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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APR 14 2016

SC SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2016-000021
Case No. 2015-CP-40-01728

Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated.....Appellants,

v.

South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority.....Respondents.

RECORD ON APPEAL (VOLUME II)

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ATTORNEYS FOR RESPONDENTS

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working retiree program." Approximately 3,300 working retirees paid such additional monies. See, Defendants' Discovery Responses to Plaintiffs' Seventh Interrogatories, dated July 7, 2008. Approximately 600 PORS working retirees paid such additional monies. See, Plaintiffs' Brief in Support of Motion for Class Certification, dated July 14, 2008.

11. It is uncontradicted that the members of the Plaintiff Class returned to work under the "old working retiree program," which did not require any further retirement contributions.

12. It is uncontradicted that the Plaintiffs and the Plaintiff Class could not rejoin SCRS (or PORS) until they had completed four years under the "old working retiree program."

ISSUES

Based on the above fact, this Court looks at two issues:

- 1) Has the State breached a contract with the working retirees; (Section I - Contract) and
- 2) Is the State estopped from changing the terms of the "old working retiree program" to require the working retirees to make additional retirement contributions without receiving additional service credit? (Section II - Estoppel).

In deciding the issues, the Court is mindful of the case of *King v. S.C. Retirement Systems*, 319 S.C. 373, 461 S.E.2d 822 (1995). In that case, the Supreme Court, in noting that certain terms in the code were not defined, held:

The purposes of the State's retirement act are remedial and beneficent. *Knight v. Board of Trustees of Firemen's Retirement & Pension Board*, 269 S.C. 671, 239 S.E.2d 720 (1977). Accordingly, the statute should be liberally construed in favor of those to be benefited and the objects sought to be accomplished.

King, 461 S.E.2d at 823.

I. CONTRACT

Plaintiffs Do Not Have a Contract

Plaintiffs contend that the retirement statutes, the forms completed by Plaintiffs, oral conversations between Plaintiffs and Defendants, or the purchase of additional service credit gave rise to a binding contract between Plaintiffs and Defendants. The Court finds, however, that neither sections 9-1-1790 or 9-11-90(4) of the South Carolina Code gave rise to a binding contract. In addition, the Court finds that neither the forms, conversations, or the purchase of additional service credit gave rise to a binding contract. Accordingly, the Court concludes that Plaintiffs are not entitled to relief on the basis of a breach of contract.

A. The retirement statutes do not form the basis of a contract.

In *Layman v. State*, the Supreme Court held that section 9-1-1790 ("the old working retiree statute") does not create a binding contract between the State and the old working retirees. 368 S.C. 631, 643, 630 S.E.2d 265, 271 (2006). The Court finds and concludes that this holding precludes a finding by this Court that the old working retiree statute formed the basis of a contract or that Defendants breached a contract arising from the terms of the old working retiree statute. Indeed, the Supreme Court's holding is the law of the case and this Court has no discretion to disturb or modify that holding. *Ackerman v. McMullan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) ("Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form.").

B. Neither the forms, oral conversations or purchase of additional service credit form the basis of contractual rights.

The Court finds that the determination in *Layman* that the old working retiree statute did not create contractual rights also precludes a finding that the statutory rights created under the old working retiree statute were converted into contractual rights by subsequent actions of the Retirement System or anyone else.

The Supreme Court expressly made clear that an agent of the State cannot convert statutory rights into contractual rights in *McKinney v. South Carolina Police Officers Retirement System*, 311 S.C. 372, 429 S.E.2d 797 (1993). In *McKinney*, the South Carolina Police Officers Retirement System terminated the plaintiff's retirement benefits because the plaintiff failed to establish twenty-five years of creditable service as required by statute. *Id.* at 373, 429 S.E.2d at 797. On appeal, the plaintiff contended that certain correspondence from the Retirement System created a binding contract between himself and the Retirement System entitling plaintiff to benefits not authorized by statute. Rejecting this argument, the Supreme Court found that the plaintiff "misconstrue[d] the nature of his right to retirement benefits: the source of his right is the statute, not a contract." *Id.* at 375, 429 S.E.2d at 798. Thus, the court held that "[n]either [plaintiff] nor [the Retirement System] have the authority to convert this statutory right into a contractual one." *Id.* Yet, in the present case, Plaintiffs make the same argument as the plaintiff in *McKinney*.

Plaintiffs urged this Court to find that the statutory rights of Plaintiffs were converted into contractual rights. The Court finds, however, *McKinney* makes clear that if the General Assembly did not create a contractual right to non-payment of retirement contributions in section

9-1-1790, then neither the Retirement System nor any other person or agency could have converted the statutory policy of section 9-1-1790 into a contractual right. Thus, the Court finds and concludes that no such contract could have been created as a matter of law by forms signed by Plaintiffs, oral communications had by Plaintiffs and agents of the Retirement System, or the purchase of additional service credit.

Statutory "[p]olicies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Alston v. City of Camden*, 322 S.C. 38, 46, 471 S.E.2d 174, 178 (1996) (citing *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985)). Indeed, it has long been the law of this State that "the state can only act under its Constitution and through its legislative enactments, and that, therefore, contracts cannot be created against the state except under such sanctions." *Ehrlich v. Jennings*, 78 S.C. 276, ___ 58 S.E. 922, 924 (1907). The Court finds and concludes that no such sanction is present in this case.

I find that no contract exists.

II. ESTOPPEL

A governmental entity may be equitably estopped in matters that do not affect the exercise of its police power or the application of public policy. *Grant v. City of Folly Beach*, 346 S.C. 74, 801, 551 S.E.2d 229, 232 (2001). The doctrine of estoppel applies when "actions, conduct, words, or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." *Rushing v. McKinney*, 370 S.C. 280, 293, 633 S.E.2d 917, 924 (Ct.App.2006).

Brading v. County of Georgetown, 327 S.C. 107, 114, 490 S.E.2d 467 (1997), identified some elements of estoppel in that case as to the party being estopped: (1) conduct calculated to convey the impression that the facts are different or inconsistent with those that the party subsequently attempts to assert; (2) intention or expectation that the conduct will be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. *Brading* also listed some elements that might be considered as to the party claiming estoppel: (1) lack of knowledge that promise would not continue and no way to determine that they would lose the promise; (2) acceptance of the promise; and (3) prejudicial change in position.

The application of estoppel depends upon the circumstances of each case. *Quail Hill, LLC v. County of Richland*, 379 S.C. 314, 324, 665 S.E.2d 194, 199 (Ct. App. 2008). "[E]stoppel is an equitable doctrine, essentially flexible, and therefore to be applied or denied as equities between the parties may preponderate." *Id.* Estoppel applies to enforce contract-like promises made unenforceable by technical defects or defenses. *Higgins Constr. Co. v. Southern Bell*, 276 S.C. 663, 281 S.E.2d 469, 470 (1981); *Powell v. Board of Commissioners of Police Ins. & Annuity Fund of State*, 210 S.C. 136, 41 S.E.2d 780 (1944). The promise should be enforced to avoid an injustice. *Id.* In fact, the purpose of estoppel is "to prevent manifest wrong and injustice." *Davis v. Monteith*, 289 S.C. 176, 181, 345 S.E.2d 724, 727 (1986).

The case of *Powell v. Board of Commissioners of Police Ins. & Annuity Fund of State*, *supra*, is similar to the facts in this matter. In *Powell*, the plaintiff was a deputy sheriff who was admitted into the Police Insurance and Annuity Fund ("Fund") in 1937. The deputy regularly paid dues to the Fund. As a deputy, the plaintiff was assigned to work in a mill and his salary was paid by a private corporation. In 1940, the State enacted a statutory amendment which

defined a police officer as one who received his salary from the State or a political subdivision. In 1946, the plaintiff became disabled and made a claim for monthly benefits under the Fund. Plaintiff's claim was denied based on the 1940 statutory amendment. The Supreme Court held that it would be unreasonable and "manifestly unjust" for the Fund to have accepted the dues paid by the deputy and then take the position that the deputy was not covered by the Fund. The court also noted that it was an "apt case" to the application of estoppel "in order to prevent injustice." *Id.* at 783. This case clearly indicates that the State can be estopped from applying a change in the law to the "old working retiree program."

Similarly, in *Oswald v. County of Aiken*, 281 S.C. 298, 315 S.E.2d 146 (Ct. App. 1984), the Court of Appeals applied the doctrine of estoppel to prevent the application of a detrimental change in the law to the plaintiff. In that case, Oswald was a police officer who was told to track his uncompensated time, as it would be designated as compensatory time. Then, subject to the needs of the county sheriff's department, Oswald could take time off from work using his accumulated compensatory time. Due to the county's demands for his services, Oswald was unable to use the compensatory time and upon his resignation, he had accumulated 1,188 hours of uncompensated time. The county denied Oswald's request for payment for that time because County Council had recently passed an ordinance prohibiting payments for compensatory time. Prior to the enactment of that ordinance, terminating employees had received payment for compensatory time. The Court of Appeals held that the county was estopped and that a government authority is not immune from the application of the doctrine of estoppel. Thus, Oswald was entitled to receive payment.

Furthermore, our appellate courts have already recognized that the doctrine of estoppel

can be applied in retirement matters. See, e.g. *McKinney v. South Carolina Police Officers Ret. System*, 311 S.C. 372, 429 S.E.2d 797 (1993)(Toal, J., concurring in part, dissenting in part).¹²

In *McKinney*, the plaintiff paid into the retirement system and relied on this buy-in to leave his employment. After receiving retirement payments for several months, he was then informed that his retirement benefits would be terminated because he did not actually have the required amount of creditable service. While the majority in *McKinney* determined the case on the basis of the plaintiff's contract claim, Chief Justice Toal filed a separate opinion (concurring in part and dissenting in part) which considered the issue of estoppel. Chief Justice Toal noted that, the plaintiff, having relied on the State's terms to retire:

is now unable to return to his employment to complete the requisite service to requalify for retirement.

Id. at 376. Chief Justice Toal concluded that it was:

wholly inequitable to prevent Mr. McKinney from receiving any retirement benefit and to deny the opportunity to complete the requisite service.

Id. at 276.

Similarly, the Plaintiffs retired and enrolled in the "old working retiree program," whose terms, at that time, required no further retirement contributions. The Plaintiffs cannot now "unretire" and are essentially captives of the program for at least four years. It is "wholly inequitable" to now require retirement contributions when the Plaintiffs are unable to return to their employment status or gain more credit for the contributions now required. This case presents a classic example for the application of estoppel.

¹²See also, *Morgan v. S.C. Budget and Control Board*, 377 S.C. 313, 659 S.E.2d 263 (Cl. App. 2008)(recognizing that estoppel could apply to the retirement system but finding the

In other jurisdictions, courts have applied the doctrine of estoppel to retirement systems. For example, the North Carolina Court of Appeals applied the doctrine of estoppel against that state's retirement system, finding it appropriate "if an estoppel is necessary to prevent the loss to another...." *Fike v. Board of Trustees, Teachers' and State Employees' Ret. System*, 179 S.E.2d 910 (N.C. App. 1981) (internal citations omitted).

Similarly, in *Hudkins v. State of West Va. Consolidated Public Ret. Board*, 647 S.E.2d 711 (W.Va. 2007), the West Virginia Supreme Court found that to deny estoppel in that case would permit a "manifest injustice." In *Hudkins*, the court considered the issue of whether unused sick time could be used for retirement service credit for the purposes of calculating pension benefits. The court noted that the retirement board had given the plaintiff assurances that she could indeed receive credit for unused sick time. The plaintiff then decided to separate from her employment on March 31, 2000. In September 2002, more than two years after her separation from employment, the plaintiff learned that she would not be permitted to convert her unused sick time to service credit. In October 2002, the retirement board responded to her inquiry, claiming that only employees who actually retire and began drawing retirement benefits at the time of the termination of employment could convert unused sick leave and that the unused sick leave could not be converted by employees, like plaintiff, who terminated their employment before they became eligible for retirement benefits. The Supreme Court of West Virginia held that "estoppel may operate against a state government with regard to unused sick leave." *Id.*, 647 S.E.2d at 713. The West Virginia Supreme Court acknowledged the plaintiff's dilemma in that, since she had terminated employment 2 years prior, she no longer had the ability to

plaintiff in that case failed to show the proper basis).

reconsider. *Id.*

The case of *Christensen v. Minneapolis Municipal Employee's Retirement Board*, 1983.MN.95, 331 N.W.2d 740 (1983) is applicable to the facts of this case. In *Christensen*, the plaintiff retired and became eligible to collect pension benefits in 1974. In 1980, the retirement board suspended his monthly benefits until he obtained the age of 60 because of the enactment of a Minnesota law which imposed a new minimum age requirement for entitlement to benefits.

Thereafter, the plaintiff brought a declaratory and injunctive relief suit against the retirement board. The Court held:

We think today a public employee's interest in a pension is best characterized in terms of promissory estoppel. This approach is presaged, to a degree, by our previous holdings using the contract approach to which promissory estoppel is related.

Promissory estoppel is the name applied to a contract implied in law where no contract exists in fact. The effect of promissory estoppel is to imply a contract from a unilateral or otherwise unenforceable promise coupled by detrimental reliance on the part of the promisee. In other words, promissory estoppel precisely applies where, as here, there are no "contract rights."

Christensen, 331 N.W.2d at 741. The Court further noted:

The state reasonably expects its promise of a retirement program to induce persons to accept and remain in public employment, and the persons are so induced, and the injustice can be avoided only by enforcement of that promise. Promissory estoppel, like equitable estoppel, may be applied against the state to the extent that justice requires.

Id., 331 N.W.2d at 741. The Court continued:

...what the state had promised, what its employees had relied on, and what, therefore, the law will enforce, is a pension program the terms of which are protectable subject to a reasonable legislative modification from time to time.

Id., 331 N.W.2d at 741. In this case, a similar situation has occurred.

Other courts have enforced similar rights on different theories. In *Simpson v. N.C. Local Government Employees' Retirement System*, 88 N.C.App. 218, 363 S.E.2d 90 (1987), North Carolina employees who were vested members of the retirement system questioned whether they were subject to adverse legislative modification after they had retired. The plaintiffs had qualified for disability benefits under the retirement system until a change in the law occurred in 1981. While adopting a reasonable and necessary approach, the court noted that various jurisdictions throughout the United States had a range of approaches to the question of legislative modification after a retiree had vested in a pension plan. I will also briefly discuss some of those approaches.

A number of jurisdictions apply the traditional common law in holding that public employees' pensions are gratuities and create no contractual rights until the member satisfies all his retirement requirements. See *Etherton v. Wyatt*, 155 Ind. App. 440, 293 N.E.2d 43 (1973). However, it appears this theory is subject to criticism and is not favored by the majority of the courts. A majority of the courts favor a theory which accords more protection to such pension rights. The case most often cited is *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (1983), discussed above. A large number of states, have construed public pension plans as giving rise to contractual rights—even in the absence of a clear statement of legislative intent to contract. See *Fineman v. Oechslein*, 494 F.Supp. 525 (D.Conn. 1980). Some states have held that such pension rights vest unconditionally at the moment of employment. See *Yeazell v. Copins*, 98 Ariz. 109, 402 P.2d 541 (1965).

In *Simpson*, the North Carolina Court of Appeals considered a variety of approaches including the relative weaknesses and strengths of each. That court went on to decide that the

approach known as the *Hughes* approach from the case of *Maryland State Teachers Association v. Hughes*, 594 F.Supp. 1353 D.Md. (1984) was the best approach. The court noted that this theory allows for amendment to a pension only if it was reasonable and necessary to serve an important public purpose. The *Simpson* court adopted this approach because it accorded some protection to plaintiff's pension rights without substantially derogating from the General Assembly's prerogative.

Indeed, under any of these views, it would be appropriate to apply estoppel to the State, and I do so.

LAW AND ANALYSIS

In this case, it is clear that if a person entered the "old working retiree program," he or she was promised that no retirement contributions would be required. The State has even admitted that a term of the "old working retiree program" was that no additional retirement contributions were required:

Q: And that they retired with understanding they wouldn't pay contributions. You understand that.

A: At the time--if they retired prior to July 1, 2005, they did not have to make contributions. That's correct.

Q: And they retired understanding that, didn't they?

A: That was the statutory provisions at the time and that was disclosed to them when they retired.

Q: It was disclosed that they wouldn't have to pay?

A: If they retired prior to July 1, 2005, yes.

Dep. of Peggy Boykin, p. 94:9-23. Again, the State acknowledged the promise made:

Q: "...Make sure I understand this now. You recognize that people had retired and were told they wouldn't have to make contributions, correct?"

A: "If they retired prior to July 1, 2005, they were told that contributions were not required on employment."

Dep. of Peggy Boykin, p. 110:12 - 111:21. Under the law prior to Act 153, the "old working retiree program" would not allow participants to "unretire" and become a member of the retirement system for four years. There was no way for any Plaintiffs to know that the "old working retiree program" would be changed. All Plaintiffs joined the "old working retiree program" with the promise that no further retirement payments would be required. They are now prejudiced with no right to reconsider.

The State included in the "old working retiree program," and Plaintiffs and the Class were told, that contributions were not required on employment. Plaintiffs and the Class entered employment under the "old working retiree program" only to have the State change its promise and require contributions.

All of the above facts above give rise to estoppel, which is founded on the principal of justice and good conscience. *Holland Group Inc. v. North Carolina*, 504 S.E.2d 300 (N.C. 1998). It applies when it would be inequitable for the party to whom the doctrine is asserted to take advantage of the situation it created. *Powell v. Board of Commissioners of Police Ins. & Annuity Fund of State*, 210 S.C. 136, 41 S.E.2d 780 (1944).

I find that it would be manifestly unfair and unjust to allow Plaintiffs and the Plaintiff Class to retire and return to work upon the promise that they would not have to pay retirement contributions and thereafter allow the State to break that promise and require the payment of

retirement contributions while giving no additional credit to the Plaintiffs Class. The State is estopped from collecting retirement contributions from the Plaintiffs and the members of the Plaintiff Classes after July 1, 2005. This Order is also the notice to the class, as described below.

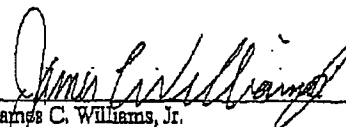
III. NOTICE TO CLASS

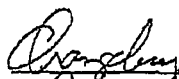
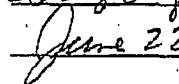
I further order the Plaintiff Class in both *Ahrens* and *Arnold* be given notice of the status of the case and the ruling hereby entered. Notice should be given as soon as is practicable after the filing of this Order. The Notice should state, at a minimum, that judgment has been entered in favor of the class, that one or both sides have appealed or will appeal, and that a final decision will be entered by an appellate court. The notice should also provide that if the final appellate decision is in favor of the class, a petition for fees payable from the class fund will be filed and the class members will be given notice and the right to object to the fees. The notice should also state that any members may opt out of the class at the time of the notice, but if they fail to do so, they will be bound by the result on appeal. After the hearing on the attorney's fees and any objections, the contributions to date, minus attorney's fees, shall be returned to the class.

CONCLUSION

Having fully considered the record, memoranda of law, and the arguments of counsel, I find that the State is estopped from changing the terms of the "old working retiree program" as to the Plaintiffs and the Plaintiff Classes. I further order that the State, after a hearing on attorney's fees and objections, return all retirement contributions wrongfully withheld from the Plaintiff Class since July 1, 2005 minus attorney's fees. I further order that the State cease withholding retirement contributions from the Plaintiffs and Plaintiff Classes in the future. Finally, I order that Notice be given to the Plaintiff Class as set forth in this Order.

AND IT IS SO ORDERED.


James C. Williams, Jr.
Presiding Judge

 South Carolina
 June 22, 2009

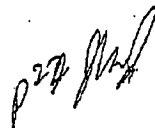


Exhibit 4

Order, Ahrens v. State, 05-CP-40-2785
(S.C. Cir. Ct. Sept. 3, 2009)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 05-CP-40-2785

NANCY AHRENS, ANN MERCER
and GARY M. McCOMBS, on behalf of
themselves and all others similarly situated,

Plaintiffs,

vs.

THE STATE OF SOUTH CAROLINA
and THE SOUTH CAROLINA
RETIREMENT SYSTEM,

Defendants,

ORDER DENYING RULE 59 MOTION

JEANETTE W. McCOMBS
C.C.P. & G.S.

2009 SEP -8 AM 10:30

RICHLAND COUNTY
FILED

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 05-CP-22-756

JAMES B. ARNOLD, JR., et al.,
individually and as Class Representatives,

Plaintiffs,

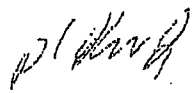
vs.

THE SOUTH CAROLINA POLICE
OFFICERS RETIREMENT SYSTEM,
THE SOUTH CAROLINA RETIREMENT
SYSTEM, AND THE STATE OF SOUTH
CAROLINA

Defendants,

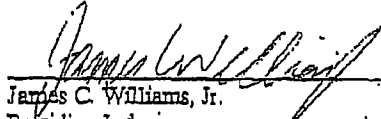
ORDER DENYING RULE 59 MOTION

These cases are before the Court on Defendants' motions pursuant to SCRCP 59 to alter
or amend the judgments previously entered by the Court on the merits in each case. A
consolidated hearing on the motions was held on August 18, 2009, at which counsel for all
parties were present.



After hearing arguments of counsel, the Court declines to alter or amend its previous judgment, except in one respect. Defendants argued that the existing Orders on the merits did not expressly rule on the theories of relief pleaded by Plaintiffs other than breach of contract and estoppel. The Court agrees with the Defendants' position as to these claims and, therefore, denies relief to Plaintiffs on all theories other than estoppel. With this exception, the motions to alter or amend the judgments are denied.

AND IT IS SO ORDERED.


James C. Williams, Jr.
Presiding Judge

Sept 3, 2009
W. J. Ball, South Carolina.

Exhibit 5

(7/13/05 Order of Judge Breeden)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 05-CP-40-2785

NANCY S. LAYMAN, DAVID M.)
FITZGERALD, VICKI K. ZELENKO,)
and WYMAN M. LOONEY, on behalf of)
themselves and all others similarly situated,)

Plaintiffs,)

vs.)

THE STATE OF SOUTH CAROLINA)
and THE SOUTH CAROLINA)
RETIREMENT SYSTEM,)

Defendants.)

**ORDER GRANTING PLAINTIFFS'
MOTION FOR TEMPORARY
RESTRAINING ORDER**

RICHLAND COUNTY
FILED
2005 JUL 14 AM 11:11
BARBARA A. SCOTT
C.C.C. & C.S.

