

In the Supreme Court of New Jersey

Docket No. A-41/42-19 (083434)

MOSHE ROZENBLIT and QWON KYU RIM,

Plaintiffs/Appellants/Cross-Respondents,

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; and JERSEY CITY PUBLIC SCHOOLS OF THE CITY OF JERSEY CITY,

Defendants/Respondents,

And

JERSEY CITY EDUCATION ASSOCIATION,

Defendant/Respondent/Cross-Appellant

BRIEF OF *AMICI CURIAE*
STEVEN RAMOS, SCOTT ARMSTRONG, AND JAMES WILLIAMS

On Appeal from the Superior Court of New Jersey, Appellate Division
Appellate Division Docket No. A-1611-17T1

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are Pennsylvania residents who litigated for over four years to eradicate taxpayer-funded “release time” for full-time union officials in just *one* of Pennsylvania’s *five hundred* school districts. *Amici* voluntarily withdrew their litigation after the National Education Association’s (“NEA’s”) state and local affiliates finally dropped their efforts to reclaim illegally awarded pension credit and began reimbursing the school district for the cost of union officials’ salaries, benefits, and pension contributions.¹ However, sustained litigation against NEA’s affiliates—in three separate fora—required considerable time, energy, and judicial resources. Accordingly, *amici* urge this Court to affirm the lower court’s conclusion that release time is unenforceable as against public policy; such a ruling from this Court will provide much-needed persuasive authority for neighboring state courts, perhaps making any future litigation over release time in Pennsylvania more efficient or, better yet, unnecessary.

Steven Ramos pays Allentown School District (“Allentown”) taxes, which fund release time for the NEA’s local affiliate’s full-time union officials,² subject only to the

¹ See Pls.’ Praecipe to Discontinue Action, *Ramos v. Allentown Educ. Ass’n*, No. 2017-C-0427 (Pa. Ct. Cm. Pl. Feb. 11, 2020), attached hereto as Appendix A.

² *Ramos v. Allentown Educ. Ass’n*, No. 150 M.D. 2016, 2016 WL 7383800, at *5 (Pa. Cmwlth. Dec. 21, 2016) (“The School District admits that the property taxes of Petitioners Ramos and Armstrong ‘are among the property taxes that fund the Allentown School District’ and that ‘a portion of the property taxes received are provided in the form of salary to the AEA President to perform full-time work in the capacity of AEA President.’”).

union's recent promises to reimburse. Mr. Ramos's children previously attended schools in Allentown, and Mr. Ramos is an alumnus of a high school in Allentown.

Scott Armstrong also pays Allentown taxes, which fund release time for full-time union officials,³ again, subject to union reimbursement. From 2011–2015, he served as a member of Allentown's school board and, in that capacity, attempted to end the NEA affiliate's release time practices. Among other efforts, Mr. Armstrong requested that Allentown's solicitor research the legality of and provide board members with a legal opinion concerning its release time practice, and the solicitor concluded that Allentown's release time practice was illegal.⁴ Yet, even *after* the solicitor provided his opinion, Allentown refused to take action.⁵

James Williams is a Pennsylvania public school teacher and is a vested member of Pennsylvania's Public School Employees' Retirement System ("PSERS"), a defined benefit pension plan for certain public school employees.⁶ PSERS, like any pension fund in New Jersey,⁷ owes a fiduciary duty to its members.⁸

³ *Id.*

⁴ *Id.* at *7 ("The Solicitor's October 21, 2015, legal memorandum stated that, under section 8102 of the Retirement Code, there is no authority 'for the District to pay the salary of the union president to perform union responsibilities, absent reimbursement by the Association.'").

⁵ *Id.*

⁶ *See generally* 24 Pa.C.S. §§ 8101–8538.

⁷ *See Carlsen v. Masters, Mates & Pilots Pension Plan Tr.*, 80 N.J. 334, 341 (1979) ("Trustees of a pension fund are fiduciaries of the potential beneficiaries of that fund.").

⁸ *See* 24 Pa.C.S. § 8521(e).

