APPENDIX A

ORDER denying Petition for Emancipation

12/28/2020

SUPREME COURT OF ARIZONA

In the Matter of	)	Arizona Supreme Court
	)	No. M-20-0080
JOHN C. STUART,	)	
	)	
Petitioner.	)	
	)	**FILED: 12/28/2020**
	)	
	)	

O R D E R

John C. Stuart has filed an "Application/Petition for Emancipation Pursuant to the Thirteenth Amendment to the Bill of Rights of the United States Constitution, the Emancipation Proclamation, and Article 4 of the Declaration of Human Rights." The petition fails to state a claim upon which relief can be granted. Therefore,

IT IS ORDERED that the petition and related pleadings are dismissed.

DATED this 28th day of December, 2020.

/S/
JAMES P. BEENE
Duty Justice

TO:
John C Stuart, ADOC 287294, Arizona State Prison, Red Rock Correctional Center

Appendix A

APPENDIX B

ORDER denying Motion for Reconsideration

01/11/2021

SUPREME COURT OF ARIZONA

In the Matter of	)	Arizona Supreme Court
	)	No. M-20-0080
JOHN C. STUART,	)	
	)	
Petitioner.	)	
	)	**FILED: 1/11/2021**
	)	
	)	

O R D E R

On January 7, 2021, Petitioner Stuart, Pro Se, filed "Motion for Reconsideration or in the Alternative Motion for Finding of Facts and Conclusions of Law to Complete the Record for Appeal (Certiorari)." After consideration,

IT IS ORDERED denying Petitioner's Motion.

DATED this 11th day of January, 2021.

/s/
JAMES P. BEENE
Duty Justice

TO:
John C Stuart, ADOC 287294, Arizona State Prison, Red Rock Correctional Center
ga

Appendix B

EXHIBIT A

Jury Question #13 with annotations

(Ex-F

FILED
11-17-11 10:30
MICHAEL K JEANES, Clerk
By T. HENNINGER, Deputy

CR 2008-106594-001

STATE OF ARIZONA

vs.

JOHN CHESTER STUART

JUROR DELIBERATION QUESTION

1. Please have the foreperson submit the written question to the Judge using this form.
2. Notify the bailiff that you have a question. The bailiff will give the form to the Judge and attorneys for consideration.
3. The Judge will provide a response to the question in writing.

QUESTION: Can we consider Involuntary Manslaughter as a charge?

If so, please give us instructions for same.

S Gonzales #15

Foreperson # and signature

RESPONSE:

There is no such offense under Arizona law.

Judge of the Superior Court

Question # 13

Exhibit A

duct and where he failed to demonstrate that his case fell within one of limited exceptions to standing rule. State v. Powers (1977) 117 Ariz. 220, 571 P.2d 1016. Constitutional Law ⇐ 769

Defendant convicted of involuntary manslaughter had no standing to complain of alleged unconstitutional vagueness in definition of involuntary manslaughter in A.R.S. § 13-456 (repealed; see, now, this section) as unlawful killing "in the commission of a lawful act which might produce death in an unlawful manner" where defendant's conviction did not arise from that part of statute and where jury was not instructed with such words. State v. Powers (1977) 117 Ariz. 220, 571 P.2d 1016. Constitutional Law ⇐ 739

2. Construction and application

Negligent homicide is distinguished from reckless manslaughter in that for the latter offense, the defendant is aware of the risk of death and consciously disregards it, whereas, for the former offense, he is unaware of the risk. State ex rel. Thomas v. Duncan (App. Div.1 2007) 216 Ariz. 260, 165 P.3d 238. Homicide ⇐ 708; Homicide ⇐ 709

Construction given by California courts to California statute, from which Arizona statute was adopted and which was in substantially the same language would, if reasonable, be persuasive. State v. de Montaigu (App. Div.1 1977) 117 Ariz. 322, 572 P.2d 456.

3. Construction with other statutes

Legislature presumably knew of § 13-1591 (repealed; see, now, § 13-3981), relating to compromise, when it created misdemeanor manslaughter. State v. Garoutte (1964) 95 Ariz. 234, 388 P.2d 809. Statutes ⇐ 212.1

Section 13-1591 (repealed; see, now, § 13-3981), relating to compromise, was applicable to misdemeanor motor vehicle manslaughter case. State v. Garoutte (1964) 95 Ariz. 234, 388 P.2d 809. Criminal Law ⇐ 40

Where former § 28-691 relating to negligent homicide by driver of vehicle, was enacted after felony statute, § 13-456 (repealed; see, now, this section and § 13-1103) for involuntary manslaughter committed without due caution and circumspection, and both statutes required substantially the same evidence of criminal negligence for conviction, former § 28-691 impliedly repealed application of felony statute to instances of homicide wherein instrumentality of death was motor vehicle operated without due caution and circumspection. State v. Morf (1956) 80 Ariz. 220, 295 P.2d 842. Automobiles ⇐ 316

Phrase "criminal means" as used in § 22-511 (repealed; see, now, §§ 11-593, 11-594), relating to coroner's duty to investigate certain deaths included criminal negligence and manslaughter as defined in § 13-456 (repealed; see, now, this section and § 13-1103). Op.Atty.Gen. No. 61-26.

4. Nature and elements of offense

Infliction of serious physical injury is an essential element of the crime of negligent homicide. State v. Harvey (App. Div.1 1998) 193 Ariz. 472, 974 P.2d 451, as amended, review denied. Homicide ⇐ 708

Negligent homicide, unlike manslaughter, is established when person fails to perceive substantial and unjustifiable risk that his conduct will cause another's death. State v. Nieto (App. Div.1 1996) 186 Ariz. 449, 924 P.2d 453, review denied. Homicide ⇐ 708

"Negligent homicide" is established where a person fails to perceive the substantial and unjustifiable risk that his or her conduct will cause the death of another. State v. Fisher (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436, denial of post-conviction relief reversed in part 152 Ariz. 116, 730 P.2d 825, appeal after new trial 176 Ariz. 69, 859 P.2d 179. Homicide ⇐ 708

Negligent homicide, established when a person fails to perceive a substantial and unjustifiable risk and when failure to perceive risk is a gross deviation from standard of care which a reasonable person would observe; is distinguished from reckless manslaughter in that for latter offense, the defendant is aware of the risk of death and consciously disregards it, whereas, for the former offense, the defendant is unaware of the risk. State v. Walton (App. Div.1 1982) 133 Ariz. 282, 650 P.2d 1264. Homicide ⇐ 708; Homicide ⇐ 709

To constitute involuntary manslaughter, homicide must have resulted from defendant's failure to exercise due caution and circumspection, which is equivalent of "criminal negligence" or "culpable negligence"; facts must be such that fatal consequence of negligence acts could reasonably have been foreseen. State v. Stambaugh (App. Div.2 1978) 121 Ariz. 226, 589 P.2d 469. Homicide ⇐ 708

Distinction, in § 13-456 (repealed; see, now, this section) proscribing vehicular manslaughter, between commission of an unlawful act with gross negligence and commission of an unlawful act without gross negligence was solely for purpose of determining appropriate punishment and did not represent a legislative intent to require proof of ordinary negligence with respect to commission of an unlawful act without gross negligence. State v. Reynolds (App. Div.2 1973) 19 Ariz.App. 159, 505 P.2d 1050. Automobiles ⇐ 344

A homicide cannot be excusable when it is the result of an unlawful act. State v. Reynolds (App. Div.2 1973) 19 Ariz.App. 159, 505 P.2d 1050. Homicide ⇐ 750

To constitute "involuntary manslaughter," the homicide must have resulted from the defendant's failure to exercise due care and circumspection, which is the equivalent of "criminal negligence" or "culpable negligence." State v. Sorensen (1969) 104 Ariz. 503, 455 P.2d 981. Homicide ⇐ 708

"Involuntary manslaughter" as distinguished from "voluntary manslaughter" contemplates an act committed unintentionally rather than intentionally. State v. Prewitt (1969) 104 Ariz. 326, 452 P.2d 500. Homicide ⇐ 662

Involuntary manslaughter, as distinguished from voluntary manslaughter, contemplates an act committed unintentionally. State v. Foggy (1966) 101 Ariz. 459, 420 P.2d 934, certiorari denied 87 S.Ct. 1386, 386 U.S. 1025, 18 L.Ed.2d 468, rehearing denied 87 S.Ct. 2060, 387 U.S. 938, 18 L.Ed.2d 1008. Homicide ⇐ 662

Under manslaughter statutes legislature intended that killing of each human being, under circumstances described in the code, would constitute a separate offense. State v. Miranda (App. 1966) 3 Ariz.App. 550, 416 P.2d 444. Homicide ⇐ 654

Voluntary manslaughter is committed intentionally, while involuntary manslaughter is committed unintentionally. State v. Douglas (App. 1965) 2 Ariz.App. 178, 407 P.2d 117. Homicide ⇐ 660; Homicide ⇐ 662

Where peace officer, in attempting to arrest a drunken driver, shot at a tire to disable automobile and killed driver, even though killing was unintentional, his act being unlawful, offense was involuntary manslaughter. Harding v. State (1924) 26 Ariz. 334, 225 P. 482. Homicide ⇐ 706

Manslaughter is involuntary if committed in perpetration of unlawful act not amounting to felony, etc. Wiley v. State (1918) 19 Ariz. 346, 170 P. 869. Homicide ⇐ 659

5. Included offenses

Generally, negligent homicide is a lesser included offense of manslaughter. State v. Fisher (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436, denial of post-conviction relief reversed in part 152 Ariz. 116, 730 P.2d 825, appeal after new trial 176 Ariz. 69, 859 P.2d 179. Indictment And Information ⇐ 189(8)

Negligent homicide is not a lesser included offense of manslaughter where the defendant's defendant presents a credible argument that his or her failure to perceive a risk was due to either voluntary intoxication or something else, negligent homicide would be a lesser included offense with respect to the defense that is unrelated to voluntary intoxication. State v. Fisher (1984) 141 Ariz. 227, 686 P.2d 750, certiorari denied 105 S.Ct. 548, 469 U.S. 1066, 83 L.Ed.2d 436, denial of post-conviction relief reversed in part 152 Ariz. 116, 730 P.2d 825, appeal after new trial 176 Ariz. 69, 859 P.2d 179. Indictment And Information ⇐ 189(8)

Negligent homicide is a lesser included offense of manslaughter, the reckless causing of the death of another, in that a person who recklessly causes death of another also acts with criminal negligence. State v. Parker (App. Div.2 1980) 128 Ariz. 107, 624 P.2d 304, affirmed in part, vacated in part 128 Ariz. 97, 624 P.2d 294. Indictment And Information ⇐ 189(8)

6. Felony or misdemeanor

Where jury found defendant guilty of offense of vehicular manslaughter with gross negligence and recommended punishment by imprisonment in county jail, trial judge was required to accept the recommendation and could not designate crime as a felony. State v. de Montaigu (App. Div.1 1977) 117 Ariz. 322, 572 P.2d 456. Criminal Law ⇐ 885

Where jury simply finds defendant guilty of vehicular manslaughter and makes no further recommendation, vehicular manslaughter could be characterized as an open-ended offense; however, when jury goes further and recommends county jail term, crime ceases to be open-end and becomes a misdemeanor. State v. de Montaigu (App. Div.1 1977) 117 Ariz. 322, 572 P.2d 456. Criminal Law ⇐ 27

7. Double jeopardy

Double jeopardy did not preclude instruction that negligent homicide defendant's negligence could be established by evidence that he had acted intentionally, knowingly or recklessly, even though defendant had previously been found not guilty of first and second-degree murder and manslaughter. State v. Nunez (1991) 167 Ariz. 272, 806 P.2d 861. Double Jeopardy ⇐ 102

Where record did not contain evidence of defendant's alleged trial and acquittal in municipal court of driving while under influence of intoxicating liquor, and defendant did not, after commencement of superior court prosecution for manslaughter in driving of a motor vehicle, raise question of double jeopardy or object to introduction of any evidence on question of intoxication or ask for instructions limiting use

EXHIBIT B

STATE v. FENDER

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

RICHARD LEE FENDER, *Appellant*.

No. 1 CA-CR 19-0586

FILED 10-22-2020

Appeal from the Superior Court in Mohave County
No. S8015CR201700603
The Honorable Billy K. Sipe, Jr., Judge *Pro Tempore*

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole
Counsel for Appellee

Mohave County Legal Advocate's Office, Kingman
By Jill L. Evans
Counsel for Appellant

EXHIBIT B

appearance bond is to assure a defendant's appearance at the trial or other hearings." *State v. Bonds*, 201 Ariz. 203, 208, ¶ 19 (App. 2001). An appearance bond—and the court's discretionary determination to forfeit all, part, or none of the bond—is a procedure distinct from a trial verdict or related sentencing.

D. Pensions and the Fourteenth Amendment

¶24 Finally, Fender alleges the trial judge had an improper financial interest in the trial's outcome. Specifically, he argues "ALL Arizona judges receive pecuniary gain from ALL convictions that lead to imprisonment, through the 'Elected Officials And Judges Pension Fund' which is invested in the 'Private Prisons'" that operate in Arizona. His argument relies on *Tumey v. Ohio*, in which the United States Supreme Court held that where a judge personally received a portion of the assessed court costs, such pecuniary interest disqualified him as impartial. 273 U.S. 510, 535 (1927). We disagree that any alleged pension fund investments in corporations operating private prisons constitutes a "direct, personal, substantial pecuniary interest" as to deprive defendants, including Fender, of due process under the Fourteenth Amendment. *See id.* at 523. The relationship between a judge and the financial policies and investment decisions of the pension system administrators is "too remote to warrant a presumption of bias toward conviction in prosecutions before" the judge. *See Ward v. Village of Monroeville*, 409 U.S. 57, 60-61 (1972) (describing *Dugan v. Ohio*, 277 U.S. 61 (1928)).

¶25 We have read and considered counsel's brief and Fender's supplemental brief, and we have fully reviewed the record for reversible error. *See Leon*, 104 Ariz. at 300. Save for the double jeopardy violation discussed above, we find none. So far as the record reveals, counsel represented Fender at all stages of the proceedings, and the sentence imposed was within the statutory guidelines. *See* A.R.S. § 13-3407(A)(7), (B)(7), (E). We decline to order any further briefing.

¶26 Upon the filing of this decision, defense counsel shall inform Fender of the status of the appeal and of his future options. Counsel has no further obligations unless, on review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Fender shall have thirty days from the date of this decision to proceed, if he desires, with an *in propria persona* motion for reconsideration or petition for review.

EXHIBIT C

HALL v. E.O.R.P.

383 P.3d 1107 (2016)
241 Ariz. 33

The Honorable Philip HALL et al., Plaintiffs/Appellees/Cross-Appellants,

v.

ELECTED OFFICIALS' RETIREMENT PLAN et al., Defendants/Appellants/Cross-Appellees, State of Arizona, Intervenor-Defendant/Appellant/Cross-Appellee.

No. CV-15-0180-T/AP.

Supreme Court of Arizona.

Filed November 10, 2016.

Appeal from the Superior Court in Maricopa County, The Honorable Douglas L. Rayes, Judge (retired), The Honorable Randall H. Warner, Judge, No. CV2011-021234.

AFFIRMED IN PART AND REVERSED IN PART.

Ron Kilgard (argued), Alison E. Chase, Keller Rohrback, L.L.P., Phoenix, Attorneys for Philip Hall and Jon W. Thompson et al.

Bennett Evan Cooper, Steptoe & Johnson, LLP, Phoenix, Attorney for Elected Officials' Retirement Plan and the Members of the Board of Trustees of the Public Safety Personnel Retirement System

Mark Brnovich, Arizona Attorney General, Charles A. Grube (argued), Senior Agency Counsel, Phoenix, Attorneys for State of Arizona

Colin F. Campbell, Osborn Maledon, PA, Phoenix; and Robert D. Klausner, Adam P. Levinson, Klausner Kaufman Jensen & Levinson, Plantation, FL, Attorneys for Amicus Curiae National Conference on Public Employee Retirement Systems

1110 *1110 JUDGE HOWE[*] authored the opinion of the Court, in which JUDGE BUTLER[*] joined, JUDGE CATTANI[*] joined and specially concurred, and JUSTICE BOLICK and JUDGE TREBESCH[*] dissented in part and concurred in the judgment in part.

1109 *1109 JUDGE HOWE, opinion of the Court:

¶1 In 2011, the Arizona Legislature enacted Senate Bill 1609, which made certain changes to the Elected Officials' Retirement Plan. The Bill changed the formula for calculating future benefit increases for retired Plan members and increased the amount that employed Plan members must contribute toward their pensions. Retired members of the Plan challenged the provision changing the formula for calculating future benefit increases. They argued that the change violated the Pension Clause of the Arizona Constitution, article 29, section 1, which provides that "public system retirement benefits shall not be diminished or impaired."[1] We agreed, holding that this provision was unconstitutional as applied to the Plan's retired members. *See* Fields v. Elected Officials' Ret. Plan, 234 Ariz. 214, 320 P.3d 1160 (2014).

¶2 Employed members of the Plan also challenged the Bill. First, they argued that the unilateral changes to the benefit increases formula and to the amount they were required to contribute toward their pensions violated the Pension Clause for the reasons set forth in *Fields*. Second, relying on our long-standing decision in Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541 (1965), they argued that because their pensions were part of their employment contracts that vested when they began employment, the Legislature could not unilaterally change the terms of their pensions to their detriment. The trial court granted the employed members summary judgment, invalidating the provisions at issue. The court denied the members' request for attorneys' fees and prejudgment interest, however. The court also denied the members' request to have the judgment run against the State, which had intervened in the case. EORP and the State appealed and the members cross-appealed.

Exhibit C

¶3 Upon transfer from the court of appeals, we affirm the granting of summary judgment to the employed Plan members. As we held in *Fields,* the Bill's change to the benefit increases formula violates the Pension Clause because it "diminishes and impairs" the employed members' pension benefits. The Bill's changes to the benefit increases formula and the contribution rate also violate our holding in *Yeazell* because the Legislature cannot unilaterally change the terms of the members' pension contracts once their rights to those terms have vested at the beginning of the members' employment. Contrary to the trial court's ruling, however, we find that the employed members are entitled to attorneys' fees and prejudgment interest and that the judgment must run against the State as well as the Plan.

I. FACTS AND PROCEDURAL HISTORY

¶4 In 1985, the Legislature established the Plan to provide pension benefits for elected officials, including judges. A.R.S. §§ 38-801(15), -802, -804. The Plan has four funding sources: employer contributions, employee contributions, court filing fees, and investment proceeds. A.R.S. § 38-810. The employee contribution rate was set by statute initially at 6%, with the employer being responsible for contributing the remaining amount necessary to fund a defined benefit upon retirement. *See* A.R.S. § 38-810(A) (1985). In 1987, A.R.S. § 38-810(A) was amended to increase the employees' contribution to 7%. *See*
1111 1987 Ariz. Legis. Serv., ch. *1111 146, § 4, *codified at* A.R.S. § 38-810(A) (1987).

¶5 During the 1990s, the Plan generated investment returns that far exceeded the actuarially assumed rate of return. *See PSPRS Plan's Funding Status Report with Options for Improving Funding and Reducing Required Contributions,* at 2 (2010). During the same period, however, the Plan's financial health was being "seriously compromised" because the Plan was gradually concentrating its investments in securities of high technology and telecommunications companies. *Id.* In March 2000, the prices of technology and telecommunications securities began to "decline rapidly." *Id.* This made the Plan vulnerable to major financial shocks in 2000, 2008, and 2009. By fiscal year 2011, the Plan's funding ratio — the actuarial value of the Plan's assets divided by its actuarial accrued liabilities — was 62.1%, a drop from 121% in 1998 and 101.9% in 1985. Accordingly, the State's contribution level necessarily increased, while the employee contribution rate remained constant, as set by statute.

¶6 In 2011, attempting to address continued rising costs, the Legislature enacted the Bill, making several unilateral changes to the Plan to be applied retroactively from June 30, 2011. *See* 2011 Ariz. Legis. Serv., ch. 357. One change the Bill made was to the statutory formula for calculating permanent benefit increases under A.R.S. § 38-818. The Bill amended A.R.S. § 38-818.01 to prohibit the transfer of any investment earnings that exceed the rate of return to the reserve fund and changed the formula used to calculate the permanent benefit increases, increasing the rate of return necessary to trigger a benefit increase. *See* A.R.S. § 38-818.01(B).

¶7 We resolved whether the Bill's change to the statutory formula for calculating permanent benefit increases was constitutional with respect to retired members in *Fields,* 234 Ariz. at 221 ¶ 34, 320 P.3d at 1167. We held that the formula was a "benefit" for purposes of the Pension Clause and that the Bill's change to the formula violated the clause because it diminished and impaired the retired members' retirement benefits. *Id.* at 220-21 ¶¶ 29, 34, 320 P.3d at 1166-67. Because the Bill retroactively prevented the transfer of funds to the Plan's reserve, the Plan could not fund expected benefit increases, and retired members' benefit increases consequently were reduced or eliminated in 2011, 2012, and 2013. *Id.* at 221 ¶ 35, 320 P.3d at 1167. The Bill also made it less likely that retired members would receive future benefits increases because of the raised rate of return required to fund an increase. *Id.* at ¶ 36, 320 P.3d at 1167.

