive the differences in interests, which will endure changes in leadership, which will extend beyond legal and contractual requirements and which will be based on the following principles:

- The Association and District agree that an interest-based approach shall be used as the basis for both individual problem-solving activities as well as contractual negotiations between the parties.
- The Association and the District agree that each group and individual has an equal right to seek the accommodation of their respective interests and to actively advocate those interests.
- The Association and the District agree that in relationships a high degree of trust is essential. To this end, each organization, as well as the leadership of those organizations, will focus on increasing their own trustworthiness as the means of developing and maintaining the bridge of trust.
- The Association and the District agree to refrain from the use of coercive tactics because their use is destructive to the relationship and lessens the commitment to agreements jointly made. Both parties will be open to persuasion at all times in order to avoid reliance on the use of power; the Association and the District will seek to persuade rather than to coerce.
- The Association and the District believe this relationship will promote and expand communications between the parties. To this end, the Association and the District will focus on: Operating in an honest and open manner; promoting and disseminating positive information about the successes of the Boise School District to the media, establishing procedures regarding rumor control, soliciting interests of all stakeholders, consulting with appropriate parties and testing assumptions, and using joint communication statements on key issues.

2015-16 Master Contract at p. 1.

The provision for leave for BEA's President is set forth as follows:

The Association president shall be allowed a leave of absence for his/her term of office with salary and benefits to be paid by the Association for the time that the president is released from teaching duties. The District shall reimburse the Association the cost of salary and benefits of a first year teacher (B.A., 1.0 experience). Said leave of absence shall count towards retirement and all other

> purposes of the Master Contract. All rights of renewable contract status, retirement, accrued sick leave, salary schedule placement and other benefits provided herein shall be preserved and available to the Association President in the event he/she chooses to return to the District as a professional employee at the conclusion of his or her term of office. If the Association President chooses to return from his or her leave of absence, he/she shall be assigned to a position at the same school, the same teaching field, if available, as that which he/she held before becoming the Association president.

2015-16 Master Contract, Article VIII. P. at p. 15; 2016-17 Master Contract, Article IX. P. at p. 15. Pursuant to this provision, in the 2015-16 school year, the District reimbursed BEA a total of $36,382 in salary and $14,927.78 in benefits ($51,309.78), which will increase to reimbursements of $37,469 in salary and $15,851.72 in benefits ($53,320.72) for the 2016-17 school year. Dennis Aff. at ¶ 22.

The provision for leave for official BEA delegates is set forth as follows:

> Official delegates of the Association will be granted up to two (2) days of paid leave to attend the Delegate Assembly of the Idaho Education Association. In addition, the Association may send representatives to other local, state, or national conferences or on other business pertinent to Association affairs. These representatives may be excused with pay, upon Association request, and with District approval. The Association shall give ten (10) days prior notice to the Superintendent or designee, except in extenuating circumstances.

2015-16 Master Contract, Article VIII. K. at p. 13; 2016-17 Master Contract, Article IX. K. at p. 13. For the 2015-16 school year, the District granted just under 200 days of paid leave for official delegates of BEA to pursue BEA business. Affidavit of Don Coberly at ¶ 22. These days constituted about 1% of the 17,318 days of paid leave the District granted for any purpose in this school year. *Id.* In addition to the salary of the delegate, the District must sometimes also pay for a substitute teacher. During the 2015-16 school year, substitutes were paid $80 per day

or $110 per day if the substitute teacher worked more than 10 days. That cost increases by $5 per day for the 2016-17 school year.

Myers, BEA's president, explained the various duties she undertakes on behalf of BEA and the District. Myers Aff. at ¶¶ 10-17. Prior to the 2016-17 school year, the duties of the BEA president were not detailed in the Master Contract. In the 2016-17 Master Contract, the parties formally specified the obligations of the BEA president based upon duties historically performed by the BEA president. Coberly Aff., ¶ 24; Dennis Aff. at ¶ 14; 2016-17 Master Contract, Article XVI, Section A.7. This provision sets forth the following duties:

> Association President's Assignments
>
> The District recognizes that a portion of the responsibilities performed by the Presidency of the Association directly benefit the District and the public it serves by discharging certain administrative tasks, facilitating communication between the District and its teachers, and otherwise promoting high-quality educational services. The District further recognizes that such responsibilities require a considerable amount of the President's time during the normal teacher work day. The District further recognizes that, absent the Association President taking on these responsibilities, the District would be required to hire another administrator to perform the same and/or similar functions. The Association recognizes that such responsibilities that benefit the District occur primarily during the contract work day, and that other Association work occurs outside the hours of the contract work day.
>
> The Association President will perform the responsibilities customarily associated with the office, including without limitation:
>
> a. Serve on the Joint Insurance Committee with the District;
> b. Train teachers, administrators, and classified staff at school facilities on changes in the laws and regulations;
> c. Provide on-going communication with the District administration on budget and policy issues;

d. Provide on-going training for Building Principal and Association Building Representative trainings at District facilities;
e. Attend and participate in monthly School Board meetings, including workshops and evening meetings;
f. Attend and participate in District Joint Problem Solving Committees;
g. Serve on the District's Professional Development and Curriculum Committee;
h. Attend and participate in monthly Sick Leave Bank meetings;
i. Serve on the Joint Calendar Committee;
j. Provide school team facilitations and leadership trainings as requested by the District and individual school sites;
k. Attend and participate in the District's Strategic Planning meetings;
l. Attend and participate in meetings to implement the District's communication strategies;
m. Collaborate with the District on the Peer Assistant Program Implementation;
n. Work with District on the ADA interactive process, accommodations, and/or requests;
o. Attend and participate in the legislative reception with District administration and school board members;
p. Meet with the District Deputy Superintendent on a monthly basis, or more frequently as necessary;
q. Maintain a record of the hours per week spent in performing the responsibilities outlined above and report such at the monthly meetings with the Deputy Superintendent or designee; and
r. Participate in any other activities, committees, and/or meetings during the contract work day as the District and the President deem appropriate and necessary.

2016-17 Master Contract at Article XVI. Section A.7.

Myers works long hours performing these duties, typically from 7:00 a.m. to 6:00 p.m. Myers Aff. at ¶ 18. Without such a leave policy provided in the Master Contract, Myers states she would have to sharply curtail BEA activities, which would weaken BEA. *Id.* at 19.

Coberly has been the Superintendent of the School District since July 2010. Beginning in 1989, Coberly served as a representative of the School District in its negotiations with BEA. Affidavit of Don Coberly, ¶¶ 1 and 7. Coberly has worked hard to maintain a cooperative

relationship with BEA. *Id.* at ¶ 10. This cooperative relationship benefits the District in many ways, including facilitating the District's recruitment and retention of high quality teachers. *Id.* at ¶ 11. BEA facilitates the District's recruitment and retention of qualified personnel by serving as the single source of reliable information about the preferences of District employees, which BEA shares with the District as a single, common request. *Id.* at ¶ 12.

This cooperative relationship avoids the animosity Coberly witnessed in the 1993-94 school year that undermined District's image in the community. Coberly Aff., ¶ 14. Coberly asserts this cooperative approach saves the District money, because BEA has the power to screen out meritless grievances prior to pursuing arbitration with the District. *Id* at ¶ 15. Coberly asserts this trust and open communication generates low arbitration rates by facilitating the informal resolution of most disagreements between the District and its employees. *Id.* at ¶ 16. The District relies on BEA to educate teachers or administrators about new regulatory requirements, and to supply information that the District might otherwise have to distribute through its human resources department, which saves the District money. *Id.* at ¶ 17.

Coberly asserts that by providing the leave to BEA's President, the District ensures the availability of a BEA representative who can communicate with School District administrators. Coberly Aff., ¶ 18. If the BEA President were in the classroom, she would not have time to assist in committees, disciplinary matters and training. *Id.* If the District did not have BEA President's assistance, the District would have to hire an additional administrator, or two, to take on her many roles. *Id.* at 19.

