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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,

v.

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

and

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

S061452 (Control)

WAYNE STANLEY JONES,
Petitioner,

v.

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

S061431

July 2014

MICHAEL D. REYNOLDS,
Petitioner,

v.

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

S061454

GEORGE A. RIEMER,
Petitioner,

v.

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

S061475 & S061860

BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

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INDEX OF CONTENTS

INDEX OF AUTHORITIES

Oregon Cases

Oregon Constitution

Oregon Statutes

Other Cases

I. INTRODUCTION

This brief is filed on behalf of the International Association of Fire Fighters (hereinafter "IAFF"), *amicus curiae*, in support of the Moro Petitioners.

The IAFF is an organization representing more than 300,000 professional fire fighters, paramedics, and other emergency responders in the United States and Canada. More than 3,200 IAFF affiliates protect the lives and property of over 85 percent of the continent's population in nearly 6,000 communities in every state in the United States and in Canada. The IAFF's local affiliates represent fire fighters throughout Oregon with respect to collective bargaining over the terms and conditions of employment including compensation issues. The IAFF is familiar with the issues in this case, and consistent with its interest and capacity as an advocate for professional fire fighters, paramedics, and emergency responders in Oregon and across the United States and due to its extensive expertise and knowledge, the IAFF believes that it will provide a unique perspective to this Court regarding the issues herein.

Ensuring that public employers provide the pension benefits they have promised their employees is an extremely important issue for fire fighters. Fire fighters risk their health and safety to protect the general public. In many jurisdictions, including Oregon, fire fighters accept these risks based on the understanding that they will be compensated now and in the future through their

pension benefits. A public employer's attempt to unilaterally alter the benefits that it has promised to its employees runs afoul of the Oregon Constitution. As this case will have a precedential effect throughout Oregon, the IAFF has a substantial interest in ensuring that Oregon public employers are made to adhere to the State's Constitution and that fire fighters continue to receive those pension benefits they have been promised in return for their service to the people of Oregon.

II. STATEMENT OF THE CASE

A. Nature of the Action

This case involves the direct challenge of the constitutionality of certain sections of the Oregon Session Laws of 2013. Specifically, as related to this brief, the petitioners are challenging the reduction of the cost-of-living adjustment ("COLA") for all retirees of the Public Employees Retirement System ("PERS") as called for in Oregon Laws 2013, chapter 53 ("SB 822") and Oregon Laws 2013, chapter 2 (Special Session) ("SB 861"). Petitioners 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 ("Moro Petitioners") allege that sections 1, 3, 5, and 7 of SB 822 and sections 1, 3, and 8 of SB 861 impair the obligations of the PERS contract in violation of Article I, Section 21 of the Oregon Constitution, and/or constitute of breach of the PERS contract

entitling petitioners to a remedy. The IAFF joins the Moro Petitioners in requesting that this court declare SB 822 and SB 861 to be unconstitutional and void in whole or in part, or alternatively declare that petitioners are entitled to damages for breach of contract.

B. Nature of the Judgment Sought to be Reviewed

This case involves direct judicial review of a legislative enactment, and therefore, there is no judgment sought to be reviewed.

C. Statutory Basis of Jurisdiction

The Oregon Legislature expressly conferred jurisdiction on this Court to determine whether any portions of SB 822 or SB 861 breach a contract between PERS members and their employers, violates any constitutional provision, or are invalid for any other reason. Or. Laws 2013, ch. 53, § 19; Or. Laws 2013, ch. 2, § 11 (Spec. Sess.).

