

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

GEORGE WILLIAMS, MEGAN ALLEN,
KEVIN DOYLE, LORI GOODWIN,
ADAM TEICHNER, BRIAN ENGLAND,
MARTHA BAKER, MAGALIE VANCOL PENA,
ROLANDO TABARES, ALLEN JONES,
And JUAN BASO, individually and
on behalf of all other individuals similarly situated,

Plaintiffs,

v.

RICK SCOTT, JEFF ATWATER, and
PAM BONDI, in their capacities as
the STATE BOARD OF ADMINISTRATION,
JEFF ATWATER, as Chief Financial Officer
of Florida, and JOHN P. MILES, Secretary
of the Department of Management Services and
Administrator of the Florida Retirement
System,

Defendants.

CLASS REPRESENTATION

CASE NO. 2011 CA 1584

(Honorable Jackie L. Fulford)

**DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION**

Defendants submit this memorandum in opposition to Plaintiffs' Motion for Temporary Injunction. Plaintiffs seek to "segregate" the retirement contributions of public employees into "an interest bearing bank account or ... a short term investment fund" pending the outcome of this case. In requesting this unnecessary and legally insupportable remedy, Plaintiffs ignore the adverse consequences to public employees and the Florida Retirement System ("FRS") trust fund that could arise from the greatly-reduced return on investment that these contributions *should and would* be earning if invested in the normal course by the State Board of Administration ("SBA"), instead of being parked in a short-term account yielding returns scarcely higher than

zero. To deprive the SBA of these funds could harm employees in defined *contribution* programs by greatly reducing their returns, and compromise the actuarial soundness of the SBA going forward because the payouts of benefits for employees' defined *benefits* plans would remain the same despite the significant reduction in monies coming into the SBA to generate those payouts. The loss in investment revenues could be in the tens of millions of dollars, would be irreversible, and clearly would be contrary to the public interest.

This case is about money. And it is bedrock law that when monetary relief is all that is sought, and would be wholly sufficient to satisfy any claim, preliminary injunctive relief is inappropriate because no "irreparable injury" can be shown and an "adequate remedy at law" exists. In addition, Plaintiffs have no likelihood of success on the merits because the employee retirement contribution is completely prospective, and the Florida Supreme Court has long held that the Legislature has the constitutional authority to change the Florida Retirement System going forward. Hence, as shown below, Plaintiffs cannot satisfy even a single necessary element for obtaining a temporary injunction.

It is also important to note, at the outset, that although Plaintiffs' Complaint challenges two provisions of Chapter 2011-68 – the three percent of salary contribution and the prospective elimination of the cost-of-living adjustment ("COLA") – their Motion concerns *only* the salary contribution. See Motion at 3; Plaintiffs' Corrected Memorandum ("Mem.") at 3 n.1. Thus, while Plaintiffs devote much of their Memorandum to the COLA issue, not a word of that argument is relevant to the issue before the Court in the Motion for a Temporary Injunction.¹

¹ Indeed, Plaintiffs could not possibly make a showing sufficient for a temporary injunction with respect to the COLA adjustment, because no COLA adjustment will occur until at least July 1, 2012. Therefore, Plaintiffs could not show an imminent threat of irreparable harm sufficient to warrant an emergency preliminary injunction with respect to the COLA adjustment.

Relevant Background and Summary of Argument

As Plaintiffs concede, Florida is in the midst of a troubled economic time that presents severe budgetary challenges for the State, counties, and municipalities. Mem. at 15-16 (acknowledging “general budget issues caused by the economic recession”). Facing a budget shortfall of nearly four billion dollars and a constitutional requirement to balance the budget, the Legislature recently made many difficult decisions and passed a number of measures to pare back expenditures of public monies, including:

- \$1.5 billion in cuts to health and human services expenditures;
- \$200 million in cuts to transportation and economic development expenditures;
- \$260 million in cuts to prison expenditures;
- \$193 million in cuts to education expenditures;
- \$40 million in workforce and administrative reductions.

Far from singling out public employees, the Legislature spread necessary budget reductions across state programs and expenditures.

Among those difficult decisions was to convert the FRS to a noncontributory retirement system to one in which public employees would have to contribute toward their own retirements, as is the case in the vast majority of other states and previously was the case in Florida. That decision resulted in enactment of Chapter 2011-68, Laws of Florida, and the two provisions challenged in this action: (1) the requirement that public employees contribute three percent of their salaries beginning on July 1, 2011, to their own retirements (the “3% contribution”); and (2) reduction of the current three-percent annual cost of living adjustment (“COLA”) on retiree

benefits for FRS Pension Plan service on or after July 1, 2011 (the “COLA adjustment”).² These provisions are expected to save the State over one billion dollars. While Plaintiffs do not dispute the Legislature’s need to take action to meet economic challenges, the essence of their claim is that the Legislature should have “raise[d] taxes, cut spending or [made] different spending decisions [other than to modify] the FRS to balance its budget.” Mem. at 16.