¶8 The Bill made another change that was not at issue in *Fields,* but is here. The Bill amended the employee contribution rate structure by increasing the rate to 10% for fiscal year 2011-2012 and to 11.5% for fiscal year 2012-2013. A.R.S. § 38-810(F)(1)-(3) (2011). It also set the rate for fiscal year 2013-2014 and each fiscal year thereafter to the lesser of 13% of the member's gross salary or 33.3% of the sum of the member's contribution rate from the preceding fiscal year and the normal cost plus the actuarially-determined amount required to amortize the employer's unfunded accrued liability. A.R.S. § 38-810(F)(4) (2011).

¶9 In November 2011, Judges Philip Hall — who has since retired — and Jon W. Thompson, on behalf of themselves and as representatives of a class of employed Plan members and beneficiaries as of July 20, 2011, the Bill's effective date (collectively, "Class Members"), sued the Plan and the Board of Trustees of the Public Safety Personnel Retirement System (collectively, "EORP"). The Class Members alleged that the Bill violated *Yeazell,* the Pension and Judicial Salary Clauses of the Arizona Constitution, and the Contract Clauses of the Arizona and United States Constitutions. The State intervened to

defend the Bill. After the State intervened, the Class Members notified the trial court and the parties that they would seek relief, including attorneys' fees, expenses, and taxable costs, not only from EORP but also from the State.

¶10 After intervening litigation, the parties each moved for summary judgment. The Class Members maintained — as relevant here — that the Bill violated *Yeazell* by unilaterally modifying their interests in their pensions, which had vested at
1112 the outset of their employment with the State, and violated the *1112 Pension Clause by diminishing their entitled benefits. EORP and the State responded that the Class Members' rights had not yet vested and therefore the Legislature could modify the pension plan as it saw fit. EORP and the State noted that in 2000, the Legislature had enacted A.R.S. § 38-810.02 ("the vesting statute"), providing that EORP benefits vest at the time the employee applies for benefits or retires. EORP and the State argued that because the statute applies retroactively, it has become part of the Class Members' employment contracts with the State, and accordingly, their rights do not vest until they retire.

¶11 The trial court granted the Class Members' motion for summary judgment and denied EORP's and the State's cross-motions for summary judgment. The court held that the Pension Clause protected the benefit increases formula and the 7% prior contribution rate because they constituted "benefits" that were always part of the members' contractual relationship with the State. The court rejected EORP's argument that the vesting statute preempted the members' contractual rights and their rights under the Pension Clause. The court concluded that the statute applies only to "ordinary" vesting, meaning that a member has no right to receive retirement benefits until the member fulfills specific conditions and retires. The court thus granted the Class Members the relief they sought.

¶12 The parties then asked for a stay pending our decision in *Fields,* which the trial court granted. After considering the effect of *Fields,* the court denied the Class Members' request for attorneys' fees under A.R.S. § 12-341.01 because it concluded that the action arose out of constitutional and statutory — not contractual — obligations. The court also denied the Class Members' request for prejudgment interest because it found that EORP was not unjustly enriched and should not be charged interest on money it legally could not pay. The court further denied the Class Members' request that relief run against the State because it found that the State had intervened only to defend the Bill's constitutionality and the Class Members' notice seeking relief against EORP and the State was insufficient to assert claims against the State.

¶13 EORP and the State timely appealed the summary judgment in the Class Members' favor, and the Class Members timely cross-appealed the judgment denying attorneys' fees, prejudgment interest, and relief against the State. We granted the parties' joint petition to transfer the case under Arizona Rule of Civil Appellate Procedure 19(a). The funding of public pensions raises issues of statewide importance, and we have jurisdiction pursuant to article 6, section 5(3) of the Arizona Constitution.

II. DISCUSSION

ISSUES ON APPEAL

¶14 EORP and the State argue that the trial court erred by finding that the Bill violates the Pension Clause and *Yeazell.*[2] We review de novo the constitutionality of statutes and, if possible, construe them to uphold their constitutionality. *State v. Glassel,* 211 Ariz. 33, 51 ¶ 65, 116 P.3d 1193, 1211 (2005). We presume that a statute is constitutional, and the "party asserting its unconstitutionality bears the burden of overcoming the presumption."[3] *Eastin v. Broomfield,* 116 Ariz. 576,
1113 580, 570 P.2d 744, 748 (1977). As discussed below, we hold that (1) the Bill's *1113 change to the benefit increases formula provision violates the Pension Clause by diminishing and impairing a benefit to which the Class Members are entitled and (2) its changes to the benefit increases formula and the contribution rate provisions are unconstitutional under *Yeazell* because it unilaterally modified the Class Members' employment contracts with the State to the Class Members' detriment.

A. The Pension Clause

¶15 EORP and the State first argue that the trial court erred because the benefit increases formula and the prior contribution rate are not "benefits" and therefore not protected by the Pension Clause. Regarding the benefit increases formula, this Court concluded in *Fields* that permanent benefit increases and the benefit increases formula were "benefits" as used in the Pension Clause. *See* 234 Ariz. at 219, 220 ¶¶ 23, 26, 320 P.3d at 1165, 1166. The reasoning in *Fields*

applies with equal force to the Class Members because the Bill's change to A.R.S. § 38-818's formula diminishes and impairs the Class Members' retirement benefits just as it does for retired members. *See id.* at 221-22 ¶¶ 34-36, 320 P.3d at 1167-68. The Bill's amendment regarding the benefit increases formula therefore violates article 29, section 1(C), of the Arizona Constitution. Regarding the prior contribution rate, however, because we hold that the prior contribution rate is protected under *Yeazell, see infra* § B, we need not decide whether it is also protected under the Pension Clause. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984) ("It is a fundamental rule of judicial restraint... that this Court will not reach constitutional questions in advance of the necessity of deciding them.").

B. A Binding Contractual Relationship

1. *Yeazell v. Copins*

¶16 EORP and the State also argue that the trial court erred in applying *Yeazell* because "*Yeazell* enshrined the vesting statute as part of the [member's employment] contract, authorizing the Legislature *as a matter of the express contract* to make reasonable prospective changes like adjusting the contribution rate." Consequently, they argue, *Yeazell* does not "apply constitutional protections for pension rights" and also does not affect whether the Pension Clause protects the benefit increases formula and the prior contribution rate. The Class Members counter that the Bill violates *Yeazell* because it seeks to unilaterally and retroactively modify their pension terms as provided in their employment contracts when they began services.

¶17 *Yeazell* established that the State's promise to pay retirement benefits is part of its contract with the employee. *See* 98 Ariz. at 113-17, 402 P.2d at 544-47. By accepting a job and continuing to work, the employee has accepted the State's offer of retirement benefits, and the State may not impair or abrogate the terms of that contract without obtaining the employee's consent. *Id. Yeazell* involved a Tucson police officer's appeal of a local board's decision setting his pension benefits based on a 1952 amendment to the pension statute in effect at the time of his retirement, rather than on the statute in effect when he was hired in 1937. *Id.* at 111, 402 P.2d at 542. Yeazell argued that the 1937 statute, requiring him to contribute 2% of his salary and granting him a monthly pension equal to one-half of his average monthly compensation for one year immediately before his retirement date, was the applicable law from which to determine his retirement benefits — not the 1952 statute. *Id.* His benefit under the 1937 statute would have been $7.21 more per month than his benefit under the 1952 statute. *Id.*

¶18 The issue in *Yeazell* was whether the Legislature could unilaterally change statutorily-created retirement benefits that were part of the terms of an employee's employment contract when the employee began service. *See id.* at 111-12, 402 P.2d at 542-43. The majority rule in the United States at the time was that pensions — characterized as "gratuities" granted at the sovereign's benevolent will — could be modified because the employees had no vested right to them. *Id.* at 112, 402
1114 P.2d at 543. Thus, pension plans could be amended or changed as a legislature *1114 saw fit. *Id. Yeazell* recognized, however, that treating retirement benefits as "gratuities" posed a problem in Arizona because of the state's Gift Clause, *id.* at 112, 402 P.2d at 543, which, as relevant here, prohibits state entities from giving or lending its credit "in the aid of, or mak[ing] any donation or grant, by subsidy or otherwise" to any individual, Ariz. Const. art. 9, § 7.

¶19 *Yeazell* acknowledged that under the Gift Clause, "[t]he state may not give away public property or funds; it must receive a *quid pro quo* which, simply stated, means that it can enter into contracts for goods, materials, property and services." 98 Ariz. at 112, 402 P.2d at 543. Thus, to uphold Arizona retirement plans under the Arizona Constitution, this Court concluded that pensions were *not* gratuities, but were, in the nature of contracts, viewed as deferred compensation for services rendered. *Id.* at 113-15, 402 P.2d at 543-45. We reasoned that a pension is a gratuity only when it is granted for services previously rendered, but when the services are rendered under 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." *Id.* at 113, 402 P.2d at 544; *see also Proksa v. Ariz. State Sch. for the Deaf & the Blind*, 205 Ariz. 627, 631 ¶ 21, 74 P.3d 939, 943 (2003) ("Put differently, in the retirement benefits area, given the Gift Clause of our constitution, this court effectively found an `adequate expression of an actual intent of the State to bind itself,' because any finding to the contrary would render the statutes unconstitutional.") (citation omitted).

¶20 Based on *Yeazell* and its Gift Clause underpinnings, the law in Arizona has been clear since 1965 that public employees are contractually entitled to the retirement benefits specified in their initial employment contract. *See, e.g.,*

Proksa, 205 Ariz. at 630 ¶ 16, 74 P.3d at 942; *Norton v. Ariz. Dep't of Pub. Safety Local Ret. Bd.*, 150 Ariz. 303, 723 P.2d 652 (1986); *Thurston v. Judges' Ret. Plan*, 179 Ariz. 49, 876 P.2d 545 (1994). This protected relationship prevents the Legislature from changing the employee's pension terms at will after the terms have vested, *see Yeazell*, 98 Ariz. at 115-16, 402 P.2d at 545-46, and provides public employees reasonable expectations that their retirement benefits are protected by the law of contracts, *see id.* at 117, 402 P.2d at 546 (holding that a public employee "ha[s] the right to rely on the terms of the legislative enactment of the [pension plan] as it existed at the time he entered the service," and that "subsequent legislation may not be arbitrarily applied retroactively to impair the contract"). The parties may subsequently agree to modify the contract, of course, but the State may not unilaterally change the contractual terms unless the change benefits the employee. *See Thurston*, 179 Ariz. at 51, 876 P.2d at 547 (recognizing that "when the amendment [to retirement benefits] is beneficial to the employee or survivors, it automatically becomes part of the contract by reason of the presumption of acceptance"). Under that circumstance, the employee is deemed to have ratified the beneficial change, which becomes part of the employment contract. *Id.*

¶21 For Yeazell, we concluded that the Legislature had unilaterally amended the 1937 statute, which had become a part of his employment contract — a contract that included the 2% contribution rate and a pension calculation based on his last year's earnings. Tucson therefore could not retroactively vary the pension terms without Yeazell's consent. *Yeazell*, 98 Ariz. at 116, 402 P.2d at 546. We explained that although an employee may not qualify to receive his pension benefits until he has performed the necessary condition — completion of the requisite years of service — this did not mean that from the moment Yeazell entered service as a Tucson police officer, a firm and binding contract did not exist between him and the City of Tucson. *Id.* at 114, 402 P.2d at 544.

¶22 Although acknowledging that *Yeazell* established a contractual relationship between the State and public employees regarding the employees' pensions, EORP and the State nonetheless assert that *Yeazell* provides only that "the employees' *contractual relationship* vested at the time they began services [and] does not automatically mean that *specific benefits* 1115 vested at that time, without regard to the contemporaneous *1115 terms of the contract." But the specific benefits — that is, the terms of the legislative enactment relating to the employees' pensions as they existed when the employees began their services — are exactly the type of benefits *Yeazell* protects:

> The legislature amended the 1937 statute which was a part of appellant's contract of employment with the City of Tucson. Tucson now attempts to apply the changes retroactively to vary the terms of its contract with appellant. We hold the changes, if applied to appellant without his assent, would constitute an alteration, a modification of his contract. This Tucson may not do.

Id. at 116, 402 P.2d at 546. *Yeazell* thus protects the specific terms of a public pension contract from unilateral retroactive alteration. Even the dissent in *Yeazell* recognized this as the Court's holding. *See id.* at 118, 402 P.2d at 547 (Udall, J., dissenting) (stating that the majority's holding was based on the "erroneous premise that there was created upon employment an absolute binding `contract' to a specific pension," which meant that the majority was holding that "the legislature, by subsequent enactment, can modify the original pension terms only if the employee consents").

¶23 The Bill's changes to the Class Members' pension contracts are consequently invalid under *Yeazell*. When the Class Members were elected or appointed as judges, they entered a contractual relationship with the State regarding the public retirement system of which they became members. Their retirement benefits were a valuable part of the consideration the State offered upon which the Class Members relied when accepting employment. *See Fields*, 234 Ariz. at 220 ¶ 27, 320 P.3d at 1166 ("As in *Yeazell*, Fields has a right in the existing formula by which his benefits are calculated as of the time he began employment and any beneficial modifications made during the course of his employment."). Under their contracts, the Class Members received retirement benefits as terms of their contracts for which they agreed to share the cost with their employers. Thus, an increase in the Class Members' proportionate share of the contribution rate above 7% and the change in the statutory formula granting permanent benefit increases without the Class Members' consent are breaches of that contract and infringe upon the Class Members' contractual relationship with the State. *See Thurston*, 179 Ariz. at 52, 876 P.2d at 548 ("Where the modification is detrimental to the employee, it may not be applied absent the employee's express acceptance of the modification because it interferes with the employee's contractual rights."). By including in its scope Class Members who were Plan members at the time of enactment, the Bill retroactively, unilaterally, and substantially changed the contract terms that the parties previously agreed to. This violates *Yeazell*.

¶24 EORP and the dissent both argue that this is not the end of the analysis. They note that *Yeazell* commented that if a governmental entity shows that its pension plan is actuarially unsound, "the law governing mutual mistakes of fact" applies.

See 98 Ariz. at 116, 402 P.2d at 546. They interpret this comment to mean that if EORP and the State could show that the parties to the Plan made a mistake about the Plan's financial viability, the Bill's retroactive changes would be permissible modifications of the Plan under *Yeazell*. But EORP and the dissent over-read *Yeazell*'s comment. Although this Court indeed said that the law of mistakes of fact applied to a pension plan if it was actuarially unsound, we expressly and carefully declined to address the consequences of such an application: "We do not, however, mean to imply what rights or remedies might be available to either party in a situation where it is established that a retirement plan is actuarially unsound. This is a matter beyond the issues of the present litigation." *Id.* at 117, 402 P.2d at 546.

¶25 This Court's reticence was appropriate. While the defense of mutual mistake of fact applies in any contract dispute, EORP and the State are unable to prove that defense as a matter of law. That defense requires that the party seeking to void a contract prove that (1) the parties made a mistake about a basic assumption on which they made the contract, (2) the
1116 mistake had a material effect on the exchange of performances, *1116 and (3) the party seeking avoidance does not bear the risk of the mistake. Restatement (Second) of Contracts § 152(1) (1981); *see also Renner v. Kehl*, 150 Ariz. 94, 97, 722 P.2d 262, 265 (1986) (applying § 152 in resolving claim of mutual mistake of fact). EORP and the State cannot prove two of these elements.

¶26 First, EORP and the State cannot show that the parties made a mistake about a basic assumption of the Plan. They claim (and the dissent accepts, *see infra* ¶¶ 73, 104) that the mistake was the parties' shared assumption that the Plan was actuarially sound, meaning that the parties mistakenly believed that the Plan's investment returns would be sufficient to maintain the Plan's actuarial soundness without changing the benefit increases formula or the employee contribution rate. But disappointment about anticipated investment returns does not qualify as a mistake. *See* Restatement (Second) of Contracts § 152 cmt. b (noting that "market conditions and the financial situation of the parties are ordinarily not such assumptions," and "mistakes as to market conditions or financial ability do not justify avoidance under the rules governing mistake").[4] Moreover, the Plan's actuarial soundness is within the Legislature's control. The Legislature is responsible for setting the amounts of the employer contributions and court filing fees, *see* A.R.S. § 38-810(B)-(D), and the Legislature may not "reduce the amount of the contributions to the fund if thereby the soundness of the fund is jeopardized," *Yeazell*, 98 Ariz. at 116, 402 P.2d at 546. If the Plan is underfunded because of inadequate investment returns, the State may increase employer contributions and filing fees.

¶27 Second, even if unanticipated reductions in investment returns could qualify as a mistake, EORP and the State cannot show that the State did not bear the risk that this mistake might occur. The Legislature designed the Plan so that the State accepted the risk of variable investment returns. When investment returns are high, the State's funding obligation through employer contributions is reduced or eliminated, as happened from 1998 to 2001. But when investment returns are low, the State's funding obligation is necessarily increased. In either situation, however, the Class Members' contribution rate remains fixed. Thus, the Class Members are not permitted to obtain any cost savings from higher investment returns, but they likewise are not required to pay more because of lower investment returns. The reward and risk of investment returns falls on the State. This is simply the nature of defined benefit plans. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999) (stating that in a defined benefit plan "the employer typically bears the entire investment risk" and "must cover any underfunding as the result of a shortfall that may occur from the plan's investments"). Because the State bears the risk of the claimed mistake, the State cannot rely on the defense of mutual mistake of fact to justify changes to the Plan.[5]

1117 *1117 ¶28 The dissent also maintains that the Bill's changes to the Plan may be upheld under the Contract Clauses of the United States and Arizona Constitutions. U.S. Const. art. 1, § 10; Ariz. Const. art. 2, § 25. *See infra* ¶ 107. As we have explained, however, the Bill's unilateral and retroactive changes to the vested terms of the Plan violate *Yeazell* and the Gift Clause. *See supra* at ¶¶ 19-23. Consequently, analyzing whether the Bill would pass review under the Contract Clauses were it not for *Yeazell* and the Gift Clause is unnecessary and violates the principle of judicial restraint. *See Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 453, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985) (stating that judicial restraint requires "avoid[ing] unnecessary resolution of constitutional issues").

¶29 The dissent's substantive concerns about our holding are, respectfully, not well taken. The dissent, however, raises one other concern that merits discussion. The dissent discusses at great length the perilous state of the Plan and this Court's need to defer to the Legislature's policy choices in making the Plan solvent, *see infra* ¶¶ 58, 64-66, 108, effectively asking this Court to get out of the way and let the Legislature fix the problem. This argument has been raised in other cases involving judicial pension reform, when state legislatures have run afoul of state constitutional provisions that preclude

retroactive changes to judicial pensions. *See In re Pension Reform Litig.*, 392 Ill.Dec. 1, 32 N.E.3d 1, 19-26 (2015); *DePascale v. State*, 211 N.J. 40, 47 A.3d 690, 693, 704-05 (2012).

¶30 But this is not a matter of refusing to defer to the Legislature on an issue of public policy. It is a matter of requiring the Legislature to follow the Arizona Constitution in setting that policy. We recognize that the financial soundness of public pension systems is a matter of great public importance. We acknowledge that devising measures to guarantee the Plan's financial stability is difficult and fraught with unpleasant policy choices. But whatever measures the Legislature enacts to address the problem still must comport with the Arizona Constitution. *See In re Pension Reform Litig.*, 32 N.E.3d at 19 (stating that "[n]either the legislature nor any executive or judicial officer may disregard the provisions of the constitution even in case of a great emergency") (citation omitted); *DePascale*, 47 A.3d at 704 (noting that a legislature has the right to implement its policy choices in dealing with critical issues but that those choices "must be made within a constitutional framework"). In examining the Bill's constitutionality, we are not meddling in the Legislature's policy choices. We are fulfilling our duty to ensure that the Arizona's constitutional framework is respected and observed in making those choices. *See Pool v. Superior Court*, 139 Ariz. 98, 108, 677 P.2d 261, 271 (1984) (noting that interpreting the state constitution is this Court's responsibility). The provisions of the Bill at issue here are contrary to Arizona's constitutional framework and consequently invalid.

2. *The Vesting Statute*

¶31 EORP and the State further assert that although *Yeazell* established a contractual relationship between the State and its employees regarding pensions, the vesting statute, enacted in 2000, is part of the employment contract for any employee hired after that date and allows the Legislature to modify the pension terms for members before they retire. The vesting statute provides:

> A. Because the plan as enacted at a particular time is a unique amalgam of rights and obligations having a critical impact on the actuarial integrity of the plan, the legislature intends that the plan as enacted at a
> 1118 particular time be construed and applied as a coherent whole and without reference *1118 to any other provision of the plan in effect at a different time.
>
> B. The plan was established in order to provide a uniform, consistent and equitable statewide program for those eligible elected officials as defined by the plan. A member of the plan does not have a vested right to benefits under the plan until the member files an application for benefits and is found eligible for those benefits. An eligible claimant's right to benefits vests on the date of the member's application for those benefits or the member's last day of employment under the plan, whichever occurs first.

