

**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,

CLASS REPRESENTATION

Plaintiffs,

vs.

CASE NO.: 2011 CA 1584

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.

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CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

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FILED

**CORRECTED MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION¹**

During the 2011 legislative session, the Florida Legislature passed Senate Bill 2100 which significantly alters the Florida Retirement System ("FRS") for the first time in almost forty years. The Governor signed Senate Bill 2100 on May 26, 2011, and it was codified as Chapter 2011-68, Laws of Florida.

In this case, Plaintiffs challenge two major provisions of Chapter 2011-68: (1) the provision changing the FRS from a noncontributory system to a contributory system and (2) the

¹ The Corrected Memorandum of Law corrects a typographical error and does not make any substantive changes to the original Memorandum of Law.

provision reducing the annual cost-of-living adjustment ("COLA") percentage rate on retiree benefits. Specifically, section 29 of Chapter 2011-68 states, in relevant part:

Beginning July 1, 2011, each employee shall contribute [3%]. The employer shall deduct the contribution from the employee's monthly salary, and the contribution shall be submitted to the division Such contributions are mandatory and each employee is considered to have consented to payroll deductions.

Section 17 of Chapter 2011-68 reduces the annual COLA by the proportion of service the retiree performs after July 1, 2011. Currently, the annual COLA is 3% irrespective of years of service or the dates of service, but under the new law that percentage rate will decrease in proportion to how long the retiree works after July 1, 2011.

These provisions of Chapter 2011-68 apply to current members of the FRS as well as those employees who are initially hired after July 1, 2011. Thus, in implementing these provisions, the Defendants necessarily will be deducting 3% from current FRS members' salaries and will be reducing current FRS members' COLA entitlement as such members retire. The Class consists of all public employees in Florida who were members of the FRS prior to July 1, 2011, and who will be subject to the challenged provisions effective July 1, 2011 (the "Class"). The application of the 3% salary deduction and COLA reduction to Class members impairs the statutorily granted contract between the State and the Class, results in an unconstitutional taking of the Class members' private property without full compensation and abridges the Class members' constitutional right to collective bargaining over wages, terms and conditions of employment.

To prevent this unconstitutional impairment, unconstitutional taking, unconstitutional abridgement and irreparable harm to the Class, the Class members hereby request that the Court, as more fully set forth below, grant their motion for temporary injunction and direct the Defendants, specifically the State Board of Administration, to segregate the 3% salary

deductions from the Class members (current members of the FRS) and place such funds either in an interest bearing account or a short term investment fund.²

BACKGROUND

Prior to 1970, numerous public retirement systems existed in Florida with different membership criteria and benefits schedules. In 1970, the Legislature created the FRS by combining existing retirement systems. *See* Ch. 1970-112, Laws of Fla. (1970). Membership in the FRS became mandatory for all officers and employees employed on or after December 1, 1970. *See* §121.011, Fla. Stat. (1971). At its inception, the FRS was a contributory system in which regular members contributed 4% of their gross compensation toward their FRS retirement and special risk members contributed 6%. Employers contributed an amount equal to the employee contributions.

In 1974, the Florida Legislature converted the FRS to a noncontributory system, eliminating the required member contributions (indeed prohibiting member contributions) and increasing the employer contributions to 9% for regular members and 13% for special risk members. In adopting the changes, the Legislature noted that the retirement fund at that time was not actuarially funded and that it was “the intent of the legislature to correct the trust fund imbalance and to implement such administrative changes as would accrue to the benefit of covered employees.” Ch. 74-302, Laws of Fla. (1974). The changes became effective January 1, 1975.

As part of the 1974 Act, the Florida Legislature also adopted the following amendment to the FRS’s preservation of rights provision:

The rights of members of the retirement system established by this chapter shall not be impaired by virtue of the conversion of the Florida Retirement System to

² Because the COLA changes will not have an immediate effect, the Class Members are not, at this time, seeking a temporary injunction to segregate those funds.

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

Ch. 74-302, §1, Laws of Fla. (1974), *codified at* §121.011(3)(d), Fla. Stat. (1975). Prior to the adoption of this amendment, the Courts in Florida had held that active participants in noncontributory public retirement systems held no vested rights to the benefits under those systems. *See Anders v. Nicholson*, 111 Fla. 849, 150 So. 639 (Fla. 1933).

