IN THE SUPREME COURT OF FLORIDA

Case No. SC12-520

RICK SCOTT, PAM BONDI, and JEFF ATWATER, as the FLORIDA STATE BOARD OF ADMINISTRATION, et al.,

Appellants,

vs.

GEORGE WILLIAMS, et al.,

Appellees.

_____ /

L.T. Case Nos.: 2011 CA 1584, 1D12-1269

ON APPEAL FROM THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL AS A MATTER OF GREAT PUBLIC IMPORTANCE

APPELLANTS' INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision of the circuit court for the Second Judicial Circuit, finding that changes to the Florida Retirement System ("FRS") made in Chapter 2011-68, Laws of Florida, violated the Florida Constitution. The First District Court of Appeal certified the judgment as requiring immediate resolution by this Court. Plaintiffs, public employees and members of the FRS, challenge the provisions of the law requiring FRS members to contribute 3% of their gross compensation toward retirement and reducing a cost-of-living adjustment for benefits earned on and after July 1, 2011. The circuit court found that the changes impaired FRS members' contractual rights, took private property without full compensation, and impaired the right of public employees to collectively bargain.

The issue on appeal is whether the Legislature may prospectively change the FRS as long as it does not affect benefits already earned. This Court has ruled repeatedly, most recently in *Florida Sheriffs Association v. Department of Administration*, 408 So. 2d 1033 (Fla. 1981), that the Legislature may change retirement benefits prospectively. The circuit court's decision violates the Court's precedent and if left standing would handcuff the Legislature's response to changing financial circumstances.

A. Facts Relevant to the Appeal

The FRS is a mandatory retirement system for employees of participating state and local public employers. *See* §§ 121.001, *et seq*., Fla. Stat. (2011). FRS members may elect to be enrolled in either the Investment Plan or the Pension Plan. The Investment Plan is a "defined-contribution plan" similar to a 401(k) plan. §§ 121.4501, 121.591, Fla. Stat. (2011). The Pension Plan is a "defined-benefit plan," which pays retired employees a defined amount regardless of the FRS Trust Fund's financial performance. Benefits are calculated based on a percentage of the member's highest average five years of compensation (the "Average Final Compensation"). For each year of service, the employee accrues a percentage of salary based on his or her class of service (the "Value Percent"). The applicable Value Percent is multiplied by the number of years the employee has actively participated in the Pension Plan to determine the employee's total "Accrued Percentage." The starting "Annual Benefit" payable at retirement is then calculated by multiplying the employee's Accrued Percentage by the Average Final Compensation. § 121.091(1), Fla. Stat. (2011).

This case involves legislative amendments to the FRS passed in 2011. Chapter 2011-68 (the "Plan Amendment") made several prospective changes to the FRS, only two of which are at issue here.

Between 1975 and July 1, 2011, the Investment and Pension Plans were funded by employer contributions (payments by state and local government agencies) for regular-class and special-risk employees. The FRS was not made non-contributory for various members of the elected-officer class until the late 1970s and early 1980s.[1] The Plan Amendment changes the contribution scheme so that, for compensation earned after July 1, 2011, active FRS members (with certain exceptions not relevant here) contribute three percent of their gross compensation (the "Employee Contribution Requirement"). §§ 121.71(2)-(3), Fla. Stat. (2011). Contributions are held on behalf of the members and invested in the FRS Trust Fund or an Investment Plan member's own account. §§ 121.021(36), 121.4501(2)(j), Fla. Stat. (2011). With this change, Florida joined almost every other state in requiring at least some, if not all, public employees to contribute to their own retirement plans.[2]

[1] The FRS was made noncontributory for judges, state attorneys, and public defenders in October 1979, *see* Ch. 79-377, § 2, Ch. 80-131, § 2, Laws of Fla.; for county elected officers in July 1981, *see* Ch. 81-214, § 2, Laws of Fla.; and for legislators, the Governor, the Lieutenant Governor, and the Cabinet in October 1981, *see* Ch. 81-307, § 3, Laws of Fla.

[2] A 2010 survey of state pension systems by the Wisconsin Legislative Council found that only Florida, Tennessee, and Utah did not require contributions from public employees. *See* DANIEL SCHMIDT, WIS. LEGISLATIVE COUNCIL, 2008 COMPARATIVE STUDY OF MAJOR PUBLIC EMPLOYEE RETIREMENT SYSTEMS 22-23 (2010), *available at* http://legis.wisconsin.gov/lc/publications/crs/2008_retirement.pdf.

The Plan Amendment also reduced the Cost-of-Living Adjustment ("COLA") for Pension Plan benefits earned on or after July 1, 2011. Just before the Plan Amendment's effective date, retired members received a COLA equal to three percent of the total monthly benefit, calculated as of July 1 of each year, received by the member during the prior year. § 121.101(3), Fla. Stat. (2011). Under the Plan Amendment, the COLA for members earning benefits on or after July 1, 2011 is calculated as three percent times a fraction equal to the member's service credit earned for service before July 1, 2011, divided by the member's total service credit earned. § 121.101(4), Fla. Stat. (2011). This means that there will be no COLA for benefits earned after that date, but Plaintiffs will receive a COLA at least as great as 3% of the Annual Benefit earned as of June 30, 2011 (A. 50).[3]

The Plan Amendment is intended to reduce state expenditures in a time of significant budget shortfalls (A. 18-19). Heading into its 2011 session, the Legislature faced a budget shortfall of over $3.6 billion in General Revenue. *Id.* The Plan Amendment saves the State an estimated $1.1 billion of General Revenue (A. 16). Of this amount, more than $861 million (about 73%) was achieved through the Employee Contribution Requirement ($456.5 million) and the elimination of the COLA for future benefits (nearly $405 million) (A. 15-16).

