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.

REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY

There is no dispute over the meaning or effect of Act 153. In the Retirement System's words, it "requir[es] people who retire and return to work for an employer covered by the state retirement system to contribute a percentage of their salary to the state retirement system just as non-retired employees do." Resp'ts' Br. 2. Nor is it disputed that Working Retirees, the claimants pursuing *this* case, are mutually exclusive from prior litigants, specifically those in 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). As the Retirement System correctly explains, "[t]he 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." Resp'ts' Br. 3 (emphasis original). The only dispute between the parties is whether Act 153 is a taking that violates the Fifth Amendment's prohibition against the redistribution of private property. This question has never been answered. The Retirement System devotes the weight of its efforts to ensuring the question is never answered because there is no credible defense to a law that forces pensioners to continue making contributions, the benefit of which they will never enjoy. Perhaps most telling is the Retirement System's *ipse dixit* assertion that there "is no taking" because, "[t]his is not a case about how much money Working Retirees make or whether they receive the money they earn." Resp'ts' Br. 19. Working Retirees beg to differ.

"Working Retirees receive the money they earn, less the statutorily required contributions." Resp'ts' Br. 19. These contributions fund a tax-deferred pension benefit that is required by state law to meet the requirements of 26 U.S.C. § 401(a) and related federal treasury revenue rulings. S.C. Code Ann. § 9-16-20(C) (Supp. 2015). These Internal

Revenue Code mandates, expressly incorporated into the state pension fund's enabling legislation, require pension trust funds to be held for the "exclusive benefit" of the employee (or their beneficiaries). 26 U.S.C. § 401(a)(2); see also Appellants' Br. 5-6. The Retirement System has made no attempt to reconcile the pension trust's obligation to hold trust funds for the exclusive benefit of employee contributors with Act 153's funding scheme. Nor can it.

Before they retired, Working Retirees received wages, some of which were paid into the Retirement System trust to fund a future pension benefit. *After* they retired, Working Retirees received the same wages, began drawing the pension benefit they paid for, but were required to make contributions, not a single cent of which increased their pension benefit. Recasting the inquiry as a term or condition of employment is of no assistance to the Retirement System, which also fails to explain why the unconstitutional conditions doctrine—the efficacy of which was reaffirmed as recently as Koontz v. St. Johns River Water Management District, 570 U.S. __, 133 S. Ct. 2586, 2594 (2013)—does not vindicate the takings clause by preventing Working Retirees from being coerced into giving up the protected rights. See id. at __, 133 S. Ct. at 2594. Simply put, Act 153 robs Peter to pay Paul. The Retirement System's arguments urging the Court to ignore this injustice should be rejected.

I. This case is not "the same" case as Layman and Ahrens.

While it concedes, as it must, that the Layman/Ahrens classes are mutually exclusive of the class of Working Retirees, the Retirement System nonetheless claims "Working Retirees have had their day in court numerous times[,]" and that this Court has "decided the issued presented in this case." Resp'ts' Br. 13-14. To the contrary, the claim

raised here was neither "directly decided" nor "necessary to support the judgment" entered in either Layman or Ahrens. See Resp'ts' Br. 14. The misunderstanding advanced by the Retirement System warrants correction here.

The Retirement System mistakenly believes that the constitutional claim presented here is identical to the one presented by the Layman/Ahrens litigants. See Resp'ts' Br. 3-4 & 11-12. It is not. Quoting this Court's decision in Layman, the Retirement System *correctly* explains:

> The Court explained that the working retirees' 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 working retirees "did not have a contractual right to the terms of their employment," summary judgment was affirmed. Id. Additionally, the Court stated: "[W]e conclude that summary judgment was proper as the constitutional issues raised by Retirees *because those issues are premised on the existence of a contract.*
>
> The working retirees 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.

Resp'ts' Br. 6. (citations removed, bracket original, emphasis added) (citing Layman, 368 S.C. at 357, 709 S.E.2d at 63); cf. Appellants' Br. 23-25 ("The claims in Ahrens and Layman were all predicated on the central premise that Act 153 could not change an *existing* employment relationship..." (emphasis original)). As Working Retirees have explained, a claim of entitlement to certain government benefits, like employment or disability insurance, can implicate the Constitution's due process and takings clauses,[1] but

[1] See Appellants' Br. 29-32 (discussing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972), Mathews v. Eldridge, 424 U.S. 319 (1976), and Snipes v. McAndrews, 280

that is not the claim Working Retirees have made here. Working Retirees simply seek the return of their property. See R. pp. 26-27 & 38-39. The Retirement System's insistence otherwise fails to address the substance of this claim.

II. The Retirement System's statute of limitations and laches arguments would flood the courts with unripe claims.

The Retirement System asks the Court to start the litigation clock for the purpose of deciding any limitation or laches period on the day Act 153 was enacted, regardless of whether Appellants or proposed class of Working Retirees had a cognizable claim. For example, in support of laches, the Retirement System argues "[t]he delay was inexcusable because Working Retirees have known or should have known since July 1, 2005, they had a claim." Resp'ts' Br. 24. This broad, factually unsupported assertion, begs which Working Retirees should have known and whether that knowledge should be imputed to litigants who were yet to become Working Retirees? For example, the Retirement System's proposed rule would bar the claim of a 2010 retiree who returned to work that same year. In the Retirement Systems' view, all Working Retirees "have known since at least July 1, 2005, that a cause of action *might* exist[,]" and "would *likely* have had standing under the public importance exception to the standing doctrine." Resp'ts' Br. 21 (emphasis added) (citing S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 645, 744 S.E.2d 521, 524 (2013)). This reasoning is flawed in two ways.

First, in order to bar this claim, the Retirement System would have the Court expand an exceedingly narrow doctrine. Generally, "a private person may not invoke the judicial

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S.C. 320, 313 S.E.2d 294 (1984), as examples of such a claim). See also Resp'ts' Br. 16 (citing entitlement cases considering takings claims predicated on a due process denial).

power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 196, 669 S.E.2d 337, 339 (2008). By requiring an injury-in-fact, traceable to the challenged conduct, redressable by a favorable decision, the standing doctrine seeks to avoid speculative disputes and advisory opinions. See id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). This Court's public importance doctrine recognizes a narrow exception that confers standing to bring suit in the public interest "without requiring the plaintiff to show he has an interest greater than other potential plaintiffs." Id. at 198, 669 S.E.2d at 341 (quoting Davis v. Richland County Council, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007)). In public importance cases, no personal stake in the litigation is necessary because *all* members of the public share an interest in the resolution of the case.[2] Id. at 199, 669 S.E.2d at 341-42. Applying the public importance doctrine here stretches it beyond its purpose by starting the limitations clock not when Appellants suffered an actual injury, but when Act 153 was enacted (July 1, 2005). See Resp'ts' Br. 21. Such a rule is not only untethered from the narrow purpose for which the public importance doctrine is recognized, but would destabilize entrenched notions of when claims accrue and give rise to a flood of anticipatory suits.

Second, a justiciable claim is not predicated on standing alone. "The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." Sloan v.

[2] By way of example, the legality of a public bond act, the eligibility of a governor to serve, and the constitutionality of an appropriations act have all been held to be matters worthy of the relaxed standing exception. Baird v. Charleston Cty., 333 S.C. 519, 511 S.E.2d 69 (1999); Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004); Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005), abrogated by American Petroleum Institute v. S.C. Dep't. of Revenue, 382 S.C. 572, 677 S.E.2d 16 (2009).

Greenville Cty., 356 S.C. 531, 547, 590 S.E.2d 338, 346 (Ct. App. 2003). A ripe controversy is not contingent, hypothetical, or abstract and the mere threat of statutory injury is too remote to warrant judicial review. Waters v. S. Carolina Land Res. Conservation Comm'n, 321 S.C. 219, 227-28, 467 S.E.2d 913, 917-18 (1996); Power v. McNair, 255 S.C. 150, 153-54, 177 S.E.2d 551, 552-53 (1970). Here, Working Retirees are a specific, discrete class[3] of individuals with the requisite interest to bring this case. A member of the Retirement System does not become a Working Retiree until that individual retires, begins collecting her pension, is rehired by a covered employer, and has earned wages taken, thus suffering the sort of injury that is the hallmark of a concrete dispute. Prior to these conditions being met, an individual is not a Working Retiree, falls outside of the Complaint's class definition, and is not representative of the class she seeks to represent. Not only would such a claimant be disqualified as a Rule 23 class representative (see Rule 23, SCRCP), but her claim of injury is entirely speculative. This Court's precedent gives no reason to confer standing on a litigant who *might* become a Working Retiree, in lieu of simply waiting for a proper case to ripen.

A similar yet far more modest theory than the one the Retirement System advances was rejected in United States v. Dickinson, 331 U.S. 745 (1947), where landowners won takings claims against the government for building a dam that slowly flooded their property. The government sought to avoid the judgments, arguing the six-year limitations

[3] The scope of the proposed class is also confined by an amendment to the Retirement System Act that effectively ends the Working Retiree program in 2013 by suspending a Working Retirees' pension benefit after she earns $10,000 through covered employment. See Act No. 278, Pt I, § 14.A, 2012 S.C. Acts 2278, eff. Jan. 2, 2013 (codified at S.C. Code Ann. § 9-1-1790 (Supp. 2015)). This provides a pecuniary disincentive against employment as a Working Retiree and is likely to have limited the size of the class.

period began to run when the dams began impounding water, seven years before the complaint was filed, not when the water reached its peak. Id. at 747. The Supreme Court disagreed, reasoning that "[t]he Constitution is intended to preserve practical and substantial rights, not maintain theories." Id. at 748 (internal quotations omitted). The Court also rejected the impracticality of such procedural rigidity:

> We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of *res judicata* against recovering later for damage as yet uncertain. The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized.

