IN THE SUPREME COURT OF FLORIDA

Case No. SC12-520

RICK SCOTT, et al.,

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

vs.

GEORGE WILLIAMS, et al.,

Appellees.
______________________________/

ANSWER BRIEF

OF APPELLEE/INTERVENOR,

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STATEMENT OF THE CASE AND FACTS

The intervenor, Brett Sandlin, accepts the statement of the case and facts made by the appellants with the exceptions by the appellees, George Williams, et al., made by Ron Meyer, Esq., as though contained here in full.

Additionally, the intervenor, Brett Sandlin, would point out that he is a firefighter employed by Alachua County and that he currently is, and has been, a special risk member of the Florida Retirement System since 1997. (Vol. 12, R. 2264). He is a member of Local 3852 of the International Association of Firefighters, AFL-CIO and he is also president of the Local which is recognized by Alachua County as the bargaining representative for the county's firefighters. (Vol. 12, R. 2265). Sandlin is the beneficiary of a collective bargaining agreement (CBA) between Alachua County and Local 3852 covering the period October 1, 2010, through September 30, 2013, which refers to the FRS pension plan. (Vol. 12, R. 2264-2265, 2269, 2315-2316, 2323).

There was no collective bargaining between Alachua County and Local 3852 concerning SB 2100 which provided for a 3% of payroll contribution by employees as of July 1, 2011, and eliminated a COLA benefit. (Vol. 12, R. 2266). Also, there has been no change in the Alachua

County/Local 3852 CBA covering the period October 1, 2010, through September 30, 2013. (Vol. 12, R. 2257, 2266).

In the proceedings below, Sandlin invoked Part VII of Chapter 112 which has the short title the "Florida Protection of Public Employee Retirement Benefits Act"[1]. It contains Section 112.66(5); Fla. Stat., which provides:

> A civil action may be brought by a member or beneficiary of a retirement system or plan to recover benefits due to him or her under the terms of his or her retirement system or plan, to enforce the member's or beneficiary's rights, or to clarify his or her rights to future benefits under the terms of the retirement system or plan.

(Vol. 12, R. 2256).

SUMMARY OF ARGUMENT

As to the appellants' Points I and II, the intervenor, Brett Sandlin, adopts the argument of the appellees made by Ron Meyer, Esq., as though contained here in full.

As to the appellants' Point III, the intervenor, Brett Sandlin, submits that the circuit court was correct that the provisions of Ch. 2011-68, Laws of Fla., making FRS employee contributory and eliminating the COLA benefit for future service are unconstitutional, as violations of Art. I, §6, Fla. Const.

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1 §112.60, Fla. Stat.

The circuit court was correct that changing pension rights and benefits for bargaining unit employees without collective bargaining is unconstitutional.

Collective bargaining by public employees is a fundamental right provided by Art. I, §6, Fla. Const. This includes collective bargaining over pension rights and benefits.

Statutes which affect fundamental rights are subject to strict scrutiny. This includes statutes which affect collective bargaining agreements.

Under the strict scrutiny test, the appellants must demonstrate that making FRS employee contributory and eliminating the COLA benefit for future service serves a compelling state interest. A budget shortfall alone is not enough. *Chiles v. United Faculty of Florida*, 615 So. 2d 671, at 673 (Fla. 1993).

Under the strict scrutiny test, the appellants must also demonstrate that there is no other reasonable alternative means of preserving its contract with public workers, in whole or in part. *Chiles*, supra, at 673.

The appellants have failed to demonstrate either the first or second parts of the strict scrutiny test. As far as alternative means goes, the government can raise taxes, borrow money, curtail non-contractual spending or possibly renegotiate other contracts, rather than unilaterally making FRS employee contributory and eliminating the COLA benefits for future service.

The Legislature itself demonstrated in other public employee pension statutes adopted just prior to these FRS changes that it must not apply statutory changes to existing collective bargaining agreements because of Art. I, §6, Fla. Const., and that it must allow sufficient time for collective bargaining on the provisions involved because of Art. I, §6, Fla. Stat.