[3] Because this case is before the Court on certification by the district court of appeal that the judgment requires immediate resolution by this Court, and pursuant to this Court's order accepting jurisdiction, the record on appeal is not due until June 26, 2012. "A. #" refers to the appendix filed with this brief.

The Plan Amendment is only the latest in a long line of legislative changes to the FRS. The FRS was created in 1970, when the Legislature consolidated all state retirement systems into a single, mandatory retirement plan (one in which the law requires eligible employees to participate). Ch. 70-112, Laws of Fla.; *see Florida Sheriffs Ass'n v. Dep't of Admin.*, 408 So. 2d 1033, 1034 (Fla. 1981) (recounting the history of the state retirement system in the 1970s). The FRS originally was a contributory plan, with regular members required to contribute 4% of gross compensation and special risk members 6%. Ch. 70-112, § 7, at 410, Laws of Fla. At that time, Florida law held that active public employees generally had no contractual rights in a mandatory retirement plan. *Florida Sheriffs,* 408 So. 2d at 1035-36; *Anders v. Nicholson*, 150 So. 639, 642 (1933). In 1974, the Legislature enacted section 121.011(3)(d), Florida Statutes, the "preservation-of-rights" statute, which provides:

> The rights of members of the retirement system established by this chapter shall not be impaired by virtue of the conversion of the Florida Retirement System to an employee noncontributory system. As of July 1, 1974, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way.

Between 1975 and 1981, the Legislature prospectively changed the FRS to a noncontributory plan (employees no longer had to contribute to their own retirement). Ch. 74-302, § 4, Laws of Fla; *supra* at 3, n.1. Since then, the

Legislature has prospectively amended the FRS several times. *See, e.g.*, Ch. 84-266, Laws of Fla.; Ch. 90-274, Laws of Fla.; Ch. 95-147, Laws of Fla.; Ch. 99-255, Laws of Fla.; Ch. 05-253, Laws of Fla.

B. Course of Proceedings

In June 2011, Plaintiffs, 23 individual members of the FRS and five public employee unions, filed their complaint in the Circuit Court of the Second Judicial Circuit against Defendants, the State Board of Administration (through its trustees) and the Secretary of the Florida Department of Management Services. Plaintiffs challenge only two provisions of the Plan Amendment as they relate to existing FRS members: the requirement that members contribute 3% of their gross compensation toward retirement, and the change to the COLA formula. Plaintiffs claim that these provisions violate the Florida Constitution's Contract Clause, Art. I, § 10, Fla. Const.; Takings Clause, Art. X, § 6, Fla. Const.; and Collective Bargaining Clause, Art. I, § 6, Fla. Const.

Defendants presented evidence that the Plan Amendment would not reduce benefits earned before its effective date (A. 50). Plaintiffs presented no evidence to the contrary (A. 147). Plaintiffs did present evidence that the Plan Amendment would reduce FRS members' *future* benefits. In particular, Plaintiffs' expert testified that the change in the COLA formula would reduce future, unearned retirement benefits, and estimated the effect of the Employee Contribution

Requirement by estimating employees' total contributions under the Plan Amendment based on their projected annual compensation (A. 64, 67).

The circuit court granted Plaintiffs' motion for summary judgment (the "Order"). The Order interpreted the "preservation-of-rights" statute, section 121.011(3)(d), Fla. Stat. (2011), to grant existing FRS members "a contract right to a noncontributory retirement plan with a cost-of-living adjustment" (A. 9; *see also* A. 6 ("FRS members have had continuous, unconditional rights to a noncontributory plan with a cost-of-living adjustment since the inception of the FRS; these elements are not related to future service.")). Based on that interpretation, the Order found that the Plan Amendment violates the Contract and Takings Clauses of the Florida Constitution because it requires existing employees to contribute to their retirement and eliminates the COLA for future benefits (A. 6-9). The Order also found that the Plan Amendment "effectively remov[ed] the subject of retirement from the collective bargaining process and render[ed] negotiations after the fact futile," in violation of the Collective Bargaining Clause of the Florida Constitution (A. 10).

The Order purported to distinguish this Court's decision in *Florida Sheriffs*, which interpreted section 121.011(3)(d) in a challenge to an FRS amendment. There, this Court held that "the 'preservation of rights' section . . . vests all rights and benefits already earned under the present retirement plan so that the legislature

may now only alter retirement benefits prospectively." 408 So. 2d at 1037. The Order stated that *Florida Sheriffs* "did not reach or contemplate" "qualitative changes to the plan," and that "absolutely nothing in it can be read as authorizing the legislature to change the fundamental nature of the plan itself" (A. 6).

The Order concluded that "[t]he portions of Senate Bill 2100 imposing a 3% mandatory employee contribution and eliminating the cost-of-living adjustment for future service (Ch. 2011-68 . . .) are unconstitutional as applied to individuals who were members of the FRS prior to July 1, 2011, and defendants are permanently enjoined from implementing those provisions as to such individuals" (A. 10). The Order also required "Defendants . . . to reimburse with interest the funds deducted or withheld, pursuant to the challenged provisions of Senate Bill 2100, from the compensation or cost-of-living adjustments of employees who were members of the FRS prior to July 1, 2011" (A. 11).

