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

GEORGE WILLIAMS, *et al.*

Plaintiffs,

v. CASE NO. 2011 CA 1584

RICK SCOTT, *et al.*,

Defendants.

_____________________________________/

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

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Defendants Rick Scott, Jeff Atwater, and Pam Bondi, in their capacities as the State Board of Administration, and John P. Miles, in his capacity as the Secretary of the Department of Management Services (collectively, "Defendants"), respectfully submit this Memorandum in Opposition to the Motion for Summary Judgment filed by the Lead Plaintiffs and Intervening Plaintiffs Park and Haire (the "Lead Motion") and the Motion for Summary Judgment filed by Intervening Plaintiff Sandlin (the "Sandlin Motion") (collectively, "Plaintiffs' Motions"). As set forth herein, Plaintiffs' Motions fail to establish that Plaintiffs are entitled to summary judgment on any counts in the Complaint. Accordingly, Plaintiffs' Motions should be denied and, for the reasons set forth in Defendants' Motion for Summary Judgment ("Defendants' Motion"), Defendants are entitled to summary judgment on all five counts in the Complaint.

I. CHAPTER 2011-68 DOES NOT IMPAIR FRS MEMBERS' CONTRACTS WITH THE STATE, THEREFORE THERE IS NO CONSTITUTIONAL VIOLATION.

A. *Florida Sheriffs* Expressly Authorizes The Types Of Prospective Changes Created By Chapter 2011-68.

As Plaintiffs acknowledge, "[a] determination of whether the Contract Clause has been violated involves an examination of . . . whether or not there is a contractual obligation . . ." See Lead Motion at p. 8. As set forth in Defendants' Motion and below, the decision of the Florida Supreme Court in Florida Sheriffs Association v. Department of Administration, 408 So. 2d 1033 (Fla. 1981), confirms that the State has no contractual obligation to maintain future benefits. Accordingly, the only contractual rights held by Plaintiffs are to previously-earned benefits, which, as set forth in Defendants' Motion, are not reduced by either the Employee Contribution Requirement or the COLA amendment.[1] Thus, Plaintiffs' "contract" with the State

[1] "Employee Contribution Requirement," "COLA," and all other undefined capitalized terms have the same definitions as those assigned to them in Defendants' Motion

was not impaired,[2] and Plaintiffs' Contract Clause claims, consisting of Counts I and II of the Complaint, fail as a matter of law.

As Plaintiffs expressly acknowledge, in Florida Sheriffs, the Florida Supreme Court defined the extent of the contractual rights contained in the preservation of rights section by "conclud[ing] that the legislature '***ha[d] the authority to modify or alter prospectively the mandatory, noncontributory plan for active state employees***' . . ." See Lead Motion at p. 9 (quoting Florida Sheriffs, 408 So. 2d at 1037) (emphasis added). As noted in Defendants' Motion, the Florida Supreme Court held that restricting future Legislatures from *prospectively* altering FRS "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." Florida Sheriffs, 408 So. 2d at 1037. This led the Supreme Court to conclude that the position taken by the Florida Sheriffs plaintiffs – just like the position of Plaintiffs here – "is not in accordance with the intent of the legislature." Id. According to the Supreme Court, "the legislature has the authority to modify or alter prospectively the mandatory, noncontributory retirement plan for active state employees." Id. The Supreme Court further stated that "[t]o 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." Id. Accordingly, Florida Sheriffs expressly dictates

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2 The contract which Plaintiffs contend has been impaired is not any form of written contract. Rather, Plaintiffs contend that the "contract" at issue is the contractual right created by Florida Statutes § 121.011(3)(d) (the so-called "preservation of rights" section), which provides that "[t]he rights of members of [FRS] 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."

that prospective changes to FRS, such as those in Chapter 2011-68, do not operate as an impairment of contract.[3]

B. Plaintiffs' Efforts To Distinguish *Florida Sheriffs* Are Unavailing.

1. Plaintiffs Attempt to Distinguish *Florida Sheriffs* On Factors Upon Which The Florida Supreme Court Did Not Base Its Decision.

Plaintiffs invent two arguments in their attempts to distinguish Florida Sheriffs.[4] First, Plaintiffs argue that the Florida Supreme Court "acknowledged that the preservation of rights provision 'vests all rights and benefits already earned under the present retirement plan so that the legislature may now only alter retirement benefits prospectively.'" See Lead Motion at pp. 9-10 (quoting Florida Sheriffs, 408 So. 2d at 1037). According to Plaintiffs, "***[b]ecause special risk credit is applied to years of service, it was clear that the plaintiffs in that case had not yet earned the 'right' or 'benefit' to a certain special risk credit for years of service they had not yet performed.***" See id. at p. 10 (emphasis added). Plaintiffs argue that "[t]he same is not true

[3] As there is no impairment of contract, Plaintiffs' arguments as to whether any impairment was "substantial" or "necessary" are irrelevant. However, the changes in Chapter 2011-68 are insubstantial because Plaintiffs' contributions are only a small percentage of the additional benefits they will earn on and after July 1, 2011. For example, based upon the numbers produced by Plaintiffs' expert, Charlette Moore ("Moore"), Plaintiff Lori Anne Goodwin ("Goodwin") will earn $559,038 in additional benefits on and after July 1, 2011, yet she will only contribute $21,969 to receive those additional future benefits. See Exhibit 12 to Defendants' Motion. Likewise, according to Moore, in Plaintiff George Williams's ("Williams") second year of retirement (the first year in which FRS members receive a COLA), his monthly benefit will be only $7.82 smaller (out of a monthly benefit of over $1,615) than if he received a 3% COLA for his entire service. See Exhibit 15 to Defendants' Motion at Ex. B, pp. 2-3. Indeed, Moore postulates that Williams's total retirement income will be less than 5% smaller than it would have been if he received a 3% COLA for his entire service. See id. at Ex. B, p. 1. Moreover, the changes imposed by Chapter 2011-68 were necessary because the Legislature faced a budget shortfall of $3.6 billion and anticipated cost savings of $1.1 billion through Chapter 2011-68, 73% of which were obtained through the Employee Contribution Requirement and the COLA amendment. See Exhibits 1 and 8 to Defendants' Motion.

[4] Despite contending that there are "several reasons" why Florida Sheriffs purportedly does not control here (see Lead Motion at pp. 9-10), Plaintiffs only argue two bases – both of which fail as a matter of law, as set forth herein.

here" because they "have from the inception of their employment participated in a plan that expressly prohibited employee contributions and expressly conferred a COLA upon the final retirement benefit throughout retirement." See id.

