IN THE SUPREME COURT OF THE STATE OF OREGON

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

v.

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

and

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

and

CENTRAL OREGON IRRIGATION DISTRICT,
Intervenor below.

S061452 (Control)

WAYNE STANLEY JONES,
Petitioner,

v.

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

S061431

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 A. 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 A. KITZHABER, OREGON ATTORNEY GENERAL ELLEN ROSENBLUM, OREGON PUBLIC EMPLOYEES RETIREMENT BOARD, and OREGON PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Respondents.

S061860

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STATEMENT OF THE CASE

This case involves direct challenges to the constitutionality of substantive parts of two 2013 legislative enactments, Oregon Laws 2013, chapter 53 ("SB 822") and Oregon Laws 2013, chapter 2 (Special Session) ("SB 861") (hereafter sometimes referred to as "the 2013 legislation"). Both enactments are legislative attempts to reform the Oregon Public Employees Retirement System ("PERS"). The collective effect of the two measures is to reduce yearly cost-of-living adjustments ("COLAs") for retirees in the system, and to eliminate, for those retirees who live outside Oregon and who are not subject to Oregon income taxes, payment of a benefit that was designed to offset the tax consequences to PERS retirees of Oregon income taxes imposed on retirees' pensions. The challengers (hereafter "petitioners") are a group ("Moro," or "the Moro petitioners") made up of public employment retirees who collectively have standing to challenge various aspects of the reform legislation, together with three individuals ("Jones," or "petitioner Jones," "Riemer," or "petitioner Riemer," and "Reynolds," or "petitioner Reynolds"), each of whom lives outside Oregon and challenges both the COLA reduction and tax offset provisions of the two enactments. This Court has direct jurisdiction over this proceeding pursuant to SB 822, section 19 (2013), and SB 861, section 11 (2013 Special Session).

The multiplicity of parties on both sides of the present issues complicates the ordinary process of presenting a statement of the case and otherwise preparing a respondent's brief. Many, if not all, of the arguments advanced by the various petitioners are the same in substance, if not in wording. However, because the Moro petitioners' presentation and arguments in their opening brief (hereafter referred to as "Moro Br") are the most comprehensive, intervenor League of Oregon Cities ("the League") chooses to treat that brief as the one to which it should first respond. The League accepts the non-argumentative parts of the "Statement of the Case" presented in that opening brief, including its statement of the "Nature of the Action," the "Nature of the Judgment Sought to be Reviewed," the "Statutory Basis of Jurisdiction," and the "Entry of Judgment and Timeliness of Appeal." Pursuant to ORAP 5.77(4), the League adopts the "Questions Presented" in the brief filed by Respondents State of Oregon *et. al* ("State Respondents"), and it further adopts the arguments in the briefs filed by: (1) the State Respondents; (2) Respondent City of Portland; (3) Respondent Tualatin Valley Fire & Rescue; and (4) Respondents Linn County, Estacada School District, Oregon City School District, Ontario School District, West Linn School District, Beaverton School District, and Bend School District, and Intervenors Oregon School Boards Association and Association of Oregon Counties ("County/School District Respondents").

BACKGROUND OF THE CASE

I. Introduction to Historical Overview

As to their arguments, petitioners' various briefs offer a series of theories and arguments, all to the effect that the legislature's 2013 amendments to the PERS statutes violate various constitutional and statutory principles. However, as the League proposes to demonstrate, the heart of this case lies in whether (or to what extent) either COLAs or pension payments that "offset" Oregon income taxation burdens for retirees who do not live in Oregon are an immutable part of the basic PERS contract. The League therefore chooses to focus its brief and arguments on those issues. In doing so, it appears to the League that a review of the development of the PERS statutory scheme, and this Court's decisions concerning the existence and extent of any unilateral contract associated with the PERS-related statutes, is essential. The League therefore undertakes that review, before it addresses the merits of the various petitioners' arguments.

As to that initial exercise, the League adds this caveat: It is not the League's purpose, at least with respect to this Court's prior cases, merely to report on those decisions by parroting them uncritically. The League takes the liberty—because it believes someone should—of criticizing various aspects of this Court's earlier jurisprudence in this area, even to the point of urging this Court to recognize what the League perceives to be errors in that jurisprudence that need to be acknowledged, and to reject those aspects of its previous opinions that either contain or rely on those errors. Certainly, the petitioners throughout their arguments rely on those errors (if errors they be). And, unless this Court is willing to examine and even question some of its previous opinions, the League believes that the legislature will be inappropriately hamstrung in its efforts to adjust the overall arrangement of the PERS statutes to the extent that it is entitled to do so, thereby skewing not only the legislature's flexibility concerning the PERS system, but also the entire range of its other law-making capacities and responsibilities.

The foregoing is by way of a preview and road map. As noted, the League proposes to present two pieces of history, one legislative and one jurisprudential, each of which is relevant to the issues that this Court now faces. We begin with the legislative piece, and then turn to the jurisprudential piece.

II. History of the Public Employees Retirement System (PERS), with Emphasis on the Use of Cost-of-Living Adjustments (COLAs) and Oregon Tax Offset Provisions

A. The Legislative Piece

The Public Employees Retirement System (PERS) began in 1945 with the "Public Employees' Retirement Act," Oregon Laws 1945, chapter 401, *codified as* OCLA §§ 90-701 to 90-723. The Act has, at least in substance, remained in

Oregon law in some form ever since.[1] The specific history of the tax exemption provision and the grant of COLAs is as follows:

1. Tax Exemption

As originally enacted, the Act exempted retiree benefits from, *inter alia*, Oregon income taxation. *See* OCLA §§ 90-701 to 90-723. However, Oregon's practice at that time was to impose an income tax on the pensions of federal and military retirees. Later, such an arrangement in a sister state was held to be illegal on both constitutional and statutory grounds, by the Supreme Court of the United States in *Davis v. Michigan Dept. of Treasury*, 489 US 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989). Faced with a choice of either taxing Oregon pension benefits or exempting the benefits of federal retirees and service personnel, the Oregon legislature opted to repeal the exemption for Oregon pensions. *See* Or Laws 1991, ch 823 (so providing). At the same time, however, the legislature enacted an increase in retirement benefits for some retirees, with the amount of the increase dependent on years of service. Still later, when certain retired employees of the state and its political subdivisions challenged the repeal of the exemption, this

[1] The qualification "at least in substance" is necessary because there was a hiatus in the law in 1953, when the law was repealed briefly in order to permit state employees to participate in the federal Social Security program. The law was immediately re-enacted. *See Hughes v. State*, 314 Or 1, 7 n 7, 838 P2d 1018 (1992) (explaining that history). Nothing in that repeal and re-enactment was intended to affect the substance of the law and, therefore, nothing in it affects the analysis in the present case.

Court invalidated the repeal as a breach of the PERS contract. *Hughes v. State*, 314 Or 1, 838 P2d 1018 (1992).[2]

Fairly soon thereafter, disgruntled federal pension recipients who resided in Oregon brought their own action, asserting that the added SB 656 benefit was a partial offset of the potential for increased taxation faced by Oregon resident retirees and, as such, amounted to a tax rebate for state retirees in violation of principles of intergovernmental tax immunity. This Court (with two judges dissenting) rejected that argument on several grounds. *See Ragsdale v. Dept. of Revenue*, 321 Or 216, 895 P2d 1348 (1995) (so holding).

The legislature next enacted a further boost to Oregon retiree benefits, which was aimed at wholly nullifying the tax consequences of the imposition of income taxation on any work performed by an Oregon retiree following the 1991 repeal of the exemption. *See* Or Laws 1995, ch 569. As was true of the 1991 measure, the enactment contained no limitation on who would receive the increase: Retirees who paid no income tax, and those who resided outside the state, received the benefit to the same degree that resident, tax-paying Oregon retirees did. *Id.*

The foregoing state of affairs, with all PERS retirees receiving the benefit of the legislature's enactment of tax-offsetting pension adjustments, while only Oregon resident PERS retirees were potentially subject to paying taxes on their

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[2] The *Hughes* decision is discussed at length later in this brief.

retirement benefits, remained in place until the legislature's enactment of SB 861 as part of the 2013 legislation. Under that measure, out-of-state retirees no longer receive an offset in their benefits for Oregon income taxes, because they are not liable for those taxes. That is, the 1991 addition (and a later 1995 addition) to their benefits are, in effect, repealed. As noted, the present case is, *inter alia*, a challenge to that legislative choice.

2. COLAs

As originally enacted in 1945, the Act did not contain any provision for awarding COLAs, periodic or otherwise, to retirees. There nonetheless grew up a legislative practice, after 1963, of awarding retirees a bonus benefit payment—referred to as a "thirteenth check"—payable at the end of the calendar year. The size of the check depended on the legislature's view as to the financial health of the system. (Stipulated Facts, p 28, ¶ 41.) And here, it must be stressed, is the key to any analysis of COLAs. The original COLAs were given by the legislature to persons *who already had retired*. They were, in other words, entirely gratuitous. And, however much the way in which COLAs thereafter were changed over time, they remained extensions of that original motivation: They were absolutely discretionary and gratuitous.

As noted, the legislature's practice of making gratuitous, *ad hoc* COLAs continued until 1971, when the legislature chose to change the process by enacting

Oregon Laws 1971, chapter 738. Sections 11-12 of that measure provided that, commencing on July 1, 1972, the monthly retirement allowances paid to retirees would be adjusted annually by an amount of up to 1.5 percent, based on the Consumer Price Index (CPI) for Portland, Oregon.[3] In 1973, the COLA "cap" was increased from 1.5 to 2.0 percent. Or Laws 1973, ch 695, § 1.

Since that time, COLAs have remained essentially untouched by the legislature, with one important exception: In 2003, the legislature attempted, as a part of a package of reforms designed to reduce the financial burden that the PERS system placed on state and local governments, to end the practice of awarding annual COLAs. This Court struck down that effort in *Strunk v. Pub. Employees' Ret. Bd.*, 338 Or 145, 108 P3d 1058 (2005), ruling that COLAs were a part of the basic PERS contract with retirees and, therefore, eliminating them was a breach of the PERS contract. *Id.* at 223. Following the *Strunk* decision, the legislature attempted no further adjustments either to the practice of granting COLAs or to the

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[3] At the same time, the 1971 legislature granted one-time benefit increases to two different classes of retirees, one class receiving a 25 percent increase in benefits and the other receiving a 12 percent increase. Moro-ER-133. Thereafter, until 1989, the legislature continued to grant other "*ad hoc*" increases in addition to the COLA, with the increases sometimes dependent on the date of the beneficiary's retirement (*e.g.*, 1972) and sometimes on a graduated scale inverse to the amount the beneficiary otherwise would receive (*e.g.*, 1977). All the one-time increases appear to have been aimed at allowing retirees either to retain or to regain approximately the same purchasing power that they had enjoyed at retirement. *See generally*, Moro-ER-130-138.

amount of any such COLA until the enactment of the legislation at issue in the present case.[4]

With the foregoing (very brief) description of the legislative history of the tax exemption and COLA provisions in the PERS legislation in mind, we turn to an examination of the litigation before this Court that addressed those provisions.

B. The Jurisprudential Piece

Most of the court cases that have had an impact on the PERS system have proceeded on the assumption that "the PERS system" is a contract between the state (or other public body employer) on the one hand, and the individual worker/retiree on the other. However, it is the use of the phrase "the PERS system" that is the problem. Even if it is conceded that at least *some* parts of a public employees' pension plan are contractual, the question remains: Which parts are those? Or, put slightly differently, which parts are essential? This Court has struggled over that question, with what the League respectfully submits have been mixed results, for over twenty years. What follows is a discussion of the pivotal cases in that struggle, together with a few others that bear on the inquiry.

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[4] The *Strunk* decision is discussed at much further length later in this brief. As the League will there explain, the *Strunk* ruling was erroneous, in part because the Court did not there consider the pre-1971 history of COLAs—a history that would have revealed the true, gratuitous nature of COLAs.

The Court first addressed a systemic challenge to the PERS scheme in 1992, in *Hughes v. State*, 314 Or 1, 838 P2d 1018 (1992). The League will discuss that case in some detail later in this brief. However, it first must be noted that, before the *Hughes* case was argued and decided, a series of other cases from this Court dealing with the subject of public employee pension benefits and related matters had established a loose framework for later cases—including *Hughes*—dealing with the same topic. At least two of those background cases deserve discussion here.

1. ***Crawford v. Teachers' Ret. Fund Ass'n*, 164 Or 77, 99 P2d 729 (1940)**

Crawford was a Portland public school teacher who had paid for a retirement annuity to a Teacher's Retirement Fund Association but who, on retirement, was denied the annuity that the fund was supposed to provide. *Crawford,* 164 Or at 79. The denial was based on an amendment to the fund's bylaws, enacted after Crawford had already retired, which raised the amount that she was required to pay into the fund in order to be entitled to her benefit. *Id* at 82-83. (She had paid the amount specified by the fund's bylaws during her tenure, and more, but she had not paid enough to qualify for the annuity under the revised price.) The Court had no difficulty in holding that Crawford was entitled to her annuity:

> In our opinion, when, under the plan authorized by the statute, plaintiff voluntarily contributed a substantial part of her salary to this fund, *contractual relations with the association were created*. Prior to the time of her retirement and the completion of her

> payments, her rights in the fund were of an inchoate nature and were subject to any changes in the by-laws necessary for the betterment of the association. However, *when there had been full performance on the part of the plaintiff, in compliance with the by-laws then governing the association, her rights became vested and no subsequent change in the by-laws could interfere with or impair such rights*. Any other rule would utterly destroy all stability and security in the retirement fund plan under consideration.