Defendants timely appealed the Order. The First DCA certified this case as presenting issues of great public importance requiring this Court to immediately resolve the issues. *See* Fla. R. App. P. 9.125. This Court accepted jurisdiction.

C. Standard of Review

This Court reviews *de novo* a lower court's ruling on the constitutionality of a statute. *Lawnwood Med. Ctr. v. Seeger*, 990 So. 2d 503, 508 (Fla. 2008); *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n*, 838

So. 2d 495, 500 (Fla. 2003). When reviewing a statute, this Court "start[s] with the well-established principle that a legislative enactment is presumed to be constitutional." *Lawnwood*, 990 So. 2d at 508; *see also Florida Dep't of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005); *State v. Fuchs*, 769 So. 2d 1006, 1008 (Fla. 2000). Thus, a party challenging a statute's constitutionality bears a "heavy burden." *Lane v. Chiles*, 698 So. 2d 260, 262 (Fla. 1997).

The standard of review for an order granting summary judgment is *de novo*. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). The Court "must examine the record and any supporting affidavits in the light most favorable to the non-moving party." *Markowitz v. Helen Homes of Kendall Corp.*, 826 So. 2d 256, 259 (Fla. 2002).

SUMMARY OF THE ARGUMENT

The Order's conclusion that the Plan Amendment violates the Florida Constitution runs contrary to decades of precedent. The changes to the FRS are purely prospective. Plaintiffs did not have to make contributions toward their benefits until July 1, 2011, and no changes were made to their COLA for benefits earned before July 1, 2011. This Court has squarely acknowledged the Legislature's power to prospectively modify the FRS. In *Florida Sheriffs*, this Court held that the Legislature could reduce the amount of benefits that would accrue to FRS members on a prospective basis.

Despite this Court's clear holding, the Order found that the Plan Amendment was improper because FRS members have perpetual rights to features of the retirement system itself, specifically, a noncontributory retirement system with a COLA. The Court rejected this very argument in *Florida Sheriffs*, and it is inconsistent with the Court's prior cases. The Order also ran contrary to the language, timing, and structure of the 1974 "preservation-of-rights" statute, section 121.011(3)(d), as well as the subsequent history of the FRS. Affirming the Order would require abandoning decades of precedent and would deny the Legislature the needed flexibility to respond to changing financial conditions by modifying one of the state's largest commitments.

Because FRS members do not have a contractual right to the FRS system itself, as opposed to the benefits they have earned, the Plan Amendment did not effectuate a taking of the property rights of FRS members. Membership in the FRS creates no rights to future employment. *See* § 121.051(5)(a), Fla. Stat. (2011). Therefore, members have no property interest in earnings from future employment.

The Plan Amendment also did not violate FRS members' rights to collectively bargain. The Legislature's decision to modify the FRS system was fully within its prerogatives because the right of public employees to collective bargaining does not override the Legislature's appropriations power. Nothing in the Plan Amendment restricts FRS members' ability to collectively bargain.

The Order also exceeded the circuit court's authority. The court ordered the Defendants—officials of the State Board of Administration and Department of Management Services—"to reimburse with interest the funds deducted or withheld" from all 600,000 "employees who were members of the FRS prior to July 1, 2011" (A. 11). The court lacked authority to order such ancillary monetary relief for nonparties. Given the vast sums of money involved and the complexity of the task, the court should have given the Legislature the flexibility to determine how to implement retrospective reimbursements.

ARGUMENT

I. THE 2011 PENSION REFORM LEGISLATION DOES NOT VIOLATE THE CONTRACT CLAUSE

The Plan Amendment changes the FRS only prospectively; it does not affect benefits Plaintiffs already have earned. The Order's finding to the contrary is inconsistent with this Court's decisions in *Florida Sheriffs* and other cases, the language of section 121.011(3)(d), and the legislative power over appropriations and the State's fiscal responsibilities.

A. The Plan Amendment Does Not Impair Contractual Rights Because It Changes the Pension System Only Prospectively

Since the 1930s, this Court has held that active members of a mandatory retirement plan like the FRS generally have no contract rights. *Florida Sheriffs*, 408 So. 2d at 1035-36 (discussing *Anders v. Nicholson*, 150 So. 639 (Fla. 1933),

Vorhees v. City of Miami, 199 So. 313 (Fla. 1940), and *City of Jacksonville Beach v. State ex rel. O'Donald*, 151 So. 2d 430 (Fla. 1963)). A mandatory plan—one in which employees must participate—does not involve mutual assent to a contract by both employee and employer. *Florida Sheriffs*, 408 So. 2d at 1035-36 (citing *Anders*, 150 So. at 642). The only plan members whom the Contract Clause generally protects are retirees, who have vested rights in the benefits earned under a retirement plan. *Florida Sheriffs*, 408 So. 2d at 1036 (citing *City of Jacksonville Beach*, 151 So. 2d at 431).

Recognizing this Court's Contract Clause decisions, in 1974 the Legislature enacted the preservation-of-rights statute, section 121.011(3)(d), Florida Statutes, to create the necessary contract between employer and employee. Ch. 74-302, § 1, at 937, Laws of Fla. The statute provides:

> The rights of members of the retirement system established by this chapter shall not be impaired by virtue of the conversion of the Florida Retirement System to an employee noncontributory system. As of July 1, 1974, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way.