This matter is before me on a motion for temporary restraining order by Plaintiffs and was heard before me on June 28, 2005. After careful consideration of the memoranda, affidavits, oral argument and applicable law, this court has determined that the temporary restraining order barring the application of Act No. 153, Session 116 to Plaintiffs should be granted.

I. BACKGROUND

The four named Plaintiffs are employees of the State of South Carolina or its agencies or political subdivisions who are participants in the Teacher and Employee Retention Incentive Program ("TERI"), pursuant to S.C. Code § 9-1-2210, et al. Under the TERI program, a long-serving state employee can retire, but continue to work for the state for up to five years following the retirement. During these five years, the pension benefits that would be paid to TERI participants are instead withheld and paid either as a lump sum at the end of the five-year period or rolled over into a qualifying retirement fund.

Prior to the enactment of Act No. 153 of Session 116 of the South Carolina General Assembly, under the "original TERI," a TERI program participant made "no further employee

contributions into the system, accrue[d] no service credit during the program, and [was] not eligible to receive group life insurance benefits or disability retirement benefits." S.C. Code Ann. § 9-1-2210(D) (2004).

The enactment of Act No. 153, effective July 1, 2005, dramatically altered the "original TERI" program. As part of Act No. 153, South Carolina Code § 9-1-2210(C) was amended to require that TERI participants or retirees who are working "shall pay to the system the employee contribution as if the program participant was an active contributing member, but the program participant does not accrue additional service credit in the system for these employer and employee contributions." Initially, this contribution will be 6.25% of the employee's pay.

Plaintiff Nancy Layman submitted an affidavit in support of this motion. According to her affidavit, TERI Participants were required to sign an "Election of Non-Membership [in the South Carolina Retirement System]" form as a condition of participating in the TERI program.¹ That form provided: "I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment since I have elected non-membership, and, as such, will not be making retirement contributions." *Id.* (emphasis added). Further information sent to TERI Participants by the Retirement System reiterated that she would "make no further employee contributions." As of June 26, 2005, the Retirement System web site still provided: "Since TERI participants are considered 'retired', no retirement contributions are deducted on wages that you earn from active employment and you do not earn additional service credit." *Teacher and Employee Retention (TERI) Program*, <http://www.retirement.sc.gov/teri/default.htm>

¹ The Court is aware that there are various versions of this form. All, however, are substantially similar in their provisions.

(accessed June 26, 2005) (emphasis added). The existence and content of these program documents, created and disseminated by the Defendants, is undisputed.

Plaintiffs have provided a further affidavit from Robert Young, stating that there is a risk that by requiring contributions from persons whose benefits are fixed, the Act No. 153 TERI amendments could be considered "disqualifying amendments" by the IRS. In that event, according to Mr. Young, the IRS could take action up to and including the termination of the entire retirement plan. Mr. Young further stated that the IRS has a procedure for states to seek the opinion of the IRS prior to implementing changes such as those made to the TERI program. Defendants do not dispute that they did not utilize the IRS procedures to request an opinion on the TERI Amendments, but rather claim that this issue was "considered" by Defendants on their own.

Plaintiffs assert that the actions of the State violate their rights in numerous ways: (1) by breaching the contract between the State and Plaintiffs; (2) by unconstitutionally impairing Plaintiffs' contracts; (3) by unconstitutionally taking Plaintiffs' vested property rights; (4) by violating Plaintiffs' due process rights; (5) by violating the South Carolina Constitution on taxation; and (6) because the State is estopped from altering the contours of the TERI Program or its treatment of retirees after-the-fact.

II. STANDARD FOR A TEMPORARY RESTRAINING ORDER

The decision to grant an injunction or temporary restraining order is equitable, and the Court must "balance the equities between the parties." *County of Richland v. Simpkins*, 560 S.E.2d 902, 905-06 (S.C. Ct.App. 2002). "The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." *FOC Lawshe Limited*

Partnership v. International Paper Company, 574 S.E.2d 228, 231 (S.C. Ct. App. 2002). To obtain a temporary injunction under South Carolina law, a party must demonstrate: (1) irreparable harm in the absence of the injunction; (2) the party will likely succeed on the merits of the litigation; and (3) a lack of an adequate remedy at law. *Id.* at 232.

Once a *prima facie* showing of success on the merits has been made, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. *Transcontinental Gas Pipeline Corporation v. Porter*, 167 S.E.2d 313, 315 (S.C. 1969). A likelihood of success on the merits does not mean an absolute legal right or certainty of success, but instead means that the party has presented a fair question to raise as to the existence of his rights. *Williams v. Jones*, 75 S.E. 705 (S.C. 1912)

II. DISCUSSION

A. SUBJECT MATTER JURISDICTION

Defendants argue that this Court lacks subject matter jurisdiction because S.C. Code Ann. § 9-21-30 provides "A claim presenting a dispute or controversy arising pursuant to or by virtue of this title must be resolved in accordance with the procedures and provisions provided in this chapter." Defendants assert that because S.C. Code Ann. § 9-21-50 and § 9-21-60 provide for administrative review followed by appeal to the Circuit Court, this action must be dismissed for lack of subject matter jurisdiction.

For two reasons, I do not agree. First, the sole "procedure" set out by those sections is described in S.C. Code Ann. § 9-21-50:

A member or the member's designated beneficiary shall file a claim concerning an administrative decision by the retirement systems arising pursuant to or by virtue of this title that adversely affects the personal interest of the member or the member's designated beneficiary by the filing of a written claim with the director within one year of the decision by the retirement systems.

By its own terms, this provision is limited to claims "concerning an administrative decision by the retirement systems." Because § 9-21-50 and § 9-21-60 provide no provision for challenging an Act of the General Assembly, Plaintiffs' claims are not covered by these sections and may be brought in Circuit Court.

More importantly, pursuant to the Supreme Court's ruling in *Evans v. State*, this matter is not even a dispute between Plaintiffs and the Retirement System, but rather between Plaintiffs and the State. 543 S.E.2d 547, 551 (S.C. 2001). In *Evans*, the Supreme Court held the Retirement System cannot be held liable for breaching a contract when it only acts pursuant to the law as changed by the General Assembly. *Id.* That is the case here. The Retirement System is merely applying Act No. 153 as enacted by the General Assembly. The real party defendant – the entity that allegedly breached the contract – is the State, and the Retirement System is included merely as a stakeholder. Thus, Plaintiffs claims do not represent "a dispute or controversy between the retirement systems and a member or a member's designated beneficiary" and are therefore not subject to the claim procedure of S.C. Code Ann. § 9-21-30.

B. IRREPARABLE HARM.

Plaintiffs argue Act No. 153 threatens irreparable harm to Plaintiffs as well as all other state employees because Act No. 153 jeopardizes the tax exempt status of the State Retirement System. They have provided an affidavit from a tax professional in support of this threat. Defendants deny

any such threat, but do not claim to have consulted the IRS. Given the enormous stakes in this matter, I conclude that Plaintiffs have sufficiently alleged an "irreparable harm."

Further, Plaintiffs are in effect being assessed 6.25% on their income, based on their irrevocable decision to retire. Six and one-fourth percent (6.25%) is not a trivial fraction of an employee's salary. Defendants do not deny the essential allegations that contrary to the terms of TERI when Plaintiffs entered the program, beginning on July 1, 2005, Plaintiffs will have 6.25% of their salary taken by the Retirement System even though Plaintiffs' benefits under the System are fixed as of entering TERI. I find the potential for disrupting the carefully laid financial plans of Plaintiffs further presents an irreparable harm.

C. SUCCESS ON THE MERITS.

1. The State had a contract with Plaintiffs.

Defendants rely very heavily on *Alston v. City of Camden*, 471 S.E.2d 174 (S.C. 1996), and argue strenuously that the TERI statutory scheme did not create a contract. In *Alston*, the City of Camden had ordinances that set benefits for City employees such as what percentage the employees had to pay for their health insurance coverage and how many leave days they could accrue. These benefit ordinances were repealed, and new (lesser) benefit levels were introduced via a new employee manual. *Id.* at 176. The holding of the Court in *Alston* was that "[t]he personnel ordinances did not give rise to any contract between City and Employees." *Id.* at 179.

These arguments misconstrue Plaintiffs' claims. Plaintiffs are not claiming that the TERI program or enabling statute (§ 9-1-2210) constituted a contract, but rather that the state entered into individual contracts with each of the Plaintiffs when they made their election to join TERI. The

Plaintiffs have made a sufficient *prima facie* showing that the State had a contract with the TERI participants. The elements of a contract are offer, acceptance, and valuable consideration. *Cobb v. Gross*, 254 S.E.2d 573, 575 (S.C. Ct.App. 1987).

The alleged contract that Plaintiffs had with the State is the "Election of Non-Membership [in the Retirement System]." That form, created by the State, is a voluntary election to leave the Retirement System permanently, pursuant to certain terms and conditions. As set forth on the form, those terms are:

- (1) "I [the employee] hereby exercise my option to elect non-membership [in the Retirement System]."
- (2) "I take this action . . . with full knowledge that I will not be credited with retirement service for this period of employment,"
- (3) "[A]nd will not be making retirement contributions."

This form contract is signed by both the employer (on behalf of the State) and the employee. The State receives up to five years of work that "will not be credited" for retirement; in exchange, the employee "will not be making retirement contributions." The Election form is a simple, one-page, old-fashioned bilateral contract between each Plaintiff and the State. It is apodictic that the State may enter into contracts and is liable for the breach of such contracts. See *Republic Contracting Corp. v. South Carolina Dept. of Highways and Public Transp.* 503 S.E.2d 761, 770 (S.C. Ct. App. 1998) (reversing grant of summary judgment to State Dept. of Highways on breach of contract claim).

This situation is analogous not to the unilateral employment ordinances in *Alston*, but to the basic bilateral procurement contracts the State enters every day, such as in *Republic Contracting, supra* (contract to build a bridge). If the State, incidental to its statutory procurement scheme, enters

into a contract to have a bridge built, but then refuses to pay for the whole cost of the bridge, the contractor can sue the State for breaching the contract. *Id.* Just as with the bridge contract in *Republic Contracting*, that the alleged TERI contracts were authorized by statute is incidental; what is critical is that the State was a party to contracts where both parties provided consideration.²

2. The State has both breached its contract and unconstitutionally impaired the contract.

Act No. 153 alters the TERI program by demanding that those workers "shall pay to the system the employee contribution as if the program participants were an active contributing member, but the program participant does not accrue additional service credit in the system." S.C. Code 9-1-2210(C). Although the State is free to make changes to the way it handles retirement, it cannot make such changes with regard to employees who already have contracted for certain terms and conditions. The Plaintiffs have sufficiently presented a *prima facie* case that the after-the-fact alteration of the "original TERI" program and the treatment of the retirement contributions of the retirees is a breach of contract.

Further, Act No. 153 constitutes an unconstitutional impairment of Plaintiffs' contractual rights as guaranteed by Article I, § 4 of the South Carolina Constitution and Article I, § 10 of the United States Constitution.

Both the United States and South Carolina Constitutions prohibit the State from passing laws which impair the obligations of contracts. See U.S. Constitution art. I, § 10; S.C. Const. art. I, § 4. A three-step analysis is applied to determine whether a law violates the Federal and State contract clauses. Initially the Court must determine whether the State law has operated as a substantial impairment of the contractual relationship. If the regulation does constitute a substantial

² Defendants' arguments that this matter presents only a dispute over terms and conditions of state employment is similarly unavailing. Although the State is generally free to alter such terms and conditions, it may not do so after entering into a specific contract.

impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation. Lastly, once a legitimate public purpose has been identified, the Court determines whether the adjustment of contracts rights is based upon reasonable conditions and is of a character appropriate to the public purpose.

Rick's Amusement, Inc. v. State, 570 S.E.2d 155, 159 (2001). Act No. 153 greatly reduces the benefit of the bargain which was to be received by the TERI participants and the retirees. Previously, there was a fairly straightforward tradeoff: retirees and TERI participants gave up the right to continue to accrue additional service credit -- a valuable benefit -- in exchange for being able to continue to work for the State without being required to make contributions into the Retirement System. By passing Act No. 153, the State will keep the benefit it contracted for (veteran employees who work for the state while no longer accruing service credit), but has legislated itself out of providing a key benefit to the retirees and TERI participants. Now, these individuals have to pay into a system knowing that these payments will provide them with no benefit.³ Plaintiffs have therefore sufficiently demonstrated a *prima facie* case that Act No. 153 is not "of a character appropriate to the public purpose," but rather is a narrowly targeted revenue-raising provision disguised as contributions into the Retirement System. Plaintiffs have therefore presented a *prima facie* showing that Act No. 153 violates the contract clauses of the South Carolina and United States Constitutions. If this were not the case, the State would be free to legislate away any contracts it no longer finds beneficial. Such is not the law.

D. INADEQUATE REMEDY AT LAW.

³ Interestingly, Section 3 of Act 153 exempts TERI participants from the grievance system. But it does so only for those who join TERI after the effective date of Act 153. By recognizing that this change may be made prospectively but not retroactively, the State treats the change to the grievance system as it should have treated the changes to employee contributions.

For the reasons stated previously, Plaintiffs have no adequate remedy at law. There is evidence that the State is jeopardizing the tax exempt status of the entire Retirement System through Act 153. Further, although Plaintiffs could eventually recover damages, there is no adequate legal remedy for the chaos to Plaintiffs' budgets caused by their 6.25% assessment (essentially, a 6.25% pay cut) during the pendency of the litigation.

E. THE BALANCE OF THE HARMS

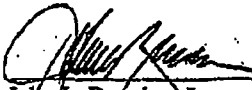
Defendants claim that under *Sea Pines Plantation Co. v. Wells*, this Court must also consider the "balance of the harms" before granting a temporary restraining order. 363 S.E.2d 891, 896 (S.C.1987) ("A court does not automatically issue a mandatory injunction once it finds a restrictive covenant has been violated. The court must balance the equities between the parties; and if the harm to the defendant outweighs the plaintiff's benefit, no relief will be granted."). As an initial matter, the language cited by Defendants applies solely to "mandatory injunctions" – situations where a party is commanded to take some positive action. *Black's Law Dictionary*, 784, 6th ed. (1990). This matter does not concern a mandatory injunction.

However, even if I were compelled to consider the balance of the harms, I find the balance would favor the Plaintiffs. Defendants claim granting the restraining order would threaten cost of living increases for retirees. This assertion is entirely unsupported. The affidavit of Robert Dezube states that cost of living increases would be threatened if "current and future TERI retirees" do not pay their contribution (emphasis added). This is immaterial. No one, including Plaintiffs, is suggesting that the State may not set new terms and conditions for people who elect to join TERI in the future. As Mr. Dezube's affidavit makes no mention of the effect on the System if the State were

held to its contract with current TERI retirees, Defendants' doom-and-gloom analysis is unsupported.

IV. CONCLUSION

Based upon the forgoing, its is ORDERED that Defendants are ENJOINED from deducting the employee contribution to the Retirement System from the salary of Plaintiffs during the pendency of this action.



John L. Breeden, Jr.
Presiding Judge
Fifth Judicial Circuit

Columbia, South Carolina

July 13, 2005.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gail M. Hutto, Debra J. Andrews,
Elizabeth W. Hodge, Margaret B.
Lineberger, Lynn R. Rogers, Nancy G.
Sullivan, Jane P. Terwilliger, Julian W.
Walls, and all others similarly situated,

Plaintiff,

vs.

South Carolina Retirement System, Police
Officers Retirement System, South
Carolina Retirement Systems Group Trust,
South Carolina Budget and Control Board,
and South Carolina Public Employee
Benefit Authority,

Defendants.

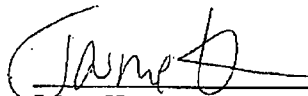
Civil Action No.: 2015-CP-40-01728

CERTIFICATE OF SERVICE

2015 SEP 23 PM 1:14
CLERK OF COURT
FIFTH JUDICIAL CIRCUIT
COLUMBIA, SC

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorneys
for Plaintiff do hereby certify that I have served a copy of the foregoing **Plaintiff's Memorandum
in Opposition of Motion to Dismiss** in connection with the above-referenced case via hand
delivery, to the following address:

Robert E. Stepp
Tina M. Cundari
1310 Gadsden Street
Columbia, SC 29201


Jaime Harmon

Columbia, South Carolina
September 23, 2015



TINA M. CUNDARI
Direct Dial 803 231.7834
Direct Fax 803 231.7863
Email tcundari@sowellgray.com

September 25, 2015

RICHARD A. HARPOOTLIAN, P.A.
Hand Delivered 4:32 PM
Received on 9/25/15

BY HAND DELIVERY

The Honorable Jeanette W. McBride
Clerk of Court, Richland County
Richland County Judicial Center
1701 Main Street, Room 205
Columbia, SC 29201

RE: Gail M. Hutto et al. v. The South Carolina Retirement System et al.
Civil Action No.: 2015-CP-40-1728
SGS&L File No.: 5832/1504

Dear Ms. McBride:

Enclosed for filing are the original and one copy of Defendants' Reply to Plaintiffs' Memorandum in Opposition of Motion to Dismiss in the above-referenced matter. Please file the original and return the filed-stamped copy to our office via our courier.

A copy is being delivered to The Honorable Tanya Gee in anticipation of the hearing scheduled for Monday, September 28, at 2:00 p.m.

Thank you for your assistance.

Sincerely,



Tina Cundari

Enclosures

cc: By Hand Delivery
The Honorable Tanya A. Gee
Richard A. Harpootlian, Esq. (also by email)
Christopher P. Kenney, Esq. (also by email)
James M. Griffin, Esq. (also by email)
Margaret N. Fox, Esq. (also by email)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) IN THE FIFTH JUDICIAL CIRCUIT

Gail M. Hutto, Debra J. Andrews,) Civil Action No. 2015-CP-40-1728
Elizabeth W. Hodge, Margaret B.)
Lineberger, Lynn R. Rogers, Nancy G.)
Sullivan, Jane P. Terwilliger, Julian W.)
Walls, and all others similarly situated,)

Plaintiffs,)

REPLY

v.)

South Carolina Retirement System, Police)
Officers Retirement System, South)
Carolina Retirement Systems Group)
Trust, South Carolina Budget and Control)
Board, and South Carolina Public)
Employee Benefit Authority,)

Defendants.)

Defendants' motion to dismiss should be granted because the relief sought in this case is foreclosed by the South Carolina Supreme Court's decision in *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). In *Ahrens*, the Supreme Court affirmed summary judgment in favor of the defendants on the same constitutional claims raised here, and held that the statutes challenged here are valid and enforceable in every respect. Accordingly, for any one of the reasons listed below, Plaintiffs' claims are barred and the motion to dismiss should be granted.

1. Plaintiffs are no different than any other working retiree.

Although Plaintiffs have different names than the working retirees in *Ahrens* and returned to work at a later date, Plaintiffs are no different than any other working retiree for purposes of determining whether the statutes requiring them to contribute to the retirement system are

constitutional. The statutes are constitutional whether a retiree returned to work before or after July 1, 2005. This is the effect of the Supreme Court's holding in *Ahrens*.

In *Ahrens*, the Supreme Court affirmed summary judgment in favor of the defendants on the issues of unconstitutional taking, violation of due process, impairment of contract, and quantum meruit. 392 S.C. 340, 357, 709 S.E.2d 54, 63 (2011). In addition, the Court found that the working retirees did not have a contractual right to the terms of their employment and that the State was not estopped from changing the law to require contributions. *Id.*

The Court's holding in *Ahrens* applies with equal force to Plaintiffs. The fact that Plaintiffs retired and returned to work after the law went into effect makes no difference for purposes of the constitutional analysis. The only significance to the date is that it shows that Plaintiffs returned to work *knowing* that they would have to contribute to the retirement system, and accepted the job anyway. Further, the fact that Plaintiffs are making a facial as opposed to an as-applied challenge to the constitutionality of the statutes (Opp. Memo. p. 19) further cements the binding effect that the Supreme Court's decision in *Ahrens*. The statutes are either constitutional or they are not.

Plaintiffs have had their day in court numerous times. Their legal interests have been litigated in the highest court in this State (twice), in a state trial court, in a federal district court, and in the Fourth Circuit. This repeat litigation is precisely what the doctrines of res judicata and collateral estoppel were designed to prevent. Defendants should not have to continue defending the same statutes on the same grounds over and over again. This case should be dismissed.

2. Plaintiffs do not have a legitimate, protected property interest.

Plaintiffs do not cite to any state law as the source of their right to not have to make contributions to the retirement system. Instead, Plaintiffs rely on federal law, which nowhere states that Plaintiffs are exempt from making such contributions.

In any event, it is clear from *Layman* and *Ahrens* that Plaintiffs do not have a protected property interest. In *Layman*, the Supreme Court found that there was nothing in the terms of the working retiree statute that created a binding contract or that “evidence[d] an intent by the legislature to be bound to any terms related to the old working retiree program.” *Layman v. State*, 368 S.C. 631, 643, 630 S.E.2d 265, 271 (2006). Accordingly, the Court did not grant any relief to the working retirees (even though the constitutional issues were before the Court) and remanded the case for a determination on the breach of contract claim only. *Id.* at 644-45, 630 S.E.2d at 272. In addition, with regard to the TERI program, which is made up of working retirees, the Supreme Court found that the statutes pertaining to that program “continue[] to be valid and those participants joining after July 1, 2015 are subject to the entirety of the requirements outlining the new TERI program in Act 153.” *Id.* at 644, 630 S.E.2d at 272.

In *Ahrens*, the Supreme Court affirmed summary judgment in favor of the defendants on the constitutional issues. 392 S.C. at 358, 709 S.E.2d at 63. In doing so, the Court found that “[t]he Working Retirees statutes are void of th[e] express guarantee that retirements contributions would not be required.” *Id.* at 352, 709 S.E.2d at 60.

Based on these cases, Plaintiffs do not have a constitutionally protected property interest. Finding to the contrary would run afoul of Supreme Court precedent.

Further, on page 9 of their brief, Plaintiffs admit that they have no-preexisting agreement forming the basis of any property right in this case. With no pre-existing agreement and no statutory right, Plaintiffs do not have a source for their alleged property right.

Moreover, this case is not about wages. It is about the terms and conditions of employment. As the Supreme Court stated in *Ahrens*, working retirees do not even have the right to be re-hired. *Id.* at 352, 709 S.E.2d at 60. With no right of re-hire, Plaintiffs do not have any right to a particular term or condition of employment.

