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 CENTRAL OREGON IRRIGATION DISTRICT,

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

COMBINED REPLY ON
MOTION TO DISQUALIFY JUSTICES OF THE SUPREME COURT
and MOTION TO DISQUALIFY SPECIAL MASTER

INTRODUCTION

"There is a well-marked distinction between a judge and a court." *U'Ren v. Bagley*, 118 Or 77, 84, 245 P 1074 (1926). That the Oregon Supreme Court has been granted jurisdiction to hear a direct review of this law does not impart the justices of this Court with the mandate to override due process to do so. Convenience and past practice are not "necessity." Neither express cooperation between the branches of government, nor longstanding practice can gloss over violations of fundamental federal due process. So too, previous holdings of necessity from this Court, and current assertions of necessity by parties to this case, are insufficient to show that such a "necessity" indeed exists here. The due process rights at issue here are not obviated by either the unquestioned integrity and fairness of this Court and the Special Master, nor by the less weighty assertions of habit.

The parties who oppose Intervenor Central Oregon Irrigation District's motions to disqualify do not in fact demonstrate the impossibility or even substantial impracticality of appointing a *pro tempore* full panel[1] of non-PERS

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[1] *Contra* to the State's suggestion, COID is not advocating the creation of a ***department*** of this Court, but rather the creation of an entire *en banc* panel of

(continued…)

recipients to sit *en banc* to hear this case. Instead, Respondents State of Oregon, *et al.*, rely on past practice and showcase narrow procedural objections, Respondent City of Portland relies upon an unfounded "de minimus" exception to the absolute necessity suggested by the rule, and Petitioners Moro, *et al.*, assert technical objections to COID's motions, particularly the raising of due process concerns at all, and COID's reading of the statutes and rules that would allow an *en banc* panel of non-PERS member *pro tempore* justices to hear this case without involving at least some sitting judges.

Ultimately, the Objecting Parties at most can point to two statutes related to wholly internal appellate procedure might need to yield to permit seating a panel of non-PERS member *pro tempore* justices under the Court's existing *pro tempore* appointment process. Yet even this very minor play in the joints of court practice would ensure Due Process here. Due Process requires not only the actual fact of fairness and a disinterested judiciary, but also the appearance thereof. With all respect to this august body and the highly esteemed Special Master, the jurists here have an actual financial stake in the outcome of these cases, and absent a true necessity—absent here because of the availability of an alternate panel—they cannot adjudicate these cases.

(…continued)

pro tempore justices from the ranks of existing or newly-created circuit court *pro tempore* judges who are not currently enrolled in the PERS system.

ARGUMENTS ON REPLY

Petitioners Moro *et al*., Respondents State of Oregon *et al*., Respondent City of Portland, and Intervenor League of Oregon Cities ("Opposing Parties") have joined in opposition to COIDs motions to disqualify the justices of this Court and the appointed Special Master. In reply, COID asserts three arguments: (1) Due Process applies here to prohibit judges with an interest from adjudicating this case; (2) there is no true necessity that requires these sitting justices or this Special Master to hear the case because of the availability of alternative appointments; and (3) no other exceptions exist to the demands of Due Process here.

1. DUE PROCESS OTHERWISE REQUIRES RECUSAL HERE.

Due Process—the bedrock ideal that the law will be administered fairly and impartially—does not exist merely for the benefit of individual litigants in a case. Rather, it is the wellspring for the consent of the governed:

> The procedural safeguards inherent in our legal system provide the impression and fact of fairness to the litigants and society. This is necessary in order to assure obedience to judgments and resort to the legal system as the only sanctioned means of settling disputes in a complex civilized society. Indeed, under the Fifth and Fourteenth Amendments, the legitimacy of government action is measured in terms of fairness.
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> Central to the fairness which must attend the resolution of a civil action is an impartial and capable fact finder.

In re Boise Cascade Sec. Litigation, 420 F. Supp. 99, 104 (W.D. Wash. 1976).

