

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.

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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Pursuant to Rule 1.510, Florida Rules of Civil Procedure, 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 of Law in support of their Motion for Summary Judgment.

INTRODUCTION

Plaintiffs’ claims in this case were effectively rejected by the Florida Supreme Court decades ago. Because the changes to the Florida Retirement System (“FRS”) are prospective only and do not reduce benefits already earned, they do not violate the Contract or Takings Clauses of the Florida Constitution. Florida Sheriffs Association v. Department of Administration, 408 So. 2d 1033 (Fla. 1981). Moreover, because the Legislature implemented these changes pursuant to its exclusive constitutional control over public funds, they do not violate the Collective Bargaining Clause of the Florida Constitution. State of Florida v. Florida Police Benevolent Association, Inc. 613 So. 2d 415 (Fla. 1992). This case really is just this simple.

Plaintiffs try hard to avoid these controlling authorities, but they cannot. For example, Plaintiffs fundamentally confuse earning new benefits at a slower pace with reducing benefits already earned. Earning benefits at a slower pace is expressly constitutional under controlling Florida Supreme Court precedent. Reducing benefits already earned would be unconstitutional absent a compelling state interest.

In other words, if an FRS member earns \$10 towards retirement each year, the member is constitutionally entitled to a retirement benefit of \$100 after ten years. The state cannot reduce this benefit to \$90 without a compelling interest. Doing so would take back benefits already

earned. The Legislature is free, however, to amend FRS in the member's tenth year of employment to provide that, beginning in the eleventh year, the member will earn only \$5 (or could even earn *nothing*) towards retirement going forward. If the member continues to work, retirement benefits will accrue at a slower pace. In this example, in the member's second ten years of employment, the member will earn an additional \$50 towards retirement. However, the \$100 earned during the member's first ten years of employment remains untouched. This prospective reduction is constitutional under Florida Sheriffs because it affects future benefit accruals only. The amendment has no retroactive effect—in other words, it does not reach back and reduce the \$100 already earned at the time of the change. The legislature followed this model when it passed Chapter 2011-68, Laws of Florida (“Chapter 2011-68”), precisely to ensure that the changes at issue here would be constitutional.

Defendants are entitled to summary judgment because they herewith submit admissible, credible, and uncontradicted expert testimony and evidence establishing that there has been no reduction to the benefits earned prior to the amendment at issue. Conversely, Plaintiffs offer only irrelevant testimony from their expert with regard to the *extent* of the changes, without regard to whether those changes operate *prospectively*. As a matter of law, so long as the changes are prospective, the amount or size of the changes does not matter. Indeed, Florida's rule in this regard is the same as the federal rule that applies to private pension plans, as well as other States' rules regarding changes to benefits under public pension plans.

There is likewise no way for Plaintiffs to avoid the controlling effect of the Legislature's power over the budget, including compensation for State employees, which trumps any collective bargaining rights. Because the Legislature established these changes on a prospective

basis, there is nothing impairing the rights of employees to negotiate other terms of their collective bargaining agreements in light of the new retirement benefits landscape.

For all of these reasons, which are more fully explained below, Plaintiffs' claims must be rejected, and summary judgment should be entered in favor of the Defendants.

STATEMENT OF FACTS

The Budget Crisis

1. Heading into the 2011 legislative session, the State of Florida was facing a budget shortfall of over \$3.6 billion, an amount which had grown by over \$1 billion since September 15, 2010. See Summary Financial Outlook, Senate Budget Committee, January 27, 2011, a copy of which is attached hereto as Exhibit 1, at pp. 1-2.

The Florida Retirement System

2. The FRS is a statutorily-created retirement system for employees of participating public employers in the State of Florida. See Florida Statutes §§ 121.001, *et seq.*

3. As of June 30, 2011, a total of 992 public employers in the State of Florida, including various state agencies, counties, cities, colleges and universities, school boards, hospitals, and others participated in the FRS. See FRS, Participating Employers 2011, a copy of which is attached hereto as Exhibit 2.

4. Participation in FRS is compulsory for most officers and employees of participating employers employed on or after December 1, 1970. See Florida Statutes § 121.051(1)(a).

5. Participation in FRS is optional for very limited classes of officers and employees of participating employers not relevant to this action. See Florida Statutes § 121.051(2).

6. Most FRS members are enrolled in the Florida Retirement System Pension Plan (the "Pension Plan"). The Pension Plan is a defined-benefit plan through which benefits are

calculated based upon a percentage of the member's highest five years' average compensation prior to retirement (the "Average Final Compensation").¹ For each year of service, the employee accrues a statutorily-established percentage of their salary based on their class of service (the "Value Percent").² The applicable Value Percent is multiplied by the number of years for which the member has been an active participant in the Pension Plan, to determine the employee's total "Accrued Percentage." The starting "Annual Benefit" payable at retirement is then calculated by multiplying the employee's Accrued Percentage by their Average Final Compensation. See Florida Statutes § 121.091(1).³ For example, if an employee had a Value Percent of 1.6%, and 10 years of credited service, then the employee's Accrued Percentage would be 16% (equal to 1.6% times 10). If the employee's Average Final Compensation is \$100,000, then the employee's Annual Benefit would be \$16,000 (which is 16% of \$100,000). In lieu of participation in the Pension Plan, FRS members may instead elect to participate in the

¹ The Average Final Compensation for all of the Plaintiffs in this action is based upon the average of the highest five years of compensation, as described above. Pursuant to Chapter 2011-68, Laws of Florida (referred to hereinafter as "Chapter 2011-68"), for those members who first become enrolled in FRS on or after July 1, 2011, Average Final Compensation will be calculated based upon the average of the highest eight years of compensation. See Chapter 2011-68, a copy of which is attached hereto as Exhibit 3, at § 5 (codified at Florida Statutes § 121.011(24)(a)(2)).

² The Value Percent varies depending upon the nature of the job performed by the member. For example, members in "Regular Class" service receive 1.60% of their Average Final Compensation for each year of service, provided that the member retires within a year following his or her normal retirement date. The Value Percent for those FRS members who are not in the "Regular Class" break down as follows: (a) members of the "Senior Management" class receive 2%; (b) members of the "Special Risk" class receive 3%; (c) members of the "Elected Officers" class, other than judges, receive 3%; and (d) those members of the "Elected Officers" class who are Supreme Court justices, or District Court of Appeal, Circuit Court, or County Court judges receive 3½%. See Florida Statutes § 121.901(1)(a).

³ Prior to the passage of Chapter 2011-68, the Pension Plan was simply referred to as the "Florida Retirement System." See Chapter 2011-68, Exhibit 3, at § 4.

Florida Retirement System Investment Plan (the “Investment Plan”), which is a defined-contribution plan similar to a 401(k) plan.⁴ In the Investment Plan, contributions are invested in the member’s choice of various investment options and are paid to the employee at retirement. See Florida Statutes §§ 121.4501, 121.591.

7. The contributions paid by members and employers into the FRS Pension Plan are held and invested in the Florida Retirement System Trust Fund (the “FRS Trust Fund”). See Florida Statutes § 121.021(36). For the fiscal year ending June 30, 2009, the net value of assets in the FRS Trust Fund declined by nearly \$28 billion from roughly \$124.5 billion on July 1, 2008, to approximately \$96.5 billion on June 30, 2009. See FRS Annual Report, July 1, 2009 – June 30, 2010, a copy of which is attached hereto as Exhibit 4, at p. 12. During that fiscal year, the FRS Trust Fund incurred over \$24.5 billion in investment losses. See id.

8. The total value of assets in the FRS Trust Fund as of June 30, 2010, had recovered somewhat to approximately \$107 billion. See FRS Annual Report, Exhibit 4, at p. 12. However, that amount was more than \$30 billion less than the liabilities of the FRS, which were over \$139.5 billion. See id. at p. 28. For every fiscal year beginning July 1, 2000, through July 1, 2008, the FRS Trust Fund had been fully funded (i.e., assets were greater than liabilities). See id. As recently as July 1, 2008, the FRS Trust Fund was over 105% funded. See id. By July 1, 2009, due primarily to investment losses during the preceding year, the Trust Fund was only 87% funded. See id. On July 1, 2010, despite some recovery in the Trust Fund’s total amount of assets, the Trust Fund remained under 87% funded. See id.

⁴ Prior to the passage of Chapter 2011-68, the Investment Plan was referred to as the “Public Employee Optional Retirement Program.” See Chapter 2011-68, Exhibit 3, at § 4.

The Defendants

9. Defendant Rick Scott is the Governor of the State of Florida. In his capacity as Governor, Governor Scott serves as Chairman of the State Board of Administration (“SBA”). See Art. IV, § 4(e), Fla. Const.

10. Defendant Jeff Atwater is the Chief Financial Officer of the State of Florida and the head of the Florida Department of Financial Services. In his capacity as Chief Financial Officer, CFO Atwater serves as Treasurer of SBA. See Art. IV, § 4(e), Fla. Const.

11. Defendant Pam Bondi is the Attorney General of the State of Florida. In her capacity as Attorney General, Attorney General Bondi serves as Secretary of SBA. See Art. IV, § 4(e), Fla. Const.

12. Collectively, Governor Scott, CFO Atwater, and Attorney General Bondi (collectively, the “Trustees”) serve as the three-member Board of Trustees for SBA. See Florida Statutes § 215.44. The Trustees have ultimate oversight of and responsibility for the SBA, which manages the investment of assets in the FRS Trust Fund and administers the FRS Investment Plan. See Florida Statutes §§ 121.4501(8), 215.44(1).

13. Defendant John P. Miles is the Secretary of the Department of Management Services (“DMS”). DMS’s Division of Retirement administers the FRS Pension Plan. See Florida Statutes § 121.025.

Chapter 2011-68, Laws of Florida

14. On May 6, 2011, the Florida Senate and the Florida House of Representatives each passed Chapter 2011-68, titled “An act relating to retirement.” See Chapter 2011-68, Exhibit 3, at p. 1; The Florida Senate, “SB 2100: Retirement – Bill History,” a copy of which is attached hereto as Exhibit 5. Chapter 2011-68 was presented to Governor Scott on May 17,

2011. See “Bill History,” Exhibit 5. Chapter 2011-68 was signed into law by Governor Scott on May 26, 2011. See id.

15. In passing Chapter 2011-68, the Legislature stated as follows: “The Legislature finds that a proper and legitimate state purpose is served when employees and retirees of the state and its political subdivisions, and the dependents, survivors, and beneficiaries of such employees and retirees, are extended the basic protections afforded by governmental retirement systems. These persons must be provided benefits that are fair and adequate and that are managed, administered, and funded in an actuarially sound manner, as required by s. 14, Article X of the State Constitution and part VII of chapter 112, Florida Statutes. Therefore, the Legislature determines and declares that this act fulfills an important state interest.” See Chapter 2011-68, Exhibit 3, at § 42.

16. Immediately prior to the effective date of Chapter 2011-68, FRS was funded solely by contributions made into the system by contributing employers, *i.e.* the State of Florida, various agencies and instrumentalities of the State of Florida, subdivisions of the State of Florida, and various agencies and instrumentalities of subdivisions of the State of Florida. See Chapter 2011-68, Exhibit 3, at § 33.

17. Pursuant to Chapter 2011-68, effective as of July 1, 2011, the funding apparatus for FRS changed, as active FRS members became obligated to contribute to the FRS three percent of the gross compensation earned after that date (the “Employee Contribution Requirement”).⁵ See Chapter 2011-68, Exhibit 3, at § 33 (codified at Florida Statutes §§ 121.70(2)-(3)).

⁵ An exception was made for those participants who were active participants in the Deferred Retirement Option Program (“DROP”) prior to July 1, 2011. See Chapter 2011-68, Exhibit 3, at § 33 (codified at Florida Statutes § 121.70(3)).

18. The Employee Contribution Requirement is calculated based upon an employee's gross compensation after July 1, 2011. Therefore, there is no contribution requirement for any FRS members to receive benefits based on service prior to that date (except for employee contributions made prior to 1975). See Chapter 2011-68, Exhibit 3, at § 33 (codified at Florida Statutes §§ 121.70(2)-(3)).

19. As a result, in part, of the contributions into FRS by FRS members, Chapter 2011-68 substantially reduced the amount of contributions required to be made into the FRS system by the State of Florida. See Chapter 2011-68, Exhibit 3, at § 33 (codified at Florida Statutes § 121.70(4)).⁶

20. Prior to the effective date of Chapter 2011-68, each month, FRS members received a cost-of-living adjustment ("COLA") equal to three percent of the total monthly benefit, calculated as of July 1 of each year, received by the member during the previous year. See Chapter 2011-68, Exhibit 3, at § 17 (codified at Florida Statutes § 121.101(3)).

21. Pursuant to Chapter 2011-68, for those members whose effective retirement date is on or after July 1, 2011, the COLA was effectively eliminated for benefits earned after that date. The COLA for such members is calculated as three percent multiplied by a fraction equal to the member's service credit earned for service before July 1, 2011, divided by the member's total service credit earned. See Chapter 2011-68, Exhibit 3, at § 17 (codified at Florida Statutes § 121.101(4)). For example, consider a member who has 20 years of service on July 1, 2011, and continues working for another 10 years, to a total of 30 years. The member's COLA will be 3% multiplied by 20/30, which equals 2%. In this example, the member's retirement benefit will

⁶ Of course, there can be no genuine dispute that, as a result of the reduced employer contributions, the Legislature has appropriated significantly less money to fund FRS contributions.

increase by 2% on each July 1 after the member retires. See id. This example demonstrates why the COLA change affects only benefits earned after June 30, 2011. As the member's years of service increase from 20 to 30, the member's benefit also increases proportionately. Suppose for each year of service the member has earned a starting benefit of \$100 per month.⁷ After 20 years of service, on July 1, 2011, the starting benefit is \$2,000 per month (which is \$100 times 20). That benefit has a COLA of 3%. Three percent of \$2,000 is \$60. So, the member has a starting benefit of \$2,000, plus an annual COLA of \$60. Ten years later, with 30 years of service, the member's starting benefit is \$3,000 (which is \$100 times 30). As shown above, the COLA is now 2% of \$3,000 which is \$60 – *the same COLA the member had on July 1, 2011*. This is not a coincidence – the formula in the law was carefully crafted to maintain the dollar value of the COLA for every one of the Plaintiffs in this case, while the initial benefit continues to increase with each year of service. So, on July 1, 2011, the member has a starting benefit of \$2,000 and a COLA of \$60. Ten years later, the member has a starting benefit of \$3,000 and a COLA of \$60.⁸

22. The COLA is only payable to members of the Pension Plan, and not to members of the Investment Plan. See Florida Statutes, § 121.101; Complaint at ¶ 59; Plaintiff Kevin Doyle's Answers to Defendants' First Set of Interrogatories, Exhibit 6, at p. 7; Plaintiff John Park's Answers to Defendants' First Set of Interrogatories, Exhibit 7, at pp. 6-7.

⁷ A member with average final compensation of \$75,000 and a value percent of 1.6% would earn an annual benefit of 1.6% of \$75,000 (or \$1,200) for each year of service, or stated differently, \$100 per month for each year of service.

⁸ This example assumes that the member's average final compensation never changes – that it remains at \$75,000 for ten years. If the member's average final compensation increases, then the dollar value of the COLA, as well as the initial benefit, will also increase, proportionately. Since the average final compensation cannot decrease, the member will not have a smaller COLA after July 1, 2011 than the member had on July 1, 2011.

23. There is no change to the COLA for those employees who retired prior to July 1, 2011. See Chapter 2011-68, Exhibit 3, at § 17 (codified at Florida Statutes § 121.101(3)).

24. As a result of Chapter 2011-68, the Legislature anticipated a total cost savings for the State of over \$1.1 billion. See Florida Retirement System: SB 2100, Eng. 2 and CS/CS/HB 1405 (the “Conference Spreadsheet”), a copy of which is attached hereto as Exhibit 8.⁹

25. Of the over \$1.1 billion in total cost savings anticipated as a result of Chapter 2011-68, more than \$861 million, or approximately 73%, was achieved through the Employee Contribution Requirement (which was expected to create cost savings of \$456.5 million) and the COLA amendment (which was expected to create cost savings of nearly \$405 million). See Conference Spreadsheet, Exhibit 8.

Absence of Retroactive Effect

26. The COLA change in Chapter 2011-68 was carefully crafted to maintain benefits already accrued, and to alter only those benefits that accrue for future service after June 30, 2011. Defendants’ expert actuary, Paul Zeisler, determined that, “the present values of the Plaintiffs’ benefits at retirement ages after 6/30/2011 are . . . at least as large as the present

⁹ The Conference Spreadsheet was provided to members of the Conference Committee and made available to those who attended the public Conference Committee meeting on April 29, 2011. It compares the bills modifying FRS that passed the Senate and the House. The Conference Spreadsheet also explains the offer made by the House Conferees which was accepted by the Senate Conferees and, upon passage, became Chapter 2011-68.

values of the benefits accrued through 6/30/2011.”¹⁰ Values found in, or easily derived from, the report of Plaintiffs’ expert Charlette Moore confirm Mr. Zeisler’s conclusions. See Zeisler Transcript, Exhibit 10, at pp. 65:16 – 66:4; Ex. 2 to the Zeisler Deposition, a copy of which is attached hereto as Exhibit 12.

27. Plaintiffs were asked to state whether the Employee Contribution Requirement “has had, is having, or will have any retroactive effects on [his or her] retirement benefits arising from labor provided by [him or her] prior to July 1, 2011.” Plaintiff Brett Sandlin responded that this was “not applicable.” See Plaintiff Brett Sandlin’s Answers to Defendants’ Interrogatories, Exhibit 13, at p. 10. Plaintiff Rodney Durbin responded that this was “Unknown/Inapplicable.” See Plaintiff Rodney Durbin’s Answers to Defendants’ Interrogatories, Exhibit 14, at p. 5.

ARGUMENT

I. BECAUSE CHAPTER 2011-68 OPERATES PROSPECTIVELY, PLAINTIFFS’ CONTRACT CLAUSE CLAIMS ARE CONTRARY TO CONTROLLING SUPREME COURT AUTHORITY.

A. Longstanding Precedent Establishes That Prospective Amendments Changing Only Future Accruals Do Not Impair Contractual Rights.

Plaintiffs contend that prior legislation establishing the prior terms of FRS—specifically, complete employer funding of FRS and a three-percent COLA for all years of accrued service – cannot be changed, even prospectively, without interfering with their contract with the State.

¹⁰ See Expert Report of Paul B. Zeisler, ASA, EA, FCA, MAAA, August 29, 2011 (the “Zeisler Report”), a copy of which is attached hereto as Exhibit 9, at ¶ 5. The Zeisler Report initially covered 14 of the 17 Plaintiffs who are members of the Pension Plan and, therefore, are affected by the COLA change. See id. at ¶ 6. In his deposition (the “Zeisler Deposition”), Zeisler explained that, after completing his report, he obtained data on the last three Pension Plan plaintiffs, and completed calculations for them reaching the same conclusion. See Zeisler Deposition transcript (the “Zeisler Transcript”), the relevant pages of which are attached hereto as Exhibit 10, at pp. 18:13 – 19:15; see also Exhibit 11, which was provided to Plaintiffs’ counsel at the Zeisler Deposition and which shows Zeisler’s calculations with respect to the final three Pension Plan Plaintiffs.

The “contract” that Plaintiffs contend has been impaired is the 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.”¹¹ This precise claim was squarely rejected thirty years ago by the Florida Supreme Court in Florida Sheriffs Association v. Department of Management Services, 408 So. 2d 1033 (Fla. 1981). The “contract” that Plaintiffs rest their case on deals only with retirement benefits based on service already accrued and is not a promise for a retirement benefit based on future service.

In Florida Sheriffs, the plaintiffs challenged a prospective reduction in the Value Percent earned by future service, just as Plaintiffs here challenge the prospective application of the Employee Contribution Requirement and COLA amendment provisions of Chapter 2011-68.¹² The Supreme Court rejected the plaintiffs’ claims, upholding the power of the Legislature to make prospective changes to FRS benefits based upon future service. After first addressing the

¹¹ Significantly, at the time the preservation of rights section took effect, FRS was a system that required employee contributions. See Florida Sheriffs, 408 So. 2d at 1034 (noting that the preservation of rights section took effect on July 1, 1974, but that it was not until January 1, 1975 that FRS “changed from a contributory to a noncontributory plan . . .”).

¹² Specifically, like the Plaintiffs here, the Florida Sheriffs plaintiffs “argue[d] . . . that the 1974 enactment of the ‘preservation of rights’ provision changed the case law and made Florida’s retirement system an absolute and binding contractual relationship between employees and the state” and, therefore, “contend[ed] that the legislature is contractually bound by its prior legislative act, and [that] any reduction in the amount present employees can earn toward future retirement is a constitutionally prohibited impairment of the employees’ contract with the state.” 408 So. 2d at 1034.

history of its own jurisprudence,¹³ the Florida Supreme Court held that while the preservation-of-rights provision creates a contractual right preventing substantial reductions to *already-earned* benefits,¹⁴ the provision only goes so far as to provide that “*the legislature may now only alter retirement benefits prospectively.*” 408 So. 2d at 1037 (emphasis added). The Supreme Court held that to bar the Legislature from altering future benefit accruals “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.” *Id.* 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 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 noted that “[t]o hold otherwise would mean that no

¹³ The Supreme Court summarized its decisions prior to the 1974 enactment of the preservation-of-rights section as holding “*that the legislature can alter retirement benefits of active employees,*” including those benefits that had already been earned, but that “once a participating member reaches retirement status, . . . [t]he contractual relationship may not thereafter be affected or adversely altered by subsequent statutory enactments.” 408 So. 2d at 1036 (emphasis added). Thus, prior to the 1974 enactment of the preservation-of-rights section, the Legislature was free to alter already-earned benefits.

¹⁴ In Plaintiffs’ sole reference to Florida Sheriffs in the Memorandum of Law in Support of their Motion for Temporary Injunction (the “TI Memo”), they acknowledge that Section 121.011(3)(d) only “creates contractual rights in *earned benefits.*” *See* TI Memo at p. 10 (emphasis added).

future legislature could in any way alter future benefits of active employees for future services, except in a manner favorable to the employee.” Id.¹⁵

As discussed below, there is no genuine dispute that the changes to FRS at issue in this case operate prospectively and do not reduce previously earned benefits. As demonstrated by the uncontroverted testimony of Defendants’ expert, Paul Zeisler, and as further illustrated by the calculations of Plaintiffs’ expert, Charlette Moore, *the total amount of benefits payable to Plaintiffs on and after July 1, 2011, exceed the benefits earned prior to that date based upon prior service.* In light of this irrefutable fact, there has been no unconstitutional retroactive reduction of benefits.

B. The Employee Contribution Requirement Is Obviously A Prospective Change As Contributions Are Only Required On Or After July 1, 2011.

There can be no genuine dispute that the Employee Contribution Requirement fully complies with Florida Sheriffs.¹⁶ The Employee Contribution Requirement only affects active employees – not FRS members who have retired. See Chapter 2011-68, § 33 (codified at Florida Statutes § 121.71(3)) (requiring contributions as a “percentage of gross compensation, effective

¹⁵ To adhere to Plaintiffs’ theory that, through the creation of the preservation-of-rights section, the 1974 Legislature bound future Legislatures to not impose prospective changes to FRS is directly contrary to Florida Supreme Court precedent providing that one Legislature cannot bind a future Legislature. See 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.”).

¹⁶ Indeed, in response to interrogatories posed by Defendants, certain of the Plaintiffs even acknowledged that they are unaware of any retroactive effect of Employee Contribution Requirement. When asked to state whether the Employee Contribution Requirement “has had, is having, or will have any retroactive effects on [their] retirement benefits arising from labor provided by [them] prior to July 1, 2011,” Plaintiff Brett Sandlin stated that this was “not applicable” and Plaintiff Rodney Durbin responded that this was “Unknown/Inapplicable.” See SOF at ¶¶ 26-27.

July 1, 2011”).¹⁷ Thus, the Employee Contribution Requirement does not fall within the first prohibition of Florida Sheriffs – the prohibition against altering benefits for those FRS members who have already retired.

The second prohibition established under Florida Sheriffs—against a retroactive change to benefits—is also not triggered by the Employee Contribution Requirement because it operates only prospectively. Indeed, in their Complaint, Plaintiffs acknowledge that Chapter 2011-68 provides that “[b]eginning July 1, 2011, each employee shall contribute 3%.” See Complaint at ¶ 58 (quoting Chapter 2011-68, § 33) (internal references omitted) (emphasis added). Chapter 2011-68’s requirement that FRS members make contributions on and after July 1, 2011, *has no impact upon their benefits earned prior to July 1*. Thus, the Employee Contribution Requirement, unquestionably, passes constitutional muster under Florida Sheriffs.

C. The COLA Amendment Operates Prospectively As Plaintiffs’ Total Benefits Are Equal To Or Greater Than Benefits Earned Prior To Chapter 2011-68.

Likewise, as confirmed by the uncontradicted testimony of the only expert to consider the issue, the COLA amendment incorporated in Chapter 2011-68 only reduces benefits earned after July 1, 2011. Significantly, Chapter 2011-68 terminates the provision of a COLA for benefits earned on or after July 1, 2011. See Chapter 2011-68, § 17 (codified at Florida Statutes § 121.101(4)). Those members who earned benefits prior to July 1, 2011, will still receive benefits at retirement greater than the amount of benefits they earned as of that date with a full three percent COLA. See id. Pursuant to Chapter 2011-68, the COLA will be calculated by multiplying the former three-percent COLA by the percentage of the member’s total service that

¹⁷ The statutory definition of “compensation” for FRS purposes is “the monthly salary paid a member by his or her employer for work performed arising from that employment.” Florida Statutes § 121.021(22). Obviously, a retired employee no longer has any relevant employment from which contributions can be made and, therefore, no contributions are required from those retired members.

was earned prior to July 1, 2011. Thus, by applying the former three-percent COLA on a prorated basis to a member's entire retirement, the COLA previously earned by the member is still provided and, therefore, there has not been a retroactive reduction to benefits.

Defendants anticipate that Plaintiffs will posit that a COLA smaller than three percent will be applied to benefits earned prior to July 1, 2011, and that this constitutes a retroactive reduction. But this argument ignores that the same COLA will be applied to future benefits earned *after* July 1, 2011. Thus, as Defendants' expert testified, whether the COLA amendment has only prospective effect, as required by Florida Sheriffs, is determined by comparing the total value of benefits post-amendment to the total value of benefits pre-amendment. If the post-amendment value is greater than or equal to the pre-amendment value, by definition there is no retroactive change to benefits earned as of the date of the amendment.

The rule established in this regard by Florida Sheriffs is clear—benefits for future service can be reduced, so long as the benefits earned as of the date of the change are protected and ultimately paid: “[T]he legislature has the authority to modify or alter prospectively the mandatory, noncontributory retirement plan for active state employees. . . . To hold otherwise would mean that no future legislature could in any way alter future benefits of active employees for future services, except in a manner favorable to the employee.” 408 So. 2d at 1037.

The Legislature could have properly exercised its authority by simply reducing the Value Percent to zero for service after July 1, 2011. Had the Legislature taken this step, it would have had the effect of permanently locking all FRS members' benefits at the amounts in place as of July 1, 2011. Such an action would have, unquestionably, satisfied the Florida Sheriffs standard because: (a) it would only have affected active employees and not retired members who already have ceased new benefit accruals; and (b) it would only have operated prospectively as FRS

members would have still received, at retirement, a total benefit equal to the benefit to which they were entitled as of June 30, 2011.

Thus, ending new FRS benefit accruals, as described in the preceding paragraph, is the baseline for determining whether there has been a retroactive reduction in benefits, and the total value of benefits on June 30, 2011, is the standard against which Chapter 2011-68 must be compared. If, notwithstanding the COLA amendment, the total value of benefits to be received by FRS members following the enactment of Chapter 2011-68, including accounting for any benefit accruals *after* July 1, 2011, is greater than or equal to the total value of benefits in place as of June 30, 2011, then Florida Sheriffs dictates that there is no unconstitutional reduction in benefits. Again, the Legislature is always free to “alter future benefits of active employees for future services.” 408 So. 2d at 1037.

Significantly, both parties’ experts agree that there has been no retroactive reduction in benefits because, due to the ongoing future accrual of benefits by FRS members—which the Legislature was under absolutely no obligation to maintain—all Plaintiffs will retire with a greater benefit than was in effect on June 30, 2011. For example, Plaintiffs’ expert Charlette Moore calculates that with a *future* “Accrued Value Percentage” of 58.80% and a 3% COLA, Plaintiff George Williams (“Williams”), who earns approximately \$32,000 per year, would have a “Total Retirement Income” of \$447,260. See Expert Report of Charlette Moore (the “Moore Report”), a copy of which is attached hereto as Exhibit 15, at Ex. B, p. 1. Ms. Moore also calculated Williams’s Accrued Value Percentage as of July 1, 2011 as 46.27%. See id. Using this amount and her Average Final Compensation amount, a 3% COLA produces a Total Retirement Income of \$351,951 ($\$447,260 \times 46.27 \div 58.80 = \$351,951$). See Zeisler Transcript, Exhibit 10, at pp. 61:18 – 62:12, and Ex. 2 to the Zeisler Deposition, Exhibit 12. Moore then

calculates that Williams' future Total Retirement Income *with the reduced COLA* is actually \$426,580. See Moore Report, Exhibit 15, at Ex. B, p. 1. In other words, according to the numbers in the Moore Report, the COLA change not only maintains the retirement income of \$351,951 that Williams had accrued as of July 1, 2011, but allows him to accrue an *additional* \$74,629 of retirement income for his 6 years of projected future service.¹⁸ The Moore Report also shows that, in order to accrue that additional retirement income of \$74,629, Chapter 2011-68 will require 3% contributions totaling only \$5,857 over the next six years. See Ex. 2 to the Zeisler Deposition, Exhibit 12.

Using numbers from Moore's report, the same result is obtained for all nine of the plaintiffs (affected by the COLA change) for whom Moore performed calculations. For example, Plaintiff Lori Anne Goodwin ("Goodwin"), whose annual pay is less than \$40,000, has already accrued "Total Retirement Income" (according to Moore's numbers) of \$390,273 for her current 8.33 years of service. See Zeisler Transcript, Exhibit 10, at pp. 63:20 – 64:3,¹⁹ and Ex. 2 to the Zeisler Deposition, Exhibit 12. Yet, over the course of the next 18.5 years, Chapter 2011-68 will still allow Goodwin to accrue an *additional* \$559,038 on top of the \$390,273 already accrued, even taking into account the reduced COLA. See Moore Report, Exhibit 15, at Ex. C, p. 1. In order to do so, Goodwin will make 3% contributions totaling \$21,969 over a period of 18.5 years (or about \$1,200 per year), according to Moore. See Zeisler Transcript, Exhibit 10, at p. 64:8-11, and Ex. 2 to the Zeisler Deposition, Exhibit 12. In fact, Moore's numbers show each

¹⁸ \$426,580 - \$351,951 = \$74,629.

¹⁹ There appears to have been a slight transcription error during the Zeisler Deposition. Using Moore's numbers, Goodwin had earned, as of July 1, 2011, \$390,273 in "Total Retirement Income." See Ex. 2 to the Zeisler Deposition, Exhibit 12. Defendants' counsel questioned Zeisler with respect to this \$390,273 figure, however, the court reporter appears to have transcribed this number as \$393,273. See Zeisler Transcript, Exhibit 10, at p. 64:2.

Plaintiff accruing future retirement income of two to fourteen times annual salary over the course of their future careers, on top of the retirement income accrued as of July 1, 2011. See Ex. 2 to the Zeisler Deposition, Exhibit 12. Indeed, Plaintiffs agree that, even after the COLA change, Plaintiffs' benefits upon retirement after July 1, 2011 will be greater than the benefits earned through July 1, 2011. See Zeisler Transcript, Exhibit 10, at p. 49:5-21.²⁰

Defendants' expert, Paul Zeisler ("Zeisler"), looked at the value of benefits both on and after July 1, 2011. He concluded that in each case, the benefit earned by the Plaintiff as of any date after July 1, 2011 (taking into account the reduced COLA) had a greater value than the benefit earned as of July 1, 2011 (with the 3% COLA). For example, for Williams ("Plaintiff 8" in the Zeisler Report) the value of his benefit five years after July 1, 2011 is 115% of the value of his benefit as of July 1, 2011. See Zeisler Report at p. 7. As Zeisler explains, whenever the percentage shown exceeds 100%, the future benefit is worth more than the benefit accrued as of July 1, 2011. See Zeisler Report at ¶ 8. The appendix to the Zeisler Report (see Exhibit 9 at pp. 6-9), and Exhibit 11, which was provided to Plaintiffs' counsel at the Zeisler Deposition and which shows Zeisler's calculations for the final three Pension Plan Plaintiffs, show numerous

²⁰ The exchange in this portion of the Zeisler Deposition began with Plaintiffs' counsel asking Zeisler the following:

And does that extra year of service credit -- ***I mean, obviously, it's going to raise the amount of money above the elimination of the three percent, isn't it, always?*** . . . And my question is, isn't that additional money from extra service credit certainly going to be more than the three percent reduction in COLA? In other word, it's not the -- what's driving the benefit up is the years of service credit, is it not?

See Zeisler Deposition, Exhibit 10, at p. 49:5-19 (emphasis added). In response, Zeisler answered: "The benefit is indeed increasing with additional years of service credit. Yes." See id. at p. 49:20-21.

scenarios for each Plaintiff, and in every case, the percentage is above 100% indicating that benefits accrued as of July 1, 2011 (with the 3% COLA) have been fully preserved.²¹

It should be no surprise that benefits under the system are increasing, not decreasing, even after the application of Chapter 2011-68. The COLA change operates slowly over time, and only as the employee accrues additional service (and, therefore, additional benefits). In every case, the decrease in the COLA percentage is offset by the increase in the initial benefit that has accrued. So, while the COLA is essentially unchanged, the underlying benefit, to which the COLA applies, is increasing. The only proper way to measure a Plaintiff's benefit is to look at the total benefit – the initial benefit plus the COLA. If the initial benefit is increasing and the COLA remains essentially constant, the total benefit increases.

As any impairment under Chapter 2011-68 was a proper exercise of the Legislature's appropriations power, whether or not the impairment is "substantial" is irrelevant for this case. However, Defendants dispute that Chapter 2011-68 "operate[s] as a substantial impairment of a contractual relationship." United States Fidelity & Guaranty Co. v. Dept. of Ins., 453 So. 2d 1355, 1360 (Fla. 1984). Moreover, any purported impairment would be "constitutional [because] it is reasonable and necessary to serve an important public purpose." Pomponio v. Claridge of Condominium, Inc., 378 So. 2d 774, 778-79 (Fla. 1979). The Legislature enacted Chapter 2011-68 because it was facing a budget shortfall of over \$3.6 billion (see SOF at ¶ 1) and achieved expected cost-savings of over \$860 million through the Employee Contribution Requirement and

²¹ See Zeisler Deposition, Exhibit 10, at p. 48:1-8 ("You have asked me the question has the COLA been reduced with respect to the 2011 benefit. And the answer is in every case -- and I tested a number of scenarios in each case to be sure that my conclusion would be the same -- I found that in no case had we fallen below the benefit that would be provided assuming that three percent COLA on the 2011 benefit going forward. That is to say, applying the three percent COLA to the 2011 benefit doesn't eliminate what's earned after that. In fact, what's earned after that is always a positive number.")

the COLA amendment (see SOF at ¶ 25). Florida courts have held that “substantial economic issue[s]” constitute an adequate basis to justify impairment. See Florida Ins. Guar. Ass’n, Inc. v. Devon Neighborhood Ass’n, Inc., 33 So. 3d 48, 53 (Fla. 4th DCA 2009), *quashed in part on other grounds*, ___ So. 3d ___, 2011 Fla. LEXIS 1526, 2011 WL 2566399 (Fla. Jun. 30, 2011). Moreover, in passing Chapter 2011-68, the Legislature “declare[d] that this act fulfills an important state interest” because it found “that a proper and legitimate state purpose is served when employees and retirees of the state and its political subdivisions, and the dependents, survivors, and beneficiaries of such employees and retirees, are extended the basic protections afforded by governmental retirement systems. These persons must be provided benefits that are fair and adequate and that are managed, administered, and funded in an actuarially sound manner” See Chapter 2011-68, § 42.

Accordingly, for the foregoing reasons, Defendants respectfully submit that, as Chapter 2011-68 operates entirely prospectively, it satisfies Florida Sheriffs. Therefore, Defendants submit that they are entitled to summary judgment on Counts I and II.

II. PLAINTIFFS’ TAKINGS CLAIMS FAIL AS A MATTER OF LAW.

A. Plaintiffs Have No Property Right To Future Benefits.

Plaintiffs contend that the employee contribution requirement and COLA amendment contained in Chapter 2011-68 operate “as a taking of the [Plaintiffs’] property for a public purpose without full compensation.” See Complaint at ¶¶ 83, 86. This argument fails on its face because it, like Counts I and II, is controlled and rejected by Florida Sheriffs. Plaintiffs’ position necessarily depends on their possession of a property right to future benefits in the first instance. However, as noted above, Florida Sheriffs firmly establishes that prospective changes to the FRS, such as the changes promulgated by Chapter 2011-68 at issue here, pass constitutional

muster. Accordingly, Plaintiffs possess no property right in prospective, yet-to-be-earned benefits.²² Therefore, there can be no impermissible taking.²³

B. Because Withdrawing FRS Members Will Receive All Amounts That They Contribute Into FRS Without Any Risk Of Loss, The Fact That They Will Not Receive Investment Gains Does Not Create An Unconstitutional Taking.

Plaintiffs also contend that a taking has occurred because those Plaintiffs who withdraw from FRS's Pension Plan due to the termination of their employment with a covered employer will only receive the principal amounts of their contributions and will not receive either interest or investment gains on their contributions.²⁴ In their Memorandum in Support of Motion for Temporary Injunction, Plaintiffs attempted to analogize this case to Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). In Webb's, the United States Supreme Court held that, where courts deposited interpleaded funds into an interest-bearing account, those funds were private property belonging to the creditor or creditors who were ultimately deemed to be the property's owner(s). 449 U.S. at 160-61. Thus, the Supreme Court held that the interest earned on those interpleaded funds also belonged to the same private owner(s). Id. at 162-64.

²² It is, of course, axiomatic that, in the absence of a cognizable property right, there can be no taking. See, e.g., 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.”).

²³ The only argument raised by Plaintiffs suggesting they have any property right other than the purported right to future benefits – which Florida Sheriffs firmly rejects – is that withdrawing FRS members do not receive interest or investment gains when their contributions are returned. However, as set forth below, this also does not constitute a taking.

²⁴ Chapter 2011-68 provides that “[e]ffective July 1, 2011, upon termination of employment . . . for any reason other than retirement, a member may receive a refund of all contributions he or she has made to the pension plan. . . . The refund may not include any interest earnings on the contributions for a member of the pension plan.” Chapter 2011-68, § 15 (codified at Florida Statutes § 121.091(5)(a)).

Plaintiffs' reliance on Webb's, however, requires an erroneous assumption—namely that, like in Webb's,²⁵ there is some form of guaranteed investment growth to share with the withdrawing members. Significantly, this is not how the FRS Trust Fund operates. Instead, SBA places the FRS Trust Fund into a vast array of investment options which can and, at times, do lose money. By making investments that run the risk of loss, there is also a much greater opportunity for gains compared to the minimal interest growth available in a bank account. However, with such investments, the risk of loss is real. For example, in the fiscal year ending June 30, 2009, the FRS Trust Fund lost over \$24.5 billion resulting primarily from investment losses, due largely to the downturn in the stock market. See SOF at ¶ 7. This is compared to investment growth of less than \$15 billion from July 1, 2009, through June 30, 2010. See SOF at ¶¶ 7-8. As a result, this caused the FRS Trust Fund's net assets to decrease by more than 22% from July 1, 2008, through June 30, 2009. See id. In fact, as of June 30, 2010, the FRS Trust Fund had still not fully recovered, and its value was still approximately 14% lower than it had been as of July 1, 2008. See id.

Thus, if an FRS member had been required to contribute during this time, had subsequently terminated his or her employment, and sought a refund of his or her contributions adjusted for investment results, he or she would have received less than the full amount of

²⁵ In Webb's, the statute at issue provided that “[m]oneys deposited in the registry of the court shall be deposited in interest-bearing certificates at the discretion of the clerk, subject to the above guidelines. . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys and shall be deposited in the same accounts as are other fees and commissions of the clerk's office.” 449 U.S. at 156 n. 1 (internal citations omitted) (emphasis omitted).

contributions due to investment losses.²⁶ Thus, unlike in Webb's where the only possible outcome was a positive but minimal return on investment, in the case of FRS, withdrawing members are not entitled to receive the benefits of any investment gains because they do not bear any risk of investment losses.²⁷

C. Chapter 2011-68 Cannot Constitute A Taking, Because The Contributions Benefit FRS Members, Including Plaintiffs, And Are Not For Public Use.

Even if Chapter 2011-68 did rise to the level of a taking (which it does not), it would not be an unconstitutional taking. Here, the property allegedly being taken – the Employee Contribution Requirement and/or any hypothetical investment gains on such amounts – is not being taken for public use. The contributions are required from the Plaintiffs for their own benefit in order to ensure the availability of retirement benefits for all FRS members. In this regard, the Employee Contribution Requirement is not unlike the Social Security withholding required of the Plaintiffs. Just as Social Security contributions are withheld from Plaintiffs'

²⁶ Defendants respectfully submit that, if terminated FRS members applied for a refund of their contributions and received an amount *less* than the total amount they had contributed due to investment losses, Plaintiffs would take the position that those withdrawing members would have had their property “taken.”

²⁷ If any FRS member desires to receive the benefit of any investment gains (and incur the risk of any investment losses) during their membership, for however long they are members, they have the statutory right to join the Investment Plan rather than the Pension Plan. When a member of the Investment Plan terminates his or her employment, whenever that may be, he or she receives the entire balance of her account, consisting of the principal contributions plus or minus any investment gains or losses. By deciding to partake in the Pension Plan, rather than the Investment Plan, an FRS member decides to enter into a system that provides that he or she will not receive any investment gains or be subject to any investment losses on his or her contributions. The Pension Plan guarantees against downside risk, but at the cost of upside potential.

paychecks and invested by the Trustees of the Social Security Trust Funds,²⁸ here, the amounts are contributed into FRS, invested by SBA, and are made available to the Plaintiffs upon their retirement. In essence, the amounts at issue are simply deferred until retirement and are no more “taken” than are Social Security contributions. Moreover, even if this did arise to a “taking” it would not be an unconstitutional taking, because: (a) the purported “taking” is for the direct benefit of the Plaintiffs themselves, by funding their retirement benefits; and (b) the Plaintiffs receive compensation, that being in the form of the retirement benefits that they receive under FRS. Thus, Plaintiffs’ takings claim with respect to the Employee Contribution Requirement is clearly without merit.²⁹

For these myriad reasons, Plaintiffs respectfully submit that Plaintiffs’ takings claims fail as a matter of law and that, therefore, Defendants are entitled to summary judgment on Counts III and IV.

²⁸ Just as the SBA’s Board of Trustees, consisting of the Governor, Chief Financial Officer, and Attorney General, make investment decisions with respect to the FRS Trust Fund, investments are selected for the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds (collectively, the “Social Security Trust Funds”) by their Board of Trustees, consisting of the Secretary of the Treasury, the Secretary of Labor, the Secretary of Health and Human Services, the Commissioner of Social Security, and two public trustees. *See, e.g.*, Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, “The 2010 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds,” *available at* <http://www.ssa.gov/OACT/TR/2010/tr10.pdf>.

²⁹ In this regard, the Supreme Court of the United States has expressly upheld the Social Security Act of 1935. *See Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

III. THE LEGISLATURE’S POWER TO APPROPRIATE FUNDS TRUMPS ANY PURPORTED ABRIDGEMENT OF COLLECTIVE BARGAINING RIGHTS.

The final count in Plaintiffs’ Complaint, Count V, claims that Chapter 2011-68 impermissibly impairs Plaintiffs’ rights to collectively bargain over their retirement benefits.³⁰ As with their Contracts and Takings claims, the Florida Supreme Court has already squarely rejected Plaintiffs’ contentions in State of Florida v. Florida Police Benevolent Association, Inc., 613 So. 2d 415 (Fla. 1992) (“PBA”).

In PBA, the State had “entered into collective bargaining agreements with several unions.” 613 So. 2d at 416. However, “[i]n 1988, the legislature enacted its general appropriations act” which “altered the leave policy for career service employees, and thus the leave awards for which the unions had bargained.” Id. The Supreme Court in PBA held that “[t]he fact that public employee bargaining is protected under Florida’s Constitution does not require us to ignore universally recognized distinctions between public and private employees. The constitutional right to bargain must be construed in accordance with all provisions of the constitution.” Id. at 418. With this in mind, the Court held that the right of public employees to bargain “[s]urely . . . was not intended to alter fundamental constitutional principles, such as the separation of powers doctrine.” Id. As part of this separation of powers, the Supreme Court further noted that, “[u]nder the Florida Constitution, exclusive control over public funds rest solely with the legislature.” Id.

After expressly holding that the right of public employees to bargain did not supersede the Legislature’s right to control public funds, the Supreme Court held that “[u]nlike the case of

³⁰ Plaintiffs have not alleged that any particular collective bargaining agreement has been impaired or that the terms of any particular collective bargaining have been violated. Rather, Plaintiffs only allege that Chapter 2011-68 purportedly violates Article I, Section 6 of the Florida Constitution because it did not “provid[e] any opportunity to engage in collective bargaining.” See Complaint at ¶ 91.

a private employer, whose agreement with a union binds the employer to fund its terms, the public employer, deemed by statute to be the governor, cannot so bind the guardian of its funds, the legislature.” Id. As a basis for this conclusion, the Supreme Court cited to what was then Florida Statutes § 447.309(2), which “provide[d] that ‘[t]he failure of the legislative body to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice.’” 613 So. 2d at 418. Since the Supreme Court’s decision in PBA, this concept has been expanded upon and strengthened in Florida Statutes Chapter 447, to now provide:

If the state is a party to a collective bargaining agreement in which less than the requested amount is appropriated by the Legislature, the collective bargaining agreement shall be administered on the basis of the amounts appropriated by the Legislature. The failure of the Legislature to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice. ***All collective bargaining agreements entered into by the state are subject to the appropriations powers 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).

As the Supreme Court held in PBA, “[a]ny other rule would permit the executive branch of government, by entering into collective bargaining agreements calling for additional appropriations, to invade the legislative branch’s exclusive right to appropriate funds. Indeed, to accept such a rule would require this Court to abrogate years of strict adherence to the separation of powers doctrine.” 613 So. 2d at 418-19. With this in mind, the Supreme Court held that “the enforcement of the monetary terms of the agreement is subject to the appropriations power of the legislature.” Id. at 419. Accordingly, the Court concluded 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 (emphasis added).³¹

This rule obviously applies here because the Legislature enacted Chapter 2011-68 specifically as a budget cost-savings measure. The Legislature entered into its 2011 session facing a budget shortfall of over \$3.6 billion. See SOF at ¶ 1. Accordingly, 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 SOF at ¶ 25. 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.³²

Thus, to the extent that Chapter 2011-68 did conflict with any Plaintiffs’ collective bargaining agreements, such impairment was a proper exercise of the Legislature’s appropriations authority, which supersedes the right of public employees to collectively bargain.

³¹ Subsequent to PBA, Florida courts have repeatedly upheld the supremacy of the Legislature in managing appropriations. See, e.g., Am. Home Assur. Co. v. Amtrak, 908 So.2d 459, 474 (Fla. 2005) (“Florida’s Constitution provides that ‘[n]o money shall be drawn from the treasury except in pursuance of appropriation made by law.’ The state may not employ state funds unless such use of funds is made pursuant to an appropriation by the Legislature.”) (internal citation omitted); Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So.2d 400, 407-08 (Fla. 1996) (“As [Article II, section 3 of the Florida Constitution] demonstrates, each branch of government has certain delineated powers that the other branches of government may not intrude upon. For instance, the power to appropriate state funds is expressly reserved to the legislative branch.”); Republican Party of Florida v. Smith, 638 So.2d 26, 28 (Fla. 1994) (“Article VII, section 1(c) of the Florida Constitution provides that ‘[n]o money shall be drawn from the treasury except in pursuance of appropriation made by law.’ This provision gives to the Legislature ‘the exclusive power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government.’”) (citing State ex rel. Kurz v. Lee, 121 Fla. 360, 384, 163 So. 859, 868 (Fla. 1935)).

³² It, of course, goes without saying that, because the Legislature faced a \$3.6 billion budget shortfall, if the Legislature had not created the cost-savings provided by Chapter 2011-68, the Legislature would have had to have made substantial additional budgetary cuts affecting untold numbers of Floridians.

Accordingly, Defendants respectfully submit that they are entitled to summary judgment on Count V.

IV. THE FLORIDA SUPREME COURT’S RULE THAT THE LEGISLATURE CAN ALTER BENEFITS PROSPECTIVELY IS CONSISTENT WITH THE VAST MAJORITY OF FLORIDA’S SISTER STATES AND WITH FEDERAL LAW.

While the Florida Supreme Court’s prior rejection of Plaintiffs’ claims is more than sufficient to warrant summary judgment for Defendants, it is also worth noting that the overwhelming majority of states to address these issues agree with Florida. Moreover, federal courts, including the Supreme Court of the United States, have also agreed with Florida’s rule on these matters, including upholding similar changes under the federal Contracts and Takings Clauses.

A. Federal Courts, Including The Supreme Court Of The United States, Hold That The Key Analysis In Concluding Whether Or Not Retirement Benefits Have Been Retroactively Reduced Is Determined By Comparing The Total Value Of Benefits Pre-Amendment With The Total Value Post-Amendment.

The United States Supreme Court addressed retroactive benefit reductions in the context of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.* (“ERISA”), in Central Laborers’ Pension Fund v. Heinz, 541 U.S. 739 (2004). In Heinz, the Supreme Court held that it would determine whether or not benefits had been retroactively reduced by assessing “the actuarial value of a beneficiary’s total benefits package.” 541 U.S. at 750 n. 6. Specifically, ERISA’s anti-cutback rule³³ does not preclude prospective changes to benefits such as that at issue here, because “employers are perfectly free to modify the deal they are offering their employees, as long as the change goes to the terms of compensation for continued, future employment.” Id. at 547. If such a change had amounted to a violation of the

³³ ERISA’s anti-cutback rule is contained in ERISA § 204(g)(1) and provides that “[t]he *accrued benefit* of a participant under a plan may not be decreased by an amendment of the plan . . .” 29 U.S.C. § 1054(g)(1) (emphasis added).

federal Contracts Clause, the Supreme Court would obviously have held it to be unconstitutional. To the contrary, a prospective change of ERISA plan benefits that complies with ERISA's anti-cutback rule has never been held to violate the federal Contracts Clause. This is important guidance because the Florida Supreme Court has "adopt[ed] an approach to contract clause analysis similar to that of the United States Supreme Court," since the latter's "decisions in this area of law convince us that such an approach is the one most likely to yield results consonant with the basic purpose of the constitutional prohibition." Pomponio, 378 So. 2d at 780.

The case most directly on point is Campbell v. BankBoston, N.A., 327 F.3d 1 (1st Cir. 2003). In that case, the defendant had previously operated a traditional pension plan, and replaced it with a cash-balance plan.³⁴ As part of the transition from the traditional pension plan to the cash-balance plan, while former pension plan participants were guaranteed at least the same total retirement benefit that they would have received under the traditional pension plan as of the date the pension plan was modified, those participants were *barred from accruing any new benefits* under the cash-balance plan unless and until their benefits under the cash-balance plan had caught up to the amount that they had earned under the pension plan. 372 F.3d at 8. Only once participants had caught up under the cash-balance plan would they again resume accrual of benefits, albeit under the less generous cash-balance plan. Id. This had the effect of reducing the plaintiff's annual retirement benefits by \$3,084.02 per year compared to what he would have received had the pension plan remained unchanged. Id. The First Circuit held that this was permissible "because no accrued benefits were reduced; only expected benefits were reduced,

³⁴ The court described the pension plan as one which is similar to the FRS Pension Plan, as it "pays an annuity based on the retiree's earnings history, usually the most recent or highest-paid years, and the number of completed years of service to the company" and the cash balance plan as "a type of defined benefit plan that guarantee an employee a certain employer contribution level, usually an annual percentage of salary, plus a fixed percentage of interest." 327 F.3d at 4.

which [defendant] could, under the law, modify or eliminate.” *Id.* Specifically, the court held that “[t]he reduction of pension benefits of which [plaintiff] complains was merely the elimination of future *expected* accruals of benefit. The . . . amendment to the plan protected all of the pension benefit based on [plaintiff’s] work for the company up to that point; it merely ceased accruals under the old plan based on employment from that point forward.” *Id.* (emphasis in original).

The same analysis applies here. As discussed above, the Legislature would have been acting well within its authority by amending FRS to prevent all members from accruing any new benefits on or after July 1, 2011. Had the Legislature taken such an action, the permanent total value of benefits would have been those in place as of June 30, 2011. Here, each of the Plaintiffs will receive total benefits far greater than those that they had accrued as of June 30.

Accordingly, Chapter 2011-68 has no retroactive effect.

B. Facing Their Own Budget Shortfalls, Other States Have Required Employee Contributions Or Increased Employee Contributions.

Providing support for the fact that the Legislature may prospectively alter benefits is the extent to which other states have recently modified their public employee retirement systems in a manner similar to that undertaken in Chapter 2011-68. Faced with similar financial and budgetary constraints, in 2011 alone, the states of Alabama, Colorado, Kansas, Maryland, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Vermont, and Wisconsin, all either shifted contribution requirements from employers to employees or increased the contribution rates for some or all public employees.³⁵ This followed 2010, in which California, Colorado, Iowa, Louisiana, Minnesota, Mississippi, Vermont, and Wyoming all increased

³⁵ See 2011 Ala. Laws Act 2011-676; 2011 Colo. Laws, Ch. 204; 2011 Kan. Laws Ch. 98; 2011 Md. Laws Ch. 397; 2011 Neb. Laws L.B. 382; 2011 N.H. Laws Ch. 224; 2011 N.J. Laws Ch. 78; 2011 N.M. Laws Ch. 178; 2011 N.D. Laws, S.B. 2108/H.B. 1134; 2011 Vt. Laws No. 63; 2011 Wis. Laws Act 10.

contribution requirements for some or all of their public employees.³⁶ In 2009, Nebraska, New Hampshire, New Mexico, and Texas all increased public employee contribution rates.³⁷ Indeed, even prior to the “Great Recession” whose effects became truly known in the Fall of 2008, between 2001 and 2008, the states of Iowa, Minnesota, Nebraska, New Jersey, New Mexico, Pennsylvania, South Carolina, and Vermont all increased their employee contribution rates for some or all public employees.³⁸

Not surprisingly, this recent legislation in other states has led to the filing of lawsuits similar in nature to the present action. On June 29, 2011, trial courts in both Colorado and Minnesota rejected takings claims similar to Plaintiffs’ claims here. These recent trial court opinions have not yet been published and are attached hereto respectively as Exhibits 16 and 17.

The Colorado court rejected such claims in Justus v. State of Colorado, No. 2010CV1589 (Colo. Dist. Ct. June 29, 2011). In that case, legislation altered the state retirement system by, *inter alia*, increasing employee contributions to retirement plans, raising the retirement age, and reducing COLAs. See Exhibit 16 at pp. 1-2. Plaintiffs sought declaratory judgments that the statutory modifications violated, *inter alia*, the Contract Clauses of the United States and Colorado Constitutions and the Takings Clause of the United States Constitution. Id. at p. 2.

³⁶ See 2010 Cal. Laws, Ch. 162; 2010 Colo. Laws, Ch. 65, S.B. 10-146; 2010 Iowa Laws, H.F. 2518; 2010 La. Laws, Act 992; 2010 Minn. Laws, Ch. 359; 2010 Miss. Laws, 1st Extraordinary Sess., Ch. 1, H.B. 1; 2010 Vt. Laws, Act 139; 2010 Wyo. Laws, Ch. 85, § 1.

³⁷ See 2009 Neb. Laws, L.B. 187, L.B. 188, L.B. 414; 2009 N.H. Laws, Ch. 144, 144:50; 2009 N.M. Laws, Ch. 127; 2009 Tex. Laws, Ch. 1308.

³⁸ See 2006 Iowa Laws, HF 729; 2001 Minn. Laws 1st Spec. Sess., Ch. 10, Art. 11, §§ 13, 14; 2005 Minn. Laws 1st Spec. Sess., Ch. Art. 5, §§ 2-4; 2006 Minn. Laws, Ch. 271, Art. 1; 2004 Neb. Laws, L.B. 514; 2005 Neb. Laws, L.B. 503; 2006 Neb. Laws, L.B. 366; 2007 Neb. Laws, L.B. 596; 2007 N.J. Laws, Ch. 103; 2005 N.M. Laws, S.B. 181; 2001 Penn. Laws, Act 2001-9; 2005 S.C. Laws, Act 153; 2008 Vt. Laws, Act 116.

Granting summary judgment for the State defendants, the court held that the plaintiffs' takings claims "were premised on the existence of a constitutional right to an unchangeable COLA formula and necessarily fail because no such right exists." Id. at p. 4. Specifically, the court held that while the "Plaintiffs unarguably have a contractual right to their PERA pension itself, they do not have a contractual right to the specific COLA formula in place at their respective retirement, for life without change." Id. This, of course, comports with the Florida Supreme Court's holding in Florida Sheriffs, in which the Court held that FRS members only have a contractual right to those benefits that they have already earned. As noted above, because there has been no reduction in the overall benefits received by Plaintiffs, no property right has been infringed.

Coincidentally, also on June 29, a Minnesota trial court addressed a takings challenge to similar legislation, in Swanson v. Minnesota, No. 62-CV-10-05285 (Minn. Dist. Ct. June 29, 2011). While the legislation at issue in the case included increased employee contributions, the court noted that "[t]he sole issue before the Court is whether the Legislature has the authority to amend a statutory formula that is used to calculate the availability and amount of future adjustments to public retirees' pension annuities." See Exhibit 17 at p. 2. The court rejected the plaintiffs' takings claims on the basis that:

. . . the challenged legislative amendments are neither an impairment [] nor a taking of constitutional proportions. These amendments are, instead, a minimal alteration in the calculation of future adjustments to retirees' annuities and a reasonable response to a fiscal threat that jeopardized the long-term interests of Plan members, the State, and the State's taxpayers. The Legislature prudently enacted Plan-wide changes that spread the burden of the financial crisis through contribution increases, changes in eligibility requirements, and changes in formulas for annuities and future adjustments. Given the considerable legislative discretion over retirement policy, including the amount and duration of benefits, Plaintiffs have not met their burden to show unconstitutionality beyond a reasonable doubt.

Finally, Plaintiffs' claims fail because they rest on a fundamental disagreement with the Legislature's policy choices and urge the court to re-write the legislation so it applies only to future retirees. All of these arguments and choices were debated in the public legislative process. This is not a debate for the court to join. The Legislature is charged with setting state retirement policy, the changes made to the statutory formula for future adjustments to retirement annuities is well within the scope of that body's policy and law-making authority. Given the preservation of retirees' pension annuities, the opportunity for future increases, and the stabilization of the Plans, the Court would threaten the balance of powers between the legislative and judicial branches by second-guessing this legislative wisdom.

See id. at p. 4. The Minnesota court's justification in reaching this holding applies as well to the Legislature's enactment of Chapter 2011-68 and Plaintiffs' challenge thereto. Thus, Defendants respectfully submit these recent decisions provide persuasive guidance to the Court.

C. State and Federal Courts Agree That Changes To Public Employee Retirement Systems Such As Those At Issue In This Case Are Not Takings Because They Are For The Benefit Of The Members And Not The Public.

Multiple courts have rejected arguments just like those raised by the Plaintiffs that changes to public employee retirement systems are unconstitutional takings. In State ex rel. Horvath v. State Teacher Retirement Board, 697 N.E.2d 644 (Ohio 1998), the Supreme Court of Ohio considered a challenge to the so-called "no interest statute," which, *inter alia*, stopped the crediting and payment of interest on mandatory teacher contributions withdrawn in lieu of retirement and delayed crediting of interest on the State Teachers Retirement System ("STRS") members' accumulated contributions until retirement. 697 N.E.2d at 648. The court rejected this position, concluding that the participant possessed no property right to interest on her contributions, and holding:

Mrs. Horvath's contributions to the STRS were used to benefit STRS participants – a subset of the public that included her. . . . STRS itself adjusts the benefits and burdens of providing public school teachers with retirement, death, and disability benefits among public school teachers and their employers. While the state may derive an indirect benefit from this use in that the STRS benefits publicly employed school teachers, that indirect benefit does not equate with physical

invasion or permanent appropriation of the assets of fund participants for its own use.

697 N.E.2d at 649 (emphasis added).³⁹

Horvath squarely addresses the final reason why Plaintiffs' takings claims fail. That is because the alleged "taking" is not for the public use, but rather is for the sole benefit of FRS members, including the Plaintiffs. The Supreme Court of Minnesota addressed a similar situation in AFSCME Councils 6, 14, 65 and 96, AFL-CIO v. Sundquist, 338 N.W. 2d 560 (Minn. 1983), *superseded in part on other grounds by statute as stated in Law Enforcement Labor Svcs., Inc. v. County of Mower*, 483 N.W.2d 696, 699 (Minn. 1992). In that case, like the Plaintiffs here, the plaintiffs "brought a motion for a temporary injunction seeking to immediately restrain that part of the Act increasing government employees' existing contributions to the pension funds by 2%." 338 N.W. 2d at 564. In assessing the Plaintiffs' takings claims under the federal and Minnesota constitutions, the court noted that:

. . . the constitutional prohibition against governmental expropriation of private property applies only when it is demonstrated that that property has been taken for public purposes. . . . Here the increased employee pension contributions were enacted for the purpose of maintaining the actuarial integrity of the public employee pension funds. ***This action benefits the contributors themselves, and is not a public use within the meaning of the constitutional proscription because only the contributing members can be beneficiaries of the pension***

³⁹ Also of note is the decision of the United States District Court for the Southern District of New York's decision in Crown v. Trustees of Patrolmen's Variable Supplements Fund, 659 F. Supp. 318 (S.D.N.Y. 1987), aff'd, 819 F.2d 47 (2d Cir. 1987). In that case, retired police officers and patrolmen alleged that the transfer of a portion of investment earnings from their pension fund to a supplemental fund, from which certain retirees received no benefit, constituted a confiscation of private property for a public purpose without just compensation. 659 F. Supp. at 319. The Southern District of New York found that, "[w]hile there is no question that plaintiffs have an entitlement under New York law to receive their pension payments – which they are receiving – they have no entitlement to, or right to direct the retention of, the particular assets that are held for investment purposes in the pension fund." Id. at 320. Thus, the court held that the police officers and patrolmen lacked a property interest in the investment earnings of the Pension Fund, as well as the Supplemental Funds. Id.

plans. . . Accordingly, assuming the requisite interference with a property right, there has been no impermissible taking of private property for a public use.

Id. at 575 (emphasis added).

The Supreme Court of Louisiana reached the same result in Stevens v. Board of Trustees of the Police Pension Fund of the City of Shreveport, 370 So. 2d 528 (La. 1979). In that case, a suit was brought on behalf “of all former police officers of the City of Shreveport who made compulsory contributions to the Policemen’s Pension Fund of the city and who later were separated from the Police Department prior to receiving benefits therefrom” and sought “to obtain refunds of the monies contributed by each of the former officers.” 370 So. 2d at 529. With respect to the plaintiffs’ takings claim, the court noted that “this system is analogous to the system set up under the Social Security Act . . . which is itself one which mandates contributions from the participants and which has no provision for refunds in the event that there are no claims made for the benefits thereunder.” Id. at 531. Thus, the court concluded that there was “no taking of private property for public use, since the use is for the members of the Police Department themselves.” Id.

Thus, Defendants respectfully submit that these cases provide substantial additional support for the conclusion that Chapter 2011-68 cannot, as a matter of law, constitute an impermissible taking.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion and enter summary judgment for Defendants on all counts in Plaintiffs’ Complaint.

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