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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

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.

BRIEF OF APPELLANTS

Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

James M. Griffin (SC Bar No. 9995)
Margaret N. Fox (SC Bar No. 76228)
GRIFFIN DAVIS
1116 Blanding Street
Columbia, South Carolina 29201
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

ATTORNEYS FOR THE APPELLANTS

May 3, 2016
Columbia, South Carolina.

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II. Whether there is a protected property right in earned wages, or whether all protected property interests arise exclusively as a matter of state statutory law?

III. Whether the affirmative defenses of statute of limitations and laches can be grounds for dismissal based on assumptions unsupported by a factual record?

IV. Whether the mandate that earned wages be seized and deposited into a state pension plan to fund the cost of other people's retirement is an unconstitutional redistribution of private property that violates the takings clause?

STATEMENT OF THE CASE

This is an appeal from the Circuit Court's November 2, 2015 Order granting Respondents' motion to dismiss for failure to state a claim.

Appellants filed this action on March 19, 2015, seeking declaratory and injunctive relief. On April 23, 2015, Respondents moved the Circuit Court for dismissal and petitioned this Court for original jurisdiction. The petition was opposed and denied.

On September 28, 2015, the Honorable Tanya A. Gee, Circuit Court Judge, held a hearing on Respondents' motion. After hearing argument, Judge Gee granted Respondents' motion. On November 2, 2015, the Circuit Court entered the Order at issue here. The undersigned received notice of the order on November 9, 2015.

Ten days later, Appellants moved for reconsideration. That motion was denied in an order dated December 7, 2015.

Appellants filed a timely notice of appeal on January 6, 2016, and served Respondents that same day. This Court has jurisdiction pursuant to South Carolina Code § 14-8-200(b)(3) and Rule 203 of the South Carolina Appellate Court Rules.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants are the employees of school districts and counties who earned retirement pensions through years of financial contributions, retired, began collecting their pensions, and later returned to work as "Working Retirees." These teachers and civil servants are asking this Court to return wages seized from them by operation of an unconstitutional state law. This law—the State Retirement System Preservation and Investment Reform Act, Act No. 153, 2005 S.C. Acts 1697 (Act 153)—mandates that their employers deduct earned wages from their paychecks and deposit them into the State's pension trust to fund the cost of other people's retirement benefits. Act 153 reduces the funding obligations of future retirees and their employers. This taking benefits everyone but Appellants and the class of hundreds of other teachers, civil servants, police officers, and firefighters who receive *nothing* in return—no increase in pension benefits, no additional service credit.

Working Retirees seek a declaration that South Carolina Code §§ 9-1-1790(C) and 9-11-90(4)(c) unconstitutionally redistribute their property to private individuals in violation of the Fifth Amendment to the United States Constitution and injunctive relief ordering the return of their wages.

The Retirement Systems' statutory tax-exempt pension trust scheme

Respondents South Carolina Retirement System (SCRS) and Police Officers Retirement System (PORS) (collectively the "Retirement Systems") are multi-employer, defined-benefit pension plans with the powers and privileges of corporations. S.C. Code Ann. §§ 9-1-10 et seq. (SCRS) & 9-11-10 et seq. (PORS) (1986 & Supp. 2015). SCRS was created by statute to provide retirement benefits to the employees of public school districts, counties, municipalities, and the State of South Carolina. Id. §§ 9-1-10(14) & 9-1-20.

Likewise, PORS is a statutorily-created retirement system created for the benefit of state and local law enforcement and firefighters. Id. §§ 9-11-20 & 9-11-48. Upon retirement, a vested beneficiary of the Retirement Systems receives a defined pension benefit calculated by multiplying the employee's years of service by her average final compensation by either 1.82 (SCRS) or 2.14 (PORS) percent. R. pp. 45, 58-59, 72 & 80.

This benefit is funded through mandatory contributions by employees and employers. S.C. Code Ann. §§ 9-1-1020, 9-1-1050, 9-1-1085, 9-11-210, 9-11-220 & 9-11-225 (1986 & Supp. 2015). Employers must deduct employee contributions from each paycheck and transfer the funds to the Retirement Systems. Id. § 9-1-1160(A) (Supp. 2015). Contribution rates are actuarially determined. See id. § 9-1-1060 (1986). Employer contributions are calculated as a percentage of the employee's gross earnings and are also transmitted to the Retirement Systems. R. p. 118; see also S.C. Code Ann. §§ 9-1-1050 & 9-1-1170 (Supp. 2015) (mandating contributions). Participation in the Retirement Systems is mandatory for the employees of covered employers. R. pp. 45, 47, 72 & 75.

The State is just one of over 600 participating SCRS and PORS employers.

Contributed funds are held in trust by the South Carolina Retirement Systems' Group Trust (Trust). S.C. Code Ann. § 9-16-20 (Supp. 2015). The Trust holds SCRS and PORS funds, as well as the funds of three other statutorily-created pension plans not at issue in this case.[1] Id. These five retirement plans are created and governed by the "Retirement Systems Act" codified in Title 9 of the South Carolina Code, as amended. The South Carolina Public Employee Benefit Authority (PEBA) and the State Fiscal

[1] The Trust also holds funds for the Retirement System for Judges and Solicitors, the Retirement System for Members of the General Assembly, and the National Guard Retirement System. S.C. Code Ann. § 9-16-10(8) (Supp. 2015).

Accountability Authority (Authority)[2] are co-trustees of the Retirement Systems. S.C. Code Ann. § 9-1-1310 (Supp. 2015). The PEBA and Authority (collectively "Trustees") are the fiduciaries charged with administering the Trust, while another entity, the Retirement System Investment Commission (Commission), is charged with investing Trust assets.[3] Id.

The Retirement Systems were established as tax-deferred pension benefit plans authorized by the Internal Revenue Code (IRC). See 26 U.S.C. § 401(a). The Retirement System Act mandates that the Trustees "hold the assets of the retirement systems in a group trust under Section 401(a)(24) of the [IRC] that meets the requirements of [Treasury] Revenue Ruling 81-100, 1981-1 C.B. 326, as amended by Revenue Ruling 2004-67." S.C. Code Ann. § 9-16-20(C) (Supp. 2015). Section 401(a) authorizes the creation of pension trusts that exempt trust contributions from the calculation of a taxpayer's taxable gross income. 26 U.S.C. §§ 401(a), 402 & 501(a). By exempting trust contributions from a taxpayer's gross income calculation, the IRC defers taxation of this income until the taxpayer begins collecting her pension. Id. This allows the corpus of the trust to grow tax-exempt during the taxpayer's high-tax earning years at considerable benefit to the taxpayer.

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[2] Created through the enactment of the South Carolina Restructuring Act, Act No. 121, 2014 S.C. Acts 1739, eff. July 1, 2015, the State Fiscal Accountability Authority (Authority) is a successor entity to the South Carolina Budget and Control Board (B&CB), which previously served as co-trustee. The Authority's members are the Governor, State Treasurer, Comptroller General, Chair of the House Ways and Means Committee, and Chair of the Senate Finance Committee, all serving *ex officio*. S.C. Code Ann. § 11-55-10 (Supp. 2015). The PEBA is governed by an 11-member board of non-state officers appointed by the members of the Authority. S.C. Code Ann. § 9-4-10 (Supp. 2015). Prior to 2012, the B&CB was the Retirement Systems' sole trustee.

[3] The Commission's members include the State Treasurer, serving *ex officio*, five individuals appointed by the remaining Authority members, and the executive director of the PEBA, serving *ex officio* without voting power. S.C. Code Ann. § 9-16-315 (Supp. 2015).

This tax benefit is permitted only if the funds are held in a "qualified" § 401(a) trust. This means that the trust fund must be held for the "exclusive benefit" of the employee and that "it [must be] impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be [...] used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries." 26 U.S.C. § 401(a)(2) (emphasis added). A qualified trust must also observe some minimally-proscribed vesting threshold, after which an employee's pension benefit becomes non-forfeitable. Id. §§ 401(a)(7) & 411. Furthermore, the trust must provide "that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the plan." Id. § 401(a)(8). These provisions protect employee funds and ensure equal tax treatment for similarly situated taxpayers.

The SCRS and the PORS purport to be qualified § 401(a) trust plans. An employee becomes a vested member of the SCRS or the PORS after earning five years' worth of service credit. S.C. Code Ann. §§ 9-1-1510 (SCRS) & 9-11-60 (PORS); see also R. pp. 58 & 80. Service credit is earned through regular payroll deductions deposited into the Retirement Systems. Id. §§ 9-1-10(7) & (9); R. pp. 47-48 & 76.

Adoption of Act 153

From 1969 until July 1, 2005, the Retirement System Act allowed vested retirees to begin collecting their pension and then return to covered employment without having to make further contributions to the Retirement Systems.[4] On July 1, 2005, Act 153 took

[4] In 2001, the General Assembly enacted the Teacher and Employee Retention Incentive (TERI) Program, creating two ways whereby a retiree could return to covered employment. See Layman v. State, 368 S.C. 631, 634, 630 S.E.2d 265, 267 (2006). While there were

effect. Act 153 changed the Retirement Systems by mandating that participating employers take a portion of a working retiree's wages and deposit them in the Retirement Systems without compensating them for this loss.

Specifically, Act 153 requires a retiree who begins collecting her pension and returns to covered employment to make contributions to the Retirement Systems "as if the member were an active contributing member[.]" S.C. Code Ann. §§ 9-1-1790(C) (Supp. 2015) (SCRS) and 9-11-90(4)(c) (Supp. 2015) (PORS). The working retiree "does not accrue additional service credit in the system" for these contributions. Id. As the Retirement Systems' handbooks explain, a working retiree must "contribute a tax-deferred 6.5 percent of their gross pay into their retirement account. Working retirees will not earn additional service credit or receive interest on their account." R. pp. 67 & 84; see also R. pp. 118-19, 162, 195-96 & 200.

In 2012, the General Assembly adopted an employee contribution rate schedule that increased the contribution mandate from the then-current 6.5 percent of an employee's gross earnings up to 8.0 percent by spreading the increase over three fiscal years. See Act No. 278, 2012 S.C. Acts 2278, Pt. I, § 4 (codified at S.C. Code Ann. §§ 9-1-1085 & 9-11-225 (Supp. 2015)).

Appellants' federal action (Hutto I & II)

Appellants and the proposed class are vested beneficiaries of SCRS and PORS who retired, began collecting their pension, and then returned to covered employment *after* Act 153 took effect on July 1, 2005 (referred to herein as "Working Retirees").

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differences in how these retirees received benefits after returning to work, neither the "old TERI participants" or the "old working retirees" were required to make any additional contributions to the SCRS or the PORS after returning to work.

Working Retirees originally filed this action on August 2, 2010, in the United States District Court for the District of South Carolina claiming Act 153 is a deprivation of private property without just compensation prohibited by the Fifth and Fourteenth Amendments. See Hutto v. S. Carolina Ret. Sys., 4:10-cv-02018-JMC (D.S.C) (Dkt. No. 1) (R. pp. 433-52). Working Retirees argued that this constitutional prohibition is made clearer by the federal statutory protections afforded to IRC § 401(a) pension plan trust participants whose retirement contributions may not be forfeited, used, or diverted for any purpose other than the exclusive benefit of the employee. See R. pp. 446-47.

Respondents[5] moved to dismiss the federal action claiming (1) Appellants failed to state a cognizable claim for unconstitutional deprivation of their property and (2) that the Eleventh Amendment renders Respondents immune from suit in federal court. See Defs.' Mot. Dismiss, Hutto, 4:10-cv-02018-JMC (Dkt. No. 11). The District Court dismissed the federal action based upon the Eleventh Amendment sovereign immunity defense without addressing the merits of Appellants' constitutional claims. Hutto v. S. Carolina Ret. Sys., 899 F. Supp. 2d 457, 465 (D.S.C. 2012) (Hutto I).

Appellants sought review by the United States Court of Appeals for the Fourth Circuit arguing, the Eleventh Amendment notwithstanding, sovereign immunity never bars a constitutional takings claim. Hutto v. S. Carolina Ret. Sys., 773 F.3d 536, 551 (4th Cir. Dec. 5, 2014) (Hutto II). The Fourth Circuit affirmed the sovereign immunity dismissal, explaining that "[b]ecause the plaintiffs can have their takings claims heard in South

[5] In addition to Respondents, Appellants also joined the members of the B&CB and the PEBA executive director, all in their official capacity, pursuant to the doctrine in Ex parte Young, 209 U.S. 123 (1908). For reasons made clear below, there was no reason to join these individuals here.

Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise." Id. at 552-53. Seeking to make good on that promise, Appellants re-filed this federal takings claim in the Richland County Court of Common Pleas.

Appellants' federal takings claim

The Fifth and Fourteenth Amendments to the United States Constitution protect private property from unreasonable and arbitrary government deprivation, U.S. Const. amend. V & XIV, including deprivations designed to redistribute private property from one individual to another private individual. See, e.g., Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.").

Working Retirees are vested, retired members of either SCRS or PORS who, on or after July 1, 2005, were rehired by covered employers and have been forced to make contributions to the Retirement System. R. pp. 28-32. Working Retirees seek here what they have sought from the beginning of this litigation: a declaration that Act 153's contribution scheme violates the takings clause and an injunction compelling the State's public pension trust fund to return their property. R. pp. 38-39.

Prior, unrelated pension trust litigation in Layman and Ahrens

In 2001, the General Assembly established laws enabling public employees who retired to return to work for covered employers without having to make further contributions to the Retirement Systems. Layman v. State, 368 S.C. 631, 635, 630 S.E.2d 265, 267 (2006). At that time, there were two separate avenues for participating as a retiree who had returned to covered employment—under the TERI program or as a working

retiree. There were differences in how these retirees received their benefits after returning to work; however, in both programs they were *not* required to make contributions to the Retirement Systems. The employees under these programs are frequently referred to as "old TERI participants" and "old working retirees" because they returned to work *prior* to July 1, 2005.

In 2005, the General Assembly changed the rules by passing Act 153, requiring the old TERI participants and old working retirees to begin making contributions to the Retirement Systems on or after July 1, 2005. In response, Nancy Layman and Nancy Ahrens, as class representatives of the old TERI and old working retiree participants who returned to work *prior* to July 1, 2005, brought suit challenging the law in this Court's original jurisdiction asserting claims for breach of contract, estoppel, takings, and due process. Layman, 368 S.C. at 635-37, 630 S.E.2d at 267-68.

Layman successfully argued that prior laws created legally binding contracts that were violated by the new contribution mandate. Id. at 644-45, 630 S.E.2d at 272 ("because we find that the old TERI statute created a binding contract, we do not address the remaining issues."). However, the Court did not find the same statute-based contract for the old working retirees (id. at 643, 630 S.E.2d at 271 ("we hold that the old working retiree statute does not create a binding contract between the State and the old working retirees...")), and remanded "the issue of breach of contract as to the old working retirees to the trial court for a case by case factual determination of whether any actions of the State

with regard to individual old working retirees constituted a breach of contract."[6] Id. at 643, 630 S.E.2d at 271-72.