In 1976, Florida voters adopted Article X, Section 14 of the Florida Constitution, which states:

A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

After the adoption of this constitutional amendment, the Legislature enacted section 112.61, Florida Statutes, stating:

It is the intent of the Legislature in implementing the provisions of s.14, Art. X of the State Constitution, relating to governmental retirement systems, that such retirement systems or plans be managed, administered, operated, and funded in such a manner as to maximize the protection of public employee retirement benefits.

The FRS has remained a noncontributory plan since 1975, meaning that employees are neither required nor permitted to contribute to their retirement funds in the FRS. It is a consolidated retirement plan which holds and administers retirement moneys for more than 900 state and local government employers in Florida, covering approximately 655,000 active and separated members and providing benefits to approximately 304,000 retired members.

Participation in the FRS is compulsory for all employees (with limited exceptions) employed by an employer that participates in the FRS. *See* §121.051(1), Fla. Stat. (2010).

The FRS members must choose to participate in either the FRS “Pension Plan” or the FRS “Investment Plan” within five months of their hire. *See* §121.4501(4)(a), Fla. Stat. (2010). The FRS “Pension Plan” or defined benefit plan entitles members to an annuitized monthly retirement income based upon a formula consisting of the member’s average final compensation, employment class, and years of creditable service. *See* §121.091, Fla. Stat. (2010). Prior to the 2011 amendment to the law, members fully vested in Pension Plan benefits upon six (6) years of service and the Pension Plan provided retirees an annual COLA of 3% regardless of the number of years of credited service or when those years of service were performed. *See* §§121.021(45), 121.101(1)(b), Fla. Stat. (2010).

The FRS “Investment Plan” or defined contribution plan entitles members to their employers’ monthly contributions to the FRS as a percentage of the members’ monthly salary and to earnings on those contributions, but it does not assure a guaranteed result. Members fully vest in the Investment Plan benefits upon one (1) year of service. *See* §121.4501(6), Fla. Stat. (2010). After their initial election, members can choose to switch between the Pension Plan and Investment Plan one time during their active service. *See* §121.4501(4)(e), Fla. Stat. (2010).

FRS funds are managed by the State Board of Administration. FRS benefit payments are administered by the Department of Management Services through the Division of Retirement. FRS employers are required to contribute a fixed percentage of their employees’ monthly compensation to the Division of Retirement for distribution to the Florida Retirement System Contributions Clearing Trust Fund. The employer contribution rate is set annually by statute based upon an actuarial determination of the level of funding necessary to support the benefit

obligations under both FRS plans. The employer contribution rate is the same percentage for members of the Pension Plan as for members of the Investment Plan. For the fiscal year 2010-2011, the employer contribution rate for each membership class is as follows:

Regular	9.63 %
Special Risk	22.11 %
Special Risk Administrative Support	12.10 %
Legislators, Governor, Cabinet State Attorneys, Public Defenders	15.20 %
Justices and Judges	20.65%
County Elected Officers	17.50 %
Senior Management Services	13.43 %

Experts recommend that public pension funds operate at or above an 80% ratio. As of July 1, 2010, the FRS Pension Plan was funded at 87.9%. See *SBA Overview March 31, 2011*, p. 9, www.sbafla.com/fsb/LinkClick.aspx?fileticket=HJKuogA9hQE%3D&tabid=997&mid=2293.

According to the State Board of Administration which manages the FRS funds, the FRS Pension Plan “has been and continues to be one of the most well-funded and healthiest public pension funds in the United States” and is “generally characterized as being in the top four by most objective publications.” *SBA Overview March 31, 2011*, p. 6, www.sbafla.com/fsb/LinkClick.aspx?fileticket=HJKuogA9hQE%3D&tabid=997&mid=2293.

Despite the actuarial soundness of the FRS, Chapter 2011-68 was enacted and is scheduled to take effect on July 1, 2011. The law makes significant changes to the FRS, but the majority of the changes do not affect current members. Instead, the following changes affect only employees who initially enroll in the FRS after July 1, 2011:

- a. Increasing the number of final years of compensation upon which retirement benefits are calculated from five years to eight years;
- b. Increasing the years required for vesting in the Pension Plan from six to eight years;

- c. For most classes of service, increasing the retirement age from 62 to 65 and increasing the required years of service from 30 to 33 years; and
- d. For special risk employees, increasing the retirement age from 55 to 60 and increasing the required years of service from 25 to 30 years.