A.R.S. § 38-810.02. This Court has previously stated that rights legally vest "when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest." *Hall v. A.N.R. Freight Sys., Inc.*, 149 Ariz. 130, 140, 717 P.2d 434, 444 (1986); *Thurston*, 179 Ariz. at 50-51, 876 P.2d at 546-47. "A vested property right is a right which is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Aranda v. Indus. Comm'n of Ariz.*, 198 Ariz. 467, 471 ¶ 18, 11 P.3d 1006, 1010 (2000) (internal quotation marks and citation omitted). Thus, once substantive rights have vested, they cannot be impaired. *Hall*, 149 Ariz. at 140, 717 P.2d at 444. And rights that are legally vested differ from rights that are contingently vested, that is, ones that only "come into existence on an event or condition which may not happen or be performed until such other event may prevent their vesting." *Thurston*, 179 Ariz. at 50, 876 P.2d at 546; *see also Fund Manager, Pub. Safety Pers. Ret. Sys. v. Phx. Police Dep't Pub. Safety Pers. Ret. Sys. Bd.*, 151 Ariz. 487, 490, 728 P.2d 1237, 1240 (App. 1986) (listing employment rights that do not vest until the "condition" of service is satisfied, including accidental disability pension, unearned annual leave, vacation credits, and sick leave).

¶32 EORP and the State argue that the term "vesting" as used in the statute refers to legal vesting and operates to permit a unilateral change to an employment contract. But if we were to accept their position, the vesting statute would alter earlier established substantive rights to particular retirement benefits, violating *Yeazell*. Thus, the vesting statute is constitutional only if it refers to contingent vesting. *See Jones v. Sterling*, 210 Ariz. 308, 314-15 ¶ 27, 110 P.3d 1271, 1277-78 (2005) (providing that when we can avoid constitutional doubt by interpreting a statute in a manner that does no violence to its text, we will adopt that interpretation); *Kotterman v. Killian*, 193 Ariz. 273, 284 ¶ 31, 972 P.2d 606, 617 (1999) ("[W]e resolve all uncertainties [regarding a statute] in favor of constitutionality."). Our interpretation preserves the statute's constitutionality

because it does not affect the earlier established substantive right to particular retirement benefits. *See In re Shane B.*, 198 Ariz. 85, 87 ¶ 8, 7 P.3d 94, 96 (2000) (providing that an exception to the general prohibition on retroactive application of statutes is that "a statute does not have impermissible retroactive effect if it is merely procedural and does not affect an earlier established substantive right").

¶33 Consequently, under *Yeazell* and the vesting statute, a public employee's interest in a retirement benefit or pension becomes a right or entitlement at the outset of employment, but the right to begin collecting pension benefits is contingent upon completing the requirements for retirement eligibility. *See Fields*, 234 Ariz. at 221 ¶ 31, 320 P.3d at 1167 (providing that although the right to receive a pension "vest[s] upon acceptance of employment," the pension is "subject to conditions precedent, such as completing the term of employment"); *Krucker v. Goddard*, 99 Ariz. 227, 230, 408 P.2d 20, 22 (1965) (providing that a plan member's right to withdraw contributions vested because he "had fulfilled every condition precedent to having his contributions returned"); *Cross v. Elected Officials Ret. Plan*, 234 Ariz. 595, 600 ¶ 12, 325 P.3d 1001, 1006 (App. 2014) ("When the Plan accepts a member's application for retirement, pension rights `vest' in that only then may the member begin to receive the benefits."). Consequently, because the Class Members have a binding contract under *Yeazell* and because the employees and the State have not agreed to modify that contract, the vesting statute, by itself, does not
1119 permit the *1119 Legislature to unilaterally change the terms of that contract to the employees' detriment. Accordingly, the Bill's changes to the benefit increases formula and the contribution rate provisions violate *Yeazell* by unilaterally modifying the Class Members' contracts with the State.

ISSUES ON CROSS APPEAL

A. Attorneys' Fees

¶34 On cross-appeal, the Class Members first argue that they are entitled to attorneys' fees incurred before the trial court under A.R.S. § 12-341.01 because the action arose out of contract. EORP counters that A.R.S. § 12-341.01 is inapplicable because the action arose from constitutional or statutory obligations, not contractual obligations, even though the members' employment contracts were implicated. We review de novo the applicability of A.R.S. § 12-341.01. *See Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Bach*, 193 Ariz. 401, 402 ¶ 5, 973 P.2d 106, 107 (1999).

¶35 Section 12-341.01(A) provides that a court may award reasonable attorneys' fees to the successful party in "any contested action arising out of a contract, express or implied." When questions of contract are combined with other questions, judicial analysis whether the action is sufficiently contractual to invoke A.R.S. § 12-341.01(A) "has aptly focused on the substance of the action and the statutory policy to mitigate the burden of the expense of litigation to establish a just claim or defense." *A.H. By & Through White v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 190 Ariz. 526, 529, 950 P.2d 1147, 1150 (1997) (internal quotation marks and citation omitted). The mere existence of a contract somewhere in the transaction is insufficient to support a fee award. *Id.* That is, "when the cause of action arises from statutory rather than contractual obligations, the peripheral involvement of a contract does not require the application of [A.R.S.] § 12-341.01(A)." *Id.* (internal quotation marks and citation omitted).

¶36 Although this action might first appear to arise from constitutional or statutory interpretation, as EORP urges, a closer examination of the operation of those contractual provisions reveals otherwise. Sections 38-810 and 38-818 are part of the Plan's statutory scheme to provide retirement benefits for elected officials. A.R.S. § 38-802. The Plan's fund is used "exclusively for payment of benefits to retired members or their beneficiaries" and "for payment of the administration, operation and investment expenses of the plan." *Id.*

¶37 As recognized in *Yeazell*, because the Gift Clause forbids the Legislature from providing gratuities, the right to receive retirement benefits necessarily arose as a condition of the employee's contract of employment. *See* 98 Ariz. at 114, 402 P.2d at 544. The Plan is therefore a creature of statute that assumes the contractual obligations between the State and public employees and exists to administer the statutorily-imposed duties of generating assets for benefit payments to retired members or their beneficiaries. Thus, the Plan's relationship with the Class Members is governed by the members' employment contracts with the State. Section 12-341.01 is therefore applicable to disputes between the Plan and Class Members because the Plan's obligation is determined by the underlying employment contracts. *See Pendergast v. Ariz. State Ret. Sys.*, 234 Ariz. 535, 542 ¶ 23, 323 P.3d 1186, 1193 (App. 2014) (providing that a public employee was entitled to attorneys' fees on appeal when the Arizona State Retirement System appealed the trial court's finding that application of a

statute limiting the employee's purchase of credited service violated the Pension Clause, because the matter arose out of contract). Consequently, because this action arose out of the contractual relationship between the Class Members and the State, it arose out of contract and is properly within the scope of the attorneys' fees statute.

B. Prejudgment Interest

¶38 The Class Members next contend that they are entitled to prejudgment interest on the principal amounts due under the judgment. EORP counters that the Class Members are not entitled to such an award because EORP cannot be charged
1120 interest *1120 on money it was not legally obligated or able to pay and that the Plan statutes provide the sole remedy for the Class Members. We review de novo whether a party is entitled to prejudgment interest. *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 508, 917 P.2d 222, 237 (1996).

¶39 Although the trial court found that awarding prejudgment interest in this case would not serve the purposes of prejudgment interest, "prejudgment interest on a liquidated claim is a matter of right" in a contract action. *Metzler v. BCI Coca-Cola Bottling Co.*, 235 Ariz. 141, 144 ¶ 11, 329 P.3d 1043, 1046 (2014) (citation and quotation marks omitted). A claim is liquidated "if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion." *Schade v. Diethrich*, 158 Ariz. 1, 14, 760 P.2d 1050, 1063 (1988) (citation omitted).

¶40 Here, the principal amounts due are liquidated because they may be computed with exactness. One principal amount due is the excess payment contributions made by all Class Members. The other principal amount due is the delayed payments of permanent benefit increases under the former benefit increases formula to judges who have retired before this action has concluded. These amounts are readily determinable. Consequently, because the principal amounts due can be computed with exactness, the Class Members are entitled to prejudgment interest on those amounts at the rate determined pursuant to A.R.S. § 44-1201(F) (setting the rate for prejudgment interest).

C. Relief Also Against the State

¶41 The Class Members argue finally that judgment should also run against the State because the State voluntarily intervened and actively litigated the case. The State counters that the Class Members will obtain all the relief to which they may be entitled from EORP and that it intervened for the limited purpose of defending the Bill's constitutionality. We hold that under the facts here, relief should also run against the State.

¶42 Arizona courts have previously held that intervenors may seek relief in civil rights actions, have judgments run against them, and be the prevailing party for purposes of the attorneys' fees statute. *See, e.g., Civil Rights Div. of Ariz. Dep't of Law v. Super. Ct. In & For Pima Cty.*, 146 Ariz. 419, 426-27, 706 P.2d 745, 752-53 (App. 1985) (providing that attorneys' fees which the Legislature intended could be recovered in civil rights actions are a form of relief that may be sought only by individual plaintiffs or intervenors); *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 172 Ariz. 356, 371-72, 837 P.2d 158, 173-74 (App. 1991) (allowing judgment to run against intervenor-defendants and awarding plaintiffs attorneys' fees against defendants and intervenor-defendants under the private attorney general doctrine); *McKesson Chem. Co., a div. of Foremost-McKesson, Inc. v. Van Waters & Rogers*, 153 Ariz. 557, 739 P.2d 211 (App. 1987) (remanding for the trial court to determine whether intervenor-defendant was entitled to attorneys' fees as prevailing party and awarding intervenor-defendant attorneys' fees incurred on appeal).

¶43 Therefore, relief can run against an intervenor-defendant. Here, the State elected to intervene as a defendant — referring to itself as "Intervenor Defendant" in several pleadings — and fully participated in this litigation, as well as in *Fields*. Although the Class Members did not amend their complaint to assert a claim against the State, they did notify the parties that they would seek relief against EORP and the State. "It would be hypertechnical and unjust to preclude [Class Members] from recovering [relief] that they have earned, merely for failure to amend their complaint to expressly include [the State] within their demand for judgment." *Hassell*, 172 Ariz. at 371-72, 837 P.2d at 173-74. Consequently, under the facts presented, relief should also run against the State.

III. CONCLUSION

¶44 For the foregoing reasons, we affirm the trial court's judgment with respect to the unconstitutionality of the two
1121 provisions of the Bill at issue, but reverse with respect to *1121 the court's denial of attorneys' fees, prejudgment interest, and relief against the State. On appeal, the Class Members request attorneys' fees pursuant to A.R.S. § 12-341.01. In our discretion, we deny their request.

CATTANI, J., concurring.

¶45 I concur in the court's analysis, but I write separately to express my view that the superior court correctly ruled that Senate Bill 1609's change to the Class Members' contribution rate violates the Pension Clause of the Arizona Constitution. From my perspective, changing the employees' pension contribution rate specified by statute — and thereby decreasing the employer's funding share — diminished the employee's public retirement system benefit. And because the Pension Clause provides that "public retirement system benefits shall not be diminished or impaired," Ariz. Const. art. 29, § 1(C), the Bill is unconstitutional regardless whether it would survive scrutiny under the Contract Clause, and the remand urged by the dissent is unnecessary.

¶46 The defined benefit pension system to which Class Members belong guarantees each Class Member fixed monthly benefit payments from the time of retirement for the remainder of the retiree's life. The cost of funding the post-retirement benefit payments is shared by Class Members and the State, with Class Members paying a fixed percentage of their salary at the rate specified in A.R.S. § 38-810, and the State responsible for the balance necessary (beyond investment earnings) to ensure the actuarial soundness of the pension system.

¶47 EORP and the State, as well as the dissent, posit that the Bill did not diminish or impair Class Members' pension benefits because the Bill did not change the guaranteed monthly payments to which Class Members are entitled upon retirement. But under that view, the Legislature could unilaterally increase the employees' contribution rate to the point that Class Members shoulder the entire cost of funding the public pension system rather than sharing the cost between employee and employer. And it would be nonsensical to suggest that converting a public employee's employer-provided retirement benefit into an entirely self-funded retirement plan would not diminish the employee's "public retirement system benefits."

¶48 The same logic applies to a partial reduction in the employer's share of contributions to a retirement plan. Consider, for example, an employment agreement in which an employer agreed to share in the cost of a $1,000,000 retirement annuity (to be purchased on the date of retirement) that would pay the employee $5,000 per month for the rest of the employee's life. If the employer agreed to pay 60 percent ($600,000) of the cost to fund the annuity, with the employee responsible for the remaining 40 percent ($400,000), the value of the retirement benefit provided by the employer would be $600,000 as of the date of retirement. Under that scenario, increasing the employee's share to 50 percent and reducing the employer's contribution to 50 percent would mean that the value of the retirement benefit provided by the employer would only be $500,000, which would obviously be a reduction in that benefit.[6]

¶49 This example highlights that the benefit to an employee participating in a pension plan should not be measured — as the dissent suggests — as simply the sum of the retirement payments received during a retiree's lifetime. Rather, the value of the benefit to the employee is the amount the *employer* contributes to guarantee the stream of post-retirement payments. And when the employee's contribution rate is a factor in determining the amount of the employer's contribution, the
1122 employee's contribution rate is a *1122 protected benefit under the Pension Clause.[7] *Cf. Fields v. Elected Officials' Ret. Plan*, 234 Ariz. 214, 219-20, ¶¶ 24-29, 320 P.3d 1160 (2014) (holding that the statutory formula for determining retiree benefit increases constitutes a pension benefit for purposes of the Pension Clause). Thus, a unilateral increase in the employee's contribution rate violates the Pension Clause.

¶50 The dissent relies on *Taylor v. City of Gadsden*, 767 F.3d 1124 (11th Cir. 2014), and *Borders v. City of Atlanta*, 298 Ga. 188, 779 S.E.2d 279, 281 (2015), to suggest that courts in other jurisdictions have concluded that pension contribution rates are not a "benefit." But the analysis in those cases is based on a critical distinction: in both *Taylor* and *Borders*, the terms of the pension plan from the outset expressly allowed modification. *Taylor* involved a pension system in which the employee handbook "explicitly stated that the 'member contribution rate is determined by statute and subject to change by the Alabama Legislature.'" 767 F.3d at 1129. The retirement plan at issue in *Borders* "unambiguously provide[d] for subsequent modification or amendment." 779 S.E.2d at 282. The Pension Clause is only implicated when a promised benefit is "diminished or impaired," and modifying the contribution rate in those circumstances did not take away a promised pension benefit precisely because the employment contract authorized the modification.

¶51 There is no such modification provision applicable to Class Members in this case. Section 38-810 specified a fixed 7% employee contribution rate, and no representations were ever made to Class Members that their contribution rate could vary in any way. Had Class Members been advised at the outset of their employment that their contribution rate was subject to change by the Legislature (effectively setting a variable formula for employee and employer contribution rates), Class Members — like the employees in *Taylor* and *Borders* — would not have a claim under the Pension Clause that a promised benefit was taken away.

¶52 And therein lies the problem underlying the position taken by EORP and the State, as well as the dissent, because the analysis turns on the question of what pension benefits employees were promised when they were hired. At its core, this case is based on the simple premise that employees who accept employment are entitled to rely on promises made as part of their employment contract. And when those promises involve pension benefits for state employees, that guarantee carries constitutional weight. Here, because Class Members were promised a specified (fixed) pension contribution rate as part of their initial employment contract, the Bill's changes to that rate diminished a promised benefit and thus contravened the Pension Clause.

¶53 The dissent asserts that the employee contribution rate was in fact variable, and that the Bill thus did not result in a Pension Clause violation. Although the constitutional provision regarding public retirement systems contemplates that *total contributions* will vary as necessary to ensure actuarial soundness, *see* Ariz. Const. art. 29, § 1(A), the provision says nothing about the employees' and employer's relative share of the total contribution amounts. And nothing in the language of § 38-810 or the terms of employment under which Class Members were hired suggests a variable rate.[8] Rather, § 38-
1123 810 (as it existed when each of the Class Members *1123 was hired) specified an employee contribution rate of 7% of salary, and this became a provision of the employment contract on which each Class Member was entitled to rely.

¶54 The dissent notes that § 38-810 "has never contained language indicating an expectation or guarantee." But the language of the statute creates precisely that expectation by imposing a fixed contribution rate for Class Members. And that language is in stark contrast to statutory language the Legislature has used in establishing other pension plans — such as ASRS — that impose a variable employee contribution rate. *See* A.R.S. § 38-736 (specifying that ASRS "member contributions are a percentage of a member's compensation equal to the employer contribution").[9]

¶55 The Legislature could have similarly designed EORP from the outset with a variable employee contribution rate. But it is not our role to rewrite the original statute or adopt language from other statutes. *See* Hughes v. Jorgenson, 203 Ariz. 71, 73, ¶ 11, 50 P.3d 821 (2002) (noting presumption that "the legislature has said what it means"); *see also* Comm. for Pres. of Established Neighborhoods v. Riffel, 213 Ariz. 247, 249-50, ¶ 8, 141 P.3d 422 (App. 2006) (noting that "when the legislature uses different language within a statutory scheme, it does so with the intent of ascribing different meanings and consequences to that language").

¶56 Finally, the dissent misses the mark by suggesting that this case "freez[es] employee contribution rates in perpetuity." Nothing in the court's opinion prevents the State from prospectively specifying — as part of an initial employment contract — that a defined-benefit employee is subject to a variable contribution rate or, as the State has actually done for judges appointed after the effective date of the Bill, provide new employees with a defined contribution pension plan. Moreover, although the dissent references pension systems involving other types of state employees while highlighting the economic concerns underlying pension reform proposals, the court's decision addresses only a small percentage of state employees (judges) who are part of an independent branch of government and whose positions carry added constitutional protections. *See* Ariz. Const. art. 6, § 33 (providing that the Legislature cannot remove judges from office or reduce their salary). And although the State cannot fire judges or reduce their salaries, nothing prevents the State from negotiating a change to the contribution rate for judges and incentivizing such a change by, for example, conditioning future raises on an agreement to accept a higher contribution rate. Accordingly, the court's decision does not "lock in" an unworkable contribution rate in perpetuity, and instead simply requires that changes to promised pension benefits be carried out in a manner that comports with constitutional principles.

BOLICK, J., joined by TREBESCH, J., dissenting in part and concurring in the judgment in part.

¶57 The majority today holds unconstitutional statutory changes to the permanent benefit increase ("PBI") formula and contribution rates as applied to active members of EORP. We respectfully dissent from the holding that changes to contribution rates are unconstitutional and otherwise concur in the result.

¶58 This case involves an anomaly that is largely this Court's invention. Most Arizona state employees are at-will employees. EORP's active members are either elected officials or judges who serve for fixed terms. No formal contract exists between the state and those employees. However, in a work of legal fiction to which the likes of John Grisham could only aspire, this Court fifty-one years ago implied such a contract for purposes of pension benefits, whose terms are largely set upon the employment date and whose benefits extend far beyond retirement until the employees' beneficiaries pass on.
1124 *1124 *See Yeazell, 98 Ariz. at 117, 402 P.2d at 546*. The voters subsequently incorporated much of that legal relationship into our Constitution. Ariz. Const. art. 29, § 1. We are impelled by that law to agree with the majority that the change in the PBI formula is impermissible. But by freezing employee contribution rates in perpetuity, the majority goes far beyond anything contemplated by our jurisprudence or the Constitution, thereby jeopardizing the Plan's financial integrity, imposing an enormous uncontemplated burden on taxpayers, and preventing the state from reasonably requiring employees to shoulder part of the increased burden of paying for their own retirement benefits.

I.

A. Factual Background

¶59 Arizona has four statewide retirement plans for public employees: the Arizona State Retirement System ("ASRS"), EORP, the Public Safety Personnel Retirement System ("PSPRS"), and the Corrections Officers Retirement Plan ("CORP"). *See* Hayleigh S. Crawford, *Going For Broke: Arizona's Legal Protection of Public Pension Benefits,* 46 Ariz. St. L.J. 635, 655 (2014). EORP is by far the smallest.[10] All are "defined benefit" systems, which means they are "funded by employer and employee contributions and guarantee[] the employee a certain benefit upon retirement." *Id.* at 639-40.

¶60 In 1985, the Legislature enacted EORP, which provided to elected officials, including judges, a pension in the amount of three and one-third percent of salary for each year worked, up to eighty percent of average yearly salary after twenty years of employment, which was increased to four percent in 1988. *See* 1985 Ariz. Sess. Laws, ch. 309, § 4 (1st Reg. Sess.) (codified at A.R.S. § 38-808(B)(1) (1985)). That promised benefit, which essentially places elected officials and judges on par with first responders, has never been changed.

