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JUN 18 2014

IN THE SUPREME COURT OF THE STATE OF OREGON

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

v.

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

and

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

S061452 (Control)

WAYNE STANLEY JONES,
Petitioner,

v.

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

S061431

PETITIONER GEORGE A. RIEMER'S OPENING BRIEF
Challenge to Constitutionality of SB822 and SB861

June 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

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.

S061860

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INDEX

STATEMENT OF THE CASE

| | |
|--|---|
| 1. Nature of the Proceeding and the Relief Sought | 1 |
| 2. Nature of the Orders to be Reviewed | 2 |
| 3. Statement of Appellate Jurisdiction | 2 |
| 4. Effective Date for Judicial Review | 2 |
| 5. Nature and Jurisdictional Basis of the Action of the State | 3 |
| 6. Questions Presented on Review | 3 |
| 7. Summary of Arguments | 4 |
| 8. Statement of Material Facts | 5 |

ASSIGNMENTS OF ERROR

| | |
|---|---|
| 1. The provisions of Chapter 53, Oregon Laws 2013 (SB822), and Sections 1, 2, 5, 6, and 13 of Chapter 2, Oregon Laws 2013 Special Session (SB861), violate Article I, Section 21, of the Oregon Constitution and Article 1, section 10, clause 1, of the United States Constitution by impairing the obligation of the contract between the State of Oregon through the Oregon Public Employees Retirement System and Petitioner Riemer as a member of and retiree under that system. | 8 |
| a. Preservation of Error | 8 |
| b. Standard of Review | 9 |
| c. Argument | 9 |

| | |
|---|----|
| 2. The provisions of Chapter 53, Oregon Laws 2013 (SB822), and Sections 1, 2, 5, 6, and 13 of Chapter 2, Oregon Laws 2013 Special Session (SB861), violate Article I, Section 18, of the Oregon Constitution and the 5th Amendment of the United States Constitution, as incorporated and applied to the States by the 14th Amendment of the United States Constitution, by taking Petitioner Riemer's private property for public use without just compensation. | 27 |
| a. Preservation of Error | 27 |
| b. Standard of Review | 27 |
| c. Argument | 27 |
| 3. The provisions of Chapter 53, Oregon Laws 2013 (SB822), violate Article I, section 20, of the Oregon Constitution by granting privileges to citizens and classes of citizens which on the same terms do not equally belong to other citizens, including Petitioner Riemer. | 29 |
| a. Preservation of Error | 30 |
| b. Standard of Review | 30 |
| c. Argument | 30 |
| 4. The provisions of Chapter 53, Oregon Laws 2013 (SB822), violate section 1 of the 14th Amendment of the United States Constitution by depriving Petitioner Riemer of his property without due process of law, denying him the equal protection of the law, and denying him the privileges and immunities he has as a citizen of another state and of the United States. | 34 |
| a. Preservation of Error | 35 |
| b. Standard of Review | 35 |

| | |
|-------------------|----|
| c. Argument | 35 |
|-------------------|----|

ARGUMENTS

1. The provisions of Chapter 53, Oregon Laws 2013 (SB822), and Sections 1, 2, 5, 6, and 13 of Chapter 2, Oregon Laws 2013 Special Session (SB861), violate Article I, Section 21, of the Oregon Constitution and Article 1, section 10, clause 1, of the United States Constitution in that they impair the obligation of the contract between the State of Oregon through the Oregon Public Employees Retirement System and Petitioner Riemer as a member of and retiree under that system.
..... 9
2. The provisions of Chapter 53, Oregon Laws 2013 (SB822), and Sections 1, 2, 5, 6, and 13 of Chapter 2, Oregon Laws 2013 Special Session (SB861), violate Article I, Section 18, of the Oregon Constitution and the 5th Amendment of the United States Constitution, as incorporated and applied to the States by the 14th Amendment of the United States Constitution, in that they take Petitioner Riemer's private property for public use without just compensation.
..... 27
3. The provisions of Chapter 53, Oregon Laws 2013 (SB822), violate Article I, section 20, of the Oregon Constitution in that they grant privileges to citizens and classes of citizens which on the same terms do not equally belong to other citizens, including Petitioner Riemer.
..... 29
4. The provisions of Chapter 53, Oregon Laws 2013 (SB822), violate section 1 of the 14th Amendment of the United States Constitution in that they deprive Petitioner Riemer of his property without due process of law, deny him the equal protection of the law, and deny him the privileges and immunities he has as a citizen of another state and of the United States.
..... 34

| | |
|------------------|----|
| CONCLUSION | 39 |
|------------------|----|

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

| | |
|---|------------|
| Article 1, Section 10, Clause 1, United States Constitution | Throughout |
| 5 th Amendment, United States Constitution | 28 |
| 14 th Amendment, United States Constitution | 29 |
| Section 1, 14 th Amendment, United States Constitution | 35,37 |
| Article I, Section 18, Oregon Constitution | Throughout |
| Article I, Section 20, Oregon Constitution | Throughout |
| Article I, Section 21, Oregon Constitution | Throughout |

CASES

| | |
|--|-------|
| <i>Arken v. City of Portland</i> , 351 Or. 113, 263 P.3d 975 (2011) | 14,15 |
| <i>Couey v. Brown</i> , 257 Or. App. 434, 306 P.3d. 778 (2013) | 33 |
| <i>Dunn v. City of Milwaukie</i> , 355 Or. 339, __ P.3d __ (2014) | 28,29 |
| <i>Eckles v. State of Oregon</i> , 306 Or. 380, 760 P.2d 846 (1988) | 22 |
| <i>Farmers Insurance Company of Oregon v. Mowry</i> , 350 Or. 686, 261 P.3d 1 (2011) | 9 |

