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July 20, 2009

The Honorable Greg Abbott
209 W. 14th Street
Austin, TX 78701
ATTN: Opinion Committee

Re: Texas Retired Teachers Association's Brief on Senator Ogden and Representative Pitts' Opinion Request No. 0801-GA, Regarding Constitutionality of Article IX, Section 17.13 of SB 1: The Appropriation Rider Concerning One-Time Payments to Eligible Annuitants under the Employees Retirement System and Teacher Retirement System

Dear General Abbott:

This letter brief is filed on behalf of the Texas Retired Teachers Association ("TRTA") in response to Opinion Request No. 0801-GA made by the Chairmen of Conference Committee on Senate Bill 1 for the 81st Legislature. Specifically, the Honorable Steve Ogden, Chairman of the Senate Finance Committee, and the Honorable Jim Pitts, Chairman of the House Committee on Appropriations, have sought an opinion regarding whether the one-time payments to certain eligible members of the Employees Retirement System and the Teacher Retirement System, as provided in Article IX, Section 17.13 of Senate Bill 1 ("the Rider"), are constitutionally and statutorily permissible. The one-time payments "are due to the availability of" federal funds authorized by the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 ("ARRA"), commonly known as the economic stimulus package. *See* Article IX, Section 17.13(d) of Senate Bill 1.

The TRTA respectfully submits that the one-time payments authorized by the Rider are permissible under the Texas Constitution and are soundly within legislative precedent. Any other conclusion would risk frustrating the purposes of federal law to stimulate the economy and invest in education. For these reasons, TRTA requests that the Attorney General find that:

1. The Rider is presumed to be constitutional and valid;
2. The Rider is valid, and does not violate the Texas Constitution; and
3. The Rider accomplishes the purposes of ARRA, the federal law designed to stimulate the economy and invest in education, and accordingly, the Rider should not be interpreted in such a way as to frustrate that federal purpose.

TRTA provides the following arguments and authorities in support of a finding that the Rider is permissible under applicable law.

I. BACKGROUND

A. The American Recovery and Reinvestment Act of 2009

On February 17, 2009, the 111th United States Congress passed and President Obama signed into law ARRA. ARRA was intended to provide a stimulus to the United States economy in the wake of the economic downturn by infusing nearly \$787 billion into federal tax relief, social welfare provisions, and spending in education, health care, and other domestic infrastructure. ARRA sets forth the following guiding purposes and principles for its enactment:

- (a) STATEMENT OF PURPOSES.—The purposes of this Act include the following:
 - (1) To preserve and create jobs and promote economic recovery.
 - (2) To assist those most impacted by the recession.
 - (3) To provide investments needed to increase economic efficiency by spurring technological advances in science and health.

- (4) To invest in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits.
- (5) To stabilize State and local government budgets, in order to minimize and avoid reductions in essential services and counterproductive state and local tax increases.

Id. at sec. 3(a).

Of the \$787 billion stimulus package, ARRA designated \$90.9 billion for education, with \$44.5 billion in aid to local school districts to prevent layoffs and cutbacks. ARRA also permits the education funds to be used for school modernization and repair via Title XIV, the State Fiscal Stabilization Fund – Education State Grants, Recovery Fund (“SFSF”). Texas received in excess of \$16 billion in ARRA funds, with over \$3 billion allocated specifically to educational purposes via the SFSF.

B. Texas H.B. No. 3347 and S.B. No. 1

In the 81st Legislative Session, the Texas House of Representatives passed House Bill No. 3347, which provides that the Employees Retirement System (“ERS”) and the Teacher Retirement System (“TRS”) shall make a one-time supplemental payment of a retirement or death benefit to eligible annuitants (“H.B. No. 3347”).¹

The Senate subsequently passed Senate Bill 1, the General Appropriations Act (“S.B. No. 1”). Article IX, Section 17.13 of S.B. No. 1 (“the Rider”) provides the necessary appropriations to fund the one-time payment contemplated by H.B. No. 3347. The Rider provides that approximately \$155 million will be funded to the ERS and TRS out of the General Revenue Fund, Section 17.13(a), “due to the availability of American Recovery and Reinvestment Act (ARRA) funds.” *See* Sec. 17.13(d) (“It is the intent of the Legislature that the one-time

¹ The population of individuals who constitute “eligible annuitants” will be determined by the Board of Trustees of the TRS (Section 5(h) of H.B. No. 3347).

appropriations made above are due to the availability of American recovery and Reinvestment Act (ARRA) funds.”).