In *Florida Sheriffs*, this Court interpreted that section to offer active employees a vested, contractual right to "rights and benefits already earned." 408 So. 2d at 1037. But it also recognized that the Legislature could "alter retirement benefits prospectively," and rejected the contention that the Legislature must retain "this

[retirement] plan" or even to "maintain[] a retirement plan" at all. *Id.* In other words, the Court interpreted the statutory phrase "the rights of members of the retirement system established by this chapter" to refer to benefits earned under the system, not a right to the system itself. The Court adhered to the principle that past legislatures cannot bind future ones. *See, e.g., Neu v. Miami Herald Publ'g Co.*, 462 So. 2d 821, 824 (Fla. 1985) ("A legislature may not bind the hands of future legislatures by prohibiting amendments to statutory law."); *Ware v. Seminole Cnty.*, 38 So. 2d 432, 433 (Fla. 1949) ("To hold otherwise would mean that one legislature could bind a future legislature and interfere with the exercise of its orderly functions. That this cannot be done is too academic to discuss.").

Based on *Florida Sheriffs,* the Legislature crafted the Plan Amendment to change the FRS only prospectively. The Employee Contribution Requirement is calculated based upon an employee's gross compensation after the law's effective date. It does not require Plaintiffs to make contributions for benefits earned before that date. This ensures that Plaintiffs will receive a COLA that is at least as great as 3% of the benefit earned as of June 30, 2011. The undisputed evidence shows that the Plan Amendment will not affect benefits earned before its effective date (A. 50). Therefore, it does not impair plan members' contract rights.

B. The Order Incorrectly Concluded that the Legislature Cannot Make "Qualitative" Changes to the FRS

The Order's conclusion that section 121.011(3)(d) creates a perpetual contract right to a noncontributory retirement plan with a COLA is inconsistent with *Florida Sheriffs* and several of this Court's prior decisions. It also is inconsistent with the language, timing, and structure of section 121.011(3)(d) itself. The Order adopted a principle that, if affirmed, would deny the Legislature the flexibility it needs to respond to the State's financial challenges.

1. **The Order was inconsistent with *Florida Sheriffs***

The Order's ruling that section 121.011(3)(d) prohibits "qualitative" or "fundamental" changes to the FRS is clearly inconsistent with *Florida Sheriffs.* In that case, this Court construed section 121.011(3)(d) as vesting "rights and benefits already earned," but not prospective benefits. 408 So. 2d at 1037. Hence, under *Florida Sheriffs,* the constitutionality of changes to the FRS depends *not* on the kind of changes but on whether they are prospective or retroactive. The Order ignored this distinction and instead analyzed whether the changes are "fundamental" or "qualitative" (A. 6 ("FRS members have had continuous, unconditional rights to a noncontributory plan with a cost-of-living adjustment since the inception of the FRS; *these elements are not related to future state service.*")) (emphasis added). These terms appear nowhere in *Florida Sheriffs*.

Florida Sheriffs rejected an interpretation of section 121.011(3)(d) that would "impose on the state the permanent responsibility for *maintaining a retirement plan* which could never be amended or repealed," or that would "bind the legislature *to this plan* for future employees." 408 So. 2d at 1037 (emphasis added). The Order's holding that section 121.011(3)(d) creates a contractual right to a specific type of plan—that is, a "noncontributory retirement plan with a cost-of-living adjustment" (A. 9)—conflicts with *Florida Sheriffs.*

Florida Sheriffs expressly reaffirmed this Court's decision in *Vorhees v. City of Miami*, 199 So. 313 (Fla. 1940), which "held that a subsequent amendatory act *repealing the original retirement plan and substituting a new one in its place* was valid and binding on all employees of the city," and "clearly established" the "principle" that "the legislature could at any time alter the benefits retroactively or prospectively for active employees." 408 So. 2d at 1036-37 (emphasis added). While *Florida Sheriffs* held that section 121.011(3)(d) "modifies the *Vorhees* rule" by limiting the Legislature's ability to *retrospectively* alter "benefits already earned," the Court noted that the *Vorhees* rule remained valid for *prospective* changes. *Id.* at 1037. The Order's ruling that section 121.011(3)(d) prohibits the Legislature from deciding "to completely gut and create a new form of pension plan" (A. 2) contradicts this Court's reaffirmation of *Vorhees*.

To justify its ruling, the Order cited *Florida Sheriffs*' statement that the

Legislature can prospectively modify the "mandatory, noncontributory retirement plan" (A. 6). But nothing in *Florida Sheriffs* indicates that this Court found a vested contractual right to a mandatory, noncontributory retirement plan. Instead, this Court explicitly stated that the Legislature could prospectively "modify," "amend," or "alter" such a retirement plan, 408 So. 2d at 1034, 1037, which in the context of the opinion means that the Legislature can change the system itself. This Court's use of the term "noncontributory" merely described the existing system in 1981; it did not limit the permitted prospective changes.[4]

The Order concluded that "absolutely nothing in [*Florida Sheriffs*] can be read as authorizing the legislature to change the fundamental nature of the plan itself" (A. 6). But this Court expressly held that section 121.011(3)(d) allows the Legislature to change its retirement system as long as changes are prospective and do not infringe on benefits already earned. 408 So. 2d at 1037. Indeed, *Florida Sheriffs* recognized that the Legislature could prospectively eliminate the FRS altogether. *See id.* (rejecting a "view" of the preservation-of-rights statute that "would, in effect, impose on the state the permanent responsibility for maintaining a retirement plan which could never be . . . repealed").

[4] Even if the Order's reading of this phrase were correct, the reference to a "contributory" plan would provide no basis to invalidate the COLA amendment.