Id. at 86-87 (emphasis added). The Court thus forthrightly took the position that, at least for persons who had completed their public employment under a pension regime that provided for a certain pension at retirement, the "contract" between the parties had been honored by the employee, and the pension fund was obligated to pay the pension. *Id*. at 87-88.

2. ***Taylor v. Mult. County Deputy Sheriff's Ret. Bd.*, 265 Or 445, 510 P2d 339 (1973)**

Taylor was a mandamus action brought by a jail matron seeking an order that she be included in Multnomah County's retirement system for deputy sheriffs. *Taylor,* 265 Or at 447. The only requirement that the petitioner had to meet under the operative Multnomah County ordinance was that she had to have taken a particular form of oath. *Id* at 447-48. She had done so. *Id* at 448. Multnomah County, however, advanced an alternative theory, arguing that petitioner was not qualified to be included under the retirement system because:

> the right to participate in a retirement program vests, if at all, only where some form of contract relation exists between the employee and the Pension Board. In the instant case no consideration or reasonable substitute thereof existed to support any contractual

> relationship as to the benefits of [the Multnomah County] Ordinance * * *. Therefore, there was no vesting of rights.

Id. at 449. This Court rejected that argument, stating:

> Oregon has joined the ranks of those rejecting the gratuity theory of pensions and has held that contractual rights to a pension can be created between the employee and the employer. In *Crawford v. Teachers' Ret. Fund Ass'n*, 164 Or 77, 99 P2d 729 (1940), we held that a teacher who had already completed the prerequisite duty entitling him to a pension had a vested contractual right thereto which could not thereafter be substantially impaired. In *Adams v. Schrunk*, 6 Or App 580, 488 P2d 831 (1971), (rev. denied November 16, 1971), the Court of Appeals held that Portland police officers acquired a right to have time served as temporary officers included in their periods of service necessary to entitle them to a pension. At the time of the temporary service the then existing pension plan authorized this inclusion in computing the length of service necessary for a pension, and contributions were withheld from the officers' salaries. Subsequently, the plan was amended to deny the inclusion of such service. The Court of Appeals thus recognized, as Crawford had not, that a contractual right could be established *before the completion* of the service necessary to a pension. We agree with that opinion.
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> In *Harryman v. Roseburg Fire Dist.*, 244 Or 631, 420 P2d 51 (1966), we held that an employee was entitled to be paid for unused sick leave at the termination of his employment when such payment was authorized at the time he was employed, even though such authorization was subsequently, during his employment, discontinued. We said that the employee had accepted employment upon the assumption that the allowance for unused sick leave was part of the compensation for his services, and that, therefore, the provision was a part of his contract of employment and could not later be denied him by his employer.
>
> We conclude from the above authorities that Oregon has adopted not only the contractual concept of pensions, but, also, the concept that contractual rights can arise prior to the completion of the service necessary to a pension.

Id. at 450-51 (emphasis in original).

The other argument by the County that this Court considered in detail in *Taylor* was an assertion that, unlike persons involved in earlier cases, petitioner Taylor did not accept employment with an expectation that she would receive a pension, nor had she been permitted to make contributions toward a pension under the system. *Id.* at 452. (In fact, she continued her employment after being rejected for inclusion in the pension arrangement.) This Court was unimpressed with that argument:

> However, we believe that plaintiff did establish a contractual right to participate in the pension plan. The adoption of the pension plan was an offer for a unilateral contract. Such an offer can be accepted by the tender of part performance. It was stipulated that plaintiff complied with all the prerequisites to coverage under the plan if she came within the definition of sworn law enforcement personnel. Therefore, we must assume that an adequate tender of part performance was made in this case, *i.e.*, that the plaintiff tendered the required contributions from her wages and asked to participate in the plan. Such a tender furnished consideration.

Id.

Taylor was a relatively early venture by this Court into the subject of public employee pensions. As such, it did not, for example, deal with the issue of whether a particular statute (or, in that case, county ordinance) clearly promised a pension, or what the parameters of any such promise were. But the case clearly does stand for the proposition that public employee pensions are created by employee acceptance of unilateral contracts offered by public employers—a proposition seemingly recognized and accepted by all participants in later cases, and one with which (as an abstract matter) the League does not take issue in this case. The true issues totally left unaddressed by *Taylor* were: (1) how clear does any promise made under a unilateral contract have to be?; and (2) what (if any) are the ancillary particulars or details of such a contract that may be altered or removed from the arrangement between public employer and employee without violating the contract or unconstitutionally impairing it?

3. ***Eckles v. State*, 306 Or 380, 760 P2d 846 (1988)**

Although not involving PERS, the *Eckles* case is an instructive milestone on the road to where the law of public employee retirement pensions now stands. The case involved the constitutionality of a legislative directive to the State Treasurer to transfer $81 million from the State Industrial Accident Fund (the "IAF") to the General Fund, on the premise that that amount could be spared from the IAF because it was in excess of the amount, including necessary and prudent reserves, required to keep the IAF fiscally sound.[5] The transfer was intended to partially offset a budget shortfall for the 1981-82 biennium.[6] Not surprisingly, however, it

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[5] The IAF was used as the source of funding for the state-created workers' compensation insurer, State Accident Insurance Fund ("SAIF")—an entity that, unaccountably, was not made a party to the *Eckles* litigation.

[6] The Legislative Assembly, obviously concerned with the constitutionality of the measure, also enacted an alternative tax of 44.5 percent on the IAF "surplus"—an

was not acceptable to certain employers who contributed to the Accident Fund, one of whom challenged the transfer act in a declaratory judgment proceeding in circuit court. His challenge was unsuccessful in the trial court, and the Court of Appeals affirmed the trial court decision without opinion. On review to this Court, however, things changed.

Before this Court, plaintiff asserted, *inter alia*,[7] that he had a contract of workers' compensation insurance with SAIF that included a unilateral promise by SAIF, based on a legislative provision, that any funds acquired by the IAF would be used exclusively for workers' compensation purposes. It followed, plaintiff asserted, that the transfer of $81 million from the IAF to the General Fund was a legislative impairment of that contract. *Eckles*, 306 Or at 388. In addressing plaintiff's theory, this Court first turned to the logical question "whether Article I, section 21, [of the Oregon Constitution,][8] applies to state contracts." *Eckles*, 306 Or at 389.

In its analysis of that basic question, the Court, citing *Hall v. Northwest Outward Bound School*, 280 Or 655, 659, 527 P2d 1007 (1977), pointed out that

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amount that coincidentally added up to $81 million. The reasons that ploy was unsuccessful lie outside the parameters of this brief.

[7] Plaintiff asserted other theories that do not require discussion here.

[8] Article I, section 21, of the Oregon Constitution provides, in part: "No* * *law impairing the obligation of contracts shall ever be passed."

> [u]nlike many of the provisions of Article I of the Oregon Constitution, the provision in section 21 against impairing the obligation of contracts has its ultimate source not in the early state and colonial constitutions but in the Constitution of the United States, Article I, section 10, clause 1,[[9]] and the Northwest Ordinance of 1787.[[10]]

Although perhaps originally intended solely as a limitation on a legislature's ability to alter or invalidate private contracts, Article I, section 10, clause 1, of the United States Constitution quickly became a vehicle by which the Supreme Court of the United States could strike down attempts by the states to dishonor or abrogate their own contracts. *See*, *e.g.*, *Fletcher v. Peck*, 10 US (6 Cranch) 87, 3 L Ed 162 (1810) (preventing Georgia from nullifying certain land grants); *Trustees of Dartmouth College v. Woodward*, 17 US (4 Wheat) 518, 4 L Ed 629 (1819) (preventing the state of New Hampshire from legislatively altering certain provisions of the royal charter given to Dartmouth College). From that history, this Court in *Eckles* concluded that "Article I, section 21, was very likely intended to apply to both state and private contracts." *Eckles*, 306 Or at 390 (citing Oregon

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[9] Article I, section 10, clause 1, of the United States Constitution provides: "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

[10] Article II of the Northwest Ordinance provided, in part: "[N]o law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed."

cases that, without specifying whether they were decided under the state or the federal constitution, applied the impairment rule to contracts involving the state and its subdivisions.)

The Court next turned to the question whether ORS 656.634, the statute that purported to dedicate fees obtained from employers to the IAF, formed the basis of a contractual obligation of the state to those insured by SAIF. In making that determination, the Court noted, there was an important consideration to be addressed: "Courts usually have concluded that a state contractual obligation arises from legislation only if the legislature has unambiguously expressed an intention to create the obligation." *Id.* at 390-91. Given the specific history of the IAF and the wording of the controlling statute, ORS 656.634, the Court concluded that the legislature did, in fact, intend to create an obligation in the nature of a contract. Key to the Court's conclusion was the fact that, in 1927, the legislature had borrowed a large sum from the IAF (as it then existed), the loan to be repaid to the IAF over a period of years. *Id.* at 391-93. After this Court upheld that legislative action, *see Eastern & Western Lumber Co v. Patterson*, 124 Or 146, 147-48, 264 P 441 (1928), *reversing on reh'g* 124 Or 112, 258 P 193 (1927), the Legislative Assembly moved quickly to enact Oregon Laws 1929, ch 172, the predecessor to ORS 656.634. That new measure, after reciting the effect of the former legislation on customer confidence in the IAF, enacted the following wording as a part of Section 1:

> The state of Oregon hereby does declare * * * the industrial accident fund created by the workmen's compensation act of Oregon, * * * [to] be and the same is a trust fund for the uses and purposes declared in said act as so amended, and no other, * * * and the state of Oregon hereby does declare that it has no proprietary interest in said fund or in the contributions thereof for its own use * * *.

Eckles, 306 Or at 392-93. Although modified in form, the foregoing wording remained essentially the same when the *Eckles* case came before the Court.

Given the history just recited, the *Eckles* Court had no difficulty in determining that the statutory wording on which the plaintiff relied was, in fact, a contractual term on which plaintiff was entitled to rely and which the legislature was not entitled to alter in any substantive way.[11] The Transfer Act, therefore, was a violation of the contract and, potentially, an impairment of the contract. *Id.* at 393, 398-99.

Turning to the question of remedy, the Court first concluded that the legislative raid on the IAF authorized by section 2 of the Transfer Act did not impair the contract but, instead, constituted a violation of the contract for which the state could be required to respond in damages. *Id.* at 402. On the other hand, the

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[11] The Court specifically stated, "We conclude that ORS 656.634 expressed a contractual promise of the state to employers who insured with SAIF that the state would not transfer IAF funds to the General Fund." *Eckles,* 306 Or at 393.

Court held that the legislature's enactment of section 4 of the Transfer Act, which affirmatively permitted the state to make certain uses of defined surpluses in the IAF, when no such authorization had existed previously, impaired the obligation of the state's contract with SAIF and its insurance customers, including plaintiff. *Id.* at 402-03. Because SAIF, whose money had been taken, was not a party to the proceeding, the Court remanded the case back to the trial court to fashion an appropriate remedy. *Id.* at 403.

The significance of *Eckles* is obvious: The Court, in its search for a contract to which the state was a party, insisted on more than just ordinary statutory wording and history. Here, it had the very vivid history of the specific reason for the legislature's enactment of ORS 656.634—information that permitted it to assert with confidence that the legislative provision under consideration was itself intended to serve as a contractual promise. But, as the League's review of later cases will show, this excellent example of the degree of scrutiny that should be associated with the inquiry whether a particular statute or group of statutes is intended to be part of a unilateral contract soon would be lost. The purpose of this brief is to urge that this Court return to its well-considered roots respecting this topic, and to show that the present case offers a perfect occasion to do that.

4. ***Hughes v. State*, 314 Or 1, 838 P2d 1018 (1992)**

As noted, the first systemic challenge to the PERS scheme occurred at the beginning of the 1990s. Up to that time, the Act had provided that recipients of pensions under PERS were exempt from Oregon income tax on the amount of their pensions. *See former* ORS 237.201 (1989) (so providing); *former* ORS 316.680(1)(d) (providing mechanism by which the exemption of PERS benefits from Oregon income taxation could be carried out in tax returns).[12] However, there was no comparable exemption from Oregon income taxes for pensions of retired federal workers and retired military service personnel.

Eventually, the Supreme Court of the United States was asked to consider the constitutionality of another state pension scheme—Michigan's—which, like Oregon's, exempted state retirees' pensions from state income taxation while subjecting federal retirees to that taxation. The Supreme Court invalidated the Michigan scheme as contrary to both statutory and constitutional principles of intergovernmental tax immunity. *Davis v. Michigan Dept. of Treasury*, 489 US 803, 109 S Ct 1500, 103 L Ed 2d 891 (1989).

The Oregon legislature responded to the *Davis* decision by amending Oregon law to make the pensions of Oregon governmental retirees subject to

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[12] As noted in the *Hughes* opinion, the exemption had been on the books since the enactment of the original PERS statutory scheme in 1945. *See* Or Laws 1945, ch 640, § 13, *codified as* OCLA 90-723 (establishing exemption).

Oregon income tax. *See* Or Laws 1991, ch 823, §§ 1, 3 (so amending earlier law). Certain PERS retirees then brought a special proceeding in this Court challenging that legislative decision as both an unconstitutional impairment of contract and as a common law breach of contract. The resulting decision, *Hughes v. State*, 314 Or 1, 838 P2d 1018 (1992), is the first of this Court's cases dealing specifically with legislative attempts to reform the PERS system.

