NO. 18-_____

In the Supreme Court of the United States

CYNTHIA N. ALMOND, ET AL.,

Petitioners,

v.

SINGING RIVER HEALTH SYSTEM, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court erred in certifying the class under Rule 23 on the grounds that Petitioners have a constitutional due process right to opt-out of class action suits which assert monetary claims on their behalf.

2. Whether the court erred in certifying the class under Rule 23 and approving the settlement on the grounds that Petitioners have a constitutional right to their property under the Fourteenth and Fifth Amendments of the U.S. Constitution.

3. Whether the court erred in certifying the class under a liability-release condition wherein the County payment is secured by a long-term contract which cannot be enforced or bound, essentially a fraudulent contract per state statute.

PARTIES TO THE PROCEEDING

Petitioners and Appellants Below

- Cynthia N. Almond
- Francisco C. Aguilar
- Kitty Patricia Aguilar
- Tanya R. Ardoin
- Ray J. Barbour

Respondents and Plaintiffs-Appellees Below

- Thomas Jones
- Joseph Charles Lohfink
- Sue Beavers
- Rodolfoa Rel
- Hazel Reed Thomas

Respondents and Defendants-Appellees

- Singing River Health System
- Board of Trustees for the Singing River Health System
- Michael J. Heidelberg
- Michael D. Tolleson
- Allen L. Cronier
- Tommy L. Leonard
- Lawrence H. Cosper
- Morris G. Strickland

- Ira S. Polk
- Stephen Nunenmacher
- Hugo Quintana
- Marva Fairley-Tanner
- William C. Descher
- Martin D. Bydalek
- Eric D. Washington
- G. Chris Anderson
- Kevin Holland

Respondents and Defendants

- KPMG
- Transamerica

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PETITION FOR A WRIT OF CERTIORARI

Cynthia N. Almond, Et Al., Petitioners, respectfully request that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on August 6, 2018.

OPINIONS BELOW

The decision of the Fifth Circuit dated August 6, 2018, for which review is sought is 5th Circuit No. 18-60130 and is included at App.1a and subsequent denial of the Petition for Rehearing En Banc on September 18, 2018 is reprinted in the Appendix to this petition at App.47a.

Additionally, the case at bar was previously appealed to this Court on Petition for Writ of Certiorari on December 5, 2017 at Sup. Ct. No. 17-846, which petition was reviewed by this Court in conference on February 16, 2018. The case was not accepted by this Court at that time. However, the opinions of the lower courts until that point would be relevant to this petition and thus are reproduced in the appendix. (App.10a-140a).

The July 27, 2017, opinion of the Fifth Circuit Court of Appeals, the judgment of which the previous Writ was sought and is related herein is 5th Circuit No. 16-60550, and is reprinted in the Appendix to this petition at App.51a. The order and Final Judgment of the United States District Court entered on June 16, 2016, and is

reprinted in the Appendix to this petition at App.87a. The Memorandum Opinion and Order Granting Motion for Final Approval of Class Action Settlement entered on June 2, 2016, is reprinted in the Appendix to this petition at App.92a. The Order of the Fifth Circuit Court of Appeals denying Petition for Rehearing, entered on September 6, 2017, is reprinted in the Appendix to this petition at App.136a. The proposed settlement is reprinted in the Appendix to this petition at App.140a.

STATEMENT OF JURISDICTION

The Fifth Circuit decision was rendered by a three (3) judge panel consisting of Patrick E. Higginbotham, James L. Dennis, and Gregg Costa, Circuit Judges. Per Curiam.

A Petition for Rehearing *en banc* was denied on September 18, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES

- **U.S. Const. amend. V**

  No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when

in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor 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. XIV, § 1

  All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- U.S. Const. Art. 1, § 10

  No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

  No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any

state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

- **Fed. R. Civ. P. 23(b)**

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally

to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

STATEMENT OF THE CASE

For the first time in the history of the United States a solvent governmental entity is able to absolve itself of their pension fund liability without the necessity of filing bankruptcy. The 2700 pension fund participants who are either current or former pension fund participants of the Singing River Hospital System,

a completely county owned governmental system, are without the protection that would be afforded a private plan beneficiary under ERISA. When Congress passed ERISA to stop pension fund abuses, it exempted government pension plans ostensibly because the government can always raise taxes to provide pension fund revenue. And now, because of the bastardization of the class action rules, these employees are deprived of any due process of law as a result of a mandatory class action lawsuit. Even though these plan beneficiaries had a valid contract which was willfully violated by their governmental employer, they find themselves facing a deprivation in their life sustaining benefits after decades of faithful service, and with no protection by legislation or law. Rather, as will be shown herein, a governmental employee has no protection at all from the abuses of their governmental employers.

