

ORIGINAL  
RECEIVED  
STATE COURT ADMINISTRATOR

JUN 18 2014  
— SUPREME COURT  
— COURT OF APPEALS  
— DEPUTY — FILED

B/7 B  
**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; PUBLIC  
EMPLOYEES RETIREMENT BOARD; and PUBLIC EMPLOYEES  
RETIREMENT SYSTEM,  
Respondents.  
S061860

---

**PETITIONER WAYNE STANLEY JONES' AMENDED BRIEF ON  
THE MERITS**  
**Brief on the Merits for Direct Judicial Review based on Senate Bill 822,  
77<sup>th</sup> Oregon Legislative Assembly, 2013 Regular Session, and  
Senate Bill 861, 77<sup>th</sup> Oregon Legislative Assembly, 2013 Special Session**

AG Ellen Rosenblum #753239 SG Anna M. Joyce #013112 AAG Keith L. Kutler #852626 Michael A. Casper #062000 Oregon Department of Justice 1162 Court Street NE Salem, OR 97301-4096 Telephone: 503-378-4402 Facsimile: 503-378-6306 <a href="mailto:anna.joyce@doj.state.or.us">anna.joyce@doj.state.or.us</a> <a href="mailto:keith.kutler@doj.state.or.us">keith.kutler@doj.state.or.us</a> <a href="mailto:matthew.merritt@doj.state.or.us">matthew.merritt@doj.state.or.us</a> <a href="mailto:michael.casper@doj.state.or.us">michael.casper@doj.state.or.us</a> Attorneys for State Respondents	William F. Gary #770325 <a href="mailto:william.f.gary@harrang.com">william.f.gary@harrang.com</a> Sharon A. Rudnick #830835 <a href="mailto:sharon.rudnick@harrang.com">sharon.rudnick@harrang.com</a> Peter F. Simons #095632 <a href="mailto:pete.simons@harrang.com">pete.simons@harrang.com</a> Harrang Long Gary Rudnick PC 360 E. 10 <sup>th</sup> Ave., suite 300 Eugene, OR 97401 Telephone: 503-242-0000 Facsimile: 541-686-6564 Attorneys for Respondents Linn County, Estacada, Oregon City, Ontario, West Linn School Districts and Beaverton School Districts, and Intervenors Oregon School Boards Association and Association of Oregon Counties
Harry Auerbach #821830 Office of the City Attorney 1221 SW 4 <sup>th</sup> Avenue, Ste 430 Portland, OR 97204 Telephone: 503-823-4047 Facsimile: 503-823-3089 <a href="mailto:harry.auerbach@portlandoregon.gov">harry.auerbach@portlandoregon.gov</a> Attorneys for Respondent City of Portland	Daniel B. Atchison #040424 Office of City Attorney 555 Liberty Street SE Rm 205 Salem, OR 97301 Telephone: 503-588-6003 Facsimile: 503-361-2202 <a href="mailto:datchison@cityofsalem.net">datchison@cityofsalem.net</a> Attorney for Respondent City of Salem
Eugene J. Karandy II #972987 Office of County Attorney Linn County Courthouse 104 SW Fourth Avenue, Room 123 Albany, OR 97321 Telephone: 541-967-3840 Facsimile: 541-928-5424 <a href="mailto:gkarandy@co.linn.or.us">gkarandy@co.linn.or.us</a> Attorney for Respondent Linn County	Edward F. Trompke #843653 Jordan Ramis PC Two Centerpointe Drive, 6 <sup>th</sup> Floor Lake Oswego, OR 97035 Telephone: 503-598-5532 Facsimile: 503-598-7373 <a href="mailto:ed.trompke@jordanramis.com">ed.trompke@jordanramis.com</a> Attorney for Respondent Tualatin Valley Fire and Rescue

<p> Lisa M. Frieley #912763  Oregon School Boards Association  PO Box 1068  Salem, OR 97308  Telephone: 503-588-2800  Facsimile: 503-588-2813  <a href="mailto:lfrieley@osba.org">lfrieley@osba.org</a>  Attorney for Respondents Estacada,  Oregon City, Ontario, and West Linn  School Districts and Intervenor  Oregon School Boards Association </p>	<p> W. Michael Gillette #660458  Leora Coleman-Fire #113581  Sara Kobak #023495  William B. Crow #610180  Schwabe Williamson &amp; Wyatt PC  1211 SW 5<sup>th</sup> Ave Suite 1900  Portland, OR 97204  Telephone: 503-222-9981  Facsimile: 503-796-2900  <a href="mailto:wmgillette@schwabe.com">wmgillette@schwabe.com</a>  Attorneys for Intervenor League of  Oregon Cities </p>
<p> Rob Bovett #910267  Association of Oregon Counties  1201 Court St. NE Ste 300  Salem, OR 97301  Telephone: 971-218-0945  <a href="mailto:rbovett@aocweb.org">rbovett@aocweb.org</a>  Attorney for Linn County </p>	<p> George A. Riemer (Petitioner Pro Se)  23206 N. Pedregosa Drive  Sun City West, AZ 85375  Telephone: 623-238-5039  <a href="mailto:cortebella@gmail.com">cortebella@gmail.com</a>  Petitioner pro se </p>
<p> Michael D. Reynolds (Petitioner Pro Se)  8012 Sunnyside Avenue N.  Seattle, WA 98103  Telephone: 206-910-6568  <a href="mailto:mreynolds14@comcast.net">mreynolds14@comcast.net</a>  Petitioner pro se </p>	<p> Gregory A. Hartman #741283  <a href="mailto:HartmanG@bennettthartman.com">HartmanG@bennettthartman.com</a>  Aruna A. Masih #973241  <a href="mailto:MasihA@bennettthartman.com">MasihA@bennettthartman.com</a>  Bennett Hartman Morris  210 SW Morrison Street, Suite 500  Portland, OR 97204  Telephone: 503-546-9601  Attorneys for Petitioners Moro,  Domenigoni, Custer, Hawkins,  Arken, Ditter, O'Kief, Smith,  Johnson, Clouseer, Silence,  Veckery, and Voek </p>

## TABLE OF CONTENTS

	Page(s)
<b>TABLE OF AUTHORITIES</b> .....	v
<b>I. STATEMENT OF THE CASE</b> .....	1
<b>II. NATURE OF THE ACTION/STATUTORY BASIS FOR JURISDICTION</b> .....	1
<b>III. LEGAL QUESTIONS PRESENTED</b> .....	3
<b>IV. SUMMARY OF THE ARGUMENT</b> .....	5
<b>V. SUMMARY OF THE FACTS</b> .....	9
<b>VI. ARGUMENT</b>	
<b>1. ARGUMENT ONE – In enacting SB 822 and SB 861, the Oregon Legislature violated Article 1, Section 21 of the Oregon Constitution, which prohibits the enactment of laws impairing the obligations of contracts, because these two acts substantially impair Petitioner Jones’ earned Annuity retirement contract with PERS, by substantially reducing Petitioner’s annual COLA and also substantially reducing his PERS retirement Annuity benefit only because Petitioner Jones no longer lives in Oregon; and these unilateral modifications of PERS contract with Petitioner Jones are not justified by the State’s use of its police power</b> .....	14
<b>A. Petitioner Jones’ PERS Retirement Annuity formed a fully vested and irrevocable contract between PERS and Petitioner Jones upon his retirement, subject only to annual COLA increases, which retirement contract was substantially impaired by the Legislature’s enactment of SB 822 and SB 861</b> .....	15
<b>B. Petitioner’s Option 2 Annuity Benefit is a Contract</b>	

with PERS .....	23
<b>C. The Oregon Supreme Court in <i>Ragsdale</i> affirmed that to receive the benefit payable under Oregon Laws 1991, chapter 796, every state retiree who qualifies for benefits (based on years of service) will receive the benefits, regardless of the state retiree's residency .....</b>	<b>24</b>
<b>D. The retirement compensation adjustment passed in House Bill 3349, Or. Laws 1995, Ch. 569 was in settlement with those PERS members with whom the State had breached its contract; and the rationale for that compensation provided by that 1995 settlement continues to this day as to Petitioner Jones, but is unconstitutionally impaired by SB 822 .....</b>	<b>29</b>
<b>E. The COLA provisions in effect prior to the enactment of SB 822 and SB 861 are part of the agreed upon compensation in Petitioner's retirement Annuity contract Petitioner has with PERS and cannot constitutionally be impaired by the Oregon Legislature .....</b>	<b>35</b>
<b>F. The Oregon Legislature's desire to ease the financial burden of PERS employers was insufficient justification to invoke the state's 'police powers' and unilaterally modify and substantially reduce Petitioner Jones' contractual retirement annuity benefit with PERS .....</b>	<b>37</b>
<b>2. ARGUMENT TWO – The Oregon Legislature substantially impaired Petitioner Jones' contractual retirement Annuity benefit by enacting SB 822 and SB 861, which impairment violates Article 1, Section 10 of the United States Constitution .....</b>	<b>39</b>

<b>A. A contractual relationship exists between Petitioner Jones and PERS .....</b>	<b>40</b>
<b>B. SB 822 and SB 861, separately, and taken together, act to impair the contractual relationship between PERS and Petitioner Jones .....</b>	<b>42</b>
<b>C. The impairment imposed by SB 822 and SB 861 on Petitioner Jones' contract with PERS is substantial .....</b>	<b>44</b>
<b>D. Oregon's use of its police power is not justified here: There is no significant and legitimate public purpose supporting the Oregon Legislature's use of state retirees' contractual benefits to address the State's general economic concerns; a revision of the Oregon state tax structure is a much better solution .....</b>	<b>45</b>
<b>1. No financial crisis existed when the 2013 Oregon Legislature enacted SB 822 and SB 861, nor does one exist now: The Oregon Public Retirement System Fund is in excellent financial condition and is among the best-funded public pension plans in the United States .....</b>	<b>48</b>
<b>2. The Oregon Legislature was unjustified in substantially impairing and reducing Petitioner Jones' contractual retirement benefits and using Petitioner's and other vested, elderly PERS retirees' retirement benefits as a funding source to assist school districts and the state .....</b>	<b>51</b>
<b>3. It is unconstitutional to seek to resolve the funding issues facing Oregon school districts and other PERS employers by reducing Petitioner Jones' and other PERs retirees contractual retirement benefits through SB 822 and SB 861 .....</b>	<b>57</b>

<b>4. ARGUMENT THREE – In enacting SB 822, the Oregon Legislature violated the Privileges and Immunities Clause and the Equal Protection Clause in Amendment XIV, Section 1 of the United States Constitution, which protects fundamental rights of individual citizens and restrains State efforts to discriminate against out of state citizens, and prohibits States from denying persons within its jurisdiction the equal protection of the laws .....</b>	<b>60</b>
<b>A. In imposing an Oregon residency requirement on Petitioner Jones in order to qualify for his full, contracted, PERS retirement benefit, which benefit is fully vested in Petitioner, SB 822 violates the Privileges and Immunities Clause by discriminating against Petitioner Jones’ fundamental right as an individual citizen to his full retirement benefit, solely because he is an out of state citizen and SB 822 violates the Equal Protection Clause as it denies Petitioner Jones (and all out of state PERS retirees) his full retirement benefit solely because he is not a resident of Oregon .....</b>	<b>60</b>
<b>B. The State is not justified in enacting SB 822 as because it does not advance a substantial state interest .....</b>	<b>65</b>
<b>VII. CONCLUSION .....</b>	<b>66</b>

**Certificate of Compliance with Brief Length and Type Size Requirements**

**Certificate of Service and Certificate of Filing**



# TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>AFSCME v. City of Benton, Arkansas</i> , 513 F.3d 874, 882 (8 <sup>th</sup> Cir. 2008) .....	47
<i>Campbell v. City of Marshalltown</i> , 235 N.W. 764 (Iowa 1931) .....	40
<i>City of Iowa City v. White</i> , 111 N.W. 2 <sup>nd</sup> 266 (Iowa 1961) .....	40
<i>Eckles v. State of Oregon</i> , 306 Or. 380 (1988) .....	37-38
<i>Fletcher v. Peck</i> , 10 U.S. 87 (1810) .....	16
<i>Home Building &amp; Loan Association v. Blaisdell</i> , 290 U.S. 398 (1934) .....	46
<i>Hughes v. State of Oregon</i> , 314, Or.1, 838 P.2d 1018 (1992) .....	6, 16-17; 21-22, 29-30, 32, 42
<i>Jacobsen v. Anheuser-Busch, Inc.</i> , 392 N.W.2d 872 (Minn. 1986) .....	39-40, 46, 47
<i>Koster v. City of Davenport, Iowa</i> , 183 F.3d 762 (8 <sup>th</sup> Cir. 1999) .....	39
<i>Lunding v. New York Tax Appeals Tribunal</i> , 522 U.S. 287, (1998) .....	65
<i>New Hampshire v. Piper</i> , 470 U.S. 274 (1985) .....	64
<i>Oregon State Police Officers Association v. State of Oregon</i> , 323 Or. 356 (1996) .....	19, 42
<i>Paul v. Virginia</i> , 75 U.S. 168, 180 (1868) .....	61
<i>Ragsdale v. Department of Revenue</i> , 321 Or. 216, 895 P.2d 1348 (1995) .....	24-28
<i>Stovall v. State of Oregon</i> , 324 Or. 92 (1996) .....	13, 29-30, 32-33, 37-38

<i>Strunk v. Public Employees Retirement Board</i> , 338, OR 145 (2005) .....	6, 35-36, 42
<i>U.S. Trust Co. v. New Jersey</i> , 431 U.S. 1 (1977) .....	48
<i>Virginia v. Friedman</i> , 487 U.S. 59, 64-65 (1988) .....	64
<i>Vogl v. Department of Revenue</i> , 327 Or. 193 (1998) .....	27-28, 31, 33

