In the Supreme Court of Florida

Case No. SC12-520
Lower Tribunal Case Nos. 2011 CA 1584, 1D12-1269

RICK SCOTT, *et al.*, Appellants,
v.
GEORGE WILLIAMS, *et al.*, Appellees.

ANSWER BRIEF OF APPELLEES AND APPELLEES/INTERVENORS PARK AND HAIRE

On Review from the Circuit Court of the Second Judicial Circuit
in and for Leon County

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STATEMENT OF THE CASE AND FACTS

Prior to 1970, there were a variety of retirement plans for public workers in Florida including state and county employees, teachers, and highway patrol officers. In 1970, the Florida Legislature sought to consolidate several of these plans by creating the Florida Retirement System (FRS). Ch. 70-112, § 1, at 399, Laws of Fla. The new plan required members (both regular class and special risk) to contribute a percentage of their gross compensation to the FRS, and employers to contribute an amount equal to their employees' contributions. *Id.* § 7, at 410.

The plan provided a 10-year vesting period, and, after the employee satisfied the age or years of service requirements, provided for a monthly retirement benefit based upon a percentage of the employees' five best years of compensation. *Id.* § 2, at 403, 404; § 9, at 412. The law also provided "cost-of-living adjustments" (COLA) for retirees based upon the consumer price index figures issued by the U.S. department of labor. *Id.* § 10, at 420-21.

The law required new employees after December 1, 1970, to participate in the FRS plan, but did not require existing employees to switch to the FRS. *Id.* § 5, at 406-407. There was a 45-day window during which existing eligible employees could elect to transfer to the FRS. *Id.* The rights of members under the previous systems were expressly protected. *Id.* § 1, at 399.

Four years later, the Florida Legislature made additional changes to the FRS to make it more actuarially sound and more attractive to employees. Ch. 74-302, Laws of Fla. (Vol. 10 pp. 1822-1826). The legislation was an effort to deal with a significant ($2 billion) unfunded liability of the FRS. *See* House Committee on Retirement, Personnel and Claims, *Legislative Program Overview*, 1974 (on file at the State Library and Archives of Florida) (Call no. F353.54S L515). The legislation made the FRS system noncontributory, discontinuing the mandatory employee contribution and instead requiring employers to accomplish the full contribution amount without reducing any employee's salary. Ch. 74-302, § 4 Laws of Fla. (Vol. 10, p. 1924). The conversion to a noncontributory system was expected to improve the soundness of the system over time because members would not be eligible for refunds of employer contributions upon termination of employment. *Legislative Program Overview* at 8.

The "Whereas" clauses to this 1974 legislation highlighted "the importance of a sound and equitable retirement system for public employees," continuing to provide "an adequate and competitive retirement plan now and in the future," the recognition "that the retirement trust fund is not actuarially funded," and the "intent of the legislature to correct the trust fund imbalance and to implement such administrative changes as would accrue to the benefit of covered employees." Ch. 74-302, Laws of Fla. (Vol. 10, p. 1822). The 1974 law retained the cost-of-living

adjustments for retirees based upon the federal average COLA index, with a cap of 3%. *Id.* § 8 (Vol. 10, p. 1825).

The same act also added Section 121.011(3)(d), Florida Statutes, establishing contractual rights for the members of the FRS:

> 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 the effective date of this Act [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.*

Id. § 1 (emphasis added) (Vol. 10, p. 1822). This section was included "to help alleviate the fears of certain members that . . . once the system was made noncontributory, the Legislature would feel free to change retirement benefits since the employee was no longer contributing to the system." *Legislative Program Overview* at 3.

The law also offered those public employees who had not initially elected to switch to the FRS an additional opportunity to do so, providing a 90-day window for eligible employees to make this irrevocable election. Ch. 74-302, § 3, Laws of Fla. (Vol. 10, p. 1823-24). The law's effective date was July 1, 1974, but the provisions making the plan noncontributory for employees were effective January

1, 1975 for most employers and October 1, 1975, for the remaining employers. *Id.* § 13 (Vol 10, p. 1826).

Between 1974 and 2011 the Legislature made a series of minor adjustments to the FRS pertaining to membership eligibility, the vesting period, and various benefit increases for specific classes of employees. (Vol. 7 pp. 1300-1302). Participation in the FRS remains compulsory for all public employees employed after December 1, 1970 (with limited exceptions not relevant here) by FRS employers. § 121.051(1), Fla. Stat. (2011). The most significant change between 1974 and 2011 was the creation in 2000 of a defined contribution plan ("Investment Plan") as an alternative to the traditional pension plan. Ch. 2000-169, § 3, at 2, Laws of Fla. Participation in the Investment Plan is optional. § 121.4501(4)(a), Fla. Stat. (2011).

The FRS Pension Plan has continued to provide a COLA to each member's retirement benefit starting one year after retirement. § 121.101(1), Fla. Stat. (2010) ("The purpose of this section is to provide cost-of-living adjustments to the monthly benefits payable to all retired members of state-supported retirement systems."). Initially the COLA was based upon the average cost-of-living index, up to three percent (3%). Ch. 70-112, § 10, at 420, Laws of Fla. From 1987 until 2011, the COLA was fixed at 3% each year throughout retirement. § 121.101(3), Fla. Stat. (2010). The statute providing the COLA also creates a continuing

appropriation of the funds necessary to pay for it from the FRS trust fund. *Id.* § 121.101(8).

The State Board of Administration (SBA) is responsible for managing FRS funds. § 121.151, Fla. Stat. (2011). According to the SBA, the FRS Pension Fund is one of the most well-funded and healthiest public pension funds in the United States. (Vol. 10, p. 1828) As of July 1, 2010, the FRS Pension Plan was funded at 87.9%, well above the 80% threshold recommended by most experts. (Vol. 10, p. 1829). Approximately 65% of every dollar paid to retirees from the FRS comes from investment gains. *Id.*

In 2011 the Legislature passed Senate Bill 2100, which for the first time since 1974 made significant substantive changes to the FRS that were detrimental to existing employees. Effective July 1, 2011, the legislation required all FRS members to contribute 3% of their monthly compensation to the FRS, and eliminated any COLA upon the retirement benefits FRS members would receive for work performed after the law's effective date. §§ 121.011(3)(h); 121.071(2)(a); 121.101(4); 121.571; 121.71(2),(3), Fla. Stat. (2011). SB 2100 did not provide any increased or improved retirement benefits for members of the FRS.

SB 2100 also changed the vesting period, final compensation calculation, and retirement eligibility requirements for employees who initially enrolled in the

FRS after July 1, 2011. §§ 121.021(24)(a)2, (29)(a)2, (29)(b)2, (45)(b), Fla. Stat. (2011). These changes are not at issue in this proceeding.

The new law also reduced the employer contribution rate for each membership class by significantly more than the 3% employee contribution; for regular class employees, for example, the employer contribution rate dropped from 8.69% to 3.28%. Ch. 2011-68, § 33, at 105-106, Laws of Fla.

This Proceeding

Plaintiffs, public employees including teachers and other school employees, sheriff's deputies and correctional officers, nurses, and social workers who were members of the FRS prior to July 1, 2011 ("Public Employees"), brought this action in circuit court on June 20, 2011. (Vol. 1, pp. 22-42).

Several other individuals and labor unions sought and were granted intervention as plaintiffs. (*E.g.*, Vol. 1, pp. 103-134). The Public Employees initiated the suit as a class action, but the parties subsequently stipulated to the withdrawal of the Public Employees' request for class certification. (Vol. 1, pp. 26-28; Vol. 2, p. 374).

The Public Employees challenged the provisions of SB 2100 mandating the 3% employee contribution and eliminating the COLA on benefits payable for service performed after July 1, 2011. (Vol. 1, p. 22-23). The complaint alleged these provisions violated three sections of the Florida Constitution: Article I,

Section 10 (Impairment of Contract), Article X, Section 6 (Taking), and Article I, Section 6 (Collective Bargaining). (Vol. 1, p. 15-20).