The two significant changes that apply to current members are the changes challenged in this case: (1) the mandatory 3% pay deduction for all members of the FRS employed on or after July 1, 2011; and (2) the reduction in the COLA for members whose effective retirement date is on or after July 1, 2011. These changes were not accompanied by a concomitant increase or improvement in retirement benefits. While there was no increase or improvement in benefits, the law did decrease the employer contribution rates for each membership class. A comparison of the new and prior rates is set forth below:

	<u>2011-2012</u>	<u>2010-2011</u>
Regular	3.28 %	9.63 %
Special Risk	10.21 %	22.11 %
Special Risk Administrative Support	4.07 %	12.10 %
Legislators, Governor, Cabinet, State Attorneys, Public Defenders	7.02 %	15.20 %
Justices and Judges	9.78%	20.65 %
County Elected Officers	9.27%	17.50%
Senior Management Services	4.81%	13.43 %

Additionally, Chapter 2011-68 establishes required employer contributions for the 2011-2012 fiscal year for each membership class “to address unfunded actuarial liabilities of the system,” as follows:

Regular	.49 %
Special Risk	2.75 %
Special Risk Administrative Support	0.83 %
Legislators, Governor, Cabinet, State Attorneys, Public Defenders	0.88 %
Justices and Judges	0.77 %
County Elected Officers	0.73 %

Senior Management Services 0.32 %

These changed rates made possible by the 3% salary deduction and COLA reduction resulted in the Legislature having funds to apply to other areas of the budget.

ARGUMENT

In determining whether to issue a temporary injunction, this Court must address “(1) [t]he likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) considerations of the public interest.” *Thompson v. Planning Comm’n*, 464 So. 2d 1231, 1236 (Fla. 1st DCA 1985); *see also Milin v. Northwest Fla. Land L.C.*, 870 So. 2d 135, 136 (Fla. 1st DCA 2003) (applying *Thompson*). All of these factors support the Plaintiffs’ request for a temporary injunction.

I. THE CLASS IS SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS

The Plaintiffs’ principal claim for relief in this litigation is based on the contention that Chapter 2011-68 unconstitutionally impairs current FRS members’ contractual rights in their pension benefits. In addition, the 3% salary deduction and COLA reduction required by Chapter 2011-68 result in an unconstitutional taking of current FRS members’ property without full compensation and unconstitutionally abridge the Class’s right to collectively bargain.

A. CHAPTER 2011-68, LAWS OF FLORIDA, UNCONSTITUTIONALLY IMPAIRS THE CONTRACTUAL RIGHTS OF CLASS MEMBERS

Article I, section 10 of the Florida Constitution states “[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.” This Article is similar to Article I, section 10 of the United States Constitution which also precludes any law “impairing the obligation of contracts.” Florida courts have interpreted the state constitutional provision in

accordance with the Federal constitution. See *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979).³

The United States Supreme Court set forth the current test for determining if a violation of the Contract Clause has occurred in *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). In *U.S. Trust*, the Court established that the inquiry into whether a violation of the Contract Clause has occurred involves the following questions: (1) Is there a contractual obligation?; (2) Was that obligation impaired?; (3) If yes, was the impairment substantial?; and (4) If yes, was the impairment reasonable and necessary to serve a legitimate or important public purpose? If a party establishes that there is a contract obligation that has been substantially impaired and the impairment was not reasonable and necessary to serve a legitimate public purpose, then, a violation of the Contract Clause has occurred. When the State is a party to the contract, in determining if an impairment is reasonable and necessary, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Id.* at 26. The Court noted:

A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

Id.

The Florida Supreme Court also has recognized that deference to the Legislature is not required when determining reasonableness and necessity, which the Court has interpreted as requiring a compelling state interest. See *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993). In *Chiles*, the Court found that the Legislature had violated the Florida

³ *Pomponio* involved a state statute's effect on a contract between private parties whereas in this case, the State is a party to the contract. Thus, the analysis in *Pomponio* is slightly different as recognized in *Pomponio* and *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). *U.S. Trust*, however, did involve the State as a party to the contract and thus, provides the proper analysis for this case.

Constitution's Contract Clause by eliminating pay raises in a collective bargaining agreement that it had previously funded. In so holding, the Court stated:

The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by article I, section 10 of the Florida Constitution The legislature has only a very severely limited authority to change the law to eliminate a contractual obligation it has itself created.

Id. at 673. The Court recognized that the Legislature had some discretion during bona fide emergencies, but held that before the Legislature could impair its contractual obligations, it had to demonstrate "a compelling state interest." *Id.* To determine what would constitute a compelling state interest, the Court, citing to *U.S. Trust*, stated:

[T]he legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the legislature must demonstrate that the funds are available from no other reasonable source.