The Singing River Health Systems ("SRHS") is a Jackson County owned hospital established under Miss. Code § 41-13-15, and is a political subdivision of the state of Mississippi. On or about 1983, the SRHS retirement plan was separated from the State Public Employees' Retirement System ("PERS") and formed a separate 401(a) governmental pension contract ("Pension Contract"). As required by SRHS, the county hospital full-time employees ("Participants") contributed three-percent (3%) of their earnings per the Pension Contract into the Pension Fund ("Fund"), and the county owned hospital was contractually obligated to contribute to the Fund in an amount to be determined annually by actuarial reports. Each Participant vested after ten (10) years of contributions into the Fund and, were assured a lifetime pension per the Pension Contract. At the time of each Participant's retirement, he

or she could elect to take a lesser amount during his or her lifetime and name his or her spouse as beneficiary to transfer the lifetime benefits upon the Participant's passing.

The Fund was substantially funded for its 2700 participants and their beneficiaries until 2009, when the SRHS ceased making the contributions, breaching the Pension Contract. Additionally, SRHS did not disclose its cessation of funding to the Petitioners and all Participants, but rather perpetrated multiple continual frauds by direct mailings via U.S. mail to the Plan Participants stating that the Fund was healthy and viable while showing fraudulent contributions by SRHS into the Fund. Further, SRHS is a county owned hospital; therefore annual budgets and accountings must be reviewed annually and approved by the Jackson County Board of Supervisors, indicating that from 2009 until 2014, the County Supervisors were implicit in their knowledge and aided in the breach of the Pension Contract.

In 2014, a change of accounting firms and practices prompted a private meeting between the Jackson County Board of Supervisors, the SRHS Board of Trustees, SRHS administrators and legal decision makers for Jackson County and SRHS. The result of this collusion was an attempt to terminate and liquidate the Pension Contract, thereby extinguishing the $150 million Fund deficit and depriving Petitioners and other Participants of their earned benefits and private property guaranteed by the Pension Contract.

In addition to the unprosecuted mail fraud referenced above, this case also contains the following

elements, none of which the Petitioners have been allowed to pursue through discovery and/or hearings:

- A secret ex-parte meeting with the State Court Judge on the eve of his recusal hearing which was videotaped by the Petitioners and resulted in his withdrawal from the case;
- Testimony about the shredding of financial documents by SRHS shortly after the litigation began and subsequent perjured testimony by the CEO of SRHS concerning this action;
- Evidence of collusion between attorneys for the hospital and class action counsel occurring even before the class was certified. (This evidence was proffered in that the witness to it escaped being served.);
- Evidence of manipulation of SRHS financial records to make it appear they were on the verge of insolvency which was a complete fabrication;
- A Special Master appointed to oversee all discovery in the litigation who, after his resignation because of his participation in the secret meeting, subsequently began representing SRHS; and
- Whistleblowers' evidence of a prior conspiracy between many of the class action attorneys, the first court appointed state trial judge and attorneys for the hospital involving the defense lawyers helping the class action plaintiffs' lawyers in their products liability suit.

And to make matters worse, all of the above was being overseen by a United States District Court Judge who formerly represented Jackson County, Mississippi and who released his former client from a $450 million pension liability even though they were never a party to the lawsuit. No, this is not a foreword to the latest John Grisham thriller. The trappings listed above have all taken place but have not been run to ground. The only innocents in this entire scenario are the poor retirees who tirelessly dedicated themselves to work at SRHS who were robbed of their pensions, and whose only recourse is to the highest Court in the land.

Upon learning about the SRHS Board of Trustees vote to terminate the Pension Contract and liquidate/terminate the Fund, Petitioner procured a series of temporary restraining orders in state court to block the signing of the previous meeting minutes wherein the vote was taken, temporarily preventing the termination of the Pension Contract and liquidation of the Fund. Several additional cases were filed in Federal Court leading to a mandatory class action settlement subsequently approved by the Federal District Court as a Rule 23(b)(1)(A). Objectors to the class action settlement became Appellants, and appealed to the Fifth Circuit Court of Appeals in 2017. The Fifth Circuit ruled on July 27, 2017, (App.51a) with a subsequent denial of a Petition for Re-Hearing *En Banc*. (App.136a) Following this denial, the Petitioners filed a preemptive appeal to this Court by a Writ of Certiorari which was rejected at conference on February 16, 2018. Upon rejection by this Court the case was remanded to the District Court to answer four specific questions. These questions were briefed by the parties and a supplemental fairness hearing was held in the United States District Court