Several points bear noting. First, this lawsuit challenges only the constitutional authority of the Legislature and the Governor to enact the statutory provisions at issue on behalf of the People of Florida. Through Florida’s Constitution, the People have entrusted matters concerning the public fisc and expenditures solely to the Legislature, Art. II, sec. 3, Fla. Const.; separation-of-powers principles require the judicial branch to respect that allocation of authority. *See, e.g., State v. Fla. Police Benev. Ass’n, Inc.*, 613 So. 2d 415, 418-19 (Fla. 1992). Moreover, it is beyond the province of the judiciary to substitute its own views as to the wisdom of legislation. *Sebring Airport Auth. v. McIntyre*, 783 So. 2d 238, 244-45 (Fla. 2001) (“[t]he propriety and wisdom of legislation are exclusively matters for legislative determination”) (citation omitted); *Deport v. Macri*, 902 So. 2d 271, 273 (Fla. 1st DCA 2005) (“The wisdom of the legislation is of no concern to us; nor is the fact that we might think it can be improved.”).

Second, the 3% contribution operates entirely prospectively. For services rendered by employees prior to July 1, 2011, contributions are unchanged. *It is only the contributions flowing from an employee’s services provided after July 1, 2011, that will be changed.*

Thus, as a matter of law the extraordinary temporary injunctive relief now sought by Plaintiffs is totally inappropriate. The requested segregation of employee contributions while this case remains pending addresses only the ability of Plaintiffs to receive back retirement

² The new COLA provisions will not affect FRS *Investment* Plan participating employees, who will not receive benefits as provided under the *Pension* Plan.

contributions should they ultimately prevail. This claim is purely a matter of money. No irreparable injury has been or can be shown. Nor can any inadequacy of legal remedy arise here, inasmuch as the entire controversy concerns the contribution of money.

Moreover, Plaintiffs cannot show a likelihood of prevailing on the merits. There is no blanket “contract” that prevents prospective conversion to a contributory retirement system with respect to future labor to be performed by public employees. At its core, this action seeks to enlist the judicial branch to declare public employees’ rights to a noncontributory system and a three-percent COLA to be etched in stone, perpetually unalterable by the People’s elected representatives even on a prospective basis. As demonstrated below, the Florida Supreme Court has rejected such an interpretation of the very constitutional and statutory provisions upon which Plaintiffs rely, underscoring that the public interest cannot be reconciled with Plaintiffs’ position.

Argument

In moving for a temporary injunction a movant bears an extraordinarily heavy burden:

The issuance of a preliminary injunction is an extraordinary remedy which should be granted sparingly, [and] which must be based upon a showing of the following criteria: (1) The likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) consideration of public interest.

Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38 (Fla. 1st DCA 2006) (quoting *Shands at Lake Shore, Inc. v. Ferrero*, 898 So. 2d 1037, 1038-1039 (Fla. 1st DCA 2005)).
Accord City of Jacksonville v. Naegele Outdoor Adver. Co., 634 So. 2d 750 (Fla. 1st DCA 1994).
As a matter of law, courts must exercise great caution and be “sparing” in entering temporary injunctions. *Thompson v. Planning Comm’n of City of Jacksonville*, 464 So. 2d 1231, 1236 (Fla. 1st DCA 1985); *see also Johnson v. Killian*, 27 So. 2d 345, 346 (Fla. 1946). Before a court properly can issue one, the movant must demonstrate that all four factors – each of which is an

essential element – have been met; the failure to satisfy any one is fatal to obtaining that relief. See, e.g., *De Leon v. Aerochago, S.A.*, 593 So. 2d 558, 559 (Fla. 3d DCA 1992).

Here, Plaintiffs fail to satisfy even a single one of the four essential elements.

I. PLAINTIFFS CANNOT SHOW IRREPARABLE HARM BECAUSE PLAINTIFFS CAN BE MADE WHOLE BY MONETARY RELIEF IF THEY PREVAIL

Plaintiffs contend that irreparable harm will result if the required 3% contributions are not sequestered while this litigation continues. Mem. at 22. Their contention is devoid of legal and logical support.

Plaintiffs offer no sound reason as to why any interim sequestration of employees' contributions is needed. Plaintiffs cannot articulate any impediment to obtaining the monetary relief they seek – refunds plus short-term market-level interest – in the absence of a temporary injunction. While they make vague references to problems that might be encountered by the SBA if a refund were later required, they ignore the burdens on the SBA from having to establish a separate fund now, having to qualify that separate fund for treatment as a proper retirement fund under all applicable tax laws and regulations, and having to provide for that separate fund either to be rolled into the existing retirement fund (if Defendants prevail as they should) or to be returned to the employees.³ As further discussed below, they also ignore the financial consequences to the FRS and employees in the Investment Plan if this Court requires tens of millions of dollars to linger in an impotent short-term account instead of being properly invested by the SBA for the duration of this litigation.