## CONSTITUTIONS, STATUTES, AND RULES

AZ Const. Article XXIX, Sec. 1 .....	41
U.S. Const., Art. 1, Sec. 10 .....	4, 6, 39, 67
U.S. Const., Amendment XIV, Sec. 1 .....	4, 8, 60-61, 67
Or. Const., Art. 1, Sec. 21 .....	3, 5, 14-15, 22-23, 30, 37-38, 42, 66
HB 3349, Chapter 569, Oregon Laws 1995 .....	13-14, 21, 27, 29-34, 64-65
Oregon Ballot Measure 5 (1990) .....	56-59
Oregon Ballot Measure 50 (1997) .....	56, 58
ORS 237.209 .....	30
ORS 237.230 .....	30
ORS 237.233 .....	30
ORS 237.301-237.315 .....	30
ORS 238.360 .....	6, 44
ORS 743.261 .....	24

SB 656, Chapter 796, Oregon Laws 1991 . . .	13-14, 21, 27, 29-30, 32, 34, 64-65
SB 822, 77 <sup>th</sup> Oregon Legislative Assembly, 2013 Regular Session .....	1-9, 12-16, 20, 23, 28, 34-35, 39, 44-45, 48, 51-53, 57, 60, 62-67
SB 861, 77 <sup>th</sup> Oregon Legislative Assembly, 2013 Special Session .....	1-8, 12-16, 19-20, 23, 35, 39, 42, 44-45, 47-48, 51-53, 57, 66-67

## TREATISES AND OTHER AUTHORITIES

<i>Can Oregon teach us about tax reform?</i> Crosscut, News of the Great Nearby, by Dick Nelson, February 6, 2014 .....	59
<i>Education Funding</i> , Public Education in Oregon, Oregon Blue Book, 2011-2012 Edition, <a href="http://www.bluebook.state.or.us/education/educationintro.html">http://www.bluebook.state.or.us/education/educationintro.html</a> .....	58
House State and School Finance Committee, Tape 225B, May 12, 1995 .....	30
House State and School Finance Committee, Tape 227B, May 12, 1995' .....	31
<i>Important information for you about The Total Lump-sum Option</i> , <a href="http://www.oregon.gov/pers/mem/docs/publications/total lumpsum.pdf">www.oregon.gov/pers/mem/docs/publications/total lumpsum.pdf</a> , (April 2008) .....	43
Letter to Representative Tina Kotek, Speaker of the House, <i>Re: Legality of cap on PERS cost-of-living adjustment</i> , from Dexter A. Johnson, Legislative Counsel, by Marisa N. James, Deputy Legislative Counsel, February 4, 2013 .....	36
Mark Marich, <i>What Do Entrepreneurs Really Want from a City</i> , <a href="http://www.Entrepreneurship.org">http://www.Entrepreneurship.org</a> (March 10, 2014) .....	54
Michael Mazeroy (Senior Fellow), <i>Report: "State Taxes Have a Negligible Impact on Americans" Interstate Moves</i> , Center on Budget and Policy Priorities, May 21, 2014 .....	54
<i>PERS to return money to 2,969 resident retirees</i> , Hannah Hoffman, Statesman Journal, April 4, 2014 .....	63

*PERS Fund value reaches new high*, Oregon Public Employees Retirement System PERSPECTIVES, Vol. 19. No. 2, page 4, April 14, 2014 ..... 49

*PERS: positive earnings and benefit modifications cut underfunding in half*, Oregon Public Employees Retirement System PERSPECTIVES, Vol. 19. No. 2, April 14, 2014 ..... 49

*Oregon PERS: Report praises pension funding as one of best in US*, Portland State AAUP News, (June 19, 2012) ..... 49-50

*Report on Adequacy of Public Education Funding As Required by Article VIII, Section 8, of the Oregon Constitution*, Joint Special Committee on Public Education Appropriation, 2011-2013 Education Budget ..... 57

*Revenue Impact of HB 3349C*, Legislative Revenue Office, June 6, 1995 ... 33

*Sales tax proposals should sharpen debate in the 2014 election: Editorial*, Oregonlive.com, December 19, 2013 ..... 59

SPECIAL MASTER'S FINAL REPORT AND  
RECOMMENDED FINDINGS OF FACT,  
April 30, 2014 ..... 7, 10-11, 16, 18, 20, 28-30, 34, 45, 52-53, 55-56

SPECIAL MASTER'S EVIDENTIARY HEARING, WITNESS  
AND EXHIBIT RECEIPT, May 1, 2014 ..... 10, 18

*State Constitutional Protections for Public Sector Retirement Benefits*, National Conference on Public Employee Retirement Systems (NCPERS),  
(March 15, 2007) ..... 40-41

Stuart Buck, *Legal Obstacles to State Pension Reform*, Association for  
Education Finance and Policy (Aug. 26, 2011)  
[http://www.aefpweb.org/sites/default/files/webform/Stuart\\_Buck\\_Obstacles\\_to\\_Pension\\_Reform.pdf](http://www.aefpweb.org/sites/default/files/webform/Stuart_Buck_Obstacles_to_Pension_Reform.pdf) ..... 40

*What the sad legacy of Measure 5 says about us*: Guest column,  
by Walt Hellman, Argus Community Writer, <http://www.OREGONLIVE.com>,  
June 3, 2013 ..... 58-59

<i>2013 OREGON PUBLIC FINANCE: BASIC FACTS</i> , Research Report #1-13, LEGISLATIVE REVENUE OFFICE, <a href="http://www.leg.state.or.us/comm/lro/hom.htm">http://www.leg.state.or.us/comm/lro/hom.htm</a> .....	55
---	----

<i>2014 State Business Tax Climate Index</i> , Number 68, Tax Foundation, by Scott Drenkard and Joseph Henchman (October 2013) .....	55
---	----

## **I. STATEMENT OF THE CASE**

Petitioner Wayne Stanley Jones, appearing pro se, submits this amended brief on the merits. This brief is based on Senate Bill 822, 77<sup>th</sup> Oregon Legislative Assembly, 2013 Regular Session (SB 822); as further amended by Senate Bill 861, 77<sup>th</sup> Oregon Legislative Assembly, 2013 Special Session (SB 861). These two legislative actions substantially impair Petitioner Jones' contract with PERS. These two bills substantially reduce the cost of living adjustments that Petitioner Jones would otherwise be entitled to receive, as a Public Employee Retirement System (PERS) retiree. In addition, Senate Bill 822 substantially reduces Petitioner Jones PERS retirement benefit solely because he is no longer a resident of Oregon.

## **II. NATURE OF THE ACTION/STATUTORY BASIS FOR JURISDICTION**

This is a direct appeal to the Oregon Supreme Court as provided in Section 19 of Senate Bill 822 and Section 11 of Senate Bill 861. Section 19 of SB 822 states: "Jurisdiction is conferred on the Supreme Court to determine in

the manner provided by this section whether this 2013 Act breaches any contract between members of the Public Employees Retirement System and their employers, violates any constitutional provision, including but not limited to impairment of contract rights of members of the Public Employees Retirement System under Article I, section 21, of the Oregon Constitution, or Article I, section 10, clause 1, of the United States Constitution, or is invalid for any other reason.” Section 11 of Senate Bill 861 restates this conferral of jurisdiction on the Oregon Supreme Court identically, except it refers to “this 2013 special session Act”.

To qualify for Oregon Supreme Court review, a person who is adversely affected by either or both of the 2013 Acts was required to file a petition for Oregon Supreme Court review. *Id.* at Section 19, Senate Bill 822, and Section 11, Senate Bill 861.

Accordingly, Petitioner Wayne Stanley Jones, on June 19, 2013, filed a PETITION FOR REVIEW as provided in Section 19 of Senate Bill 822. On December 3, 2013, Wayne Stanley Jones, Petitioner, filed an AMENDED PETITION FOR SUPREME COURT REVIEW as provided in Section 11 of SB 861. Petitioner Jones has met all the statutory jurisdictional

requirements of both SB 822 and SB 861 to qualify for the Oregon Supreme Court's direct review of this case.

### **III. LEGAL QUESTIONS PRESENTED**

Petitioner presents the following legal questions for review by this Court:

1. Should the enactment of SB 822 and SB 861 by the Oregon Legislature be held unconstitutional, as a violation of Article 1, Section 21 of the Oregon Constitution, which prohibits the enactment of laws which impair the obligations of contracts, and which enactments substantially impair Petitioner Jones' PERS Annuity retirement contract with PERS: (a) by substantially reducing the annual COLA which had been capped by statute at 2.0 percent when Petitioner Jones retired in 1998 and continued, unchanged, until the enactment of SB 822 and SB 861, and (b) by substantially reducing Petitioner Jones' contracted Annuity retirement benefit only because Petitioner Jones no longer lives in Oregon; and which unilateral modifications of PERS contract with Petitioner Jones were not justified by the State's use of its 'police power'?



2. Should the Oregon Legislature, in enacting SB 822 and SB 861 in violation of Article 1, Section 10 of the United States Constitution, which prohibits legislative enactments which impair the obligations of contracts, be allowed to substantially impair Petitioner Jones' PERS retirement contract with PERS, by substantially reducing both: (a) the annual COLA and (b) also the contracted Annuity retirement benefit, only because he no longer lives in Oregon?

3. Should the Oregon Legislature be allowed to violate the Privileges and Immunities Clause and the Equal Protection Clause in Amendment XIV, Section 1 of the United States Constitution which protects the fundamental rights of individual citizens against state efforts to discriminate against out-of-state citizens, and prohibits States from denying any person within its jurisdiction the equal protection of the laws, by enacting SB 822, which denies Petitioner Jones' fundamental right to his full contractual retirement benefit and which denial is not justified by the advancement of a substantial state interest, and which violates the equal protection of the laws?

#### IV. SUMMARY OF THE ARGUMENT

Petitioner Jones challenges the constitutionality of Senate Bill 822, 77<sup>th</sup> Oregon Legislative Assembly, 2013 Regular Session, as modified and amended by Senate Bill 861, 77<sup>th</sup> Oregon Legislative Assembly, 2013 Special Session. Petitioner Jones' asserts both SB 822 and SB 861 breach and impair the contract Petitioner had with PERS, as a former employee of the City of Portland Development Commission (PDC) and as a PERS retiree who is entitled to his fully vested retirement benefit, whether or not he resides in Oregon, and to his fully vested 1973-based statutory COLA as a PERS retiree since March 1, 1998.

Petitioner asserts the application of SB 822 and SB 861 results in a violation of the Oregon Constitution and the United States Constitution as these legislative enactments substantially impair the contract rights that existed between Public Employees Retirement System and Petitioner, as a former employee of the City of Portland Development Commission. This impairment violates both the Oregon and the federal constitutions.

Article 1, Section 21 of the Oregon Constitution provides: "No . . . law impairing the obligation of contracts shall ever be passed . . . ."

Article 1, Section 10, clause 1 of the United States Constitution states: “No state shall . . . pass any . . . law impairing the obligation of contracts . . . .”

The Oregon Supreme Court in *Hughes v. State of Oregon*, 314 Or. 1, 838 P.2d 1018, 1027 (1992) found that “PERS is a contract.” The Oregon Supreme Court went on to state: “Our analysis of the history surrounding the enactment of the 1953 Act reveals an underlying legislative intent to create contract rights in PERS employees.” *Id.* at 1028. Additionally, commenting on a retiree’s contract rights to the statutory COLA, this Court held in *Strunk v. Public Employees Retirement Board* that “. . . the text of ORS 238.360(1) (2001) evinces a clear legislative intent to provide retired members with annual COLAs on their service retirement allowances, whenever the CPI warrants such COLAs. We therefore conclude that the general promise embodied in ORS 238.360(1)(2001) was part of the statutory PERS contract applicable to the group of retired members affected by the 2003 provisions at issue here.” *Strunk v. Public Employees Retirement Board*, 338 Or. 145, 221 (2005).

Petitioner asserts that application of SB 822 and SB 861 to reduce Petitioner’s COLA under this 2013 enactment by the Legislature violates Petitioner’s Notice of Entitlement, Option 2 Annuity. When Petitioner

actually retired under the Oregon Public Employees Retirement System effective March 1, 1998, Petitioner qualified for and met all the conditions prerequisite to an annuity contract being formed, and his retirement annuity constituted a contract at the time of Petitioner's retirement:

- Petitioner was credited with 30 years and 8 months of service with the Portland Development Commission (PDC), which is part of the Oregon Public Retirement System (PERS);
- Petitioner had worked more than the required number of years to retire from PDC with a full retirement benefit from PERS; and
- Petitioner retired March 1, 1998 and has been receiving a PERS retirement benefit monthly since that date.

"Based on PERS calculations, . . . SB 822 and SB 861 together will reduce Petitioner's total expected benefits over his current life expectancy by \$307,562 without discounting to present value." SPECIAL MASTER'S FINAL REPORT AND RECOMMENDED FINDINGS OF FACT, April 30, 2014, 75 (hereinafter 'SPECIAL MASTER'S FINAL REPORT'). This diminished retirement benefit is a substantial impairment of Petitioner Jones' retirement contract rights with PERS.

Petitioner Jones asserts that the Oregon Legislature's use of its police power to enact SB 822 and SB 861 is not justified here. There is no significant and legitimate public purpose supporting the Oregon Legislature's use of Oregon PERS retirees' contractual benefits to increase school funding and other uses by the State general fund.

Petitioner asserts that SB 822, which reduces the full retirement benefit to PERS retirees who no longer live in the state of Oregon, is a violation of Amendment XIV, Section 1 of the United States Constitution which states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Privileges and Immunities Clause protects the fundamental rights of individual citizens like Petitioner Jones against state efforts to discriminate against out-of-state citizens. SB 822 violates this Clause by significantly reducing Petitioner Jones' fundamental right to his full contractual retirement benefit simply because he no longer lives in Oregon. SB 822 is not justified as advancing a substantial state interest.