D. Entry of Judgment and Timeliness of Appeal

In addition to conferring jurisdiction in this Court, the Oregon Legislature also expressly authorized any party who would be adversely affected by the acts to petition this Court for review within 60 days after the effective date of the acts. Or. Laws 2013, ch. 53, § 19(2)(a); Or. Laws 2013, ch. 2, § 11(2)(a) (Spec. Sess.). SB 822 became effective on May 6, 2013, Or. Laws 2013, ch. 53, § 22, whereas SB 861 became effective October 8, 2013, Or. Laws 2013, ch. 2, § 13 (Spec. Sess.). The Moro Petitioners filed a petition

challenging SB 822 on July 1, 2013 and thereafter filed an amended petition challenging SB 861 on December 6, 2013. (Moro Pet'rs' Brief at 3.) Therefore, jurisdiction is properly before this Court and the Moro Petitioners' petitions for direct review are timely.

E. Questions Presented

The IAFF's brief addresses the first question presented by the Moro Petitioners:

> Do SB 822 or SB 861 impair any obligations of the PERS Contract in violation of Article I, section 21 of the Oregon Constitution or in the alternative, breach the PERS Contract?

(Moro Pet'rs' Brief at 3.)

F. Summary of the Argument

The question of whether SB 822 or SB 861 impair any obligations of the PERS contract in violation of the Oregon Constitution, or alternatively constitute a breach of the PERS Contract, is of substantial importance to IAFF members who have served as fire fighters, paramedics, and emergency responders for public employers in Oregon. This Court has previously recognized that COLA benefits are contractual obligations under PERS. *See Strunk v. Pub. Employees Ret. Bd.*, 338 Or. 145, 220-25, 108 P.3d 1058 (2005). Both Oregon case law and the case law of Oregon's sister states support finding that a PERS member's right to COLA is not limited just to the benefit itself, but also the formula by which it will be calculated.

The Oregon Legislature's passage of SB 822 and SB 861 directly impairs contractual benefits afforded to PERS members in violation of Oregon law. The changes were made not to address funding problems with the plan, but rather to provide public employers with greater financial flexibility in the 2013-2015 budget as well as future budgets. The Legislature sought to create this flexibility by denying PERS members their promised benefits and thereafter re-directing the promised funds to other governmental functions. Allowing SB 822 and SB 861 to stand would deny PERS members their contractual benefits and negate the protections that the Oregon Contract Clause is meant to provide. Therefore, the challenged provisions of SB 822 and SB 861 should be declared unconstitutional and null and void.

G. Summary of Material Facts

A more detailed discussion of all of the relevant material facts of this case, including the history of the PERS legislation, can be found in the Moro Petitioners' Brief. (*See* Moro Pet'rs' Brief at 6-41.) For the purposes of this *amicus* brief, the IAFF will highlight facts relevant to the question of whether SB 822 and SB 861 violate the Contracts Clause of the Oregon Constitution.

PERS members who have served public employers are categorized in three different groups: (1) Tier One members – those employees who joined PERS prior to January 1, 1996; (2) Tier Two members – public employees who joined PERS after January 1, 1996, but prior to August 29, 2003; and (3)

Oregon Public Service Retirement Plan ("OPSRP") members – public employees working for a public employer on or after August 29, 2003 that had not previously established Tier One or Tier Two membership in PERS. *Strunk*, 338 Or. at 158-59; *see also* ORS 238A.025(3). The rights and benefits of Tier One and Tier Two members are governed by ORS chapter 238 and the rights of OPSRP members are governed by ORS chapter 238A. ORS 238A.025.

No matter which group or corresponding benefit formula that an employee finds him or herself in, "PERS historically has increased such [benefit] allowance through annual cost-of-living adjustments (COLAs)." *Strunk*, 338 Or. at 162. Prior to the enactment of SB 822 and SB 861, COLAs were based on the Consumer Price Index ("CPI") and were capped at two percent per year of each member's allowance. ORS 238.360 (2011) (Moro Pet'rs' App-1); ORS 238A.210 (2011) (Moro Pet'rs' App-4). In those years where the CPI exceeded two percent, Tier One and Tier Two members were entitled to accumulate the excess percentage to be used as a "bank" for subsequent years where the CPI fell below the two percent statutory cap. ORS 238.360(3) (2011) (Moro Pet'rs' App-1). Since the entitlement to COLA was enacted, the CPI has frequently been above two percent. (Special Master Final