Southern District of Mississippi on January 22, 2018. After the supplemental fairness hearing, the District Court concluded that the settlement was fair, reasonable, and adequate. Petitioners/Objectors appealed that decision to the Fifth Circuit Court of Appeals, which resulted in the opinion of August 6, 2018 being issued from which this appeal is borne. (App.1a) Therefore, no further appellate options are available to these Petitioners except to this Honorable Court.

REASONS FOR GRANTING THE PETITION

I. THE SETTLING PARTIES HAVE FAILED TO SUFFICIENTLY ANSWER THE MANDATE

The Fifth Circuit Opinion of July 27, 2017 (App. 51a), which vacated and remanded for further consideration of four illustrative questions included:

1. How, and how much, the future stream of SRHS's payments into the Plan, together with existing Plan assets and prospective earnings, will intersect with future claims of Plan participants, including, but not limited to, what effect the Settlement has on current retirees;

2. What are SRHS's future revenue projections, showing dollar amounts, assumptions[,] and contingencies, from which a reasonable conclusion is drawn that SRHS has the financial ability to complete performance under the settlement;

3. Why any payments from litigations involving KPMG, Transamerica or related entities are permitted to defray SRHS's payment obligation rather than supplement the settlement for the benefit of class members;

4. Why class counsel's fees should not be tailored to align with the uncertainty and risk that class members will bear.

The heart of the issue lies in the evidence that Petitioners appealed to the Fifth Circuit about the validity and completeness of the Defendant's answers to the Mandate, and the lower court's approval of the settlement due to the insufficient answering of the Mandate.

II. THIS IS A CASE OF FIRST IMPRESSION

The Fifth Circuit Court of Appeals opined that this is a case of first impression in the July 2017 Opinion, "[n]either Objectors nor this court have found definitive legal authority holding a Mississippi county responsible for the debts of its 'independent' entities." (App.49a-50a) In response to the Fifth Circuit's opinion that there is no law holding a Mississippi County responsible for the debts of its "independent" entities, Petitioners assert that allowing SRHS and Jackson County to escape their Pension Contract liability is a clear violation of Article 1 § 10 of the U.S. Constitution[1]. The Fifth Circuit held that the policy behind granting ERISA exemptions for a public entity's plan is an insufficient basis for imposing a legal duty on Jackson County. *Id.*

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[1] Miss. Art 3 § 16 of the Mississippi Constitution

While there is no case law on point with the case at bar, a new case from the First Circuit has emerged which will have a bearing on this case however. In January 2018 the First Circuit decided the case of *Cranston Firefighters, et al. v. Gina M. Raimondo, in Her Capacity as Governor of Rhode Island, et al.*, U.S. Court of Appeals, 880 F.3d. 44 (1st Cir. 2018), a case where a governmental pension plan fell on hard times resulting in a class action lawsuit. The resulting settlement encompassed many of the same scenarios envisioned here, *i.e.*, losses of COLA payments, reduction of benefits, raising the retirement age, etc. The resulting settlement was codified in a law entitled the Pension Reform Act. Twenty years later the government wants to reduce the benefits again because of the poor financial health of the plan. Not so fast say the Police and Fire Unions of the City of Cranston. We have a settlement they say, which already reduced our benefits. As Pensioners we should be exempt from another round of cuts, particularly when a law was passed. Oh well says the First Circuit, laws can always be changed. For your protection you should have had a contract!

The *Cranston Firefighters* case also raises a point that has been addressed in this settlement. The *Cranston* case held:

> Our case law does leave open for future consideration the possibility that the mere creation of a retirement plan to which members contribute a portion of their own pay clearly and unequivocally creates a contractual commitment requiring the state

> to repay member contributions and, perhaps, reasonable interest.

So how does the class action settlement here propose to handle the 1,000 or so beneficiaries of the plan who have not received any money? It doesn't! Is that not therefore an unconstitutional taking of property without the due process of law in violation of section 1 of the 14th Amendment to the U.S. Constitution?

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person in life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *Id.*

The response by SRHS and the settlement proponents to future claims was virtually non-existent. Three different scenarios were presented in filings by SRHS so that current retirees only have a general what if understanding of what this settlement is all about. And, while these scenarios present a very cursory example of what current retirees can expect in the future, nothing has been said or considered about future claims of the plan.