In their challenge to the 1991 legislation, the *Hughes* petitioners identified the "contract" on which they were relying as a unilateral contract that was offered by the state in the PERS statutes and that then became binding on the state by virtue of the petitioners' acceptance of government employment. *Hughes,* 314 Or at 10-11. That contract, petitioners asserted, included the promise that retired government employees would receive a pension that would not be taxed as income for Oregon income tax purposes. *Id.* In response, the state[13] asserted, as pertinent here, that the provisions in the PERS and Oregon state income tax laws that in 1945 first created the concept of a pension that would be exempt from state income taxes[14] were not a part of the unilateral contract offered under the PERS law. (The

[13] By "the state," the League refers to the various governmental entities that participate in the PERS system.
[14] The relevant wording of the exemption of the pension from state taxation appeared as follows in the 1945 act:

state conceded that PERS was "a contract between the state and its employees"—a concession whose lack of precision as to which *parts* of the PERS law constituted the "contract" would be used against it again and again in the Court's analysis. *Id.* at 11. The state did not, to be sure, specifically concede that the tax exemption was an essential part of that contract, but the Court quickly lost or ignored that distinction in the discussion that followed.)

In its analysis, the Court began by noting that, as the state already had conceded, legislatures could create unilateral contracts through statutory enactments. *Id.* at 14-15. However, the Court noted:

> * * * In cases where the state is alleged to be a party to the [statutory unilateral] contract, * * *courts have developed a number of additional rules. * * * Briefly, those rules are: (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

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> The right of a person to a pension, an annuity, or a retirement allowance, to the return of contribution, the pension, annuity, or retirement allowance itself, any optional benefit or death benefit, or any other right accrued or accruing to any person under the provisions of the act, and the money in the various funds created by the act, shall be exempt from all state, county, and municipal taxes and shall not be subject to execution, garnishment, attachment or any other process or the operation of any bankruptcy or insolvency law, and shall be unassignable.

Or Laws 1945, ch 401, § 23, *codified* at OCLA 90-723. Although the wording of the statute that codified the 1945 enactment was augmented on later occasions, the foregoing wording remained in all versions.

> domain; and (3) the state may not contract away the "police power." * * *

Id. at 14 (internal citations omitted). That recitation, however, was mostly hollow: "Eminent domain" was not involved in the *Hughes* case (nor is it involved in the present proceeding), and "the police power," a label without separate substance, *see, e.g.*, *Eckles*, 306 Or at 398, really had nothing to do with the case, either. The only pertinent, substantive rule of law applicable in *Hughes* was the first one listed by the Court, *viz.*, "a state contract will not be inferred from legislation that does not unambiguously express an intention to create a contract." Unfortunately, that rule—once stated—was to receive little more than lip service.

The irrelevance of the Court's reference to "eminent domain" is self-evident. On the other hand, it is perhaps important to note how limited the third rule (respecting the inability of the state to contract away the "police power"), identified *supra*, actually is: That rule means only that the state cannot *permanently* give away its sovereign power to do any of the vast majority of things that governments do; the most that it can do (if it wishes) is suspend temporarily the state's power to do particular things, *e.g.*, regulate hairdressers, build bridges, or inspect boilers. However, any such relinquishment of the government's authority, even if it purports to be permanent, is only temporary, because the next session of the legislature is entitled to abandon such legislative choices and substitute its own.

On the other hand, if the legislature, in carrying out the far more limited function of creating a unilateral contract by enacting a state law, clearly and unequivocally promises some benefit in perpetuity for those who choose to accept that contract, ensuing state legislatures may withdraw the *offer*, but they may not deny the benefits of the contract to those who already have accepted it. Such an inescapable and permanent limitation of the state's power to deal with the subject of the unilateral contract has the potential to leave the legislature powerless in an emergency to take certain appropriate actions. In analytical terms, therefore, it is important that any claim based on an alleged unilateral legislative contract must point to wording in the particular legislation that clearly and unambiguously expresses an intention to create a contract. *See Hughes*, 314 Or at 17 (to that effect).

The *Hughes* court did not, however, attempt to determine if the PERS statutes were, in fact, an unambiguous offer of a contract. That first step in the process could be omitted, the Court explained, because, in inquiring

> * * * whether *former* ORS 237.201 (1989) states a valid contractual obligation, we do not begin writing on a blank slate. We begin from the premise that PERS is a contract between the state and its employees. The contractual nature of such pension schemes was settled in *Taylor v. Mult. Dept. Sher. Ret Bd.*, 265 Or 445, 450, 510 P2d 339 (1973).

Hughes, 314 Or at 18.

It is important to note the analytical alchemy that occurs at this point in the Court's opinion: Although the actual issue in the case is whether the legislature intended to make one statute (former ORS 237.201) within the broader PERS law part of a contractual promise, the Court does not thereafter confine itself to determining whether that one statutory provision is in the form of a binding promise to state employees. Instead, the Court states, "Our analysis of the history * * * of the * * * Act *reveals an underlying legislative intent to create contract rights in PERS employees*." *Hughes*, 314 Or at 18 (emphasis added). That answer, of course, is far broader than is the question that engendered it, and is somewhat to the side: Virtually everyone involved in the litigation agreed that at least *some* parts of PERS *were* a contract. The real question, which the Court had earlier articulated but then seemed thereafter to have wholly forgotten, was whether former ORS 237.201 was *itself* a binding part of that contract.

By announcing that the legislature intended that the entire PERS *system* be contractual, the Court seemed to have totally excused itself from conducting the very kind of examination of the statutory wording that it earlier had indicated it was required to perform. Having thus excused itself, however, the Court then unaccountably refocused its attention back to what really had been the only issue all along:

> Thus, by virtue of the terms of the statutes, the legislative history, and our holdings that PERS is a contract, the contractual intent of

> the legislature in this case has been decided. *The only remaining question, therefore, is whether and to what extent former ORS 237.201 (1989) was intended to be a term of the PERS contract*.

Id. at 21 (emphasis added).

In spite of the serpentine path that its analysis thus far had followed, that emphasized sentence was at least promising. But intellectual honesty compels the admission that the Court's claim to have considered "the terms of the statutes, the legislative history, and our holdings that PERS is a contract" (*id.* at 21) is utterly untrue: The opinion to this point had not yet examined "the terms of the statutes" (and it was not going to); it had not said anything about the legislative history beyond recognizing that there was one; and, at that moment in the state's history, there *were no* "holdings" that "PERS is a contract." (The single case that the Court cited for that proposition was the *Taylor* case, which was not about PERS at all, and which dealt with a problem utterly different than the issue in *Hughes*.)[15]

The only *actual, inescapable* question that the Court faced was the emphasized one, *viz.*, "whether and to what extent *former* ORS 237.201 (1989) was intended to be a term of the PERS contract." *Hughes*, 314 Or at 21. Or, to put

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[15] And this is the point for a *mea culpa*. The undersigned acknowledges, as he must, that he bears a share of the blame for the many deficiencies and errors in *Hughes* and the cases that followed it, because he was a participant in *Hughes* and virtually all the rest of those decisions that are relevant here. But, while it is always best to avoid making a mistake in the first place, nothing excuses ignoring the mistake later, when great interests are at stake.

the question differently: What were the *essential terms* of the unilateral contract, and what were instead mere details that the legislature could choose to alter from time to time, and on which list did ORS 237.201 (1989) belong? As to that central issue, the state had argued that the tax exemption previously featured in ORS 237.201 was a detail, not an essential term.

The Supreme Court was not persuaded. The problem with the state's argument, it explained, was that, rather than being some "isolated tax exemption enacted as a general statute on taxation," former ORS 237.201 (1989) was an integral part of the PERS statutes, "which [statutes] this court previously has held to be of a contractual nature." *Id.* at 22.[16] After some further discussion that is of no assistance, the Court finally announced that "PERS was intended to be and is a contract * * * and * * * *former* ORS 237.201, enacted as an essential part of and within the context of that contract, is a term of that contract." *Id.* at 25.

With respect: Saying it doesn't make it so. The statute was not about the PERS pension itself; it was about taxation of that pension—an aside from the

[16] As noted, the case that the Court then cites as authority for the foregoing statement is a case that in fact did not involve PERS and therefore does not stand for the proposition stated in the quoted sentence. Furthermore, the Court never even *mentions* the fact that it is possible that *some, but not all*, of the provisions in the PERS legislation are the contract. For the Court at that time, it seems that, as long as *some* provisions of the PERS law were contractual, *all* the provisions—whatever their subject and scope—were contractual. That is an incredibly superficial assumption, useful primarily to avoid hard questions, but it is the one under which the Court appears to have proceeded.

decision to grant the pension itself. Various pressures—political, fiscal, or other—may cause a legislature to make a particular benefit available to state employees at one point, yet unavailable at others. There is no reason—and certainly no legislative history cited—to justify a belief that the legislature thought that it needed to promise permanent exemption from state income taxes for PERS pensions in order to be able to obtain qualified workers for state jobs. The essence of the PERS offer was *the pension itself*, with a wide variety of bells and whistles available for attachment then, later, or from time to time, with any such choice dependent on all the other issues that the legislature faced. Certainly, there are no statutory words singling out the tax exemption as something especially promised or guaranteed.

Later in the opinion, the *Hughes* Court would also rely on the existence of another statute, ORS 316.680(1)(d) (1989),[17] as context for the promise that it purported to find. *Hughes*, 314 Or at 33. But that statute was purely mechanical, describing only how a person otherwise entitled to the exemption set out in ORS 237.201 should claim the exemption on the person's Oregon tax return. If that statute is proof of the legislative promise and is therefore itself part of the promise,

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[17] ORS 316.680(1)(d) (1989) provided: "There shall be subtracted from federal taxable income * * * The amount of any payments received from the Public Employees' Retirement Fund under ORS 237.001 to 237.315 which are exempt from state taxation under ORS 237.201."

then it is difficult to imagine how any statute even tangentially related to PERS, and however mundane its content, could be anything other than an integral part of the promise. To offer but one example: If a part of the PERS statute stated that applications for retirement benefits were to be submitted on an 8½ x 11 yellow sheet that would be supplied by PERS, the *Hughes* Court's approach apparently would deem it a violation of the PERS contract for PERS to substitute forms printed in blue or red.

The Court's holding that the statutory exemption from taxation for Oregon government pensions was "an essential" part of a unilateral contract between the government and its employees that could not be impaired forced the Court to turn to the question of what to do about the legislature's decision to tax those pensions nonetheless. And it was here that the Court came closest to returning to the right path: To the Court, the PERS member employees who were the beneficiaries of the contractual promise fell into three groups: (1) those whose rights were already accrued; (2) those who were working and whose rights still were accruing; and (3) those whose rights, if any, "may accrue in the future." *Id.* at 28. The Court concluded that only the rights of workers in the first two categories were involved in the case before it, because the third category was not mentioned in the statute. *Id.* The Court then announced its overall decision as follows:

> We conclude that *former* ORS 237.201 (1989), as a term of the PERS contract, means that the state promised that all PERS

> retirement benefits that have accrued or are accruing for work performed so long as *former* ORS 237.201 remained in effect (*e.g.*, before the enactment of Oregon Laws 1991, chapter 823) are exempt from state and local taxation forever. But the promise—the state's obligation—is no greater than that.
>
> *In practical terms, what this means is that the legislature did not contract away its ability to tax PERS retirement benefits that may accrue in the future based on work not yet performed. All PERS retirement benefits accrued or accruing after September 28, 1991, as compensation for work performed after that date, are not contractually exempt from state income taxation*. Thus, because the state has no contractual obligation not to tax unaccrued PERS retirement benefits for work performed after the effective date of the Act, any action by the legislature in relation to the taxation of those un-accrued benefits could not constitute an impairment or breach of a contractual obligation.

Id. at 29 (footnote omitted; emphasis added).[18]

As an initial effort to tackle the question of whether some or all of the statutes making up the PERS system are contractual, the precise holding in *Hughes* is a sensible effort (assuming that the tax exemption was a part of the state's unilateral promise to employees), but the explanation of the Court's holding is, in parts, superficial, wrong, even indefensible. One might take some encouragement

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[18] The Court went on to hold that another section of the 1991 legislation was not an impairment of the PERS contract but was, instead, simply a breach of that contract. *Hughes,* 314 Or at 33. Two justices dissented: Justice Fadeley would have held that the promise applied to the section of the statute deemed by the lead opinion to be a mere breach of the contract; he would have held that section unconstitutional as well. *Id.* at 36-58 (Fadeley, J., concurring in part and dissenting in part). Chief Justice Peterson would have held that the legislature had not made the promise that was pivotal to the lead opinion's analysis and disposition of the case. *Id.* at 58-73 (Peterson, C.J., dissenting).

from the purported attempt by the Court to think in restrictive terms, not automatically concluding that any provision of law that an employee might like to have treated as a contractual obligation must, in fact, be such a right. But, in the event, the Court essentially excused itself from carrying out that challenging task by repeatedly stating (incorrectly) that it already had found the PERS statutes to be a contract in other cases, thereby making the announcement that the statutes under consideration in *Hughes* were a part of the state's promise a foregone conclusion. Indeed, a further part of the downside of the case lay in its glib and repeated assertion that the PERS *system* was a contract, which had the unacknowledged but very real consequence of placing on the state and those other public employers who used that system the essentially impossible burden of showing, in any case that might arise in the future, that a particular statute within PERS was *not* an essential part of the contract. Moreover, and quite soon thereafter, a majority of the Court, with the same justice who authored *Hughes* authoring that majority opinion, would utterly abandon any principled consideration of the issues that it had at least identified in *Hughes*, even to the point of turning a word of permission, "may," in a statute into an ironclad, unilateral promise.