¶61 The EORP Plan has four funding sources: employer contributions, employee contributions, court filing fees, and investment proceeds. The employee contribution rate is set by statute and has changed over time. In 1985, it was set at six percent of the employee's gross salary. *See id.* (codified at A.R.S. § 38-810(A) (1985)). In 1987, it was increased to seven percent. *See* 1987 Ariz. Sess. Laws, ch. 146, § 4 (1st Reg. Sess.) (codified at A.R.S. § 38-810(A) (1987)).

¶62 By contrast, employer contributions are determined by actuarial calculations of the amount needed to fund the plan in light of projected payouts and investment income, in order to cover both normal service costs and the amortized amount of the unfunded actuarial accrued liability over a period not to exceed thirty years. In recent years, the employer contribution rate has increased dramatically, from a low of 6.97 percent of each employee's salary in 2002 to 29.79 percent in 2011, the year in which the reform at issue was adopted. According to EORP, the rate has continued to increase every year since then, to 39.62 percent in the fiscal year ending in 2014. In other words, the employer's contribution rate has increased 568 percent in twelve years.

¶63 Also at issue in this case are "permanent increases in base benefits" for retired employees. In 1990, the state enacted the first statutory PBI formula, providing retirement payment increases based on the Plan's investment earnings. 1990 Ariz. Sess. Laws, ch. 236, § 4 (2d Reg. Sess.) (codified at A.R.S. §§ 38-818(B), (E), (F) (1990)). If investments returned more than nine percent, half of the return would be used to fund increases up to four percent, with any remainder placed into a reserve for future benefits increases. *Id.* After that statute expired in 1994, the Legislature enacted a new PBI formula the following year. Increases were based on the Plan's investment returns, capped at the lesser of three percent or half of the percentage change in the consumer price index. 1996 Ariz. Sess. Laws, ch. 198, § 1 (2d Reg. Sess.) (codified at A.R.S. §
1125 38-818(F) (1996)). In 1998, the Legislature raised the maximum possible increase to four *1125 percent and eliminated any reference to the inflation rate. 1998 Ariz. Sess. Laws, ch. 264, § 1 (2d Reg. Sess.) (codified at A.R.S. § 38-818(F) (1998)). That statutory formula remained in place until S.B. 1609. According to EORP, since the 1998 change, EORP retirees received a four percent annual benefit increase each year until the end of fiscal year 2010.

¶64 The statute at issue in this case is part of a nationwide effort to reform public pensions. As a result of recession and insufficient contributions, as of 2010, public pensions for state employees nationally were underfunded by an estimated one trillion dollars. Pew Center on the States, *The Trillion Dollar Gap: Underfunded State Retirement Systems and the Roads to Reform* at 1-3 (2010). Between 2008 and 2013, every state passed some type of pension reform legislation. *See* National Conference of State Legislatures, *Pensions and Retirement State Legislation, available at* http://www.ncsl.org/research/fiscal-policy/pension-legislation-database.aspx (last visited Mar. 7, 2016).

¶65 Arizona's public pensions were not immune to these financial challenges. In 2010, Arizona taxpayers were paying at least $1.39 billion annually to fund the state pension systems, a 448 percent increase from ten years previously and more than the estimated cost for higher education, corrections, or healthcare for indigent people. Crawford at 637. Serious reversals in investment returns in 2000, 2008, and 2009, combined with significant actuarial errors pertaining to the PBI mechanism, contributed to what EORP characterizes as "dramatic decreases" in the Plan's funding ratio — a benchmark of financial soundness calculated by dividing the plan's assets by its liabilities. The funding ratio decreased from 141.7 percent in 2001 to 58.4 percent in 2012, a decline EORP considers "alarming." *See generally Fields*, 234 Ariz. at 217 ¶ 8, 320 P.3d at 1163 (recounting declining funding ratio). Based on record evidence, EORP suggests that an "80% funding ratio is a generally accepted indicator of a healthy pension plan." Additionally, EORP's PBI reserve for future benefit increases declined from more than $40 million in 2000 to zero in 2011. In sum, EORP was severely under-funded, rendering precarious its ability to pay future pension obligations.

¶66 In an effort to place EORP, CORP, and PSPRS on a more sound financial footing, the Legislature passed S.B. 1609 in 2011. As relevant here, the statute increased the employee contribution rate from seven percent to ten percent for fiscal year 2011-12, to 11.5 percent in 2012-13, and a maximum of thirteen percent thereafter. A.R.S. § 38-810(F)(1)-(4) (2011), *renumbered as* A.R.S. § 38-810(G)(1)-(4) (2013). The Legislature also included a "maintenance of effort" clause, which provides that employee contributions above seven percent of salary shall not be used to reduce the employer's contribution. A.R.S. § 38-810(G) (2011), *renumbered as* A.R.S. § 38-810(H) (2013).

¶67 Senate Bill 1609 also made changes to the PBI formula in EORP, PSPRS, and CORP. First, it ended future inflows into the PBI reserve fund. A.R.S. § 38-818.01(E). Second, it increased the investment return rate upon which future PBIs would be calculated. A.R.S. § 38-818.01(D). Finally, it maintained a four percent maximum for future benefit increases, it pegged such increases to the Plan's funding ratio, with larger benefit increases as the actuarial soundness of the Plan improved. A.R.S. § 38-818.01(C). These changes — the increased employee contribution rate and the changes in the PBI formula — are at issue here.

¶68 In 2013, EORP was closed to new members so that elected officials and judges taking office thereafter are no longer eligible. 2013 Ariz. Sess. Laws, ch. 216, § 9 (1st Reg. Sess.). Instead, they participate in a "defined contribution" program. [11]

B. Applicable law

¶69 The Contract Clause of our Declaration of Rights, comprised by Arizona Constitution article 2, section 25, provides that
1126 "no... law impairing the obligation of a contract[] *1126 shall ever be enacted." Historically, Arizona courts have applied the United States Supreme Court's test for determining violations of the Contract Clause of the Federal Constitution. In order to violate the Contract Clause, a law must substantially impair a contractual relationship. The state may justify the impairment by demonstrating a significant, legitimate public purpose, and that the impairment is reasonable and appropriate. *See, e.g., Fund Manager, Pub. Safety Pers. Ret. Sys. v. City of Phoenix, Police Dep't Pub. Safety Pers. Ret. Sys. Bd.*, 151 Ariz. 487, 491, 728 P.2d 1237, 1241 (App. 1986) (citing *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)).

¶70 This Court first held that public pension benefits are contractual rights in *Yeazell*, 98 Ariz. at 114-15, 402 P.2d at 544-45. Because the Arizona Constitution prohibits gifts of public funds to individuals,[12] the Court reasoned that "state pensions cannot be sustained as constitutional unless anchored to a firmer basis than that of a gift." *Id.* at 112, 402 P.2d at 543. On that basis, the Court determined that public pensions are contractual in nature, and that "[c]ontroversies as to those rights should be settled consistent with the law applicable to contracts." *Id.* at 113-14, 402 P.2d at 544.

¶71 More specifically, the Court held that "the laws of the state are a part of every contract." *Id.* at 113, 402 P.2d at 544. Because retirement benefits are "a valuable part of the consideration for the entrance into and continuation in public employment," the "right to a pension becomes vested upon acceptance of employment." *Id.* at 115, 402 P.2d at 545. A "contract cannot be unilaterally modified nor can one party to a contract alter its terms without the assent of the other party." *Id.* Applying those principles, the Court held that a legislative amendment "may not be arbitrarily applied retroactively to impair the contract" as it existed at the time the employment relationship was established. *Id.* at 117, 402 P.2d at 546.

¶72 The Court in *Yeazell* and subsequent cases essentially created a one-way ratchet. Baseline benefits are set on the employment date. They can be increased but never decreased without members' consent. Such un-bargained for, open-ended benefits are hardly compelled by the Gift Clause, though they might well be forbidden by it. *Cf. Turken v. Gordon*, 223 Ariz. 342, 351 ¶ 43, 224 P.3d 158, 167 (2010) (payments of public funds must be supported by consideration that is not disproportionate to the value received). In dissent, Justice Udall declared that the majority opinion "had no support in reason or logic nor the case law ... and will create problems far beyond the immediate controversy." *Yeazell*, 98 Ariz. at 124, 402 P.2d at 551 (Udall, J., dissenting). Justice Udall was prescient.

¶73 However, the *Yeazell* decision embraced a vitally important limiting principle to ensure that the supposed pension contract would not necessarily be a financial suicide pact for the taxpayers. "We do not ... mean to imply what rights or remedies might be available to either party in a situation where it is established that a retirement plan is actuarially unsound," the Court declared. *Id.* at 117, 402 P.2d at 546. In such circumstances, the Court stated, ordinary contract principles such as mutual mistake of fact could be applied to modify or rescind a contract in appropriate circumstances. *Id.* at 116, 402 P.2d at 546. Specifically, if both parties "labored under the mistaken assumption that there was a fund sufficient to afford... beneficiaries of the fund the amount provided" by the original plan, the state could modify the contract if it carried its burden of proving the mutual mistake. *Id.* Although the State presented abundant evidence that EORP was structurally unsound prior to S.B. 1609, the trial court never addressed the question of mutual mistake, instead disposing of the case entirely under the Pension Clause of our Constitution.

¶74 In 1998, upon legislative referral, Arizona voters enacted Proposition 100, which added article 29, section 1 to the
1127 Arizona Constitution. Most relevant to the issues presented *1127 here is section C, which provides, "Membership in a public retirement system is a contractual relationship that is subject to article II, section 25 [the Contract Clause], and public retirement system benefits shall not be diminished or impaired."[13]

¶75 In *Fields*, this Court struck down under the Pension Clause S.B. 1609's change in the permanent benefit increase formula as to *retired* EORP members. 234 Ariz. at 221 ¶ 34, 320 P.3d at 1167. The Court concluded that the statutorily prescribed permanent benefit increase formula is a Plan "benefit," and that S.B. 1609's formula modification violated article 29, section 1 because it "diminishes and impairs the retired members' benefits." *Id.* at 216 ¶ 1, 220-22 ¶¶ 30-36, 320 P.3d at 1162, 1166-68.

¶76 In this action, on cross-motions for summary judgment, the trial court concluded that the changes to the permanent benefit increase formula and contribution rates for active Plan members violated the Pension Clause. Because it so ruled, it did not reach any of the other constitutional issues. Although we agree with the majority's outcome on the PBI formula issue, we believe that the contribution rate is not a pension "benefit," and that the trial court improperly granted summary judgment to the plaintiffs without considering defendants' defenses under *Yeazell* or the Contract Clause.

II.

A. The Pension Clause

¶77 Although the majority reaches the Pension Clause issue only with regard to the PBI formula and not to contribution rates, we consider it in both contexts because it was the sole basis for the trial court's contribution rates ruling as embraced by the concurring opinion.

¶78 "In interpreting a constitutional amendment, our primary purpose is to `effectuate the intent ... of the electorate that adopted it.'" *Id.* at 219 ¶ 19, 320 P.3d at 1165 (quoting *Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994)). In doing so, we give words "the meaning most common to the ordinary individual." *Downs v. Sulphur Springs Valley Elec. Coop.*, 80 Ariz. 286, 293, 297 P.2d 339 (1956); *accord Fields*, 234 Ariz. at 219 ¶ 19, 320 P.3d at 1165.

¶79 In addition to the text's plain language, the ballot pamphlet can aid in determining the electorate's intent. *See* Calik v. Kongable, 195 Ariz. 496, 498 ¶ 10, 990 P.2d 1055, 1057 (1999). The ballot measure's proponents (no opponents submitted statements) all address one overriding purpose: to prevent the legislature from raiding pension funds, which had occurred in other states. *See* Ariz. Sec'y of State, 1998 Publicity Pamphlet 6-12 (1998), *available at* http://apps.azsos.gov/election/1998/Info/PubPamphlet/ Prop100.html.

¶80 That objective reflects in the first two of article 29, section 1's three substantive provisions. Subsection A declares, "Public retirement systems shall be funded with contributions and investment earnings using actuarial methods and assumptions that are consistent with generally accepted actuarial standards." Subsection B provides, "The assets of public retirement systems, including investment earnings and contributions, are separate and independent trust funds and shall be invested, administered and distributed as determined by law solely in the interests of the members and beneficiaries of the public retirement systems."

¶81 On its face, subsection C, at issue here, makes two changes from prior law regarding pension contracts.[14] First, it establishes that "[m]embership in a public retirement system is a contractual relationship that is subject to article II, § 25,"
1128 the Contract Clause. This language marks a significant departure from *1128 *Yeazell* and its progeny because instead of applying ordinary contract principles to pension contract terms, it establishes that the relationship is subject to Contract Clause rules, which generally provide greater leeway to contract modifications by government. *See, e.g.,* Fund Manager, Pub. Safety Pers. Ret. Sys., 151 Ariz. at 491, 728 P.2d at 1241. As a result, this change is extremely consequential for the present case.

¶82 Second, subsection C states that "public retirement system *benefits* shall not be diminished or impaired." This too marks a departure from prior law, more favorable to Plan members and beneficiaries in this instance because it suggests that benefits cannot be diminished or impaired *period,* even in light of contract defenses that might previously have been raised under *Yeazell.*

¶83 It therefore makes an enormous difference whether a particular pension contract provision is a "benefit." If so, it is legally sacrosanct; if not, it is subject to the Contract Clause's modification rules. The Court recognized this crucial distinction in *Fields,* declaring that the "Contract Clause applies to the general contract provisions of a public retirement plan, while the Pension Clause applies only to public retirement benefits." 234 Ariz. at 218 ¶ 17, 320 P.3d at 1164. In this case, the majority correctly applies the changes wrought by the Pension Clause to invalidate changes to the PBI formula, but improperly ignores them in order to strike down the change in contribution rates.

B. Permanent benefit increases

¶84 This Court decided in *Fields* that the PBI formula for retired Plan members is a benefit. Because S.B. 1609 diminished or impaired that benefit, it violated the Pension Clause. 234 Ariz. at 220 ¶¶ 26-27, 320 P.3d at 1166.

¶85 The State and EORP argue that the vesting statute, A.R.S. § 38-810.02, changed the pension contract for employees hired after its 2000 effective date. Specifically, they urge that for such employees, benefits do not vest until retirement, hence the state may determine benefit increases upon retirement.

¶86 As a general proposition, we agree with defendants that the state is free to change pension terms or benefits or eliminate them altogether for new employees, as the state did by changing to a defined-contribution system for judges and elected officials in 2013. But their interpretation of the vesting statute collides with the contractual nature of public pensions, under *Yeazell* and as embraced and modified by article 29, section 1. Prior to the vesting statute in 2000, all seem to agree that Plan members had a contractual expectation of a particular formula for permanent benefit increases. The State and EORP posit that after the vesting statute, that contractual expectation was replaced by a contingent expectation; that is, the state may determine benefit increases upon retirement.

¶87 Such a contingent, open-ended possibility fails for two reasons. First, it does not provide a sufficiently definite term to satisfy the requirement of contractual consideration. *See, e.g.,* Savoca Masonry Co. v. Homes & Son Constr. Co., 112 Ariz. 392, 394, 542 P.2d 817, 819 (1975) (requiring sufficient specification of terms for mutual assent). Second, it raises the Gift Clause concerns that animated the *Yeazell* decision because the state is deciding the amount of compensation after work is performed, thus giving rise to the prospect of a gift rather than proportionate, bargained-for consideration. 98 Ariz. at 112-13, 402 P.2d at 543-44.

¶88 Accordingly, we conclude that the vesting statute did not alter the contractual expectations of EORP Plan members, and thus the Court's conclusion in *Fields* that the PBI formula is protected by the Pension Clause also controls here. Because S.B. 1609's modification to the PBI formula impaired or diminished that benefit for active Plan members, it violates the Pension Clause.

C. Contribution Rates

¶ 89 By contrast, contribution rates are not benefits and thus do not fall within the Pension Clause's strictures.

¶90 By their nature, pension plans fall into one of two categories: defined benefits or defined contributions. In the former,
1129 benefits are fixed but the contributions may vary; in *1129 the latter, contributions are fixed but the payouts may vary. *See, e.g.*, Crawford at 639-42.

¶91 Article 29, section 1(B) uses the term "contributions" and makes clear they are Plan "assets," providing that they are to be held in trust for the Plan's beneficiaries. Section 1(A) provides that public pension systems "shall be funded with contributions and investment earnings using actuarial methods and assumptions that are consistent with generally accepted actuarial standards." That language indicates contributions are not fixed, but rather may vary over time to ensure the Plan's financial integrity. Indeed, at oral argument, plaintiffs' counsel could point to nothing in the ballot materials that would have placed voters on notice that the state could not adjust employee contribution rates to ensure the Plan's financial viability.

¶92 Thus, unlike the PBI formula to which an employee is contractually "entitled" according to statutory provisions in effect on the hiring date, *Fields*, 234 Ariz. at 219 ¶ 23, 320 P.3d at 1165, public employees are not entitled to a fixed contribution rate. Indeed, if they were, the failure to raise sufficient funds through employee contributions could jeopardize the Plan's financial viability required under article 29, sections 1(A)-(B), thus justifying the state's change to those rates. By contrast, if the entire burden of providing adequate pension contributions is placed upon the state, it would create an uncertain, open-ended, and limitless obligation that could run afoul of the Gift Clause. *See Turken*, 223 Ariz. at 351 ¶ 43, 224 P.3d at 167.

¶93 The employee contribution rate statute, A.R.S. § 38-810, has never contained language indicating an expectation or guarantee. In fact, the employee contribution rate has varied over time, including an increase from six to seven percent in 1987, shortly after EORP was created. *See* 1987 Ariz. Sess. Laws., ch. 146, § 4 (1st Reg. Sess.) (codified at A.R.S. § 38-810(A) (1987)). Arizona tax statutes also treat pension contributions and benefits differently, with the former generally shielded and the latter generally exposed to taxation. *See* A.R.S. §§ 38-810, -810.01, -811, 43-1022. Arizona contribution rate statutes thus do not exhibit the indicia of contractual entitlement that the Court found with regard to the PBI formula in *Fields*, 234 Ariz. at 219 ¶¶ 23-24, 320 P.3d at 1165.

¶94 Other courts that have considered the precise issue of whether pension contribution rates are a benefit have held they are not. In *Taylor v. City of Gadsden*, 767 F.3d 1124 (11th Cir. 2014), plaintiffs argued, as here, that they had a protected contractual pension right to a particular contribution rate. Holding the change did not violate the state or federal Contracts Clauses, the court explained, "Here, the City did not alter plaintiffs' pension *benefits;* instead, it altered their pension obligations." *Id.* at 1135.

¶95 The Georgia Supreme Court likewise recently considered a challenge to sizable increases in employee contribution rates. The court observed that the "pension contribution increases were not retroactive and did not change a member's benefit formula, calculation of pension benefit, or actual benefit amount payable at the time of retirement." *Borders v. City of Atlanta*, 298 Ga. 188, 779 S.E.2d 279, 281 (2015). The court upheld the contribution rate change because it "did not alter Plaintiffs' pension benefits, but rather modified their pension obligations, and in no manner divested Plaintiffs of their earned pension benefits, so as to implicate constitutional concerns." *Id.* at 287; *see also In re Enrolled Sen. Bill 1269*, 389 Mich. 659, 209 N.W.2d 200, 203 (1973), *followed in AFT Michigan v. Michigan*, 303 Mich.App. 651, 846 N.W.2d 583, 593-94 (2014).

¶96 Furthermore, if contribution rates were benefits, we have difficulty perceiving which aspects of the pension contract would be subject to the Contract Clause rather than to the absolute prohibition against benefit impairment in article 29, section 1(C). Rather, as the Court stated in *Fields,* that special protection is reserved for benefits, which contribution rates are not. Indeed, we are loath to attribute to voters the intent to have taxpayers alone shoulder all unanticipated financial burdens of guaranteed pension payouts, absent clear evidence they were placed on notice that they were doing so when they adopted article 29, section 1.

1130 *1130 ¶97 The majority does not address this issue, finding instead that the changes to the contribution rate violate *Yeazell.* But the concurring opinion by Judge Cattani would affirm the trial court's holding that employee contribution rates are benefits and thus unchangeable under the Pension Clause.

¶98 Judge Cattani compares the defined-benefit contribution to an annuity. Respectfully, it is not. The common definition of annuity is "[a] fixed sum of money payable periodically." Black's Law Dictionary 105 (9th ed. 2009). The defined-benefit pension, by contrast, involves fixed benefits but requires variable payments. Judge Cattani seems to recognize that distinction by observing that if this were an annuity, the amount of payments, or cost, would "be determined upon the employee's retirement." But in reality, under EORP, the payments are made and calculated during employment, based not only on that particular employee's circumstances but the pension system as a whole; indeed, deferring until retirement the amount of an employee's compensation would present Gift Clause problems because it would be indeterminate and open-ended. Perhaps the legislature could improve the current system by purchasing annuities for its employees, but that is not the system before us.