The appellants' reliance on *Florida Sheriffs Association v. Department of Administration, Division of Retirement*, 408 So. 2d 1033 (Fla. 1982), is questionable because that case did not involve collective bargaining and the statute interpreted by the Supreme Court in *Florida Sheriffs* has been amended retroactively out of existence.

The appellants' reliance on *State v. Florida Police Benevolent Association*, 613 So. 2d 415 (Fla. 1992), for their claim that the Legislature's appropriation power is superior to the public employees' fundamental right to bargain collectively is misplaced. The later case of *Chiles v. United Faculty of Florida*, supra, limits *Police Benevolent Association*, supra, to its facts as no contract was involved.

In the present case, there are existing collective bargaining agreements (CBAs) that would be affected by the statutes that the circuit court declared unconstitutional. The intervenor Sandlin's CBA is in the second year of a three year contract.

The Legislature's amicus curiae brief suggesting budget concerns over the effect of the present case is overstated and incorrect.

The refund of the employees' unlawful contributions by the FRS trust fund would create an actuarial unfunded liability, which the government may amortize over 30 years by law with the earnings of the trust fund offsetting the amortization, year by year.

The holding of the circuit court is that the provisions of Ch. 2011-68, Laws of Fla., making FRS employee contributory and eliminating the COLA for future service without collective bargaining and applying these statutory changes to existing CBAs are unconstitutional. The order of the circuit court is correct and should be affirmed.

ARGUMENT

POINT ONE

THE 2011 PENSION REFORM LEGISLATION DOES NOT VIOLATE THE CONTRACT CLAUSE

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

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

1. The Order was inconsistent with *Florida Sheriffs*

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

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

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

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

(Appellant's Point One)

The standard of review is de novo. *City of Miami v. McGrath*, 824 So. 2d 143, at 146 (Fla. 2002); *Caribbean Conservation Corps., Inc.*, v. *Florida Fish and Wildlife Conservation Commission*, 838 So. 2d 492, at 500 (Fla. 2003).

The circuit court's judgment was a declaration that the 2011 statutory amendment to FRS contained in Ch. 2011-68, Laws of Fla., making FRS employee contributory was unconstitutional in that this violated the prohibition against impairment of existing contracts guaranteed by Art. I, §10, Fla. Const., with respect to the 1974 contract between the employees and the government, when FRS was made non-contributory. §121.011(3)(d), Fla. Stat. The intervenor, Brett Sandlin, adopts the

argument on this point of the appellees, George Williams, et al., made by Ron Meyer, Esq., as though contained here in full.

The circuit court's declaration was correct on this point and should be affirmed. It is expected that the government will honor the declaration. See §86.061, Fla. Stat.

POINT TWO

THE PLAN AMENDMENT DOES NOT VIOLATE THE TAKINGS CLAUSE

(Appellant's Point Two)

The standard of review is de novo. *City of Miami v. McGrath*, 824 So. 2d 143, at 146 (Fla. 2002); *Caribbean Conservation Corps., Inc.*, v. *Florida Fish and Wildlife Conservation Commission*, 838 So. 2d 492, at 500 (Fla. 2003).

The circuit court's judgment was a declaration that the 2011 statutory amendment to FRS contained in Ch. 2011-68, Laws of Fla., making FRS employee contributory was unconstitutional in that this violated the prohibition against impairment of existing contracts guaranteed by Art. I, § 10, Fla. Const., with respect to the 1974 contract between the employees and the government, when FRS was made non-contributory. §121.011(3)(d), Fla. Stat. The intervenor, Brett Sandlin, adopts the argument on this point of

the appellees, George Williams, et al., made by Ron Meyer, Esq., as though contained here in full.

The circuit court's declaration was correct on this point and should be affirmed. It is expected that the government will honor the declaration. See §86.061, Fla. Stat.