| | |
|--|-------------|
| <i>Hale v. State of Oregon</i> , __ Or. App. __, __ P.3d __ (2013) | 34 |
| <i>Hall v. Dept. of Transportation</i> , 355 Or. 503, __ P.3d __ (2014)..... | 28 |
| <i>Hughes v. State of Oregon</i> , 314 Or. 1, 838 P.2d 1018 (1992) | 21,28 |
| <i>Jones & Laughlin Hourly Pension Plan v. LTV Corporation</i> , 824 F.2d 197 (2 nd Cir. 1987) | 36 |
| <i>Oregon State Police Officers' Association v. State of Oregon</i> , 323 Or. 356, 918 P.2d 765 (1996) | 12,13,17,25 |
| <i>Oregonian Publishing Co. v. O'Leary</i> , 303 Or. 297, 736 P.2d 173 (1987) | 23 |
| <i>Ragsdale v. Department of Revenue</i> , 321 Or. 216, 895 P.2d 1348 (1995) | 31 |
| <i>Saenz v. Roe</i> , 526 U.S. 489 (1999) | 38 |
| <i>State v. Supanchick</i> , 354 Or. 737, __ P.3d __ (2014) | 23 |
| <i>State v. Savastano</i> , 354 Or. 64, 309 P.2d 1083 (2013) | 23,31 |
| <i>Stone v. State</i> , 191 N.C. App. 402, 664 S.E.2d 32 (2008), discretionary review denied and appeal dismissed, 363 N.C. 381, 680 S.E.2d 712 (2009) | 11 |
| <i>Strunk v. PERB</i> , 338 Or. 145, 108 P.3d 1058 (2005) | 14,17,22,30 |
| <i>United States Trust Co. v. New Jersey</i> , 431 U.S. 1 (1977) | 25 |
| <i>United States v. Seckinger</i> , 397 U.S. 203 (1970) | 18 |
| <i>Vogel v. Department of Revenue</i> , 327 Or. 193, 960 P.2d 373 (1998) | 21 |

STATUTES

| | |
|-------------------------------------|------------|
| SB822..... | Throughout |
| SB861..... | Throughout |
| ORS 14.175 | 34 |
| ORS 238.360 | 1,16,18,19 |
| ORS 238.362(3) | 21 |
| ORS 238.364 | 7 |
| ORS 238.366 | 7 |
| ORS 238.660(1) | 22 |
| ORS 238.372 | 32 |
| ORS 238.384 | 32 |
| Oregon Laws 1971, Chapter 738 | 5,6 |
| Oregon Laws 1991, Chapter 796 | Throughout |
| Oregon Laws 1995, Chapter 569..... | Throughout |

PETITIONER GEORGE A. RIEMER'S OPENING BRIEF

STATEMENT OF THE CASE

Nature of the Proceeding and the Relief Sought

Petitioner George A. Riemer (hereafter Petitioner Riemer) is a retired Tier One¹ member of the Oregon Public Employees Retirement System (hereafter PERS), having retired from public employment effective April 1, 2006. He presently resides in Arizona. He is a citizen of the United States.

Oregon Laws 2013, Chapter 53 (hereafter SB822), and Oregon Laws 2013 Special Session, Chapter 2 (hereafter SB861), went into effect in 2013. SB822 and SB861 substantially reduced the yearly cost of living adjustment previously awarded Tier One PERS retirees by ORS 238.360. SB822 also eliminated for non-resident retirees the benefits retirees are entitled to receive pursuant to the terms of Oregon Laws 1991, Chapter 796, and Oregon Laws 1995, Chapter 569.

¹ See footnote 3 and page 79 of the Special Master's Final Report and Recommended Findings of Fact.

Both SB822 and SB861 conferred jurisdiction on the Oregon Supreme Court to determine whether their provisions violated any provision of the Oregon or United States Constitutions.

Petitioner Riemer timely filed petitions with the Oregon Supreme Court challenging the constitutionality under both the Oregon and United States Constitutions of SB822 and SB861.

Nature of the Orders to be Reviewed

The “orders” to be reviewed in this instance are the provisions of SB822 and SB861.²

Statement of Appellate Jurisdiction

Jurisdiction to review the legality of the laws in question is conferred on the Oregon Supreme Court by provisions in both SB822 and SB861.

Effective Date for Judicial Review

² Petitioner Riemer is not providing the full text of the challenged statutes (SB822 and SB861) in an Appendix or Excerpt of Record to avoid unnecessary duplication of material in the numerous briefs that will be filed in these consolidated cases.

Petitioner Riemer timely filed petitions in the Oregon Supreme Court challenging the legality of both SB822 and SB861.

Nature and Jurisdictional Basis of the Action of the State

SB822 and SB861 were enacted into law in 2013 and are being enforced by the State of Oregon and its representatives as valid statutory enactments at this time.

Questions Presented on Review

1. Do the provisions of SB822, and Sections 1, 2, 5, 6, and 13 of SB861, violate Article I, Section 21, of the Oregon Constitution and Article 1, section 10, clause 1, of the United States Constitution by impairing the obligation of the contract between the State of Oregon through PERS and Petitioner Riemer as a member of and retiree under PERS?
2. Do the provisions of SB822, and Sections 1, 2, 5, 6, and 13 of SB861, violate Article I, Section 18, of the Oregon Constitution and the 5th Amendment to the United States Constitution, as incorporated and applied to the States by the 14th Amendment to the United States Constitution, by taking Petitioner Riemer's private property for public use without just compensation?

3. Do the provisions of SB822 violate Article I, section 20, of the Oregon Constitution by granting privileges to citizens and classes of citizens which on the same terms do not equally belong to other citizens, including Petitioner Riemer?
4. Do the provisions of Chapter 53, Oregon Laws 2013 (SB822), violate section 1 of the 14th Amendment of the United States Constitution by depriving Petitioner Riemer of his property without due process of law, denying him the equal protection of the law, and denying him the privileges and immunities he has as a citizen of another state and of the United States?

Summary of Arguments

Both SB822 and SB861 are unconstitutional impairments of terms of Petitioner Riemer's PERS contract with the State. The State has unilaterally and significantly changed the terms of his contract that promised him a yearly cost of living adjustment to provide a substantially lesser amount and eliminated another term of his contract that promised him benefit adjustments solely because he lives out of state.

The State and other respondents' "public purpose defense" has no basis in Article I, Section 18, of the Oregon Constitution. Even if this

court reaches the State and other respondents' "public purpose defense" under Article 1, section 10, clause 1, of the United States Constitution, their proffered evidence fails to establish that defense.