Coberly also asserts the BEA President discharges these tasks more cheaply than the School District could find in its own administrators. Coberly Aff., ¶ 20. The School District only has to pay an amount equal to a first year teacher's salary and benefits, rather than an administrator's salary and benefits, a roughly $59,000 difference. *Id.* Coberly asserts by providing leave for BEA members to participate in the Assembly, it enhances the trust they have for BEA, which in turn enhances the cooperative relationship between the two entities. *Id.* at 21.

Coby Dennis has worked for the District as a teacher, administrator and Deputy Superintendent since 1991. Dennis Aff. at ¶ 4. He has been involved in collective bargaining agreement negotiations with BEA since 2003. *Id.* at ¶ 5. He also states that the BEA President's services under the Master Contract benefit the District by maintaining a relationship of trust, and by providing services to staff members who are not members of BEA, serving on joint committees that reduce costs to the district, providing training to District staff, as well as each of the ways specified in the Master Contract at p. 34. *Id.* at ¶¶ 16-19.

On August 31, 2015, Plaintiffs filed this action seeking a declaration that the Master Contract leave provisions for the BEA president and BEA official delegates are unconstitutional under Article VIII, Section 4[1] and/or Article XII, Section 4[2] of the Idaho Constitution. In

[1] "No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or incorporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state." Article VIII, Section 4, Idaho Constitution.

[2] "No county, town, city, or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association: provided, that cities and towns may contract

addition, Plaintiffs seek a permanent injunction forbidding such provisions going forward. On January 12, 2016, the Court entered an Order Governing Proceedings and Setting Trial. The final day to amend pleadings was March 11, 2016. The discovery cut-off day was August 12, 2016. On July 22, 2016, BEA supplemented their discovery responses by providing, among other things, a copy of the 2016-17 Master Contract, which went into effect on July 1, 2016.

Both the District and BEA moved for summary judgment as to all claims. The District's motion included a memorandum and supporting affidavits of Coby Dennis, Don Coberly and Daniel J. Skinner. BEA's motion included a memorandum and affidavits of Stephanie Myers and John M. West.

In response, Plaintiffs moved to amend their Complaint and the Order Governing Proceedings and to stay the summary judgment proceedings, with supporting Affidavits of Rachel Gilbert and James Auld. Plaintiffs seek to substitute a different donor plaintiff for Auld because it appears Auld may not have standing as a taxpayer, no longer desires to be a plaintiff, and declines to provide tax and other information as requested by Defendants. Plaintiffs also seek leave to include a challenge to the leave provisions of the 2016-17 Master Contract. The District and BEA filed opposing memorandums to Plaintiffs' motion for stay and motion to amend. Plaintiffs filed a Reply in support of their motions to stay and amend.

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indebtedness for school, water, sanitary and illuminating purposes: provided, that any city or town contracting such indebtedness shall own its just proportion of the property thus created and receive from any income arising therefrom, its proportion to the whole amount so invested." Article XII, Section 4, Idaho Constitution.

On September 14, 2016, BEA filed a Notice of Supplemental Authority containing a recent decision from the Arizona Supreme Court, *Cheatham v. DiCiccio,* 240 Ariz. 315, 379 P.3d 211 (Ariz. 2016).

A hearing was held on September 12, 2016. Jeffrey Wilson McCoy, *pro hac vice*, Mountain States Legal Foundation, and John L. Runft, Runft & Steele Law Offices, PLLC, appeared on behalf of Plaintiffs. Paul J. Stark, Idaho Education Association and John M. West, *pro hac vice*, Bredhoff & Kaiser, PLLC, appeared on behalf of BEA. Daniel J. Skinner, Cantrill Skinner Lewis Casey & Sorensen, LLP, appeared on behalf of the District. The Court took the matters under advisement.

**Legal Standard**

Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho R. Civ. P. 56(c). When considering a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Moreover, the Court must draw all reasonable inferences and conclusions in favor of the party resisting the motion. *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991).

The moving party "initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law." *Kalange v. Rencher*, 136 Idaho 192, 195, 30 P.3d 970, 973 (2001). "Once the moving party establishes the

absence of a genuine issue of material fact, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact." *Asbury Park, LLC v. Greenbriar Estate Homeowners' Ass'n, Inc.*, 152 Idaho 338, 344, 271 P.3d 1194, 1200 (2012), (citing *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009)).