There is no argument from the Opposing Parties that the Due Process Clause ordinarily prohibits judges with a monetary interest in a case from adjudicating it—of course it does.[2] Additionally, the State forthrightly admits that "there is no doubt that [the justices and Special Master] each have ***some*** financial interest in this case." State's Response at 9 (emphasis in original). Nonetheless, Respondent City contends that the jurists here have no financial interest in the case because the precise amount of benefit is unascertainable at the moment.

The State has the better interpretation here. The City cites to the Code of Judicial Conduct, Rule 2-106 for the proposition that any financial impact is "de minimus," and can be disregarded in the due process analysis. The rule does not provide for a "de minimus" exception where there exists a direct financial interest by a judge. Rather, the rule states, "A judge ***shall*** disqualify himself or herself in a proceeding in which the judge's impartiality ***reasonably may be***

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[2] The Moro Petitioners argue in passing that COID cannot raise due process rights as a municipal entity. To be precise, COID cannot raise such rights against the State operating ***as its creator***. COID is entitled to raise due process concerns against "action of a state entity other than its creator." *See River Vale v. Orangetown*, 403 F2d 684, 686 (2d Cir. N.Y. 1968), *quoting Williams v. Mayor & City Council*, 289 US 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator"). This Court is not COID's creator, and neither SB 822 nor SB 861 vest jurisdiction over this case in the sitting justices of this Court, but rather vest jurisdiction in the Court itself. *See U'Ren v. Bagley*, 118 Or 77, 84 (drawing distinction between judge's power and court's jurisdiction). This important difference is discussed, *infra*.

questioned, including but not limited to instances when … the judge knows that the judge … has ***a financial interest*** in the subject matter in controversy, is a party to the proceeding or has ***any other interest that could be substantially affected*** by the outcome of the proceeding[.]" JR 2-106(A)(3) (emphasis added). It is only these "other interests" that must be affected "substantially" to require recusal.[3] A direct financial impact, on the other hand, ***always*** requires recusal (absent the Rule of Necessity).

Indeed, Oregon law accepts this strict interpretation: "when a judge has a financial interest, ***no matter how small***, in the outcome of a case, that judge should recuse himself or herself[.]" *Hughes v. State*, 314 Or 1, 5 n2, 838 P2d 1018 (1992) (emphasis added). Nor is recusal ignored if the direct financial benefit is contingent or likely to happen only in the future. As the City itself notes, the legislative assumption in passing the PERS bill was to lower future outlays into the PERS system. Even if it turns out by some bizarre confluence of circumstances that SB 822 (or now SB 861) does not lower the rates of return for future PERS retirees, then certainly the understanding at this point is that it will. Thus, the judicial officers involved in this case possess at the minimum a

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[3] A substantiality element is also included in JR 2-106(D) which allows parties unanimously to waive the conflict in writing after a judge discloses the conflict on the record, after attesting that the conflict is immaterial. No such disclosure has occurred, and it is unknown whether all of the parties here would unanimously waive the conflict. Intervenor COID, for its part, respectfully would not.

perceived direct financial interest in the underlying matter.[4] Tellingly, the prior use of the Rule of Necessity itself in PERS cases suggests that this Court does not consider future PERS changes to be overly speculative or de minimus.

So too, even though the admitted integrity of this Court and the Special Master are not at issue here as a factual matter, the mere reasonable possibility of direct financial interest requires recusal. Rule JR 2-106 applies in "a proceeding in which the judge's impartiality ***reasonably may be questioned***"—not simply in proceedings in which the judge has been ***proven*** to be biased. The appearance of impartiality must be visible to the public as much as the fact of impartiality. As noted in COID's initial motion: "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." *Aetna Life Ins. Co. v. Lavoie*, 475 US 813, 825 (1986) (citation and internal quotation marks omitted). Permitting interested judges to decide cases involving their own financial future corrodes the appearance of justice upon which rest the Rule of Law and consent of the governed.