This Court has not pronounced a decision about the failure to have subclasses within the class. Objectors pointed out in the supplemental fairness hearing the complete failure of the District Court and settlement proponents to recognize the various subclasses of this Plan. Following are just a few samplings of the various subclasses for which no opinion has been offered as to how, when or how much, or ever these people will be affected. Two witnesses, Ray Barbour, Jr. and Laurie

Grady, both former employees of SRHS, who received subsequent social security disability awards, testified that they should be entitled to disability retirement benefits under the Plan. Neither has been able to get a hearing as to their issues, which is a complete denial of their due process rights. The testimony of both witnesses was proffered by Affidavit. How can this settlement be determined to be fair when there is a subclass of employees for which no consideration has been given? And, if the governmental retirees are not protected by the contract in this case, nor law as in the *Cranston* case, nor afforded a hearing in a mandatory settlement as outlined above, then hopefully this Court can articulate to the retirees how they can be protected from governmental abuses such as this.

Notwithstanding the general Fifth Circuit premise that Jackson County is not responsible for SRHS, that Court supports Petitioners' general position that Jackson County is responsible for the Pension Contract and that it breached the contract and is liable for the debt to Petitioners.

> "The FY 2015 audited financial report for SRHS states: 'While the County may appropriate money from its general fund and levy property taxes to support the operations of the Health System, the Health System has been self-supporting and receives no County appropriations for its operations, nor has it received any such financial support from the County in over twenty-six years.'"[2]

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[2] App.37a, Footnote 11

The mere fact that Jackson County-owned SRHS has never received financial support from the entity which owns it, does not mean that it is not liable for the Fund liability as a result of the breach of the Pension Contract. Jackson County may not have formerly contributed financially, however SRHS is established under Miss. Code Ann. § 41-13-15, and SRHS would not be in existence but for the County. Further, the County Board of Supervisors appoints the SRHS Board of Trustees ("Trustees"), they approve the annual SRHS budget, and the County is ultimately responsible for the overall health and vitality of SRHS, as well as the failure, and is the only entity with taxing authority.

III. PETITIONERS' DUE PROCESS AND PROPERTY RIGHTS HAVE BEEN VIOLATED

Additionally, the District Court has certified this class action under Rule 23(b)(1)(A) as a "mandatory settlement class" thereby depriving the Plan Participants of their constitutionally protected due process rights to pursue individual breach of contract and/or tort claims for the pension fund failure in violation of the 14th Amendment to the U.S. Constitution and the takings clause of the 5th Amendment.

IV. PETITIONERS' HAVE BEEN FORCED INTO A SETTLEMENT INCLUSIVE OF A VOID CONTRACT APPROVED BY THE LOWER COURT

One integral part of the settlement agreement (App.140a) in the case at hand includes a "Memorandum of Agreement" wherein the current Jackson County Board of Supervisors bound Jackson County to a contract wherein the county would provide $13,600,000 million to SRHS. Payments are scheduled to be made

over a period of nine installments beginning upon approval of the settlement and ending on September 30, 2014 (App.101a). In exchange for the contractual payment scheduling, Jackson County will be released from all Pension Contract liability pursuant to the proposed settlement.

American Oil v. Marion County, along with other Mississippi authorities, held that "[o]ne city council cannot legally adopt a resolution binding a successor administration on discretionary matters . . . To hold that such action as a matter of law binds a subsequent administration would violate well-settled Mississippi case law." *Id.* at 595.[3] The mandatory settlement herein not only is due to a breach of contract by Jackson County, but establishes a second contract which will become invalid upon the election of a new board, leaving the Petitioners without any recourse and left with nothing but empty promises and a complete disservice of the justice system when they needed it the most.

In spite of various denied motions in the state and federal court to lift the federal court stay, this legal issue remains unresolved. This particular legal quagmire is a local one with which this honorable court need not concern itself. But, what should be of concern to this Court however, is the fact that not only is there a government contract impairing the obligation of a prior government contract (Pension Contract), but the secondary contract ("Memorandum of Agreement") will ultimately be rendered void by operation of law. *Id.* A lack of due process to determine whether state law has been

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[3] *American Oil Co. v. Marion County*, 187 Miss. 148, 192 So. 296 (1939)

violated in a contract impairing the obligation of a contract should be of paramount concern to this Court however.