> The nonmoving party, however, "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or ... otherwise ..., must set forth specific facts showing that there is a genuine issue for trial." Idaho R. Civ. P. 56(e); *Baxter,* 135 Idaho at 170, 16 P.3d at 267.

*Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117, 123, 206 P.3d 481, 487 (2009).

Idaho's Declaratory Judgment Act, I.C. § 10-1201, provides the following:

> Any person interested under a deed, will, written contract or other writings constituting a contract or any oral contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

I.C. § 10-1201; *see also* I.R.C.P. 57[3]. The act "provides authority for courts of record to declare rights, status and other legal relations." *Martin v. Camas County ex rel. Bd. Com'rs,* 150 Idaho 508, 513, 248 P.3d 1243, 1248 (2011). "[T]he right sought to be protected by a declaratory judgment may invoke either remedial or preventive relief; it may relate to a right that has either

[3] "These rules govern the procedure for obtaining a declaratory judgment pursuant to the statutes of this state. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory judgment." I.R.C.P. 57.

been breached or is only yet in dispute or a status undisturbed but threatened or endangered." *Harris v. Cassia Cnty.*, 106 Idaho 513, 516-17, 681 P.2d 988, 991-92 (1984).

"[A] declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists." *Id.* at 516, 681 P.2d at 991.

The elements of a justiciable controversy include the following:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. *Idaho Schools for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281–82, 912 P.2d 644, 649–50 (1996).

*Wylie v. State, Idaho Transp. Bd.*, 151 Idaho 26, 31-32, 253 P.3d 700, 705-06 (2011). Standing is a subcategory of justiciability. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2001) (citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989)).

**Analysis**

**A. Standing**

While the Declaratory Judgment Act provides for a cause of action, it "does not relieve a party from showing that it has standing to bring the action in the first instance." *Harris v. Cassia Cnty.*, 106 Idaho 513, 516-17, 681 P.2d 988, 991-92 (1984). "It is a fundamental tenet of American jurisprudence that a person wishing to invoke a court's jurisdiction must have standing." *Noh v. Cenarrusa,* 137 Idaho 798, 53 P.3d 1217, 1219 (2002); *see also Thomson v.*

*City of Lewiston*, 137 Idaho 473, 50 P.3d 488, 493 (2002); and *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 125, 15 P.3d 1129, 1133 (2000). Standing is a preliminary question to be determined by this Court before reaching the merits of the case. *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989).

"The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles*, 116 Idaho at 641, 778 P.2d at 763. "To satisfy the requirement of standing, 'litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.'" *Miles,* 116 Idaho at 641, 778 P.2d at 763. The requirement that a party have standing applies to declaratory judgment actions. *See Selkirk–Priest Basin Ass'n v. State ex. rel. Batt,* 128 Idaho 831, 834, 919 P.2d 1032, 1035 (1996) ("[T]he Declaratory Judgment Act does not relieve a party from showing that it has standing to bring the action in the first instance."); *State v. Rhoades,* 119 Idaho 594, 597, 809 P.2d 455, 458 (1991) ("[A] declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists." (quoting *Harris v. Cassia Cnty.,* 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)). "An interest, as a concerned citizen, in seeing that the government abides by the law does not confer standing." *Troutner v. Kempthorne*, 142 Idaho 389, 392, 128 P.3d 926, 929 (2006). However, "[t]axpayers have been held qualified to maintain an action to test the validity of a statute or ordinance which increases the tax burden. Generally cases so holding involve an alleged illegal expenditure of public money." *Koch v.*

*Canyon Cty.*, 145 Idaho 158, 161, 177 P.3d 372, 375 (2008) (quoting *Greer v. Lewiston Golf & Country Club, Inc.*, 81 Idaho 393, 397, 342 P.2d 719, 722 (1959)).

In order for Plaintiffs to challenge the provisions of the Master Contract, both IFF and its chosen taxpayer must have standing to bring the current action.