The Rider provides that the appropriated funds will be transferred to, and paid from, a sub-account within the General Revenue at the ERS/TRS, without filtering funds through the retirement trust funds (“ERS Trust” or “TRS Trust”). *See* Sec. 17.13(a). In other words, the ERS/TRS sub-account, which is under the control of the Comptroller, is a conduit through which the funds will pass, without the necessity of using ERS/TRS member contributions or ERS/TRS Trust assets.

II. THE RIDER IS PRESUMED TO BE CONSTITUTIONAL AND VALID.

The Texas Code Construction Act, Tex. Gov’t Code § 311.021, sets forth a high presumption of validity for legislative enactments, stating:

§ 311.021. INTENTION IN ENACTMENT OF STATUTES. In enacting a statute, it is presumed that:

- (1) compliance with the constitutions of this state and the United States is intended;
- (2) the entire statute is intended to be effective;
- (3) a just and reasonable result is intended;
- (4) a result feasible of execution is intended; and
- (5) public interest is favored over any private interest.

Id.; *see also* *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Worker’s Comp. Comm’n*, 74 S.W.3d 377, 381 (Tex. 2002) (a statute must be construed “in a manner that renders it constitutional and gives effect to the Legislature’s intent”). Accordingly, the starting point of any analysis is the presumption that the Rider complies with the Texas and United States Constitutions, is intended to be effective and feasibly executed, is intended to achieve a just and reasonable result, and favors the public interest over any private interest. The burden to prove otherwise—to overcome this high presumption—is on those challenging the validity of the

Rider's one-time payment. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 725 (Tex. 1995) (“[F]ollowing standard rules of constitutional interpretation, [the Court] must begin with the presumption that [the bill] is constitutional; the burden of proof is on those parties challenging this presumption.”). Therefore, absent evidence to the contrary, the appropriation in the Rider should be presumed valid, as set forth by the Code Construction Act and the Supreme Court of Texas.

III. THE RIDER DOES NOT VIOLATE THE TEXAS CONSTITUTION.

A. Article III, Sections 51 and 52 of the Texas Constitution Do Not Prohibit the Rider's One-Time Payment to Eligible Annuitants.

The Rider's one-time payment to eligible annuitants does not violate the constitutional prohibition against granting public money to individuals. Article III, sections 51 and 52 of the Texas Constitution state in pertinent part:

[Sec. 51] The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; provided that the provisions of this Section shall not be construed so as to prevent the grant of aid in cases of public calamity.

[Sec. 52(a)] [T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever

1. The one-time payments are not “gratuitous transfers” of public moneys.

Sections 51 and 52(a) have been interpreted to prohibit the Texas Legislature from making “gratuitous payments” to individuals of public moneys. A payment is *not* gratuitous if there is consideration for the payment, or if it serves a legitimate public purpose and affords a

clear public benefit in return. *See Tex. Mun. League*, 74 S.W.3d at 383; *Meno*, 917 S.W.2d at 740. The Rider’s one-time payment is not gratuitous, as the payment (a) satisfies the “consideration” requirement *and* (b) likewise serves a legitimate public purpose and affords a clear public benefit.

a. **Consideration has been given for the one-time to eligible annuitants.**

Consideration has been given by the TRS and its eligible annuitants so that the one-time payment to those annuitants does not constitute a gratuitous transfer. The consideration given by the TRS and its eligible annuitants need only be sufficient, not return-in-kind, consideration. Furthermore, the eligible annuitants’ years of valued service to the State of Texas constitutes *per se* consideration.

For example, the Supreme Court of Texas has held that payments of unclaimed death benefits to the Secondary Injury Fund (“Fund”) from the Texas Municipal League Risk Pool (“Risk Pool”) did not constitute a gratuitous payment. *See Tex. Mun. League*, 74 S.W.3d at 384-385. The Risk Pool provided a joint-insurance fund through which participating Texas cities could satisfy their requirement to provide worker’s compensation benefits. The Texas Legislature established the Fund to be administered by the Texas Worker’s Compensation Commission (“TWCC”). The Risk Pool was required to pay all unclaimed death benefits to the Fund which would use such amounts to fund lifetime benefits in instances where an injured employee suffers a compensable injury that, when combined with a prior injury’s effects, results in a condition entitling such employee to certain lifetime benefits. The Risk Pool argued that the requirement that it transfer amounts to the Fund necessitates the transfer of public moneys—money paid by cities into the Risk Pool—to the Fund, which in turn served as a conduit for the

individuals receiving lifetime benefits. The Risk Pool claimed that was unconstitutional under the gratuitous transfer restrictions in the Texas Constitution.

