

**IN THE SUPREME COURT OF THE STATE OF OREGON**

EVERICE MORO; TERRI DOMENIGONI; CHARLES CUSTER; JOHN  
HAWKINS; MICHAEL ARKEN; EUGENE DITTER; JOHN O'KIEF;  
MICHAEL SMITH; LANE JOHNSON; GREG CLOUSER; BRANDON  
SILENCE; ALISON VICKERY; and JIN VOEK,  
Petitioners,

v.

STATE OF OREGON; STATE OF OREGON by and through the  
Department of Corrections; LINN COUNTY; CITY OF PORTLAND; CITY  
OF SALEM; TUALATIN VALLEY FIRE & RESCUE; ESTACADA  
SCHOOL DISTRICT; OREGON CITY SCHOOL DISTRICT; ONTARIO  
SCHOOL DISTRICT; BEAVERTON SCHOOL DISTRICT; WEST LINN  
SCHOOL DISTRICT; BEND SCHOOL DISTRICT; and PUBLIC  
EMPLOYEES RETIREMENT BOARD,  
Respondents,

and

LEAGUE OF OREGON CITIES; OREGON SCHOOL BOARDS  
ASSOCIATION; and ASSOCIATION OF OREGON COUNTIES,  
Intervenors,

and

CENTRAL OREGON IRRIGATION DISTRICT,  
Intervenor below.

S061452 (Control)

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WAYNE STANLEY JONES,  
Petitioner,

v.

PUBLIC EMPLOYEES RETIREMENT BOARD; ELLEN ROSENBLUM,  
Attorney General; and JOHN A. KITZHABER, Governor,

Respondents.

S061431

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MICHAEL D. REYNOLDS,  
Petitioner,

v.

PUBLIC EMPLOYEES RETIREMENT BOARD, State of Oregon; and  
JOHN A. KITZHABER, Governor, State of Oregon,  
Respondents.

S061454

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GEORGE A. RIEMER,  
Petitioner,

v.

STATE OF OREGON; OREGON GOVERNOR JOHN KITZHABER;  
OREGON ATTORNEY GENERAL ELLEN ROSENBLUM; OREGON  
PUBLIC EMPLOYEES RETIREMENT BOARD; and OREGON PUBLIC  
EMPLOYEES RETIREMENT SYSTEM,  
Respondents.

S061475

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GEORGE A. REIMER,  
Petitioner,

v.

STATE OF OREGON; OREGON GOVERNOR JOHN KITZHABER;  
OREGON ATTORNEY GENERAL ELLEN ROSENBLUM; PUBLIC  
EMPLOYEES RETIREMENT BOARD; and PUBLIC EMPLOYEES  
RETIREMENT SYSTEM,  
Respondents.

S061860

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**RESPONDENT TUALATIN VALLEY FIRE & RESCUE'S  
ANSWERING BRIEF AND  
SUPPLEMENTAL EXCERPT OF RECORD**

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Challenge to Constitutionality of SB 822 and SB 861

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## **STATEMENT OF THE CASE**

Respondent Tualatin Valley Fire & Rescue (“TVF&R”) accepts Petitioners’ Custer’s and Ditters’ (–Petitioners”) statement of the case except as stated below.

### **I. NATURE OF THE ACTION.**

Respondents accept Petitioners’ descriptions of the action, except to the extent they characterize the legal impacts of SB 822 and SB 861 (sometimes, the –2013 legislation”), which speak for themselves.

### **II. QUESTIONS PRESENTED ON APPEAL.**

Respondents reject Petitioners’ questions presented, and offer the following:

**Question 1:** Do Petitioners raise a justiciable controversy and state a claim with respect to TVF&R?

**Question 2:** Does *former* ORS 238.360 (2011) demonstrate a clear and unmistakable expression of the legislature’s intention to create a contractual right in Petitioners to receive an annual COLA under the formula set forth in that statute?

**Question 3:** If ORS 238.360 constitutes a statutory contract, does the 2013 legislation violate either Article I, §21 of the Oregon Constitution or Article I, §10, clause 1 of the United States Constitution by substantially impairing the state’s obligation under such contract?

**Question 4:** If ORS 238.360 constitutes a statutory contract, but the 2013 legislation does not substantially impair the state's obligation of that contract, does that legislation breach any contractual right Petitioners have under ORS 238.360?