5. ***Oregon State Police Officers Assn. v. State of Oregon*, 323 Or 356, 918 P2d 765 (1996) ("*OSPOA*")**

Significant public controversy over public employee pensions led a private group to propose, and the people to adopt, Ballot Measure 8 (1994). That measure added three substantive sections, Sections 10, 11, and 12, to Article IX of the Oregon Constitution. In due course, the measure came before the Oregon Supreme Court on claims that each of the substantive provisions violated the Contracts Clause of the Constitution of the United States.[19] As described more fully below, a majority of the Court ruled that all three sections violated the Contract Clause.[20]

The three substantive clauses in Ballot Measure 8 were: (1) Section 10,[21] which provided that (a) any government employee participating in a retirement system had to contribute an amount equal to six percent of the employee's salary to the system, (b) the state would no longer have the authority as part of the collective bargaining process or otherwise to agree to "pick up" employees' six percent

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[19] Because the ballot measure had created an amendment to the Oregon Constitution, the only constitutional limitation on its effect had to come from Article I, section 10, clause 1 of the federal Constitution.

[20] The case was not decided unanimously. A bare majority declared all three sections of Ballot Measure 8 unconstitutional. Three members of the Court (Gillette, J., joined by Carson, C. J., and Graber, J.) dissented from the majority's substantive holding concerning Section 10, as well as dissenting from the entire analytical framework that the majority utilized. *OSPOA,* 323 Or at 404-12 (Gillette, J., joined by Carson, C. J., and Graber, J., specially concurring in part and dissenting in part). One member of the Court, Justice Fadeley, although he provided the fourth vote for the majority, also considered the measure's three substantive provisions to be in violation of the *Oregon* Constitution's Contract Clause. *Id.* at 384 (Fadeley, J., concurring). Just how some parts of a state constitution could be declared unconstitutional in light of other parts of the same constitution is somewhat hard to fathom. *See* footnote 20, *supra*. Justice Fadeley's concurring opinion will not be further discussed here.

[21] The measure added three new sections to the already-existing Article IX of the Oregon Constitution, hence the odd numbering.

contribution obligations, and (c) the state would not increase salaries to make up for the required contribution; (2) Section 11, which forbade the state contracting to guarantee any rate of interest or return on the funds in a retirement system; and (3) Section 12, which forbade increasing any retiring state employee's retirement benefits on the basis of unused sick leave.

The principle problem confronting the *OSPOA* court was the fact that all the substantive sections of Ballot Measure 8 operated prospectively—a circumstance that, under *Hughes*, should have made them valid. The Court escaped from that trap by reviewing a series of older Oregon cases, none of which was dispositive, and then stating,

> The common thread running through the Oregon cases cited above is that the state may undertake binding contractual obligations with its employees, including benefits that may accrue in the future for work not yet performed. * * * Most jurisdictions adhering to a contract theory of pensions construe pension rights to vest on acceptance of employment or after a probationary period, with vesting encompassing not only work performed but also work that has not yet begun.

OSPOA, 323 Or at 371.

Hughes had recognized that it was *possible* for a state to undertake binding contractual obligations with its employees to include benefits that might accrue at some time in the future for work not yet performed. *Hughes*, 314 Or at 28. However, nothing in that earlier opinion justified *assuming* that every provision in the PERS statutes is a promise to bind the state in perpetuity. That inquiry—

whether a particular provision was intended to be an unalterable part of the unilateral contract, or something more transitory—had been given lip service and then ignored in *Hughes*; actual performance of the inquiry should have been the *OSPOA* Court's next step. Instead, the majority skipped that vital question entirely, stating, "* * * Our analysis, therefore, must focus on only two narrow questions: What are the contractual obligations contained in the relevant statutes and does Measure 8 impair any of those contractual obligations?" *OSPOA,* 323 Or at 372. Needless to say, that "narrow focus" did not bode well for the substantive components of Ballot Measure 8.

Section 10 of Measure 8 was the "six percent pick-up" provision. Before 1979, employees who were in PERS were required statutorily to contribute a percentage of their salary to their pension plans. Then, in 1979, the legislature chose to *permit* public employers to "agree, by a written employment policy or agreement * * * to 'pick-up,' assume or pay the full amount of contributions to the fund required [of employees in PERS]." The rate of contribution for any such pick-up was set at six percent. Or Laws 1979, ch 538, § 3 (codified until 1995 at *former* ORS 237.075; re-codified as ORS 238.205 in 1995). That statute provided:

> [A] public employer participating in the [Public Employees' Retirement System] *may agree*, by a written employment policy or agreement in effect on or after July 1, 1979, to "pick-up," assume or pay the full amount of contributions to the fund required of all or less than all employee members of the system employed by the employer. If a public employer so agrees:

> (1) The rate of contribution of each employee member of the system employed by the employer who is covered by such policy or agreement shall uniformly be six percent of salary regardless of the amount of monthly salary.

Former ORS 237.075 (1981) (emphasis added).

Of course, any neutral consideration of the wording of ORS 237.075 would have recognized that what it gave was permission—nothing more—to bargain collectively over having the state pay the six percent pick-up. The opportunity to bargain over a subject is not, however, the right to receive it. The "right" of an employee to have the state pick up the six percent contribution would exist only when stated in "a written employment policy or agreement," *i.e.*, only when it was a part of a *different, periodically renegotiable* contract. Thus, the statute did not in any way promise that the benefit thus bargained for actually would be agreed to, and there was no colorable promise, much less a clear one, that state employees would, in perpetuity, be entitled to the six percent pick-up.

However, the foregoing logical conclusion, based on the inescapable meaning of the English words used in the statute, was not where the Court majority was headed. Instead, the majority, after a brief recitation of the statute's history, stated, "The enactment of ORS 237.075 followed lengthy negotiations between the state and employee unions, during which employees agreed to forego a requested pay raise in exchange for the right to bargain with public employers for a six percent 'pick-up.' * * *." *OSPOA,* 323 Or at 373. Of course, the extent of negotiations necessary to agree on the measure had nothing to do with anything: The wording chosen for the statute would mean whatever it meant, whether arrived at after months of dispute or spontaneously agreed upon over lunch. But the use by the Court of the adjective "lengthy" tipped off what was coming: Section 10 was going to be found to impair an obligation of contract.

And that's what happened. The Court went into an extensive examination of the value to both sides of the statutory bargain about the pick-up. *Id.* at 373. The Court then examined the financial consequences to employees if the six percent pick-up were no longer available. *Id.* Not once did the Court acknowledge or consider the contingent nature of the authorization in ORS 237.075, or its self-limiting reference to periodic salary negotiations and their outcome ("a public employer *may* agree, by a written employment policy or agreement"). Instead, it announced:

> * * * The change [back to requiring employees to pay their own six percent contribution to their retirement account] mandated by Section 10 alters the state's contractual obligation, in violation of [precedent], by increasing plaintiffs' cost of retirement benefits for services that, absent a lawful separation of employment they will provide in the future. That consequence, if approved, would permit the state to retain the benefit of plaintiffs' labor, but relieve the state of the burden of paying plaintiffs what it promised for that labor.

Id. at 374 (footnote omitted). Such an outcome, the Court majority declared, would offend "[t]he most basic purposes of the Contracts Clause, *as well as the notions of fundamental fairness that transcend the clause itself.*" *Id.* at 375 (emphasis added).[22] Neither, at least in the majority's view, was the flaw in section 10 a retrospective one only. Because the statute was deemed to be part of the PERS contract, the Court majority now announced, it could not be altered, even if the alteration were prospective only. *Id.* at 374-75.

So it came about that the legislature's two-year experiment (the original enactment had a sunset provision) in expanding the permissive subjects of collective bargaining between governmental entities and their employees was turned into a permanent promise that could not be rescinded, in spite of the fact that employees already had the obligation to contribute six percent of their salary to their retirement fund before the statutory change. And so also there arose a mantra that has repeated itself in arguments by employees ever since, including the arguments argued by the petitioners in the present case: "*Any* change in the system that improves our situation is a promise, and must be permanent."

There were two other substantive provisions of Measure 8 under examination in *OSPOA*. One, Section 11, would have eliminated the statutorily guaranteed rate of return on each PERS member's individual retirement account.

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[22] Of course, the importation of "notions of fundamental fairness" into the inquiry was incredibly off the mark, and showed that the Court majority was making policy, not interpreting and applying constitutional principles. As noted, there was a pointed dissent from the foregoing rulings, including that one. *See OSPOA*, 323 Or 404, 411 n 7 (Gillette, J., joined by Carson, C. J., and Graber, J., specially concurring in part and dissenting in part).

The Court majority, relying on its analysis of Section 10, also invalidated Section 11 as an impairment of contract. *Id.* at 378.[23] The other, Section 12, forbade the use of unused sick pay to set the final salary of retirees for the purposes of defining the amount of their pension payments. The majority struck down that section as well, again relying on its analysis of section 10. *Id.* at 379.[24]

The net outcome of *OSPOA* was to leave the entire jurisprudence of unilateral statutory contracts in complete disarray. No logic could justify the sweep of the Court majority's decision, or the grounds for it. It remained for this Court to attempt to right the ship in future cases. That opportunity, and the beginning of the cure, came in 2005.

6. *Strunk v. Public Employees' Retirement Bd.* 338 Or 145, 108 P3d 1058 (2005)

After *OSPOA*, PERS law remained essentially unchanged until 2003, when the legislature passed a series of measures (the "2003 PERS legislation") intended to regularize and control the expenses associated with that retirement system.

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[23] The dissent agreed that the guaranteed rate of return, once enacted in 1975, was so worded as to become a binding promise on the state. The dissent did not, however, accept the analytical path by which the majority reached that conclusion. *Id.* at 412-13 (Gillette, J., joined by Carson, C. J., and Graber, J., specially concurring in part and dissenting in part).

[24] Again, the dissenting justices rejected the majority's analysis, but concurred in the result. *Id.* at 412-13 (Gillette, J., joined by Carson, C.J., and Graber, J., specially concurring in part and dissenting in part).

Among other things, the 2003 PERS legislation (1) discontinued contributions into members' regular PERS accounts in favor of contributions into an Individual Account Program ("IAP"); (2) ended the statutory practice of annually crediting each member's account at a statutorily established "assumed earnings rate"; (3) ended the availability of the so-called "Money Match" formula used to calculate pension benefits at retirement; and (4) ended the automatic yearly enhancement of pensions with COLAs. Naturally enough, there were both active and retired state employees who wished to contest those changes. The result was the *Strunk* case.

The *Strunk* litigation plaintiffs all were so-called "Tier One" members of PERS, *i.e.*, they all had joined the PERS system before January 1, 1996. The case therefore dealt almost entirely with the impact of various parts of the 2003 PERS legislation on the interests of those employees. The technical details of the changes in PERS created by the 2003 PERS legislation are too extensive and complex to be explicated here: the League assumes that the Court is at least aware of, if not familiar with, those changes. Instead, the League here focuses on the analytical methodology used by the Court majority in dealing with various arguments against the PERS changes.

One of the most important aspects of the *Strunk* opinion lies in its methodology. The Court majority[25] described its approach this way:

> We note some considerations from *Eckles* and *Hughes* that guide our analysis in these cases. First, in *Eckles*, this court clarified that the contracts provision of Article I, section 21, prohibited the impairment of a contractual *obligation*. *Eckles,* 306 Or at 395. As to the determination whether newer legislation amounts to an impairment of a preexisting statutory contractual obligation, the court focused on whether the legislation would change or eliminate the state's obligation under that contract. *Id.* at 399-400. * * * In *Hughes*, this court set out a two-step process for addressing a claim of contract impairment or breach under Article I, section 21:
>
> "First, it must be determined whether a contract exists to which the person asserting an impairment is a party; and, second, it must be determined whether a law of this state has impaired an obligation of that contract. General principles of contract law normally will govern both inquiries, even where the state is alleged to be a party to the contract at issue." *Hughes*, 314 Or at 14. In its ensuing analysis, the court divided the first question into three component inquiries: (1) is there a state contract?; (2) if so, what are its terms?; and (3) what obligations do the terms provide? * * * Further, as noted above, this court in *Hughes* concluded that PERS constituted a statutory contract. *Id.* at 25.

Strunk, 338 Or at 170. The *Strunk* majority would attempt to follow those guidelines throughout its analysis of the issues in that case.

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[25] The *Strunk* decision, like *OSPOA*, was a four-to-three decision, but the lineup was very different. Justice DeMuniz wrote for the majority, and was joined by Carson, C.J., and Gillette and Balmer, J.J. Justice Durham wrote what was styled as a "concurrence and dissent" but what was in fact simply a dissent, that was joined by Riggs and Kistler, J.J.

a. Redirection of Members' Contributions to IAPs

The 2003 PERS legislation changed the way in which a PERS member's six percent contributions (whatever their source) were handled: The contributions no longer went into the member's account in the fund. Instead, the contributions went into an IAP. Members in that situation were not entitled to have their accounts credited from invested funds at not less than the assumed earnings rate for PERS investments, were not eligible for a particularly desirable payout arrangement (the "Money Match"), and were not entitled to COLAs after retirement. The majority said, "* * *Respondent State of Oregon characterizes the IAP accounts as 'invested and credited in the same fashion as a typical 401(k) or IRA account,' and we agree with that general description." *Strunk*, 338 Or at 180.