ARGUMENT

I. THE LOWER COURT ERRED IN CERTIFYING THE CLASS UNDER RULE 23 AND APPROVING THE SETTLEMENT ON THE GROUNDS THAT PETITIONERS HAVE A CONSTITUTIONAL RIGHT TO THEIR PROPERTY UNDER THE FOURTEENTH AND FIFTH AMENDMENTS OF THE U.S. CONSTITUTION

The governmental retirees in this case all obtained a property interest in their retirement benefits by working anywhere from a minimum of ten (10) years to as much as forty-six (46) years.[4] They should also have a protected property interest as the government took three-percent (3%) of their payroll as a mandatory deduction. Now, Jackson County, through SRHS, is orchestrating a mandatory class action settlement whereby the County is paying the paltry sum of $13,600,000 million for the benefit of SRHS indigent care and to prevent default on a bond issue. Payment through nine installments would entitle the County to a release pursuant to the settlement. (App.101a, 128a, 130a). Even though Jackson County is not a party to

[4] A "Participant" is any SRHS employee who contributed into the Fund per the Retirement Contract. A "vested" Participant is any employee who contributed into the Fund per the Retirement Contract for a minimum of ten (10) years. A vested Participant may begin receiving benefits at age 65.

the federal lawsuit, the District Court and ostensibly the Fifth Circuit, will allow Jackson County to be released from a $450 million net pension deficit through this class action process, a class action process that is not legal in the state of Mississippi. Under Miss. Code. Ann. § 11-53-37, class actions are not permitted in any legal proceedings in Mississippi state courts, whether circuit or chancery. There is no rule or statute which expressly or impliedly provides for class actions, thus providing no state remedy.[5]

This is not a limited fund class action as seen in many non-opt-out settlements, such as in *In re A.H. Robins Co.*, 880 F.2d 709, 747-48 (4th Cir.). In *Robbins*, each individual's capacity to recover is dependent on the other and there can no longer be an individual right of autonomy in pursuing claims against the Defendant. In the case herein, each individual has a different vested or non-vested amount which is owed them per the Pension Contract from an unlimited fund, the owner of SRHS, Jackson County, a responsible entity which has taxing authority.

In *Tron v. Condello*, 427 F. Supp. 1175 (S.D.N.Y. 1976), the District Court addressed a similar issue regarding the mismanagement of a government pension plan not protected by ERISA. In *Tron*, the issue was that the teacher's retirement funds were not being invested properly, leaving the retirees with a lower amount in their pension per their contract with the state. *Tron* also alleged that he and the retired teachers were deprived of their property without due process, violating his Fourteenth Amendment, as per

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[5] *USF&G Ins. Co. of Miss. v. Walls* (Miss. 2005) 911 So.2d 463

the terms of the NYC Administrative Code, Ch. 20 § B20-6.0, retirees could not vote for members of the Retirement Board, a board which was responsible for maintaining the integrity and investing into the fund.

Similarly, Petitioners have been deprived of their property without due process and have had their Fourteenth Amendment rights violated, as their Pension Contract and Fund were managed by the SRHS Board of Trustees ("Trustees"), appointed by the Jackson County Board of Supervisors. These Trustees were responsible for and had a fiduciary duty owed to the Petitioners and other Participants to inform Participants of the status of the Fund and because Petitioners had no voice in ensuring that someone protecting their interests was a Trustee of the Fund, the Pension Contract disaster ensued and was masked by the Trustees who were appointed by the County which ultimately owned the hospital. Petitioners and other Participants were deprived of their property without due process of law.

The *Tron* opinion goes on to say "Close examination is therefore required of any radical change in means chosen to maintain the integrity and security of the sources from which the concededly protected benefits are to be paid." *Id.* At 512, 375 N.Y.S.2d at 83, 337 at 594 (citations omitted). Petitioners did not have an opportunity for 'close examination,' as all changes were made internally prior to SRHS's attempt at termination, and Petitioners were not afforded the opportunity at the fairness hearing to cross-examine the witnesses related to the financial solvency of the Trust.