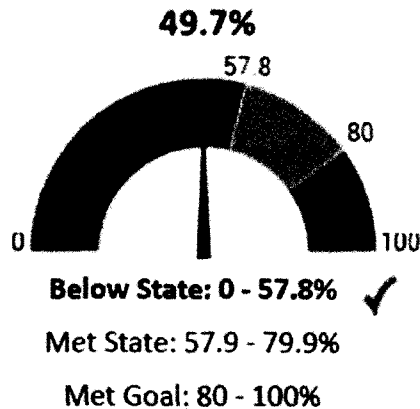
ARGUMENT

I. THE “GHOST TEACHER” PROBLEM TRANSCENDS STATE LINES

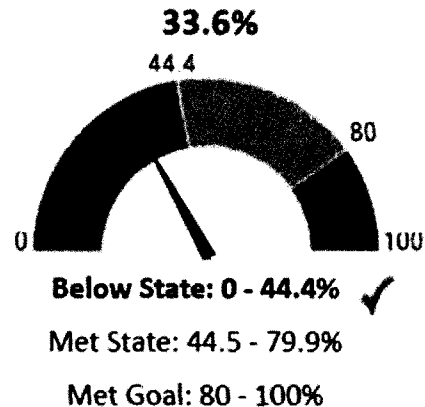
As the Superior Court noted, the Jersey City school district “operates a vast, educationally diverse school system.” *Roxenblit v. Lyles*, 461 N.J. Super. 20, 28 (App. Div. 2019). Although some of its schools are performing,⁹ many are not. In fact, according to the New Jersey Department of Education, few students in Jersey City Public School are performing according to expectations on statewide assessments:¹⁰

Students that met or exceeded expectations on statewide assessments

English Language Arts



Math



⁹ For example, U.S. News and World Reports ranks Dr. Ronald E. McNair High School fourth overall in New Jersey and 67th nationally. U.S. News & World Reports, Best High Schools, Jersey City Public Schools District, <https://www.usnews.com/education/best-high-schools/new-jersey/districts/jersey-city-public-schools-103649>. Infinity Institute is ranked 21st and 465th, respectively, and Liberty High School is 95th in the state and 2,333th nationally. *Id.* All three schools have a 100% graduation rate. *Id.*

¹⁰ New Jersey Dep’t of Educ., NJ School Performance Summary Report, Jersey City Public Schools, <https://rc.doe.state.nj.us/report.aspx?type=summarydistrict&lang=english&county=17&district=2390&SY=1819&schoolyear=2018-2019>.

Yet the NEA's local affiliate in Jersey City, the Jersey City Education Association ("JCEA"), insists on having the school district pay certain teachers *not* to teach. As the Superior Court explained,

[t]hese two teachers, who are paid their fulltime salaries, do not report to any school administrator or school district official and are not subject to any administrative oversight. In short, while serving as president and designee of the JCEA, these two teachers act exclusively as labor leaders. Despite this, their salaries and benefits are commensurate to the teachers who serve the day-to-day educational needs of the students of the district.

Rozenblit, 461 N.J. Super. at 28.

Amici challenged a similar "Ghost Teacher" arrangement secured by an equally aggressive NEA affiliate, the Allentown Education Association ("AEA"). Allentown's school district is composed of 22 public schools serving 16,946 students, the fifth largest school system in Pennsylvania.¹¹ In 2019, the Pittsburgh Business Times ranked Allentown 483rd out of 493 Pennsylvania school districts included in its study.¹² Nearly 30% of Allentown high schoolers originally scheduled to graduate in 2018 either dropped out sometime during their four years in high school or otherwise

¹¹ Pennsylvania Dep't of Educ., Public School Enrollments 2018–2019, <https://www.education.pa.gov/Documents/Data%20and%20Statistics/Enrollment/Public%20School/Enrollment%20Public%20Schools%202018-19.xlsx>

¹² Ethan Lott, *2019 School Guide Rankings: The Highest-Scoring School Districts in Pennsylvania Revealed*, Pittsburgh Business Times (May 9, 2019), <https://www.bizjournals.com/pittsburgh/news/2019/05/09/2019-school-guide-rankings-the-highest-scoring.html>.

failed to graduate.¹³ 76.6% of the families served by Allentown are denoted as “low income.”¹⁴