The PERS statutes dealing with calculation of pension benefits at retirement at that time provided three different methods of making the calculation—the "Full Formula," the "Money Match," and the "Pension Plus Annuity."[26] They also provided that a retiring member would receive "at least" the amount available under the "Full Formula" alternative, which the legislature apparently believed would prove the best of the three alternative formulations for the majority of members. (In reality, the "Money Match" proved to be the most popular among

[26] A full explanation of the assumptions about and the calculations to be made under each of the three alternative approaches is unnecessary within the context of this brief.

retiring members.) Petitioners argued, *inter alia*, that the 2003 legislative choice to deny them the right to retire using the "Money Match" formula would result in pensions that would be lower than what they characterized as a "statutory promise" made to them in the PERS statutes—a promise that their pensions would amount to "at least" a figure that, in fact, could only be reached if "Money Match" remained a choice among the choices that members could make concerning retirement calculations. *Strunk*, 338 Or at 185-86. The majority agreed, driven especially by the fact that "the wording of [the applicable statute, ORS 238.300 (2001)]* * * is unambiguously promissory." *Id.* at 186.

That conclusion did not, however, take the majority to where the petitioners wished to go. Instead, the majority, after examining the long history of statutory changes in methods used to calculate pensions, concluded that the legislature had never intended to make a promise that any of the various formulae that it had used was intended to be a promise that use of any particular formula "*always* would be the case." *Id.* at 191 (emphasis in original). After further analysis, the majority stated that "[t]he predicate question—which we determine to be dispositive in these cases—is whether the contract offer that the particular pension plan presents *contains* * * * a promise that extends over the life of a covered member's service." *Id.* at 192 n 40 (emphasis in original). The Court then held:

> In summary, we conclude that the 1981 Legislative Assembly promised each eligible member that, at retirement, the member

> would be entitled to receive a service retirement allowance calculated under the formula that yielded the highest pension amount. The legislature did not alter or eliminate that promise when it enacted in the 2003 PERS legislation.

Id. at 192. That is, the promise did not include a guarantee that three, and only three, particular formulae always would be the pension calculation formulae from which a retiree could choose.

Turning to petitioners' additional contention that they were entitled to have their six percent contribution credited under the former system, rather than to an IAP, the majority readily dismissed that argument:

> Nothing in the text of ORS 238.200(1)(a) (2001), which required PERS members to contribute six percent of their salaries to the fund, supports petitioners' argument that the legislature intended that contribution to be immutable. * * * [T]he text of ORS 238.200(1)(a) and its statutory context *do not establish clearly and unambiguously that the legislature intended to promise members* that they could contribute six percent of their salaries to their regular accounts throughout their PERS membership so as to maximize their pension component calculation under the Money Match.
>
> Applying the foregoing conclusions to petitioners' claims[,] * * * [n]othing about the creation of the IAP alters the legislature's promise that, at retirement, each member will receive a service retirement allowance calculated under the formula yielding the highest pension amount, and nothing about the IAP legislation constitutes a breach of that promise.

Id. at 192-93 (emphasis added).

The emphasized wording in the foregoing quotation shows that the Court had returned to interpreting alleged statutory contracts according to traditional criteria, one of which was an insistence that the legislative intention to make a particular statutory provision part of a unilateral contract had to be "clear and unambiguous." As the League has pointed out in detail earlier in this brief, the Court did not purport to employ either standard in its *Hughes* and *OSPOA* decisions. *Strunk* thus represents a true turning point in jurisprudence on the topic of statutory contracts.

b. <u>Assumed Earnings Rate</u>

Since 1975, the PERS statutory scheme had provided that the investment earnings that were credited annually to Tier One members' regular accounts would be no less than the existing assumed earnings rate. *Former* ORS 237.277 (1975) (now ORS 238.255). Since 1989, the assumed earnings rate had been set at eight percent. The 2003 PERS legislation changed all that, in particulars that need not be elaborated here. It is sufficient to state that the majority found the change to be an impermissible impairment of contract. *Strunk,* 338 Or at 205-06, 208. That decision is unsurprising, given the legislative history of the earnings credit statutes, and the League takes no exception to it. The statutory provision concerning the assumed earnings rate that the 2003 legislation altered was unquestionably promissory, and the petitioners in *Strunk* were faced with a clear loss as a result of the change.

c. The Variable Annuity Account Program

PERS members have long been permitted, under certain circumstances, to invest a part of their account in a variable annuity that fluctuates with the securities markets. The majority's analysis of the problem is extensive, but its answer is short and clear:

> [T]here is nothing inconsistent between the earlier promise that the legislature made with respect to the variable annuity account program—that any funds placed into variable accounts would be reserved for the purchase of a variable annuity—and the 2003 Legislative Assembly's decision to discontinue permitting PERS members to contribute to their variable accounts. Consequently, there can be no breach or impairment of the obligations set out in the PERS contract in that respect.

Id. at 213. This disposition, which is like that respecting the majority's treatment of the objections to the IAP earlier, is not surprising. So long as the funds deposited in the variable accounts up to the date of the new legislation remained in those accounts, the legislature's decision to discontinue that feature presented no constitutional problems.

d. COLAs

Both before and after the 2003 PERS legislation, ORS 238.360 (2001) directed the Public Employees Retirement Board ("PERB") to determine and apply annual COLAs to retired Tier One PERS members' service retirement allowances. (As explained in the discussion of legislative history of the PERS system, *supra*, the practice of awarding annual supplements to the regular pensions of retirees was a relatively old and entirely gratuitous one; the creation of the statutory scheme that at once specified and limited the ability of retirees to receive COLAs did not occur until 1971.) However, the 2003 legislation purported to suspend payment of those COLAs to certain members unless prescribed financial conditions were met.[27]

The majority had no difficulty in determining that the promise of a COLA—and the Court clearly felt that the 1971 statute was a promise—was limited by the requirement that any payment be correctly calculated under the standards set out in the statute. *Id.* at 222. The only question for the majority thus reduced itself to an inquiry as to whether the legislative choice to withhold COLAs from certain Tier One retirees for a period of time was based on the fact that the member was not "entitled to receive" a COLA under ORS 238.360. *Id.* at 223. The simple answer to that question was that the choice not to pay the COLA was not based on that criterion. Thus, because any other reason would be extra-statutory ones, the majority felt that they would constitute a breach of the promise contained in the

[27] The freezing of COLAs to certain retired Tier One members was part of a legislative attempt to recover unmerited over-crediting of such members' PERS accounts by roughly 7.5 percent in 1999. *Strunk,* 338 Or at 220. However, at least for that purpose, the statutory freeze was unnecessary: PERB had (and continues to have) statutory authority—ORS 238.715—to recover PERS overpayments.

PERS statutes. *Id.* The Court therefore invalidated that part of the 2003 statute, returning the affected Tier One retirees to the *status quo ante*. *Id.* at 225 n 59.[28]

Read by itself, the Court's treatment of COLAs seems perfectly credible. However, the League respectfully submits that the Court, in reading the 2003 legislation respecting COLAs—ORS 238.360—should not have confined its consideration of the statutory context to the relative isolation of the period 1971 (when the statute's predecessor first was passed) to the present. Instead, the Court should have looked further back, to the history of COLAs as they were granted from time to time during the period between 1945 and 1971. Had the Court done so, it would have discovered that the awarding of supplementary payments to retirees to improve the retirees' financial situation—often referred to as a "thirteenth check"—had been a regular practice of the legislature since 1963, with the decision to award them being made on an entirely gratuitous, *ad hoc* basis and without any permanent legislative criteria. (The record in the present case shows that such thirteenth checks usually met, and often exceeded, any retiree's check for a single month. *See* Moro-ER-186-87.) That more complete history, the League suggests, presents the 1971 statutory authorization of COLAs—and, haphazard and unpredictable as they were, that is precisely what the "thirteenth checks" were—in

[28] The court dealt with one further issue—actuarial equivalency factors—in a way that does not require discussion.

a new and different light: When the history of COLAs is fully considered, the idea that the Legislative Assembly intended, by its adoption of the predecessor to ORS 238.360 in 1971, to *promise* that retirees would be receiving COLAs ever after is insupportable.

Two considerations support the League's position. First and foremost, COLAs awarded prior to 1971 were clearly gratuitous—they were awarded to persons already retired—so the practice that was regularized in 1971 was a gratuitous practice. Second, there is no distinctively clear and unambiguous promissory wording in the 1971 statute that would separate the revised practice from its roots in the haphazard history of the practice of awarding COLAs before 1971. This demonstrates that, rather than promising COLAs from 1971 on, the legislature was simply attempting to regularize the practice of awarding them. Such regularization made COLAs easier to anticipate and budget for, and improved the likelihood that the IAF would remain fiscally sound, but it did not turn them into a promise.[29]

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[29] In fairness to the Court, the League acknowledges that, so far as it can determine, the history of COLAs before 1971, and the proposition that the League now argues based on that history, was never brought to the Court's attention in the *Strunk* case. The Court was thus "flying blind" on the issue and, given the number of thorny issues that it otherwise had to resolve, should not be faulted for not investigating the pertinent history on its own. Nonetheless, the League believes that the Court's holding in *Strunk* respecting a "promise" of future COLAs was mistaken, and needs to be withdrawn.

Notwithstanding the single, erroneous holding respecting COLAs that the League believes that it has identified, *Strunk* represents an important turning point in this Court's PERS jurisprudence. The Court's meticulous examination not only of legislative wording, but also of legislative intent, restores the standard that should have been applied all along, *viz.*, a unilateral, statutory contract exists only if the legislature intended to create it, and then only to the extent that the legislature intended the contract to reach. The announcement or, more precisely, the re-emergence of that standard in *Strunk* is a vindication of the separation of powers, providing as it does an assurance to the legislature that it is the standard by which any future legislative policy choice will be judged, and against which any alleged unilateral, statutory contract will be tested.

Strunk also is important for the way in which both the majority and the concurrence by then-Justice Balmer treated the *OSPOA* decision. The majority first observed, "* * * we note that this court's earlier conclusion in *OSPOA*, 323 Or at 374-76, that the employer pick-up provisions are part of the PERS contract does not necessarily assist our analysis in this more complex case, which requires that we view all the statutes at issue as a whole." *Strunk*, 338 Or at 183 n. 34. Still later, the majority confines *OSPOA* to its own facts. *Strunk*, 338 Or at 191. At least equally important, moreover, was this concurring statement by Justice Balmer:

> * * * We appropriately have declined to revisit the questions of statutory interpretation and legislative intent that *OSPOA* addressed and decided. Our respect for that precedent, however, should not be misread as an endorsement of either the result or the reasoning in that case.
>
> To the contrary, in my view, the court in *OSPOA* lost sight of the polestar of statutory contractual analysis: clear, unambiguous, and unmistakable promissory intent. [Citations omitted.] Having lost that bearing, the court in *OSPOA* proceeded to misconstrue the "assumed interest rate" provisions of ORS 238.255—a patently administrative provision intended to smooth fluctuations in PERS fund earnings—as both a material and a perpetual aspect of the PERS contract.

Strunk, 338 Or at 239 (Balmer, J., concurring). The League wholly agrees with and endorses Justice Balmer's analysis, and urges this Court to adopt it for the future.

The League notes that the reassurance that it takes from the *Strunk* decision has been validated by two decisions handed down more recently. This is true not because either decision necessarily plows new ground but, to the contrary, because each adheres to the paradigmatic approach utilized in *Strunk*.

7. ***Arken v. City of Portland*, 351 Or 113, 263 P3d 975 (2011)**

After the PERB made ill-advised and significant overpayments to Tier One members in 2000, PERB determined that it wished to recover the overages, and published notices to the retirees explaining how it intended to do that. In sum, PERB's approach was either to accept a lump sum repayment of the overage from a retiree, or to recover the overpayment through a reduction in monthly benefits, spread out over time. Two different groups of retirees challenged the recovery methods adopted by PERB, essentially asserting that they were entitled to keep the overpayments, and to receive COLA payments based on monthly pension payments that included those overpayments.

This Court's response to such claims was refreshingly curt: "It is clear * * * that the Legislative Assembly did not make such a statutory promise." *Arken*, 351 Or at 130. That is, the legislature did not, in its 2003 PERS legislation, make any promise to the effect that the retirees could keep the overpayments. The Court's extensive examination of the pertinent statutory wording, as well as the legislative history, graphically illustrates the proposition that these questions are, first and foremost, questions of legislative *intent*, not policy choices that this Court is entitled to make for itself. As the Court summarized the rule: "* * *[T]he terms of the statutory PERS contract are a matter of legislative intent and only statutory terms that 'unambiguously evince[] an underlying promissory, contractual legislative intent' become a part of the statutory contract." *Id.* at 136 (quoting *Hughes,* 314 Or at 26).

The case covers other topics, including a refusal to accept the legislature's attempt to reinstate its COLA freeze respecting the overpayments, but the importance of the case lies in its ringing endorsement of the standards for identifying a legislative promise.

8. ***Goodson v. Pub. Employees' Ret. Sys.*, 351 Or 173, 264 P3d 148 (2011)**

A follow-on to *Arken*, this case involved an assertion by another group of Tier One retirees that PERB had promised them the overpayment at issue in *Arken*—a 20 percent credit to their pension—and they retired in reliance on it. The Court answered that assertion in fine style:

> Petitioners' argument rests on a false premise. The terms of the statutory contract between the state and its retirees are determined by examining the pertinent statutes enacted by the legislature; PERB[, which had made the promise on which petitioners relied,] had no authority to make or change those contractual terms.

Goodson, 351 Or at 176.

