STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

THOMAS R. OKRIE, and SIMILARLY SITUATED RETIRED STATE AND PUBLIC SCHOOL EMPLOYEES BORN AFTER 1945,

Plaintiffs-Appellants,

MSC No.
COA No. 326607
LC No. 13-000093-MK

v

STATE OF MICHIGAN, GOVERNOR RICK SNYDER, MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET, OFFICE OF RETIREMENT SERVICES, STATE EMPLOYEES RETIREMENT SYSTEM, MICHIGAN PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, and MICHIGAN DEPARTMENT OF TREASURY,

Defendants-Appellees.

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STATEMENT OF ORDERS APPEALED FROM AND RELIEF SOUGHT

Plaintiff-Appellants Thomas R. Okrie, on behalf of similarly situated retired state and public school employees born after 1945 and who retired before 2011 PA 38 went into effect on January 1, 2012 ("Mr. Okrie *et al.*"), appeal from the unpublished opinion of the Court of Appeals (Sawyer, PJ, and Hoekstra and Wilder, JJ), issued on June 16, 2016 (**EX. 1**), affirming the following orders of the Court of Claims: (1) granting Defendants State of Michigan, Governor, Department of Technology Management and Budget, Office of Retirement Services, State Employees Retirement System, Michigan Public School Employees Retirement System, and Department of Treasury's (hereafter, "the State of Michigan or "the State") motion for summary disposition under MCR 2.116(C)(8) and (C)(10) regarding all eight counts of Mr. Okrie *et al.*'s First Amended Complaint; (2) denying Mr. Okrie *et al.*'s cross-motion for summary disposition; (3) denying Mr. Okrie *et al.*'s motion to file a second amended complaint; and (4) denying, as moot, Mr. Okrie *et al.*'s motion for class certification, as set forth in the Court of Claim's opinions and orders dated November 5, 2013 (**EX. 2**), February 10, 2014 (**EX.3**), April 21, 2014 (**EX. 4**), and June 17, 2014 (**EX. 5**). Under MCR 7.305(B), Mr. Okrie *et al.* request that this Court grant their Application for Leave to Appeal on the following grounds:

- (B)(1): "the issue involves a substantial question about the validity of a legislative act"
- (B) (2): "the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions"
- (B)(3): the issue involves a legal principle of major significance to the state's jurisprudence"
- (B) (5)(a): "the decision is clearly erroneous and will cause material injustice"

- (B)(5)(b): "the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals"

The crux of this case is the payment of retirement benefits as deferred compensation that Mr. Okrie *et al*. earned for their years of governmental service to the State of Michigan or one of its political subdivisions ("the State" or "State of Michigan"). See *Kosa v State Treasurer*, 408 Mich 356, 372 n 22, 372-373 (1980) (stating that tax-exempt pensions represent deferred compensation). Michigan courts have consistently defined "compensation" in accordance with Black's Law Dictionary, which defines the term as "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages." Black's Law Dictionary (9th ed); see also *Gentile v Detroit*, 139 Mich App 608, 617 (1984); *Hay v Highland Park*, 134 Mich App 624, 628 (1984); *Stover v St Clair Shores Fire & Police Ret Bd*, 78 Mich App 409, 415 (1977). "Deferred compensation" is thus defined in relevant part as "[p]ayment for work performed, to be paid in the future or when some future event occurs." Black's Law Dictionary (9th ed.). The principal question of this class-action lawsuit is whether the State of Michigan may eliminate the retirement benefits payable in the form of tax exempt public pensions earned as deferred compensation by Mr. Okrie *et al.*, all of whom were born after 1945 but who retired before the entry into force of 2011 PA 38 on January 1, 2012, without providing financial benefits equal to, or greater than, the monetary value of the tax exemptions that were eliminated.

First, as argued throughout this litigation, the *Okrie* case is a continuation of the *Davis* case. *Davis v State of Michigan*, 160 Mich App 98 (1987) (*Davis I*); *Davis v Mich Dep't of Treasury*, 489 US 803 (1989)("*Davis II*"); *Davis v Dep't of Treasury*, 179 Mich App 683 (1989) ("*Davis III*") and 1991 OAG No. 6697, issued December 18, 1991, 1991 Mich AG LEXIS 39.

Specifically, in *Davis I*, the Court of Appeals, agreeing with the State, established the following propositions:

- Tax exemptions were offered as inducements to attract and retain qualified employees. (160 Mich App at 105).
- Tax exemptions were recognized as an integral part of retirement benefits conferred upon state employees. (160 Mich App at 105).

On appeal to the U.S. Supreme Court, the State of Michigan in *Davis II* argued the following propositions in defense of its differential treatment of retired state and federal employees with respect to state tax exemptions:

- Tax exemptions were offered as inducements to hire and retain qualified civil servants. (489 US at 816).
- Tax exemptions provided to retired state employees and not to retired federal employees were because the State recognized that "its retirement benefits are significantly less munificent than those offered by the Federal Government. . ." (489 US at 816).

In finding that the State's differential treatment was violative of the intergovernmental immunity statute, 4 USC § 111, the U.S. Supreme Court recognized the following proposition:

- The State of Michigan could have provided "the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of tax exemptions." (489 US at 815 n 4).

On remand from the U.S. Supreme Court, the Court of Appeals in *Davis III*, acting as if it were the Legislature in determining whether to extend the tax exemptions to retired federal employees or eliminate them for retired state employees, agreed with State of Michigan on the following propositions:

- Extending the tax exemptions to retired federal employees was favored because elimination of the tax exemptions for retired state employees would have "deleterious effect" upon "the reliance interests and financial well-being of those employees." (179 Mich App at 688).

- "Equitable considerations favor an extension" of the tax exemptions to retired federal employees, as opposed to an elimination of the tax exemptions of retired state employees. (179 Mich App at 688).

Subsequently, in the aftermath of the decisions in *Davis*, the State Attorney General issued a formal opinion (1991 OAG No. 6697) in response to Senator Schwarz's question whether the Legislature may limit or withdraw the tax exemptions, recognizing the following proposition:

- The Legislature may limit or repeal the tax exemptions found in the four retirement statutes as to current retired public employees and members "if it provides alternative benefits in their place that are equal to or greater than the pension benefit that would be limited or withdrawn." (1991 OG No. 6697, 1991 Mich AG LEXIS at p 9), citing *Seitz v Probate Judges Retirement System*, 189 Mich App 445, 456 (1991), which relied upon *Campbell v Judges' Retirement Bd*, 378 Mich 169 (1966).

These propositions established in the *Davis* litigation and the subsequent formal opinion of the State Attorney General issued in 1991 OAG No. 6697 form the legal backdrop for Mr. Okrie *et al.*'s contention that the tax exemptions were not gratuities but represented an integral part of their retirement benefits (given in lieu of higher salaries, and hence higher pensions) earned by Mr. Okrie *et al.* as deferred compensation for their years of governmental service to the State.

To receive the retirement benefits as deferred compensation payable in the form of a tax exempt pension, Mr. Okrie *et al*. had to satisfy these conditions: (1) vest in one of the four defined benefit systems operated and administered by the State of Michigan; (2) make irrevocable decisions to terminate their state employment; (3) retire; and (4) reside thereafter in the State of Michigan (or another state with a reciprocity agreement with the State of Michigan). For decades, the State unfailingly paid the retirement benefits earned by retired state and public school employees for their years of governmental service to the State as deferred compensation

in the form of tax-exempt pensions. The entry in force of 2011 PA 38 on January 1, 2012 eliminating the tax-exemption for public pensions for those born after 1945, however, did not eliminate the vested right of Mr. Okrie *et al*. to the retirement benefits that they had earned as deferred compensation for their years of governmental service to the State. While the retirement benefits earned by Mr. Okrie *et al*. as deferred compensation were no longer payable in the form of a tax-exempt pension after 2011 PA 38 went into effect on January 1, 2012, alternative financial benefits equal to, or greater than, the tax exemptions were nonetheless owed to them, as set forth in 1991 OAG No. 6697. Although the current Attorney General now wants to disavow the fundamental legal propositions argued in *Davis* and embraced by the 1991 OAG No. 6697, he is judicially estopped from asserting positions in the present litigation that repudiate those successfully argued previously in the Court of Appeals in *Davis I* and *Davis III*. See *Pasche v Retool Indus*, 445 Mich 502, 509-510 (1994).

Contrary to the State's claims, this case is not about the power to tax; rather, it is about the payment of retirement benefits earned by Mr. Okrie *et al*. as deferred compensation in an amount equal to, or greater than, the value of the tax-exemptions that were eliminated by 2011 PA 38 and the related legislation. By retroactively applying 2011 PA 38 and the related legislation to Mr. Okrie, *et al*., without providing alternative financial benefits equal to, or greater than, the monetary value represented by the tax exemptions that were eliminated, the State thus abrogated the retirement benefits that they had earned in violation of the provisions of the Contract Clauses under the 1963 Michigan Constitution, art 1, § 10, and the United States Constitution, Art I, § 10, as well as the Takings Clauses under 1963 Michigan Constitution, art 1, § 2, and the US Const Am V and XIV. For the reasons stated herein, Mr. Okrie *et al.* respectfully

request that this Court grant their Application for Leave to Appeal in order to reverse the Court of Appeals' unpublished opinion issued on June 16, 2016. (**EX. 1**).

STATEMENT OF THE QUESTIONS FOR REVIEW

I. Pursuant to *Associated Builders and Contractors v City of Lansing,* Was the Court of Appeals Bound by *Campbell v Judges' Retirement Bd*, 378 Mich 169 (1966)?

II. Did the State Breach Mr. Okrie *et al.*'s Public Employment Contracts By Taking Away Retirement Benefits Earned As Deferred Compensation for Their Years of Governmental Service Without Providing Alternative Benefits That Are Equal to, or Greater Than, the Value of the Tax Exemptions that Were Eliminated by 2011 PA 38 and the Related Legislation?

III. Alternatively, Did the State Breach the Implied Contracts with Mr. Okrie *et al.* Based upon the Doctrine of Promissory Estoppel By Taking Away Retirement Benefits Earned As Deferred Compensation for Their Years of Governmental Service Without Providing Alternative Benefits That Are Equal to, or Greater Than, the Value of the Tax Exemptions that Were Eliminated by 2011 PA 38 and the Related Legislation?

IV. Does the State's Retention of Mr. Okrie *et al.*'s Retirement Benefits Earned as Deferred Compensation for Their Years of Governmental Service Without Providing Alternative Benefits That Are Equal to, or Greater than, the Value of the Tax Exemptions that Were Eliminated by 2011 PA 38 and the Related Legislation Constitute Unjust Enrichment?

V. Does the Application of 2011 PA 38 and the Related Legislation to Mr. Okrie *et al.* Violate the Contract Clauses of 1963 Const, art 1, § 10 and US Const, art 1, § 10(1)?

VI. Does the Application of 2011 PA 38 and the Related Legislation to Mr. Okrie *et al.* Violate the Takings Clauses under 1963 Const Art 10, § 2 and US Const Am V and US Const Am XIV?

VII. Should Mr. Okrie *et al.* Be Allowed to Amend Their Verified Class Action Complaint to Allege Claims for the Breach of the Service Credit Purchase Contract, Breach of the Member Investment Plan (MIP) Contract, Fraud in the Inducement and Gross Negligent Misrepresentation?

VIII. Should Mr. Okrie *et al.*'s Second Amended Verified Class Action Complaint Be Remanded to the Trial Court for Certification as a Class Action?

INTRODUCTION

It is an incontestable juridical fact that tax-exempt defined-benefit ("DB") pensions represent deferred compensation for governmental service rendered by retired state and public school employees to the State of Michigan. That tax-exempt pensions are more valuable than nonexempt DB pensions was unanimously recognized by this Court in *Kosa v State Treasurer*, 408 Mich 356, 372 n22, 372-373 (1980), which cited with approval Robert Tilove's treatise, *Public Employee Pension Funds* (1976), noting that "[a]n income tax exemption has precisely the same effect as a benefit." This fundamental legal proposition was also consistently defended by the State throughout the *Davis* litigation. Specifically, in *Davis v State of Michigan*, 160 Mich App 98, 105 (1987) (*Davis I*), the State argued, and the Court of Appeals agreed, that the "income tax exemption is an integral part of the retirement benefits conferred upon state employees," which is an "economic inducement" for "attracting and retaining []qualified employees." As the Court of Appeals explained:

> Under the Michigan income tax system, a class distinction is made between retirees and all other retirees, including federal retirees. ***In our opinion, the attracting and retaining of qualified employees is a legitimate state objective which is rationally achieved by a retirement plan offering economic inducements. <u>One such inducement to state employees is tax exempt status for their retirement benefits</u>. The State of Michigan, as an <u>employer</u>, owes a special responsibility to its employees, which it does not owe to federal employees. The full tax emption permitted by the [Income Tax Act] is simply intended to recognize that <u>income tax exemption is an integral part of the retirement benefits conferred upon state employees</u>.*** . . . [*Id*. at 105.] (Emphasis added.)