2. **The Order was inconsistent with the language, timing, and structure of section 121.011(3)(d)**

The sole basis for the Order's conclusion that FRS members have contractual "rights to a noncontributory plan with a cost-of-living adjustment" is section 121.011(3)(d), Fla. Stat. (2011) (A. 1-2, 4-7). Yet, in ruling that FRS members have "rights to a noncontributory plan with a cost-of-living adjustment" (A. 6), the Order effectively rewrote the statute from providing for "the rights of members *of* the retirement system established by this chapter" to providing for "the rights of members *to* the retirement system. . . ." This was beyond the circuit court's power. *See Bennett v. St. Vincent's Med. Ctr, Inc.*, 71 So. 3d 828, 841 (Fla. 2011) (rejecting a statutory construction that "erroneously injected [a] term . . . into the statutory definition when no such term occurs"); *Tasker v. State*, 48 So. 3d 798, 805 (Fla. 2010) (courts are "not at liberty to extend or modify the express and unambiguous terms" of a statute with terms "that do not appear" there); *Valdes v. State*, 3 So. 3d 1067, 1072, 1075 (Fla. 2009) (rejecting a "judicial gloss" on a statute because courts had "added words that were not written by the Legislature"); *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 7 (Fla. 2004) (rejecting a construction that would require the court "to add words to the statute").

The Order's interpretation of section 121.011(3)(d) also is inconsistent with the enactment's timing. When the statute went into effect in 1974, Florida had a *contributory* retirement system that required greater employee contributions than

the Plan Amendment requires. Ch. 70-112, § 7, at 410, Laws of Fla. (requiring 4% contributions from "regular members" and 6% from "special risk" members); *Florida Sheriffs*, 408 So. 2d at 1034-35. The FRS did not become noncontributory for most employees until 1975, and for all employees until 1981. *See* Ch. 74-302, § 4, at 940, Laws of Fla; *supra* at 3, n.1. Therefore, section 121.011(3)(d) cannot be read as creating rights to a noncontributory system because when it was enacted such a system did not exist.

The Order also was inconsistent with the linguistic structure of section 121.011(3)(d). The section contains two sentences: the first protects rights of members of the original contributory system; the second protects rights of members of the new noncontributory system. Both sentences use the same words to describe the rights being protected: "the rights of members of the retirement system established by this chapter." Those words cannot be read as granting FRS members vested rights to a noncontributory system when they also describe rights in a contributory system. Whatever "rights" the statute protects exist regardless of whether the system is contributory or noncontributory. And *Florida Sheriffs* identified those rights: the rights to benefits already earned.

Finally, the Order's interpretation of section 121.011(3)(d) as creating a right to a noncontributory retirement plan is inconsistent with other provisions of the FRS. When the Legislature created the FRS, it provided that "[p]articipation in

the system shall not give any member the right to be retained in the employ of the employer. . . ." Ch. 70-112, § 5, at 408, Laws of Fla. (codified at § 121.051(5)(a), Fla. Stat. (2011)). Yet the Order found that the Plan Amendment violated section 121.011(3)(d) not just because it reduces members' retirement benefits, but also because the contribution requirement effectively reduces members' future compensation: "The costs of the changes to the individual plaintiffs range from $12,445.81 to $329,683.56 *over the span of their working years* and retirement if they receive no further salary increases" (A. 7) (emphasis added). In other words, viewing the evidence in the light most favorable to the nonmoving party, the Order interpreted the statute to create a right to future, continued salary levels. Such an interpretation cannot be squared with section 121.051(5)(a), which provides that membership in the FRS creates no right to future employment.

C. The Court Should Reject Plaintiffs' Invitation to Abandon Eighty Years of Precedent

The Order rejected eighty years of this Court's precedents addressing public retirement plans. These precedents, the policy reasons underlying them, and the reliance the state has placed upon them, warrant the Court's reaffirmation of its previous decisions.

1. For eighty years in multiple cases, this Court has consistently reaffirmed the Legislature's authority to prospectively change the retirement system

Since the 1930s, this Court has held that governmental bodies may prospectively change a public retirement system for active (non-retired) members. Beginning with *Anders* in 1933, this Court "expressly held that Florida's constitutional impairment of contract provision did not protect a governmental mandatory retirement system and that the legislature could modify or alter benefits provided by such a retirement plan." *Florida Sheriffs*, 408 So. 2d at 1035 (citing *Anders*, 150 So. 639). In 1940, this Court held "that a subsequent amendatory act repealing [an] original retirement plan and substituting a new one in its place was valid and binding on all employees . . . , including the participants of the original pension plan." *Id.* at 1036 (citing *Voorhees*, 199 So. at 315). In 1963, this Court reiterated that the only limitation on a legislature's ability to prospectively change a mandatory retirement plan concerned the rights of retired employees. *Id.* (citing *City of Jacksonville Beach,* 151 So. 2d at 431). In *Florida Sheriffs*, this Court reaffirmed these cases and once again ruled that the Legislature may prospectively alter its retirement system for active employees. 408 So. 2d at 1035-36.

