

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

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

Plaintiffs,

CASE NO.: 2011 CA 1584

JOHN PARK; RANDALL HAIRE;
CHARLES E. BROOKFIELD, LODGE #86;
LIUNA, Local 517; FRATERNAL ORDER
OF POLICE; BRETT SANDLIN; RODNEY DURBIN;
the GOVERNMENT SUPERVISORS ASSOCIATION
OF FLORIDA, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, LOCAL 100;
GREGORY L. BLACKMAN; the FLORIDA NURSES
ASSOCIATION; DEBORAH HOGAN; INTERNATIONAL
UNION OF POLICE ASSOCIATIONS, AFL-CIO;
JASON CANON; JOSEPH PADUANO; GARY PENNY;
STEVEN HELMER; MICHAEL AGOSTINIS;
FREDRICK McCRONE; and MARK TARVER;

Intervenors/Plaintiffs,

vs.

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.

**RESPONSE BY PLAINTIFFS AND INTERVENING PLAINTIFFS PARK AND HAIRE
TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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BOB HAZEN
CLERK OF CIRCUIT COURT
LEON COUNTY, FLORIDA

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Plaintiffs and Intervening Plaintiffs Park and Haire (“Plaintiffs”), pursuant to Rule 1.510 of the Florida Rules of Civil Procedure and this court’s Amended Scheduling Order dated August 22, 2011, submit this response to Defendants’ Motion for Summary Judgment and the supporting memorandum of law. As shown below, defendants have failed to demonstrate that they are entitled to judgment as a matter of law; to the contrary, plaintiffs have demonstrated their entitlement to entry of judgment in their favor.

RESPONSE TO DEFENDANTS’ STATEMENT OF FACTS

Plaintiffs do not dispute the general content of most of the defendants’ “Statement of Facts” in the Memorandum of Law in Support of Defendants’ Motion for Summary Judgment (“Defendants’ Memorandum”). Plaintiffs do not, however, accept or agree with the precise wording of each the defendants’ specific factual contentions. Plaintiffs address below the assertions requiring supplementation or response.

For purposes of clarity and completeness, plaintiffs provide additional information regarding the historical level of funding of the FRS Pension Fund. The funding ratio is correctly analyzed by comparing actuarial assets to actuarial liabilities. (Defendants’ Exhibit 4, p. 13). The FRS Trust Fund reported \$120.93 million in actuarial assets and \$137.64 million in actuarial liabilities as of July 1, 2010; thus it had a funding ratio of 87.9%. (*Id.*; *see also* Plaintiffs’ Notice of Filing, Tab 2, p. 2). Defendants’ comparison of the FRS Trust Fund’s *present* net assets (instead of its actuarial assets) to its actuarial liabilities (Defendants’ Memorandum at 5, ¶ 8) is inappropriate.

It is true the FRS Pension Fund’s funding ratio dropped below 100% in 2009 and 2010 (Defendants’ Memorandum at 5 ¶¶ 7-8); however, the levels reached in 2009 and 2010 (88.5% and 87.9%, respectively) (Plaintiffs’ Notice of Filing, Tab 2, p. 2), were nowhere near record low

funding levels. The FRS Pension Fund was funded below 60% from 1985 to 1991, and below 80% from 1992 to 1996. (Plaintiffs' Notice of Filing, Tab 2, p. 2) (bar graph showing funding ratio for years 1985 through 2010). Additionally, from 1998 to 2008, when the FRS Pension Fund was fully funded, the legislature used the available surplus to reduce employer contributions below normal cost levels. (Defendants' Exhibit 4, p. 13). In 2011, the legislature lowered employer contribution levels by more than the 3% savings to be achieved through the new mandatory 3% employee contribution. *Compare* § 121.171(3), Fla. Stat. (2010) *with* Ch. 2011-68, § 33, Laws of Fla.

The statements and conclusions in paragraphs 21 and 26 of defendants' statement of facts are addressed to the ultimate legal issue in the case and are more properly considered in the context of the parties' respective legal arguments.

ARGUMENT

I. SENATE BILL 2100 SUBSTANTIALLY IMPAIRS PLAINTIFFS' CONTRACT WITH THE STATE.

A. The holding of *Sheriffs* allowing prospective changes to benefits accruing for future state service does not apply to plaintiffs' contractual right to a noncontributory system and cost-of-living adjustments independent of years of service or dates of service.

Defendants assume, without analysis or discussion, that the holding of *Florida Sheriffs Ass'n v. Dept. of Admin.*, 408 So. 2d 1033 (Fla. 1981), applies to the specific changes to the FRS imposed by Senate Bill 2100. This assumption is incorrect. The changes to FRS at issue in this case are outside the holding of *Sheriffs* and instead are governed by the plain language of section 121.011(3)(d), Florida Statutes (2010).