On remand, Nancy Ahrens became the lead plaintiff for the old working retirees and the case was restyled Ahrens v. State. Back on appeal, and with an evidentiary record, this Court rejected the argument that certain signed forms "created binding contracts" between the State and the old working retirees. Ahrens v. State, 392 S.C. 340, 350, 709 S.E.2d 54, 59 (2011); see also id. at 351, 709 S.E.2d at 59 (explaining even the forms were contractual, "we do not believe that the Retirement Systems had the authority to create contracts without the statutory directive of the legislature."). Based on its contract holding, the Court also rejected old working retirees' estoppel theory. See id. at 352-57; 709 S.E.2d at 60-63.

None of the Layman or Ahrens plaintiffs, representatives or class members, are parties to the current case as they all returned to work *prior* to July 1, 2005 and raised claims challenging Act 153's change to an existing contract (or quasi-contract). Working Retirees here (Appellants and the proposed class) all returned to work *on or after* July 1, 2005. This claim seeks no support from any allegation that the State is liable for changing position. This is a takings claim—pure and simple.

The Circuit Court decision

Respondents' motion to dismiss raised five theories in support of dismissal: (1) *res judicata* and collateral estoppel, (2) laches, (3) statute of limitations, (4) exhaustion of administrative remedies, and (5) failure to state a claim. See R. pp. 201-06. Respondents'

[6] The Court never addressed old working retirees' estoppel, takings, or due process claims. See id.

Rule 12(b)(6) theory argued this takings claim is un-cognizable because, in the Retirement Systems' view, Working Retirees "do not have a property interest worthy of constitutional protection[.]" R. p. 208.

After hearing oral argument, Judge Gee ruled in Respondents' favor on *two* of the five grounds raised in their motion:

> The Court: All right. Prior to this hearing, I received memos from both sides with numerous exhibits, which I reviewed as well as this entire file. I did carefully read the prior decisions in Layman and Ahrens, as well as the Fourth Circuit's decision in the Hutto case, and I'm prepared to rule on this matter from the bench.
>
> I find that the Motion to Dismiss is granted. I find that the constitutionality of the statute has already been decided by the South Carolina Supreme Court and the plaintiffs in this case are bound by that decision. I grant the motion specifically on the grounds of *res judicata* and collateral estoppel. I also find as a separate ground the failure to state a claim as there's no protected privacy[7] interest. The retirees voluntarily returned knowing that this legislative scheme existed and voluntarily gave their property and this is not a State taking.
>
> And Ms. Cundari, I would ask that you please prepare the Order.
>
> Ms. Cundari: Yes, Your Honor.

R. pp. 623, lns. 4-22. Judge Gee instructed Respondents' counsel to send the proposed order to the undersigned prior to submitting it to the Court. R. p. 624, lns. 4-7.

On October 27, 2015, Respondents' counsel submitted a proposed order that, contrary to the Circuit Court's instruction, entered rulings in their favor on statute of

[7] It appears either Judge Gee misspoke or there is a scrivener's error in the transcript as the Court no doubt meant *property* interest, not privacy interest.

limitations and laches in addition to two reasons cited by Judge Gee on the record. R. pp. 626-44) (noting Appellants' objection and attempting to justify the inclusion of the alternate holdings). The Circuit Court signed Respondents' proposed order as submitted.

Appellants' motion for reconsideration was denied and this appeal followed.

ARGUMENT

This is the *fourth* court to be asked whether the Fifth Amendment condones a state law mandating the redistribution of private property designed to shift the cost of other people's retirement onto Working Retirees. No court has ever ruled on this question. Without reaching the merits of this dispute, the Fourth Circuit held that "the Eleventh Amendment bars Fifth Amendment taking claims against States *in federal court* when the *State's court* remain open to adjudicate such claims." Hutto v. S. Carolina Ret. Sys., 773 F.3d 536, 552 (4th Cir. 2014) (emphasis original) (Hutto II). This case asks whether this State's courts are truly "open" to such a claim.

The court below adopted a laundry list of collateral theories to justify dismissal on grounds other than a decision on the federal question presented. Initially, the Circuit Court held this action was barred by *res judicata* and collateral estoppel and that Working Retirees have no property interest in earned wages; but it subsequently endorsed the "supplemental" holdings contained in the Retirement System's proposed order, namely laches and statute of limitations. For the reasons discussed below, each of these decisions is flawed and should be reversed.

Finally, the Retirement Systems complain there should be finality to this dispute. See R. p. 208. Working Retirees agree, but finality should come as a result of a decision squarely addressing the merits of the claim raised. The Retirement Systems prevailed in its effort to convince the federal courts that this *federal* claim should be heard in state court. Disposition of this action on anything short of the merits would constitute a bait-and-switch that might raise serious questions as to the availability of federal relief in this State's forums. Cf. Reich v. Collins, 513 U.S. 106, 111 (1994). Working Retirees respectfully

request the Court reach this issue and hold Act 153 is a taking the Constitution cannot condone.

I. The *res judicata* doctrines of claim and issue preclusion pose no bar to Working Retirees who have never been heard on this claim and who are mutually exclusive to any prior pension fund litigants.

The doctrine of *res judicata* bars re-litigation of prior matters by discerning what effect, if any, a valid judgment should have on a subsequent proceeding. See James F. Flanagan, South Carolina Civil Procedure 664 (3d Ed. 2010). Generally, the doctrine requires "proof that: (1) the earlier judgment was final, valid, and on the merits; (2) the parties in the subsequent action must be the same as in the earlier action; (3) the second action must involve matters properly included in the first action." Id. (citing Latimer v. Farmer, 360 S.C. 375, 602 S.E.2d 32 (2004)) (footnote omitted). While these elements are a "starting point" for any preclusion analysis, proper application of the doctrine requires particular focus on which of its two forms is being applied. See id.

The modern trend is to recognize *res judicata* in two forms: claim preclusion and issue preclusion. Flanagan, 664. Although the term "*res judicata*" encompasses both claim preclusion and issue preclusion, it is commonly understood to refer to claim preclusion, while issue preclusion is also known as collateral estoppel. Catawba Indian Nation v. State, 407 S.C. 526, 537, 756 S.E.2d 900, 906 (2014). For the sake of simplicity here, Appellants will refer to the two forms using their modern monikers of claim and issue preclusion wherever possible.

"Claim preclusion bars *plaintiffs* from pursuing a later suit where the claim (1) was litigated or (2) could have been litigated." Id. (emphasis added) (citing Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1997)). Simply put, claim preclusion

prevents a litigant from sandbagging and harassing an adversary by raising only some theories of relief in the hopes of pursuing the proverbial "second bite" should the first litigation fail. As such, a claim preclusion argument typically turns on whether a subsequent claim could have or should have been litigated in the first action. See Flanagan, 671. For example, in Plum Creek Development Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999), claim preclusion barred a developer from seeking money damages in a second action when it could have joined that claim to an earlier petition for mandamus concerning the same contract and easement. Id. at 35, 512 S.E.2d at 109. In discerning whether the claim was encompassed by a prior action, this Court's recent precedent looks to whether the precluded claim arises from the same transaction or occurrence—a test mirroring the joinder rules mandating when a claim must be raised. See, e.g., id. at 34, 512 S.E.2d at 109 (claim preclusion bars "subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties."); Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (same); Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997) ("claim preclusion turns on whether a counterclaim is permissive or compulsory."); cf. Rule 13, SCRCP.

Issue preclusion, on the other hand, precludes a party from re-litigating an issue decided in a prior action. Catawba Indian Nation, 407 S.C. at 536-37, 756 S.E.2d at 906. This Court has long followed § 27 of the Restatement (Second) of Judgments' view "that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different

claim." Id. (citing S.C. Prop. & Cas. Ins. Guaranty Ass'n v. Wal–Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991)). "Stated another way, 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. (internal quotations and brackets omitted).

The Circuit Court concluded this action is barred by both doctrines as a result of the Layman and/or Ahrens decisions. R. pp. 9-15.