POINT THREE

THE PLAN AMENDMENT DOES NOT ABRIDGE PLAINTIFFS' COLLECTIVE BARGAINING RIGHTS

(Appellant's Point Three)

The standard of review is de novo. *City of Miami v. McGrath*, 824 So. 2d 143, at 146 (Fla. 2002); *Caribbean Conservation Corps., Inc.*, v. *Florida Fish and Wildlife Conservation Commission*, 838 So. 2d 492, at 500 (Fla. 2003).

In 1968, the people of Florida adopted a new Constitution. Article I of this Constitution is entitled "Declaration of Rights". The rights described in Article I are fundamental rights retained by the people to themselves.

One of the fundamental rights described in Article I is the right of persons to be rewarded for industry. Art. I, §2, Fla. Const. Another one of the fundamental rights described in Article I is the right of public employees to bargain collectively, but not the right to strike.

Article I, Section 6, of the Florida Constitution provides:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

The Supreme Court of Florida decided in *Ryan I*[2] that under Article I, §6, Fla. Const., public employees had the same constitutional right to bargain collectively as did private employees, except the right to strike, and that this constitutional right required legislative implementation. Thereafter, the Florida Legislature stumbled for three sessions over this requirement, such that the Supreme Court of Florida decided in *Ryan II*[3] that the Legislature must implement this constitutional right or the Supreme Court would do it for them. *Ryan II*, at 688. In 1974, the Florida Legislature adopted the Florida Public Employees Relations Act [PERA] (Part II of Ch. 447, Fla. Stat.; §447.201, et seq., Fla. Stat.). In 1977, the Florida Legislature amended the Act to prohibit public employees from collectively bargaining over pensions. Ch. 77-343, §9, at 1486, Laws of Fla.; and Ch. 77-343, §13, at 1490, Laws of Fla., creating §447.301(2) Fla. Stat. (1977), and

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2 *Dade County Classroom Teachers' Association v. Ryan*, 225 So. 2nd 903 (Fla. 1969).

3 *Dade County Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684 (Fla. 1972).

§447.309(5), Fla. Stat. (1977). This statute was declared unconstitutional for violating Article I, Section 6, of the Florida Constitution which allowed for no such exception. *City of Tallahassee v. P.E.R.C.*, 410 So. 2d 487 (Fla. 1981). Since this case became final in 1982, pensions have been a mandatory subject of collective bargaining. Ibid.

While *City of Tallahassee v. P.E.R.C.*, supra, may have used a rational basis test, later cases have treated the right of public employees to bargain collectively to be a fundamental right,[4] subject to strict scrutiny.[5]

The right of public employees to bargain collectively in Article I, §6, Fla. Const., is right along side freedom of religion (§3), freedom of speech (§4), freedom of the press (§4), trial by jury (§22), equal protection of the laws (§2), due process of law (§9) and others. Indeed, the right of public employees to bargain collectively has been specifically determined to be a fundamental right. *SEAG, FPD, NUHHCE, AFSCME v. State*, 653 So. 2d 487, at 488 (Fla. 1st DCA 1995); affirmed, *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030 (Fla. 1999); also *Chiles v. United Faculty of Florida*, 615 So. 2d 671, at 673 (Fla. 1993).

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[4] *Dade County School Administrators Ass'n, Local 77 AFSA, AFL-CIO v. School Board of Miami-Dade County*, 840 So. 2d 1103 (Fla. 1st DCA 2003).

[5] *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030 (Fla. 1999); *Coastal Florida Police Benevolent Ass'n Inc. v. Williams*, 838 So. 2d 543 (Fla. 2003).