This is a distinction without a difference. Plaintiffs acknowledge that the special risk credit at issue in Florida Sheriffs could be prospectively modified because "the plaintiffs in that case had not yet earned the 'right' or 'benefit' to a certain special risk credit ***for years of service they had not yet performed.***" See Lead Motion at p. 10 (emphasis added). The same is true here. The Employee Contribution Requirement and COLA amendment are only applicable "***for years of service [Plaintiffs] ha[ve] not yet performed.***" While Plaintiffs contend that they have "from the inception of their employment participated in a plan that expressly prohibited employee contributions and expressly conferred a COLA upon the final retirement benefit throughout retirement" (see id.), the Florida Sheriffs plaintiffs also participated in a plan that expressly provided a higher Value Percent for FRS members who received a special risk credit.[5] The key holding of Florida Sheriffs, which Plaintiffs admit, is that FRS members have no contractual rights to future benefits where they have "not yet earned the 'right' or 'benefit' . . . for years of service they [have] not yet performed." See id. Plaintiffs had not earned the right to participate in FRS on and after July 1, 2011, without making contributions, and had not earned the benefit of a COLA for the work performed on and after that date. Accordingly, just as the prospective change was upheld in Florida Sheriffs, there is absolutely no reason a similar prospective change should not be upheld in this case.

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5 Plaintiffs argue that "[u]nlike the special risk credit at issue in Florida Sheriffs, neither of [the contribution or COLA] components of the FRS have ever been related to or dependent upon years of service." See Lead Motion at p. 10. This is incorrect. The COLA is calculated as a percentage of a member's benefit (see Florida Statutes §121.101(3)), which is based upon years of service. Similarly, the Employee Contribution Requirement only applies to future years of service.

Plaintiffs' second basis for distinguishing Florida Sheriffs is that "the dramatic systemic changes to FRS challenged in this case are wholly unlike the insubstantial reduction in future benefit addressed in Florida Sheriffs." See Lead Motion at p. 10. As a preliminary matter, this is a highly dubious argument, considering that the Florida Sheriffs plaintiffs certainly would not have thought the changes to FRS in that case were "insubstantial." Indeed, the special risk credit at issue in Florida Sheriffs was reduced "from three to two percent," or a decrease of 33%. 408 So. 2d at 1034. No such drastic reduction is at issue here. Plaintiffs' own expert report shows that not one plaintiff has a 33% reduction in future retirement income. For example, according to Moore, Williams's total retirement income is less than 5% lower than it would have been, but for Chapter 2011-68 (with Williams receiving $426,580 instead of $447,260). See Exhibit 15 to Defendants' Motion at Ex. B, p. 1. Certainly, Moore does not contend that any of the Plaintiffs incur anything close to a 33% decrease in benefits. See generally id.

Regardless, Plaintiffs' position would be impossible for courts or for the State to manage, because their standard – or, in reality, their lack of a standard[6] – would be defined by some amorphous determination of when changes to FRS were sufficiently "dramatic" as to prohibit the Legislature from prospectively modifying FRS. This would require a case-by-case analysis subject only to the whims of a reviewing court as to whether the legislation was sufficiently "dramatic." As the Florida Supreme Court has stated in examining whether laws provide adequate guidance to an administrative body, "when these purported standards are considered with the thing to be tested, it becomes evident that in truth and in fact [Plaintiffs' position] establishes no standards at all . . ." Godshalk v. Winter Park, 95 So. 2d 9, 12 (Fla. 1957).

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[6] Significantly, Plaintiffs suggest no standard of what the bright-line would be that would somehow make a "dramatic" prospective change an impairment of contract, whereas a lesser change would not be an impairment of contract.

Of course, it must also be noted that absolutely nowhere in Florida Sheriffs did the Florida Supreme Court indicate that its decision was based in any way upon the factual distinctions raised by Plaintiffs. The Florida Supreme Court set forth a decisive, bright-line rule that reviewing courts can easily follow: if a change to FRS is prospective, it is permissible; if a change *retroactively* reduces benefits, it is only permitted if the change is either insubstantial or necessary. Conspicuously, Plaintiffs cite to no cases in which Florida courts have ever used minor factual distinctions as a means to distinguish Florida Sheriffs. Rather, Plaintiffs are far overreaching by finding minor factual variances between this case and Florida Sheriffs, and then contending that those variances distinguish the two cases. But there is simply nothing in Florida Sheriffs to suggest that the Florida Supreme Court based its decision on the minor distinctions conjured by Plaintiffs. As such, the controlling principle of Florida Sheriffs is just as applicable here as it was in that case. Accordingly, Defendants submit that Florida Sheriffs is binding and controlling precedent that directly addresses the case at bar.

2. Plaintiffs' Attempts To Distinguish *Florida Sheriffs* Would Require The Court To Allow One Legislature To Improperly Bind Future Legislatures.

Even if the Court were inclined to credit Plaintiffs' efforts to distinguish Florida Sheriffs, the ruling Plaintiffs seek would also run afoul of another longstanding legal principle articulated by the Florida Supreme Court – namely, that one Legislature cannot bind future Legislatures. The Supreme Court spoke directly on this point in Florida Sheriffs when it noted that: "***We stress that the rights provision was not intended to bind future legislatures from prospectively altering benefits which accrue for future state service.***" 408 So. 2d 1037. This position has been restated by the Supreme Court on many occasions. See, e.g., 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."), *superseded in part on other grounds as stated in*

Melbourne v. A.T.S. Melbourne, Inc., 475 So. 2d 270, 271 (Fla. 1985); Daytona Beach Racing & Rec. Facilities Dist. v. Volusia County, 372 So. 2d 419, 420 (Fla. 1979) ("The legislature cannot bind its successors with respect to the exercise of the taxing power; a subsequent legislature has the unquestioned authority to repeal prior tax exemption statutes."); Ware v. Seminole County, 38 So. 2d 432, 433 (Fla. 1949) ("To hold otherwise would mean that one legislature could bind a future legislature and interfere with the exercise of its orderly functions. That this cannot be done is too academic to discuss."); Tamiami Trail Tours, Inc. v. Lee, 142 Fla. 68, 71 (Fla. 1940) ("The legislative power to deal with new situations as they arise cannot thus be limited, even though their action expressly or impliedly repeals former legislative Acts.").

In the Lead Motion, Plaintiffs cite to United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977) ("U.S. Trust") for the principle that "the U.S. Supreme Court has expressly rejected the notion that one legislature cannot bind a future legislature." See Lead Motion at p. 15. This is a drastic misinterpretation of U.S. Trust and a meaningless argument. In U.S. Trust, the Court expressly ***upheld*** that one legislature cannot bind a future legislature, except insofar as "States are bound by their debt contracts." 431 U.S. at 23-24. Here, Chapter 2011-68 does not preclude the State from paying its debts – *i.e.*, paying all benefits that have already been earned – it only reduces the extent to which the State will accrue debts in the future.[7]

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[7] Moreover, even if U.S. Trust stated the broad principle for which Plaintiffs incorrectly cite it, this would not salvage Plaintiffs' argument. Nothing in U.S. Trust, which applied the federal Contracts Clause, considered whether a State could, under State law, preclude one legislature from binding a future legislature. "[T]he federal Constitution generally sets the floor, not the ceiling, with regard to the extent of personal rights and freedoms afforded by the State of Florida." State v. Kelly, 999 So. 2d 1029, 1042 (Fla. 2008). The Florida Supreme "Court is the ultimate 'arbiter[] of the meaning and extent of the safeguards provided under Florida's Constitution." Id. (quoting Busby v. State, 894 So. 2d 88, 102 (Fla. 2004)). Thus, the Florida Supreme Court's precedent that one Legislature cannot bind future Legislatures is Florida law regardless of U.S. Trust.