In rejecting the gratuitous transfer argument, the Court found that the amounts were not “gratuitously” transferred because the Risk Pool had received consideration for the amounts paid to the Fund. Specifically, the Fund’s requirement that it pay lifetime benefits to any Risk Pool member city’s employee who qualified for benefits was consideration. *Tex. Mun. League*, 74 S.W.3d at 384-85. The Supreme Court specifically noted that all that is required is “**sufficient—not equal—return consideration to render [the payment of such funds] constitutional.**” *Id.* (emphasis added).

Likewise, the TRS is obligated by its terms and applicable law to pay retirement benefits to any eligible annuitant. Whether the funds to be distributed are equal-return is wholly irrelevant to the constitutional inquiry; rather, the import lies with the obligation of TRS to pay benefits. Because that is sufficient consideration, the state constitutional prohibition on gratuitous transfers is not offended. *See id.* at 384-85.

Further, payments made to eligible annuitants under the TRS are typically retirement benefits or deferred compensation for services rendered, *i.e.*, amounts that were earned through services rendered during a participant’s employment but were unpaid at the time of employment. Indeed, “it is well-established that pensions, and by analogy contributions to retirement funds, constitute compensation for services rendered and do not run afoul of article III, section 52 of the Texas Constitution.” *Op. Tex. Att’y Gen. No. DM-265 (1993)* (addressing payment of additional interest by the Texas County and District Retirement System under Article III, section 52 of the Texas Constitution).

Additionally, Texas jurisprudence supports the proposition that payments to eligible TRS annuitants are deferred compensation payments for years of service rendered and sufficient consideration for purposes of the gratuitous transfer prohibition. For instance, in *Devon v. City of San Antonio*, an action was brought by a former police officer to recover contributions to a pension fund. The court held that when a fireman or policeman is employed by a city, he is contractually entitled to participate in the pension fund; the right to participate in the fund is “as much of his agreed compensation, for services rendered to the city, as is his monthly salary.” 443 S.W.2d 598, 600 (Tex. Civ. App.—Waco 1969, writ ref’d). Further, the court held that “deferred pension payment is a part of the compensation of fireman and policemen for services rendered to the city. It is not, therefore, a gratuity or donation in any sense.” *Id.*; see also *Byrd v. City of Dallas*, 6 S.W.2d 738, 741 (Tex. 1928) (“The right to participate in [the pension] fund is therefore not a gratuity or donation in any sense. It is as much a part of the agreed compensation as is the monthly stipend.”); *City of Dallas v. Trammel*, 96 S.W.2d 110, 111 (Tex. Civ. App.—Dallas 1936) (pension paid to retired police officer was earned but unpaid compensation), *rev’d on other grounds*, 101 S.W.2d 1009 (Tex. 1937).

In sum, the amounts to be paid to eligible annuitants such as teachers and school administrators under the TRS are retirement benefits—deferred compensation for services rendered—and as such are premised upon sufficient consideration and not gratuitous.

b. The Rider’s one-time payment serves a legitimate public purpose and affords a clear public benefit received in return.

The Supreme Court of Texas has established a three-part test to determine when a statute authorizing a payment of public money accomplishes a public purpose: “the Legislature must: 1) ensure that the statute’s predominant purpose is to accomplish a public purpose, not to benefit

private parties, 2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment, and 3) ensure that the political subdivision receives a return benefit." *Tex. Mun. League*, 74 S.W.3d at 384. For example, in concluding that a public purpose was served by the transfer of unclaimed death benefits from one fund to another that would then pay lifetime benefits to eligible individuals, the Supreme Court explained:

In determining that the Fund accomplishes a legitimate public purpose, we apply the three-part test. First, the challenged provisions' predominant purpose is to provide lifetime workers' compensation benefits for Texas employees with subsequent compensable injuries. Thus employers would not have to pay higher workers' compensation rates for hiring disabled employees and wouldn't be discouraged from hiring such employees. Second, the TWCC retains exclusive control over the unclaimed death benefits to fulfill the Fund's objectives. Third, as we already concluded, the Risk Pool's member cities receive a reciprocal benefit from the Fund.