Meanwhile, Allentown’s school district has been in financial distress for many years. In 2011, the district furloughed 112 teachers; two years later, it furloughed 100 more teachers, and, in 2014, it furloughed another 60.¹⁵ Today, Allentown employs just 987 classroom teachers.¹⁶ It continues to face heavy deficits and, in 2019, took out a \$10 million loan to meet its budget.¹⁷

Still, from at least 1990 to 2017—even as Allentown was furloughing its classroom teachers—the AEA insisted that local taxpayers fund the salary, benefits, and pension costs for their union officials. One union official received approximately

¹³ Pennsylvania Dep’t of Educ., 2017–2018 Pennsylvania 4-Year Cohort Graduation Rates, <https://www.education.pa.gov/Documents/Data%20and%20Statistics/Cohort%20Graduation%20Rates/2017-2018%20Pennsylvania%204-Year%20Cohort%20Graduation%20Rates.xlsx>

¹⁴ Pennsylvania Dep’t of Educ., 2018–2019 Public Schools Percent Low Income, <https://www.education.pa.gov/Documents/Data%20and%20Statistics/Loan%20Cancellation/Public/2018-2019%20Public%20Schools%20Percent%20Low%20Income.xlsx>

¹⁵ Data obtained via records provided by the District via Pennsylvania’s Right-to-Know Law.

¹⁶ Pennsylvania Dep’t of Educ., 2018–19 Professional Staff Summary Report, <https://www.education.pa.gov/Documents/Data%20and%20Statistics/Professional%20and%20Support%20Personnel/2018-19%20Professional%20Staff%20Summary%20Report.xlsx>; 2018–19 Public School Support Personnel, <https://www.education.pa.gov/Documents/Data%20and%20Statistics/Professional%20and%20Support%20Personnel/2018-19%20Support%20Personnel.xlsx>

¹⁷ Jacqueline Palochko, *‘We Are Broke’: Allentown School Director Says No More Spending on Conferences and Dinners*, *The Morning Call* (Sept. 27, 2019) <https://www.mcall.com/news/education/mc-nws-allentown-school-district-gerlach-conferences-20190927-kmatalsur5aadpqqucvohz5vjq-story.html>).

\$555,000 in publicly-funded wages, \$134,000 in publicly-funded benefits, and \$76,000 in publicly-funded pension contributions in a seven-year span.¹⁸ She and other AEA union officials maintained their seniority preferences even as other teachers were being furloughed, transferred, or recalled.¹⁹

Unfortunately, other NEA affiliates across Pennsylvania have also secured public funding for union officials. For example, the NEA affiliate in Reading, Pennsylvania—which the NEA had described as “America’s most poorly funded school district”²⁰—insisted on a taxpayer-funded release time arrangement until its local NEA affiliate was sued.²¹ According to the Commonwealth Foundation, 23% of Pennsylvania’s 500 school districts authorize full-time “release” for union officials as of 2018, often with “pension, health benefits, and salary and seniority progression” and only “[i]n some cases, unions reimburse school districts” for those costs.²²

¹⁸ *Ramos*, 2016 WL 7383800, at * 3–4.

¹⁹ *Id.* at *4.

²⁰ Amanda Litvinov, *Reading, Pa., Retains Title as America’s Most Poorly Funded School District*, Educ. Votes (Apr. 27, 2016), <http://educationvotes.nea.org/2016/04/27/reading-pa-retains-title-as-americas-most-poorly-funded-school-district/> [<https://web.archive.org/web/20171026070542/http://educationvotes.nea.org/2016/04/27/reading-pa-retains-title-as-americas-most-poorly-funded-school-district/>]; see also Amanda Litvinov, “*These Kids Are Just Pawns*”: *The Rising Toll of Inequitable School Funding*, *neaToday* (July 20, 2015), <http://neatoday.org/2015/07/20/these-kids-are-just-pawns-the-rising-toll-of-inequitable-school-funding/>.

²¹ Watchdog News, *Reading Teachers Union to Reimburse Taxpayers for ‘Ghost’ Teacher Costs*, *The Center Square* (May 9, 2018), https://www.thecentersquare.com/pennsylvania/reading-teachers-union-to-reimburse-taxpayers-for-ghost-teacher-costs/article_1f611de0-53b2-11e8-b6df-9fa572083650.html.