Finally, the terms and conditions of Plaintiffs' employment are a function of state statutory law, which is subject to change as necessary to meet the policy interests and constitutional obligations of the State, including the General Assembly's constitutional duty to prescribe member contributions to the retirement system. S.C. Const. art. X, § 16. Given this constitutional duty, neither the General Assembly nor any arm of the State can be said to have violated the Takings Clause by requiring the plaintiffs in this case to contribute to the system. A finding to the contrary would mean that *all* employees working in positions covered by the system, whether retirees or not, would have viable takings claims. It is no more a taking for the General Assembly to impose a duty to contribute to the retirement system upon working retirees than it is for the General Assembly to increase the percentage of contributions required from every employee, which is done from time to time.

Because Plaintiffs do not have a protected property interest, Plaintiffs cannot state a claim for relief.

3. The claims are time barred.

Finally, the case should be dismissed because Plaintiffs' claims are time barred. Plaintiffs do not address the statute of limitations in their brief. Instead, they argue that there is

no evidence before the Court as to when Plaintiffs retired and returned to work. Although it is true that Plaintiffs have omitted from the complaint the date they returned to work, Plaintiffs would have had to have returned to work by August 2, 2010, the date they filed the case in federal court. Otherwise, Plaintiffs would not have had standing to state a claim. Accordingly, the statute began to run at the latest on August 2, 2010. A complaint filed on March 20, 2015, nearly five years later, is late.

Moreover, under the doctrine of laches, ten years is an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Plaintiffs knew or should have known since at least July 1, 2005, that if they returned to work for the state after retirement, they would have to contribute a portion of their salary to the retirement system. This is especially true given that Plaintiffs are making a facial challenge to the statutes and are represented by the same counsel as the plaintiffs in *Layman* and *Ahrens*. Plaintiffs could have and should have acted sooner.

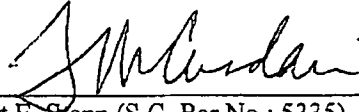
For these reasons, the claims are barred by the three-year statute of limitations and the doctrine of laches.

CONCLUSION

The motion to dismiss should be granted. Allowing Plaintiffs to proceed with this case would be contrary to Supreme Court precedent. The issue of whether it is constitutional to require working retirees to contribute to the retirement system has been decided by the South Carolina Supreme Court, and that decision is binding on Plaintiffs and all working retirees. Accordingly, the complaint should be dismissed.

SOWELL GRAY STEPP & LAFFITTE LLC

By:



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Attorneys for Defendants

Columbia, South Carolina
September 25, 2015

CERTIFICATE OF SERVICE

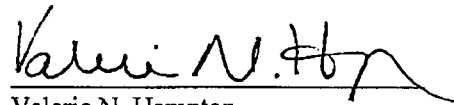
I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendants, certify that I have served all counsel in this action with a copy of the document specified below by hand delivery of the same, to the following addresses:

Document: Reply

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Post Office Box 11208
Columbia, South Carolina 29211

Counsel for Plaintiffs


Valerie N. Hampton

Columbia, South Carolina
September 25, 2015

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Gail M. Hutto, et al.,

Plaintiff,

vs.

South Carolina Retirement System, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-40-01728

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

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Defendant's Attorney:

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Tina Cundari, Bar No. 71951

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Phone: 803-929-1400 Fax _____

E-mail: rsteypp@sowellgray.com

Tcundari@sowellgray.com

Other: _____

RICHLAND COUNTY
FILED
2015 NOV 19 PM 12:20
JEANETTE W. HOBBS
C.C.P. & C.

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

11-19-15

Date submitted

SECTION III: Motion Fee

☒ PAID AMOUNT: \$ 25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____	
☐ MOTION FEE COLLECTED: \$ _____	
☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gail M. Hutto, Debra J. Andrews,
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Officers Retirement System, South
Carolina Retirement Systems Group Trust,
South Carolina Budget and Control Board,
and South Carolina Public Employee
Benefit Authority,

Defendants.

Civil Action No.: 2015-CP-40-01728

PLAINTIFFS' MOTION TO RECONSIDER

RICHLAND COUNTY
FILED
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JEANETTE W. MOBRIDE
C.P. & C.S.

Plaintiffs hereby move the Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for reconsideration of the Order entered November 3, 2015 and received by counsel on November 9, 2015. The Order fails to address arguments presented to the Court by Plaintiffs, includes rulings that the Court did not render when the Court announced the decision at the conclusion of the hearing, and is based upon erroneous factual and legal findings, to wit:

A. Res Judicata and Collateral Estoppel

The Court's opinion incorrectly concludes that Plaintiffs were litigants in the Layman v. State, 368 S.C. 631, 630 S.E.2d 265 (2006) and Ahrens v. State, 392 S.C. 340, 709 S.E.2d 54 (2011) cases previously decided by the South Carolina Supreme Court. They were not.

The Court also incorrectly concludes that Plaintiffs are in privity with the litigants in Layman and Ahrens and fails to address the Supreme Court decision in Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001) and Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994), which Plaintiffs cited during oral argument. In Carrigg, the Court explained:

To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action.

Carrigg, 347 S.C. at 80-81, 552 S.E.2d 767, 770 (quoting Wade v. Berkeley Cnty., 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998)). "Due process concerns prohibit estopping litigants who never had a chance to present their evidence and arguments on a claim, despite one or more existing adjudications of the identical issue which stand squarely against their position." Id. (citing Richburg v. Baughman, 290 S.C. 431, 434-35, 351 S.E.2d 164, 166 (1986)). Here, the Plaintiffs legal interests were not litigated in the prior actions.

A conclusion that Plaintiffs' claims are *similar* to those of earlier litigants¹ is insufficient grounds to bar them here. In Roberts, the Court ruled that "One whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him." Roberts, 316 S.C. at 496, 450 S.E.2d at 619 (citing 50 C.J.S. Judgments § 788 at 327 (1947)). Likewise, the Roberts Court reasoned a contrary conclusion raised due process concerns by "estopping some litigants who never had a chance to present their evidence and arguments on a claim[.]" Id. (citing Richburg, *supra*).

¹ They are not. They are factually and legally distinct for reasons previously explained.

In addition, the Court incorrectly concluded that the federal court's dismissal of Plaintiffs' claims on the basis of Eleventh Amendment immunity bars Plaintiffs from litigating these issues in state court. The ruling in federal court was not a decision on the merits. Rather, the ruling was simply that the Court did not have jurisdiction over the Defendants. The same *res judicata* and collateral estoppel arguments Defendants advance here were presented to the District Court and the United States Court of Appeals and rejected as each court instead based its ruling on Defendants' constitutional argument that this case must first be brought in federal court. See Hutto v. S. Carolina Ret. Sys., 773 F.3d 536 (4th Cir. 2014); see also, Hutto v. S. Carolina Ret. Sys., 899 F. Supp. 2d 457 (D.S.C. 2012). Had either federal court ascribed any merit to Defendants' *res judicata* and collateral estoppel arguments, those cases would have been dismissed on those state law grounds because the constitutional avoidance doctrine required the federal courts to avoid the constitutional question Defendants presented if possible. See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g. P.C., 467 U.S. 138, 158 (1984) (doctrine requires where possible deciding on state law grounds to avoid unnecessary constitutional conflicts). The facts that it was necessary for the federal courts to reach the constitutional question is strong evidence they concluded that accepting Defendants' *res judicata* and collateral estoppel arguments would constitute a denial of due process. Respectfully, this Court should reconsider its decision in light of this same concern and this Court's finding that "the federal courts might have decided the issue of whether the statutes are constitutional" is simply incorrect.

Lastly, this Court's conclusion that the issue raised in this case was actually litigated in Layman and Ahrens is also incorrect. Plaintiffs' claim in this case is premised upon a constitutionally-protected property interest derived from the United States' Constitution and

federal statutes, not state statutory or common law. Specifically, Plaintiffs argue that Internal Revenue Code, 26 U.S.C. § 401(a), creates a constitutionally-protected property interest in all contributions to a qualified pension plan, such as those pertaining to this case. The Supreme Court has recognized that federal statutes may lead to constitutionally-protected property interests. Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (observing “that the interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created ‘property’ interest protected by the Fifth Amendment.”). This issue was never litigated in either Layman or Ahrens.

B. Constitutionally Protected Property Interest

This Court’s ruling that Plaintiffs do not have a constitutionally protected property interest fails to address Plaintiffs’ argument that federal statutes may create such a protected property interest. The Court does not address or attempt to distinguish Mathews, 424 U.S. at 332, relied upon by Plaintiffs.

The Court’s decision is also inconsistent with the recognition of such a property interest protected by the United States’ Constitution. See Washlefske v. Winston, 234 F.3d 179, 184 (4th Cir. 2000); Orloff v. Cleland, 708 F.2d 372, 378 (9th Cir. 1983); McMahan v. Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529, 539 (D.S.C. 1994).

C. Statute of Limitations

When the Court issued its decision at the close of oral argument, it did not rule upon the statute of limitations defense argued by Defendants. Instead, Defense counsel was instructed to prepare a proposed order ruling in Defendants’ favor on the grounds of res judicata and collateral estoppel, with the alternative holding in Defendants’ favor finding no protected property interest. Defense counsel ignored this instruction and submitted a proposed order, over the undersigned’s

objection that took the liberty of adding additional rulings in Defendants' favor never cited by the Court when it issued its decision or during its instruction to counsel. The Court then entered Defendants' proposed order, without modification. The additional holdings inserted by Defendants' counsel improperly make factual findings at the motion to dismiss stage in furtherance of reaching a statute of limitations holding. For example, the Order states that Plaintiffs "presumably retired and returned to work before August 2, 2010." The Court may only dismiss a complaint based upon a defense of statute of limitations when it is apparent from the four corners of the pleadings that the case is time barred. Spence v. Spence, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). This is improper and highly objectionable.

In holding that Plaintiffs had to pursue their federal claim in state court, the Fourth Circuit "conclude[d] that the Eleventh Amendment bars Fifth Amendment taking claims against States *in federal court* when the *State's courts* remain open to adjudicate such claims." Hutto, 773 F.3d at 551-52 (emphasis original). The Hutto Court reasoned further:

Because the plaintiffs can have their takings claims heard in South Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise. But in concluding that the Fifth Amendment Takings Clause does not, in this case, trump the Eleventh Amendment, we do not decide the question whether a State can close its doors to a takings claim or the question whether the Eleventh Amendment would ban a takings claim in federal court if the State courts were to refuse to hear such a claim.

Id. at 552.

The undersigned assume that this Court's decision to sign an order prepared by Defense counsel addressing matters not included in the Court's ruling is a mere oversight. This oversight should be corrected by granting this motion.

In addition, the Court relies exclusively upon the decision in Anonymous Taxpayer v. S. Carolina Dep't of Revenue, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008) for the finding that

Plaintiffs' claims are time barred. However, this decision is not applicable. In Anonymous Taxpayer, plaintiff challenged a statutory change that removed state tax exemptions on plaintiff's state retirement benefits. The Supreme Court concluded that the plaintiff had a vested interest in his retirement benefits at the time of the statutory change and therefore plaintiff's cause of action accrued on the date the law changed. The Court reasoned:

Although Appellant did not begin receiving retirement income until 1997, he had a vested interest in his retirement plan prior to Act 189. Similar to Harvey, Appellant's action accrued at the time of the 1989 change, not when he later retired and attempted to claim the prior tax exemption.

Id.

Here, Plaintiffs did not have a vested interest in wages that they might earn in the future when Act 153 was passed, requiring the working retirees to begin making contributions to the Retirement Systems on July 1, 2005. As a result, Plaintiffs' claims did not accrue when Act 153 was passed. Instead, Plaintiffs' claims accrued once they earn the wages from which the State illegally deducted a portion. This is an ongoing violation and a new cause of action accrues each time Plaintiffs' wages are confiscated. See Estate of Livingston v. Livingston, 404 S.C. 137, 147-48, 744 S.E.2d 203, 209 (Ct. App. 2013) (finding a new statute of limitations begins to run after each separate injury, and therefore statute of limitations barred only claims falling outside the three-year time period and did not bar claims occurring within that time), cert. granted, No. 2013-001505 (S.C. S. Ct. filed Oct. 24, 2014); see also Hogar Dulce Hogar v. Cmty. Dev. Comm'n of Escondido, 110 Cal. App.4th 1288, 2 Cal. Rptr.3d 497, 502 (2003) ("When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." (citation omitted)); State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc., 777 S.E.2d 176, 200 (S.C. 2015), reh'g granted (July 8, 2015).

Additionally, any limitations period on Plaintiffs claims was tolled by the pendency of the federal action while in the District Court and Court of Appeals. See Jinks v. Richland Cnty., S.C., 538 U.S. 456 (2003) (reversing the South Carolina Supreme Court's decision a claim was time barred due to the passage of time while the claim was pending in federal court).

D. Laches

Lastly, this Courts' ruling that Plaintiffs' claim is barred by the doctrine of laches is improper for the reasons explained in § C, supra. It also fails to address Plaintiffs' argument that this defense is fact intensive and should not be ruled upon at the motion to dismiss stage.

Affirmative defenses are not properly considered in evaluating a motion to dismiss unless the defense is established in the allegations of the complaint. Spence, 368 S.C. at 123, 628 S.E.2d at 878. This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint. Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial. Id.

Defendants' appeal to laches also rests upon factual assumptions that stretch beyond the four corners of the pleadings. More specifically, Defendants assert that "plaintiffs could have and should have brought this lawsuit within three years of their return to work." Of course, there is no evidence before the court as to when the plaintiffs returned to work—only that they did so after the enactment of South Carolina Code Sections 9-1-1790(C) and 9-11-90(4)(c). Without evidence of the date of Plaintiffs' return to work, Defendants are unable to prove the first element of laches: lack of diligence. "An inexcusable or unreasonable delay may occur only after

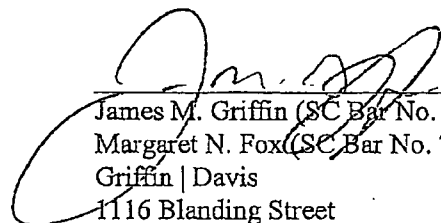
the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action.” White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990). There are no facts before the Court as to this element.

As to the second element of laches—prejudice to the defendant—Defendants have produced no evidence whatsoever. “The second element—prejudice to the defendant—is demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff’s conduct.” White, 909 F.2d at 102 (citing Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 844 (D.C. Cir. 1982)). The Court’s conclusion that Defendants have been prejudiced because “the retirement system has continued to rely upon the receipt of the funds” is without factual support from the pleadings. Even assuming *arguendo* that these factual allegations are correct, Defendants’ reliance upon Plaintiffs “continuing receipt of funds” in no way prejudices Defendants’ ability to defend this case. Barring such proof, laches is inappropriate.

Based upon the foregoing, Plaintiffs request the Court reconsider its Order granting Defendant’s Motion to Dismiss and deny the same.

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Respectfully submitted,



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Attorneys for the Plaintiffs

November 19, 2015
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gail M. Hutto, Debra J. Andrews,
Elizabeth W. Hodge, Margaret B.
Lineberger, Lynn R. Rogers, Nancy G.
Sullivan, Jane P. Terwilliger, Julian W.
Walls, and all others similarly situated,

Plaintiff,

vs.

South Carolina Retirement System, Police
Officers Retirement System, South
Carolina Retirement Systems Group Trust,
South Carolina Budget and Control Board,
and South Carolina Public Employee
Benefit Authority,

Defendants.

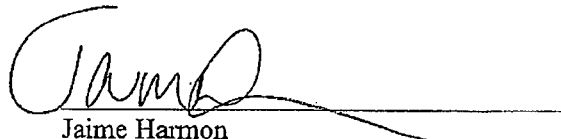
Civil Action No.: 2015-CP-40-01728

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2015 NOV 19 PM 12:20
JEANNETTE MCBRIDE
C.C.P. & S.S.

I, Jaime Harmon, the undersigned employee of Griffin Davis, LLC, attorneys for Plaintiffs do hereby certify that I have served a copy of the foregoing **Plaintiffs' Motion to Reconsider** in connection with the above-referenced case via U.S. Mail, postage prepaid, to the following address:

Robert E. Stepp
Tina M. Cundari
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Columbia, SC 29201


Jaime Harmon

Columbia, South Carolina
November 19, 2015



TINA M. CUNDARI
Direct Dial 803 231.7834
Direct Fax 803 231.7863
Email tcundari@sowellgray.com

December 3, 2015

BY HAND DELIVERY

The Honorable Jeanette W. McBride
Clerk of Court, Richland County
Richland County Judicial Center
1701 Main Street, Room 205
Columbia, SC 29201

RE: Gail M. Hutto et al. v. The South Carolina Retirement System et al.
Civil Action No.: 2015-CP-40-1728
SGS&L File No.: 5832/1504

Dear Ms. McBride:

Enclosed for filing are the original and one copy of Defendants' Memorandum in Opposition to Plaintiffs' Motion to Reconsider in the above-referenced matter. Please file the original and return the file-stamped copy to our office via our courier.

A copy is being delivered to The Honorable Tanya Gee.

Thank you for your assistance.

Sincerely,

Tina Cundari

Enclosures

cc: The Honorable Tanya A. Gee
By U.S. Mail and E-Mail
Richard A. Harpootlian, Esq.
Christopher P. Kenney, Esq.
James M. Griffin, Esq.
Margaret N. Fox, Esq.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) IN THE FIFTH JUDICIAL CIRCUIT

Gail M. Hutto, Debra J. Andrews,) Civil Action No. 2015-CP-40-1728
Elizabeth W. Hodge, Margaret B.)
Lineberger, Lynn R. Rogers, Nancy G.)
Sullivan, Jane P. Terwilliger, Julian W.)
Walls, and all others similarly situated,)

Plaintiffs,)

v.)

South Carolina Retirement System, Police)
Officers Retirement System, South)
Carolina Retirement Systems Group)
Trust, South Carolina Budget and Control)
Board, and South Carolina Public)
Employee Benefit Authority,)

Defendants.)

**MEMORANDUM IN OPPOSITION TO
MOTION TO RECONSIDER**

Defendants hereby respond to Plaintiffs' motion to reconsider the Court's order dated November 2, 2015, granting Defendants' motion to dismiss. For the reasons stated below, the motion to reconsider should be denied.

1. The Court correctly found that Plaintiffs *or their privies* previously litigated the same issue raised in this case. Contrary to what Plaintiffs argue, the Court did not find that Plaintiffs were parties in the cases of *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006), and *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). Instead, the Court found that Plaintiffs were in privity with the plaintiffs in the prior cases.

2. The Court correctly found that Plaintiffs were in privity with the plaintiffs in the *Layman* and *Ahrens* cases. Like the plaintiffs in *Layman* and *Ahrens*, Plaintiffs are working retirees who retired and returned to work for an employer participating in the South Carolina

Retirement Systems. The statutes requiring working retirees to contribute to the retirement system upon their return to work impact all working retirees in precisely the same way, irrespective of the date the retiree returns to work. Accordingly, there is nothing legally or factually distinguishable between the plaintiffs in this case and the plaintiffs in the other cases. All plaintiffs are identically situated to the subject matter of this case.

The cases of *Carrigg v. Cannon*, 347 S.C. 75, 522 S.E.2d 767 (Ct. App. 2001), and *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994), do not change the Court's privity analysis or determination. The law recited in those cases is the same as the law cited in the Court's order. The difference between those cases and the present case is that there was a lack of privity between the parties.

In *Carrigg*, the appellate court found that a police officer's guilty plea could not be used to collaterally estop a sheriff from making arguments in a subsequent civil case because there was a lack of privity between the parties. 347 S.C. at 82, 522 S.E.2d at 771. The court found that the sheriff and the police officer did not share the same legal interests. *Id.* The court found that the police officer's legal interest in a guilty plea proceeding stood in sharp contrast to the sheriff's legal interest in a subsequent civil case, such that there was a potential conflict of interest between the two, which undermined a finding of privity. *Id.*

Similarly, in *Roberts*, the appellate court found that the passenger of a car was not in privity with the driver of the car for purposes of litigating the issue of liability against a third party. 316 S.C. at 496, 450 S.E.2d at 619. The court determined that the interests of the driver and the passenger were *almost* identical—not identical—and therefore the passenger and the driver were not in privity. *Id.*

In the present case, however, Plaintiffs' legal interests are identical to those of the plaintiffs in the prior cases. Plaintiffs are challenging the same statutes on the same grounds and stand in exactly the same position for purposes of the constitutional analysis as the plaintiffs in the prior cases. Accordingly, the Court properly determined that Plaintiffs are in privity with the plaintiffs in the prior cases.

3. The Court correctly determined that the dismissal with prejudice of *Hutto v. S.C. Ret. Sys.*, Case No. 4:10-cv-02018-JMC (D.S.C.), *affirmed* 773 F.3d 536, 543 (4th Cir. 2014), bars Plaintiffs from re-litigating the present case in state court. Under South Carolina law, "[a] dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication." *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986). "Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein." *Id.* (internal quotations omitted). "For a judgment to bar the maintenance of a subsequent action, there must be identity of the cause of action as well as identify of the subject matter." *Id.*

Here, the cause of action and subject matter in this case are identical to the cause of action and subject matter in the federal court case. Although the federal court did not reach the merits of whether the statutes are constitutional, the issue was briefed and argued and might have been decided. By ruling that the case was barred by the doctrine of sovereign immunity, the federal court did not, as Plaintiffs contend, simply make a jurisdictional determination. As the Fourth Circuit explained, sovereign immunity is an affirmative defense. *Hutto*, 773 F.3d at 543

("We therefore conclude that sovereign immunity is akin to an affirmative defense, which the defendant bears the burden of demonstrating.").

By ruling that the case was barred by the doctrine of sovereign immunity, the federal court did not reject the res judicata and collateral estoppel arguments. Instead, the court chose one of a number of grounds upon which to dismiss the case with prejudice. Moreover, the federal court did not decide a constitutional question when it ruled that the case was barred under the doctrine of sovereign immunity. Instead, the court decided an affirmative defense. The court's determination did not create a risk of unnecessary constitutional conflicts. Finally, there is nothing in the Fourth Circuit opinion indicating that the court believed a finding of res judicata or collateral estoppel would constitute a denial of due process.

Accordingly, the Court properly ruled that the dismissal with prejudice of the *Hutto* case bars the present case.

4. The Court correctly concluded that the issue in this case was actually litigated and decided in prior cases. Plaintiffs' argument that the IRS Code provides the source of the constitutionally protected property interest is not a new issue. It is a new argument related to the same issue. The issue in this case is whether the statutes violate the Takings Clause of the United States Constitution, and that issue has been litigated and decided.