When *Davis* was appealed to the U.S. Supreme Court, the State again maintained that it had an "interest in hiring and retaining qualified civil servants through the inducement of a tax exemption for retirement benefits." *Davis v Mich Dep't of Treasury*, 489 US 803, 816 (1989) (*Davis II*). While the U.S. Supreme Court found "no difficulty concluding that civil service

retirement benefits are deferred compensation for past years of service rendered to the Government," the Court found as violative of the intergovernmental immunity statute, 4 USC § 111, the Michigan statute exempting from state and local income tax the retirement benefits paid by state or political subdivisions, but not by other employers, including the federal government. *Id*. Addressing the State's important financial incentive of providing tax-exempt pensions as deferred compensation to its employees, the Court noted:

> We also take issue with the dissent's assertion that "it is peculiarly inappropriate to focus solely on the treatment of state government employees" because ***"[t]he State may always compensate in pay or salary for what it assesses in taxes***". . . . *In order to provide the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of a tax exemption, the State would have to increase its outlays by more than the cost of the current tax exemption, since the increased payment to retirees would result in higher federal income tax payments in some circumstances*. [*Id*. at 815 n 4 (emphasis added)]

Subsequently, on remand, the Court of Appeals in *Davis v Dep't of Treasury*, 179 Mich App 683, 688 (1989) (*Davis III*), acting as though it were the State Legislature, agreed with the State's argument that extension of the tax exemption to federal retirees was the "preferred means of redress" of the federal statutory violation of 4 USC § 111. As the Court of Appeals explained:

> This approach avoids the hardship that would ensue if, instead, the favored class [state retirees] is made to do without its beneficial treatment. In the instant case, the state's position favoring extension is based in large measure on the deleterious effect that the opposite approach – withdrawal of benefits from retired state and local employees – would have on the ***reliance interests and financial well-being of those employees***. Not surprising in view of his own self-interest, plaintiff concurs in the state's position. We also agree that ***equitable considerations*** favor an extension of the more favorable treatment . . . to the retired federal employees. We do not believe that the Legislature would have chosen differently if confronted with this question. Of course, if the Legislature disagrees with our resolution of this remand, it is free to amend the statutory scheme in a manner consistent with the dictates of the Supreme Court's *Davis* decision. . . . [*Id*. at 688-689](Emphasis added.)

In the aftermath of the *Davis* litigation, the Michigan Attorney General, in accordance with U.S. Supreme Court's observation that "[t]he State may always compensate in pay or salary for what it assesses in taxes," recognized in a formal opinion that, if the State eliminated the tax-exemption for the pensions of retired state and public school employees, the State should have to pay comparable financial benefits to them, which were equal to or greater than financial benefits represented by tax-exempt pensions. Specifically, in response to Senator Schwarz's query whether the Legislature may limit or withdraw the statutory tax exemptions for public pensions here at issue,[1] the Attorney General issued a formal opinion on December 18, 1991, stating:

> It is my opinion, therefore, that the Legislature may, without violating Const 1963, art 9, § 24, limit or repeal the tax exemptions now found in the four retirement statutes as to current retirees and members ***if it provides alternative benefits in their place that are equal to or greater than the pension benefit[s] that would be limited or withdrawn since there would be no constitutionally cognizable impairment of the pension benefit[s]***. [OAG No. 6697, p 6; 1991 AG LEXIS 39](Emphasis added.)

In the present case, Mr. Okrie *et al*. concur with the Attorney General's position expressed in 1991 OAG No. 6697, which was in effect at the time they retired, and request that the State of Michigan keep its word to them and their fellow citizens. Simply put, as a matter of law and justice, the State cannot retroactively apply 2011 PA 38 and the related legislation to Mr. Okrie *et al.* without providing alternative benefits in their place that are equal to, or greater than, the monetary value of the tax-exempt pension benefits of which they have been deprived. See

[1] State Employees' Retirement Act, 1943 PA 240, § 40, MCL 38.40, providing the right to an exemption from state and local taxes since 1943; Public School Employees Retirement Act of 1979, 1980 PA 300, § 46(1); MCL 38.1346(1), amending predecessor act, 1945 PA 136, Ch 1, § 25, providing an exemption for retirement benefits from state or local taxation for only Chapter I members since enactment in 1945; Michigan Legislative Retirement System Act, MCL 38.1057(1), with exemption added by 1961 PA 167; and City Library Employees' Retirement Systems, 1927 PA 339, MCL 38.705, with an exemption since 1927. The Income Tax Act of 1967, MCL 206.30(1)(f), exempted retirement and pension benefits from taxation.

Pierce v State, 910 P2d 288, 304 (NM 1995)(stating that "any action by the legislature that serves to terminate, diminish or alter the value of pension benefits must be compensated for by providing an equal or greater benefit"). By claiming that the statutes revoking the tax exemption for public pensions, which entered in force on January 1, 2012, may be retroactively applied to retired state and public school employees who made irrevocable employment termination decisions and retired before that date, in detrimental reliance upon the State's unqualified promises for decades not to tax their pensions, the State is now impermissibly repudiating the position taken in the *Davis* litigation and the formal opinion of the Attorney General (1991 OAG No. 6697). In fact, as a matter of judicial estoppel, the State should not be permitted by this Court to assert positions in the present case that are inconsistent with, or contrary to, those successfully argued in *Davis*. See *Paschke v Retool Indus*, 445 Mich 502, 509-510 (1994). Rather, the State should be legally required to keep its word to Mr. Okrie *et al.* by not taking away their retirement benefits earned as deferred compensation payable in the form of tax-exempt pensions, without providing them with financial benefits equal to, or greater than the financial benefits represented by the tax exemptions. [2]

STATEMENT OF FACTS

[2]For the purpose of this litigation, the class of retired state and public school employees consist of those born after 1945 whose state pensions have been subject to state and local taxation since January 1, 2012 pursuant to 2011 PA 38 and the related legislation. Essentially, this class of individuals consists of all those Tier I retirees and deferred (vested) public school employees (their spouses and surviving spouses) covered by MSPERS, administered by the ORS, and retired and deferred (vested) state employees (their spouses and surviving spouses) covered by MSERA, also administered by the ORS, who were born after 1945 and whose pension benefits had vested or accrued before January 1, 2012 when 2011 PA 38 went into effect. Thus, this class does not include those state and public school employees who were active or current public employees as of January 1, 2012 and thereafter, nor retired federal employees.

A. Background Facts

1. The State, Through the ORS, Regularly and Consistently Over Decades Promised Mr. Okrie *et al.* that Their DB Pensions Were Exempt from State and City Income Tax When They Retired.

For decades, MSERS and MPSERS, administered by the ORS, issued Retirement Guidelines advising public school employees and state employees: "It's never too early to begin planning a secure retirement." [3] (BIS- Pl. SD Motion, EX. 1, Retirement Guidelines, May 1995). As explained in the Introduction to the MPSERS Retirement Guidelines dated April 1998:

> **Retirement**. You look forward to it as a time to enjoy the good life you've earned. To enjoy retirement to its fullest, you need financial security. The State of Michigan established a retirement plan to begin building that security for you. This retirement plan, together with Social Security contributions and your personal savings, can help you ensure financial security during your retirement years. [*Id*. at EX. 3, p 3].

It also informs public school employees:

> Use the MPSERS Retirement Guidelines throughout your career to help you plan for retirement. When you're ready to retire, use it to help you make benefits decisions. [*Id*.]

The Introduction further states:

> Remember, this book is a summary of the main features of the plan and not a complete description. The operation of the plan is controlled by the Michigan Public School Employees Retirement Act (Public Act 300 of 1980, as amended). If the provisions of the Act conflict with this summary, the Act controls. [*Id*.] [4]

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[3] According to the Retirement Guidelines:

> MSPERS is the State agency that will process your retirement application and pay your pension. It will be your "partner in retirement" throughout your lifetime. [BIS- Pl. SD Motion, EX. 2, p 11].

[4] At all times relevant to this litigation, until 2011 PA 38 entered into effect on January 1, 2012, the Public School Employees Retirement Act ("PSERA"), MCL 38.1346(1) as well as the State Employees Retirement Act ("SERA"), MCL 38.40, exempted certain public-pension benefits from taxation, as did the Income Tax Act, MCL 206.1 *et seq*.

Significantly, as "your 'partner in retirement' throughout your lifetime," MSPERS constantly reminded public school employees of the "[i]rrevocable nature of retirement." (*Id*. at EX. 3, pp, 11, 26, 34). As the 1998 Retirement Guidelines made unambiguously clear, without qualification: "Pensions paid by MPSERS are ***exempt*** from Michigan state income tax and Michigan city income tax." (*Id*. at p 32)(Emphasis added.)[5] This statement accurately reflected the statutory language contained in PA 300 of 1980 exempting pensions from state and city income tax, which was in effect at the time Mr. Okrie *et al*. made their irrevocable employment termination and retirement decisions.

In almost identical language, the ORS, administering the State Employees Retirement System ("SERA"), regularly and consistently promised state employees covered by SERA (civil service employees as well as appointed officials in the Executive branch and employees of the Legislature and Judiciary) that their pension benefits were exempt from state and city income tax. For example, the 2001 "Retirement Guidelines" booklet prepared by ORS ("your 'partner in retirement throughout your lifetime") that was furnished to state employees stated that the booklet should be carefully reviewed prior to retirement. (*Id*. at EX. 4, pp 3, 9, 28). Under the heading "Tax Obligations," the Guidelines booklet informed state employees:

TAX OBLIGATIONS

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[5] This statement reiterated what was stated in the 1992 Retirement Guidelines (*Id*. at EX. 5, p 41) and repeated in many other years over the decades:

> State and Local Income Tax Information
>
> Pensions paid by MPSERS are exempt from Michigan state income tax and Michigan city income tax. Although you are exempt from paying Michigan income tax, you must still file state and city (if applicable) tax returns.

> **State and local income tax**
>
> **Pensions paid by the State Employees' Retirement System are exempt from Michigan state and city income tax. Although you are exempt from paying Michigan income tax, you must file state and city (if applicable) tax returns acknowledging your state pension and claiming your exemptions.** (*Id*. at 29)

The clear and unequivocal language in these statements conveys the unmistakable promise not to subject the pensions of retired state and public school employees to state or city income tax. Importantly, this promise to exempt pensions from state and city income taxes is in marked contrast to the statements making it clear that their pensions were subject to federal income tax.

2. In Making Irrevocable Employment Termination and Retirement Decisions and in Calculating Their Retirement Benefits, Mr. Okrie *et al*. Detrimentally Relied upon the State of Michigan's Promise that "Pensions . . . Are Exempt from Michigan State and City Income Tax."

Mr. Okrie, a public school teacher, retired effective July 1, 2000 from the Troy School District as a "Health/Social Studies Teacher." Mr. Okrie, who was born on October 16, 1946, was 53 years old when he retired for health reasons. (*Id*. at EX. 6, Affidavit, ¶ 1). With more than 33 years in service credit and being less than 55 years old, Mr. Okrie was eligible for the "30 and Out" plan. *Id*. In the years before retiring, while he was still a public school teacher, Mr. Okrie regularly received and consulted the MPSERS Retirement Guidelines published by the ORS. (*Id*. at ¶ 2). The ORS, through the MPSERS Guidelines, instructed him to "Use the MPSERS Retirement Guidelines" and "When you're ready to retire, use it to help you make benefit decisions." (*Id*. at EX. 3, p 3). It also reminded him of the "[i]rrevocable nature of retirement." (*Id*. at 26). The Guidelines that he regularly received and consulted while he was

still a public school teacher made the unambiguous, unqualified statement that "Pensions paid by MPSERS are exempt from Michigan state income tax and Michigan city tax." (*Id*. at 32).