No one involved in the Oregon judicial system can doubt the

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[4] The State cogently points out that it does not matter if a judge knows which way to vote to best advance the judge's interest. A direct financial interest is a direct financial interest all the same.

conscientiousness and honesty of the jurists involved in this case. But our narrow cross-section of the populace is not the only group observing or interested in this litigation. This Court should hold that the Due Process Clause applies here to require recusal of the sitting justices and the Special Master, unless some basis to avoid that recusal exists. Intervenor COID believes that no such basis for avoiding recusal can be stated.

2. TRUE NECESSITY HAS NOT BEEN DEMONSTRATED, BECAUSE A *PRO TEMPORE* PANEL CAN BE SEATED.

The common law Rule of Necessity is triggered only where no substitute judge can be obtained, and the case would otherwise not be heard—that is why it is a rule of ***necessity***: "The Rule of Necessity had its genesis at least five and a half centuries ago. Its earliest recorded invocation was in 1430, when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was ***no provision for appointment of another judge***." *United States v. Will*, 449 US 200, 213-214 (1980) (emphasis added). The cases cited by *Will* supporting the use of the rule of necessity all similarly demonstrate the lack of any procedure to secure an alternative appointment. *See id., quoting Philadelphia v. Fox*, 64 Pa 169, 185 (Penn. 1870) ("The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest—***where no provision is made for calling another in***, or where no one else can take his place —it is his duty to hear and decide")

(emphasis added). *See also Atkins v. United States*, 214 Ct Cl 186 (US Ct Claims 1977) ("The rule, simply stated, means that a judge is not disqualified to try a case because of his personal interest in the matter at issue ***if there is no other judge available*** to hear and decide the case") (emphasis added).

By contrast, in the initial motion and below, Intervenor COID has shown that it is possible—albeit perhaps inconvenient or cumbersome—to appoint a disinterested *en banc* Oregon Supreme Court panel and Special Master to hear this case. Therefore, without any true, absolute necessity, the Rule of Necessity cannot be used to avoid core due process principles.

No "necessity" can be invoked here for two reasons: (1) appointed Circuit Court *pro tempore* judges are in fact "appointed judges"; and (2) rules on quorum or limits on the number of *pro tempore* justices—if indeed they would prohibit the empaneling of a *pro tempore en banc* court—do not create a "necessity" sufficient to avoid due process requirements.

A. CIRCUIT COURT *PRO TEMPORE* JUDGES ARE "APPOINTED AND QUALIFIED," AND *PRO TEMPORE* JUDGES ARE NOT NECESSARILY PERS MEMBERS.

There is no basis to assert that circuit court pro tempore judges are not "appointed and qualified" pursuant to ORS 1.600 for purposes of a *pro tempore* appointment to this Court. Under ORS 1.600 a judge of the circuit court, if

"appointed and qualified,"[5] may serve as a *pro tempore* justice. ORS 1.600(1). Circuit Court *pro tempore* judges are in fact appointed, and the qualification requirements of a *pro tempore* circuit court judge under ORS 1.635 are at least equal to the qualification requirements for a "judge of the Supreme Court" under ORS 2.020. *Compare* ORS 1.635 ("A person is eligible for appointment [as a Circuit Court *pro tempore* judge] 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"), *with* ORS 2.020 ("judge of the Supreme Court" must be a citizen of the United States, "shall have resided in this state at least three years next preceding their election or appointment," and "at time of their election, have been admitted to practice in the Supreme Court of Oregon"). *See also* ORS 3.041 and ORS 3.050 (qualifications for circuit judges equivalent, with added residency requirement).

Thus, the idea that a *pro tempore* judge of the circuit court is any less

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[5] Contrary to the Moro Petitioners' argument ORS 1.600(1) does not say "regularly appointed and qualified," but only "appointed and qualified." The statute does discuss "regularly elected and qualified" judges, with "regularly elected" being a commonplace legal term of art. *See, e.g.*, *State v. Blasingame*, 127 Or App 382, 388, 873 P2d 361 (1994) ("ORS 1.615(1) authorizes the Supreme Court to assign any regularly elected and qualified judge of the district court to serve as a judge *pro tempore* of any circuit court. ORS 1.615(3) provides that a judge pro tempore has all the "powers and duties" of a regularly elected and qualified judge"). "Regularly appointed" has no such meaning that would distinguish a properly appointed sitting circuit judge from a properly appointed *pro tempore* circuit judge.