A statute which affects fundamental rights is subject to the strict scrutiny test of constitutional validity. *Hillsborough County Governmental Employees Association, Inc. v. Hillsborough County Aviation Authority*, 522 So. 2d 358 (Fla. 1988). *Chiles v. State Employees Attorneys Guild*, supra. The strict scrutiny test requires the Legislature (not the plaintiffs) to demonstrate that the statute fulfilled a compelling state interest and that the statute did so in the least intrusive way possible. *Florida Board of Bar Examiners re: Applicant No. 63161*, 443 So. 2d 71, at 74 (Fla. 1983). Furthermore, in a strict scrutiny case in which the trial court has held a statute to be unconstitutional, the case comes to the Supreme Court of Florida with a presumption that the statute is unconstitutional. E.g. *North Florida Women's Health and Counseling Service, Inc., v. State*, 866 So. 2d 612 (Fla. 2003).

Pensions are a proper subject of public employee collective bargaining as part of the wages, hours, and terms and conditions of employment. *City of Tallahassee v. P.E.R.C.*, supra.

There are two caveats in regard to the case of *Florida Sheriffs Association v. Department of Administration, Division of Retirement*, 408 So. 2d 1033 (Fla. 1982), relied on by the appellants. (Appellant's Brief 25-27). The first is that this case does not involve collective bargaining. The

second is that the Legislature subsequently retroactively amended out of existence the very same statute which *Florida Sheriffs* interpreted.

When *Florida Sheriffs* began, the amendments to the PERA statutes still prohibited collective bargaining over pensions. §447.301(2), Fla. Stat. (1979) and §447.309(5), Fla. Stat. (1979). These two statutes were declared unconstitutional by the Florida First District Court of Appeal on February 6, 1981. *City of Tallahassee v. P.E.R.C.*, 393 So. 2d 1147 (Fla. 1st DCA 1981). This decision holding that these statutes prohibiting collective bargaining over pensions were unconstitutional as conflicting with Article I, Section 6, Fla. Const., was approved of by the Supreme Court of Florida on December 3, 1981, but that decision did not become final until March 23, 1982. *City of Tallahassee v. P.E.R.C.*, 410 So. 2d 487 (Fla. 1981).

Meanwhile, *Florida Sheriffs* was in the circuit court and then on appeal to the Supreme Court, which decided the case on December 10, 1981, but it did not become final until February 15, 1982, one month before *City of Tallahassee v. P.E.R.C.*, supra. A plain reading of the two cases shows that the constitutional validity of the reduction in the special risk service credit from 3% to 2% in 1979 for any failure to engage in collective bargaining was not involved in *Florida Sheriffs*.

The second strange feature of *Florida Sheriffs* is that the reduction in the special risk service credit from 3% to 2% described in that case concerned a 1978 statutory amendment by Ch. 78-308, §6, at page 83, Laws of Fla., effective October 1, 1978.[6] Then in 1988, the Legislature increased the special risk service credit to 2.2% beginning December 31, 1988, and .2% for each year thereafter for 5 years until December 31, 1992, when a 3% service credit would again be achieved. §121.091(1)(a)2a-h, Fla. Stat. (1988).

The Florida Association of Counties and others challenged the constitutional validity of this increase in benefits, but only on the ground of funding on a sound actuarial basis under Art. X, §14, Fla. Const. The case does not involve the issue of collective bargaining. Both the 1st DCA and the Supreme Court of Florida held that this staggered increase was constitutional. *Florida Ass'n of Counties v. Dept. of Admin.*, 580 So. 2d 641 (Fla. 1st DCA 1991); affirmed, 595 So. 2nd 42 (Fla. 1992). Then, in 2000, the Florida Legislature amended §121.091(1)(a)2i, Fla. Stat. (2000), restoring the 3% special risk service credit retroactive to September 30, 1978, for those who retire after July 1, 2001. Ch. 2000-169, §15, page 1670,

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[6] Collective bargaining over pensions was forbidden by statute at that time.

Laws of Fla. Thus, for the last 11 years, the statute interpreted by the Supreme Court in *Florida Sheriffs* has been amended out of existence.