615 So. 2d at 673.

Applying the impairment test to this case, it is evident that the challenged provisions of Chapter 2011-68 are an unconstitutional impairment of contract. First, section 121.011(3)(d), Florida Statutes clearly and unambiguously establishes that the rights of the members of the FRS under Chapter 121 "shall be legally enforceable as valid contract rights and shall not be abridged in any way." The Florida Supreme Court in *Florida Sheriffs Ass'n v. Department of Administration*, 408 So. 2d 1033 (1981) held that this statute creates contractual rights in earned benefits. Thus, in the present case, a contractual obligation clearly exists.

The next inquiry is whether the contract was impaired and if so, whether the impairment was substantial. The relevant terms of the contract between the State and Class members who became members of the FRS prior to July 1, 2011, were: (1) a mandatory, noncontributory pension; and (2) a 3% COLA on pension benefits upon retirement irrespective of years of service

or dates of service. Chapter 2011-68, Laws of Florida substantially alters these contract provisions. See Ch. 2011-68, §§5, 7, 11, 13, 17, 24, 26, 29, 33, 40, Laws of Fla. (2011). It now requires the Class members to contribute 3% of their salary (pre-tax) toward their pension thereby converting the noncontributory system under the current contract to a contributory system and mandatorily requiring a 3% reduction in the employee's salary after July 1, 2011. The new law also reduces the COLA percentage on all retirement benefits based upon how many years an employee works after July 1, 2011, essentially penalizing employees for working beyond that date. For instance, under Chapter 2011-68, §17, an employee who retires effective July 1, 2012, with 30 years of service of which 29 years occurred before July 1, 2011 would receive a COLA of 2.9% rather than 3% (the formula under the new law is: $29/30 = .9667 \times 3\% = 2.9\%$). The new reduced COLA applies to all of the employee's benefits and not just those benefits accrued after July 1, 2011.

Both of these provisions in Chapter 2011-68, Laws of Florida substantially and retroactively impair the Class members' contract rights in the FRS. The 3% salary deduction results in an abrogation of the very essence of the Class members' contract with the State. Their contract was for a noncontributory pension plan, and they now have a contributory pension plan, a completely different system. Additionally, by requiring the Class members to contribute 3% of their salary to the FRS, the State has decreased the value of their retirement benefits overall by the proportion of their contributions to the FRS. Essentially, they will be required "to pay more for each pension dollar they will eventually receive." *Association of Pennsylvania State College and University Faculties v. State System of Higher Education*, 479 A. 2d 962, 965 (Pa. 1984) (Pennsylvania Supreme Court found that a change to the state's retirement system which required members to contribute an additional one and one-quarter percent of their wages was an

unconstitutional impairment of contract with regard to employees who were members prior to the effective date of the amendment). As stated in *Dewberry v. Auto-Owners Insurance Co.*, 363 So. 2d 1077, 1080 (Fla. 1978), “[i]t is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution.”

In *Dewberry*, prior to October 1, 1976, the plaintiff entered into a contract with the defendant for a stacking uninsured motorist coverage policy. However, the Legislature passed a bill effective October 1, 1976, that prohibited stacking for any accidents occurring on or after October 1, 1976. The plaintiff was in an accident in December 1976 and filed a declaratory judgment lawsuit to enforce the stacking provision of his contract, alleging that the legislative act was an unconstitutional impairment of contract. The Florida Supreme Court found that the legislative act retroactively diminished the value of the plaintiff’s insurance contract in that the plaintiff had to pay the same amount for less coverage and thereby impaired plaintiff’s contract. In reaching this decision, the Court stated “[a]ny conduct on the part of the legislature that detracts in any way from the value of the contract is inhibited by the Constitution.” *Id.* at 1080. Likewise, in this case, the retroactive diminishment of the Class members’ retirement benefits (they have to pay more for the same benefit) is prohibited by section 121.011(3)(d), Florida Statutes as is the abrogation of the “mandatory, noncontributory retirement plan.” *Florida Sheriffs Ass’n v. Department of Administration*, 408 So. 2d 1033, 1037 (1981)(finding that a prospective modification of a special risk credit from 3% to 2% in the “mandatory, noncontributory retirement plan” was not an impairment of contract).