"appointed or qualified" than an appointed sitting judge of the circuit court is not borne out by Oregon law. Pointedly, the Legislative Assembly knows full well how to restrict the authority of *pro tempore* judges. *See* ORS 1.675 (prohibiting pro tempore judges from serving as or voting on the Chief Judge or presiding judge of their court). No such prohibition exists with respect to serving as a *pro tempore* justice of this Court.[6] Any non-PERS member lawyer in private practice for at least three years, once appointed as *pro tempore* judge of the circuit court, is qualified to serve on the Oregon Supreme Court as a *pro tempore* justice, and several such appointments to this Court would avoid the due process concerns otherwise raised here.

B. NEITHER THE QUORUM STATUTE NOR THE LIMIT ON THE NUMBER OF *PRO TEMPORE* JUSTICES REPRESENT A TRUE NECESSITY FOR THESE JUDGES TO HEAR THE CASE.

The only identifiable limits on seating an entirely *pro tempore en banc* panel of the Oregon Supreme Court seem to arise out of the quorum statute found in ORS 2.100, and the limit on *pro tempore* participation found in ORS 2.111(5). The State argues that these two statutes in fact prohibit the appointment of such a *pro tempore en banc* panel. First, the State argues that

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[6] By the same token the Legislature knows how to use the term "appointed judge" to mean one appointed by the Governor. *See* ORS 305.470 (referring to judge appointed by governor under statutory procedure) and ORS 305.452 (tax court judge statutory appointment procedure).

ORS 2.111(3) requires any department of the Court to consist of at least three and not more than five justices. However, the State misunderstands the proposed solution: COID is not suggesting that this Court create a ***department***. Rather, as noted in ORS 2.111(1), the Court can sit "all together or in departments," and COID's proposed solution would involve the Court sitting "all together." Under ORS 2.111(5) the Court can consist of up to two *pro tempore* justices. 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." By sitting "all together" (*en banc*) with those two additional *pro tempore* justices, and then by the PERS-member justices all recusing themselves from consideration of the case, the *en banc* panel of this Court (with that initial quorum) will consist ***effectively*** of only those two *pro tempore* justices, and no Due Process concerns arise.

Is this an awkward solution? Yes. Is it untenable? **No.** The very fact that it is possible under existing rules shows that there is no actual "necessity" to be invoked here. In fact, the situation becomes much less unwieldy with minor procedural modifications to the quorum and *pro tempore* participation rules that would allow more *pro tempore* justices to be seated. These modifications can easily be made to comply with Due Process while maintaining the overall consistency of Supreme Court practice. Nonetheless, even without increasing the number of allowed *pro tempore* justices, or making

the quorum rules applicable to the majority of *pro tempore* justices allowed to hear a case, the current rules function adequately. Unlike in *United States v. Will*, 449 US 200, *Evans v. Gore*, 253 US 245, 247-48 (1920), and a host of other "Rule of Necessity" cases, there is a procedure ***in Oregon*** to appoint additional justices to the Oregon Supreme Court—justices who can state unequivocally that they have no financial interest in the PERS system.

Second, the State raises the same concerns as the City in arguing that all appointed pro tempore justices must come from the ranks of sitting circuit court judges. As discussed immediately above, that argument is not supported by a reading of the judicial qualification statutes or ORS 1.600(1).

3. PAST PRACTICE AND *STARE DECISIS* ARE NOT EXCEPTIONS HERE.

While the Legislature did confer jurisdiction on the Oregon Supreme Court to decide challenges to SB 822 (and now SB 861), it did not confer jurisdiction on the sitting Justices personally. The Legislature possibly could have specifically vested jurisdiction in the Honorable Justices of this Court, and it must be assumed to know this distinction. The difference between a court's jurisdiction and a judge's authority is well-established, and jurisdiction is not hampered by requiring a replacement judge after disqualification under ORS 14.250 or ORS 14.260: "It is to be borne in mind that this law does not oust courts of their jurisdiction, but simply requires that another judge be called to

preside in the same court. There is a well-marked distinction between a judge and a court." *U'Ren v. Bagley*, 118 Or at 84, *quoted in State v. McDonnell*, 343 Or 557, 567-68, 176 P3d 1236 (2007). *See also Anderson ex rel. Poe v. Gladden*, 205 Or 538, 543-44, 288 P2d 823 (1955) (drawing same distinction). The Legislature's vesting of jurisdiction in this Court is not determinative of the question of whether the justices of this Court must recuse themselves.