**1. Auld**

As the Court explained in *Koch v. Canyon County:*

> As a general rule, a citizen or taxpayer, by reason of that status alone, does not have standing to challenge governmental action. "An interest, as a concerned citizen, in seeing that the government abides by the law does not confer standing." *Troutner v. Kempthorne*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006). "A citizen or taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction." *Ameritel Inns, Inc. v. Greater Boise Auditorium Dist.*, 141 Idaho 849, 852, 119 P.3d 624, 627 (2005). The general rule holds even if the citizen or taxpayer alleges some indirect harm from the governmental action.

*Koch v. Canyon Cty.*, 145 Idaho 158, 160, 177 P.3d 372, 374 (2008). However, the Idaho Supreme Court recognizes a narrow exception, which allows taxpayer standing for an expenditure that violates a constitutional limit on spending power. *Id.* at 161, 177 P.3 at 375 (citing and quoting *Greer v. Lewiston Golf & Country Club,* 81 Idaho 393, 397, 342 P.2d 719, 722 (1959)).

Here, Auld is not a taxpayer of the District. Auld does not own a home, or pay taxes on a home, within the District. Auld lives in a home owned by a trust and it is the trust, not Auld, who pays taxes assessed by the District. For this reason, the Court concludes that Auld cannot demonstrate taxpayer standing to maintain this action.

**2. IFF**

IFF has conceded it has no independent standing,[4] but instead argues it has standing through the doctrine of associational standing, based on the standing of Auld. *See also* Affidavit of John West, Ex. A, IFF's Answer to BEA Interrogatory No. 4-5. However, because Auld lacks standing, IFF lacks standing.

Plaintiffs propose to cure this difficulty by substituting Rachel Gilbert ("Gilbert") as an individual plaintiff. According to IFF, Gilbert is another donor and supporter of IFF who owns and lives in a house within the District, and pays taxes, a portion of which is paid over to the District. Affidavit of Rachel Gilbert. IFF argues that it would have standing due to the taxpayer status of Gilbert. Because Gilbert is an IFF donor and supporter, IFF argues that it would have standing as an association to challenge the BEA leave provisions.

In Idaho, an association "may have standing to seek judicial relief not only to protect its own interests, but also those of its members." *Bear Lake Educ. Assoc. v. Sch. Dist. 33,* 116 Idaho 443, 448, 776 P.2d 452, 457 (1989).

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members.... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the case, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

[4] Counsel for IFF confirmed this understanding at oral argument on the motions.

*Id.* The Court has approved the three-part test for determining associational standing as adopted by the United States Supreme Court in *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383, 394 (1977) as follows:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

*Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 604, 130 P.3d 1138, 1142 (2006) (quoting *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383, 394 (1977)).

There appears to be little guidance in the Idaho appellate decisions as to what attributes an entity must have to assert associational standing based upon its "members". The Idaho Supreme Court has looked to decisions of the United States Supreme Court for guidance when deciding whether a party has standing. *See Koch v. Canyon Cty.*, 145 Idaho 158, 161, 177 P.3d 372, 375 (2008) (citing *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1898).

Prior to 1977, Supreme Court jurisprudence included a number of cases where the Court accepted that an organization can have standing solely as the representative of its members. See, *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2211, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972); and *National Motor Freight Traffic Assoc., Inc. v. United States*, 372 U.S. 246, 247, 83 S.Ct. 688, 9 L.Ed.2d 709

(1963). In these cases, the association had standing because its members had sustained a sufficient injury to give the association standing to sue.

In *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the Washington Apple Advertising Commission sued to invalidate a North Carolina apple statute which placed restrictions on the importation of apples from Washington to North Carolina based on a violation of the Commerce Clause of the United States Constitution, Art. I, s 8, cl. 3. The Washington Apple Advertising Commission was a state agency created by the Washington Legislature to promote and protect Washington's large apple industry. The commission was comprised of 13 apple growers and dealers elected by growers and dealers. Its only source of funding was assessments levied upon Washington apple growers and dealers. The federal district court ruled that the commission had standing on its own, and on behalf of the growers and dealers. *Id.* 432 U.S. at 339. In the United States Supreme Court, North Carolina argued there was no associational standing because the Commission had no members, and therefore could not assert standing based upon injuries suffered by its members. The Court ruled that the Commission's status as a state agency, rather than a "traditional voluntary membership organization" was not dispositive. The Court found that the Commission had standing because it "for all practical purposes, performs the functions of a traditional trade association representing the Washington apple industry," noting as follows:

> . . . its purpose is the protection and promotion of the Washington apple industry; and, in the pursuit of that end, it has engaged in advertising, market research and analysis, public education campaigns, and scientific research. It thus serves a

> specialized segment of the State's economic community which is the primary beneficiary of its activities, including the prosecution of this kind of litigation.
>
> Moreover, while the apple growers and dealers are not "members" of the Commission in the traditional trade association sense, they possess all of the indicia of membership in an organization. They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them. In a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests.
>
> . . . In the event the North Carolina statute results in a contraction of the market for Washington apples or prevents any market expansion that might otherwise occur, it could reduce the amount of the assessments due the Commission and used to support its activities. This financial nexus between the interests of the Commission and its constituents coalesces with the other factors noted above to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."

*Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 344–45, 97 S. Ct. 2434, 2442, 53 L. Ed. 2d 383 (U.S. 1977).

The Defendants cite to a number of cases, which followed the decision in *Hunt*. In *Health Research Group v. Kennedy*, 82 F.R.D. 21, 24 (D.D.C. 1979), the court denied standing to a media "watchdog" association with no members, stating:

> Members, as the Court implicitly acknowledged in Hunt, normally exercise a substantial measure of power or control over an organization which, in typical circumstances, they themselves have created. In Hunt, "the indicia of membership" were present because the growers and dealers alone elected the members of the Commission, served as members of the Commission, and financed its activities. In a real sense then, despite the anomaly that the Commission was a State-created, non-membership organization, it was totally a creature of the parties it purported to represent.

*Health Research Grp. v. Kennedy*, 82 F.R.D. 21, 26 (D.D.C. 1979). In *American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987), the court denied standing to the American Legal Foundation, an organization without members, which the court described as "nonprofit media law center which works to promote media fairness and accountability." *Id.* at 87. The court found that the organization did not have any of the attributes cited in *Hunt* that would allow for associational standing.

> ALF's relationship to its "supporters" bears none of the indicia of a traditional membership organization discussed in *Hunt*. With its broadly defined mission as a "media watchdog," ALF serves no discrete, stable group of persons with a definable set of common interests. To the contrary, ALF's constituency of supporters is completely open-ended; ALF could, consistent with this "institutional commitment," purport to serve all who read newspapers, watch television, or listen to the radio. Furthermore, it does not appear from the record that ALF's "supporters" play any role in selecting ALF's leadership, guiding ALF's activities, or financing those activities. Finally, we can discern no linkage between ALF's interest in the outcome of this kind of litigation and those of its supporters. Lacking a definable membership body whose resources and wishes help steer the organization's course, ALF "may have reasons for instituting a suit ... other than to assert rights of its [supporters]," and so cannot be described as "but the medium through which individual[s] ... seek to make more effective the expression of their own views." Thus, we cannot conclude, as could the *Hunt* Court, that the organization before us is the functional equivalent of a traditional membership organization.

*Am. Legal Found. v. F.C.C.*, 808 F.2d 84, 90 (D.C. Cir. 1987) (citations omitted). In *Washington Legal Foundation v. Leavitt*, 477 F.Supp. 2d 202, 208-09 (D.D.C. 2005), the court held that the foundation lacked standing because it had no members and was not the functional equivalent of a traditional membership organization.

> WLF agrees that they are not members as defined by WLF's Articles of Incorporation. However, an organization with no formal members can still have

> associational standing if it "is the functional equivalent of a traditional membership organization." Three main characteristics must be present for an entity to meet the test of functional equivalency: (1) it must serve a specialized segment of the community; (2) it must represent individuals that have all the "indicia of membership" including (i) electing the entity's leadership, (ii) serving in the entity, and (iii) financing the entity's activities; and (3) its fortunes must be tied closely to those of its constituency.

*Washington Legal Found. v. Leavitt*, 477 F. Supp. 2d 202, 208 (D.D.C. 2007).