The Memorandum of Agreement entered into between Jackson County and SRHS is an essential

taking of Petitioners' property. The Petitioners had a valid and mandatory contract with the County through SRHS. Petitioners fulfilled their contractual requirements, but as a result of the failure of the County to make their contractually required contributions to the Fund per the Pension Contract, Petitioners and Participants will be forced to live on the insufficient accumulated benefits until exhausted. By agreeing to this mandatory class action settlement, the County has deprived Petitioners of contractually promised lifetime benefits for which they have worked for decades to gain a vested right. Now the County, by a breach of contract, is taking away Petitioner's contractual property rights without just compensation to which they would otherwise be entitled under the Fifth Amendment, as made applicable to the states by the Fourteenth Amendment. The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment (*See Chicago, B. & Q.R. Co. v Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)), provides that private property shall not "be taken for public use, without just compensation."[6] The interference of a governmental mandatory class action amounts to a taking of what should otherwise be constitutionally protected and guaranteed rights of the Petitioners and others wherein the government should be barred from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. In the case *sub judice*, the failure of the County to enforce SRHS's required contributions into

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[6] *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)

the Fund has resulted in a financial disaster, the burden of which will be borne by the 2700 Participants and their beneficiaries. This failure of the government should not be exacerbated by allowing a mandatory class action depriving petitioners of their due process rights. Rather, the solution to this problem lies with the taxing authority by the County so that this burden may be born equally by the public as a whole.

II. THE DISTRICT COURT ERRED IN CERTIFYING THE CLASS UNDER RULE 23 ON THE GROUNDS THAT PETITIONERS DO NOT HAVE A CONSTITUTIONAL DUE PROCESS RIGHT TO OPT-OUT OF CLASS ACTION SUITS WHICH ASSERT MONETARY CLAIMS ON THEIR BEHALF

However, if the class were re-certified with an opt out provision, at least the Petitioners and other Participants would have a choice as to litigation versus settlement. Yet, in complete denial of the due process rights afforded to all citizens, no choice is being allowed. Petitioners assert that certifying this class action under Rule 23(b)(1)(A) is unlawful under these circumstances. This type of certification is traditionally reserved to "take in cases where the party is obliged by law to treat the members of the class alike (a utility acting towards customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against a down river owners.)" *See Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231, 521 U.S. 591, 138 L.Ed.2d 689 (1997) at page 614.

In the case at bar, there is a wide variety of subclasses ranging from Participants currently employed who are not vested despite contributing to the Fund

prior to SRHS halting all contributions, to an aged retiree with more than forty (40) years of employment who elected to take a lesser amount of monthly benefits in exchange for a continuing lifetime benefit for his or her surviving spouse, to Participants who have vested and are receiving monthly checks versus those who have vested but are not yet of age to receive their benefits. This is exactly the kind of case better suited for a Rule 23(b)(3) class action providing for opt outs. "Each Plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]"; each "ha[s] a substantial stake in making individual decisions on whether and when to settle." *Gregory v. Electro-Mechanical Corp.*, 83 F.3d, at 633.

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997).

Here, the proponents of the settlement could not risk a large number of opt-outs, which might decertify the class, or worse, a sufficient number of opt-outs could pursue the multitude of culpable defendants or other entities escaping liability whatsoever under the guise of this mandatory class action. The District Court initially had a certification plan under a Rule 23(b)(1)(B) "limited fund" concept. This proposal was so thoroughly discredited by the Objectors (Petitioners

herein), that the settlement proponents acquiesced.[7] Now, in a departure from a traditional damages/breach of contract case where each party should have a constitutionally protected right to choose litigation versus settlement, the District Court is imposing a mandatory class. "Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge . . . any substantive right. § 2072(b). *Id.* at page 2248.

Appellants find cogent parallels with this case and a due process denial of benefits due a welfare recipient. Section 1 of the 14th Amendment to the U.S. Constitution states,

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person in life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the case of *Jack Goldberg Commissioner of Social Services of the City of New York v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), New

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[7] The Fifth Circuit states that "Objectors have not briefed the propriety of this legal determination, and it is waived." (App.70a, fn.7) This is incorrect. Objectors did in fact brief that the unsecured promise of a settlement without opt-out provision was a clear error in Petitioner's Objection to the Settlement. Petitioners chose to also flesh out other factors regarding the improper classification, however this objection was not waived and was included in the filed objection. Further, the argument was continued at the fairness hearing in May 2016.

York city residents receiving financial aid brought suit challenging the adequacy of procedures for notice and hearing in connection with the termination of their benefits. The Supreme Court held that pre-termination hearings must be held prior to termination. The City of New York procedures in place violated the due process rights of the recipients. "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union, etc. v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748-1749, 6 L.Ed.2d 1230 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' (*See also Hannah v. Larche*, 363 U.S. 420, 440, 442, 80 S.Ct. 1502, 1513, 1514, 4 L.Ed.2d 1307 (1960)).