Likewise, the past decisions of this Court declaring a necessity to exist as an aid to deciding prior PERS cases bears little weight where there appears to have been no apparent direct challenge, no extended analysis, and most importantly, no alternative option offered, to the sitting justices deciding those cases. Indeed, the foundation of this Court's prior use of the Rule of Necessity appears flawed from the outset. *Hughes v. State*, 314 Or 1, 838 P2d 1018 (1992), upon which *Strunk v. PERB*, 338 Or 145, 151 n5,108 P3d 1058 (2005), and *Oregon State Police Officers' Assn. v. State of Oregon*, 323 Or 356, 412 n3, 918 P2d 765 (1996) ("*OSPOA*"), relied, was itself based on *Woodward v. Pearson*, 165 Or 40, 103 P2d 737 (1940), a tax case. In *Woodward*, the Court invoked the Rule of Necessity based on the justices' status as taxpayers:

> Our interest as taxpayers attends in every case where a fellow taxpayer seeks to enjoin the payment of money derived from taxation; but ***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.

Woodward, 165 Or at 58 (emphasis added), *quoted in Hughes v. State*, 314 Or at 5 n2. All Oregonians are subject to the tax laws, so it was in fact impossible to find any Oregon judge—sitting or *pro tempore*—who was not subject to Oregon tax laws. But that is not true of the PERS system. This Court can certainly take judicial notice of the fact that not every member of the Oregon State Bar is a member of PERS. Because qualified members of the Bar exist, and may be appointed *pro tempore* to this Court, the Rule of Necessity invoked in *Hughes* and its progeny is, upon examination, without a firm foundation.

Likewise, *stare decisis* does not present an impediment where an argument has not been fully considered in prior cases. Rather, "the doctrine of *stare decisis* contemplates only such points as are actually involved and determined in a case[.]" *Safeway Stores v. State Bd. Agriculture*, 198 Or 43, 79-80, 255 P.2d 564 (1953) (citation and quotation marks omitted). The prior holdings of cases that involve no analysis of a particular holding are accordingly given little weight. *State v. McDonnell*, 343 Ore 557, 567, 176 P3d 1236 (2007) ("we cannot conclude that [prior] cases 'fully considered' whether the effect of a violation of the disqualification statute renders the resulting judgment void or merely voidable. Those cases included no analysis of that issue. … The statements in our cases on which defendant relies, therefore, are not entitled to deference under the doctrine of *stare decisis*").

So too here, in each of the prior PERS cases, this Court did not fully

consider, and did not offer any analysis regarding, the application of the Rule of Necessity. The Court merely, by footnote, said that the Rule applied. These prior decisions are not entitled to the deference of *stare decisis*, and this Court must look afresh at the issue to determine if in fact, as Intervenor COID has demonstrated, an *en banc* panel of *pro tempore* justices can adjudicate this matter free from any question that it is violating the Due Process Clause.

CONCLUSION

For the foregoing reasons, the justices of this Court and the Special Master are respectfully requested to recuse themselves, and appoint alternative jurists to hear these cases.

Respectfully submitted, this 24th day of October, 2013.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 24, 2013, I filed **INTERVENOR CENTRAL OREGON IRRIGATION DISTRICT'S COMBINED REPLY ON MOTIONS TO DISQUALIFY** electronically with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that on October 24, 2013, I served **INTERVENOR CENTRAL OREGON IRRIGATION DISTRICT'S COMBINED REPLY ON MOTIONS TO DISQUALIFY** either electronically through the Court's filing system, or by First Class Mail per the Court's service list upon:

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