The State has unilaterally taken Petitioner Riemer's private property for public use without just compensation in violation of Article I, Section 18, of the Oregon Constitution and the 5th Amendment of the United States Constitution.

SB822 bars Petitioner Riemer from reestablishing benefit adjustments for up to one year after again becoming a resident of Oregon. By so doing it violates Article I, Section 20, of the Oregon Constitution and various provisions of Section 1 of the 14th Amendment of the United States Constitution.

Statement of Material Facts

Petitioner is a Tier One member and retiree of PERS. His previously established start date of PERS covered employment was August 1, 1982. He retired from his Oregon public employment effective April 1, 2006. He presently resides in Arizona and is a citizen of the United States.

Prior to the effective date of Oregon Laws 1971, Chapter 738, PERS provided adjustments to retiree benefits by way of a "13th Check"

process. Special Master's Final Report and Recommended Findings of Fact (hereafter SMFR), page 22. The adjustments under that process went up, never down, between 1964 and 1971. SMFR, page 22-23. Upon the enactment into law of Oregon Laws 1971, Chapter 738, PERS began making cost-of-living adjustments (hereafter COLA) to retiree benefits on a yearly basis. SMFR, page 23. The maximum increase or decrease was 1.5 percent of a retiree's monthly service retirement allowance. Further changes in the law resulted in the maximum increase or decrease becoming 2 percent of a retiree's monthly service retirement allowance on and after July 1, 1973. The maximum 2 percent COLA remained in effect for over forty years, until SB822 and then SB861 were enacted into law. SMFR, page 23.

Before the effective date of SB822, Oregon law provided that yearly COLA adjustments, which were added to the base amount of a retiree's monthly service retirement allowance, were "banked". When the Consumer Price Index for Portland (hereafter CPI) was greater than 2 percent, retirees would receive a 2 percent COLA and the difference between the CPI and 2 percent was carried forward in a "bank" to be accumulated and applied in future years when the CPI was less than 2 percent. SMFR, pages 23-24. SB822 and SB 861

eliminated the foregoing “bank” and unilaterally confiscated the bank Petitioner Riemer had earned between his retirement effective April 1, 2006, and the effective date of SB822 and SB861. Petitioner Riemer lost approximately 3 percent in banked COLA adjustments as the result of these measures. See Exhibit 48 (and including Portland CPI-U for 2013 of which Petitioner Riemer requests this court take judicial notice).

Prior to the effective date of SB822, PERS had never treated non-resident retirees who retired before January 1, 2012, any differently from resident retirees who retired before January 1, 2012, as to their entitlement to the benefit adjustments authorized by Oregon Laws 1991, Chapter 796 (ORS 238.366), and Oregon Laws 1995, Chapter 569 (ORS 238.364).³ Upon the effective date of SB822,

³ A change in the law in 2011, distinguishing between residents and non-residents who retired on and after January 1, 2012, is not involved in this case. See SMFR, page 25, footnote 57. “2011 Or Laws chapter 563, [section] 2. PERS’ Deputy Director testified at the evidentiary hearing that, before the 2011 legislation, he could not recall any other instance in which PERS distinguished between Oregon residents and

Petitioner Riemer, as a non-resident of Oregon, was stripped of the benefits he received under those laws and his gross monthly service retirement allowance was reduced by \$256.32 as a result. SMFR, page 79. Furthermore, if Petitioner Riemer reestablishes residence in Oregon at any time in the future, SB822 and administrative rules PERS has adopted to implement it impose restrictions that require him to wait until January 1 of the following year to be entitled to the reinstatement of the benefits authorized by Oregon Laws 1991, Chapter 796, and Oregon Laws 1995, Chapter 569. SMFR, page 80.

ASSIGNMENTS OF ERROR

1. The provisions of SB822, and Sections 1, 2, 5, 6, and 13 of SB861 violate Article I, Section 21, of the Oregon Constitution and Article 1, section 10, clause 1, of the United States Constitution in that they impair the obligation of the contract between the State of Oregon through the Oregon Public Employees Retirement System and Petitioner Riemer as a member of and retiree under that system.

a. Preservation of Error

Petitioner Riemer timely raised this issue in both of his petitions for judicial review.

nonresidents in determining a retiree's gross service retirement allowance. Tr, 146, 280, April 2, 2014 (Rodeman testimony)."

b. Standard of Review

The special master's findings of fact are reviewed for substantial evidence to support them. The Supreme Court has authority to set aside or modify SB822 and SB861 if they are unconstitutional under either the Oregon or United States Constitutions.

c. Argument

Absent a completely unprecedented and unwarranted 180 degree reversal of a decades-long series of decisions of this court,⁴ a

⁴⁴ This court would have to determine that the contract basis of state retirement benefits is and always has been in error and that the State has never offered state employees anything other than monetary gifts subject to change or termination at any time out of the generosity of its governmental heart. The doctrine of *stare decisis* would have to be stood on its head for this court to do so. See *Farmers Insurance Company of Oregon v. Mowry*, 350 Or. 686, 705, 261 P.3d 1 (2011) ("The proponent of overturning precedent bears the burden of demonstrating why prior case law should be abandoned."). Even in states that have adopted the gratuity theory of public pensions, once a

contract exists between the State and Petitioner Riemer concerning his entitlement to retirement benefits based on over twenty-three years of fully performed public employment.

The issue of the terms of the contract between the State and retirees such as Petitioner Riemer has been the proverbial football, tossed back and forth over the years as if the results were less important than the game. The game should have been over years ago. Petitioner Riemer urges this court to end it now. His PERS contract was not written in disappearing ink.

The State has always been in the driver's seat concerning the terms of its contract with Petitioner Riemer. The State has had many opportunities to enact into law clear language that it was not enacting a provision of the contract between it and Petitioner Riemer, but was only granting him a gift, subject to change at any time and without notice.