¶99 Judge Cattani also observes that the system has no "modification provision" to alert employees that contribution rates might go up. Were this a real rather than fictional contract, perhaps it would contain such a provision. As with many benefits, such as health insurance, parking, or public transit passes, employee costs can vary. The benefit is the outcome, not how much it costs the employer or employee. That is the nature of a defined-benefit as opposed to a defined-contribution retirement plan. Moreover, as noted, the statutes governing employee contributions have never created an expectation or entitlement, and the rate has changed multiple times over the years. A post hoc transformation of a defined-benefit pension plan into an annuity whose cost is determined upon retirement does not alter the legal reality that employee contribution rates are not benefits.

¶100 For the foregoing reasons, the trial court erred in holding that S.B. 1609's employee contribution rate increase violates the Pension Clause, the sole basis for its ruling on contribution rates.

D. The Contract Clause and *Yeazell*

¶101 The majority bases its decision striking down the contribution rate changes on its view that *Yeazell* allows no changes whatsoever to a pension plan that are to the members' disadvantage, absent the members' consent. As we noted earlier, that conclusion misreads *Yeazell,* which expressly recognizes contract defenses such as mutual mistake regarding the Plan's actuarial soundness. 98 Ariz. at 116, 402 P.2d at 546. It also ignores the constitutional changes that significantly alter our jurisprudential landscape.

¶102 The majority says we "over-read" *Yeazell* because although it recognizes the mutual mistake defense, the Court stated it did "not, however, mean to imply what rights or remedies might be available to either party in a situation where it is established that a retirement plan is actuarially unsound. This is a matter beyond the issues of the present litigation." *See* ¶ 24 (citing *Yeazell,* 98 Ariz. at 117, 402 P.2d at 546). But that is precisely the issue in *this* litigation; and whatever "rights or remedies might be available," it is judicial abdication to preemptively foreclose them.

¶103 Because this case was decided on cross-motions for summary judgment, the trial court made no factual findings on contract defenses. As this Court is not affirming the trial court's ruling that the change in employee contribution rates violates the Pension Clause, and as the parties below fiercely contested the factual issues pertaining to contract defenses, affirming the summary judgment is manifestly inappropriate. *See* Ariz. R. Civ. P. 56(a); *see also Peterson v. Valley Nat. Bank of Phoenix,* 90 Ariz. 361, 362, 368 P.2d 317, 318 (1962) (stating summary judgment inappropriate where there are material contested issues of fact or where there is the slightest doubt as to the facts).

1131 ¶104 Rather than remand the issue for factual determination, the majority dons trial *1131 court robes to determine that EORP and the State are "unable to prove that defense." Selectively reviewing the record, the majority finds that the Plan's financial worries are attributable solely to EORP's investment choices, and states that "disappointment about anticipated investment returns does not qualify as a [mutual] mistake." *See* ¶ 26. Not only that, but "the Plan's actuarial soundness is within the Legislature's control," because it can always increase taxes and court fees, apparently *ad infinitum. Id.* In reality, EORP presented evidence of a variety of causes, and did not learn until a 2010 audit that the Plan was severely unfunded. Until then, all parties labored under the assumption that the Plan was actuarially sound — an assumption that proved to be mistaken. By finding otherwise, the majority short-circuits the mistake of fact analysis that *Yeazell* expressly recognizes.

¶105 The majority errs even more fundamentally by beginning and ending its analysis with *Yeazell.* Article 29, section 1 now governs the contractual relationship regarding public employee pensions. Section 1(C) very plainly states that although benefits are sacrosanct, other parts of the pension contract are governed by the Contract Clause. We said as much in *Fields,* 234 Ariz. at 218 ¶ 17, 320 P.3d at 1164 ("The Contract Clause applies to the general contract provisions of a public retirement plan, while the Pension Clause applies only to public retirement benefits."). As noted previously, we cannot assume that the amendment's drafters were ignorant of past governing law and the significant change effected by the ballot language. Our job is to enforce that language, not ignore it.

¶106 But ignore it the majority does, justifying itself with the proposition, remarkable on multiple levels, that "analyzing whether the Bill would pass review under the Contract Clauses were it not for *Yeazell* and the Gift Clause is unnecessary and violates the principle of judicial restraint." *See* ¶ 28. Article 29, section 1 governs public pensions. It does so in all, not just some, of its particulars. Declining to apply all of its provisions is not judicial restraint but pick-and-choose jurisprudence.

¶107 As we decided in *Fields,* public pension contract terms that are not benefits are subject to the Contract Clause. Neither this Court nor the trial court made the requisite determination that the contribution rate changes violate the Contract Clause; thus, remand is imperative. *See State v. Brita,* 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988) ("It is highly undesirable to attempt to resolve issues for the first time on appeal, particularly when the record below was made with no thought in mind of the legal issue to be decided."). But even so, based on available facts and contrary to the majority's conclusion, the record is quite clear that the changes constitute "a significant and legitimate public purpose," and that the impairment is reasonable and appropriate. *Fund Manager, Pub. Safety Pers. Ret. Sys.,* 151 Ariz. at 491, 728 P.2d at 1241. Averting a pension crisis and protecting the Plan's actuarial soundness are not only significant and legitimate, they are the very essence of the constitutional guarantees the voters approved. The Plan members' contribution rate increases are dwarfed by the increased taxpayer contributions. Senate Bill 1609 takes pains to not displace the state's obligations or to raid pension funds. Based on the record, we would uphold the contribution rate changes under the Contract Clause (and therefore under article 29, section 1(C)). At the very least, we would remand to the trial court to determine this question in the first instance.

III.

¶108 If ever there were a case in which we should seriously indulge the presumption of statutory constitutionality, this is it. The majority winks at that rule, then utterly fails to apply it. It repeatedly invokes the mantle of judicial restraint while casually invalidating a statute designed to preserve the financial stability of a public employee pension plan, a purpose so important that the voters made it part of our state's organic law.

¶109 The majority opinion portends a huge financial windfall for the class members, a burden the taxpayers will shoulder.
1132 Under such circumstances, we should act with great restraint, lest the rule of law be undermined *1132 by a public perception that this decision is of the judges, by the judges, and for the judges. On this important issue, the majority exhibits no such restraint, and we therefore respectfully dissent.

[*] Chief Justice Scott Bales, Vice Chief Justice John Pelander, and Justices Robert M. Brutinel and Ann A. Scott Timmer recused themselves; pursuant to article 6, section 3 of the Arizona Constitution, the Honorable Randall M. Howe and the Honorable Kent E. Cattani, Judges of the Court of Appeals, Division One; the Honorable Michael J. Butler, Judge of the Pima County Superior Court; and the Honorable Patricia A. Trebesch, Judge of the Yavapai County Superior Court, were designated to sit in this matter.

[1] This provision was subsequently amended by Laws 2016, S.C.R. 1019, § 1, effective May 26, 2016. This amendment pertains only to the Public Safety Personnel Retirement System established by Chapter 38, Article 4.1, and thus does not affect the resolution of this case.

[2] The Class Members argue that even if the Bill does not violate the Pension Clause and *Yeazell,* it is still unconstitutional under the Contract Clauses of the United States and Arizona Constitutions and the Judicial Salary Clause of the Arizona Constitution. *See* Ariz. Const. art. 6, § 33; Ariz. Const. art. 2, § 25; U.S. Const. art. 1, § 10. We need not reach these arguments, however, because the Pension Clause and *Yeazell* resolve the fundamental issues regarding the Class Members' rights to the benefit increases formula and the prior contribution rate.

[3] The Class Members argue that because *Fields* held that the Bill's benefit increases formula provision was unconstitutional, the Bill is not entitled to such a presumption. But *Fields* decided only the Bill's constitutionality with regard to *retired* judges and their entitlement to the benefit increases formula. 234 Ariz. at 220-21 ¶¶ 29, 34, 320 P.3d at 1166-67. The issue here is its constitutionality with regard to *employed* judges and their entitlement to the benefit increases formula and the prior contribution rate.

[4] EORP also claims that changes to the Class Members' pension contracts may be justified under the defense of "commercial impracticability." As with the defense of mutual mistakes of fact, however, "mere market shifts or financial inability do not usually effect discharge under the rule" of commercial impracticability. Restatement (Second) of Contracts § 261 cmt. b; *accord id.* at § 152 cmt. b (recognizing that the same analysis applies for mutual mistakes of fact and commercial impracticability). Any defense of commercial impracticability thus fails.

[5] The dissent contends that in ruling that EORP and the State are unable to establish the defenses of mutual mistake of fact and commercial impracticability, we are usurping the trial court's role by improperly determining as fact that poor investment returns were the cause of the Plan's alleged actuarial unsoundness. *See infra* ¶¶ 104-106. The dissent maintains that EORP and the State "presented evidence of a variety of causes" and did not rely only on the Plan's poor investment returns. *Id.* This misunderstands the record and our ruling.

In the pleadings and arguments before the trial court, EORP and the State did not present a "variety of causes" for the Plan's alleged actuarial unsoundness; they presented two: the Plan's poor investment returns and the unsustainability of the former benefit increases formula. These are actually the same cause, however. The former benefit increases formula was based on the Plan's investment returns, *see* Laws 1998, ch. 264 § 1; *Fields*, 234 Ariz. at 216 ¶ 4, 320 P.3d at 1162, which is the very reason that EORP and the State allege it was unsustainable. Thus, the claimed mutual mistake of fact or commercial impracticability — whether made forthrightly on poor investment returns or obliquely on the unsustainability of the benefit increases formula — rests on investments returns. Because EORP and the State as a matter of law cannot rely on poor investment returns to support their defenses, *see* Restatement (Second) of Contracts § 152 cmt. b; *id.*, § 261 cmt. b, our ruling is not improperly based on any factual determination, *see Scottsdale Jaycees v. Super. Ct.*, 17 Ariz.App. 571, 574, 499 P.2d 185, 188 (1972) (holding that when the dispute is not with the facts but with "the legal conclusions to be drawn from" the facts, the legal conclusions "are properly resolved by the court sitting in its capacity as judge and not in its capacity as a trier of fact.").

[6] The dissent asserts that a guaranteed annuity as of the date of retirement is not an accurate way to portray Class Members' retirement benefits because "in reality, under EORP, the payments are made and calculated during employment, based not only on that particular employee's circumstances but the pension system as a whole." But while calculating the funding needed for the public retirement system admittedly requires a more complex actuarial model than this illustration, the shared funding obligations and fixed post-retirement payments of this guaranteed annuity example are in fact similar to the relevant provisions of the Class Members' defined benefit pension.

[7] The retirement payment amount is similarly protected under the Pension Clause. Assuming (as § 38-810 specified) a fixed employee contribution rate, a reduction in the post-retirement payment obligation would reduce the employer's funding share, thus diminishing the employee's pension benefit in violation of the Pension Clause.

[8] The dissent asserts that the employee contribution rate specified by § 38-810 "has varied over time," and that the rate "has changed multiple times over the years." In fact, the rate was changed only once: an increase from 6% to 7% in 1987, shortly after EORP was created. A single statutory modification almost three decades ago — and over a decade before adoption of the Pension Clause — does not establish that the rate is variable at the Legislature's will, much less that such modification comports with the strictures of the Pension Clause. Nor does it foreclose the argument — not at issue here — that an employee hired with the promise of a 6% contribution rate would be entitled to that rate notwithstanding the statutory change.

[9] This means that for ASRS members, who as the dissent acknowledges make up the overwhelming majority of state employees (approximately 535,000 of 582,000), the contribution rate is not fixed as a specified percentage of the employee's salary, but — consistent with the statutory terms of the employment contract — can increase or decrease (just as the State's rate can correspondingly go up or down) depending on the amount needed to fund the overall ASRS pension fund.

[10] ASRS covers about 535,000 members, EORP has approximately 2,000, and PSPRS and CORP together have about 45,000. *Id.*

[11] A defined contribution plan does not provide a guaranteed benefit amount at retirement. Rather, employers and employees contribute to a plan in which benefits are based on contributions plus or minus investment returns.

[12] The Gift Clause, in article 9, section 7 of the Arizona Constitution provides, "Neither the state, nor any ... subdivision of the state shall ever ... make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation...."

[13] This provision is now codified in sections C and D of article 29, section 1 of the Arizona Constitution. *See* Laws 2016, S.C.R. 1019, § 1, Prop. 124, approved election May 17, 2016, eff. May 26, 2016.

[14] We presume that the legislature (in this instance, the measure's drafters and the electorate) knows the prior law, and if it changes that law, that it intends that those changes have real and substantial effect. *See, e.g., Stone v. I.N.S.*, 514 U.S. 386, 397, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995); *Brousseau v. Fitzgerald*, 138 Ariz. 453, 455, 675 P.2d 713, 715 (1984).

EXHIBIT D

Arizona Attorney General Opinion

1983 Ariz. Op. Atty. Gen. 27 (Ariz.A.G.), Ariz. Op. Atty. Gen. No. I83-034, 1983 WL 42690

Office of the Attorney General

State of Arizona
I83-034 (R83-028)
April 4, 1983

*1 (Representative Messinger)—Public governing bodies may not contract with private corporations to provide law enforcement personnel and services. [House of Representatives: opinion requests; Law Enforcement; Delegation of Authority; Peace Officers; Public Safety, Department of; ARS32-2601; ARS32-2634; AG72-16; AG72-19; AG76-42; AG80-169]

The Honorable Paul R. Messinger
Arizona State Representative
State Capitol, House Wing
Phoenix, AZ 85007

Dear Representative Messinger:
We are writing in response your letter of January 17, 1983, in which you asked several questions regarding the ability of a private corporation to provide law enforcement personnel and services to a municipality.

This issue has been discussed in two prior opinions of this office, both of which are attached for your information. In Ariz.Atty.Gen.Op. 72-19, we said that a duly commissioned deputy sheriff may be paid with private funds, so long as the officer is fully controlled by and answerable only to the sheriff. In Ariz.Atty.Gen.Op. 76-42, we said that a town's attempt to contract with a private corporation for police services constitutes an illegal delegation of its authority to establish a police force. These opinions remain valid.

The Legislature has granted the control of law enforcement exclusively to specific governing bodies, such as the state, counties, cities, towns and designated agencies. Only a designated body can appoint or commission peace officers. State v. Ovens, 4 Ariz.App. 591, 422 P.2d 719 (1967); Ariz.Atty.Gen.Ops. I80-169, 72-16. Any attempt by the body to delegate its control, direction and supervision would be illegal.[1] See, e.g., Godbey v. Roosevelt Sch. Dist. No. 66, 131 Ariz. 13, 638 P.2d 235 (Ct.App. 1981).
Sincerely,

BOB CORBIN
Attorney General

February 11, 1976

The Honorable Walter L. Henderson

Attorney, Town of Oro Valley

220 East Speedway Blvd.

Tucson, Arizona 85705

Dear Mr. Henderson:
The question put forth in this opinion request is as follows:

Exhibit D

By authority of Title 41, Article 8, Arizona Revised Statutes, is the Arizona Law Enforcement Officer Advisory Council authorized to deny certification of a duly commissioned law enforcement officer solely upon the basis that the officers are paid by a private corporation and are not on the payroll of the State of Arizona or a political subdivision thereof?

*2 The question results from action taken by the Arizona Law Enforcement Officer Advisory Council (hereafter 'Council') on October 6, 1975. The Council had been asked to issue peace officer employment standards certification for six individuals employed by the Metropolitan Fire Department, Inc., and assertedly commissioned as peace officers by the Town of Oro Valley (hereafter 'Town'). On October 6, 1975, the Council declined to issue such certifications and stated: 'In reviewing the applicable statutes and rules as they apply to Oro Valley's contractual arrangements for police officers, we have concluded that the men listed on the enclosure are, in fact, employees of a private corporation. Therefore, we cannot pursue the A.L.E.O.A.C. certification procedures for them.'

Because the Town of Oro Valley improperly commissioned and appointed the six individuals, the question above need not be answered. The Council cannot consider the certification of the six individuals because they are neither peace officers nor police officers, and the Council thus lacks authority to certify, qualify, regulate, or govern them in any way.

I. FACTS:

The Town of Oro Valley was incorporated in 1974, pursuant to Ariz.Rev.Stat.Ann. § 9-101 (as amended 1973).

On July 16, 1975, the Town entered into a contract with the Metropolitan Fire Department, Inc. (hereafter 'Metropolitan'), an Arizona corporation, wherein Metropolitan agreed to provide police services for the Town of Oro Valley. The Town has authority to provide for policing per A.R.S. § 9-240(B)(12).

By resolution adopted on July 20, 1975, the Town Council then 'appointed' and 'commissioned' Stephen L. Hermann as Chief of Police in and for the Town of Oro Valley, Arizona, '. . . to enforce the laws of the State of Arizona and the ordinances of the Town of Oro Valley, and to exercise all of the powers of commissioned police officer in and for the Town of Oro Valley, and to take all actions required by law to exercise the police function of the Town.'

Subsequently, the Town Council 'appointed' and 'commissioned' six full-time employees of Metropolitan to serve as regular members of the Town's Police Department. (The Chief of Police is also a full-time employee of Metropolitan.) Apparently all seven 'members' of the Town's Police Department were placed on the Town's payroll at the rale of $1.00 per year, and were issued checks in that amount. The Town has paid them no further stipends, but Metropolitan apparently does pay them salaries.

II. DISCUSSION:

There is no shortage of definitions of 'peace officer' and 'law enforcement officer' in the Arizona Revised Statutes. A.R.S. § 1-215 states that:

In the statutes and laws of the state, unless that context otherwise requires . . .

***

20. 'Peace officers' means Sheriffs of counties, constables, marshals, and policemen of cities and towns.

A.R.S. § 9-901 sets out the following:

In this article [chapter 8, Police and Fire Departments; article 1, Minimum Wages], unless the context otherwise requires:

***

*3 3. 'Peace officers' include regularly salaried deputy sheriffs, policemen and police officers of duly organized police departments.

A.R.S. § 38-1001 says:
In this chapter [chapter 7, Merit Systems], unless the context otherwise requires:

***

4. 'Law enforcement officer means:

***

(b) A regularly employed police officer in a city or town.

[NOTE: This definition also applies to the statute mandating overtime compensation for 'person(s) engaged in law enforcement activities'. A.R.S. § 23-392]

While neither term is defined in the statutes regarding the Council [Title 41, Article 8], the Council by regulation defines 'peace officer' as a 'member of a law enforcement unit who is employed to enforce the criminal laws of, and is commissioned by, a city . . .' [A.C.R.R. R 13-4-01(2)].

The Arizona appellate tribunals have not had occasion directly to determine who can and cannot be denominated a 'peace officer.' However, the term 'public officer' in A.R.S. § 13-541 and its predecessor has been construed, and the constructions are important because State v. Arce, 6 Ariz.App. 241, 245 (1967), has held that a police officer is a public officer. In State v. Kurtz, 78 Ariz. 251 (1954), the Supreme Court held that in undertaking certain off-duty actions, several city police officers were indeed acting as 'public officers' and not as private citizens. The Court posited this test: '[W]ere the officers acting in vindication of public right and justice, or were they merely performing acts of service to their private employer?' 78 Ariz. at 218. In applying the test, the Court found it significant that 'it manifestly appear[ed] from the record that at the time of the incident in question the [private employer] had no right of supervision over these officers, nor did he attempt any such control.' Id. And in State v. Ovens, 4 Ariz.App. 591 (1967), the Court of Appeals held that county attorney's investigators were not peace (ergo, public) officers. The Court found that although the investigators had been administered oaths as deputy sheriffs and had been given cards that stated they were 'regularly appointed' deputy sheriffs, they were not bona fide deputies and thus not public officers. The Court stated:
It is our opinion that one of the vital elements in relation to being a defacto deputy sheriff is the matter of instructions from and control by the Sheriff or by some law enforcement or security organization or agency. 4 Ariz.App. at 596.

It is within these statutory and judicial pronouncements that the peace officer status vel non of six 'members' of the Town's police department must be decided. It is the conclusion of this office that under the circumstances, the six individuals do not enjoy peace officer status.

No reported case has discussed the manner in which towns may exercise the authority 'to establish and regulate the police of the town, to appoint watchmen and policemen, and to remove them and to prescribe their powers and duties.' A.R.S. § 9-240(B)(12). This authority—along with the authority to undertake 28 other categories of activity set out in the statute—is permissive: 'The common council shall have the power . . .' A.R.S. § 9-240(B). But there are compelling reasons for concluding that once a town opts to exercise power in compliance with subsection 12, it must exercise the power fully, and may not cede authority to a private organization. What the Town seeks to do is to 'establish' its police force, and to 'appoint policemen' but then to permit Metropolitan to 'regulate the police', and to 'remove them', and to 'prescribe their powers and duties.' Such a grant of authority must be voided for contravening public policy.