5. The Court correctly concluded that Plaintiffs do not have a constitutionally protected property interest. The IRS Code does not contain any language protecting Plaintiffs from having to contribute to the retirement systems upon their return to work. Plaintiffs' failure to identify language protecting them from having to make the contributions is fatal to Plaintiffs' claims in this case.

The Court did not err in failing to address the case of *Matthews v. Eldridge*, 424 U.S. 319 (1976), nor does *Matthews* change the correctness of the Court's decision. *Matthews* is not a takings case. It is a procedural due process case in which the Supreme Court recognized that a person has a statutorily protected "property" interest in the continued receipt of social security benefits, and therefore those benefits cannot be taken away without a hearing. 424 U.S. at 332.

Additionally, the Court's ruling in the present case is not inconsistent with the cases of *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000), *McMahan v. Int'l Ass'n of Bridge & Structural Ornamental Iron Workers*, 858 F. Supp. 529 (D.S.C. 1994), and *Orloff v. Cleland*, 708 F.2d 372 (9th Cir. 1983). These cases do not stand for the proposition that federal law may provide the source of a plaintiff's right under the Takings Clause.

In *Washlefske*, the court stated "we look outside the Takings Clause to *traditional rules of property law* to determine whether a constitutionally protected property interest exists" 234 F.3d at 184. The court found that prison inmates do not have a protected property interest to the wages they earn in prison because they do not have employment contracts. In *McMahan*, the court determined that dues and assessments paid by members of a labor union were private property entitled to constitutional protection. 858 F. Supp. at 539 n.7. In *Orloff*, the court found that the alleged source of plaintiff's right was an employment contract and a "mutually explicit" understanding that may have arisen after the contract expired. 708 F.2d at 377.

Even if these cases stood for the proposition that a protected property interest may be rooted in federal law, Plaintiffs have failed to identify any law – whether state or federal – protecting them from having to contribute to the retirement system as working retirees. Accordingly, the Court correctly determined that Plaintiffs do not have a constitutionally protected property interest.

6. The Court correctly determined that this case is barred by the statute of limitations and the doctrine of laches. Although it is true that the Court did not announce a ruling from the bench on these grounds, the Court is free to consider and address additional grounds when the time comes to prepare the formal order. The statute of limitations and laches defenses were fully briefed and argued. Plaintiffs handed up additional case law at the hearing regarding the statute of limitations defense, which the Court was free to consider and address in the order rather than at the hearing. Further, when defense counsel submitted the proposed order to the Court, counsel alerted both Plaintiffs' counsel and the Court that additional rulings were included. Plaintiffs were free to object, which they did, and the Court was free to accept or reject Plaintiffs' objections.

Additionally, the Fourth Circuit did not, as Plaintiffs contend, determine that Plaintiffs had the right to re-file the present case regardless of the statute of limitations or any other defenses. The Fourth Circuit determined only that the Fifth Amendment does not trump the Eleventh Amendment when the state courts remain open to hearing Fifth Amendment claims.

Finally, the statute of limitations was not tolled by the filing of the case in federal court. The case of *Jinks v. Richland Cnty*, 538 U.S. 456 (2003), does not stand for the proposition that filing a case in federal court tolls the statute of limitations. The *Jinks* case involves the federal supplemental jurisdiction statute, which expressly provides that the statute of limitations is tolled on supplemental claims. No such statute applies here. Plaintiffs chose to initiate this case in federal court, and in doing so, they ran the risk that the statute of limitations for bringing an action in state court would expire while the federal case was pending. In any event, because Plaintiffs challenge the facial validity of the statutes (effective July 1, 2005), the statute of limitations had already expired on August 2, 2010, when Plaintiffs filed the case in federal court.

7. The Court properly relied on allegations in the complaint and matters of public record in concluding that this case is barred by the doctrine of laches. Plaintiffs have made it clear both in the complaint and the memo in opposition to the motion to dismiss that they are challenging the constitutionality of the statutes on their face. Throughout the complaint, Plaintiffs allege that they retired and returned to work on or after July 1, 2005, the date the statutes went into effect. Further, Plaintiffs seek an order “compelling the immediate return of all monies wrongfully seized and held by the Defendants since July 1, 2005.” (Compl. ¶¶ 28, 57 and Prayer for Relief.) In the memorandum in opposition to the motion to dismiss, Plaintiffs state that they “are challenging the facial validity of the statutory provisions in question (rather than the manner of their application)” Memo p. 18, n.1.

Because Plaintiffs are challenging the constitutionality of the statutes on their face, the cause of action accrued at the time the statutes were passed. *See Anonymous Taxpayer*, 377 S.C. 425, 439, 661 S.E.2d 73, 80 n.5 (2008) (holding that the cause of action accrued when the law changed because the basis of the claim was that the appellant had a statutorily-created contract). Accordingly, the Court correctly concluded that a lawsuit filed 10 years after the statutes were passed was barred by the doctrine of laches. Plaintiffs are presumed to know the law and are charged with using care to protect their interests. *Ahrens*, 392 S.C. at 355, 709 S.E.2d at 62. A delay of 10 years is unreasonable under the circumstances. Further, the Court properly concluded that the delay prejudiced Defendants because Defendants have relied upon the receipt of the contributions for all these years.

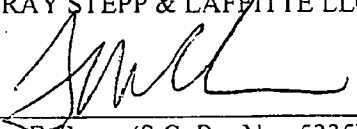
Finally, the Court was correct in finding that although Plaintiffs did not include the date they returned to work from the complaint, Plaintiffs must have returned to work prior to August 2, 2010, which is the date they filed the case in federal court. Although Plaintiffs did not specify

the date they returned to work, Plaintiffs allege that they have been required to "forfeit a percentage of [his or her] gross earnings," "[s]ince her return to work" and "[s]ince his return to work." *Hutto v. S.C. Ret. Sys.*, Case No. 4:10-cv-02018-JMC (D.S.C.), ECF No. 1, ¶¶ 3 -10. Based on these allegations, the Court properly concluded that Plaintiffs had returned to work by the time the complaint was filed.

CONCLUSION

The motion to reconsider should be denied. The Court properly determined that the issue in this case has been litigated in the state courts of South Carolina since 2005 and that the issue has been decided. Moreover, the Court properly determined that Plaintiffs do not have a constitutionally protected property interest and that this case is time barred because it was filed 10 years after the statutes were passed.

SOWELL GRAY STEPP & LAFFITTE LLC

By: 

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Columbia, South Carolina
December 3, 2015

CERTIFICATE OF SERVICE

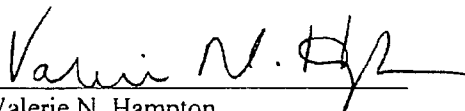
I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendants, certify that I have served all counsel in this action with a copy of the document specified below by U.S. Mail, to the following addresses:

Document: Memorandum in Opposition to Motion to Reconsider

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Counsel for Plaintiffs


Valerie N. Hampton

Columbia, South Carolina
December 3, 2015

RECEIVED

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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-40-01728

Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated.....Appellants,

v.

South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority.....Respondents.

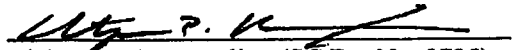
NOTICE OF APPEAL

Appellants Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated hereby appeal the Order (Exhibit 1) of the Honorable Tanya A. Gee, Circuit Court Judge, filed on November 2, 2015 and received on November 9, 2015, granting Respondents' motion to dismiss for failure to state a claim.

On November 19, 2015, Appellants moved the Circuit Court to reconsider that decision (Exhibit 2). On December 7, 2015, the motion was denied. On December 14, 2015, the undersigned received notice of that Order (Exhibit 3).

This appeal is filed within thirty (30) days of receipt of that order, as required by
Rule 203, SCACR.

Respectfully submitted by,


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ATTORNEYS FOR THE RESPONDENTS

January 6, 2016
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4001728

Gail M Hutto

S C Retirement System

Debra J Andrews

Police Officers Retirement System

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant.

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Settled, Non-suit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 3 November 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Richard A. Harpootlian

James Milon Griffin

Robert E. Stepp

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Janet W. McBride

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

IN THE FIFTH JUDICIAL CIRCUIT

Gail M. Hutto, Debra J. Andrews,
Elizabeth W. Hodge, Margaret B.
Lineberger, Lynn R. Rogers, Nancy G.
Sullivan, Jane P. Terwilliger, Julian W.
Walls, and all others similarly situated,

Civil Action No.: 2015-CP-40-1728

Plaintiffs,)

ORDER

v.)

South Carolina Retirement System,
Police Officers Retirement System,
South Carolina Retirement Systems Group
Trust, South Carolina Budget and Control
Board, and South Carolina Public
Employee Benefit Authority,

Defendants.)

FILED
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CLERK OF COURT
FIFTH JUDICIAL CIRCUIT
RICHLAND COUNTY, SOUTH CAROLINA

This matter came before the Court on a motion to dismiss filed by Defendants pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. A hearing was conducted on September 28, 2015. James M. Griffin of Lewis Babcock & Griffin, LLP, and Christopher P. Kenney of Richard A. Harpootlian, P.A., appeared on behalf of Plaintiffs. Tina Cundari and Roland Franklin of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of Defendants. Stephen R. Van Camp, General Counsel for the South Carolina Public Employee Benefit Authority, was also present. After considering the motion, memoranda, oral presentations of counsel, matters of public record, and applicable law, the Court grants the motion to dismiss.

FACTS

This case challenges the constitutionality of two state statutes, Sections 9-1-1790(C) and 9-11-90(4)(c), requiring retired members of the state retirement systems who are re-employed in

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positions covered by the retirement system to make the same contributions to the system that a non-retired employee occupying that same position would make. Plaintiffs contend the statutes violate the Takings Clause of the Fifth Amendment of the United States Constitution.

The statutes have been the subject of litigation in this state since 2005, the year they were enacted. Effective July 1, 2005, the statutes were enacted as part of the State Retirement Systems Preservation and Investment Reform Act (Act 153). (Compl. ¶ 28.) Just days before the statutes went into effect, a group of plaintiffs represented by the same counsel as Plaintiffs in this case filed a class action alleging that Act 153 was unlawful in several respects, including that it violated the Takings Clause of the state and federal constitutions. *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006). The plaintiffs in *Layman* were people who retired and returned to work before July 1, 2005, some of whom participated in the Teacher and Employee Retention Incentive (TERI) program. The South Carolina Supreme Court decided the case in its original jurisdiction.

The supreme court held that Act 153 breached a contract between the State and the TERI participants who retired and returned to work before July 1, 2005. *Id.* at 644, 630 S.E.2d at 272. In doing so, the supreme court stated: "The new TERI program as adopted by the legislature in Act 153 continues to be valid and all those participants joining after July 1, 2005, are subject to the entirety of the requirements outlining the new TERI program in Act 153. It is fully within the power of the legislature to make changes to laws that affect future participants" *Id.* The supreme court further stated: "[O]ur holding today does not hamper the legislature's ability to govern. The new TERI program will continue in its current form and all participants in the new TERI program, enacted via Act 153, will be subject to the terms of that statute." *Id.* at 641, 630 S.E.2d at 270.

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As to the remaining, non-TERI working retirees, the supreme court held that the statutes governing the working retirees did not contain the same contractually significant language as the statutes in the TERI program. *Id.* at 643, 630 S.E.2d at 271. Accordingly, the supreme court did not grant any relief to those plaintiffs and instead remanded only the breach of contract claim because the Court found that the record contained evidence that some of the working retirees may have had written contracts detailing the terms of their employment. *Id.* The Court did not remand the constitutional claims, nor did the Court grant relief to the remaining plaintiffs on any other basis. Therefore, following *Layman*, the statutes remained in full force and effect, and the State was permitted to continue collecting contributions from working retirees.

On remand, the working retirees filed amended complaints alleging multiple causes of action, including that the statutes violated the Takings Clause of the state and federal constitutions.¹ Following discovery, the parties filed cross-motions for summary judgment addressing all causes of action. After a hearing, the trial court granted relief to the working retirees on the ground of equitable estoppel. The defendants moved for reconsideration, arguing that the trial court erred in granting relief and failing to dispose of all the issues in the case,

¹ Although this Court must generally limit itself to the facts alleged on the face of a complaint in considering a motion to dismiss, the Court may take judicial notice of matters of public record in considering a motion to dismiss. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (holding a court can “consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular . . . matters of which a court may take judicial notice”); *Sec’y of State for Defence v. Tremble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (“In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record.”); *State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955) (noting that court may take judicial notice of public records). Here, the parties provided the Court with pleadings, motions, memoranda, and orders filed in prior cases, all of which were matters of public record, and all of which the Court is permitted to consider in deciding the motion to dismiss. Additionally, the Court is guided by the doctrine of *stare decisis*, which “enjoys particular efficacy in the context of challenges concerning construction of statutes and determination of legislative intent.” *Wehle v. S.C. Retirement Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005).

including the allegation that the statutes are unconstitutional. After a hearing, the trial court issued an order declining to alter or amend the judgment on the equitable estoppel ground, but amending the order to expressly deny relief on all other grounds. The working retirees moved for reconsideration, but the motion was denied.

Both parties appealed the issues they lost at the trial court level, and after briefing and oral argument, the supreme court reversed the trial court on the equitable estoppel ground and affirmed the granting of summary judgment on the constitutional and remaining grounds. *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). In reaching its decision, the supreme court found that the statutory scheme governing the employment of working retirees is "void of [an] express guarantee that retirement contributions would not be required." *Id.* at 352, 709 S.E.2d at 60. The supreme court further stated: "Because there is no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retiree statutes as providing a mere option to retirees, rather than an offer." *Id.* Accordingly, the supreme court found that the statutes were valid and enforceable in every respect, and the State was not required to return the contributions received from the working retirees. *Id.* at 357, 709 S.E.2d at 63.

In addition to finding that the working retirees did not have a contractual or equitable basis for relief, the supreme court unanimously affirmed the trial court's order granting summary judgment in favor of the defendants on the constitutional grounds. *Id.* at 357, 709 S.E.2d at 63. The opinion twice recites that the supreme court was affirming the grant of summary judgment on the constitutional issues. The first time, the Court explained that the plaintiffs' claims of unconstitutional taking and violations of due process were "founded on the presumption that a contractual right has been unfairly taken away," and because the plaintiffs "did not have a

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contractual right to the terms of their employment," the Court affirmed the granting of summary judgment on those issues. *Id.* The second time, the Court stated: "[W]e conclude that summary judgment was proper as to the constitutional issues raised by Retirees because those issues are premised on the existence of a contract." *Id.* at 358, 709 S.E.2d at 63.

The plaintiffs petitioned for rehearing, arguing that the cause of action for unconstitutional taking was valid regardless of the existence of a contract and that the plaintiffs had "vested rights or entitlements that are constitutionally protected against a taking." The supreme court denied the petition.

On August 2, 2010, while the *Ahrens* case was pending on appeal, Plaintiffs filed a class action in federal district court alleging that the statutes requiring them to contribute to the retirement system violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. *Hutto v. S.C. Ret. Sys.*, Case No. 4:10-cv-02018-JMC (D.S.C.). The defendants moved to dismiss the complaint on multiple grounds, including res judicata, collateral estoppel, sovereign immunity, and lack of a protected property interest. The district court dismissed the complaint on the ground of sovereign immunity, and the Fourth Circuit affirmed. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536 (4th Cir. 2014).

After losing the federal court case, Plaintiffs filed the present case. Like the federal court case, this is a putative class action seeking an order declaring that the statutes requiring working retirees to contribute to the retirement system are unconstitutional in violation of the Takings Clause of the Fifth Amendment.² (Compl. ¶¶ 47 - 54.) Plaintiffs have sued several of the same

² In this case, Plaintiffs do not allege that the statutes violate the Due Process Clause of the Fourteenth Amendment.

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defendants³ that they sued in the federal court case, and seek the same relief as they did in the federal court case, which is the return of all contributions made to the retirement system since July 1, 2005.⁴

LEGAL STANDARD

A defendant may move to dismiss a complaint for "failure to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "The Court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case." *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014).

Dismissal may be appropriate when a case presents only questions of law and there are no factual issues requiring further development. *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001). *See also* *Madison v. Am. Home Prods. Corp.*, 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004) ("Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss."); *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001) (same). A motion to dismiss should be granted if the facts and inferences therefrom

³ In the federal court case, Plaintiffs sued a number of individual defendants, including the governor, the state treasurer, the state comptroller general, the chair of the South Carolina Senate Finance Committee, the chair of the House Ways and Means Committee, and the executive director of the Budget and Control Board, all in their official capacities.

⁴ Plaintiffs presumably do not seek the return of contributions that they made before they retired.

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would not entitle a plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **The Court concludes that this case is barred by the doctrines of res judicata and collateral estoppel.**

The Court concludes as a matter of law that this case is barred by the doctrine of res judicata and collateral estoppel. The Court finds that this is the fourth time that Plaintiffs or their privies have sued Defendants or their privies over whether the statutes requiring working retirees to contribute to the retirement systems are constitutional. The Court finds that the South Carolina Supreme Court and a South Carolina trial court have decided the issue presented in this case. Accordingly, the Court grants Defendants' motion to dismiss the complaint on the grounds of res judicata and collateral estoppel.

Res Judicata

"Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies." *Plum Creek Dev. Corp. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (quoting J. Flanagan, *South Carolina Civil Procedure* p. 642 (1996)). "Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Id.*

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (internal quotation marks omitted). "Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues *which might have been raised in the former suit.*'" *Plum Creek Dev. Corp.*, 334 S.C. at 34, 512 S.E.2d at 109 (emphasis added).

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The following elements must be shown in order to establish res judicata: "(1) The parties must be the same or their privies; (2) the subject matter must be the same; (3) while generally the precise point must be ruled [upon], yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but *what might have been decided.*" *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (quoting *Bagwell v. Hinton*, 205 S.C. 377, 32 S.E.2d 147 (1944) (emphasis added)). "It is apodictic that the doctrine of res judicata has been elongated to include 'privies.'" *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997). See also *First Nat. Bank v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 35 S.E.2d 47 (1945) (applying res judicata to the parties and their privies); *H.G. Hall Constr. Co., Inc. v. J.E.P. Enters.*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1984) (same).

"There is no bright line test which can be applied to determine whether one is in privity with another." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). "The term 'privity', when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *Id.* "One in privity is one whose legal interests were litigated in the former proceeding." *Id.* "'Privity' as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." *Id.*

Further, "[a] dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication." *Nunnery*, 289 S.C. at 209, 345 S.E.2d at 743. "Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, so as to conclusively settle not only all matters litigated in the earlier proceedings,

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but also all matters which might have been litigated therein." *Id.* (internal quotations omitted). "For a judgment to bar the maintenance of a subsequent action, there must be identity of the cause of action as well as identity of the subject matter." *Id.*

Here, the Court finds that all three elements of res judicata have been satisfied. First, the parties in this case are identical to or in privity with the parties in the other three cases. This is the fourth time that Plaintiffs or their privies have sued Defendants or their privies regarding the constitutionality of these statutes. The first time was in the *Layman* case filed in 2005. The second time was on remand in the *Ahrens* case. The third time was in the *Hutto* case filed in federal court. The Court finds that in these prior cases, Plaintiffs or their privies sued Defendants or their privies over whether statutes requiring working retirees to contribute to the retirement systems are constitutional. The parties in the prior cases are identically situated to the subject matter of this case. The statutes requiring working retirees to contribute to the retirement system affect all the parties in the same way. Likewise, the Defendants in this case are either the same as or in privity with the defendants in the other cases. All Defendants are required to follow the law as enacted by the General Assembly.

Plaintiffs contend that they are not the same people as the plaintiffs in *Layman* and *Ahrens* and therefore those prior cases are not binding. Although the Court acknowledges that the plaintiffs in *Layman* and *Ahrens* are not the same people as the plaintiffs in this case, the Court finds that the plaintiffs in this case are in privity with the plaintiffs in those cases. The plaintiffs in all three cases are identically situated in relationship to the statutes. The statutes affect all the plaintiffs in the same way. The Court finds that the only difference between the plaintiffs in *Layman* and *Ahrens* and the plaintiffs in this case is that the plaintiffs in *Layman* and *Ahrens* retired and returned to work before July 1, 2005, and some enrolled in the TERI program.

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These differences are not legally significant for purposes of determining whether the statutes are constitutional. The statutes make no distinction between people who retired and returned to work before July 1, 2005. Whether someone retired and returned to work before the statutes were enacted makes no difference for purposes of analyzing whether the statutes are constitutional. This is particularly so given that Plaintiffs are attacking the constitutionality of the statutes on their face.

Second, the Court finds that the subject matter of all four cases is the same. In each of the prior cases, the plaintiffs alleged that statutes requiring working retirees to contribute to the retirement system violated the Takings Clause of the Fifth Amendment of the state and federal constitutions. Plaintiffs are making the same allegation here. They allege that Sections 9-1-1790(C) and 9-11-90(4)(c) violate the Takings Clause of the Fifth Amendment of the United States Constitution. This same issue has been raised and litigated in the prior cases.

Third, the Court finds that the issue raised in this case was either decided or might have been decided in the prior cases. In *Layman*, the issue regarding the constitutionality of statutes requiring working retirees to contribute to the retirement system was squarely before the Court, and although the Court did not address the issue, the Court might have done so given that the issue was raised and litigated. In *Ahrens*, the issue was litigated once again, and the issue was expressly decided by the trial court and affirmed by the appellate court. In *Hutto*, the issue was litigated once again, and although the district court dismissed the complaint based on sovereign immunity and the Fourth Circuit affirmed, the federal courts might have decided the issue of whether the statutes are constitutional given that the issue was raised and argued in the district court and again on appeal.

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Finally, contrary to what Plaintiffs argue, the Fourth Circuit did not authorize the present case to be filed. In analyzing whether the Fifth Amendment trumps the Eleventh Amendment, the Fourth Circuit concluded that “[b]ecause the plaintiffs can have their takings claim heard in South Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise.” *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014). The Court finds that this statement was part of the Fourth Circuit’s analysis of whether the Fifth Amendment trumped the Eleventh Amendment and was not a directive authorizing the present case to be filed irrespective of any defenses that may be raised by the defendants. The Fourth Circuit recognized that because South Carolina state courts remain open to takings claims, Plaintiffs could have initiated the present case in state court. Instead, Plaintiffs chose to initiate this case in federal court, where the District Court dismissed this case with prejudice and the Fourth Circuit affirmed the dismissal.