In *Sheriffs*, the Florida Supreme Court considered whether the legislature could prospectively reduce the amount of credit special risk members of FRS “earn toward retirement.” 408 So. 2d at 1034. Before July 1, 1974, the credit was two percent of the officers’ monthly income for each year of service in a special risk position; effective October 1, 1974, the credit was increased to three percent. *Id.* Effective October 1, 1978, the legislature returned the special risk credit to two percent for future service; this was the change challenged in the lawsuit. *Id.* The Court held that this change was permissible because the preservation of rights section in section 121.011(3)(d), Florida Statutes, was not intended to bind future legislatures from prospectively altering “benefits which accrue for future state service.” *Id.* at 1037. Because the special risk credit was a benefit that would accrue for future state service, the Court held the legislature’s prospective reduction of such credit was permissible.¹

Since the inception of FRS, its members have accrued retirement benefits throughout their employment based upon two factors: years of service and a percentage credit for each year performed in a specific class of service. Ch. 70-112, § 9, at 412, Laws of Fla., *codified at* § 121.091(1), Fla. Stat. (“The amount of monthly benefit shall be calculated as the product of A and B . . . ,” where “A” is a percentage credit based upon class of service, and “B” is the years of creditable service). It is plain that no FRS member has earned credit under either “A” or “B” for work the member has not yet performed. The Court in *Sheriffs* merely determined that the legislature could properly change the value assigned to one element of this equation (the 2% service credit falls under “A”) for work that has not yet been performed.

Unlike the special risk credit at issue in *Sheriffs*, the changes to FRS imposed by Senate Bill 2100 are not quantitative changes to a well-established formula, but instead are qualitative

¹ Ironically, although the Court upheld the return of the special risk credit to two percent, the legislature later raised the special risk credit to three percent and also awarded additional retroactive special risk credit for service during the period in which it was two percent. (Defendants’ Exhibit 4, p. 69).

changes to the plan. From 1975 until 2011, the noncontributory nature of the FRS and the application of cost-of-living adjustments have been absolute, unconditional components of the plan; nothing about these elements has ever related to years of service or dates of service. Until this year, Chapter 121 specified that “each employer shall accomplish the [required contribution] by a procedure in which no employee’s gross salary shall be reduced.” §§ 121.071(2), 121.571(1), Fla. Stat. (2010); *see also* FRS Summary Plan Description, Defendants’ Exhibit 4, p. 61 (FRS Annual Report, July 1, 2009-June 30, 2010) (“The [FRS] does not require employee contributions to establish service credit for work performed in a regularly established position; employers pay all required contributions.”) Likewise, until this year, Chapter 121 specified that it “provide[d] cost-of-living adjustments to the monthly benefits payable to all retired members of state-supported retirement systems,” and provided a continuing appropriation with which to pay such adjustments. § 121.101(1),(6), Fla. Stat. (2010); *see also* FRS Summary Plan Description, Defendants’ Exhibit 4, p. 66 (“The benefits received by retirees and beneficiaries are increased by a 3 percent cost-of-living adjustment (COLA) each July. . . . The COLA applies to all continuing monthly retirement benefits paid under the FRS Pension Plan . . .”). Although the calculation of the cost-of-living adjustment has varied over time, since the inception of the FRS members have been entitled to some level of annual adjustment in their retirement benefit to account for increases in the cost of living.²

The Court’s decision in *Sheriffs* does not address the propriety of changes to the characteristics of FRS such as these that have been continuous, unconditional aspects of the plan since its inception and are not connected to future state service. Instead, the noncontributory

² Initially, the COLA was based upon an “average cost of living index” (which was based upon the consumer price index figures issued by the U.S. Department of Labor), ignoring changes greater than 3%. Ch. 70-112, § 10, at 420-22, Laws of Fla. The calculation was changed slightly in 1980 and 1983, but still capped at 3%. Ch. 80-242, § 4, at 801-804, Laws of Fla; Ch. 83-216, § 37, at 1001-1002, Laws of Fla. In 1987, the COLA was set at a fixed level of three percent. Ch. 87-534, § 1, at 1-4, Laws of Fla.

nature of the plan and the entitlement to annual cost-of-living adjustments are squarely encompassed within the “rights of members of the retirement system established by [Chapter 121],” which the legislature declared “to be of a contractual nature, entered into between the member and the state . . . legally enforceable as valid contracts” which “shall not be abridged in any way.” § 121.011(3)(d), Florida Statutes (2010). The narrow holding in *Sheriffs* relating to unearned service credit does not permit the legislature to redefine established, unconditional contractual rights under Chapter 121 as suddenly accruing based upon service—while simultaneously eliminating any accrual for future service with the justification that such elimination is purely “prospective.” If such a rewriting of the contract is permissible, then the contract is wholly illusory.