³ Plaintiffs also overlook that the monies invested by the SBA flow into the FRS *from hundreds of different employers across the state*. Thus, Plaintiffs ignore the possibility that, regardless of the outcome of this case, the funds at issue conceivably could be kept in the FRS and any required refunds arranged separately by the employers – all without any interim injunctive relief.

Moreover, Plaintiffs offer no basis for believing that this Court would be powerless to fashion appropriate relief in the unlikely event that Plaintiffs should prevail. The claim that the Court might lack a “mechanism ... to retrieve the funds” (Mem. at 23) is wholly unsupported in law or fact. Plaintiffs’ glaring inability to cite legal support for their argument is understandable. “In order to support the granting of a temporary injunction it is also necessary for plaintiff to demonstrate irreparable injury; *injury which cannot be redressed in a court of law.*” *Tamiami Trail Tours v. S. Greyhound Lines Div.*, 212 So. 2d 365, 366 (Fla. 4th DCA 1968) (emphasis added) (reversing temporary injunction).⁴ As noted, this lawsuit is solely about money. A preliminary dispute *not over whether* three percent of employees’ salaries should be contributed, but over *how* the State handles retirement contributions during the course of this litigation, cannot predicate a finding of irreparable harm to warrant entry of a temporary injunction.

As a matter of law, Plaintiffs’ failure in this critical respect requires the denial of their motion.

II. PLAINTIFFS HAVE AN ADEQUATE REMEDY AT LAW

For the reasons discussed above, Plaintiffs also have failed to establish that they lack an adequate remedy.

An adequate remedy at law exists if monetary compensation will suffice or atone for the loss. *Supreme Serv. Station Corp. v. Telecredit Serv. Ctr., Inc.*, 424 So. 2d 844 (Fla. 3d DCA 1983) (“Irreparable harm for the purpose of an injunction is not established where the harm can be compensated for adequately by money damages.”) (citing *Sampson v. Murray*, 415 U.S. 61 (1974)). See also *Oxford Int’l Bank & Trust, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,

⁴ Even the threatened loss of business caused by allegedly unlawful conduct by a competitor is legally insufficient to establish irreparable injury. *Id.* The same applies to loss of income during litigation. *State Dep’t of Health and Rehabilitative Servs. v. Artis*, 345 So. 2d 1109, 1111 (Fla. 4th DCA 1977) (reversing temporary injunction).

374 So. 2d 54 (Fla. 3rd DCA 1979); *Mary Dee's, Inc. v. Tartamella*, 492 So. 2d 815 (Fla. 4th DCA 1986); *Gonzalez v. Benoit*, 424 So. 2d 957 (Fla. 3d DCA 1983).

Again, the crux of this lawsuit is all about money: namely, whether employees must contribute some money towards their retirement benefits. Plaintiffs' inability to show that they are without adequate remedy at law constitutes an independent basis for the denial of their motion. See *Orlando Sports Stadium, Inc. v. State ex rel. Powell*, 262 So. 2d 881, 885 (Fla. 1972); *B.G.H. Ins. Syndicate, Inc. v. Presidential Fire & Cas. Co.*, 549 So.2d 197, 198 (Fla. 3rd DCA 1989).

III. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS

In seeking a temporary injunction, Plaintiffs further bear the burden of demonstrating that they are likely to prevail on the merits. See *Colucci v. Kar Kare Auto. Group, Inc.*, 918 So. 2d 431, 440 (Fla. DCA 2006) ("To prevail on an action for temporary injunctive relief, a party must demonstrate a substantial likelihood of prevailing on the merits."); *Mid-Florida At Eustis, Inc. v. Griffin*, 521 So. 2d 357 (Fla. 5th DCA 1988).

As a threshold matter, because this action seeks a declaration that duly-enacted statutory provisions are unconstitutional, the question of whether Plaintiffs satisfy the "likelihood of prevailing on the merits" element must be assessed under a rubric that is highly deferential to the State. First, statutes enacted by the Legislature and signed into law by the Governor enjoy a presumption of validity. *State v. State Bd. of Educ. of Fla.*, 467 So. 2d 294, 297 (Fla. 1985); *Bunnell v. State*, 453 So. 2d 808, 808 (Fla. 1984). That presumption of validity fully applies when a statute's constitutionality is challenged. *State v. Bussey*, 463 So. 2d 1141, 1144 (Fla. 1985); *Felts v. State*, 537 So. 2d 995, 1000 (Fla. 1st DCA 1988). Second, "if the legal rights of the parties are in dispute, a temporary injunction should not be issued." *Colucci*, 918 So. 2d at

440 (citing *Storer Comm'ns, Inc. v. State, Dep't of Legal Affairs*, 591 So. 2d 238, 240 (Fla. 4th DCA 1991)). Thus, any doubt as to whether chapter 2011-68 is constitutional must be resolved *against* entering a temporary injunction.