It would appear unassailable that the State cannot alter the retirement benefits it promised Petitioner Riemer after he fully retired

public employee has retired, the public employee's pension has fully vested and cannot lawfully be unilaterally changed or terminated.

from public employment. To hold otherwise would be to reverse long-standing precedent concerning the contractual nature of public employee retirement benefits. Neither the State nor any other respondent appears to be arguing that the properly calculated service retirement allowance Petitioner Riemer has been and continues to receive is not contractually based. Once a public employee has retired, unilateral changes to those benefits are prohibited by Article I, Section 21, of the Oregon Constitution. Under Article 1, Section 10, clause 1, of the United States Constitution, unilateral changes can only be made if the State demonstrates that any proposed reduction is reasonable and necessary to serve an important public purpose and cannot be addressed through means other than violating Petitioner Riemer's (and other retirees') constitutional rights.⁵ Petitioner Riemer will discuss the

⁵ Seeking the convenience of a revenue neutral approach (not having to raise taxes or cut other programs) to solve the state's budget, education or other problems by taking vested benefits from public service retirees was and is not reasonable or necessary. See, e.g., *Stone v. State*, 191 N.C. App. 402, 664 S.E.2d 32 (2008), discretionary

State and other respondents' "public purpose" defense later in this section.

So what are the terms of the contract between the State and its public employees concerning their receipt of retirement benefits for fully performed government service?⁶

review denied and appeal dismissed, 363 N.C. 381, 680 S.E.2d 712 (2009).

⁶ Former Justice Gillette agreed that public employees have a contract that they will receive a pension for the work they performed. *Oregon State Police Officers' Association v. State of Oregon*, 918 P.2d at 791. "But not every statutory provision in ORS Chapter 237 is a part of that contract. Instead, whether a particular provision is part of that contract is a question of legislative intent." It appears that Petitioner Riemer was supposed to litigate the terms of his contract before he became a member of PERS to ensure he could rely on what the PERS statutes said he would receive as retirement benefits after completely performing his side of the bargain (over twenty-three years of public service). Of course, no court would have allowed him to do that.

If part performance of a contract constitutes adequate consideration for the enforcement of the terms of a contract, even with the State, Petitioner Riemer is entitled to the terms of his contract with the State effective the date he became a member of PERS. "The PERS pension plan becomes vested in the state's employees on acceptance of employment." *Oregon State Police Officers' Association v. State of Oregon*, 323 Or. 356, 381, 918 P.2d 765 (1996). In Petitioner Riemer's case, he became a member of PERS on August 1, 1982. Even if the terms of his contract were not fixed until the effective date of Petitioner Riemer's retirement (April 1, 2006), the provisions of state law concerning what he was entitled to receive as of that date are the terms of his contract.

State law both on August 1, 1982, and on April 1, 2006, entitled Petitioner Riemer to receive a maximum yearly COLA of 2 percent and to the "banking" of CPI above and below 2 percent so that Petitioner Riemer could receive a COLA adjustment of 2 percent even if CPI was below 2 percent for as long as his bank and the CPI together in a particular year amounted to at least 2 percent.

SB822 and SB861 changed all of that. The State decided, after more than forty years, to reduce the COLA retirees would receive, first

effective August 1, 2013, and then effective August 1, 2014. If the State enacted COLA reductions required by SB822 and SB861 are valid, the State can reduce COLAs for retirees in any manner it desires, even eliminating COLAs for all retirees entirely. The State can then magnanimously decide to gift adjustments to retirees – or not.⁷

This court in *Strunk v. PERB*, 338 Or. 145, 108 P.3d 1058 (2005), held that the State could not suspend certain retirees' yearly COLA adjustments until they paid back overpayments of improperly calculated service retirement allowances. A modified "COLA freeze" was similarly invalidated by this court in *Arken v. City of Portland*, 351 Or. 113, 263 P.3d 975, 1008 (2011) ("... we conclude that the COLA freeze mechanism set out in Section 14b is invalid for the same

⁷ The State's future charity is easy to predict based on the supplementary payments authorized by Section 8 of SB861. All retirees receiving a yearly pension of more than \$20,000 receive a maximum supplementary payment of \$150 a year (which is not used to calculate their yearly COLA adjustment). These payments last through 2019 though state law can be changed at any time to eliminate them entirely.

reasons that we struck the COLA freeze provision contained in Section 10 in Strunk.”).

It makes no sense for this court to have held the State could not suspend COLAs until erroneously paid service retirement allowances were repaid, but to now hold the State has the power to reduce or eliminate entirely PERS retiree yearly COLA adjustments. What purpose was served by striking down unconstitutional means of suspending COLAs if COLAs have always been a gift? The answer: no purpose. “In Strunk, this court did determine, however, that Tier One PERS members have a statutory contract right to annual COLAs on their regular member accounts.” *Arken*, supra, 263 P.3d at 986. What could be a clearer statement that Petitioner Riemer has a statutory contract right to an annual COLA on his regular member account than that?⁸

⁸ Are the State and other respondents really contending that reductions in retiree COLAs are permissible as long as they receive some amount of yearly COLA? So a \$0.01 yearly COLA is permissible, but a \$0.00 yearly COLA is not? The whole point of a cost of living adjustment is to address increases or decreases in the cost of living. SB822 and SB861

The State had every opportunity to clearly express its intention that COLA adjustments were a gift subject to change at any time and without notice when it enacted ORS 238.360 into law. The statute does not mention any such thing.⁹ Unfortunately, the State has used threads of loose language in this court's decisions concerning the terms of the

are arbitrary perversions of the concept of adjustments due to the actual cost of living due to inflation or deflation.

⁹ In point and fact, ORS 238.360 is a clear expression that the State intended cost-of-living adjustments to be perpetual. Why would the State provide a COLA bank if it clearly intended otherwise? ORS 238.360(3) provides, "The amount of any cost-of-living increase or decrease in any year in excess of the maximum annual retirement allowance adjustment of 2 percent shall be accumulated from year to year and included in the computation of increases or decreases in succeeding years." Why did the State specifically and clearly mention "from year to year" and "succeeding years" if a gift was intended? Is the State claiming the legislature enacted this provision *non compos mentis*?

contract between the State and public employees¹⁰ concerning their retirement benefits as a blunt force instrument to incrementally, and relentlessly, attempt to renege on its prior, unequivocal, contractual commitment to provide PERS retirees with a yearly COLA adjustment

¹⁰ In *Oregon State Police Officers' Association v. State of Oregon*, 323 Or. 356, 918 P.2d 765 (1996), this court deemed a number of statutory provisions (six-percent pick-up; guaranteed rate of return; sick leave credit) concerning PERS "integral terms" of the plaintiffs' pension contracts. In *Strunk v. PERB*, 338 Or. 145, 108 P.3d 1058 (2005), the majority focused on the requirement that the intention of the legislature to create contractual obligations must clearly and unmistakably appear. This has allowed the State to retrospectively argue that its prior legislative enactments did not do so even though the State had every opportunity at the time it enacted those provisions to clearly state it was not doing so. The State would appear to have special court-sanctioned power to argue that its own drafting failures inure to its benefit and to the substantial detriment of all those who believe they have a contract requiring the State to provide the benefits it promised in the statutes it drafted and enacted.

to ensure their public service retirement allowance remained a semblance of itself over time due to the immutable effects of inflation.