Id. at 385.

Likewise, the Rider's one-time payment to eligible annuitants satisfies the "legitimate public purpose" three-part test. First, the Rider accomplishes a public purpose, as it stabilizes the retirement benefits of members of TRS, thereby enhancing recruitment and retention of the teacher workforce in Texas. Further, as stated by the TRS:

The TRS administers retirement and health benefits for Texas teachers and other educational personnel. These payments are important to improving the attractiveness of teaching as a profession by enhancing the overall compensation to teachers. In addition, they involve a notable economic stimulus to communities across the state.²

² See Teacher Retirement System of Texas, *Beyond the Classroom: The Impact of Pension Benefits Paid by the Teacher Retirement System of Texas (TRS) on Business Activity in Texas, Its Regions, Metropolitan Areas, and Counties*, at 5 (July 2006) (available at http://www.trs.state.tx.us/about/documents/beyond_the_classroom.pdf).

Second, the TRS and its members will receive a return benefit from distribution, as the Texas Education Agency and the TRS will benefit from decreased attrition of its teaching workforce, stabilized retirement benefits, and enhanced recruitment abilities. Accordingly, by meeting the requirements of the “legitimate public purpose” test, the Rider’s one-time payment is not a gratuitous transfer.

2. **Even if the Rider were a “gratuitous transfer,” which it is not, transfers of “public moneys” for the development of the economy or the expansion of commerce are exceptions to section 51’s prohibition on gratuitous transfers.**

Even if the Rider’s one-time payment were deemed a “gratuitous transfer”—which it is not—Article III, section 52A of the Texas Constitution sets forth an exception for the purposes of “development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, . . . or the development or expansion of . . . commerce in the state.” Art. III, sec. 52A. The one-time payment to eligible annuitants will undoubtedly serve these purposes. For example, the one-time payment will impact employment in the State of Texas by enhancing the recruiting of new professionals and encouraging teachers to remain in the profession. Further, the one-time payment will impact commerce and the economy by infusing cash into the economy as funds are distributed to eligible annuitants across the State.³

³ This exception to the gratuitous transfer prohibition does have a restriction requiring a vote of the people when ad valorem taxes are to be raised to fund the grant of monies to be expended. But ad valorem taxes will not be raised or relied upon to accommodate the payment to eligible annuitants.

B. The Rider Does Not Violate the Constitutional Prohibition Against Legislative Grants of “Extra Compensation . . . After Service Has Been Rendered,” as Defined by Article III, Sections 44 and 53 of the Texas Constitution.

The Rider’s one-time payment to eligible annuitants does not violate the constitutional prohibition against payment of extra compensation for services rendered, as is set forth in Article III, sections 44 and 53 of the Texas Constitution. Those provisions state, in pertinent part:

[Sec. 44] The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same

[Sec. 53] The Legislature shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into, and performed in whole or in part; nor pay, nor authorize the payment of, any claim created against any county or municipality of the State, under any agreement or contract, made without authority of law.

Texas courts have consistently construed those provisions to render payments to eligible annuitants not as “extra compensation” but deferred compensation—monies earned during the employee’s years of service that are paid after retirement—the precise amounts of which may be increased from time-to-time as necessary and appropriate. Any other reading would lead to the absurd result that *every* payment made to a pension beneficiary or eligible annuitant in the State of Texas would be invalid as “extra compensation” received after the service has been rendered.

The Supreme Court’s decision in *Byrd v. City of Dallas* is instructive. There, the Court addressed the certified question of whether pension plan payments to firemen and policemen for services rendered were invalid under multiple sections of the Constitution, including sections 44

and 53 of Article III. 6 S.W.2d 738 (Tex. 1928). During most of the period when the employees rendered their services to the City of Dallas, there was no pension plan in effect—and the ordinance creating the payment plan went into effect only a short time before the employees’ retirement date. In upholding the constitutionality of the payments, the Court explained that “[i]f the pension provided for . . . is a part of the compensation of such employee for services rendered to the city, or if it be for a public purpose, then clearly it is a valid exercise of the legislative power.” *Id.* at 740. Further, the Court reasoned that the pension payment, although not received until after the employees had completed their service, is “as much a part of the agreed compensation as is the monthly stipend.” *Id.* The Court squarely affirmed the validity of the payments and, in so doing, rejected the argument that sections 44 and 53 prohibit payments made as a retirement benefit for services already rendered. *See also Dallas County v. Lively*, 167 S.W.219 (Tex. 1914) (specific amount of compensation not determined until after services were rendered); *City of San Antonio v. Baird*, 209 S.W.2d 224 (Tex. Civ. App.—San Antonio 1948, error refused) (minimum wage for officers awarded after service completed).