Thus, even if Plaintiffs' strained efforts to distinguish Florida Sheriffs found favor with the Court, it could have absolutely no effect upon the outcome of this case. If the Court were to credit Plaintiffs' irrelevant distinctions between this case and Florida Sheriffs and find Florida Sheriffs distinguishable, this would have the net effect of allowing the 1974 Legislature – through the passage of the preservation of rights section – to bind all future Legislatures to permanently provide the same benefits to all FRS members. Clearly, the 1974 Legislature was without authority to take this drastic step (a step which the Florida Sheriffs Supreme Court expressly held that the 1974 Legislature did not intend to take).[8]

C. The Changes Created By Chapter 2011-68 Are Prospective, Not Retroactive.

Plaintiffs contend that, through the Employee Contribution Requirement, "the state has 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." See Lead Motion at p. 11. Not only is this position directly contrary to the Florida Supreme Court's holding in Florida Sheriffs, but it is also completely illogical. Plaintiffs argue that because they will have to "pay more for each pension dollar they will eventually receive," the result is that the Employee Contribution Requirement has retroactive effect. Plaintiffs' theory redefines the word "retroactive." As established in Defendants' Motion, each Plaintiff had a set amount of benefits

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[8] Plaintiffs' theory would mean that every time the Legislature increased FRS benefits, future Legislatures would be bound to permanently provide the same benefits. For example, Plaintiffs acknowledge that the 3% COLA only came into existence in 1987. See Lead Motion at p. 5. Under Plaintiffs' theory, the 1987 Legislature bound future Legislatures to continue to provide a 3% COLA. This is the case even though Plaintiffs Williams, Brian England ("England"), and Martha Baker ("Baker") all entered into FRS *before* 1987. See Exhibits A-C, which respectively consist of summaries of Williams's, England's, and Baker's histories in FRS and, in pertinent part, show the years in which those Plaintiffs have had contributions made on their behalves to FRS. Thus, under Plaintiffs' theory, Williams, England, and Baker entered FRS without receiving a COLA, subsequently received a COLA, and now have a "contractual" right to permanently receive that COLA on future benefits.

that had been earned as of June 30, 2011, the day before Chapter 2011-68 took effect. Plaintiffs do not have to pay one cent in contributions to receive those previously-earned benefits once they retire. Significantly, all Chapter 2011-68 requires is that FRS members contribute 3% of their compensation to earn *additional benefits on and after July 1, 2011*[9] – absolutely no contributions are required for Plaintiffs to receive any benefits earned prior to July 1.

Thus, Plaintiffs' reliance upon Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077 (Fla. 1978), is misplaced. In Dewberry, the plaintiff had entered into a new insurance contract and, under Florida law at that time, "uninsured motorist coverage would stack." 363 So. 2d at 1089. Subsequent to the plaintiff entering into his new contract, new legislation took effect, to which "the legislature intended a retroactive application," prohibiting stacking. Id. As a result, the Florida Supreme Court held that, when Plaintiff was denied the opportunity to obtain the benefits associated with stacking, his contract had been retroactively impaired with because he had "paid premiums for the increased coverage." Id. at 1080. This is obviously not the case for Plaintiffs in the present case because they have not paid any contributions for those benefits earned prior to July 1, 2011, nor will they be required to do so. Contributions are only required for additional benefits earned on and after July 1. Moreover, the Dewberry Court also indicated that there is no unconstitutional impairment when a contract is entered into *after* legislation takes effect.[10] Florida Sheriffs makes clear that Plaintiffs only have a contractual right to those benefits they

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9 For example, as noted above, according to the numbers provided by Moore, in order for Goodwin to receive an additional $559,038 in benefits that she will earn on and after July 1, 2011, she will only have to contribute $21,969. See Exhibit 12 to Defendants' Motion.

10 In Dewberry, the Court held that where legislation had been signed into law but had not yet taken effect before the contract was signed, this was insufficient to put the plaintiff on notice because "[t]he citizens of this State cannot be charged reasonably with notice of the consequences of impending legislation before the effective date of that legislation." 363 So. 2d at 1080. Here, of course, no contributions were required prior to the July 1, 2011, effective date of Chapter 2011-68.

have actually earned. Therefore, Plaintiffs only will obtain contractual rights to benefits earned on and after July 1, 2011, as of the dates on which those benefits are actually earned. Those additional benefits, which are the only benefits affected by Chapter 2011-68, only came into existence after Chapter 2011-68 took effect. Accordingly, Dewberry is irrelevant in this case.[11]

Plaintiffs' efforts to argue that the COLA amendment is retroactive are similarly unavailing. As set forth in Defendants' Motion, Chapter 2011-68 effectively terminated the COLA for all benefits earned on and after July 1, 2011. In order to ensure that all FRS members receive the COLA for all benefits earned prior to July 1, 2011, the 3% COLA is multiplied by the percentage of the member's total service credit earned prior to July 1, 2011. This has the effect of ensuring that Plaintiffs receive the same value of COLA earned prior to July 1, 2011.[12]

Moreover, as discussed in Defendants' Motion, whether or not a change to a retirement plan has retroactive effect is determined by examining whether the total benefit received by members has been reduced. Here, because Plaintiffs will continue to earn benefits, all Plaintiffs will retire with greater benefits than those earned as of June 30, 2011. This fact is established both by the report of Defendants' expert, Paul Zeisler, which is Exhibit 9 to Defendants' Motion, and by a closer examination of Moore's calculations. See Exhibit 12 to Defendants' Motion. Thus, ***both parties' experts agree that Plaintiffs will all retire with far greater benefits than those earned as of June 30, 2011.***

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[11] Moreover, Dewberry predates Florida Sheriffs in which the Florida Supreme Court expressly upheld prospective changes to FRS such as those at issue in this case without holding that such modifications are retroactive impairments.

[12] For example, if a member retires with 20 years of service, 10 of which were earned prior to July 1, 2011, then the member will receive a COLA of 1.5% (50% x 3%) for his entire 20 years of service. This is the same as providing a 3% COLA to the member for the 10 years of service prior to July 1, 2011 (*i.e.*, 1.5% x 20 years is the same as 3% x 10 years).

Indeed, in this regard, and as discussed more fully in Defendants' Motion, ***the Legislature could have provided that, effective July 1, 2011, FRS members would no longer earn any new benefits under FRS***. Such a prospective change to FRS – *i.e.* by prospectively prohibiting new benefit accruals – would have satisfied Florida Sheriffs, because it would have guaranteed those benefits already earned, while only modifying (or eliminating) those benefits which members would earn in the future. Instead of taking this drastic step, the Legislature simply instituted modest modifications to those same future benefits by requiring a relatively minor contribution (when compared to the amount of the benefits received) and eliminating the COLA for those newly-earned benefits. In light of the fact that completely eliminating new benefits would have satisfied Florida Sheriffs, it must be the case that Chapter 2011-68, through which Plaintiffs will continue to earn new FRS benefits and through which Plaintiffs will retire with far greater benefits than those in place as of June 30, cannot have an impermissible retroactive effect.