Respecting both *Arken* and *Goodson*, the most important fact is that each opinion was unanimous.[30] This Court appears now to be set firmly on the course first identified (albeit not fully laid out, and certainly not followed) in cases like *Hughes*, *viz.*, when a litigant alleges that it is a party to a unilateral contract with the state that the state wishes to alter, it must clearly and unambiguously appear that the legislature intended to offer such a contract. The clarity in that standard permits the League and all other litigants in this case to know what the appropriate inquiry is, and what evidence assists in that inquiry. With the foregoing legislative

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[30] Justice Landau did not participate in the *Arken* decision.

and jurisprudential history in mind, the League now turns to the contentions of the parties.[31]

ANSWERS TO ASSIGNMENTS OF ERROR

I. Standards of Review and Preservation of Errors

The League agrees that this Court reviews the facts *de novo* from the comprehensive report of the Special Master, and conducts a plenary review of the legal issues. *Strunk*, 338 Or at 171. The League also agrees that arguments are properly preserved and presented.

II. Answers to Moro Petitioners' Assignments of Error

A. Answer to Moro Petitioners' First Assignment of Error:

SB 822 §§ 1, 3, 5, 7, and 11-17 and SB 861 §§ 1, 3, and 8 do not impair the COLA and SB 656 benefit 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.

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[31] The League adds one additional preliminary observation. The Moro petitioners' statement of facts—while admirable in many respects for the manner in which it sorts its way through the jungle of facts in this case—devotes an incredible amount of space (pages 29 through 41 of its opening brief, for example) toward the apparent goal of demonstrating that the legislation under examination here either (1) was wholly unjustified, given the results that the Moro petitioners project that it actually will achieve, or (2) did not achieve enough, in light of the financial hardship that it works on present and prospective retirees, of which the Moro petitioners are offered as a representative sample. Whatever battle the Moro petitioners think that they are fighting by emphasizing those considerations, the League declines to join it. In the League's view, the advisability of the present legislation is not within this Court's purview; the legislation either is constitutionally permissible, or it is not. Put another way: A foolish but constitutional enactment must be sustained; a brilliant but unconstitutional one cannot be.

As noted, Moro petitioners rely, in mounting this part of their attack on the 2013 legislative reforms of PERS, on Article I, section 21, of the Oregon Constitution. That provision states: "No* * *law impairing the obligations of contracts shall ever be passed." Specific to this case, Moro petitioners assert that they have entered into a unilateral contract with the State of Oregon or one or another of its political subdivisions and that the amalgam of statutory provisions that describe the PERS system are a part of that contract.

The League does not contest that the government can form contracts of that kind, or even that certain provisions of the PERS statutes are a part of such a contract. Indeed, the only true question in this case is whether the COLA provisions and the tax offset provisions of the Act are a part of that contract. Ultimately, that is the question that this Court must answer. Unfortunately, however, Moro petitioners at the outset, when it matters most, downplay (or fail to quote) the exacting legal standard applicable to that inquiry. That standard, which the League has been at pains to point out (even in those circumstances in which the Court, after acknowledging the standard, failed to follow it), is variously stated as a requirement that a party asserting a statutory contract must "*establish clearly and unambiguously that the legislature intended to promise members* [the benefit claimed]," *Strunk,* 338 Or at 192-93 (emphasis added), or as "the polestar of statutory contractual analysis: clear, unambiguous, and unmistakable promissory intent," *Strunk*, 338 Or at 239 (Balmer, J., concurring).

Instead of forthrightly acknowledging the foregoing standard at the outset, however, Moro petitioners attempt an end run around it. First, Moro petitioners say, "Whether a law violates the provision, requires a two-step analysis: (1) is there a contract; and (2) has the law in question impaired any obligation of that contract[?]" (Moro Br at 42.) Moro petitioners then add:

> General principles of contract law govern both inquiries, even where the state is alleged to be a party to the contract. However, the following additional rules apply: (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."

(Moro Br at 42-43.)

That last discussion is mostly a red herring. Neither the state's condemnation power nor the prohibition on the state's contracting away its "police power" is implicated in this case; mention of either is a distraction. Only the first issue identified, *viz.*, *the legislature's intent*, is implicated in this case. And, as to that, Moro petitioners obscure the inquiry by use of a double negative ("does not unambiguously express"). (Moro Br at 43.) That use is no mortal sin—it parrots the phrasing used by the Court in *Hughes*, 314 Or at 14. Still, it would have been far better if the Moro petitioners had acknowledged that later decisions of this Court hold that the inquiry whether there is a contract simply "is [an inquiry] of legislative intent." *Strunk*, 338 Or at 175. *See also Arken*, 351 Or at 136 ("[T]he terms of the statutory PERS contract are a matter of legislative intent and *only statutory terms that 'unambiguously evince[] an underlying promissory, contractual legislative intent' become a part of the statutory PERS contract*." (emphasis added).)

Moro petitioners then obscure the issue even further by once again resorting to *Hughes* to state the following:

> In determining whether a particular statute unambiguously expresses an intent to be contractual in nature, [[32]] "the context in which the* * *statute is enacted is of primary importance." [*Hughes*, 314 Or] at 25. The statute must not be examined in isolation but rather, the analytically proper approach is to examine it within the broader context of the Act into which it is enacted. *Id. Where the Act itself is found to be supported by the requisite contractual intent, "[e]very valuable privilege given by the [Act], * * *is a contract which cannot be changed by the Legislature, where the power to do so is not reserved in the * * *[Act]*." *Id.* at 24 *citing The Piqua Branch of the State Bank of Ohio v. Knoop*, 57 US 369, 379-80, 14 L Ed 977 (1853), *see also Strunk*, 338 Or at 183, n 34 [quotation from note omitted].

(Moro Br at 43 (emphasis added).) It should be noted that the Moro petitioners' use of the extensive quote from the *Piqua* case is a blatant attempt to turn the inquiry—as this Court has described the inquiry—on its head: The Moro petitioners are actually asserting that the undifferentiated Act as a whole should be deemed to be a contract, and any attempt to remove some statutory provision from

[32] To be fair, Moro petitioners do correctly state the inquiry in this passage, but only in passing, and on their way to a further incorrect exposition.

that contract must be supported by specific legislative wording indicating that the legislature *did not, from the outset, mean for that particular provision to be a part of the contract*. Or, to paraphrase in a way that is wholly fair to their argument, Moro petitioners argue: "An intent to make a statute contractual must be manifest, and a statute is contractual in its entirety unless the same statute unambiguously states which of its provisions are *not* a part of the contract." That is a nice turnabout in the law that will benefit the Moro petitioners, if they can get it. But nothing in the history of the Act or this Court's cases could justify such an about-face in Oregon law construing the scope of unilateral statutory contracts. We turn the Moro petitioners' contentions under this first assignment of error.

1. COLAs and SB 656 Benefits Are Not Contractual Terms within the PERS Statutes

In their argument,[33] Moro petitioners assert:

> Whether the PERS statutes create contractual obligations that are entitled to protection under Article I, Section 21[, of the Oregon Constitution,] can no longer be reasonably disputed. As recently as in the *Strunk* case, this court reaffirmed that the "accepted

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[33] Moro petitioners consistently refer to the statutory grant of a part of their benefits to serve as an offset to Oregon income tax as "the SB 656 benefits," referring to the numbering of the Senate Bill, first codified at ORS 1.343 and ORS 237.001-237.315 (1991), that conferred that benefit. In fact, a later legislative enactment, Or Laws 1995, ch 569 created a different form of addition to PERS benefits ("the HB 3349 benefit"), with a party who is the beneficiary of both being entitled to select the one most valuable to that party's circumstances. With the understanding that the reference is to both enactments, the League similarly refers to both enactments using the shorthand "SB 656 Benefits."

> proposition of the contractual nature of PERS is an essential background" to any inquiry. *Strunk*, 338 Or at 183.

(Moro Br at 45-46.) Moro petitioners then go on to add other citations and quotations, all of which, they imply, are to the same effect. (*See id.*, citing *OSPOA*, 323 Or at 371; and *Hughes*, 314 Or at 20.) However, neither of those cases purports to identify the *entire* PERS contract, and none asserts that *every word*, or even *every benefit conferred* from time to time by the PERS statutes *is a part of the contract*. No case involving this Court and PERS ever provided this Court with an occasion to directly address either of those issues and, some unfortunate wording in the earlier cases notwithstanding, this Court never has purported to do so. Indeed, after the foregoing citations and quotes, the Moro petitioners finally get around to recognizing and admitting that the pivotal question to be answered in this case remains an open one: "* * * Therefore, *the* * * * *remaining question is* whether ORS 238.360 (Tier One/Two COLA), ORS 238A.210 (OPSRP COLA), and ORS 238.366 and 238.368 (SB 656 benefits) constitute terms of that PERS statutory contract." (Moro Br at 47 (emphasis added).)

That, at last, is the correct question. We turn next to an examination of why Moro petitioners believe that the answer to the question is "yes," and why they are mistaken.

a. Are Tier One and Tier Two COLAs Contractual?

Moro petitioners assert that the answer to the foregoing question is "yes," and point to statements of this Court in *Strunk* as controlling:

> In fact, this [C]ourt need only go back to its decision in *Strunk*, 338 Or 220-225, to confirm that ORS 238.360 (Tier One/Two COLA) constitutes a term of the PERS statutory contract. In *Strunk*, the [C]ourt reviewed the text and context of ORS 238.360 (2001), and recognized that, "[t]he legislature enacted that statute in 1971, and its substance has remained unchanged, notwithstanding other interim amendments." *Id.* at 220. Following a review of these factors, the [C]ourt concluded that (1) "the general promise embodied in ORS 238.360(1) (2001) was part of the statutory PERS contract" (*id.* at 221); (2) "the promise does extend to properly calculated service retirement allowances" (*id.* at 222); (3) "the elimination of annual COLAs from the 'fixed' service retirement allowance, as set out in Oregon Laws 2003, chapter 67, section 10(3), is inconsistent with the legislature's promise set out in ORS 238.360(1) (2001) (*id.* at 223); and (4) "by precluding application of annual COLAs to 'fixed' service retirement allowances chapter 67, section 10(3) amounts to a directive from the legislature to PERB to breach the promise set out in ORS 238.360(1) (2001)."

(Moro Br at 47-48.)

In its discussion of the *Strunk* decision, *see* League Br at 38-50, the League believes that it has refuted the accuracy of the Court's statement in *Strunk* on which the Moro petitioners now rely. In sum, that discussion demonstrates that, far from being a new development in 1971, "COLAs," although called something else, had been awarded to retirees for some time prior to 1971. The 1971 legislation, seen in that light, is simply a regularization of an *ad hoc* process that had been in place for some time and had, as a general matter, supplied retirees with far greater supplemental benefits than the scheme created in ORS 238.360. Yet that 1971 legislative reduction went unchallenged legally; no one appears to have doubted the legislature's plenary control of the subject.

Even if one were to assume that the message to be derived from the foregoing history is not entirely clear, it certainly defeats any suggestion that COLAs were a new phenomenon in 1971 and that their addition to the PERS statutes was promissory. Indeed, as noted, the 1971 legislation significantly *reduced* the percentage by which retiree benefits up to that time were being supplemented. Clearly, the 1971 legislature—the one that made the supposed "promise" on which Moro petitioners rely—thought that it had the power to change arrangements respecting COLAs, including significantly reducing them. In logic, the power to reduce should also be deemed to be the power to eliminate. But this Court does not need to go even that far: In the present legislation, COLAs are merely reduced, not eliminated. Surely, the history that the League cites establishes that the legislature never promised that it was relinquishing its authority to do *that*.

Perhaps anticipating the League's argument, the Moro petitioners insist that the wording of the 1971 enactment is, in fact, promissory. However, as the League will show, they make no independent effort to prove it.

As of 2001, with no relevant amendments since its original wording beyond raising the permissible amount of adjustment of retirement benefits through COLAs from 1.5 to 2.0 percent, ORS 238.360 provided:

> (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 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.

Given that it is their burden to establish that the 2013 legislation violates constitutional inhibitions, one would expect the Moro petitioners at this point to undertake a specific analysis of the wording of the statute. They do not. Their substantive argument respecting the wording is the following:

> As the [C]ourt recognized in *Strunk* 338 Or at 221, the language of ORS 238.360 is promissory in nature. It not only evinces a "clear legislative intent to provide retired members with annual COLAs

> on their service retirement allowances, whenever the CPI warrants such COLAs" up to a maximum of 2 percent, but also an intent that CPI in excess of the 2 percent maximum "shall be accumulated * * * and included in the computation" of COLA in succeeding years.

(Moro Br at 49.) Of course, that is no analysis at all; it simply is a shorthand re-visiting of the wording quoted just two pages earlier in this Intervenor's Brief. Moro petitioners make no independent effort to justify the statement from *Strunk* on which they rely. However, what Moro petitioners are reluctant to do, the League is happy to do: An analysis of each of the three paragraphs of ORS 238.360, the statute that this Court said in *Strunk* evinced a "clear legislative intent to provide retired members with annual COLAs," follows. Because the statute contains three separate sub-paragraphs, each with a different function, the League discusses each individually:

ORS 238.360(*1*). For convenience, the League once again sets forth this sub-paragraph:

> (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 *adjusted* to the resultant amount.

(Emphasis added.) Where is the promise? The emphasized words, which normally would be a characteristic of any promise, have another office entirely: The first "shall" is directory: It indicates something that the PERB is expected to do to make it possible to calculate the COLA that the statute permits. But the word says nothing about whether that COLA will continue for the next century; it simply is a necessary procedural device for making a calculation, *assuming* that the legislature continues to wish to award automatic COLAs. In that respect, it is a classic example of what Justice Balmer, in his concurrence in *Strunk*, described as "a patently administrative provision." *Strunk,* 338 Or at 181 (Balmer, J., concurring).