The Public Employees sought a preliminary injunction to sequester the 3% mandatory contributions during the pendency of the lawsuit. (Vol. 1, pp. 75-99). The State opposed the temporary injunction, asserting that the Public Employees could not establish irreparable harm or an inadequate remedy at law because the case was purely about money and the court could fashion appropriate monetary relief if the Public Employees prevailed. (Vol. 1, p. 142-43). The State repeatedly asserted this position at the hearing on the motion for preliminary injunction:

> [The State's Counsel]: I'm saying precisely that the moneys are there. I'm saying the moneys will be there for them – for the plaintiffs and that's all that we need to concern ourselves with today. Those moneys will be there. If they had to come out of the SBA fund to pay them, so be it, they would come out of the SBA fund.
>
> But the point is, they will be made whole. They have an adequate remedy of law. It will be on the defendants' end so to speak in the face of a judgment . . . it would be up to defendants to decide, to figure out where the money would come from. (Vol. 18, p. 2891 Line 13 – p. 2892 Line 2)
>
> I believe what I represented to the court, and I stand by that, is that they would have an adequate remedy of law. (Vol. 18, p. 2895 Lines 15-17)
>
> We'll represent that we will satisfy the judgment. (Vol. 18, p. 2895 Lines 23-24)
>
> The point we're making really [] quite simply is . . . we're good for the money. (Vol. 18, p. 2925 Lines 15-17)

See also, e.g., Vol. 18, p. 2826; Vol. 18, p. 2833-34; Vol. 18, p. 2845; Vol. 18, p. 2885; Vol. 18, p. 2896; Vol. 18, p. 2898; Vol. 18, p. 2906; Vol. 18, p. 2917. In reliance upon these representations, the trial court denied the motion for preliminary injunction, finding that there was an adequate remedy at law available to the Public Employees. (Vol. 2, pp. 371-72).

After the parties filed cross-motions for summary judgment and responses (Vol. 6, p. 1042-Vol. 9, p. 1752; Vol. 10, p. 1776–Vol. 11, p. 2066, Vol. 12, p. 2347-2371, Vol. 13, pp. 2372-2494),[1] a final hearing was held at which the parties presented oral arguments and expert testimony. (Vol. 16, T. 1–Vol. 17, T. 241).

By order dated March 6, 2012, the trial court granted Plaintiffs' Motion for Summary Judgment and denied Defendants' Motion for Summary Judgment. (Vol. 14, pp. 2665-2675). The court found that the changes to the FRS rendered by SB 2100 as to the mandatory 3% employee contribution and the elimination of the COLA constituted an unconstitutional impairment of the Public Employees' contract rights under Section 121.011(3)(d), Florida Statutes, a taking of private property without just compensation, and an impairment of the Public Employees' constitutional right to engage in collective bargaining. (*Id.*) The court

[1] The record on appeal appears inadvertently to have placed Exhibits A-T to Defendants' Memorandum in Opposition to Plaintiffs' Motions for Summary Judgment behind Defendants' Memorandum of Law in Support of Motion for Summary Judgment. These exhibits, found in Vol. 8, p. 1511–Vol. 9, p. 172, were actually filed in the trial court behind Vol. 13, pp. 2461-2494.

permanently enjoined the State from implementing the challenged provisions as to employees who were members of the FRS prior to July 1, 2011. (Vol. 14, pp. 2674-75). Having noted the State's stipulation regarding the availability of a remedy to refund improperly withheld funds, the court ordered the reimbursement of such funds with interest. (Vol. 14, pp. 2667, 2675).

The State appealed to the First District, invoking the automatic stay pursuant to Rule 9.310(b)(2) of the Florida Rules of Appellate Procedure. The First District certified the case as requiring immediate resolution by the Supreme Court.

SUMMARY OF ARGUMENT

The trial court correctly determined that SB 2100 substantially impairs the Public Employees' contract rights under the FRS system. The qualitative changes to the FRS in SB 2100 that not only reduce the amount of ultimate benefits but also change the method of calculating them are entirely unlike the changes at issue in *Florida Sheriffs Association v. Department of Administration,* 408 So. 2d 1033 (Fla. 1982), and therefore *Sheriffs* does not govern the present case. Furthermore, because the changes in SB 2100 substantially reduce the Public Employees' lifetime retirement benefits, they constitute an impermissible retroactive impairment as a matter of law. In the alternative, the Public Employees urge this Court to recede from *Sheriffs* or limit the decision to its facts, because it is unsound

in principle and there has been no detrimental reliance upon the decision. SB 2100 also constitutes a taking of private property without compensation.

The trial court also correctly held that Article I, Section 6 requires that the Legislature not completely ignore the right to collectively bargain when passing legislation affecting retirement, an established mandatory subject of bargaining. The State's claim that the Legislature's appropriations power supersedes public employees' rights under Article I, Section 6 is without merit. This Court's decisions hold that legislative enactments, including those involving appropriations, are limited by Article I, Section 6. The trial court correctly recognized that there can be no effective bargaining only after the fact where, as here, the Legislature has unilaterally predetermined the term or condition through statute, rendering any subsequent negotiations futile. The Legislature has the power to make policy affecting subjects of negotiations, but it does not have the power to excuse negotiation altogether.

The trial court correctly ordered the State to issue refunds to the affected members of the FRS without specifying whether the monies should come from the FRS Trust Fund or any other source. The State successfully asserted at the preliminary injunction stage that this remedy would be available at the conclusion of the case, and is estopped from asserting a different position on appeal. The State's remaining arguments regarding the scope of the order are not preserved.

ARGUMENT

This Court reviews an order on summary judgment *de novo*. *E.g., Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130-31 (Fla. 2000). In considering the constitutionality of a statute, the wisdom of legislative policy is not before the Court; the only issue before the Court is whether the challenged statute violates the Florida Constitution. *E.g., Sebring Airport Auth. v. McIntyre*, 783 So. 2d 238, 244-45 (Fla. 2001). Legislative acts are accorded a presumption of constitutionality; courts are obligated to construe challenged legislation to effect a constitutional outcome whenever possible. *E.g., Florida Dep't of Revenue v. Howard*, 916 So. 2d 640. 642 (Fla. 2005).

I. SENATE BILL 2100 SUBSTANTIALLY IMPAIRS THE PUBLIC EMPLOYEES' CONTRACT RIGHTS UNDER THE FRS SYSTEM.

A. The trial court correctly distinguished this case from *Sheriffs* and correctly recognized the unambiguous contract created by Section 121.011(3)(d), Florida Statutes.

The trial court correctly held that SB 2100's elimination of the noncontributory plan and the COLA clearly abridge FRS members' contract rights under Section 121.011(3)(d), Florida Statutes.

This Court has considered whether post-1974 changes to FRS impaired contract rights under Section 121.011(3)(d) only one time. *Fla. Sheriffs Ass'n v. Dep't of Admin.*, 408 So. 2d 1033 (Fla. 1981). As explained below, the Court's

determination that the changes to the FRS in that case did not impair the members' contract rights does not govern the facts of the present case.

When the FRS was created in 1970, special risk members were given 2% credit for each year of service, while the credit for regular class members was 1.60%. Ch. 70-112, § 9, at 412, Laws of Fla. Four years later, in addition to the legislative change converting the FRS to a noncontributory system and creating contract rights for FRS members (HB 3909), there was a separate bill pertaining to special risk members (SB 81). Among other things, Senate Bill 81 increased the contribution rate for special risk members from 6% to 8%, and increased their retirement credit from 2% to 3%. Ch. 74-376, Laws of Fla. Both bills passed.[2]

Four years later, the Legislature returned the special risk credit to 2%. Ch. 78-308, § 6, at 883, Laws of Fla. The Florida Sheriffs Association filed suit over this change, arguing that it impaired the contract created by Section 121.011(3)(d). *Sheriffs*, 408 So. 2d at 1035-36. After setting out the history of the special risk credit and Florida case law prior to 1974, the Court concluded that the FRS

[2] This created an inconsistency. SB 81, effective October 1, 1974, required special risk members to contribute 8% of their pay toward the FRS (while also increasing the retirement credit); HB 3909, effective for most members January 1, 1975, made the FRS noncontributory. Op. Att'y Gen. Fla. 74-196 (July 3, 1974). The Attorney General determined that the higher contribution rate established by SB 81 could only be effective until the noncontributory requirements of HB 3909 became law. *Id.* The Attorney General determined that the portion of SB 81 that increased the credit for special risk members from 2% to 3% however, could remain in effect because it did not expressly conflict with HB 3909. *Id.*

contract provision did not prohibit prospective reduction of the special risk credit. *Id.* at 1037. The Court opined the contract provision "vests all rights and benefits already earned under the present retirement plan" but that it was not intended to bind future legislatures from prospectively altering "benefits which accrue for future state service." *Id.* Because the special risk credit was such a benefit, the Court held the Legislature's prospective reduction it was permissible. *Id.*