²² Jessica Barnett, Policy Memo, *Troubling Features of Pennsylvania Teacher Contracts* (June 2018), <https://www.commonwealthfoundation.org/docLib/20180613>

Jerry Jordan, president of the American Federation of Teachers' ("AFT's") local affiliate in Philadelphia, is employed as a "teacher" but has been on leave for over 30 years. Philadelphia's collective bargaining agreement authorizes full-time union leave for 35 teachers and 24 other employees with full salaries, benefits, and public pensions. The union has claimed to reimburse the school district for salaries and benefits, but there is no contractual obligation to do so, and the impact of such expansive release time practices on an underfunded pension system have yet to be realized.^{23, 24}

PolicyMemoInsideTeacherContracts.pdf?t=6/13/2018%203:42:41%20PM; *see also* Commonwealth Foundation, DATABASE: Pennsylvania Teachers' Union Contract, <https://infogram.com/cba-database-1hxr4zg1wlo52yo>.

²³ A recent legal challenge to AFT's practice in Philadelphia was dismissed for lack of standing. *See Ams. for Fair Treatment v. Phila. Fed'n of Teachers*, 150 A.3d 528 (Pa. Cmwlth. 2016).

²⁴ Similar release time practices have been observed throughout the country. *See* Marc E. Fitch, *Connecticut Judicial Dept. Releases List of Grievances Dropped in Exchange for Union President's Leave Time*, Yankee Institute for Public Policy (Apr. 2, 2020), <https://yankeeinstitute.org/2020/04/02/connecticut-judicial-dept-releases-list-of-grievances-dropped-in-exchange-for-union-presidents-leave-time/>; Edward Ring, *How "Release Time" Causes Taxpayers to Fund Government Unions*, California Policy Center (July 17, 2019), <https://californiapolicycenter.org/how-release-time-causes-taxpayers-to-fund-government-unions/>; Bethany Blankley, *Taxpayer-funded Union "Release Time" Challenged in Arizona, Texas, Other States*, The Center Square (July 1, 2019), https://www.thecentersquare.com/texas/taxpayer-funded-union-release-time-challenged-in-arizona-texas-other/article_b12059d6-9b3b-11e9-903e-cf029f6d19a4.html; Katherine Gregg, *R.I. Conservative Group: Unions Are Driving Up Costs for Taxpayers*, Providence Journal (May 1, 2019), <https://www.providencejournal.com/news/20190501/ri-conservative-group-unions-are-driving-up-costs-for-taxpayers>; Mark Pulliam, *Union Time, Taxpayer Dime*, City Journal (Nov. 15, 2016), <https://www.city-journal.org/html/union-time-taxpayer-dime-14857.html>; Christine Hall, *Little-Known Union Perk Flies Under Taxpayer Radar*, CNSNews.com (July 7, 2008),

II. SCHOOL DISTRICTS LACK AUTHORITY TO PAY OR COLLECTIVELY BARGAIN FOR INDIVIDUALS NOT ENGAGED IN PUBLIC EMPLOYMENT

The Superior Court correctly concluded that any arrangement to pay Jersey City union officials a public salary and benefits was contrary to public policy. *Rozenblit*, 461 N.J. Super. at 31. More specifically, it correctly concluded that there is “no legal authority in Title 18A for the Board to sanction this disbursement of public funds.” *Id.* And, without such authorization, any contractual arrangement for publicly-funded release time is void. *See id.* at 25 (“As a creature of the State, a local board of education ‘may exercise only those powers granted to them by the Legislature—either expressly or by necessary or fair implication.’” (quoting *Fair Lawn Educ. Ass’n v. Fair Lawn Bd. of Educ.*, 79 N.J. 574, 579 (1979))); *see also Hill v. Bd. of Adjustment of Borough of Eatontown*, 122 N.J. Super. 156, 162 (App. Div. 1972) (“[A] contract which a municipality is ‘utterly without capacity to make under any and all circumstances’ is void.” (quoting *Bauer v. City of Newark*, 7 N.J. 426, 434 (1951))).²⁵

<https://www.cnsnews.com/news/article/little-known-union-perk-flies-under-taxpayer-radar>.