In July 1999, the ORS sent Mr. Okrie retirement application forms and informational materials that he had requested, including the 1998 MPSERS Retirement Guidelines and the Retirement Pension Estimate Workbook. (*Id*. at EX. 6 ¶ 3). Before making the irrevocable decision to retire, Mr. Okrie consulted the 1998 Guidelines, which made the unambiguous, unqualified statement that "Pensions paid by MPSERS are exempt from Michigan state income tax and Michigan city tax." (*Id*. at EX. 3, p 32; EX. 6, ¶ 3). Mr. Okrie thus reasonably expected that, after retiring, his pension would be exempt from state and city income tax, relying upon these unqualified, unambiguous statements in the Retirement Guidelines in making his irrevocable retirement decision and in calculating his financial security. (*Id*.)

On August 18, 1999, Mr. Okrie submitted the completed forms to the ORS stating that the effective date of his pension was July 1, 2000. (*Id*. at ¶ 4). Among the forms that he submitted to the ORS was the form entitled "Income Tax Information" (*Id*. at EX. 7), which again stated:

> MICHIGAN STATE AND CITY INCOME TAX
>
> Pensions paid by MPSERS are exempt from Michigan state income tax and Michigan city income tax. **Although you are exempt from paying Michigan income tax, you must still file state and city (if applicable) tax returns, acknowledge receipt of your MPSERS pension, and claim your exemptions on these forms. . . .** (Emphasis in original).

Again, Mr. Okrie relied upon this unqualified, unambiguous statement by the ORS in making his irrevocable decision to retire and in calculating his financial security, as MPSERS directed him to do. (*Id*. at EX. 6, ¶ 4). Significantly, there was no statement anywhere in the documents or forms sent to him stating that "the tax exemption could be eliminated at any time, so figure that

into your retirement decision." (*Id.*). Although his pension was exempt from state and city income tax, it was subject to federal taxation, and thus he had to fill out the "Pension Recipient's Federal Income Tax Withholding Authorization" form. *Id*. Mr. Okrie elected "the straight life" – no survivor pension provided option, providing him with a monthly lifetime pension of $3,290.15, with an annual 3% increase. (*Id*. at ¶ 3).

On October 14, 1999, Mr. Okrie received a letter from the ORS informing him that his "retirement application is now being processed by the Michigan Public School Employees Retirement System (MPSERS)." (*Id*. at ¶ 5). The letter informed Mr. Okrie as follows:

> Please contact MPSERS immediately if the data on the Benefit Application Summary is incorrect. ***The "Retirement Guidelines" booklet that accompanied your retirement application forms should be carefully reviewed prior to retirement***. [*Id*. at EX. 8].

As the ORS directed him to do, Mr. Okrie again reviewed the Retirement Guidelines, which unambiguously state without qualification that "Pensions paid by MPSERS are exempt from Michigan state income tax and Michigan city income tax." (*Id*. at EX. 3, p 32; EX. 6, ¶ 5). The letter ends by congratulating Mr. Okrie "on your retirement" and telling him: "You will soon reap the rewards of your hard work over the years." (*Id*. at EX. 8). The rewards consisted of a pension exempt from state and city income tax.

On June 7, 2000, Mr. Okrie received a letter from the ORS stating that "[y]our application for retirement has been processed and you will receive your first pension check . . . at the end of July, 2000." (*Id*. at EX. 6, ¶ 6; EX. 9). On July 25, 2000, he received a "remittance advice" from the State, and no state tax was assessed against him, as promised. (*Id*. at EX. 6, ¶ 6; EX. 10). This continued uninterrupted every month for the next 11 years, as he received 132 check stubs confirming the promise that his pension was exempt from state and city income tax.

(*Id*. at EX. 6, ¶ 6). However, that changed on January 1, 2012. With the entry in force of 2011 PA 38 and the related legislation, the State broke its promise to Mr. Okrie and similarly situated retired state and public school employees born after 1945 and who retired before January 1, 2012, by subjecting their pensions to state and city income tax, despite the fact that they had already made irrevocable employment termination and retirement decisions in justifiable reliance upon the State's promise that their pension benefits were exempt from Michigan state and city income tax. (*Id*. at EX. 6, ¶ 7-8).

3. The Enactment of 2011 PA 38 and the Related Legislation Subjected the Pensions of Retired State and Public School Employees Born After 1945 to Taxation, Without the Payment of Equivalent Financial Benefits.

2011 PA 38 was enacted in order to pay for Governor Snyder's proposal to replace the Michigan Business Tax with the corporate income tax – thereby reducing business taxes by $1.7 billion. 2011 PA 38 originated as House Bill (HB) 4361, which sought to amend the Income Tax Act, eliminating numerous credits, deductions, and exemptions, as well as changing future tax rates. Bill Analysis, Senate Fiscal Agency dated May 9, 2011. As reported in Crain's Detroit Business on April 28, 2011:

> "The Michigan House . . . passed a series of bills that would slash business taxes while raising taxes on retirees, the working poor and the other individual taxpayers."
>
> * * *
>
> Republican Gov. Rick Snyder proposed the changes. He says eliminating the Michigan Business Tax and replacing it with a 6 percent income tax on large corporations with shareholders is key to encouraging businesses to add jobs in a state with a 10.3 percent unemployment rate. Instead of paying about $2 billion annually into the state's general fund, businesses will pay about $300 million. Only about a third of businesses will pay the corporate income tax. [Michigan House Passes Business Tax Cut, Pension Tax Increases]

The Crain's Detroit Business article further noted:

> Although angry seniors protested in recent months against having the state income tax apply to most retirement income, the governor wrapped the pension tax increase into the bill cutting business taxes, virtually ensuring passage in the GOP-controlled House. . . .
>
> The governor's original proposal would have raised an estimated $900 million by ending exemptions for most retirement income, but lawmakers balked at supporting it. The current bill would raise about $300 million through retiree income tax changes.

With amendments, HB-4361 passed the Senate on May 12, 2011. On May 25, 2011, Governor Snyder signed 2011 PA 38 and a series of other laws, PA 41 through 45 of 2011, which amended elements of Michigan employee retirement laws to eliminate the tax exemption for the pensions of retired state and public school employees born after 1945.

Subsequently, on May 31, 2011, Governor Snyder requested an advisory opinion from this Court concerning the constitutionality of 2011 PA 38, which provided $343 million toward the financing of his $1.7 billion elimination of the Michigan Business Tax in order to pay for this huge corporate tax break. On June 15, 2011, this Court granted Governor Snyder's request to consider "the constitutionality of the reduction or elimination of tax exemption for pension incomes contained in 2011 PA 38" before it took effect on January 1, 2012. 489 Mich 954 (2011). On November 11, 2011, this Court issued *In re Request for Advisory Opinion regarding Constitutionality of 2011 PA 38,* 490 Mich 295 (2011). As a result of this Court's decision, 2011 PA 38 and the related legislation, which entered into effect on January 1, 2012, subjecting to state and local taxation the pensions of Mr. Okrie *et al*.

B. <u>Procedural Facts</u>

On July 9, 2013, Mr. Okrie *et al.* filed a Verified Class Action Complaint with the Court of Claims, then "housed" in the Ingham Circuit Court, Judge Rosemarie E. Aquilina presiding,

claiming that the taxation of the pensions of retired state and retired public school employees born after 1945 was a breach of contract based upon the equitable doctrine of promissory estoppel and also asking for equitable relief. On August 8, 2013, the State filed a Motion for Summary Disposition under MCR 2.116(C)(8) and (10) as to these claims. On August 14, 2013, Mr. Okrie *et al.* filed a Motion for Summary Disposition under MCR 2.116(C)(10) and MCR 2.116(I)(1) in support of their claim for breach of contract based upon the equitable doctrine of promissory estoppel. On the same date, Mr. Okrie *et al.* filed a Motion for Class Certification pursuant to MCR 3.501 and a brief in support of class certification on behalf of similarly situated retired state and public school employees born after 1945.

Subsequently, on September 23, 2013, Mr. Okrie *et al*. filed a brief in opposition to the State's Motion for Summary Disposition. On October 2, 2013, the State filed their response to Mr. Okrie *et al.*'s Motion for Summary Disposition under MCR 2.116(C)(10) and MCR 2.116(I)(1). On October 4, 2013, the State filed their response in opposition to the Motion for Class Certification. On October 9, 2013, Mr. Okrie *et al.* filed a Reply in response to the State's response to their Motion for Summary Disposition under MCR 2.116(C)(10) and MCR 2.116(I)(1), and also a Reply to the State's response to their Motion for Class Certification.

On October 9, 2013, a hearing was held in a packed courtroom before Judge Aquilina on the parties' cross-motions for summary disposition as to Mr. Okrie *et al*.'s breach of contract claim based upon the doctrine of promissory estoppel and equitable relief, and motion for class certification. On the same date, Judge Aquilina granted Mr. Okrie *et al.*'s Motion to file an Amended Verified Class Action Complaint adding claims for breach of employment contract and unjust enrichment under state law, as well as claims for violations of the Contract Clauses, the

Takings Clauses, and Substantive and Procedural Due Process Clauses under the state and federal constitutions.

Thereafter, on November 1, 2013, Mr. Okrie *et al.* filed a Motion for Summary Disposition and Brief in Support of his motion as to these added claims, and noticed this motion for a hearing before Judge Aquilina on December 13, 2013 at 9:00 a.m. On November 6, 2013, the State likewise filed a Motion for Summary Disposition and Brief in Support of its motion as to these claims. In an Opinion and Order dated November 5, 2013, Judge Aquilina granted the State's Motion for Summary Disposition under MCR 2.116(C)(10), denied Mr. Okrie *et al.*'s Motion for Motion for Summary Disposition under MCR 2.116(C)(10) and MCR 2.116(I)(1), and denied his Motion for Class Certification under MCR 3.501 as "moot." **(EX. 2**). On November 25, 2013, Mr. Okrie *et al.* filed a Motion for Reconsideration of the Court's November 5, 2014 Opinion and Order.

In the meantime, however, on November 13, 2013, Governor Snyder, a party defendant in this matter, signed into law 2013 PA 164 transferring the Court of Claims from the Ingham Circuit Court to the Court of Appeals. On November 14, 2013, Court of Appeals Judge Talbot, acting as Chief Judge of the Court of Claims, issued an order staying the proceedings in the cases pending in the Court of Claims as of November 13, 2013, including this case. Thereafter, Court of Appeals Judge Servitto was assigned to act as a Court of Claims judge in this case. Subsequently, on February 10, 2014, Judge Servitto issued an Opinion and Order denying the Motion for Reconsideration of Judge Aquilina's November 5, 2013 Opinion and Order. **(EX. 3**).

Mr. Okrie *et al.* then filed a Second Amended Verified Class Action Complaint on February 24, 2014, adding claims for breaches of the purchase service credit contracts and

Member Investment Plan (MIP) contracts. Mr. Okrie *et al.* also filed an Amended Motion for Class Certification as to their Second Amended Verified Class Action Complaint. Subsequently, on March 13, 2014, Mr. Okrie *et al.*'s counsel received a letter dated March 12, 2014 from Judge Servitto stating that the State had filed a second motion for summary disposition on November 6, 2013, but that there was no record of an answer filed by Mr. Okrie *et al.*, and that the State had yet to respond to their Second Amended Verified Class Action Complaint. The letter also informed Mr. Okrie *et al.*'s counsel that his Motion to file a Second Amended Verified Class Action Complaint and the State's Motion for Summary Disposition would be decided on March 25, 2014, but without a hearing to allow the parties to argue their claims orally to the court and answer any questions. Mr. Okrie *et al*. then filed a Response in opposition to the State's Motion for Summary Disposition on March 17, 2014, requesting that the State's Motion for Summary Disposition be denied, that their Motion for Summary Disposition be granted, that they be allowed to amend their complaint to add two claims for breach of the service credit purchase and breach of the Member Investment Plan (MIP) contract, and that this Court grant their Motion for Class Certification as to their Second Amended Verified Class Action Complaint.

Thereafter, in an Opinion and Order dated April 21, 2014, Judge Servitto granted the State's Motion for Summary Disposition under MCR 2.116(C)(10), denied Mr. Okrie *et al.*'s Motion for Summary Disposition under MCR 2.116(C)(10) and MCR 2.116(I)(1), their motion to file a Second Amended Verified Class Action Complaint and their Motion for Class Certification under MCR 3.501. **(EX. 4**). On May 7, 204, Mr. Okrie *et al.* filed a timely Motion for Reconsideration from the Court's April 24, 2014 Opinion and Order. Apparently, on June 17, 2014, Judge Servitto denied Plaintiffs' Motion for Reconsideration but the order was not entered

into the public record until March 12, 2015 **(EX. 5**). Thereafter, Mr. Okrie *et al.* filed a timely appeal as of right with the Court of Appeals from the Court of Claims' orders dismissing their claims.