The trial court in the instant case correctly found that the Court's ruling based upon the facts presented in *Sheriffs* does not authorize the changes in SB 2100 challenged here. (Vol. 14, p. 2670-71). The Court in *Sheriffs* acknowledged that the contract provision "vests all rights and benefits already earned." *Id.* at 1037. Since the inception of FRS, its members have earned retirement benefits throughout their employment based upon two factors: years of service and a percentage credit for each year performed in a specific class of service. Ch. 70-112, § 9, at 412, Laws of Fla., codified at § 121.091(1), Fla. Stat. (2011) ("The amount of monthly benefit shall be calculated as the product of A and B . . . ," where "A" is a percentage credit based upon class of service and "B" is the years of creditable service). It is plain that no FRS member has earned credit under either "A" or "B" for work the member has not yet performed. The Court in *Sheriffs* merely determined that the Legislature could properly change the value assigned to one element of this equation ("A") for work that has not yet been

performed. Because special risk credit is applied to years of service, it was clear that the plaintiffs in *Sheriffs* had not yet earned the "right" or "benefit" to a certain special risk credit for years of service they had not yet performed.

The same is not true here. The Public Employees in this case, like all FRS members prior to July 1, 2011, have, since the implementation of the 1974 legislation, participated in a plan that expressly prohibited employee contributions and expressly conferred a COLA upon the final retirement benefit throughout retirement. At the time of the adoption of the FRS contract language, and every year until 2011, Chapter 121 has specified that "each employer shall accomplish the [required contribution] by a procedure in which no employee's gross salary shall be reduced." §§ 121.071(2), 121.571(1), Fla. Stat. (2010). Likewise, throughout the history of the FRS Chapter 121 has specified that it "provide[d] cost-of-living adjustments to the monthly benefits payable to all retired members of state-supported retirement systems," and provided a continuing appropriation with which to pay such adjustments. § 121.101(1),(6), Fla. Stat. (2010). Unlike the special risk credit at issue in *Sheriffs*, the members' entitlement to these components has never been related to or dependent upon years of service. Therefore, the noncontributory nature of the plan and the entitlement to a COLA are, for public employees who were FRS members prior to July 1, 2011, "rights

and benefits already earned under the present retirement plan" expressly protected by Section 121.011(3)(d).

Additionally, the trial court correctly noted that in *Sheriffs* the Court interpreted the contract language as allowing the Legislature "to modify or alter prospectively the *mandatory, noncontributory plan* for active state employees." (Vol. 14, p. 2670) (emphasis added). This reference cannot possibly read as suggesting that the *Sheriffs* Court would have approved eliminating the noncontributory component of the plan that had been central to the conversion four years earlier and had been an attractive lure to members of other plans. Instead, the Court in *Sheriffs* recognized that its allowance of prospective modifications to the plan must be read together with the express purpose of Section 121.011(3)(d), which is to protect the rights of members of the noncontributory system. One of those rights is the noncontributory nature of the plan itself.

The fact that the contract provision and the conversion of the plan to a noncontributory system were phased in with different effective dates is of no legal import. *See* Ch. 74-302, § 13 (specifying that the act shall take effect July 1, 1974, except that the noncontributory aspect of the plan shall take effect January 1, 1975 for state agencies, state community college districts, and school districts, and October 1, 1975 for all other governmental units) (Vol. 10, p. 1826). These changes were all part of a single legislative act which had the express purposes of

consolidating members from other plans, increasing the actuarial soundness by eliminating employee contributions, making the plan competitive, and protecting members' rights under the consolidated noncontributory plan. Ch. 74-302, Laws of Fla. (Vol. 10, pp. 1822-26).

The State cites to broad language in *Sheriffs* to argue that notwithstanding Section 121.011(3)(d), the State retains the right to make any and all changes to the FRS, including its repeal. Under the State's interpretation of *Sheriffs*, the State is not bound to honor any of the "rights of members of the retirement system established by [Chapter 121]" that exist when the member enters the FRS; the State can rewrite or repeal any such right so long it "crafts" the amendment to apply "prospectively" as determined by an actuary. (Initial Brief at 13). But such power cannot be reconciled with the "well settled principle that the law in force at the time of the contract is made forms part of the contract." *E.g.*, *Schekter v. Michael*, 184 So. 2d 641 (Fla. 1966); *State v. City of Coral Gables*, 72 So. 2d 48, 49 (Fla. 1954). Furthermore, a contract in which "one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract" is illusory. *Pan-Am Tobacco v. Dept. of Corrections*, 471 So. 2d 4, 5 (Fla. 1985). This Court has rejected the notion that express contracts with the State of Florida are unenforceable. *Id.*

In any event, the Court's holding in *Sheriffs* was narrower than the State asserts. The Court determined that because of Section 121.011(3)(d), Florida Statutes,

> the legislature could not take away the additional one percent earned from October 1, 1974, to October 1, 1978, but it could change the rate for future services subsequent to October 1, 1978.
>
> According, we *hold* that there was no impairment of any statutorily created contract rights which prohibits prospective reduction of special risk credit.

408 So. 2d at 1037 (emphasis added). This holding was consistent with the Court's earlier determination that Section 121.011(3)(d) "vests all rights and benefits already earned under the present retirement plan," *id.*, because special risk members had not yet earned special risk credit for service they had not yet performed. Thus the Court's actual decision—no matter how broad its language—simply did not reach the issues presented by SB 2100 because those issues were not before the Court. *Ex parte Amos*, 112 So. 289, 295 (Fla. 1927) (Whitfield, J., concurring) ("[W]hat may have been said in an opinion should be confined to and limited by the facts of the case under consideration when the expressions relied upon where made, and should not be extended to cases where the facts are essentially different."); *Smitz v. Wright*, 60 So. 225 (Fla. 1912) (general words in judicial opinion should be construed with such limitations as are required by reference to the facts of the case).

Because SB 2100 purported to rewrite fundamental aspects of the FRS rather than change an accrual rate for future service, the State is incorrect in its assertion that the changes applied "only prospectively." The Public Employees' expert testified that retirement benefits are measured from entry into the retirement system until death. (Vol. 16, T. 15-16). The expert calculated the lifetime benefits for twelve of the public employees who brought suit; the reduction in lifetime benefits for these individuals due to SB 2100 ranged from approximately $12,500 to over $500,000. (Vol. 10, p. 1836).

The Public Employees' expert disagreed that the analysis performed by the State's expert of "accrued benefits" was an appropriate analysis. Specifically, the Public Employees' expert testified that it was not "accurate" or "logical" to attempt to calculate the employees' accrued benefits at an arbitrary point in time because the FRS does not define "accrued benefits" and the calculation would require a series of assumptions. (Vol. 12, p. 2354) (citing Vol. 13, pp. 2395, 2396, 2420-21) ("To calculate an individual's retirement benefit, if an employee is still actively working . . . the benefit starts from the date they are employed to the date they die. My approach is to look at that value in the entirety. You don't chop it up midstream with unknown variables.").

These calculations unequivocally demonstrated that SB 2100 retroactively decreased the value of the benefits for the employees who were members of the

FRS prior to July 1, 2011 and continue to work for an employer within the FRS. This result is an impermissible retroactive impairment of contract as a matter of law. *Dewberry v. Auto-Owners Insurance Co.*, 363 So. 2d 1077, 1080 (Fla. 1978) (law applying to existing insurance contracts retroactively diminished value of plaintiff's contract because plaintiff had paid a higher premium for coverage that was eliminated); *Yamaha Parts Distrib. Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla. 1975) (prohibiting application of statute to contract entered into before statute's effective date, noting that "[v]irtually no degree of contract impairment has been tolerated in this state"). *See also Ass'n of Pa.. State Coll. and Univ. Faculties v. State Sys. of Higher Educ.*, 479 A. 2d 962, 965 (Pa. 1984) (change in contribution rate required members "to pay more for each pension dollar they will eventually receive" and therefore decreased the value of the members' retirement benefits in proportion to their contributions).