**Question 5:** If the 2013 legislation impaired TVF&R's contractual obligation under the aforementioned laws, was such impairment nevertheless constitutionally permissible as a reasonable and necessary means to address a significant and legitimate public purpose?

**Question 6:** Does the 2013 legislation affect a taking of private property for public use without just compensation in violation of Article I, §18 of the Oregon Constitution or the 5<sup>th</sup> Amendment to the United States Constitution?

**Question 7:** Are attorneys fees available if Petitioners prevail?

### **III. SUMMARY OF ARGUMENT.**

The 2013 legislation amends the PERS statutes in two ways, only one of which is relevant to the claims of Petitioners against TVF&R: it amends former ORS 238.360, ORS 238.238A.210, and ORS 238.575 to adjust the manner in which annual cost of living adjustments ("COLAs") to PERS retirement allowances are calculated by the PERB. It does not change the manner in which any employer contribution to PERS is allocated to TVF&R.

Petitioners have failed to allege any current and actual controversy between either of them and TVF&R, and they have failed to state a claim.

There is no allegation of breach of any contract term by TVF&R rendering the matter not ripe, and lacking any adversity. In addition, whatever decision is made by this court, the PERB will compute and allocate an employer contribution to TVF&R, and TVF&R will pay that amount. There is, however an allegation of a breach by the state, but unless the PERB refuses to compute an employer contribution or TVF&R refuses to pay that amount, there is no current controversy, and any potential controversy is not ripe.

The 2013 legislation does not constitute an impairment of contract or a taking under either the Oregon or federal Constitutions, because neither law makes any change to any statutory contract of TVF&R. If either enactment made such a change, the resulting impairments are not unconstitutional, both because they are not substantial, and because they constituted a reasonable and necessary means to address a significant and legitimate public purpose.

Accordingly, this Court should dismiss the action as to TVF&R, or in the event this court finds a justiciable controversy, conclude that the 2013 legislation is constitutional and valid in all respects.

#### **IV. SUMMARY OF MATERIAL FACTS.**

The facts in this matter are set out in the Special Master's Report, which is adopted herein. TVF&R addresses the facts relevant to each assignment of error in the context of its responses below.

## **RESPONSE TO ASSIGNMENTS OF ERROR**

### **V. AS A PRELIMINARY MATTER, THERE IS NO JUSTICIABLE CONTROVERSY, AND PETITIONERS CUSTER AND DITTER HAVE FAILED TO STATE A CLAIM AGAINST TVF&R.**

Petitioners allege that TVF&R is liable only to the PERB as an employer for a statutory contract. Petitioners allege that the state (specifically the PERB) is primarily liable, and the PERS statutes bear this out. More to the point, Petitioners' prayer for relief seeks only that ~~respondent~~ employers *by and through PERB* pay to petitioners benefits in an amount no less than that they would have received had SB 822 and/or SB 861 not been passed." (Emphasis added.) SER-1. No direct liability of TVF&R was sought in this case. Virtually identical language is used in Petitioners' prayer under Petitioners' ~~takings~~" claim. *Id.*

It is the duty of the PERB to determine who are eligible members of PERS, and to compute amounts of benefits to which they are entitled. ORS 238.250; 238.285; 238.300, *et seq.* It is the duty of the PERB to determine the amounts needed to fund the benefits paid, to determine what funds are available from earnings of the PERS fund, from employee contributions, to determine the amount of employer contributions are needed, and to allocate the proper amount to each government employer. *See, Strunk v. PERB*, 338 Or 145, 158-60, 108 P3d 1058 (2005).



If, and only if (1) Petitioners prevail in this action, (2) the PERB fails to follow its statutory duty to properly allocate employer contributions to TVF&R so as to cover the benefits which Petitioners might become entitled if they prevail, and (3) TVF&R then declines to pay the lawful employer contributions (or sums unpaid by PERS to Petitioners), will there be a justiciable controversy. This case is much like that of *Strunk, supra*, where a claim was dismissed as unripe because “the controversy must involve present facts as opposed to a dispute which is based on future events of a hypothetical issue.” *Id.* at 154. In *Strunk*, the PERB had agreed not to carry out the statutory acts complained of, just as TVF&R has agreed to pay the employer contribution assessed against it by the PERB, no matter the outcome of this or any other any challenge to the PERB methods of computing such figures and benefits. *See, Respondent Tualatin Valley Fire & Rescue’s Answer to Petition for Direct Review – Legislation (Second Amended)*, p. 7. (“TVF&R does not dispute its direct duty to make contributions assessed by PERS”). SER-2.