In *Florida Sheriffs*, this Court acknowledged that in 1974, the Legislature enacted section 121.011(3)(d) based upon the "considerable Florida case law which established basic legal guidelines for governmental retirement systems in

the state." *Florida Sheriffs*, 408 So. 2d at 1035. In 2011, the Legislature expressly relied upon this "considerable Florida case law" in fashioning the Plan Amendment to change FRS members' benefits only prospectively.[5]

2. **This Court's decisions are based on sound principles**

Thirty years ago in *Florida Sheriffs*, this Court identified good reasons why the Legislature needs the flexibility to prospectively alter the FRS. Pension and retirement costs are among the largest and most longstanding financial commitments of state and local governments. When revenues expand, government agencies can increase retirement benefits for public employees. But in financially challenging times such as these, the Legislature must be able to adjust its future pension commitments. It is no coincidence that the Court's seminal cases on the Florida Constitution's Contract Clause came during the Great Depression, when overcommitted Florida governments were forced to reduce retirement benefits.

[5] For example, the House of Representatives' staff analysis specifically cited *Florida Sheriffs* in noting that "[t]he Florida Supreme Court has held that the Florida Legislature may only alter the benefits structure of the FRS prospectively." FLORIDA HOUSE OF REP., HOUSE OF REP. STAFF ANALYSIS, CS/CS/HB 1405—RETIREMENT, at 12 n.36 (2011), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h1405e.APC.DOCX&DocumentType=Analysis&BillNumber=1405&Session=2011. The analysis concluded that the changes at issue here pass muster because "[t]he prospective application would only alter future benefits." *Id*. at 12.

In *Florida Sheriffs*, this Court expressly recognized that a proper application of the Contracts Clause and section 121.011(3)(d) preserved the Legislature's flexibility:

> We stress that the rights provision was not intended to bind future legislatures from prospectively altering benefits which accrue for future service. To hold otherwise . . . would, in effect, impose on the state the permanent responsibility for maintaining a retirement plan which could never be amended or repealed irrespective of the financial condition of the state. Such a decision could lead to fiscal irresponsibility.

408 So. 2d at 1037. This is not a one-sided policy that only operates to public employees' detriment, however. This flexibility permits the Legislature to increase employees' retirement benefits in good times without fear that the state would be locked into such benefits in future bad times. *Cf. id.* (stating that requiring the state to maintain the same retirement plan "would prohibit the legislature from modifying the plan in a way that would be beneficial to a majority of employees, but would not be beneficial to a minority").

While reasonable people may differ about whether the Legislature should have solved the state's $3.6 billion budget shortfall in part by reducing employees' future pension benefits, such difficult policy choices are for the Legislature. *See, e.g.*, *St. Vincent's Med. Ctr., Inc. v. Mem'l Healthcare Group, Inc.*, 967 So. 2d 794, 802 (Fla. 2007) ("[C]ourts should never second-guess the Legislature about the policy decisions contained within a challenged statute."); *Askew v. Schuster*, 331

So. 2d 297, 300 (Fla. 1976) ("[T]his Court, in accordance with the doctrine of separation of powers, will not seek to substitute its judgment for that of another coordinate branch of the government. . . . The propriety and wisdom of legislation are exclusively matters for legislative determination."); *see also* Ch. 2011-68, § 42, at 113, Laws of Fla. (finding that FRS members "must be provided benefits that are fair and adequate and that are managed, administered, and funded in an actuarially sound manner. . . . the Legislature determines and declares that this act fulfills an important state interest.").[6]

II. THE PLAN AMENDMENT DOES NOT VIOLATE THE TAKINGS CLAUSE

The Plan Amendment does not violate the Takings Clause of the Florida Constitution, either. The Order's Takings Clause ruling is based on the same false premise that FRS members have a contractual right to a specific type of retirement plan. The Order held that because Plaintiffs "have a contract right to a noncontributory retirement plan with a cost-of-living adjustment," they therefore have a property right in their future benefits because "[c]ontract rights are property rights within the meaning of Article X, Section 6" (A. 9). Because FRS members

[6] As noted above, because FRS members do not have contractual rights to future benefits, there was no impairment of contract. Thus, it is unnecessary to consider whether the changes were "necessary" to achieve an important governmental purpose. Because the Legislature faced a budget shortfall of over $3.6 billion, however, and because it expected cost savings of more than $861 million from the Employee Contribution Requirement and the COLA amendment, had there been any impairment, that impairment would have been "necessary."

have no contractual right to the FRS as a *system*—only to their already-earned benefits, which are left untouched—the Plan Amendment does not deprive Plaintiffs of a property interest. *See Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 670 (Fla. 1979) ("It is incumbent upon [plaintiff] to show, not only a taking, but also that a private property right has been destroyed by governmental action.").

Even if Appellees had a property right affected by the Plan Amendment, no taking would occur because members' contributions are applied to their own retirement. FRS member contributions are deposited in the FRS Trust Fund or an Investment Plan account to be used for the members' own retirement. §§ 121.021(36), 121.4501(2)(j), Fla. Stat. (2011). At retirement, members typically receive all of those contributions and more because agency employers still also contribute toward the members' retirement. § 121.71(4), Fla. Stat. (2011). Thus, the contributions are not "taken" at all. Rather, they are merely held in either the FRS Trust Fund on behalf of a Pension Plan member or are placed directly into an Investment Plan member's own account.

III. THE PLAN AMENDMENT DOES NOT ABRIDGE PLAINTIFFS' COLLECTIVE BARGAINING RIGHTS

The Order erroneously concluded that the Plan Amendment violated the Collective Bargaining Clause of the Florida Constitution because it "effectively remove[ed] the subject of retirement from the collective bargaining process and rendered negotiations after the fact futile" (A. 10). The Collective Bargaining

Clause does not supersede the Legislature's right to exercise its appropriations power. Moreover, the Plan Amendment does not prohibit government employees from engaging in collective bargaining over retirement benefits.