On June 16, 2016, the Court of Appeals (Sawyer, PJ, and Hoekstra and Wilder, JJ), issued an unpublished opinion affirming the Court of Claims' orders: (1) granting the State of Michigan's motion for summary disposition under MCR 2.116(C)(8) and (C)(10) regarding all eight counts of Mr. Okrie *et al*.'s First Amended Complaint; (2) denying Mr. Okrie *et al.*'s cross-motion for summary disposition; (3) denying Mr. Okrie *et al.*'s motion to file a second amended complaint; and (4) denying, as moot, Mr. Okrie *et al.*'s motion for class certification. **(EX. 1**). On June 29, 2016, Mr. Okrie *et al*. filed a Motion for Reconsideration, which the Court of Appeals denied on August 2, 2016. (**EX. 6**)

ARGUMENT

A. Standard of Review

MCR 2.116(C)(10) provides that judgment may be granted where "there is no genuine issue as to any material fact." A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkeley*, 461 Mich 73, 76 (1999). On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561 (2003). In addition, MCR 2.116(I)(1) states that "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other

proofs show that there is no genuine issue of material fact," then the court must "render judgment without delay." S*ee Ford Motor Co v Bruce Twp,* 264 Mich App 1, 15 (2004).

B. <u>Legal Discussion</u>

I. Pursuant to *Associated Builders and Contractors v City of Lansing*, the Court of Appeals Was Bound by *Campbell v Judges' Retirement Bd*, 378 Mich 169 (1966).

In *Associated Builders and Contractors v City of Lansing*, Docket No. 149622, Decided May 17, 2016, this Court expressly held:

> The Court of Appeals is bound to follow decisions by this Court except where those decisions have clearly been overruled or superseded, and is not authorized to anticipatorily ignore our decisions where it determines that the foundations of a Supreme Court decision have been undermined. (*Id*. at slip op p 13) (Emphasis in original; footnotes omitted)

Pursuant to the rule stated in *Associated Builders and Contractors*, the Court of Appeals was bound by *Campbell v Judges' Retirement Bd*, 378 Mich 169 (1966).

As already observed, the Attorney General's formal opinion (1991 OAG No. 6697) recognized that in *Seitz v Probate Judges Retirement System*, 189 Mich App 445 (1991), the Court of Appeals, relying upon *Campbell, supra* at p 180, held that the provisions of Const 1963, art 1, § 10, and US Const, art 1, § 10, "provide that vested rights acquired under a contract may not be destroyed by subsequent state legislation." Referencing *Campbell, supra* at pp 181-182, *Seitz* expressly held:

> In a nutshell, the principle of law to be applied is that the Legislature may increase pension benefits but not reduce them with respect to those individuals who have accrued rights under the pension plan at the time of the legislative enactment. . . Thus, while the Legislature may change public pension plans from time to time, including adding restrictions on benefits, the state may not reduce the pension benefit of any state employee or official, or local employee or official, once a pension right has been granted. (189 Mich App at 455-456).

Specifically, in *Campbell*, this Court recognized that "[v]ested rights acquired under contract may not be destroyed by subsequent State legislation or even by an amendment of the State Constitution." 378 Mich at 180. Thus, this Court ruled:

> We hold that a valid contract was entered between judges and the State, and that the State's agreement thereunder to pay the judges certain benefits created vested rights for the judges upon their retirement, that these are enforceable and cannot be impaired or diminished by the State. This should be deemed to include not only the benefits provided by statute at the time of entry into the contract and of retirement, but, also, those later added by statutory amendment***.*** ***The legislature may add to but not diminish benefits without running afoul of [the] constitutional prohibition against impairment of the obligation of a contract.*** [*Id*. at 181-182 (Emphasis added)].

In the present case, the State, through the retroactive application of 2011 PA 38 and the related legislation eliminating the tax exemption for public pensions of retired state and public school employees born after 1945, abrogated the retirement benefits earned by Mr. Okrie *et al*. as deferred compensation for their years of governmental service to the State. As explained in *Campbell* and *Seitz,* the elimination of the tax exemptions for Mr. Okrie *et al*., without providing them with financial benefits equal to, or greater than, the value of the tax exemptions, violated the provisions of Contract Clauses under Const 1963, art 1, § 10, and US Const, art I, § 10.

Here, this Court's opinion in *Campbell* (pursuant to *Associated Builders and Contractors*) and the Court of Appeals' published opinion in *Seitz* (pursuant to MCR 7.215 (J)(1)) were binding on the Court of Appeals as they apply with equal force to contractual retirement benefits earned by Mr. Okrie *et al.* in the form of tax exemptions or their equivalent value which cannot be diminished "without running afoul of [the] constitutional prohibition against impairment of the obligation of a contract. *Campbell, supra* at pp 181-182. In particular, the Court of Appeals

was bound by *Campbell* because this Court has never "*clearly* overruled or superseded" its decision in that case. In short, *Campbell* remains good law.

Contrary to the State's claim, neither *Studier v Mich Pub Sch Employees' Retirement Bd,* 472 Mich 642 (2005) nor *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295 (2011) changes this result. First, reliance upon *Studier* is misplaced because that case dealt with amendments to the MPSERS health care plan that increased deductibles, and not the vested rights to an integral part of the retirement benefits earned by Mr. Okrie *et al*. as deferred compensation for their years of governmental service to the State. As *Studier* recognized, "vested rights" is a term associated with ***contractual relationships*** with the State, such as here. *Studier, supra*, 472 Mich at 663-664. Thus, *Studier* is clearly distinguishable from the present case and does not "clearly overrule[] or supersede[]" *Campbell*.

Second, this Court's decision in the *Advisory Opinion* is not precedentially binding in the present litigation. See *In re Certified Question (Bankey v Storer Broadcasting Co),* 432 Mich 438, 467-471 (1989) (noting that advisory opinions are not precedentially binding since the Court addresses questions without having before it adverse parties to existing controversies and thus acts not as a court but as the constitutional adviser of the other departments of government). Further, the *Advisory Opinion*, as an advisory opinion, did not address the precise claims and legally supported arguments being made by Mr. Okrie *et al.* here, particularly, the contract claim based upon the doctrine of promissory estoppel. Indeed, this case presents an "as applied" constitutional challenge to 2011 PA 38, which was not addressed in the *Advisory Opinion*.

Therefore, the Court of Appeals clearly erred as a matter of law by not following this Court's decision in *Campbell* (pursuant to *Associated Builders and Contractors*), or *Seitz* (pursuant to MCR 7.215 (J)(1)).

II. The State Breached Mr. Okrie *et al.*'s Public Employment Contracts By Taking Away Retirement Benefits Earned As Deferred Compensation for Their Years of Governmental Service Without Providing Alternative Benefits That Are Equal to, or Greater Than, the Value of the Tax Exemptions that Were Eliminated by 2011 PA 38 and the Related Legislation.

It is a fundamental proposition of law that public employees have a constitutionally-protected contractual right to compensation that has been earned through services rendered. *Mississippi ex rel Robertson v Miller*, 276 US 174, 178-79 (1928). This right is not based upon statutory language but rather is implied from the fact that the employee rendered services in exchange for the promised compensation. *Id*. at 179 ("But after services have been rendered by a public officer under a law specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed."). *Id*. at 179. This fundamental proposition of law was reinforced by the U.S. Supreme Court in *Lynch v United States*, 292 US 571, 579 (1934), which noted that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." As Justice Brandeis incisively observed in *Lynch*, quoting the *Sinking-Fund Cases,* 99 U.S. 700, 719 [1879]:

> Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. ***To abrogate contracts, in the attempt to lessen***

> ***government expenditure, would be not the practice of economy, but an act of repudiation*. *"The United States are as much bound by their contracts as are individuals*. *If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a* ***State*** *or a municipality or a citizen*." (Emphasis added.) [*Id*. at 580][6]

Accordingly, to the same extent as any private employer, the State of Michigan cannot breach its contracts with Mr. Okrie *et al.* as to their retirement benefits earned as deferred compensation for their years of governmental service to the State.

1. The Elements of a Unilateral Employment Contract.

This Court has defined a contract as an agreement, supported by sufficient consideration, to do or not to do a particular thing. *McInerney v Detroit Trust Co*, 279 Mich 42, 46 (1937). See *Cain v Allen Electric & Equipment Co*, 346 Mich 568, 579 (1956), quoting 1 Corbin on Contracts, § 13. ("A promise is an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future, communicated in such manner to a promise that he may justly expect performance and may reasonably rely thereon."). As a general rule, employment contracts are considered to be unilateral and may be accepted only by performance, and thus a promisor does not receive a promise in return as consideration. *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 138 n 9 (2003). Specifically, as explained by the Michigan Court of Appeals in *Cunningham v 4-D Tool*, 182 Mich App 99, 106 (1989).

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[6] See also *Horowitz v United States*, 267 US 458, 461 (1925), quoting *Jones v United States*, 1 Ct Cl 383, 384 (1865) ("In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court."); *Perry v United States,* 294 US 330, 351 (1935) ("To say that the Congress may withdraw or ignore [its] pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledger. ***This Court has given no sanction to such a conception of the obligations of our Government***."). (Emphasis added.)

> Employment contracts can generally be described as unilateral contracts, a unilateral contract being one in which the promisor does not receive a promise in return as consideration. 1 Restatement Contracts, §§ 12, 52; pp 10-12, 58-59. The employer makes an offer or promise which the employee accepts by performing the act upon which the promise is expressly or impliedly based. The employer's promise constitutes, in essence, the terms of the employment agreement; the employee's action in reliance upon the employer's promise constitutes sufficient consideration to make the promise legally binding. *Toussaint* [*v Blue Cross & Blue Shield of Michigan*, 408 Mich 579], 630-631 [1980]; *In re Certified Question*, 432 Mich 438, 444-447; 443 NW2d 112 (1989).[7]

Thus, in *Psutka v Michigan Alkali Co*, 274 Mich 318, 319 (1936), this Court held that a pension and death benefit plan for employees to which they contributed no monetary consideration was a contract supported by ample consideration in order attract more competent workers, induce better and more continuous services, and avoid expense of labor turnover. Similarly, in *Gaydos v White Motor Corp*, 54 Mich App 143, 148 (1974), the Court of Appeals held that that the adoption by the employer of a policy of severance pay constituted an offer of contract and work thereafter by employees supplied consideration for unilateral contract, on which employees had the right to rely. As the Court of Appeals noted in *Gaydos*, "[w]e cannot agree that the severance pay provision was merely a 'unilaterally promulgated policy' or a gratuity. The adoption of the described policy by defendant constituted an offer of a contract." The reasoning underlying *Psutka* and *Gaydos* applies with equal force to the present case.

2. Mr. Okrie *et al.* had contractual relationships with the State for retirement benefits earned as deferred compensation for their years of governmental service payable in the form of tax-exempt pensions or financial benefits equal to, or greater than, the value of the tax exemptions that were eliminated.

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[7] See Mark Petit, *Modern Unilateral Contracts*, 63 BU L Rev 551, 563 (1983)("Most modern courts characterize employment benefits as forms of compensation (usually deferred compensation) that employees earn just as they earn wages or salaries.") (Footnotes omitted).

In this case, the undisputed facts show that Mr. Okrie *et al*. entered into contractual relationships in which the State promised to pay retirement benefits earned as deferred compensation in the form of a tax-exempt pensions after (1) they had vested in one of the DB plans administered by the ORS covering public school employees under MPSERS and state employees under MSERS; (2) made irrevocable employment termination decisions; (3) retired; and (4) resided thereafter in the State of Michigan (or a state having a reciprocity agreement with the State of Michigan). See *Opinion of the Justices*, 364 Mass 847; 303 NE 320 (Mass 1973) (holding that a statute providing membership in the retirement system establishes contractual rights and benefits). Having received the benefits of their employment in exchange for the promise of retirement benefits as deferred compensation in the form of tax-exempt pensions, the State thus entered into an enforceable binding contract, which it breached by depriving Mr. Okrie *et al*. of an ***integral*** part of their retirement benefits that they had earned for their years of governmental service, without providing alternative benefits in their place that are equal to, or greater than, the financial benefits represented by the tax exemptions that were eliminated by 2011 PA 38 and the related legislation. *Davis I, supra*, 160 Mich App at 105 (holding that "income tax exemption is an integral part of the retirement benefits conferred upon state employees"); see also *Davis III, supra*, 179 Mich App at 668 (holding that retired state employees have "reliance interests" in the tax-exemptions that represent an integral part of their retirement benefits).