SB 822 also violates Amendment XIV, Section 1 of the United States Constitution which provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." SB 822 uses a formula

based on his years of service with PERS retirement system to reduce Petitioner Jones' contractual retirement benefits. This formula, labeled the "tax remedy," is not based on Petitioner Jones' tax liability as if he were a resident of Oregon, nor is a corresponding "tax remedy" reduction applied to the retirement benefits of Oregon PERS retirees' who live in Oregon but may not be subject to Oregon income tax. SB 822 violates the 14<sup>th</sup> Amendment in that it fails to put citizens of other States on the same footing as citizens of Oregon, and denies Petitioner Jones the equal protection of Oregon's laws, so far as the advantages given to Oregon residents is concerned.

## **V. SUMMARY OF THE FACTS**

The facts relating to Petitioner Jones are as follows:

"Petitioner Jones receives a PERS retirement based on his continuous employment at the Portland Development Commission (PDC) from July 1, 1967, through February 28, 1998. At the time of Jones' retirement, effective March 1, 1998, he was credited with 30 years, and 8 months of service with the PDC. Twenty-four years and 3 months of Jones' service occurred prior to October 1, 1991. Jones is a Tier One PERS member, having joined the

system prior to January 1, 1996.” SPECIAL MASTER’S FINAL REPORT, 73.

“When Jones retired, on the Service Retirement Application, he chose retirement benefit Option 2 Annuity, Full Survivorship, which provided full benefits to his spouse, if Jones predeceased her. Jones received a Notice of Entitlement from PERS, dated April 10, 1998, which confirmed his retirement benefit with PERS by specifying his monthly retirement benefit under Option 2 Annuity.” *Id.*

“As a result of choosing this option, my retirement benefit was reduced to provide for this survivorship option.” Paragraph 7, Affidavit of Wayne Stanley Jones, Pro Se Exhibits #63, SPECIAL MASTER’S EVIDENTIARY HEARING WITNESS AND EXHIBIT RECEIPT, MAY 1, 2014.

“On August 6, 2006, my wife, died.” *Id.* “Under the terms of PERS Service Retirement Application, I could not, after my wife died, choose a different retirement option; one that would provide a higher retirement allowance to me.” *Id.*

“I am bound by the PERS Service Retirement Application dated January 12, 1998, . . . between PERS and me.” *Id.*

“Petitioner Jones was born in Oregon in 1943 and resided continuously in Oregon until 2006, when personal family circumstances necessitated a move to another state. He now lives at 18 North Foxhill Road, North Salt Lake, Utah 84054.” SPECIAL MASTER’S FINAL REPORT, 73.

“Effective August 1, 2013, PERS increased Jones’ service retirement allowance by 1.5 percent as a result of Section 1 of Oregon Senate Bill 822, signed into law by Governor Kitzhaber on May 6, 2013. By letter dated December 18, 2013, PERS informed Jones that his service retirement allowance would be reduced as a result of legislation passed in 2013. The letter advised Jones, among other things, that:

“You currently receive an increase in your monthly PERS benefit as a statutory remedy for Oregon state income tax (“tax remedy”).

“Legislation passed in 2013 eliminated this tax remedy for benefit recipients who do not pay Oregon state income tax on their PERS benefits because they do not reside in Oregon. Recently PERS received notification that you did not pay income taxes in Oregon because you are not an Oregon resident.



“Therefore, your monthly PERS benefit is being adjusted to remove the tax remedy. Your gross monthly benefit will be reduced by \$520.01. Your adjusted monthly gross benefit will be \$6,649.20, effective with the payment you receive on January 1, 2014.”

*Id.* at 73-74.

“PERS has estimated the yearly allowance differences, both year by year and cumulatively, for Jones, depending on the outcome of the pending litigation. If SB 822 and SB 861 are declared invalid in their entirety with respect to reductions in the service retirement allowance due to Petitioner’s non-residency and COLA, and assuming a COLA percentage each year of 2 percent, Jones is projected to receive over his current joint life expectancy of 21.3 years benefits totaling \$2,272,760.45.” *Id.* at 74.

“If SB 822 is declared valid and SB 861 is declared invalid, Jones is projected to receive \$1,911,594 over his current joint life expectancy of 21.3 years. . . . If SB 822 and SB 861 are declared valid in their entirety, Jones is projected to receive benefits totaling \$1,873,937 over his current joint life expectancy of 21.3 years.” *Id.*

“Based on PERS’ calculations, SB 822 alone will reduce Jones’ total expected benefits of [by] \$271,447 without discounting to present value. . . .

SB 822 and SB 861 together will reduce his total expected benefits by \$307,562 without discounting to present value. . . . If SB 822's elimination of SB 656/HB 3349 benefits is upheld but the COLA changes in SB 822 and SB 861 are struck down, Jones' projected benefits would be reduced by \$84,316 without discounting to present value." *Id.* at 75.

"The maximum COLA was increased to 2.0 percent effective July 1973; it remained at 2.0 percent until the enactment of SB 822 in 2013." *Id.* at 23.

"The history of the SB 656/HB3349 benefits before SB 822 was enacted is described in *Stovall*, 324 Or. 92 at 98-104. . . . This report adopts and incorporates that description. Legislation enacted in 2011 eliminated HB 3349 benefits for members who retire on or after January 1, 2012 and reside outside Oregon." Footnote 57, referenced from this paragraph, states:

"2011 Or Laws chapter 653, Section 2. PERS' Deputy Director testified at the evidentiary hearing that, before the 2011 legislation, he could not recall any other instance in which PERS distinguished between Oregon residents and nonresidents in determining a retiree's gross service retirement allowance. . . . April 2, 2014 (Rodeman testimony)." *Id.* at 25.

“SB 822 also eliminated the SB656/HB3349 benefit increases effective January 1, 2014 for any benefit recipients who are not subject to Oregon personal income tax because they do not reside in Oregon.” *Id.* at 31.

“SB 822’s elimination of SB 656/HB 3349 benefits for retirees who reside outside Oregon affected 16,546 recipients, 14 percent of all benefit recipients.” *Id.* at 37.

## **VI. ARGUMENT**

**1. ARGUMENT ONE – IN ENACTING SB 822 AND SB 861, THE OREGON LEGISLATURE VIOLATED ARTICLE 1, SECTION 21 OF THE OREGON CONSTITUTION, WHICH PROHIBITS THE ENACTMENT OF LAWS IMPAIRING THE OBLIGATIONS OF CONTRACTS, BECAUSE THESE TWO ACTS SUBSTANTIALLY IMPAIR PETITIONER JONES’ EARNED ANNUITY RETIREMENT CONTRACT WITH PERS, BY SUBSTANTIALLY REDUCING PETITIONER’S ANNUAL COLA AND ALSO SUBSTANTIALLY REDUCING HIS PERS RETIREMENT ANNUITY BENEFIT ONLY BECAUSE PETITIONER JONES NO**

**LONGER LIVES IN OREGON; AND THESE UNILATERAL  
MODIFICATIONS OF PERS CONTRACT WITH PETITIONER  
JONES ARE NOT JUSTIFIED BY THE STATE'S USE OF ITS  
POLICE POWER**

Petitioner Jones incorporates herein the SUMMARY OF THE FACTS,  
and the arguments presented in ARGUMENT TWO.

**A. Petitioner Jones' PERS Retirement Annuity formed a fully  
vested and irrevocable contract between PERS and Petitioner  
Jones upon his retirement, subject only to annual COLA  
increases, which retirement contract was substantially  
impaired by the Legislature's enactment of SB 822 and SB 861.**

Since its adoption in 1859, the Oregon Constitution has prohibited the  
enactment of laws that impair contractual obligations. This provision states:

"No . . . law impairing the obligation of contracts shall ever be passed . . . ."

Article 1, Section 21, Oregon Constitution. This provision applies not only  
to contracts between private parties, but also to contracts entered into  
between private individuals and the state. Oregon case law establishes that  
when the state enters into a contract, the legislature may not enact legislation

thereafter that substantially impairs that contract. *E.g., Hughes v. State of Oregon*, 314 Or. 1, 13-14, 838 P.2d 1018 (1992) (citing *Fletcher v. Peck*, 10 U.S. 87, 135, (1810)).

Despite this straightforward and unambiguous constitutional provision and well-settled case law, the Oregon Legislature enacted SB 822 and SB 861, which, “[b]ased on PERS’ calculations . . . SB 822 and SB 861 together will reduce his total expected benefits by \$307,562 without discounting to present value.” SPECIAL MASTER’S FINAL REPORT, 75.

Whether legislation violates the contract clause involves a two-step inquiry. The first is whether a contract exists between the parties, and second, if a contract does exist, whether the legislation impairs an obligation of that contract. *Hughes* at 13-14. General principles of contract law govern this inquiry.

On the date of Petitioner’s retirement, the laws governing PERS in effect on that date formed the contract under which Petitioner’s future benefits would accrue.

Petitioner does not contest the right of the Legislative Assembly to change the benefits of persons who become members of PERS **after** the PERS statutes are amended. This right is well established.

Petitioner is disputing the right of the Legislative Assembly to change the benefits of persons who are members of PERS, and specifically, those who have relied on PERS benefits as outlined in statute, and have retired with their retirement benefits being fully vested and the contractual promise of those benefits continuing to be provided. This is Petitioner's situation. See *Hughes* at 21.

"Petitioner Jones receives a PERS retirement based on his continuous employment at the Portland Development Commission (PDC) from July 1, 1967, through February 28, 1998. At the time of Jones' retirement, effective March 1, 1998, he was credited with 30 years, and 8 months of service with the PDC. Twenty-four years and 3 months of Jones' service occurred prior to October 1, 1991. Jones is a Tier One PERS member, having joined the system prior to January 1, 1996."

*Id.* at 73.

"When Jones retired, on the Service Retirement Application, he chose retirement benefit Option 2 Annuity, Full Survivorship, which provided full benefits to his spouse, Christine O. Jones, if Jones predeceased her. Jones received a Notice of Entitlement from PERS, dated April 10, 1998, which confirmed his retirement benefit with PERS by specifying his monthly retirement benefit under Option 2 Annuity." *Id.* "As a result of choosing this option, my retirement benefit was reduced to provide for this survivorship option."

Paragraph 7, Affidavit of Wayne Stanley Jones, Pro Se Exhibits #63, SPECIAL MASTER'S EVIDENTIARY HEARING WITNESS AND EXHIBIT RECEIPT, May 1, 2014.

"On August 6, 2006, my wife, died." *Id.* at Paragraph 9.

never benefited from the Option 2 full survivorship retirement. Her death created a change of circumstances for Petitioner. But Petitioner Jones did not re-apply for Option 1 Annuity, a retirement option with a larger benefit and no survivorship benefits rights, because he knew that his current Option 2 annuity contract with PERS was final and irrevocable, subject only to annual COLA increases. "Under the terms of PERS Service Retirement Application, I could not, after my wife died, choose a different retirement option; one that would provide a higher retirement allowance to me." *Id.* at Paragraph 10. "I am bound by the PERS Service Retirement Application dated January 12, 1998, between PERS and me." *Id.* at Paragraph 11. Petitioner Jones asserts that upon his retirement, his Option 2 Annuity retirement benefit with COLA increases became a binding and unalterable contract between PERS and Petitioner Jones.

For the same reasons, the Oregon Legislature, though it may have had a

change of circumstances, cannot constitutionally remake and impair its contract with Petitioner through SB 822 and SB 861 and reduce the benefits that he was promised upon his retirement in his Option 2 Annuity in the Notice of Entitlement from PERS along with the promised COLA.

Petitioner Jones acknowledges that since 2006, he is no longer a resident of Oregon. SB 822 and SB 861 significantly and substantially impair Petitioner's fully vested retirement benefits in violation of Oregon's Contract Clause, solely because he no longer lives in Oregon. This contractual impairment has two violations:

- 1<sup>st</sup>, it substantially impairs Petitioner Jones' contractual right to receive his full PERS retirement Annuity benefit only because he is not a resident of Oregon, and
- 2<sup>nd</sup> it substantially impairs Petitioner Jones' contractual right to receive his annual COLA promised upon his retirement, unreduced by these two 2013 enactments.

These reductions to Petitioner Jones' contractual and vested retirement benefits violate well-established Oregon case law which has consistently held that Oregon retiree benefits are a contract right. See *Oregon State Police Officers Association v. State of Oregon*, 323 Or. 356, 381 (1996).



Since 1973, the Oregon Legislature has annually provided a COLA capped at 2.0 percent to PERS retirees. “The maximum COLA was increased to 2.0 percent effective July 1973; it remained at 2.0 percent until the enactment of SB 822 in 2013.” SPECIAL MASTER’S FINAL REPORT, 23.

SB 861 superseded the 2014 cost-of-living adjustment (COLA) that was previously approved in SB 822. In an attempt to explain the Legislature’s changes to PERS retirees, the Public Employee Retirement System web page under the heading: *Changes to PERS – Special Session (September 30 – October 2, 2013)* says:

“Senate Bill 822 capped the COLA payable on August 1, 2013 at 1.5% for all benefit recipients. Under SB 822, the COLA payable August 1, 2014, and beyond would have varied based on the amount of the yearly benefit.”

*Id.*

The website explains the new COLA:

“Senate Bill 861 does not affect the August 1, 2013 COLA, but modifies the yearly COLAs for all PERS benefit recipients. Effective with the August 1, 2014 benefit payment, a COLA will be limited to 1.25% on the first \$60,000 of yearly benefit payment and 0.15% on amounts above \$60,000. Additionally, SB 861 provides a supplemental, one-time payment of 0.25% of their yearly benefit of all benefit recipients, not to exceed \$150. Those who have a PERS benefit of less than \$20,000 per year will receive a second supplemental, one-time payment of 0.25% of their yearly benefit. These supplemental payments will not be compounded into the member’s yearly

benefit and will be in effect for six years (first payable after July 1, 2014 and ending after July 1, 2019.)”