The State's remaining grounds for reversal of the trial court's decision are likewise unavailing. Because the court's decision rested upon Section 121.011(3)(d), any asserted conflict with Florida cases decided before the adoption of that section is irrelevant. Furthermore, the State's assertion that the trial court "rewrote" Section 121.011(3)(d) and did not apply appropriate principles of statutory construction in reaching its conclusion is absurd. The trial court applied the plain language of the statute. It is the State who seeks to rewrite the section to

interpret the "rights of members of the retirement system established by [Chapter 121]" to exclude rights the State no longer wishes to honor.

Additionally, the State's attempt to parse the two sections of Section 121.011(3)(d) to assert the trial court's order conflicted with the "linguistic structure" of Section 121.011(3)(d) unnecessarily overcomplicates the straightforward language of this section. The first sentence protects the rights of members before the conversion to a noncontributory system; the second sentence protects the rights of members after the conversion. Nothing in this language suggests the "rights" protected by the second sentence would exclude the very characteristic of the system that prompted adoption of that section.

Finally, the State misunderstands the court's order by suggesting that the trial court's interpretation of Section 121.011(3)(d) "create[s] a right to future, continued salary levels." In addressing the State's claim below that any impairment of contract caused by SB 2100 was not "substantial" (Vol. 6, p. 1068; Vol. 17, T. 181-83), the trial court pointed to testimony by the Public Employees' expert regarding the substantial reductions in salary and retirement benefits the bill imposed. (Vol. 14, p. 2671). The trial court held these reductions substantial as a matter of law. (*Id.*) The court did not rule, indicate, or suggest that Public Employees are entitled to employment or to any particular salary level.

B. In the alternative, this Court should recede from *Sheriffs* or limit the decision to its facts.

As an alternative to distinguishing the *Sheriffs* case on its facts, this Court should recede from that decision or limit it to its facts because it is unsound in principle and there has been no detrimental reliance upon the decision. The Public Employees acknowledge that courts afford great deference to precedent and will not depart from a prior decision because a precedent is merely "erroneous." *Brown v. Nagelhout*, 37 Fla. L. Weekly S225 at *4 (Fla. Mar. 15, 2012). In determining if departure is appropriate, a court considers various factors including whether the decision is "unsound in principle" and whether it has been relied upon to the extent that receding from it will result in serious injustice or serious disruption in the stability of the law. *Id.*; *see also N. Fla. Women's Health and Counseling Servs., Inc. v. State*, 866 So. 2d 612, 637 (Fla. 2003). Although the bar for receding from a prior decision is high, "stare decisis is not an ironclad and unwavering rule that the present always must bend to the voice of the past." *Haag v. State*, 591 So. 2d 614, 618 (Fla. 1992). It is proper to depart from precedent when "necessary to vindicate other principles of law or to remedy continued injustice." *Id.*

1. Unsound in Principle

Section 121.011(3)(d), Florida Statutes states in pertinent part:

> 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.

The Court determined that this language protects only "benefits already earned." 408 So. 2d at 1037. In reaching this interpretation, the Court stated:

> We stress that the rights provision was not intended to bind future legislatures from prospectively altering benefits which accrue for future state service. To hold otherwise would mean that no future legislature could in any way alter future benefits of active employees for future services, except in a manner favorable to the employee. This view 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 fiscal condition of this state. Such a decision could lead to fiscal irresponsibility. . . . We find appellants' contention is not in accordance with the intent of the legislature and conclude that the legislature has the authority to modify or alter prospectively the mandatory, noncontributory retirement plan for active state employees.

Id. The Court's interpretation is contrary to the plain and unambiguous meaning of the statute, ignores the rules of statutory construction and reaches a legally incorrect conclusion that contravenes years of precedent relating to impairment of public contracts.

In interpreting a statute, legislative intent is the polestar of statutory construction, and intent is determined by "the actual language used in the statute." *Daniels v. Florida Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation

and construction; the statute must be given its plain and obvious meaning.'" *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So. 2d 1, 5 (Fla. 2004) (citations omitted). "Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992) (quoting *Van Pelt v. Hilliard*, 78 So. 693, 694-95 (1918)).

Section 121.011(3)(d), in plain and unambiguous terms, establishes that the rights under Chapter 121 form a contract between the member of the FRS and the State which cannot be abridged in any way. The statute evinces a clear legislative intent to create a contract protecting a member's overall retirement rights and does not on its face limit the protected rights to "accrued" or "earned" rights. Those terms never appear in the statute. Yet, the Court in *Sheriffs* read these terms into the statute and thereby erroneously altered the plain and unambiguous terms used by the 1974 Legislature. *See Fla. Hosp. v. AHCA*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002) ("[c]ourts are not at liberty to add words to statutes that were not placed there by the Legislature"); *Nationwide Mut. Fire Ins. v. Southeast Diagnostics, Inc.*, 766 So. 2d 229, 231 (Fla. 4th DCA 2000) ("[i]f the statute is clear and unambiguous, the court is not free to add words to steer it to a meaning which its plain wording does not supply").

The State attempts to support the Court's interpretation of Section 121.011(3)(d) by citing to pre-*Sheriffs* jurisprudence, but prior case law does not provide a proper basis for departing from the plain and unambiguous language in Section 121.011(3)(d). No Florida Supreme Court case prior to *Sheriffs* made any distinction between active employees' earned and unearned benefits. Furthermore, the pre-*Sheriffs* cases all grew out of an early case opining that no contract rights attached to mandatory, non-contributory public pension plans, *see Anders v. Nicholson*, 111 Fla. 849 (Fla. 1933). Section 121.011(3)(d) clearly was intended not to incorporate this principle but to overrule it. Even the Court in *Sheriffs* acknowledged that the statute was a departure from previous jurisprudence, but then arbitrarily determined, in spite of the actual language, that the departure protected only "benefits already earned." 408 So. 2d at 1037.

The Legislature's amicus brief, citing to a 204-page appendix containing documents not presented to the trial court, asserts a view of the "history" of the law that was not argued by the State below. The Legislature's attempt to retry this case on appeal is patently improper and should be rejected. *See Dade County v. Eastern Airlines*, 212 So. 2d 7, 8 (1968) (striking amicus brief and appendix which attempted to introduce matters outside the record); *Riechmann v. State*, 966 So. 2d

298, 304 (Fla. 2007) (it is axiomatic that amici are not permitted to raise new issues).[3]

The only relevant legislative history from 1974 cited by the parties is the committee report cited by the Public Employees. House Committee on Retirement, Personnel and Claims, *Legislative Program Overview*, 1974 (on file at the State Library and Archives of Florida) (Call no. F353.54S L515). In discussing Section 121.011(3)(d) the Committee stated that this section was included to "help alleviate the fears of certain members . . . that once the system was made non-contributory, the Legislature would feel free to change retirement benefits since the employee was no longer contributing to the system." *Legislative Program*

[3] Even if considered, the Legislature's cherry-picked "legislative history" does not support the *Sheriffs* Court's interpretation of the contract language. Glaring in its omission is the lack of any documents from the relevant session: 1974. A committee report from 1972 and floor debate from 1978 provide only patchy historical perspective, and cannot be relied upon in determining the intent of the unambiguous 1974 statute. *See American Home Assurance Co. v. Plaza Materials Corp.*, 908 So. 2d 360, 373 (Fla. 2005) (Cantero, J., dissenting) (legislative intent should be derived from the language of the statute, not speculation of what legislators intended). A subsequent act may have some bearing on interpreting an ambiguous statute, *see Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (1984), but floor debate on a different act passed by a legislature four years later has no relevance. The floor debate shows only that the 1978 Legislature was in disagreement over what the 1974 Legislature intended with regard to Section 121.011(3)(d), Florida Statutes. Although Representative Brown argued that the statute allowed prospective changes, Representatives Fontana and Blackburn disagreed. (Appendix to Amicus Brief of the Legislature, Tab C p. 46, 49).

Overview at 3. Nothing in this report suggests that the statutory protections were only for "earned" benefits or rights.[4]

In any event, the language used in Section 121.011(3)(d), is clear and unequivocal and, therefore, the absence of a complete legislative history is of no consequence. "Legislative history cannot be used to change the plain and clear language of a statute." *Florida Dep't of Revenue v. Florida Municipal Power Agency*, 789 So. 2d 320, 324 (Fla. 2001). Section 121.011(3)(d) contains no limitation on the contract protection for the rights of FRS members, and the Court in *Sheriffs* erred in creating such a limitation.