3. A tax-exempt pension was a term or condition of the public employment contracts in effect at the time Mr. Okrie *et al.* made their irrevocable employment termination and retirement decisions.

A tax-exempt pension was a term or condition of the public employment contracts in effect at the time that Mr. Okrie *et al*. made their irrevocable employment termination and retirement decisions. As the U.S. Supreme Court observed in *Indiana ex rel Anderson v Brand*, 303 US 95, 100 (1938):

> The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent to repeal when a subsequent legislature shall determine to alter that policy. **Nevertheless, it is established that a legislative enactment may contain provisions, which when accepted as the basis of action by individuals, became contracts between them and the State or its subdivisions within the protection of Art I, § 10** [the contract clause of the United States Constitution]. (Emphasis added.) [8]

Under the Supremacy Clause, Article VI of the U.S. Constitution, this Court is **bound** by the U.S. Supreme Court's ruling in *Brand* holding that public contracts are established on the basis of legislative enactments that are accepted as the basis of action by individuals, and thus protectable under the Contract Clause of the U.S. Constitution. See US Const art VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land;. . . ."). That is precisely the case here.

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[8] As Jack M Beerman, *The Public Pension Crisis*, 70 Wash & Lee L Rev 3, 51-52 (2013) noted:

> Unlike the typical regulatory program, pension benefits are earned through government employment and, especially with regard to past services, are compensation for work already performed. In employment situations, perhaps the presumption [that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. *Indiana ex rel Anderson v Brand*, 303 US 95, 104-105 (1938)] should be flipped – it ought to be presumed that promises made based on employment are intended to be contractual. Otherwise, state and local employers would be free to take advantage of employees in exactly the way that the Contract Clause, as applied to the government's own contracts, is supposed to prevent. Further, allowing state and local governments complete freedom to alter employee benefits retroactively could hamper public employers' ability to attract high quality employees or reduce employers' flexibility regarding the timing of pay and benefits if employees refuse to accept *insecure* promises of deferred compensation. (Emphasis added; footnote omitted).

Accordingly, as a matter of contract law, the method of compensation set forth in the pertinent statutes in effect at the time Mr. Okrie *et al.* retired must be considered as part of the terms and conditions of their contractual relationships. See *Seneca Nursing Home v Kansas*, 490 F2d 1324 (CA10 1974) (holding that plaintiffs, by performing the required services, became entitled to the statutory payment amounts since the method of compensation set forth in the statutes was part of the terms and conditions of the contract); *Payne v Bd of Trs of the Teachers' Ins & Ret Fund*, 76 ND 278, 287; 35 NW2d 553, 556 (ND 1948) ("The pension payments are added compensation for service that has been rendered. Such compensation is earned by reason of the service performed and becomes payable upon compliance with the provisions of the law authorizing payment to be made. Manifestly, *the amount of compensation is measured by the terms of the law in force at the time the period of service is terminated.*")(Emphasis added.); *Bakenhus v City of Seattle*, 296 P2d 536, 538 (Wash 1956) ('"But, where . . . services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself.'"), quoting *O'Dea v Cook*, 169 P 366, 367 (Cal 1917). Having performed the requisite years governmental service, vested in one of the state-administered DB plans, made irrevocable employment termination decisions and retired, thereafter residing in the State of Michigan, Mr. Okrie *et al*. are thus entitled to the retirement benefits that they had earned as deferred compensation payable in the form of tax-exempt pensions, as specified in the DB plans at the time they retired, or alternative financial benefits equal to, or greater than, the financial value represented by tax exemptions, as set forth in 1991 OAG No. 6697.

4. **The State may not retroactively apply 2011 PA 38 and the related legislation to Mr. Okrie *et al.*, without providing alternative benefits in their place that are equal to, or greater than, the financial benefits represented by the tax exemptions that were eliminated.**

The retroactive application of 2011 PA 38 and the related legislation, which went into effect on January 1, 2012, would abrogate the contractually vested rights of Mr. Okrie *et al*. to retirement benefits that they earned as deferred compensation for their years of governmental service. Contrary to the State's claim, it was bound by the terms and conditions of the statutes in effect at the time that Mr. Okrie *et al.* made their irrevocable employment termination and retirement decisions based upon the promise of tax-exempt pensions, or the equivalent financial value of the promised tax exemption.

As a general rule, there is a presumption against retroactive legislation. *Eastern Enterprises v Apfel,* 524 US 498, 532-34 (1998) ("Retroactivity is generally disfavored in the law . . . "). Specifically, statutes may not be applied retroactively if they abrogate or impair vested rights. *Landgraf v USI Film Prods*, 511 US 244, 268-270, 280 (1994); *In re Certified Questions*, 416 Mich 558, 572 (1982). In determining whether a statute should be applied prospectively or retroactively, the intent of the Legislature is controlling. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583 (2001). As a general rule, statutes and amendments are presumed to operate prospectively unless they are merely remedial or procedural, were adopted to clarify an existing statute and determine a question regarding its meaning, or the Legislature expressly or impliedly indicated an intent to give retroactive effect. *Detroit v Walker*, 445 Mich 682, 704 (1994). A statute that affects substantive rights is not remedial. *Frank W Lynch, supra* at 585. Accordingly, 2011 PA 38 and the related legislation may not be applied retroactively to

Mr. Okrie *et al.* since that would abrogate their vested rights to retirement benefits earned as deferred compensation for their years of governmental service.

In this regard, it is instructive to consider case law under the Employment Retirement Income Security Act ("ERISA"). [9] Although 29 USC § 1003(b)(1) of ERISA excludes state government plans from its scope, the State should be treated like any private employer under the ERISA, which may not apply an amendment to an ERISA plan if it deprives a beneficiary of promised vested benefits.[10] See *Wheeler v Dynamic Eng'g Inc*, 62 F3d 634, 640 (CA 4 1995). That is because ERISA imposes an obligation on plan administrators to operate the plan according to *current plan documents*, ruling out amendments that alter a plan provision in effect at the time performance under the plan became due. *Curtiss-Wright Corp v Schoonejongen*, 514

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[9] ERISA regulates two types of benefit plans, pension benefit plans that create vested rights and welfare benefit plans that do not need to create vested rights. *Chiles v Ceridian Corp*, 95 F3d 1505, 1510 (CA 10 1996). As explained by the U.S. Supreme Court in *Firestone Tire & Rubber Co v Bruch*, 489 US 101, 113 (1989), "ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits." Under ERISA, "every employee benefit plan shall be established and maintained pursuant to a written instrument" and "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright Corp v Schoonejongen*, 514 US 73, 83 (1995)(citations omitted).

[10] Thus, in *The Public Pension Crisis*, 70 Wash & Lee L Rev at 58, Beerman observes:

> [T]here are very good reasons to treat statutory promises to government employees different from promises contained in other regulatory statutes. Most people have multiple employment options at the outset and at various stages of their careers. Retirement promises form part of the inducement for individuals to choose and remain in government employment . . . . Employees cannot be expected to save two or three times for retirement or change jobs every so often so their retirement promises come from multiple employers. This recognition helps explain why federal law protects private pensions through the ERISA and the programs administered by the Pension Benefit Guaranty Corporation.

US 73, 83 (1995) ("ERISA's statutory scheme is 'built around reliance on the face of written plan documents.") Given that the State was acting as an employer, it thus should be treated no differently than any private employer subject to the requirements of ERISA.

Moreover, contrary to the State's mischaracterization, the State's creation of such policies promising retirement benefits to retired state and public school employees earned as deferred compensation in the form of tax-exempt pensions for services already rendered to the State does ***not*** bind the State in ***perpetuity.*** Rather, it only binds the State to Mr. Okrie and those similarly situated retired state and public school employees who were born after 1945 and who retired before 2011 PA 38 went into effect on January 1, 2012. Simply put, Mr. Okrie *et al.* are ***not*** challenging the Legislature's exclusive power to tax or to eliminate the statutory tax exemptions for public pensions, but only that the revocation of the statutory tax exemptions may not be applied to them retroactively without the State providing alternative financial benefits equal to, or greater than, those represented by the tax exemptions that were eliminated.

5. The State Supreme Court decisions in *Hughes* and *Bailey* issued in the aftermath of U.S. Supreme Court's decision in *Davis* support Mr. Okrie *et al.'s* breach of contract claim for retirement benefits earned as deferred compensation for their years of governmental service.

Mr. Okrie *et al.*'s position is clearly supported by the other state supreme courts that have fully considered this question in the aftermath of the U.S. Supreme Court's decision in *Davis*, such as Oregon Supreme Court in *Hughes v State*, 838 P2d 1018 (Ore 1992) and the North Carolina Supreme Court in *Bailey v State*, 500 SE2d 54 (NC 1998). In *Hughes*, the Oregon Supreme Court addressed a challenge to the Oregon legislature's repeal of the tax exemption contained in the Public Employees' Retirement System ("PERS"), which had been in the Public Employees' Retirement Act since 1945. The Oregon Supreme Court found that the tax

exemption, which induced retired public employees to accept the state's offer of employment, was part of the PERS contract between the state and the retired public employees. *Id*. at 1032. According to the court, the tax exemption had benefitted Oregon by allowing it to receive the services of workers for less upfront pay in exchange for deferred compensation in the form of tax-exempt pensions. As the Oregon Supreme Court recognized:

> Government obtained its employees' services less expensively because the gross cost of providing a more nearly adequate pension amount was lowered by the tax exempt nature of the benefit payments and of the contributions put in trust to purchase annuities payable at the time of each employee's future retirement. . . . Less expense meant that less tax money was exacted from the taxpayers in general over past years to fund a public employee's salary and benefits. . . . Government proposes to keep the benefit of lower cost, but to take away the promise that its employees accepted in order to lower that cost, thereby keeping the benefit of its bargain but depriving the employees of the benefit of theirs. [*Id*. at 1042 n 7].

Similarly, *Bailey* supports Plaintiffs. There, the North Carolina Supreme Court ruled that capping the tax exemption deprived public employees of their vested contractual right to already earned benefits. The court based its decision on "the premise that retirement benefits are presently earned but deferred compensation to which employees have a vested contractual right" and that the tax exemption was a term of that contract. 500 SE2d at 60, 63. Specifically, the North Carolina Supreme Court held:

> The necessity for the State to be bound to its contractual obligations is clear when the Act in question is compared with the long-established practice of the issuance of municipal bonds. The State regularly enters into contracts for tax exemptions in connection with its issuance of municipal bonds and the creation of its obligations thereunder. In exchange for paying a lower rate of interest, the State agrees by statutory exemption to forgo taxation of the income or gain on the bonds. The State's policy of entering into a contract for a tax exemption clearly serves a public purpose by inducing needed investment for important projects while paying a lower-than-market rate of interest.

The State's action here in changing the taxability of vested retirement benefits is no different than if the State issued tax-free bonds, collected hundreds of millions of dollars for their purchase, and then retrospectively repealed investors' tax-free interest and capital gain advantages. However, under application of defendants' premise, this is precisely what the State could do. The basis for prohibiting such action is fundamental fairness. As the Pennsylvania Supreme Court so eloquently stated:

> According to the cardinal principle of justice and fair dealings between government and man, as well as between man and man, the parties shall know prior to entering into a business relationship the conditions which shall govern that relationship. *Ex post facto* legislation is abhorred in criminal law because it stigmatizes with criminality an act entirely innocent when committed. The impairment of contractual obligations by the Legislature is equally abhorrent because such impairment changes the blueprint of a bridge construction when the spans are half way across the stream.

Hickey v Pension Bd, 378 Pa. 300, 309-10, 106 A2d 233, 237-38 (1954).