²⁵ The same should be true in Pennsylvania. In Pennsylvania, as in New Jersey, “a school district is a creature of the legislature and therefore has no power *except by express statutory grant and necessary implication.*” *Giacomucci v. Se. Delco Sch. Dist.*, 742 A.2d 1165, 1170 (Pa. Cmwlth. 1999) (citation omitted). “Because a school district is ‘the administrative arm of the legislature, its authority springs only from legislative enactments.’” *Id.* (quoting *In re James Granat*, 590 A.2d 849, 852 (Pa. Cmwlth. 1991)). And the Pennsylvania General Assembly, like the New Jersey Legislature, has provided no statutory authority allowing school districts to pay teachers to serve as full-time union officials. *See* 24 P.S. §§ 1-101–27-2702; 43 P.S. §§ 1101.101–1101.2301.

Although not specifically addressed by the Superior Court, New Jersey's labor laws grant no separate basis of authority from which public-sector unions could justify bargaining for release time provisions. Instead, the New Jersey Employer-Employee Relations Act specifies, in part, that public-sector unions certified as exclusive representatives are "entitled to act for and to negotiate agreements covering all employees in the [bargaining] unit" and that such unions and public employers must negotiate over "new rules or modifications of existing rules governing working conditions" as well as "grievances, disciplinary disputes, and other terms and conditions of employment." N.J. Stat. Ann. § 34:13A-5.3.²⁶

Surely, in granting such narrow authority to negotiate over terms and conditions of employment for certain public employees in positions identified in the relevant certification of a bargaining unit, the New Jersey Legislature effectively precluded public-sector unions from using their exclusive representative status to demand special favors for individuals who will soon leave their bargaining unit positions to engage in non-public employment at public expense. *See Bd. of Ed. of Woodstown-Pilesgrove Reg'l Sch. Dist. v. Woodstown-Pilesgrove Reg'l Ed. Ass'n*, 81 N.J. 582,

²⁶ Similarly, Pennsylvania's Public Employee Relations Act describes "collective bargaining" as a conference or negotiation between a "public employer" and a "representative of the public employes . . . with respect to wages, hours and other terms and conditions of employment." 43 P.S. § 1101.701. Likewise, Pennsylvania's Public School Code describes "collective bargaining" as conference or negotiation between the "employer," elsewhere defined as a "public school entity," 24 P.S. § 11-1101-A, and "representative of the employes . . . with respect to wages, hours and other terms and conditions of employment." 24 P.S. § 11-1111-A.

591 (1980) (“[A] viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further the public interest in efficiency in public employment.”).

Indeed, as the Superior Court suggested, individuals on release time are *not* engaged in public employment in the first place. If anyone directs, controls, and supervises individuals on release time, it would be the JCEA, *not* the Jersey City school district:

The two teachers, selected by the members of the JCEA to serve as president and designee, are required to travel throughout the school district to attend meetings, participate in disciplinary matters to advocate the interests of JCEA members, attend to the affairs of the union, and negotiate the terms of the next CBA. These two teachers, who are paid their fulltime salaries, do not report to any school administrator or school district official and are not subject to any administrative oversight. In short, while serving as president and designee of the JCEA, these two teachers act exclusively as labor leaders. . . .

. . . . In fulfilling their duties to the JCEA, the teachers’ role is to advocate the interests of the JCEA, even when such interests may conflict with the educational and administrative policies of the Board. The JCEA does not cite to any statutory authority permitting the Board to pay the salaries of teachers whose job duties are exclusively devoted to the service of another organization, in this case the JCEA.

Rozenblit, 461 N.J. Super. at 28–30.

Finally, although no party seems to claim that release time is a mandatory subject of bargaining, accepting the JCEA’s argument below would naturally lead to

this absurd conclusion. The JCEA argued that release time was justified under section 18A:30-7 of the New Jersey Statutes as “payment of salary in cases of absence not including sick leave,” bargaining over which the Superior Court has held to be mandatory. *See Bd. of Ed. of Piscataway Twp. v. Piscataway Maint. & Custodial Ass’n*, 152 N.J. Super. 235 (App. Div. 1977). But such a conclusion would clearly be out of step with legislative intent and would sanction an abdication of the school district’s responsibility to students. *See Byram Twp. Bd. of Ed. v. Byram Twp. Ed. Ass’n*, 152 N.J. Super. 12, 24–25 (App. Div. 1977) (“It cannot be denied that the safety and well-being of the student body and the correlative maintenance of order and efficiency are matters of major educational policy which are management’s exclusive prerogative. For a board of education to relinquish its right and duty to assign teachers to supervisory tasks in exceptional cases, despite a resulting impingement upon their otherwise duty-free lunch period, would be an abdication of its responsibility in that regard.”).