Petitioners were noticed by Class Counsel and attended a fairness hearing in May 2016. Rule 23 generally concludes that proper notice and a fairness hearing for objectors is sufficient for due process; however upon the appeal to the Fifth Circuit, the Court ultimately issued a mandate for further transparency regarding the financial capabilities of SRHS regarding the proposed settlement. Further, the Fifth Circuit determined that Petitioners (Objectors in District Court) were not

afforded the opportunity to cross-examine key witnesses regarding the financial viability of the settlement, leaving Petitioners on the sidelines watching a two (2) day dog-and-pony show wherein Class Counsel portrayed that with the settlement, one-hundred percent (100%) of the unpaid funds from SRHS to the Trust would be paid back over thirty-five (35) years. When counsel for Petitioners attempted to cross-examine witnesses regarding the difference between 'SRHS paying back 100%' of unpaid debt into the Fund and Petitioners receiving '100% of their contractually owed pension,' the District Court thwarted Petitioners' right to due process by disallowing cross examination. The difference between the two is extreme, as one option will fail and leave Petitioners with significantly less than agreed to in their Pension Contract, and one will fulfill their Pension Contract. (App.82a).

"It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239, 88 S.Ct. 362, 366, 19 L.Ed.2d 438 (1967). Thus, the crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended—is that termination of

aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy." *Jack R. Goldberg, Commissioner of Social Services of the City of New York v. John Kelly, et al*, 397 U.S. 254, 90 S.Ct. 1011 25 L.Ed.2d 287 (1970). Is this rationale also not just as true to a retiree whose benefits are being taken away?

III. WHETHER THE COURT ERRED IN CERTIFYING THE CLASS UNDER A LIABILITY-RELEASE CONDITION WHEREIN THE COUNTY PAYMENT IS SECURED BY A LONG-TERM CONTRACT WHICH CANNOT BE ENFORCED OR BOUND, ESSENTIALLY A FRAUDULENT CONTRACT PER STATE STATUTE

A vital part to the Settlement which was approved by the District Court includes a "Memorandum of Agreement" signed by Jackson County which binds the Jackson County Board of Supervisors for payments to SRHS for the purposes of bond indebtedness and indigent care. (App.16a, 57a, 74a, 84a, 100a, 130a, 147a). The commitment of a long-term payment contract between Jackson County and its wholly-owned county hospital SRHS is a clear error in law, as Mississippi courts have determined that commitments by one board my become voidable at the discretion of future boards.[8]

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[8] *Biloxi Firefighters Ass'n v. City of Biloxi*, 810 So.2d 589 (Miss. 2002); *Smith v. Mitchell*, 190 Miss. 819, 1 So.2d 765 (1941); *American Oil Co. v. Marion County*, 187 Miss. 148, 192 So. 296 (1939);

In *Biloxi Firefighters*, the court noted the discretion municipal authorities have to determine the manner in which they exercise their powers. *Id.* at 592 (quoting *Webb v. City of Meridian*, 195 So.2d 832, 835 (Miss. 1967)). A city's dealings with employees are discretionary. *Id.* (citing *Scott v. Lowe*, 223 Miss. 312, 318, 78 So.2d 452, 454 (1955)). In *American Oil*, the court found that passing the resolution was an ultra vires act "(one which is beyond the powers conferred upon the municipality by law) and not binding on its face." *Id.* The "city council could not contract away a subsequent governing body's 'control of municipal affairs, property, and finances.'" *Id.* Nor could the city contract away a successor administration's right to maintain and regulate the fire department. *Id.*

> [T]his act was clearly discretionary and thus not binding on successor city administrations. To hold otherwise would permit city administrations, through their actions, to "tie the hands" of successor administrations and totally destroy their ability to effectively conduct city business. Accordingly, we hold here that the . . . adoption of [the resolution] was not binding on subsequent Biloxi city councils which, in the exercise of discretion, could determine whether to adhere to the provisions of this resolution. *Id* at 593

For the current Jackson County Board of Supervisors to enter into a contractual agreement scheduling payment over nine (9) installments in order to escape liability for its own Pension Contract indebtedness under

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Tullos v. Town of Magee, 181 Miss. 288, 179 So. 557 (1938); *Edwards Hotel & City R. Co. v. City of Jackson*, 96 Miss. 547, 51 So. 802 (1910).

the guise that once the next Board of Supervisors is elected, they are not bound by the terms of the previous Boards' commitments is a clear error in law and must be reviewed by this Court. For the entire County to attempt to escape a net pension liability of $450 million and then force Petitioners and others into a settlement wherein the county contract becomes void upon election of a new board is a legal fiction.