Here, in exchange for the inducement to and retention in employment, the State agreed to exempt from state taxation benefits derived from employees' retirement plans. This exemption certainly was for a public purpose, as it was a significant difference between governmental and comparable private employment that helped attract and keep quality public servants in spite of the generally lower wage paid to state and local

employees. Thus, the State entered into a contract for, *inter alia*, a tax exemption for a public purpose. [*Id*. at 65].[11]

6. The United States Supreme Court's decision in *Winstar* supports Mr. Okrie *et al.*'s claim for contract damages.

The U.S. Supreme Court's decision in *United States v Winstar Corp*, 518 US 839 (1996) also lends constitutional protection to the contractual entitlement of Mr. Okrie *et al*. to retirement

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[11] As Raven Merlau cogently observed in *The State Giveth And The State Taketh: Constitutional Pension Protections And The Retroactive Removal of Public Pension Tax Exemptions*, 19 Geo Mason L Rev 1229, 2256 (2012):

> **A tax-exempt pension is, without question, more valuable than a nonexempt pension.** If public employees are willing to accept lower wages because of the prospect of receiving greater deferred compensation, public employees would be willing to accept even lower wages if the later compensation were of higher value. Tax exemptions create just such an increase, thus functioning as part of the consideration a public employee accepts in forming an employment contract with the state.
>
> When states repeal their tax exemptions, they modify their employees' employment contracts – often years after employees rendered their service. In doing so, they retroactively change the structure of the original bargain that they struck with their employees. As the Oregon Supreme Court noted in *Hughes* [v *State*, 838 P2d 1018, 1042 n 7 (Ore 1990)], this unfairly allows the state to retain the benefit of the original bargain (receiving the employee's services at a lower wage than would otherwise have been paid), while depriving the employee of her half of the bargain (more pay later).
>
> Noting this unfairness, the North Carolina Supreme Court in *Bailey* analogized a state's taxing of previously exempt public pensions to a state issuing tax-exempt bonds and then subsequently taxing them. The analogy is apt. When a purchaser of a tax-exempt municipal bond accepts a lower interest rate than is available on commercial bonds, he does so because the state's promise not to tax the bond's interest adds value to the investment; without this assurance, no rational investor would accept the lower municipal interest rate. Removing the tax exemption when the investor attempts to redeem the bond would fundamentally rework the original bargain and violate the terms of the original purchase contract. *Removing a tax exemption from vested pension rights – years after the employee has performed the work – is no different. In both cases, the state has used a tax exemption to induce individuals to accept worse terms than are available elsewhere, and it is fundamentally inequitable for the state to later remove the future benefit it promised up front*. (*Id*. at 1251-53; emphasis provided; footnotes omitted.)

benefits earned as deferred compensation payable in the form of tax-exempt pensions or comparable financial benefits, given the subsequent changes in the tax laws eliminating tax exemptions for public pensions. In *Winstar*, the U.S. Supreme Court affirmed that, when acting in its contracting capacity, the government should be held to ordinary contract principles in order to remain a reliable contracting party. Specifically, *Winstar* stands for the proposition that the government will be liable for contract damages if, as a result of a subsequent change in the tax law, the United States denies a contractor the benefit of an earlier bargain. Thus, in *Winstar,* the U.S. Supreme Court held that the government is liable for damages when a subsequent, targeted change in the tax law is made that deprives a contracting party of favorable tax treatment that the government specifically used as an inducement or consideration.

Specifically, in *Winstar*, the U.S. Supreme Court held that the government cannot abrogate contractual promises of favorable tax treatment that the government made to induce investors to buy failing savings and loan institutions. In particular, the government allowed acquiring institutions to count the excess of the purchase price over the failing S&Ls' assets as "supervisory goodwill," which could be used as capital toward meeting federal capital reserve requirements. When subsequent legislation forbade this treatment, Winstar and several other acquiring institutions sued for contract damages. The U.S. Supreme Court agreed with Winstar that the government breached its contract when Congress passed legislation specifically eliminating a deduction that induced the purchase of the failing S&Ls.

Accordingly, "the Supreme Court's decision in *Winstar* establishes that while a contract may not interfere with Congress' power to enact tax legislation, the contract may nonetheless bind the government to pay damages in the event such legislation is found to breach the

contract." *Centex Corp v United States*, 395 F3d 1283, 1309 (Fed Cir 2005) (upholding a sizeable damage award for the government's breach of contract with Centex, an investment firm that agreed to help with the S&L bailout, when Congress passed legislation specifically eliminating a deduction for compensated losses). As the US Claims Court observed, ***"[a]ny alteration of this principle would undercut our democratic system. It would allow governmental policies to be paid for with a minority's rights***." *Winstar Corp v United States*, 25 Cl Ct 541, 549 (1992) (Emphasis added).

The same principles hold here with even greater force. Specifically, a claim for breach of public employment contracts arises here since a subsequent change in the tax law by the State Legislature that was signed by Governor Snyder deprived Mr. Okrie *et al*. of favorable tax treatment that the State explicitly used for decades as an inducement or consideration to attract and retain state and public school employees at lower salaries and wages, as recognized by the Court of Appeals in *Davis I* and the U.S. Supreme Court in *Davis II*. Here, Mr. Okrie *et al*.'s contract claim does not bar or interfere with the Legislature's exercise of its taxing power. It merely ensures that if the exercise of the State's taxing power breaches a particular contractual obligation, the injured party will have redress for the breach. See *Centex, supra* at 1309. Based upon that fundamental principle underlying *Winstar*, Mr. Okrie *et al*. established their claim for breach of employment contracts and thus request that this case be remanded to the Court of Claims for the calculation of damages.

III. Alternatively, the State Breached the Implied Contracts with Mr. Okrie *et al.* Based upon the Doctrine of Promissory Estoppel By Taking Away Retirement Benefits Earned As Deferred Compensation for Their Years of Governmental Service Without Providing Alternative Benefits That Are Equal to, or

Greater Than, the Value of the Tax Exemptions that Were Eliminated by 2011 PA 38 and the Related Legislation.

1. The Doctrine of Promissory Estoppel

The equitable remedy of promissory estoppel is a common-law rule of contract law that essentially makes a promise an enforceable contract, despite the lack of the necessary elements for the formation of a contract. *Huhtala v Travelers Ins Co*, 401 Mich 118 (1977); *State Bank of Standish v Curry*, 442 Mich 76 (1993). As this Court noted in *State Bank of Standish*:

> Justice Cooley long ago explained the premise of promissory estoppel:
>
> > The doctrine of estoppel rests upon a party having directly or indirectly made **assertions, promises or assurances** upon which another has acted under such circumstances that he would be seriously prejudiced if the assertions were suffered to be disproved or the promises or assurances to be withdrawn. [*Maxwell v Bay City Bridge Co*, 41 Mich 453, 467; 2 NW 639 (1879).] (442 Mich at 95 (Emphasis added.))

Specifically, the elements of promissory estoppel are: (1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) the circumstances such that the promise must be enforced if injustice is to be avoided. *Crown Technology Park v D&N Bank, FSB,* 242 Mich App 538, 548-549 (2000); see also Restatement (Second) of Contracts, § 90 (1981). "Promissory estoppel . . . substitutes for consideration in a case where there are no mutual promises, enabling the promisee to assert a separate claim against the promisor, independent of any other claim he may have against the promisor." *Huhtala, supra,* 401 Mich at 133. "The guiding principle in determining an appropriate measure of damages is to ensure that the promise is compensated for the loss suffered to the extent of the promisee's reliance." *Joerger v Gordon Food Serv*, 224 Mich App 167, 173-174 (1997) (citations omitted).

2. The State promised Mr. Okrie *et al.* that their pensions were exempt from state and local taxation when they retired.

Here, there is undisputable evidence that the State, through the ORS, administering MPSERS and MSERA, expressly promised retirement benefits earned as deferred compensation by Mr. Okrie *et al.* for their years of governmental service payable in the form of tax-exempt pensions. Indeed, there was nothing vague or uncertain in the Retirement Guidelines booklets and other publications issued to state employees and public school employees over the course of several decades about the State's unqualified promise that DB pensions were exempt from state and city income tax upon retirement. For example, the MPSERS Retirement Guidelines repeatedly stated for years in their brochures:

> **TAX OBLIGATIONS**
>
> **State and local income tax**
>
> Pensions paid by MPSERS are exempt from Michigan state and city income tax. **Although you are exempt from paying Michigan income tax, you must file state and city (if applicable) tax returns acknowledging your MPSERS pension and claiming your exemptions**. (Emphasis in original).

In almost identical language, the ORS, administering the State Employees Retirement Act (MSERA), regularly and consistently promised state employees covered by MSERA (civil Service employees as well as appointed officials in the Executive branch and employees of the Legislature and Judiciary) that their pension benefits were exempt from state and local (but not federal) taxation. For example, a booklet prepared by ORS, issued through MSERA, regularly promised state employees over the past several decades: "**Your Pension is exempt from Michigan and local income taxes**." See www.michigan.gov/ORSstateDB, p 29. The State also

furnished its employees with booklets entitled "Retirement Guidelines" telling its employees that "The Retirement Guidelines" booklet should be carefully reviewed prior to retirement. Under the heading "Tax Obligations," the Guidelines booklet informed state employees:

> **TAX OBLIGATIONS**
>
> **State and local income tax**
>
> **Pensions paid by the State Employees' Retirement System are exempt from Michigan state and city income tax. Although you are exempt from paying Michigan income tax, you must file state and city (if applicable) tax returns acknowledging your state pension and claiming your exemptions.**

Thus, the clear and unequivocal language in these statements conveys the unmistakable promise not to tax pensions earned by state and public school employees after they retired. Importantly, this promise to exempt the pensions of retired state and public school employees from state and city taxes is in marked contrast to the statements making it clear that their pensions were subject to federal income tax.

3. The State reasonably expected to induce action of definite and substantial character on the part of Mr. Okrie *et al.* in making their irrevocable employment termination and retirement decisions.

Further, it is obvious that the State should have (for decades) reasonably expected these statements to induce action of a definite and substantial character on the part of Mr. Okrie *et al.*, who justifiably relied upon this promise in planning their retirement before making the irrevocable employment termination and retirement decisions. Indeed, the State, through the Department of the Treasury, consistently and faithfully carried out this policy for decades by not taxing the DB pensions of retired state and public school employees. In fact, after the enactment of the Income Tax Act, the Legislature amended the State Employees Retirement Act ("SERA")

more than 17 times between 1968 and 2010, but never opted to repeal the SERA tax exemption (until 2011). The fact that this policy and practice went unaltered for decades clearly supports the proposition that the State should reasonably have expected to induce action of a definite and substantial character on the part of Mr. Okrie *et al.* and in fact did produce such action on their part.

Specifically, in deciding to terminate their public employment and making retirement plans, Mr. Okrie *et al*. calculated what income they expected to have in retirement based upon the State's explicit promises made to them for decades that their pensions were not subject to state and local taxation. It is indisputable that like other retired state and public school employees who came before them, Mr. Okrie *et al.* reasonably relied upon the State's repeated promises that their DB pensions were exempt from state and city income tax. It is also undisputed that the promised tax exemptions provided Mr. Okrie *et al*. with financial benefits that resulted in greater net monetary payments to them as retirees than nonexempt pensions.

4. The State's "assertions, promises, or assurances" that Mr. Okrie *et al.*'s pensions were exempt from state and local taxation when they retired were backed up by the Court of Appeals' binding legal rulings in the *Davis* litigation and the Attorney General's formal opinion in 1991 OAG No. 6697.

Here, there can be little doubt that the "***assertions, promises or assurances***" made by the State, through the ORS, as backed up by the ***binding legal rulings*** of the Court of Appeal's in *Davis v State of Michigan*, 160 Mich App 98 (1987)("*Davis I*") and *Davis v Dep't of Treasury*, 179 Mich App 683 (1989)("*Davis III*"), as well as the Attorney General's formal opinion, 1991 OAG No. 6697, issued after *Davis III*, reinforced Mr. Okrie *et al*.'s justifiable reliance on the State's promise to pay retirement benefits earned as deferred compensation payable in the form

of tax exemptions, or to provide them with alternative financial benefits that were equal to, or greater than, the value of the tax exemptions if the tax exemptions were eliminated. Specifically, the Court of Appeals in *Davis I,* agreeing with the Attorney General, recognized the tax exemptions were an **integral part of the retirement benefits** earned by retired state employees for their years of governmental service upon vesting in one of the DB pension plans administered by the State and then making the irrevocable decision to terminate their employment, retire and thereafter reside in the State of Michigan. Moreover, the Court of Appeals held in *Davis III* that retired state employees had "***reliance interests***" in the continuation of the tax exemptions and implied that it would be "inequitable" for the State to eliminate them. Surely, the Court of Appeals' legally binding opinions in *Davis I* and *Davis III* were entitled to "reasonable reliance" by Mr. Okrie *et al.?* Although *Davis III's* decision was based on "what would the enacting Legislature have done if it had known that its statute was flawed by the unconstitutional classification," it is also legally significant that the Legislature acquiesced to this decision for more than 20 years, lending yet more "reasonable reliance" upon *Davis III* since the Legislature left it untouched for so many years.[12]

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[12] Even though the doctrine of legislative acquiescence is not recognized in this state as a doctrine of statutory construction, see *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 177-178 n 33 (2000) (noting that "the legislative acquiescence doctrine 'is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence'") (Citation omitted; emphasis omitted.), it does not thereby follow that legislative acquiescence may not be used in the promissory estoppel context to support Mr. Okrie *et al.'s* "reasonable reliance" upon *Davis III* and the Attorney General's formal opinion in 1991 OAG No. 6697. See, e.g., *Citizens Action Coalition v Northern Indiana Public Service Co*, 485 NE2d 610, 616 (Ind 1985) (stating that "the doctrine of legislative acquiescence is an estoppel doctrine designed to protect those who rely on a long standing administrative interpretation").

