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Appellate Court Records

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,

vs.

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; CENTRAL OREGON IRRIGATION DISTRICT; and ASSOCIATION OF OREGON COUNTIES,

Intervenors.

S061452 (Control)

August 2014

WAYNE STANLEY JONES, Petitioner, vs. **PUBLIC EMPLOYEES RETIREMENT BOARD, ELLEN ROSENBLUM, Attorney General and JOHN A. KITZHABER, Governor,** Respondents.	SC S061431
MICHAEL D. REYNOLDS, Petitioner, vs. **PUBLIC EMPLOYEES RETIREMENT BOARD, State of Oregon; and JOHN A. KITZHABER, Governor, State of Oregon,** Respondents.	SC S061454
GEORGE A. RIEMER, Petitioner, vs. **STATE OF OREGON, OREGON GOVERNOR JOHN KITZHABER, OREGON ATTORNEY GENERAL ELLEN ROSENBLUM, OREGON PUBLIC EMPLOYEES RETIREMENT BOARD, and OREGON PUBLIC EMPLOYEES RETIREMENT SYSTEM,** Respondents.	SC S061475 and S061860

August 2014

GEORGE A. RIEMER,

Petitioner,

vs.

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

Respondents.

SC S061860

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

Petition for Direct Judicial Review of SB 822 and SB 861

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BRIEF

STATEMENT OF THE CASE

Respondents Linn County, Estacada School District, Oregon City School District, Ontario School District, West Linn School District, Beaverton School District, and Bend School District, and Intervenors Oregon School Boards Association and Association of Oregon Counties ("County/School District Respondents") accept Petitioners'[1] statements of the case except as stated below:

I. NATURE OF THE ACTION

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

II. QUESTIONS PRESENTED ON APPEAL

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

Question 1: Does *former* ORS 238.360 (2011) demonstrate an unambiguous expression of the legislature's intention to create a contractual right in Petitioners who are Tier One or Tier Two members to receive an annual Cost of Living Adjustment ("COLA") according to the formula expressed in that statute?

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[1] Respondents' use of "Petitioners" refers collectively to the Moro Petitioners and to Petitioners Jones, Riemer, and Reynolds.

Question 2: If ORS 238.360 constitutes a statutory contract, does the 2013 legislation substantially impair the state's obligation under such a contract within the meaning of either Article I, §21 of the Oregon Constitution or Article I, §10, clause 1 of the United States Constitution?

Question 3: If ORS 238.360 constitutes a statutory contract but the 2013 legislation does not substantially impair the state's obligation thereunder, does that legislation nevertheless breach any contractual right Petitioners have under ORS 238.360?

Question 4: Does *former* ORS 238A.210 (2011) demonstrate an unambiguous expression of the legislature's intention to create a contractual right in Petitioners who are OPSRP members to receive an annual COLA according to the formula expressed in that statute?

Question 5: If ORS 238A.210 constitutes a statutory contract, does the 2013 legislation substantially impair the state's obligation under such a contract within the meaning of either Article I, §21 of the Oregon Constitution or Article I, §10, clause 1 of the United States Constitution?

Question 6: If ORS 238A.210 constitutes a statutory contract but the 2013 legislation does not substantially impair the state's obligation thereunder, does the 2013 legislation nevertheless breach any contractual right Petitioners have under ORS 238A.210?

Question 7: Does SB 656 (1991) demonstrate an unambiguous expression of the legislature's intention to create a contractual right in those Petitioners who do not reside in Oregon to receive the benefits conferred by that legislation?

Question 8: If SB 656 constitutes a statutory contract, does the 2013 legislation substantially impair the state's obligation under such a contract within the meaning of either Article I, §21 of the Oregon Constitution or Article I, §10, clause 1 of the United States Constitution?

Question 9: If SB 656 constitutes a statutory contract but the 2013 legislation does not substantially impair the state's obligation thereunder, does the 2013 legislation nevertheless breach any contractual right Petitioners have under SB 656?

Question 10: Does HB 3349 (1995) demonstrate an unambiguous expression of the legislature's intention to create a contractual right in those Petitioners who do not reside in Oregon to receive the benefits conferred by that legislation?

Question 11: If HB 3349 constitutes a statutory contract, does the 2013 legislation substantially impair the state's obligation under such a contract within the meaning of either Article I, §21 of the Oregon Constitution or Article I, §10, clause 1 of the United States Constitution?

Question 12: If HB 3349 constitutes a statutory contract but the 2013 legislation does not substantially impair the state's obligation thereunder, does the 2013 legislation nevertheless breach any contractual right Petitioners have under HB 3349?

Question 13: If the 2013 legislation substantially impaired the state's contractual obligation under any of the aforementioned laws, was such impairment nevertheless constitutionally permissible as a reasonable and necessary means to address a significant and legitimate public purpose?

Question 14: 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^{th} Amendment to the United States Constitution?

Question 15: Does SB 822 violate the Due Process Clause, the Privileges and Immunities Clause or the Equal Protection Clause of the 14^{th} Amendment to the United States Constitution by discriminating against certain Petitioners because of their residency outside of Oregon?

Question 16: Does SB 822 violate Article I, §20 of the Oregon Constitution by granting privileges to classes of citizens which do not apply on the same terms to Petitioners residing outside of Oregon?

Question 17: Does SB 822 impose an unlawful tax on the retirement allowances of certain Petitioners who reside outside of Oregon in violation of 4 USC §114(a)?

III. SUMMARY OF ARGUMENT

The 2013 legislation amends the PERS statutes in two ways: First, it amends former ORS 238.360, ORS 238.238A.210, and ORS 238.575 to adjust the manner in which annual COLAs to PERS retirement allowances are calculated. Second, SB 822 amends ORS 238.372 to ORS 238.378, and ORS 237.635 to ORS 237.637, to provide that benefits established under Oregon Laws 1991, chapter 796 (SB 656) and Oregon Laws 1995, chapter 569 (HB 3349)—which were enacted to compensate for the breach of contract that occurred when the legislature repealed the tax exemption for PERS retirement benefits—shall not be paid to a retiree who is not subject to Oregon personal income tax. ER 48-55; ER 90-93.

The 2013 legislation does not constitute an impairment of contract or a taking under either the Oregon or federal Constitutions, because none of the provisions of that legislation makes any change to any statutory contract. And if those enactments 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.

Nor does the 2013 legislation violate any of the other constitutional or statutory provisions relied upon by Petitioners. The “tax remedy” provisions of SB 822 do not violate Article I, §20 of the Oregon Constitution or the federal Equal Protection Clause because they are supported by a rational basis; they do not violate the federal Privileges and Immunities Clause because they do not impose a durational residency requirement or treat new Oregon residents differently from other residents; and they do not violate 4 USC §114(a) because they do not impose a tax on PERS benefits. Additionally, the 2013 legislation does not violate federal due process because the legislative process and this judicial review process provide all the process that is due.

Accordingly, this court should conclude that the 2013 legislation is constitutional and valid in all respects.

IV. SUMMARY OF MATERIAL FACTS

The facts related to this matter are set out in the Special Master’s Report. ER 161-256. County/School District Respondents address the facts relevant to each assignment of error in the context of their responses below.

RESPONSE TO ASSIGNMENTS OF ERROR

V. RESPONSE TO MORO PETITIONERS' FIRST AND THIRD ASSIGNMENTS OF ERROR, PETITIONER JONES' ARGUMENTS I AND II, PETITIONER RIEMER'S FIRST ASSIGNMENT OF ERROR, AND PETITIONER REYNOLDS' ARGUMENT II:

The 2013 legislation does not violate either Article 1, §21 of the Oregon Constitution or Article 1, §10 of the U.S. Constitution, and does not breach Petitioners' contract rights.

A. <u>Standard of review</u>

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

B. <u>TIER 1/TIER 2 COLA:</u> The 2013 legislative changes to the formula by which COLAs are calculated under ORS 238.360 do not constitute an unconstitutional impairment of contract under the Oregon or United States Constitutions.

Prior to the enactment of the 2013 legislation, ORS 238.360 (2011) directed PERB to determine annually the previous year's increase or decrease in the cost of living based on the Department of Labor's Consumer Price Index for the Portland area ("CPI"), and to increase or decrease each PERS retiree's service retirement allowance in the same proportional amount. ORS 238.360(1) (2011). The increase or decrease each year was capped at 2%, such that the extent of any increase or decrease in the cost of living beyond 2% would be carried over and applied to succeeding years. *Id.* at (2)-(3).

When initially enacted in 1971, the statute governing COLAs was substantially the same as the statute in effect immediately prior to the 2013 legislation. ORS 237.060 (1971); *see also* Or Laws 1971, ch 738, §11. However, as originally enacted, ORS 238.360 capped the annual benefit increase or decrease at 1.5%. *Id*. Two years later, in 1973, that cap was changed to 2%. Or Laws 1973, ch 695, §1.

The 2013 legislation again changed the COLA mechanism, this time in three key ways. First, rather than imposing an increase or decrease to a retiree's benefit depending on whether the CPI increased or decreased, the new law provides for an increase in benefits every year and eliminates the possibility of a benefit decrease. SB 822, §§1-4; SB 861, §§1-4. Second, rather than adjusting retirees' benefits by a variable amount depending on the extent to which CPI changed, the new law provides for a fixed increase that does not change based on economic conditions. *Id.* Third, rather than imposing an adjustment to all benefits equally, the new law provides a tiered scheme that applies different COLA rates to each of several levels of retirement benefits, such that retirees receiving relatively smaller benefit allowances receive proportionally larger annual increases than those receiving larger benefit allowances. *Id.*

The 2013 legislation did not change the fact that all retirees are to receive COLAs on their retirement allowances. Rather, what the 2013 legislation changed was how COLAs are to be calculated. Accordingly, whether the 2013 legislation affects the contract rights of Tier 1/Tier 2 members depends on whether the former law constituted a "statutory contract" not merely entitling retirees to COLAs, but entitling retirees to the specific means of calculation found in the pre-2013 law. As the text, context, and legislative history of ORS 238.360 all make clear, the answer to that question is no.

Moreover, if this court finds that the legislature expressed in *former* ORS 238.360 a clear and unambiguous intent to establish a statutory contract entitling Tier 1/Tier 2 retirees to that statute's specific means of calculating the annual COLA, there is no basis to conclude that the 2013 legislation substantially impaired that obligation.

Finally, even if this court finds that the 2013 legislation substantially impaired a contractual obligation under the COLA statute, that impairment is not unconstitutional, because it constituted a reasonable and necessary means to accomplish a significant and legitimate public purpose.

1. ORS 238.360 is Not a Statutory Contract.

a. <u>The Law of Statutory Contracts:</u> This court must find a legislative expression of "clear," "unambiguous," and "unmistakable" promissory intent

This court has held that "PERS was intended to be and is a contract between the State and its employees." *Hughes v. State*, 314 Or 1, 25, 838 P2d 1018 (1992). The terms of that contract are contained in the statutes that govern

PERS. *Strunk*, 338 Or at 175-76. However, not every statute dealing with PERS is contractual. Rather, the court must examine the text, context and legislative history of each legislative enactment to determine whether the legislature intended to make a contractual promise to PERS members that could not be changed by subsequent legislatures. *Id*.

This analysis is substantively different from the analysis applied by the court in construing the meaning of a statute. There, if the text and context of the statute at issue leaves the legislature's intent ambiguous, the court may turn to legislative history and maxims of statutory construction to resolve the ambiguity and discern the legislature's intent. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009); *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 859 P2d 1143 (1993). When determining whether the legislature intended a statute to create contractual rights in private parties, however, the court must find clear and unmistakable evidence that the legislature intended to make a contractual promise that could not be changed by subsequent legislative action. *Strunk*, 338 Or at 171. If examination of the text, context and legislative history leaves the legislature's promissory intent ambiguous, then this court *must* conclude that no statutory contract was created. It cannot resolve the ambiguity itself or infer a legislative intent to make a contractual promise.

In other words, there is a strong presumption that the acts of one legislature cannot tie the hands of a subsequent legislature to enact or repeal laws as it deems appropriate. This presumption may not be easily overcome. As this court said in *Campbell v. Aldrich*, and repeated in *Strunk:*

> "Ordinarily it is the function of a Legislature to make laws and not contracts. It is true, however, that legislative enactments may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the state. It is also equally well established that the intention of the Legislature thus to create contractual obligations, resulting in extinguishment to a certain extent of governmental powers, must clearly and unmistakably appear. The intention to surrender or suspend legislative control over matters vitally affecting the public welfare cannot be established by mere implication."

Campbell, 159 Or 208, 213-14, 79 P2d 257 (1938); *Strunk*, 338 Or at 171 (quoting *Campbell*); *see also Hughes*, 314 Or at 17 ("[A] contract will not be inferred from * * * legislation unless it unambiguously expresses an intention to create a contract.")

The requirement that the legislature "clearly and unmistakably" express its intention to limit the legislative power to amend laws by creating contract rights is essential to the separation of powers mandated by Article III, §1 of the Oregon Constitution. Only the legislature has the power to decide whether and to what degree its contractual promises will constrain future legislative acts. For the court to infer such limitations in the absence of an unambiguous expression of legislative intent would usurp the legislature's power in violation of Article III, §1.

In keeping with this stringent rule of law, this court has made clear that the legislature's unambiguous promissory intent cannot be inferred from the fact that the legislature used imperative language like "shall" in a statute. *Campbell*, 159 Or at 214. That is because such terms are a mechanism to express a *command*, denoting that, as to the object of the statute, the described action is mandatory and not discretionary. *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 346 Or 415, 426, 212 P3d 1243 (2009) (en banc) ("As this court has stated in the statutory context, in ordinary usage, 'shall' creates a mandatory duty.") (internal quotation marks omitted); *Preble v. Dep't of Revenue*, 331 Or 320, 324, 14 P3d 613 (2000) ("'Shall' is a command: it is used in laws, regulations, or directives to express what is mandatory" such that the object of the statute "has no discretion regarding whether to [comply].") (internal quotation marks omitted). Accordingly, unless in a statute the object being commanded is the legislature itself, use of imperative language like "shall" cannot be read to indicate a legislative commitment not to repeal or amend the statute in the future.

For example, in *Campbell*, the plaintiffs asserted that a law enacted in 1935, which imposed a mandatory retirement age of 65 for teachers, violated their statutory contractual right under a 1913 statute to remain employed until dismissed. The statute upon which plaintiffs relied stated, in relevant part:

> "Section 4. Teachers who have been employed in schools * * * as regularly appointed teachers for not

> less than two successive annual terms *shall* by the board of directors be placed upon the list of permanently employed teachers.
>
> "Section 5. Teachers so placed upon such list *shall not* be subject to annual appointment, but *shall* continue to serve until dismissed or discontinued * * *.
>
> "* * * * *
>
> "Section 10. * * * [A]ll such teachers who shall be re-elected for employment by the board for the school year beginning in September, 1913, *shall* be permanent teachers under the provisions of this act."

Campbell, 159 Or at 212 (emphasis added) (quoting Or Laws 1913, ch 37). The Supreme Court nevertheless concluded that the 1913 act was not a contract:

> "We are at a loss to find language in the act clearly and plainly indicating an intention to surrender or suspend legislative control over the tenure of teachers. The Legislature, in 1913, in dealing with the all-important question of teachers' tenure, did not indicate an intention to preclude such action by subsequent Legislatures that might, in the light of experience, see fit to declare a different policy."

Id. at 214. Rather, the court concluded that "[i]t is not a contractual right which [the teachers] enjoy but rather a status making their positions as teachers secure against the whim, caprice, and political motives of our ever-changing office-holders." *Id.* The fact that the legislature used mandatory language in its 1913 enactment was not, by itself, a "clear and plain" indication of promissory intent. The legislature's phrasing of a statute in mandatory terms means only that those directed by the statute must comply, not that those directives can never be changed.

While this court has been consistent in its statement of this rule, it has not always been rigorous in its application. At the "rigorous end" of the spectrum, in *Eckles v. State*, 306 Or 380, 760 P2d 846 (1988), the court considered whether the statute creating the Industrial Accident Fund ("IAF") was a contractual promise that IAF funds would be used only for workers' compensation purposes. In 1929, after money in the IAF was used to construct a state office building, the legislature amended the statute creating the IAF to expressly disavow any proprietary interest in the Fund on the part of the state. *Id.* at 393. The court found that this statutory statement of legislative intent evinced an express contractual promise to employers who insured with SAIF that the state would not use IAF funds for general government purposes. *Id.* The court noted that if the legislature had simply provided that the IAF was to be used for the purposes stated in the workers' compensation statutes, "a contractual obligation probably could not have been inferred from the provision because it would have contained nothing indicative of a legislative commitment not to repeal or amend the statute in the future." *Id.* at 391.

In *Hughes v. State*, the court considered whether the statute exempting PERS retirement benefits from state income tax created a contract, thus prohibiting the legislature from repealing the exemption. As in *Eckles*, the court looked closely at the words of the statute in question and concluded that the legislature's statement that PERS benefits "shall be exempt from all state, county and municipal taxes *heretofore or hereafter imposed"* "unambiguously evinces an underlying promissory, contractual legislative intent" indicative of a commitment not to repeal the tax exemption statute in the future. 314 Or at 26 (emphasis in original).[2]

In *OSPOA v. State*, 323 Or 356, 381, 918 P2d 765 (1996), however, the court failed to apply its well-established rubric for identifying statutory contracts at all, when it held that every provision of an initiative measure amending the Oregon Constitution unconstitutionally impaired the obligation of contract because they would have modified "integral terms of [the] plaintiffs' PERS pension contracts." *See also Strunk*, 338 Or at 239 (Balmer, J., concurring) ("[T]he court in *OSPOA* lost sight of the polestar of statutory contractual analysis: clear, unambiguous, and unmistakable promissory intent."). Although those "integral terms" were prescribed by statute, the *OSPOA* court did not consider whether the legislature that enacted those statutes intended to make a contractual promise that their terms would never change. Instead, the court simply concluded that "PERS constitutes an offer by

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[2] The court first looked at the PERS statutes as a whole, and held that they comprised a unitary, unilateral contract that could not be amended after a PERS member accepted the offer by working—an analysis that this court rejected in *Strunk*. *Hughes*, 314 Or at 22-26.

the state to its employees for a unilateral contract that may be accepted by the tender of part performance by those employees." *OSPOA*, 323 Or at 380. Using this "unilateral contract" analysis, the court concluded that every aspect of PERS "becomes vested in the state's employees on acceptance of employment." *Id.*

Finally, in *Strunk*, the court effectively rejected *OSPOA*'s analytical approach, and returned to its earlier statutory contract analysis described in *Campbell* and *Hughes:* a statute affecting PERS is subject to change unless the legislature that adopted it "clearly and unmistakably" intended to make a contractual promise that the statute would not be amended. *Strunk*, 338 Or at 171. Applying that standard in reviewing the 2003 PERS reforms, the court evaluated each statutory provision separately to determine: "(1) is there a state contract?; (2) if so, what are its terms?; and (3) what obligations do the terms provide?" *Id.* at 170. The court concluded that some of the PERS statutory provisions at issue satisfied the standard and therefore were part of the PERS contract, while other provisions did not satisfy the standard and thus could be modified by subsequent legislative act.

In order to determine whether the provisions of the 2013 legislation that amend ORS 238.360 are lawful, this court must start by analyzing the statutes those bills amend to determine whether there exists an unambiguous statement of the enacting legislature's intent to promise that those statutes would never be subject to change. Unless "clear," "unambiguous," and "unmistakable" evidence of such intent exists, this court must conclude that the statutes create no contractual rights, and that the 2013 amendments to those statutes are therefore lawful.

b. ORS 238.360 does not evince any "clear," "unmistakable," and "unambiguous" expression of promissory intent

(1) Text and context of *former* ORS 238.360

In determining whether *former* ORS 238.360 established a statutory contract, the heart of the analysis lies in the text of the law. While context and legislative history play important roles in the process, "the best evidence of the legislature's intent behind a particular statute is the language of the statute itself." *Hughes*, 314 Or at 26 (citing *Whipple v. Howser*, 291 Or 475, 480, 632 P2d 782 (1981)).

That is especially true in the realm of PERS. It cannot be that context alone is enough, such that the legislature's enactment or codification of a law in the context of PERS statutes presumptively evinces an intent to establish contract rights and to extinguish legislative power. To the contrary, this court has stated clearly that not all statutes within PERS constitute statutory contracts. *See Strunk*, 338 Or at 192 (ORS 238.200(1)(a) was not a term of the PERS contract, because "[n]othing in the text of ORS 238.200(1)(a) (2001), which required PERS members to contribute six percent of their salaries to the fund, supports petitioner's argument that the legislature intended that contribution to be immutable"); *Hughes*, 314 Or at 21 ("[The question] is whether and to what extent *former* ORS 237.201 (1989) was intended to be a term of the PERS contract."); *OSPOA*, 323 Or at 405 (Gillette, J., specially concurring in part and dissenting in part) ("[N]ot every statutory provision in [PERS] is a part of that contract. Instead, whether a particular provision is part of that contract is a question of legislative intent.") (emphasis omitted). And it cannot be that the legislative history of a statute is sufficient to show promissory intent where the language itself does not do so; this court has consistently and unequivocally rejected that approach. *See Patton v. Target Corp.*, 349 Or 230, 243, 242 P3d 611 (2010) ("[E]ven if the legislative history clearly suggested that the 1995 amendment was intended to [accomplish the result sought]," the legislature "failed to translate that intent into operational language to accomplish that goal.") (alterations and quotation marks omitted); *Whipple*, 291 Or at 480 (the court is "not at liberty to give effect to any supposed intention or meaning in the legislature, unless the words to be imported into the statute are, in substance at least, contained in it.").

In short: what matters, first and foremost, is the text—and more specifically, whether that text evinces "clear," "unambiguous," and "unmistakable" promissory intent. *Strunk*, 338 Or at 239 (Balmer, J., concurring). With regard to *former* ORS 238.360, the answer to that question is no.

The text of the COLA statute, as originally enacted in 1971,[3] first set out the legislature's instruction to PERB to provide annual COLAs:

> "On and after July 1, 1972, every monthly retirement allowance payable to or on account of any person who has retired or who will retire as a member of the system shall be adjusted annually to reflect the percentage increase or decrease in the cost of living for the previous calendar year. * * *."

Former ORS 237.060(1) (1971). Next, the statute established a limit to the increase or decrease applicable in any calendar year:

> "However, such increase or decrease shall not exceed one and one-half percent of any monthly retirement allowance in any year and no allowance shall be adjusted to an amount less than the amount to which the member would be entitled if no cost of living adjustment were authorized."

Id. Next, the statute set out the process by which PERB was to calculate the applicable adjustment:

> "As soon as practicable after January 1 each year, the Public Employees' Retirement Board shall determine the percentage increase or decrease in the cost of living for the previous calendar year, based on the Consumer Price Index (Portland area – all items) as published by the Bureau of Labor Statistics of the U.S. Department of Labor for the Portland, Oregon

[3] As discussed at p. 31-32, *infra*, the original 1971 enactment is the operative legislative act for purposes of determining promissory intent.

> area. Prior to July 1 each year the allowance which the member is receiving or is entitled to receive on August 1 for the month of July shall be multiplied by the percentage figure determined, and subject to subsection (1) of this section, the member's allowance for the next 12 months beginning July 1 adjusted to the resultant amount."

Id. at (2). Finally, the statute provided that the amount of cost-of-living increases or decreases in excess of the 1.5% limit "shall be accumulated from year to year and included in the computation of increases or decreases in succeeding years," *id.* at (3), and specified how PERB was to account for payment of increases and credit for decreases, *id.* at (4).

The modern Tier I/Tier II COLA statute in effect prior to the 2013 legislation, ORS 238.360 (2011) applies a higher "cap" and differs in its organization in non-substantive ways, but it is otherwise substantively identical. *Strunk*, 338 Or at 221 ("The legislature enacted that statute in 1971, and its substance has remained unchanged, notwithstanding other interim amendments.").

In effect, the Tier I/Tier II COLA statute – both as originally enacted and also as it appeared prior to the 2013 amendments – serves two distinct functions. First, the statute provides that annually, each retiree's service retirement allowance is to be adjusted to help account for changes in the cost of living. That portion of the statute establishes the *fact* of the benefit.

Second, the statute sets out the calculation by which PERB is to determine the adjustment that will apply – that is, the process of arriving at the amount by which retirees' benefits are to be adjusted. Those portions, in contrast, concern questions of mechanics: Given the statutory command to provide a COLA, should such an adjustment be based on economic indicators, other statistical figures, a static number, or some combination thereof?[4] Should such an adjustment be constrained to a certain percentage of a retiree's allowance, or should allowances simply be free to rise and fall without limit? And if that adjustment is limited, should adjustments in following years account for that limit in any way?

The legislature did not set out any expression of "clear," "unambiguous," and "unmistakable" promissory intent as to either the fact of COLAs or the calculation by which COLAs are determined. To the contrary, the legislature

[4] That question, in fact, encompasses several more specific variables: if the adjustment is to be based on an economic indicator, should that indicator be one that reflects prices only, such as the federal Bureau of Labor Statistics' CPI? Or should the indicator be one that also reflects other important aspects of cost of living like household consumption and substitution, such as the federal Bureau of Economic Analysis' PCE index (to which the Federal Reserve has now moved)? If the former is to be used, then should the law use the Bureau's "Core CPI," which reflects fundamental inflationary and deflationary changes by excluding volatile prices like gasoline, or should the law use the more erratic "All Items CPI," which can spike and dip in response to transient events (like natural disasters) that have nothing to do with inflation at all? In either case, should the relevant CPI be one that reflects the local Portland metro area alone, or should the law instead use the statewide or even nationwide measure, given that PERS members live in places other than Portland? *Et cetera.*

stated the fact of COLAs in plain and straightforward language providing that retirement allowances are to be "multiplied by the percentage figure determined" by PERB and the allowance "adjusted to the resultant amount."

Then, as to the calculation by which COLAs are to be determined, the legislature answered the above questions of mechanics by instructing PERB to rely on the "All Items" CPI (not "Core" CPI or any static figure); to rely on the Portland area figure; to limit adjustments to +/- 1.5% annually regardless of how the cost of living actually changes; and to "accumulate[] from year to year" the amount of cost-of-living increases or decreases in excess of the annual 1.5% limit. *Former* ORS 238.360. In doing so, the legislature did not express its intent to form a contract but merely established a set of commands to PERB, just as other statutes tell PERB how it may invest funds received as rollover contributions (ORS 238.220) or how often it is to determine the liabilities of the system (ORS 238.222).

The statute does use the imperative term "shall" as to both the fact of COLAs and the calculation by which they are determined. Indeed, that is the only textual evidence to which any Petitioner cites to show the legislature evinced "unmistakable" promissory intent. *See, e.g.*, Moro Br. at 48-49; 51-52. However, it is clear under this court's precedents that the use of imperative language such as "shall" is not sufficient standing alone to meet the strict standard required under the statutory contract analysis. *See Campbell*, 159 Or at 214. And that makes sense: The word "shall" appears approximately 800 times in the 108 statutes that comprise ORS Chapter 238, and tens of thousands of times in the Oregon Revised Statutes altogether. In fact, the legislature uses imperative language like "shall" *even when it is expressly disavowing any intent to create contractual rights*. *See* Or Laws 1995, ch 569, §3(1) ("Upon retirement of an employee who is a member of the Public Employe[e]s Retirement System and computation of that member's service retirement allowance * * * the Public Employe[e]s Retirement Board *shall* add to the amount of the allowance * * * the greater of the increase provided by ORS 237.208 or an increase based on the percentage calculated under subsection (4) of this section."); §2(3) ("No member of the system * * * shall acquire a right, contractual or otherwise, to the increased benefits provided by sections 3 to 10 of this 1995 Act."). Whatever else the term "shall" signifies, its use does not distinguish statutes that are promissory from those that are not.[5]

The legislative context in which ORS 238.360 operates and was enacted supports the same result. As soon as the COLA statute was enacted in 1971, its benefits, by definition, ran only to existing retirees. Those retirees could not accept the legislature's purported "offer" of COLA benefits by working in

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[5] Indeed, if the language the legislature used in ORS 238.360 to set out those instructions is sufficient to elevate that statute from mere enactment to statutory contract, it is difficult to imagine what language the legislature could have used to set out those instructions to PERB *without* establishing a statutory contract.

public service; their performance was concluded. As to those retirees—the only individuals who, upon enactment, received the benefit—the COLA scheme could not have established a statutory contract because there was no consideration for the supposed legislative promise.

Further, it cannot be that, merely by keeping that law on the books long enough for later members to continue working and thereby "perform" the requisite public service, the legislature impliedly expressed the requisite promissory intent. This court has repeatedly made clear that statutory contracts cannot arise by implication. *See Stovall v. State*, 324 Or 92, 127, 922 P2d 646 (1996) ("[T]his court [has] cautioned explicitly that it will not imply the existence of a statutory contract between the state and another party."); *Hughes*, 314 Or at 17 ("[A] contract will not be inferred from * * * legislation unless it unambiguously expresses an intention to create a contract."). Accordingly, the words of *former* ORS 238.360 do not evince a clear and unmistakable legislative intent to create a statutory contract.

(2) <u>The legislative history of *former* ORS 238.360</u>

The legislative history of *former* ORS 238.360 provides no affirmative indication that the legislature ever intended to provide members a contractual right to COLAs generally or to one particular means of calculating them specifically, and it provides no affirmative indication that the legislature intended never to change that law in the future. In fact, as to the means of calculation, the legislative history affirmatively indicates that the legislature did *not* intend to bind itself to the existing law.

ORS 238.360 (2011) was originally passed as part of 1971 HB 1397. Originally submitted by the Oregon Public Employees Retirement Conference, a group comprised of several public employers' associations, the bill made two key changes: First, §§8 and 9 of the bill repealed ORS 237.198, under which PERS, since 1964, had distributed each year's excess interest in what was referred to as the "13th check" system, and enacted in its place a one-time service retirement allowance increase of 12% for all members who had retired since 1968 and an increase of 25% for all members who had retired before that year. Second, at §11, the bill established the COLA scheme. Or Laws 1971, ch 738, §§9, 11.

As introduced, the bill's COLA scheme would have provided for an unlimited cost-of-living adjustment. Early in the bill's progress, the Legislative Fiscal Office conducted a fiscal impact analysis concluding that the bill would "significantly increase" required employer contributions and that its impact on local government employers would be "very significant," but that its precise fiscal impact was unknown. App-5-6.

The Joint Ways and Means Committee's Salary Subcommittee met seven separate times on the bill over the next two months. During the course of those meetings, PERS Director James McGoffin sent a letter providing the legislature with the PERS actuary's analysis of HB 1397. Through that correspondence, PERB voiced support for the one-time 25% and 12% benefit increases contained in §§8 and 9 of the bill but, rather than moving forward with "an unlimited cost of living adjustment of total allowance to all pensioners," recommended amendments to the bill limiting COLAs to an increase or decrease of 1.5% per year. As to both of those aspects of the bill, the letter explained:

> "This will provide, then, a permanent base for all pensions and will do away with the necessity of distributing excess interest to pre-1968 pensioners and will additionally provide all of our pensioners with an annual cumulative increase of 1 1/2 percent per year. In further explanation, were the index to go up 3 percent in 1972, in 1973 a retirant [*sic*] would receive 1 1/2 percent increase. In 1973, if it were up 3 percent, he would receive an additional 1 1/2 percent of the 1973 computed base. In no event, should the CPI go downward, would the individual ever go below the starting base of benefits received at retirement."

App-10.[6]

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[6] The "permanent base for all pensions" referred to by McGoffin that would "do away with" the prior 13th check system was not the COLA scheme, but the one-time 25% and 12% base increases contained in §§8-9 of the bill. The COLA scheme was "additional" to that change. That "permanent" increase provision was eventually amended several times and, in 1995, finally repealed altogether.

McGoffin also attended one of the Salary Subcommittee meetings on HB 1397 in early May, 1971 to discuss the bill. Concerning the purpose of the COLA scheme, McGoffin explained:

> "So the reduction then is, or the meaning or the purpose of the benefit, is to take account of what has happened to the cost of [inaudible], the cost of living in the interval of time, and the idea of putting a maximum on this is to set some basis of control as to cost of the benefit. Otherwise there would be no way of telling what this thing could cost."

ER-8-9. McGoffin's comments only further support the conclusion that the legislature's intent in enacting the COLA scheme was twofold: first, to establish a system of regular adjustments to PERS retirement allowances, and second, *to establish a mechanism to calculate those adjustments that ensured the cost to the employer was appropriately curtailed*—that is, to "control [the] cost of the benefit."

The Salary Subcommittee then developed a set of proposed amendments, all of which were adopted by the Joint Ways and Means Committee in late May 1971. From the date of their adoption forward, the COLA provision was no longer "unlimited," but was instead capped at 1.5%. HB 1397 was passed with the 1.5% cap in place. Or Laws 1971, ch 738, §11.

Eighteen months later, just prior to the legislature's 1973 session, Fiscal Analyst Jon Yunker sent a memorandum to state administrator Robert W. Smith containing a "summary of PERS increased benefit proposals." Among them was a COLA increase:

> "Increase 'cost of living' maximum increase per year from one and one-half percent to two and one-half percent. *This is a very controversial and expensive item.* Presently retirement checks increase up to one and one-half percent/year based on Consumer Price Index increase. If Consumer Price Index increases above one and one-half percent, the additional amount is credited to retiree to provide cushion when and if CPI drops. Retired employe[e]s don't believe CPI will drop in their lifetime so they're asking for no limit on annual increase. PERS wants to go to two and one-half percent, CPI presently increasing approximately three percent/year."

App-12. By early March 1973, the Oregon Public Employees Retirement Conference again submitted a set of proposed PERS reforms introduced as SB 411. Consistent with Yunker's letter, the Conference's bill proposed to lift altogether the annual COLA limit.

McGoffin informed the legislature by letter that the bill represented PERS' preferred legislative program, "with our exception of the 100 percent cost-of-living increase as presented." He explained: "The Board, in meetings of December 1972, moved and agreed that they only desire to support a cost-of-living increase at the initially suggested rate of 2 1/2 percent." App-15.

The Legislative Fiscal Office, too, was evidently wary of the cost of increasing COLA adjustments. In the State Budget Division's April 1973 "Analysis of Proposed Legislation" concerning SB 411, the Division predicted that the total employer contribution cost for all of the benefit increases contained in the bill as introduced would amount to approximately 2.6% of payroll. Near the end of the document, however, a note from the Legislative Fiscal Office makes clear it disagreed: the bill's "unlimited post retirement cost-of-living escalator," noted the LFO, "cannot be financed" within the employer cost increase the Budget Division predicted. App-19.

Later in April, McGoffin attended a Joint Ways and Means Salary Subcommittee meeting to address a proposed amendment that would have imposed an increased 2.5% cap in lieu of the bill's original proposal to lift the cap altogether. McGoffin explained the proposed change as follows:

> "In the last session you gave us a post retirement increase for all of our retirees. It was limited to 1 and a half percent. It was cumulative, meaning if it went over 1 and a half percent the following year it did not go up at all, and they would have the opportunity of drawing on that remaining 1 unit. *The 2 and a half percent inclusion was not placed there for any other reason than a fiscal reason*, and that is that we know full well that the inflation that we're facing is more than 2 and a half, more like 6, possible 8, but that that factor would have to have increased our fiscal reaction, and *we felt that to be fiscally responsible we would suggest a minimum – a maximum, in this session, request for 2 and a half percent.* The bill 411 reads is actually a 100 percent request, meaning that if our CPI in the Portland area does go up 6 percent that they would receive 6 percent, all retirees in the following year. There would be no need for a cumulative factor. We have priced that additionally with a 3 percent maximum, and that would, the actuary feels, increase our cost to the employer of 3 percent of salary. If we stay with a 100 percent, totally

> 100 percent with no limitations, we have only concluded that it must be another 2 points, about an 8 and a half percent, and then we're going to guesstimate to you."

ER-21-22 (emphasis added). Later in the session, the Salary Subcommittee held a second meeting concerning SB 411, at which the Committee Chair explained the bill as follows:

> "The original bill contained a cost of living escalator. Presently PERS law contains a one and a half percent maximum cost of living escalator fee that is tied to the Consumer Price Index in the Portland area, and it says that by any amount that the Portland CPI raises that the benefits of employees in the year following who are retired will be increased by a similar amount, up to the maximum of 1 and a half percent. The proposal was to the bill [inaudible] to raise that to whatever the increase in the Consumer Price Index might be [inaudible] and the actuary warned us earlier when he was here that he was not able to determine a cost factor for an unlimited Consumer Price Index escalator. He recommended that it be capped at some level and proposed a 3 percent, a 2.5 percent, and the Oregon State Employees Association and others recently proposed a 2 percent level, so it increases only one half of 1 percent."

ER-26-27.

In short, concerns of cost control were consistently voiced throughout the legislature's consideration of 1973 SB 411. The Joint Ways and Means Committee heeded those concerns, ultimately adopting amendments to SB 411 that included a raise in the annual COLA limits by 0.5%, from 1.5% to 2.0%. So amended, SB 411 was passed by both chambers.

1973 SB 411 marked the last substantive change to the mechanics of the COLA scheme until the 2013 legislation. In 1989, in an evident effort to simplify the statute's language and eliminate surplusage, the legislature eliminated former subsection (1) altogether, and revised the operative language of former subsection (2) to provide for the same result. Or Laws 1989, ch 799, §2. In 1995, the provision was renumbered ORS 238.360, but was not substantively altered. In 2001, the provision was amended a final time, revising two references in subsection (4) from "current service contributions" to simply "contributions." Or Laws 2001, ch 945, §79.

Ultimately, the legislative history of ORS 238.360 makes clear the following. First, the relevant enactment for purposes of determining whether the legislature intended to create a statutory contract is 1971 HB 1379. As this court has instructed, in order to assess the import of legislative history, the court "must ensure [that it is] ascertaining the intent of the correct legislature – an inquiry that is critical when analyzing statutory contracts." *Strunk*, 338 Or at 189. That is so "because the fundamental purpose behind such contracts is to bind future legislative action." *Id*. In *Strunk*, this court concluded that certain amendments beyond a law's initial enactment could be considered a "reenactment" for purposes of legislative intent where such amendments included "material changes" to the language by which "the legislature intended * * * to change the meaning of the statute materially." *Id.* at 191. Here, in contrast, none of the legislature's amendments to ORS 238.360 (1971) include any such material changes, as this court has recognized. *See id.* at 221 ("The legislature enacted [the COLA] statute in 1971, and its substance has remained unchanged, notwithstanding other interim amendments."). Thus, none of the law's post-1971 amendments constituted a "reenactment" for purposes of determining legislative intent.

Second, there is nothing in the legislative record of 1971 HB 1397 constituting a clear, unambiguous, and unmistakable manifestation of intent to establish contractual rights. While the legislature's intent in providing COLAs was undoubtedly to confer a benefit on retirees, it gave no indication that such benefit would constitute an offer of contractual right, or that it understood the law to constitute a binding promise precluding later legislative amendment. That is particularly true as to the mechanism by which PERB was to calculate those cost-of-living adjustments. The 1971 legislative history makes clear that with regard to the amount of the COLA, the driving concern was to "control [the] cost" of providing such a benefit.

Third, nothing in the legislative record of 1971 HB 1397 indicates a manifestation of intent to contractually promise that PERS members would receive a cost-of-living adjustment that in fact represented real-world changes in the cost of living. Indeed, to provide retirees with *less* than an adjustment reflecting real-world inflation or deflation was the very nature of the legislature's decision to impose an annual COLA cap. Unless the legislature can be absolutely certain that average inflation or deflation will remain within the limit imposed by the statute—and of course it cannot—then it cannot be certain that adjustments to retirees' benefits as calculated under the statute will reflect actual changes in cost of living.

Indeed, the legislature was evidently well aware that benefit levels would *not* keep up with actual changes in cost of living. *See, e.g.*, App-10 ("[W]ere the index to go up 3 percent in 1972, in 1973 a retirant [*sic*] would receive 1½ percent increase. In 1973, if it were up 3 percent, he would receive an additional 1½ percent of the 1973 computed base."); App-2 ("Under current trends, [the COLA law] appears to assure an annual increase in service retirement benefits of 1½ percent as long as current inflationary trends continue.").[7] Establishing a

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[7] It is helpful to view the statutory limit in the context of contemporary rates of inflation. In just the five years prior to the enactment of HB 1397, CPI had increased from 94.6 to 113.2 (1967 basis) – an increase of approximately 19%, equivalent to an average yearly increase of well over twice the original statutory limit of 1.5%. And changes in cost of living over the years since the law's enactment make the point even more clearly. By simple arithmetic, the "ideal" hypothetical 1971 retiree – one who, through perfect timing, would have been entitled to an annual COLA increase at the then-maximum of 1.5% per year, compounding every year – would today, 43 years later, earn a retirement allowance approximately 90% higher than when he or she retired. (Even at a constant 2% increase, as the statute now provides, the retiree's allowance would only slightly more than double.) But over those same 43 years in the real world, consumer prices, as measured by CPI, have more than *quintupled*. *See* ER-136 (History of CPI-Portland); *see also* ER-131 (graphical representation of CPI-Portland since 1967). That is why, as Petitioners note, the legislature provided numerous "ad hoc" increases to shore up those early retirees'

statutory limit that potentially adjusts benefits by something *less* than retirees' actual increase in cost of living is contrary to any intent to promise retirees that they would receive annual adjustments that actually reflected their real-world cost increases.

Indeed, the only way for the legislature to have guaranteed a benefit that would assuredly reflect actual changes in cost-of-living would have been to enact an unlimited COLA provision—one that would adjust benefits up and down, dollar for dollar, with the rise and fall of the economy. As described above, the legislature twice considered doing so, and twice rejected the idea. The legislature did not intend to promise PERS members that the COLA benefit to which *former* ORS 238.360 entitled them must in fact represent real-world changes in cost of living.

Fourth and finally, only two years after enactment of HB 1397, the legislature did in fact change the mechanism by which COLA benefits were calculated. While a subsequent legislature's decisions are not determinative of a prior legislature's intent, *see, e.g.*, *Hilton v. MVD*, 308 Or 150, 156, 775 P2d 1378 (1989), this court, where appropriate, has consulted subsequent history in the process of discerning the meaning of an earlier-enacted law, particularly when such subsequent history serves to confirm its conclusions about what the

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purchasing power. Oregon's COLA law, however, never adjusted benefits to keep up with actual inflation—not even close.

earlier legislature likely meant. For example, in *Harris v. Bd. of Parole*, 288 Or 495, 605 P2d 1181 (1980), this court consulted the legislative history of a 1977 enactment in the course of discerning the meaning of a law enacted in 1973. Despite acknowledging that it had no strict need to decide what the 1977 legislature meant, the court nevertheless found the subsequent history relevant, noting that "[i]t would indeed be incongruous to suppose that the Oregon Legislature intended" in 1973 a particular result, given the decision that it later made in 1977. *Id.* at 501-02; *see also State v. Cloutier*, 351 Or 68, 103-04, 261 P3d 1234 (2011) (noting Supreme Court's use of subsequent legislative history).

The same principle applies here. While there is no strict need to determine what the legislature intended in 1973 in order to determine its intent in 1971, nevertheless "it would indeed be incongruous to suppose that the Oregon legislature intended" in 1971 that the provision governing COLA adjustments could never be changed, given the legislature's decision to change that provision only two years later. That result is all the more appropriate given that a majority of the House membership and more than two-thirds of the Senate membership served in both legislative sessions.[8]

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[8] *See Oregon Legislators and Staff Guide: 1971 Regular Session (56th)*, Oregon Secretary of State, http://arcweb.sos.state.or.us/pages/records/legislative/recordsguides/histleg/statehood/1971reg.html (last visited Aug. 25, 2014); *Oregon Legislators and Staff Guide: 1973 Regular Session (57th)*, Oregon

That 1973 change, moreover, cannot be explained simply as a decision to increase benefits. Because the 1.5% cap contained in the 1971 law served as a constraint on "[t]he amount of any cost of living increase *or decrease* in any year," the law's effect was not only to limit the cost of benefit increases in the event of sustained inflation, but also effectively to limit the adverse impact on retirees of any sustained downturn. The legislature was well aware of that possibility. As the legislature's own summary of the bill acknowledged, continued 1.5% annual increases to service retirement benefits would be assured *only* "as long as current inflationary increases continue." App-2.[9] And the legislature included in HB 1397 (and in the law as ultimately enacted) a "backstop" ensuring that, in the event of sustained cuts to retirees' benefits resulting from decreases in CPI, "no allowance shall be adjusted to an amount less than the amount to which the member would be entitled if no cost of living adjustment were authorized" in the first place. Or Laws 1971, ch 738, §11(1).

Secretary of State, http://arcweb.sos.state.or.us/pages/records/legislative/recordsguides/histleg/statehood/1973reg.html (last visited Aug. 25, 2014).

[9] Such a sustained downturn was – and is – entirely possible. While gradual inflation tends to be the rule over the long term, short-term periods vary widely. CPI has on several occasions seen sustained decreases lasting from several months to several years – reducing CPI by as much as 26% in the early 1930s. CPI data from 1962 forward is available at ER-136. Broader CPI data, including data prior to 1962, is published by the Bureau of Labor Statistics at http://www.bls.gov/cpi/.

In the case of any such sustained downturn, increasing the annual COLA limit serves only to magnify the potential *decreases* in retirement allowances—that is, to increase PERS members' downside risk. Stated simply, in a down year, the 1973 amendment would require a greater cut in benefits than the prior law provided. Accordingly, if the 1971 law in fact had been a statutory contract entitling members to a particular means of calculating COLAs, then the 1973 legislature's decision to increase the potential cuts in retirees' benefits might well have impaired those contractual obligations. And while that is not the claim at issue in this matter, it is nevertheless strong evidence confirming what is indicated in the language of the law itself: the 1971 legislature did not clearly and unambiguously intend to make a contractual promise that PERS members would have the right to have cost-of-living adjustments calculated in a certain way, or that the legislature would not change that calculation in the future.

(3) <u>This court's decision in *Strunk* does not compel a contrary result</u>

This court's decision in *Strunk* does not compel a contrary result concerning the extent to which *former* ORS 238.360 constitutes a "statutory contract," for two independent reasons. First, the *Strunk* court did not conduct the kind of strict and methodical inquiry that the *Strunk* decision itself and other precedents call for in a statutory contract analysis. As a result, regardless of what the court concluded in *Strunk* concerning whether any portion of *former* ORS 238.360 constituted a statutory contract, this court should not simply fall back on its analysis in that case to guide the result here. Second, to the extent *Strunk* guides the court's decision in this matter, that case is not inconsistent with the result called for here: *Strunk* concerned the question whether the legislature could *stop* providing COLAs *altogether* as to certain retirees, not whether it could merely alter the calculation by which COLA adjustments are determined.

In *Strunk*, legislation passed in 2003 created for certain retirees an alternative service retirement allowance that would not have been subject to annual COLAs at all. The petitioners in that case challenged that enactment on the basis that "ORS 238.360(1) (2001) required PERB to provide COLAs on *all* service retirement allowances," not just those of certain retirees. *Strunk*, 338 Or at 219 (emphasis in original). The petitioners "argue[d] that, when a member has performed fully under the PERS contract in reliance on the promise set out in ORS 238.360(1) (2001), that member's rights have vested and the legislature may not take away COLAs without breaching the PERS contract or unconstitutionally impairing an obligation of that contract." *Id.*

The court agreed, except as to certain erroneously-credited earnings to which members were not entitled in the first place. *Id.* at 220-22. However, the analysis on which the court based its conclusion concerning the extent to which *former* ORS 238.360 constituted a "statutory contract" was short and superficial, lacking the kind of thorough and rigorous inquiry that the court's precedents—including, elsewhere, *Strunk* itself—command.

The analysis consisted of the following: the court first recited the entirety of *former* ORS 238.360, italicizing the portions in subsection (1) that were phrased in the imperative (e.g., PERB "*shall determine the percentage increase or decrease in the cost of living*"; yearly allowances "*shall be multiplied by the percentage figure determined*"). *Id.* at 220-21 (emphasis in original). With no further analysis, the court concluded:

> "ORS 238.360(1), as it existed in 2001 and as presently worded, provides that PERS members' monthly service retirement allowances annually shall be adjusted to reflect 'the percentage increase or decrease in the cost of living for the previous calendar year[.]' Like the tax provision analyzed in *Hughes*, the text of ORS 238.360(1) (2001) evinces a clear legislative intent to provide retired members with annual COLAs on their service retirement allowances, whenever the CPI warrants such COLAs. We therefore conclude that the general promise embodied in ORS 238.360(1) (2001) was part of the statutory PERS contract applicable to the group of retired members affected by the 2003 provisions at issue here."

Id. at 221. The court offered no explanation of why *former* ORS 238.360 was "[l]ike the tax provision analyzed in *Hughes*," and it provided no explanation of how the statute "evinced a clear legislative intent" to establish a contract. The court simply stated those conclusions as though they were self-evident. This court's precedents—including *Strunk* itself—require more.

Moreover, *Strunk* is legally distinct. To the extent *Strunk* guides the court's analysis in this matter, the *Strunk* court never concluded that *former* ORS 238.360 contained any legislative promise that PERS members would have the right to have cost-of-living adjustments calculated in a certain way, or that the legislature would not change that aspect of the law in the future. Indeed, that question was never before the court in that case. *Strunk* concerned the question whether the state could stop providing COLAs altogether as to certain retirees, not whether the state could merely alter the calculation by which it determines COLA adjustments.

In short, the relevant legislative history lacks any express indication that the legislature intended to create a statutory contract when it enacted *former* ORS 238.360. Accordingly, Petitioners' challenges fail.

2. If ORS 238.360 constitutes a statutory contract, the 2013 legislation does not substantially impair the state's obligation under that contract.

a. <u>The Threshold Issue:</u> Is the matter at issue a facial challenge or an as-applied challenge?

In deciding the constitutionality of the 2013 legislation, this court will have to determine whether Petitioners challenge those enactments as unconstitutional on their face, or only as applied to their individual circumstances.

The law in Oregon concerning facial constitutional challenges is straightforward: "A statute is not facially unconstitutional unless the statute is incapable of constitutional application in any circumstances." *Jenson v. Whitlow*, 334 Or 412, 421, 51 P3d 599 (2002); *see also State v. Sutherland*, 329 Or 359, 365, 987 P2d 501 (1999) (a statute is only facially unconstitutional if "there can be no reasonably likely circumstances in which application of the statute would pass constitutional muster"). This court has repeatedly emphasized the heavy burden required to reach that result. *See MacPherson v. DAS*, 340 Or 117, 139, 130 P3d 308 (2006) (except for free speech challenges, persons "asserting [a] facial challenge [to a statute] bear [a] 'heavy burden' to demonstrate that [the] statute cannot be constitutionally applied under any circumstance"). And where a statute is intended only to provide a mechanism to challenge the law on its face, the court cannot in such action find the law invalid "to the extent" it causes a particular result. *See, e.g., Engweiler v. Persson*, 354 Or 549, 568, 316 P3d 264 (2013) (en banc) (statutory action provided the court with authority to determine the validity of the agency rule at issue; however, plaintiff "[did] not assert that a rule or policy is facially invalid; rather, he repeatedly suggest[ed] that, 'to the extent that' a rule or policy could be interpreted to deny him earned time credits, it is invalid"; court concluded that under the statute such arguments "are not cognizable" because the statute provided for only facial challenges).

As a general matter, if the challenged statute is not facially unconstitutional, the court nevertheless may consider whether the statute is unconstitutional as it applies to the particular facts before it—an "as applied" challenge. *Molodyh v. Truck Ins. Exch.*, 304 Or 290, 299, 744 P2d 992 (1987); *see also State v. Hirsch*, 338 Or 622, 627, 114 P3d 1104 (2005) ("[I]f the challenger is unable to establish facial unconstitutionality * * *, then the challenger is left to argue only that the statute is unconstitutional as applied to the particular facts at hand."), *overruled on other grounds by State v. Christian*, 354 Or 22, 307 P3d 429 (2013). If the court concludes that the statute is unconstitutional as applied only to certain persons or facts, the court will not declare the statute unconstitutional or invalid *in toto*; "[i]nstead, we will hold that the statute was not intended to apply to the persons or situations in question." *Molodyh*, 304 Or at 299.

Petitioners bring this action under the authority of SB 822, §19, and SB 861, §11. Those provisions confer jurisdiction on this court to determine whether either of those 2013 enactments "is invalid" because it "breaches any contract between members of [PERS] and their employers"; that either law "is invalid" because it "violates any constitutional provision," including the state and federal Contract Clauses; or that the law "is invalid" for "any other reason[.]" The text of the jurisdictional provisions strongly indicates that the legislature intended to grant this court only the authority to conclude the statute "is invalid" as a matter of law—the very definition of a facial challenge.[10]

However, based on their respective petitions for judicial review and their opening briefs, Petitioners have not asserted a facial challenge to the 2013 legislation. To begin with, Petitioners do not argue that the 2013 legislation is an unconstitutional impairment of contract as it applies to all PERS members. Nor could they. For example, on its face, the portion of the legislation amending the rate of annual increases is not an impairment of contract either to PERS members who retired before the COLA law was enacted or to members who are hired after the effective date of the 2013 legislation, since in each case the members in question gave no consideration for any alleged contractual right to a COLA as described in the statute prior to its amendment in 2013. As to those members, ORS 238.360 as amended by the 2013 legislation is wholly valid, and Petitioners do not contend otherwise.

Moreover, even as to those members who worked after enactment of the COLA statute and prior to its amendment in 2013, the legislation cannot be said to substantially impair contractual obligations in *all* reasonably likely circumstances. Petitioners do not argue for that result, and this court could not

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[10] That is further supported by the fact that the legislature specifically commanded this court to give these proceedings "priority over all other matters before the Supreme Court." SB 861, §11. There would have been no reason to give such urgent priority to proceedings challenging the legislation merely as applied to the facts of an individual petitioner's retirement.

reach it. That is because, as shown below, whether any particular member receives a greater or lesser COLA amount under the 2013 legislation than under the prior law depends wholly on each individual member's circumstances and future economic conditions that are at this point unknown. The impairment allegedly effected by the 2013 legislation might be "substantial" as to a member who receives significantly less under the new law, but certainly is not as to a member who receives as much or even more.

Instead, Petitioners' filings make clear that they have asserted as-applied challenges to the 2013 legislation. They argue only that the 2013 legislation impairs contractual obligations owed to each individual petitioner. *See, e.g.*, Moro Br. at 65-71. And they present evidence intended to show only that such impairment is substantial as to the Petitioners before this court. *See, e.g.*, *id*.

There is no indication in the 2013 legislation that the legislature intended to confer original jurisdiction on this court merely to decide whether those statutes are unconstitutional as applied to some or all of these 16 Petitioners. Yet that is the only case Petitioners have put before this court. And even if this court were vested with jurisdiction to decide whether the 2013 legislation is unconstitutional as applied to those 16 individuals, this court could not on that basis invalidate the statute as it applies to other retirees. *See, e.g., Barcik v. Kubiaczyk*, 127 Or App 273, 281, 873 P2d 456 (1994) ("Although plaintiffs sought relief on behalf of themselves and 'others similarly situated,' this is not a class action; accordingly, we are concerned only with the rights of these particular plaintiffs.") *aff'd in part, rev'd in part on other grounds*, 321 Or 174, 895 P2d 765 (1995). That is because as-applied constitutional challenges are governed by the same essential rule of justiciability that governs all of this court's cases: the judiciary power is limited to adjudication of those facts before the court. To render a decision on facts other than those before the court is to issue a hypothetical or advisory opinion, which this court has no constitutional authority to do. *See Barcik*, 321 Or at 188; *Yancy v. Shatzer*, 337 Or 345, 362, 97 P3d 1161 (2004).

b. <u>The law of substantial impairment</u>

If *former* ORS 238.360 constitutes in relevant part a "statutory contract," this court must proceed to determine whether the 2013 legislation unconstitutionally impairs the state's obligations under that contract. *See* Or Const, Art I, §21 ("No * * * law impairing the obligation of contracts shall ever be passed * * *."); US Const, Art I, §10 ("No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *.") Legislation that eliminates or alters a statutory contractual obligation impairs that contract. Legislation that directs the state to act contrary to a statutory contractual obligation is a neither an impairment nor unconstitutional, but is a breach of that contract. *Strunk*, 338 Or at 170 (citing *Eckles*, 306 Or at 399-400).

To determine whether a legislative enactment *unconstitutionally* impairs an obligation of contract, however, the court must do more than determine whether the new legislation is inconsistent with a statutory contractual obligation it amends. As is clear from the time of Oregon statehood, the court must also determine whether the impairment is substantial.

Oregon's Contract Clause derives from the parallel provision of the United States Constitution. *Eckles*, 306 Or at 389-90; *see also Hall v. Nw. Outward Bound Sch.*, 280 Or 655, 659, 572 P2d 1007 (1977) (describing history of Oregon's Contract Clause). Consistent with that origin, this court has concluded that "the framers of the Oregon Constitution intended to incorporate the substance of the federal provision, as it was then interpreted by the Supreme Court of the United States," into the Contract Clause of the Oregon Constitution. *Eckles*, 306 Or at 390.

Federal jurisprudence recognizes that the Contract Clause's prohibition is not absolute or unlimited. As the U.S. Supreme Court has more recently stated:

> "Although the Contract Clause appears literally to proscribe "any" impairment, * * * 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.' Thus, a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution."

U.S. Trust Co. of N.Y. v. New Jersey, 431 US 1, 21, 97 S Ct 1505, 52 L Ed 2d 92 (1977) (citation omitted) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 US 398, 428, 54 S Ct 231, 78 L Ed 413 (1934)); *see also Kilpatrick v. Snow Mountain Pine Co.*, 105 Or App 240, 243-44, 805 P2d 137 (1991) ("The prohibitions against impairing the obligation of contracts in both the state and federal constitutions are not absolute."). The principle that, to be unconstitutional, an impairment must be substantial was an essential and well-founded part of the federal Contract Clause jurisprudence well before Oregon's decision to adopt the federal clause as its own. *See, e.g.*, *City of El Paso v. Simmons*, 379 US 497, 503, 85 S Ct 577, 13 L Ed 2d 446 (1965) (noting the "long line of cases" permitting state action affecting the operation of a contract "as long as there is no substantial impairment of the value of the obligation," beginning with *Sturges v. Crowninshield*, 17 US (4 Wheat) 22, 4 L Ed 529 (1819)). As such, that principle was a part of the Contract Clause as it was adopted into Oregon's own constitution. *Eckles*, 306 Or at 389-90.

Accordingly, decisions dating back to Oregon's earliest days reflect that very same principle. *See, e.g.*, *Goldsmith v. Brown*, 5 Or 418, 419-20 (1875) ("The act of 1870 is a contract, and the act of 1874, in our opinion, *seriously* impairs the obligations of that contract. * * * [W]e can reach no other conclusion than that the act of 1874 is unconstitutional.") (emphasis added). And while this court clarified in *Strunk* that it has not yet formally adopted that principle as applicable under Oregon's constitution, *Strunk*, 338 Or at 206 (declining to adopt substantiality requirement because "we need not answer that question in this instance"), other recent case law has applied the Contract Clause consistent with that longstanding rule, *e.g.*, *Hughes*, 314 Or at 20 (employees' rights of statutory contract "may not be *substantially* impaired by subsequent legislation") (emphasis added).

Given the wealth and depth of federal authority on the subject and the sound history on which the principle rests, this court should, consistent with *Eckles*, 306 Or at 390, adopt as Oregon law the federal requirement that an impairment of contractual obligation must be substantial to violate the prohibition contained in Oregon's contract clause.

To determine whether an impairment is sufficiently "substantial," courts in the federal context look to the extent to which the state's act disrupts the reasonable expectations of the parties to the contract. *Allied Structural Steel Co. v. Spannaus*, 438 US 234, 245-46, 98 S Ct 2716, 57 L Ed 2d 727 (1978). Accordingly, legislation may "restrict[] a party to gains it reasonably expected from the contract" without creating a substantial impairment. *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 US 400, 411, 103 S Ct 697, 74 L Ed 2d 569 (1983).

That same standard is appropriate here, particularly given the kinship between the contract clauses of the Oregon and United States Constitutions, and given that such an approach is broadly consistent with the use of the term "substantial" in other contexts of Oregon law. *See, e.g.*, *Hawkins v. City of La*

Grande, 315 Or 57, 68, 843 P2d 400 (1992) (describing the "substantial interference test" under the takings clause).

The *Strunk* court's analysis of what constitutes a "substantial impairment" is also instructive here. There, the court concluded that it need not decide whether to formally adopt the substantiality requirement because the impairment caused by the legislature's 2003 change to the annual assumed earnings rate guarantee was, in fact, "substantial." *Strunk*, 338 Or at 207. It came to that conclusion for two reasons: First, the provisions relating to crediting of Tier 1 members' regular accounts would result in a reduction of benefits "in amounts varying between approximately 12 and 20 percent per month," which reductions "are illustrative of a substantial impairment of the assumed earnings rate guarantee." *Id.* at 206. Second, the effect of the legislation was "retrospective" in that it imposed "a unilateral decision to reduce benefits already earned" for "work already performed"—an effect the court deemed to constitute a "substantial" impairment of the state's obligation. *Id*. at 206-07.

Here, the latter concern is not at issue. As to the former – the amount of the change in benefits imposed – given that a reduction in benefits of between "12 and 20 percent per month" is "illustrative of a substantial impairment," the 2013 legislation imposes no reduction even remotely similar.

c. The 2013 legislation does not substantially impair any contractual obligation to *provide* COLAs

If *former* ORS 238.360 establishes a contractual promise "to provide retired members with annual COLAs on their service retirement allowances, whenever the CPI warrants such COLAs," as stated in *Strunk*, then the 2013 legislation is not unconstitutional for the simple reason that it does not substantially impair the state's obligation to provide a COLA on retirees' benefit allowances. Rather, the amended statute *does* "provide retired members with annual COLAs on their service retirement allowances," as *Strunk* commands.

The provisions of the 2013 legislation that amend ORS 238.360—appearing under the heading "Cost of Living Adjustments"—provide that PERB annually "shall increase the yearly allowance that a member or member's beneficiary receives or is entitled to receive." Under the law as amended, the amount of that change is not determined by the calculation originally set forth in ORS 238.360(1), but rather according to a schedule set forth in §1(2) of SB 861. Under that schedule, rather than providing a variable adjustment of between -2.0% and +2.0% each year, PERB shall adjust each retiree's benefits by an amount equaling +1.25% of the member's first $60,000 in retirement allowance (supplemented by an additional 0.5% increase on annual benefits less than $20,000) and 0.15% of any benefit allowances exceeding $60,000. Further, the 2013 legislation provides such yearly benefit increases not merely "whenever the CPI warrants" doing so, but in *all* years, even when the change in CPI would not otherwise warrant providing such an increase and even when, under the former statute, the change in the CPI would have mandated a *reduction* in benefits. In short, under the 2013 legislation, the state remains obligated to provide exactly what *Strunk* concluded it must provide—an annual COLA benefit.

d. The 2013 legislation does not substantially impair any contractual obligation to provide COLAs *as calculated* in a certain way

Even if *former* ORS 238.360 constituted a statutory contract entitling retirees to receive COLAs as calculated under that law, the 2013 legislation does not substantially impair that obligation. That is because as to the vast majority of retirees, the 2013 legislation causes no substantial reduction in COLA benefits—and in some circumstances it increases those benefits.

The question whether the 2013 legislation substantially impairs an obligation to provide COLAs as calculated in a certain way cannot simply be reduced to the question whether the method of COLA calculation has changed. Rather, the inquiry must consider the *amount* in COLA benefits the retirees actually receive under each law. Because the benefit of the alleged contract is purely financial (and therefore fungible, *see, e.g.*, *United States v. Sperry Corp.*, 493 US 52, 62 n 9, 110 S Ct 387, 107 L Ed 2d 290 (1989) ("Unlike real or personal property, money is fungible.")), a PERS beneficiary could have no "reasonable expectation" of anything other than a substantially equal *amount* in COLA benefits. Accordingly, when determining whether the legislation effects a substantial impairment, it is not the change in calculation mechanism that matters but the change in amount. A change to the calculation mechanism that resulted in no decrease in benefits, for example, would not constitute a substantial impairment of the state's obligation to provide those benefits. *See OSPOA*, 323 Or at 374 n 18 (contract clause violation arises where legislative enactments "increase[] the level of public employee contributions *without providing offsetting benefits*") (emphasis added).

As to the vast majority of retirees, that description is remarkably close to the actual impact of the 2013 legislation. Indeed, limiting the financial impact on those receiving more modest allowances was among the legislation's chief objectives. To understand how the law achieves that result, Respondents briefly recount the law's real effect on various retirees under various economic conditions.

First, as stated above, the 2013 legislation provides for COLA increases not merely "whenever the CPI warrants" doing so, but in all years. Thus, under the 2013 legislation, if the CPI remains unchanged for a sustained period, retirees generally will earn more in COLA benefits under the 2013 legislation than they would have under the prior law.[11] Moreover, because the 2013 legislation eliminates the possibility of any negative cost-of-living adjustment, in any sustained economic downturn *all retirees will earn more under the new law*, being newly protected from the reduction in benefits they otherwise would have suffered.

Enhanced benefits under the 2013 legislation are not limited to times of economic distress. In fact, the majority of retirees will earn more in COLA benefits than under the prior law even in times of modest economic growth. For those earning $60,000 or less in retirement allowance each year—a segment representing approximately 90% of all PERS retirees as of February, 2014 (ER-144)—the 2013 legislation currently provides COLAs in an amount equal to +1.5% of retirement allowance every year. (In addition, retirees earning less than $20,000 receive a supplemental annual increase of 0.25% through 2019.) Accordingly, in a moderately improving economy that sees inflation of anything less than 1.5% per year, which, for context, is near the most recent five-year average rate of inflation in Portland of 1.8% (ER-136), *nine out of 10*

[11] Under the prior law, some retirees would continue to receive benefit increases for a limited time, to the extent their annual adjustments would continue to reflect "banked" percentage adjustments from prior years. The number of years during which such a "banked" positive adjustment would apply would differ as to each retiree. Some would receive none at all.

PERS employees will earn more under the 2013 legislation than under the prior law.[12]

Even in the opposite economic environment—one of sustained, soaring growth—the effects of the 2013 legislation as to most retirees will be quite small. Under the prior law, those same nine out of 10 retirees could potentially receive an annual increase in an amount no greater than 2.0% of their retirement allowance, while under the new law, they would receive an increase of at least 1.5% and as much as 1.75%. Thus, even in the steepest of inflationary environments, the net effect of the law as to the vast majority of retirees in any given year amounts to a maximum difference of 0.25% to 0.50% of what they would earn under *former* ORS 238.360—a real-world change that amounts to no more than $300 in a year, and for most will be far smaller.

If, as this court held in *Strunk*, a reduction in benefits "in amounts varying between approximately 12 and 20 percent per month" is "illustrative of a substantial impairment" of PERS contract rights, then a difference of 0.25% to 0.50%—which, under the 2013 legislation, is the *worst* result that approximately nine out of 10 retirees would ever see in annual COLA changes—can hardly be described in the same terms.

Only the approximately one in 10 retirees who earn greater than $60,000 per year could be subject to a more substantial reduction in future COLAs under

[12] *See* Footnote 12, *supra*.

the 2013 legislation. As to those individuals, the 2013 legislation affords a lesser COLA of 0.15% as to the marginal amount of retirement allowance exceeding $60,000. And even most of those individuals will see at worst only modest changes; most who earn more than that threshold do not exceed it by very much,[13] and the law treats every retiree's first $60,000 identically. But even if in a given year the 2013 legislation could be said to substantially impair the state's COLA obligations as to the handful of highly-compensated retirees at the very pinnacle of public retirement income, the law's effect on those few retirees would not permit a decision finding the 2013 legislation unconstitutional in its entirety. At best, that would permit a decision finding the 2013 legislation unconstitutional as applied to the facts presented by those specific retirees.

e. The inescapable problem of speculation

Finally, what all of the above illustrates is not merely a problem of individualized impact—because whether a given retiree will earn a greater or lesser COLA under the 2013 legislation than before depends largely on that retiree's benefit, accumulated changes in CPI in excess of the statutory limit, and other individual factors—but even more fundamentally a problem of speculation. Even if all retirees were identically situated, one could not

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[13] Only a small fraction of PERS retirees—fewer than 1 in 20—exceed $72,000 annually. ER-144. That small fraction, however, takes home well over 15% of the system's benefits. *Id.*

determine in a given year whether a retiree will receive greater or lesser benefits under 2013 legislation as compared to the prior law until we know that year's economic conditions. In a year of growth, a retiree may receive a lower COLA than before—but may not, depending on whether that growth is weak or strong. And in a period of decline, a retiree is likely—eventually certain, in fact—to receive a greater COLA under the 2013 legislation than under the prior law. Whether, to what extent, when, and to whom the 2013 legislation will result in smaller COLA benefits going forward is a fact we simply do not know and cannot accurately predict. Indeed, in this very case, the court already has recognized that, as to its own members, "the potential, future impact * * * of the changes to PERS made by the 2013 PERS legislation" is an "uncertain and perhaps speculative" matter. *Moro v. State*, 354 Or 657, 664, 320 P3d 539 (2014) (opinion on motion to disqualify). This court has made clear that it would be inappropriate to determine the constitutional validity of a law based on speculation about future economic events. *See State ex rel Kane v. Goldschmidt*, 308 Or 573, 590, 783 P2d 988 (1989) ("Although [the statute] is not [facially] unconstitutional, it might be applied in an unconstitutional manner * * * [depending on] fluctuations in the price of construction or acquisition or on the values of owned or leased property" in the future; however, "[i]f we attempted to anticipate" those conditions, "we would stray into giving an advisory opinion.”). But that is exactly what Petitioners’ challenge invites this court to do. The court should decline that invitation.

C. <u>The OPSRP COLA Law</u>: The 2013 Legislative changes to the formula by which COLAs are calculated under ORS 238A.210 does not constitute an impairment of contract under the Oregon or United States Constitutions.

As Petitioners in this matter note, the COLA provision of OPSRP prior to the 2013 legislation, found at *former* ORS 238A.210, is similar to its Tier 1/Tier 2 counterpart at ORS 238.360. Insofar as expression of promissory intent is concerned, the text of ORS 238A.210 does not substantively differ from that statute’s counterpart at ORS 238.360, and petitioners make no claim that it does.

The COLA statutes applicable to Tier 1/Tier 2 and OPSRP differ, however, with respect to expressions of contractual intent. Having seen four decades of arduous litigation on the subject, the 2003 legislature knew to make clear in the statute’s text whether and to what extent it intended to establish a statutory contract limiting its ability to later amend the law. Accordingly, in ORS 238A.470, the legislature stated in no uncertain terms that it intended to preserve its ability to amend the provisions of OPSRP, and not to be prohibited from doing so by any “statutory contract,” subject to one limitation: benefits attributable to service performed and salary earned before the date of the legislative change would be protected. *Id.* Thus, to the extent the legislature seeks to alter benefits attributable to service performed and salary earned, it may do so only prospectively; only "benefits attributable to service performed and salary earned on or after the date the change is made" may be changed by legislative amendment. *Id.*

The question, then, is whether ORS 238A.470 evinces a clear and unambiguous expression of intent to prohibit prospective changes to COLA benefits. The answer to that question is no.

First, the meaning of the statute is clear. By way of context, ORS 238A.125 through ORS 238A.130, under the heading "Computation of Benefit," provide a straightforward formula for the calculation of OPSRP retirement service allowances based on two specific factors: years of service performed and amount of salary earned. ORS 238A.470, in turn, uses those same two factors to describe that statute's limit on the legislature's power to "change the benefits" provided under OPSRP, distinguishing between the benefits one is entitled to for service performed and salary already earned, and the benefits one may earn for service performed and salary earned in the future. OSR 238A.470 places the former beyond the legislature's reach, but expressly permits the legislature to modify the latter.[14]

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[14] The legislature could, for example, abolish the defined-benefit structure of OPSRP entirely, replacing it with a defined contribution system akin to the 401(k) programs offered to many workers in the private sector. That change, however, would apply only prospectively; an existing OPSRP member with ten years of service at the time of that legislative change would still be entitled to receive 1.5% of his or her final average salary for every year that he

Cost-of-living adjustments are unaffected by the limitation in ORS 238A.470 because the proportional change that a retiree was to receive in any given year under *former* ORS 238A.210 was not "attributable to" service performed or salary earned at all. Under *former* ORS 238A.210, the percentage COLA applicable to retirees' benefits in a given year is exactly the same regardless of service performed and regardless of salary earned. The percentage amount of that COLA under ORS 238A.210 (2011), be it 2% or a lesser figure, is "attributable to" nothing other than changes in the CPI, as constrained by the statute itself. And the dollar amount of COLA under the former calculation was determined by application of the percentage increase to the member's service retirement allowance, not to the "salary earned." Thus, the amount of the COLA under the former statute was not attributable to "service performed and salary earned" and, accordingly, ORS 238A.470 is not

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or she has already worked. ORS 238A.470 is thus a direct reflection of this court's discussion in *Hughes*:

> "Employe[e] pension plans, whether established by law or contract, create a contractually based vested property interest which may not be terminated by the employer, *except prospectively*. The employer offers payment of future pension benefits as part of compensation for work currently performed. Employees accept and earn such future benefits by performing current labor."

Hughes, 314 Or at 20-21 (emphasis in original) (quoting 38 Op Atty Gen 1356, 1365 (1977)).

an expression of clear and unmistakable legislative intent to prohibit changes to ORS 238A.210. There is no sufficient basis from which to conclude that the state is prohibited from altering COLA benefits under ORS 238A.210 as a matter of statutory contract.

That understanding is also consistent with the way OPSRP describes COLAs elsewhere in Chapter 238A. For instance, ORS 238A.120 sets out the conditions under which a vested inactive member may withdraw from the pension program and receive a lump-sum payment. As the statute provides, that option is available if "the member's benefit" under OPSRP is $5,000 or less. *Id.* at (1). The statute is clear, however, that calculation of "the member's benefit" is *not* to include COLAs. Indeed, the statute does not even refer to the COLA as a "benefit" unto itself, but rather describes that amount as a "value attributable to adjustments to the benefit under ORS 238A.210." *Id.* at (5).

That same result is equally clear in light of the statute's broader context. Even as interpreted by Petitioners, ORS 238A.470 does not prohibit all potential changes to the OPSRP COLA statute, but only those that would affect benefits attributable to service performed and salary earned prior to July 2013. To carry out that scheme, however, the legislature would have to have intended for PERB annually to provide one cost-of-living adjustment to the portion of a retiree's service allowance attributable to service performed and salary earned up to July 2013 (at a rate calculated under the pre-2013 law), and then provide a second cost-of-living adjustment (at a rate calculated under the 2013 legislation) to the portion of his or her service retirement allowance attributable to service performed and salary earned from July 2013 forward. The legislature could have stated as much, but it did not. Instead it stated that "a person's yearly pension or benefit "shall be increased" by the applicable rate.

Moreover, applying multiple COLAs to a unitary annual retirement service allowance would be wholly inconsistent with the existing retirement benefit provisions of OPSRP. In ORS 238A.125, the legislature directed that all retirees "shall be paid an annual pension * * * [equal to] 1.5 percent [or 1.8% for police and fire] of final average salary multiplied by the number of years of retirement credit" earned. The formula provides for a fixed annual retirement payment, ORS 238A.125, calculated not according to the salary earned in each year of service, but based on a calculation of final average salary, ORS 238A.130. Given the nature of the benefit adopted by the legislature, it would be impossible to discern which part of a retiree's annual service retirement allowance resulted from work performed and salary earned prior to 2013 as opposed to after.

The legislature did not direct PERB to apply different cost-of-living increases to multiple retirement benefit allowances, based on different salaries applicable to different periods of time. Imposing such a scheme now would be contrary to the legislature's express intent throughout ORS Chapter 238.

D. <u>The 1991 Tax Remedy</u>: The legislature's elimination for out-of-state retirees of the benefits provided under 1991 SB 656 does not constitute an impairment of contract.

2013 SB 822, §11 amended ORS 238.372 to provide that the benefits established under Oregon Laws 1991, chapter 796 (SB 656) shall not be paid to a retiree whom the board learns is not subject to Oregon personal income tax. That amendment did not constitute an impairment of contract under either the Oregon or United States Constitutions, because as to those individuals there is no statutory contract to impair. That is true for two reasons: First, SB 656 did not establish any rights of statutory contract to the benefits that bill describes, because the law includes no clear and unambiguous expression of intent to establish a contract and thereby to extinguish the legislature's power to change the law. Second, to the extent SB 656 constituted a statutory contract to provide the benefits it describes, the beneficiaries of that contract did not include those whose retirement allowances were not subject to Oregon income tax.

1. Text and context

SB 656, §2(1),[15] provided in relevant part:

> "(1) Upon retirement of an employee who is a member of the system and computation of that

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[15] Section 2(1) provided the relevant benefits to those retiring on or after 1991. Section 6 provided those same benefits to those who had already retired by that point. The provisions, for purposes of this matter, are identical. *See* Or Laws 1991, ch 796.

> member's service retirement allowance * * *, the board shall add to the amount of the allowance * * * an additional amount equal to the percentage increase provided in subsection (4) of this section."

As with 1971 HB 1397, SB 656 contains no language evincing a clear, unambiguous, and unmistakable expression of promissory intent to establish contractual rights and to extinguish the legislature's power to amend the law in the future. Petitioners claim that the bill's language—specifically, the five lines set out above—is "mandatory and promissory in nature," Moro Br. at 62, but they do not explain why or how, other than to note the legislature's use of the word "shall" in the excerpt above. As stated above, that is not enough. The legislature in ORS 238A.470 has made clear what kind of wording evinces an intent to protect certain benefits from later statutory change. *See* ORS 238A.470. No such words even remotely similar appear in SB 656.

Nevertheless, even if this court could conclude that the text of SB 656 set out above were "unambiguously promissory," that would not resolve the central question of the resulting contract's scope. As to that question, the context of the bill's benefit provisions provides essential guidance. *See Hughes*, 314 Or at 25 (it is "of primary importance" to consider the context in which a law appears). Here, that context makes indisputably clear that, to the extent the legislature expressed in SB 656 "promissory intent" to provide the benefits that bill describes, its intent was limited to providing them only when the service retirement allowance at issue was subject to Oregon income taxation.

As described in greater detail below, the purpose of SB 656 was to provide compensation for the loss in income suffered by Oregon's retirees when the legislature made the decision to subject their retirement benefits to Oregon income tax. Given the intent to compensate retirees for that loss, it would have been flatly contrary for the law to provide that compensatory benefit even when retirees' income was *not* taxed, such that retirees had no loss to compensate. Accordingly, the legislature included in the bill a separate section providing in relevant part:

> "* * * Notwithstanding any other provision of this Act, the increased benefits payable * * * [under] this Act shall not be paid in any tax year in which the retirement benefits payable under the Public Employe[e]s Retirement System are exempt from Oregon personal income taxation."

SB 656, §12. That limiting principle could hardly be clearer: To the extent the legislature expressed "promissory intent" to provide SB 656 benefits, it intended to entitle retirees to those amounts *only when Oregon taxed those benefits*, and it correspondingly intended to prevent retirees from receiving both an exemption from Oregon income taxation and the compensatory benefit in the same year.[16]

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[16] It is not surprising that SB 656 failed to provide that *individuals* not subject to Oregon income tax by reason of non-residency would not be entitled to the compensatory benefit, because, at the time of the law's enactment, Oregon taxed nonresidents on their PERS income. *See* Or Laws 1997, ch 839, §10

2. Legislative history of SB 656

The legislative record unequivocally supports these conclusions. Prior to 1991, PERS benefits paid to retirees were exempt from Oregon state taxes, while federal pension benefits enjoyed no such exemption. *See Stovall*, 324 Or at 98 (describing history); *Hughes*, 314 Or at 7-8 (discussing the evolution of tax exemption). In 1989, the U.S. Supreme Court concluded that such a scheme violates federal statutory and constitutional principles of intergovernmental tax immunity; states must either tax or exempt state and federal retirement benefits alike. *Davis v. Mich. Dep't of Treasury*, 489 US 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989). In order to comply with *Davis*, the Oregon legislature took the latter option, subjecting PERS retirement benefits to taxation for the first time in 1991. *See* Or Laws 1991, ch 823; *Stovall*, 324 Or at 99 (discussing the history leading to enactment of that law); *Hughes*, 314 Or at 9 (same).

By that time, however, the concept of PERS as a "statutory contract" had been established, *see, e.g.*, *Taylor v. Multnomah Cnty. Deputy Sheriff's Ret. Bd.*, 265 Or 445, 451, 510 P2d 339 (1973), and the legislature was well aware that suddenly subjecting PERS benefits to income taxation without providing a compensatory benefit would invite costly legal action. In the hope of preemptively addressing that problem, on May 8, 1991 then-Senator John

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(exempting from taxation, for the first time, retirement income received by a nonresident).

Kitzhaber presented to the Senate Committee on Labor a set of legislative proposals to compensate PERS retirees for that loss:

> "I am here to offer several options for the Senate Labor Committee to examine on increasing PERS benefits. As a result of the U.S. Supreme Court decision, the State of Oregon is required to equalize its treatment of federal and state retirees. The Legislature recognizes that the approach it has chosen to equalize this tax treatment embodied in HB 2352 will create a burden for state retirees and possibly for some active members of PERS.
>
> "I am requesting that the Senate Labor Committee consider the options I will present today. I have made an effort to work this issue out. It is an issue fraught with lawsuits, serious politics, serious State dollars, and I think the committee will have to work through this and come to some conclusion."

App-20-21.

Kitzhaber made the overall intent of the proposals clear: "We are trying to develop a strategy that offsets the impact of the tax." App-21. Kitzhaber's original proposals included several options. One, akin to that ultimately enacted, was a tiered benefit based on years of service. He also suggested potentially pursuing a more specific means of compensation, involving "a mechanism to essentially calculate the impact of the tax on individuals as they come out of the system." App-21-22. As Kitzhaber stated, as to all of the options, "[t]he objective is to try to mitigate the impact of the tax and to avoid to the greatest extent possible a lawsuit based on a breach of contract." *Id.*

Kitzhaber's description of the bill as a means of compensating retirees' losses due to taxation is echoed frequently and is completely uncontradicted in the legislative record. *See, e.g.*, App-34 (Memorandum from City of Portland dated May 13, 1991, noting "The 1991 Legislature is considering a number of options for responding to a 1989 Supreme Court decision which held that, for purposes of taxation, all public employee retirement benefits must be treated equally. * * * [One] proposal under consideration would increase the monthly retirement benefits of PERS retirees as compensation for the loss of their income tax-free privileges."); App-36 (Letter from League of Oregon Cities to Senate Labor Committee dated May 14, 1991, stating "[We] appreciate the dilemma facing the legislature regarding the taxation of public employees retirement benefits and the pending action to compensate retirees for the costs. * * * We recognize that the root of SB 656 is the U.S. Supreme Court decision which has caused the State to tax public retiree benefits, and then to presume, for other legal reasons, that it is necessary to increase retiree benefits as a compensatory measure."). That remained true as the bill proceeded from the Senate to the House. *See, e.g.*, App-39 (statement of Administrator Victoria Dozler, House Committee on Labor, stating "this bill is meant to offset the tax being levied" on PERS benefits).

Consistent with that singular purpose, the legislative record also confirms that the legislature's corresponding intent in enacting §12 was to ensure that retirees would be entitled to SB 656 compensation only when Oregon taxed their PERS benefits, and that retirees would not be entitled to that compensation when their PERS benefits were subject to Oregon tax. In a May 14, 1991 work session of the Senate Committee on Labor (where SB 656 originated), Committee Chair Senator Grattan Kerans began by describing SB 656 and distributing its latest amendments, ultimately seeking the committee's vote to move the bill as amended to the Senate floor. In doing so, Chair Kerans had Committee Counsel Annette Talbott explain the effect of each amendment. As the minutes of that meeting describe, she explained the addition of §12 as follows:

> "Section 12 provides that the increase in benefits under the act shall not be paid in any tax year in which the retirement benefits payable under PERS are exempt. *It makes clear that a person would not receive both the tax exemption and the benefit.* "

App-27 (emphasis added). Consistent with the text of §12, the legislative intent underlying that provision was clear: because the increase in benefits is intended to compensate for taxes paid in Oregon, that increase in benefits is not to be paid when a person's retirement benefits are not taxable in Oregon. No discussion, correspondence, or exhibit anywhere in the legislative record evinces any contrary intent.[17]

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[17] That was not for lack of opportunity, as can be the case when amendments are hastily appended to a bill just before its enactment. To the contrary, §12

Indeed, the sole proposed amendment that would have concerned contract rights did not state any intent to establish a contract, but merely stated the legislature's apparent irresolution on that issue. In a June 7, 1991 House Labor Committee work session on SB 656, Rep. Johnson orally proposed to amend the bill to change the date by which recipients needed to have retired to be eligible for the bill's compensatory benefits, as well as adding a new sentence reading:

> "Nothing contained in this act shall be construed as evidence that the members either have or do not have any contractual rights to the benefits granted herein."

App-44-45. As Rep. Johnson stated, "We as the legislature should leave the issue of whether or not there is a contract up to the court and remain a neutral entity and we should make that clear by adding" that language. *Id.* The Committee approved Rep. Johnson's proposed amendment. As discussed above, the idea that it is the function of the court rather than the legislature to determine whether a statute should be treated as a contract is exactly backwards. But, however misguided Rep. Johnson's proposal may have been, it is wholly contrary to any suggestion that the legislature intended to express

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was part of SB 656 from the beginning, following the bill's first public hearing on May 8, 1991. Through well over a month of hearings and work sessions by five different committees in the Senate and House, the benefit provisions of SB 656 underwent substantial changes as the legislature sought to reach the optimal means of compensating retirees' tax losses. In contrast, §12 was never substantively changed.

"clear" and "unmistakable" promissory intent in the text of the bill itself. A moment later, on the basis of another Representative's having misunderstood Rep. Johnson's first proposed amendment (concerning the date by which recipients needed to have retired), the motion was reconsidered and then voted down. *Id.* Although the Committee evidently had otherwise approved of the additional "no contract rights" language, that language was not later taken up on its own, and the Committee moved on. Nothing in the bill from that point forward addressed the issue.

There is no basis from which to conclude that the legislature unambiguously intended SB 656 to constitute a statutory contract of any kind. To the extent the legislature intended to establish a statutory contract at all, it is incontrovertibly clear that its intent did not extend to promising SB 656 benefits to retirees whose PERS benefits were not subject to Oregon taxation. Rather, all evidence indicates the opposite—an intent to provide SB 656 benefits only when retirees' benefits were taxed by Oregon, and to affirmatively prevent retirees from receiving those benefits when their benefits were not taxed by Oregon, because retirees should "not receive both the tax exemption and the benefit" in the same year. Accordingly, by later deciding not to provide SB 656 benefits to those who are not subject to taxation by reason of non-residency, the legislature did not impair or breach any statutory contract. To the contrary, the

2013 legislature carried out precisely what the 1991 legislature intended to accomplish.

E. The 1995 Tax Remedy: The legislature's elimination for out-of-state retirees of the benefits formerly provided under 1995 HB 3349 does not constitute an impairment of contract.

Petitioners Reynolds, Riemer, and Jones (but not the Moro petitioners) argue that the 2013 legislation substantially impairs contract rights granted to them by the 1995 Legislature in Oregon Laws 1995, chapter 569 (HB 3349). Petitioners' claims fail for two reasons. First, the substantive terms of the law are to the contrary. The legislature expressly stated that the benefits provided under that law "shall not be paid in any tax year in which retirement benefits that are payable under the Public Employees Retirement System to a member of the system * * * are exempt in whole or in part from Oregon personal income taxation." *Id.* at §2(2). Second, the text expressly disavows contract rights. The legislature stated in §2(3) of the law that "[n]o member of the system or beneficiary of a member of the system shall acquire a right, contractual or otherwise, to the increased benefits provided by sections 3 to 10 of this 1995 Act." Put simply, Petitioners' contract rights under the 1995 law have not been substantially impaired by the 2013 legislation because the legislature has made clear that no such contract rights exist.

F. Substantial Public Purpose: If the 2013 Legislation substantially impaired any obligation of statutory contract, that legislation is a reasonable means to address an important and legitimate public purpose, and is therefore constitutionally permissible.

Even if this court were to conclude that the laws amended by the 2013 legislation contained "clear," "unambiguous," and "unmistakable" expressions of promissory intent to bind subsequent legislatures, and even if the court concluded that the 2013 legislation substantially impaired those contractual promises, the question remains whether the Contract Clauses in the Oregon or U.S. Constitutions prohibit legislative impairment of such contractual promises in all circumstances. The answer in both cases is no. The history of both the Oregon and the federal Contract Clauses demonstrate that their scope does not extend so far as to prohibit the legislature from impairing a contractual obligation where it is reasonable and necessary to do so in order to serve an important and legitimate public purpose.

1. The limits inherent in the Contract Clause

As stated in greater detail at 46-47, *supra,* both Oregon's Contract Clause jurisprudence and that of the federal Contract Clause from which Oregon's clause derives have consistently recognized that the prohibition on impairment of contractual obligations is not absolute or unlimited. Key among those limitations is the notion that, where the state's legislative act is justified by a sufficiently important public cause and the act is sufficiently narrowly tailored thereto, the Contract Clause does not prohibit that act, even though it may be said to have impaired the contractual obligation at issue.

That principle has been an essential part of the federal Contract Clause jurisprudence for more than 200 years, and it figured prominently in case law immediately prior to Oregon's adoption of the clause in its own Constitution. One such case is *Phalen v. Virginia*, 49 US (8 How) 163, 168, 12 L Ed 1030 (1850). In 1829 the Virginia Legislature created a statutory body charged with holding lotteries to raise money for certain public improvements. Eventually, in 1839, the body engaged a corporation to conduct those lotteries. In the meantime, however, in 1834 the legislature passed a separate law prohibiting lotteries, which was intended to protect the public welfare. Plaintiff, whom the state had engaged to conduct the lotteries, contended that the 1829 law constituted a statutory contract and that Virginia's 1834 law constituted an impairment of that contract in violation of the federal Contract Clause.

The Supreme Court disagreed. It explained that, "assuming * * * [the 1829 law] conferred a privilege or benefit on the corporation in the nature of a franchise or irrevocable contract," the Contract Clause does not prohibit legislative impairment of the state's own contractual obligations where "reasons of sound policy" and the protection of public welfare—such as "[t]he suppression of nuisances injurious to public health"—necessarily "justify legislative interference," because the Contract Clause's prohibition on impairment of contractual obligations "does not extend" that far. *Id.* at 167-68. The reason for that principle, the Supreme Court later explained, is because notwithstanding the Contract Clause's prohibition on impairment of contractual obligations, "the state also continues to possess authority to safeguard the vital interests of the people"; thus, "the reservation of essential attributes of sovereign power is * * * read into contracts as a postulate of the legal order." *Home Bldg. & Loan Ass'n*, 290 US at 435.

Application of this doctrine is not a matter of "balancing" the fact of a constitutional violation against the value of the public good that might result. Rather, it is a limit contained in the Contract Clause itself, such that under the requisite circumstances, the state's act of impairment *does not violate the Contract Clause in the first place*, because the Clause "does not extend" that far. It is undisputed—and in fact indisputable—that the framers of the U.S. Constitution did not intend the Contract Clause to take away the states' "essential attributes of sovereign power," including the power to enact laws necessary to protect the public welfare. *See, e.g., U.S. Trust Co.*, 431 US at 23 ("[T]he Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.").

Neither did the framers in Oregon. Accordingly, and consistent with the historical nexus of Oregon's Contract Clause with that in the U.S. Constitution, the Oregon Supreme Court has in several cases throughout the last century made clear that Oregon's Contract Clause is limited in precisely the same way. For instance, in *Campbell*, 159 Or 208, as discussed above, several public school teachers alleged that a 1935 law that provided for compulsory retirement at age 65 violated the Contract Clause. The teachers asserted that, under the preceding teachers' tenure law of 1913, they had acquired rights of "statutory contract" entitling them to continue working past 65.

The court disagreed on two independent grounds. First (as discussed in greater detail above), it concluded that the 1913 law was not a statutory contract, because there was no "language in the act clearly and plainly indicating an intention to surrender or suspend legislative control over the tenure of teachers." *Id.* at 214. Second, even assuming a statutory contract did arise, the court concluded that the legislature's impairment of those contractual rights would not be unconstitutional under the Contract Clause, given the importance of allowing the legislature to set education policy:

> "Assuming, but not deciding, that plaintiffs acquired vested contractual rights under the 1913 tenure law, we think such private rights must yield to the public welfare when a different educational policy has been determined through the proper exercise of the police power. The rule is thus stated in *Treigle v. Acme Homestead Association*, 297 U.S. 189, 56 S.Ct. 408, 411, 80 L.Ed. 575, 101 A.L.R. 1284: 'Though the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the

> accomplishment of that end and must not be arbitrary or oppressive.'
>
> "In 6 R.C.L. 347, it is said: 'All contracts made with reference to any matter that is subject to regulation under the police power must be understood as made in reference to the possible exercise of that power, because if the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose of doing that which otherwise might be prohibited.'
>
> "* * * * *
>
> "It is unquestionably the function of government to establish and maintain public schools. Indeed, the Constitution of Oregon, art. 8, § 3, specifically commits to the legislative assembly the 'establishment of a uniform and general system of common schools.' That public education and the control thereof is a proper subject for the exercise of the police power is beyond question. It is difficult to conceive of any legislative policy which more vitally affects the public welfare."

Id. at 217-18. Under "these fundamental principles," as the court described them,

> "the precise question is: Is the statutory enactment of 1935, making it compulsory for teachers to retire at the age of 65, reasonably adapted to the end to be attained, viz., the promotion of the public welfare? If so, it is a proper exercise of the police power and private rights must yield. If it has no such relation, it cannot impair the obligation of contracts."

Id. at 218. The court answered that question unequivocally yes. It explained:

> "The Legislature, in the exercise of its sovereign power, has in effect said that compulsory retirement of teachers who are 65 years of age tends to promote the general welfare of the public and is for the betterment of the public school system. Many reasonable–minded persons believe that there is danger of schools being loaded down with superannuated teachers who have lost their appeal to youth. * * * Whether such legislation is wise is not for this court to determine. It is sufficient to say that we do not consider such compulsory retirement of teachers arbitrary or unreasonable. It is beside the question that the plaintiffs are efficient and well qualified to teach. Laws are not enacted to fit individuals. It is the average teacher of the age of 65 years that the Legislature had in mind.
>
> "In our opinion, the sovereign power vested in the Legislature to enact laws for the betterment of common schools is one which cannot be bartered away. The exercise of such power at one time does not mean that future Legislatures may not, in the light of experience, declare a different policy. If such is not the law, there is no hope for progress, and future legislators, in determining educational policies concerning the tenure of teachers, must follow in trodden paths."

Id. at 218-19 (citation omitted).

Consistent with *Campbell*, this court has approached the central questions of the doctrine—whether a statute is directed at a sufficiently important matter of public welfare and whether the statute constitutes an appropriate means to promote it—with a measure of deference to the legislature's judgment. Thus, in *Evans v. Finley*, 166 Or 227, 111 P2d 833 (1941), appellant contended that a statute of limitation unconstitutionally impaired its mortgage rights, and that the so-called “police power” limitation on the reach of the Contract Clause did not save the statute because mere statutes of limitation are not aimed at a sufficient public exigency. This court explained:

> “[Appellant] argue[s] that a statute of this kind cannot be upheld unless it has its basis in the promotion of the public welfare; and it seems to be thought that unless some great public exigency is shown to have moved the legislature to action, the law must be stricken down. Statutes of limitation are no doubt passed to promote the general welfare. The mischief which they are intended to remedy ‘is the general inconvenience resulting from delays in the assertion of a legal right which it is practicable to assert.’ But the question whether such mischief exists and the means to be taken to curb it is for the legislature, not the courts. We must assume that it was the judgment of the legislature that hardships and injustices, perhaps frauds, had been suffered if not encouraged under the law before the amendment of 1935, and that the amendment, by requiring a more prompt enforcement in the courts of the rights of mortgagees, or in lieu thereof the filing of the prescribed affidavit, would prevent, or lessen, these evils. The court cannot say that there was no reasonable basis for this determination.”

Id. at 238 (citation omitted); *see also Schramm v. Bank of Cal., Nat’l Ass’n,* 143 Or 546, 579, 20 P2d 1093 (1933) (with respect to “the restriction which 1925 Session Laws, c. 207, §88, imposed on the state bank’s borrowing and pledging power[,] * * * we construe the 1925 act as an exercise of the police power of the state intended to promote the public welfare and protect depositors against imposition. The unlimited borrowing and pledging powers which were conferred upon the Bank of Kenton by its charter were not immune from restriction when the public welfare demanded that they be restricted. A corporation, like an individual, is always subject to laws which are intended to carry into effect the police power of the state.”).

Far from being a mere historical anomaly, the doctrine is one for which the Oregon courts have continued to voice support well into the modern era. *See, e.g.*, *Kilpatrick*, 105 Or App at 243-44 (“Legislation adjusting the rights and responsibilities of contracting parties must be on reasonable conditions and of a character appropriate to the public purpose justifying its adoption.”). Moreover, this court has taken the same approach in other similar constitutional contexts. In fulfilling its obligation to protect the health, safety and welfare of its citizens, the legislature sometimes must pass legislation that impacts a right guaranteed by the state or federal constitution. The Oregon courts have consistently held that such an encroachment is permissible if reasonably necessary to address a threat to the interests and welfare of the public in general. *See, e.g.*, *State v. Boyce*, 61 Or App 662, 665-66, 658 P2d 577 (1983) (applying principle to claim of violation of Oregon Constitution, Article I, §27); *Bowden v. Davis*, 205 Or 421, 433-34, 289 P2d 1100 (1955) (considering claims of due process violation and violation of Oregon Constitution, Article I, §18); *Christian v. LaForge*, 194 Or 450, 462, 242 P2d 797 (1952) (considering claim of violation of due process).

The doctrine, while well-founded and historically sound, came to be interpreted by this court in an altogether different way beginning in 1988 with *Eckles v. State*. The court in *Eckles* ostensibly acknowledged the doctrine's underlying principle, 306 Or at 398 ("[T]he contracts clause must be accommodated to the inherent police power of the State to safeguard the vital interests of its people") (internal quotation marks omitted), but then proceeded to characterize the argument as something wholly different. The court described the issue as "a 'balancing' analysis" employed primarily in the federal courts, under which the validity of an act impairing a contractual obligation would be determined by "balancing" the fact of the resulting constitutional violation with the important public good that such violation would create. The court disavowed that approach, explaining that "the state cannot avoid a constitutional command by 'balancing' it against another of the state's interests or obligations, such as protection of the 'vital interests' of the people." *Id*. at 399. Rather, "[L]imits on the contractual obligations of the state must be found within the language or history of Article I, section 21, itself." *Id.*

Put simply, *Eckles* misunderstood the doctrine in its entirety. As explained above, and as illustrated in every prior Oregon case applying and construing that doctrine, it is not a matter of "balancing" the fact of a constitutional violation against the value of the public good that might result. Rather, it is a limit "found within the language or history of Article I, section

21, itself," as *Eckles* requires, providing that under certain requisite circumstances the State's act of impairment *does not violate the Contract Clause in the first place*, because the Clause "does not extend" that far.

Unfortunately, later cases of this court, when presented with the legally and historically sound doctrine described in *Campbell*, have looked to the erroneous description provided in *Eckles* and searched no further. For instance, the court in *Hughes* explained that "the state's inherent power to enact laws and regulations" cannot save what would otherwise constitute a constitutional violation, because while "a state may not contract away its 'police power,'" Oregon's Contract Clause jurisprudence "does not embrace the 'balancing' analysis currently employed by the Supreme Court of the United States in its analysis of the Contract Clause in Article I, section 10, clause 1, of the federal constitution." 314 Or at 14 n 16. Later, in *Strunk*, when respondents asserted that the state's acts were not unconstitutional under the doctrine described in *Campbell*, this court disposed of the argument swiftly, looking to *Hughes* and *Eckles*:

> "Respondents next argue by way of affirmative defense that, even if the impairment is substantial, a substantial impairment can be justified if reasonable and necessary for an important public purpose. Oregon has not adopted that view. *See Hughes*, 314 Or. at 14 n. 16, 838 P.2d 1018 ('the application of the rule that a state may not contract away its 'police power' under Article I, section 21, of the Oregon Constitution, does not embrace the 'balancing'

> analysis currently employed by the Supreme Court of the United States').”

Strunk, 338 Or at 207.

This court's decisions, beginning with *Eckles*, lost sight of the nature of the argument at issue. Through those recent decisions, the court has unmoored Oregon's Contract Clause from the essential principles on which it originally stood. But such mistakes have not bound this court before, and they need not now. This court should instead adhere to the rule it originally determined Oregon's, and the nation's founders, intended: “[The] obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power,” but such power “must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive.” *Campbell*, 159 Or at 217-18.

As more recently described by the federal courts, the doctrine applies a similar but more detailed rule: First, the state must have a “significant and legitimate public purpose behind the regulation.” *Energy Reserves Grp.*, 459 US at 412. A state regulation has a significant and legitimate public purpose when it remedies “a broad and general social or economic problem,” which need not be an emergency or temporary situation. *Id.* at 412; *see also U.S. Trust Co.*, 431 US at 31 n 30 (stating that eliminating unforeseen windfall profits is a legitimate state interest).

Second, if the legislation serves a substantial and legitimate public purpose, the court then determines "whether the adjustment of the 'rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy Reserves Grp.*, 459 US at 412 (alterations in original) (quoting *U.S. Trust Co.*, 431 US at 22). Said more simply, impairments of statutory contracts must be "both reasonable and necessary." *U.S. Trust Co.*, 431 US at 27.

When the state is a party to the contract, a court determines the reasonableness of the regulation by looking at the circumstances that necessitated the change. *See id.* at 31. Importantly, impairment of a statutory contract is generally reasonable if it eliminates unforeseen and unintended consequences. *Id.* For example, in *City of El Paso*, 379 US 497, a Texas law originally granted a perpetual right of redemption to those whose land had been forfeited to the state. The legislation had led to several unforeseen and unintended consequences, including a loss of approximately $2 million in school funds due to repurchases and arrears, which "confer[red] considerable advantages on the purchaser and his successors and a costly and difficult burden on the State." *Id.* at 513, 515. In response, the state amended the law to impose a five-year statute of limitations on the right of redemption. The Supreme Court upheld the amendment against a Contract Clause challenge, explaining that while the law constituted a substantial impairment of contractual obligations, that impairment was not unconstitutional, in part because the legislation sought to remedy consequences to the state that were unforeseen and unintended by the legislature, and was therefore reasonable. *Id.* at 515-17.

Finally, to determine whether legislation is necessary, the court examines whether "an evident and more moderate course would serve [the state's] purposes equally well." *U.S. Trust Co.*, 431 US at 31. In short, for the regulation to be necessary, it must be true that the state could achieve its goals only through the modification, and that no "less dramatic modification" was available. *Id*. at 29-30.

Here, both the state and federal standards are satisfied.

2. The economic conditions underlying the 2013 legislation

The process of preparing Oregon's proposed budget for the 2013-15 biennium was undertaken in the face of significant and pressing economic problems. Those in the Office of the Governor, including Curtis Robinhold, the Governor's Chief of Staff (whose role as "policy lead" was particularly significant in the area of PERS, a subject for which the Governor had no separate, dedicated policy advisor), determined that under then-current assumptions used by the state's economists, Oregon faced a growing "budget gap." That budget gap represented the divergence between available revenue and the revenue required to maintain existing service levels for essential state and local services, including public education. The state's projections further indicated that two areas of public spending disproportionately drove the projected increases in that "budget gap": health care spending, and the cost of maintaining PERS. ER-216.

Among the materials relied upon by the Governor's staff in concluding that PERS costs would significantly contribute to Oregon's budget gap in coming years were several studies and presentations concerning PERS prepared from late 2011 through late 2012 by Milliman, the PERS actuary. To learn more, Robinhold and others among the Governor's staff engaged in an ongoing dialogue with PERS, including its executive director Paul Cleary. The Governor's staff believed that the costs of maintaining PERS would continue to escalate, and that the employer contribution rates necessary to support those costs would continue to increase. The Governor's staff concluded that the cost of maintaining PERS would be growing faster than the state's revenue, and that the resulting escalation in employer contribution rates would increasingly adversely impact the ability of public bodies – and school districts in particular – to provide essential services to the public. They further concluded that those adverse impacts threatened to hinder Oregon's ability to compete economically with other states in the region for residents and businesses. ER-216-217.

As described by John Tapogna, President of the economic and financial consulting firm ECONorthwest, the conclusions of the Governor's staff described above were, and are, supported by the underlying economic realities.

To begin with, it has become a matter of broad consensus among economists that the condition and operation of public pension systems in America is a matter of grave concern. For instance, a 2012 survey of the nation's most prominent economists showed that 92% agreed or strongly agreed that, without substantially increasing taxes, cutting spending, or changing public pension systems themselves, within only the coming two decades some states require severe austerity budgets, a federal bailout, or default. ER-210-211.

Oregon was no exception. A prominent 2012 study compared the employer contributions that would be required in each of the 50 states to achieve fully funded pension systems within 30 years. Oregon faced one of the most challenging paths in the nation to fully funding its pension liability. The study found that Oregon's system is so troubled that, if the state were to take only two out of the three available remedial measures – i.e., not making structural, legal changes to PERS itself but instead raising taxes and/or reducing public services by amounts sufficient to achieve fully funded status – the tax burdens or service cuts required would be so burdensome that residents would simply opt to leave the state, resulting in an exodus that would itself reduce the state's tax base to such a degree that Oregon could not pay for PERS benefits in any case. ER-211-212.

The data within PERS was troubling as well. For instance, the PERS actuary's December 31, 2011, valuation signaled a significant long-term increase in employer contribution rates. The actuary predicted that, under the baseline annual investment return assumption of 8%, average base employer contribution rates would increase to 25% of payroll, while under the more conservative investment return assumption of 4.5%, employer contribution rates could ultimately exceed 40% of payroll. ER-209.

Oregon's PERS liability is not just troubling on its own, but also impacts the state in more significant ways than the pension systems of neighboring states. For instance, Oregon's accrued pension liability, expressed as a share of its economic activity, is approximately *twice* that of Washington. Accordingly, Oregon is left with a proportionally smaller share of tax revenues to devote to its non-pension public services. Thus, given equal levels of taxation, Oregon's higher legacy pension costs mean the state is able to provide diminished levels of education services as compared with neighboring states such as Washington. ER-214-215.

The steadily increasing adverse impact on Oregon's schools is evident in school districts' employer contribution rates. For example, in the Bend-La Pine School District, rates increased from approximately 2% of payroll in the 2009 biennium, to 10-11% in the 2011 biennium, to 16-18% in the 2013 biennium – an overall increase of *more than 800%* in the space of just two budget cycles. Similar hikes were felt in other Oregon schools: In Ontario, rates increased from approximately 6% (2009) to 12-13% (2011) to 18-20% (2013). In Oregon City, rates increased from approximately 4-5% (2009) to 9-11% (2011) to 15-17% (2013). In Estacada, rates increased from approximately 4% (2009) to 10-12% (2011) to 16-18% (2013). ER-246-247.[18]

The problem, of course, is that every increase in the proportional amount of a school district's budget that must be spent on pension costs represents an equivalent decrease in the amount that district can spend on actual educational costs, such as additional teachers and instructional materials. Bend-La Pine School District, for example, employs approximately 30 *fewer* full-time-equivalent teaching positions in the 2013 school year than it did five years ago. During the same period, student enrollment in the district has *increased* by more than 750 students. As a result, the district has 60 fewer teachers than it

[18] School Districts were not alone in feeling the effects of increased PERS costs. In Linn County, for instance, employer contribution rates for Tier I/Tier II employees increased from approximately 12% (2009) to 16% (2011) to 18% (2013), as well as equivalent increases for OPSRP employees. Those increases have come amid reductions in federal forest payments to the county of more than $8 million since 2007-08, as well as reductions in the county's local option law enforcement levy of nearly $5 million in 2013-14. Those cuts have resulted in cutbacks in essential services, including the closure of a 48-bed bod in the county jail in 2012. ER-252.

would need just to maintain the same teacher-student ratio it had in 2009. ER-248.

Those decreases in the proportional amounts available to Oregon's schools for non-pension obligations not only directly adversely impact the quality of education that Oregon's students receive, but also indirectly impact the entire state's economy, given that the quality of education services is a key determinant in whether businesses decide to locate in Oregon or in neighboring states. ER-214-215.

3. The remedial measures taken

As members of the Governor's staff were assessing the effects of PERS' growing costs on Oregon's economic health and ability to compete economically, they also considered the apparent causes. In particular, they determined that the increasing cost of PERS was in significant part attributable to the cost of benefits being paid to existing retirees, particularly those at the higher end of the economic spectrum—those receiving amounts well in excess of the income replacement ratios that the system was originally intended to provide—and to the annual cost-of-living adjustments that continued disproportionately to escalate those retirees' benefits. They also determined that payments that had been created to compensate PERS retirees for Oregon state income taxes on PERS benefits, but which were being paid to retirees even if they resided outside of Oregon and paid no Oregon income taxes, also were contributing to increasing PERS costs, though to a lesser extent than cost of living adjustments. ER-217.

Based on those assessments, it was determined in Fall 2012 that the Governor's efforts to improve Oregon's economy would focus substantially on addressing the growing cost of PERS and to helping control future increases in employer contribution rates paid by participating public employers in the state. The Governor directed that his proposed budget for the 2013-15 biennium should be based upon the assumption that legislation would be enacted to reduce and control PERS costs. To achieve that goal, Robinhold, together with other members of the Governor's staff, specifically sought out ways to address the aspects of PERS that disproportionately contributed to the system's costs, including the amounts by which cost-of-living adjustments are made to existing retirees' benefits. ER-217-218.

Robinhold and other staff members proposed to Governor Kitzhaber that a legislative effort should be made to amend the laws governing certain aspects of PERS, including specifically the statutes governing COLA amounts and tax-offset payments to out-of-state retirees. They believed that such a legislative effort would be a narrowly-focused solution to what had become a broad-based economic concern: In order to help alleviate the increasing difficulty Oregon's public bodies faced with providing essential services, the Governor's legislative effort specifically targeted the individual elements of the retirement system that disproportionately drove the escalation in those public bodies' contribution rates. ER-218.

4. The results accomplished by the 2013 legislation

Taken together, SB 822 and SB 861 reduced the PERS unfunded actuarial liability by approximately $5.3 billion. The total effect of the changes in projected contributions to be paid by public employers as a result of the legislation is estimated to be approximately the same amount. ER-198-199.

As intended, those reductions have had a direct impact on employer contribution rates. Under PERS' recalculation of net employer contribution rates following the 2013 legislation, school districts were required to pay rates 4.4% lower than PERS had originally calculated before the 2013 legislation was enacted.

As intended, those rate decreases had a real impact on the ability of Oregon's schools to provide education services. For instance, the Estacada and Ontario School Districts each saved an amount equivalent to the cost of five to six teachers. The Oregon City School District saved an amount equivalent to the cost of 19 teachers, 35 classified employees, or nine additional instructional days. The Bend-La Pine School District saved an amount equivalent to the cost of approximately 47 teachers. And those cost savings do not merely exist "on paper," but have in fact resulted in real, substantial changes at the school level. Bend-La Pine School District, for instance, was able to return to a full school year in 2013-14 and has added teaching positions to reduce class sizes in kindergarten, first grade, and at the high school level. ER-248-249.

5. The Contract Clause did not prohibit the state from addressing the underlying economic problems through the 2013 legislation.

The facts clearly demonstrate that the 2013 legislation was justified by the important, significant, and legitimate public purpose of remedying a broad and general economic problem—the increasing costs of funding PERS, and the resulting impact on Oregon's public bodies to provide the quality of service, at given levels of taxation, comparable to those provided in nearby states that compete with Oregon for business and households.

Under this court's precedents, it is beyond question that those concerns represented "a proper subject" for the exercise of the legislature's power to enact laws for "the promotion of the public welfare." *Campbell*, 159 Or at 218-19 (imposing compulsory retirement for "the betterment of the public school system"); s*ee also Evans*, 166 Or at 238 (imposing statute of limitations to thwart "the general inconvenience resulting from delays in the assertion of a legal right which it is practicable to assert"); *Schramm*, 143 Or at 579 (imposing limits on banks' borrowing power in order to "protect depositors").

It is similarly clear that the means employed were "reasonably adapted to the accomplishment of that end," and not "arbitrary or oppressive." *Campbell,* 159 Or at 217. The 2013 legislation sought to address the underlying economic problems described above by directly addressing the particular circumstances that were most directly affecting pension costs, effectively making available $368 million annually in additional resources for the operations of school districts, cities, counties, state agencies, and other special purpose districts.

It is equally clear that the underlying economic concerns constituted "a significant and legitimate public purpose," as is required under the federal standard; increasing pension obligations that prevent public agencies from providing sufficient levels of essential public services undoubtedly constitute "a broad and general social or economic problem." *Energy Reserves Grp.*, 459 US at 411-12.

Moreover, the state's chosen means to achieve its goals were both "necessary" and "reasonable," as the federal standard requires. As described above, raising taxes and cutting benefits would not solve Oregon's problem; structural changes were necessary to curtail the serious negative impacts of the ever-growing cost of PERS on government services, and particularly public education.

The state's chosen means to address this serious social and economic problem were reasonable. As the Governor's Office and the legislature intended, the 2013 legislation was not merely aimed at the cost of PERS as a general matter, but was in fact focused keenly on the very aspects of the system that disproportionately drove its increased cost. And as is evident from the above analysis of the statutes' impact on various retirees' COLA benefits, the legislation was tailored in such a way as to impact primarily those who earn far more than the legislature ever intended—and far more than most of their fellow PERS retirees—but to only minimally impact those who are least able to shoulder the burden.

Under both the state and federal standards, the 2013 legislation represents precisely the sort of legislative action that courts for over 200 years consistently have held to remain within states' lawmaking power, even as that power is limited by the state and federal Contract Clauses.

VI. RESPONSE TO MORO PETITIONERS' SECOND ASSIGNMENT OF ERROR AND PETITIONER RIEMER'S 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 14th Amendment of the U.S. Constitution.

A. Standard of review

See Section V.A., *supra.*

B. This court has fully addressed Petitioners' taking claim in *Strunk*

With regard to the *Strunk* petitioners' claims that parts of the 2003 PERS legislation violated the state and federal takings causes, this court said:

> "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."

Strunk, 338 Or at 237-38. The same reasoning applies here to dispose of Petitioners' takings claims.

VII. RESPONSE TO PETITIONER JONES' ARGUMENT III AND PETITIONER RIEMER'S FOURTH ASSIGNMENT OF ERROR:

SB 822 does not deny Petitioners due process of law, the equal protection of the law, or the privileges and immunities of citizens in violation of the 14^{th} Amendment of the U.S. Constitution.

A. Standard of review

See Section V.A., *supra.*

B. SB 822 does not violate the 14^{th} Amendment

Section 1 of the 14^{th} Amendment to the federal Constitution states:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property without due process of law; not deny to any person within its jurisdiction the equal protections of the law."

Petitioners Jones and Riemer argue that §§11-17 of SB 822 violate the 14^{th} Amendment's Privileges and Immunities, and Equal Protection Clauses because they discriminate against them based on their out-of-state residency. Jones Br. at 60-63; Riemer Br. at 38-39. Petitioner Riemer also asserts that he was deprived of notice and a hearing before his benefits were adjusted by SB 822 and SB 861. Riemer Br. at 35. None of these arguments have merit.

1. Privileges and Immunities Clause

The U.S. Supreme Court consistently has interpreted the federal Privileges and Immunities Clause very narrowly. *See McDonald v. City of Chicago*, 561 US 742, 130 S Ct 3020, 3029-30, 177 L Ed 2d 894 (2010); *Saenz v. Roe*, 526 US 489, 511, 119 S Ct 1518, 143 L Ed 2d 689 (1999) (Rehnquist, C.J., dissenting) (stating that the clause has remained dormant for 130 years). As applicable to these Petitioners' assignments of error, the clause protects the right to travel between states, but only in one, limited circumstance: The Privileges and Immunities Clause "does not allow for degrees of citizenship based on length of residence," nor does it allow for "a hierarchy of * * * subclasses of similarly situated citizens based on the location of their prior residence." *Saenz*, 526 US at 506-07. Said another way, if a resident of State A moves to State B, State B cannot deny its new resident privileges and immunities that everyone else in State B enjoys. *Id.* at 502.

To the extent that Petitioners Jones and Riemer claim that, if they relocate to Oregon, they will be treated differently from other Oregon residents that claim is not ripe — there is no evidence that Petitioners' interests "are in fact subjected to or imminently threatened with substantial injury." *Or. Newspaper Publishers Ass'n v. Peterson*, 244 Or 116, 120, 415 P2d 21 (1966).

And in any case, neither Petitioner has demonstrated that he would, in fact, be treated differently. If and when they become domiciled in Oregon (and subject to Oregon income tax), Petitioners' benefits under SB 656 and HB 3349 will be reinstated. SB 822, §12. Accordingly, SB 822 does not allow for "degrees of citizenship based on length of residence."[19]

2. Equal Protection Clause

The Equal Protection Clause of the 14th Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause does not forbid classifications—most laws differentiate in some manner between classes of persons. Rather, equal protection prohibits laws that treat differently persons who are "in all relevant respects alike," unless "the classification rationally further[s] a legitimate state interest." *Nordlinger v. Hahn*, 505 US 1, 10, 112 S Ct 2326, 120 L Ed 2d 1 (1992). SB 822 is supported by a rational basis.

As discussed above, the legislature enacted SB 656 and HB 3349 to offset by way of an increase in retirement benefits the impact of the repeal of the statute exempting PERS benefits from state income tax, which this court

[19] Petitioner Jones cites to cases interpreting the privileges and immunities clause of Article IV, §2 of the U.S. Constitution, which prohibits a state law from treating non-residents who travel into other states, intending to return home, differently than residents of that state unless there is a substantial reason for the different treatment. *Saenz*, 526 US at 501. That provision is inapplicable on the facts here.

determined was a breach of retirees' statutory contractual right. SB 822 prohibits PERB from paying those benefits to retirees who reside elsewhere and are not subject to Oregon income tax. Thus, SB 822 is rationally related (and, in fact, narrowly tailored) to achieve the outcome sought by the legislature in enacting that law.

Petitioner Jones claims that the court should apply strict scrutiny, because this legislation impacts his exercise of "his fundamental right as an individual citizen to his full, contractual retirement benefit" based on his state of residency. Jones Br. at 60-66. Petitioner Riemer asserts that the court must apply strict scrutiny because SB 822 imposes a durational residency requirement before he is entitled to reinstatement of his benefit, should he move back to Oregon. Riemer Br. at 38-39. Both are wrong. First, The U.S. Supreme Court has held that classifications within a state's tax system are subject to rational basis review, and courts are "especially deferential in the context of classifications made by complex tax laws." *Nordlinger*, 505 US at 11. Moreover, Petitioner Riemer's assertion fails for a second reason: He has not shown that he "has been impeded from traveling or from settling in "Oregon as a result of SB 822, a prerequisite to strict scrutiny review. *Id.* at 10-11. Consequently, Petitioners' equal protection claims are subject to—and fail—rational basis review.

3. Due Process

Finally, Petitioner Riemer claims that his due process rights were violated because he was denied notice and a hearing before his benefits were reduced. Riemer Br. at 35-37. Petitioner Riemer's argument relies on the contention that he has a protected property interest in the benefits amended by the 2013 legislation. As discussed above, Petitioner Riemer has no contractual rights in those benefits, and his due process argument fails for that reason alone.

Petitioner Riemer first argues that the process of enacting the 2013 legislation violated due process because he was not afforded "any pre-deprivation notice" or "an opportunity to challenge" the laws before they became effective. Riemer Br. at 35. The law is clear that, with regard to the enactment of a statute, the legislative process affords a constitutionally sufficient opportunity to be heard. *See Sch. Dist. No. 12 of Wasco Cnty. v. Wasco Cnty.*, 270 Or 622, 632, 529 P2d 386 (1974) (process before county commissioners in advance of adoption of budget meets due process requirements), *abrogated on other grounds by Cole v. State ex rel Dep't of Revenue*, 294 Or 188, 191, 655 P2d 171 (1982).

Second, Petitioner Riemer argues that the state's implementation of the 2013 legislation violated due process because he was entitled to, and did not receive, notice and hearing before his benefits were adjusted. Riemer Br. at 37. In fact, this process of judicial review provides Petitioner Riemer with all the process he is due. *See Lujan v. G&G Fire Sprinklers, Inc.*, 532 US 189, 196, 121 S Ct 1446, 149 L Ed 2d 391 (2001) (when a party claims it has been deprived of a payment owed under a contract, due process is satisfied so long as the state "makes ordinary judicial process available * * * for resolving [the] contractual dispute"). Petitioner Riemer's due process rights have not been violated here.

VIII. RESPONSE TO PETITIONER RIEMER'S THIRD ASSIGNMENT OF ERROR:

SB 822 does not violate Petitioner Riemer's rights under Article I, §20 of the Oregon Constitution.

A. Standard of review

See Section V.A., *supra.*

B. SB 822 does not violate Article I, §20 because it is supported by a rational basis

Article I, §20 states that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Petitioner Riemer asserts that SB 822 violates this constitutional provision by denying him the benefits of SB 656 and HB 3349 based on his residence outside of Oregon. Riemer Br. at 30-34. In fact, SB 822 does not violate the privileges and immunities clause because it is supported by a rational basis.

The constitutional guarantee of equal privileges and immunities "do[es] not prevent the legislature from resorting to classification in order to accomplish a legitimate public purpose." *Thompson v. Dickson*, 202 Or 394, 403, 275 P2d 749 (1954). Here, Petitioner Riemer has the burden "to show beyond a reasonable doubt that the classification adopted is arbitrary and unreasonable and without any rational relationship to the end sought to be achieved." *Id.; see also State v. Clark*, 291 Or 231, 241, 630 P2d 810 (1980) ("[G]eographic distinctions are tested by the usual criteria of equal privileges and immunities * * *."). Petitioner Riemer not only has not met that burden, he does not even address this issue in his brief.

IX. RESPONSE TO PETITIONER REYNOLDS' ARGUMENT I:

SB 822 does not tax the retirement income of Petitioner, a resident of a state other than Oregon, in violation of 4 USC §114(a).

A. Standard of review

See Section V.A., *supra.*

B. SB 822 does not impose a tax on Petitioner Reynolds' retirement income.

SB 822, §11 prohibits PERB from paying the increased benefits provided by SB 656 or HB 3349 if the Board receives notice that the retiree to whom the payments are made are not subject to Oregon personal income tax. As discussed above, the legislature enacted those laws to approximately offset the amounts retirees who were subject to income taxation in Oregon would pay in state income taxes after the statute exempting PERS benefits from such taxation was repealed. Petitioner Reynolds resides outside Oregon, but has been receiving SB 656 and HB 3349 benefits even though his retirement income is not subject to Oregon state tax. He claims that the reduction in his monthly retirement affected by SB 822, §11, violates 4 USC §114(a) because it imposes an income tax on his retirement income. Petitioner is wrong.

USC §114(a) states: "No State may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State." The fatal flaw in Petitioner Reynolds' argument is this: SB 822 affects only the calculation of the amount of Petitioner Reynolds retirement income; it does not tax that income. In other words, SB 822 operates to reduce Petitioner Reynolds' retirement allowance by removing from the calculation the windfall benefits he has been receiving for the period he has resided outside Oregon. The operation of SB 822 on the calculation of Petitioner Reynolds retirement benefit is not a tax. Rather, SB 822 simply reduces the amount of retirement income that is subject to tax. Thus, the application of SB 822 to the calculation of Petitioner Reynolds' retirement allowance does not violate 4 USC §114(a).

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Respectfully submitted this 25th day of August, 2014.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(D)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 24, 862 words.

I certify that the size of the 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)(f).

The court granted a motion to exceed the length limit for this brief. The order granting that motion was dated August 15, 2014 and permits a brief of up to 25,000 words. I certify that (1) this brief complies with that order, and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 24, 862 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on August 25, 2014, I filed the foregoing **RESPONDENTS AND INTERVENORS MERITS BRIEF** with the Appellate Court Administrator by using the eFiling system.

Participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system.

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I further certify that on said date I served two copies of said document on the party or parties listed below, by causing the same to be deposited in the United States Mail at Eugene, Oregon, enclosed in a sealed envelope with postage prepaid, and addressed as follows:

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