There is another Florida statutory pension scheme beside FRS. Chapters 175 and 185 of the Florida Statutes provide for funding and pension rights and benefits of city firefighters and city police officers. On May 4, 2011, 2 days prior to the adoption of SB 2100 (Ch. 2011-68, Laws of Fla.) in the same 2011 session, the Legislature passed SB 1128, which is now Ch. 2011-216, Laws of Fla. It amended §112.66(11), Fla. Stat. (2011), §175.032(3), Fla. Stat. (2011), and §185.02(4), Fla. Stat. (2011), to reduce the average final compensation used to determine city firefighters' and city police officers' pensions by limiting the amount of overtime to be included. However, these three statutes have an unusual effective date: for non-bargaining unit employees, it is July 1, 2011, but for bargaining unit employees, the effective date is the date of inception of the next collective bargaining agreement. §112.66(11), Fla. Stat. (2011), §175.032(3), Fla. Stat. (2011), and §185.02(4), Fla. Stat. (2011).

As of July 1, 2011, Section 112.66(11), Fla. Stat., now reads:

> For noncollectively bargained service earned on or after July 1, 2011, or for service earned under collective bargaining agreements entered into on or after July 1, 2011, when calculating retirement benefits, a defined benefit pension system or plan sponsored by a local government may include up to 300 hours per year of

> overtime compensation as specified in the plan or collective bargaining agreement, but may not include any payments for accrued unused sick leave or annual leave. **For those members whose terms and conditions of employment are collectively bargained, this subsection is effective for the first agreement entered into on or after July 1, 2011**. This subsection does not apply to state-administered retirement systems or plans. (Emphasis added.)

Section 175.032(3), Fla. Stat. (2011), and Section 185.02(4), Fla. Stat. (2011), track this same language.

This same provision allowing for collective bargaining over pension rights and benefits (or something like it) could have been done in SB 2100 for FRS employees, but it was not.

Collective bargaining agreements in the public sector can be for up to 3 years (and generally are for 3 years). §447.309(5), Fla. Stat. Therefore, the earliest possible effective date would be July 2, 2011, for a third year union contract and the latest possible effective date would be July 1, 2014, for a first year union contract.[7] This provision does two things: (1) it provides that this reduction in pension rights and benefits would not apply to existing collective bargaining agreements so that the statute would not impair the obligation of contracts per Article I, §10, Fla. Const., and (2) it would allow sufficient time for the employers and the unions to engage in

[7] Fiscal years end September 30, which corresponds to most CBAs (e.g. Vol. 12, R. 2269). As a practical matter, the date is probably September 30.

collective bargaining prior to the change as to how the change should be addressed per Art. I, §6, Fla. Const. By this enactment, the Legislature itself recognized the need for collective bargaining over public employee pensions affected by statute, and it provided a practical vehicle for doing so. Ch. 2011-216, §§2, 4, 8, Laws of Fla.

Yet, later in the same session on May 6, 2011, the Legislature amended Chapter 121, Fla. Stat., to make FRS employee contributory and to eliminate the COLA benefit for future service. In so doing, the Legislature did not provide for collective bargaining and made the effective date, July 1, 2011, notwithstanding existing collective bargaining agreements, which would not expire for up to 3 years in the future.

The circuit court's judgment was a declaration that the 2011 statutory amendments to FRS contained in Ch. 2011-68, Laws of Fla., making FRS employee contributory and eliminating the COLA for future service were unconstitutional in that this violated the right of public employees to collective bargaining guaranteed by Art. I, §6, Fla. Const.

The appellants admit that these changes were made without collective bargaining and that they apply to all FRS employers and employees as of July 1, 2011. (Appellants' Brief 3, 7, 25, 28). The appellants claim that the government did not have to engage in collective bargaining and that the

statutory changes would apply to existing bargaining agreements. (Appellants' Brief 3, 7, 27). The appellants claim that the Legislature's appropriation power is superior to the right of employees to engage in collective bargaining. (Appellants' Brief 25). For this proposition, the appellants rely on *State v. Florida Police Benevolent Ass'n*, 613 So. 2d 415 (Fla. 1993). (Appellant's Brief 25-27). However, the *PBA* case is not the last word from the Supreme Court of Florida on this subject. The last word is *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993). In *Chiles*, the Supreme Court began by explaining that *PBA* is confined to its facts and that in *PBA* there was no contract. *Chiles*, at 672. It reads:

> We begin by noting that the present case is factually quite different from our recent opinion in *State v. Florida Police Benevolent Association*, 613 So. 2d 415 (Fla. 1992). There we dealt with a situation in which no final agreement had been reached between the parties, unlike here where an agreement was reached and funded, then unilaterally modified by the legislature, and finally unilaterally abrogated by the legislature. Accordingly, we do not believe that the result reached in *Police Benevolent* dictates the result here.

In *Chiles*, the United Faculty of Florida was in the second year of a collective bargaining agreement which provided for a raise. The Legislature, having a $700 million shortfall, did not give the raise. The Supreme Court held that the Legislature had to give the raise because the

State's contracts must be as good as anybody else's. In this, the Court found no separation of powers problem. *Chiles*, at 673. The Supreme Court held:

> ...The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by article I, section 10 of the Florida Constitution, and is equally enforceable in labor contracts by operation of article I, section 6 of the Florida Constitution. The legislature has only a very severely limited authority to change the law to eliminate a contractual obligation it has itself created. Art. I, § 10, Fla. Const. As we stated in *Police Benevolent*, 613 So. 2d at 421,
>
> > [w]here the legislature provides enough money to implement the benefit as negotiated, but attempts to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced.
>
> We recognize that in the sensitive area of a continuing appropriation obligation for salaries and perhaps in other contexts as well, the legislature must be given some leeway to deal with bona fide emergencies. Accordingly, we agree with the trial court that the legislature has authority to reduce previously approved appropriations to pay public workers' salaries made pursuant to a collective bargaining agreement, but only where it can demonstrate a compelling state interest. Art. I, §§ 6, 10, Fla. Const.; *Hillsborough County Governmental Employees Ass'n, Inc. v. Hillsborough County Aviation Authority*, 522 So. 2d 358 (Fla. 1988).
>
> Before that authority can be exercised, however, the legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the legislature must demonstrate that the funds are available from no other possible reasonable source. [citing authorities].

Chiles v. United Faculty of Florida, supra, at 673.

In the present case, there are collective bargaining agreements (e.g. Vol. 12, R. 2269), so *Chiles* and not *PBA* applies.

In *Chiles,* the Supreme Court of Florida indicated that the right of public employees to bargain collectively and that existing collective bargaining agreements could not be impaired. This was constitutionally superior to the Legislature's appropriation power even when there was a budget shortfall. *Chiles*, at 673. (In *Chiles*, it was $700 million of a $28 billion budget; at page 674). The Court stated the strict scrutiny test at page 673: (1) compelling state interest; and (2) no other reasonable alternative. In the present case, this means that the Legislature must demonstrate that it cannot collect unpaid taxes; it cannot raise taxes; it cannot borrow money; it cannot curtail any more non-contractual spending; and that it cannot renegotiate any other contracts. In the present case, the government's employees alone would have to bear the burden. It is a kind of equal protection of the laws issue. When the government needs more money to provide its services, that is a burden that should be borne by all of us. It should not be borne by a discreet identifiable minority, the government's own employees.

Plainly, in the present case, the Legislature has not met the strict scrutiny test, especially the second part.

The appellants and the amici curiae, particularly the Legislature, have suggested that the constitutional invalidity of making FRS employee contributory and eliminating the COLA for future service would cause budget concerns. (Legislature's Brief 13-20). This is overstated and basically incorrect because it is incomplete.