ORS 238.360 is a clear and unmistakable part of the contract between the State and Petitioner Riemer. Had the State intended otherwise, it could have easily and clearly said so. As the drafter of the contract, the State is not entitled to the benefit of its own failure to qualify in any way the duration of the benefits provided in the statute it enacted.¹¹ Why on earth would the State enact into law a COLA bank to ensure retirees' ongoing receipt of an annual COLA adjustment if it intended COLAs to be a gift? The answer is that the COLA was never intended to be anything other than an integral part of the PERS contract. The State and the other respondents just don't like that term and are willing to spend huge amounts of time and money to break the commitments the State made in statutes they currently regret it

¹¹ The U.S. Supreme Court, in a case involving a contract entered into by the federal government, applied the general maxim that a contract should be construed most strongly against the drafter, which in the case in question was the United States. *United States v. Seckinger*, 397 U.S. 203, 210 (1970).

enacted into law. The State is free to enact retirement plans for new hires with no cost of living benefits and free to provide new hires no retirement plan at all. It is not free to change the terms of existing PERS contracts based on enactor's remorse.

SB822 and SB861 constitute an impairment of Petitioner Riemer's contractual right to the COLA provided by ORS 238.360. The record shows that both measures have a significant adverse impact on his promised retirement benefits over time (losses ranging from over \$400,000 to almost \$600,000). SMFR, pages 79-81. If the State can lawfully reduce its COLA promise to him in these substantial amounts, it would appear to have license to reduce his yearly COLA adjustment to \$.01 a year or even eliminate it entirely. An impairment is a material, detrimental, change in the contractual obligation. SB822 and SB861 impair the State's obligation to provide Petitioner Riemer the yearly COLA adjustment required by ORS 238.360.¹²

¹² The COLA reductions imposed by HB822 were not enough for the State. HB861, enacted but months after HB822, imposed even greater reductions. It clearly appears the State wanted to give the court the option to invalid HB861 as going too far, but deeming the changes

Similarly, SB822 constitutes an impairment of Petitioner Riemer's contractual right to the benefits provided by Oregon Laws 1991, Chapter 796, and Oregon Laws 1995, Chapter 569. SB822 eliminates those benefits because he is a nonresident of Oregon.

The record shows that those changes have a significant adverse impact on Petitioner Riemer's promised retirement benefits over time (a loss of over \$61,000). SMFR, pages 79-81. Nothing in Oregon Laws 1991, Chapter 796, expresses a clear and unmistakable intent that the increase in benefits it provides was intended to be a gift. The State's claim that it reserved the right to eliminate the benefit provided by Oregon Laws 1995, Chapter 569, at any time is specious as that benefit was provided as a settlement of prior litigation. "The increased benefits provided by this 1995 Act are intended to provide full, complete and final payment of any claim of a member of the system, or a beneficiary of a member, raising out of the taxation of those

made by HB822 to be insubstantial and therefore enforceable. Of course, the State hopes the court will validate both. The next step after that will be to repeal the COLA provisions in their entirety and then start going after core retirement benefits.

benefits." *Vogel v. Department of Revenue*, 327 Or. 193, 960 P.2d 373, 377 (1998). The State has violated the terms of that settlement by enacting SB822 and has breached, once again, the State's obligation to provide a remedy for the taxation of Petitioner Riemer's retirement benefit as determined by this court in *Hughes v. State of Oregon*, 314 Or. 1, 838 P.2d 1018 (1992). A settlement is a settlement even if the State attempts to argue it provided more than the State now claims was required to make affected members of PERS whole.¹³

¹³ That ORS 238.362(3) provides that no member of the system shall acquire a right, contractual or otherwise, to the increased benefits provided by sections 3 to 10, chapter 569, Oregon Laws 1995, is noted, but a settlement of a prior claim for damages is not within the scope of this restriction. Petitioner Riemer's right to damages was not created by Oregon Laws 1995, Chapter 569, and cannot be unilaterally terminated by SB822 because he is a nonresident. He is still entitled to a remedy for the damages he suffered by the repeal of the law that exempted his retirement benefits from state income taxation, as determined by this court in *Hughes* in 1992. Serial breaches do not constitute a remedy.

The State and other respondents' fallback position is that the State's contract between it and Petitioner Riemer (and other similarly-situated public employees and retirees) can be unilaterally altered to remedy a broad and general economic problem that the State may be facing at any given time. This is essentially an argument that the Public Employees Retirement Fund is a huge "rainy day" fund available to the State whenever it determines the money to pay promised benefits can be better used for other public purposes.¹⁴

This court stated in *Strunk* that Oregon has not adopted the view that even if an impairment is substantial, it can be justified if reasonable and necessary for an important public purpose. 108 P.3d at 1195.

This court in *Eckles v. State of Oregon*, 306 Or. 380, 760 P.2d 846 (1988), stated, ". . . 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

¹⁴ Of course, the PERF is not a part of the State's General Fund. It is a trust fund separate and apart from the General Fund, only to be used for purposes associated with Chapters 238 and 238A and related statutes, and for no other use or purpose. ORS 238.660(1).

people. See *Oregonian Publishing Co. v. O'Leary*, 303 Or. 297, 305, 736 P.2d 173 (1987). Limits on the contractual obligations of the state must be found within the language or history of Article I, section 21, itself.” 760 P.2d at 858. See also *Hughes v. State*, 314 Or. 1, 14, 838 P.2d 1018 (1992)(“the application of the rule that a state may not contract away its ‘police powers’ 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.”).