The reduction in the COLA percentage also is a prohibited retroactive change in the Class members’ benefits. See *Florida Sheriffs*. The COLA amendment in Chapter 2011-68 does not apply only to benefits earned after July 1, 2011. Instead, the reduced COLA applies to all

retirement benefits for those members who retire after July 1, 2011, and whose entitlement to such benefits was earned prior to July 1, 2011.

Although Florida courts have not had the opportunity to review FRS amendments such as the ones at issue in this case, other states have addressed the substantial impairment of contracted pension rights. Like Florida, New York has an express provision granting contract rights to retirement system members. Article V, section 7 of the New York State Constitution states that “[a]fter July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.” New York’s highest court interpreted this provision in *Birnbaum v. New York State Teachers Retirement System*, 152 N.E. 2d 241 (N.Y. 1958). In *Birnbaum*, active members of the New York Teachers Retirement System (“TRS”) challenged the TRS’s adoption of a mortality table which would reduce by approximately 5% the amount of monetary payments the members would receive under the TRS on the basis that it impaired the contractual relationship guaranteed under the New York Constitution. The Court found that the constitutional provision fixed “the rights of the employee at the time he became a member of the system” and that the challenged change in the mortality table was “a diminution and an impairment of the benefits of the Retirement System.” *Id.* at 245. Thus, the Court held that the new mortality table was invalid as applied to current members of the TRS.

Even in the absence of an express statutory or constitutional provision, other states have found that employees have a contract right in their retirement system. When contractual rights exist, the states have held that those contractual rights are substantially impaired when the contracting public entity passes laws or ordinances changing the employees’ existing pension rights. See *State of Nevada Employees Assoc., Inc. v. Keating*, 903 F. 2d 1223 (9th Cir.

1990)(determining that the State's elimination of the right of public employees to withdraw pension contributions without penalty substantially impaired the State's contractual obligations); *Calabro v. City of Omaha*, 531 N.W. 2d 541 (Neb. 1995)(finding a substantial contract impairment where the city eliminated a cost-of-living supplemental benefit plan provided to retired firefighters); *Dadisman v. Moore*, 384 S.E. 2d 816 (W.Va. 1989)(holding that the State's inadequate funding of the pension system constituted a substantial impairment of contract); *Oregon State Police Officers' Ass'n v. State of Oregon*, 918 P. 2d 765 (Or. 1996)(finding that several changes to Oregon's pension system, including a required 6% contribution rate for employees while prohibiting employers from offsetting the contribution rate, was a substantial impairment of contract).

The substantiality of the changes at issue in this case is clearly evident when viewed from the perspective of the Class members. The changes result in an immediate 3% salary reduction for all members of the FRS. A 3% salary reduction for the Class members results in a substantial reduction in their ability to pay for necessities such as food and housing. Furthermore, members of the Class who have planned for retirement on the basis of receiving an annual 3% COLA are suddenly after years of planning faced with a severely reduced benefit. Accordingly, it is clear that the modifications contained in Chapter 2011-68 are a substantial impairment of contract. *See Chiles; Association of Surrogates and Supreme Court Reporters v. State of New York*, 940 F. 2d 766, 772 (2nd Cir. 1991)(finding that the institution of a lag payroll substantially impaired State's obligation under the collective bargaining agreement and stating "it would be inconsistent for us to accept the defendants' argument that this impairment was necessary because of a governmental fiscal crisis, and to do so by disregarding the personal fiscal crises that the lag payroll would create").

The final inquiry in determining if a violation of the Contract Clause has occurred is whether the substantial impairment was reasonable and necessary. In this case, it clearly was not. Florida's pension plan is one of the most stable in the nation. The actuarial soundness of the FRS is well documented. See *2009-2010 State Board of Administration Investment Report*, <http://www.sbafla.com/fsb/LinkClick.aspx?fileticket=1KGUzNfF0IQ%3d&tabid=749&mid=195>

7. In the 2010 report from the State Board of Administration ("SBA"), the SBA states:

The FRS Pension Plan continues to be one of the best-run public pension funds in the United States. In fact, independent research once again confirmed that the FRS is one of the best-funded plans in the nation. It was recently recognized by the Pew Center on the States as one of four model pension funds, entering 2008 fully funded. Additionally, the FRS was highlighted as the top performing large U.S. pension fund for calendar year 2009 by Wilshire/TUCS and was deemed among the most cost-effective pension providers among its peers by CEM Benchmarking, Inc.

2009-2010 State Board of Administration Investment Report, p. 6-7.