The FRS pension trust fund has received the employees' contributions illegally (by an unconstitutional statute) and it has not received funding for the unlawfully eliminated COLA for future service (by an unconstitutional statute). Since FRS received the employee contributions illegally, it would have to refund them. When FRS refunds the employee contributions and the necessary COLA funding is determined, this would create an actuarial unfunded liability[8] in FRS. However, under Art. X, §14, Fla. Const., and Part VII of Chapter 112, Fla. Stat., (Florida Protection of Public Employee Retirement Benefits Act) and ERISA, an actuarial unfunded liability in a public employee pension system does not have to be accounted for when it occurs. §112.64(4), Fla. Stat. Rather, the sponsor of the trust, that is, the government need only have a plan to account for the actuarial unfunded liability over 30 years. §112.64(4), Fla. Stat.

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[8] Also called unfunded actuarial liability.

Section 112.63, Fla. Stat., provides that the cost methods utilized to establish the amount of the annual actuarial normal cost to support the promised benefit shall be only those methods approved by ERISA and the U.S. Treasury Department. Section 112.64, Fla. Stat., provides for the amortization of unfunded liability apart from annual normal costs. Section 112.64(4), Fla. Stat., provides:

> The net increase, if any, in unfunded liability under the plan arising from significant plan amendments adopted, changes in actuarial assumptions, changes in funding methods, or actuarial gains or losses shall be amortized within 30 plan years.

Now comes the good part. The experience of the fund over these 30 years, including interest, dividends and the profitable sale of investments offsets, year by year, what is required under the plan. §112.64(4), Fla. Stat.

Furthermore, the employer contributions for 2011 and 2012 are set by statute. §121.71, Fla. Stat. So no additional payments to FRS by employers would be required for these years.

Section 121.71, Fla. Stat. (2011), sets forth the employer contribution rates in order to address actuarial unfunded liabilities for the regular membership class and the special risk membership class and others. For the regular membership class, it was 0.497 of payroll for July 1, 2011, and 2.16

of payroll for July 1, 2012. For the special risk class, it was 2.75 of payroll for July 1, 2011, and 8.21 of payroll for July 1, 2012.

In the recent case of *The City of Miami Beach v. The Board of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Miami Beach*, No. 3D11-2974 (Fla. 3rd DCA June 27, 2012), the Third District Court of Appeal decided that the referendum requirement of Section 166.021(4), Florida Statutes, was unconstitutional when applied to collectively bargained pension rights in violation of Art. I, §6, Fla. Const. Id., at page 8. The Third District Court of Appeal held that Art. I, §6, Fla. Const., guarantees public employees the right of *effective* collective bargaining. This is the Court's original emphasis, as follows:

> The Florida Constitution guarantees public employees the right of *effective* collective bargaining. Collective bargaining is embedded in our state constitution's Declaration of Rights, and is deemed by our Supreme Court to be a fundamental right. [citing authorities].

Id., at 5-6.

Collective bargaining by public employees guaranteed by Article I, Section 6, Fla. Const., is an example of democracy in action because the wages, hours and terms and conditions of employment are to be agreed upon beforehand by a majority of the legislative body and by a majority of the bargaining unit membership, not just the union leaders and the government

executive or administrator. Section 447.309, Fla. Stat. A change in the employee's pension rights must be submitted to the bargaining unit members, to be approved by the majority. §447.309, Fla. Stat.; *City of Tallahassee v. P.E.R.C.*, supra. In the present case, the government never even asked. They did it for Chapter 175 and Chapter 185 changes, but not for FRS. Ch. 2011-216, Laws of Fla. They could have and should have, but did not.

As he did below, the intervenor, Brett Sandlin, argues that the provisions of Ch. 2011-68, Laws of Fla., making FRS employee contributory and eliminating the COLA for future service, are unconstitutional for violating Art. I, §6, Fla. Const. by having no collective bargaining on these changes and for violating Article I, Section 6, and Art. I, §10, Fla. Const., by applying to existing collective bargaining agreements.

The circuit court's declaration was correct and should be affirmed on this point. It is expected that the government will honor the declaration. See §86.061, Fla. Stat.

CONCLUSION

The order of the circuit court should be affirmed.

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Certificate of Service

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CERTIFICATE OF FONT SIZE AND STYLE

I certify that this brief has been typed in 14 point proportionately spaced Times New Roman.

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