The relevant portion of Article I, Section 21, of the Oregon Constitution provides that “No . . . law impairing the obligation of contracts shall ever be passed” The analytical framework this court uses in interpreting the provisions of the Oregon Constitution is to determine the scope of a provision when enacted (its original intent),¹⁵ not what present courts could interpret the provision to mean based on developments in the law and society over time. Respondents have the burden to clearly and

¹⁵ See, e.g., *State v. Supanchick*, 354 Or. 737, ___ P.3d ___ (2014); *State v. Savastano*, 354 Or. 64, ___ P.2d ___ (2013).

unambiguously prove that their public purpose argument is within the language and original intent of Article I, Section 21. And then that the evidence in the record of this case meets the burden imposed by that test. Failing in the first, evidence to support it is irrelevant.

If the State has violated Article I, Section 21, of the Oregon Constitution by the enactment of SB822 and SB861, this court has no reason to reach their constitutionality under Article 1, section 10, clause 1, of the United States Constitution.

The United States Supreme Court in interpreting Article 1, section 10, clause 1, of the United States Constitution has held that the State may only depart from its contractual obligations for a significant and legitimate public purpose.

"In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."

United States Trust Co. v. New Jersey, 431 U.S. 1, 25-26 (1977). This court found the State did not make the requisite showing under this standard in *Oregon State Police Officers' Association v. State of Oregon*, 323 Or. 356, 918 P.2d 765 (1996). The State and other respondents in this case have failed, once again, to prove the type of economic calamity that could justify overriding the federal Contract Clause.¹⁶ The current condition of the PERF is strong.¹⁷ The State and

¹⁶ Any line drawing concerning significant and legitimate public purposes, insignificant but legitimate public purposes, and significant but illegitimate public purposes will apply to the State's next step if successful in this case. Why not take 5 or 10% of public service retirees' core benefits to build a new bridge across the Columbia River? That would save other taxpayers a lot of money. Isn't that a significant and legitimate public purpose?

¹⁷ "As of December 31, 2013, the PERS Fund was estimated to be 96 percent funded (including side accounts)." SMFR, page 17. That the invalidation of SB822 and SB861 results in a funding status somewhat less than that amount is not a legal basis for upholding the constitutionality of SB822 and SB861.

the other respondents only seek to redistribute funds that support promised benefits based on self-interest.¹⁸ If that is all it takes to override the federal Contract Clause, the Clause is nothing more than words on paper, not the protection of contract rights it clearly states it provides.

The arguments of various respondents' expert John Tapogna that the changes made by SB822 and SB861 make the State of Oregon and various Oregon cities more competitive in comparison to other states and cities in those states is uniquely dubious. Petitioner Riemer has found nothing in the record that establishes Tapogna's personal theory of interstate competition has any basis in the law. Moro Petitioners' expert Thomas Potiowsky's testimony demonstrates that Oregon's failed overall tax structure underlies its education system funding problems. SMFR, page 58. "While changes to Oregon's PERS benefits which lower employer contribution rates would lower the cost of services (as would cutting teacher[s'] salaries or larger classrooms with less teachers), it does not address the fundamental issues underlying our tax revenue system for funding Oregon's K-12 education." Potiowsky Report, page 23.

2. The provisions of SB822, and Sections 1, 2, 5, 6, and 13 of SB861 violate Article I, Section 18, of the Oregon Constitution and the 5th Amendment to the United States Constitution, as incorporated and applied to the States by the 14th Amendment to the United States Constitution, in that they take Petitioner Riemer's private property for public use without just compensation.

a. Preservation of Error

Petitioner Riemer timely raised this issue in both of his petitions for judicial review.

b. Standard of Review

The special master's findings of fact are reviewed for substantial evidence to support them. The Supreme Court has authority to set aside or modify SB822 and SB861 if they are unconstitutional under either the Oregon or United States Constitutions.

c. Argument

There can be no argument that what the State has taken from Petitioner Riemer was his private property. Unless this court decides that his retirement benefits were always intended to be complete gifts, the State cannot unilaterally take them whenever it wants and use the money for other preferred purposes without providing him the just compensation required by Article I, Section 18, of the Oregon Constitution. The State established a cost-of-living adjustment process

that banked increases and decreases in inflation to ensure, over the years, Petitioner Riemer would receive a yearly 2 percent COLA. The State has confiscated his COLA bank and serially reduced his yearly COLA in two successive legislative enactments. It has also confiscated the benefit adjustments it granted him pursuant to Oregon Laws 1991, Chapter 796, and has reneged on the settlement it provided retirees as a result of this court's decision in *Hughes* as provided by Oregon Laws 1995, Chapter 569.

The State's de facto exercise of its power of eminent domain has resulted in Petitioner Riemer's petitions before the court in these proceedings. His claims under Article I, Section 18, are in essence inverse condemnation claims that this court has clearly recognized as a remedy to vindicate a property owner's constitutional right to just compensation for such takings (permanently and intentionally taking (confiscating) private personal property and/or the fundamental legal interests in private personal property for a public purpose). See *Dunn v. City of Milwaukie*, 355 Or. 339, ___ P.3d ___ (2014). See also *Hall v. Dept. of Transportation*, 355 Or. 503, ___ P.3d ___ (2014).

Petitioner Riemer's property rights are similarly protected by the 5th Amendment of the United States Constitution (to which the State is

subject pursuant to the 14th Amendment of that constitution). As noted by this court in *Dunn*, supra, 355 Or. at 349, one of the bright lines of federal takings analysis is that "a regulation that permanently divests a property owner of all economically beneficial use of land is a taking." No less protection is provided against a law or regulation that permanently divests a property owner of all economically beneficial use of his personal property.

SB822 and SB861 take benefits previously granted to Petitioner Riemer by law for public use without just compensation. These takings violate both Article I, Section 18, of the Oregon Constitution and the 5th Amendment of the United States Constitution. The claim that the promised benefits were and always have been gifts is completely without merit. The State would, for example, have this court believe that its creation of a COLA bank to credit and debit inflation for the purpose of ensuring 2 percent COLA adjustments on a yearly basis was nothing more than transitory largesse. Nothing in the record supports such an argument. The property (money) the State has taken from Petitioner Riemer is real and has been given to others without his consent and without providing him just compensation for the taking.