A. The Constitutional Power of the Legislature To Control Appropriations Supersedes The Right Of Public Employees To Collectively Bargain

The Plan Amendment does not violate the Collective Bargaining Clause because it was an exercise of the Legislature's appropriations power. In *State v. Florida Police Benevolent Association*, 613 So. 2d 415 (Fla. 1993) ("*PBA*"), this Court held that the right to collective bargaining in the public sector is inherently limited by the separation of powers, which gives the Legislature "exclusive control over public funds." *Id.* at 418 (citing Art. VII, § 1(c), Fla. Const.). Based on this principle, this Court held that the Legislature's exercise of the appropriations power is not subject to the Collective Bargaining Clause, or to judicial review under the compelling state interest standard, "because the exercise of legislative power over appropriations is not an abridgment of the right to bargain, but an inherent limitation" on that right. *Id.* at 419 & n.6.[7] "The providing of benefits to public employees . . . necessarily requires the expenditure of public funds and therefore implicates the legislature's appropriations power." *Id.* at 418 n.3; *see*

[7] While no compelling state interest need be shown because the Plan Amendment does not abridge the right to collectively bargain, the $3.6 billion budget shortfall and anticipated $861 million-plus cost savings constitute such an interest.

also Coalition for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400, 406-07 (Fla. 1996) (stating that "to subjectively evaluate the Legislature's value judgments as to the spending priorities to be assigned to the state's many needs . . . . the Court would have to usurp and oversee the appropriations power").

The Plan Amendment was an exercise of the Legislature's appropriations power because it concerned "the providing of benefits" which "necessarily requires the expenditure of public funds." *PBA*, 613 So. 2d at 418 n.3. There can be little doubt of the fiscal impact of the Plan Amendment, as it saved the state $1.1 billion, and an adverse ruling in this case would throw the entire state budget into disarray (A. 16, 19). Even the Order acknowledged that the Plan Amendment "was proposed and passed to free up funds for the budget shortfall the state was experiencing" (A. 9). Because it was an exercise of the appropriations power, the Plan Amendment did not abridge FRS members' right to collectively bargain.

Although the Order concluded that the Plan Amendment is "substantive legislation" and not "an appropriations act" (A. 10), *PBA* cannot be distinguished on that ground. In *PBA*, this Court repeatedly stated that its ruling applied to the Legislature's exercise of the "appropriations power"—not on the label attached to a given law. 613 So. 2d at 418 & n.3, 419 & n.6, 420. The Court also made clear that any act that "necessarily requires the expenditure of public funds," such as "the providing of benefits to public employees," "implicates the Legislature's

appropriations power." *Id.* at 418 n.3. Because the Plan Amendment involves spending public funds and therefore was the exercise of appropriations power, it is irrelevant whether the law was labeled an appropriations act. In any case, the Plan Amendment was enacted through a conforming bill—that is, one conforming general law to appropriations decisions in the General Appropriations Act. *See* Joint Rules of the Fla. Legis., 2010-2012 (adopted March 2011), § 2.2(1), at 18 (defining a conforming bill as one that amends the Florida Statutes to conform to a general appropriations bill), *available at* http://www.flsenate.gov/ PublishedContent/ ADMINISTRATIVEPUBLICATIONS/JointRules.pdf.

The Order stated that "[t]he power over appropriations does not allow the legislature to excuse negotiation[,] [o]therwise the fundamental right to collectively bargain in Florida's Constitution would be meaningless" (A. 10). That was exactly what the *dissent* argued in *PBA*, asserting that "the majority opinion has largely abolished Article I, Section 6 as that constitutional provision applies to public employees," 613 So. 2d at 422, and that the Legislature should be "bound to ensure that some mechanism exists by which negotiations with public employees are meaningful." *Id.* at 424.

B. The Plan Amendment Does Not Impair The Right Of Public Employees To Collectively Bargain

Even if *PBA* did not govern here, the Order was incorrect in stating that the Plan Amendment "effectively remove[ed] the subject of retirement from the

collective bargaining process" (A. 10). The Plan Amendment does not remove the subject of retirement benefits from collective bargaining. The key cases the Order cited, finding a violation of collective bargaining rights in the context of retirement benefits, involved flat prohibitions on collective bargaining over retirement. *See City of Tallahassee v. Pub. Emps. Relations Comm'n*, 410 So. 2d 487, 490 (Fla. 1981) (stating that the statutes in question "did not simply regulate a particular aspect of collective bargaining—they prohibited it entirely"); *see also Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030, 1031 (Fla. 1999) (invalidating "a wholesale ban on collective bargaining by government lawyers").

In this case, absolutely nothing precludes Plaintiffs from bargaining over FRS. Indeed, between the date when the Plan Amendment was signed into law and the date it took effect on July 1, 2011, a number of FRS members did, in fact, bargain with their employers. For example, Defendants introduced uncontroverted evidence to the circuit court that, in June 2011, following the passage of the Plan Amendment but before its effective date, both the Amalgamated Transit Union Local 1395 and the Police Benevolent Association bargained with the Escambia County Board of County Commissioners and obtained a 3.1% increase in their base salaries which were expressly intended "to offset for recent changes to [the] Florida Retirement System" (A. 34, 36). The Order's analysis, taken to its logical conclusions, would also create several anomalies. First, it would prohibit the

Legislature from modifying the FRS *at all*—as *Florida Sheriffs* held the Legislature is entitled to do—without violating state employees' rights to collectively bargain. Second, FRS members work for a myriad of governmental employers at the state and local level. Approximately 75% of FRS members work for local or regional governments.[8] The Order would require the Governor to engage in collective bargaining with all of these members regardless of whether they work for the state government—and in the process displace any negotiation process with their actual employers. Such a scenario is not only impractical, but also removes power from local governments to manage their own affairs.