Furthermore, while the Attorney General's formal opinions are not binding upon the courts, ***they are binding upon the state agencies and officers*** until courts make a pronouncement on the issue, and thus may be relied upon in good faith as carrying "great weight," as they can be regarded as "persuasive authority" by the judiciary. *Frey v Dep't of Management & Budget*, 429 Mich 315, 338 (1987); *Traverse City School Dis v Attorney General*, 383 Mich 390, 407 n 2 (1971); *Indenbaum v Michigan Bd of Medicine (After Remand),* 213 Mich App 263, 274 (1995). Thus, when Mr. Okrie *et al*. made the irrevocable decision to terminate their employment with the State, retire and then reside in the State of Michigan thereafter, they had every reason to believe that they were entitled to financial benefits equal to, or greater than, those represented by the tax exemptions if the tax exemptions were eliminated.

Contrary to the State's contention (COA Df. Br., p 15), the ORS was clothed with actual or apparent authority as an agent of the State to make such "assertions, promises or assurances" that their pensions were tax-exempt, which induced Mr. Okrie *et al*.'s reasonable reliance upon them in making employment and retirement termination decisions. See *Detroit v Detroit Police Officers Assoc*, 408 Mich 410 (1980)(noting that an official may be clothed with authority to make statements about the operation of the law). While the State claims that "Okrie [sic] neglects to mention that [1998 edition of the "MPSERS Guidelines" booklet] also contains specific disclaiming, language that expressly and unambiguously states that the benefit information provided is governed by the Retirement Act and is subject to change" (COA Df. Br, p 17), the cited paragraph contains no such disclaimer – it essentially states that "[i]f the provisions of the Act conflict this summary, the Act controls." But at the time that Mr. Okrie *et al*. retired in reasonable reliance upon the "assertions, promises or assurances" made by the ORS

in retirement booklets, forms and seminars, there was no conflict at all, and certainly no reason to expect that the State would take away, after they retired, their earned retirement benefits, which represented deferred compensation payable to them in the form of tax-exempt pensions, without paying equivalent financial benefits if the tax exemptions were eliminated, as set forth in the binding legal opinion of the Attorney General in 1991 OAG No. 6697. Thus, there is no question that Mr. Okrie *et al.* reasonably relied upon the "assertions, promises or assurances" of the ORS since they were validated by the Attorney General himself in a binding formal legal opinion that went unchallenged for 20 years.

Moreover, when Mr. Okrie and the 100,000+ similarly situated retired state and public school employees made irrevocable decisions to terminate their state employment and retire before January 1, 2012 in reasonable reliance upon the advice contained in statements repeatedly made for decades by the ORS in Retirement Guidelines booklets, in seminars, and on retirement forms that their pensions were exempt from state and local income tax, those statements by the ORS accurately reflected the language of the statutory provisions in force at the time of they made their irrevocable employment termination and retirement decisions. It is important to underscore that for *decades* before 2011 PA 38 eliminating tax exemptions for public pensions became effective on January 1, 2012, there *never* was any conflict with the relevant statutes in effect regarding the promise that the retirement benefits earned as deferred compensation were payable in the form of tax-exempt pensions, especially since the Court of Appeals in *Davis I* validated that the "the income tax exemption is an integral part of the retirement benefits conferred upon state employees." 160 Mich App at 105. Thus, there was objectively no reason for Mr. Okrie *et al*. to think or expect that their pensions would be subject to state and local

taxation after they retired, without the provision of equivalent financial benefits, as set forth in 1991 OAG No. 6697.

5. The State should be judicially and equitably estopped from asserting positions in the present case that are inconsistent with, or contrary to, those taken in the *Davis* litigation and expressed in 1991 OAG No. 6697.

Based upon the foregoing, the State should therefore be judicially and equitably estopped from asserting positions in the present case inconsistent with, or contrary to, those taken in the *Davis* litigation and expressed in the 1991 OAG No. 6697. See *Lichon v American Universal Ins Co*, 435 Mich 408, 416 (1990) ("Under this doctrine, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding."), citing *Edwards v Aetna Life Ins Co*, 690 F2d 595, 598 (CA 6, 1982); *Paschke*, 445 Mich at 509-510. Further, contrary to the State's assertion, it was the State of Michigan, not Mr. Okrie *et al*., that "proceeded at [its] own peril" by taking away the promised retirement benefits earned as deferred compensation payable in the form of tax-exempt pensions without providing them comparable financial benefits, equal to or greater than those represented by tax-exempt pensions. Indeed, because the ORS, as "your partner in retirement," repeatedly directed public employees for decades to rely upon its representations in the Retirement Guidelines booklets for the purpose of making "benefit decisions" at the time of retirement, the State should also be equitably estopped from contesting the actual reliance by Mr. Okrie *et al.* upon the State's unqualified promises not to tax their pensions after they retired. *Hetchler v American Life Ins Co*, 266 Mich 608, 613 (1934).

Accordingly, given the incontestable juridical fact that tax exemptions represented retirement benefits earned as deferred compensation for previously rendered governmental service, the doctrine of promissory estoppel is thus applicable because the State breached its implied contracts with Mr. Okrie et *al*. when it began to tax their DB pensions after January 1, 2012, pursuant to 2011 PA 38 and the related legislation, without providing alternative financial benefits equal to, or greater than, the value of the tax-exemptions that were eliminated.

6. ***Toussaint* supports Mr. Okrie *et al.'s* claim that their pensions would not be subject to state or local taxation, without the payment of alternative benefits equal to, or greater than, the value of the tax exemptions that were eliminated**.

As this Court explained by this Court in *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 613-619 (1980), relying upon *Cain, supra*, 346 Mich at 568, policy statements by the employer announcing a financial benefit concerning employee deferred compensation operate as inducements that an employer should reasonably have expected to induce reliance by the employee in joining or remaining in the employer's service. For that reason, the present case is analytically on all fours with *Toussaint* where this Court observed:

> While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiation need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. *It is* ***enough*** *that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has created a situation "instinct with an obligation*." (Footnotes omitted; emphasis added) [*Id*. at 613]

Thus, an employer's statements of policy that give rise to "legitimate expectations" create enforceable contractual rights even if the employer can amend the policy unilaterally without notice to the employee.

In this case, the State's longstanding policy and practice of providing tax-exempt pensions as retirement benefits earned as deferred compensation for years of governmental service, as validated by the Court of Appeals in the *Davis* litigation, also gave rise to enforceable contract rights. The fact that this policy and practice went unaltered by the Legislature for many decades clearly supports the proposition that the State of Michigan should reasonably have expected to induce action of a definite and substantial character on the part of Mr. Okrie *et al*. that their pensions would not be subject to state or local taxation, without the payment of alternative benefits equal to, or greater than, the value of the tax exemptions that were eliminated by 2011 PA 38 and the related legislation.

Finally, under the facts and circumstances presented here, enforcement of the promise not to tax their pensions is necessary to avoid injustice, i.e., unjust enrichment. See *Christensen v Minneapolis Mun Employees Ret Bd*, 331 NW2d 740 (Minn 1983)(applying a promissory estoppel approach in analyzing the relationship between the state and its employees). Accordingly, even assuming the absence of an express employment contract, Mr. Okrie *et al.* had implied contracts based upon the doctrine of promissory estoppel to the earned retirement benefits that represented deferred compensation for their years of governmental service, which was payable in the form of tax-exempt pensions, or alternative equivalent financial benefits.

IV. The State's Retention of Mr. Okrie *et al.*'s Retirement Benefits Earned as Deferred Compensation for Their Years of Governmental Service Without Providing Alternative Benefits That Are Equal to, or Greater than, the Value of the Tax

Exemptions that Were Eliminated by 2011 PA 38 and the Related Legislation Constitutes Unjust Enrichment.

"A plaintiff making a claim of unjust enrichment has the duty of establishing the nature of the transaction and the character of liability arising therefrom as a prerequisite to his right to recover at all." *Booker v City of Detroit*, 469 Mich 892, 897 (2003). Under Michigan law, the elements of a claim for unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 546 (1991); *Barber v SMH (US), Inc.*, 202 Mich App 366, 375 (1993). To support an action on the theory of unjust enrichment, the controlling equities must favor the party claiming to have been injured. *In re McCallum Estate*, 153 Mich App 328, 335 (1986); *City Nat'l Bank v Westland Towers Apartments,* 107 Mich App 213, 230 (1981). Mr. Okrie *et al*. clearly satisfy these conditions.

To begin, it is undisputed that the State received the benefits of the governmental service rendered for decades by Mr. Okrie *et al*. Further, an inequity has resulted because the State received the benefits of their labor but broke its word by retaining the retirement benefits earned by Mr. Okrie *et al*. representing deferred compensation payable in the form of tax-exempt pensions, without providing them with alternative financial benefits that are equal to or greater than the value of tax exemptions that were eliminated. Simply put, the State unjustly enriched itself at the expense of Mr. Okrie *et al*. – their faithful former state and public school employees and citizens. Given the obvious inequity, Mr. Okrie *et al*. have clearly established their claim of unjust enrichment.

V. The Retroactive Application of 2011 PA 38 and the Related Legislation to Mr. Okrie *et al*. Violates the Contract Clauses of 1963 Const, art 1, § 10 and US Const, art 1, § 10(1).

Whether the right to the retirement benefits earned as deferred compensation payable in the form of tax-exempt pensions, or alternative financial benefits equal to, or greater than, the monetary value of the tax exemptions that were eliminated, is characterized as a contractual right arising from an express public employment relationship or based upon the doctrine of promissory estoppel, the State's retroactive application of 2011 PA 38 and the related legislation, 2011 PA 41, 43-45, to Mr. Okrie *et al*. impairs contractual obligations in violation of 1963 Const, art 1, § 10 and US Const, art 1, § 10(1).[13] To establish a Contracts Clause violation against a state under the U.S. Constitution, it is necessary to show three elements: (1) a contractual relationship; (2) the change in the state's law has resulted in a "substantial impairment of a contractual relationship" and (3) the impairment is justified as "reasonable and necessary to serve an important public purpose." *United States Trust Co of NY v New Jersey*, 431 US 1, 25 (1977); *Energy Reserves Group v Kan Power & Light Co*, 459 US 400, 410-413 (1983); *Gen Motors Corp v Romein*, 503 US 181, 186 (1992).

"The threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Energy Reserves Group, supra* at 459 US at 411, quoting *Allied Structural Steel Co v Spannaus*, 438 US 234, 244 (1978). "The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected." *Energy Reserves Group, supra* at 411, citing *Allied Structural Steel Co, supra* at 245. In

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[13] 1963 Const, art 1, § 10 provides: "No bill of attainder, ex post facto law or law impairing the obligation of a contract shall be enacted." US Const, art 1, § 10(1) states in pertinent part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

deciding whether an impairment is substantial as not to be "permitted under the Constitution," contracts are examined to determine whether the plaintiff had "reasonably relied" upon the abridged right and thus "substantially induced" the plaintiff to "enter into the contract." *Id. at* 246. An impairment may be substantial if the "Legislation [] deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of the contract." *Northern Pac Ry Co v State of Minnesota*, 208 US 583, 591 (1908). Thus, an impairment appears to be substantial "where the right abridged was one that induced the parties to contract in the first place . . . or where the impaired right was one on which there had been reasonable and especial reliance." *Baltimore Teachers' Union v Mayor and City Council of Baltimore*, 6 F3d 1012, 1017 (4th Cir 1993).