3. The provisions of SB822 violate Article I, section 20, of the Oregon Constitution in that they grant privileges to citizens and

classes of citizen which on the same terms do not equally belong to other citizens, including Petitioner Riemer.

a. Preservation of Error

Petitioner Riemer timely raised this issue in his petition for judicial review concerning SB822.

b. Standard of Review

The special master's findings of fact are reviewed for substantial evidence to support them. The Supreme Court has authority to set aside or modify SB822 and SB861 if they are unconstitutional under either the Oregon or United States Constitutions.

c. Argument

Article I, Section 20, of the Oregon Constitution provides as follows: "No law shall be passed granting to any citizens or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

This court has stated that the legislature is free to create statutory classes and to create distinctions among those classes, but may not create distinctions that exist independent of the terms of legislation. *Strunk v. PERB*, 108 P.3d at 1111.

SB822 changes Oregon law so that for the first time the adjustments authorized by Oregon Laws 1991, Chapter 796, and

Oregon Laws 1995, Chapter 569, are denied nonresident retirees who retired prior to January 1, 2012. The residence of PERS retirees is a distinction not based on the terms of Oregon Laws 1991, Chapter 796,¹⁹ or Oregon Laws 1995, Chapter 569. A PERS retiree whose domicile is in Arizona, as is Petitioner Riemer's, loses the benefits provided by these statutes until the retiree reestablishes domicile in Oregon and waits until the first of the following year. A PERS retiree, even one who pays no Oregon income tax, who is and remains an Oregon resident continues to receive the benefits provided by the statutes. SB822 violates Article I, Section 20, by creating distinctions based on characteristics (residence) that exist independent of the terms of Oregon Laws 1991, Chapter 796, and Oregon Laws 1995, Chapter 569. *State v. Savastano*, 354 Or. 64, 73, ___ P.3d ___ (2013)(This court "has recognized that requiring privileges and immunities to be granted "equally" permits the legislature to grant

¹⁹ "... under Oregon Laws 1991, chapter 796, every state retiree who qualifies for benefits (based on years of service) will receive the benefits, *regardless of residency.*" *Ragsdale v. Department of Revenue*, 321 Or. 216, 895 P.2d 1348, 1356 (1995)(emphasis added).

privileges or immunities to one citizen or class of citizens as long as similarly situated people are treated the same."). (emphasis added)

The State has illegally attempted to preclude Petitioner Riemer from receiving the benefits he is entitled to receive under Oregon Laws 1991, Chapter 796, and Oregon Laws 1995, Chapter 569, by unilaterally providing in Section 11 of SB822 that he "has no right or claim" to the increased benefit provided by these statutes excepted as provided in ORS 238.372 to 238.384. The State cannot legally reach back retroactively to add a residency requirement to laws that do not contain that restriction.

As to Petitioner Riemer's claim that the delay in the reinstatement of his benefits under Oregon Law 1991, Chapter 796, and Oregon Laws 1995, Chapter 569, upon his reestablishment of residence (domicile) in Oregon is a separate violation of his constitution rights, the State will undoubtedly argue that it is not yet ripe because he has not reestablished residence (domicile) in Oregon.

Petitioner Riemer's petition is in the nature of a declaratory judgment action in this court as authorized by the broad terms of HB822's grant of jurisdiction to it to resolve all legal claims against the measure. The State has already enacted regulations denying retirees

who reestablish residence (domicile) in Oregon the benefits provided by Oregon Laws 1991, Chapter 796, and Oregon Laws 1995, Chapter 569, for up to a year while retirees who are and remain residents retain those benefits. Some residents are treated differently from other identically situated residents for the administrative convenience of the State only. That retirees will continuously move out of and back into Oregon cannot be seriously contested by the State. This court's determination of the legality of the State's restrictions when retirees reestablish residence in Oregon is not moot. As noted in *Couey v. Brown*, 257 Or. App. 434, 306 P.3d. 778 (2013), "The lesson to be drawn from these apparently conflicting cases is that a dispute under the declaratory judgment act is or is not moot depending on the facts of the particular case, and in particular, the degree to which the facts that will make the dispute active are imminent and certain, as opposed to contingent and hypothetical. The inquiry necessarily involves judgment." Petitioner Riemer asks this court to exercise its judgment to determine the legality of the statutes and regulations that bar retirees who reestablish residence in Oregon from receiving the benefits other identically situated resident retirees receive for up to one year solely based on the State's administrative convenience.

Beyond the foregoing, the factual circumstance Petitioner Riemer raises is subject to constant repetition as retirees move out and back in and back out and back in to Oregon as their individual circumstances require. Petitioner Riemer urges this court to adjudicate the legality of the State's action under these circumstances. See ORS 14.175. To require a retiree to sue only if he or she has actually moved back to Oregon imposes a huge financial barrier to the vindication of Petitioner Riemer's and other retirees' constitutional rights. This court would not be deciding a hypothetical circumstance. It cannot be reasonably argued that a nonresident retiree will never seek the reinstatement of his or her Oregon Laws 1991, Chapter 796, and/or Oregon Laws 1995, Chapter 569, benefits pursuant to the regulations PERS has adopted to implement SB822.

This court can enter a decree that binds the State, a party to this proceeding, against enforcing statutes and regulations that unconstitutionally prevent Petitioner Riemer from promptly obtaining reinstatement of the benefits he is entitled to receive when he again becomes an Oregon resident. *Hale v. State of Oregon*, __ Or. App. __, __ P.3d __ (2013).