The reasoning of the Court in *Hunt* is helpful guidance. The Court finds that the following facts are not in dispute: 1) IFF has no members; 2) IFF does not represent the interests of a distinct group with a common interest; 3) no donor or supporter has the right to vote or elect leadership; 4) No donor has the right to affect its agenda or activities; 5) there is no financial nexus between IFF and its donors and supporters. Based upon these undisputed facts, the court concludes that IFF is not the functional equivalent of a traditional membership organization, because IFF does not serve a specialized segment of the community; IFF does not represent individuals who have all the indicia of membership; and 3) IFF's fortunes are not closely tied to those of its constituency. Therefore, IFF does not have associational standing to bring this action.

**B. The constitutional challenge**

As explained above, the Court has concluded that neither IFF nor Auld have standing to pursue this action. Generally, this would be the end point of the analysis because "[a] person wishing to invoke a court's jurisdiction must have standing." *Coal. for Agric.'s Future v. Canyon Cty.*, 160 Idaho 142, 369 P.3d 920, 924 (2016) (quoting *Van Valkenburgh v. Citizens for Term*

*Limits,* 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000)). Here, Plaintiffs seek to substitute Gilbert, who IFF asserts is a District taxpayer. As a taxpayer, Gilbert may have standing to challenge the BEA leave provisions as unconstitutional. For this reason, the Court will consider the merits of Plaintiffs' constitutional challenge.

The Master Contract leave provision for the BEA president grants the BEA president a leave of absence for the term of office. During the leave of absence, the BEA pays the salary and benefits of the president. The District reimburses BEA at the cost of the salary and benefits of a first year teacher with a bachelor's degree. This reimbursement covers about half of the salary and benefits paid to the president by BEA. The Master Contract leave provision for official delegates of the BEA grants up to 2 days paid leave to attend the Delegate Assembly of the Idaho Education Association, as well as for BEA representatives to attend other local, state or national conferences or to attend other BEA activities. This provision amounted to about 1% of the total leave approved by the District for the 2015-16 school year. Coberly Aff. ¶ 21.

Article VIII, Section 4 of the Idaho Constitution provides as follows:

> No county, city, town, township, board of education, or school district, or other subdivision, shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual, association or corporation, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state.

Idaho Const. art. VIII, § 4. This provision prohibits a school district from using public funds or credit to subsidize the activities of a private person or entity.

Idaho Const. art. XII, § 4 provides as follows:

> No county, town, city, or other municipal corporation, by vote of its citizens or otherwise, shall ever become a stockholder in any joint stock company, corporation or association whatever, or raise money for, or make donation or loan its credit to, or in aid of, any such company or association: provided, that cities and towns may contract indebtedness for school, water, sanitary and illuminating purposes: provided, that any city or town contracting such indebtedness shall own its just proportion of the property thus created and receive from any income arising therefrom, its proportion to the whole amount so invested.

Idaho Const. art. XII, § 4. This section prohibits a "municipal corporation" from using public funds or credit to subsidize the activities of a private person or entity. The District is a municipal corporation under Article XII, Section 4. *Sch. Dist. No. 8, Twin Falls Cty., v. Twin Falls Cty. Mut. Fire Ins. Co.*, 30 Idaho 400, 164 P. 1174, 1175 (1917).

Plaintiffs assert the BEA leave provisions are unconstitutional because they obligate the District to subsidize the private interests of BEA in violation of both Article VIII, Section 4 and/or Article XII, Section 4 of the Idaho Constitution. BEA and the District argue that the challenged leave provisions were bargained for at arms-length and serve a valid public purpose by facilitating a harmonious labor relations process, which distinctly benefits the District, the teachers and the public.

The gravamen of both Article VIII, Section 4 and Article XII, Section 4 of the Idaho Constitution is to prohibit the use of public funds for a private purpose.

> It is obvious that the framers of the Idaho Constitution had no intention of limiting the power of municipalities to *contract* in furtherance of the public interest, but rather of limiting *loans* or *donations* of public credit. These words clearly limit the scope of the credit clause to cases in which the public credit is under the control of private interests.