In sum, the Court concludes that this case represents precisely what res judicata was designed to prevent—a defendant being sued multiple times for the same cause of action. Plaintiffs have had their day in court, both through the federal court case and through their privies in *Layman* and *Ahrens*. Defendants should not have to continue defending the same statutes on the same grounds, particularly when the South Carolina Supreme Court and a South Carolina trial court have determined that the statutes are constitutional.

Collateral Estoppel

“Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.” *State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014) (quoting *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d

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779, 782 (Ct. App. 2009)). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue." *Hewins*, 409 S.C. at 106, 760 S.E.2d at 821 (quotations and citation omitted).

Accordingly, "[u]nder the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986).

The policy reasons for collateral estoppel are similar to those of *res judicata*. "The public interest demands an end to the litigation of the same issue." *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 252, 481 S.E.2d 706, 708 (1997). "Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation." *Id.*

Here, the Court concludes that this case is barred by the doctrine of collateral estoppel. First, as explained above, the issue presented in this case has been actually litigated numerous times. It was litigated in the *Layman* case, the *Ahrens* case, and the federal counterpart of this case. At every stage of the litigation, Plaintiffs or their privies argued that the statutes were unconstitutional, and at every stage of the litigation, the request for relief was denied.

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Second, the Court finds that the issue in this case was directly decided in *Ahrens*. The trial court granted summary judgment in favor of the defendants on the constitutional grounds and denied the plaintiffs' motion to reconsider. On appeal, the supreme court unanimously affirmed summary judgment in favor of the defendants' on the constitutional grounds and denied the plaintiffs' petition for rehearing.

Third, the Court finds that a ruling on the issue was necessary to support the judgment in *Ahrens*. The parties in *Ahrens* filed cross-motions for summary judgment addressing all causes of action in the complaint. In ruling on the motions, it was necessary for the trial court to address each cause of action so that no argument was left open on appeal. On appeal, it was necessary for the supreme court to address all rulings made by the trial court, again so that there was no question regarding the validity of the statutes. Further, the Court finds that the supreme court would not have denied relief to the working retirees and at the same time left open the issue of whether the statutes were constitutional. By denying relief to the plaintiffs in *Ahrens*, the supreme court made it clear that the statutes were valid and enforceable in every respect, even as to working retirees who retired and returned to work before the statutes went into effect.

Because the issue presented in this case has been raised, litigated, and decided time and again, the Court concludes that the case is barred by the doctrine of collateral estoppel.

2. The Court concludes that Plaintiffs do not have a protected property interest.

In addition to concluding that this case is barred by the doctrines of res judicata and collateral estoppel, the Court concludes that the complaint fails to state a claim because Plaintiffs do not have a protected property interest entitled to constitutional protection.

"The Takings Clause provides that private property shall not be taken for public use without just compensation." *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 283, 721

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S.E.2d 423, 427 (2012). Parties claiming a violation of the Takings Clause must "first show they have a legitimate property interest." *Id.* at 283-84, 721 S.E.2d at 427. "Property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims or entitlement to those benefits.'" *Id.* at 284, 721 S.E.2d at 427.

Here, the Court finds that Plaintiffs have failed to identify any legitimate property interest rooted in state law. There is no statute or case law protecting Plaintiffs from having to contribute to the retirement system as working retirees. Not only does no such authority exist, the South Carolina Supreme Court expressly determined in *Ahrens* that working retirees did not have a constitutionally protected property interest. In *Ahrens*, the plaintiffs argued that they had "vested rights or entitlements that are constitutionally protected against a taking," irrespective of the existence of a contract. But the supreme court rejected this argument by affirming summary judgment on the constitutional grounds and denying the petition for rehearing. Additionally, the supreme court found that the statutory scheme governing the employment of working retirees is "void of [an] express guarantee that retirement contributions would not be required." *Id.* at 352, 709 S.E.2d at 351.

Plaintiffs argue that the source of their property interest can be found in the Internal Revenue Code, and specifically 26 U.S.C. § 401(a), which states that "contributions to a tax qualified trust must be non-forfeitable and cannot be diverted for purposes other than the exclusive use of the employee and his or her beneficiaries." (Compl. ¶¶ 41-42.) The Court concludes that the IRS Code does not provide the source for Plaintiffs' right. First, the language in the Code does not say anything about whether it is permissible for the State to require working retirees to contribute to the retirement system as a term and condition of employment. The

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SCANNED

language cited in the IRS Code relates to how funds are used once they are contributed and not with the contribution of the funds in the first instance. Second, the IRS Code does not provide the necessary state law source of Plaintiffs' right. See *Grimsley*, 396 S.C. at 283-84, 721 S.E.2d at 427 (requiring parties that allege a violation of the takings clause to show they have a legitimate property interest rooted in state law).

Plaintiffs also contend that they have a constitutionally protected property interest in their wages. But the Court finds that this case is not about wages. It is about the terms and conditions of employment. The terms and conditions of employment are a matter of state statutory law, and Plaintiffs are on notice of those terms and conditions prior to returning to work. Further, as the supreme court noted in *Ahrens*, "[b]ecause there was no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retirees statutes as providing a mere option to retirees, rather than an offer." 392 S.C. at 352, 709 S.E.2d at 60. The Court finds that with no guarantee of being rehired, working retirees do not have any right to any term or condition of their employment.

Accordingly, because Plaintiffs do not have a protected property interest rooted in state law, the Court concludes that Plaintiffs cannot state a claim for relief.

3. The Court concludes that Plaintiffs' claims are time barred.

Finally, the Court concludes that Plaintiffs' claims are barred by the statute of limitations and the doctrine of laches.

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Anonymous Taxpayer v. S.C. Dept. of Revenue*, 377 S.C. 425, 438, 661 S.E.2d 73, 80 (2008). "A constitutional claim can become time-barred just as any other claim can."

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SCANNED

Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 292 (1983). Under South Carolina law, "an action for taking, detaining, or injuring any goods or chattels including an action for the specific recovery of personal property" must be brought within three years of the alleged taking. S.C. Code Ann. § 15-3-530(4) (2005). Similarly, an action brought upon a liability created by statute must be brought within three years. S.C. Code Ann. § 15-3-530(2). "The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist." *Anonymous Taxpayer*, 377 S.C. at 439, 661 S.E.2d at 80.

Additionally, the equitable doctrine of laches bars an action when there has been "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Robinson v. Estate of Harris*, 388 S.C. 645, 656, 698 S.E.2d 229, 236 (2010). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Id.* at 656-57, 698 S.E.2d at 236. "The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." *Id.* at 657, 698 S.E.2d at 236.

Here, the Court finds and concludes that the Plaintiffs' claims are time barred. Plaintiffs have been on notice since at least July 1, 2005, when the statutes were enacted, that they would have to contribute to the retirement system upon their return to work post-retirement. *See Ahrens v. State*, 392 S.C. at 355, 709 S.E.2d at 62 (recognizing "the well-established rule that citizens are presumed to know the law and are charged with using care to protect their interests"). A case filed on March 20, 2015, challenging the constitutionality of these statutes on

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their face is late. Plaintiffs had three years from the date the statutes were enacted to file the present case. Plaintiffs' failure to do so bars the present case.

Even assuming that Plaintiffs did not have standing to bring a claim until they actually retired and returned to work, Plaintiffs should have brought this case within three years of the date they returned to work. Although the complaint does not allege when Plaintiffs retired and returned to work, Plaintiffs presumably retired and returned to work before August 2, 2010, when they filed this same case in federal court. A complaint filed on March 20, 2015, nearly five years later, is late.

Moreover, under the doctrine of laches, ten years is an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Plaintiffs knew or should have known since at least July 1, 2005, that they had a claim. Rather than act diligently, Plaintiffs waited almost ten years to file the present case. The prejudice to Defendants as a result of this delay is obvious. Plaintiffs and other working retirees have been permitted to occupy positions covered by the state retirement system with the understanding that a percentage of their salary would be contributed to the retirement system, when those positions could have been filled by non-retired members for all these years. Defendants have relied upon the receipt of contributions from all employees in covered positions and not just non-retired employees.

At the hearing, Plaintiffs argued that the constitutional violation is continuing and that each time funds are contributed to the retirement system, a new limitations period begins. The Court disagrees. The Court finds that a similar argument was made in *Anonymous Taxpayer* and was rejected by the Supreme Court. In that case, the supreme court held that the defendant's failure to impose a pre-Act 189 tax exemption to retirement benefits each year did not amount to

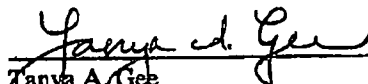
17 03 18 JH
SCANNED

a continuing breach because the plaintiff was put on notice that he had a cause of action when Act 189 was passed. *Anonymous Taxpayer*, 377 S.C. at 439-40, 661 S.E.2d at 80.

The same reasoning applies here, where Plaintiffs challenge the constitutionality of the statutes on their face. (Mem. in Opp'n to Mot. to Dismiss 18, n.1) (stating "whereas Plaintiffs in this case are challenging the facial validity of the statutory provisions in question (rather than the manner of their application)") Because Plaintiffs challenge the constitutionality of the statutes on their face, the cause of action for unconstitutional taking accrued the date the statutes were enacted. In other words, the alleged constitutional injury occurred at the time the statutes became the law of this State. Accordingly, Plaintiffs should have filed the present case within three years of July 1, 2005. The Court finds and concludes that a cause of action filed nearly ten years later is late.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Dismiss is hereby granted.

IT IS SO ORDERED.



Tanya A. Gee
Presiding Judge

Columbia, South Carolina

November 2, 2015

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SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Gail M. Hutto, et al.,

Plaintiff,

vs.

South Carolina Retirement System, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-40-01728

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

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Tina Cundari, Bar No. 71951

Sowell Gray Stepp & Laffitte, LLC

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Columbia, SC 29211

Phone: 803-929-1400 Fax _____

E-mail: rstepp@sowellgray.com

Tcundari@sowellgray.com

Other: _____

RICHLAND COUNTY
FILED
2015 NOV 19 PM 12:20
JEANETTE W. MCBRIDE
C.C.P. & C.S.

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

11-19-15

Date submitted

SECTION III: Motion Fee

☒ PAID AMOUNT: \$ 25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

EXHIBIT

2

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____	
☐ MOTION FEE COLLECTED: \$ _____	
☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gail M. Hutto, Debra J. Andrews,
Elizabeth W. Hodge, Margaret B.
Lineberger, Lynn R. Rogers, Nancy G.
Sullivan, Jane P. Terwilliger, Julian W.
Walls, and all others similarly situated,

Plaintiffs,

vs.

South Carolina Retirement System, Police
Officers Retirement System, South
Carolina Retirement Systems Group Trust,
South Carolina Budget and Control Board,
and South Carolina Public Employee
Benefit Authority,

Defendants.

Civil Action No.: 2015-CP-40-01728

PLAINTIFFS' MOTION TO RECONSIDER

RICHLAND COUNTY
FILED
2015 NOV 19 PM 12:20
JEANETTE M. MCBRIDE
C.P. & G.S.

Plaintiffs hereby move the Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for reconsideration of the Order entered November 3, 2015 and received by counsel on November 9, 2015. The Order fails to address arguments presented to the Court by Plaintiffs, includes rulings that the Court did not render when the Court announced the decision at the conclusion of the hearing, and is based upon erroneous factual and legal findings, to wit:

A. Res Judicata and Collateral Estoppel

The Court's opinion incorrectly concludes that Plaintiffs were litigants in the Layman v. State, 368 S.C. 631, 630 S.E.2d 265 (2006) and Ahrens v. State, 392 S.C. 340, 709 S.E.2d 54 (2011) cases previously decided by the South Carolina Supreme Court. They were not.

The Court also incorrectly concludes that Plaintiffs are in privity with the litigants in Layman and Ahrens and fails to address the Supreme Court decision in Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001) and Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994), which Plaintiffs cited during oral argument. In Carrigg, the Court explained:

To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action.

Carrigg, 347 S.C. at 80-81, 552 S.E.2d 767, 770 (quoting Wade v. Berkeley Cnty., 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998)). "Due process concerns prohibit estopping litigants who never had a chance to present their evidence and arguments on a claim, despite one or more existing adjudications of the identical issue which stand squarely against their position." Id. (citing Richburg v. Baughman, 290 S.C. 431, 434-35, 351 S.E.2d 164, 166 (1986)). Here, the Plaintiffs legal interests were not litigated in the prior actions.

A conclusion that Plaintiffs' claims are *similar* to those of earlier litigants¹ is insufficient grounds to bar them here. In Roberts, the Court ruled that "One whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him." Roberts, 316 S.C. at 496, 450 S.E.2d at 619 (citing 50 C.J.S. Judgments § 788 at 327 (1947)). Likewise, the Roberts Court reasoned a contrary conclusion raised due process concerns by "estopping some litigants who never had a chance to present their evidence and arguments on a claim[.]" Id. (citing Richburg, *supra*).

¹ They are not. They are factually and legally distinct for reasons previously explained.

In addition, the Court incorrectly concluded that the federal court's dismissal of Plaintiffs' claims on the basis of Eleventh Amendment immunity bars Plaintiffs from litigating these issues in state court. The ruling in federal court was not a decision on the merits. Rather, the ruling was simply that the Court did not have jurisdiction over the Defendants. The same *res judicata* and collateral estoppel arguments Defendants advance here were presented to the District Court and the United States Court of Appeals and rejected as each court instead based its ruling on Defendants' constitutional argument that this case must first be brought in federal court. See Hutto v. S. Carolina Ret. Sys., 773 F.3d 536 (4th Cir. 2014); see also, Hutto v. S. Carolina Ret. Sys., 899 F. Supp. 2d 457 (D.S.C. 2012). Had either federal court ascribed any merit to Defendants' *res judicata* and collateral estoppel arguments, those cases would have been dismissed on those state law grounds because the constitutional avoidance doctrine required the federal courts to avoid the constitutional question Defendants presented if possible. See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g. P.C., 467 U.S. 138, 158 (1984) (doctrine requires where possible deciding on state law grounds to avoid unnecessary constitutional conflicts). The facts that it was necessary for the federal courts to reach the constitutional question is strong evidence they concluded that accepting Defendants' *res judicata* and collateral estoppel arguments would constitute a denial of due process. Respectfully, this Court should reconsider its decision in light of this same concern and this Court's finding that "the federal courts might have decided the issue of whether the statutes are constitutional" is simply incorrect.

Lastly, this Court's conclusion that the issue raised in this case was actually litigated in Layman and Ahrens is also incorrect. Plaintiffs' claim in this case is premised upon a constitutionally-protected property interest derived from the United States' Constitution and

federal statutes, not state statutory or common law. Specifically, Plaintiffs argue that Internal Revenue Code, 26 U.S.C. § 401(a), creates a constitutionally-protected property interest in all contributions to a qualified pension plan, such as those pertaining to this case. The Supreme Court has recognized that federal statutes may lead to constitutionally-protected property interests. Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (observing "that the interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created 'property' interest protected by the Fifth Amendment."). This issue was never litigated in either Layman or Ahrens.

B. Constitutionally Protected Property Interest

This Court's ruling that Plaintiffs do not have a constitutionally protected property interest fails to address Plaintiffs' argument that federal statutes may create such a protected property interest. The Court does not address or attempt to distinguish Mathews, 424 U.S. at 332, relied upon by Plaintiffs.

The Court's decision is also inconsistent with the recognition of such a property interest protected by the United States' Constitution. See Washlefske v. Winston, 234 F.3d 179, 184 (4th Cir. 2000); Orloff v. Cleland, 708 F.2d 372, 378 (9th Cir. 1983); McMahan v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529, 539 (D.S.C. 1994).

C. Statute of Limitations

When the Court issued its decision at the close of oral argument, it did not rule upon the statute of limitations defense argued by Defendants. Instead, Defense counsel was instructed to prepare a proposed order ruling in Defendants' favor on the grounds of res judicata and collateral estoppel, with the alternative holding in Defendants' favor finding no protected property interest. Defense counsel ignored this instruction and submitted a proposed order, over the undersigned's

objection that took the liberty of adding additional rulings in Defendants' favor never cited by the Court when it issued its decision or during its instruction to counsel. The Court then entered Defendants' proposed order, without modification. The additional holdings inserted by Defendants' counsel improperly make factual findings at the motion to dismiss stage in furtherance of reaching a statute of limitations holding. For example, the Order states that Plaintiffs "presumably retired and returned to work before August 2, 2010." The Court may only dismiss a complaint based upon a defense of statute of limitations when it is apparent from the four corners of the pleadings that the case is time barred. Spence v. Spence, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). This is improper and highly objectionable.

In holding that Plaintiffs had to pursue their federal claim in state court, the Fourth Circuit "conclude[d] that the Eleventh Amendment bars Fifth Amendment taking claims against States *in federal court* when the *State's courts* remain open to adjudicate such claims." Hutto, 773 F.3d at 551-52 (emphasis original). The Hutto Court reasoned further:

Because the plaintiffs can have their takings claims heard in South Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise. But in concluding that the Fifth Amendment Takings Clause does not, in this case, trump the Eleventh Amendment, we do not decide the question whether a State can close its doors to a takings claim or the question whether the Eleventh Amendment would ban a takings claim in federal court if the State courts were to refuse to hear such a claim.

Id. at 552.

The undersigned assume that this Court's decision to sign an order prepared by Defense counsel addressing matters not included in the Court's ruling is a mere oversight. This oversight should be corrected by granting this motion.

In addition, the Court relies exclusively upon the decision in Anonymous Taxpayer v. S. Carolina Dep't of Revenue, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008) for the finding that

Plaintiffs' claims are time barred. However, this decision is not applicable. In Anonymous Taxpayer, plaintiff challenged a statutory change that removed state tax exemptions on plaintiff's state retirement benefits. The Supreme Court concluded that the plaintiff had a vested interest in his retirement benefits at the time of the statutory change and therefore plaintiff's cause of action accrued on the date the law changed. The Court reasoned:

Although Appellant did not begin receiving retirement income until 1997, he had a vested interest in his retirement plan prior to Act 189. Similar to Harvey, Appellant's action accrued at the time of the 1989 change, not when he later retired and attempted to claim the prior tax exemption.

Id.

Here, Plaintiffs did not have a vested interest in wages that they might earn in the future when Act 153 was passed, requiring the working retirees to begin making contributions to the Retirement Systems on July 1, 2005. As a result, Plaintiffs' claims did not accrue when Act 153 was passed. Instead, Plaintiffs' claims accrued once they earn the wages from which the State illegally deducted a portion. This is an ongoing violation and a new cause of action accrues each time Plaintiffs' wages are confiscated. See Estate of Livingston v. Livingston, 404 S.C. 137, 147-48, 744 S.E.2d 203, 209 (Ct. App. 2013) (finding a new statute of limitations begins to run after each separate injury, and therefore statute of limitations barred only claims falling outside the three-year time period and did not bar claims occurring within that time), cert. granted; No. 2013-001505 (S.C. S. Ct. filed Oct. 24, 2014); see also Hogar Dulce Hogar v. Cmty. Dev. Comm'n of Escondido, 110 Cal. App.4th 1288, 2 Cal. Rptr.3d 497, 502 (2003) ("When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." (citation omitted)); State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc., 777 S.E.2d 176, 200 (S.C. 2015), reh'g granted (July 8, 2015).

Additionally, any limitations period on Plaintiffs claims was tolled by the pendency of the federal action while in the District Court and Court of Appeals. See Jinks v. Richland Cnty., S.C., 538 U.S. 456 (2003) (reversing the South Carolina Supreme Court's decision a claim was time barred due to the passage of time while the claim was pending in federal court).

D. Laches

Lastly, this Courts' ruling that Plaintiffs' claim is barred by the doctrine of laches is improper for the reasons explained in § C, supra. It also fails to address Plaintiffs' argument that this defense is fact intensive and should not be ruled upon at the motion to dismiss stage.

Affirmative defenses are not properly considered in evaluating a motion to dismiss unless the defense is established in the allegations of the complaint. Spence, 368 S.C. at 123, 628 S.E.2d at 878. This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint. Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial. Id.

Defendants' appeal to laches also rests upon factual assumptions that stretch beyond the four corners of the pleadings. More specifically, Defendants assert that "plaintiffs could have and should have brought this lawsuit within three years of their return to work." Of course, there is no evidence before the court as to when the plaintiffs returned to work—only that they did so after the enactment of South Carolina Code Sections 9-1-1790(C) and 9-11-90(4)(c). Without evidence of the date of Plaintiffs' return to work, Defendants are unable to prove the first element of laches: lack of diligence. "An inexcusable or unreasonable delay may occur only after

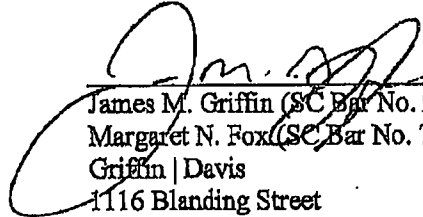
the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action." White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990). There are no facts before the Court as to this element.

As to the second element of laches—prejudice to the defendant—Defendants have produced no evidence whatsoever. "The second element—prejudice to the defendant—is demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct." White, 909 F.2d at 102 (citing Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 844 (D.C. Cir. 1982)). The Court's conclusion that Defendants have been prejudiced because "the retirement system has continued to rely upon the receipt of the funds" is without factual support from the pleadings. Even assuming *arguendo* that these factual allegations are correct, Defendants' reliance upon Plaintiffs "continuing receipt of funds" in no way prejudices Defendants' ability to defend this case. Barring such proof, laches is inappropriate.

Based upon the foregoing, Plaintiffs request the Court reconsider its Order granting Defendant's Motion to Dismiss and deny the same.

[signature page follows]

Respectfully submitted,



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Attorneys for the Plaintiffs

November 19, 2015
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gail M. Hutto, Debra J. Andrews,
Elizabeth W. Hodge, Margaret B.
Lineberger, Lynn R. Rogers, Nancy G.
Sullivan, Jane P. Terwilliger, Julian W.
Walls, and all others similarly situated,

Plaintiff,

vs.

South Carolina Retirement System, Police
Officers Retirement System, South
Carolina Retirement Systems Group Trust,
South Carolina Budget and Control Board,
and South Carolina Public Employee
Benefit Authority,

Defendants.

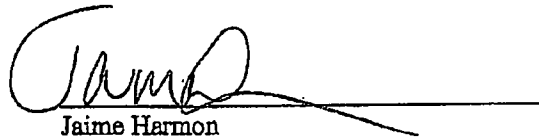
Civil Action No.: 2015-CP-40-01728

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
2015 NOV 19 PM 12:20
JEANNETTE B. MCBRIDE
C.C.P. 8th S.S.