*Id.*

Petitioner Jones’ residence was always in Oregon until 2006, when he moved to Utah. SB 822 strips away the benefit mandated by the Oregon Supreme Court in *Hughes v. State of Oregon*, (314 Or. 1, 838 P.2d 1018 (1992)) and as further provided by the Oregon Legislative Assembly in 1995 H.B. 3349, (O.R.S. Section 238.364)(hereinafter HB 3349), and 1991 S.B. 656 (O.R.S. Section 238.366)(hereinafter SB 656) simply because a retiree does not reside in the state of Oregon. The Legislature’s action is contrary to established Oregon case law of *Hughes*. In *Hughes*, the Oregon Supreme Court held “that the legislature intended and understood that PERS constituted an offer, by the state to its employees, for a unilateral contract.”

*Id.* at 1029.

The Oregon Supreme Court reviewed the essential elements of that PERS contract:

“Accrued and accruing pension benefits are protected under Oregon law. Oregon is in line with the theory of pensions which holds that pensions are a form of compensation and that employees acquire vested contractual rights in pension benefits. . . . An employee’s contract right to pension benefits becomes vested at the time of his or her acceptance of employment. . . . On vesting, an employee’s contractual interest in a pension plan may not be

substantially impaired by subsequent legislation. . . . 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.”

*Id.*

This Court in *Hughes* went on to “hold that the tax exemption in former ORS 237.201 (1989) is a term of the PERS contract and an obligation of the state under that contract. Therefore, by virtue of Article 1, Section 21, of the Oregon Constitution, the obligations of that contract, including the exemption from taxation are not subject to legislative impairment without the consent of the PERS beneficiaries.” *Id.* at 1033.

This Court in *Hughes* determined that “section 1 of the Oregon Laws 1991, chapter 823, violates Article 1, section 21. As a law impairing an obligation of a contract, section 1 is a nullity as it relates to PERS retirement benefits accrued or accruing for work performed before the effective date of that section. Those benefits may not be taxed. . . . Because it is unconstitutional, section 1, not being necessary to the remainder of the Act, is severed.” *Id.* at 1035.

Elimination of the contractual benefits previously provided to retirees living

in state or out of state under SB 822 is unconstitutional under Article 1, section 21 of the Oregon Constitution which provides: "No . . . law impairing the obligation of contracts shall ever be passed . . . ."

Additionally, SB 822 and SB 861 violate Petitioner's contractual right to the annual COLA increases in effect upon his retirement. Upon his retirement, Petitioner contractually agreed to receive a specific fixed rate retirement benefit under Option 2 Annuity subject to annual COLA benefit increases of up to 2 percent, and that same fixed rate Annuity contract obligation still continues today.

#### **B. Petitioner's Option 2 Annuity Benefit is a Contract with PERS**

Petitioner worked for the City of Portland Development Commission for 30 years and 8 months and then retired effective March 1, 1998. 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.

When Petitioner exercised his right to retire and chose Option 2 Annuity, his retirement benefits fully vested and his Annuity benefit became a fixed amount, subject only to the statutory 2% COLA increase. This is consistent with Oregon state law which says: "An annuity or pure endowment policy shall contain a provision that the policy, including a copy of the application if endorsed upon or attached to the policy when issued, shall constitute the entire contract between the parties." ORS 743.261.

**C. The Oregon Supreme Court in *Ragsdale* affirmed that to receive the benefit payable under Oregon Laws 1991, chapter 796, every state retiree who qualifies for benefits (based on years of service) will receive the benefits, regardless of the state retiree's residency.**

The retirement benefits payable to Petitioner Jones may not be reduced simply because Petitioner no longer resides in Oregon. The 77<sup>th</sup> Oregon Legislature attempted to justify its action based on the fact that because Petitioner Jones does not pay Oregon income taxes, his retirement benefit should be reduced. The Oregon Legislature is unconstitutionally attempting to unilaterally remake its contractual retirement benefit with Petitioner and reduce Petitioner's vested retirement benefit and promised compensation.

In *Ragsdale v. Department of Revenue* 321 Or. 216, 895 P.2d 1348 (1995), the Oregon Supreme Court examined the 1991 retirement benefit granted by the Oregon Legislature to retirees. This Court said in *Ragsdale*:

“The 1991 Legislature also increased PERS retirement benefits payable to some state retirees. Or. Laws 1991, ch. 796. The increased PERS retirement benefits are based on an employee’s years of service and range from one percent (10 to 20 years of service) to four percent (30 or more years of service). . . . 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.”

*Id.* at 1351.

The Oregon Supreme Court went on to state in *Ragsdale* that the 1991 retirement benefit granted by the Legislative Assembly was not a tax rebate.

The Court said: “With respect to Oregon Laws 1991, chapter 796, that statute contains indicia that could lead one to conclude either that the “benefits” are a kind of tax rebate or that the “benefits” are compensation. The provision to end the payments if state taxation ends[,] points toward a tax rebate. However, for the reasons that follow, we conclude that, in context, the 1991 legislation is a [sic] not [a] tax rebate or tax benefit that would implicate the principle of intergovernmental tax immunity.” *Id.* at 1354-55.

Further, this Court in *Ragsdale* stated:

“[C]onsistent with the points made above regarding state payment of compensation to its retirees, the increase in benefits provided by the 1991 legislature is not part of the system of state taxation in Oregon. It does not involve the assessment or collection of revenues, which is the hallmark of a tax.”

*Id.* at 1355.

The Court also found:

“The 1991 increase in compensation is not transformed into a tax rebate or tax benefit simply because it was motivated in whole or in part as a response to the Davis decision and the consequent removal of the tax exemption for PERS retirement benefits.”

*Id.*

The Oregon Supreme Court in *Ragsdale* held, “we find no correlation, either direct or indirect, between state retirees’ state tax obligations and the amount of increased PERS retirement benefits, if any, to which they may be entitled under the provision of Oregon Laws 1991, chapter 796. As noted, the amounts of increased retirement benefits are based on the PERS members’ years of service, not on their state income tax obligations. All eligible PERS retirees receive those increased benefits. Moreover, the increased benefits received pursuant to the 1991 statute are themselves subject to state and federal taxation. Indeed, the taxpayer’s claim for a tax refund measured by

the increased benefit paid to state retirees incorrectly assumes that every state retiree who receives an increase in benefits paid state income taxes, but it is conceivable that many state retirees paid little or no state income tax for 1991.” *Id.* at 1355-56 (emphasis in the original).

This Court in *Ragsdale*, in comparing Oregon’s law to that of Montana, concluded: “In contrast, under Oregon Laws 1991, chapter 796, every state retiree who qualifies for benefits (based on years of service) will receive the benefits, regardless of the state retiree’s residency.” *Id.* at 1357. So it is clear that, as to the 1991 benefit, (SB 656) the Court understood and acknowledged that the 1991 retirement benefits were not to be considered as a tax rebate or a tax benefit. This Court also made it clear that the 1991 benefit was payable to all state retirees, regardless of whether the retiree paid little or no income taxes to the state of Oregon, and regardless of the residency of the retiree.

In referring to the subsequent HB 3349 benefits, *Vogl v. Department of Revenue*, 327 Or. 193, 960 P.2d 373 (1998), said, “the foregoing aspects of the 1995 statute satisfy this court that the increase provided therein is, in substance, a tax rebate.” *Id.* at 382. This Court in *Vogl* stated: “We emphasize that our holding necessarily is confined to the 1995 statute. We



do not overrule *Ragsdale* or its analysis of the 1991 law.” *Id.* at 384. *Vogl* highlighted that in *Ragsdale*, “the 1991 benefit increase was “compensation,” rather than an unlawful “tax rebate.” *Id.* at 377. So the holding in *Ragsdale* remains the controlling precedent as to the 1991 benefits not being considered a tax rebate or a tax benefit. And *Ragsdale* also makes it clear that the 1991 benefit is payable to the retiree, regardless of the state where the retiree currently resides.

SB 822 attempts to recast both the retirement benefits provided in both 1991 and 1995 as a ‘tax remedy’ is an unconstitutional attempt by the Oregon Legislative Assembly to overrule these Oregon Supreme Court determinations.

In summary, the retirement compensation and benefits fully vested in Petitioner Jones and formed a contract between PERS and Petitioner Jones when he retired. That contract was substantially impaired when the Oregon Legislature enacted. Based on PERS’ calculations, “SB 822 alone will reduce Jones’ total expected benefits by \$271,447 without discounting to present value.” SPECIAL MASTER’S FINAL REPORT, 75. This is a substantial impairment to Petitioner Jones retirement contract, based on his out of state residency.

**D. The retirement compensation adjustment passed in House Bill 3349, Or. Laws 1995, Ch. 569 was in settlement with those PERS members with whom the State had breached its contract; and the rationale for that compensation provided by that 1995 settlement continues to this day as to Petitioner Jones, but is unconstitutionally impaired by.**

Petitioner Jones was part of the PERS retirement system prior to 1991. As such, he is entitled to the compensation provided by the Legislature under SB 656, Or. Laws (1991), ch. 796 (SB 656); or HB 3349, Or. Laws (1995), ch. 569 (HB 3349), whichever is greater. The basis for Petitioner Jones continued right to his PERS retirement benefit under SB 656 was discussed in Argument One B. and C. above.

The SPECIAL MASTER'S FINAL REPORT gives a brief history of SB 656 and HB 3349:

*"In Stovall v. State of Oregon, 324 Or. 92 (1996), the Supreme Court explained that PERS benefits were exempt from state income taxes from 1945 until 1991. In 1991, after the United States Supreme Court decided Davis v. Michigan Dept. Of Treasury, 489 US 801(1989), the legislature passed Oregon Laws 1991, chapter 823, which eliminated the state tax exemption. Stovall, 324 Or. at 98-99 (describing history). In Hughes v. State of Oregon, 314 Or 1 (1992), the Oregon Supreme Court held that*

Oregon Laws 1991, chapter 1, violated Article 1, section 21, of the Oregon Constitution, and that section 3 of that law "breached petitioners' PERS contract insofar as it subjects to state taxation PERS retirement benefits accrued or accruing for work performed before the effective date of that

1991 legislation." *Stovall*, 324 Or. at 99 . . . The Stovall court stated that SB 656 "provided for increased PERS benefits in lieu of the tax exemption" (324 Or. at 102), and that HB 3349 "provided for increased compensation to PERS members as to whom the state had breached its contract to provide tax-free pension benefits."

SPECIAL MASTER'S FINAL REPORT, 2, footnote 4.

As the Legislature was considering the passage of HB 3349, the chair of the House State and School Finance Committee (HSSFC) noted that because the intention behind the bill was to satisfy a lawsuit then pending concerning damages to be awarded PERS retirees as a result of the *Hughes* decision, he did not intend to endorse the bill unless language was added to the bill that it was in settlement of the lawsuit. See HSSFC, Tape 225B, May 12, 1995.

The legislation was amended to add Sections 2(1) and 2(3) to address the Chair's concerns. Section 2 (1) states:

"The increased benefits provided by section 3 of this 1995 Act, and by the amendments to ORS 237.209, 237.230, 237.233 and section 14, chapter 796, Oregon Laws 1991, by sections 5, 6, 7 and 8 of this 1995 Act, are paid to members of the Public Employees' Retirement System and their beneficiaries by reason of subjecting benefits paid pursuant to ORS 237.301 to 237.315 to Oregon personal income taxation. The increased benefits provided by this 1995 Act are intended to provide full, complete and final payment of any claim of a member of the system, or a beneficiary of a member, arising out of the taxation of those benefits."

HB 3349, 68<sup>th</sup> Oregon Legislative Assembly, 1995 Regular Session; also quoted in *Vogl v. Department of Revenue*, 327 Or. 193, 960 P.2d 373, 378 (1998)

Subsection (3) of HB 3349 states: "No member of the system or beneficiary of a member of the system shall acquire a right, contractual or otherwise, to the increased benefits provided by sections 3 to 10 of this 1995 Act." HB 3349, 68<sup>th</sup> Oregon Legislative Assembly, 1995 Regular Session. The Chair of HSSFC stated why Subsection (3) was added: "So if the plaintiff in this case decided not to accept this settlement, we would have no obligation to pay that beyond any funds that we might obligate during this current biennium. If we choose to rescind this." HSSFC, May 12, 1995, tape 227B. The Chair clarified the relationship between Sections 2(1) and 2(3):

"I would like to say for the public record that between the section sub 1 and the entire section 2 this is intended to settle the suit that has been brought by the public retirees and, uh, PERS retirees. And there is not a contractual right to this benefit if it is awarded and if the settlement should not work out then we would anticipate actually rescinding this benefit."

*Id.*

So the reservation in Section 2(3) that no member acquired a right in the benefits was to preserve the ability of the Legislature to rescind this legislation if a settlement was not successfully reached. But history shows

that the settlement of the *Stovall/Chess* lawsuit was reached and so this settlement with the State cannot be rescinded.

“The state argues that SB 656 and HB 3349 fully compensate its former employees for damages due to them under this court’s decision in *Hughes*. *Stovall* plaintiffs concede that implementation of those acts would constitute a complete remedy for the breach of contract of which they complain. . . . Accordingly, as between the state and its own former employees, the validity of SB 656 and HB 3349 is not at issue.”

*Stovall v. State of Oregon*, 324 Or. 92, 922 P.2d 646, 655 (1996). Therefore, based on the *Stovall* decision inasmuch as HB 3349 compensation is in settlement of a lawsuit with PERS retirees, PERS’ obligation to pay the increased benefits mandated under HB 3349 continues to this day.

This obligation to pay Petitioner Jones his earned retirement compensation is a contract right, which cannot constitutionally be impaired. This Court in *Stovall* noted:

“The state admits that it has breached a statutory contract to provide PERS benefits free from state income taxation with respect to . . . its former employees who were employed in PERS-covered positions, only, and with respect to PERS benefits that had accrued or were accruing before September 29, 1991, only. In other words, in response to plaintiffs’ pleadings, the state has admitted its liability to its own former employees. That issue has been resolved on the pleadings, and no party brings it to us for review.”