D. The Court Cannot Accept Plaintiffs' Invitation To Overturn *Florida Sheriffs*.

1. The Court Is Required To Follow The Florida Supreme Court.

Undoubtedly aware that there are no genuine distinctions between the present case and Florida Sheriffs that would warrant a different result, Plaintiffs posit that Florida Sheriffs "rests upon a faulty premise." See Lead Motion at p. 15. See also id. at p. 14 (arguing that the Supreme Court's holding in Florida Sheriffs "is contrary to the plain and unambiguous language of the statute"); id. at p. 15 (referring to "the erroneous interpretation reached in Florida

Sheriffs").[13] Defendants submit, respectfully, that even if the Court agrees with Plaintiffs' view that Florida Sheriffs was wrongly decided – which it absolutely was not – the Court is nevertheless bound to follow the precedent of the Supreme Court.

"Stare decisis is a fundamental principle of Florida law. . . . Where an issue has been decided in the Supreme Court of the state, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the court might believe that the law should be otherwise." State v. Dwyer, 332 So. 2d 333, 335 (Fla. 1976). See also Reiter v. Gross, 599 So. 2d 1275 (Fla. 1992) ("Furthermore, the courts of this state are bound to follow the decisions and rules of [the Florida Supreme Court], and only [the Florida Supreme Court] can void or modify a rule it has adopted."); Hernandez v. Garwood, 390 So. 2d 357, 3579 (Fla. 1980) ("A

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[13] Given that Plaintiffs argue Florida Sheriffs was wrongly decided, Defendants submit that this is a tacit acknowledgement that Florida Sheriffs holds that Plaintiffs' claims fail as a matter of law. To the extent that Plaintiffs seek to have the Florida Supreme Court overturn Florida Sheriffs – which is something that only the Florida Supreme Court can do –this cannot possibly affect the constitutionality of Chapter 2011-68. The existence of a contract is determined by reference to state law. See U.S. Trust, 431 U.S. at 19 n. 17. Subsequent to Florida Sheriffs, Florida law has been clarified that FRS members do not have contractual rights to future benefits. Therefore, unquestionably, Chapter 2011-68 was constitutional when passed. In the unlikely event that the Florida Supreme Court overturns Florida Sheriffs, such a ruling could only limit future changes to FRS and could not affect the constitutionality of Chapter 2011-68.

In this regard, because Plaintiffs contend that they have had a "contract" with the State with respect to their rights under FRS since entering their employment, a fundamental issue arises with respect to the terms of that purported contract. For the last 30 years, Plaintiffs' retirement benefits have been earned in a system under which the rights of FRS members have been guided by the decision of the Florida Supreme Court in Florida Sheriffs. In light of this indisputable fact, Defendants respectfully submit that the promise made by the State pursuant to the "contract" was clarified by Florida Sheriffs, and all Plaintiffs performed their service with the understanding that the Legislature could prospectively change FRS. If the Florida Supreme Court were to overturn Florida Sheriffs, Defendants submit that the result would be that the "contracts" of FRS members would only be changed for performance of services after that reversal. In effect, by performing services pursuant to their "contracts" while Florida Sheriffs has been the law of the State, Plaintiffs have "accepted" the holding of Florida Sheriffs and its limits on their contractual rights.

trial judge may well be free to express his personal disagreement with the decisions of higher courts in some forums, but he is not free to disregard them in the exercise of his judicial duties."); Bunn v. Bunn, 311 So. 2d 387, 389 (Fla. 1975) ("[T]he views and decisions of an appellate court on issues which are properly raised and decided in disposing of the case are, unless reversed or modified by a higher court, binding on the lower court as the law of the case."); State v. Lott, 286 So. 2d 565, 566 (Fla. 1973) ("The trial court is bound by the decisions of this Court . . ."); Wood v. Fraser, 677 So. 2d 15, 19 (Fla. 2nd DCA 1996) ("[W]e take this opportunity to remind trial courts again that they do not create precedent. . . . Although they are free to express their disagreement with decisions of higher courts, trial courts are not free to disregard them in the adjudicatory process. . . . We emphasize, therefore, in accord with the doctrine of stare decisis, that once a point of law has been decided by a judicial decision, it should be adhered to by courts of lesser jurisdiction, until overruled by another case, because it establishes a precedent to guide the courts in resolving future similar cases."); Hill v. State, 302 So. 2d 785 (Fla. 4th DCA 1974) ("[W]hether we agree with the decision of the Supreme Court . . . , we must follow it. . . . [W]e receive the interpretation of the law 'from our Supreme Court, agreeing with some, disagreeing with some, following all . . . .'") (quoting Johnson v. Johnson, 284 So. 2d 231 (Fla. 2nd DCA 1973)). In light of the foregoing, Defendants respectfully submit that the Court is bound to follow the Florida Supreme Court's binding precedent which dictates that Plaintiffs' claims fail as a matter of law.

2. Plaintiffs' Position That *Florida Sheriffs* Was Wrongly Decided Because The Preservation-Of-Rights Statute Does Not Contain The Word "Accrued" Fails As A Matter Of Law.

While Defendants respectfully submit that the Court must follow Florida Sheriffs, even if the Court were to disregard the Supreme Court's clear mandate that its precedent must be followed, Plaintiffs have failed to state any basis to conclude that Florida Sheriffs was wrongly

decided. Plaintiffs' argument, essentially, is that because the preservation of rights section does not contain the word "accrued," the Florida Supreme Court erred in holding that FRS members only have contractual rights to earned benefits. To make this point, Plaintiffs point to Hawaii and Michigan whose laws contain the word "accrued," and whose courts have reached the same result as Florida Sheriffs. See Lead Motion at pp. 15-16. Plaintiffs then point to New York, Illinois, and Massachusetts whose laws do not contain the word "accrued" and whose courts have held that prospective changes violate the laws of those states.[14] See id. at pp. 16-18. Thus, according to Plaintiffs, this creates a universal rule in all states in which prospective changes are only permissible if a state's laws protecting benefits uses the word "accrued."

Plaintiffs' "magic word" theory is simply inapplicable in the State of Florida. There is no dispute that there is a split among the states whether prospective changes to public employee retirement systems, such as those at issue in Chapter 2011-68, satisfy the varying laws of the several states involved. Defendants' Motion notes the extent to which such changes have been upheld in various states and also notes that analogous prospective changes to pension plans governed by ERISA are permitted under federal law. The Lead Motion highlights those states that have reached a different result – but also notes that states such as Michigan and Hawaii have upheld such changes. It may well be that an Illinois court, applying Illinois law,[15] has applied

[14] Defendants submit that this inflexibility has been to the detriment of those states' retirement systems. For example, Felt v. Board of Trustees of Judges Retirement System, 481 N.E. 2d 698 (Ill. 1985), a case cited by Plaintiffs (see Lead Motion at p. 17), dealt with the Judicial Retirement System of Illinois (the "JRSI"). 481 N.E. 2d at 699. As of June 30, 2010, the JRSI was only **34.1% funded**. See JRSI, Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2010, a copy of which is attached as Exhibit D, at p. 24. Defendants submit that, if these states followed the majority rule and permitted prospective modifications, their retirement systems would be far healthier.