*4 The discursive opinion of the Court of Appeals in Board of Education v. Scottsdale Education Association, 17 Ariz.App. 504 (1972) was vacated by the Supreme Court, for reasons not pertinent to this issue, at 109 Ariz. 342 (1973). In that opinion, the Court concluded a School Board could not validly give up the responsibility of controlling and managing school district affairs, nor could the Board surrender its discretion in the exercise of that responsibility. The Court thereupon voided a collective bargaining agreement that effectively had done both. The Court grounded its view on highly persuasive authority from other jurisdictions:

'[T]he employer-employee relationship in government is a legislative matter which may not be delegated. Such [collective bargaining] contracts if permitted to stand would result in taking away from a municipality its legislative power to control its employees and vest such control in an unelected and uncontrolled private organization . . .' 17 Ariz.App. at 510, quoting Fellows v. Latronica, 377 P.2d 547, 550 (Colo. 1962).

'Under our form of government, public . . . employment never has been and cannot become a matter of bargaining and contract. * * * This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. * * *' 17 Ariz.App. at 510, quoting City of Springfield v. Clouse, 206 S.W.2d 539, 545 (Mo. 1947).

The Court of Appeals also cited Arizona authority:

'A public office is considered a public agency or trust, created in the interest and for the benefit of the people, i.e., public officers are servants of the people. * * * A public officer may not agree to restrict his freedom of action in the exercise of his powers, 43 Am. Jr. Public Officers § 295, and an agreement which interferes with his unbiased discharge of his duty to the public, in the exercise of his office, is against public policy and unenforceable.' * * * School District No. 69 v. Altherr, 10 Ariz. App. 333, 338 (1969).

A fortiori, a Town Council, may not agree to transfer regulation, supervision and control over the absolutely vital function of enforcing the law and preserving the peace to a private agency responsible only to its stockholders.

There is no conflict between this opinion and this office's most recent pronouncement on the general topic of peace officer status. In Department of Law Opinion No. 72-19, we found no impediment to peace officer status when a deputy sheriff's salary derived from private funding; but the deputy was otherwise properly trained, qualified, supervised, directed and controlled in his official endeavors by the sheriff. That opinion held that 'where private corporations seek to assist a county in funding another law enforcement officer which they [sic] could not otherwise afford, and where said officer is otherwise a duly appointed and fully controlled, regular deputy sheriff, responsible only to the sheriff for his work direction, [then] such a deputy is a 'peace officer' . . .'

Sincerely,

*5 (illegible signature)

Attorney General

JOHN A. LASOTA, JR.

Chief Assistant

Attorney General

June 29, 1972

DEPARTMENT OF LAW OPINION NO. 72-19 (R-51)

REQUESTED BY: JAMES J. HEGARTY

Secretary-Treasurer, Arizona Law

Enforcement Officers Advisory Council

QUESTION: Does the source of funding affect the peace officer status of an otherwise duly appointed and full time deputy sheriff?

ANSWER: No. See body of opinion.

In Department of Law Opinion No. 70-24, the Attorney General responded to a similar question from the Arizona Law Enforcement Officers Advisory Council in regard to the status of a civil deputy sheriff as a peace officer. The conclusion reached there was as follows:
. . . [I]t is the opinion of this office, because of the aforementioned authorities, any title or position involving the use of the term 'Deputy Sheriff' is required to be occupied by a properly trained and qualified peace officer.

That opinion further noted that the term 'peace officer' contemplates some regular assignment to arduous and hazardous duty. A.R.S. § 38-842.10. Police Pension Board of City of Phoenix v. Warren, 97 Ariz. 180, 398 P.2d 892, rehearing denied, 97 Ariz. 301, 400 P.2d 105 (1965).

Since Opinion No. 70-24 did not speak directly to the source of funding, particularly funding by non-governmental agencies, some further discussion is needed. Initially, we should note several other statutory definitions bearing upon this problem.

§ 1-215. Definitions
In the statutes and laws of the state, unless the context otherwise requires:

***

20. 'Peace officers' mean sheriffs of counties, constables, marshals and policemen of cities and towns.

§ 38-1001. Definitions
In this chapter [Chapter 7.—Merit Systems], unless the context otherwise requires:

***

4. 'Law enforcement officer' means:
(a) A regularly appointed and paid deputy sheriff of a county.

§ 9-901. Definitions
In this article [Article 1. Minimum Wages, Chapter 8.—Police and Fire Departments], unless the context otherwise requires:

***

3. 'Peace officers' include regularly salaried deputy sheriffs, policemen and police officers of duly organized police departments.

In connection with A.R.S. § 9-901, we should also take note of A.R.S. § 9-903, as follows:
This article shall not be construed to apply to a person holding a courtesy or honorary commission in the police, peace officers or fire forces of a city or town, or to persons not appointed in accordance with the rules, regulations, ordinances, charter provisions or statutes concerning appointments to the police, peace officers or fire department to which appointment is claimed, or to those officers employed in part time service.

(All emphasis added.)

It seems that two of the three definitions quoted above, i.e., A.R.S. §§ 38-1001 and 9-901, contemplate regular salary as well as regular appointment. Thus, for the purposes of the merit system and for minimum wages of police departments, the source of funding would affect at least the economic status of the peace officer. However, this is probably not true as a general proposition. A.R.S. § 1-215.20 includes sheriffs as 'peace officers' for general purposes of Arizona law, but deputies are not specifically mentioned. Nevertheless, as noted in Opinion No. 70-24, deputy sheriffs are 'generally thought to be possessed with full authority to perform every act the sheriff, his principal, could perform. [Citing authorities.]'

*6 The Arizona Law Enforcement Officers Advisory Council is concerned about the status of deputy sheriffs because of the provisions of A.R.S. § 41-1822, which states that the Council shall prescribe 'reasonable minimum qualifications for officers to be appointed to enforce the laws of this state and the political subdivisions thereof.' A.R.S. § 11-409 provides the methods by which deputy sheriffs are appointed:
The county officers enumerated in § 11-401 may, by and with the consent of, and at salaries fixed by the board, appoint deputies, stenographers, clerks and assistants necessary to conduct the affairs of their respective offices. The appointments shall be in writing, and filed in the office of the county recorder. (Emphasis added.)

But even where a written appointment was not recorded, our Supreme Court has held that a deputy sheriff is not deprived of de facto status as a public officer. State v. Stago, 82 Ariz. 285, 312 P.2d 160 (1957).

In State v. Stago, supra, Ernest Dillon charged the defendant with resisting and obstructing a public officer. Dillon had been appointed by the Sheriff of Navajo County as a deputy sheriff and issued a card confirming the appointment. However, Dillon was not paid by the county nor was his appointment recorded. He was paid by the Pinetop Merchant Patrol and wore a police officer's uniform. Since the appointment had not been properly filed, the Court held that Dillon was not a de jure public officer. However, for the purposes of the offense of resisting or obstructing a public officer, he was held to be a de facto public officer. This conclusion seems to have been based on two major points: (1) The statute requiring filing of written appointment was directory; and (2) the Navajo County Board of Supervisors had accepted a $1,000.00 bond executed by Dillon to faithfully perform the duties of a deputy sheriff.

It should also be noted that in the context of the offense of resisting or obstructing a public officer, a police officer is a public officer. State v. Kurtz, 78 Ariz. 215, 279 P.2d 406 (1954); State v. Arce, 6 Ariz.App. 241, 431 P.2d 681 (1967).

State v. Kurtz, supra, is another case that aids in answering the Council's main question. There the Court was concerned with the issue of whether duly appointed and acting city policemen, when privately paid and employed during off duty hours, as special officers to maintain order and keep the peace at a dance hall, were 'public officers' within the obstructing a public officer statute. The Court decided that the turning point for this issue was whether the officers were 'performing mere acts of service for their private employer' or 'were acting in vindication of the public right in apprehending a wrongdoer.' 78 Ariz. at 219.

State v. Ovens, 4 Ariz.App. 591, 422 P.2d 719 (1967), is another case involving the status of a deputy sheriff paid by someone other than the sheriff as a peace officer. There the Court noted that a person must be a peace officer to be authorized to serve a warrant. A.R.S. §§ 1-215.20 and 13-1407. The Court held that two county attorney investigators who had been appointed by the county attorney as deputy sheriffs were not de facto deputy sheriffs nor peace officers. Neither the holding of a deputy sheriff card nor inclusion in a false arrest rider on the county's public liability insurance policy were sufficient to accomplish this either. The Court also made the following relevant comment:

*7 It is our opinion that one of the vital elements in relation to being a de facto deputy sheriff is the matter of instructions from and control by the Sheriff or by some law enforcement or security organization or agency. . . . 4 Ariz.App. at 596.

This same idea of instruction and control is carried out to some extent in still another statutory definition of the term 'peace officer' as follows:

§ 41-1701. Definitions

In this chapter [Chapter 12.—Public Safety], unless the context otherwise requires:

***

5. 'Peace officer' means any personnel of the department designated by the director as being a peace officer under the provisions of this chapter.

Although this definition does not have specific application to deputy sheriffs, it is interesting to note that the statutes relating to the Arizona Law Enforcement Officer Advisory Council appear in this same chapter, thus making the definition applicable to those statutes.

The above statutes and cases, reviewed in light of the facts here, where private corporations seek to assist a county in funding another law enforcement officer which they could not otherwise afford, and where said officer is otherwise a duly appointed and fully controlled, regular deputy sheriff, responsible only to the sheriff for his work direction, clearly indicates that such a deputy is a 'peace officer' and must meet the minimum standards.

As was alluded to earlier, this opinion does not cover any other relationship which might be governed by the source of salary, i.e., merit system, retirement system, or insurance benefits or coverage. The only question posed and answered is as to the 'peace officer' status of a deputy so employed.

Respectfully submitted,

GARY K. NELSON

The Attorney General

Footnotes

1 In connection with this issue, we note the Legislature's treatment of privately controlled security guard services. A.R.S. §§ 32-2601 et seq., permit the establishment of security guard services by private persons or organizations. However, A.R.S. § 32-2634 specifically and unambiguously withholds peace officer status from a security guard. Thus, although the Legislature will permit private security forces, it specifically has reserved the management of public law enforcement to public governing bodies of this state.

1983 Ariz. Op. Atty. Gen. 27 (Ariz.A.G.), Ariz. Op. Atty. Gen. No. I83-034, 1983 WL 42690

End of Document

EXHIBIT E

STATE v. JACOBSEN

141 Ariz. 421 (1984)
687 P.2d 946

In the Matter of 1976 PORSCHE AUTOMOBILE NEW MEXICO LICENSE NO. BNE-532 VIN: XXXXXXXXXX

The STATE of Arizona, Plaintiff/Appellee,

v.

Scott JACOBSEN, Defendant/Appellant.

No. 2 CA-CIV 4936.

Court of Appeals of Arizona, Division 2.

June 25, 1984.

Stephen D. Neely, Pima County Atty. by Michael P. Callahan, Deputy County Atty., Tucson, for plaintiff/appellee.

422 *422 Scott Jacobsen, in pro. per.

OPINION

HATHAWAY, Judge.

This appeal is from a February 11, 1983, judgment to retain a 1976 Porsche automobile as a result of forfeiture proceedings filed under A.R.S. § 13-3409(A)(3).

The facts show that appellant was allegedly involved in two drug transactions in Pima County in May 1982. The Porsche automobile was allegedly used by appellant to transport the narcotics in Tucson on those dates. Appellant was not arrested following the transactions, but rather he returned to New Mexico while negotiations for larger transactions ensued. Tucson police officers and appellant arranged a sale of $1,000 worth of methamphetamines, the sale being consummated on May 25, 1982, in Albuquerque. At this point, a laboratory for the manufacture of narcotics was seized, appellant and others were arrested and federal narcotics prosecutions were instituted. The vehicle in question was seized on June 14, 1982, in Albuquerque by the Albuquerque Police Department at the request of the Tucson Police Department, and was delivered to the Tucson Police Department. Forfeiture proceedings were instituted two days later when an order was issued by Pima County Superior Court Judge William Sherrill authorizing the retention of the automobile. Pleadings were thereafter filed by the state and eventually responsive pleadings were filed by appellant, which were stricken as untimely. A default judgment was eventually entered along with the judgment to retain the vehicle.

Preliminarily, the state has argued that appellant was correctly denied relief below since he failed to timely raise his challenge to the proceedings, citing *In the Matter of 1969 Ford Truck I.D. No. E14AHD34733, License No. 2 CB-870,* 122 Ariz. 442, 595 P.2d 674 (App. 1979). However, in that case, the appellant was advancing an illegal search and seizure argument in the motion to suppress and was therefore bound by the 20-day requirement of Rule 16.1(b), Rules of Criminal Procedure, 17 A.R.S. Here, appellant has challenged the jurisdiction of the court to conduct the forfeiture proceeding. Lack of subject matter jurisdiction may be raised at any time and is not subject to the 20-day limitation of Rule 16.1(b).

Appellant's jurisdictional argument was that, since Arizona improperly gained control of the automobile by requesting its seizure outside of its territorial limits by another law enforcement agency, the forfeiture proceedings were void and the automobile should be returned to him. The basic prerequisite to the court's exercise of jurisdiction is its actual or constructive possession of the property being subjected to the forfeiture proceeding. Strong v. United States, 46 F.2d 257 (1st Cir.1931). However, courts are divided as to whether an illegal or unauthorized seizure precludes a court from exercising jurisdiction.

One line of decisions has held that the illegality of the seizure has nothing to do with the question of jurisdiction, since the owner of the property suffers nothing which he would not have suffered if the seizure had been lawful. Dodge v. United States, 272 U.S. 530, 47 S.Ct. 191, 71 L.Ed. 392 (1926); United States v. One Ford Coupe Automobile, 272 U.S. 321, 47 S.Ct. 154, 71 L.Ed. 279 (1926); Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886); State v. Four Bell

Exhibit E

Fruit Gum Slot Machines, 196 Okl. 44, 162 P.2d 539 (1945). Some cases have reasoned that if the res is within the jurisdiction at the time the proceeding is initiated, the government is, in effect, adopting the seizure and proceeding thereon by legal process and the action is no less valid than when the seizure is by authority originally given. See *United States v. Dodge Truck*, 23 F. Supp. 582 (W.D.Pa. 1938); cf. *Cook v. United States*, 288 U.S. 102, 53 S.Ct. 305, 77 L.Ed. 641 (1933) (recognizing this principle, but finding it inapplicable where beyond the territorial limits placed upon the government's authority by treaty).

423 In *Dodge v. United States*, supra, the court was presented with a seizure of a motorboat by state officers for violation of *423 the National Prohibition Act. The state officers were not authorized by the act to make the seizure. The court held that where the seizure was made by one having no authority to do so, the government could nevertheless adopt the seizure with the same effect as if it had been originally made by one duly authorized, reasoning that "the jurisdiction of the court was secured by the fact that the res was in the possession of the [party authorized to seize] when the libel was filed." 272 U.S. at 532, 47 S.Ct. at 192.

It has been pointed out that both Mr. Justice Holmes in *Dodge v. United States*, supra, and Mr. Justice Brandeis in *United States v. One Ford Coupe Automobile*, supra, were apparently paraphrasing Mr. Justice Story's opinion in *The Caledonian*, 4 Wheat (17 U.S.) 100, 103, 4 L.Ed. 523 (1819), for the proposition that a forfeiture proceeding "quite basically involves the *in rem* jurisdiction of a court of the United States and that it makes very little difference to any one how initial possession of the *res* was obtained, so long as the proceeding to enforce the forfeiture accords with due process." *United States v. One 1963 Cadillac Coupe de Ville Two-Door*, 250 F. Supp. 183, 186 (W.D.Mo. 1966). In the present case, appellant received notice of the proceedings and did eventually appear, and no due process argument is made.

A case close to the factual posture of the instant one was decided by the Ninth Circuit in *United States v. One 1977 Mercedes Benz, 450 SEL, VIN XXXX-XXXXXXXXX*, 708 F.2d 444 (9th Cir.1983). There the claimant-owner of the automobile argued that the seizure by federal officers was improper as it infringed on the authority of the State of California. She maintained that because forfeiture is an in rem action, the district court's jurisdiction rested on seizure of the res and if the res were improperly before the court, the court lacked jurisdiction to enter a forfeiture order. The court found the question disposed of in *United States v. One 1971 Harley-Davidson Motorcycle*, 508 F.2d 351 (9th Cir.1974). There, the government had seized a motorcycle for forfeiture without a warrant under circumstances the court found illegal. The court rejected the argument that "an object illegally seized cannot in any way be used ... as the basis for in rem jurisdiction." 508 F.2d at 351. The court in *One 1977 Mercedes Benz*, supra, cited *Dodge v. United States*, supra, to support its holding and found the jurisdiction of the trial court was proper despite any irregularities in the automobile's seizure. A similar result, that the mere presence of the res within the jurisdiction is enough to support the court's jurisdiction, was reached in *People v. One 1949 Cadillac Convertible Coupe*, 113 Cal. App.2d 115, 247 P.2d 848 (1952), citing *Harrington v. Superior Court*, 194 Cal. 185, 228 P. 15 (1924), and *Sampsell v. Superior Court*, 32 Cal.2d 763, 197 P.2d 739 (1948). See also *People v. One 1951 Chevrolet 2-Door*, 157 Cal. App.2d 301, 320 P.2d 881 (1958).

Opposed to these cases are decisions which reject the ability of the court to acquire jurisdiction over a res or a person "where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *United States v. Toscanino*, 500 F.2d 267, 275 (2nd Cir.1974). The court there reasoned that its conclusion "represents but an extension of the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud." 500 F.2d at 275. See *In re Johnson*, 167 U.S. 120, 17 S.Ct. 735, 42 L.Ed. 103 (1896); *Fitzgerald Construction Co. v. Fitzgerald*, 137 U.S. 98, 11 S.Ct. 36, 34 L.Ed. 608 (1890). In *United States v. One 1949 Model Ford Coach Automobile*, 101 F. Supp. 492 (D.S.C. 1951), the court ruled that where the automobile was seized illegally, no forfeiture could be had. Similarly, a forfeiture was dismissed in *United States v. One 1949 Buick Sedanette*, 112 F. Supp. 218 (D.Mass. 1953).

Other cases have taken the position that if the statute authorizing forfeitures expressly establishes a procedure for seizing the property to be forfeited, failure to comply with the procedure would preclude the forfeiture. *United States v. Four*
424 *Thousand* *424 *One Hundred and Seventy One Dollars ($4,171.00) in United States Currency*, 200 F. Supp. 28 (N.D.Ill. 1961); *State v. Rosarbo*, 2 Conn.Cir. 399, 199 A.2d 575 (1963); *State v. Ford Touring Car*, 117 Me. 232, 103 A. 364 (1918); *State v. Intoxicating Liquors*, 110 Me. 260, 85 A. 1060 (1913); *State v. Spiritous Liquors*, 75 N.H. 273, 73 A. 169 (1909); *State v. Certain Liquors*, 21 R.I. 531, 532, 45 A. 552 (1900); *Utah Liquor Control Com. v. Wooras*, 97 Utah 351, 93 P.2d 455 (1939). In *State v. Intoxicating Liquors*, supra, the court stated:

"If there was no legal seizure, then there could be no judgment of forfeiture. `The very foundation of forfeiture is a legal seizure; until this is had, no further proceedings are authorized.' [Citations omitted]" 85 A. at 1061.

The cases are compiled in the annotation of 8 A.L.R.3d 473, under the lead case of *Berkowitz v. U.S.*, 340 F.2d 168 (1st Cir.1965), which held that the government could not enforce a forfeiture of money and checks on the ground that the items had been used in violation of internal revenue laws, where the government had seized the property by an invasion of the constitutional rights of the person from whom the property had been seized incident to an unlawful arrest. The court, refusing to allow "the Governmental violators of the Constitution" to "enrich the Treasury by their defiance of fundamental liberties," applied exclusionary rule reasoning referred to, but not followed, by Mr. Justice Holmes in *Dodge v. United States*, supra.

We are persuaded that the general rule is that the governmental authority has the power to enforce a forfeiture regardless of how control was obtained over the property. See *United States v. F/V Taiyo Maru, Number 28, SOI 600*, 395 F. Supp. 413 (D.Me. 1975). However, our legislature has chosen to follow the minority rule which requires a lawful seizure of the res. Forfeitures under A.R.S. § 13-3409 are required to be accomplished in accordance with the procedure set forth in A.R.S. § 13-106, which provides in part:

"B. Property subject to forfeiture pursuant to chapter 34 of this title may be seized by a peace officer upon process issued by any court having jurisdiction over the property. Seizure without process may be made if any of the following apply:

1. The seizure is incident to any arrest or any lawful search or seizure or an inspection under the administrative inspection warrant.

2. The seizing officer has probable cause to believe that the property subject to seizure has been the subject of a prior judgment in favor of this state and the seizing officer has probable cause to believe that the property will be destroyed or removed from the jurisdiction of the state before a warrant can be obtained.

3. A peace officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety and that harm may occur before a warrant can be obtained.

4. A peace officer has probable cause to believe that the property was used or is intended to be used in an offense and that the offense will occur or the property will be removed from the jurisdiction of the seizing agency before a warrant can be obtained."