Both when Section 121.011(3)(d) was adopted and when it was considered by the *Sheriffs* Court, similar provisions existed in other states which clearly expressed whether or not they were limited to "accrued" benefits. Florida's language is similar to New York's, adopted in 1939: "After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." N.Y. CONST. art. V, § 7 (1939). Courts have

[4] This House Committee report was the only legislative history relating to the 1974 law the Public Employees were able to locate at the State Library and the Archives of Florida. The Legislature submitted no legislative history whatsoever from 1974. It submits (improperly) a bulletin from the Division of Retirement, but an agency's construction of a statute that is inconsistent with the clear language of the statute must be rejected. *See Atlantis at Perdido Ass'n, Inc. v. Warner*, 932 So. 2d 1206, 1212 (Fla. 1st DCA 2006).

construed this provision as fixing rights at the time the employee becomes a member of the pension system and prohibiting subsequent impairment. *See Birnbaum v. New York State Teachers Ret. Sys.*, 152 N.E. 2d 241 (N.Y. 1958). *See also* ILL. CONST. art. XIII, §5 (1970) ("Membership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired"); Mass. Gen. Laws. Ch. 32, § 25(5) (1956) (establishing membership in the retirement system as a contractual relationship under which members are entitled to contractual rights and benefits, and prohibiting amendments or alterations that deprive any member of their pension rights or benefits).

In contrast, where the contract protection was intended to be limited to earned or accrued benefits, the provisions specifically said so. *See* ALASKA CONST. art. XII, §7 (1956) (membership is a contractual relationship and accrued benefits shall not be diminished or impaired); L.A. CONST. art. 10, § 29 (1974) (same); MICH. CONST. art. 9, § 24 (1963) ("accrued financial benefits" shall be a contractual obligation which shall not be diminished or impaired). Given that these provisions were in place when the Legislature adopted Section 121.011(3)(d), it cannot be said that the Legislature meant this section to be limited to accrued benefits even though it did not say so.

The *Sheriffs* Court's misinterpretation of Section 121.011(3)(d) appears largely due to its misapplication of the general principle that one legislature cannot bind a future legislature. *See Ware v. Seminole County*, 38 So. 2d 432 (Fla. 1949). The State and the *amici* seek to perpetuate this misapplication of the law.[5] While it is the general rule that one legislature cannot bind a future legislature, the rule is inapplicable where there is a clear contract. Where there is a clear indication that a legislature intends to bind itself contractually, the contract will be binding on future legislatures. *See U.S. Trust*, 431 U.S. 1, 24 (1977) ("[w]hatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned."); *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466-67 (1985); *see also Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F. 3d 46, 60 (1st Cir. 1999) ("Finding a public contractual obligation has considerable effect. It means that a subsequent legislature is not free to significantly impair that obligation for merely rational reasons."). Because a

[5] The Legislature includes in its appendix (Tab D) an informal Attorney General opinion from 1975. The opinion was requested by Representative Jerry Melvin who asked whether the Legislature could prospectively reduce the retirement credit rate for certain members. In finding that the Legislature could change benefits prospectively, the Attorney General, like the court in *Sheriffs*, misapplied the principle that one legislature cannot bind a future legislature. In any event, like the remainder of the "history" improperly submitted by the Legislature, this document further demonstrates that there was uncertainty and disagreement regarding the scope of this provision.

public contract will bind a future legislature, there must be an "unmistakable" intent to create a contract. *See United States v. Winstar Corp.*, 518 U.S. 839 (1996); *Parella*, 173 F.3d at 60.

> Statutory language, standing alone, may evince such as intent if it expressly authorizes a contract or expressly states that benefits are contractual. *See, e.g., United States Trust Co.*, 431 U.S. at 18 (deriving clear intent to contract from the use of the phrase "covenant and agree"); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 105 (1938) (holding that a statute's repeated use of the label "contract" demonstrated legislative intent to create a binding and enforceable obligation). A statutory provision can also evince an unmistakable intent to contract if it expressly bars future amendments that would reduce benefits already granted. *See, e.g., Parker [v. Wakelin]*, 123 F. 3d [1] at 8-9 (describing anti-retroactivity provision in Maine pension law); *see also id.* at 7 (noting that several state constitutions contain similar provisions barring reductions in accrued benefits of public employees).

Id.

Section 121.011(3)(d) states that the relationship between the member and the State is "contractual in nature," grants "valid contract rights" which are "legally enforceable" and cannot be "abridged in any way." This statutory language evinces an unmistakable intent to bind the state contractually. *See U.S. Trust,* 431 U.S. at 18. Since a contract is involved, future legislatures are bound to uphold the contract.

This Court has recognized that where a contract is at issue, a future legislature is not free to act. *State v. Gadsden County*, 229 So. 2d 587 (Fla. 1969) (approving circuit court finding that "[t]he power to make any contract or authorize

any contract includes the power to grant vested rights, which a future legislature cannot impair; the Constitution contains no express limitation on the power of a legislature to authorize such a contract, and the power to preempt the tax does not imply such a limitation"); *State v. City of Pensacola*, 40 So. 2d 569 (Fla. 1949) (where county issues bonds under statute authorizing the levy of tax to service the bonds, "the Legislature is without power to repeal the statute, as it impairs the obligation of a contract"). The First District Court of Appeal also has rejected a future legislature's attempt to change a prior legislature's statutorily created contract. *See Coastal Petroleum Co. v. Chiles*, 672 So. 2d 571, 573 (Fla. 1st DCA 1996) ("under the contracts clause of our state constitution, little tolerance has been shown for the state's attempts to alter its own contracts"); *State v. Leavins*, 599 So. 2d 1326, 1332 (Fla. 1st DCA 1992) ("The State having agreed to contracts granting plaintiffs' rights to mechanically harvest their leases, cannot now impair those leases by passing a special act to take that right away").

The Court in *Sheriffs* failed to recognize the principle in these cases that an express statutory contract must be given effect even when it has the effect of binding a future legislature. Curiously, while protesting that one legislature cannot bind a future legislature, the Court in *Sheriffs* did just that. By finding that Section 121.011(3)(d) prevents legislatures from altering benefits already earned by FRS members, an acknowledged departure from the law at that time, the Court bound

future legislatures from acting in area where they had previously been free to act. The court essentially "split the baby" by determining that a future legislature could be bound to honor "accrued" benefits, but not future ones.

The Court in *Sheriffs* also erroneously failed to consider or apply well-settled case law regarding impairment of contract. This law addresses the Court's concerns regarding the ability of future legislatures to change the terms of the contract in times of fiscal emergency. Determining whether the Contract Clause has been violated involves an examination of (1) whether there is a contractual obligation; (2) whether that obligation was substantially impaired; and (3) if so, whether the impairment is reasonable and necessary to serve a legitimate or important public purpose. *U.S. Trust*, 431 U.S. at 17-20, 25-26. This is the test that the Court in *Sheriffs* should have utilized in reviewing the Legislature's change of the special risk credit from 3% to 2%.[6] This test fully addresses the Court's concern that future legislatures would be unable to modify benefits and would have a permanent responsibility for maintaining the plan "irrespective of the fiscal condition" of the state. 408 So. 2d at 1037. The *Sheriffs* Court's failure to apply the correct test resulted in a decision which is unsound in principle.

[6] Indeed, the Court may have concluded that any impairment was not "substantial" in light of the fact that the legislation contemplated increased contributions in exchange for a higher service credit, but most members only had to pay the increased contributions for three months before the plan became noncontributory. *See supra* note 2, p 12.

2. No Detrimental Reliance

The Court's decision in *Sheriffs* has not been relied upon to the extent that injustice would result from receding from the case nor would the stability of the law be adversely affected. The State and Legislature point to numerous amendments to the FRS as an indication of their alleged reliance on *Sheriffs*. *See* Initial Brief p. 6; Amicus Brief of the Legislature p. 7-8. However, none of the amendments cited involve a substantial impairment of the retirement benefits or rights of existing employees.[7] A summary of the changes made to the State's retirement system also does not reveal any changes since 1981 that involve a reduction in benefits or rights. (Vol. 15, pp. 2699-2701).[8]

Recession also would have no effect on local retirement plans. Although the Florida League of Cities intimates in its brief that departing from *Sheriffs* will affect municipal plans, this argument is incorrect. Section 121.011(3)(d) creates a contract between FRS members and the State only. It does not apply to local

[7] The Legislature notes that pre-*Sheriffs*, it passed a law requiring a 1% contribution from employees. *See* Ch. 77-467, Laws of Fla. However, the 1978 Legislature repealed this change before it took effect. *See* Ch. 78-308, Laws of Fla. The 1978 law at issue in *Sheriffs* and *Hillaman v. Division of Retirement*, 446 So. 2d 158 (Fla. 1st DCA 1984) reflect the only reduction of benefits known to the Public Employees until the 2011 changes involved in this case.

[8] The Legislature did not even rely upon the *Sheriffs* decision to maintain the reduction of the special risk credit to two percent. It later raised the special risk credit to three percent and also awarded additional retroactive special risk credit for service during the period in which it was two percent. (Vol. 7, p. 1301).

plans, and therefore any change in the interpretation of the statute can have no effect on local pension plans.

Since the Court's decision in 1981, there have been seven Florida cases that have cited to *Sheriffs*. Only one relied on the *Sheriffs* Court's interpretation of Section 121.011(3)(d). *See Hillaman v. Division of Retirement*, 446 So. 2d 158 (Fla. 1st DCA 1984).[9] In *Hillaman*, the court upheld a change in the definition of special risk that was included in the same law as the change addressed in *Sheriffs*. The court, citing to *Sheriffs*, found that the change did not impair the FRS members' vested rights. Outside of Florida, *Sheriffs* has been cited primarily in discussions of how other states address pension issues, but has not been relied on or served as a model for other jurisdictions.[10] Consequently, reliance does not

[9] The remaining cases are *City of Tampa v. Bartley*, 413 So. 2d 1280 (Fla. 1st DCA 1982) (finding *Sheriffs* inapplicable to worker's compensation law); *Nation v. City of Ft. Lauderdale*, 419 So. 2d 630 (Fla. 1982) (citing *Sheriffs* for difference between voluntary and mandatory plans); *City of Daytona Beach v. Caradonna*, 456 So. 2d 565 (Fla. 5th DCA 1984) (citing *Sheriffs* for principle that rights vest at retirement); *Florida State Lodge, FOP v. City of Hialeah*, 815 F. 2d 631 (11th Cir. 1987) (finding *Sheriffs* inapplicable to sick and vacation leave issue absent a preservation of rights clause in collective bargaining agreement,); *O'Connell v. State*, 557 So. 2d 609 (Fla. 3d DCA 1990) (citing *Sheriffs* for principle that rights vest at retirement); *DeLoach v. DeLoach*, 590 So. 2d 956 (Fla. 1st DCA 1992) (citing *Sheriffs* as further evidence that an unvested pension is a marital asset).

[10] In fact, even without express constitutional or statutory provisions such as Florida's, most states now follow a contractual approach to pension rights. *See Pensions in a Pinch: Why Texas Should Reconsider Its Policies on Public Retirement Benefit Protection*, 43 Tex. Tech L. Rev. 1211, 1232 (2011); *Public Pension Benefits Under Siege: Does State Law Facilitate or Block Recent Efforts to Cut the Pension Benefits of Public Servants*, ABA Journal of Labor &

weigh against receding from *Sheriffs*. *Compare North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612, 638 (Fla. 2003) (declining to recede from prior decision in part because it had been relied on by Florida residents for fourteen years, by Florida appellate courts more than fifty times and had served as the model in other jurisdictions).

Because of the fundamental contract right involved, the unsoundness of the *Sheriffs* decision and the lack of substantial reliance, the Court should recede from *Sheriffs* or limit it to its facts, adhere to the plain language of Section 121.011(3)(d) and find that the statute creates a binding contract that precludes changing the rights of FRS members unless the change is permissible under the *U.S. Trust* test for impairment of contract. The impairment of contract test safeguards not only the Public Employees, but the State as well. It protects the right to contract while allowing the State to make insubstantial changes or, if reasonable and necessary, substantial changes to the contract. The State also remains free to change pension rights of new hires since they have yet to enter into a contract with the State.

3. *U.S. Trust* Analysis

As found by the trial court, applying the *U.S. Trust* test to this case shows that the State substantially impaired the Public Employees' contract and the

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Employment Law, Vol. 27, No. 2, p. 179-94 (2012). Florida stands alone in having an express contract provision which is not expressly limited to "accrued" rights but is so limited by judicial construction.

impairment was not reasonable and necessary. The State does not meaningfully challenge the results of this analysis on appeal.

The State does not in its initial brief challenge the substantiality of the 2011 changes to the FRS and therefore has abandoned this argument. *E.g.*, *Sunset Harbor Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005). The Public Employees stand by their argument in the trial court and the trial court's determination that the changes are substantial. (Vol. 10, pp. 1794-96; Vol. 12, pp. 2359-60; Vol. 14, p. 2671); *see also United Firefighters of L.A. City v. City of L.A.*, 210 Cal. App. 3d 1095 (Cal. App. Ct. 1989) (city's capping of COLA was a substantial impairment); *Barnes v. Arizona State Retirement System*, CV 2011-011638 (Ariz. Sup. Ct. Feb. 1, 2012) (Vol. 14, pp. 2642-2650) (changing employee's proportionate share of annual contributions from 50% to 53% was an unconstitutional impairment).

As to whether the impairment was reasonable and necessary to serve an important public purpose, the State contends only that there was a budget shortfall of $3.6 billion and it expected cost savings of $861 million from SB 2100. (Initial Brief at 23 n.6). The trial court found this evidence insufficient as a matter of law (Vol. 14, p. 2672), and so too should this Court. This Court's precedent requires the State to demonstrate a "compelling state interest" to impair its own contractual obligation. *See Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993).

Although a legislature has some discretion during bona fide emergencies, it can only impair its contractual obligations if it can demonstrate "that the funds are available from no other reasonable source." *Id.* This it failed to do.[11]

II. SENATE BILL 2100 VIOLATES THE TAKINGS CLAUSE.

The trial court also correctly found that SB 2100 takes private property from Public Employees without just compensation. "No private property shall be taken except for a public purpose and with full compensation therefor . . . ." Art. X, § 6, Fla. Const. The purpose of the Takings Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The challenged changes to SB 2100—both the mandatory contributions and the elimination of the COLA—constitute a confiscation of private property for a public use. A similar taking of public employee pension benefits was struck down in *Bailey v. State*, 500 S.E.2d 54 (N.C. 1998). The North Carolina Legislature

[11] The Legislature's amicus brief improperly introduces substantial argument and factual assertions regarding the circumstances surrounding the budget. None of this information was presented to the trial court and therefore has not been authenticated or subjected to discovery or cross-examination through the ordinary litigation process. This Court must reject the Legislature's attempt to retry this case on appeal. *See Dade County*, 212 So. 2d at 8; *Riechmann v. State*, 966 So. 2d at 304. In any event, the Legislature's belated, improper, unauthenticated representations still fail to demonstrate that the funds were available from no other reasonable source.

eliminated a tax exemption for public employees' pension benefits. *Id.* at 59. The court found that this change was "in derogation of plaintiffs' rights established through the retirement benefits contracts" and thus constituted a taking of the plaintiffs' private property without compensation. *Id.* at 69. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (Florida statute allowing clerk of court to keep interest earned on funds deposited in court registry constituted taking of private property).

The State's contention that there is no taking because the contributions "are applied to [the members] own retirement" reflects a misunderstanding of the nature of the Public Employees' property rights under Section 121.011(3)(d). Because this provision grants Public Employees enforceable rights to a noncontributory retirement plan with a COLA, the taking of those rights without any offsetting benefit constitutes a taking. Even to the extent member contributions are "to be used for the members' own retirement" (which is true for the Investment Plan but not for the Pension Plan or the COLA), they do not constitute *additional* funds applied to the members' retirement. Indeed, by eliminating the COLA, SB 2100 significantly reduced the retirement benefits for members of the Pension Plan. The mandatory deduction of private funds in exchange for a reduced benefit is an unconstitutional taking.