[15] Plaintiffs expressly acknowledge that the Illinois Supreme Court in Felt was applying Article XIII, Section 5 of the Illinois Constitution. See Lead Motion at p. 17.

the "magic word" theory promoted by Plaintiff to prohibit prospective changes, though this is apparently not the case for either New York or Massachusetts.[16] Regardless, Illinois's "magic word" theory is not the legal standard in Florida. "[M]ention to other states that have" imposed a different standard "is surprising because this has never been the standard under Florida law." Willis v. Gami Golden Glades, LLC, 967 So. 2d 846, 856 n. 4 (Fla. 2007).

In this regard, it should not be surprising that the Florida Supreme Court's decision in Florida Sheriffs did not fall directly in line with the Illinois court's "magic word" theory, which the Illinois court used to distinguish the precedent of Hawaii and Michigan. As Plaintiffs acknowledge, the Hawaii Constitution refers to "accrued benefits" and the Michigan Constitution refers to "accrued financial benefits." See Lead Motion at pp. 15-16 (quoting Haw. Const., Art. XVI, § 2; Mich. Const., Art. 9, § 24). Likewise, the Illinois Constitution protects "benefits." See Lead Motion at p. 17 (quoting Ill. Const., Art. XIII, § 5). By contrast, the preservation of rights section does not speak to the protection of "benefits" at all. Instead, the preservation of rights section protects the "rights of [FRS] members." See Florida Statutes § 121.011(3)(d). Language regarding the protection of "benefits" is clearly distinct from language regarding the protection of "rights." Thus, the Florida Supreme Court was simply facing an altogether

[16] While Plaintiffs suggest that New York, Illinois, and Massachusetts have adopted their "magic word" theory, it appears that, in fact, Illinois is the only one of the three to have done so. In neither of the New York cases cited by Plaintiffs did the New York courts base their decision upon the absence of the word "accrued" in the New York Constitution. See generally Birnbaum v. N.Y. State Teachers Ret. Sys., 152 N.E. 2d 241 (N.Y. 1958) (cited in Lead Motion at pp. 16-17); Kleinfeldt v. N.Y.C. Employees' Ret. Sys., 324 N.E.2d 865 (N.Y. 1975) (cited in Lead Motion at p. 17). Likewise, the Massachusetts court did not base its decision upon the absence of the word "accrued" in the *potential* Massachusetts legislation at issue for which the court gave an advisory opinion. See generally Opinion of Justices, 303 N.E.2d 320 (Mass. 1973) (cited in Lead Motion at p. 18).

different question than that faced by the Illinois court, whose constitution, like that of Michigan and Hawaii, protects "benefits" and not "rights."

Another important distinction between the Illinois court and the Florida Supreme Court is that, as noted above, the Illinois court was interpreting the Illinois Constitution while Florida Sheriffs was interpreting a Florida *statute*. Compare Felt, 481 N.E.2d at 699-700 with Florida Sheriffs, 408 So. 2d at 1034. This distinction is critical because of the Florida Supreme Court's precedent, *supra*, that one Legislature cannot pass a statute that binds a future Legislature. Of course, this rule is inapplicable with respect to a provision of the Constitution as the Constitution can and does bind the Legislature. See Chiles v. Phelps, 714 So. 2d 453, 458 (Fla. 1998) ("The Constitution of this state is not a grant of power to the Legislature, but a limitation only upon legislative power, and unless legislation be clearly contrary to some express or necessarily implied prohibition found in the Constitution, the courts are without authority to declare legislative Acts invalid.") (quoting Savage v. Bd. of Pub. Instruction, 133 So. 341, 344 (1931)).[17]

Even if the Florida Supreme Court had faced an identical constitutional provision as that faced by the Illinois court, instead of a dissimilar statutory provision, there are, of course, countless examples of ways in which Illinois courts have examined legal questions applying Illinois law and reached an entirely different result than Florida courts applying Florida law. Plaintiffs' position is that because an Illinois court, applying Illinois law, may have noted the absence of the word "accrued" from their state constitutions, then, *ipso facto*, the Florida Supreme Court erred in upholding prospective changes to FRS because the preservation of rights

[17] While the Massachusetts court addressed a *potential* statute in an advisory opinion, as noted above, the Massachusetts case is inapposite because the Massachusetts court did not rely upon Plaintiffs' "magic word" theory. See generally Opinion of Justices, 303 N.E.2d 320. Thus, Massachusetts is simply one of the minority states that restricts prospective changes to its public employee retirement system (and by doing so, also finds itself in contrast with federal law in the ERISA context).

statute does not use the word "accrued." If the Florida Supreme Court had been applying Illinois law, Plaintiffs might possibly have a point. However, the Florida Supreme Court's job is to interpret and apply Florida law. The position argued by Plaintiffs "may well be the position of other states, but it is not the position adopted by the Florida Supreme Court . . . . The law of the state of Florida is what our supreme court says it is." SunTrust Bank v. Riverside Nat'l Bank, 792 So. 2d 1222, 1232 (Fla. 4th DCA 2001). Clearly there is no legal basis to suggest that because an Illinois court interpreted the Illinois Constitution in one way, the Florida Supreme Court erred by interpreting a Florida statute in a different way. Therefore, Defendants respectfully submit that Plaintiffs are not entitled to summary judgment on either Count I or Count II and that, instead, summary judgment should be entered for Defendants on those counts.

II. CHAPTER 2011-68 IS NOT AN UNCONSTITUTIONAL TAKING.[18]

A. *Florida Sheriffs* Means There Is No Property Right To Future Benefits.

Plaintiffs' Takings Clause claims, Counts III and IV of the Complaint, overlook a fundamental prerequisite for an unconstitutional taking to arise. In order for an unconstitutional taking to occur, there must be the deprivation of a cognizable property right. See Tequesta v. Jupiter Inlet Corp., 371, So. 2d 663, 670 (Fla. 1979) ("It is incumbent upon Jupiter to show, not only a taking, but also that a private property right has been destroyed by governmental action."). As the Supreme Court of the United States has stated in affirming the Florida Supreme Court's analysis of a takings challenge, "[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been

[18] The Takings Clause section of the Lead Motion is titled "Chapter 2011-68 is an Unconstitutional Taking of the Property of Class Members Without Full Compensation." See Lead Motion at p. 25. Plaintiffs have withdrawn their request for class certification. See Stipulated Scheduling Order. Accordingly, there are no "class members."

established." Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, __ U.S. __, 130 S. Ct. 2592, 2612 (2010).

Here, Florida Sheriffs sets the standard for the property rights possessed by an FRS member by holding that FRS members only have property rights in those benefits that they have already earned. As Florida Sheriffs clearly holds that prospective amendments do not operate as an impairment of contract, then, *ipso facto*, Plaintiffs cannot possibly have a property right to their future benefits, and any prospective modification to that benefit cannot operate as a taking.

B. The Employee Contribution Requirement Cannot Operate As An Unconstitutional Taking Because The Amounts Withheld, Like Social Security Withholdings, Are For Plaintiffs' Own Benefit.