In sum, the JCEA and school district cannot point to any authorization for release time within Title 18A or the New Jersey Employer-Employee Relations Act and are therefore without authority to enter into any agreement to have taxpayers fund the salaries and benefits of the JCEA’s union officials. Accordingly, this Court should affirm the Superior Court’s conclusion that release time is void as against public policy.

III. AFFIRMING THE SUPERIOR COURT'S DECISION WOULD PROVIDE MUCH-NEEDED PERSUASIVE AUTHORITY FOR NEIGHBORING STATE COURTS

The Superior Court correctly held that release time for union officials is contrary to public policy in New Jersey. However, this case—and *amici*'s case in Pennsylvania—demonstrates that, whatever the relative clarity of this conclusion, any challenge to release time arrangements will require sustained litigation and considerable time, energy, and judicial resources. This Court's affirmance of the Superior Court would settle the legal question in New Jersey, but it would also provide persuasive legal authority across state lines.

In Pennsylvania, shortly after *amici* filed their lawsuit in 2016, the pension system for public school employees revoked pension credit provided to the AEA's union officials on the basis that working as a publicly-funded union official was not creditable "school service."²⁷ But the pension system's revocation of credit did not settle the dispute; in fact, *amici* were faced with new challenges.

First, in revoking credit, the pension system unintentionally deprived the court in which *amici* had filed their case of jurisdiction to resolve the dispute. Because a state entity was no longer party to the case, *amici*'s case was transferred to a county court, where the initial filings would have to be revised and refiled.²⁸ Fortunately, in the meantime, the AEA partially reformed its release time practice; it agreed, as a

²⁷ *Ramos*, 2016 WL 7383800, at *12.

²⁸ Eventually, *amici* successfully obtained a stay in their case in order to intervene in collateral administrative proceedings.

prospective matter only, to start reimbursing the school district for the costs of union officials' salaries and benefits.

However, the AEA quietly filed two separate administrative challenges to revocation of pension credit for its union officials, extending the legal dispute into collateral proceedings to which *amici* were not parties. Upon learning of the AEA's administrative challenges, *amici* had to petition to intervene in order to vindicate their rights as taxpayers and a pension system member. Even though *amici* were ultimately permitted to intervene, they were prohibited from calling witnesses or introducing evidence before the administrative tribunal. Meanwhile, the school district declined to intervene altogether.

Finally, as it became clear to the AEA that it could not prove its union officials were engaged in creditable school service, the AEA adopted a new legal strategy of requesting a good-faith waiver of pension system requirements.²⁹ Such requests have been granted in other contexts, sanctioning inherent conflict with statutory guidelines set forth by the Pennsylvania General Assembly for the pension system. *Amici's* continued involvement helped to prevent such an outcome, ultimately forcing the AEA and its affiliates to purchase annuities for its own union officials.³⁰ And that is precisely what the union should have done in 2016: assumed the cost for what are, functionally, their own employees.

²⁹ See 24 Pa.C.S. § 8303.1(a)(1)–(4).

³⁰ See Appendix A.

Although the AEA's strategic counterattack was not successful, it was certainly time- and resource-consuming, for *amici* and for the courts. It should not have taken a lawsuit and over four years for the AEA to reimburse for the costs of its union officials and finally drop its efforts to secure public funding for their pensions. *Amici* had to litigate through two courts and one administrative tribunal to secure what should have been obvious all along.

Amici's case had direct effects in Allentown and indirect impact on other school districts in Pennsylvania, but Pennsylvania courts have still not addressed the legality of public funding for full-time union officials. A ruling from the New Jersey Supreme Court affirming the lower court would go a long way to making future litigation less expensive and time consuming, both in New Jersey or neighboring states.

CONCLUSION

This Court should affirm the Superior Court and conclude that there is no statutory authorization for publicly-funded release time for union officials. As such, the JCEA's release time arrangement is void as against public policy.

Respectfully Submitted,

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