*Id.* at 655. So even with regard to HB 3349, the State admitted in the Stovall pleadings that it had a statutory contract with PERS employees with PERS benefits accrued before September 29, 1991.

In *Vogl*, this Court held that the 1995 statute “applies without regard to individual tax circumstances.” *Vogl v. Department of Revenue*, 327 Or. 193, 960 P.2d 373, 382 (1998).

It is irrelevant as to PERS’ obligation to pay the HB 3349 retirement benefits that Petitioner Jones lives out of state and is not subject to Oregon income tax. In enacting HB 3349, legislators understood that some of the retirement benefits being given under that bill would not be subject to Oregon income tax. This premise is verified by the legislative history in which the Legislative Revenue Office examined the cost of funding that Act. In its report, that office noted “some of the \$250 million in benefits would not be taxable either because the retiree lives out-of-state or has no taxable income.” *Revenue Impact of HB 3349C*, Legislative Revenue Office, June 6, 1995.

A publication produced September 27, 2013 by the Oregon Public Employees Retirement System reviews the “tax remedy” of. This publication highlights that the dollar amount of the benefit increase payable

to each retiree has no relationship to the Oregon income tax rate. And Oregon retirees who pay little or no income tax have no decrease in the benefit they are provided. Quoting PERS:

“How are the tax remedy increases determined? Under Senate Bill 656 formula, a benefit recipient receives a percentage increase based on the number of years of service credit that person has in PERS, from a minimum increase of 1% with 10 years of creditable service to a maximum of 4% with 30 years of creditable service.”

“Under the House Bill 3349 formula, a benefit recipient receives a percentage increase based on the ratio of his/her service in PERS that occurred before 1991 to total years of service. . . . Eligible benefit recipients receive the benefit increase under either the House Bill 3349 formula or the Senate Bill 656 formula, whichever is greater.”

*“Tax Remedy” Elimination for Certain Benefit Recipients (Senate Bill 822),*

September 27, 2013, Oregon PERS Document Library –

<http://OregonPERS.info/>.

This principle of the continued efficacy of SB 656 and HB 3349 are critical to Petitioner Jones’ contractual retirement benefit, and the impact of their removal is substantial. “Twenty-four years and 3 months of Petitioner Jones’ service occurred prior to October 1, 1991. Jones is a Tier One PERS member, having joined the system prior to January 1, 1996.” SPECIAL MASTER’S FINAL REPORT, 75. PERS’ calculations estimate: “SB 822 reduces Petitioner Jones’ PERS retirement annuity benefit by \$271,447 over his current life expectancy.” *Id.* at 75.

**E. The COLA provisions in effect prior to the enactment of SB 822 and SB 861 are part of the agreed upon compensation in Petitioner's retirement Annuity contract Petitioner has with PERS and cannot constitutionally be impaired by the Oregon Legislature.**

When Petitioner Jones retired in 1998, his rights in his retirement income were fully vested. He had fulfilled all the requirements set by his employer and was eligible to retire and actually retired. "The maximum COLA was increased to 2.0 percent effective July 1973; it remained at 2.0 percent until the enactment of SB 822 in 2013." *Id.* at Page 23. Petitioner Jones accepted this up to 2.0 percent COLA provision as part of his agreed upon compensation when he retired in 1998.

Those provisions in SB 822 and SB 861 that reduce the cost-of-living adjustments to Petitioner violate the statutory contract between public employers and PERS members. This Court in *Strunk v. Public Employees Retirement Board*, 338 Or. 145 (2005), determined that the annual COLA under the 1973 law is part of the statutory contract. The Oregon Supreme



Court has already addressed the legality of limitations on the annual COLA increases for Tier 1 and Tier 2 employees in the *Strunk* case. The Oregon Supreme Court held that petitioners prevailed in *Strunk* for two reasons:

“First, petitioners . . . correctly have argued that the provisions of the 2003 PERS legislation that alter the manner in which earnings are credited to the regular accounts of Tier One members impair an obligation of the statutory PERS contract in violation of Article I, section 21, or the Oregon Constitution. As such, those provisions are void and of no effect. Second, *Strunk* and *Sartain* petitioners are correct in their assertion that the provision of the 2003 PERS legislation that directs PERB to not apply annual COLAs to certain retired members’ “fixed” service retirement allowances breaches the contrary obligation of the PERS contract to do so; that provision also is declared void and of no effect.”

*Id.* at 223-224.

In a letter of advice dated February 4, 2013, to the Speaker of Oregon’s House of Representatives about the potential legal impact of suspending the COLA, Oregon’s Legislative Counsel said:

“Based on the court’s clear finding in *Strunk*, we are of the opinion that attempts to limit the COLA to the first \$24,000 of benefits would be found to be in violation of the contract rights of Tier 1 and Tier 2 members.”

Page 2, Letter to Representative Tina Kotek, Speaker of the House, *Re: Legality of cap on PERS cost-of-living adjustment*, from Dexter A. Johnson, Legislative Counsel, by Marisa N. James, Deputy Legislative Counsel, February 4, 2013.

For Petitioner Jones, there is no question that the COLA is a fully accrued contractual benefit since he is a PERS member who has retired and whose retirement benefits and right to the statutory COLA has fully accrued. “We note the status of the law is particularly clear with regard to retired members, and there can be little question that the COLA is a fully accrued benefit for a member who has retired.” *Id.*

**F. The Oregon Legislature’s desire to ease the financial burden of PERS employers was insufficient justification to invoke the state’s ‘police powers’ and unilaterally modify and substantially reduce Petitioner Jones’ contractual retirement annuity benefit with PERS**

This Court in *Stovall* discussed the proper approach for determining whether a state law violates Article 1, Section 21. It said:

“First, it must be determined whether a contract exists as 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. \* \* \*

“In cases where the state is alleged to be a party to the contract, however, courts have developed a number of additional rules. In *Eckles*, this court detailed the nature and origins of those 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 domain; and (3) the state may not contract away its ‘police power.’”

*Stovall v. State of Oregon*, 324 Or. 92, 922 P.2d 646, 658 (1996).

With regard to the assertion that there is a contract, and that it has been impaired, and that this contract, which Petitioner has with the state, is not just inferred from legislation, but is firmly established in Oregon case law and has been discussed in detail in the arguments above. With regard to the state's power of eminent domain, that inquiry is irrelevant and has no application to this lawsuit. And finally, with regard to the state's 'police power,' the *Eckles* court clarified its use:

"the 'police power' is indistinguishable from the state's inherent power to enact laws and regulation; the existence of the power cannot explain the extent to which the power is constitutionally limited. \* \* \* [T]he state cannot avoid a constitutional command by 'balancing' it against another of the state's interests or obligations, such as protection of the 'vital interest' of the people. Limits on the contractual obligations of the state must be found within the language or history of Article 1, Section 21, itself."

*Eckles v. State of Oregon*, 306 Or. 380, 399 (1988). The Court in *Eckles* determined that the State's contractual obligations under Article 1, Section 21 may not be avoided under the "police power" doctrine. *Id.* This is the situation at bar where the Oregon Legislature clearly intended to substantially impair existing retirement contracts. A simple 'balancing test' is insufficient to justify the Legislature's use of Oregon's police powers. The Oregon Legislature failed to meet its burden in this matter.

**2. ARGUMENT TWO – THE OREGON LEGISLATURE  
SUBSTANTIALLY IMPAIRED PETITIONER JONES’  
CONTRACTUAL RETIREMENT ANNUITY BENEFIT BY  
ENACTING SB 822 AND SB 861, WHICH IMPAIRMENT  
VIOLATES ARTICLE 1, SECTION 10 OF THE UNITED STATES  
CONSTITUTION**

Petitioner incorporates herein the SUMMARY OF THE FACTS, and the arguments presented in ARGUMENT ONE.

SB 822 and SB 861 are unconstitutional under Article 1, Section 10 of the United States Constitution, which states: “No State shall . . . pass any . . . law impairing the obligation of contracts, . . . .”

To establish an impairment of contract under federal law, federal contracts clause cases require three questions to be satisfied: “(1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial?” *Koster v. City of Davenport, Iowa*, 183 F.3d 762, 766 (8<sup>th</sup> Cir. 1999).

If a substantial impairment of the contract is found to exist, “those urging the constitutionality of the legislative act must demonstrate a significant and

legitimate public purpose behind the legislation.” See, e.g., *Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d, 872 (Minn. 1986). See also, Stuart Buck, *Legal Obstacles to State Pension Reform*, Association for Education Finance and Policy (Aug. 26, 2011), [http://www.aefpweb.org/sites/default/files/webform/Stuart\\_Buck,\\_Obstacles\\_to\\_Pension\\_Reform.pdf](http://www.aefpweb.org/sites/default/files/webform/Stuart_Buck,_Obstacles_to_Pension_Reform.pdf)

**A. A contractual relationship exists between Petitioner Jones and**

**PERS.**

The first question is whether there is a contractual relationship. Legislatures and courts across this country have taken basically three approaches to retirement benefits:

One: *States in Which Pension Benefits are Not Contractual*. “Only a few states have said that their pension benefits are not contractual, at least not for constitutional purposes.” *Id.* at 20. As an example, Iowa is one of a few states that provide that the duty to pay public pension benefits are purely statutory and not contractual. *Campbell v. City of Marshalltown*, 235 N.W. 764 (Iowa 1931). **But even in Iowa, courts have held that a pension is protected once a member applies for retirement.** *City of Iowa City v. White*, 111 N.W. 2<sup>nd</sup> 266 (Iowa 1961). See also, National Conference on

Public Employee Retirement Systems (NCPERS), State Constitutional Protections for Public Sector Retirement Benefits, (March 15, 2007). Under this analysis, even if Petitioner Jones' pension benefits are not considered contractual, once Petitioner Jones applied for retirement, that pension is protected.

*Two: States in Which Pension Benefits have State Constitutional Protection as a Contract.* Seven states have constitutional provisions that provide, for example, that "Membership in a public retirement system is a contractual relationship that is subject to article II, Section 25, and public retirement system benefits shall not be diminished or impaired." AZ Const., Article XXIX, Section 1; and (NCPERS). Oregon does not provide this constitutional protection.

*Third: States which have No Explicit Constitutional Protection for Retirement Benefits, but in which Courts have held Pension Benefits Are Entitled to State Constitutional Protection.* Courts in thirty-four states provide state constitutional protection against impairment of contracts, particularly for pension benefits that have fully vested. *Id.* Oregon is among these states. The Oregon Supreme Court held that "[a]n employee's contract right to pension benefits becomes vested at the time of her or her acceptance of employment. . . . On vesting, an employee's contractual interest in a

pension plan may not be substantially impaired by subsequent legislation.” *Hughes v. State of Oregon*, 838 P.2d 1018 (Or. 1992). The *Strunk v. Public Employees Retirement Bd.*, 108 P.3d 1058 (Or. 2005) decision held that suspension of COLA benefits breached the state’s obligation of contract under Oregon Constitution Article I, Section 21. And the *Oregon State Police Officers Ass’n v. State*, 918 P.2d 765 (1996) ruled that once an employee provides services in reliance on a promise to provide benefits on retirement, the employer is contractually bound to honor that promise.

So, Oregon retirement benefits are a contract under Oregon case law, particularly as to Petitioner Jones who met all the requirements of this retirement benefit annuity by working, contributing, and retiring under a PERS retirement benefit in accordance with laws and rules established by the Oregon Legislature and the Oregon Public Retirement System.

**B. SB 822 and SB 861, separately and taken together, act to  
impair the contractual relationship between PERS and  
Petitioner Jones**

The second inquiry is does the change in the law impair the contractual relationship between PERS and Petitioner. When Petitioner retired March 1, 1998, he chose Option 2 Annuity. Petitioner’s Annuity promised him

lifetime benefits to him and to his spouse. This Annuity retirement benefit is a contractual obligation of PERS. The principle that an annuity is a contract is affirmed in Oregon Revised Statutes Section 238.005 (2), which states:

“Annuity means payments for life derived from contributions made by a member as provided in this chapter.” Petitioner, in determining whether to take a lump-sum option or take the option of a lifetime benefit for himself and his wife used PERS background information, which even in 2008 continues to state:

**“A lifetime benefit. First, the monthly benefit from PERS is paid for the member’s lifetime. Depending on the benefit option, it can also be paid for a beneficiary’s lifetime.”**

**“Cost-of-living adjustment. Second, monthly benefits are subject to an automatic 2 percent cost-of-living adjustment (COLA) each August when the Consumer Price Index increases at least 2 percent the previous year.”**

*Important information for you about The Total Lump-sum Option,*

[www.oregon.gov/pers/mem/docs/publications/totallumpsum.pdf](http://www.oregon.gov/pers/mem/docs/publications/totallumpsum.pdf), (April

2008) (emphasis added).

As this publication shows, PERS agreed the monthly benefit would be paid for his lifetime; and it would grow with a COLA of up to 2 percent a year.

Petitioner relied on PERS representations when he retired.



However, the Oregon Legislature, through SB 822, as further modified by SB 861, impaired Petitioner's guaranteed retirement annuity by: (a) substantially reducing his retirement Annuity contract amount because he is no longer a resident of Oregon, and (b) by substantially reducing his COLA.

**C. The impairment imposed by SB 822 and SB 861 on Petitioner**

**Jones' contract with PERS is substantial**

The third question is whether the impairment is substantial. Before SB 822 was enacted, ORS 238.360 provided that Petitioner would receive a cost-of-living adjustment on his monthly retirement allowance, not to exceed two percent in any year, based on the Consumer Price Index, and Petitioner Jones' retirement Annuity benefit was not diminished simply because he did not reside in Oregon. But with the enactment of SB 822: Petitioner Jones' contractual retirement Annuity benefit is substantially reduced because he does not live in Oregon, and his annual COLA benefit to which Petitioner Jones is contractually entitled is substantially reduced.