To the extent that Plaintiffs contend that the Employee Contribution Requirement operates as a taking, this position is clearly without merit. As discussed in Defendants' Motion, the Employee Contribution Requirement is effectively identical to Social Security withholding required of all of the Plaintiffs. In both cases, a percentage of each Plaintiff's income is withheld from their paychecks (a higher rate being withheld for Social Security) to fund their retirement benefits. Just as withholding for Social Security is constitutional, so too is the Employee Contribution Requirement. In this regard, and as addressed more fully in Defendants' Motion, the fact that the amounts withheld are for the benefit of the Plaintiffs themselves – and not for the public at large – establishes that Chapter 2011-68 cannot operate as an unconstitutional taking.[19]

[19] Plaintiffs suggest that Chapter 2011-68 was not for Plaintiffs' own benefit because, subsequent to Chapter 2011-68, they are receiving the same benefit (albeit modified by the COLA amendment) that they did prior to the enactment of Chapter 2011-68. See Lead Motion at p. 28. This is both wrong and shortsighted. No contribution is required unless there is future service which earns a future benefit, thus, the contribution is not required for benefits already earned. Moreover, without the cost savings achieved through Chapter 2011-68, the Legislature could well have imposed drastic reductions to future benefits, or even have prevented FRS members from earning new benefits altogether. By obtaining the cost savings achieved through Chapter 2011-68, FRS members will earn additional benefits that they would not have otherwise received.

C. The Fact That Withdrawing Members Do Not Receive Investment Gains Is Not A Taking Because Those Members Do Not Bear The Risk Of Loss.

Finally, Plaintiffs attempt to analogize this case to Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). Plaintiffs' effort in this regard is totally without merit, however, because Florida Sheriffs stands for the proposition that Plaintiffs have no property right to future benefits and Plaintiffs acknowledge that Webb's dealt with "the application of the Takings Clause to personal property." See Lead Motion at p. 26.

To the extent that Plaintiffs cite Webb's for the proposition that withdrawing FRS members "do not receive any interest or investment income on the returned funds regardless of how many years those funds have been invested in the FRS trust fund," (see Lead Motion at p. 27), that argument is fully addressed in Defendants' Motion. Specifically, this case is wholly distinguishable from Webb's because: (1) unlike in Webb's, where the amounts invested could only gain value through the earning of interest, here, the FRS trust fund's investments can lose money, and withdrawing FRS members do not bear the risk of that loss as they receive the full amount of their contributions, even if their contributions have suffered investment losses; and (2) because FRS offers both the Pension Plan and the Investment Plan, if any FRS members wish to obtain the benefits of investment gains, and bear the risk of investment losses, they may choose to participate in the Investment Plan instead of the Pension Plan. By electing to participate in the Pension Plan, FRS members knowingly choose a system where they do not receive the benefit of any investment gains if they withdraw from FRS, but where they also do not run the risk of loss. Accordingly, as set forth in Defendants' Motion, Counts III and IV of the Complaint are wholly without merit, and Plaintiffs are not entitled to summary judgment on those counts.

III. <u>PLAINTIFFS' CLAIM THAT CHAPTER 2011-68 ABRIDGES THEIR RIGHT TO COLLECTIVE BARGAINING FAILS AS A MATTER OF LAW.</u>

A. The Legislature's Right To Control Appropriations Supersedes The Right Of Public Employees To Collectively Bargain.

Plaintiffs' final count, Count V, charges that Chapter 2011-68 abridges Plaintiffs' right to collectively bargain, not because the terms of any specific collective bargaining agreement ("CBA") have been impaired, but rather because Plaintiffs allege that the State was required to collectively bargain over any changes to FRS. As set forth in Defendants' Motion, this claim fails as a matter of law because, in State of Florida v. Fla. Police Benevolent Ass'n, Inc., 613 So. 2d 415 (Fla. 1992) ("PBA"), the Florida Supreme Court held that the right of public employees to collectively bargain "is subject to the appropriations power of the legislature." 613 So. 2d at 419.

Indeed, the Supreme Court noted that:

> 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 the funds will stand ***even if contradictory to the negotiated agreement***. . . . Any other result would necessarily entail impeding on the right to appropriate, since enforcing the negotiated agreement would necessitate additional funding under this scenario.

Id. at 421. Subsequent to PBA, Florida courts have upheld the principle that the Legislature's appropriations power trumps the right of public employees to collectively bargain. See Fla. Police Benevolent Ass'n v. State, 818 So. 2d 584, 586 (Fla. 1st DCA 2002) ("A wage agreement with a public employer is subject to the necessary public funding which involves the powers, duties, and discretion of the legislature. The legislature is not required to fund a collective bargaining agreement of public employees.").[20]

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[20] Additionally, Florida law further provides that "***[a]ll collective bargaining agreements entered into by the state are subject to the appropriations power of the Legislature, and the provisions of this section shall not conflict with the exclusive authority of the Legislature to appropriate funds***." Florida Statutes § 447.309(2)(b) (emphasis added).

In PBA, "the governor entered into collective bargaining agreements with several unions." 613 So. 2d at 416. Under those CBAs:

> employees were entitled to 17.333 hours per month of annual leave and four hours and twenty months per month of sick leave. If an employee accumulated more than 240 hours of annual leave in a year, the employee had the option of converting the excess hours into sick leave or receiving a cash payment for one-half of the excess hours.

613 So. 2d at 416. Following the signing of these CBAs, "the legislature enacted its general appropriations act" which:

> contained proviso language that altered the leave policy for career service employees, and thus the leave awards for which the unions had bargained. Under the proviso, annual leave was decreased from 17.333 hours per month to thirteen hours per month. Sick leave was increased from four hours and twenty minutes per month to eight hours per month. All accumulated annual leave in excess of 240 hours was cancelled, thus eliminating the cash-payment and sick-leave conversion options.

Id.

Thus, there can be no dispute that the changes at issue in PBA affected "the existing wages, hours and terms and conditions of employment." See Lead Motion at p. 30. According to Plaintiffs, the Legislature must provide "the opportunity to engage in negotiations *prior to* the modification of the existing wages, hours and terms and conditions of employment . . . of the affected employees." See id. PBA makes clear that they are simply wrong and that the Legislature is not required to subject its appropriations decisions to collective bargaining prior to enactment.

Despite the fact that the Legislature enacted legislation that unmistakably modified the PBA plaintiffs' "existing wages, hours and terms and conditions of employment," the Florida Supreme Court expressly rejected the position that such a unilateral legislative modification required further bargaining. Indeed, just as the Plaintiffs do here, in PBA, "*[t]he unions contended that the legislature should have provided for the governor and the unions to return to*

the bargaining table to negotiate possible changes in annual and sick leave, rather than unilaterally imposing these changes." 613 So. 2d at 420 n. 8 (emphasis added). The Florida Supreme Court expressly rejected the position taken by Plaintiffs here by holding that "[w]hile such a solution would certainly be preferable to unilateral changes, ***we refuse to impose renegotiation on our own prerogative.***" Id. (emphasis added).