I, Jaime Harmon, the undersigned employee of Griffin Davis, LLC, attorneys for Plaintiffs
do hereby certify that I have served a copy of the foregoing Plaintiffs' Motion to Reconsider in
connection with the above-referenced case via U.S. Mail, postage prepaid, to the following
address:

Robert E. Stepp
Tina M. Cundari
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Columbia, SC 29201


Jaime Harmon

Columbia, South Carolina
November 19, 2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015-CP-40-1768 14 2015

Gail M. Hutto, Debra J. Andrews, et al

Richard A. Harpootlian, P.A.
SC Retirement Systems, Police Officers Retirement System, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award. Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

After careful consideration, the Plaintiff's Motion to Reconsider is respectfully denied.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Janet L. G.

Judge Code 2756

Date 12/7/2015

For Clerk of Court Office Use Only

This judgment was entered on the 10 day of Dec, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Dec, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

SCRPC Form 4C (10/2011)

Clerk of Court

Janette W. McBride

SCANNED

EXHIBIT

3

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

JAN - 6 2016

SC SUPREME COURT

Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-40-01728

Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated.....Appellants,

v.

South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority.....Respondents.

AMENDED CERTIFICATE OF SERVICE

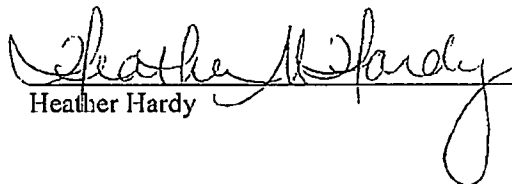
I, Heather Hardy, Paralegal to Richard A. Harpootlian, hereby certify that on **January 6, 2016**, I did serve, via **HAND DELIVERY**, the following document to the below mentioned counsel:

Documents:

Notice of Appeal.

Counsel:

Robert E. Stepp
Tina M. Cundari
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Columbia, South Carolina 29201


Heather Hardy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

GAIL M. HUTTO, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	4:10-2018
-versus-	)	
	)	September 5, 2012
SC RETIREMENT SYSTEM, ET AL.,	)	
	)	Greenville, SC
Defendants.	)	

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE J. MICHELLE CHILDS
UNITED STATES DISTRICT JUDGE, presiding

A P P E A R A N C E S:

For the Plaintiffs: RICHARD A. HARPOOTLIAN, ESQ.
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1410 Laurel Street
Columbia, SC 29202

JAMES M. GRIFFIN, ESQ.
Lewis Babcock & Griffin
PO Box 11208
Columbia, SC 29211

For the Defendants: TINA M. CUNDARI, ESQ.
ROBERT E. STEPP, ESQ.
Sowell Gray Stepp & Lafitte
PO Box 11449
Columbia, SC 29211

Court Reporter: KAREN E. MARTIN, RMR, CRR
300 E. Washington Street
Room 304
Greenville, SC 29601

The proceedings were taken by mechanical stenography and
the transcript produced by computer.

Karen E. Martin, RMR, CRR
US District Court
District of South Carolina

1 certainly. they can't take money out of our check for a
2 defined benefit plan tax deferred and not give us a
3 benefit I would submit under federal law.

4 Now, the next issue --

5 THE COURT: But they agree that there's no
6 benefit coming back in return.

7 MR. HARPOOTLIAN: Well, I'm not sure I heard
8 that. Are they on the record stating that there's no
9 benefit, that we get no additional retirement benefit from
10 this money?

11 MR. STEPP: The benefit is their job.

12 MR. HARPOOTLIAN: Okay.

13 THE COURT: Okay.

14 MR. STEPP: That's the benefit they get under
15 the terms of which they have to make the contribution.

16 THE COURT: Okay.

17 MR. STEPP: They don't have to make the
18 contribution and they don't have to take the job. But if
19 they take the job, they have to make the contribution and
20 that's the benefit.

21 MR. HARPOOTLIAN: Well, unfortunately, the IRS,
22 when you look at the IRS code -- and we've pled it and
23 we've included it -- a defined benefit plan, getting the
24 job is not the defined benefit. This is a dollars and
25 cents actuarial computation. And it's a very -- and we

Karen E. Martin, RMR, CRR
US District Court
District of South Carolina

1 State of South Carolina Court of Common Pleas
2 County of Richland Fifth Judicial Circuit
3
4 Gail M. Hutto, et al.,) Transcript of Record
5 Plaintiff,) 2015-CP-40-01728
6 vs.)
7 South Carolina Retirement)
8 System, et al.,)
9 Defendant.)
10
11 September 28, 2015
12 Columbia, South Carolina
13
14 B E F O R E:
15 The Honorable Tanya A. Gee, Judge
16
17 A P P E A R A N C E S:
18 James M. Griffin, Esquire
19 Christopher Kenney, Esquire
20 Attorneys for the Plaintiff
21
22 Tina Cundari, Esquire
23 Roland Franklin, Esquire
24 Steven Van Camp, Esquire
25 Attorneys for the Defendant
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P R O C E E D I N G S

THE COURT: All right. Our next case is Gail M. Hutto versus South Carolina Retirement System. It's a Motion Dismiss.

MR. GRIFFIN: Good afternoon.

THE COURT: Good afternoon. And for the benefit of my court reporter, if y'all could just state your name for the record, please.

MR. GRIFFIN: My name is Jim Griffin. I represent the Plaintiff.

MR. KENNEY: My name is Chris Kenney from Dick Harpootlian's office, also for the Plaintiff.

MS. CUNDARI: Tina Cundari on behalf of the Defendant. Roland Franklin on behalf of the Defendant as well. And this is Steven Van Camp. He's the general counsel for the -- PEBA, the Public Employee Benefit Authority.

THE COURT: Thanks.

All right. Ms. Cundari, this is your Motion to Dismiss, so I'll let you take it away.

MS. CUNDARI: Thank you, Your Honor. May it please the Court? Again, Tina Cundari on behalf of the South Carolina Retirement System, as well as the other Defendants, and with me today is my colleague, Roland Franklin, and the general counsel for PEBA, Steven Van Camp. This is a Motion to Dismiss the complaint for

1 failure to state a claim and this Motion to Dismiss is
2 unique as far as motions to dismiss go given the litigation
3 history in this case. This has been a case that has gone
4 on for ten years now, since the time that these statutes
5 that are being challenged in the case were passed in July
6 of 2005.

7 If I could just take a moment to briefly recount that
8 history, the first case was the Layman case, that was
9 Layman versus State, that was filed by working-retirees,
10 just like the working-retirees in this case except for
11 that these folks had retired and returned to work before
12 the law changed, whereas the Plaintiffs in this case
13 retired and returned to work after the law changed. In
14 that case, the Supreme Court heard in its original
15 jurisdiction the question of whether these statutes, the
16 statutes being those that require working-retirees to
17 contribute a portion of their salary to the retirement
18 system as a term and condition of their employment, the
19 South Carolina Supreme Court considered whether those
20 statutes were constitutional. The court determined that
21 they -- the court did not directly address the issue, but
22 the court determined that as to the TERI participants, who
23 were another form of working-retirees, that they were
24 entitled to relief because they had a contractual right
25 under the prior legislation, but that going forward the

1 statues were okay, so that's what was decided as to the
2 TERI participants.

3 The court remanded one cause of action, and that was
4 for breach of contract, and despite the remand being
5 narrowed in that way, when we got back to remand in the
6 case the Plaintiffs filed amended complaints and, again,
7 brought up the issue of whether the statutes were --
8 whether they violated the takings clause of the Fifth
9 Amendment, and so we litigated that issue again. And the
10 trial court in the Ahrens case, that became the Ahrens
11 case, the trial court determined -- denied relief on the
12 constitutional ground. The initial order did not address
13 the constitutional ground. We, the Defendants, moved for
14 reconsideration. The judge said it would be denied on this
15 ground. The Plaintiffs then moved for reconsideration.
16 The judge denied again. So we had two trial court
17 decisions saying that these statutes are constitutional.

18 That gets appealed to the South Carolina Supreme
19 Court, becomes the case of Ahrens versus State. And,
20 again, the Supreme Court looked at the issues and said they
21 affirmed the trial court on the constitutional ground, and
22 that was a unanimous decision. Even Justice Hearn, who
23 dissented in the Ahrens case, said she agreed with the
24 majority on the constitutionality of the statute.

25 **THE COURT:** She just disagreed as to whether there

1 was a contract.

2 **MS. CUNDARI:** Correct. In the meantime, these exact
3 same plaintiffs who are before the court now filed a case
4 in Federal court. Again, alleging that the statutes were
5 unconstitutional. So while Ahrens was pending, we also
6 were fighting a case in Federal court.

7 **THE COURT:** But they're saying they're not the
8 exact same plaintiffs because in Ahrens these were the
9 pre-July 1, 2005 folks and in this case they were hired
10 after they changed the law.

11 **MS. CUNDARI:** We agree they're different people,
12 they have different names, they have different dates of
13 retirement and return to work, but for purposes of the
14 constitutional analysis they are exactly the same. They
15 are exactly -- they're affected exactly the same way with
16 respect to the statute and don't have any different
17 property interest than the plaintiffs that retired and
18 returned to work before July 1 of 2005. And actually you
19 could even argue they were one step removed because they
20 came back to work knowing what the terms and conditions of
21 employment were and accepted the job anyway and continued
22 to work in their interim positions. But we -- we agree
23 that they're not the exact same people, but they are
24 legally identical to the plaintiffs in the Ahrens and the
25 Layman cases.

1 But you have Hutto, which was -- Hutto One, I'll
2 call it, which was filed in Federal court, and they were
3 the exact same people. And, again, the issue of the
4 constitutionality of the statute was litigated once again.
5 We won that case in district court, got it dismissed based
6 on sovereign immunity --

7 **THE COURT:** Right. So that -- so in that case though
8 the district court didn't even touch the constitutional
9 issues and just said this is a state question, right?

10 **MS. CUNDARI:** Well, the judge dismissed based on
11 sovereign immunity and when she did so she did it treating
12 sovereign immunity like a jurisdictional bar, but when it
13 got to the Fourth Circuit, the Fourth Circuit looked at
14 sovereign immunity and said it's an affirmative defense.
15 So it picked one of the many defenses that we had and
16 decided to take on that affirmative defense. The court
17 did not have to address every single ground. The court
18 can dismiss a case on any affirmative defense and it
19 picked sovereign immunity, but the point is the issue got
20 litigated. The issue got briefed, it got argued, it got,
21 you know, litigated, and those same plaintiffs had their
22 one bite of the apple, went to Federal Court and district
23 court, went to the Fourth Circuit, and they lost, but here
24 we are again.

25 So this is the fourth case and this is the whole

1 foundation of our Motion to Dismiss. I just thank you for
2 indulging me on that history because --

3 **THE COURT:** No, that's helpful to me, too. I've read
4 it all, but I wanted to hear it again, and then I think
5 Mr. Griffin has an opportunity to see the facts as you
6 present them to me and he'll have an opportunity to --

7 **MS. CUNDARI:** Most certainly. And, Your Honor,
8 everything that I have stated is a matter of public record.
9 Everything that I'm stating has come from pleadings and
10 orders and opinions and so the bottom line here is that
11 the Ahrens versus State decision in 2011 by the South
12 Carolina Supreme Court bars this case under stare decisis
13 or any of the grounds that we mention in our Motion to
14 Dismiss. Those three grounds are res judicata and
15 collateral estoppel. I combine those for purposes of
16 discussion, but the point is that a party should not be
17 permitted to be sued twice for the same cause of action.
18 And, again, this is the fourth time that the Retirement
19 System and these Defendants have been sued over these
20 statutes. The three elements to res judicata, the parties
21 are the same or are in privity, and as I mentioned, our
22 position is that these plaintiffs are identically situated
23 in relationship to the subject matter, which is the
24 statute, and, therefore, they are -- that first element is
25 satisfied. They're not the exact same people, but they

1 are in privity and, therefore, their claims are barred.
2 Although I would also argue as to Hutto One they are the
3 same people and so res judicata applies to bar this case
4 under Hutto One as well. Subject matter is the same.
5 We're talking about the same statutes, the same issues
6 about whether they're constitutional. And then the issue
7 was ruled upon. The issue has been directly ruled upon by
8 the trial courts in this state twice and by the highest
9 court in the state in Ahrens versus State.

10 As to collateral estoppel, again, the issues have been
11 actually and necessarily litigated and determined in the
12 Ahrens case and directly determined by the trial court,
13 directly determined by the South Carolina Supreme Court.
14 And I'd also like to mention the South Carolina Supreme
15 Court entertained the issue once again on a petition for
16 rehearing in Ahrens and denied that petition as well, so
17 there was yet another chance for them to argue this issue.

18 **THE COURT:** If I were to disagree with you about
19 whether these are the same parties with regard to res
20 judicata, would that matter with regard to collateral
21 estoppel? With collateral estoppel you don't need the same
22 parties, right?

23 **MS. CUNDARI:** That's right. That's right. Just look
24 and see if has the issue been decided and was it -- was it
25 actually litigated, the first element, was it directly

1 determined, and was it necessary to support the prior
2 judgment. So if these doctrines mean anything, they apply
3 in this case, and I submit to the Court that the complaint
4 should be dismissed on one or both of those grounds.

5 Second, Your Honor, is that there's no protected
6 property interest and to state a claim under the takings
7 clause of the Fifth Amendment you have to start with a
8 protected property interest. The plaintiff cannot identify
9 any state statute or even contract or anything that gives
10 them a protected property interest. In fact, in their
11 brief they say that they have no agreement, they don't
12 point to any state law and, in fact, the South Carolina
13 Supreme Court has already said it doesn't exist.

14 **THE COURT:** Well, aren't they relying on the Internal
15 Revenue Code for this argument?

16 **MS. CUNDARI:** They are relying on that and I -- I've
17 looked at the portions that they cite and there's nothing
18 in there that says that these plaintiffs are prevented or
19 protected from having to contribute to the retirement
20 system as working-retirees. There's nothing in there that
21 says that. Also, generally speaking, the source of the
22 right needs to be state law and so -- and that's what
23 Grimsley versus SLED says, that the source of the property
24 interest needs to be state law, needs to be rooted in state
25 law. In Layman, the court said that there was nothing in

1 the terms of the working-retiree statute that created a
2 binding contract or that evidenced an intent by the
3 legislature to be bound to any terms related to the old
4 working-retiree program. That was in Layman. And in
5 Ahrens the court said the working-retiree statutes are void
6 of the express guarantee that retirement contributions
7 would not be required.

8 So the Supreme Court has addressed this issue, has
9 honed the statute and does not find a protected property
10 interest and so any -- I submit that any decision by this
11 court that recognizes the interest would be contrary to
12 the Supreme Court's decision on that particular issue.

13 And then finally, Your Honor, the case should be
14 dismissed based on the statute of limitations or the
15 doctrine of laches, either one.

16 **THE COURT:** Doesn't that require me to make some
17 assumptions about when these folks were hired?

18 **MS. CUNDARI:** It does, but I think you can do it based
19 on the pleadings and based on the fact that they filed the
20 Hutto One case, the Federal Court case. They filed that
21 case in August of 2010. The same plaintiffs filed a case
22 five years ago saying that they -- that they're -- they
23 have a protected property issue that's been taken, so that
24 they come to this court five years later. Under the
25 statute they've got to bring the claim within three years

1 and they haven't done so within 2010, they certainly
2 haven't done so within 2005, and so whether it be the
3 statute of limitations or Doctrine of Latches, that the
4 claim is time barred as well.

5 So, Your Honor, I submit to the Court that it's time
6 for this litigation to end. The whole point of those
7 doctrines were to stop the harassment of these defendants
8 being sued repeatedly for the same causes of action. We
9 have been up and down to the Fourth Circuit to the South
10 Carolina Supreme Court. I suspect we're gonna be headed
11 back to the South Carolina Supreme Court at some other
12 point, whether it be on this motion or later, and I do
13 submit to the Court that, you know, to the extent there's
14 any question about what the South Carolina Supreme Court
15 meant in Ahrens versus State, let's let the South Carolina
16 Supreme Court decide that. Thank you, Your Honor.

17 **THE COURT:** Thank you. One quick question before you
18 sit down. Is there a -- the only argument that the other
19 side is making is based on the takings clause? There's no
20 longer a due process argument, that was only the Federal
21 case?

22 **MS. CUNDARI:** Correct, yes.

23 **THE COURT:** Thank you. All right.

24 **MR. GRIFFIN:** Good afternoon, Your Honor. One thing
25 counsel didn't advise the Court is that they sought to have

1 this case also taken into the original jurisdiction of the
2 South Carolina Supreme Court after it was filed in this
3 court. The South Carolina Supreme Court refused to do so.
4 And it's also important to note that we did file the Hutto
5 case in Federal court because we are principally relying
6 upon the property right being derived from Federal law and
7 it is a takings case and that all of these issues that are
8 before the Court today on the merits of dismissing based on
9 res judicata, collateral estoppel, laches, the statute of
10 limitations and failing to identify the property right were
11 all raised at the district court in Hutto and the court did
12 not -- did not rule upon those and then the Fourth Circuit,
13 the Court of Appeals, in their decision they say that they
14 affirm the sovereign immunity dismissal by explaining that
15 because the plaintiffs can have their takings claims heard
16 in South Carolina state courts, the Eleventh Amendment does
17 not render the takings clause on empty promise.

18 Now the reason that the Fourth Circuit and the
19 district court threw us out in Federal Court is the
20 Eleventh Amendment, the Sovereign Immunity Doctrine, and
21 we did argue there that -- that the retirement systems are
22 not the arm of the state, and we lost that issue, but
23 that's the only issue that was litigated to a judgment.
24 Here the -- the retirement systems are arguing the same
25 issues that they previously argued, that these plaintiffs,

1 who undeniably were not part of the class -- either the
2 class of Ahrens or of Layman because they went to work
3 after the law was changed in -- July 1, 2005. So they're
4 not part of the class, they're separate and distinct, and
5 that -- and so that they are -- they're not the same
6 parties. I think we all agree with that.

7 The retirement systems argue that we're -- that these
8 plaintiffs are in privity with those plaintiffs, and I'll
9 address that -- the law on privity in a second, but it's
10 important to note what was litigated in Layman and Ahrens
11 is that when these TERI employees and working-retirees went
12 to work under this plan that was passed I think around 2000
13 that -- that they had -- that they retired, they went back
14 to work under certain conditions and then in 2005 those
15 conditions changed. The question was -- litigated in
16 Ahrens and Layman was the retroactive application of the
17 act that was passed in 2005, did that impair the property
18 right existing under state law by virtue of their
19 employment relationship with this state, and so that was
20 the subject matter of the litigation.

21 **THE COURT:** But here's -- here's something that trips
22 me up when I read the Layman case, and it's a quote from --
23 if you're looking at the South Carolina Reporter, starting
24 on Page 635 -- if you're in the South Eastern Second, it's
25 at 257, the Supreme Court says the new TERI program as

1 adopted by the legislature in Act 153 continues to be valid
2 and all those participants joining after July 1, 2005, are
3 subject to the entirety of the requirements outlined in the
4 new TERI program in Act 153. It is fully within the power
5 of the legislature to make changes to laws that affect
6 future participants.

7 **MR. GRIFFIN:** Sure. And the -- and so what Layman
8 did not do is strike down the statute going forward, but
9 it didn't foreclose, Your Honor, the ability of future
10 employees to challenge the conduct that -- that is
11 depriving them of their wages and depriving them of their
12 property interest and their retirement benefits.

13 **THE COURT:** But isn't it -- isn't the whole point, the
14 Supreme Court, as they consider it, they think this July 1,
15 2005 date is so important because some people unwittingly
16 have their money taken away? Here we have folks who went
17 in with their eyes wide open. The legislature had already
18 passed this law. These folks who retired and came back as
19 working-retirees knew exactly what was gonna happen with
20 their money and it was an option. It was an option. They
21 could come back to work for the State and this is how it
22 would work or they didn't need to. They -- I mean, they're
23 not forced into this situation.

24 **MR. GRIFFIN:** Well, and that's a factual issue that
25 frankly, Your Honor, is subject to litigation. It's not a

1 defense to say you can choose for us to violate the law as
2 a condition of your employment, you can choose or you can
3 go work somewhere else, and that is the issue here.

4 And we've set forth in our pleadings and in our brief
5 the relevant Internal Revenue Code provisions regarding
6 public pension funds, which this is one of them, and it
7 says that the money that you contribute is yours and yours
8 alone and cannot be used for any other purpose, and that is
9 the law.

10 Now -- now what Your Honor is suggesting, what we
11 think is -- can't be the law, is the State conditions your
12 employment taking this job by -- by acknowledging that you
13 don't have the rights of a United States citizen guaranteed
14 by the Internal Revenue Code provision or other Federal
15 laws. Meaning it's as if the State of South Carolina --

16 **THE COURT:** I never thought the Internal Revenue Code
17 gave me rights. That's interesting.

18 **MR. GRIFFIN:** Well, absolutely within the pension
19 funds it absolutely guarantees you rights to your
20 contributions because otherwise, and I've said this before
21 and it gets them upset, but if a private company were doing
22 this there would be an enforcement action, there would be
23 folks getting severely punished because you're taking the
24 employee retirement contribution. And think of it like
25 this, Your Honor. When I contribute to a retirement fund,

1 my wages are not taxed until I receive them later and so
2 what's happening here is that the State is taking wages
3 from the employee, putting them into this retirement fund.
4 Now these aren't State employees. These plaintiffs here
5 are employees from school districts around the state.
6 They don't work for the State, they work for the school
7 districts, they're retired teachers, and they're taking
8 their wages and they're putting them in this fund and what
9 the Internal Revenue Service says when regulating pension
10 funds is you can do that and we won't tax you as wages
11 until the employee takes them out and then at that point
12 they're taxed.

13 And so there's safeguards on the front end to protect
14 the government for their tax base and then on the back
15 end it protects the employee because everything in the
16 retirement fund -- and I'm citing the provisions here,
17 Your Honor. 401(a)(1) says employee contributions must be
18 for the purpose of distributing to such employees or their
19 beneficiaries the corpus and income of the fund accumulated
20 by the trust, so it gives them an interest of what they
21 contribute. 401(a)(2) says no part of the corpus or income
22 may be used for any purpose other than an exclusive benefit
23 of employees and their beneficiaries of their exclusive
24 benefit. Now that doesn't -- if that doesn't evidence an
25 intent that the employees have a property interest in what

1 goes in that fund --

2 **THE COURT:** Well, wasn't that true for the plaintiffs
3 in the Ahrens case, too?