Because the claims raised by the Plaintiffs have little if any chance to succeed on the merits, no temporary injunction should issue.

A. Plaintiffs' Contract Claim Fails Because There Is No Bar to Legislation that Alters the FRS Prospectively

Plaintiffs attempt to create an incorrect impression that a "contract" exists that precludes the Legislature from changing the FRS back to a contributory system. Mem. at 8-16. Plaintiffs offer no evidence to support their position, and no such contract exists. In fact, the *actual* contracts that apply here – numerous distinct collective bargaining agreements between hundreds of public employers participating in the FRS and their respective employees – fully anticipate and accede to legislative changes to the FRS. Many of these contracts contain "savings clauses" that allow for and incorporate FRS changes made by the Legislature. See Master Contract, The State of Florida and Florida Public Employees Council 79 American Federation of State, County and Municipal Employees, AFL-CIO at 31-32 ("If any provision of this Contract is in contravention of ... subsequently enacted legislation ... then such provision shall not be applicable, performed, or enforced.") (attached hereto as Exhibit A).⁵ As such, the very law that Plaintiffs challenge as impairing a contract is incorporated into the contracts, and collective bargaining already is under way among FRS participants to take account of it. See Exhibit B.

Plaintiffs cite section 121.011(3)(d), Florida Statutes, which recognizes employees' rights under the FRS to be "of a contractual nature." They claim that this section entitles them to a

⁵ Exhibit A also contains numerous other examples of savings clauses found in contracts between state and local employers and employees.

permanent and unalterable noncontributory retirement system. The Florida Supreme Court rejected Plaintiffs' position thirty years ago, stating:

We stress that the rights provision [under section 121.011(3)(d)] 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 prospectively the mandatory, noncontributory retirement plan for state employees.

Fla. Sheriffs Ass'n v. Dep't of Admin., 408 So. 2d 1033, 1037 (Fla. 1981) (emphasis added). See also *Neu v. Miami Herald Pub. Co.*, 462 So. 2d 821, 824 (Fla. 1985) ("A legislature may not bind the hands of future legislatures by prohibiting amendments to statutory law.").

In *Florida Sheriffs*, the Court expressly held that the Legislature could prospectively reduce from 3% to 2% a special risk credit that certain law enforcement officers earned toward their retirement funds, but could not make that same reduction retroactive to apply to benefits accrued during prior years of service already provided by the employees. The key consideration was whether the new legislation changed benefits accruing for *future* service by employees, or instead altered benefits accruing for *past* service. The Court could not have been plainer: the Legislature is not foreclosed from passing statutes that change the retirement system with respect to services not yet provided by employees. It is only where legislation would change benefits

accruing to services already provided by employees that an impairment of contractual rights would arise.⁶

Because the Legislature cannot be “obligated” to continue any sort of retirement benefits into perpetuity and has the authority to change benefits going forward for labor services not yet provided by public employees, there cannot be any “contractual obligation” that was “impaired” here. This conclusion is driven home by the Supreme Court’s decision in *State v. Florida Police Benevolent Association*, 613 So. 2d 415, 418-19 (Fla. 1992). There, the Supreme Court reiterated that the Legislature’s supreme power over the state treasury cannot be abridged – even by a collective bargaining agreement entered into by the Florida Governor. Moreover, the notion that the very existence of the FRS and section 121.011(3)(d), Florida Statutes, created some overarching perpetual master contract restricting the Legislature was never even broached by the Court. The reason is clear: no such contract right exists.⁷

Plaintiffs’ lengthy discussion about Contract Clause jurisprudence is thus irrelevant, as are their citations to authorities from sister states whose constitutions, statutes, and case law differ from Florida’s and whose precedents are neither binding nor – in the face of the Florida Supreme Court’s decision in *Florida Sheriffs* – persuasive.

The bottom line is that there exists no binding, unalterable state-level “contract” that requires a noncontributory system, much less any “impairment” of such a contract. Instead, the

⁶ But even in such instances, Plaintiffs concede that the legislation could stand if it met the compelling interest standard. Because the legislation at issue operates only prospectively, the Court need not address the compelling interest standard here.

⁷ The absence of such a contract here renders inapposite *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (Fla. 1978), relied on by Plaintiffs. Mem. at 12. In *Dewberry*, the plaintiff had *already paid* the premium for an agreed level of insurance coverage for an agreed period of time – plainly a contractual arrangement – and midway through the agreed period the scope of coverage was reduced by legislative act, depriving plaintiff of the full value of the policy he had purchased. The impairment there was of an existing contract.

relevant collectively bargained contracts anticipate that the Legislature may alter substantive terms of the contracts, and there is nothing to prevent the parties from bargaining around such alterations. *See* Exhibit B. The probability that Plaintiffs will prevail on their contract impairment claim is effectively zero.

B. Plaintiffs' Takings Claim Fails As a Matter of Law

Plaintiffs next make the meritless claim that the 3% contribution provided in chapter 2011-68, section 33, Laws of Florida, amounts to a "physical taking" of employee property without compensation. *See* U.S. Const. amend. V; Art. X, § 6, Fla. Const. Because the new law operates only *prospectively* and without affecting vested rights or other assets, Plaintiffs lack any cognizable takings claim.⁸

The first step in analyzing a takings claim is to ask whether the plaintiffs have a protected property interest that has been jeopardized by governmental action. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-04 (1984). The instant Plaintiffs do not. As shown above, they possess no statutory or contract-based right in having the FRS operate perpetually as a noncontributory retirement system. Also, the very terms of chapter 2011-68 state that the law only operates prospectively – requiring contributions beginning July 1, 2011 – such that already-

⁸ Chapter 2011-68, Florida Laws, does not alter vested benefits but only FRS terms regarding contributions going forward, as follows:

Beginning July 1, 2011, each employee shall contribute [to the FRS].... The employee does not have the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the plan. Such contributions are mandatory and each employee is considered to have consented to payroll deductions. Payment of an employee's salary or wages, less the contribution, is a full and complete discharge and satisfaction of all claims and demands for the service rendered by employees during the period covered by the payment.

Ch. 2011-68, Fla. Laws, § 33 (amending § 121.71(2), Fla. Stat.).

accrued benefits and assets are not affected. Plaintiffs nonetheless assert a property interest in retaining the old noncontributory retirement system or being able to “opt out of the FRS or otherwise prevent the deduction from their salary.” Mem. at 18; *see also* Complaint ¶¶ 83-84 (“[b]y deducting 3% ... Chapter 2011-68 ... violates [Art. X, § 6, Fla. Const.]”). This attempt to lock the current FRS retirement plan into place though the Takings Clause cannot prevail, because employees have no property interest in having a non-contributory FRS plan.

To have a legally cognizable property interest in the perpetuation of the current FRS system, plaintiffs “must have more than an abstract need or desire for it. [They] must have more than a unilateral expectation of it. [They] must, instead, have a legitimate claim of entitlement to it.” *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). However, statutorily provided employee benefit plans are creations of the Legislature, which also retains the discretion to alter the laws.

[A]n act merely fixing salaries of officers creates no contract in their favor, and the compensation named may be altered at the will of the Legislature.... The presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.

Dodge v. Bd. of Educ. of City of Chicago, 302 U.S. 74, 78-79 (1937).⁹ In fact, “[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his

⁹ *See also U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980) (rejecting a claim that Congress had “taken property in violation of the Fifth Amendment, since railroad benefits, like social security benefits, are not contractual and may be altered or even eliminated at any time”); *Lynch v. United States*, 292 U.S. 571, 576-77 (1934) (“Pensions, compensation allowances and privileges [accorded to former members of the army and navy] are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress.”); *Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir. 1985) (“a ‘government fostered expectation’ that retirees will be provided retirement annuities which will not be ravaged by inflation ... does not

benefit.” *New York Cent. R. Co. v. White*, 243 U.S. 188, 198 (1917); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 n.24 (1994) (citing the observation that “[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.”) (citation omitted).

The Florida Supreme Court recognizes the same principle and has held that the Legislature can alter retirement benefits of active employees prospectively, *Fla. Sheriffs Ass’n*, 408 So. 2d at 1036-37. In fact, such changes to state benefit systems are commonplace. See, e.g., *Nat’l Educ. Ass’n-R.I. v. Ret. Bd. of R.I. Employees’ Ret. Sys.*, 172 F.3d 22, 27 (1st Cir. 1999) (“After all, legislatures regularly modify compensation schedules and benefit programs. Supreme Court precedent has tended to treat government pension statutes as similarly subject to modification for payments not yet made, unless the government’s intent to create a contract is clear and definite.”) (citing *Dodge*, 302 U.S. at 78-79). Thus, Plaintiffs cannot prevent the Legislature from amending the FRS Plan under a takings theory, because they have no legally cognizable property interest in their preferred terms.¹⁰

rise to the level of ‘property’ protected by the takings clause”); *Monaco v. United States*, 523 F.2d 935, 939 (9th Cir. 1975) (Veterans Preference Act, which gave veterans preference to retention in civil service, did not confer “a vested, unrepealable” right to such preference); *Jones v. Reagan*, 748 F.2d 1331, 1338-39 (9th Cir. 1984) (merchant seamen’s “property right” to free medical care extinguished by Congress’s repeal of benefit; takings challenge rejected).

¹⁰ There also is no credible argument that the operation of a mandatory contributory retirement plan, by itself, violates the Takings Clause. Mandatory contributory retirement systems are commonplace. See, e.g., *Fla. Sheriffs Ass’n*, 408 So. 2d at 1034 (explaining different types of governmental retirement plans including mandatory, contributory systems). In fact, the Complaint acknowledges that the FRS system itself used to operate as a contributory plan “mandatory for all officers and employees.” Complaint ¶ 30. See also *Fla. Sheriffs Ass’n*, 408 So. 2d at 1034 (describing that “[o]n December 1, 1970, the legislature consolidated all existing retirement systems into a mandatory, contributory plan”). At that time, the FRS required that “regular members contribute[] 4% of their gross compensation toward their FRS retirement.” Complaint ¶ 31. See also *Fla. Sheriffs Ass’n*, 408 So. 2d at 1034 (a mandatory plan “can be contributory [and] require the employee to contribute part of his pay to the system”).

Plaintiffs' citation to *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), does not rescue their takings claim. First, *Webb's* recognized that property rights generally arise from state law, whereas here Florida law grants no "property right" to employees to have a specific retirement system.

[P]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....' *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Webb's, 449 U.S. at 161. Second, *Webb's* addressed "narrow circumstances" where government holds "private" money that is to be returned to a depositor and which accrues interest. *Id.* at 164-65. In such circumstances, government may not retain the interest on the private money for itself, but "interest ... follows the principal and is to be allocated to those who are ultimately to be the owners of the principal." *Id.* at 162.

Webb's holding does not further the Plaintiffs' argument here with respect to either the FRS Investment or the Pension Plan. In the FRS *Investment* Plan, the contributions of members together with any accrued earnings or interest are held in discrete funds and disbursed back to the member at retirement. The FRS does not retain earnings or interest on these accounts, so nothing can be considered to have been "taken." In the FRS *Pension* Plan, contributions are not held in individualized or "private" accounts as was the case in *Webb's*. Instead, Pension Plan contributions by members are pooled and invested to support the FRS's funding of a defined schedule of benefits that are paid back to members without regard to earnings on specific contributions or prevailing market/interest rate returns. There is no individual or "private" account held by the State or earnings on discrete contributions. The narrow circumstances addressed by *Webb's* do not apply to this type of non-private, non-individualized account. See *State ex rel. Horvath v. State Teachers Ret. Bd.*, 697 N.E. 2d 644, 651-52 (Ohio 1998)

(concluding that *Webb's* did not require the return of interest on mandatory contributions made to a system that disbursed defined benefits); *Crown v. Trs. of Patrolmen's Variable Supplements Fund*, 659 F. Supp. 318, 320 (S.D.N.Y. 1987), *aff'd*, 819 F.2d 47 (2d Cir. 1987) (holding that because contributors' property rights are determined solely by the governing statutes, "plaintiffs lack a property interest in the investment earnings of the [State] Pension Fund").¹¹

For these reasons, Plaintiffs have no cognizable Takings Clause claim, much less a strong likelihood of succeeding on the merits of any such claim.

C. Plaintiffs' Claim of Collective Bargaining Rights Infringement Lacks Merit

Plaintiffs next contend that the challenged legislation violates the right of public employees to engage in collective bargaining under Article I, section 6 of the Florida Constitution. This claim is unfounded, both legally and factually.

Plaintiffs argue that there is no difference (save the right to strike) between public and private employees, that any aspect of employment can be the subject of negotiations in the private sector, that the same must be true in the public sector, and therefore that the Legislature is helpless to legislate concerning employment. Mem. at 19-21. Plaintiffs' position is fundamentally unsound, as a matter of law.

To begin with, Plaintiffs are wrong in their contention that there are no real differences between public and private employees. In *State v. Fla. Police Benev. Ass'n*, 613 So. 2d 415 (Fla. 1992), discussed *supra*, the Supreme Court flatly disagreed with Plaintiffs, stating:

In fact, courts and commentators uniformly agree that public bargaining is inherently different from private bargaining. ...

* * *

¹¹ Of course, the employee controls the option in the first instance of participating in either the Investment Plan, with defined contributions that accrue earnings and interest in an individual account, or the Pension Plan, where the individual nature of contributions is lost and benefits are paid to all according to a defined formula.