SB 861 further reduced the annual COLA benefits to Petitioner Jones and other PERS retirees.

"PERS has estimated the yearly allowance differences, both year by year and cumulatively, for Jones, depending on the outcome of the pending litigation. If SB 822 and SB 861 are declared *invalid in their entirety* with

respect to reductions in the service retirement allowance due to petitioner's non-residency and COLA, and assuming a COLA percentage each year of 2 percent, Jones is projected to receive over his current joint life expectancy of 21.3 years benefits totaling \$2,272,760.45."

SPECIAL MASTER'S FINAL REPORT, 74.

"If SB 822 and SB 861 are declared *valid in their entirety*, Petitioner Jones is projected to receive benefits totaling \$1,873,937 over his current joint life expectancy of 21.3 years.

*Id.*

If both SB 822 and 861 are entirely upheld, this results in a substantial impairment to Petitioner Jones' lifetime retirement benefits. This impact is \$398,823 [\$2,272,760 minus \$1,873,937], which represents a 17.55% reduction in Petitioner's retirement benefits.

**D. Oregon's use of its police power is not justified here: There is no significant and legitimate public purpose supporting the Oregon Legislature's use of state retirees' contractual benefits to address the State's general economic concerns; a revision of the Oregon state tax structure is a much better solution**

If a substantial impairment of the contract is found to exist, which Petitioner Jones has clearly established, "those urging the constitutionality of the

legislative act must demonstrate a significant and legitimate public purpose behind the legislation.” *See, e.g., Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 872 (Minn. 1986).

In *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), the Supreme Court examined the federal Contracts Clause. In *Blaisdell*, the Supreme Court upheld a Minnesota law that extended the time period in which borrowers could pay back their debts on property to lenders. The State argued the legislation was a legitimate use of its ‘police powers’ as it was enacted to prevent mass foreclosures during a time of great economic hardship in America. The Supreme Court held that because an emergency existed, in enacting the Mortgage Moratorium Law, Minnesota did not violate the federal Contracts Clause. However, even when the Court determined the State’s use of its ‘police powers’ was justified, the Court was careful to note that the obligations of the contracts were not impaired in modifying the time period for borrowers to pay back their debts, and the substantial rights secured by the contract were also not impaired. These facts are not present in the case at bar. First, there is no ‘emergency’ or great economic crisis in Oregon. Second, Petitioner Jones’ retirement contract with the state is not only impaired, it is substantially impaired with

a 17.55% reduction in Petitioner's retirement benefits over his joint projected lifetime.

"[W]hen the government, through legislation, modifies a contract to alter its own obligations, the Court will look carefully to see if there is in fact a "significant and legitimate public purpose behind the legislation." *Jacobsen* at 872. The Oregon Legislature failed to establish a "significant and legitimate public purpose" behind SB 822 and SB 861.

The Eighth Circuit examined the defense of the city's use of its 'police power' in *AFSCME*. A city sought to stop paying retiree health insurance premiums on grounds of economic need. But the Eighth Circuit held:

"Although economic concerns can give rise to the City's legitimate use of the police power, such concerns must be related to 'unprecedented emergencies,' such as mass foreclosures caused by the Great Depression. . . .

Further, to survive a challenge under the Contract Clause, any law addressing such concerns must deal with a broad, generalized economic or social problem." *AFSCME v. City of Benton, Arkansas*, 513 F.3d 874, 882 (8<sup>th</sup> Cir. 2008).

The Supreme Court has noted that "[a] governmental entity can always find

a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contracts Clause would provide no protection at all.” *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) (footnote omitted). Petitioner Jones’ asserts the Oregon Legislature was unjustified in using its ‘police power’ to reduce public retirees contractual retirement benefits to address the State’s general economic concerns. The Oregon Legislature’s actions resulted in a substantial impairment of Petitioner Jones’ contractual retirement benefit.

**1. No financial crisis existed when the 2013 Oregon Legislature enacted SB 822 and SB 861, nor does one exist now: The Oregon Public Retirement System Fund is in excellent financial condition and is among the best-funded public pension plans in the United States**

The headline in the April 14, 2014 PERSPECTIVES, a PERS publication, is: “PERS: positive earnings and benefit modifications cut underfunding in half.” The article states:

“The PERS Fund experienced positive investment results for the fifth

consecutive year with a return of nearly 16 percent for 2013. After taking in employer and member contributions of approximately \$2 billion and paying out approximately \$3.5 billion in retiree benefits in 2013, the fund was valued at \$67.1 billion as of December 31, 2013, up from \$61.4 billion at the end of 2012.”

*PERS: positive earnings and benefit modifications cut underfunding in half,*

Oregon Public Employees Retirement System PERSPECTIVES, Vol. 19.

No. 2, April 14, 2014.

Oregon State Treasurer, Ted Wheeler, one of the five voting members of the Oregon Investment Council, wrote an article for PERSPECTIVES, entitled “PERS Fund value reaches new high”. He noted: “At the end of 2013, the Fund reached a new high of \$67.1 billion. The Fund is invested on behalf of PERS members and helps to ensure Oregon can pay the retirement benefits for more that 330,000 current and former public employees.” Treasurer Wheeler summarized PERS Fund success with this statement: “Oregonians and PERS members can be proud of the long-term horizon and discipline that governs our investment strategy, and that has helped to put the PERS Fund among the nation’s strongest.” *PERS Fund value reaches new high,* Oregon Public Employees Retirement System PERSPECTIVES, Vol. 19. No. 2, p. 4, April 14, 2014.

According to Portland State AAUP News, dated June 19, 2012:

"The Oregon Public Employees Retirement System continues to rank among the best-funded public pension plans in the United States, according to a new report by the Pew Center on the States."

"Oregon ranks eighth in the nation in terms of the funded status of its pension plan, said the Pew Center in a report released Monday called "The Widening Gap Update." The report found that Oregon PERS in 2010 owed active and former public employees about \$59.3 billion in pension payments, with 87 percent of that amount funded."

"It's an improvement over last year's Pew report on public pensions, in which Oregon ranked 11<sup>th</sup> in the country. Pension experts say a funded status greater than 80 percent is a sign of a healthy pension plan."

Portland State AAUP News, *Oregon PERS: Report praises pension funding as one of best in US*, (June 19, 2012).

Based on strong market returns, this unfunded liability in the pension fund continues to shrink. On December 31, 2010, Oregon Public Employees Retirement Fund returns showed total operating fund net asset value at \$56,681 billion. The Pew Report praised Oregon's Public Employees Retirement Fund, noting 87 percent of the pension payments were funded. *Id.* The Fund is even stronger today. On December 31, 2012, the Fund had grown to \$61,056 billion in assets. And in ten months time, as of October 31, 2013, the Fund had gained over \$5 billion to stand at a total of \$66,323 billion in assets.

<http://www.oregon.gov/treasury/Divisions/Investment/Pages/Oregon-Public-Employees-Retirement-Fund.aspx>.

Based on these strong market returns, and Oregon's public retiree's funded status at over 80 percent, the Oregon Legislature's enactment of SB 822 and SB 861 was not based on an unprecedented emergency and does not justify the State's use of its 'police power' to unconstitutionally and substantially impair Petitioner's annuity retirement contract.

**2. The Oregon Legislature was unjustified in substantially impairing and reducing Petitioner Jones' contractual retirement benefits and using Petitioner's and other vested, elderly PERS retirees' retirement benefits as a funding source to assist school districts and the state**

SB 822 and SB 861 substantially reduce the contractual benefits provided to PERS retirees. SB 822 does this by directing the Public Employees Retirement Board to "not pay the increased [benefit] benefits provided by chapter 796, Oregon Laws 1991, or chapter 569, Oregon Laws 1995, if the board receives notice . . . that the payments made to the person under this chapter are not subject to Oregon personal income tax. . . ." Section 11 (1), Senate Bill 822.



SB 822 also reduces the COLA, which, from 1983 until 2013, was capped at 2.0 percent to PERS retirees. "The maximum COLA was increased to 2.0 percent effective July 1973; it remained at 2.0 percent until the enactment of SB 822 in 2013." SPECIAL MASTER'S FINAL REPORT, 23.

SB 861 superseded, and further reduced, the 2014 cost-of-living adjustment (COLA) that was previously approved in SB 822.

Included in the Special Master's FINAL REPORT, is reference to the Novy-Marx and Rauh report. They simulated that, if Oregon raised taxes or reduced public services by amounts required to fully fund an unchanged pension system, the tax burdens or service cuts would become so burdensome that 'residents flee at a rate that makes paying the benefits impossible.'" SPECIAL MASTER'S FINAL REPORT, 47-48.

In the Special Master's Final Report, Economist John Tapogna is quoted as concluding:

"that the changes made by SB 822 as amended by SB 861 were justified by an important, significant, and legitimate public purpose of remedying a broad and general economic problem."  
 "Specifically, in his view, the enactment of SB 822 as amended by SB 861 was justified so that Oregon's public agencies could provide levels of service quality, at given levels of taxation, that would be more comparable

to those provided in Washington, Idaho, and other states that compete with Oregon for businesses and households.

"Tapagona further explained that the public services provided for a given level of taxation is a factor in the location decisions of business and households, especially in intraregional contexts such as the Portland metropolitan area and other communities along Oregon's border with Washington."

SPECIAL MASTER'S FINAL REPORT, 56.

The Novy-Marx and Rauh statement about Oregonian's fleeing the state with a revision of Oregon's tax structure is unfounded and false. Likewise, the ultimate conclusion of John Tapogna that the Oregon Legislature's enactment of SB 822 and SB 861 was justified to remedy a 'broad and general economic problem' is also inaccurate according to a detailed study by Michael Mazerov.

In his 31-page study and analytical report, Michael Mazerov, Senior Fellow with the Center on Budget and Policy Priorities, concludes from actual data and other studies that people seldom move from one state to another as a result of higher or lower tax rates. His report states:

"Differences in tax level among states have little to no effect on whether and where people move, contrary to claims by some conservative economists and elected officials. . . . To be sure, some individuals relocate because they think their taxes are too high or take state and local tax level into account in deciding where to live. Nonetheless, there is overwhelming

evidence that those cases are sufficiently rare that they should not drive state tax policy formulation."

page 1, Michael Mazeroy (Senior Fellow), *Report: State Taxes Have a*

*Negligible Impact on Americans' Interstate Moves*, Center on Budget and

Policy Priorities, May 21, 2014. Mr. Mazeroy concludes in his report that:

"[t]he vast majority of academic research using sophisticated statistical techniques concludes that a fuller look at both IRS and Census data show that people do not appear to be moving from state to state in response to the presence or absence of high income tax rates or any income tax at all. The raw data - confirmed by a series of careful academic studies - show that for the vast majority of people - including the vast majority of the rich - tax levels are a minor consideration or completely irrelevant."

*Id.* at 4.

Likewise, tax rates are a very minor factor in businesses choosing whether to locate in a state. Business Endeavor Insight released a report citing research culled from surveys and interviews with 150 founders of some of the fastest growing companies in the U.S.

"More than 30% of survey respondents identified access to talented people as their primary factor in determining where to start and scale their firms. In comparison, tax rates were only cited by 5% of survey respondents."

Mark Marich, *What Do Entrepreneurs Really Want from a City*,

<http://www.Entrepreneurship.org> (March 10, 2014) (italics added).

Thomas Potiowsky, chair of the Economics Department of Portland State

University is cited in the Special Master's Final Report as saying:

- "Oregon moved the major funding for K-12 education from a more stable property tax base to the more uncertain personal income tax base.
- "With K-12 education now dependent on state funding, it is in competition with public safety and human services for scarce resources.
- "Oregon; by many measures, is a relatively low tax burden state and percent of budget spent on education is one of the lowest among the states."

SPECIAL MASTER'S FINAL REPORT, 56.

Oregon's Legislative Revenue Office ranks Oregon #35 overall per person tax burden, compared with other states. Page A1, 2013 OREGON PUBLIC FINANCE: BASIC FACTS, Research Report #1-13, LEGISLATIVE REVENUE OFFICE, <http://www.leg.state.or.us/comm/lro/hom.htm>. The Tax Foundation's 2014 edition of the "State Business Tax Climate Index" lists the tax climate of each state as of July 1, 2013. Oregon's rank is number 12, with number 1 being the best. *2014 State Business Tax Climate Index*, Number 68, Tax Foundation, by Scott Drenkard and Joseph Henchman (October 2013).

These factors cited above evidence that an increase in the tax rates in Oregon would not only help relieve the continuing funding problem of schools, local

and state governments, but, according to Marrich would not impact the ability of the state to attract new businesses and jobs nor send people moving out of Oregon.

According to Thomas Potiowsky,

“Changes to Oregon’s PERS benefits which lower employer contributions do not make any fundamental change to Oregon’s revenue system and ultimately will not resolve Oregon’s K-12 funding issue . . . . While changes to Oregon’s PERS benefits which lower employer contributions rates will lower the cost of services (as would cutting teacher’s salaries or larger classrooms with fewer teachers), Potiowsky believes that such changes do not address the fundamental issues underlying our tax revenue system for funding Oregon’s K-12 education.”

SPECIAL MASTER’S FINAL REPORT, 58.

The challenge to retirement funding, particularly for school districts in Oregon, is not of PERS retirees’ making. The voters of Oregon approved Oregon Ballot Measure 5 (1990) and Oregon Ballot Measure 50 (1997), which ballot measures have substantially reduced funding over the years for schools. It is unconstitutional to saddle Petitioner Jones and other PERS retirees, a group that consists of an aging population on fixed retirement incomes, with an attempted solution to funding problems in Oregon. The PERS retirees were induced to retire and promised in their financial planning that the PERS retirement system would provide a fixed benefit and an

annual COLA of up to 2.0 percent. The Oregon Legislature has betrayed the trust of this elderly population by their enactment of SB 822 and SB 861, which strip critical, contractually promised benefits from PERS retirees.