4 **MR. GRIFFIN:** It was true for the plaintiffs in the
5 Ahrens case. It was not litigated.

6 **THE COURT:** And they all made constitutional arguments
7 there that were rejected?

8 **MR. GRIFFIN:** These arguments were not made in Ahrens.
9 The plaintiffs in this case were not plaintiffs in Ahrens
10 and for reasons I'm gonna show you they weren't in privity
11 to the plaintiffs in Ahrens. This issue has never been
12 addressed and these plaintiffs have a right to bring this
13 issue to court to be addressed on the merits and the
14 reason is they're different people, right, and they're in
15 different classes, so the classes are separate, and the
16 issue of privity, Your Honor, the -- and I have some
17 additional cases here that I'd like to hand up, but here's
18 the rule on privity. And this is the reason that -- that
19 no Federal court has bitten off on their offer to dismiss
20 on res judicata and collateral estoppel grounds, but
21 privity deals with a person's relationship to the subject
22 matter of the litigation, not the relationship between the
23 entities or parties. To be in privity, the party's legal
24 interest must have been litigated in a prior proceeding.
25 Having an interest in the same question or improving or

1 disproving the same set of facts does not establish
2 privity, nor is privity found when the litigating question
3 might affect the person's liability as judicial precedent.

4 And the case there is Carrigg v. Cannon. I'll hand
5 it up in a second, Your Honor. It's at 347 SC 75 and in
6 that case a sheriff was sued because his deputy was in an
7 accident. He sued under the Tort Claims Act. The deputy
8 went to court and pled guilty to reckless driving and what
9 the plaintiff had argued is that it was entitled to summary
10 judgment on liability because the deputy was acting in the
11 course and scope of his employment, therefore, he was in
12 privity with the sheriff and you have to sue the sheriff
13 under the Tort Claims Act and the Court of Appeals and
14 Supreme Court said no, they're not in privity.

15 Another case, Roberts v. Recovery Bureau, 316 SC 492,
16 and the court says one whose interest is almost identical
17 to that of a party but who does not claim through him is
18 not in privity with him. And these plaintiffs do not claim
19 through the plaintiffs in Ahrens or in Layman. They claim
20 -- and it's not like it's a situation, Your Honor, where
21 the -- where it's, you know, a personal representative of
22 the estate where that would be in privity or that someone's
23 in a trust relationship. I mean, these folks are standing
24 on their own and they have independent claims and they have
25 independent wrongs for what they've done.

1 Your Honor, I'm handing up the Carrigg v. Cannon
2 decision, it's a Court of Appeals of 2001, and the Roberts
3 v. Recovery decision of 1994, also from the Court of
4 Appeals.

5 **THE COURT:** Okay. Thank you.

6 **MR. GRIFFIN:** And so, Your Honor, as a matter of law
7 they are not in privity and they're not bound. Now the
8 Court may consider the precedential value of the Layman
9 decision and the Ahrens decision, but I would also point
10 out that this issue, this property right issue, was not
11 litigated in either one of those cases and has never been
12 addressed, and so we don't believe that the rulings out of
13 those two cases are --

14 **THE COURT:** There wasn't an argument made in either
15 of those cases that there was a constitutional taking?

16 **MR. GRIFFIN:** There was, but it was premised upon
17 this impairment of the contract right; that they had an
18 existing contractual relationship that gave them a property
19 interest under state law. This issue was not litigated.
20 And so you can -- you can find property interest that have
21 constitutional protections in state law. That's not what
22 this case is about. That's not -- and that's why we went
23 to Federal court and then they -- they asserted --

24 **THE COURT:** You didn't go to Federal court because our
25 Supreme Court had said what it said in Layman?

1 **MR. GRIFFIN:** No. I mean, we're here, but what we
2 believe is that our claims are principally Federal -- our
3 property rights are premised principally on Federal law.

4 **THE COURT:** And what about what Ms. Cundari said about
5 this Grimsley case, that they need to be rooted in state
6 law?

7 **MR. GRIFFIN:** Well, that is not the law. I mean,
8 that's one place where you can find a protected property
9 interest in state law. Your Honor, we cited the -- in our
10 brief, Your Honor, we cited the Social Security cases,
11 Matthews v. Eldridge, 424 US 319, and there are a number
12 of cases cited in that, including the Board of Regents v.
13 Roth where that involved welfare benefits under Federal
14 law, but Matthews v. Eldridge, which is on Page 13 of our
15 brief, and it says observing that decision, the U.S.
16 Supreme Court, that the interest of an individual in
17 continued receipt of Social Services benefits is a
18 statutorily created property interest protected by the
19 Fifth Amendment and here we have a Fifth Amendment claim
20 that's supplied to the states through the Fourteenth
21 Amendment, and so we -- and so we are deriving our property
22 interest in state and Federal law. It does not limit it to
23 state law.

24 And, Your Honor, you mentioned earlier about the
25 different concepts between collateral estoppel and res

1 judicata and collateral estoppel doesn't need to be the
2 same parties, that's an accurate statement of the law, but
3 not in this case. You can't bind someone under the --
4 under the Doctrine of Offensive Collateral Estoppel unless
5 that person was a party in a prior action. So collateral
6 estoppel doesn't have to have -- you can allocate parties,
7 but the party being estopped has to have been a party in a
8 prior action and so that's -- and we were not.

9 Now the question about has the statute of limitations
10 expired? Your Honor, what we have here is on-going
11 violations, on-going takings, and so even if the Court were
12 to conclude the statute is not tolled as a result of the
13 prior Federal litigation, which we think that does toll it,
14 but the remedy is not to bar their claims, it is to limit
15 their recovery going back whatever period of time the
16 statute of limitations is.

17 There's a number of cases in this area. The ones --
18 there's a case out this summer, the State ex. rel. Wilson
19 v. Ortho McNeil Janssen case, Your Honor, and that was an
20 unfair trade practice case and it was a big verdict out of
21 Spartanburg where the drug company was mislabeling drugs
22 and the State was paying them through Medicaid and what the
23 Supreme Court there ruled, and they recognized this concept
24 of continuous accrual of causes of action for on-going
25 conduct, and I'm going to hand that decision up. I will

1 tell Your Honor that the Court granted the motion for a
2 re-hearing in that case and I don't think it's either been
3 re-heard or the case has been settled since.

4 There's another case in there, which I'll hand up,
5 and these are -- and there are a number of cases that
6 involve states -- excuse me state agencies or governmental
7 entities under nuisance claims, but the one I'm handing
8 up, *Silvester v. Spring Valley Country Club*, and it says
9 when a business is continuing and the injury is abatable,
10 that they can stop it, the statute of limitations does not
11 run merely from the original intrusion, rather the statute
12 of limitations begins to run after each separate invasion.

13 And so what we do have, Your Honor, is on-going
14 conduct that we've challenged and so the statute of
15 limitations did not run on January 1 -- excuse me, July 1,
16 2005, because every day these employees are working,
17 every day money is taken from their paycheck and being
18 redistributed to other retirees within the program for
19 their benefit and they get no additional benefit whatsoever
20 from their wages, and so it's an on-going violation.
21 Every time they take money from them, the statute of
22 limitations accrues for that separate taking and because
23 it is abatable, I mean, they can stop it tomorrow if they
24 wish and they choose not to do so; so, therefore, the
25 statute of limitations does not run from July 1, 2005.

1 And so I'm handing up the Silvester v. Spring Valley
2 case, 344 SC 280. And then the Janssen case is a Westlaw
3 cite, Your Honor, 2015 WL 4112411.

4 **THE COURT:** Okay. Thank you.

5 **MR. GRIFFIN:** And I've highlighted the provisions of
6 those opinions that -- well, the Janssen case is like
7 thirty something pages, but what I've highlighted is
8 towards the rear. It's on Page 23 actually of the Janssen
9 case, which the court speaks to this issue of continuous
10 accrual.

11 **THE COURT:** Uh-huh.

12 **MR. GRIFFIN:** And I think I've highlighted the --
13 and, again, in that -- with regard to latches, Your Honor,
14 again, that's an affirmative defense. You can't make that
15 determination based upon the four corners of the pleadings.
16 They have to show there's a lack of diligence by the
17 plaintiffs in this case from asserting the claim and that
18 there's prejudice to the defendant and, again, that's a
19 factual inquiry.

20 Your Honor, I think I've spoken at length about the
21 -- about the -- where we find our property interest in
22 these -- in these contributions to a pension plan regulated
23 by the Internal Revenue Service, but also the Supreme Court
24 of the United States has recognized that -- that every man
25 has a property in his own person -- the labor of his body

1 and the work of his hands are the property of his and so
2 that -- and so there's a Federal common law of a man's
3 rights to the benefits of his labor and so what's happening
4 here is taking earned wages from folks who aren't state
5 employees; teachers, policemen for municipalities and
6 school districts, you're taking a part of their wages and
7 then the State is re-dis -- is taking it to shore up the
8 retirement fund for the benefit of folks who are no longer
9 contributing to the fund, folks who may contribute in the
10 future, but, I mean, it's a private taking and they do have
11 property interest in their wages.

12 And I understand the questions that Your Honor's
13 asked, but the fact of the matter is this issue has never
14 been squarely addressed by any of the courts of the state,
15 these plaintiffs aren't bound by earlier rules.

16 **THE COURT:** Let's talk about why this hasn't -- if it
17 hasn't been litigated, why it hasn't been litigated. Were
18 you the attorney in Layman and Ahrens?

19 **MR. GRIFFIN:** I was not. Mr. Harpootlian was and
20 Mr. Lewis was, but I personally was not.

21 **THE COURT:** Okay. So the same law firm. So we have
22 a situation where we have a class of folks who are suing on
23 this new statute and they argue both constitutionality and
24 contract. There's two grounds.

25 **MR. GRIFFIN:** Sure.

1 **THE COURT:** And they win with regard to the TERI
2 employees. I mean, we can say that that was a win and then
3 the working-retirees they did not win.

4 **MR. GRIFFIN:** Correct.

5 **THE COURT:** Okay. It was kind of a long road, a long
6 and winding road, but ultimately they did not win for that.
7 Now the same law firm representing the plaintiffs now have
8 a new argument that they'd like -- that they really wish
9 they would have made perhaps to the Supreme Court, but they
10 didn't make it, so how do they get it back before the court
11 and they try to carve out another class of employees, but
12 it seems to me like those employees were represented anyway
13 in the constitutional argument, although they might not
14 have been able to take advantage of the contract argument,
15 which is why we have the division anyway with the TERI
16 employees and the working-retirees. So knowing that as the
17 background, I'm having a hard time understanding why courts
18 would allow this piecemeal litigation years on down the
19 road to keep coming up with new theories when they could
20 have all been addressed in the first lawsuit.

21 **MR. GRIFFIN:** Well, if these plaintiffs in this case
22 had only hired me because I -- I was retained before --
23 before I merged with Lewis Babcock, right? Had they only
24 retained me and not -- as well as Mr. Harpootlian and
25 Mr. Lewis then, I mean, would we be making this argument?

1 Because the fact of the matter is these plaintiffs didn't
2 have a claim, most of them, at the time Layman and Ahrens
3 were litigated because they were still working as before
4 they had retired. They didn't have a claim.

5 **THE COURT:** Right. And the Supreme Court went ahead
6 and addressed not only what it meant for people who had
7 been hired prior to July 1, 2005, but they let everybody
8 know that this statute going forward did comply with the
9 constitution, that there were no problems, that the
10 legislature did what it was allowed to do for people going
11 forward who knew what the deal was, but it wasn't fair to
12 the folks who didn't know about this statute and who didn't
13 have some other working relationship with the State.

14 **MR. GRIFFIN:** And we say that's dicta. I mean, what
15 the Supreme Court was ruling was based upon what was before
16 them and it was this impairment contract.

17 **THE COURT:** And they hadn't thought about this
18 Internal Revenue Code.

19 **MR. GRIFFIN:** It clearly was not litigated, it
20 clearly was not presented to the court, it clearly was not
21 addressed, and was ruled upon. And these plaintiffs in
22 this case, frankly, were -- I don't think they were retired
23 at the time, so they didn't have an opportunity to raise
24 it and I wasn't involved in the case so I didn't have an
25 opportunity to say hey, guys, look out, you know, we've got

1 these Federal regulations that guarantee that when you put
2 money in a pension plan that it is yours and no one else's,
3 and that's what the case is about.

4 **THE COURT:** Okay. Thank you.

5 **MR. GRIFFIN:** Thank you.

6 **THE COURT:** Ms. Cundari.

7 **MS. CUNDARI:** Briefly, Your Honor, I just want to
8 point out a few things. In the Hutto case, Hutto One,
9 this exact argument was made. If you look at the Hutto
10 complaint, you see IRS provisions are cited in that
11 complaint. In fact, they actually filed a motion in that
12 case to get the United States of American to intervene in
13 the case and Judge Huff denied that motion and so that was
14 based on this idea that there's some sort of IRS violation
15 happening. What we said in that case and what we say again
16 today is that if they believe there's some sort of IRS
17 violation happening, they need to let the IRS know so that
18 the IRS can take a look at this. They don't have a private
19 right of action to go out and enforce the IRS code, there's
20 no cause of action in their complaint with regard to that,
21 and then if they're saying it's the source of their right,
22 you just have to read the statute, and I don't read the
23 statute to say anything about the terms and conditions of
24 the employment for working-retirees. It's just a plain
25 language reading of the code. It says nothing about

1 whether you can require someone who has come back to work
2 after retirement to contribute to the system.

3 You know, under their theory, this -- this is a --
4 this argument that making people contribute to the system
5 is a taking, I mean, that's -- the whole foundation of the
6 system requires and depends upon employee contributions and
7 the General Assembly actually has a constitutional duty to
8 prescribe member employee contributions. And so that's
9 what -- that's what happened here in Act 153 and so to
10 suggest that that is somehow illegal and that people are
11 protected from doing that, then the system could never be
12 funded by employee contributions under their theory.

13 A couple of other things. They've mentioned that
14 this money is coming into the system and then is being
15 diverted to other people, and that's just simply not true.
16 And I recognize that we could possibly be getting outside
17 the pleadings, but actually we're not because on their
18 complaint attached as Exhibit C they show a form that
19 people sign upon their return to work and that form states
20 that the contributions will be credited to the individuals'
21 accounts and upon their death any remaining contributions
22 that have not been exhausted through benefit payments will
23 be paid to my beneficiary. So there is no taking. The
24 money is in their account, it is accounted for. They
25 either get it through their pension payments or they get it

1 as a death benefit. And that's the -- that's an exhibit
2 to their complaint and so that is proper for the Court to
3 consider if the Court goes that far.

4 **THE COURT:** What about their argument that the
5 statute of limitations was tolled while the Federal case
6 was pending?

7 **MS. CUNDARI:** That's the first time I've heard that
8 argument. I don't -- as I understand it, that case is on
9 appeal and I haven't had a chance to read that case. I
10 would like to look at it and see if that applies in this
11 case. You know, I just don't know if that -- if it's based
12 on a nuisance, then presumably there's a compounding damage
13 that's happening and every day is a new day. I don't know
14 if the same would apply here. Some of these people may
15 not even be working anymore as far as we know. So, again,
16 I'd need to read that case that they've handed up to the
17 Court. But either way, I mean, you know, this statute has
18 been passed ten years ago and if it's not under the statute
19 of limitations, then certainly under the Doctrine of
20 Latches the State has depended on and has people in these
21 positions making these contributions and to say now after
22 the case has been up to the South Carolina Supreme Court
23 multiple times that this is somehow now a new day and all
24 the money has to be taken back up, that's incredibly
25 prejudicial for them to have waited ten years to make that

1 claim and so under the Doctrine of Latches, you know, I
2 would submit the case is barred.

3 The other thing I wanted to mention is that the class
4 in Layman was decertified and the argument was not a part
5 of the class. It was decertification because the South
6 Carolina Supreme Court said that the law's going to apply
7 the same no matter what. You don't need a class to decide
8 who the law is going to apply to. It's going to apply to
9 all the working-retirees regardless of whether they're in
10 the class. The court decertified the class in that case.
11 There was a certification of a class in Ahrens and the
12 trial court -- the Supreme Court didn't address the issue.

13 **THE COURT:** Okay.

14 **MS. CUNDARI:** Finally, I wanted to mention in their
15 petition for re-hearing I believe Mr. Griffin said
16 something about the argument in Layman and Ahrens was
17 based on a contract -- a contract as the property interest
18 and in the petition for re-hearing they actually argued
19 the opposite and that petition is attached as Exhibit J to
20 our motion. They say that the Supreme Court on Page 5 of
21 their petition misapprehended the law when it found that
22 the old working-retirees taking the claim depended on the
23 existence of a contract. They just claimed that they had
24 a vested property interest and so they're making the same
25 argument that they're making here. They may not be citing

1 to the IRS code as far as their rights, but they're making
2 the same argument and the Supreme Court denied that
3 petition.

4 **THE COURT:** Okay.

5 **MS. CUNDARI:** If Your Honor has no further questions,
6 that's all that we have. Again, I submit that the Court
7 should dismiss this case and to the extent there's any
8 question about what the Supreme Court meant, we can find
9 out.

10 **THE COURT:** Okay. All right. Thank you. Anything
11 you'd like to say in response to that, Mr. Griffin?

12 **MR. GRIFFIN:** Just briefly, Your Honor. The question
13 of if an employee receives a benefit because their next of
14 kin perhaps gets their contribution, that's -- I mean, that
15 is a factual question, frankly, but -- A. B, I don't see
16 that as a benefit of a living, breathing United States
17 citizen who can only get a benefit once they're dead. I
18 mean, that's -- that's their argument on the -- on the
19 property interest we have; is that your property interest
20 is only good when you die, and so we disagree with that
21 proposition.

22 And the issue of -- on the motion for reconsideration
23 or re-hearing really proves our point, you know, what the
24 Supreme Court said when they denied it, no, no, you know,
25 your claims are premised upon property based upon contract

1 and we're not gonna go beyond that at this point, and they
2 didn't, and so that -- thank you.

3 **THE COURT:** Thank you.

4 All right. Prior to this hearing, I received memos
5 from both sides with numerous exhibits, which I reviewed
6 as well as this entire file. I did carefully read the
7 prior decisions in Layman and Ahrens, as well as the
8 Fourth Circuit's decision in the Hutto case, and I'm
9 prepared to rule on this matter from the bench.

10 I find that the Motion to Dismiss is granted. I
11 find that the constitutionality of the statute has
12 already been decided by the South Carolina Supreme
13 Court and the plaintiffs in this case are bound by that
14 decision. I grant the motion specifically on the grounds
15 of res judicata and collateral estoppel. I also find as
16 a separate ground the failure to state a claim as there's
17 no protected privacy interest. The retirees voluntarily
18 returned knowing that this legislative scheme existed and
19 voluntarily gave their property and this is not a State
20 taking.

21 And Ms. Cundari, I would ask that you please prepare
22 the order.

23 **MS. CUNDARI:** Yes, Your Honor.

24 **THE COURT:** About how long do you think it will take
25 to prepare the order? And give yourself enough time. I

1 just want to be able to kind of tickle myself to make sure
2 that -- if we don't get it soon, we'll keep reminding you.

3 **MS. CUNDARI:** Two weeks.

4 **THE COURT:** Okay. And, Emily, if you'll just note
5 that. And if you'll send it to Mr. Griffin first, of
6 course, so he can get a chance to look at it and then send
7 it to me and my law clerk.

8 **MS. CUNDARI:** Okay.

9 **THE COURT:** Thank you very much.

10 **MR. GRIFFIN:** Thank you.

11 (Proceedings were concluded at 3:02 PM.)
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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 28th day of September, 2015.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

November 30, 2015

Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

Chris Kenney

From: Tina Cundari <tcundari@sowellgray.com>
Sent: Tuesday, October 27, 2015 1:51 PM
To: tgee@sccourts.org
Cc: tgeelc@sccourts.org; James M. Griffin; Chris Kenney; Bobby Stepp; Roland Franklin; Valerie Hampton
Subject: Hutto et al. v. S.C Retirement Sys. et al., Case No. 2015-CP-40-1728
Attachments: Proposed Order (A0810215xA08D7).docx

Dear Judge Gee,

Attached is a proposed order granting the defendants' motion to dismiss in the above-referenced case. Please let me know if you would like to receive a hard copy by U.S. mail.

As you instructed, I shared a draft of the order with the plaintiffs' counsel before sending the order to you. Plaintiffs' counsel, who are copied on this email, object to the factual and legal conclusions in the proposed order and object to the inclusion of a ruling on the statute of limitation and laches defenses.

When you stated your ruling from the bench, you did not specifically mention the statute of limitations or the doctrine of laches. As you may recall, the plaintiffs' counsel handed up two cases at the hearing about those defenses. You asked me about the plaintiffs' position, and I said I did not know how to respond because I had not read the cases. Having now read the cases and done further research, I have written the order to grant relief on those grounds. When I sent the proposed order to plaintiffs' counsel, I acknowledged that you did not specifically mention the SOL and laches defenses from the bench and stated that I had written the order to grant relief on those grounds.

Please let me know if you need anything else at this time.

Thank you.

Tina Cundari



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	IN THE FIFTH JUDICIAL CIRCUIT
	)	
Gail M. Hutto, Debra J. Andrews,	)	Civil Action No.: 2015-CP-40-1728
Elizabeth W. Hodge, Margaret B.	)	
Lineberger, Lynn R. Rogers, Nancy G.	)	
Sullivan, Jane P. Terwilliger, Julian W.	)	
Walls, and all others similarly situated,	)	
	)	
Plaintiffs,	)	ORDER
v.	)	
	)	
South Carolina Retirement System,	)	
Police Officers Retirement System,	)	
South Carolina Retirement Systems Group	)	
Trust, South Carolina Budget and Control	)	
Board, and South Carolina Public	)	
Employee Benefit Authority,	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on a motion to dismiss filed by Defendants pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. A hearing was conducted on September 28, 2015. James M. Griffin of Lewis Babcock & Griffin, LLP, and Christopher P. Kenney of Richard A. Harpootlian, P.A., appeared on behalf of Plaintiffs. Tina Cundari and Roland Franklin of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of Defendants. Stephen R. Van Camp, General Counsel for the South Carolina Public Employee Benefit Authority, was also present. After considering the motion, memoranda, oral presentations of counsel, matters of public record, and applicable law, the Court grants the motion to dismiss.