To the extent that Plaintiffs rely upon federal courts applying federal labor law or the laws of other states, their position is wholly without merit because, in PBA, the Florida Supreme Court stated that "[a]lthough some courts have ordered renewed negotiations after a legislature fails to fund a provision, ***this remedy has only been imposed where the legislature itself mandated it. . . . Accordingly, such a solution would be completely without precedent as a judicially-imposed remedy, in addition to being administratively untenable.***" Id. (emphasis added). The Florida Supreme Court further declared itself "***unwilling to eliminate the certainty of appropriations by requiring renegotiation and then a subsequent reconvening of the legislature to pass a new appropriation every time the legislature attaches conditions to appropriations that happen to touch upon a collective bargaining term.***" Id. (emphasis added). As noted throughout this Opposition, where the Florida Supreme Court has clearly spoken on an issue, as it has here, the decisions of other courts have no bearing because the Florida Supreme Court has the final say on matters of Florida law.

As noted in Defendants' Motion, the supremacy of the Legislature's right to control appropriations is critical because the Legislature entered its 2011 session facing a budget shortfall of over $3.6 billion. See Exhibit 1 to Defendants' Motion at pp. 1-2. In an effort to remedy this shortfall, the Legislature enacted Chapter 2011-68 which, when passed, was expected to obtain a total cost savings of well over $1 billion. See Exhibit 8 to Defendants'

Motion. Of the total cost savings expected through Chapter 2011-68, approximately 73%, or over $860 million, was achieved through the Employee Contribution Requirement and the COLA amendment. See id. Given the Legislature's unquestionable control over the appropriations process, there can be no legitimate contention that the Legislature was not permitted to create substantial budgetary savings through modification of FRS in a manner that Plaintiffs have not even alleged to be in violation of *any* terms of *any* of their CBAs. This is particularly true because FRS is a statutory scheme developed by the Legislature, which the Florida Sheriffs Court held was subject to prospective legislative amendments.

B. To Abridge The Right To Collectively Bargain, Legislation Must Affirmatively Prohibit Bargaining, Which Chapter 2011-68 Does Not Do.

The Florida Supreme Court's precedent makes clear that only affirmative restrictions of the *right* to bargain, rather than legislative changes to statutory schemes that do not *prohibit* bargaining, rise to the level of unconstitutional impairments of collective bargaining. Plaintiffs cite to City of Tallahassee v. PERC, 410 So. 2d 487 (Fla. 1981), and that case is also a significant point of emphasis in the Sandlin Motion, because, as Plaintiffs note, the Florida Supreme Court held in that case that "retirement provisions are necessarily a part of the collective bargaining process." 410 So. 2d at 491. However, it must be noted what was at issue in that case. There, the Legislature had passed a statute which provided that public employees had the right to bargain over "the terms and conditions of their employment, *excluding any provisions of the Florida Statutes or appropriate ordinances relating to retirement*." Id. at 489 (internal citations omitted) (emphasis added). ***The Florida Supreme Court held that this did amount to "an abridgement of the right to collectively bargain" because it "prohibit[ed] bargaining."*** Id. (emphasis added). Likewise, Plaintiffs also cite to Chiles v. State Employees Attorneys Guild, 734 So. 2d 1030 (Fla. 1999). However, that case involved a situation where the

Legislature had passed a statute that amounted to a "wholesale ban on collective bargaining by government lawyers." 734 So. 2d at 1031.

Thus, the City of Tallahassee cases merely bar the Legislature from affirmatively prohibiting public employees from engaging in collective bargaining, absent a compelling state interest.[21] However, that is clearly not what has occurred here. Absolutely nothing precludes Plaintiffs from bargaining over FRS. Chapter 2011-68 does not in any way prohibit any of the Plaintiffs from exercising their right to collectively bargain or to preclude Plaintiffs from bargaining over any topic. Those are the prohibitions created by City of Tallahassee line of cases, and those are clearly not infringed or otherwise at issue here.

Indeed, Chapter 2011-68 was signed into law by Governor Scott on May 26, 2011. See Exhibit 5 to Defendants' Motion. However, Chapter 2011-68 did not take effect until July 1, 2011. Significantly, during the intervening month-plus, a number of affected FRS members sought to bargain with their employers over the effects of Chapter 2011-68. For example, in June 2011, following the passage of Chapter 2011-68 but before its effective date, both the Amalgamated Transit Union Local 1395 and the Police Benevolent Association[22] collectively bargained with the Escambia County Board of County Commissioners and obtained a 3.1% increase in their base salaries which were expressly intended "to offset for recent changes to

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[21] Defendants respectfully submit that while no compelling state interest need be shown, because there has been no abridgement of the right to collectively bargain, the State did, in fact, have a compelling state interest. As noted above, the Legislature entered its 2011 session facing a budget shortfall of $3.6 billion and expected to obtain total savings of more than $1.1 billion through Chapter 2011-68, of which more than $861, or approximately 73%, was achieved through the Employee Contribution Requirement and the COLA amendment. See Exhibits 1 and 8 to Defendants' Motion.

[22] Intervening Plaintiffs Park and Haire are represented in this action by the General Counsel for the Florida Police Benevolent Association, which is the union that entered into the memorandum of understanding attached hereto as Exhibit F.

[the] Florida Retirement System." Copies of the Memoranda of Understanding implementing these wage increases for the members of the respective unions are attached hereto as Exhibits E and F.[23] Obviously, given that similarly-situated FRS members have already, in fact, bargained over the impact of Chapter 2011-68, this clearly shows that there has been absolutely no deprivation of the right to bargain, and certainly there has been no *prohibition* against bargaining such as that at issue in the City of Tallahassee line of cases.

Moreover, Chapter 2011-68 clearly does not fall within the City of Tallahassee prohibitions because PBA, which followed City of Tallahassee by over 11 years and which referenced City of Tallahassee,[24] expressly held that legislative modifications that are an exercise of the Legislature's appropriations power do not require negotiation. 613 So. 2d at 420 n. 8.

C. The *United Faculty* Case Cited In The Sandlin Motion Is Inapposite.

In the Sandlin Motion, Intervening Plaintiff Sandlin relies heavily upon (and misapplies) Chiles v. United Faculty of Florida, 615 So. 2d 671 (Fla. 1993) ("United Faculty"). In that case, the Florida Supreme Court distinguished PBA where, after the Legislature had resolved a collective bargaining impasse by authorizing a pay raise, the Legislature subsequently postponed the pay raise. The Court held that this postponement did abridge the right to collectively bargain because the Legislature had specifically approved and partially funded the CBA. 615 So. 2d at

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23 The Escambia County wage increases were obtained even though the respective CBAs remained in full force and effect at the time. See Exhibits E and F (noting that the bargaining parties "agree[d] it would be in the best interest [of] all parties to administer this wage increase prior to the expiration of the collective bargaining agreement"). It may well be that not all Plaintiffs could obtain any modifications to their CBAs either during or after the expiration of those agreements. However, the fact that these unions obtained these wage increases expressly to offset the changes of Chapter 2011-68 shows that Plaintiffs have, in no way, been prohibited from bargaining over its effects.

24 In PBA, the Supreme Court noted that the City of Tallahassee Court had held "that [i]t would be impractical to require that collective bargaining procedures . . . be identical in the public and the private sectors." PBA, 613 So. 2d at 418 (quoting City of Tallahassee 410 So. 2d at 491) (other internal citations omitted).