How much more then, should an elderly retiree, whose benefits equate to sometimes half or more of their monthly income, be afforded due process rights for the denial of benefits for which he or she both worked and paid? If the standard of due process rights is afforded a welfare recipient because of potential adverse economic benefits, one should equate that the same rights be afforded to the elderly of our society who are unable to re-enter the workforce and who, in good faith, entered into a contract with a governmental agency, performing all duties and obligations. Due process should at the very least allow the Petitioners and other Participants the right to choose his or her own destiny.

Additionally, the terms of the settlement include a thirty-five-year schedule (App.5a, 16a, 39a, 57a, 61a, 100a, 127a) for SRHS to deposit $149,950,000 into the Fund (App.5a), and as noted in the Fifth Circuit Opinion, "testimony taken as a whole was remarkably vague about SRHS's future ability to fund its share of payments as well as the results to retirees and other class members if it did not." (App.72a). Petitioners' strong concerns about the failure and insecurity of the Fund over thirty-five (35) years on an unsecured debt was echoed by the Fifth Circuit opinion questioning

"whether over the extraordinarily lengthy 35-year contemplated term, SRHS, still in precarious shape, will be able to handle the escalating annual installment payments." (App.72a). Petitioners attempted to recall Bond (Chief Financial Officer, SRHS), but were denied cross-examination.[9]

SRHS's, unsecured promise in the form of a thirty-five (35) year scheduled payment plan into the Fund piqued the interest of the Fifth Circuit as well,

> "[p]erhaps the most intriguing fact is that class counsel arranged for their agreed, complete payout of fees from SRHS before the end of 2018, and thus alleviated any significant future risk of nonpayment. Meanwhile, the Plan participants bear considerable risk and worse, uncertainty. As the record stands, SRHS's future ability to make escalating annual payments to the Plan over thirty-five years is arguable . . . " (App.74a-75a)

The Court goes on to assert,

> "There is no assurance in the record that the Plan will not run out of money to pay the class members' claims well before 2051. (App.76a)

The lower court should have never approved such a long-term settlement knowing that municipalities are unable to bind themselves to contracts for an unreasonable time.

> "A municipality cannot bind itself by a perpetual contract, or by one which lasts an unreasonable length of time. It is declared to be

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[9] App.74a, Footnote 8

> against public policy to permit a municipal corporation to part with any of its legislative power. In the absence of a clear grant of power from the legislature, the municipal authorities can do nothing which amounts in effect to the alienation of a substantial right of the public. It cannot obligate itself not to exercise such powers, and a contract in which it purports to do so, even upon valuable consideration, is void. Thus, a municipal corporation cannot, by contract or otherwise, divest itself of its general police power, or of the power of eminent domain which has been delegated to it by the legislature, or of the power of taxation." *Lamar Bath House Co. v. Hot Springs*, 229 Ark. 214, 315 S.W.2d 884 (1958) (*See American Fed. State, County v. City of Benton, Ark.* 513 F.3d 874 (8th Cir. 2008) at 881 and *Risser v. City of Little Rock*, 225 Ark. 318, 281 S.W.2d 949, 950).

In essence, the lower court allowed for SRHS, a wholly owned county hospital to bind itself to a thirty-five year (35) unsecured payment "contract," allowing the County to enter into an unsecured payment "contract" which would bind future boards for approximately nine (9) years, and approved payment for attorney's fees from SRHS to Class Counsel over the period of three (3) years. "The Settlement Agreement's payment obligations are no more than unsecured contractual obligations of SRHS (and Jackson County); there is no collateral to support them or incentivize payments to the Plan over those to other unsecured creditors . . . " (App.32a). Petitioners aver that the 'payment plan' as scheduled per the settlement structured over thirty-

five (35) years is voidable and is an impairment of the Pension Contract as is the 'payment plan' as scheduled by and between Jackson County and SRHS (App.165a). The lengthy schedule of payments under the contract will potentially give rise to future litigation should subsequent Boards not agree to the terms, while the class action attorneys have already received their money and left Petitioners holding an empty bag, or as the Fifth Circuit stated, "counsel assured themselves a multi-million-dollar bird in hand, while leaving the class members two in the bush . . . " (App.75a).

CONCLUSION

For the above reasons, the Petitioners respectfully request that their petition for a Writ of Certiorari be granted.

Respectfully submitted,

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