Such authority is in harmony with the Supreme Court’s guidance on the construction of laws impacting retirement plans. The Court has clearly articulated that laws should be read liberally to fully effectuate the purposes of retirement plans in the State of Texas, stating:

As the outset it should be stated that the plain intent of the constitutional amendment, and the Act giving it life, was to provide security for teachers and create an incentive to encourage qualified persons to become and remain teachers in the Public Schools of Texas. That being in the public interest, even the State’s part of the program is not founded strictly upon a gratuity or donation. The teacher’s share in the program is obviously not to be so considered, since, to be eligible for the benefits, he must contribute to the fund throughout his years of active service. Under such circumstances, the Act should be liberally construed in order to effectuate the whole purpose of the plan.

Woods v. Reilly, 218 S.W.2d 437, 442 (Tex. 1949).

Further, as set forth in greater detail in the Texas Public Employees Association's Memorandum of July 6, 2009, increases in annuity payments after the completion of services is common practice. *See* Section III, pp. 3-5 (citing a \$19 million increase in annuity payments in 1977; a \$76 million increase in annuity payments in 1979 (12%); a \$17.5 million increase in annuity payments in 1981 (5.1%); and periodic increases from investment income earnings beginning in 1987 and continuing until 2007, when a one-time supplemental payment was authorized). That, too, further confirms the permissibility of the Rider.

The Rider should be viewed not as "extra compensation" in violation of sections 44 and 53, but as deferred compensation that was earned during the employees' years of service that is being paid after retirement, in amounts that may be increased from time to time as necessary and appropriate.

C. The Rider's One-Time Payment Does Not Violate Article 16, Section 67(a)(1) of the Texas Constitution.

Article 16, section 67(a)(1) of the Texas Constitution provides that the Legislature may enact general laws establishing systems and programs of retirement benefits for public employees. The Rider's one-time payment to eligible annuitants does not violate Article 16, section 67(a)(1)'s requirement that "[f]inancing of benefits must be based on sound actuarial principles."⁴

⁴ Likewise, the Rider is entirely consistent with the applicable provisions of the Government Code. *See* TEX. GOV'T CODE §§ 821.006 (governing actions increasing amortization period) and 824.2031 (governing benefit improvements). In tandem, these provisions prohibit the payment of increased benefits if the increased liabilities cause the pension funding period to exceed 30 years (*i.e.*, the limit for actuarial soundness). Specifically, the provisions require the Legislature to "determine [based on certain specified criteria] whether the performance of the retirement system trust fund makes the fund capable of supporting improvements in the plan of benefits" (Section 824.2031) and determine whether "*as a result of the particular action*" the amortization period for any unfunded liabilities "would be *increased*" to a period of more than 30 years. Section 821.006 (emphasis added). For the

Here, the one-time payment would have no effect on the amortization of unfunded liabilities of the Fund. The funds are paid into the TRS sub-account, while the Rider's one-time payments are made outside of the TRS Trust. Moreover, the one-time payment to eligible annuitants is contingent on full funding. *See* Section 17.13(a) (making one-time payments “[c]ontingent on the passage of Senate Bill 2567, or similar legislation authorizing the payment provided for herein”). Accordingly, the one-time payment offends neither the “sound actuarial” requirement of section 67 nor Section 821.006’s requirement that financing benefits be premised on sound actuarial principles.

D. Past Practice Supports the Validity of the Rider’s One-Time Payment.

Authorizing the one-time payment envisioned in the Rider is fully consistent with past legislative practice. In 2007, the Texas Legislature authorized a similar payment of a one-time supplemental payment of a retirement or death benefit under the TRS. Using language almost identical to that set forth in H.B. 3347, the Legislature authorized a supplemental payment to eligible annuitants and, in fact, the supplemental payment was made to eligible annuitants in September 2007. *See* Section 5 of S.B. No. 1846.⁵

Supplemental one-time payments that fall outside of the TRS trust are not novel in Texas. Indeed, Section 825.517 of the Texas Government Code expressly provides for a separate, nonqualified, unfunded excess benefit arrangement to be created “*outside the trust fund of the*

reasons explained above, the Rider does not conflict with either provision of the Government Code. And, of course, even if it did conflict, because the Legislature can always alter statutory requirements, the later-passed statutory provision (*i.e.*, the Rider) would prevail over any earlier statutory provisions.