672-73. According to Sandlin, like the United Faculty CBA, because his CBA was already in effect, the Legislature could not exercise its appropriations power without violating the holding of United Faculty. See Sandlin Motion at p. 7.

Sandlin is incorrect for myriad reasons. First, the only basis that the Florida Supreme Court gave for distinguishing PBA in United Faculty was the fact that the Legislature had, itself, set the terms of an agreement (unlike in PBA where the Governor had set the terms of the agreement), and partially funded that agreement. 615 So. 2d at 672. This is clearly not the case with respect to Sandlin. As Sandlin acknowledges, his CBA is not with the State. Rather, his CBA is with Alachua County. See Sandlin Motion at p. 2. Thus, unlike in United Faculty, there was no opportunity for the Legislature to either set the terms of Sandlin's CBA or fund Sandlin's CBA. Rather, that is the responsibility of Alachua County. Accordingly, the United Faculty Court's basis for distinguishing PBA completely disappears and, therefore, PBA controls.

Moreover, even if the State was a party to Sandlin's CBA, all United Faculty stands for is the proposition that, *when the Legislature itself sets the terms of a CBA and then partially funds that CBA, it is an abridgement of the right to collectively bargain if the Legislature directly violates the terms of that agreement.* Nothing in Sandlin's CBA guarantees any specific retirement benefits to the employees covered by that CBA. See generally Exhibit to Sandlin Motion.[25] Thus, the holding of United Faculty could not be violated because there would be no term of Sandlin's CBA that would be violated by Chapter 2011-68. Significantly, as noted above, ***none of the Plaintiffs contend that Chapter 2011-68 violates the terms of any specific CBA***. Indeed, in responding to Defendants' interrogatories, ***all of the Plaintiffs expressly***

[25] Indeed, the only reference at all to FRS in Sandlin's CBA is a notation that those who meet the FRS Pension Plan's normal retirement age are entitled to a health insurance subsidy. See Exhibit to Sandlin Motion at Article 15.5.

acknowledged that "Plaintiffs do not allege in this action that any particular collective bargaining agreement is impaired by the provisions of Chapter 2011-68, Laws of Florida, challenged in this action."[26] Rather, Plaintiffs merely contend that they were denied the right to bargain – an argument belied by the fact that many similarly situated FRS members have actually engaged in bargaining over the effects of Chapter 2011-68.

D. The Frequent, Unchallenged, "Unilateral" Legislative Changes To FRS Establish That Such Modifications Do Not Impair The Right To Bargain.

Further establishing that the changes promulgated by Chapter 2011-68 do not impair Plaintiffs' right to collectively bargain is the fact that FRS is a regular and frequent object of legislative modification, consistently and uniformly without collective bargaining. Between the years 2000 and 2010 the Legislature routinely modified FRS in order to, *inter alia*, change the employer contribution rates for FRS a minimum of nine times.[27] Yet, Plaintiffs never previously challenged these "unilateral" modifications as an impairment of their collective bargaining rights, nor did any union seek to bargain such changes in advance. Of course, just as Plaintiffs maintain the right to bargain over FRS subsequent to Chapter 2011-68, Plaintiffs had the right to bargain over these various prior modifications. The fact that Plaintiffs only now challenge the

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[26] This answer can be found in each Plaintiff's answer to Interrogatory 3 in Defendants' Second Set of Interrogatories, which are attached hereto as follows: George Williams – Exhibit G; Megan Allen – Exhibit H; Kevin Doyle – Exhibit I; Lori Goodwin – Exhibit J; Adam Teichner – Exhibit K; Brian England – Exhibit L; Martha Baker – Exhibit M; Magalie Vancol Pena – Exhibit N; Allen Jones – Exhibit O; Juan Baso – Exhibit P; John Park – Exhibit Q; Randall Haire – Exhibit R.

[27] See Chapter 2000-169, Laws of Florida, at § 3 (codified at Florida Statutes § 121.571(2)); Chapter 2002-177, Laws of Florida, at § 1 (codified at Florida Statutes § 121.71(3)); Chapter 2003-260, Laws of Florida, at § 3 (codified at Florida Statutes § 121.71(3)); Chapter 2004-293, Laws of Florida, at § 1 (codified at Florida Statutes § 121.71(3)); Chapter 2006-35, Laws of Florida, at § 1 (codified at Florida Statutes § 121.71(3)); Chapter 2007-84, Laws of Florida, at § 1 (codified at Florida Statutes § 121.71(3)); Chapter 2008-139, Laws of Florida at § 7 (codified at Florida Statutes § 121.71(3)); Chapter 2009-76, Laws of Florida, at § 1 (codified at Florida Statutes § 121.71(3)); Chapter 2010-180, Laws of Florida, at § 4 (codified at Florida Statutes § 121.74).

Legislature's right to modify FRS is a transparent attempt by Plaintiffs to formulate any possible argument – no matter how strained – to undercut this legislation which they do not happen to like. Unfortunately for Plaintiffs, under the Florida Constitution and the Florida Supreme Court's repeated holdings, the Legislature's determinations – particularly in the exercise of its appropriations authority – are not subject to mandatory collective bargaining prior to enactment.

In this regard, to the extent that Plaintiffs have bargained to participate in FRS, then they have bargained to participate in a system that is subject to legislative modification. For example, in the CBA identified by Plaintiff Juan Baso ("Baso") as governing his employment,[28] a copy of which is attached hereto as Exhibit S, that agreement merely provides that Baso's employer "provides a retirement plan in accordance with applicable law (Florida Retirement System (FRS))." See Exhibit S at Article 13.4. Florida Sheriffs makes it absolutely clear that the "applicable law" underlying FRS is subject to prospective modification by the Legislature. Accordingly, to the extent that Plaintiffs have collectively bargained for the right to participate in FRS,[29] they have bargained for the right to participate in a system that is subject to prospective legislative modifications, precisely such as those created by Chapter 2011-68.

CONCLUSION

For the foregoing reasons and the reasons set forth in Defendants' Motion, Defendants respectfully submit that Plaintiffs are not entitled to summary judgment on any of the counts in

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[28] In his answers to interrogatories, Baso identified Exhibit S, which is the "Collective Bargaining Agreement Between Hillsborough County BOCC and American Federation of State, County, and Municipal Employees, Local 167, effective October 1, 2007 to September 30, 2010" as the agreement governing his employment. See Plaintiff Juan Baso's Answers to Defendants' First Set of Interrogatories, a copy of which is attached hereto as Exhibit T, at p. 7.

[29] Defendants respectfully submit that it is entirely unclear that Plaintiffs' participation in FRS is a subject for collective bargaining, given that participation in FRS is mandatory for Plaintiffs.

their Complaint and that, therefore, Defendants are entitled to summary judgment on all five counts.

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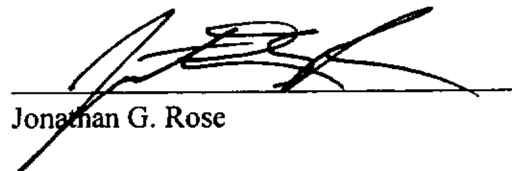

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