*Utah Power & Light Co. v. Campbell*, 108 Idaho 950, 954, 703 P.2d 714, 718 (1985) (emphasis in original). The Master Contract is not a loan or a donation to BEA. Rather, using the affirming language of *Utah Power and Light Co.*, it is an "arms-length contract, based upon the exchange of adequate consideration". The mandate of Idaho Code §33-1271, which requires negotiation of yearly collective bargaining agreements, "reflect[s] the legislature's determination that structured negotiation procedures would benefit not only school districts and teachers, but the public as well." *Gilbert v. Nampa Sch. Dist. No. 131,* 104 Idaho 137, 147, 657 P.2d 1, 11 (1983).

Over many years, the District and BEA have worked to develop a relationship that involves a high degree of trust that has been effective in labor negotiations and problem-solving. The financial cost of the BEA leave provisions, while modest, are nonetheless an integral part of this process. The District has explained how the District's leave policy for the time of the BEA president and delegates directly benefit the District. Coberly Aff. at ¶¶ 11-21. Dennis Aff. at ¶¶ 16-19. In the Court's view, the Master Contract and its BEA leave provisions serve a valid public purpose: fostering a harmonious and productive collective bargaining environment, which benefits the District, the teachers and the public.

The Arizona Supreme Court reached a similar conclusion in *Cheatham v. DiCiccio*, 240 Ariz. 315, 379 P.3d 211 (Ariz. 2016), which involved a taxpayer challenge to leave provisions in the collective bargaining agreement between the City of Phoenix and the Phoenix Law Enforcement Association. The taxpayer challenge was based upon Ariz. Const. art. IX, § 7, which provides as follows:

> Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.

Ariz. Const. art. IX, § 7. The prohibitions of this provision are similar to those contained in Article VIII, Section 4 and/or Article XII, Section 4 of the Idaho Constitution. Noting that "[i]t is not unusual for collective bargaining agreements to include provisions requiring employers to pay certain employees for time spent on union activities," the court held that the collective bargaining agreement and the union leave provisions served a public purpose, and dismissed the taxpayer challenge.

The Court finds no merit in the constitutional challenge to the BEA leave provisions.

**C. Motions to Amend and for Stay**

Plaintiffs move to stay consideration of the motions for summary judgment, and request leave to amend the Complaint to include the 2016-17 Master Contract, and to dismiss James Auld and name Rachel Gilbert as a plaintiff.

As it is past twenty days since the serving of the Complaint, only by leave of the court may the Complaint be amended, which "leave shall be freely given when justice so requires." IRCP 15(a). Certain factors the court should consider are "whether the amended pleading sets out a valid claim, whether the opposing party would be prejudiced by any undue delay, or whether the opposing party has an available defense to the newly added claim. ... Timeliness of

a motion for leave to amend is not decisive, but it 'is important in view of ··· factors such as undue delay, bad faith, and prejudice to the opponent.'" *Spur Products Corp. v. Stoel Rives LLP*, 142 Idaho 41, 122 P.3d 300, 303 (2005)(citations omitted).

> In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, 'be freely given.'"

*Clark v. Olsen*, 110 Idaho 323, 326, 715 P.2d 993, 996 (1986). The burden is on the defendants to show why the court should not grant leave to amend. *See, Clark v. Olsen*, 110 Idaho 323, 326, 715 P.2d 993, 996 (1986).

However, where an amendment would be futile, the court should deny the motion. *See, McCann v. McCann*, 138 Idaho 228, 237, 61 P.3d 585, 594 (2002) and *Shapley v. Centurion Life Ins. Co.*, 154 Idaho 875, 882, 303 P.3d 234, 241 (2013). The Court concludes that the motion to amend would be futile. Auld does not have standing as a taxpayer. IFF does not claim independent standing, but asserts associational standing. As discussed above, IFF does not have associational standing based upon its relationship to either Auld or Gilbert. Gilbert may be able to assert taxpayer standing, but the Court has concluded that there is no merit in the constitutional challenge.

**Conclusion**

As explained above, the motions for summary judgment are granted. The motion for leave and stay is denied. The motion to stay proceedings is denied.

IT IS SO ORDERED.

Dated this 25 day of October, 2016.

Patrick H. Owen
District Judge

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 25 day of October, 2016 I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

| | |
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CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk