IN THE SUPREME COURT OF THE STATE OF OREGON

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

Petitioners,

v.

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

Respondents,

and

LEAGUE OF OREGON CITIES; and OREGON SCHOOL BOARDS ASSOCIATION,

Intervenors.

Supreme Court No. S061452
(Control)

WAYNE STANLEY JONES,

Petitioner,

Supreme Court No. 061431

v.

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

Respondents.

MICHAEL D. REYNOLDS,

Petitioner,

v.

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

Respondents.

Supreme Court No. 061454

GEORGE A. RIEMER,

Petitioner,

v.

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

Respondents.

Supreme Court No. 061475

MOTION – DISQUALIFY JUSTICES OF THE SUPREME COURT

Pursuant to ORAP 7.05, ORAP 8.30(3), ORS 2.111, ORS 14.210(1)(a), ORS 14.275, 2013 Or Laws ch. 53, §19, and the Fourteenth Amendment to the United States Constitution, Prospective Intervenor Central Oregon Irrigation District ("COID") most respectfully moves to disqualify the sitting, elected judges of the Supreme Court from hearing the above captioned cases and have them replaced with *pro tempore* justices.

INTRODUCTION

Axiomatically: *Nemo iudex in causa sua* — "No one can be a judge in his or her own cause." Even the distinguished, respected, and highly ethical jurists of Oregon's Supreme Court must yield to this basic tenet of justice. But would such a disqualification mean that no one can decide the case? Not at all.

This Court is empowered by the Legislature to appoint *pro tempore* justices from the ranks of the Circuit Court *pro tempore* judge pool from anywhere in the state (or appoint any qualified lawyers as Circuit Court *pro tempore* judges and then appoint them to this Court). *Pro tempore* judges are typically not members—at least not members by definition, as sitting judges are—of the Public Employee Retirement System (PERS), and membership or a spouse's membership in PERS can serve as a screening criteria for a *pro tempore* justice in this case. Such newly appointed *pro tempore* justices may

rule by themselves in place of Oregon's honorable elected justices on the above captioned cases. Through this, "Justice [will] not only be done, but manifestly [will] be seen to be done." *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 US 123, 172 n19 (1951) (Frankfurter, J., concurring) (citation and internal quotation marks omitted). There is, therefore, no ***actual necessity*** for the sitting justices of this Court to decide the case, rather it would be more convenient. Respectfully then, the Justices of the Supreme Court should step aside in this case.

POINTS AND AUTHORITIES

The Legislative Assembly and Supreme Court have granted COID the right to request such disqualification by granting a right of mandatory intervention to all public entities who participate in PERS.[1] *See* 2013 Or Laws

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[1] As a party-intervenor, COID is bound by ORAP 8.30(3)(a), as well, which provides:

> [A] party or attorney for a party in a case before the Supreme Court or Court of Appeals may move to disqualify a judge of the Supreme Court or Court of Appeals for one or more of the grounds specified in ORS 14.210, or upon the ground that the judge's participation in the case would violate the Oregon Code of Judicial Conduct.

ch. 53, §19(5).[2] COID is one such entity. Respectfully, COID intervenes here to request that the sitting members of this Court recuse themselves from the above cases for three reasons.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution demands that judges not hear cases involving "a direct, personal, substantial, pecuniary interest" personal to the judge. *Aetna Life Ins. Co. v. Lavoie*, 475 US 813, 821-22 (1986), *citing* US Const, Amend XIV. Likewise, ORS 14.210(1)(a)[3] provides in pertinent part that: a "judge shall not act as judge if the judge is a party to or directly interested in the action, suit or proceeding," and ORS 14.275[4] allows for the disqualification of justices of this

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[2] "The Supreme Court shall allow public employers participating in the Public Employees Retirement System to intervene in any proceeding under this section." 2013 Or Laws ch. 53, §19(5)

[3] ORS 14.210(1)(a) provides *in toto*:

> A judge shall not act as such in a court of which the judge is a member in any of the following circumstances:
>
> The judge shall not act as judge if the judge is a party to or directly interested in the action, suit or proceeding, except that the judge shall not be disqualified from acting as such in a case in which the judge is added as a party after taking any official action as a judge in the action, suit or proceeding, and in that case the judge shall be dismissed as a party without prejudice.

[4] ORS 14.275 provides:

> A party or an attorney for a party in a cause before the Supreme Court or Court of Appeals may move to disqualify a judge of the Supreme Court or of the Court of Appeals for one or more of the

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Court on those grounds as well as on violations of the Oregon Code of Judicial Conduct. Finally, the Oregon Code of Judicial Conduct, JR 2-106(A)(3), requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality may be questioned, including but not limited to instances when … the judge knows that the judge … has a financial interest in the subject matter in controversy … or has any other interest that could be substantially affected by the outcome of the proceeding." The justices of this Court, as members of the PERS system, have a direct and substantial financial interest in the outcome of these consolidated cases.

To resolve this impasse, two choices exist: (1) chose *pro tempore* justices and allow them to handle the case as an en banc court; or (2) invoke the doctrine of necessity despite there being no actual necessity for the justices of this Court to decide this case. Intervenor COID suggests that the more prudent, logical, and proper route is to appoint *pro tempore* justices, and allow them alone to decide the case.

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> grounds specified in ORS 14.210, or upon the ground that the judge's participation in the cause would violate the Oregon Code of Judicial Conduct.

I. BASES FOR DISQUALIFICATION

A. DUE PROCESS

"[U]nder the Due Process Clause no judge 'can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome.' *In re Murchison*, 349 US 133, 136 (1955)." *Aetna Life Ins. Co. v. Lavoie*, 475 US at 822. *Aetna* involved a judge who was a party in a private class action suit against Aetna rendering an opinion in similar case the judge had against Blue Cross. The case in which the judge rendered an opinion involved an undecided point of Alabama law, and he cast the deciding vote in favor of a change in law that subsequently made his own personal action more valuable. *Id.* at 822-24 ("the affirmance of the largest punitive damages award ever (by a substantial margin) on precisely the type of claim raised in the Blue Cross suit undoubtedly 'raised the stakes' for Blue Cross in that suit, to the benefit of Justice Embry"). The judge's case did in fact settle for a "tidy sum" shortly after the Aetna decision was published. *Id.* at 824.

The Supreme Court held that "Justice Embry's participation in this case violated [Aetna's] due process rights as explicated in *Tumey*,[5] *Murchison*,[6] and

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[5] *See Tumey v. Ohio*, 273 US 510, 19, 523 (1927) (violation of Due Process where mayor of town served as judicial officer on prohibition cases, and from the fines was paid "the amount of his costs in each case, in addition to his regular salary, as compensation for hearing such cases").

Ward.[7]" *Aetna*, 475 US at 825. In reaching this conclusion, the Court expressly disclaimed any need for an illicit motive on behalf of the judge:

> We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Ward*, 409 US at 60 (*quoting Tumey v. Ohio*, *supra*, at 532). The Due Process Clause "***may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally*** between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 US, at 136

Aetna, 475 US at 825 (emphasis added). *See also Caperton v. A. T. Massey Coal Co.*, 556 US 868, 876-877 (2009) (discussing cases and stating, "[t]his rule reflects the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.' THE FEDERALIST No. 10, p 59 (J. Cooke ed. 1961) (J. Madison)").[8] In fact, the Court in *Ward* emphasized that an avenue of appeal

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[6] *See Murchison*, 349 US 133 (violation of Due Process for judge to serve as "one man grand jury" and interrogate police officer, and then later try the officer for suspected perjury in his own court).

[7] *See Ward v. Monroeville*, 409 US 57, 59 (1972) (Due Process violation where mayor of town sat as judicial offier for traffic violations, and "the revenue produced from a mayor's court provide[d] a substantial portion of a municipality's funds").

[8] *Caperton* involved an elected judge being given $3,000,000 from a single donor for election to the West Virginia Supreme Court, traveling and carousing with the donor, and then presiding over a case involving his donor at the West

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did nothing to remediate the Due Process violation of having a self-interested mayor deciding a judicial case, even if that self-interest was limited to raising revenue for his town and not for himself. *Ward*, 409 US at 61-62. Simply put, from the beginning, no judge can have an interest in seeing a case turn out one way or another.

This Court is undeniably composed of "judges who have no actual bias and who would do their very best to weigh the scales of justice equally[.]" *Aetna*, 475 US at 825. This motion is not undertaken lightly, and the sterling reputation of this Court as one of solid integrity is not in doubt. The issues are whether the popular legitimacy of the system is maintained, and whether we avoid "temptation" as thoroughly as vice. And in truth, the judges of this Court will be substantially affected by the outcome of this proceeding because:

1. Section 3 of Senate Bill 822, if upheld, will reduce[9] the yearly allowances and pensions and benefits of judges earned from service in the Oregon Department of Justice; and

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Virginia Supreme Court in which he joined the majority in the reversal of a $50,000,000 award against the donor's corporation. *See* 556 US at 872-876.

[9] COID acknowledges that the justices of this Court are not retirees receiving retirement payments today; the Legislative Assembly, however, has authorized this proceeding to be brought on behalf of (and the proceeding has been brought on behalf of) individuals like the judges of this Court whose retirement payments "***will** be* adversely affected." 2013 SB 822, §19 (2) (emphasis added). *See* Moro Petition, ¶¶ 12–16.

2. Section 10 of Senate Bill 822, if upheld, will reduce the annual adjustment earned from judges' service in the Oregon Judicial Department.[10]

Of course these cuts would be substantial, given that they have warranted this action involving a dozen parties and substantial briefing. Either way the Court decides will result in money gained or lost directly from the honorable justices' pockets on retirement. Such an effect undeniably "***offer***[***s***] a possible temptation to the average . . . judge[.]" *Ward*, 409 US at 60 (emphasis added) (citation and internal quotation marks omitted). It is undoubted that the members of this Court could rise above such a temptation, but that is not an exception to the Due Process Clause. Because of this, the justices of this Court must recuse themselves.

B. Oregon Statute Requires Recusal

The participation of the judges of this Court in this proceeding would violate ORS 14.275 and ORS 14.210 . As noted above in Footnote 4, *supra*, ORS 14.275 permits a party to "move to disqualify a judge of the Supreme

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[10] JR 2-106(A)(3) also requires a judge to disqualify himself where the judge knows the judge's spouse or child has a financial interest that could be substantially affected by the outcome of the proceeding. To the extent that the judges of this Court with parents, spouses, partners, or children who are retirees or members of the Public Employees Retirement System have additional grounds requiring withdrawal from the proceeding.

Court or Court of Appeals for one or more of the grounds specified in ORS 14.210, or upon the ground that the judge's participation in the case would violate the Oregon Code of Judicial Conduct." ORS 14.275. *See also* ORAP 8.30(3)(a) (same). For its part, ORS 14.210 (1)(a) provides that a "judge shall not act as judge if the judge is a party to or directly interested in the action, suit or proceeding[.]" As noted above, the justices here will gain or lose financially based on the result of this case. Oregon statue forbids such a result.

C. THE JUDICIAL CODE PREVENTS THE JUSTICES FROM DECIDING THIS CASE.

The Oregon Code of Judicial Conduct requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality may be questioned, including but not limited to instances when … the judge knows that the judge … has a ***financial interest in the subject matter*** in controversy … or has ***any other interest that could be substantially affected*** by the outcome of the proceeding." JR 2-106(A)(3) (emphasis added). *See also*JR 1-101(F) ("A judge shall not use the position to advance the private interests of the judge"). The broad and sweeping term "any other interest" would apply to pension payments from PERS, even if—and perhaps especially if—those payments are significantly far down the line. As with the other rationales provided above, this rule also prohibits the justices of this Court from hearing and deciding these cases.

II. THE RULE OF NECESSITY DOES NOT APPLY BECAUSE THERE IS NO GENUINE NECESSITY.

This Court has invoked the "rule of necessity" to decide previous cases challenging changes to PERS. *See Strunk v. PERB*, 338 Or 145,108 P3d 1058 (2005);[11] *Oregon State Police Officers' Assn. v. State of Oregon*, 323 Or 356, 918 P2d 765 (1996) ("*OSPOA*");[12] *Hughes v. State of Oregon*, 314 Or 1, 838 P.2d 1018 (1992).[13] In those cases, however, the parties apparently did not challenge the judges' use of the rule of necessity, or at least presented no viable alternative. However, such an alternative exists.

The "rule of necessity," as the name suggests, permits an interested judge to decide a case in a matter of "necessity," *i.e.*, there is no other option to the interested judge's deciding the case. *United States v. Will*, 449 US 200, 213-14 (1980), explains when a court may invoke the "rule" to permit interested judges

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[11] *Strunk v. PERB*, 338 Or at 151 n5 ("To the extent that the justices of this court either have, or arguably could be said to have, a financial stake in the outcome of this litigation, we likewise conclude that the rule of necessity requires that we decide the contractual and constitutional challenges that the legislature has directed us to adjudicate").

[12] *OSPOA*, 323 Or at 412 n3 ("the 'rule of necessity' authorizes this court to adjudicate these claims. *See Hughes v. State of Oregon*, 314 Or 1, 5 n2, 838 P.2d 1018 (1992)").

[13] *Citing Evans v. Gore*, 253 US 245, 247-48 (1920) (deciding that it is appropriate for the Supreme Court of the United States to decide a case involving the ability of Congress to tax the compensation of federal judges)

to decide a case. *Will* addressed the compensation of all federal judges, including the justices of the United States Supreme Court. That Supreme Court held that it was impossible to appoint disinterested justices to hear the case. Therefore, the "rule of necessity" permitted the court to decide the case. This "necessity" is the same in Oregon. *E.g.*, *Woodward v. Pearson*, 165 Or 40, 58 (1940) ("by reason of the fact that no tribunal is available unattended by the same disqualifying interest wherein the issues of such a case may be determined, this court and other courts composed of tax-paying judges have been compelled to hear and decide such issues.").

However, there is no "necessity" here. A court of disinterested judges is possible though appointment of *pro tempore* judges from the Circuit Court to this Court. The process would work as follows:

ORS 1.635 authorizes this Court to appoint members of the bar to the Circuit Court.

> The Supreme Court may appoint any eligible person to serve as judge pro tempore of the Oregon Tax Court or as judge pro tempore of the circuit court in any county or judicial district, whenever the Supreme Court determines that the appointment is reasonably necessary and will promote the more efficient administration of justice. A person is ***eligible for appointment if the person is a resident of this state and has been a member in good standing of the Oregon State Bar for a period of at least three years*** next preceding the appointment.

ORS 1.635 (emphasis added). There is not only a vast pool of Oregon lawyers who would qualify for these positions who are not members of PERS, there

exists a large pool of *pro tempore* Circuit Court judges already in service, of whom many have no connection whatsoever to PERS. This Court could obtain *pro tempore* judges from either source.

Then, ORS 1.600 authorizes this Court to appoint such Circuit Court judges *pro tempore* to hear this case in the Oregon Supreme Court:

> The Supreme Court may appoint any regularly elected and qualified, ***or appointed and qualified***, judge of the Court of Appeals, Oregon Tax Court or circuit court to serve as judge *pro tempore* of the Supreme Court[.]

ORS 1.600(1) (emphasis added). The *pro tempore* appointment of these judges would not prevent these *pro tempore* justices from adjudicating this proceeding for the following reasons.