**3. It is unconstitutional to seek to resolve the funding issues facing Oregon school districts and other PERS employers by reducing Petitioner Jones' and other PERs retirees contractual retirement benefits through SB 822 and SB 861**

The Oregon Joint Special Committee on Public Education Appropriation studied the adequacy of Oregon's Education Budget and produced a report in November 2011 which states:

"Oregon schools have historically received about 30 percent of their funding from state sources. The passage of Oregon Ballot Measure 5 in 1990 limited the amount of local property taxes that can be collected and used for schools. This shifted the bulk of school funding from local property tax to the state's General Fund. The state now provides approximately two-thirds of the K-12 public education budget."

Page 10, *Report on Adequacy of Public Education Funding As Required by Article VIII, Section 8, of the Oregon Constitution*, Joint Special Committee on Public Education Appropriation, 2011-2013 Education Budget, November 2011.

The problem with K-12 education funding in Oregon is a well-known structural problem. The 'Public Education in Oregon' webpage states:

"Oregon has struggled with funding public education since Measure 5 passed in 1990. The property tax limitations enacted under Measure 5 and later Measures 47 and 50 shifted the primary burden of paying for K-12 education from local property tax payers to the state General Fund. . . . In the 1990s, as Measure 5 phased in, more of the state General Fund went to pay for education. However, in recent years, funding for education – K-12 and post-secondary – has been squeezed, both as a result of general budget cuts during the recession and also as the costs of corrections and social services grow."

*Education Funding*, Public Education in Oregon, Oregon Blue Book, 2011-2012 Edition, <http://www.bluebook.state.or.us/education/educationintro.html>

Oregon Argus Community Writer, Walt Hellman in a June 3, 2013 article highlighted the devastating effects of Measure 5, together with Measure 50, on K-12 school funding. He said:

"Of course people enjoyed the reduction in school taxes, but K-12 school funding was devastated as a result and schools never recovered. The total losses of school revenue losses in today's dollars are staggering, over \$4 billion per year statewide. The roughly \$200 million in increased PERS costs to schools next year pales in comparison.

"The major reason Measure 5 passed was that its authors required the state to make up all the revenue lost through the property tax reduction. For voters it became a "have your cake and eat it too" situation: lower taxes with no losses to schools.

"If that sounds too good to be true, it was. The state's money was already fully budgeted. The result was predictable. The state lowered other school payments to make up what it was required to pay for Measure 5. As a result, school budgets failed to keep up with growing needs. . . .

"With PERS costs increasing, there is a sudden concern to help schools by

reducing PERS benefits. But those with a sincere concern about the schools would recognize the bigger picture; that most school shortages stem from voter-approved Measure 5 and that it is the responsibility of all Oregonians, not just PERS recipients, to pay for and restore the school funding Measure 5 eliminated.”

*What the sad legacy of Measure 5 says about us:* Guest column, by Walt Hellman, Argus Community Writer, <http://www.OREGONLIVE.com>, June 3, 2013.

The solution to the Public Education funding problem is not found by unconstitutionally reducing and substantially impairing the contractual retirement benefits due and payable to Petitioner Jones and other PERS retirees. Instead, a tax reform measure, such as that being proposed by Governor John Kitzhaber is a more robust, long-term solution. *Can Oregon teach us about tax reform?* Crosscut, News of the Great Nearby, by Dick Nelson, February 6, 2014. “Announcing that he will run for re-election next year, Kitzhaber declares that tax reform would be the theme of his fourth term in office.” *Sales tax proposals should sharpen debate in the 2014 election: Editorial*, Oregonlive.com, December 19, 2013.



**3. ARGUMENT THREE – IN ENACTING SB 822, THE OREGON  
LEGISLATURE VIOLATED THE PRIVILEGES AND IMMUNITIES  
CLAUSE AND THE EQUAL PROTECTION CLAUSE IN  
AMENDMENT XIV, SECTION 1 OF THE UNITED STATES  
CONSTITUTION, WHICH PROTECTS FUNDAMENTAL RIGHTS  
OF INDIVIDUAL CITIZENS AND RESTRAINS STATE EFFORTS  
TO DISCRIMINATE AGAINST OUT OF STATE CITIZENS, AND  
PROHIBITS STATES FROM DENYING ANY PERSON WITHIN ITS  
JURISDICTION THE EQUAL PROTECTION OF THE LAWS**

Petitioner Jones incorporates herein the SUMMARY OF THE FACTS, and  
the arguments presented in ARGUMENT ONE and TWO:

**A. In imposing an Oregon residency requirement on Petitioner**

**Jones in order to qualify for his full, contracted, PERS  
retirement benefit, which benefit is fully vested in Petitioner,**

**SB 822 violates the Privileges and Immunities Clause by**

**discriminating against Petitioner Jones' fundamental right as  
an individual citizen to his full retirement benefit, solely**

**because he is an out of state citizen and SB 822 violates the**

**Equal Protection Clause as it denies Petitioner Jones (and all**

**out of state PERS retirees) his full retirement benefit solely  
because he is not a resident of Oregon**

Petitioner Jones, as a PERS retiree who no longer lives in the state of Oregon, asserts that SB 822 imposes an Oregon residency requirement on Petitioner in order to receive his full, contractual retirement benefit, and that this is in violation of the Privileges and Immunities Clause within Amendment XIV, Section 1 of the United States Constitution which states: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

The United States Supreme Court in *Paul v. Virginia*, 75 U.S. 168, 180 (1868) held that “it was the object of the [Privileges and Immunities] clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.” *Id.*

The Equal Protection Clause, within Amendment XIV, Section 1 of the United States Constitution bolsters the Privileges and Immunities Clause. The Equal Protection Clause states: “No State shall . . . deny any person within its jurisdiction the equal protection of the laws.”

The reduction of Petitioner Jones' full retirement benefits in SB 822 solely because he no longer lives in Oregon, places Petitioner Jones on unequal footing with citizens of the State of Oregon with regard to the taxation of his PERS contractual retirement benefit. As such, it violates both the Privileges and Immunities Clause and the Equal Protection Clause. While it is true that if Petitioner Jones were a resident of Oregon, his PERS contractual retirement benefit would be subject to Oregon income tax, the removal of the so-called 'tax remedy' in SB 822 is not based on Petitioner Jones' income nor what might be his Oregon tax liability if he were a resident of that state. The "tax remedy" as calculated before enactment of SB 822 is based on the PERS benefit recipient's years of service in PERS. Quoting PERS: "Senate Bill 822 (2013) eliminated the tax remedy for benefit recipients who do not pay Oregon state income tax because they do not reside in Oregon." *Id.*

SB 822 is flawed for two reasons:

- 1<sup>st</sup>, The reduction of retirement compensation benefits under SB 822 is in effect an attempt by the State of Oregon to collect taxes on Petitioner Jones by reducing his PERS contractual retirement benefit by the amount of the calculated 'tax remedy,' which is based on Petitioner's years of service

before October 1991. The 'taxation' of Petitioner Jones is not on the same basis (or same footing) as the computation of income tax of Oregon's own citizens. Indeed, this is exactly the type of factual situation the Privileges and Immunities Clause and the Equal Protection Clause were designed to prohibit.

2<sup>nd</sup>, Under SB 822, the test of whether the 'tax remedy' is applied is not based on a PERS retiree's tax liability under Oregon law, instead the test of whether the 'tax remedy' is applied, is based solely on the PERS retiree's residence outside the state of Oregon. SB 822 does not fairly "tax" all PERS retirees, living within or outside the state of Oregon. A resident Oregon PERS retiree who does not pay Oregon income taxes on their PERS retirement, based on their income and tax liability, still receives the full, contractual PERS retirement benefit, undiminished by the Oregon 'tax remedy.' In April of 2014, PERS sent checks to 2,969 Oregon resident retirees who did not pay 2012 taxes, to make up for the cut to their pension under SB 822, because PERS assumed these retirees lived out of state and were not entitled to the 'tax remedy.' *PERS to return money to 2,969 resident retirees*, Hannah Hoffman, Statesman Journal, April 4, 2014. The Oregon residency requirements in SB 822 in order to continue the "tax

remedy” previously granted in HB 3349 and SB 656, violates the 14<sup>th</sup> Amendment as it is patently unequal to Petitioner Jones, as an out of state citizen who is denied his full, contractual retirement benefit under this law.

The Privileges and Immunities Clause is a constitutional provision that restrains state efforts to discriminate against out-of-state citizens. The two-part test of the Privilege and Immunities Clause is: First, is whether the activity is a fundamental right. “Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest” *Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988), citing *New Hampshire v. Piper*, 470 U.S. 274 (1985). In Petitioner Jones’ situation, the right to receive his full, earned, vested contractual retirement benefit is clearly a protected privilege and fundamental right, meriting equal protection of the laws whether Petitioner Jones lives in Oregon or in any other State. Petitioner Jones earned his retirement benefits by working over 30 years, applying for retirement with PERS, and then retiring with his contractual retirement benefit from PERS. The Oregon Legislature’s enactment of SB 822 violates Petitioner Jones’ fundamental right to his full, earned retirement benefit and to equal protection of the laws.

The Supreme Court ruled in *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, (1998), that a New York tax law that effectively denied only nonresident taxpayers an income tax deduction for alimony paid, violated the Privileges and Immunities Clause. The Supreme Court held that in the absence of a substantial reason for the difference in treatment of nonresidents, New York had violated the Privileges and Immunities Clause by denying nonresidents, who paid State income tax on income earned in New York, an income tax deduction for alimony. Likewise, Oregon's SB 822 violates the Privileges and Immunities Clause by denying Petitioner Jones the retirement benefits of SB 656 and HB 3349, solely because he resides in another state.

**B. The State is not justified in enacting SB 822 because it does not advance a substantial state interest**

Under the Privileges and Immunities Clause, when there is a violation of a fundamental right, courts will examine whether "the restriction is not closely related to the advancement of a substantial state interest." As discussed in Argument Two F., the Oregon Legislature's reduction of out-of-state PERS retirees' benefits in SB 822 was not based on a significant and legitimate

public purpose, which argument is in substance the same as not advancing a substantial state interest.

Petitioner Jones' AMENDED BRIEF ON THE MERITS highlights that SB 822 discriminates against Petitioner Jones' by imposing an Oregon residency requirement on Petitioner Jones in order to qualify for his full, contracted, and vested PERS retirement benefit. Petitioner Jones asserts that SB 822 violates the Privileges and Immunities Clause by discriminating against his fundamental right as an individual citizen to his full, contractual retirement benefit, solely because he is an out of state citizen; and this law also violates the Equal Protection Clause by denying Petitioner Jones the equal protection of his retirement benefits, solely because Petitioner Jones resides in another state. This scenario is what the 14<sup>th</sup> Amendment was designed to prevent.

## VII. CONCLUSION

Petitioner Jones asks this Court to declare SB 822 and SB 861 unconstitutional, as enactments that violate Article 1, Section 21 of the Oregon Constitution, which prohibits the enactment of laws which impair the obligations of contracts, and which enactments substantially impair Petitioner Jones' PERS Annuity retirement contract with PERS: (a) by substantially reducing the promised annual COLA of up to 2.0 percent, and

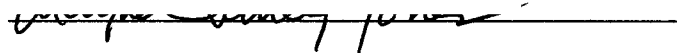
(b) by substantially reducing the contractually agreed upon Option 2 Annuity retirement benefit, solely because he no longer lives in Oregon; and which unilateral modifications of PERS contract with Petitioner Jones were not justified by the State's use of its 'police power.'

Petitioner Jones asks this Court to declare SB 822 and SB 861 unconstitutional, as enactments which violate Article 1, Section 10 of the United States Constitution, which legislative enactments substantially impair the obligations of Petitioner Jones' PERS retirement contract with PERS, by substantially reducing both: (a) the annual COLA which had been capped by statute at 2.0 percent when Petitioner Jones retired in 1998 and continued until the enactment of SB 822 and SB 861, and (b) the Annuity retirement contract benefit, only because he no longer lives in Oregon.

Finally, Petitioner Jones asks this Court to declare that the enactment of SB 822 is in violation of the Privileges and Immunities Clause and Equal Protection Clause in Amendment XIV, Section 1 of the United States Constitution, which provides protection for those privileges and fundamental rights of individual citizens against state efforts to discriminate against out-of-state citizens and prohibits states from denying any person the equal protection of the laws.



Respectfully submitted this 17<sup>th</sup> day of June, 2014.



Wayne Stanley Jones, Pro Se

North Road

North Salt Lake, Utah 84054

Telephone: 801-296-1552

Email: [wstanmgt@gmail.com](mailto:wstanmgt@gmail.com)

CERTIFICATE OF COMPLIANCE

WITH BRIEF LENGTH AND

TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this AMENDED BRIEF ON THE MERITS complies with the word-count limitation in ORAP 5.05(2)(b) and (2)

the word count of this BRIEF (as described in ORAP 5.05(2)(a)) is 13,989 words.

