IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: SC12-520

RICK SCOTT, PAM BONDI, and JEFF ATWATER, as the FLORIDA STATE BOARD OF ADMINISTRATION, et al.,

Appellants,

vs.

GEORGE WILLIAMS, et al.,

L.T. Case Nos.: 2011 CA 1584
1D12-1269

Appellees.

_____/

ON APPEAL FROM THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, CERTIFIED BY THE FIRST DISTRICT COURT OF APPEAL AS A MATTER OF GREAT PUBLIC IMPORTANCE

AMICUS CURIAE BRIEF OF THE NATIONAL CONFERENCE ON PUBLIC EMPLOYEE RETIREMENT SYSTEMS

By: ROBERT D. KLAUSNER
Florida Bar No. 244082
ADAM P. LEVINSON
Florida Bar No. 55344

KLAUSNER, KAUFMAN, JENSEN & LEVINSON
Attorneys for NCPERS
10059 N.W. 1st Court
Plantation, Florida 33324
Telephone: (954) 916-1202
Fax: (954) 961-1232

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CONCISE STATEMENT OF AMICUS CURIAE

The National Conference on Public Employee Retirement Systems (hereinafter "NCPERS") is a national trade association focused on the preservation, growth and stability of public retirement systems.[1] NCPERS is the largest non-profit public pension advocacy organization, representing over 550 governmental pension funds throughout the United States and Canada. Founded in 1941, NCPERS has been the principal trade association working to promote and protect pensions by focusing on advocacy, research and education regarding public sector retirement systems. NCPERS members collectively manage nearly $3 trillion in pension assets held in trust for approximately 21 million public employees and retirees. The economic impact of public employee retirement systems and the retirement security they provide to retirees and their families is substantial, particularly in a state such as Florida which has long been a destination for retirees from across the country.[2]

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[1] General information concerning NCPERS as well as specific data regarding its activities can be found at its website: www.ncpers.org.

[2] According to the National Institute on Retirement Security, expenditures made by retirees of state and local government provide a steady economic stimulus to Florida communities and the state economy. http://www.nirsonline.org/index.php?option=com_content&task =view&id=684& Itemid=48.

In 2009, 360,065 Florida residents received $7.2 billion in pension benefits from state and local pension plans. http://www.nirsonline.org/storage/nirs/documents/ factSheetsPreviews/Factsheet_FL.pdf.

Among other activities, NCPERS speaks on behalf of its member retirement systems with respect to legislative, legal and regulatory actions through research, published studies and position papers, and the filing of *amicus* briefs. NCPERS is interested in preserving the integrity of state and local retirement systems. NCPERS is a non-profit, tax exempt entity under § 501(c)(6) of the Internal Revenue Code.

As a primary advocate for governmental retirement plans and millions of Americans whose financial security depends upon them, NCPERS has a stake in the outcome of this litigation which was certified as a matter of great public interest. NCPERS and its member funds, many of whom are Florida plans, represent significant assets and substantial numbers of Floridians whose pension rights are directly impacted by this litigation concerning pension rights and obligations.

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INTRODUCTION

For purposes of this Amicus Brief, the lower court's order granting summary judgment shall be referred to as the "Order." The Florida Retirement System, shall be referred to as "FRS." Section 121.011(3)(d), Florida Statutes, shall be referred to as the FRS "anti-impairment" provision. Senate Bill 2100, shall be referred to as "SB 2100." The FRS defined benefit plan shall be referred to as the FRS "Pension Plan."

SUMMARY OF ARGUMENT

The lower court's decision should be affirmed since it is supported by longstanding precedent. The lower court's Order is properly based on a long line of cases recognizing the sanctity of contracts in Florida under Art. I, § 10 of the Florida Constitution. In addition to the constitutional protection against impairment of contract, two other fundamental rights are implicated this case, the right to collectively bargain under Art. I, § 6, and the prohibition against taking private property without just compensation under Art. X, § 6. These mutually reinforcing guarantees are further supported by, and should be read together with, the specific anti-impairment provisions in § 121.011(3)(d), Fla. Stat.

The lower court properly determined that a budgetary shortfall, by itself, does not justify impairing the obligation of contract. The lower court correctly recognized that Appellants merely produced evidence that the state faced a significant budget shortfall. Appellants did not demonstrate that the impairment was reasonable and necessary under the *U.S. Trust* and *Chiles* compelling state interest test.

FRS is one of the best funded state plans in the country, despite the absence of an employee contribution prior to SB 2100. The Legislature's amendments in SB 2100 were not necessary to improve the actuarial funding of the FRS.

Defined benefit plans are funded on a long term basis and involve back-loaded benefits. The elimination of the FRS COLA for future service resulted in a substantial impairment and uncompensated taking. On its website the FRS freely admits that benefits in the Pension Plan are back-loaded, "which means that you accumulate benefits slowly at first and then at a faster rate the longer you stay." According to FRS, this is particularly the case "if you stay with FRS employers for most of your career or for the final years of your career" when the COLA would otherwise have maximum impact.

The imposed employee contribution together with the elimination of the COLA for future service constituted substantial impairments which distinguishes SB 2100 from the facts in the *Sheriffs* case. The lower court's Order correctly recognized the qualitative nature of this impairment and should be affirmed accordingly.

ARGUMENT

I. THE LOWER COURT'S DECISION WAS CORRECTLY DECIDED AND IS SUPPORTED LONGSTANDING PRECEDENT.

The lower court's Order is properly based on a long line of cases recognizing the sanctity of contracts in Florida. Article I, §10's protections against impairment of contract should be read alongside the two other fundamental rights implicated this case under Art. I, § 6 and Art. X, § 6 of the Florida Constitution. These mutually

reinforcing guarantees are further supported by the specific anti-impairment provisions in § 121.011(3)(d), Fla. Stat.

This Court has repeatedly affirmed that "[v]irtually no degree of contract impairment has been tolerated in this state." *Yamaha Parts Distribs., Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla.1975); *see also Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774 (Fla. 1979). The fact that Plaintiffs are public employees does not fundamentally alter this analysis. *Chiles v. United Faculty of Florida*, 615 So. 2d 671, 673 (Fla. 1993)(indicating that the "right to contract is one of the most sacrosanct rights guaranteed by our fundamental law"). The Appellants' expansive reading of legislative authority would effectively rewrite the fundamental rights of public sector employees. Appellants' view is also directly contrary to this Court's longstanding definition of "impairment" under Art. I, § 10.[3]

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[3] Forty years prior to the adoption of § 121.011(3)(d)'s anti-impairment provision, this Court broadly interpreted the concept of contract impairment as follows:

> To "impair" has been defined as meaning to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken. Whatever legislation lessens the efficacy of the means of enforcement of the obligation is an impairment.

State ex rel. Women'ss Benefit Ass'n v. Port of Palm Beach Dist., 164 So. 851, 856 (1935), discussed in *Yamaha Parts Distribs., Inc. v. Ehrman*, 316 So. 2d 557, 559 (Fla. 1975), cited for other purposes in *State ex rel. Stringer v. Lee*, 2 So. 2d 127, 129 (Fla. 1941). The back-loaded nature of defined benefit plans, particularly in the case of the eliminated FRS COLA, underscores the impairment caused by SB 2100.

Since 1974, members of FRS have relied on the anti-impairment provisions in § 121.011(3)(d), Fla. Stat.:

> As of the effective date of this Act, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contractual rights, *and shall not be abridged in any way* (emphasis added).

These protections could not have been clearer for public employees, when viewed alongside the three fundamental rights at issue in this case. The fact that the FRS defined benefit Pension Plan and the retirement security that it provides is back-loaded, funded on a long term basis and generally understood to reward long term service underscores the importance of the protections at issue in this appeal.

A. The Lower Court Properly Determined that a Budgetary Shortfall, By Itself, Does Not Justify Impairing the Obligation of Contract.

The lower court correctly recognized that Appellants "merely produced evidence that the state faced a significant budget shortfall," but did not demonstrate that the impairment was reasonable and necessary under the compelling state interest test. Order at 8, *citing U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19-21 (1977); *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993).

According to this Court in *Chiles*, the contract rights of public employees are expressly guaranteed by Art. I, § 10 of the Florida Constitution[4] and are "equally enforceable," for example, in labor contracts by operation of Art. I, § 6. *Id.* at 673. Despite Appellants' suggestions to the contrary, the Legislature has only a "very severely limited" authority to amend the law to eliminate a contractual obligation it has itself created." *Id.* at 673.

> Before 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. *Id.*

Yet, on the undisputed record, the lower court determined that "other reasonable alternatives existed to preserve the state's contract with FRS members." Order at 8. The lower court further found that the Legislature preserved $1.2 billion in unspent general revenue funds for the 2011-12 fiscal year. *Id.* Doing so was possible because Appellants were willing to impair Plaintiffs' contract rights without bargaining. *See* Order at 2 (indicating that when faced with a budget shortfall Appellants "turned to

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[4] In interpreting Art. I, § 10, the Court has adopted an approach similar to that of the United States Supreme Court in interpreting Art. I, § 10 of the United States Constitution. *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So.2d 774 (Fla. 1979).

the employees of the State of Florida and ignored the contractual rights given to them by the Legislature in 1974").

Florida TaxWatch argues on page 17 of its amicus brief that public employees should be placed on an equal footing with private sector employees, who are only governed by ERISA's limited anti-cutback rule. This argument misses the point. ERISA, by design, specifically exempts public employees who are very different from the private sector workforce.[5] Public sector workers are generally better educated, paid less, and assume risks that are not taken by private sector workers.[6] Most importantly, this appeal is about government's obligations to fulfill its own contracts with its employees, not the rights of private parties under ERISA.

By seeking to cover the state's budget shortfalls at the expense of FRS members, some have suggested that SB 2100 was effectively a tax increase on public

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[5] *Rose v. The Long Island R.R. Pension Plan*, 828 F.2d 910, 914 (2nd Cir. 1987), *cert. denied*, 108 S.Ct. 1112 (1988)(recognizing that Congressional reluctance to interfere with the administration of public retirement plans was based on principles of federalism).

[6] State and local government employees are twice as likely as their private sector counterparts to have a college or advanced degree. Earnings of state and local employees are lower than those for private sector workers with comparable earnings determinants (e.g., education). Over the last 20 years, the earnings for state and local employees have generally declined relative to comparable private sector employees. National Institute On Retirement Security, *Comparing Public and Private Sector Compensation over 20 Years* at 3, April 2010, http://www.nirsonline.org/storage/nirs/documents/final_out_of_balance_report_april_2010.pdf.

employees.[7] As described below in Section D of this amicus brief, SB 2100 was not a means of improving funding. Legislative expedience should not be permitted to override constitutional rights.

B. Federal and Out-of-State Precedent Support the Lower Court Order.

Federal and out-of-state authority similarly support affirming the lower court Order. In *U.S. Trust v. New Jersey*, 431 U.S. 1 (1977), the Court held that "a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *Id.* at 1516 n. 14. In addition, "statutes governing the interpretation and enforcement of contracts may be regarded as forming part of the obligation of contracts made under their aegis." *Id.* Accordingly, § 121.011(3)(d) is properly treated as part of the pension contract since its plain language evinces an intent to create enforceable rights.[8] *U.S. Trust* concluded that "[a] state may not refuse to meets its legitimate financial

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[7] Currently Florida does not levy a personal income tax, although the state is permitted to do so if it complies with Art. VII, § 5 of the Florida Constitution. As described by this Court in a line of cases dating back to the 1930's, a tax is a burden imposed by "sovereign right for the support of the government, the administration of the law, and to execute the functions the sovereign is called on to perform." *Collier County v. State*, 733 So. 2d 1012, 1018 (Fla. 1999)(citing *Klemm v. Davenport*, 129 So. 904, 907 (1930)).

[8] Based on this Court's holding in *Greene v. Gray*, 87 So. 2d 504, 505-507 (Fla. 1956), § 121.011 should be liberally construed in favor of the Appellees.

obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *Id.* at 1521.

As the Second Circuit has noted, holding government to its contracts with its officers and employees is a concept as old as the Republic itself:

> [W]hen the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services, during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens.

Association of Surrogates v. State, 940 F.2d 766, 774 (2d Cir. 1991)(citing *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 694 (1819)(Story, J., concurring)).[9]

While states differ as to when pension rights attach, pension obligations are protected from contractual impairment when they do. *See, e.g., Mascio v. PERS of*

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[9] In the Federalist No. 44, Madison eloquently notes the evils of government interference with its own contracts :

> The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

Ohio, 160 F.3d 310 (6th Cir. 1998)(what is a small change to government is not necessarily a small change to the pensioner); *AFSCME v. City of Benton*, 513 F.3d 874 (8th Cir. 2008)(termination of vested post retirement benefits impairs contract clause); *Professional Firefighters Ass'n of Omaha v. City of Omaha*, 2010 WL 2426446 (D. Neb. 2010)(goal of saving taxes does not outweigh the sanctity of contract in the absence of an "unprecedented emergency"); *Maybourg v. City of St. Bernard*, 2006 WL 3803393 (S.D. Ohio 2006)(suspension of pension benefits without individualized consideration of the impact denies substantive due process).

Likewise, the lower court's Order is supported by case law from around the country. In *Municipality of Anchorage v. Gallion*, 944 P.2d 436 (Alaska 1997), the court struck down a city ordinance which took assets from two overfunded tiers of a local retirement system to pay the unfunded accrued actuarial liability in a third tier. Alaska, like Florida, protects pension benefits under a contract impairment theory. Just as members were not entitled to increased benefits in the overfunded tiers, the employer had no right to withdraw from the overfunded tiers to pay the employer's obligation in an underfunded tier.

The Oregon Supreme Court in *Strunk v. PERB*, 108 P.3d 1058, 1097 (Or. 2005) considered a temporary suspension of annual COLA payments to retirees created by alteration of the rate credited to member contribution accounts. The *Strunk* court

recognized that even a temporary change was an impairment of the retirees' pension contract.

The misappropriation of COLA money was expressly disapproved in *Wisconsin Retired Teachers v. Employee Trust Funds*, 558 N.W.2d 83 (Wis. 1997). In an effort to plug a budget gap, the Wisconsin legislature adopted a measure which altered the COLA methodology for retirees. The result was a transfer of funds used for post 1974 retirees to fund a benefit previously paid by general budgetary allocations. The effect of the law was to reduce the benefits of both pre and post 1974 retirees, while relieving the state of $230M in budgetary expenditures. The court found this to be an unlawful taking of property without just compensation.

The avoidance of financial obligations to retirees through a variety of legislative devices has also been firmly rejected as contrary to the contract and property rights of plan participants. *See, e.g., Louisiana Municipal Ass'n v. State*, 893 So. 2d 809 (La. 2005)(refusal to fund employer obligations in the face of rising costs is an impairment of constitutionally guaranteed rights of participants); *McDermott v. Regan*, 624 N.E.2d 985 (N.Y. 1993)(alteration of actuarial methodology to create a surplus eliminating employer contributions impairs the rights of members to a secure retirement plan); *Dadisman v. Moore*, 384 S.E.2d 816 (W.Va. 1991)(transfer of appropriations designated for retirement system to other state budget purposes impairs the contract

rights of members); *United Firefighters v. City of Los Angeles*, 259 Cal. Rptr. 65 (Cal. Ct. App. 1989)(reduction of COLA benefits is an unconstitutional impairment to members vested prior to enactment); *Calabro v. City of Omaha*, 531 N.W.2d 541 (Neb. 1995)(elimination of supplemental pension plan without an offsetting advantage impairs the obligation of contract); *Cloutier v. State*, 42 A.3d 816 (N.H. 2012)(alteration of judicial pensions from standards in place at the commencement of office is an impairment of contract); *Nash v. Boise City Fire Dept.*, 663 P.2d 1105 (Idaho 1983)(lowering COLA cap was invalid when retirement plan was neither insolvent or unable to meet its obligations).

In *Claypool v. Wilson*, 6 Cal. Rptr.2d 77 (Cal. Ct. App. 1992), the court approved a legislative program which replaced a performance based COLA applicable only to certain retirees with a fixed rate COLA for all plan participants. To be held reasonable, the court noted that any disadvantages had to be offset by comparable new advantages.

The development of the concept of a reasonable alternative, begun with *Claypool*, was further explained by the same court in *Teacher Ret. Board v. Genest*, 65 Cal. Rptr.3d 326 (Cal. Ct. App. 2007). In *Genest*, the court disapproved a reduction in COLA benefits finding that no comparable advantage was simultaneously created offsetting the loss. The court noted that while assisting the public fisc is not

unreasonable, it is not enough to justify the destruction of vested contract rights of retirees. *Id.* at 344; *see also, Bakenhus v. City of Seattle*, 296 P.2d 536, 540 (Wash. 1956)(public employee pensions are not a mere gratuity but are deferred compensation for services rendered and thus modifications which are disadvantageous should be accompanied by comparable new advantages). By contrast, in the present appeal, SB 2100 simultaneously eliminated the COLA and imposed a new employee contribution, without any corresponding advantage for the membership.

C. Defined Benefit Plans, Such as the FRS's Pension Plan and its COLA, Are Funded on a Long Term Basis and Involve Back-loaded Benefits.

At the heart of the lower court Order is the determination that SB 2100 involved "two significant," "qualitative" changes to FRS.[10] Order at 4 & 6. Specifically, the lower court held that the elimination of the FRS COLA on future service and the mandatory new employee contribution resulted in a "complete change" to FRS.[11]

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[10] As a result, at the same time that FRS members would be paying into FRS for the first time in over thirty years, they would be receiving substantially lower benefits under SB 2100.

[11] Under *Sheriffs* the Legislature had options which would not have fundamentally altered FRS. The Legislature could have facilitated bargaining over prospectively lowering the multiplier (or benefit accrual rate) for future service for members not otherwise eligible for retirement. Similarly, the Legislature could have enabled bargaining over the elimination of certain kinds of "spiking" for overtime or "accumulated annual leave payments" with regard to future service. *See* SB 1128, Chapter 2011-216, Laws of Florida (adopted by the Legislature the same year as SB 2100 but only applicable to local and municipal plans). Similarly,

Based on these findings, the lower court held that this Court's decision in *Florida Sheriffs Ass'n v. Department of Admin.*, 408 So. 2d 1033 (Fla. 1981) was factually distinguishable, as SB 2100 was "substantially" different than the amendment in *Sheriffs*. According to the lower court, the Legislature was not permitted to "completely gut and create a new form of pension plan." Order at 2. Contrary to its claim that the lower court decision prevents the State from responding to economic issues by being bound to its contract, the Legislature remains free to set whatever employment terms it deems in the best interest of the State for future employees. The contract terms would be known to those employees and accepted by virtue of acceptance of employment. *See Steigerwalt v. City of St. Petersburg*, 316 So.2d 554 (Fla. 1975)(pension forfeiture provision does not impair contract because it was law at time of employment and became part of employment contract).

The lower court holding correctly appreciates the long term nature of defined benefit pension plans such as the FRS Pension Plan and its COLA. It is generally recognized that a defined benefit pension has a long time horizon, since benefits earned by participants in the plan do not all come due at once and are actuarially funded over time. "As a result, many DB plans take the long view, especially for

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the Legislature could have facilitated bargaining over incentivizing employees to opt out of FRS or otherwise retire early.

public DB plans because they are backed by government entities that (unlike private corporations) have a very low risk of insolvency."[12]

Indeed, FRS itself readily admits the "back-loaded" nature of benefits earned under the FRS Pension Plan. According to the Division of Retirement's website, How Your Benefit Accumulates:

> *In the Pension Plan, your benefits are generally back-loaded, which means that you accumulate benefits slowly at first and then at a faster rate the longer you stay.* This is different from the Investment Plan, where benefits are earned more or less evenly over your career (subject to fluctuations in the financial markets and your investment strategy). So, if you stay with FRS employers for most of your career or for the *final years of your career*, you're more likely to receive a greater benefit under the Pension Plan (emphasis added).[13]

Given the back-loaded nature of the Pension Plan, members "accumulate benefits slowly at first and then at a faster rate" in the final years of their career when the COLA would otherwise have maximum impact.

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[12] Beth Almeida, Kelly Kenneally & David Madland, *The New Intersection on the Road to Retirement*, THE FUTURE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS 298 (Olivia S. Mitchell & Gary Anderson, eds.,The Pension Research Council, Wharton School of the University of Pennsylvania, 2009).

[13] http://myfrs.com/portal/server.pt/community/pension_plan/233#

The "backloading of benefits" is found in most traditional defined benefit designs, including FRS.[14]

> In Florida, FRS public employee benefits are based on the average of the highest five years of earnings, which typically occur at the end of a career, rather than lifetime earnings. Vested workers who leave FRS employment prior to the normal retirement age of 62 will find that the purchasing power of their retirement benefits is eroded, since the wage base is frozen in nominal terms. *Id.*

Accordingly, in a defined benefit plan such as the FRS Pension Plan, members need to wait until normal or early retirement age to retire with full benefits. In other words, defined benefit plans encourage and promote length of service.[15] If employees simply walk away from their public employer and participation in FRS, or a court artificially truncates their pension rights to "accrued" benefits, they stand to lose substantial back-

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[14] Kenneth Trager, James Francis & Kevin SigRist, *Florida's Public Pension Reform Debate* in PENSIONS IN THE PUBLIC SECTOR 291 (edited by Olivia S. Mitchell & Edwin C. Hustead, Pension Research Council, Wharton School of the University of Pennsylvania, 2001).

[15] Over fifty years ago this Court acknowledged that the delayed payments in a governmental pension represent "a part of the participant's compensation for services already performed; that they contribute to efficiency is government; that they offer an added inducement to those with special skills and techniques to remain in government employment." The Court further recognized that governmental pensions "tend to raise the standard of government personnel and make government service a career rather than a passing interlude." *Greene v. Gray*, 87 So. 2d 504, 505-507 (Fla. 1956)(holding that public pensions should be liberally construed in favor of the grantee).

loaded defined benefit pension value.[16] The back-loaded value of a defined benefit plan is particular acute in the case of the Pension Plan's COLA. The lower court Order recognized the qualitative nature of the impairment resulting from SB 2100 and should be affirmed accordingly.

D. FRS Is One of the Best Funded State Plans in the Country, Despite the Absence of an Employee Contribution Prior to SB 2100.

Despite suggestions to the contrary, SB 2100 and this case are not about improving the actuarial funding of the FRS. For the past decade FRS has been one of the best funded state systems.[17] This was accomplished without a member contribution, which was eliminated in 1974.[18]

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[16] Benefit accruals in defined benefit plans typically are back-loaded as they ordinarily are more valuable the closer a long-term worker gets to retirement. Cash balance plans and defined contribution plans, on the other hand, generally use a more level pattern of accrual throughout a worker's career. Edward A. Zelinsky, *The Cash Balance Controversy*, 19 Va. Tax Rev. 683, 688 (2000).

[17] For example, FRS was 117.89% funded in 2001. FRS Annual Report, 2010-2011 at 40, https://www.rol.frs.state.fl.us/forms/2010-11_Annual_Report .pdf.

[18] In its Initial Brief at page 3, Appellants observe that Florida joined almost every state in 2011 by requiring an employee contribution. While it is accurate that the large majority of state retirement systems require employee contributions, this is not necessarily an apples to apples comparison. Many state systems provide health insurance for retirees which has become an increasingly expensive exercise. Many states have a higher benefit accrual rate than FRS or use a shorter averaging period than the FRS five year average.

As recognized by the lower court Order, FRS is one of the "most well-funded and healthiest public pension funds in the United States." Order at 5. The healthy funded status of FRS was investigated by PolitiFact earlier this year and confirmed.[19] The same month that the lower court Order was entered, the GAO released a study further confirming the lower court's undisputed factual findings. "Data compiled on large plans indicate that the funded ratios for these plans, in aggregate, have fallen over the past decade from over 100 percent in fiscal year 2001 to 75.6 percent in fiscal year 2010."[20] As stated in the Order, it is undisputed that "FRS has been operating well above the 80% funding ratio recommended by experts." Order at 5. Accordingly, FRS has consistently been well above these national averages without an employee contribution.

As described in the academic literature regarding retirement systems, defined benefit plans are funded on a long term basis and the funding ratio will fluctuate over time with plan experience:

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[19] According to Aaron Sharockman with PolitiFact Florida, "[t]he fact is, the state pension system [FRS] is one of the best funded state pension systems in the country." http://www.wtsp.com/news/topstories/article/246155/250/Gov-Rick-Scott-state-pension-not-funded and http://www.politifact.com/florida/statements /2012/ mar/07/rick-scott/rick-scott-says-state-pension-fund-not-funded/.

[20] Government Accounting Office, *State and Local Government Pension Plans, Economic Downturn Spurs Efforts to Address Costs and Sustainability*, GAO-12-322 at 13, http://www.gao.gov/assets/590/589043.pdf.

> What makes retirement programs much different from other entitlement programs or benefits is the *considerable length of time between when the funds are deposited into the account, and when the benefits are actually paid out.* For a new employee at age 25, benefits earned based on a year of service now will not be eligible for payment for up to forty years into the future at age 65. Then if annual pension payments are made, it may be another twenty years or more before the pension system is no longer obligated to make any further payments to the employee or beneficiary. Thus, the average time horizon for an employee entering a retirement program is generally at least twenty and often sixty or more years (emphasis added).[21]

It should be recognized that the funded status of defined benefit pension plans "tends to ebb and flow over time with the ups and downs of asset markets, interest rates, and other macroeconomic factors."[22] As a general rule, the funded status for all retirement systems (the ratio of existing plan assets to current and future benefits) fell in the wake of the downturn in financial markets at the beginning of the 2000 decade. *Id.* As acknowledged by the GAO, funded ratios have trended lower across the country due to market declines and for other reasons "such as sponsors' failure to keep pace with their actuarially required contributions *and benefit increases* during the early

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[21] Karen Steffen, *State Employee Pension Plans* in PENSIONS IN THE PUBLIC SECTOR 45 (Olivia S. Mitchell & Edwin C. Hustead eds., Pension Research Council, Wharton School of the University of Pennsylvania, 2001).

[22] Beth Almeida, Kelly Kenneally & David Madland, *The New Intersection on the Road to Retirement*, THE FUTURE OF PUBLIC EMPLOYEE RETIREMENT SYSTEMS 298 (Olivia S. Mitchell & Gary Anderson, eds.,The Pension Research Council, Wharton School of the University of Pennsylvania, 2009).

2000s."[23] Yet, in contrast to other states, benefits have not increased under FRS during the past decade, as was the case in other states. To the contrary, FRS participants were asked to bear the brunt of the state's budgetary shortfall.

CONCLUSION

WHEREFORE, for the foregoing grounds and reasons, the Amicus Curiae, NCPERS, respectfully prays that this Honorable Court affirm the lower court Order.

Respectfully submitted,
KLAUSNER, KAUFMAN,
JENSEN & LEVINSON
ROBERT D. KLAUSNER
Florida Bar No. 244082
ADAM P. LEVINSON
Florida Bar No. 55344

Attorneys for Amicus Curiae NCPERS
10059 N.W. 1st Court
Plantation, Florida 33324
Telephone: (954) 916-1202
Fax: (954) 961-1232

By: _____
Robert D. Klausner
Fla. Bar No. 244082
Adam Levinson
Fla. Bar No. 0055344

[23] Government Accounting Office, *State and Local Government Pension Plans, Economic Downturn Spurs Efforts to Address Costs and Sustainability*, (emphasis added) GAO-12-322 at 13. http://www.gao.gov/assets/590/589043.pdf.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is submitted in Times New Roman 14-point font, which complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

By: _____
ROBERT D. KLAUSNER
Fla. Bar No. 244082

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 6th day of July, 2012, to:

Pamela Jo Bondi
Attorney General
Louis F. Hubener, III
Blaine Winship
Timothy D. Osterhaus
Deputy Solicitor General
Office of the Attorney General
The Capitol, Suite Pl-01
Tallahassee, Florida 32399-1050
lou.hubener@myfloridalegal.com
timothy.osterhaus@myfloridalegal.com
blaine.winship@myfloridalegal.com

Raoul G. Cantero
T. Neal McAliley
White & Case LLP
Southeast Financial Center
200 South Biscayne Blvd.
Suite 4900
Miami, Fl 33131-2352
raoul.cantero@whitecase.com
nmcaliley@whitecase.com

H. Douglas Hinson
Alston & Bird LLP
One Atlantic Center
1201 West Peachtree Street
Suite 4200
Atlanta, Georgia 30309
doug.hinson@alston.com

Jonathan G. Rose
Alston & Bird LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004
jonathan.rose@alston.com

David R. Godofsky
Richard S. Siegel
Alston & Bird LLP
950 F Street, N.W.
Washington, DC 20004
david.godofsky@alston.com
richard.siegel@alston.com

Ronald G. Meyer
Jennifer S. Blohm
Lynn C. Hearn
Meyer, Brooks, Demma and Blohm
131 North Gadsden Street
Tallahassee, Fl 32301
rmeyer@meyerbrookslaw.com
jblohm@meyerbrookslaw.com
lhearn@meyerbrookslaw.com

Pamela L. Cooper
Director and General Counsel
Florida Education Association
300 East Park Avenue
Tallahassee, Florida 32301
pam.cooper@floridaea.org

Alice O'Brien
General Counsel
National Education Association
1201 16th Street, NW - Suite 820
Washington, D.C. 20036
aobrien@nea.org

Richard A. Sicking
1313 Ponce de Leon Blvd., #300
Coral Gables, Fl 33134
sickingpa@aol.com

Osnat K. Rind
Kathleen M. Phillips
Phillips, Richard & Rind, P.A.
9360 SW 72nd Street, Suite 283
Miami, Fl 33173
Orind@Phillipsrichard.com
kphillips@phillipsrichard.com

Richard Siwica
Egan, Lev & Siwica, P.A.
Post Office Box 2231
Orlando, Fl 32802
rsiwica@eganlev.com

Gregory T. Stewart
Nabors, Giblin & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, Fl 32308
gstewart@ngnlaw.com

Aaron Nisenson
International Union of Police Associations
1549 Ringling Blvd.
Suite 600
Sarasota, Fl 34236
nisenson@iupa.org

G. Hal Johnson
Florida Police Benevolent Association
300 East Brevard Street
Tallahassee, Fl 32301
hal@flpba.org

Virginia Delegal
General Counsel
Florida Association of Counties
100 South Monroe Street
Tallahassee, Fl 32301
gdelegal@fl-counties.com

Craig A. Meyer
Thomas Ross McSwain
Leah L. Marino
The Florida Senate
Suite 409, The Capitol
Tallahassee, Fl 32399-1100
meyer.craig@flsenate.gov
mcswain.ross@flsenate.gov
marino.leah@flsenate.gov

Gary D. Wilson
Jill S. Schwartz
Jill S. Schwartz & Associates, P.A.
180 North Park Avenue, Suite 200
Winter Park, Fl 32789-7401
gwilson@schwartzlawfirm.net
jschwartz@schwartzlawfirm.net

Donald D. Slesnick II
Law Office of Slesnick & Casey, LLP
2701 Ponce de Leon Blvd., Suite 200
Coral Gables, Fl 33134
donslesnick@scllp.com

Harry Morrison, Jr.
Kraig A. Conn
Florida League of Cities, Inc.
301 South Bronough Street
Suite 300
Tallahassee, Florida 32301
Telephone: (850) 222-9684
Facsimile: (850) 222-3806

James W. Linn
Glenn E. Thomas
Lewis, Longman & Walker, P.A.
315 South Calhoun Street
Suite 830
Tallahassee, Florida 32301
Telephone: (850) 222-5702
Facsimile: (850) 2249242
jlinn@llw-law.com
gthomas@llw-law.com

George T. Levesque
Don Rubottom
Teresa Ward
Florida House of Representatives
Suite 422, The Capitol
Tallahassee, Fl 32399-1300
george.levesque@myfloridahouse.gov
don.rubottom@myfloridahouse.gov
teresa.ward@myfloridahouse.gov

BY: _____
ROBERT D. KLAUSNER