The Order also incorrectly assumed that the Legislature lacks authority to define terms of employment through substantive law (A. 10). The Legislature does have such authority; and it routinely establishes terms of employment such as workers compensation, drug testing, minimum qualifications, benefits, and employee rights, to name a few. *See, e.g.*, § 440.01, *et seq*., Fla. Stat. (2011) (Workers Compensation Law); § 112.0455, Fla. Stat. (2011) (Drug Free Workplace Act); § 112.532, Fla. Stat. (2011) (Law Enforcement Officers' Bill of Rights); § 447.401, Fla. Stat. (2011) (requiring public employers to negotiate a grievance process culminating in resolution by an impartial neutral); § 110.105, *et seq*., Fla. Stat. (2011) (outlining general state employment conditions); § 112.311,

[8] See DEP'T OF MGMT. SERVS., DIVISION OF RETIREMENT SUMMARY OF FACTS FOR 2011-12 (2011), *available at* https://www.rol.frs.state.fl.us/forms/ fact_sheet.pdf.

et seq., Fla. Stat. (2011) (Code of Ethics for Public Officers and Employees). In fact, courts have counseled the Legislature to alter non-economic terms of employment, such as discipline, through substantive law rather than appropriations language. *Florida Pub. Emps. Council, 79, AFSCME v. Bush*, 860 So.2d 992, 996 (Fla. 1st DCA 2003).

IV. THE ORDER'S REMEDY EXCEEDED THE CIRCUIT COURT'S AUTHORITY

The Order's remedy, which requires reimbursement of funds to all employees who were active FRS members before July 1, 2011, exceeded the circuit court's jurisdiction and failed to give the Legislature flexibility to implement the complex financial responsibility of implementing the Order. Plaintiffs in this case are only 23 out of about 600,000 active FRS members, and five out of 600 unions certified to represent public employees in the FRS.[9] Plaintiffs did not proceed as a class, as their class allegations were dropped by stipulation early in the proceedings (A. 39). Yet Defendants were "ordered to reimburse with interest . . . employees who were members of the FRS prior to July 1, 2011" (A. 11), regardless of whether they were parties to the case or were employed by the Defendants. The Order did not even consider that many FRS

[9] *See* DEP'T OF MGMT. SERVS., DIVISION OF RETIREMENT SUMMARY OF FACTS FOR 2011-12 (2011), *available at* https://www.rol.frs.state.fl. us/forms/fact_sheet.pdf; *Certifications*, FLA. PUB. EMPS. RELATIONS COMM'N, http://perc.myflorida.com/co/certResults.aspx?Union=a&Employer= (last visited June 1, 2012).

members already have been afforded a remedy from their FRS employers through pay raises that offset the 3 percent salary contributions (A. 34, 36).

Should this Court affirm the Order, Defendants will of course honor the decision going forward, and also account for actions taken to date under the Plan Amendment. But the Order transformed the complex task of providing monetary relief to 600,000 FRS members from one based on the administrative and legislative powers of elected statewide officers and the Legislature into an exercise of judicial fiat. In so doing, the circuit court exceeded its role.

The Order effectively provided class-wide damages to all FRS members without having certified a class action under Florida Rule of Civil Procedure 1.220. *See Glidden v. Chromalloy Am. Corp.*, 808 F.2d 621, 626 (7th Cir. 1986) (finding that a court "may not award relief to the class without certifying the class."). Even if the circuit court could enjoin *future* violations against all FRS members without a class action, it could not award monetary relief to nonparties. *See, e.g., Curtis v. Comm'r, Maine Dep't of Human Servs.,* 159 F.R.D. 339, 342 (D. Me. 1994) (holding that to order "the restoration of wrongfully withheld benefits" for all affected individuals, class certification is required) (citing *Davis v. Smith*, 607 F.2d 535, 540 (2d Cir. 1978)); *Rivera v. Patino*, 524 F. Supp. 136, 149 (N.D. Ca. 1981) (holding that to order "ancillary monetary relief for each of the members of the class," class certification is required).

The Order plainly exceeded the authority of any court by effectively appropriating money from the Treasury. *See* Art. V, § 14(d), Fla. Const. ("The judiciary shall have no power to fix appropriations"); Art. VII, § 1(c), Fla. Const. (requiring that appropriations from treasury may only be made by law). The Order imposed an enormous and complex financial obligation on the State government, which if allowed to stand, will require variable responses depending on the particular circumstances of the individual FRS members and government employers involved. The circuit court never conducted a hearing on the scope and form of potential remedies and had no basis to know whether the Order's meat-cleaver approach to a remedy would be workable and avoid significant and adverse consequences to the State and the FRS. The Order imposed a monetary remedy for hundreds of thousands of individuals not before the Court, without allowing Defendants and the Legislature to craft a solution that reduces the potential for financial chaos. In the event this Court affirms the Orders' merits determinations, it should at least vacate the Order and remand with directions to conduct further proceedings on the proper scope and nature of remedial measures.

CONCLUSION

For the reasons stated, this Court should reverse the Order and remand with directions to enter judgment in favor of the Defendants, or at least remand to determine the proper remedy.

Respectfully submitted,

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