III. SENATE BILL 2100 ABRIDGES THE FUNDAMENTAL RIGHT OF PUBLIC EMPLOYEES TO COLLECTIVELY BARGAIN.

The trial court also correctly held that Article I, Section 6 requires that the Legislature not ignore the right to collectively bargain when passing legislation affecting matters clearly subject to that right like retirement, which this Court found to be a mandatory subject of bargaining in *City of Tallahassee v. PERC*, 410 So. 2d 487 (Fla. 1981). The State's primary response is that the Legislature's appropriations power "[s]upercedes" public employees' rights under Article I, Section 6, relying on this Court's decision in *State v. Florida Police Benevolent Association, Inc.*, 613 So. 2d 415 (Fla. 1992) ("*PBA*"). This reliance is misplaced.

First, *PBA* involved an issue completely different from that presented in this case: whether the Legislature lawfully may change or negate provisions in a collective bargaining agreement negotiated with public employee unions in an appropriations act by choosing not to fund those provisions. That case says nothing about the issue in this case: whether the Legislature may through substantive legislation, not an appropriations act, unilaterally change a mandatory subject of bargaining not covered by a collective bargaining agreement without affording the certified collective bargaining agent of the affected public employees the opportunity to engage in negotiations over the change prior to its becoming effective.

Second, to the extent that *PBA* can be read to apply to the issues in this case at all, it certainly does not stand for the broad proposition attributed to it by the State. The State asserts that *PBA* stands for the proposition that providing benefits to public employees necessarily requires the exercise of the Legislature's exclusive power over appropriations that supersedes any rights guaranteed by Article I, Section 6. In other words, no exercise of the appropriations power is subject to any limitation by Article I, Section 6. This is simply not the law.

Contrary to the State's claim, it "remains a basic legal principle that 'no department, not even the legislative, has unlimited power under our system of government.'" *Browning v. Fla. Hometown Democracy, Inc.*, 29 So. 3d 1053, 1064 (Fla. 2010**) (**quoting *Sylvester v. Tindall*, 18 So. 2d 892, 899 (Fla. 1944), and *State v. City of Stuart*, 120 So. 335, 347 (Fla. 1929), both stating that all of the rights in the Declaration of Rights of the Florida Constitution "constitute a limitation upon the powers of each and all the departments of the state government.") The right to collectively bargain is, of course, one of these fundamental rights contained within the Declaration of Rights and nothing in *PBA* states otherwise.

Rather, in *PBA* this Court sought to harmonize the rights guaranteed by Article I, Section 6 with the Legislature's appropriations power, holding, in essence, that no collective bargaining agreement between the Governor and a

union requires the Legislature to fund it. 613 So. 2d at 418-19. The "inherent limitation" on the right to collectively bargain in the public sector is this requirement of prior legislative approval of funding before an agreement becomes binding. This Court clearly did not hold, as the State claims here, that if an action can be characterized, directly or indirectly, as an appropriations decision it is exempt from Article I, Section 6.

In fact, if this were true, one would have expected this Court to have approved the Legislature's rescission of a pay raise for public employees to balance the budget in a financial crisis because it was clearly such an exercise of the appropriations power. However, this Court expressly rejected such a claim in *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993), which the State fails even to mention.

In *Chiles*, the Legislature, after funding collective bargaining agreements that provided pay increases to the covered employees, first reduced and later rescinded those increases to balance the state budget following a significant shortfall in expected revenue. Relying upon *PBA*, the state contended as it does here that the Legislature's exclusive power over appropriations trumps any rights guaranteed by Article I, Section 6, including any obligations set forth in a collective bargaining agreement. *Id.* at 672-73. Distinguishing *PBA*, this Court recognized that the legislature has the authority to reduce previously approved

appropriations for employee salaries required under a collective bargaining agreement, but only if it can demonstrate a compelling state interest. *Id*. at 673. Thus, even though the Legislature's action was indisputably an exercise of its appropriations power to address a revenue shortfall, it was limited by Article I, Section 6.

Rather than an appropriations decision, the present case involves a legislative decision to totally ignore Article I, Section 6. The controlling authority is therefore *City of Tallahassee v. Public Employees Relations Commission*, 410 So. 2d 487 (Fla. 1981), not *PBA*. Although the Legislature did not expressly exclude the mandatory subject of retirement from collective bargaining in SB 2100, it effectively did so by failing to require that the changes made in the retirement system first be subjected to the collective bargaining process. One cannot do indirectly that which cannot be done directly. The Public Employees do not claim that Article I, Section 6 prohibits the Legislature from making changes in the retirement system, only that the collective bargaining process be followed to its conclusion first.

Article I, Section 6 guarantees the right to *effective* collective bargaining. *Hillsborough County Governmental Employees Ass'n, Inc., v. Hillsborough County Aviation Authority*, 522 So. 2d 358, 362 (Fla. 1988). The trial court correctly recognized that there simply can be no effective bargaining only after the

fact. Indeed, such "bargaining" is contrary to the bargaining obligation required for both private and public employees. Like in the private sector, public sector collective bargaining is a process by which the employer and a union meet to negotiate "in the ***determination*** of the wages, hours and terms and conditions of employment of the public employees in the bargaining unit." § 447.309(1), Fla. Stat. (2011) (emphasis added). That simply cannot happen where, as here, the Legislature has ***predetermined*** the term or condition, rendering any subsequent negotiations futile because the public employer with which the union must bargain has no power to implement an agreement that is inconsistent with a statute. *See* § 447.309(3), Fla. Stat. (2011).

The Legislature itself has recognized this fact by the enactment of Section 447.501(1)(c), Florida Statutes (2011), which makes it an unfair labor practice for an employer to unilaterally ch§ange a mandatory subject of bargaining. *See The Fla. School for the Deaf and the Blind v. The Fla. School for the Deaf and the Blind Teachers United, FTP-NEA*, 483 So. 2d 58, 59 (Fla. 1st DCA 1986) ("Absent a clear and unmistakable waiver by the certified bargaining representative, exigent circumstances requiring immediate action, or legislative action imposed as a result of impasse, a public employer's unilateral alteration of wages, hours or other terms and conditions of employment of employees

represented by a certified bargaining agent constitutes a per se violation of Sections 447.501(1)(a) and (c).").

Unilateral changes are prohibited because such a change in a mandatory subject "is a circumvention of the duty to negotiate which frustrates the objectives of [the federal equivalent of 447.501(1)(c), Florida Statutes] as much as does a flat refusal" that "must of necessity obstruct bargaining, contrary to Congressional intent." *NLRB v. Katz*, 369 US 736, 743, 747 (1962) (first applied to the Florida public sector in *Pasco County School Board v. Fla. Public Relations Comm'n*, 353 So. 2d 108, 125-26 (Fla. 1st DCA 1976)). This is so because a unilateral change not only violates the statutory requirement that the parties bargain over " 'wages, hours, and other terms and conditions,' ***but also injures the process of collective bargaining itself … by emphasizing to the employees that there is no necessity for a collective bargaining agent.***" *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1992) (emphasis added). Consequently, unilateral action like that enacted through SB 2100 plainly constitutes a substantial abridgement of the right to collectively bargain guaranteed by Article I, Section 6.

This Court has recognized that Article I, Section 6, limits the Legislature's power to unilaterally determine significant policy matters that affect or determine subjects falling within the scope of mandatory collective bargaining. In *United Teachers of Dade v. Dade County School Board*, 500 So. 2d 508 (Fla. 1986), the

Court was required to determine whether the statewide Master Teacher Program enacted by the Legislature to provide financial awards to outstanding teachers but made no provision for collective bargaining over any aspects of the program abridged Article I, Section 6. The Court rejected the notion that the Legislature was insulated from accommodating Article I, Section 6 when acting as a policymaker, not the employer, as an "exercise in semantics" which ignores the real impact or practical effect legislation may have on collective bargaining rights:

> It would be an abdication of our duty to protect and enforce constitutionally guaranteed rights were we to base our holding on such a tenuous premise. Cases arising from disputes between local school boards . . . and teacher's bargaining representatives may produce different factual or procedural scenarios than do cases arising because of legislative action allegedly impacting unconstitutionally upon collective bargaining rights. The correct analysis of each of these situations, however, must encompass not only the legislature's, the State Board of Education's, or the local school board's constitutional authority to make educational policy decisions, but also must focus on the impact such decisions have on public employees' constitutionally guaranteed collective bargaining rights.
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> Prior to the adoption of article I, section 6, it could be easily asserted that such a uniform program clearly comes within the purview of article IX, section I's mandate that the legislature shall provide for a uniform system of public education, and article IX, section 2, which grants the State Board of Education supervisory powers. However, article I, section 6 grants public employees rights they did not have previously, ***and the days of totally unilateral legislative power over all educational personnel matters are gone.***

500 So. 2d at 510-11 (citation omitted and emphasis supplied).

This analysis is applicable to the present case as well. The policy decision to change the noncontributory nature of the FRS without affording the affected unionized employees an opportunity for input through collective bargaining has the "real impact or practical effect" of abridging the rights guaranteed by Article I, Section 6. 500 So. 2d at 510. Unlike the Master Teacher Program, however, the retirement plan for the FRS is unquestionably a mandatory subject of bargaining as determined in *City of Tallahassee*.