A. Claim preclusion cannot be applied to different parties raising a novel claim.

The Circuit Court held claim preclusion applied based on the finding that "all three elements of res judicata have been satisfied." R. p. 11. It defined these elements explaining:

> 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).

R. p. 10 (bracket original). Based on this framework, the Circuit Court found privity between Working Retirees and litigants in three other cases based on the following finding:

> 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 system are constitutional. *The parties in the prior cases are identically situated to the subject matter of this case.*

R. p. 11 (emphasis added). In other words, the Circuit Court's reasoning turns on the assertion that (1) Working Retirees are identical to the Layman/Ahrens litigants, (2) Working Retirees are in privity with the Arhens/Layman litigants, and (3) Working Retirees are identical to the Hutto litigants. The Court's first and second contention are simply not accurate, while the third is correct, but merely illustrates why claim preclusion is inapplicable.

1. Working Retirees could not have raised the claims here because they were never part of the Layman and Ahrens litigations.

Claim preclusion bars claims a party *should have* but failed to raise and, as such, only applies to litigants who actually asserted those claims. Thus, where a landowner split his claims for partition and waste arising from the same land dispute into two different lawsuits, the subsequent claim was barred. See Judy, 393 S.C. at 173, 712 S.E.2d at 415. Likewise, a developer's claim for money damages was barred on account of its failure to join it to a prior mandamus petition. Plum Creek Development, 334 S.C. at 35, 512 S.E.2d at 109. Those litigants had their day in court, chose which arguments to raise, and were bound by the outcomes in those cases.

Unlike those cases where claim preclusion barred a claim, Working Retirees never sought their day in court before the Hutto litigation was filed, were never part of any proposed class but this one, and have never had the merits of this claim raised or decided. To understand why, the Court need only look to the class definition here to see that Working Retirees were expressly *excluded* from Layman and Ahrens. Here, Appellants all "returned to work on or after July 1, 2005...." R. pp. 28-30. Likewise, the proposed class is defined as:

> All retired members of the South Carolina Retirement System and the Police Officers Retirement System, *who returned to covered employment with the South Carolina Retirement Systems on or after July 1, 2005*, and who are required to contribute a portion of their gross earnings to either the South Carolina Retirement System or the Police Officers Retirement System without receiving any additional service credit or interest on their retirement accounts.

R. pp. 31-32 (emphasis added). In contrast, the circuit court in Ahrens explained that members of that class were limited to individuals returning to work prior to July 1, 2005.

> This case centers on the State's "old working retiree program" which includes members of the South Carolina Retirement System (SCRS) and the Police Officers Retirement System (PORS). The "old working retiree program" allowed eligible employees to retire and return to work and, inter alia, no longer be required to pay retirement contributions. The core issue here is whether or not the State is required to continue the provision which permits *those employees who retired and returned to work before July 1, 2005* to make no additional retirement contributions.

R. pp. 487-88 (emphasis added, footnotes omitted). Simply put, the Hutto class and the Ahrens and Layman classes are mutually exclusive. In order to avail itself of the claim preclusion doctrine, the Retirement Systems were required to prove Working Retirees could have brought this claim in Layman or Ahrens. At the motions hearing, Judge Gee appears to have understood this based on questions posed to the Retirement Systems' counsel. R. p. 599, lns. 18-22 ("If I were to disagree with you about whether these are the same parties with regard to res judicata, would that matter with regard to collateral estoppel? With collateral estoppel you don't need the same parties, right?"). Nevertheless, Judge Gee's Order concludes otherwise and that conclusion is incorrect.

2. The Circuit Court's notion of privity stretches it beyond what due process allows.

Generally, parties are bound by a judgment and non-parties are not, because "[t]o hold otherwise deprives non-parties of due process and an opportunity to be heard."

Flanagan, 681. A non-party can be bound to a judgment only when in "privity" to a bound party, a relationship this Court described as "one so identified in interest with another that he represents the same legal right." Richburg v. Baughman, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). For example, successive owners of the same property may be held in privity, as have lessor and lessee, heir and ancestor, executor and testator, and assignor and assignee. See Flanagan, 681-82 (citing, e.g., Smith v. Smith, 55 S.C. 507, 33 S.E. 583 (1899), Bailey v. United States Fid. & Guar. Co., 185 S.C. 169, 193 S.E. 683 (1937), Columbia Nat'l Bank v. Arthur, 154 S.C. 147, 151 S.E. 274 (1930)).

The Circuit Court believed Working Retirees were in privity with the Layman and Ahrens litigants because §§ 9-1-1790(C) and 9-11-90(4)(c) "affect all the parties the same way[,]" and because "[t]he plaintiffs in all three cases are identically situated in relationship to the statutes." R. p. 11. This reasoning is flawed. Simply put, the Circuit Court failed to appreciate that parties are only in privity with one another when the subsequent litigant stands in the shoes of the earlier litigants. As one leading commentator explains, "[i]n these situations the subsequent claimant's rights rise only to the level held by the predecessor in interest." Flanagan, 682. Put differently still, "[o]ne in privity is one whose legal interests were litigated in the former proceeding." Richburg, 290 S.C. at 434, 351 S.E.2d at 166. Conversely, "[o]ne whose interest is almost identical with that of a party, *but who does not claim through him*, is not in privity with him." Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994) (emphasis added) (citing 50 C.J.S. Judgments § 788 at 327 (1947)).

Privity does not arise merely through shared interest in a legal or factual dispute. Id. Nor could it as "[d]ue process prohibits estopping some litigants who never had a chance

to present their evidence and arguments on a claim," even when a prior decision stands squarely against the subsequent litigant's position. Id. (citing Richburg, 351 S.E.2d at 166). These due process concerns are heightened here where the decision below proposes to bar thousands of absent class members' claims. See Salmonsen v. CGD, Inc., 377 S.C. 442, 457-558, 661 S.E.2d 81, 89-90 (2008) (discussing the due process rights of absent class members and the circuit court's power to protect those rights). Such a result bypasses traditional due process protections designed to protect absent class members like a class notice requirement and an opportunity to "opt out" of class litigation *before* a court enters a binding decree. See id. (rejecting an opt-in procedure based on concerns it denied class members a jury trial); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection."); Rule 23, SCRCP (outlining procedural requirements).

3. Hutto I and Hutto II merely held Working Retirees had to pursue their takings claim in state court.

While the Circuit Court was correct that Appellants are the same litigants as the Hutto plaintiffs, this observation does not support the conclusion that preclusion is warranted. In Hutto I and Hutto II there was no judgement on the merits. The federal courts merely held as a matter of federalism that Working Retirees were required to bring their Fifth Amendment claim in state court in the first instance. The Circuit Court failed to appreciate this and even criticized Working Retirees for seeking to have their federal claim heard in federal court. The Circuit Court found "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." R. p. 13 (emphasis added). This is not true. Neither federal

court dismissed this claim "with prejudice." To the contrary, the District Court's opinion held:

> Having found that Defendants are immune from suit, the court determines that it lacks the requisite subject matter jurisdiction to address the merits of Plaintiffs' claims. Accordingly, the court GRANTS Defendants' Supplemental Motion to Dismiss [Dkt. No. 32] pursuant to Federal Rule of Civil Procedure 12(b)(1) *and declines to address the remaining issues raised in the motion.*

Hutto I, 899 F. Supp. 2d at 475-76 (emphasis added). In fact, the Circuit Court's decision is incongruous with Judge Gee's own observations during the motion hearing in which she, accurately, observed that in Hutto I, "the district court didn't even touch the constitutional issues and just said this is a state question, right?" R. p. 597, lns. 7-9. This sort of incongruity warrants correction.

4. This federal takings claim was never raised or decided in Ahrens and Layman.

Without explanation, the Circuit Court found "the subject matter of all four cases is the same." R. p. 12. In the Circuit Court's view,

> 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.

R. pp. 12. This is inaccurate and inconsistent with the unambiguous explanation this Court gave to the Ahrens and Layman claims.

The claims in Ahrens and Layman were all predicated on the central premise that Act 153 could not change an *existing* employment relationship with *current* employee

participants in the old TERI and old working retiree programs. In Layman, the Court described the litigants and claims as follows:

> Petitioners (old TERI program participants and old working retiree participants) *who retired before July 1, 2005* under the old TERI program or pursuant to the old working retiree statute brought this action against the State of South Carolina and South Carolina Retirement System (Respondents or the State), alleging breach of contract. In addition, the old TERI program participants and old working retiree participants argue the State should be estopped from *retroactively* applying new legislation to Petitioners. Finally, the old TERI program participants and old working retiree participants claim violations of the Takings and Due Process Clauses of the State and Federal Constitutions.

Layman, 630 S.E.2d at 267 (emphasis added). Likewise, in Ahrens, the Court described the litigants and claims, explaining:

> the Retirees' chief contention is that it is unlawful for the State *to change the terms of the old working retiree program after the Retirees irreversibly retired*, and with the understanding that contributions to the Retirement Systems would not be required.

Ahrens, 709 S.E.2d at 57 (emphasis added).

This is equally clear from the litigants' claims themselves—breach of contract, estoppel, takings, and due process claims—which all turned on the *retroactive* impact of Act 153 on the employment bargain the Ahrens and Layman litigants believed they were entitled to continue under as old TERI/old working retirees. In Ahrens, the Court credited this argument; in Layman, it did not. But in either case, this Court's decision was limited to contract and estoppel holdings addressing the change-in-employment-terms claims raised. In Layman, the Court held "the language in the old TERI statute demonstrates, in unambiguous terms, the intent of the legislature to bind itself to the terms in the statute," and therefore, "[w]hen the State, through Act 153, sought to collect retirement contributions from the old TERI participants, it was in clear breach of the contract it created

by the relevant statutes." Layman, 630 S.E.2d at 269; see also Ahrens, 709 S.E.2d at 57 (quoting Layman as such). Because the TERI litigants and the old working retiree litigants relied on different statutes as the contractual basis for their claim, the Layman Court remanded "the old working retiree participants' breach of contract claim to the trial court[.]" Layman, 630 S.E.2d at 267.

On remand in Ahrens, the trial court entered judgment for the old working retirees under an equitable estoppel contract theory. Ahrens, 709 S.E.2d at 56. This Court reversed, reasoning that, unlike the TERI statute, the statutes allowing the old working retirees to return to work did not create a binding contract or entitle them to relief under an equitable alternative. Id. at 59-63. The Court also rejected the constitutional claims explaining that the old working retirees'

> [c]laims of unconstitutional taking, violation of due process, and impairment of contract *are founded on the presumption that a contractual right has been unfairly taken away*. Because we find that the Retirees did not have a contractual right to the terms of their employment, *we find it unnecessary to address these constitutional issues*.

Id. at 63 (emphasis added).

In holding these claims to be "the same" as those raised in Ahrens and Layman, the circuit court overlooked the fact that those claims asked something fundamentally different than the question presented here. Those claims challenged a change in a pre-existing employment relationship. Working Retirees here could never raise these claims as they all retired and returned to work after Act 153 took effect.

B. The takings claim at issue here has never been raised, decided, or presented by these litigants such that issue preclusion is permitted.

The Circuit Court found this claim barred by the issue preclusion doctrine for the same reasons offered in support of its claim preclusion holding. See R. pp. 14-15. As discussed, these conclusions are flawed.[8] The reasoning employed below also overlooks a threshold prerequisite to the offensive use of issue preclusion.

Finally, unlike claim preclusion, issue preclusion does not require the party seeking preclusive effect to have participated in the prior litigation; however, the party to be estopped must have had a full and fair opportunity to litigate the issue.

> Some litigants-those who never appeared in a prior action-may not be collaterally estopped without litigating the issue. They never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Richburg, 290 S.C. at 434-35, 351 S.E.2d at 166 (citing, *intra alia*, Hansberry v. Lee, 311 U.S. 32, 40 (1940)); Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971). Since Working Retirees have had no such opportunity, collateral estoppel does not apply.

C. Two federal courts have already rejected these arguments.

Finally, the exact same preclusion arguments adopted by the Circuit Court were presented to two federal courts and rejected in both instances in favor of a ruling on the Retirement System's Eleventh Amendment argument. See Hutto II, 773 F.3d at 542-49;

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[8] For example, the Circuit Court continues to misconstrue the record when it contends that "the issue in this case was directly decided in Ahrens[,]" and that "a ruling on the issue was necessary to support the judgment in Ahrens." R. pp. 15. As shown above, this is not accurate. See § I.A.4, supra.

Hutto I, 899 F. Supp. 2d at 466-75. Had either federal court ascribed any merit to these arguments, Hutto I and Hutto II would have been dismissed on those state law grounds, because the constitutional avoidance doctrine required the federal courts to avoid the constitutional question 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 a decision on state law grounds when possible to avoid unnecessary constitutional conflicts). In other words, the fact that it was necessary for the federal courts to reach the constitutional question is strong evidence they believed that crediting the Retirement System's *res judicata* and collateral estoppel arguments results in a denial of due process.

II. Working Retirees have a substantive property interest in earned wages that can be vindicated through a takings claim.

The taking at issue here is a taking of wages, earned through labor, without compensation for the use of those funds. To be sure, the right to contract for wages is both an individual liberty and a personal property right. 16A C.J.S. Constitutional Law § 829 (West 2016). Once earned, those wages are entitled to the Fifth Amendment's substantive and procedural protections.

For example, in Sniadach v. Family Finance Corporation of Bay View, 395 U.S. 337 (1969), the Court held that a state's prejudgment garnishment procedure failed to comport with due process. Notably, there was no question whether the prejudgment debtor had a property interest in wages; "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process." Id. at 342 (parenthetical citation omitted). More recently, this Court cited Justice Harlan's concurrence in Sniadach with approval to explain that "[t]he property of which petitioner

has been deprived is the use of the garnished *portion* of her wages[.]" Grimsley v. S. Carolina Law Enf't Div., 396 S.C. 276, 284-85, 721 S.E.2d 423, 428 (2012) (emphasis original, brackets supplied) (quoting Sniadach, 395 U.S. at 342).

This conclusion is no surprise, as recognition of a property interest in one's own labor is so fundamental to our notion of ordered liberty it predates the republic itself. In Washlefske v. Winston, 234 F.3d 179 (4th Cir. 2000), the Fourth Circuit quoted Enlightenment philosopher John Locke to explain:

> [E]very man has a property in his own person.... The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.

Id. at 187, n.2 (quoting John Locke, The Second Treatise of Government ¶ 27 (1690)). This property right—the right to enjoy the proceeds of one's own labor—has been a recurring fixture in American jurisprudence. Washlefske, 234 F.3d at 184 ("[P]rivate citizens ordinarily have a constitutionally protected property interest in the wages earned from their labor under employment contracts...."); Orloff v. Cleland, 708 F.2d 372, 378 (9th Cir. 1983) ("It is obvious that [the plaintiff] had a property interest in his salary."); Morford v. Bellanca Aircraft Corp., 45 Del. 129, 135, 67 A.2d 542, 545 (Del. Super. 1949) (employee could not be denied right to sue for his former wage).[9]

[9] See also Reid v. Smith, 375 Ill. 147, 153, 30 N.E.2d 908, 911-12 (1940) ("The right to contract is both a liberty and a property right under the constitution."), overruled in part on other grounds by Bradley v. Casey, 415 Ill. 576, 581, 114 N.E.2d 681, 683 (1953); Mitchell v. Texas Hous. Co., 265 S.W.2d 157, 162 (Tex. Civ. App. 1954), writ refused NRE (right to contract for wages is a liberty interest and a property right).

The Circuit Court disagreed, holding that Working Retirees' takings claim is not viable because "Plaintiffs have failed to identify any legitimate property interest rooted in state law." R. p. 16. This conclusion is incorrect for two reasons.

A. State law is not the exclusive source of protected property interests that can be vindicated by the takings clause.

The Circuit Court's belief that a property interest must flow from state law is based on a misreading of precedent. For example, in Grimsley v. South Carolina Law Enforcement Division, 396 S.C. 276, 721 S.E.2d 423 (2012) (Grimsley I), rehired employees brought a takings claim challenging a Retirement System program that reduced wages by 13.6 percent to cover the employer's contribution to PORS. Id. at 279, 721 S.E.2d at 425. The employees argued, "the trial court erred in dismissing the unlawful takings claim because they do not have a constitutionally protected property interest." Id. at 283, 721 S.E.2d at 427. This Court agreed, explaining:

> 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 of entitlement to those benefits." Snipes v. McAndrew, 280 S.C. 320, 324, 313 S.E.2d 294, 297 (1984) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 [ ] (1972)).

Grimsley I, 396 S.C. at 284, 721 S.E.2d at 427 (emphasis added). In other words, state law is *one* possible source of a protected property right—not the only source.

While the Circuit Court cited this very same passage from Grimsley I, it then restated the rule to require *all* property interests to flow from state law. R. p. 16; see also R. p. 17 (claiming Grimsley I "requir[es] parties to allege a violation of the takings clause to show they have a legitimate property interest rooted in state law"). This restated rule is inconsistent with this Court's reasoning and unsupported.

Is also inconsistent with the fact that the Fifth Amendment (and the Bill of Rights as a whole) was adopted as a restraint on *federal* power, not state power. Takings claims have long been a vehicle to liberate property from federal hands. See, e.g., United States v. Lee, 106 U.S. 196 (1882); Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949). And the prohibition against government appropriation of private property extends to financial assets and real property alike. McMahan v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529, 539 (D.S.C. 1994). The Circuit Court's belief that a takings claim must be rooted in *state* law make little sense in light of the fact that the clause was incorporated against the states through the Fourteenth Amendment. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 141 n.3 (1978); Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897). Surely the framers did not conceive a taking so narrowly that the clause's protections only applied on a case-by-case basis as decided by each state.

A far better explanation considers precisely what this and other courts were referring to when explaining that property interests are created and defined by rules and independent sources *such as* state law. Grimsley I's explanation traces back to the Board of Regents of State Colleges. v. Roth, 408 U.S. 564 (1972), which asked whether an untenured teacher was denied due process when terminated by a state university without opportunity for review or appeal. See id. at 567. The question in Roth turned on the existence of a protected property interest in his employment because, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Id. at 569.

Roth explained that procedural due process *can* safeguard employment benefits because "[t]hese interests—property interests—may take many forms[,]" but that it only does so when the interest is something "upon which people rely in their daily lives," based on a "legitimate claim of entitlement to it[,]" rather than a "unilateral expectation" or an "abstract need or desire for it." Roth, 408 U.S. at 576-77. Thus the origin of the language seized on by the Circuit Court appears in Roth as follows:

> Property interests, of course, are not created by the Constitution. Rather they 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 of entitlement to those benefits. Thus, the welfare recipients in Goldberg v. Kelly, supra, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Id. at 577. In other words, the Supreme Court's reference to property interests flowing from state law was not a proclamation about the nature of all property rights, but an effort to circumscribe a due process mandate to a limited set of entitlements.

Two additional points highlight the problematic nature of the decision below. First, the suggestion that federal law cannot provide the basis for a protected property right is wrong. For example, in the seminal case Mathews v. Eldridge, 424 U.S. 319 (1976), the Court considered what process was owed to a Social Security beneficiary before his federal disability insurance could be terminated. Id. at 333. The property interest in Mathews flowed from the Social Security Act, not state law, but could nevertheless give rise to Fifth Amendment protection. See Mathews, 424 U.S. at 332-33 (collecting like cases). Under the Circuit Court's formulation, the Supreme Court could never hear Mathews or any of the cases challenging the deprivation of entitlements conferred under federal law.

While this claim does not rise or fall on this point alone (see below), the Internal Revenue Code (IRC) provides strong evidence that the pension trust fund contributions at issue here are protected by a federal mandate that they be held in trust for the exclusive benefit of the employee contributor. IRC § 401(a) requires that employee contributions to SCRS and PORS must be "for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust." 26 U.S.C. § 401(a)(1). No part of the corpus or income may be used for any purpose other than the exclusive benefit of employees and their beneficiaries. Id. § 401(a)(2). Retirement plan forfeitures may not increase the benefit any employee would otherwise receive under the plan. Id. § 401(a)(8). Finally, distributions must be calculated for each employee based on the entire interest of that employee. Id. § 401(a)(9). These federal protections are incorporated into Title 9 of the South Carolina Code, which mandates that the Trustees "hold the assets of the retirement systems in a group trust under Section 401(a)(24) of the [IRC] that meets the requirements of [Treasury] Revenue Ruling 81-100, 1981-1 C.B. 326, as amended by Revenue Ruling 2004-67." See S.C. Code Ann. § 9-16-20(C) (Supp. 2013). The Circuit Court's conclusion that the IRC creates no protected rights (see R. p. 16), belies the fact that these federal mandates are designed to protect pensioners like Working Retirees from unscrupulous funding schemes and that the General Assembly expressly incorporated these mandates into the Retirement System statutory plan.

Second, this is not an entitlement case, like Roth or Mathews, asking whether constitutional process is due. See also Snipes v. McAndrew, 280 S.C. 320, 313 S.E.2d 294 (1984) (principals claiming a property interest in employment). This is a property case. The Retirement System has possession of Working Retirees' money. These funds not only fall

within the quintessential definition of property as a valuable intangible,[10] but the disputed funds are *earned* wages, meaning there is no question they are the fruits of Working Retirees' labor. What the entitlement cases do not purport to do is exclude traditional categories of property—i.e., land, chattels, and money—from the definition of property. That is precisely what the Circuit Court's decision does and it is error.

B. The Circuit Court's decision to substitute its own rendition of Working Retirees' claim is improper.

The Circuit Court's decision also fails to fairly meet the substance of Working Retirees' claim. Specifically, the court concluded:

> 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 Court finds that with no guarantee of being rehired, working retirees do not have any right to any term or condition of their employment.

R. p. 17. While the Retirement System has repeatedly advanced this misconstruction (see R. pp. 590), it has never been an accurate statement of Working Retirees' claim.

In Grimsley I, this Court was rightly critical of a very similar tactic taken by the Retirement System and credited by the circuit court, explaining:

> The trial court held Appellants' takings claim should also be dismissed because Appellants did not have a property interest rooted in state law upon which the claim could be based. Specifically, the trial court adopted the manner in which the State framed the issue—that an employee does not have a property interest in a particular salary amount. Appellants contend the trial court erred in granting the State's motion to dismiss. We agree.

Grimsley I, 396 S.C. at 281, 721 S.E.2d at 425-26. Grimsley I proceeded to reject the argument that the PORS beneficiaries lacked a property interest in the portion of their

[10] Property is defined in the most general sense as "the rights in a valued resource such as land, chattel, or an intangible." PROPERTY, Black's Law Dictionary (10th ed. 2014).

salary that went to pay their employer's contribution to the pension trust by looking to South Carolina Code § 9-11-90—one of the very same statutes at issue here. See id. at 284-85, 721 S.E.2d at 427-28 ("Properly construing Appellants' claim, we hold section 9–11–90 provides a basis to assert a property interest.").[11]

The Circuit Court here erred in the same manner this Court found objectionable in Grimsley I. When considering a motion to dismiss, a circuit court is required to "construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Grimsley I, 396 S.C. at 281 (quoting Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). If the allegations and inferences entitle the plaintiff to any relief, dismissal is improper. Id. (citing Sloan Const. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008)). The circuit court's decision to reformulate the allegations here was a departure from this rule and warrants correction.

III. The Circuit Court's supplemental statute of limitations and laches holdings were improperly injected into this litigation and are premised on factual and legal inaccuracies.

When Judge Gee ruled in the Retirement System's favor at the close of oral argument, she did not rule on statute of limitations or laches grounds, but instead instructed opposing counsel to prepare a written order addressing the issues discussed above. Instead, the Retirement System submitted a proposed order holding this claim barred under both additional theories. The Circuit Court signed that order over Working Retirees' objections

[11] The Court's more recent decision in Grimsley v. South Carolina Law Enforcement Division, 415 S.C. 33, 780 S.E.2d 897 (2015) (Grimsley II), does not alter Grimsley I's applicability here as Grimsley II turned on facts the Court found to undermine the allegation that employer contributions were paid by anyone other than SLED. See Grimsley II, 415 S.C. at 39, 780 S.E.2d at 900.

(R. p. 626), a decision that is highly objectionable and unfairly prejudicial. An abuse of discretion occurs when a trial court is controlled by an error of law or issues an order based on factual conclusions that lack evidentiary support. Zabinski v. Bright Acres Associates, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001).

The Circuit Court's holdings are also factually and legally incorrect.

A. The Circuit Court's statute of limitations holding relied on factual speculation, misunderstood that claims continue to accrue, and counted the pendency of the federal action toward the expiration of the limitations period.

The circuit court concluded Working Retirees' claim was barred by a three-year statute of limitations because,

> 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. 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.

R. pp. 18-19. This conclusion is flawed in four ways.

First, the Circuit Court wrongly assumes that all of Working Retirees' claims—claims of eight individuals and thousands of class members—accrued on July 1, 2005, even though many of these individuals returned to work sometime after Act 153 took effect. According to the Circuit Court's reasoning, a *pre*-retirement beneficiary who was still working on June 30, 2008 (one day before the purported limitations period ran), should have filed suit to preserve this claim. Moreover, the Circuit Court's reasoning would hold such a claim to be timely raised even though that pre-retirement beneficiary had not retired, had not begun collecting her pension, had not applied for re-employment as a Working Retiree, had not been re-hired by the employer, and *never had a single dollar deducted*

from her paycheck. A claim predicated on this sort of speculative, hypothetical injury is disallowed by South Carolina standing doctrine. ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 196, 669 S.E.2d 337, 339 (2008). As such, no Working Retirees' claim accrued for the purpose of calculating a limitations period until those individuals actually retired and returned to work.

Second, the question concerning *when* Working Retirees retired is a factual question that cannot be resolved through a motion to dismiss. A court can only dismiss a complaint based upon a statute of limitations defense 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). Here, the Complaint merely alleges that the eight named plaintiffs and the class all "returned to work on or after July 1, 2005[,]" without stating when. R. pp. 28-32. In other words, a factual record must be developed to discern which, if any, Working Retirees have time-barred claims.

Third, even assuming some Working Retirees returned to work outside the limitations period, the nature of the violation here is recurring such that new takings (and claims) continue to accrue with each pay period. The Circuit Court rejected this argument by relying exclusively upon Anonymous Taxpayer v. South Carolina Department of Revenue, 377 S.C. 425, 661 S.E.2d 73 (2008). See R. pp. 19-20. In Anonymous Taxpayer, the plaintiff challenged a statutory change that removed tax exemptions from vested state retirement benefits. Id. at 430-31, 662 S.E.2d at 75-76. This Court held the limitations period ran from the time the statute changed because that change threatened a vested benefit:

> 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 [v. South Carolina Department of Corrections, 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000)], 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. at 439, 661 S.E.2d at 80. In other words, the Anonymous Taxpayer claim accrued because the beneficiary had a vested right to his retirement funds and those funds were at risk once the statute was enrolled.

Unlike Anonymous Taxpayer's vested pension funds, the property threatened here is Working Retirees' wages—wages that are earned day by day, week by week. Until those wages are earned and paid, Working Retirees have no right to them. Each time funds are deducted from those wages, that deprivation gives rise to an actionable claim, making this an ongoing violation to which a new cause of action accrues each time wages are confiscated. This conclusion comports with the longstanding rule that "[w]here, however, the cause of the injury is abatable, each injury gives rise to a new cause of action which may be commenced within the applicable limitations period." Cutchin v. S. Carolina Dep't of Highways & Pub. Transp., 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (citing Webb v. Greenwood County, 229 S.C. 267, 277, 92 S.E.2d 688, 692 (1956)).[12] Accordingly, even assuming some claims might be barred, there is no legal or factual basis to conclude that

[12] See also State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc., 414 S.C. 33, 77-78, 777 S.E.2d 176, 199 (2015) (rejecting total limitations bar because "labeling claim presents a series of discrete, independently actionable wrongs that are at the core of the typical unfair trade practice action."), cert. denied, 136 S. Ct. 824 (2016); Estate of Livingston v. Livingston, 404 S.C. 137, 147–48, 744 S.E.2d 203, 209 (Ct. App. 2013) (applying a new limitations period for each separate injury); Silvester v. Spring Valley Country Club, 344 S.C. 280, 287, 543 S.E.2d 563, 567 (Ct. App. 2001) (reversing the trial court's limitations ruling for failure to consider whether nuisance was abatable).

this bar includes all claims, such as those based on wages taken during the limitations period.

Fourth, the Circuit Court incorrectly counted the period this case was pending in the federal court toward the expiration of the limitations period. Specifically, it reasoned that "Plaintiffs presumably retired and returned to work before August 2, 2010, when they filed this same case in federal court[,]" and that "[a] complaint filed on March 20, 2015, nearly five years later, is late." R. p. 19. This reasoning is flawed as any limitations period was tolled by the pendency of the federal action while in the District Court and Court of Appeals, even if those claims are eventually dismissed for lack of jurisdiction. Jinks v. Richland Cnty., S.C., 538 U.S. 456 (2003).

B. There is no allegation or evidence in the record to support a laches defense as grounds for dismissal.

Laches bars a claim on account of an unreasonable failure to timely assert known rights, which causes an adversary to incur expense, accept an obligation, or otherwise detrimentally change his position. Robinson v. Estate of Harris, 388 S.C. 645, 656-57, 698 S.E.2d 229, 236 (2010). A party seeking to establish laches must prove (1) a delay, (2) that is unreasonable under the circumstances, and (3) prejudice. Id.

The court below also held this claim barred by the doctrine of laches because "Plaintiffs waited almost ten years to file the present case[,]" and "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." R. p. 19. As an initial matter, this is not accurate. The District Court action was filed on August 2, 2010, and these plaintiffs have been diligently pursuing this claim ever since. The Circuit Court's suggestion that this claim has languished for 10 years has no basis in fact.

The laches holding is also flawed because affirmative defenses are not properly considered at a motion to dismiss unless the defense is established by the allegations in the complaint. Spence, 368 S.C. at 123, 628 S.E.2d at 878. For example, the Retirement Systems' appeal to laches rests upon factual assumptions that stretch beyond the four corners of the pleadings, such as the contention that plaintiffs could have and should have brought this lawsuit within three years of their return to work. See R. pp. 222-23. There is no evidence in the record as to when the plaintiffs returned to work, only that they did so after §§ 9-1-1790(C) and 9-11-90(4)(c) were adopted. Without evidence concerning Working Retirees' return to work, the Retirement System could not prove, and the Circuit Court should not have credited as proven, the first element of laches: a lack of diligence.

The other two elements are similarly unmet. There is nothing in the record that would have allowed the lower court to discern whether a delay was inexcusable. See White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990) ("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."). Nor is there any evidence of prejudice as demonstrated by a disadvantage in asserting a right or some other harm caused by reliance on the plaintiff. In the absence of such a record, the Circuit Court should have refrained from ruling on this issue until summary judgment or trial.

IV. Act 153 is a redistribution of private property that is never permitted by the takings clause.

In adopting the Fifth and Fourteenth Amendments, the People imposed a fundamental restraint on sovereign power. The Fifth Amendment provides that "[n]o person shall be [...] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const.

amend. V. Act 153 seizes Working Retirees' earnings for the benefit of others, including the State. Working Retirees receive *nothing* in return—no service credit, no interest. S.C. Code Ann. §§ 9-1-1790(C) (SCRS) & 9-11-90(4)(c) (PORS). As such, Act 153 is unquestionably a taking.

It is also undisputed that Working Retirees receive no benefit from and no compensation for the now eight (8) percent of their gross wages taken by this scheme, but that these funds are used to pay the cost of future retirees. The Retirement conceded this point before the District Court:

The Court:	And this contribution does not allow [Working Retirees] to receive any additional benefits, correct?
Ms. Cundari:	Well, it's an entire statutory scheme, so there are other benefits with that system, other ordinary retirement benefits. But is there a *quid pro quo* specifically for the contribution? No. But the benefit is that, hopefully, they will receive their retirement benefit just like every other state employee. [...]
The Court:	All the benefits that you've mentioned are benefits that they would have received as a result of their regular retirement though.
Ms. Cundari:	I think that's probably true.
The Court:	Okay. So the additional compensation is essentially going toward funding the system.
Ms. Cundari:	That's correct.

Hr.'g Tr. 2:25-3:21, Hutto, 4:10-cv-02018-JMC (Dkt. No. 46, filed Nov. 11, 2012); see also R. p. 200 ("Although you do not accrue additional service credit [...] and are not entitled to a recalculation of benefits, the contributions help to fund the system [...]."). In other words, Act 153 reduces the funding burden that would otherwise be borne by pre-

retirement employees and their employers by confiscating Working Retirees' earned wages.

To be sure, Act 153's status as a taking, by itself, does not render it constitutionally infirm. The Constitution does not prohibit all takings. To the contrary, the text of the amendment "confirms the State's authority to confiscate private property" while "impos[ing] two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." Brown v. Legal Found. of Washington, 538 U.S. 216, 231-32 (2003). Working Retirees do not receive just compensation for their wages and it is difficult conceive how the Retirement System might constitutionally compensate them in any manner short of the wholesale return of these funds. Nevertheless, the absence of just compensation is not the Act's sole defect.

Act 153 can never pass constitutional muster because the property seized is not for public use and thus is a class of taking the Constitution never condones. "[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." Kelo v. City of New London, Conn., 545 U.S. 469, 477 (2005). Government redistributions of property from one private party to another are always *ultra vires* acts deemed void. Id. at 477; see also Midkiff, 467 U.S. at 245; Missouri Pacific R. Co. v. Nebraska, 164 U.S. 403 (1896).

Act 153 seizes Working Retirees' wages for the benefit of other Retirement System participants. To the extent additional revenue is needed to fund the Retirement System, taking earnings from Working Retirees forces them to subsidize the cost of someone else's retirement. This is precisely the sort of gross injustice that the public use and just

compensation clauses are designed to prevent. In her powerful Kelo dissent, Justice O'Connor discussed the public use and just compensation clauses, explaining:

> These two limitations serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great obj[ects] of Gov[ernment]." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed.1911). Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

Kelo, 545 U.S. at 496 (O'Conner, J., dissenting). Act 153 and the disparate burden it places on Working Retirees for the benefit of future retirees implicates these very concerns. There being no public use, this is not a compensable taking and thus the sole remedy available is the return of Working Retirees' earnings.

The Retirement Systems previously disputed the allegation Working Retirees get nothing in return for their contributions by arguing they receive the benefit of their job and that contributions are merely a condition of employment—a theme echoed by the Circuit Court's findings. See R. p. 17. The United States Supreme Court recently reaffirmed the takings clause's longstanding prohibition against the government coopting property as a condition of permitting by applying reasoning that offers guidance here. In Koontz v. St. Johns River Water Management District, 570 U.S. __, 133 S. Ct. 2586 (2013), a landowner sought a building permit from a water management district. Id. at __, 133 S. Ct. at 2592-93. The district conditioned acceptance on the landowner's willingness to build improvements on the district's land elsewhere. Id. The Court rejected the coercive permitting procedure as inconsistent with the Fifth and Fourteenth Amendment:

> By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would

> otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

Id. at __, 133 S. Ct. at 2594-95 (citations omitted) (citing Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) and Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987)); cf. Missouri Pac. Ry. Co. v. State of Nebraska, 164 U.S. 403 (1896) (government prohibited from requiring railroad to surrender portion of its right of way for third-party construction). Here, the value of Working Retirees' salary—even after the illegal eight percent deduction—far exceed the amount wrongfully taken, making a benefit-of-their-job or condition-of-employment justification precisely the sort of "unconstitutional extortionate demand" that the takings clause will not condone. See Koontz, 570 U.S. at __, 133 S. Ct. at 2597.

Respectfully, Working Retirees ask that the Court strike down Act 153 as an unconstitutional taking and order the return of Working Retirees' funds.

CONCLUSION

For the reasons set forth above, the decision of the Circuit Court should be reversed. The Court should declare Act 153 unconstitutional and remand this case with instructions for the entry of injunctive relief in Working Retirees' favor.

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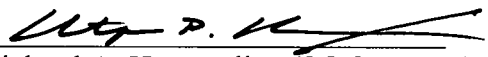
Respectfully submitted,



Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

James M. Griffin (SC Bar No. 9995)
Margaret N. Fox (SC Bar No. 76228)
GRIFFIN DAVIS
1116 Blanding Street
Columbia, South Carolina 29201
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

ATTORNEYS FOR APPELLANTS

May 3, 2016
Columbia, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2016-000021
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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,

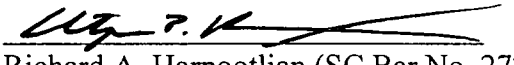
v.

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.

CERTIFICATE OF COMPLIANCE

As required by Rule 211 of the South Carolina Appellate Court Rules, Appellants' undersigned counsel certifies that the Appellants' Brief and Reply comply with Rule 211(b).

Respectfully submitted,



Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
RICHARD A. HARPOOTLIAN, P.A.
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)
rah@harpootlianlaw.com
cpk@harpootlianlaw.com

James M. Griffin (SC Bar No. 9995)
Margaret N. Fox (SC Bar No. 76228)
GRIFFIN DAVIS
1116 Blanding Street
Columbia, South Carolina 29201
(803) 744-0800
jgriffin@griffindavislaw.com
mfox@griffindavislaw.com

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CERTIFICATE OF SERVICE

I, Holli Miller, Paralegal to Richard A. Harpootlian, PA, hereby certify that on May 3, 2016, I served a copy of the following, by having the same hand delivered to the counsel listed below:

Document: Brief of Appellants

Counsel Served:
Robert E. Stepp
Tina M. Cudari
Sowell Gray Stepp & Laffitte
1310 Gadsden Street
Columbia, South Carolina 29201

Holli Miller