It is clear that the property can only be seized pursuant to a court order, unless one of the enumerated exceptions applies, which is not the case here. Indeed, § 13-106(B)(1) contemplates a seizure pursuant to a *lawful* search or seizure. Since Arizona has aligned itself with those jurisdictions which authorize forfeiture proceedings only where the res is properly brought before the court, we also follow the cases which void the proceeding when the seizing authority has disregarded the statutory requirements for forfeiture. Therefore, the forfeiture order is vacated as having been entered without jurisdiction.

BIRDSALL, C.J., and HOWARD, J., concur.

EXHIBIT F

In the MATTER OF GREEN

67 N.C.App. 501
Court of Appeals of North Carolina.

In the Matter of Sonya Renee GREEN, DOB XX/XX/XX.

No. 8221DC1287.
|
April 3, 1984.

Synopsis
County protective service worker filed petition in which it was alleged that child was abused and neglected. The District Court, Forsyth County, Abner Alexander, C.J., entered order concluding that the child was an abused and neglected juvenile, placing legal custody of the child with county department of social services, placing physical custody with the child's mother, and ordering further relief. The child's mother and stepfather appealed. The Court of Appeals, Johnson, J., held that: (1) the mother and stepfather could raise for first time on appeal issue of trial court's subject-matter jurisdiction, and (2) trial court lacked subject-matter jurisdiction where the county's petition was not duly signed and verified as required by law.

Vacated and dismissed.

West Headnotes (9)

[1] **Pleading**
⚖Signature of party
Pleading
⚖Necessity for Verification and Effect of Omission

In the absence of a statutory requirement or rule of court to the contrary, it is ordinarily not necessary to the validity of a petition that it be signed or verified.

2 Cases that cite this headnote

[2] **Pleading**
⚖Signature of party
Pleading
⚖Necessity for Verification and Effect of Omission

Where it is required by statute that a petition be signed and verified, such essential requisites must be complied with before the petition can be used for legal purposes; without compliance, the petition is rendered incomplete and nonoperative.

4 Cases that cite this headnote

[3] **Infants**
⚖Pleading

Primary purpose to be served by a signature and verification on part of petitioner alleging that a child is abused or neglected is to obtain the written and sworn statement of the facts alleged in such official and authoritative form as that it may be used for any lawful purpose, either in or out of a court of law, and, under the juvenile code, such requirements serve to invoke the jurisdiction of the court. G.S. § 7A–517(1, 21).

5 Cases that cite this headnote

[4] **Infants**
⚖Pleading

Failure of county protective service worker to sign and verify, before an official authorized to administer oaths, petition alleging that a child was abused and neglected, rendered the petition fatally deficient and inoperative to invoke jurisdiction of the court over the subject matter. G.S. § 7A–517(1, 21).

10 Cases that cite this headnote

[2] **Pleading**

Exhibit F

[5] **Courts**
⇨Jurisdiction of Cause of Action
Courts
⇨Waiver of Objections
Courts
⇨Time of making objection

Jurisdiction of a court over subject matter of an action is the most critical aspect of the court's authority to act; a defense based upon lack of such jurisdiction cannot be waived and may be asserted at any time.

3 Cases that cite this headnote

[6] **Infants**
⇨Issues and questions in lower court in general

Mother and stepfather of child whom county protective service worker alleged was abused and neglected could raise issue of jurisdiction over subject matter of the petition for the first time on appeal although they initially failed to raise the issue before the trial court. G.S. § 7A–517(1, 21).

1 Cases that cite this headnote

[7] **Infants**
⇨Pleading

Trial court lacked jurisdiction over subject matter of county protective service worker's petition which alleged that a child was abused and neglected where the petition was not duly signed and verified as required by law. G.S. §§ 7A–517(1), (1), par. c, (21), 7A–544, 7A–561(b).

7 Cases that cite this headnote

[8] **Trial**
⇨Sufficiency in General

Trial court's verbatim recitations of testimony did not constitute findings of fact. Rules Civ.Proc., Rule 52(a), G.S. § 1A–1.

38 Cases that cite this headnote

[9] **Trial**
⇨Separate Statement of Facts and Law

Where trial judge sits without jury, the judge is required to find facts specially and state separately his conclusions of law thereon and direct entry of appropriate judgment. Rules Civ.Proc., Rule 52(a), G.S. § 1A–1.

3 Cases that cite this headnote

*502 **194 This proceeding was commenced with the filing of a petition by Charles Martin, a Protective Service Worker with the Forsyth County Department of Social Services. It was alleged in the petition that Sonya Renee Green was an abused child as defined by G.S. 7A–517(1) and a neglected child as defined by G.S. 7A–517(21). The petition set forth facts in support of each allegation; however, the petition was neither signed nor verified.

At the time of the filing of the petition, the minor child was living with the movants. Mildred Joe is the biological mother of the minor child and Malachi Joe is her stepfather.

At the call of the case for hearing and prior to the introduction of any evidence, the Joes moved to have the petition dismissed on the grounds the petition, issued pursuant to G.S. 7A–544 and G.S. 7A–561(b), was not signed as required by those statutory provisions. The motion was denied.

Following a hearing on the petition pursuant to G.S. 7A–516, *et seq.*, the court made findings of fact and concluded as a matter of law that Sonya Renee Green is an abused juvenile as defined by G.S. 7A–517(1)(c) and a neglected juvenile as defined by 7A–517(21). The court then entered an order which directed that:

1. Legal custody of Sonya Renee Green is hereby placed with the Forsyth County Department of

Social Services.

2. Physical custody of Sonya Renee Green is hereby placed with her mother, Mildred Joe, who is responsible for protecting the minor from any further acts of abuse or neglect.

3. The Forsyth County Department of Social Services is to make regular home visits to insure the safety and wellbeing of the minor child.

4. Malachi Joe and Mildred Joe are to actively participate in family counseling with Sonya Renee Green and they are to fully cooperate with the Forsyth County Department of Social Services and any other agency employed to help Sonya Renee Green.

***503** From the order and rulings of the court, Mildred and Malachi Joe appealed.

Attorneys and Law Firms

Kennedy, Kennedy, Kennedy & Kennedy by Annie Brown Kennedy, Willie M. Kennedy and Harvey L. Kennedy, Winston-Salem, for appellants.

Bruce E. Colvin, Winston-Salem, for petitioner-appellee.

Opinion

JOHNSON, Judge.

By their first assignment of error, appellants contend the trial court erred in the denial of their motion to dismiss on the ground that the petition was not signed. Appellants also contend that the trial court was without jurisdiction in that the petition was neither signed nor verified.

The appellee admits that the petition is neither signed nor verified, but insists that appellants suffered no harm by lack of the petitioner's signature on the petition and that the lack of a verification is immaterial. Further, that the issue of verification was waived by appellants by their failure to raise it before the trial judge. We disagree.

[1] In the absence of a statutory requirement or rule of court to the contrary, it is ordinarily not necessary to the validity of a petition that it be signed or verified. *See State v. Higgins,* 266 N.C. 589, 146 S.E.2d 681 (1966) (affidavit referred to in warrant charging defendant upon information and belief with assault is not defective because affiant did not subscribe the affidavit); *Alford v. McCormac,* 90 N.C. 151 (1884) (affidavit is valid despite lack of affiant's subscription if the oath was administered by one authorized to administer oaths).

[2] On the other hand, where it is required by statute that the petition be signed and verified, these essential requisites must be complied with before the ****195** petition can be used for legal purposes. *See Alford v. McCormac, supra.* Without compliance, the petition is rendered incomplete and nonoperative. *See In re Colson,* 14 N.C.App. 643, 188 S.E.2d 682 (1972) (juvenile delinquency petition must be signed and verified as "required by law").

The petition in this case was instituted under Juvenile Code provisions which state in clear and concise terms that the petition ***504** shall be signed and verified before an official authorized to administer oaths. G.S. 7A–544 provides in pertinent part that when a report of abuse or neglect is received, the Director of the Department of Social Services *shall* sign a complaint seeking to invoke the jurisdiction of the court. G.S. 7A–561(b) also provides in pertinent part that the complaint should be filed as a petition and the petition *shall be* verified before an official authorized to administer oaths.

[3] The Juvenile Code requisites that the petition be signed and verified are therefore essential to both the validity of the petition and to establishing the jurisdiction of the court. The primary purpose to be served by signature and verification on the part of the petitioner is to obtain the written and sworn statement of the facts alleged in such official and authoritative form as that it may be used for any lawful purpose, either in or out of a court of law. *See Alford v. McCormac, supra* at 153. Under the Juvenile Code, these requirements also serve to invoke the jurisdiction of the court.

[4] [5] [6] In the case *sub judice,* the failure of the petitioner to sign and verify the petition before an official authorized to administer oaths rendered the petition fatally deficient and inoperative to invoke the jurisdiction of the court over the subject matter. It is elementary that the jurisdiction of the court over the subject matter of the action is the most critical aspect of the court's authority to act. *See* Shuford, N.C.Civ.Prac. & Proc. (2nd Ed.), § 12–6. Without it the court lacks any power to proceed; therefore, a defense based upon this lack cannot be waived and may be asserted at any time. *Id.* Accordingly, the appellants may raise the issue of jurisdiction over the matter for the first time on appeal although they initially failed to raise the issue before the trial court. *See Real Estate Trust v. Debnam,* 299 N.C. 510, 263 S.E.2d 595 (1980); *Bache Halsey Stuart, Inc. v. Hunsucker,* 38

N.C.App. 414, 248 S.E.2d 567 (1978) (an appellate court may raise the question on its own motion).

[7] We conclude that the trial court lacked jurisdiction over the subject matter because the petition was not duly signed and verified as required by law. G.S. 7A–544; G.S. 7A–561(b). Therefore, the order of the trial court must be vacated and the case dismissed.

*505 [8] [9] We deem it unnecessary to discuss appellants' other assignments of error in view of our decision on the question of jurisdiction.[1]

Vacate and dismiss.

VAUGHN, C.J., and WELLS, J., concur.

All Citations

67 N.C.App. 501, 313 S.E.2d 193

Footnotes

1 Although we vacate and dismiss the order entered on other grounds, one particularly troubling feature of the order warrants mention. Eleven out of the twelve "Findings of Fact" begin by stating that the witness "testified under oath ...", and continue to merely restate the content of that testimony. Such verbatim recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented. Where, as here, the trial judge sits without a jury, the judge is required to find the facts specially and state separately his conclusions of law thereon and direct entry of the appropriate judgment. G.S. 1A–1, Rule 52(a). "The requirement for appropriately detailed findings is ... not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.' " *Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980). The purported "findings" in the order under discussion do not even come close to resolving the disputed factual contentions of the parties, and, under ordinary circumstances would require this Court to remand the matter to the District Court for the entry of appropriately considered and detailed factual findings.

End of Document

EXHIBIT G

STATE ex rel HANSEN v. RIGGS

KeyCite Yellow Flag - Negative Treatment
Distinguished by State ex rel. Lee v. Tahash, Minn., November 13, 1964

258 Minn. 388
Supreme Court of Minnesota.

STATE of Minnesota ex rel. K. R. HANSEN,
Appellant,
v.
Douglas C. RIGG, Warden, Minnesota State Prison, Respondent.

No. 37962.
|
July 8, 1960.

Synopsis
Habeas corpus proceeding. The District Court, Washington County, Carl W. Gustafson, J., entered order vacating writ, and petitioner appealed. The Supreme Court, Murphy, J., held that where defendant was charged only with being an habitual offender, charge failed to state a criminal offense and the court lacked jurisdiction to sentence the defendant to prison.

Reversed with directions.

West Headnotes (4)

[1] **Sentencing and Punishment**
⚖Offenses in Other Jurisdictions

An habitual-offender sentence based on a prior Iowa conviction for which the accused had already been punished in Iowa was entirely beyond the power of the Minnesota court and was void. M.S.A. § 609.155.

Cases that cite this headnote

[2] **Sentencing and Punishment**
⚖Requisites and Sufficiency of Accusation

Where defendant was charged only with being an habitual offender, charge failed to state a criminal offense and the court lacked jurisdiction to sentence the defendant to prison. M.S.A. § 610.29.

3 Cases that cite this headnote

[3] **Criminal Law**
⚖Jurisdiction of Offense

In a criminal prosecution it is necessary that the trial court have jurisdiction of subject matter, that is, the offense, as well as the person of the defendant, and jurisdiction of the subject matter is derived from the law.

4 Cases that cite this headnote

[4] **Sentencing and Punishment**
⚖Sentence Enhancement Distinguished from Separate Offense

Habitual-offender statutes do not create a criminal offense but merely define a status justifying a more severe penalty for commission of designated crimes because of the prior offenses. M.S.A. § 609.155.

3 Cases that cite this headnote

**553 Syllabus by the Court.

*388 1. Habitual-offender statutes do not create a criminal offense but merely define a status justifying a more severe penalty for commission of designated crimes because of the prior offenses.

2. Where a defendant is charged only with being an habitual offender, the charge fails to state a criminal offense and the court lacks jurisdiction to sentence the defendant to prison.

Exhibit G

Attorneys and Law Firms

K. R. Hanson, Stillwater, for appellant.

Miles Lord, Atty. Gen., Charles E. Houston, Sol. Gen., St. Paul, for respondent.

Opinion

MURPHY, Justice.

Petitioner applied to the District Court of Washington County for a writ of habeas *389 corpus, alleging that he was unlawfully restrained in the state prison at Stillwater. The district court issued its writ of habeas corpus, and the warden of the state prison **554 filed a return stating that the petitioner was in his custody. According to the record the imprisonment resulted from the following circumstances:

[1] On January 18, 1956, the petitioner was charged by complaint in the municipal court of the city of Mankato of fraudulently issuing a worthless check. The complaint alleged a gross misdemeanor by violation of M.S.A. s 622.04. The petitioner entered a plea of guilty to this charge. No judgment of sentence was entered on this plea in the municipal court. On January 25, 1956, another information was filed in municipal court alleging that the petitioner was an habitual offender under s 617.75,[1] and he was bound over to the district court. Thereafter a new information was filed in the district court by which it was charged that the defendant did commit the crime of 'Being an Habitual Offender' in that he had within a 5-year period committed three gross misdemeanors, including the one to which he entered a plea of guilty on January 18, 1956. The information concluded that by reason of the facts alleged the defendant was an habitual offender. He entered a plea of guilty to this information and was sentenced to 3 years' imprisonment in the state penitentiary.[2] This sentence was suspended and he was placed on probation, but on November 20, 1958, the stay was vacated on the recommendation of the State Board of Parole and Probation. He was then committed to the state prison where he has since been confined.

Petitioner appeals from an order vacating the writ.

[2] [3] [4] *390 1-2. We cannot agree with the argument of the state that the court had jurisdiction to impose a sentence on the charge to which the petitioner entered a plea of guilty. In a criminal prosecution it is necessary that the trial court have jurisdiction of the subject matter-that is, the offense-as well as the person of the defendant. Jurisdiction of the subject matter is derived from the law.[3] Habitualcriminal statutes do not create a crime. They merely increase punishment for a crime where the defendant has been convicted of prior offenses. The defendant here was not charged with the substantive offense of obtaining money by a worthless check. He was charged with an asserted violation of a statute which does not create a criminal offense. Section 617.75, subds. 1 and 2, provide:

'Every person who shall hereafter be guilty of * * * any misdemeanor or gross misdemeanor involving moral turpitude, who within the previous period of five years shall have been twice convicted in this state of one or more of the offenses hereinbefore named, shall be guilty of being an habitual offender.

'Such person shall be punished for such third offense, * * * if a man above the age of 30 years, by imprisonment in the state prison at Stillwater, for a term of not exceeding three years.'

A sentence imposed on an habitual offender is, as the statute provides, imposed **555 as a penalty for the third offense. In State v. Zywicki, 175 Minn. 508, 510, 221 N.W. 900, 901, we explained:

> '* * * The information presented to the court for the purpose of showing prior convictions is not an indictment or information charging the defendant with having committed a crime. It merely charges a prior conviction or convictions, which if proved will increase the sentence to be imposed, or already imposed, for the later crime of which defendant then stands convicted.'

Courts are agreed that habitual-offender statutes merely define a status justifying a more severe penalty for commission of certain designated crimes because of the prior offenses, and that such statutes do not in themselves define a criminal offense. See, e.g., *391 State ex rel. MacMillen v. Utecht, 221 Minn. 138, 21 N.W.2d 239; State v. Hensley, 20 Wash.2d 95, 145 P.2d 1014; Salisbury v. State, 80 Okl.Cr. 13, 156 P.2d 149; Davis v. O'Grady, 137 Neb. 708, 291 N.W. 82; Goodman v. Kunkle, 7 Cir., 72 F.2d 334.

The defendant was charged in the district court only with having committed the crime of 'Being an Habitual

Offender,' and therefore he was neither charged with nor convicted of any crime by that court. It must follow that the court was without jurisdiction to impose sentence in this case.

Reversed with directions to reinstate the writ of habeas corpus and direct the warden to release the prisoner.

All Citations

258 Minn. 388, 104 N.W.2d 553

Footnotes

1 M.S.A. s 617.75 increases punishment for the habitual offender who has been twice convicted within a previous 5-year period for the commission of a 'misdemeanor or gross misdemeanor involving moral turpitude,' as opposed to s 610.29, which increases the penalty upon conviction of one who has previously been convicted of three or more felonies.

2 The petitioner was also sentenced at this time to 3 years' imprisonment for a prior conviction of a felony in 1941 by an Iowa court. These terms were to be served consecutively. The sentence was amended on November 28, 1956, to provide that the terms be served concurrently. The district court in the present action stated, correctly, that the sentence based on a prior conviction, for which the petitioner had already been punished in Iowa, was entirely beyond the power of the Minnesota court and, therefore, void.

3 14 Am.Jur., Criminal Law, s 214.

End of Document

EXHIBIT H

Article on Pension Funds

Arizona further invests public retirement in Private Prisons

28 AUG 2017 • (LEAVE A COMMENT)

The American Friends Service Committee has long been opposed to Arizona's deep financial involvement in the for-profit private prison industry. Fundamentally, that is because we believe that incarceration for profit is immoral. But we also know that these corporations are profoundly mismanaged, negligent, and do not deliver the cost savings they promise to taxpayers.

That is why we were deeply disturbed to learn that the Arizona State Retirement System (ASRS) just increased its shares in CoreCivic (formerly Corrections Corporation of America), the largest for-profit prison company in the US.

During the second quarter, the ASRS "raised its position in shares (https://baseballnewssource.com/markets/corrections-corp-of-america-cxw-shares-bought-by-arizona-state-retirement-system/1555498.html) of Corrections Corp. of America (NYSE:CXW) by 1.8% during the second quarter, according to its most recent filing with the SEC. The fund owned 49,800 shares of the real estate investment trust's stock after buying an additional 900 shares during the period. Arizona State Retirement System's holdings in Corrections Corp. of America were worth $1,373,000 at the end of the most recent quarter."

The ASRS is the government-run retirement system whose membership includes employees of the State of Arizona, the three state universities, community college districts, school districts and charter schools, all 15 counties, most cities and towns, and a variety of special districts. A total of 205,162 members around the State (https://www.azasrs.gov/content/facts-figures).

In 2017, the State of Arizona spent approximately $168,617,100 of general fund dollars on private prison contracts. As of the latest Department of Corrections report (http://www.azleg.gov/jlbc/17AR/adc.pdf), Arizona currently has 5 contracts that account for roughly 14% of the Department of Corrections' $1 billion budget.

As the state's corrections budget has grown, it has siphoned off general fund dollars from other critical agencies and programs. Ironically, some of those who have lost the most in state funding are the very same whose retirement is now invested in this predatory industry. For example, the Grand Canyon Institute (http://grandcanyoninstitute.org/arizona-spends-too-much-incarcerating-too-little-on-personnel-drug-treatment-transition-services-and-higher-education/) reported that Arizona spends 60% more on prisons than on state colleges and universities. Yet, the retirement funds for those professors are now tied up in the corporation that arguably benefitted from the drastic reduction in state funding for higher education.

It is also worth noting that two former members of the Arizona Board of Regents were also serving on the Board of Directors of what was then Corrections Corporation of America (now CoreCivic). Former Arizona Senator Dennis DiConcini came under public pressure to resign (https://www.tucsonweekly.com/TheRange/archives/2014/05/12/deconcini-no-longer-on-private-prison-company-board-of-directors) from the Board from immigrant rights advocates and others (including AFSC) for his willingness to accept huge stock dividends from a corporation that was detaining thousands of immigrants in Arizona and elsewhere. He later resigned from the Board of CCA.

Another former ABOR member, Anne Mariucci (http://www.marketwatch.com/investing/stock/CXW/insiders?pid=10617363), is currently listed as "Independent Director" at Corrections Corp. of America. She remains on the Board of Directors at Corrections Corp. of America, as well as Southwest Gas Corp., Arizona State University Foundation, Banner Health System, Inc., Fresh Start Women's Foundation and The University of Arizona Health Network. Notably, she served previously as the Director of the Arizona State Retirement System.