Moreover, the legislative history of Senate Bill 2100 shows that the actuarial soundness of the FRS was not the reason for the modifications. In fact, the actuarial soundness of the FRS is not even mentioned. See *The Florida Senate Bill Analysis and Fiscal Impact Statement* (April 1, 2011), <http://www.flsenate.gov/Session/2011/2100/Analyses/ps5XnOs0q1WqXSBwrik2IzHaDug=7/Public/Bills/2100-2199/2100/Analysis/2011s2100.bc.PDF>; *The Florida Legislature, Summary of Conference Committee Action* (May 5, 2011), <http://www.flsenate.gov/Session/Bill/2011/2100/Analyses/VOuskO0TtfDTnw=PL=kf8cNN2b2gYc=|7/Public/Bills/2100-2199/2100/Analysis/S2100%20Conference%20Report.PDF>. Indeed, it could not be since the employer contribution rates were decreased by more than the now required 3% contribution rate for members. Thus, the 3% deduction from members' salaries in no way increases the actuarial soundness of the FRS. Instead, the reason for the modifications had nothing to do with the FRS and everything to do with general budget issues caused by the economic recession. Rather than

raise taxes, cut spending or make different spending decisions, the Legislature implemented the modifications to the FRS to balance its budget. This classic legislative action of impairing its own contracts because the Legislature would rather use the funds elsewhere is precisely the type of action that the United States Supreme Court has determined does not constitute reasonable and necessary impairment of a state's contractual obligations. *See U.S. Trust*. As the Florida Supreme Court in *Chiles* succinctly stated, "[t]he mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason." 615 So. 2d at 673. Likewise, in this case, the Legislature did not have a compelling reason to modify the FRS and therefore, the substantial impairment resulting from the passage of Chapter 2011-68, Laws of Florida is unconstitutional and cannot stand.

B. CHAPTER 2011-68 IS AN UNCONSTITUTIONAL TAKING OF THE PROPERTY OF CLASS MEMBERS WITHOUT FULL COMPENSATION

Article X, section 6 of the Florida Constitution states that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." Article X, section 6 is consistent with the United States Constitution's Takings Clause. The Fifth Amendment of the United States Constitution, like Article X, section 6, precludes the taking of private property for public use without just compensation. In interpreting the Takings Clause, the United States Supreme Court has found that the purpose of the Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U. S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960). In this case, the State has done exactly what the constitutional provisions were enacted to prevent -- it has taken the private property of the Class members

alone to bear the public burden of balancing the State's budget. Therefore, the 3% salary deduction and the COLA reduction result in an unconstitutional taking under Article X, section 6 of the Florida Constitution.

In general, there are two types of takings which require the State to justly compensate the property owner, physical/eminent domain takings and regulatory takings. See *Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622 (Fla. 1990). In a physical taking, the State confiscates private property for a public use. *Id.* Under a regulatory taking, the State regulates private property under its police power in such a manner that the "regulation effectively deprives the owner of the economically viable use of that property." *Id.* at 624. A taking under Article X, section 6 of the Florida Constitution "applies equally to real and personal property." *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN*, 576 So. 2d 261, 263 (Fla. 1990)(finding that the state's failure to return the respondents' truck for a period of two years raises a meritorious claim of a taking); see also *Flatt v. City of Brooksville*, 368 So. 2d 631 (Fla. 2d DCA 1979)(finding that plaintiffs could recover for the unwarranted governmental destruction of their personal property).

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed. 2d 358 (1980), the Court also addressed the application of the Takings Clause to personal property. The case involved a challenge to section 28.33, Florida Statutes which authorized the clerk of the Circuit Court to keep the interest earned on an interpleader fund deposited in the court's registry. In addition to taking the interest earned on the funds deposited, the clerk also charged a fee for services rendered in receiving the money into the court registry. The Florida Supreme Court found that a taking had not occurred because the funds were not private property. The United States Supreme Court rejected this finding and held that the principal sum deposited

in the registry was private property and that the taking of the interest on the private property was in violation of the Fifth Amendment. In reaching this conclusion, the Court stated:

Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.

To put another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

449 U.S. at 164, 101 S.Ct. at 452.

This case involves a physical taking and not a regulatory taking. After Class members have worked and already earned their compensation at their contractual rates of pay, a 3% deduction is imposed on their earned compensation/salary. Class members cannot opt out of the FRS or otherwise prevent the deduction from their salary. Moreover, even under the limited circumstances by which they can receive a refund of their salary deductions (i.e. they leave public employment), they 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* Ch. 2011-68, §15, Laws of Fla. (2011). Class members have not been granted any increase in benefits or coverage to account for this salary deduction. Additionally, the COLA that was a part of the Class members' contract with the State upon entering the FRS will now be reduced based upon the time they work beyond July 1, 2011, with no commensurate increase in benefits or coverage.