Report "SMFR", p.24, Moro Pet'rs' Excerpt of Record at 188.)[1] This has resulted in most retired petitioners possessing a COLA "bank." (*Id.*)

In preparation of the 2013 legislative session PERS asked its actuary to estimate the system-wide effects that would take place if the modifications proposed in SB 822 were enacted. (SMFR, p.29, ER-193.) The actuary reported that the benefit reductions called for in SB 822 "would reduce the total liabilities of the system by $3.2 billion, and reduce accrued liabilities of the system by $2.6 billion. Both sums were expressed on a present value basis." (*Id.*) The actuary also reported that "projected uncollared employer contribution rates would be reduced by 2.5 percent in the 2013-15 biennium." (*Id.*)

SB 822 was passed by the Oregon Legislature during the 2013 Regular Session. Or. Laws 2013, ch. 53. The changes to PERS became effective May 6, 2013. *Id.* at § 22. Regardless of employment status (active, inactive, retired), the law reduced COLA benefits for all PERS members. *Id.* at §§ 1, 3, 5, 7. In discussing the purported rationale for these changes, legislators did not point to any financial problems with COLA benefits, but rather focused on how reducing these benefits could facilitate a reduction in employer costs and allow for money to be devoted to other governmental functions — specifically the state's education system. (*See* ER-58-67; ER-73-80.) Moreover, legislators

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[1] The Moro Petitioners' Excerpt of Record is hereafter cited as "ER-___."

were plainly aware that they would be denying PERS members a promised benefit.[2] (ER-59-60; ER-75.)

Retirement benefits under PERS have been adjusted annually since July 1, 1972 to reflect the increase or decrease in the cost of living as reflected in the CPI for Portland. *See* Or. Laws. 1971, ch. 738, §§ 11-12. When originally enacted, the adjustment was limited to a maximum increase or decrease of one and one-half percent of monthly retirement income, with employees being able to accumulate CPI in excess of the statutory cap for years in which the CPI was below the statutory cap. *Id.* at §§ 11(1), (3). The 1973 legislature raised the statutory cap to the two percent that has remained in place until the legislation at issue here.[3] *See* Or. Laws 1973, ch. 695, § 1; *see also* ORS 238.360 (2011) (Moro Pet'rs' App-1); ORS 238A.210 (2011) (Moro Pet'rs' App-4).

SB 822 reduced the statutory cap on COLA "from 2.0 percent to 1.5 percent effective August 1, 2013" and eliminated employees' ability to bank

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[2] Representative Buckley, co-chair of the Joint Committee on Ways and Means, in discussing SB 822 stated:

> We've given our word as a state in two different directions, and we can't keep both those promises. We've promised retirees and workers a certain benefit package that they've worked for, many of them for decades. We've promised our kids educational opportunities at least as good as the ones that we had when we were growing up. . . . [We cannot] keep both those promises.

(ER-59.)

[3] Since its inception, OPSRP members have also received up to a two percent COLA increase, but are not entitled to bank any CPI amounts in excess of the two percent statutory cap. *See* ORS 238A.210 (2011) (Moro Pet'rs' App-4).

excess CPI. (SMFR, p.30, ER-194.) SB 822 reduced the annual COLA percentages as follows:

Annual Benefit Amount	**Applicable COLA**
First $20,000	2.00%
$20,000 to $40,000	1.50%
$40,000 to $60,000	1.00%
$60,000 or more	0.25%

(SMFR, p.30, ER-194.) SB 861 reduced this benefit even further, setting the new benefit entitlement as follows:

<table>
<tr><td rowspan="2">Yearly Benefit</td><td rowspan="2">Senate Bill 822 COLA (No longer in effect after approval of SB 861)</td><td colspan="3">Senate Bill 861 (*Ends in 2019)</td></tr>
<tr><td>COLA</td><td>First Supplemental Payment for All benefit recipients*</td><td>Second Supplemental payment for benefit recipients whose yearly benefit is $20,000 or less*</td></tr>
<tr><td>< $20,000</td><td>2.00%</td><td rowspan="3">1.25%</td><td rowspan="3">0.25%</td><td>0.25%</td></tr>
<tr><td>$20,000 - $40,000</td><td>1.50%</td><td rowspan="3">---</td></tr>
<tr><td>$40,000 - $60,000</td><td>1.00%</td></tr>
<tr><td>> $60,000</td><td>0.25%</td><td>0.15%</td><td>$150</td></tr>
</table>

(SMFR, p.33, ER-197.) As of December 31, 2013, PERS is estimated to be 87 percent funded (excluding side accounts) and 96 percent funded (including side accounts). (SMFR, p.35, ER-199.)

The implementation of SB 822 and SB 861 are projected to deny members billions of dollars in benefits. (*Id.*) It is estimated that the change in

COLA alone "will result in $60 to $70 million in projected benefits not being paid through 2015." (SMFR, p.36, ER-200.)

III. ASSIGNMENT OF ERROR

SB 822 §§ 1, 3, 5, 7 and SB 861 §§ 1, 3, and 8 Impair the COLA Obligations of the PERS Contract in Violation of Article I, Section 21 of the Oregon Constitution or in the Alternative, Breach Those Terms of the PERS Contract.

A. Standard of Review

This Court has previously outlined the standard or review for this type of proceeding in its decision in *Strunk*. Where the legislature has conferred jurisdiction upon this Court to determine all issues as original matters, as it has done here, this Court has "appointed a special master to conduct the trial of all factual issues and to assemble the record." *Strunk*, 338 Or. at 155. Having received the record from the Special Master, this Court conducts "a *de novo* review of the evidentiary record and a plenary review of the legal issues presented." *Id.*

When "presented with multiple bases for disposition, this court generally considers the issues hierarchically." *Id.* at 171 (citing *State v. Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983)). Accordingly, claims addressing matters of state law are considered first. *Strunk*, 338 Or. at 171; *Eckles v. State of Oregon*, 306 Or. 380, 386, 760 P.2d 846 (1988).

B. Preservation of Error

The Moro Petitioners preserved this assignment of error through their First, Fourth, Fifth, and Eighth Claims for Relief in their original and amended petitions.

C. Argument

1. Legal Standard of Oregon Contract Clause Claims

Article I, section 21 of the Oregon Constitution provides: "No . . . law impairing the obligation of contracts shall ever be passed." Or. Const., Art. I, § 21. This Court has recognized that this provision applies to both state and private contracts. *Eckles*, 306 Or. at 390. A two-step analysis is conducted to determine whether a law amounts to a violation of this provision. *Hughes v. State*, 314 Or. 1, 14, 838 P.2d 1018 (1992). The court must first determine "whether a contract exists to which the person asserting an impairment is a party . . . ." *Id.* Next, the court determines "whether a law of this state has impaired an obligation of that contract." *Id.*

In making these determinations the court will apply the general principles of contract law — even when the state is a party. *Id.* However, where the state is an alleged party, the following additional rules will be applied: "(1) a state contract will not be inferred from legislation that does not unambiguously express an intention to create a contract; (2) the Contract Clause does not limit

the state's power of eminent domain; and (3) the state may not contract away its 'police power.'" *Id.*

When determining whether a statute creates a contractual obligation, "the context in which the . . . statute is enacted is of primary importance." *Id.* at 25. Statutes must not be viewed in isolation, but rather "in the context of their collective operation" with all of the statutory provisions at issue. *Strunk*, 338 Or. at 183 n.34.

Once a contractual obligation has been established, the state may only avoid it through those limits "found within the language or history of Article I, section 21, itself." *Eckles*, 306 Or. at 399. The prohibition against the state contracting away its police power does not extend "***so far as to permit the state to disregard a financial guarantee to persons or corporations who participate in a state . . . system.***" *Id.* (emphasis added). Furthermore, "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.* (emphasis added).

Once a determination has been made that a contractual obligation exists, the second step of the court's analysis is to determine whether the state has eliminated any part of that obligation — thereby impairing the contract. *See, e.g.*, *Hughes*, 314 Or. at 31 (finding that the unilateral statutory change removed the state's contractual liability to the employees and constituted an

impermissible impairment); *Eckles*, 306 Or. at 399-01 (evaluating the various sections of the legislation to determine whether they constitute a change that would impair the contract). Even where the law in question does not remove or alter a contractual obligation, but instead commands non-performance, it will be considered a breach and will entitle the adversely affected party to a remedy for the breach. *Hughes*, 314 Or. at 32-33.

For the reasons discussed in greater detail below, the COLA provisions altered by SB 822 and SB 861 are contractual in nature and subject to the constitutional protections of Article I, section 21 of the Oregon Constitution. Section 1, 3, 5, and 7 of SB 822 and sections 1, 3, and 8 of SB 861 impair the COLA benefit formulas public employers are obligated to provide to their employees in accordance with the PERS contact, and should be declared unconstitutional and void in whole or in part. In the alternative, the above referenced provisions of SB 822 and SB 861 constitute a breach of the PERS contract for which damages should be awarded.

2. PERS Members Are Contractually Entitled to the COLA Benefit Formula

PERS has been found to constitute a contract between the State of Oregon and its employees. *Hughes*, 314 Or. at 18. Moreover, this Court has recognized "that the legislature intended and understood that PERS constituted an offer, by the state to its employees, for a unilateral contract." *Id.* at 20. Offered as a unilateral contract, "[a]n employee's contract right to [PERS]

pension benefits become[] vested at the time of his or her acceptance of employment." *Id.* This vesting policy adopts "the concept that contractual rights can arise prior to the completion of the service necessary to a pension." *Taylor v. Multnomah County Deputy Sheriff's Ret. Bd.*, 265 Or. 445, 451, 510 P.2d 339 (1973).

i. Both ORS 238.360 and ORS 238A.210 Established a Contractual Benefit Formula

In *Strunk*, this Court concluded that annual COLA benefits were part of the statutory PERS contract. *Strunk*, 338 Or. at 221. Therefore, the 2003 legislation that sought to eliminate annual COLAs was deemed "inconsistent with the legislature's promise set out in ORS 238.360(1) (2001)." *Id.* at 223. Just as this Court found that COLA benefits are part of the PERS contract, so too should it find that employees are contractually entitled to the statutorily prescribed COLA benefit formula.

Prior to the enactment of SB 822 and SB 861, COLA benefits for Tier One and Tier Two employees were calculated as follows:

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

> (2) Such increase or decrease *shall not exceed two 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 recipient would be entitled if no cost-of-living adjustment were authorized.
>
> (3) The amount of any cost-of-living increase or decrease in any year in excess of the maximum annual retirement allowance adjustment of two percent *shall be accumulated from year to year and included in the computation* of increases or decreases in succeeding years.

ORS 238.360 (2011) (Moro Pet'rs' App-1) (emphasis added).

Just as the Court recognized in *Strunk* when considering the promissory nature of subsection one, 338 Or. at 221, the statutory language of subsections two and three similarly demonstrate that the legislature intended that members receive COLAs up to two percent when called for by the CPI and be eligible to bank excess CPI above the statutory cap for subsequent years.

Having previously determined that PERS members are contractually entitled to receive COLA benefits, it is axiomatic that the formula used to calculate those benefits should also be found to be a contractual obligation. A contrary finding would permit the Legislature the ability to constantly minimize the benefit formula until it reached the point that the promised benefit is effectively eviscerated — *exactly what the Legislature is attempting to do here with SB 822 and SB 861*.

Although this Court's consideration of COLA benefits in *Strunk* was limited to benefits for Tier One and Tier Two members, a similar analysis and finding of contractual obligation should be applied to OPSRP COLA benefits

for service performed and salary earned prior to the enactment of SB 822 and SB 861. While lacking the ability to bank CPI in excess of the statutory cap, the COLA benefit for OPSRP follows a similar calculation formula to that applied to Tier One and Tier Two members:

> (1) 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 Portland-Salem, OR-WA, Consumer Price Index* for All Urban Consumers for All Items, as published by the Bureau of Labor Statistics of the United States Department of Labor. Before July 1 each year, *the board shall adjust every pension* payable under ORS 238A.180, 238A.185 and 238A.190, every disability benefit under ORS 238A.235 and every death benefit payable under ORS 238A.230 by multiplying the monthly payment by the percentage figure determined by the board. If a person has been receiving a pension or benefit for less than 12 months on July 1 of a calendar year, *the board shall make* a pro rata reduction of the adjustment based on the number of months that the pension or benefit was received before July 1 of the year. The adjustment *shall be made* for the payments payable on August 1 and thereafter.
>
> (2) An increase or decrease in the benefit payments under this section *may not exceed two percent* in any year. A pension or death benefit may not be adjusted to an amount that is less than the amount that would have been payable if no cost-of-living adjustment had been made since the pension or death benefit first became payable.

ORS 238A.210 (2011) (Moro Pet'rs' App-4) (emphasis added).

The language of ORS 238A.210 similarly tracks the language of ORS 238.360, and should therefore be found to be promissory in nature and creating a contractual obligation. This position is further bolstered by the legislative guidance provided through the enactment of ORS 238A.470 which states:

> The Legislative Assembly may change the benefits payable to persons who become members of the Public Employees Retirement System on or after August 29, 2003, as described in ORS 238A.025, as long as the change applies only to benefits attributable to service performed and salary earned on or after the date the change is made.

ORS 238A.470 (2011) (Moro Pet'rs' App-5). While the Legislature reserved the right to make future changes to OPSRP, it expressly limited the application of those changes "***only*** to benefits attributable to service performed and salary earned on or ***after the date the change is made***." ORS 238A.470 (2011) (Moro Pet'rs' App-5) (emphasis added). This language, coupled with the language selected for ORS 238A.210, demonstrates that the Legislature intended to provide OPSRP members with a contractual entitlement to the COLA benefits based on CPI up to the statutory cap of two percent applicable to service provided and salary earned prior to any future changes.

As COLA has already been recognized as a protected contractual right, arguing that the COLA formula is not a contractual right is nonsensical. The COLA formula defines the COLA itself. The formula is not separate from the COLA — it ***is*** the COLA. Therefore, the formula is the protected benefit that may not be impaired.

ii. The Law of Oregon's Sister States Supports a Finding that the COLA Benefit Formula is a Contractual Obligation

A number of Oregon's sisters states have similarly recognized that pension benefits vest prior to an employee having completed all of the

requirements to receive a pension. *See, e.g.*, *Carman v. Alvord*, 31 Cal. 3d 318, 325, 644 P.2d 192, 196 (Cal. 1982) ("By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer."); *Pub. Employees' Ret. Bd. of the State of Nevada v. Washoe County*, 96 Nev. 718, 721, 615 P.2d 972, 974 (Nev. 1980) ("By rendering services and making contributions, an employee acquires a limited vested right to pension benefits which may not be eliminated or substantially changed by unilateral action of the governmental employer to the detriment of the member."); *Yeazell v. Copins*, 98 Ariz. 109, 115, 402 P.2d 541, 545 (Ariz. 1965) (stating that "the right to a pension becomes vested upon acceptance of employment"); *Bakenhus v. City of Seattle*, 48 Wash. 2d 695, 701, 296 P.2d 536, 540 (Wash. 1956) (adopting the rule that "the employee who accepts a job to which a pension plan is applicable contracts for a substantial pension and is entitled to receive the same when he has fulfilled the prescribed conditions").

Recognizing that an employee's pension rights vest prior to their satisfying every requirement necessary to begin drawing the pension grants employees assurances that the promises they have received will be honored after they have served the employer for the requisite period of time. *Pub. Employees' Ret. Bd.*, 96 Nev. at 722 n.6, 615 P.2d at 974 n.6; *Pasadena Police Officers Ass'n v. City of Pasadena*, 195 Cal. Rptr. 339, 343 (Cal. Ct. App.

1983) (noting that employee is entitled to not only those benefits already earned, but also those "promised during his prior service"). This includes not only those promises made at the beginning of employment, but also those made during the course of an employee's service. *Fields v. Elected Officials' Ret. Plan*, 320 P.3d 1160, 1166 (Ariz. 2014) (finding that employee "has a right in the existing [benefit increase] formula by which his benefits are calculated as of the time he began employment ***and any beneficial modifications made during the course of his employment***" (emphasis added)); *Nash v. Boise City Fire Dep't*, 104 Idaho 803, 808, 663 P.2d 1105, 1110 (Idaho 1983) (finding that the employee was entitled to the COLA benefit formula that had been in place for the last 15 years of his career).

The COLA benefit formula for Tier One and Tier Two employees has been in place for nearly 40 years. It is a promise that employees have relied on in choosing to continue to serve their respective government employers, and, along with the contractual entitlement to COLA benefits, should be found to represent a contractual obligation. Similarly, OPSRP members have operated with the understanding that the Legislature's statutory proclamation that any changes to benefits would only be applied prospectively, entitles them to the COLA benefits as laid out in ORS 238A.210 for the period of service taking place prior to the legislative change. *See* ORS 238A.470 (2011) (Moro Pet'rs' App-5).

It is important to highlight that the Legislature is well aware that these benefit formulas were promises made to PERS members — promises that they have relied upon in serving their respective employers. (*See* ER-59-60; ER-75.) SB 822 and SB 861 represent unilateral changes to benefits that have been promised to employees and which they are entitled to receive upon satisfaction of their pension requirements.

3. The Changes Implemented through the Enactment of SB 822 and SB 861 Substantially Impair or Breach COLA Obligations in Violation of Article I, Section 21

In assessing whether a legislative enactment constitutes an impairment, the court will focus on whether the legislation at issue "would change or eliminate the states' obligation under that contract." *Strunk*, 338 Or. at 170 (citing *Eckles*, 306 Or. at 399-400). Where legislation does not alter or eliminate an obligation, but rather compels non-compliance, it will also constitute a breach. *Id.* Even though a breach does not contravene Article I, section 21, "in accordance with that constitutional provision, such legislation ordinarily would require payment of damages resulting from the breach." *Id.*

Similar to the legislation at issue in *Strunk*, which, due to the legislation ordering the Public Employees Retirement Board ("PERB") to withhold COLA benefits, was determined to be a breach of the contractual obligation, *id.* at 224, the legislation at issue here fundamentally alters the COLA benefit formulas. SB 822 and SB 861 implement a permanent change to the calculation of COLA

benefits. This change is an impairment of public employers' contractual obligations to PERS members.

This Court in *Strunk* noted that it has "yet to determine whether substantiality of an impairment of a contractual obligation is required to show a violation of Article I, section 21." *Strunk*, 338 Or. at 206. Nevertheless, this Court concluded the benefit reduction in *Strunk* would be substantial as the legislation reduced benefits "in amounts varying between approximately 12 and 20 percent per month." *Id.* More significantly, rather than limiting the changes to being only prospective in nature, the *Strunk* Court noted that the legislation at issue "amounts to nothing more than a unilateral decision to reduce benefits already earned." *Id.* at 207. That is precisely what is happening here pursuant to the provisions of SB 822 and SB 861.

As the Moro Petitioners discuss in their brief, the percentage of loss that will be felt by PERS members will be similar to those percentages deemed to be substantial by this Court in *Strunk*. (*See* Moro Pet'rs' Brief at 66-69.) More troubling is that the legislation places no prospective limitation on its application. As a result, SB 822 and SB 861 will cause PERS members to lose benefits they have already earned, amounting to a substantial impairment of their contractual COLA benefits.

4. Oregon Law Does Not Recognize a Public Purpose Defense to Violations of Article I, Section 21

"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 in its analysis of the Contract Clause in Article I, section 10, clause I of the federal constitution." *Hughes*, 314 Or. at 14 n.16. Notably, in *Eckles* this Court stated its disbelief that "the 'police power' doctrine could be stretched so far as to permit the state to disregard a financial guarantee to persons" to which the state had a contractual obligation. *Eckles*, 306 Or. at 399.

Even those jurisdictions that allow for reasonable changes to vested benefits do so only in limited circumstances. The rule adopted by many of Oregon's sister states holds that "[a]lthough pension rights may be modified prior to retirement, such modifications must be for the sole purpose of 'keeping the pension system flexible and maintaining its integrity.'" *Wash. Fed'n of State Employees v. State*, 98 Wash. 2d 677, 683-84, 658 P.2d 634, 638 (Wash. 1983) (quoting *Bakenhus*, 48 Wash. 2d at 701, 296 P.2d at 540); *see also Pub. Employees' Ret. Bd.*, 96 Nev. at 722, 615 P.2d at 974 (stating same); *Hanson v. City of Idaho Falls*, 92 Idaho 512, 514, 446 P.2d 634, 637 (Idaho 1968) (stating same); *Allen v. City of Long Beach*, 45 Cal. 2d 128, 131, 287 P.2d 765, 767 (Cal. 1955) (stating same).

For a modification to be found to be reasonable it "must bear some material relationship to the purpose of the pension system and its successful operation . . . ." *Pub. Employees' Ret. Bd.*, 96 Nev. at 722, 615 P.2d at 975. Where the modification creates a disadvantage to employees, it "must be accompanied by comparable new advantages." *Id.* Absent a new advantage to counterbalance the legislation's disadvantageous provisions, a "modification will be declared unreasonable." *Wash. Fed'n of State Employees*, 98 Wash. 2d at 684, 689, 658 P.2d at 638, 640-41 (finding that the elimination of lump-sum leave payments from consideration in calculating average final compensation without the addition of a favorable comparable benefit was unreasonable); *Pub. Employees' Ret. Bd.*, 96 Nev. at 722, 615 P.2d at 975 (noting that the legislature acted unreasonably where it failed to demonstrate that "the change was essential to maintain the system's integrity or flexibility").

In enacting SB 822 and SB 861, the Legislature has not asserted that the imposed changes to PERS members' COLA benefit formula was necessary for the viability of PERS. The modifications were enacted here to allow funds to be directed at other governmental functions, such as the state's education system, and generally reduce employer costs. (*See* ER-58-67; ER-73-80.) Furthermore, it cannot be claimed that any substitute favorable benefit was provided to PERS members. Therefore, even if this Court were to apply the

modification rule adopted by its sister states, the enacted legislation at issue here is not reasonable and must therefore be deemed unconstitutional.

IV. CONCLUSION

As set forth above, SB 822 and SB 861 unconstitutionally impair PERS members COLA benefit formula. Accordingly, the IAFF respectfully submits that this court should declare SB 822 and SB 861 to be unconstitutional and void in whole or in part, or in the alternative that petitioners are entitled to damages for breach of contract or just compensation.

Dated this 3rd day of July, 2014.

Respectfully submitted,

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

Brief Length

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 5,671 words.

Type Size

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).

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CERTIFICATE OF FILING

I certify that on July 3, 2014, I filed the original of this Amicus Brief of the International Association of Fire Fighters by electronic filing with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system pursuant to ORAP 16.

CERTIFICATE OF SERVICE

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