FACTS

This case challenges the constitutionality of two state statutes, Sections 9-1-1790(C) and 9-11-90(4)(c), requiring retired members of the state retirement systems who are re-employed in

positions covered by the retirement system to make the same contributions to the system that a non-retired employee occupying that same position would make. Plaintiffs contend the statutes violate the Takings Clause of the Fifth Amendment of the United States Constitution.

The statutes have been the subject of litigation in this state since 2005, the year they were enacted. Effective July 1, 2005, the statutes were enacted as part of the State Retirement Systems Preservation and Investment Reform Act (Act 153). (Compl. ¶ 28.) Just days before the statutes went into effect, a group of plaintiffs represented by the same counsel as Plaintiffs in this case filed a class action alleging that Act 153 was unlawful in several respects, including that it violated the Takings Clause of the state and federal constitutions. *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006). The plaintiffs in *Layman* were people who retired and returned to work before July 1, 2005, some of whom participated in the Teacher and Employee Retention Incentive (TERI) program. The South Carolina Supreme Court decided the case in its original jurisdiction.

The supreme court held that Act 153 breached a contract between the State and the TERI participants who retired and returned to work before July 1, 2005. *Id.* at 644, 630 S.E.2d at 272. In doing so, the supreme court stated: "The new TERI program as adopted by the legislature in Act 153 continues to be valid and all those participants joining after July 1, 2005, are subject to the entirety of the requirements outlining the new TERI program in Act 153. It is fully within the power of the legislature to make changes to laws that affect future participants" *Id.* The supreme court further stated: "[O]ur holding today does not hamper the legislature's ability to govern. The new TERI program will continue in its current form and all participants in the new TERI program, enacted via Act 153, will be subject to the terms of that statute." *Id.* at 641, 630 S.E.2d at 270.

As to the remaining, non-TERI working retirees, the supreme court held that the statutes governing the working retirees did not contain the same contractually significant language as the statutes in the TERI program. *Id.* at 643, 630 S.E.2d at 271. Accordingly, the supreme court did not grant any relief to those plaintiffs and instead remanded only the breach of contract claim because the Court found that the record contained evidence that some of the working retirees may have had written contracts detailing the terms of their employment. *Id.* The Court did not remand the constitutional claims, nor did the Court grant relief to the remaining plaintiffs on any other basis. Therefore, following *Layman*, the statutes remained in full force and effect, and the State was permitted to continue collecting contributions from working retirees.

On remand, the working retirees filed amended complaints alleging multiple causes of action, including that the statutes violated the Takings Clause of the state and federal constitutions.¹ Following discovery, the parties filed cross-motions for summary judgment addressing all causes of action. After a hearing, the trial court granted relief to the working retirees on the ground of equitable estoppel. The defendants moved for reconsideration, arguing that the trial court erred in granting relief and failing to dispose of all the issues in the case, including the

¹ Although this Court must generally limit itself to the facts alleged on the face of a complaint in considering a motion to dismiss, the Court may take judicial notice of matters of public record in considering a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (holding a court can “consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular . . . matters of which a court may take judicial notice”); *Sec’y of State for Defence v. Tremble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (“In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record.”); *State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955) (noting that court may take judicial notice of public records). Here, the parties provided the Court with pleadings, motions, memoranda, and orders filed in prior cases, all of which were matters of public record, and all of which the Court is permitted to consider in deciding the motion to dismiss. Additionally, the Court is guided by the doctrine of *stare decisis*, which “enjoys particular efficacy in the context of challenges concerning construction of statutes and determination of legislative intent.” *Wehle v. S.C. Retirement Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005).

allegation that the statutes are unconstitutional. After a hearing, the trial court issued an order declining to alter or amend the judgment on the equitable estoppel ground, but amending the order to expressly deny relief on all other grounds. The working retirees moved for reconsideration, but the motion was denied.

Both parties appealed the issues they lost at the trial court level, and after briefing and oral argument, the supreme court reversed the trial court on the equitable estoppel ground and affirmed the granting of summary judgment on the constitutional and remaining grounds. *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). In reaching its decision, the supreme court found that the statutory scheme governing the employment of working retirees is “void of [an] express guarantee that retirement contributions would not be required.” *Id.* at 352, 709 S.E.2d at 60. The supreme court further stated: “Because there is no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retiree statutes as providing a mere option to retirees, rather than an offer.” *Id.* Accordingly, the supreme court found that the statutes were valid and enforceable in every respect, and the State was not required to return the contributions received from the working retirees. *Id.* at 357, 709 S.E.2d at 63.

In addition to finding that the working retirees did not have a contractual or equitable basis for relief, the supreme court unanimously affirmed the trial court’s order granting summary judgment in favor of the defendants on the constitutional grounds. *Id.* at 357, 709 S.E.2d at 63. The opinion twice recites that the supreme court was affirming the grant of summary judgment on the constitutional issues. The first time, the Court explained that the plaintiffs’ claims of unconstitutional taking and violations of due process were “founded on the presumption that a contractual right has been unfairly taken away,” and because the plaintiffs “did not have a

contractual right to the terms of their employment,” the Court affirmed the granting of summary judgment on those issues. *Id.* The second time, the Court stated: “[W]e conclude that summary judgment was proper as to the constitutional issues raised by Retirees because those issues are premised on the existence of a contract.” *Id.* at 358, 709 S.E.2d at 63.

The plaintiffs petitioned for rehearing, arguing that the cause of action for unconstitutional taking was valid regardless of the existence of a contract and that the plaintiffs had “vested rights or entitlements that are constitutionally protected against a taking.” The supreme court denied the petition.

On August 2, 2010, while the *Ahrens* case was pending on appeal, Plaintiffs filed a class action in federal district court alleging that the statutes requiring them to contribute to the retirement system violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. *Hutto v. S.C. Ret. Sys.*, Case No. 4:10-cv-02018-JMC (D.S.C.). The defendants moved to dismiss the complaint on multiple grounds, including res judicata, collateral estoppel, sovereign immunity, and lack of a protected property interest. The district court dismissed the complaint on the ground of sovereign immunity, and the Fourth Circuit affirmed. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536 (4th Cir. 2014).

After losing the federal court case, Plaintiffs filed the present case. Like the federal court case, this is a putative class action seeking an order declaring that the statutes requiring working retirees to contribute to the retirement system are unconstitutional in violation of the Takings Clause of the Fifth Amendment.² (Compl. ¶¶ 47 - 54.) Plaintiffs have sued several of the same

² In this case, Plaintiffs do not allege that the statutes violate the Due Process Clause of the Fourteenth Amendment.

defendants³ that they sued in the federal court case, and seek the same relief as they did in the federal court case, which is the return of all contributions made to the retirement system since July 1, 2005.⁴

LEGAL STANDARD

A defendant may move to dismiss a complaint for “failure to state facts sufficient to constitute a cause of action.” Rule 12(b)(6), SCRPC. “Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.” *Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). “The Court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case.” *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014).

Dismissal may be appropriate when a case presents only questions of law and there are no factual issues requiring further development. *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001). *See also Madison v. Am. Home Prods. Corp.*, 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004) (“Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss.”); *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001)

³ In the federal court case, Plaintiffs sued a number of individual defendants, including the governor, the state treasurer, the state comptroller general, the chair of the South Carolina Senate Finance Committee, the chair of the House Ways and Means Committee, and the executive director of the Budget and Control Board, all in their official capacities.

⁴ Plaintiffs presumably do not seek the return of contributions that they made before they retired.

(same). A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to “any relief on any theory of the case.” *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Court concludes that this case is barred by the doctrines of res judicata and collateral estoppel.

The Court concludes as a matter of law that this case is barred by the doctrine of res judicata and collateral estoppel. The Court finds that this is the fourth time that Plaintiffs or their privies have sued Defendants or their privies over whether the statutes requiring working retirees to contribute to the retirement systems are constitutional. The Court finds that the South Carolina Supreme Court and a South Carolina trial court have decided the issue presented in this case. Accordingly, the Court grants Defendants’ motion to dismiss the complaint on the grounds of res judicata and collateral estoppel.

Res Judicata

“Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies.” *Plum Creek Dev. Corp. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (quoting J. Flanagan, *South Carolina Civil Procedure* p. 642 (1996)). “Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues.” *Id.*

“Res judicata’s fundamental purpose is to ensure that no one should be twice sued for the same cause of action.” *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (internal quotation marks omitted). “Under the doctrine of res judicata, ‘[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues *which might have been*

raised in the former suit." *Plum Creek Dev. Corp.*, 334 S.C. at 34, 512 S.E.2d at 109 (emphasis added).

The following elements must be shown in order to establish res judicata: "(1) The parties must be the same or their privies; (2) the subject matter must be the same; (3) while generally the precise point must be ruled [upon], yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but *what might have been decided.*" *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (quoting *Bagwell v. Hinton*, 205 S.C. 377, 32 S.E.2d 147 (1944) (emphasis added)). "It is apodictic that the doctrine of res judicata has been elongated to include 'privies.'" *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997). *See also First Nat. Bank v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 35 S.E.2d 47 (1945) (applying res judicata to the parties and their privies); *H.G. Hall Constr. Co., Inc. v. J.E.P. Enters.*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1984) (same).

"There is no bright line test which can be applied to determine whether one is in privity with another." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). "The term 'privity', when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *Id.* "One in privity is one whose legal interests were litigated in the former proceeding." *Id.* "'Privity' as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." *Id.*

Further, "[a] dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication." *Nunnery*, 289 S.C. at 209, 345 S.E.2d at 743. "Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject

matter, so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein.” *Id.* (internal quotations omitted). “For a judgment to bar the maintenance of a subsequent action, there must be identity of the cause of action as well as identify of the subject matter.” *Id.*

Here, the Court finds that all three elements of res judicata have been satisfied. First, the parties in this case are identical to or in privity with the parties in the other three cases. This is the fourth time that Plaintiffs or their privies have sued Defendants or their privies regarding the constitutionality of these statutes. The first time was in the *Layman* case filed in 2005. The second time was on remand in the *Ahrens* case. The third time was in the *Hutto* case filed in federal court. The Court finds that in these prior cases, Plaintiffs or their privies sued Defendants or their privies over whether statutes requiring working retirees to contribute to the retirement systems are constitutional. The parties in the prior cases are identically situated to the subject matter of this case. The statutes requiring working retirees to contribute to the retirement system affect all the parties in the same way. Likewise, the Defendants in this case are either the same as or in privity with the defendants in the other cases. All Defendants are required to follow the law as enacted by the General Assembly.

Plaintiffs contend that they are not the same people as the plaintiffs in *Layman* and *Ahrens* and therefore those prior cases are not binding. Although the Court acknowledges that the plaintiffs in *Layman* and *Ahrens* are not the same people as the plaintiffs in this case, the Court finds that the plaintiffs in this case are in privity with the plaintiffs in those cases. The plaintiffs in all three cases are identically situated in relationship to the statutes. The statutes affect all the plaintiffs in the same way. The Court finds that the only difference between the plaintiffs in *Layman* and *Ahrens* and the plaintiffs in this case is that the plaintiffs in *Layman* and *Ahrens* retired

and returned to work before July 1, 2005, and some enrolled in the TERI program. These differences are not legally significant for purposes of determining whether the statutes are constitutional. The statutes make no distinction between people who retired and returned to work before July 1, 2005. Whether someone retired and returned to work before the statutes were enacted makes no difference for purposes of analyzing whether the statutes are constitutional. This is particularly so given that Plaintiffs are attacking the constitutionality of the statutes on their face.

Second, the Court finds that the subject matter of all four cases is the same. In each of the prior cases, the plaintiffs alleged that statutes requiring working retirees to contribute to the retirement system violated the Takings Clause of the Fifth Amendment of the state and federal constitutions. Plaintiffs are making the same allegation here. They allege that Sections 9-1-1790(C) and 9-11-90(4)(c) violate the Takings Clause of the Fifth Amendment of the United States Constitution. This same issue has been raised and litigated in the prior cases.

Third, the Court finds that the issue raised in this case was either decided or might have been decided in the prior cases. In *Layman*, the issue regarding the constitutionality of statutes requiring working retirees to contribute to the retirement system was squarely before the Court, and although the Court did not address the issue, the Court might have done so given that the issue was raised and litigated. In *Ahrens*, the issue was litigated once again, and the issue was expressly decided by the trial court and affirmed by the appellate court. In *Hutto*, the issue was litigated once again, and although the district court dismissed the complaint based on sovereign immunity and the Fourth Circuit affirmed, the federal courts might have decided the issue of whether the statutes are constitutional given that the issue was raised and argued in the district court and again on appeal.

Finally, contrary to what Plaintiffs argue, the Fourth Circuit did not authorize the present case to be filed. In analyzing whether the Fifth Amendment trumps the Eleventh Amendment, the Fourth Circuit concluded that “[b]ecause the plaintiffs can have their takings claim heard in South Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise.” *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014). The Court finds that this statement was part of the Fourth Circuit’s analysis of whether the Fifth Amendment trumped the Eleventh Amendment and was not a directive authorizing the present case to be filed irrespective of any defenses that may be raised by the defendants. The Fourth Circuit recognized that because South Carolina state courts remain open to takings claims, Plaintiffs could have initiated the present case in state court. Instead, Plaintiffs chose to initiate this case in federal court, where the District Court dismissed this case with prejudice and the Fourth Circuit affirmed the dismissal.

In sum, the Court concludes that this case represents precisely what res judicata was designed to prevent—a defendant being sued multiple times for the same cause of action. Plaintiffs have had their day in court, both through the federal court case and through their privies in *Layman* and *Ahrens*. Defendants should not have to continue defending the same statutes on the same grounds, particularly when the South Carolina Supreme Court and a South Carolina trial court have determined that the statutes are constitutional.

Collateral Estoppel

“Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.” *State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014) (quoting *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009)). “The party asserting collateral estoppel must demonstrate that the issue in the

present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Id.* “While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue.” *Hewins*, 409 S.C. at 106, 760 S.E.2d at 821 (quotations and citation omitted).

Accordingly, “[u]nder the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim.” *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986).

The policy reasons for collateral estoppel are similar to those of res judicata. “The public interest demands an end to the litigation of the same issue.” *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 252, 481 S.E.2d 706, 708 (1997). “Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation.” *Id.*

Here, the Court concludes that this case is barred by the doctrine of collateral estoppel. First, as explained above, the issue presented in this case has been actually litigated numerous times. It was litigated in the *Layman* case, the *Ahrens* case, and the federal counterpart of this case. At every stage of the litigation, Plaintiffs or their privies argued that the statutes were unconstitutional, and at every stage of the litigation, the request for relief was denied.

Second, the Court finds that the issue in this case was directly decided in *Ahrens*. The trial court granted summary judgment in favor of the defendants on the constitutional grounds and

denied the plaintiffs' motion to reconsider. On appeal, the supreme court unanimously affirmed summary judgment in favor of the defendants' on the constitutional grounds and denied the plaintiffs' petition for rehearing.

Third, the Court finds that a ruling on the issue was necessary to support the judgment in *Ahrens*. The parties in *Ahrens* filed cross-motions for summary judgment addressing all causes of action in the complaint. In ruling on the motions, it was necessary for the trial court to address each cause of action so that no argument was left open on appeal. On appeal, it was necessary for the supreme court to address all rulings made by the trial court, again so that there was no question regarding the validity of the statutes. Further, the Court finds that the supreme court would not have denied relief to the working retirees and at the same time left open the issue of whether the statutes were constitutional. By denying relief to the plaintiffs in *Ahrens*, the supreme court made it clear that the statutes were valid and enforceable in every respect, even as to working retirees who retired and returned to work before the statutes went into effect.

Because the issue presented in this case has been raised, litigated, and decided time and again, the Court concludes that the case is barred by the doctrine of collateral estoppel.

2. The Court concludes that Plaintiffs do not have a protected property interest.

In addition to concluding that this case is barred by the doctrines of res judicata and collateral estoppel, the Court concludes that the complaint fails to state a claim because Plaintiffs do not have a protected property interest entitled to constitutional protection.

"The Takings Clause provides that private property shall not be taken for public use without just compensation." *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 283, 721 S.E.2d 423, 427 (2012). Parties claiming a violation of the Takings Clause must "first show they have a legitimate property interest." *Id.* at 283-84, 721 S.E.2d at 427. "Property interests 'are

created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims or entitlement to those benefits.” *Id.* at 284, 721 S.E.2d at 427.

Here, the Court finds that Plaintiffs have failed to identify any legitimate property interest rooted in state law. There is no statute or case law protecting Plaintiffs from having to contribute to the retirement system as working retirees. Not only does no such authority exist, the South Carolina Supreme Court expressly determined in *Ahrens* that working retirees did not have a constitutionally protected property interest. In *Ahrens*, the plaintiffs argued that they had “vested rights or entitlements that are constitutionally protected against a taking,” irrespective of the existence of a contract. But the supreme court rejected this argument by affirming summary judgment on the constitutional grounds and denying the petition for rehearing. Additionally, the supreme court found that the statutory scheme governing the employment of working retirees is “void of [an] express guarantee that retirement contributions would not be required.” *Id.* at 352, 709 S.E.2d at 351.

Plaintiffs argue that the source of their property interest can be found in the Internal Revenue Code, and specifically 26 U.S.C. § 401(a), which states that “contributions to a tax qualified trust must be non-forfeitable and cannot be diverted for purposes other than the exclusive use of the employee and his or her beneficiaries.” (Compl. ¶¶ 41-42.) The Court concludes that the IRS Code does not provide the source for Plaintiffs’ right. First, the language in the Code does not say anything about whether it is permissible for the State to require working retirees to contribute to the retirement system as a term and condition of employment. The language cited in the IRS Code relates to how funds are used once they are contributed and not with the contribution of the funds in the first instance. Second, the IRS Code does not provide the necessary state law

source of Plaintiffs' right. See *Grimsley*, 396 S.C. at 283-84, 721 S.E.2d at 427 (requiring parties that allege a violation of the takings clause to show they have a legitimate property interest rooted in state law).

Plaintiffs also contend that they have a constitutionally protected property interest in their wages. But the Court finds that this case is not about wages. It is about the terms and conditions of employment. The terms and conditions of employment are a matter of state statutory law, and Plaintiffs are on notice of those terms and conditions prior to returning to work. Further, as the supreme court noted in *Ahrens*, "[b]ecause there was no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retirees statutes as providing a mere option to retirees, rather than an offer." 392 S.C. at 352, 709 S.E.2d at 60. The Court finds that with no guarantee of being rehired, working retirees do not have any right to any term or condition of their employment.

Accordingly, because Plaintiffs do not have a protected property interest rooted in state law, the Court concludes that Plaintiffs cannot state a claim for relief.

3. The Court concludes that Plaintiffs' claims are time barred.

Finally, the Court concludes that Plaintiffs' claims are barred by the statute of limitations and the doctrine of laches.

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Anonymous Taxpayer v. S.C. Dept. of Revenue*, 377 S.C. 425, 438, 661 S.E.2d 73, 80 (2008). "A constitutional claim can become time-barred just as any other claim can." *Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983). Under South Carolina law, "an action for taking, detaining, or injuring any goods or chattels including an action for the specific

recovery of personal property” must be brought within three years of the alleged taking. S.C. Code Ann. § 15-3-530(4) (2005). Similarly, an action brought upon a liability created by statute must be brought within three years. S.C. Code Ann. § 15-3-530(2). “The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist.” *Anonymous Taxpayer*, 377 S.C. at 439, 661 S.E.2d at 80.

Additionally, the equitable doctrine of laches bars an action when there has been “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Robinson v. Estate of Harris*, 388 S.C. 645, 656, 698 S.E.2d 229, 236 (2010). “Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights.” *Id.* at 656-57, 698 S.E.2d at 236. “The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice.” *Id.* at 657, 698 S.E.2d at 236.

Here, the Court finds and concludes that the cause of action for unconstitutional is time barred. Plaintiffs have been on notice since at least July 1, 2005, when the statutes were enacted, that they would have to contribute to the retirement system upon their return to work post-retirement. *See Ahrens v. State*, 392 S.C. at 355, 709 S.E.2d at 62 (recognizing “the well-established rule that citizens are presumed to know the law and are charged with using care to protect their interests”). A case filed on March 20, 2015, challenging the constitutionality of these statutes on their face is late. Plaintiffs had three years from the date the statutes were enacted to file the present case. Plaintiffs’ failure to do so bars the present case.

Even assuming that Plaintiffs did not have standing to bring a claim until they actually retired and returned to work, Plaintiffs should have brought this case within three years of the date they returned to work. Although the complaint does not allege when Plaintiffs retired and returned to work, Plaintiffs presumably retired and returned to work before August 2, 2010, when they filed this same case in federal court. A complaint filed on March 20, 2015, nearly five years later, is late.

Moreover, under the doctrine of laches, ten years is an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Plaintiffs knew or should have known since at least July 1, 2005, that they had a claim. Rather than act diligently, Plaintiffs waited almost ten years to file the present case. The prejudice to Defendants as a result of this delay is obvious. Plaintiffs and other working retirees have been permitted to occupy positions covered by the state retirement system with the understanding that a percentage of their salary would be contributed to the retirement system, when those positions could have been filled by non-retired members for all these years. Defendants have relied upon the receipt of contributions from all employees in covered positions and not just non-retired employees.

At the hearing, Plaintiffs argued that the constitutional violation is continuing and that each time funds are contributed to the retirement system, a new limitations period begins. The Court disagrees. The Court finds that a similar argument was made in *Anonymous Taxpayer* and was rejected by the Supreme Court. In that case, the supreme court held that the defendant's failure to impose a pre-Act 189 tax exemption to retirement benefits each year did not amount to a continuing breach because the plaintiff was put on notice that he had a cause of action when Act 189 was passed. *Anonymous Taxpayer*, 377 S.C. at 439-40, 661 S.E.2d at 80.

The same reasoning applies here, where Plaintiffs challenge the constitutionality of the statutes on their face. (Mem. in Opp'n to Mot. to Dismiss 18, n.1) (stating "whereas Plaintiffs in this case are challenging the facial validity of the statutory provisions in question (rather than the manner of their application)") Because Plaintiffs challenge the constitutionality of the statutes on their face, the cause of action for unconstitutional taking accrued the date the statutes were enacted. In other words, the alleged constitutional injury occurred at the time the statutes became the law of this State. Accordingly, Plaintiffs should have filed the present case within three years of July 1, 2005. The Court finds and concludes that a cause of action filed nearly ten years later is late.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Dismiss is hereby granted.

IT IS SO ORDERED.

Columbia, South Carolina

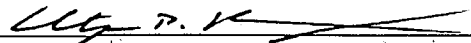
Tanya A. Gee
Presiding Judge

_____, 2015

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,


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