CoreCivic is also the largest employer in Pinal County, where it operates a total of 6 facilities. In addition to contracts for incarceration of Arizona state prisoners and Mesa Jail detainees, the company also imports prisoners from California, Vermont, and Hawaii, as well as thousands of immigrant detainees from ICE and the US Marshals.

The corporation is moving aggressively into other areas of Arizona's criminal justice system, including the recent privatization of the Mesa jail (http://www.azcentral.com/story/news/local/mesa/2017/05/23/mesa-first-arizona-city-private-jail-corecivic/337197001/) and the acquisition of New Beginnings Treatment Center (http://www.cca.com/investors/financial-information/quarterly-reports), Inc, a residential reentry center in Tucson that holds a contract with the Federal Bureau of Prisons.

A closer look at the ASRS's holdings reveals that it is also invested in the nation's second largest for-profit prison corporation, GEO Group. In fact, as of August 2, 2017, ASRS had 52,450 shares in the company–more than its recent increased investment in CoreCivic. GEO Group also holds contracts with the Arizona Department of Corrections for Florence West and Phoenix West.

You can read the full list of the Arizona State Retirement System's investments here (https://www.sec.gov/Archives/edgar/data/1558481/000114036117029773/xslForm13F_X01/form13fInfoTable.xml).

AFSC has long advocated for divestment from private prisons as a strategy that both individuals and institutions can use to help end for-profit incarceration. The organization even has a website that allows people to scan their investments to find out if any of their holdings are involved in prison profiteering: http://investigate.afsc.org/ (http://investigate.afsc.org/)

EXHIBIT I

Grand Jury Detail

City of Phoenix

PERFORMANCE MANAGEMENT GUIDE

Date: 2013-06-20
Type: Performance
Status: Scheduled

Employee Name	Empl ID	Dept	Dept Name	Job Title
Wennes,Joe D	[redacted]	B2076	Police:Central Booking Detail	Police Officer

Overall Performance Expectations: Met

CORE CITY VALUES	
Description	**Met?**
Serves internal and external customer needs	Met
Contributes to team spirit	Met
Values and respects diversity	Met
Learns, changes and improves	Met
Devotes effort towards achieving quality results	Met

CURRENT RATING PERIOD		
Item #	**Duties & Goals**	**Performance Expectations**
1	Demonstrates professionalism in work performance and decisions.	Met
2	Practices open and effective communication.	Met
3	Practices workplace and environmental safety.	Met
4	Demonstrates acceptable attendance.	Met
5	Complies with Departmental rules and regulations.	Met
6	Provides knowledgeable and quality testimony within the Grand Jury setting.	Met
7	Assists in training and orienting new members to the Grand Jury Detail.	Met
8	Works in cooperation with the County Prosecutors, and acts as a conduit for information between the County Attorney's Office and the Police Department on issues involving the Grand Jury.	Met
9	Dresses appropriately and professionally for Grand Jury proceedings as outlined in Operations Order 2.9, Court Appearances.	Met
10	Keeps your supervisor informed of issues of importance to the Police Department.	Met

NEXT RATING PERIOD	
Item #	**Duties & Goals**
1	Note : For your next rating period you will receive a new goal setting worksheet.

COMMENTS	Completed by
Supervisor	
Joe, congratulations on successfully completing another year of employment with the Phoenix Police Department. For this review, which covers the period from June 2012 to the present, you have 'Met' Overall Performance Expectations. Joe, for the entirety of this rating period you were assigned to a [redacted] with the Grand Jury Detail, where your principal duty was to provide hearsay testimony before a Maricopa County Grand Jury on criminal cases originating from Phoenix P.D. investigations. Your performance during this past year has been outstanding. The knowledge and job skills you have accumulated over your many years of police experience afford you the ability to provide quality hearsay testimony in a wide variety of criminal cases. You routinely volunteered for complex investigations, were meticulous in your preparation for your appearances before the Grand Jury, and became the County Attorney's go to person for DUI cases. You rarely took	Michaud,Paul Joseph 2013-06-18T14:54:18-0700 Complete: Y

time off, and each day displayed a willingness to work hard and solve problems, which resulted in outstanding productivity. Your strong work ethic was evident on 3-29-13, when, despite being understaffed, you and two others were able to provide testimony on 22 cases, including 6 late arriving "last day" cases. Failure to present these late cases would have resulted in dangerous criminals being released from jail. For your effort you received a Commendation. You also frequently volunteered to stay late when the demands of the job required it, whether it be late testimony before the Grand Jury or waiting to ensure that there were no further questions about the case from the jurors before they rendered a verdict. Your professionalism has been exemplary, resulting in praise from the prosecutors assigned to the Grand Jury and various Grand Jury panels. Finally, your overall dress and appearance was unfailingly impeccable, and in keeping with the highest standards of the Police Department. During this rating period you attended Ethics Training and a seminar on the new TruNarc drug testing system, and remained current on all AZPOST required proficiencies and training mandates. Congratulations, Joe, on an outstanding year.	

Reviewer	
Joe, thank you for your hard work this past year.	Tallman,Mark P 2013-06-19T12:51:23-0700 Complete: Y

Employee	
Thank you to Sgt. Michaud and Lt. Tallman for all your help and support this past year. I've enjoyed being part of the Grand Jury Detail and Phoenix Police team. Sincerely, Joe Wennes.	2013-06-19T12:39:29-0700 Complete: Y

City of Phoenix

PERFORMANCE MANAGEMENT GUIDE

Date: 2014-06-20
Type: Performance
Status: Scheduled

Employee Name	Empl ID	Dept	Dept Name	Job Title
Wennes,Joe D	[redacted]	B2076	Police:Central Booking Detail	Police Officer

Overall Performance Expectations: Met

CORE CITY VALUES	
Description	**Met?**
Exhibits ethical behavior and decision making	Met
Embraces diversity in all work activities	Met
Is professional and accountable in all work assignments	Met
Participates in and supports team endeavors	Met
Engages in innovative thinking and problem solving	Met
Provides responsive and consistent customer service	Met

CURRENT RATING PERIOD

Item #	Duties & Goals	Performance Expectations
1	Demonstrates professionalism in work performance and decisions	Met
2	Practices open and effective communication.	Met
3	Practices workplace and environmental safety.	Met
4	Demonstrates acceptable attendance.	Met
5	Complies with Departmental rules and regulations.	Met
6	Provides knowledgeable and quality testimony within the Grand Jury setting.	Met
7	Assists in training and orienting new members to the Grand Jury Detail.	Met
8	Works in cooperation with the County Prosecutors, and acts as a conduit for information between the County Attorney's Office and the Police Department on issues involving the Grand Jury.	Met
9	Dresses appropriately and professionally for Grand Jury proceedings as outlined in Operations Order 2.9, Court Appearances.	Met
10	Keeps your supervisor informed of issues of importance to the Police Department.	Met

NEXT RATING PERIOD

Item #	Duties & Goals
1	Note : For your next rating period you will receive a new goal setting worksheet.

COMMENTS	Completed by
Supervisor	
Joe, congratulations on successfully completing another year of employment with the Phoenix Police Department. For this review, which covers the period from June 2013 to the present, you have 'Met' Overall Performance Expectations. Joe, for the entirety of this rating period you were assigned to a [redacted] with the Grand Jury Detail, where your principal duty was to provide hearsay testimony before a Maricopa County Grand Jury on criminal cases originating from Phoenix P.D. investigations. Your performance during this past year has been outstanding. You are an unquestioned leader on the Grand Jury Detail, and your fellow squadmates frequently look to you for advice and direction. Your knowledge of all aspects related to the Grand Jury, and your opinion, is so valued by the County Attorney's Office that on 12-18-13 your presence was requested for a	Michaud,Paul Joseph 2014-06-12T09:42:59-0700 Complete: Y

meeting concerning our entire operation. Your input was instrumental in the formulation of new procedures that reflected a greater cooperation between County employees and the Grand Jury Detail, and led to a more efficient and effective overall operation. The knowledge and job skills you have accumulated over your many years of police experience afford you the ability to provide quality hearsay testimony in a wide variety of criminal cases. You routinely volunteered for complex investigations, were meticulous in your preparation for your appearances before the Grand Jury, and could always be counted on to stay late to present a case, answer every question put forth by a grand juror, and do whatever necessary to ensure the success of your case. The quality of your work is best illustrated by the Commendations and other positive feedback you received during this rating period. DCA [redacted], Charging Bureau Chief for the Grand Jury, had nothing but praise for your performance this past year, including your willingness on 12-20-13 to present a 1st Degree Murder case that prevented the suspect from being released from jail, possibly to flee the jurisdiction. A clerical error caused the case to be to be pushed back to its "Last Day", meaning if the case was not presented immediately the suspect would have to be set free. Even though this type of case is not normally appropriate for hearsay testimony, you volunteered to take on this challenge, and successfully presented the case to the Grand Jury. On 5-23-14 another Grand Jury DCA commended you for your preparation and presentation of an extremely difficult case, a case that had failed presentations on two previous occasions. Without exception your professionalism and demeanor have been exemplary, resulting in praise from the prosecutors assigned to the Grand Jury and various Grand Jury panels. Finally, your overall dress and appearance was unfailingly impeccable, and in keeping with the highest standards of the Police Department. During this rating period you successfully completed a 5 month Investigator Training course, attended Threat Assessment and Psychopathy training, received a Commendation for no usage of sick time,and remained current on all AZPOST required proficiencies and training mandates. Congratulations, Joe, on an outstanding year.	

Reviewer	
Joe, I agree with Sgt. Michaud's assessment of your performance. You are a mature and dedicated officer. Thank you for the good work you do.	Tallman,Mark P 2014-06-19T12:19:30-0700 Complete: Y

Employee	
I'm humbled and grateful to be part of the Phoenix Police Team!! A special thanks to Sgt. Michaud and Lt. Tallman for all their help!! Joe	2014-06-19T07:42:38-0700 Complete: Y

City of Phoenix

PERFORMANCE MANAGEMENT GUIDE

Date: 2015-06-20
Type: Performance
Status: Scheduled

Employee Name	Empl ID	Dept	Dept Name	Job Title
Wennes,Joe D	[redacted]	B2019	Police Dept: Property Managemt	Police Officer

Overall Performance Expectations: Met

CORE CITY VALUES	
Description	Met?
Exhibits ethical behavior and decision making	Met
Embraces diversity in all work activities	Met
Is professional and accountable in all work assignments	Met
Participates in and supports team endeavors	Met
Engages in innovative thinking and problem solving	Met
Provides responsive and consistent customer service	Met

CURRENT RATING PERIOD		
Item #	Duties & Goals	Performance Expectations
1	Demonstrates professionalism in work performance and decisions.	Met
2	Practices open and effective communication.	Met
3	Practices workplace and environmental safety.	Met
4	Demonstrates acceptable attendance.	Met
5	Complies with Departmental rules and regulations.	Met
6	Provides knowledgeable and quality testimony within the Grand Jury setting.	Met
7	Assists in training and orienting new members to the Grand Jury Detail.	Met
8	Works in cooperation with the County Prosecutors, and acts as a conduit for information between the County Attorney's Office and the Police Department on issues involving the Grand Jury.	Met
9	Dresses appropriately and professionally for Grand Jury proceedings as outlined in Operations Order 2.9, Court Appearances.	Met
10	Keeps your supervisor informed of issues of importance to the Police Department.	Met

NEXT RATING PERIOD	
Item #	Duties & Goals
1	Demonstrates professionalism in work performance and decisions.
2	Practices open and effective communication.
3	Practices workplace and environmental safety.
4	Demonstrates acceptable attendance.
5	Complies with Departmental rules and regulations.
6	Provides knowledgeable and quality testimony within the Grand Jury setting.
7	Assists in training and orienting new members to the Grand Jury Detail.
8	Works in cooperation with the County Prosecutors, and acts as a conduit for information between the County Attorney's Office and the Police Department on issues involving the Grand Jury.
9	Dresses appropriately and professionally for Grand Jury proceedings as outlined in Operations Order 2.9, Court Appearances.
10	Keeps your supervisor informed of issues of importance to the Police Department.

COMMENTS	Completed by

Supervisor	
Joe, congratulations on successfully completing another year of employment with the Phoenix Police Department. For this review, which covers the period from June 2014 to the present, you have "Met" Overall Performance Expectations. Joe, for the entirety of this rating period you were assigned to a [redacted] with the Grand Jury Detail, where your principal duty was to provide hearsay testimony before a Maricopa County Grand Jury on criminal cases originating from Phoenix PD investigations. During this past year your performance has been exemplary. You continue to be the unquestioned leader of the GJD, with your squad mates looking to you for everything from guidance on how to handle difficult or unusual cases to being their liaison with the Maricopa County Attorney's Office on matters involving the grand jury. On 3-3-15 you attended a meeting with the heads of the MCAO-Grand Jury, during which you voiced your squads' concerns that some inefficient practices were negatively affecting productivity, and offered ideas on how to make the GJ process flow smoother. Your superb knowledge on the entire GJ operation allows you to take an active approach in training new members of the GJD while tirelessly imparting knowledge and techniques that will allow them to provide quality testimony before the grand jury. Joe, your work ethic and dedication to duty are outstanding. No one presents more cases before the grand jury than you, and the quality of your testimony, no matter the type or difficulty of the case, was uniformly excellent. An example of your work ethic occurred on the week of April 27-May 1, 2015, when, due to a severe GJD staffing shortage, you presented an incredible 42 cases before the Grand Jury. The effort you put forth to read and understand each report, and provide expert testimony to each case without incident, is a testament to your professionalism, perseverance, and positive attitude. Your dedication to duty is evident by the numerous times this past year you stayed beyond your work hours, to present cases and remain until all jurors questions were answered. Finally, your overall dress and appearance was unfailingly impeccable, and in keeping with the highest standards of the Phoenix Police Department. Joe, your value to the Grand Jury can best be illustrated by the lengths that Deputy County Attorney [redacted], Charging Bureau Chief for the Grand Jury, DCA [redacted], Assistant Charging Bureau Chief for the Grand Jury, and other DCAs assigned to the Grand Jury were willing to go to advocate for a permanent position for you on the GJD. Memos have been written and phone calls placed to the Police Chief's Office in the belief that you, and the knowledge and skills you possess, should continue to play a vital role in the Grand Jury process. To quote DCA [redacted] "[redacted] and I wholeheartedly support having Office Wennes permanently assigned to the squad. In our opinion, having Officer Wennes serve in this capacity would benefit both our agencies tremendously.. [redacted] and I have witnessed first hand Officer Wennes' positive influence on the program. Since his arrival there is a continuity among the squad that did not exist...In our opinion and based on our past experience with the program since March of 2009, Officer Wennes possesses the experience, temperament, and professionalism to continue to make the hearsay program a success." Joe, these statements are the ultimate proclamation of your importance to the Grand Jury process, and how your performance has reflected positively on both the Phoenix Police Department and the Maricopa County Attorney's Office. During this rating period you stayed current on all AZPOST required proficiencies and training mandates. Congratulations, Joe, on an outstanding year.	Michaud,Paul Joseph 2015-06-16T06:33:02-0700 Complete: Y

Reviewer	
Joe, I agree with Sgt. Michaud's assessment of your performance. You have demonstrated an exceptional amount of professional in your grand jury duties as noted by the County Attorney Charging Bureau Chief. Thank you for all your efforts that reflect positively on the Phoenix Police Department.	Tallman,Mark P 2015-06-23T11:48:30-0700 Complete: Y

Employee	
Many thanks to Sgt. Michaud and Lt. Tallman for everything!! I'm humbled and grateful to be part of their team!! Wishing Sgt. Michaud a long, healthy and blessed retirement!!! Joe	2015-06-17T08:12:39-0700 Complete: Y

City of Phoenix

PERFORMANCE MANAGEMENT GUIDE

Date: 2016-06-20
Type: Performance
Status: Scheduled

Employee Name	Empl ID	Dept	Dept Name	Job Title
Wennes,Joe D	[redacted]	B2019	Police Dept: Property Managemt	Police Officer

Overall Performance Expectations: Met

CORE CITY VALUES	
Description	**Met?**
Exhibits ethical behavior and decision making	Met
Embraces diversity in all work activities	Met
Is professional and accountable in all work assignments	Met
Participates in and supports team endeavors	Met
Engages in innovative thinking and problem solving	Met
Provides responsive and consistent customer service	Met

CURRENT RATING PERIOD

Item #	Duties & Goals	Performance Expectations
1	Demonstrates professionalism in work performance and decisions.	Met
2	Practices open and effective communication.	Met
3	Practices workplace and environmental safety.	Met
4	Demonstrates acceptable attendance.	Met
5	Complies with Departmental rules and regulations.	Met
6	Provides knowledgeable and quality testimony within the Grand Jury setting.	Met
7	Assists in training and orienting new members to the Grand Jury Detail.	Met
8	Works in cooperation with the County Prosecutors, and acts as a conduit for information between the County Attorney's Office and the Police Department on issues involving the Grand Jury.	Met
9	Dresses appropriately and professionally for Grand Jury proceedings as outlined in Operations Order 2.9, Court Appearances.	Met
10	Keep your supervisor informed of issues of importance to the Police Department.	Met

NEXT RATING PERIOD

Item #	Duties & Goals
1	Demonstrates professionalism in work performance and decisions.
2	Practices open and effective communication.
3	Practices workplace and environmental safety.
4	Demonstrates acceptable attendance.
5	Complies with Departmental rules and regulations.
6	Provides knowledgeable and quality testimony within the Grand Jury setting.
7	Assists in training and orienting new members to the Grand Jury Detail.
8	Works in cooperation with the County Prosecutors, and acts as a conduit for information between the County Attorney's Office and the Police Department on issues involving the Grand Jury.
9	Dresses appropriately and professionally for Grand Jury proceedings as outlined in Operations Order 2.9, Court Appearances.
10	Keep your supervisor informed of issues of importance to the Police Department.

COMMENTS **Completed by**

Supervisor	
This narrative was authored by Sergeant Janina Austin #6618: Joe, I became your supervisor on February 8, 2016. During this rating period, you have continued to distinguish yourself as the informal leader of the Grand Jury Detail (GJD), consisting at various times of four to six officers, in total. As you have been assigned to the GJD for more than three years, you have had the opportunity to develop excellent working relationships with Deputy County Attorney (DCA) [redacted], Charging Bureau Chief, DCA [redacted], Assistant Charging Bureau Chief and many other DCAs assigned to work with Grand Jury Detail officers. Their evaluation of your performance is consistently glowing and their appreciation of your strong work ethic is abundantly clear. Joe, you have developed the skills, knowledge and expertise to present any type of criminal case, with or without notice. You have even been called upon in the past to present a 1st Degree Murder case, due to an administrative error. This resulted in an indictment, based on your hearsay testimony. Joe, you keep the Grand Jury Squad functioning like a well-oiled machine and take responsibility for ensuring that new officers are well oriented to their work there. You also take ownership of the squad and attempt to work out any issues informally. When necessary, you also let your supervisor know when a fellow employee is struggling and not able to be successful in the GJD environment. Joe, your consistently positive attitude and very high level of productivity make you a pleasure to supervise. On June 16, 2016, you were commended by Court Services employees, who regularly contact you to arrange hearsay testimony for same-day cases in which subpoenaed officers are not able to be contacted. On every occasion, you have taken responsibility for ensuring the needed testimony is provided, representing the Phoenix Police Department to the best of your ability and providing critical assistance for attorneys who would otherwise have to dismiss legitimate criminal charges. You were praised for your professionalism and courteous attitude and exemplary customer service skills. I completely agree. Your dedication to duty is outstanding. I encourage you to request and attend training that is of interest to you and will help to further your career. I look forward to working with you in the future. Thank you for all of your hard work.	Austin,Janina M 2016-07-09T16:55:02-0700 Complete: Y

Reviewer	
Joe, thank you for the excellent job you do everyday. You have developed an excellent reputation with the County Attorney's Office that reflects well on the Phoenix Police Department.	Tallman,Mark P 2016-07-21T12:13:41-0700 Complete: Y

Employee	
Many thanks to Sgt. Austin, Sgt. Michaud, Sgt. Baltzer, Lt. Tallman and Cmdr. Gardner for their kind words and encouragement for another productive year. A special thank you to Assistant Chief Renteria for our meeting to provide her with an update on the continued progress and development of the Grand Jury Hearsay Detail with future plans of increasing stability, accuracy, and continuity. Her sincere interest in reviewing the proposal and accepting a copy of the two notebooks of details for future reference was very much appreciated. I am amazed at the volume of cases that the Detail is responsible for each year. I estimate that I have had the opportunity to present approximately a thousand cases each year, therefore I have been personally involved with the preparation and presentation of upwards of 4000 cases since I started. I am impressed with how the members of our squad work in tandem with the MCAO staff to handle as many cases as possible each day. The details of each case are critical and our presentations are essential in these felony cases. Fortunately, our work allows officers and detectives to stay active in their assignments while we present their cases, saving the city both time and money and allowing us to be force multipliers. I am both humble and grateful for the opportunity to be a part of the Grand Jury Hearsay Detail.	2016-07-20T23:31:36-0700 Complete: Y