In determining whether the substantial impairment was reasonable and necessary to serve an important public purpose, the U.S. Supreme Court in *United States Trust* held that reasonableness is judged on whether the prior state contractual obligations "had effects that were unforeseen and unintended by the legislature" when those obligations were created. 431 US at 25, 27, 31; see also *Home Bldg & Loan Ass'n v Baisdell*, 290 US 398 (1934)("The question is . . . whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."). To be considered necessary, the state must establish that (1) no less drastic modification could have been implemented to accomplish the state's goal; and (2) the state could not have achieved its public policy without the modification. *United States Trust*, *supra* at 29-30. Thus, "a State it is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *Id.* at 30. However, *United States Trust* made it crystal clear that state attempts to impair its own contracts, especially

financial obligations, were subject to heightened scrutiny and afforded very little deference because the state's self-interest is at stake. Specifically, in *United States Trust*, the U.S. Supreme Court stated:

> Merely because the government actor believes that money can be better spent or should not be conserved does not provide a sufficient interest to impair the obligation of contract. . . . In applying this standard . . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contracts Clause would provide no protection at all. . . . Thus, a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors. [*Id*. at 25-26, 29).

Applying these principles, the U.S. Supreme Court in *United States Trust* and *Allied Structural Steel* found substantial impairments of public contracts in violation of the Contracts Clause of the U.S. Constitution. In *United States Trust*, the Port Authority of New York and New Jersey sold some bonds to private investors containing covenants expressly prohibiting the use of the sale proceeds for mass transit. Subsequently, the states enacted statutes allowing the proceeds to be used for mass transit, abrogating the covenants in violation of the Contract Clause. Similarly, in *Allied Structural Steel,* the U.S. Supreme Court held that Contract Clause prevented the State of Minnesota from retroactively modifying the pension law because it severely impaired established contractual relationships between employers and employees where the State had not acted to meet an important general social problem but improperly provided a benefit to special interests.

The same is true here. Unquestionably, the State's legislation taking away the retirement benefits earned by Mr. Okrie *et al*. as deferred compensation for their years of governmental

service constitutes a substantial contractual impairment. See *Retired Public Employees of Wash v Charles*, 148 Wash 2d 602, 625 (2003) (finding that legislation that reduces the value of a contract is an impairment). As recognized in *Andrews v Anne Arundel County, Maryland*, 931 F. Supp 1255, 1275 (D Md 1996), aff'd without opinion, 114 F.3d 1175 (CA4 1997), citing *Baltimore Teachers Union*, 6 F3d at 1018 n 8, the reduction of retirement benefits is a substantial impairment "because the individual receiving pension benefits is typically already living on a reduced income as compared to her pre-retirement earnings." See *City of Frederick v Quinn*, 371 A2d 724, 726 (Md Ct Spec App 1977) (noting that "the employee must have available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public welfare").

Further, the State's purported justification for the impairment of the contracts was neither reasonable nor necessary to serve an important public purpose. *United States Trust, supra*. Indeed, in seeking to pay for a huge corporate tax break so thousands of businesses would not have to pay any taxes at all, the State acted with an improper motive by specifically targeting, in age-discriminatory fashion, the retirement benefits earned by Mr. Okrie and similarly situated retired state and public school employees born after 1945 and who retired before the enactment of 2011 PA 38. See *United States Dep't of Agriculture v Moreno*, 413 US 528, 534 (1973) (noting that "animus is not a legitimate state interest" and that "a bare desire to harm a politically unpopular group cannot constitute a legitimate government interest"); *United States v Carolene Prods Corp*, 304 US 144, 152 n4 (1938) (noting that "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry"). Rather than fairly administering the financial affairs of this State or at least

seeking a more moderate course of action, the State specifically and purposefully targeted the class of retired state and public school employees born after 1945 and who retired ***before*** 2011 PA 38 went into effect on January 1, 2012. Simply put, ***after Mr. Okrie et al. retired,*** the State blatantly took away the retirement benefits that they had previously earned for their years of governmental service, which was payable in the form of a tax-exempt pension as specified in the DB plans at issue, without providing alternative benefits in their place that are equal to, or greater than, the value of their tax exemptions that were eliminated. As the U.S. Supreme Court has cautioned, "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Trust, supra* 431 US at 31. Accordingly, the retroactive application of 2011 PA 38 and the related legislation impair Mr. Okrie *et al*.'s contracts in violation of the Contract Clauses under the state and federal constitutions.

VI. The Retroactive Application of 2011 PA 38 and the Related Legislation to Mr. Okrie *et. al.* Violates the Takings Clauses under 1963 Const Art 10, § 2 and US Const Am V and US Const Am XIV.

Whether the right to retirement benefits earned as deferred compensation payable in the form of tax-exempt pensions, or alternative financial benefits equal to, or greater than, the monetary value of the tax exemptions that were eliminated, is characterized as a contract or property right, the State's retroactive application of 2011 PA 38 and the related legislation, 2011 PA 41, 43-45, to Mr. Okrie *et al*. constitutes a "takings" in violation of 1963 Const, art 10, § 2 and US Const, Ams V and XIV.[14] As the U.S. Supreme Court declared in *Bd of Regents v Roth*,

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[14] US Const Am V provides in pertinent part: [N]or shall private property be taken for public use, without just compensation."

408 US 564, 577 (1972), property interests "extend well beyond actual ownership of real estate, chattels, or money." Specifically, in *Roth*, the U.S. Supreme Court stated:

> [T]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. [*Id.*]

Moreover, as explained by Justice Brandeis in *Lynch, supra*, 292 US at 579, "**valid contracts are property**, whether the obligor be a private individual, a municipality, a **State** or the United States," and "are protected by the Fifth Amendment." (Emphasis added).

Having provided years of governmental service, vested in one of the state-administered DB plans, made irrevocable employment termination decisions, retired, thereafter residing in the State of Michigan, Mr. Okrie *et al*. have property interests in the retirement benefits that they earned as deferred compensation, which was payable in the form of tax-exempt pensions or alternative benefits that are equal to or greater than the monetary value of the tax exemptions. Because such earned retirement benefits representing vested contractual rights create a property right, they are immune from confiscation by the State without the payment of just compensation. See *Pierce, supra*, 910 P2d at 292 (finding that a retirement plan creates a property right in the amount of the benefit and requiring compensation for any reduction once the participant vests and "matures" once the participant has attained the age necessary to receive the benefits); *Pineman v Oechslin*, 488 A2d 803, 810 (Conn 1985) (finding that benefits created by public pension plan are entitled to constitutional protection as property). By taking away the retirement benefits earned for years of governmental service payable in the form of tax-exempt pensions, without providing alternative financial benefits in their place that have an equivalent monetary value of the tax exemptions, the State has illegally confiscated the property of Mr. Okrie *et al.* in

violation of the Takings Clauses under the state and federal constitutions. *Roth, supra*, 408 US at 577; see *Pierce, supra* at 304 (noting that "any action by the legislature that serves to terminate, diminish or alter the value of pension benefits must be compensated for by providing an equal or greater benefit").

VII. Mr. Okrie *et al*. Should Be Allowed to Amend Their Verified Class Action Complaint to Allege Breach of the Service Credit Contract, Breach of the Member Investment Plan (MIP) Contract, Fraud in the Inducement and Gross Negligent Misrepresentation.

Leave to amend is freely granted when justice so requires; amendment is a matter of right rather than grace, and should be denied only for *particularized* reasons. *Ben P. Fyke & Sons v Gunter Co*, 390 Mich 649, 656, 659 (1973). Further, a grant of summary disposition does not automatically preclude amendment of the complaint. *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 783 (1988). Thus, a court ***must*** give a party the opportunity to amend unless amendment would be futile. *Weymers v Khara*, 454 Mich 639, 658 (1997). An amendment would be futile it if merely restated the allegations already made or added allegations that failed to state a claim. *Id*.

Here, Mr. Okrie *et al*.'s proposed counts for breach of the service credit purchase contract and the MIP contract are not "futile." Specifically, Mr. Okrie *et al*. seek to amend their Verified Class Action Complaint to allege two claims involving breach of individual investment contracts signed by Mr. Okrie and other similarly situated retired public school employees. These claims are completely and qualitatively different from the other claims being alleged by Mr. Okrie on behalf of all similarly situated retired state and public school employees born after 1945.

Specifically, one claim involves individual investment decisions by Mr. Okrie and similarly situated retired state and public school employees born after 1945 who invested their own money to purchase tax-exempt service credit on the explicit promises by the State that the purchased service credit was tax exempt. The other breach of contract claim involves Mr. Okrie and similarly situated retired public school employees born after 1945 who used their own money to enter into Member Investment Plan (MIP) contracts with the State of Michigan, which guaranteed a tax-exempt annual escalator clause of 3% on their pensions after they retired. Notwithstanding the novelty of these claims, Mr. Okrie *et al*. were simply not given an opportunity to demonstrate that their proposed amendments were not "futile;" rather, it was falsely assumed – without any analysis, examination, briefing or argument – that "Plaintiffs' proposed new claims are simply variations on the theme of the previous two complaints." (COA Pl. Br., **EX. 4**, p 11).

However, as explained in the document, *Your Retirement Plan Choice: The MIP/Basic Choice* ["The Booklet"], the proposed count for violation of the individual investment contract was qualitatively different in character than Mr. Okrie *et al*.'s other allegations. Specifically, in comparing alternative investments to MIP, such as Tax Sheltered Annuities and Individual Retirement Accounts, the State-issued Booklet makes the unqualified claim that the MIP investment is better because "**MIP and Basic Benefits are exempt from Michigan state and local taxes by law, but income from the alternative investment is not."** (Motion for Reconsideration dated May 7, 2015, EX. 2 – Your Retirement Plan Choice: the MIP/Basic Choice). Unlike the statements promising tax-exempt pensions arising from employment relationships with the State, both the service credit and MIP contracts involve ***individual***

investment contracts with the State in which Mr. Okrie *et al*. invested their ***own*** money on the explicit, unqualified condition that their investment returns were tax-exempt. Here, Mr. Okrie *et al*. should be treated just like any purchaser of tax-exempt bonds who accepts a lower interest rate than is available on commercial bonds because the promise not to tax the bond's interest adds value to the investment. These are hardly "futile" claims.

Finally, in the event that all the foregoing claims are dismissed, Mr. Okrie *et al*. should be permitted to amend their complaint to add counts for fraud in the inducement and gross negligent misrepresentation against the State. Fraud in the inducement occurs when a party materially misrepresents future conduct under circumstances in which the assertions may be reasonably expected to be relied upon and are in fact relied upon. *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639 (1995). Negligent misrepresentation occurs when a plaintiff has justifiably and detrimentally relied on information provided without reasonable care by one who owed the plaintiff a duty of care. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33 (1989). Here, there is no question that, in making irrevocable employment termination and retirement decisions, Mr. Okrie and 100,000+ similarly situated retired state and public school employees who were born after 1945 and who retired before January 1, 2012, reasonably relied upon the unqualified statements made repeatedly for decades by the State, through the ORS, in the Retirement Guideline booklets, in seminars, and retirement forms that their pensions were exempt from state and local taxes upon retirement. Accordingly, Mr. Okrie *et al.* should be allowed to amend their Complaint to seek redress against the State for fraud in the inducement and gross negligent misrepresentation for the State's material misrepresentations upon which they detrimentally relied in making employment termination and retirement decisions promising

tax-exempt pensions in retirement, without providing them with alternative benefits that are equal to, or greater than, the value of the tax exemptions that were eliminated.

VIII. Mr. Okrie *et al.*'s Second Amended Verified Class Action Complaint Should Be Remanded to the Trial Court for Certification as a Class Action.

Given that Mr. Okrie *et al*. state cognizable legal claims for recovery, the Court of Appeals erred in affirming the trial court's order declaring that their Amended Motion for Class Certification under MCR 3.501 was "moot." Since their Amended Motion for Class Certification has yet to be considered on the merits, Mr. Okrie *et al*. request that this Court remand to the trial court so that their Second Amended Verified Class Action Complaint be certified and proceed forward as a class-action complaint.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing, Plaintiff-Appellant Thomas R. Okrie, on behalf of similarly-situated retired state and public school employees born after 1945 and who retired before 2011 PA 38 went into effect on January 1, 2012, requests that this Court GRANT their Application for Leave to Appeal under MCR 7.305(B)(1), (2), (3), (5)(a) or (5(b) in order to reverse the Court of Appeals unpublished opinion issued on June 16, 2016 affirming the Court of Claims' opinions and orders dismissing his claims. Instead, this Court should grant *Mr. Okrie et al*.'s motions for summary disposition, their Second Amended Verified Class Action Complaint adding claims for breach of service credit and the Member Investment Plan (MIP) contracts, fraud in the inducement and gross negligent misrepresentation, and remand this case to the trial court for certification as a class action. Mr. Okrie *et al.* also ask for attorney fees and costs.

Respectfully Submitted,

By: ______________________________

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