4. The provisions of Chapter 53, Oregon Laws 2013 (SB822), violate section 1 of the 14th Amendment of the United States

Constitution in that they deprive Petitioner Riemer of his property without due process of law, deny him the equal protection of the law, and deny him the privileges and immunities he has as a citizen of another state and of the United States.

a. Preservation of Error

Petitioner Riemer timely raised violation of section 1 of the 14th Amendment in his petition challenging the constitutionality of SB822.

b. Standard of Review

The special master's findings of fact are reviewed for substantial evidence to support them. The Supreme Court has authority to set aside or modify SB822 if any of its provisions are unconstitutional under either the Oregon or United States Constitutions.

c. Argument

The State substantially reduced Petitioner Riemer's yearly COLA adjustment and eliminated the benefits he was entitled to receive pursuant to Oregon Laws 1991, Chapter 796, Oregon Laws 1995, Chapter 569, unilaterally, without affording him any individualized pre-deprivation notice of the legal basis for so doing or an opportunity to challenge those actions before they went into effect. The State has violated Petitioner Riemer's due process rights under Section 1 of the 14th Amendment to the United States Constitution by so doing.

The State may argue that Petitioner Riemer's COLA benefits are not eliminated in their entirety by SB822 and SB861, but the right to substantially reduce them undoubtedly includes the right to eliminate them unless this court enters into the previously uncharted arena of substantiality of impairment (reducing COLAs by X amount is a substantial impairment; reducing COLAs on a sliding scale based on the gross service retirement allowance of retirees as provided in SB861 is not).

The possible loss of all COLA adjustments is nowhere stated in Petitioner Riemer's contract to receive retirement benefits. The State "forgot" to express that possibility in any PERS statute it has enacted to date, including SB822 and SB861. Nor has any PERS statute given PERB the power to reduce benefits under prescribed circumstances such as an economic calamity.

The foregoing factors take the property interest Petitioner Riemer has in the benefits taken away by SB822 and SB861 out of the realm of substantial, but not compelling, and into the substantial and compelling such that he was entitled to pre-deprivation notice and a hearing before the State took away those benefits. See *Jones & Laughlin Hourly Pension Plan v. LTV Corporation*, 824 F.2d 197 (2nd

Cir. 1987). Petitioner Riemer was entitled to know, prior to the State's confiscation of his property, the legal basis for doing so, and the individualized effect it would have on him. He was entitled to a hearing to contest the State's action before his property was taken. The contention that post-deprivation remedies are sufficient to protect Petitioner Riemer's rights gives the State the unrestricted license to bulldoze tens of thousands of retirees who do not have the resources or wherewithal to engage in protracted litigation with the State over the legality of its confiscatory and self-serving actions. The inconvenience to the State in not getting access to funds it desires to confiscate as fast as it desires does not trump Petitioner Riemer's property rights in benefits the State has been paying him and tens of thousands of other retirees for years.

Section 1 of the 14th Amendment of the U.S. Constitution provides as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The State's action also violates Petitioner Riemer's other rights under Section 1 as the State may not discriminate against him solely because he is a citizen of another State. "Permissible justifications for discrimination between residents and nonresidents are simply inapplicable to a nonresident's exercise of the right to move into another State and become a resident of that State." *Saenz v. Roe*, 526 U.S. 489, 502 (1999). "In short, the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens." *Saenz*, *supra*, at 507. Here, the State imposes up to a one-year delay in the reinstatement of Petitioner Riemer's benefits solely based on its administrative convenience.

Whether considered under Article I, Section 20, of the Oregon Constitution, the Privileges and Immunities Clause of Section 1 of the 14th Amendment, or the Equal Protection Clause of that Amendment, the State unconstitutionally discriminates against Petitioner Riemer by imposing up to a one-year delay in the reinstatement of the benefits he and all other resident PERS retirees are entitled to receive under Oregon Laws 1991, Chapter 796, and Oregon Laws 1995, Chapter 569,

when the State imposes no similar burden on a favored, but identically situated, class of resident PERS retirees.

This is not a case of Petitioner Riemer being able to take his new-found benefits and running back to Arizona or another State to reside. The benefits in question are based on his bona fide residence in Oregon. Once he has attested that he is again a bona fide resident of Oregon, the State may not delay the reinstatement of the benefits all resident retirees are entitled to receive by up to a year for its bureaucratic convenience. Neither is this a case of the imposition of a durational residency requirement for the receipt of some new State benefit. Up until the effective date of SB822, Petitioner Riemer received the benefits in question regardless of his residency in Oregon.

CONCLUSION

SB822 and SB861 unconstitutionally impair the COLA benefits and benefits provided by Oregon Laws 1991, Chapter 796, and Oregon Laws 1995, Chapter 569, that Petitioner Riemer already earned by full performance of his obligations under his PERS contract with the State. They unconstitutionally confiscate his earned COLA and COLA bank without just compensation. They unconstitutionally confiscate the benefits he was entitled to receive pursuant to Oregon Laws 1991,

Chapter 796, and Oregon Laws 1995, Chapter 569, and SB822 unconstitutionally delays their reinstatement upon his reestablishment of residence in Oregon. These measures and the regulations the State has adopted to implement them are void. This court should immediately order the State and its agents to return Petitioner Riemer's retirement benefits to their pre-SB822 levels and to immediately refund to him the money he has been deprived of during the time both measures and their implementing regulations have been enforced by the State.

Respectfully submitted, this 16th day of June, 2014.

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**CERTIFICATION OF COMPLIANCE WITH BRIEF LENGTH AND
TYPE SIZE REQUIREMENT**

Brief length

I certify that (1) this brief complies with the word-count limitations in ORAP 5.05(2)(b); and (2) that the word count of this brief (as described in ORAP 5.05(2)(a)) is less than 10,000 words.

Text size

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

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PROOF OF FILING AND SERVICE

State of Arizona)
)
County of Maricopa) ss.
)
)

I, George A. Riemer, hereby certify that (1) I am a petitioner herein, (2) I filed Petitioner Riemer's Opening Brief with the Oregon Supreme Court by placing the original and fifteen (15) copies thereof in a sealed envelope plainly addressed to the following:

Appellate Court Administrator
Appellate Court Records Section
1163 State Street
Salem, OR 97301-2563

all such documents sent via Fed Ex 2 Business Day Delivery at Phoenix, Arizona, this 16th day of June, 2014.

and (3) I served Petitioner Riemer's Opening Brief on the other pro se parties and counsel for the other represented parties either by e-mail as they have authorized or by mailing them two (2) copies via Fed Ex 2 Business Day Delivery at Phoenix Arizona on or before June 19, 2014, as listed below:

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