Id. at 749. Accordingly, when the substantive claim is a question of federal law, the statute of limitations is tolled by the pendency of a cross-jurisdictional suit in which the plaintiff is diligently pursuing relief. See, e.g., Burnett v. New York Cent. R. Co., 380 U.S. 424, 434-35 (1965) (FELA claim tolled during pendency of state court action); Carlisle v. CSX Transp., Inc., 668 S.E.2d 98, 107 (N.C. Ct. App. 2008) (same); Farrell v. Auto. Club of Michigan, 870 F.2d 1129, 1134 (6th Cir. 1989) (ERISA claim tolled during pendency of state court action).

Moreover, the technical dismissal the Retirement System seeks cannot be reconciled with the Fourth Circuit's decision that federalism requires this claim to be filed in state court. "South Carolina courts have long recognized a right of persons to sue the State for unconstitutional takings." Hutto v. S. Carolina Ret. Sys., 773 F.3d 536, 552 (4th

Cir. 2014) (Hutto II) (citing Graham v. Charleston Cnty. Sch. Bd., 262 S.C. 314, 204 S.E.2d 384, 386 (1974) (recognizing a taking claim as the sole exception to sovereign immunity)). In the federal appellate court's view, "[b]ecause 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." Id. The Fourth Circuit's exercise of comity *presumes* this case will be heard, and does not leave Working Retirees without recourse if it is not:

> 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. The court below incorrectly concluded Hutto I and Hutto II were dismissed with prejudice. See Appellants' Br. 21-22. While the Retirement System does not repeat this error here, its reasoning reaches the same unjust result the federal courts sought to avoid. This conclusion should be rejected.

III. Working Retirees' takings claim is preserved.

The Retirement System claims the merits of this dispute are unpreserved. Resp'ts' Br. 25-27. This argument should be rejected as the Circuit Court's opinion reaches the merits by concluding (incorrectly) that Act 153 is not a taking because Working Retirees lack a protected property interest. See R. pp. 15-17. Moreover, the Retirement System's preservation theory is circular. Working Retirees filed this action seeking declaratory and injunctive relief that turned on one, and only one, question. Before any discovery occurred or any summary judgment motion was filed, the Retirement System sought dismissal by raising a laundry list of theories designed to ensure the Circuit Court would never reach the merits. These theories included arguments that the merits had already been decided in

prior litigation. Now the Retirement System suggests the merits are unpreserved because "although raised, the issue of whether the statutes are unconstitutional was not ruled upon[.]" Resp'ts' Br. 25. Put differently, the Retirement System argues since it succeeded in convincing the Circuit Court not to reach the merits, the merits are unreviewable.[4]

This reasoning requests a legal absurdity. The Court has always been "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 644-45 (2011). The purpose of the preservation rules is to allow the lower court to rule after considering all the relevant facts, law, and arguments and "prevent a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id. (quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). Working Retirees have hardly been opaque about the question this litigation presents. See R. pp. 26-27. And the Circuit Court had an opportunity to decide whether Act 153 is a taking as there is no factual dispute concerning its effect. This dispute turns solely on a question of law. The Circuit Court ruled instead there could not be a taking because Working Retirees lacked an actionable property interest. This conclusion was incorrect. The parties both claim to want a full and final resolution of this case. The Court should rule accordingly and declaring Act 153 an unconstitutional taking.

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[4] Even if the Court credits this circular reasoning, it could still reach the issue as a matter of judicial economy. Jeter v. S. Carolina Dep't of Transp., 369 S.C. 433, 441 n.6, 633 S.E.2d 143, 147 n.6 (2006); State v. Bonner, 400 S.C. 561, 564, 735 S.E.2d 525, 526 (Ct. App. 2012). Disposition under this exception is warranted when the issue "would be raised to the Court at some future time", has been briefed, and a decision furthers judicial economy. S. Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991).

CONCLUSION

For these additional reasons, the decision of the Circuit Court should be reversed, Act 153 should be declared unconstitutional, and this case should be remanded with instructions to enter summary judgment on liability in Working Retirees' favor.

Respectfully submitted,

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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,

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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:

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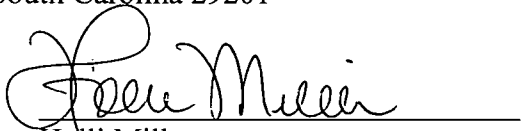

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