Type size

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

Wayne Stanley Jones

### CERTIFICATE OF FILING

I certify that on June 14, 2014, I filed the original and 7 copies of the WAYNE STANLEY JONES' BRIEF ON THE MERITS with the Appellate Court Administrator by United States Postal Service, first class, priority mail, certified mail, return receipt requested at this address:

Appellate Court Administrator  
Appellate Court Records Section  
1163 State Street  
Salem, OR 97301-2563  
[appealsclerk@ojd.state.or.us](mailto:appealsclerk@ojd.state.or.us)

### CERTIFICATE OF SERVICE

I certify that on June 14, 2014, I served two copies of the foregoing WAYNE STANLEY JONES' BRIEF ON THE MERITS by United States Postal Service, first class mail, and also emailed an electronic copy to:

AG Ellen Rosenblum #753239  
SG Anna M. Joyce #013112  
AAG Keith L. Kutler #852626  
Michael A. Casper #062000  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301-4096  
Telephone: 503-378-4402  
Facsimile: 503-378-6306  
[anna.joyce@doj.state.or.us](mailto:anna.joyce@doj.state.or.us)  
[keith.kutler@doj.state.or.us](mailto:keith.kutler@doj.state.or.us)  
[matthew.meritt@doj.state.or.us](mailto:matthew.meritt@doj.state.or.us)  
[michael.casper@doj.state.or.us](mailto:michael.casper@doj.state.or.us)  
Attorneys for State Respondents

William F. Gary #770325  
[william.f.gary@harrang.com](mailto:william.f.gary@harrang.com)  
Sharon A. Rudnick #830835  
[sharon.rudnick@harrang.com](mailto:sharon.rudnick@harrang.com)  
Peter F. Simons #095632  
[pete.simons@harrang.com](mailto:pete.simons@harrang.com)  
Harrang Long Gary Rudnick PC  
360 E. 10<sup>th</sup> Ave., suite 300  
Eugene, OR 97401  
Telephone: 503-242-0000  
Facsimile: 541-686-6564  
Attorneys for Respondents Linn  
County, Estacada, Oregon City,  
Ontario, West Linn School Districts  
and Beaverton School Districts, and  
Intervenors Oregon School Boards  
Association and Association of  
Oregon Counties

<p>Harry Auerbach #821830  Office of the City Attorney  1221 SW 4<sup>th</sup> Avenue, Ste.430  Portland, OR 97204  Telephone: 503-823-4047  Facsimile: 503-823-3089  <a href="mailto:harry.auerbach@portlandoregon.gov">harry.auerbach@portlandoregon.gov</a>  Attorneys for Respondent City of Portland</p>	<p>Daniel B. Atchison #040424  Office of City Attorney  555 Liberty Street SE Rm 205  Salem, OR 97301  Telephone: 503-588-6003  Facsimile: 503-361-2202  <a href="mailto:datchison@cityofsalem.net">datchison@cityofsalem.net</a>  Attorney for Respondent City of Salem</p>
<p>Eugene J. Karandy II #972987  Office of County Attorney  Linn County Courthouse  104 SW Fourth Avenue, Room 123  Albany, OR 97321  Telephone: 541-967-3840  Facsimile: 541-928-5424  <a href="mailto:gkarandy@co.linn.or.us">gkarandy@co.linn.or.us</a>  Attorney for Respondent Linn County</p>	<p>Edward F. Trompke #843653  Jordan Ramis PC  Two Centerpointe Drive, 6<sup>th</sup> Floor  Lake Oswego, OR 97035  Telephone: 503-598-5532  Facsimile: 503-598-7373  <a href="mailto:ed.trompke@jordanramis.com">ed.trompke@jordanramis.com</a>  Attorney for Respondent Tualatin Valley Fire and Rescue</p>
<p>Lisa M. Frieley #912763  Oregon School Boards Association  PO Box 1068  Salem, OR 97308  Telephone: 503-588-2800  Facsimile: 503-588-2813  <a href="mailto:lfrieley@osba.org">lfrieley@osba.org</a>  Attorney for Respondents Estacada, Oregon City, Ontario, and West Linn School Districts and Intervenor Oregon School Boards Association</p>	<p>W. Michael Gillette #660458  Leora Coleman-Fire #113581  Sara Kobak #023495  William B. Crow #610180  Schwabe Williamson &amp; Wyatt PC  1211 SW 5<sup>th</sup> Ave Suite 1900  Portland, OR 97204  Telephone: 503-222-9981  Facsimile: 503-796-2900  <a href="mailto:wmgillette@schwabe.com">wmgillette@schwabe.com</a>  Attorneys for Intervenor League of Oregon Cities</p>
<p>Rob Bovett #910267  Association of Oregon Counties  1201 Court St. NE Ste 300  Salem, OR 97301  Telephone: 971-218-0945  <a href="mailto:rbovett@aocweb.org">rbovett@aocweb.org</a>  Attorney for Linn County</p>	<p>George A. Riemer (Petitioner Pro Se)  N. Pedregosa Drive  Sun City West, AZ 85375  Telephone: 623- -5039  <a href="mailto:@gmail.com">@gmail.com</a>  Petitioner pro se</p>

Michael D. Reynolds (Petitioner Pro Se)

Sunnyside Avenue N.  
Seattle, WA 98103

Telephone: 206- -6568

14@comcast.net

Petitioner pro se

Gregory A. Hartman #741283  
HartmanG@bennettthartman.com

Aruna A. Masih #973241

MasihA@bennettthartman.com

Bennett Hartman Morris

210 SW Morrison Street, Suite 500

Portland, OR 97204

Telephone: 503-546-9601

Attorneys for Petitioners Moro,

Domenigoni, Custer, Hawkins,

Arken, Ditter, O'Kief, Smith,

Johnson, Clouseer, Silence,

Veckery, and Voek

Wayne Stanley Jones

Petitioner, Pro Se

### AMENDED CERTIFICATE OF FILING

I certify that on June 17, 2014, I filed the original and 7 copies of this WAYNE STANLEY JONES' AMENDED BRIEF ON THE MERITS with the Appellate Court Administrator, together with a letter explaining the resubmission of my brief to the Appellate Court Administrator. I amended and reprinted my brief all in black type font, because of the lightness of print associated with blue-colored Internet citations and email addresses in the original, (but in all other aspects is identical to the original brief except for the amended name and footers). I sent this amended brief by United States Postal Service, first class, priority mail express 1-day, certified mail, return receipt requested to this address:

Appellate Court Administrator

Appellate Court Records Section

1163 State Street

Salem, OR 97301-2563

appealsclerk@ojd.state.or.us

## AMENDED CERTIFICATE OF SERVICE

I certify that on June. 17, 2014, I sent a copy of the letter explaining the resubmission of my brief to the Appellate Court Administrator. I amended and reprinted all in black type font for the Court because of the lightness of print associated with blue-colored Internet citations and email addresses in the original (but in all other aspects is identical to the original brief except for the amended name and footers). I emailed a copy of my amended brief and sent a copy of this letter by United States Postal Service, first class mail to:

AG Ellen Rosenblum #753239 SG Anna M. Joyce #013112 AAG Keith L. Kutler #852626 Michael A. Casper #062000 Oregon Department of Justice 1162 Court Street NE Salem, OR 97301-4096 Telephone: 503-378-4402 Facsimile: 503-378-6306 <a href="mailto:anna.joyce@doj.state.or.us">anna.joyce@doj.state.or.us</a> <a href="mailto:keith.kutler@doj.state.or.us">keith.kutler@doj.state.or.us</a> <a href="mailto:matthew.merritt@doj.state.or.us">matthew.merritt@doj.state.or.us</a> <a href="mailto:michael.casper@doj.state.or.us">michael.casper@doj.state.or.us</a> Attorneys for State Respondents	William F. Gary #770325 <a href="mailto:william.f.gary@harrang.com">william.f.gary@harrang.com</a> Sharon A. Rudnick#830835 <a href="mailto:sharon.rudnick@harrang.com">sharon.rudnick@harrang.com</a> Peter F. Simons #095632 <a href="mailto:pete.simons@harrang.com">pete.simons@harrang.com</a> Harrang Long Gary Rudnick PC 360 E. 10 <sup>th</sup> Ave., suite 300 Eugene, OR 97401 Telephone: 503-242-0000 Facsimile: 541-686-6564 Attorneys for Respondents Linn County, Estacada, Oregon City, Ontario, West Linn School Districts and Beaverton School Districts, and Intervenors Oregon School Boards Association and Association of Oregon Counties
Harry Auerbach #821830 Office of the City Attorney 1221 SW 4 <sup>th</sup> Avenue, Ste 430 Portland, OR 97204 Telephone: 503-823-4047 Facsimile: 503-823-3089 <a href="mailto:harry.auerbach@portlandoregon.gov">harry.auerbach@portlandoregon.gov</a> Attorneys for Respondent City of Portland	Daniel B. Atchison #040424 Office of City Attorney 555 Liberty Street SE Rm 205 Salem, OR 97301 Telephone: 503-588-6003 Facsimile: 503-361-2202 <a href="mailto:datchison@cityofsalem.net">datchison@cityofsalem.net</a> Attorney for Respondent City of Salem

<p>Eugene J. Karandy II #972987  Office of County Attorney  Linn County Courthouse  104 SW Fourth Avenue, Room 123  Albany, OR 97321  Telephone: 541-967-3840  Facsimile: 541-928-5424  <a href="mailto:gkarandy@co.linn.or.us">gkarandy@co.linn.or.us</a>  Attorney for Respondent Linn County</p>	<p>Edward F. Trompke #843653  Jordan Ramis PC  Two Centerpointe Drive, 6<sup>th</sup> Floor  Lake Oswego, OR 97035  Telephone: 503-598-5532  Facsimile: 503-598-7373  <a href="mailto:ed.trompke@jordanramis.com">ed.trompke@jordanramis.com</a>  Attorney for Respondent Tualatin  Valley Fire and Rescue</p>
<p>Lisa M. Frieley #912763  Oregon School Boards Association  PO Box 1068  Salem, OR 97308  Telephone: 503-588-2800  Facsimile: 503-588-2813  <a href="mailto:lfrieley@osba.org">lfrieley@osba.org</a>  Attorney for Respondents Estacada,  Oregon City, Ontario, and West Linn  School Districts and Intervenor  Oregon School Boards Association</p>	<p>W. Michael Gillette #660458  Leora Coleman-Fire #113581  Sara Kobak #023495  William B. Crow #610180  Schwabe Williamson &amp; Wyatt PC  1211 SW 5<sup>th</sup> Ave Suite 1900  Portland, OR 97204  Telephone: 503-222-9981  Facsimile: 503-796-2900  <a href="mailto:wmgillette@schwabe.com">wmgillette@schwabe.com</a>  Attorneys for Intervenor League of  Oregon Cities</p>
<p>Rob Bovett #910267  Association of Oregon Counties  1201 Court St. NE Ste 300  Salem, OR 97301  Telephone: 971-218-0945  <a href="mailto:rbovett@aocweb.org">rbovett@aocweb.org</a>  Attorney for Linn County</p>	<p>George A. Riemer (Petitioner Pro  Se)  N. Pedregosa Drive  Sun City West, AZ 85375  Telephone: 623- -5039  <a href="mailto:@gmail.com">@gmail.com</a>  Petitioner pro se</p>

Michael D. Reynolds (Petitioner Pro Se)

Sunnyside Avenue N.  
Seattle, WA 98103

Telephone: 206-91 -6568  
14@comcast.net

Petitioner pro se

Gregory A. Hartman #741283  
HartmanG@bennettthartman.com

Aruna A. Masih #973241  
MasihA@bennettthartman.com

Bennett Hartman Morris  
210 SW Morrison Street, Suite 500  
Portland, OR 97204

Telephone: 503-546-9601  
Attorneys for Petitioners Moro,  
Domenigoni, Custer, Hawkins,  
Arken, Ditter, O'Kief, Smith,  
Johnson, Clouseer, Silence,  
Veckery, and Voek

Wayne Stanley Jones  
Petitioner, Pro Se



JUN 18 2014

June 17, 2014

RE: *Moro v. State*, S061452 (Control); *Jones v. PERB* S061431

Dear Appellate Court Administrator:

On June 14, 2014, I filed the original and 7 copies of the WAYNE STANLEY JONES' BRIEF ON THE MERITS with the Appellate Court Administrator by United States Postal Service, first class, priority mail, certified mail, return receipt requested. After I had sent this brief to the Oregon Supreme Court along with serving two copies to all the parties to the lawsuit by first class mail along with an email version of the brief, I saw that the printing quality on some of the printed pages of the brief was not very good, especially where there was a reference to an Internet citation or an email address, which my Word program had automatically converted into blue font color.

On Monday, June 16, 2014, I called the Supreme Court clerk and asked whether I needed to file a new copy of the brief, as the print was faint on a few of the pages. She advised me that it was up to me to decide whether to file an amended brief. But if I did decide to do it, I needed to file a new Certificate of Filing with the Oregon Supreme Court with an original and 7 copies of my amended brief, together with a cover letter explaining the reason for the changes. She said if my amended brief had no changes other than converting the color from blue font on citations and emails into black font and then reprinting the amended brief, I did not need to resend my amended brief to all the parties, only to the Court. However, she said I did need to give each of the parties a copy of this letter of explanation.

So I decided to amend my brief to put it all of it in black font color, by changing all the blue-font colored Internet citations and email addresses in the original brief into black. But in all other aspects, this amended brief is identical to the original brief except for the word "amended brief" being added to the name and footers. This change added two words to my substantive word count. I am sending the original and 7 copies of this amended brief by United States Postal Service, first class, priority mail express 1-day, certified mail, return receipt requested to the Appellate Court Administrator.

I am also sending a copy of this letter to all the parties to this lawsuit by United States Postal Service, first class mail. In addition, I am emailing a copy of this

letter and my amended brief to all the parties to this lawsuit. If any of the parties desire a printed copy of my amended brief, if they will let me know, I will send them printed copies.

If there is any error in my understanding as I have recited this change, please do not hesitate to call or email me so that I can put all in order for the Court's consideration of this reprinted WAYNE STANLEY JONES' AMENDED BRIEF ON THE MERITS.

Sincerely, 

Wayne Stanley Jones ' / - - - ✓  
North F Road  
North Salt Lake, Utah 84054  
Phone: 801- -1552  
Email: \_ @gmail.com

cc: Ellen Rosenblum  
Anna M. Joyce  
Keith L. Kutler  
Michael A. Casper  
Gregory A. Hartman  
Aruna A. Masih  
Michael D. Reynolds  
George A. Riemer  
Rob Bovett  
Lisa M. Frieley  
Harry Auerbach  
W. Michael Gillette  
Leora Coleman-Fire  
Sara Kobak  
William B. Crow  
Eugene J. Karandy II  
Edward F. Trompke  
Daniel B. Atchison  
William F. Gary  
Sharon A. Rudnick  
Peter F. Simons