ORS 2.010 requires seven "judges" of the Supreme Court, however, those "judges of the Supreme Court" are defined as citizens who have lived in Oregon for three years, and admitted to the Oregon Bar. ORS 2.020. ORS 2.111 sets out the procedure for proceeding in departments and en banc in this Court. ORS 2.111(1) provides in its entirety, "In hearing and determining causes, the Supreme Court may sit all together or in departments." ORS 2.111(3) requires a "department" of this Court to "consist of regularly elected and qualified judges of the Supreme Court." *See* ORS 2.111(2) ("A department shall consist of not less than three nor more than five judges"). Therefore, if all of the justices recuse themselves, there can be no departments. Yet, the "minimum of three" requirement does not extend to instances in which this

Court sits *en banc*. **Thus, there is no ***minimum*** number of justices required to hear a case *en banc***. That is crucial, because ORS 2.111(5) provides:

> The Chief Justice or a majority of the regularly elected and qualified judges of the Supreme Court ***at any time may refer a cause to be considered en banc***. ***When sitting en banc, the court may include not more than two judges pro tempore*** of the Supreme Court. ***When the court sits en banc, the concurrence of a majority of the judges participating is necessary to pronounce a judgment***, but if the judges participating are equally divided in their views as to the judgment to be given, the decision being reviewed shall be affirmed.

ORS 2.111(5) (emphasis added). Taking this as three steps, the statute states that a case can be sent en banc at any time, so **Step 1** would have this Court call this case to en banc review. The statute also states that the number of pro tempore judges cannot exceed two. **Step 2** would be this Court appointing those two judges *pro tempore*. Finally, the statute requires what would be, in this case, unanimity of the two pro tempore judges to pronounce a judgment in these cases, which would happen after **Step 3**, the current justices recusing themselves.

There are two alternative ways to accomplish a hearing under these conditions. First, under current law, ORS 2.100 requires a quorum of the court to conduct business, defined as "the presence of a majority of all the judges of the Supreme Court." ORS 2.120 grants the Court "power to make and enforce all rules necessary for the prompt and orderly dispatch of the business of the court[.]" ORS 2.130 states that "[t]he Supreme Court is empowered to

prescribe and make rules governing the conduct in that court of all causes of original jurisdiction therein." To obtain a quorum for this case that would allow the *pro tempore* judges to hear the action, this Court could convene with a majority and then simply recuse themselves from discussing the case while the pro tempore judges move the case through the system.

Alternatively, this Court could recognize the constitutional necessity of altering the pro tempore rules to allow for at least four to seven pro tempore judges, meaning that ORS 2.111(5) (and ORS 174.010) would need to give way to federal Due Process concerns. Indeed, this is not a radical concept in Oregon. When faced with statutory law of unconstitutional scope, this Court has applied the law in constitutional manner—even if that application does minor violence to the express terms of the law. For instance, *in Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 496–97 (1989), to achieve a constitutional result, this Court expanded the legislatively supplied term "church" to include all forms of religious organizations. By the same logic, if the authority provided by ORS 1.600 needed to be expanded to guarantee the right to an impartial tribunal conferred by the Due Process Clause, then this Court must provide the necessary expansion. In other words, the "necessity" is for the courts to protect constitutional rights to impartial tribunals, not to invoke the "rule of necessity" to permit interested judges to decide cases.

A hypothetical situation may put this point in perspective: Assume Oregon had a law that ***prohibited*** a judge from recusing himself or herself. Assume that the judge's spouse or partner appeared before the judge in an adversarial proceeding. In that case, this Court would have no trouble determining that the law must give way to the requirements of fairness flowing from the Due Process Clause. This case is no different.

If ***absolute necessity*** is needed to intentionally override the Due Process Clause—as it is— then this situation does not qualify. There exists a means to supplement this Court with disinterested pro tempore justices to hear only this case. Either the panel is limited to two under the current rules of the Court, or the numerical provisions of the *pro tempore* statute yield to matters of the utmost constitutional and public policy import. The honorable justices of this Court cannot invoke the rule of necessity to avoid the bar to adjudicating these cases put in place by the Due Process Clause and Oregon law.

Respectfully submitted, this 27th day of September, 2013.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 27, 2013, I filed **PROSPECTIVE INTERVENOR CENTRAL OREGON IRRIGATION DISTRICT'S OTION – DISQUALIFY JUSTICES OF THE SUPREME COURT** electronically with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that on September 27, 2013, I served **PROSPECTIVE INTERVENOR CENTRAL OREGON IRRIGATION DISTRICT'S OTION – DISQUALIFY JUSTICES OF THE SUPREME COURT** either electronically through the Court's filing system, or by First Class Mail upon:

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