The fact that public employee bargaining is protected under Florida's Constitution does not require us to ignore universally recognized distinctions between public and private employees. The constitutional right to bargain must be construed in accordance with all provisions of the constitution. Surely it was not intended to alter fundamental constitutional principles, such as the separation of powers doctrine. Under the Florida Constitution, exclusive control over public funds rest solely with the legislature. Art. I, § 1(c), Fla. Const. ("No money shall be drawn from the treasury except in pursuance of appropriation made by law."). This fact in and of itself necessitates a realization that public and private bargaining is inherently different.

Unlike the case of a private employer, whose agreement with a union binds the employer to fund its terms, the public employer, deemed by statute to be the governor, cannot so bind the guardian of its funds, the legislature.

613 So. 2d at 417-18.¹² There, the Legislature enacted a proviso that altered the leave policy for career service employees. *Id.* at 416. Nevertheless, the legislation was upheld. Explaining this result, the Supreme Court stated:

Where the legislature provides enough money to implement the changes as negotiated, but attempts to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced. This result would not impede the legislature's exclusive power over public funds, because the funds would already be there to enforce the benefit. *Where the legislature does not appropriate enough money to fund a negotiated benefit, as it is free to do, then the conditions it imposes on the use of funds will stand even if contradictory to the negotiated agreement.*

Id. at 421 (emphasis added) (footnotes omitted).

This holding effectively dooms Plaintiffs' claim that their collective bargaining rights have been infringed, for several reasons. First, there is no "negotiated benefit" here at all. The earlier conversion from a contributory system to a noncontributory system was made by statute, not by collective bargaining negotiations, and the same is true of the conversion back to a

¹² See also *Fla. Police Benevolent Ass'n v. State*, 818 So. 2d 584, 586 (Fla. 1st DCA 2002) ("public bargaining and private bargaining are inherently different because, under the Florida Constitution, exclusive control over public funds rests solely with the legislature.").

contributory system. Second, as Plaintiffs concede, this conversion was motivated by the Legislature's concern for the fisc, over which it wields exclusive control, and was made precisely to save money by reducing the level of prospective funding of FRS retirement accounts for public employees – funding for which no appropriation had been made in the first place. Third, where, as here, no appropriation has been made to fully fund a negotiated benefit, the Legislature may impose conditions on the use of funds – employee leave allowances in *Fla. Police Benevolent Ass'n*, and retirement contributions here.¹³ *This result obtains even though both leave allowances and retirement contributions could be the topics of collective bargaining.*

The Supreme Court further noted:

Accordingly, the collective bargaining agreements entered into by the unions in this case were subject to the appropriations power of the legislature, are as any agreements entered into by public employees. Indeed, the agreements themselves recognized this [noting in footnote 5 that “[e]ach agreement contained a ‘Savings Clause,’ which provided as follows: “If any ... provision of this Agreement ... should be rendered ... invalid ... by reason of any existing or subsequently enacted legislation ... then such provision shall not be applicable, performed or enforced”] *The fact that this contingency differentiates public bargaining from private bargaining does not represent an abridgement of the right to collectively bargain, but rather an inherent limitation due to the nature of public bargaining itself.*

Id. at 419 & 419 n.5 (emphasis added). Obviously, the Court deemed the inclusion of “savings clauses” in the pertinent collective bargaining agreements to constitute “recognition” of the Legislature’s authority to alter or affect the agreements’ terms.

Here, as shown in Exhibit A, comparable savings clauses are found in all or most of the collective bargaining agreements between the public employers and public employees subject to the FRS. Those clauses incorporate into the agreements such legislation as may be passed that

¹³ In upholding legislative restrictions on employee leave, the Court noted that the Legislature “did not simply underfund or refuse to fund certain benefits, but rather unilaterally changed them.” 613 So. 2d at 420.

would affect terms and conditions of the agreements. While they are, as noted, mere acknowledgements of legislative authority, their inclusion cannot logically be viewed as violative of the collective bargaining process in any event because they result from that process.

Moreover, as demonstrated by Exhibit B, Plaintiffs' contention that the legislation at issue has infringed collective bargaining rights is belied by the fact that negotiations for pay raises to offset or mitigate the effects of that legislation have been occurring for at least some of the affected employees.¹⁴ While such offsets likely will not be feasible for employers facing difficult fiscal realities, there is nonetheless no impediment to such negotiations taking place with respect to the many public employee groups on whose behalf employers make contributions to the FRS.