Thus, defendants’ contention that the changes wrought by Senate Bill 2100 are permissible because they are “only prospective” misses the point. The relevant legal question is whether it is an impairment of FRS members’ contract with the state to discontinue the noncontributory aspect of the plan and to eliminate cost-of-living adjustments. This determination must be made based upon the contract language itself, the law in effect at the time of its adoption (*i.e.*, the “rights under [Chapter 121]”), and the applicable case law construing the contract language. Nothing in the contract language itself permits prospective impairments. Although *Sheriffs* construed the contract language as allowing prospective impairment as to an element of the equation for unearned service credit, the changes in Senate Bill 2100 do not relate to the equation for unearned service credit. Therefore, whether the changes are prospective or not is legally irrelevant.

Even if the prospective nature of the legislative changes were relevant in this case, defendants’ expert’s technical actuarial analysis sheds little light upon this issue. Mr. Zeisler

states that he conducted a series of calculations based upon a series of assumptions regarding the plaintiffs' post-July 1, 2011 retirement accruals. (Defendants' Exhibit 9.) Although Mr. Zeisler does not provide his calculations for the actual plaintiffs, he does provide a narrative of his methodology, "Sample Participant Calculations," and charts entitled "Sensitivity Analysis" for each plaintiff. (*Id.* pp. 2-4, Appendix). Mr. Zeisler's narrative provides in pertinent part:

For each participant, benefits were calculated as of 6/30/2011 and as of retirement dates five years thereafter. . . . [and] cumulative amounts paid were calculated each year for both the 2011 Accrued Benefit and Future Benefit. The present values of these payment streams were also calculated as of date of retirement, along with the ratios of these present values. *When the ratio of the present value of the Future Benefit to the present value of the 2011 Accrued Benefit equals or exceeds 100%, there has been no cutback in benefits.* This ratio is referred to below as the Benefit Ratio. In all cases where the Benefit Ratio is greater than 100%, the value of the Plaintiffs' benefit is increasing, not decreasing. . . . Results showed that *for every Plaintiff participant* the Benefit Ratio exceeded 100%.

(Defendants' Exhibit 9 ¶¶ 7-9) (emphasis in original). In lay language, Mr. Zeisler determined that assuming the plaintiffs each work an additional five years, and applying the reduced COLA to service performed after July 1, 2011,³ plaintiffs' total retirement benefits under the FRS will be higher than they were as of June 30, 2011. This is no great revelation; the total retirement benefits clearly will be higher five years from now because the plaintiffs will receive additional service credit for those years. (Plaintiffs' Supplemental Notice of Filing, Tab 13, p. 66, line 14 through p. 67, line 2). Mr. Zeisler did not compare the benefits payable to plaintiffs upon implementation of Senate Bill 2100 to those payable under pre-existing law. (*Id.*, p. 32, line 3-8). Even if this court concludes that under *Sheriffs* it is appropriate to consider whether the challenged changes to FRS affect members' accrued benefits, it is not clear that Mr. Zeisler's

³ Mr. Zeisler's analysis did not take into account the mandatory 3% employee deduction. (Supplemental Notice of Filing Materials in Support of Motion for Summary Judgment by Plaintiffs and Intervening Plaintiffs Park and Haire ("Plaintiffs' Supplemental Notice of Filing"), Tab 13, p. 6, lines 14-18).

analysis of present values and benefit ratios based upon carefully constructed assumptions answers this question in a way contemplated by the Florida Supreme Court in *Sheriffs*. As set forth in Plaintiffs' Motion for Summary Judgment, the systemic changes of Senate Bill 2100 constitute a retroactive, unconstitutional impairment under the case law because they substantially devalue plaintiffs' pre-existing contract with FRS. (Plaintiffs' Motion for Summary Judgment pp. 11-13).

Defendants' attempt to bootstrap their expert's conclusions through manipulations of the report of plaintiffs' expert, Charlette Moore (Defendants' Memorandum p. 11, 17-19, Defendants' Exhibit 12), is inappropriate. Ms. Moore clearly testified that she did not calculate Senate Bill 2100's effect upon the plaintiffs' accrued benefits. (Plaintiffs' Supplemental Notice of Filing, Tab 14, p. 16, lines 15-19; p. 122, lines 8-13). She further opined that to conduct such a calculation was not "accurate" or "logical." (*Id.* p. 16, line 20 through p. 17, line 10; p. 116, lines 1-9). She maintained this view because, among other reasons, the plaintiffs had not left their employment, the FRS system does not provide a definition for accrued benefits, and the calculation would require a series of assumptions. (*Id.* p. 19, lines 4-20; p. 116, lines 10-17; p. 118, line 20 through p. 119, line 6; p. 120, lines 5-8). Ms. Moore explained, "[I]f an employee is still actively working . . . the benefit starts from the date they are employed to the date they die. My approach is to look at that value in the entirety. You don't chop it up midstream with unknown variables." (*Id.* p. 20, lines 3-7). Given this testimony, any attempt to rely upon Ms. Moore's report for the proposition that Senate Bill 2100 does not affect benefits the plaintiffs may have accrued through June 30, 2011, is severely misplaced.