The purpose for the salary deduction and COLA reduction was not to increase benefits for FRS members or to ensure the actuarial soundness of the FRS. In fact, Chapter 2011-68 offers no enhancement of retirement benefits at all and even if the funds are returned (in the event the employee leaves public employment), as stated previously, no interest or other investment income is provided even though the funds will have been earning income in the FRS trust fund. Receiving a benefit that is already required and not providing interest or investment income is not full compensation. Instead, the Defendants in implementing Chapter 2011-68 will be physically reaching into the pocketbooks of the Class and appropriating their personal property for public use, balancing the State's budget. This is simply an attempt to raise revenue at the expense of public employees. Balancing the budget, a clear public use of funds, should be borne equally by the public as a whole. Accordingly, the 3% salary deduction and COLA reduction constitute a taking of private property without full compensation in violation of Article X, section 6 of the Florida Constitution. *See Webb's Fabulous Pharmacies, Inc.; In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN*, 576 So. 2d 261, 263 (Fla. 1990); *Canel v. Topinka*, 818 N.E. 2d 311 (Ill. 2004)(finding that an unconstitutional taking occurred when the state refused to return dividends made on unclaimed property).

**C. CHAPTER 2011-68, LAWS OF FLORIDA,
UNCONSTITUTIONALLY ABRIDGES THE RIGHT TO
COLLECTIVELY BARGAIN GUARANTEED BY ARTICLE I,
SECTION 6**

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

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

(emphasis supplied). This provision guarantees public employees the same rights to collectively bargain as those enjoyed by private employees, with the exception of the right to strike. See *Dade County Classroom Teachers Ass'n v. Ryan*, 225 So. 2d 903, 905 (Fla. 1969). These rights specifically include the right to bargain over pensions and retirement benefits. See *City of Tallahassee v. Pub. Empl. Relations Comm'n*, 410 So. 2d 487 (Fla. 1981). This right may be abridged based only upon a compelling state interest implemented by the least restrictive means. See *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030 (Fla. 1999). Chapter 2011-68, Laws of Florida, which becomes effective July 1, 2011, and was enacted without any prior collective bargaining and without any language making its provisions contingent upon such bargaining, plainly and unambiguously abridges this right.

In *City of Tallahassee*, the Florida Supreme Court found unconstitutional a statute that completely removed the subject of retirement from collective bargaining, stating that "Article I, Section 6, permits regulation of the bargaining process but not the abridgment thereof." 410 So. 2d at 490. Although Chapter 2011-68 does not explicitly remove retirement and pensions from collective bargaining, it effectively does so by making significant and fundamental changes to the FRS without providing any collective bargaining opportunity for the Class members who are covered by the FRS. It does not even purport to regulate collective bargaining; it simply unilaterally establishes all of the new terms and conditions applicable to those covered without mentioning the obligation to bargain at all. Its failure to do so in Chapter 2011-68 is significant because the various public employers whose participation in the FRS is mandatory therefore have no power to bargain over the changes being made, rendering any demand to bargain made

to them by a certified union futile.⁴ This is a substantial and material abridgment of the right to collectively bargain by any definition.

The Legislature has failed to specify, and there is in fact not any compelling state interest requiring or justifying its unilateral action. As previously noted, these changes were enacted solely to raise funds to balance the budget, not to remedy some imminent problem with the financial stability of the retirement fund. Under *Chiles*, therefore, the Legislature is not free to jettison the right to collectively bargain simply because it is politically more expedient than raising taxes.

Article I, Section 6, guarantees public employees, the right to *effective* collective bargaining. See *Hillsborough Governmental Employees Ass'n. v. Hillsborough Aviation Authority*, 522 So. 2d 358 (Fla. 1988). No such bargaining is possible where, as here, the Legislature has already unilaterally determined what the result will be. As noted by the United States Supreme Court in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991), "it is difficult to bargain if, during the negotiations, the employer is free to alter the very terms and conditions of employment that are the subject of negotiations." Consequently, Chapter 2011-68 unconstitutionally abridges Article I, Section 6.