Finally, insofar as this action would qualify as a labor dispute or an unfair labor practice claim, it should have been brought before the Public Employees Relations Committee ("PERC"), warranting dismissal of this action for want of jurisdiction and failure to exhaust administrative remedies. *See, e.g., Fla. Educ. Ass'n v. Wojcicki*, 930 So. 2d 812 (Fla. 3d DCA 2006); *Maxwell v. Sch. Bd. of Broward Co.*, 330 So. 2d 177 (Fla. 4th DCA 1976). That Plaintiffs assert claims of violation of the Florida Constitution does not alter this result. *See Hadi v. Liberty Behavioral Health Corp.*, 927 So. 2d 34, 38 (Fla. 1st DCA 2006) ("[The] mere assertion of constitutional questions should not automatically entitle a party to bypass administrative channels.") (quoting *Gulf Pines Mem'l Park, Inc. v. Oaklawn Mem'l Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978)).

D. Class Action Status

Plaintiffs, having pitched their suit on the faulty premise of a common contractual right to retain a noncontributory retirement system and a three-percent COLA for benefits flowing from

¹⁴ Time constraints for preparing this submission prevent a thorough reporting of all such collective bargaining developments.

future services, have identified a “class” that ignores the hundreds of distinct employers and corresponding employee groups participating in the FRS, ignores that many groups are subject to distinct collective bargaining agreements, and ignores that negotiations are completed or under way by some of the 970 FRS employers to offset or mitigate the effects of the relevant legislative provisions.

As a consequence, it is likely that Plaintiffs will fail to meet the requirements of Florida Rule of Civil Procedure 1.220 to maintain a class action. The requisite commonality of questions of law or fact required under Rule 1.220(a)(2), and the typicality requirement under Rule 1.220(a)(3), are patently lacking where, as here, a potentially significant (but as yet unidentified) number of members of the proposed class have bargained away causes of action or effects arising from a claimed wrong. In such a circumstance, the requirements of Rule 1.220(b)(2) also could not be met, because the party opposing the class has not acted or refused to act on grounds generally applicable to the class: some employees will have been made “whole” for the reduction in take-home pay, while others may not. It also is unlikely that questions of law or fact common to a claim or defense could be deemed to “predominate” over key questions of law or fact that differ markedly from one putative class member to another, rendering Rule 1.220(b)(3) unavailing for Plaintiffs. Indeed, the collective bargaining process may end up yielding dozens of different situations applicable to employees in the FRS.

The unsuitability of class action treatment here further underscores the inappropriateness of a temporary injunctive remedy on behalf of all members of the ill-defined class.

IV. THE PUBLIC INTEREST WILL BE DISSERVED BY ENJOINING THE EFFECTIVE APPLICATION OF THE LEGISLATION AT ISSUE

In *Florida Land Co. v. Orange Co.*, 418 So. 2d 370 (Fla. 5th DCA 1982), the Fifth District Court of Appeal stated:

A trial court may properly refuse to grant an injunction when it appears that greater injury and inconvenience would be caused to the Defendant by granting the injunction than denying it, or where the granting of an injunction would result in confusion, disorder and injury to the public outweighing any individual rights to the relief the complainant may have.

Id. at 372 (citation omitted).

Plaintiffs ignore the harms that their requested segregation of employees' three-percent contributions into "an interest bearing bank account or ... a short term investment fund" could cause to employees and to the actuarial soundness of the FRS trust fund going forward. If Plaintiffs' Motion is denied, those contributions will be invested by the SBA and likely will yield returns *many times greater* than would accrue in the sort of short-term vehicle Plaintiffs ask the Court to impose. Indeed, the difference may amount to tens of millions of investment dollar returns forever foregone. *See Exhibit C (Declaration of Ron Poppell, Senior Defined Contribution Programs Officer at the SBA.)*

Plaintiffs' proposal would mean that employees participating in the Investment Plan, whose contributions are defined but whose benefits derive from investment outcomes, could earn greatly diminished returns on their retirement funds.

At the same time, with respect to the Pension Plan, the SBA would continue to have to *pay out* the same in defined benefits, but it would be deprived of a significant portion of monies *coming in* upon which it depends to generate the investment returns needed to pay those benefits. Thus, while Plaintiffs make much of the *current* actuarial soundness of the FRS trust fund in the SBA's hands, the injunction they seek would compromise that actuarial soundness *going*

forward. The loss in investment revenues, likely in the tens of millions of dollars, clearly would be contrary to the public interest.¹⁵

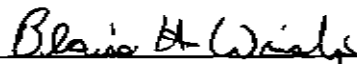
Under these circumstances, Plaintiffs cannot carry their burden of establishing that the public interest would be advanced by entry of the temporary injunction they seek.

Conclusion

For all of the reasons stated above, Plaintiffs' motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of June, 2011, a copy of the foregoing was served by electronic mail and by U.S. Mail upon:

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¹⁵ In addition, as Exhibit C demonstrates in detail, numerous other problems would arise, for the SBA and covered employees, in the event that the Motion is granted.

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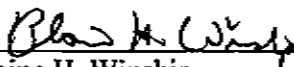
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