⁵ The 2007 payment relied upon TRS Trust Funds and actually anticipated a negative financial impact that would eventually be reversed through an increase in the rate of contributions made by active members of the TRS to the TRS Trust Fund. *See* “Fiscal Analysis” Fiscal Note, 80th Legislative Regular Session, Dated May 26, 2007 (the funding for S.B. 1846 was generated through the TRS Trust, via contributions made by active members of TRS (*i.e.*, currently employed teachers and school administrators) and contributions made by their employers (*i.e.*, public school districts)). No such negative financial impact will be fashioned on the Trust by the Rider.

retirement system” (emphasis added). The amounts provided under the excess benefit arrangement are to be paid to annuitants whose benefits provided through the TRS Trust otherwise exceed the limitations imposed by 415(b)(1)(A) of the Internal Revenue Code of 1986, as amended (“Code”). The Board of Trustees of the TRS is responsible for administering the excess benefit arrangement even though the amounts are not held in the TRS Trust. As an “unfunded” arrangement, benefits are paid from a dedicated account in the general revenue fund maintained only for the excess benefit arrangement. *See* TEX. GOV’T CODE § 825.517.

Of course, the supplemental one-time payment authorized by H.B. 3347 is not by definition “an excess benefit arrangement,” because the funds will benefit the broad base of eligible annuitants—not simply those whose compensation exceed the limits set forth in section 415(b)(1)(A) of the Code. But they are analogous, and Section 825.517 demonstrates that providing retirement benefits outside of the TRS Trust is hardly without precedent. Like the excess benefit arrangement, the Rider’s one-time payment will be governed by the Board of Trustees of the TRS. And the Rider’s one-time payment will be unfunded right up until that payment is made, at which time the distribution will be made from a dedicated subaccount in the TRS’s general revenue fund. Thus, the one-time payment has been structured to follow the same guidelines as those governing the excess benefit arrangement—a permissible and valid mechanism for providing supplemental payments to eligible annuitants after services have been rendered to the State.

IV. THE RIDER SHOULD BE CONSTRUED AS PERMISSIBLE TO AVOID RAISING SERIOUS CONSTITUTIONAL QUESTIONS.

As demonstrated above, the Rider is permissible and appropriate. But under the familiar canon of constitutional avoidance, any doubts on that score must be resolved, if at all possible, in

favor of a construction that renders the Rider valid. *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996) (when possible, statutes should be interpreted in such a way as to avoid constitutional infirmities). Thus, between two possible constructions of a statute—one that will uphold it and one that will render it unconstitutional—the former must be adopted. *See Marcus Cable Assocs., LP v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002).

Applied here, those principles support the conclusion that the Rider is neither a gratuitous transfer nor extra compensation rendered after the services have been rendered. Rather, the Rider’s one-time payment satisfies the requirement of consideration for non-gratuitous transfers, serves a legitimate public purpose, and affords a clear public benefit. The Rider’s one-time payment should be interpreted not as “extra compensation” in violation of sections 44 and 53, but as deferred compensation that was earned during years of service and paid after retirement, in amounts that may be increased from time-to-time as necessary and appropriate. Any question about the constitutionality of the Rider under Texas law thus can, and should, be resolved in favor of a construction that renders it valid. *See Allen v. Mauro*, 733 S.W.2d 228, 230 (Tex. App.—El Paso 1986, writ ref’d n.r.e.).

A reading that renders the Rider unconstitutional would also frustrate and obstruct the accomplishment and execution of Congress’ full purposes and objectives, as set forth in ARRA,⁶ and arguably give rise to federal preemption. *See BIC Pen Corp. v. Carter*, 251 S.W.3d 500, 504

⁶ Sections 14002(c) and 14003(c) of Title XIV of the State Fiscal Stabilization Fund recite a rule of construction forbidding local educational agencies “to engage in school modernization, renovation, or repair that is inconsistent with state law.” But the expenditures contemplated by the one-time payment in the Rider are not for “school modernization, renovation, or repair,” and therefore the rule of construction is not implicated.