In addition to explaining why the present case is not governed by *Sheriffs*, Plaintiffs' Motion for Summary Judgment set forth substantial support for the proposition that *Sheriffs* was

wrongly decided. Its limitation of the contract in section 121.011(3)(d), Florida Statutes, to “benefits already earned” is patently inconsistent with the plain language of that provision protecting the “rights of members of the retirement system established by [Chapter 121].” (Plaintiffs’ Motion for Summary Judgment, pp. 13-19). Plaintiffs’ motion also identified similar governing provisions in other states that expressly protect all rights of public retirement system members, *see* N.Y. Const. art. V, § 7, Ill. Const. art. XIII, § 5, and Mass. Gen. Laws. Ch. 32, § 25(5), as contrasted with provisions that expressly protect only “accrued” rights or benefits, Haw. Const. art. XVI, § 2, and Mich. Const. art. 9, § 24. As demonstrated by the authorities and discussion in Plaintiffs’ Motion for Summary Judgment, the Court in *Sheriffs* read the word “accrued” into section 121.011(3)(d), Florida Statutes, despite the fact that the legislature did not place it there. No principle of statutory construction supports such a reading. Defendants point to nothing in the express contract language that supports the holding in *Sheriffs*.⁴

Although defendants cursorily contend that pre-*Sheriffs* jurisprudence specified that “already earned” benefits could be altered (Defendants’ Memorandum p. 13 n.13), in fact no Florida Supreme Court case prior to *Sheriffs* made any distinction between active employees’ earned and unearned benefits. Furthermore, the pre-*Sheriffs* cases all grew out of an early case opining that no contract rights attached to mandatory, non-contributory public pension plans, *see Anders v. Nicholson*, 111 Fla. 849 (Fla. 1933). Section 121.011(3)(d), Florida Statutes, clearly was intended not to incorporate this principle but to overrule it.

⁴ To the extent defendants subtly suggest that the preservation of rights provision does not reach the noncontributory nature of FRS because it was technically a contributory system when the preservation of rights was adopted (Defendants’ Memorandum p. 12 n.11), this suggestion ignores the provision’s declaration that members’ rights “shall not be impaired by virtue of the conversion of the Florida retirement system to an employee non-contributory system.” § 121.011(3)(d), Fla. Stat. Furthermore, the same legislation that adopted the preservation of rights provision also mandated that the system be changed from contributory to noncontributory the following year. *See* Ch. 74-302, §§ 1, 4, Laws of Fla. (Plaintiffs’ Notice of Filing, Tab 1).

Defendants contend that plaintiffs' reading of section 121.011(3)(d) is contrary to Florida Supreme Court statements that one legislature cannot bind a future legislature, citing *Daytona Beach Racing & Rec. Facilities Dist. v. Volusia Cty.*, 372 So. 2d 419 (Fla. 1979) and *Ware v. Seminole Cty.*, 38 So. 2d 432 (Fla. 1949). While these cases state the general rule that one legislature cannot bind a future legislature, they are inapplicable to cases such as this one in which there is a clear contract. The U.S. Supreme Court has held that if there is a clear indication that a legislature intends to bind itself contractually, the contract will be binding on future legislatures. See *U.S. Trust*, 431 U.S. 1, 24 (1977); *National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co.*, 470 U.S. 451, 466-67 (1985); see also *Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F. 3d 46, 60 (1st Cir. 1999) ("Finding a public contractual obligation has considerable effect. It means that a subsequent legislature is not free to significantly impair that obligation for merely rational reasons."). The Florida Supreme Court has similarly recognized that where a contract is at issue, a future legislature is not free to act. *State v. City of Pensacola*, 40 So. 2d 569 (Fla. 1949) (where county issues bonds under statute authorizing the levy of tax to service the bonds, "the Legislature is without power to repeal the statute, as it impairs the obligation of a contract"); *Long v. St. John*, 170 So. 317 (Fla. 1936).

In this case, section 121.011(3)(d), Florida Statutes, unequivocally creates a binding contractual obligation. The statute specifically uses the term "contract" and expressly protects the enforceability of the contract ("such rights shall be legally enforceable as contract rights") by prohibiting its abridgment "in any way." § 121.011(3)(d), Fla. Stat. (2010). This language is a "clear indication" that the legislature intended to bind itself. See *U.S. Trust*, 431 U.S. at 18 (holding that the use of the terms "covenant" and "agree" provided a clear indication of the intent to contract); compare *Parella*, 173 F.3d at 60-62 (finding that the language of the statute did not

“clearly and unequivocally” demonstrate an intent to contract). The defendants’ reliance upon general statements that one legislature is precluded from binding a future legislature is misplaced in light of the clearly defined contractual obligation involved in this case.

In defense of *Sheriffs’* interpretation of section 121.011(3)(d), defendants do not rely upon the statutory language itself or upon decisions from states with similar provisions; instead they cite cases from other jurisdictions and other contexts which are readily distinguishable. For instance, defendants rely upon *Central Laborers’ Pension Fund v. Heinz*, 541 U.S. 739 (2004) and *Campbell v. BankBoston, N.A.*, 327 F.3d 1 (1st Cir. 2003), for the unremarkable proposition that ERISA’s anti-cutback rule allows prospective changes to benefits. However, government plans are not subject to ERISA, *see* 29 U.S.C. §§ 1003(b)(1), 1002(32), and there is no legal or policy reason to look to ERISA in construing government plans that contain their own express contract provision. It is especially inappropriate to apply ERISA’s anti-cutback rule, which expressly limits its protection to participants’ “*accrued* benefits,” *see* 29 U.S.C. § 1054(g)(1), to section 121.011(3)(d), Florida Statutes, which contains no such limitation.⁵ Judicial decisions applying ERISA necessarily do not address contract issues, because ERISA expressly preempts all state law claims relating to employee benefit plans. *See* 29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987) (civil enforcement provisions of ERISA are the

⁵ In any event, the Supreme Court’s holding in *Heinz* supports the plaintiffs’ arguments in this case. The Court found that a plan could not expand the scope of post-retirement employment that would suspend a member’s pension, because such a change impermissibly placed a restriction on the receipt of the plaintiff’s benefit. 541 U.S. at 744. The Court noted that the object of ERISA is to protect employees’ justified expectations of receiving the benefits their employers promise them, and that the plaintiff reasonably relied upon the plan’s terms in planning his retirement. *Id.* at 743, 744. “We simply do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz’s pensions rights and reducing his promised benefits.” *Id.* at 745. Similarly, Florida’s imposition of the new mandatory 3% employee contribution places a restriction on the receipt of plaintiffs’ benefits; they do not have the option of foregoing the contribution in exchange for foregoing additional retirement benefits. The only way FRS members can maintain their eligibility to collect their accrued benefits without being subject to the 3% contribution is to quit their jobs.

exclusive vehicle for actions by ERISA-plan participants and beneficiaries; all state law claims within scope of ERISA's enforcement scheme are pre-empted).

The recent cases relied upon by defendants from trial courts in Colorado and Minnesota are also irrelevant. In those cases there was no express language conferring contract rights upon members of the public retirement plans. In *Justus v. State*, Case No. 2010CV1589 (Colo. Dist. Ct. June 29, 2011), the court found the state had changed the COLA formula numerous times during its 40-year history and that plaintiffs had failed to show "any statutory language or provision, much less unmistakable and clear language, establishing an intent to create a contractual right at odds with 40 years of history." *Id.* at 9. The court held that absent a "clear indication that the legislature intended to bind itself" contractually, "the presumption is that the law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Id.* (citation omitted). Similarly, in *Swanson v. State*, No. 62-CV-10-05285 (Minn. Dist. Ct. June 29, 2011), the court upheld a "minimal alteration" in the calculation of future adjustments to retirees' annuities, because "no plain and unambiguous language shows the Legislature intended to confer contract rights to a particular adjustment formula." *Id.* at 4, 17. Neither of these cases shed any light upon the proper interpretation and scope of section 121.011(3)(d), Florida Statutes.

Finally, the fact that other states have made a variety of changes to their pension systems in recent years (Defendants' Memorandum pp. 31-32) provides no more support for the legality of Senate Bill 2100 than does its mere enactment. The constitutional validity of a legislative act is not proven by the mere existence of another, even identical, legislative act. And of course the legislation referenced by defendants is not even similar, much less identical, to Senate Bill 2100.

An increase in contribution rates within an existing contributory pension system is entirely different than a conversion from a non-contributory system to a mandatory, contributory system.

States have developed different approaches to public pension rights, and each state's legislative changes must be evaluated against the state's unique constitutional, statutory, and judicial framework. As set forth in Plaintiffs' Motion for Summary Judgment, plaintiffs assert that to the extent out-of-state authorities are persuasive in this case, it is most appropriate to look to states with provisions similar to section 121.011(3)(d), Florida Statutes. For example, Illinois enacted some changes to its public pension system in 2010, but the changes only applied to those who first became employed after January 1, 2011. *See* Illinois Public Act 096-1495, *available at* <http://www.ilga.gov/legislation/publicacts/96/PDF/096-1495.pdf>. Similarly, in Massachusetts and New York there have been legislative proposals to modify the pension system, but those proposals would only apply to future employees. *See* New York Legislative Bill Drafting Commission 12024-09-1, *available at* http://governor.ny.gov/assets/documents/GPB_10_tievi.pdf; Massachusetts Bills S.2010 and S.2018, *available at* <http://www.malegislature.gov/Bills/187/Senate/S02010> and <http://www.malegislature.gov/Bills/187/Senate/S02018>.

The authorities discussed above, as well as those discussed in Plaintiffs' Motion for Summary Judgment, demonstrate that the contract created by section 121.011(3)(d), Florida Statutes, protects plaintiffs' rights to a non-contributory system and to a cost-of-living adjustment independent of plaintiffs' years of service or dates of service.

B. The undisputed material facts demonstrate that the impairment of plaintiffs' contract is substantial.

Defendants do not and cannot meaningfully dispute that the impairment of plaintiffs' contract caused by Senate Bill 2100 is substantial; they assert only that whether it is substantial is

“irrelevant for this case.” (Defendants’ Memorandum p. 20). Their only basis for disputing the substantiality of the impairment is a citation, without discussion, to *United States Fidelity & Guaranty Co. v. Dept. of Ins.*, 453 So. 2d 1355 (Fla. 1984).

United States Fidelity has no relevance to the present case. There, motor vehicle insurers alleged that a state law requiring them to refund excess profits impaired their insurance contracts with their customers. 453 So. 2d at 1360. The Court’s impairment analysis rested nearly entirely upon the fact that insurance was a heavily regulated industry. *Id.* (“In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past.”). The Court concluded that because the plaintiffs operated in a heavily regulated industry, and an earlier law had put them on notice that they might have to refund their excess profits, the statute did not operate as a substantial impairment of a contractual relationship. *Id.* at 1361. Obviously, the facts of the present case are unlike those in *United States Fidelity*. Plaintiffs are public employees; they do not operate in a heavily regulated industry. And their contract is with the state itself, which the Court in *United States Fidelity* acknowledged calls for a lower level of deference. *Id.* at 1361 (“Unless the State itself is a contracting party . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.”) (citing *United States Trust*, 431 U.S. 1, 22-23 (1977)).

In their summary judgment motion, plaintiffs provided clear, undisputed factual support for the substantial detrimental effect Senate Bill 2100 is having upon them. (Plaintiffs’ Motion for Summary Judgment, pp. 19-20; Plaintiffs’ Notice of Filing, Tab 4). Plaintiffs also cited relevant applicable legal authority for the proposition that the impairment is substantial. (*Id.* pp. 20-21). Defendants have not created any dispute as to this issue.

C. The undisputed material facts demonstrate that the impairment of plaintiffs' contract is not reasonable and necessary to serve a compelling interest.

Defendants cannot and do not meaningfully assert that the substantial impairment of plaintiffs' contract is justified by a compelling state purpose. They merely point to a general budget shortfall and assert that "substantial economic issues" justify impairment, citing *Florida Insurance Guaranty Association v. Devon Neighborhood Association*, 33 So. 3d 48 (Fla. 4th DCA 2009), *quashed on other grounds*, 67 So. 3d 187 (Fla. 2011).

Again defendants misapprehend the appropriate standard to be applied in contract impairment cases where the state is a party to the contract. In *Florida Insurance Guaranty*, the court relied upon *United States Fidelity* to determine that a statute requiring insurers to give homeowners notice of the option to engage in mediation in lieu of the appraisal process minimally impaired insurance contracts, a heavily regulated industry. 33 So. 3d at 53. The court concluded that this minimal impact to insurers was justified by the state purpose of reducing the cost of the appraisal process, a "substantial economic issue *for homeowners.*" *Id.* (emphasis added).

Clearly *Florida Insurance Guaranty* has no applicability to the present case, in which the plaintiffs are not operating in a heavily regulated industry and the state has impaired its own contract. As fully addressed in Plaintiffs' Motion for Summary Judgment, in order to justify the impairment of its own contractual obligations, the state must demonstrate a compelling state interest. (Plaintiffs' Motion for Summary Judgment, pp. 22-24) (citing *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993) and *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977)). Defendants have produced no evidence that the state had "no other reasonable

alternative means of preserving its contract with public workers” and that “the funds were available from no other reasonable source.” *Chiles*, 615 So. 2d at 673.