The requirement of prior collective bargaining refutes the State's claim that bargaining over the impact of the Legislature's unilateral changes in the FRS satisfies Article I, Section 6. The fact that some unions may have been able to ameliorate the negative impact of the unilateral changes by negotiating pay increases to offset the amount of the now mandatory retirement contribution in no way compensates for the loss of the opportunity to bargain over whether the changes should be made in the first place. It is impossible to have meaningful collective bargaining where, as here, the Legislature has already unilaterally determined what the result will be before there are even any negotiations at all. There simply can be no ***effective*** right to collectively bargain under such circumstances.

While there are recognized differences between private and public sector bargaining (such as the prohibition against strikes and the need for legislative

appropriation in public sector bargaining), the ultimate right to bargain and the prohibition against abridgment of that right through unilateral changes are not among them. The Legislature has the power to make policy that affects those things that are subject to negotiations, but it does not have the power to excuse negotiation itself, directly or indirectly. Consequently, the trial court correctly found that SB 2100 unconstitutionally abridges Article I, Section 6.

IV. THE TRIAL COURT PROPERLY ORDERED REFUNDS OF THE MONIES DEDUCTED BY THE STATE PURSUANT TO AN UNCONSTITUTIONAL LAW.

The State argues for the first time on appeal that the trial court should not have ordered refunds to all FRS employees subjected to the challenged provisions of SB 2100.

The State is precluded from raising this issue on appeal because it did not raise the issue in the trial court. The Public Employees clearly articulated the relief they requested both in their motion for summary judgment and at the hearing. (Vol. 10, p. 1812; Vol. 16, T. 71-72). While the State vigorously opposed the Public Employees' arguments on the merits, the State was silent as to the remedy requested. Accordingly, the State has failed to preserve this issue for appeal. *E.g.*, *Sunset Harbor Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (to be preserved for further review by higher court, specific legal argument or ground argued on appeal must be part of presentation to lower court) (quoting *Tillman v. State*, 471 So. 2d

32, 35 (Fla. 1985)); *Dober v. Worrell*, 401 So. 2d 1322, 1324 (Fla. 1981) (it is inappropriate for a party to raise an issue for the first time on appeal from summary judgment). To allow a party to assert matters on appeal that were not previously raised "renders a mockery of the 'finality' concept in our system of justice . . . [and] would substantially extend litigation, expand its costs, and, if allowed, would emasculate summary judgment procedure." *Id.* at 1324.

Even after the court issued its final order, the State did not seek rehearing. This also constitutes waiver. *E.g., Emerald Coast Comm'ns, Inc. v. Carter*, 780 So. 2d 968, 970 (Fla. 1st DCA 2001); *D.T. v. Fla. Dep't of Children & Families*, 54 So. 3d 632, 633 (Fla. 1st DCA 2011). The State now complains that the trial court never held a hearing regarding potential remedies, but it never asked for one.

In any event, this Court and others have ordered refunds in similar contexts. *State v. Lee*, 356 So. 2d 276, 283 (Fla. 1978) (ordering funds collected pursuant to unconstitutional statute "refunded to the extent possible without cost to the original payor); *Pa. Fed'n of Teachers v. Sch. Dist. of Philadelphia*, 484 A.2d 751, 752, 754 (Pa. 1984) (affirming trial court order requiring state to refund monies collected pursuant to law increasing contribution rate to employees who were members of the retirement system before the effective date of the challenged law).

The cases cited by the State all arose in contexts substantially different from the present case. *Glidden v. Chromalloy Am. Corp.*, 808 F.2d 621 (7th Cir. 1986)

(dismissing appeal of summary judgment order due to lack of finality because class allegations had not been adjudicated); *Curtis v. Comm'r, Me. Dep't of Human Servs.*, 159 F.R.D. 339 (D. Maine 1994) (granting motion for class certification over defendants' objection); *Rivera v. Patino*, 524 F. Supp. 136, 149 (N.D. Cal. 1981) (same). None of the cases call for the reversal of a lower court award of refunds due to a finding of facial unconstitutionality of a state statute. Certainly none of these cases stand for the proposition that the trial court "exceeded its authority" by entering the order below.

To the extent the State now contends - apart from the class action issue - that the trial court's order erroneously failed to give the State adequate flexibility to implement the order (Initial Brief at 30-32), the State is judicially estopped from asserting this position because it successfully maintained the contrary position below. A claim made or position taken in a former proceeding, if successfully maintained, estops the party from making an inconsistent claim or taking a conflicting position in a subsequent proceeding to the prejudice of the adverse party. *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) (quoting *Chase & Co. v. Little*, 156 So. 609 (Fla. 1934)).

The State opposed the motion for preliminary injunction below on the grounds that the Public Employees would not be irreparably harmed if the funds were not sequestered because, at the end of the case, the money would be available

from the FRS trust fund or other public monies to comply with a money judgment. (*E.g.*, Vol. 18, pp. 2826, 2833, 2834, 2844, 2845, 2885, 2891-92, 2895, 2896, 2898, 2906, 2917, 2925, 2927). The State specifically asked the trial court not to require sequestration of the funds during the litigation or to order that the funds ultimately be paid out of the FRS trust fund, because the State sought the flexibility of determining the best way to satisfy a judgment ordering refunds. (Vol. 18, p. 2833) ("Whether those moneys . . . would be coming out of the SBA fund, or they would come from the employers through other means, through their revenue stream doesn't really matter much in terms of satisfying the plaintiffs by giving them a remedy, but it matters a lot to us."); (Vol. 18, p. 2844) ([I]f . . . today the Florida Supreme Court said no, that's unconstitutional, you can't do that. . . . The state, the legislature, it would be put back to the burden of finding where to come up with the money to replenish the SBA funds."); (Vol. 18, p. 2845-46) (". . . [T]he moneys are there, they can liquidate them. If [the SBA is] subject to a court order that says they have to do that and there is no other way in the interim for the state and the other [FRS employers] to come up with the money, then that money would be subject to Your Honor's ruling.)

The State was successful in asserting this position, persuading the trial court to deny the preliminary injunction because the Public Employees would have an adequate remedy at the end of the case. (Vol. 2, pp. 371-72). The trial court's

order noted the State's stipulation "that should they ultimately be ordered to refund the 3% employee contributions, it was not a matter of whether the refunds would be given, it was only a matter of the State of Florida determining from what source it would make the refunds." (*Id.*) Indeed, the State's success with this position carried through to the final order; although the trial court ruled against the State on the merits, the court simply ordered the State to issue refunds to the eligible employees; it did not specify that the funds must come from the SBA or any other specific source of funds. (Vol. 14, pp. 2667, 2675).

Having successfully maintained its position that it was unnecessary for the challenged contributions to be sequestered in order to provide an adequate remedy at the conclusion of the case, and that the trial court should allow the State the flexibility to determine the best manner to comply with an order requiring the challenged contributions to be refunded, the State is now estopped from asserting that the trial court erred in ordering the State to issue refunds at all.

CONCLUSION

The Public Employees respectfully request that this Court affirm the decision of the trial court in its entirety, and grant such further relief as the Court deems appropriate.

Respectfully submitted,

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I certify that this submission complies with the typeface requirements of Florida Rule of Appellate Procedure 9.210. This brief was typed using Times New Roman, 14 point font.

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