Two different points demonstrate the League's position. First, the use of "shall" in the statute is directory, not promissory. Whatever duration (from a week to a century) the legislature intended for COLAs, that duration could not have been accomplished without using the word "shall"; use of "may" would leave the entire program subject to PERB's willingness voluntarily to keep track of the CPI and to make calculations based on it. Second, and similarly, any use of the word "may" respecting the crediting of the result of the prescribed calculations would be absurd; PERB would be left to decide for itself, without any legislative criteria, whether to award a COLA or how much it would be. Simply put, this entire paragraph is ministerial—it is about *how* a COLA is to be awarded, it is not about *whether* such a COLA will be awarded. The paragraph is not promissory at all, much less "clearly" promissory, in the sense that would make it part of the PERS contract. This Court's original suggestion that the paragraph was promissory did not delve into the wording appropriately, and therefore is mistaken.

ORS 238.360(*2*). Again, the League repeats the statutory text to assist the reader:

> (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.

(Emphasis added.) The first "shall" in this paragraph simply directs what calculation is to be made; it is a mathematical detail, not a promise. The second "shall" is even less promissory: It directs what is to be done in certain circumstances (those in which use of the CPI would result in a *reduction* of benefits), but it cannot be turned into any more of a promise than one to the effect that, as long as the paragraph is the law, pension benefits will not be reduced as a result of a significantly reduced CPI.[34]

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[34] So understood, the last "shall" makes clear statutorily what probably would be the constitutional ruling in any case, *viz.*, a pension cannot be reduced after the retired employee, having done all that he or she can to merit the pension, has begun to receive it. *See*, *e.g.*, *Crawford,* 164 Or at 87 (retired teacher who had completed service could not thereafter have vested pension denied). The present case, by contrast, is one in which already-retired parties are complaining about losing a benefit that, at least as to them, is a pure gratuity: Any "promise," even if there

<u>ORS 238.360(*3*).</u> Once again, the League sets out the text of the paragraph to assist the reader:

> (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.

(Emphasis added.) Once again, all the emphasized wording (which the League has noted to be fair to the Moro petitioners) contains not a word of promise as to *duration*; it is concerned only with, and describes, mathematical calculations. In fact, one of the most salient features of the paragraph for the purposes of this case is its recognition that future COLAs may "decrease," an event that, when considered in light of the provisions in paragraph (2) of the statute, could go so far as to eliminate COLAs entirely in a given year.

The truth is that, far from containing a "clear promise" that retirees would receive a COLA every year for the rest of their lives, ORS 238.360 is a statute implementing the idea that COLAs, *if* they are awarded, ought to be awarded on a systemized, not a random or *ad hoc*, basis. Every "shall" that appears in the statute is the kind of "shall" used many hundreds of times throughout the Oregon Revised Statutes as a direction to administrators, officials, and the public indicating what must be done when described circumstances are present. The words have no

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were one, would be a promise made *after* the claimant had ceased to provide any consideration for it. There is no consideration for the "promise" and, hence, no obligation.

larger, promissory content, and this Court was mistaken in suggesting otherwise in *Strunk*. That mistake, impinging as it does on the power of the legislature to make policy, needs to be withdrawn.

Moro petitioners doubtless will complain that the League is quoting the statutes out of context, when they are supposed to be read in context. But, as noted, the Moro petitioners' own version of the task facing this Court recognizes that some promissory intent must appear *with respect to the particular part of the PERS law under consideration.*[35] Certainly, the statement from *Strunk* on which the Moro petitioners rely purported to look for a promise in ORS 238.360 alone, and purported to find it there. The League is doing nothing more than refocusing that inquiry to show that the Court should have reached a different conclusion after that inquiry. Having agreed to the inquiry, Moro petitioners can scarcely complain as to where it leads.

Moro petitioners spend a significant amount of time (Moro Br at 50-56) quoting various parts of the legislative history of Oregon Laws 1971, chapter 738—the enactment that first created the controlled COLA. Especially important, they insist, is the fact that the statutory change was created "during a period of high inflation." (Moro Br at 50.) What Moro petitioners fail to explain is why that fact

[35] As the Moro petitioners themselves put it, "[T]he only remaining question is whether * * * [the statutes describing COLA and SB 656 benefits] constitute terms of th[at] PERS statutory contract." (Moro Br at 47.)

has any relevance to the question of constitutional permissibility of the 2013 legislation. For example, would the permanency of COLAs, as the Moro petitioners argue for it, be defeated if the 1971 enactment had occurred during a period of *low* inflation? Of *no* inflation? The truth is that the economic circumstances that existed at the time of the enactment may explain why the legislature was motivated to enact a particular measure, or they may not. (As the League has pointed out, a desire to regularize the payments that the legislature continued to make to retirees makes sense on its own, for predictability.) In any event, the bottom line as to this argument should be clear: The enactment, whatever its motivation, *needs clear indicia of a legislative intent to make it a part of the immutable PERS contract*, in order for it to be such a part. And the history that Moro petitioners recite does not fulfill that requirement. Logic says that the legislature would not wish permanently to cede control over what had been, up to 1971, its ability to alter (or omit) additional grants to retirees, beyond the retirees' basic pension rights; Moro petitioners do not—and cannot—identify anything clearly establishing that the legislature nonetheless suddenly decided in 1971 to forever abandon its control over COLAs.[36]

[36] Moro petitioners quote extensively from various parts of legislative history, but a careful examination of the quotations—whatever their source—reveals that they describe *what a proposed measure will do*, and do not independently address or decide *how long the measure, if adopted, will do it*.

Moro petitioners also offer what they deem to be "context" for their argument in favor of the permanency of COLAs at "at least" the amount of the highest percentage granted by the legislature to date.[37] The League respectfully suggests that the "context" offered by the Moro petitioners is irrelevant to the question before this Court, because it is impossible to derive clearly promissory statutory wording from that "context," just as it is impossible to draw it directly from the statutory wording. The League does not believe that the "context" argument merits any further response.

The Tier One and Tier Two COLAs are not contractual.

b. Is the OPSRP COLA Contractual?

Moro petitioners next argue that the OPSRP COLA arrangement provided in ORS 238A.210 also is contractual. Moro petitioners are mistaken.

The issue of downward adjustment or elimination of COLA rights of OPSRP retirees under ORS chapter 238A differs in one important particular from that involving Tier One/Tier Two retirees under ORS chapter 238: ORS 238A.470 specifically provides that the legislature retains its authority to change OPSRP "as

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[37] All the petitioners in the present case appear to think that adjustments *upward* in COLA percentages always will become a permanent and binding part of the PERS contract, while insisting that no adjustment *downward* is permissible. And it is very important for this Court to recognize that that self-serving posture must be legally correct in order for the PERS "promise" to stretch far enough for petitioners to prevail.

long as the change applies only to benefits attributable to service performed and salary earned after the date the change is made."[38] But, whatever else might fall within its scope, if there were no promise in ORS chapter 238A respecting COLAs in the first place, the reservation in ORS 238A.470 would be irrelevant.

And, as to that underlying question, the answer is: There is no promise that COLAs will continue forever. The statute in question is precisely the same kind of statute that ORS 238.260 is: An instruction manual as to how the parts of the PERS system are to calculate COLAs. It nowhere promises perpetual COLAs in the first place. Moro petitioners purport to find support for their position in the "measure summary" that attached to HB 2020, the bill that eventually became, *inter alia*, ORS 238A.210 and .470. But the "summary" merely quotes, in a kind of legislative shorthand, what the bill says. It contains no analysis of such things as scope and effect, beyond referring to the words of the measure itself. The same is true of the little additional legislative history that the Moro petitioners provide.

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[38] And it is at this point that, for some reason, Moro petitioners resurrect the *Hughes* citation to the Supreme Court's statement in *Piqua Bank*, 57 US at 379-80, that "[e]very valuable privilege given by the charter * * * is a contract which cannot be changed, where the power to do so is not reserved in the charter." (Moro Br at 58.) The Moro petitioners cite ORS 238A.470 as "an example of such an express reservation of rights." *Id.* But the League believes that it already has demonstrated (League Br at 55-56), that the *Piqua Bank dictum* is not consonant with much later formulations of Oregon law that place the burden on the party claiming an impermissible impairment of a contract to show that there is a "clear and unambiguous" promise in the statute under consideration. *See*, *e.g.*, *Strunk*, 338 Or at 192 (so holding).

In sum: There is no unambiguous wording of a promise in the statute itself, and—even assuming that ambiguous wording could be cleared up sufficiently to meet the demanding standard of "clear and unambiguous" wording of a promise—the legislative history does not supply that kind of clarity.

The OPSRP COLA is not contractual.

c. Are SB 656 Benefits Contractual?

Finally, the Moro petitioners assert, on behalf of those members of their coterie who live outside Oregon, that SB 656 tax benefits are contractual, *i.e.*, that those remedies, which PERS retirees who live outside Oregon have received until now, cannot be eliminated. Again, Moro petitioners are mistaken.

SB 656 benefits were created in 1991. The operative section (section (2)) of the enacted measure provided that retirees would have added to their pensions benefits ranging from one to four percent, depending on the length of a retiree's service. Section (2) stated, as pertinent here: "(1) Upon retirement of an employee who is a member of the system and computation of the member's [nominal pension] * * *, the board shall add to the amount of the allowance, * * * , an additional amount equal to the percentage increase provided in subsection (4) of this section. * * *" Addressing that wording, the Moro petitioners state, "Again, the language used is mandatory and promissory in nature." (Moro Br 62.) With respect: No, it is not. As was shown in the League's discussion of the Moro petitioners' COLA arguments, there is nothing in the statutory wording that speaks of a right in perpetuity. The statute directs a mathematical computation, nothing more.

Moro petitioners assert, however, that this Court declared the permanency of the SB 656 allowance for all retirees in *Ragsdale,* 321 Or at 221, when it said:

> The benefits are not calculated on actual or even potential tax liability. That is to say, there is no mathematical correlation between taxes and the benefits created in 1991. Some state retirees who will be required to pay state income taxes on their PERS retirement benefits will receive no additional benefits under the 1991 law. Conversely, some state retirees who will pay no state income taxes will receive additional benefits.

(Quoted in Moro Br at 63.) This Court then went on to note specifically that retirees who reside outside Oregon were entitled under the 1991 act to receive the benefits. *Ragsdale*, 321 Or at 229-30.

Just what about the foregoing recitation supports the Moro petitioners' position escapes the League. The *Ragsdale* quotation and further citation to it do not help: Each is simply a description of the wording of the 1991 measure; neither purports to inquire whether, much less find that, the ability of out-of-state retirees to receive benefits under the act is a promise. Indeed, even if there were such a finding, it would be a *dictum*: The issue in *Ragsdale* was whether the 1991 enactment was a violation of principles of intergovernmental tax equality, and the Court found that it was not. That is all the case stands for; Moro petitioners cannot make more of it than that.

Still less clear is the Moro petitioners' point respecting SB 656(2), Section 12. (Moro Br at 64-65.) That statute limits payment of SB 656 benefits "in any tax year in which retirement benefits payable under [PERS] are exempt from Oregon personal income taxation." It is true, as Moro petitioners point out, that the tax exemption in *former* ORS 316.680(1)(d) (1989) has never been reinstated. But so what? The only thing proved by the statute is that, *Ragsdale* notwithstanding, the SB 656 augmented benefits always were intended to offset Oregon income tax that a party might have to pay on those benefits. But the fact that the augmented benefits have, as a matter of practice, been distributed to more people than the rationale for them would seem to justify only demonstrates why the legislature now has determined to confine future SB 656 benefits to those who actually to receive them.

Or, if Moro petitioners only mean to argue that, given the wording of the statute, the legislature must have *meant* to extend SB 656 benefits to non-residents, the answer again is—so what? Nothing about that fact—if it is a fact—makes SB 656 benefits any more of a promise than its text shows it to be and, as the League believes that it has demonstrated, there is no true textual basis for assuming, much less finding, that there is clear and unambiguous evidence of the promise that Moro petitioners claim.

2. The Challenged Sections of SB 822 and SB 861 Do Not Substantially Impair or Breach the COLA and SB 656 Obligations of the PERS Contract in Violation of Article I, section 21, of the Oregon Constitution

At this point in their brief (Moro Br at 65), the Moro petitioners launch into a discussion whether the constitutional violations that they claim to have shown constitute an impairment, or only a breach, of the PERS contract. The League believes that it has demonstrated that the necessary premise for this discussion—a constitutional violation—is not present, making the entire conversation irrelevant. The League therefore offers only the following observations, with the hope that this Court will agree that they are unnecessary.

The 2013 legislation did not eliminate COLAs; it only limited or reduced them to levels below pre-existing practice. Such a legislative limitation on, rather than elimination of, a statutory right, if it existed, would only be a breach, not an impairment, of the PERS contract. *See*, *e.g.*, *Eckles*, 306 Or at 403 (ordering the State Treasurer to transfer $81 million from the IAF to the General Fund merely breached the state's contract with SAIF employer clients; changing the availability of IAF funds to the General Fund from the IAF, on the other hand, was an impairment). In the present case, COLAs are diminished, not eliminated. If that were impermissible, it would only constitute a breach. On the other hand, elimination of SB 656 pension benefits for PERS retirees residing outside Oregon, while it would not eliminate all benefits, would eliminate benefits derived from what the Moro petitioners have tried to portray (unsuccessfully, the League believes) as a discrete promise that is a part of the PERS contract. The League suggests that, if the Moro petitioners' premise were well taken, it would have shown an impairment of the PERS contract. Of course, the League must add that the premise, again, is not well taken.