II. ALL OF THE REMAINING FACTORS IN THE TEMPORARY INJUNCTION INQUIRY FAVOR GRANTING THE REQUESTED INJUNCTION

For the reasons set forth above, the Plaintiffs have a "substantial likelihood" of prevailing on the merits of their claims that the 3% salary deduction and COLA reduction

⁴ This includes the State itself because the Legislature has designated the Governor as the public employer for State employees in Section 447.203(2), *Florida Statutes*, exempting itself from any bargaining obligation and, thus, from any unfair labor practice for failure to bargain. See §447.501(1)(c), *Fla. Stat.*, prohibiting "public employers or their agents or representatives" from "refusing to bargain collectively."

unconstitutionally impair the Class members' contract rights in the FRS, constitute an unconstitutional taking of their property without full compensation and unconstitutionally abridge their right to collectively bargain. The Plaintiffs now address briefly the remaining factors – other than the likelihood of success on the merits – that are relevant to the temporary injunction analysis.

A. IRREPARABLE HARM

The Class members will suffer irreparable harm if this Court does not promptly issue an injunction safeguarding the funds being deducted from their salary. The Plaintiffs are not asking this Court to enjoin the Defendants' collection of the funds. Instead, they are asking that this Court prevent irreparable harm to them and to the FRS by segregating the funds from the FRS trust fund.

The FRS trust fund is a long term investment fund from which payments are made once the member has retired. It is not a short term investment depository with a mechanism for a payout outside of the statutorily mandated payment system. Thus, if the 3% salary deduction funds are invested in the FRS trust fund, there is no mechanism for retrieving those funds and even if there was, the short term risk of loss irreparably harms not only the Class members but the Defendants as well.

To prevent harm to both the Class members and the Defendants, the Plaintiffs ask that this Court direct the State Board of Administration which oversees the FRS trust fund to segregate the funds at issue in this case to protect the funds from loss. Although Florida courts have not had the opportunity to address the unique issues presented in this case, other states that have addressed the issue have granted temporary injunctions precluding the salary deductions. *See, e.g. American Federation of State, County, Municipal Employees, AFL-CIO v.*

Commonwealth, 465 A. 2d 62 (Pa. Cmwlth. 1983)(enjoining state from implementing statute requiring retirement plan members to contribute higher percentage of salaries to retirement); *Singer v. City of Topeka*, 607 P.2d 467 (Kan. 1980)(enjoining city from raising some pension members' contributions from 3% to 7%). In *Singer*, the temporary injunction was dissolved after the parties reached a stipulation and the "City was ordered to withhold 7% of plaintiffs' and the class's salaries, and to retain those funds as identifiable so that in the event the 1976 amendments were declared unconstitutional the excess over 3% is to be returned to plaintiffs and to the class with interest equivalent to the then prevailing rate on passbook savings at savings and loan associations in Topeka, Kansas." 607 P. 2d at 470-471.

B. NO ADEQUATE REMEDY AT LAW

The Plaintiffs, on behalf of the Class, have no adequate remedy at law, inasmuch as they have no mechanism available to retrieve the funds improperly deducted from their salaries once such funds are placed in the FRS trust fund. There is no legal action through which the Class members could recoup funds once they are intermingled with other funds and invested in long term investment vehicles through the FRS trust fund. Nor is there any administrative process by which the Class members could obtain this relief. Under the circumstances of this case, a temporary injunction is the only adequate remedy available to the Plaintiffs and the Class.

C. INJUNCTIVE RELIEF WILL SERVE THE PUBLIC INTEREST

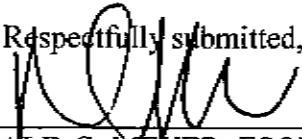
There can be no question that a temporary injunction in this case will serve the public interest. Ensuring that the State honors its contractual obligations, refrains from taking private property without full compensation and resists abridging the right to collectively bargain as guaranteed by the Florida Constitution protects the public interest. Indeed, there is no greater

public interest than protecting the integrity of the Constitution and the ability of the people to ensure that this fundamental charter is followed by those elected or serving under its auspices.

CONCLUSION

For the reasons stated herein, this Court should enter a temporary injunction enjoining the Defendants from placing the 3% salary deduction from the Class members' salaries in the FRS trust fund and directing the Defendants to segregate the funds in either an interest bearing bank account or in a short term investment fund.

Respectfully submitted,



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** Motion to Appear Pro Hac Vice to be filed*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished via electronic and U.S. mail on this 21st day of June, 2011 to:

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