Defendants’ citation to the legislative declaration that Senate Bill 2100 fulfills an “important state interest,” *see* Ch. 2011-68, § 42, at 113, Laws of Florida, is not helpful as this section makes no mention of a compelling interest. Furthermore, the bill analysis explains that this finding pertains to the restrictions in the Florida Constitution upon the imposition of unfunded mandates, *i.e.*, laws requiring counties or municipalities to spend money. *See* Art. VII, § 18, Fla. Const. (“No county or municipality shall be bound by any general law requiring such county or municipality to spend funds . . . unless the legislature has determined that such law fulfills and important state interest and . . . the expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments.”); (Plaintiffs’ Notice of Filing, Tab 7, p. 10) (finding an exception to the “mandates provision” because “the Legislature has determined that this bill satisfies an important state interest”). Furthermore, the plain language of section 42 demonstrates that it has nothing to do with justifying *reductions* in pension plan benefits but rather relates to the requirement in Article X, section 14 of the Florida Constitution that any “*increase* in the benefits” of a government retirement system must concurrently provide for funding of the increase on a sound actuarial basis. Art. X, § 14, Fla. Const. Language identical to that contained in section 42 of Senate Bill 2100 is routinely placed in bills that make improvements to the FRS. *E.g.*, Ch. 2002-273, § 10, at 42, Laws of Fla.; Ch.

2000-167, § 3, at 2, Laws of Fla. It has no relevance to the substantial reductions occasioned by Senate Bill 2100.⁶

Because there is no genuine issue of material fact as to whether the substantial impairment of plaintiffs' contract with the FRS is reasonable and necessary to serve a compelling interest, the impairment of plaintiffs' contract caused by Senate Bill 2100 is unconstitutional and must be enjoined.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT UPON THEIR TAKINGS CLAIMS AS A MATTER OF LAW

Because plaintiffs have demonstrated their entitlement, as a matter of law, to a noncontributory pension system and to cost-of-living adjustments independent of years of service or dates of service, it logically follows that defendants may not take these private property rights from plaintiffs for a public purpose without providing plaintiffs with just compensation. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Bailey v. State*, 500 S.E. 2d 54, 69 (N.C. 1998); *Nat'l Educ. Ass'n-Rhode Island v. Retirement Bd. of Rhode Island Employees' Retirement Sys.*, 890 F. Supp. 1143, 1166 (D.R.I. 1995).

Defendants' contention that FRS members are not entitled to investment gains because they do not bear risk of investment losses (Defendants' Memorandum pp. 22-24) is based upon a misunderstanding of the nature of plaintiffs' takings claims. Plaintiffs cite the lack of interest payments on contribution refunds as evidence that Senate Bill 2100 does not provide compensation for the taking of plaintiffs' private property rights. (Plaintiffs' Motion for

⁶ The Florida Constitution's requirement that any increase in public retirement benefits must be funded on an actuarially sound basis is consistent with plaintiffs' construction of section 121.011(3)(d), Florida Statutes, as guaranteeing FRS members' entitlement to their rights and benefits under Chapter 121. If, as defendants contend, the legislature may simply restructure the plan or reduce employees' future benefits to address an actuarial deficiency, then there would be no need to require an increase in benefits to be actuarially sound at the time of adoption.

Summary Judgment p. 27-28). Plaintiffs do not assert that failure to provide interest upon contribution refunds, by itself, constitutes a taking.⁷ There are many ways in which the state could provide compensation for the private property rights taken by Senate Bill 2100, by providing a concomitant increase in benefits. But Senate Bill 2100 provides no compensation of *any* kind, not even simple interest upon member contributions.

Defendants' assertion that the changes to the FRS contained in Senate Bill 2100 are not "for public use" (Defendants' Memorandum p. 24) is in direct contradiction to its statements that the legislature enacted the bill to serve the "important public purpose" of addressing a \$3.6 billion shortfall (*id.* p. 20). Defendants cannot have it both ways. It is undisputed that the legislature made a policy decision to derive significant funds from FRS members in order to make funds available for other areas of the state budget. Plaintiffs do not contend that defendants were prohibited from doing so, but merely contend that the state must provide just compensation for the private property taken. The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005).

There are no issues of material fact as to plaintiffs' claims that Senate Bill 2100 constitutes a taking of private property for a public purpose without just compensation in violation of Article X, Section 6 of the Florida Constitution. Plaintiffs are entitled to judgment as a matter of law on these claims.

⁷ Plaintiffs express no view as to whether or not the failure to pay interest could be the basis of a takings claim; such a claim is simply not encompassed within the plaintiffs' complaint in this action.