The Moro petitioners then conduct an in-depth study of the financial effect of the 2013 legislation on their pensions. (Moro Br at 66-75.) The League has taken the position, since the beginning of the present litigation, that this is a case of a facial challenge to the 2013 legislation; it is not, and should not be, treated as an "as applied" challenge. From that, the League believes that it follows that the Moro petitioners' long discussion of individual consequences is beside the point. The League therefore respectfully declines to enter into this part of the fray.

III. Answer to Moro Petitioners' Second Assignment of Error

SB 822 §§ 1, 3, 5, 7, and 11-17 and SB 861 §§ 1, 3, and 8 do not take private property (COLAs and SB 656 benefits) in violation of Article I, Section 18, of the Oregon Constitution.

Moro petitioners devote little time to their argument in this second assignment of error, perhaps because they recognize its irreparable flaw: In order for the state to take their property, they must have property to take. And, concerning the "private property" that they allege in this claim ("COLAs and SB 656 benefits"), that "property" is, at present, simply a devout hope. It can only become theirs if they prevail on their first assignment of error. (If they do not, it never was their "property," because the state lawfully kept them from obtaining it in the first place.) Further, if they should prevail on their first assignment, the remedies associated with that claim would "restore" that "property," so that this second assignment of error would become moot.

Moro petitioners' second assignment of error should be denied.

IV. Answer to Moro Petitioners' Third Assignment of Error

SB 822 §§ 1, 3, 5, 7, and 11-17 and SB 861 §§ 1, 3, and 8 do not impair the COLA and SB 656 benefit obligations of the PERS contract in violation of Article I, Section 10, clause 1 of the United States Constitution or, in the alternative, breach those terms of the PERS contract.

In their last assignment of error, Moro petitioners assert that, even if the 2013 legislation does not violate the contract clause of the Oregon Constitution, it does violate Article I, Section 10, clause 1 ("the Contract Clause") of the Constitution of the United States. Once again, however, the League respectfully submits that the Moro petitioners' argument founders on the rock of "promise": There is nothing in the federal jurisprudence that Moro petitioners cite that suggests that, as to the pivotal question whether COLAs and SB 656 benefits were a part of the PERS contract, the federal courts would differ from the Oregon approach. And, as the League hopes to have persuaded this Court, Moro petitioners cannot prevail under the Oregon approach. It follows that, as is true of the other two, this assignment of error is not well taken, and should be denied.

The League turns now to the assignments of error and arguments made by the individual petitioners.

V. Answer to Petitioner George A. Riemer's Assignments of Error

Petitioner Riemer is an out-of-state PERS retiree. He challenges both parts of the 2013 legislation. He presents four arguments.

Petitioner Riemer first argues that the 2013 legislation violates the contract clauses in both the state and federal constitutions because it "impair[s] the obligation of the contract between the [PERS] and Petitioner Riemer as a member of and retiree under that system." Riemer Br at 8. However, as the League has elsewhere demonstrated in its response to arguments of the Moro Petitioners, the provisions of the PERS law that Petitioner Riemer asserts are contractual are not so. Repeating that analysis here would only serve to lengthen this brief. This argument is not well taken.

Petitioner Riemer next argues that the 2013 legislation takes his private property for a public use without paying him just compensation. This theory is thoroughly discussed, and its error identified, in the League's response to a similar argument by the Moro Petitioners. The League will not repeat that response here. Petitioner Riemer's argument is not well taken.

Petitioner Riemer next argues that the 2013 legislation denies him a privilege that other citizens enjoy, in violation of Article I, section 20, of the

Oregon Constitution. This argument is fundamentally flawed, because the "privilege" about which Petitioner Riemer complains (increased retirement compensation to offset Oregon personal income tax payments) is one that by its own terms is of value only to a class of citizens—Oregon residents potentially liable to pay those Oregon personal income taxes—to which Petitioner Riemer does not belong. This argument is not well taken.

Finally, Petitioner Riemer argues that the 2013 legislation deprives him of due process, equal protection, and privileges and immunities under the 14th Amendment to the Constitution of the United States. All his arguments are based, in the final analysis, on the assumption that various benefits to which he had become accustomed but that were altered by the 2013 legislation were his "property," because he was entitled to them as terms of the PERS contract. However, as the League believes that it elsewhere has demonstrated with respect to similar claims of the Moro Petitioners, Petitioner Riemer's fundamental premise—that the parts of the PERS law that provided the benefits he seeks were contractual—is mistaken. This argument is not well taken.

Petitioner Riemer's arguments attacking the 2013 legislation should be rejected.

VI. Answer to Petitioner Wayne Stanley Jones's Assignments of Error

Petitioner Jones also is an out-of-state PERS retiree. He, too, challenges both parts of the 2013 legislation. In that connection, the League accepts as true, for the purposes of this proceeding only, Petitioner Jones's recitation in his opening brief of the statistical likelihood of certain downward changes in his pension as a result of the 2013 litigation. (Jones Br 9-14.) The League respectfully notes, at the same time, that this case is not and should not be an "as applied" inquiry into the constitutional permissibility of the 2013 legislation. Indeed, by the arguments that he makes, Petitioner Jones appears to recognize this. We turn to his claims.

A. Petitioner Jones's "Argument One" Has No Merit

Although he uses different words, Petitioner Jones first argues, as have Moro petitioners, that periodic COLAs are a part of his "fully vested and irrevocable" contract with PERS. The League agrees that Petitioner has a "fully vested and irrevocable" right to receive a pension (in his case, a "retirement annuity") as calculated at the time of his retirement, together with any additional amounts actually allowed him by the legislature between the date of his retirement and the effective date of the 2013 legislation. But the League disagrees that *permanent* two percent COLAs are a part of Petitioner Jones's retirement annuity; those COLAs are, as to Petitioner Jones, gratuitous and can, the League believes, be reduced or eliminated from any *future* benefits to which Petitioner Jones may otherwise be entitled.

In making his arguments under "Argument One," Petitioner Jones cites all the cases—*Hughes*, *OSPOA*, *Strunk*—that arguably support one or another part of his argument. His approach to both the constitution and the cases is clear and direct. However, as the League has been at pains to spell out earlier in this brief, it disagrees with Petitioner Jones that the cases upon which he relies are dispositive, and it further asserts that some of those cases include very serious analytical errors that need to be corrected. Chief among those cases are *Hughes* and *OSPOA*, both of which are central to Petitioner Jones's analysis.

The League's disagreement with Petitioner Jones may perhaps best be highlighted by this example: Petitioner Jones argues,

> * * * Upon his retirement, PERS agreed that Petitioner would be paid a fixed rate annuity *with annual COLA increases* for the remainder of his life as a result of his years of service. That obligation of PERS and the annuity contract between Petitioner and PERS continues in force. Petitioner's right to his specific Annuity retirement benefit is a contract right that cannot be reduced only because he is no longer living in Oregon.

(Jones Br 23 (emphasis added).) The League disagrees that any statutory wording extant at the time of Petitioner Jones's entry into public service made any promise, much less a "clear and unambiguous" one, that Petitioner Jones's fixed rate annuity would be accompanied by "annual COLA increases." Indeed, as the League has repeatedly demonstrated, an award of COLAs is not a promise that has been made to anyone. All that may be said about COLAs is that a statutory procedure was in place to award them, until the legislature decided not to do so; there was no promise that they would be awarded at any time beyond the particular year, much less a promise that they would be awarded in perpetuity. (Indeed, as the League has elsewhere demonstrated, COLAs in fact were, and continue to be, gratuitous legislative acts.)

As the League also has explained, it is inaccurate to claim that Petitioner Jones's fixed rate annuity included the SB 656 tax offset. The fact that the legislature was for many years overly expansive in granting that offset in no way turned the grant into a perpetual obligation.[39]

Petitioner Jones also relies on this Court's refusal, in *Vogl v. Department of Revenue*, 327 Or 193, 208, 960 P2d 373 (1998) to overrule *Ragsdale*, even though it described a supplemental legislative grant to retirees as being, "in substance, a tax rebate." That is not the point, however. The point is that, whether labeled "compensation" or a "tax rebate," the legislative award to retirees under consideration in *Ragsdale* was not a promise that was part of the PERS contract.[40]

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[39] Petitioner Jones also misreads *Ragsdale*, relying on precisely the *dictum* that the League already has identified.

[40] Petitioner Jones also offers an elaborate demonstration why the later, 1995 adjustments to pensions such as his were binding. In essence, he argues that the 1995 benefits were intended and advertised to be enacted in settlement of lawsuits

B. Petitioner Jones's "Argument Two" Has No Merit

Petitioner Jones next urges that the 2013 legislation violates the federal Contract Clause, Article I, section 10, clause 1, of the Constitution of the United States. The League believes that its response to the similar assertion by the Moro petitioners satisfactorily answers this contention. However, the League wishes to add that, to the extent that Petitioner argues (both here and elsewhere) that no balancing of interests between Petitioner Jones and the state, and no severe need on the part of the state, justifies the legislature's abrogation of his contractual rights, the League considers the former argument to be an "as applied" argument not suited to the nature of the present case, and the latter argument to be one in which, because the argument is irrelevant, it respectfully declines to engage.[41]

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arising out of the *Hughes* decision, and that it was understood that the legislature would withdraw the benefits if the settlement failed. However, the settlement succeeded, meaning, Petitioner Jones argues, that "this settlement cannot be rescinded." (Jones Br at 32.) That argument is nicely reasoned, but it does not even address, much less satisfy, the constitutional requirement, repeated in our cases, that a binding unilateral contract with the state be "clear and unambiguous." *See*, *e.g.*, *Arken,* 351 Or at 136 (illustrating necessity of that kind of clarity). This argument is not well taken.

[41] Indeed, as a part of the latter argument, Petitioner Jones challenges the need for any legislation on the present subject at all. The League urges this Court not to permit itself to become entangled in any discussion of a need that the legislature perceives to exist; however misperceived the legislative view may be, it is not the office of this or any Court to examine that question on the merits. The principle of separation of powers dictates that each branch be left to its own folly, without it becoming a judge of the folly of another branch.

C. Petitioner Jones' "Argument Three" Has No Merit

Finally, Petitioner Jones offers a unique and stimulating argument to the effect that the 2013 legislation violates the federal Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. Although stimulating, however, Petitioner Jones's arguments under this theory are based on the idea that his SB 656 benefits are a part of his "full retirement benefits" (as he phrases it). That premise is not well taken.

Petitioner Jones asserts that he is being denied the "privilege" of the SB 656 benefits (or their alternative, 1995 version). But those benefits are the state's efforts to make up for its alteration of the part of its unilateral PERS contract under which it promised that PERS benefits would not be subject to Oregon personal income taxes. The "privilege," however, does not extend beyond this state's borders—the state has no control over whether or to what extent other jurisdictions might tax the benefits. It necessarily follows that, by choosing to live elsewhere, Petitioner Jones has removed himself from the ambit of the "privilege," and cannot complain about the result. (Petitioner Jones's alternative argument—that the legislature is denying him his "full" pension benefit *because* he lives out of state—does not require comment.) Petitioner Jones's attacks on the 2013 legislation are not well taken.

VII. Answer to Petitioner Michael D. Reynolds's Assignments of Error

Petitioner Reynolds also is an out-of-state PERS retiree. He, too, challenges both parts of the 2013 legislation. Petitioner Reynolds makes essentially the same arguments with respect to the 2013 legislation that are made by the other petitioners, and which the League believes that it has refuted elsewhere in this brief. The League will not increase the length of this brief by repeating those arguments here.

However, Petitioner Reynolds advances one argument that the other petitioners have not made, at least in the way that he makes it, and which deserves to be addressed (however briefly): Petitioner Reynolds submits that withholding the additional 656 benefit from the pensions of out-of-state retirees is a "tax" and, as such, violates 4 USC § 114(a), which provides, "No state may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State (as determined under the laws of such State)."[42] Petitioner reasons from the foregoing that, inasmuch as his PERS "retirement income" is being reduced under the 2013 legislation by removal of the SB 656

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[42] The League agrees with Petitioner Reynolds that PERS benefits are "retirement income" under the federal Act (4 USC § 114(b)(1)(G)). The term "income tax" is defined in 4 USC § 110(c) (and incorporated by reference in 4 USC § 114(b)(2)) as "* * * any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts."

benefits part of that income, such removal is a "tax" forbidden by the federal statute.

The foregoing argument is imaginative and well presented, but it is flawed. Discontinuance of SB 656 benefits through the 2013 legislation is not a reduction of some amount owed; it is, instead, a belated recognition by the Oregon legislature that the SB 656 benefits were not owed to begin with, and they needed to be discontinued. So understood, the League suggests, the 2013 legislation did not "tax" Petitioner Reynolds's pension, and his argument in this respect is unavailing. The League submits that Petitioner Reynolds's arguments are not well taken.

CONCLUSION

Based on the arguments presented by the League (and by the other Intervenors and Respondent parties), this Court is respectfully requested to reconsider certain of its discrete rulings in the case law and, having done so, to hold that the 2013 legislative reforms to the PERS system are constitutionally permissible.

DATED this 25th day of August, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS UNDER ORAP 5.05(2)(d)

I certify that: (1) this brief complies with the word-count limitation and allocation permitted in this Court's Order dated August 18, 2014; and (2) the word-count of this brief as described in ORAP 5.05(2)(a) is 19,499. I further 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(d)(ii).

/s/ W. Michael Gillette
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing INTERVENOR LEAGUE OF OREGON CITIES' BRIEF ON MERITS with the State Court Administrator via the eFiling System on August 25, 2014.

I further certify that the foregoing INTERVENOR LEAGUE OF OREGON CITIES' BRIEF ON MERITS will be served electronically via the eFiling System, if applicable, by email, and by U.S. First Class Mail on August 25, 2014, on the following individuals:

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