(Tex. 2008); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001). When a state law or constitutional provision conflicts with federal law, it is preempted and has no effect. *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 426 (Tex. 2005); *Frontier Ditch Co. v. Southeastern Colorado Water Conservancy Dist.*, 761 P.2d 1117, 1123-24 (Colo. 1988). The key inquiry as to whether state law stands as an obstacle to a federal requirement for purposes of preemption analysis is whether application of the state law would frustrate the primary purpose of the federal law. *See Worthy v. Collogen Corp.*, 967 S.W.2d 360, 368 (Tex. 1998); *see also Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 885 (5th Cir. 1996) (state regulation preempted where federal regulation requires uniformity vital to national interests such that allowing state regulation “would create potential frustration of national purposes”).

Here, the “one-time appropriations . . . are due to the availability of [ARRA] funds.” Section 17.13(d). In other words, because dollars are fungible, the availability of federal ARRA dollars in the overall budget enabled the Legislature to appropriate general revenue funds for the one-time payment. The purposes of ARRA are to stimulate the economy in the short term and invest in education and other essential public services in the long term to ensure the economic health of our nation. According to the U.S. Department of Education, the ARRA funds designated for distribution through SFSF:

will help stabilize state and local government budgets in order to minimize and avoid reductions in education and other essential public services. The program will help ensure that local educational agencies (LEAs) and public institutions of higher education (IHEs) have the resources to avert cuts and retain teachers and professors. The program may also help support the modernization, renovation, and repair of school and college facilities. In addition, the law provides governors with significant resources to support education (including school modernization renovation, and repair), public safety, and other government

services.... SFSF is a key element of the *ARRA* and is guided by the principles of *ARRA*.⁷

According to the Department of Education, one of the guiding principles for the distribution and use of ARRA funds is “to spend funds quickly to save and create jobs.” *Id.* The Department urges States to “move rapidly to develop plans for using funds . . . and to promptly begin spending funds to help drive the nation’s economic recovery.” *Id.*

“Promptly begin[ning] [the] spending [of] funds” via the one-time payment will further the federal objectives in two important ways. First, by providing retirement benefits to retired teachers, local education agencies should be able to better retain active teachers. Even though this is a one-time payment, general knowledge of this supplemental payment to subsidize and sustain retirement benefits may provide a stimulus for recruiting new professionals and encouraging teachers to remain in the profession. Second, the one-time payment may likewise act as a stimulus to the economy as it results in additional funds being placed, quickly, into circulation. Indeed, a 2005 study of the impact of TRS retirement benefits on the economy confirms that payments made from the TRS to retirees has a direct effect on the economy:

- In terms of employment, the impact of TRS retiree benefits payments range from about 2,000 permanent jobs in West Texas to more than 15,000 in the Metroplex region;
- TRS retiree benefit payments led to gains in output (gross product) in all of the state’s metropolitan area economies;
- Overall spending on a per capita basis ranges from \$265 in Laredo to \$808 in College Station-Bryan; and
- The average per capita impact in rural Texas is almost 30% higher than the state average.⁸

⁷ United States Department of Education, *State Fiscal Stabilization Fund* (March 7, 2009) (available at <http://www.ed.gov/policy/gen/leg/recovery/factsheet/stabilization-fund.html>).

The one-time payment will directly impact the economy in both the metropolitan and rural areas of Texas, and will directly further the greater purpose of economic recovery for America as envisioned by ARRA. For those reasons, the one-time payment should be construed as constitutional under the Texas Constitution and Government Code to avoid frustrating the federal purposes sought to be accomplished by ARRA, which enabled the Legislature to appropriate the one-time payment.

V. CONCLUSION

For the foregoing reasons, TRTA requests that the Attorney General find that:

1. The Rider is presumed to be constitutional and valid;
2. The Rider is indeed valid, and does not violate the Texas Constitution; and
3. The Rider accomplishes the purposes of ARRA, the federal law designed to stimulate the economy and invest in education, and accordingly, the Rider should not be interpreted in such a way as to frustrate those federal purposes.

If you have any questions or desire any additional briefing or discussion, please do not hesitate to contact me. Thank you.

Sincerely,



R. Ted Cruz

cc: The Honorable Steve Ogden
Chairman, Senate Finance
Texas State Senate
Post Office Box 12068
Austin, Texas 78711

⁸ See Teacher Retirement System of Texas, *supra* at n. 4, at 27-38.

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