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT UPON THEIR COLLECTIVE BARGAINING CLAIM AS A MATTER OF LAW

Defendants' summary judgment memorandum fails to address the actual claim raised by plaintiffs on this issue. Instead, defendants answer a question not raised by this case: whether the legislature lawfully may change or negate provisions in a collective bargaining agreement negotiated with public employee unions in an appropriations act by choosing not to fund those provisions. There is no question that *State of Florida v. Florida Police Benevolent Association, Inc.*, 613 S0. 2d 415 (Fla. 1992), answers this question, but that case says nothing about the issue in this case: whether the legislature may through substantive legislation, not an appropriations act, unilaterally change a mandatory subject of bargaining without affording the certified collective bargaining agent of the affected public employees the opportunity to engage in negotiations over the change prior to its becoming effective.

Defendants' assertion that the *PBA* case "obviously applies" because Senate Bill 2100 was enacted as a cost savings measure is patently incorrect. Nothing in that case or any other case even remotely suggests that the fundamental right to collectively bargain may so casually be dismissed. To the contrary, the Florida Supreme Court itself expressly rejected this notion in its subsequent decision of *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993).

In *Chiles*, the legislature, after funding collective bargaining agreements that provided pay increases to the covered employees, first reduced and later rescinded those increases as part of its plan to balance the state budget following a significant shortfall in expected revenue. Relying upon *PBA*, the state contended as defendants do here that the legislature's exclusive power over appropriations trumps any rights guaranteed by Article I, Section 6, claiming that the collective bargaining agreements were not enforceable against the legislature because it was not

a party to the agreements. 615 So. 2d at 672. Stating “we do not believe that the result reached in *Police Benevolent* dictates the result here,” the Supreme Court rejected the state’s position:

The state itself clearly is a party to the contract, and the legislature is a constituent branch of the state. Once the executive has negotiated and the legislature has accepted and funded an agreement, the state and all its organs are bound by that agreement under the principles of contract law.

Id. at 672-73. Recognizing that the legislature has the authority to reduce previously approved appropriations for employee salaries if it can demonstrate a compelling state interest, the Court found that

[b]efore that authority can be exercised, however, the legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the legislature must demonstrate that the funds are available from no other possible reasonable source. . . . That has not happened here.

Id. at 673.

Thus, even though the legislature’s exercise of its appropriations power to abrogate a prior appropriation was indisputably a “cost savings measure,” it was trumped by Article I, Section 6, refuting the basic premise of defendants’ argument. Therefore, the fact that the legislature may have considered Senate Bill 2100 as part of its efforts to balance the state budget in the face of a revenue shortfall is simply irrelevant to the issue in this case.

What is relevant is *Chiles*’ teaching that the legislature “is a constituent branch of the state” that is subject to the requirements of Article I, Section 6, despite its power of appropriations. Rather than an appropriations decision, the present case involves a decision by the legislature to ignore the obligation to comply with Article I, Section 6. The controlling authority is *City of Tallahassee v. Public Employees Relations Commission*, 410 So. 2d 487 (Fla.

1981), not *PBA*. Although the legislature did not expressly exclude the mandatory subject of retirement from collective bargaining in Chapter 2011-68, it effectively did so by failing to require that the changes made in the retirement system first be subjected to the collective bargaining process. The proposition that one cannot do indirectly that which cannot be done directly is applicable here. No one is claiming that the legislature cannot make changes in the retirement system and nothing in Article I, Section 6, or the statute implementing it prevents it from ultimately doing so. All that is required by Article I, Section 6, is that the collective bargaining process be followed to its conclusion first. Because that was not done in this case and there is no compelling state interest justifying this failure, Article I, Section 6, was violated. The challenged provisions of Senate Bill 2100 must therefore be found unconstitutional.

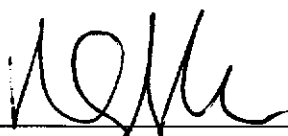
CONCLUSION

Plaintiffs do not assert that the state may never change the Florida Retirement System in a way that is detrimental to its members, only that in doing so it must comply with statutory and constitutional prescriptions. Because the contractual rights conferred by Chapter 121 attach upon employment, changes to the system affecting future employees are permissible (such as those in Senate Bill 2100 pertaining to the calculation of average final compensation, lengthening vesting periods, and raising retirement ages). Additionally, even changes that substantially impair FRS members' contractual rights or collective bargaining rights are permissible under the Florida Constitution when the state demonstrates a compelling interest for the need to do so. What the state cannot do is impair FRS members' rights simply because it wishes as a matter of policy to make wholesale changes to the system or spend the money

elsewhere. Because the undisputed facts demonstrate that this precisely is what occurred here, Senate Bill 2100 is unconstitutional and its challenged provisions must be enjoined.

Wherefore, Plaintiffs respectfully request the court to deny Defendants' Motion for Summary Judgment and instead grant the Motion for Summary Judgment by Plaintiffs and Intervening Plaintiffs Park and Haire, and grant such further relief as the court deems appropriate.

Respectfully submitted,



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