The PERB is the only entity whose conduct is challenged by Petitioners, arising under the 2013 legislation — the duty of TVF&R is acknowledged in Petitioners’ prayer to be a duty only to pay the PERB, and no direct liability to Petitioners is sought. Any duty of TVF&R to make payments directly to Petitioners (which are not sought as a remedy in this action) under the 2013 legislation can arise only if certain hypothetical events occur in the future:

Petitioners must prevail in this action, the PERB must refuse to perform its duty to properly pay benefits to Petitioners after the judgment of this court is entered, and TVF&R must refuse to pay those benefits. None of these events is alleged as occurring, and they cannot be, because they have not occurred.

No matter how this court rules, immediately after judgment is entered, TVF&R will owe nothing to Petitioners directly, even if they prevail, because there is neither allegation nor evidence that the PERB will fail to comply with the order of this court. As to any liability to the PERB, (which is irrelevant to this case) it is possible — the evidence does not address the issue — that TVF&R may owe nothing extra to PERB, if Petitioners prevail.

This case differs from *Stovall v. State by and Through Dep't of Transportation*, 324 Or 92, 922 P2d 646 (1991). Here, TVF&R has acknowledged that it will pay the PERB's assessments of employer contributions, as required by law. SER-2. *Compare, Stovall*, 324 Or at 120-25 (existing dispute as to local government's duty to fund the employer contributions to the PERB, and hypothetical issue of direct liability to petitioner discussed, but that is not raised by Petitioners as an issue in this case).

There is no controversy here — TVF&R does not dispute its duty to pay whatever assessments are made against it by the PERB. The duty of TVF&R to pay any assessment against it, including any possible amounts that were not assessed due to the 2013 legislation, has not yet arisen (changes in contribution

rates follow changes in benefits by up to two years). The duty of TVF&R to make any direct payment to Petitioners arising on the hypothetical, future, non-alleged, and non-proven default of the PERB has not yet arisen. This case is not ripe as to any liability of TVF&R.

In addition, there is no adversity. TVF&R does not dispute its liability to pay its lawfully computed employer contribution before and following the decision of this court. No direct liability to Petitioners is prayed for. There is simply no dispute in this matter, only the need for this Court to determine what the law is, and instructions to the PERB what its computational duties are with respect to both benefits and employer contributions. TVF&R will comply with the result. This case must be dismissed as to TVF&R, as non justiciable, and for failure to state a claim.

## **VI. RESPONSE TO PETITIONERS' FIRST AND THIRD ASSIGNMENTS OF ERROR.**

The 2013 legislation does not impair Petitioners' contract rights in violation of either Article 1, §21 of the Oregon Constitution or Article 1, §10 of the United States Constitution, and the legislation does not breach Petitioners' contract rights.

### **A. Standard of Review.**

The court conducts a *de novo* review of the evidentiary record assembled by the Special Master and a plenary review or analysis of the legal issues presented. *Strunk v. PERB*, 338 Or 145, 155, 108 P3d 1058 (2005).

**B. The 2013 Legislative Changes to the Formula by Which COLAs are Calculated Under ORS 238.360 Do Not Impair a Contract, In Violation of the Oregon and United States Constitutions.**

In addition to the arguments set forth in Section C below, TVF&R adopts the arguments asserted by the State of Oregon in its *Combined Response to All Assignments of Error*, and the County/School District Respondents in their *Merits Brief of Respondents Linn County, Estacada School District, Oregon City School District, Ontario School District , West Linn School District, Beaverton School District, Bend School District and Intervenors Oregon School Boards Association and Association of Oregon Counties* as each brief pertain to these two Assignments of Error.

**C. There is no Contract Between Petitioners and TVF&R.**

Planning for long-term financial health is an important function of local governments, including TVF&R. Another important governmental function is whether to hire and how much to pay government employees. This court has delivered two lines of decisions that are, respectfully, contradictory, rendering it difficult for the governing bodies of local governments to properly budget for short term, and plan for the long-term stability of those governments to deliver the essential government services that they were created (and for which their governing boards were elected) to deliver.

Respectfully, it is incumbent upon this Court to give guidance to those largely volunteer governing boards so that they can make short and long-term financial and service delivery plans.

**i. The First Line of Cases.**

Beginning approximately 1929, and continuing to the present day, this Court has held that inherent limitations on the legislative power of municipal corporations limit the authority of their governing bodies to entering into long-term financial and other contracts, rendering longer contracts void, or at least voidable. This Court determined that to hold otherwise would infringe upon the rights of the public to carry out their democratic function in our government, by prohibiting them from electing new legislative bodies that make different policy choices. Thus, this Court has adopted a rule that certain kinds of contracts are outside the legislative power of the elected bodies.

In *Johnson v. City of Pendleton*, 131 Or 46, 280 P 873 (1929), the city adopted an ordinance that the city would impose a tax to build and operate a new city building. The court ruled that the action was invalid because the tax would be imposed for all time, or at least for an indefinite time, limiting the authority of subsequent governmental bodies to modify or repeal the tax. The tax was therefore void.

A more important case is *Miles v. City of Baker*, 152 Or 87, 51 P2d 1047 (1935). The court there held that an out-going city council could not bind a

subsequently elected counsel to the terms of a contract, because the contract involved providing a ~~—~~governmental function,” an audit. The court held that the members of a governing body of finite tenure (an elected body) are prohibited from binding a subsequently elected body to a contract that calls for the performance of a governmental function. More recently, that same rule was applied to the provision of sheriffs' services by a county, in *Graves v. Arnado*, 307 Or 358, 768 P2d 910 (1989). (Elected sheriff is not bound by the contracts between a prior elected sheriff and a deputy.)

Since 1929, cities and counties, as well as the courts in Oregon, have applied *Johnson v. City of Pendleton, supra*, to allow contracts to extend for a considerable period of time. However, a governmental body may not bind a subsequent governmental body past the time when a majority of the elected officials of that body must stand for reelection. The subsequent board, even if it is the same people, must have the ability to terminate the contract. See, *e.g.*, *Klamath County Commissioners v. Select County Employees*, 148 Or App 48, 939 P2d 80 (1997).

The recent cases in this line of decisions involve employment issues. As a result, the decisions hold that elected officials, such as a sheriff, who holds statutory authority to fire deputies, may not be bound by a predecessors' hiring contracts. *Graves v. Arnado, supra*.

This rule has not been applied to the state, to restrict the power of the Legislative Assembly. However, the question in this case is whether the rule applies to TVF&R, and whether the terms of a “statutory contract” that persists long beyond the elected terms of board members, is a valid and binding contract of TVF&R (not the state).

In this case, the governing body of TVF&R is an elected body of finite tenure. ORS 478.221, *et seq.* Hiring personnel to provide fire services is a governmental function, just as providing sheriff’s services are. *See*, ORS Chapter 478. Whether, and how to allocate funds for personnel salaries and benefits is also a discretionary governmental function. *See*, *McBride v. Magnuson*, 282 Or 433, 437, 578 P2d 1259 (1978) (discretionary); *Klamath County Commissioners*, 148 Or App at 54 (“With respect to personnel \*\*\*governmental functions [include] making policy judgments, ranking and evaluating policy objectives and making choices among competing goals and priorities.”) *See also*, *Rooney v. Kulongoski*, 322 Or 15, 56, 902 P.2d 1143 (1995), citing *City of Enterprise v. State*, 156 Or 623, 69 P2d 953 (1937) (“statute that, among other things, vested court with power to levy taxes, fix salaries of municipal officers, and effect municipal contracts” vested legislative power in judiciary).

Also in this case, the obligations of the “PERS contract” continue long after the term of any given majority of the board of directors of TVF&R

expires, and the board must stand for reelection. Under the reasoning of these cases, there can be no long-term PERS contract between TVF&R and either Custer or Ditters. It is beyond the legislative authority of TVF&R's directors to bind subsequent directors.

## ii. The Second Line of Cases.

The second line of cases hold the opposite, but the court in those cases did not consider how the first line of cases could affect the court's decision. The second line of cases held that the pension plan offered when a state employee was hired was a unilateral offer that was accepted and became a term of the "PERS contract" between the employer and that employee, when the employee first performed work. *Hughes v. State*, 314 Or 1, 20, 838 P2d 1018 (1992). However, the terms of the contract have changed many times over the years, (see, discussion of the evolution of PERS in *Strunk, supra*). The numerous changes, in and of themselves, evidence the intention of the state that the terms of the "PERS contract" were not intended to be forever fixed, but would evolve over time. In fact, this Court has held that the term of a PERS contract are that "a" pension must be delivered, demonstrating that no particular terms are required in it, leaving great flexibility to the state to determine exactly what pension may be provided, so long as it is not "substantially" impaired. *Hughes* at 20. (On vesting, an employee's contractual interest in a pension



plan may not be substantially impaired by subsequent legislation.”) *Id.*

(Emphasis added.)

The court went on to hold that ~~“a statute]~~, as a term of the PERS contract, means that the state promised that all PERS retirement benefits that have accrued or are accruing for work performed so long as [the statute] remained in effect \*\*\* [T]he legislature did not contract away its ability to [modify the term] in the future based on work not yet performed.” *Hughes* at 29. Although not discussed, this language can help to conform this second line of cases to the first, as applied to the state – even if one legislative body binds subsequent bodies by adopting statutes that govern employment contracts, the statutes themselves may be repealed or amended, to the extent that they apply to future employment benefits not yet earned when the statute is amended or repealed.

As applied to the Custer and Ditters claims against TVF&R, these employees did not receive nor did they accept a promise of PERS benefits when they were hired, in 1968 and 1972, respectively. The first dates when they were entitled to participate in PERS was 1981 and 1989, respectively. SER-3 - 4. Each accepted an offer from TVF&R (actually TVF&R’s predecessors) to work for years with non-PERS benefits, primarily life and health insurance. *Id.* These became the terms of their ~~“Pension contract”~~ for 13 and 17 years,

respectively. And, if the ~~“PERS contract”~~ is applied to those years, it would violate ORS 174.010, which mandates that this court not add terms to contracts.

Petitioners have offered no evidence of the terms of those pre-PERS employment contracts, or how SB 822 and SB 861 would apply to benefits accrued during those years of service. They simply assume the PERS statutes (from what year is not clear) govern them.

In *Stovall, supra*, the court discussed that that there is a contract between municipal corporations and their employee-PERS members. The contract between them, however, would be enforceable only if PERS or the state failed to pay the statutory amounts owed. *Stovall*, 344 Or at 124. There is no allegation of such liability here – Petitioners did not seek the relief of direct liability to them from TVF&R and TVF&R has at all material times paid the sums required by the PERS Board, and no breach is alleged by Petitioners. There is not even an allegation that the PERB has failed to assess TVF&R for the amounts required should Petitioners prevail. And TVF&R stated in its Response to the Petition that it ~~“does not dispute its direct duty to make contributions assessed by PERS.”~~ SER-2.

There is no dispute that TVF&R will make all PERS contributions assessed against it. There is no allegation of a breach of contract by TVF&R, nor of any demand that TVF&R pay the amounts claimed by Petitioners, that PERS is not authorized or required to pay under the 2013 legislation. All there

is, is a hypothetical effect on Petitioners, (1) if they prevail, (2) if the PERB declines to pay the benefits this court orders, and assess TVF&R for the amounts it will owe, and (3) if TVF&R changes its mind and declines to pay such assessment. TVF&R is not in breach of any contract at this time, and any future breach, no matter how hypothetical, is subject to an action when such a controversy might arise. Until then, the direct review of the 2013 legislation, which directly affects only the PERB, and not TVF&R, may proceed against the PERB (and any intervenors that wish to participate) but judgment in favor of TVF&R is proper.

**D. Attorneys Fees Are Not Available.**

Petitioners seek attorneys fees but cite nothing more than a bare claim to such fees under a statute or an equitable doctrine.

**i. ORS 652.200 is Inapplicable.**

ORS 652.200 provides attorneys fees for unpaid wages, or for late payment of final wages. There are no ~~wages~~ owed in this case, only retirement benefits, that by their very nature cannot be paid when wages are paid, during the time of employment or immediately after the termination of employment. Wages do not include the contract claims asserted here, whether for breach of contract or statutory contract. *Swartout v. Precision Castparts Corp.*, 83 Or App 203, 730 P2d 1270 (1986). No Attorneys fees are available to Petitioners.

## **ii. The Common Fund Doctrine.**

The common fund doctrine ~~is~~ used to spread litigation expenses among all beneficiaries of a preserved fund so that litigant-beneficiaries are not required to bear the entire financial burden of the litigation while inactive beneficiaries receive the benefits at no cost.” *Strunk v. PERB*, 341 Or 175,181, 139 P.3d 956, (2006). TVF&R objects to payment of attorneys fees, but if they are awarded, asserts that they should be paid from the pool of benefits awardable to beneficiaries that might be protected by this action. They should not be assessed against non-prevailing PERS members’ benefits, and should not be assessed as employer contributions.

## **VII. RESPONSE TO PETITIONERS’ SECOND ASSIGNMENT OF ERROR.**

The 2013 legislation does not take Petitioners’ private property for public use without just compensation in violation of either Article I, §18 of the Oregon Constitution or the 5th and 14th Amendments of the United States Constitution.

### **A. Standard of Review.**

The court conducts a *de novo* review of the evidentiary record assembled by the Special Master and a plenary review or analysis of the legal issues presented. *Strunk v. PERB*, 338 Or 145, 155, 108 P3d 1058.

**B. This Court Has Fully Addressed Petitioners' Taking Claim in *Strunk*.**

TVF&R hereby adopts the arguments asserted by the State in its Combined Arguments, as they pertain to this Assignment of Error, and incorporates them herein. In addition, TVF&R asserts:

This Court held, with respect to the *Strunk* petitioners' claims that parts of the 2003 PERS legislation violated the state and federal takings causes, that such claims are impossible to assert in this kind of case, because if there is an impairment of contract, Petitioners' remedy arises under that provision, and if there is no impairment of contract, there is no ~~taking~~" for which compensation must be paid:

—The foregoing holdings dispose of those claims, either because we have voided the challenged legislation in light of petitioners' state contract claims or because our determination of the particular obligations set out in the PERS contract obviates the fundamental premise of Petitioners' remaining claims (that is, that the PERS contract granted them rights that cannot be breached, impaired, or taken for public use). We therefore need not discuss those claims further."

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*Strunk*, 338 Or at 237-38. The same reasoning applies here. Petitioners' takings claims must fail, and deserve no further discussion.

Dated this 25th day of August, 2014.

JORDAN RAMIS PC

By: s/Edward H. Trompke  
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**INDEX OF RESPONDENT TUALATIN VALLEY FIRE & RESCUE'S  
SUPPLEMENTAL EXCERPT OF RECORD**

<b>Court Entry Date</b>	<b>Document</b>	<b>SER No.</b>
12-6-13	Petition for Direct Review – Legislation (Second Amended) (Page 23 only)	SER-1
1-9-14	Respondent Tualatin Valley Fire & Rescue's Answer to Petition for Direct Review – Legislation (Second Amended) (Page 7 only)	SER-2
4-30-14	Special Master's Final Report (Pages 89 and 90 only)	SER-3 – 4

WHEREFORE, petitioners petition this court for an order:

1. Appointing a special master under Section 19, subsection 6, of SB 822 and Section 11, subsection 6, of SB 861 to hear evidence and to propose recommended findings of facts;
2. Declaring SB 822 and SB 861 to be unconstitutional and void in whole or in part;
3. In the alternative, declaring that SB 822 and SB 861 in whole or in part constitute a breach of the petitioners' PERS and/or OPSRP contracts and ordering that respondent employers by and through PERB pay to petitioners benefits in an amount no less than that they would have received had SB 822 and/or SB 861 not been passed;
4. In the alternative, declaring that SB 822 and SB 861 in whole or in part constitute an unconstitutional taking and ordering that respondent employers by and through PERB pay to petitioners just compensation measured as the difference between what petitioners would have received in benefits had SB 822 and/or SB 861 not been enacted and what petitioners will now receive as a result of SB 822 and/or SB 861;
5. Enjoining respondents from implementing SB 822 and SB 861 in whole or in part, including issuing a preliminary injunction;
6. Granting such other relief as may be just and equitable; and



2.

With respect to paragraph 2 of the Second Amended Petition, TVF&R admits that certain provisions of the statutes cited therein, in certain circumstances, have created certain contracts among certain persons. TVF&R is without sufficient information at this time to determine whether, and on what terms, such statutory contracts may exist with petitioners Custer and Ditter. TVF&R further alleges in response to paragraph 2 that it generally admits that it agreed to enroll petitioners Custer and Ditter in PERS, but denies that it agreed with petitioners to provide more than such enrollment. TVF&R does not dispute its direct duty to make contributions assessed by PERS. TVF&R's duties to petitioners Custer and Ditter extended only through petitioners' respective dates of retirement, at which time only their respective contracts with the state of Oregon PERS continued. TVF&R otherwise denies the remainder of paragraph 2.

3.

With respect to paragraph 3 of the Second Amended Petition, TVF&R admits that SB 822 became law on May 6, 2013 and that SB 861 became law on October 8, 2013. TVF&R is without sufficient information to admit or deny the remainder of paragraph 3.

payroll, resulting in savings of approximately \$835,682 in Linn County's budget for fiscal year 2013-2014. That savings is equivalent to the cost of 8.5 "average" positions (based on the average cost to the County of an employee) or about 7.5 deputy sheriff positions.<sup>148</sup>

### **C. Tualatin Valley Fire & Rescue<sup>149</sup>**

Tualatin Valley Fire and Rescue ("TVF&R") was organized in 1989 by the merger, consolidation or contracting for services of many other fire districts. TVF&R employed two petitioners, Charles Custer and Eugene Ditter.

West Slope Fire Department ("West Slope") first hired Custer in 1968. West Slope hired him under a contract that provided non-PERS retirement benefits that first granted benefits upon his future retirement, under the contract terms and conditions then in force. West Slope became part of Washington County Fire District No. 1 ("Dist. No. 1") in 1972, which in turn, became part of TVF&R in 1989. Custer first became eligible for PERS benefits July 1, 1981, while at District No. 1, though he previously worked for about 13 years under a predecessor retirement plan and agreement.

Tualatin Rural Fire Protection District ("Tualatin Rural") first hired Ditter in 1973. Tualatin Rural hired him under a contract that provided for non-PERS retirement

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<sup>148</sup> Joint Stipulated Facts, p. 52, ¶ 52.

<sup>149</sup> The TVF&R facts are stated in TVF&R's "Proposed Stipulated Facts Regarding Petitioners Custer and Ditter" and the Declaration of Debra Guzman (Ex. TVFR 1). The Moro Petitioners did not controvert those facts. See Moro Petitioners' "Response to TVF&R's Proposed Stipulated Facts."

benefits, upon his future retirement, under the terms and conditions of the contract and retirement plan then in force. Tualatin Rural became a part of TVF&R in 1989.

Ditter first became eligible for PERS retirement benefits in 1989 when Tualatin Rural joined TVF&R, though he previously worked for about 17 years under the terms of a predecessor plan and contract.

At all times that they were employed by TVF&R or its predecessor entities, Custer and Ditter were subject to the terms of express contracts that governed their eligibility for retirement benefits.

#### **D. City of Portland<sup>150</sup>**

According to the Chief Administrative Officer for City of Portland, the City's 2013-2014 budget includes annual budgeted expenditures totaling \$2.65 billion for delivering a variety of municipal services, including Police, Fire, Parks, Utility, and Transportation services.

With that budget, the City is not able to maintain the level of municipal services that it maintained before the recent economic recession. The City attributes this to the financial challenges of the economic recession and other non-economic budget challenges. Though the City's population has grown by more than 23,000 residents, discretionary revenue growth has failed to allow the City to maintain service levels. For

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<sup>150</sup> The City of Portland's facts were set forth in the Declaration of Fred Miller (Ex. P1). The Moro Petitioners did not controvert those facts. *See Moro Petitioners' Response to City of Portland's Proposed Stipulated Facts.*"

## **CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)**

### **Brief Length**

I certify that (1) this brief complies with the word-count limitations in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,897 words.

### **Type Size**

I certify that the size of type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(g).

*s/Edward H. Trompke*  
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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date shown below, I electronically filed the foregoing **RESPONDENT TUALATIN VALLEY FIRE & RESCUE'S ANSWERING BRIEF AND SUPPLEMENTAL EXCERPT OF RECORD** on:

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