No. _____

In the Supreme Court of the United States

TRACY GUERIN, DIRECTOR OF THE WASHINGTON STATE DEPARTMENT OF RETIREMENT SYSTEMS,

PETITIONER,

v.

MICKEY FOWLER, LEISA MAURER, AND A CLASS OF SIMILARLY SITUATED INDIVIDUALS,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General

PETER B. GONICK*
ANNE E. EGELER
Deputy Solicitors General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
peter.gonick@atg.wa.gov
**Counsel of record*

QUESTIONS PRESENTED

1. If a State's statutorily created pension system allows government employees to transfer their accumulated pension contributions into a different pension plan, do the employees have a constitutional right to a particular method for calculating interest on the contributions at the time of transfer?

2. Does the Eleventh Amendment provide a state immunity from a claim in federal court for money damages, when the claim is framed as a request for an injunction ordering the State to provide compensation to Plaintiffs?

PARTIES TO THE PROCEEDINGS

Petitioner is Tracy Guerin, in her official capacity as Director of the Washington State Department of Retirement Systems.

Respondents are Mickey Fowler and Leisa Maurer, on behalf of a putative class of similarly situated individuals. The proposed class is all active and retired members of the Washington Teachers' Retirement System (TRS) who transferred from TRS Plan 2 to TRS Plan 3 prior to January 20, 2002. App. 29a, 49a. As of the time of the filing of this petition, the class had not been certified by the district court.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTRODUCTION

The Ninth Circuit's opinion below creates an unprecedented and costly constitutional rule for public pensions that conflicts with multiple, well-settled doctrines of this Court and other circuits.

First, the Ninth Circuit created a new constitutional mandate that a state must provide interest on a daily basis for statutory retirement benefit programs. Specifically, the Ninth Circuit held that public employee contributions to a statutorily created pension system must accrue interest on a daily basis, notwithstanding state law to the contrary. A constitutional right to daily interest would have a wide impact, implicated in any state or federal program providing interest on funds. Mandating states to pay daily interest is in direct conflict with this Court's recognition that states have great latitude in setting the circumstances in which interest may be earned. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998).

No other court in the nation—state or federal—has even hinted at such a rule. Not only is this decision unprecedented, but it applies a common law rule that interest accrues daily out of context, ignores the long history of legislative and industry modification of the rule, and would invalidate laws of the federal employment retirement system and the retirement systems of numerous states in addition to Washington.

Second, the Ninth Circuit ignored settled Eleventh Amendment analysis in applying its new-fangled rule to require retrospective monetary relief from the State. In doing so, the Ninth Circuit snubbed

this Court's warnings that mere labels applied by plaintiffs should not control Eleventh Amendment analysis. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Ignoring *Edelman*, the court concluded that an injunction to transfer money to Plaintiffs to compensate them was not the same as an award of money damages. The Ninth Circuit also ignored other circuit court opinions in failing to analyze whether demanding funds from the state retirement system was the functional equivalent of demanding funds from the State.

This Court should grant certiorari.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 899 F.3d 1112 (2018). App. 24a-39a. The order denying rehearing en banc, and the opinion dissenting from the denial, is reported at 918 F.3d 644 (2019). App. 1a-23a.

The district court opinion dismissing the lawsuit as unripe is reported at *Fowler v. Frost*, No. CV15-5367BHS, 2015 WL 9303486 (W.D. Wash. Dec. 22, 2015). App. 40a-48a.

JURISDICTION

The order denying rehearing en banc was entered on March 13, 2019. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in part: "[N]or shall private

property be taken for public use without just compensation."

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Wash. Rev. Code § 41.50.033 provides, in part:

> (1) The director [of the Department of Retirement Systems] shall determine when interest, if provided by a plan, shall be credited to accounts in the public employees' retirement system, the teachers retirement system, the school employees' retirement system, the public safety employees' retirement system, the law enforcement officers' and firefighters' retirement system, or the Washington state patrol retirement system. The amounts to be credited and the methods of doing so shall be at the director's discretion, except that if interest is credited, it shall be done at least quarterly.
>
> (2) Interest as determined by the director under this section is "regular interest" as defined in [Wash. Rev. Code §§] 41.40.010(15), 41.32.010(23), 41.35.010(12), 41.37.010(12), 41.26.030(23), and 43.43.120(8).
>
> (3) The legislature affirms that the authority of the director under [Wash. Rev. Code §§] 41.40.020 and 41.50.030 includes the

> authority and responsibility to establish the amount and all conditions for regular interest, if any. The legislature intends chapter 493, Laws of 2007 to be curative, remedial, and retrospectively applicable.

App. 85a-86a (notes omitted). Wash. Admin. Code § 415-02-150 provides, in part:

> (1) You are required to make contributions to your retirement plan each pay period.
>
> (2) Your contributions are tracked in an individual account in your name.
>
> (3) [method of calculating interest]
>
> (4) The calculated amount of regular interest will be credited to your individual account on the last day of the quarter. The total amount in your individual account (i.e., all your member contributions plus all the regular interest that has been credited to the account) are your "accumulated contributions."
>
> (5) Your individual account does not "earn" or accrue regular interest on a day by day basis.

App. 87a-88a.

STATEMENT OF THE CASE

Like the federal government and many states, Washington operates a statutory retirement benefit program for government employees that offers defined benefits—often called a public pension. The federal program and most states' programs fund the benefits primarily through employee contributions deducted

from their paycheck, employer contributions, and the investment returns on the contributions.[1] The federal program and state programs also track the amount of an employee's contributions in the event of a refund or other exit from the pension plan.[2]

The federal program and state programs vary widely with respect to the accrual and crediting of interest on employee contributions. Some states, like Florida, Louisiana, and Rhode Island, do not provide any interest at all when refunding employee contributions.[3] Some states credit interest on an annual basis, some semi-annual, and some quarterly. *E.g.*, Alabama, Kentucky, New Mexico, North

---

[1] U.S. Office of Personnel Management, *CSRS/FERS Handbook*: *Employee Deductions and Agency Contributions*, ch. 30, at 4 (April 1998), https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c030.pdf; Nat'l Ass'n of State Ret. Adm'rs, *NASRA Issue Brief: Employee Contributions to Public Pension Plans* 1 (Oct. 2018), https://www.nasra.org/files/Issue%20Briefs/NASRAContribBrief.pdf.

[2] *E.g.*, U.S. Office of Personnel Management, *CSRS/FERS Handbook*: *Refunds*, ch. 32, at 4 (April 1998), https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c032.pdf.

[3] Fla. Stat. § 121.071(2)(b); Florida Ret. Sys., *Pension Plan Member Handbook* 23 (2018), https://www.rol.frs.state.fl.us/forms/member_handbook.pdf; La. Stat. §§ 11:415, 11:403(1), (23), 11:445; Louisiana State Emp. Ret. Sys., *Member's Guide to Retirement* 11 (Apr. 2019), https://lasersonline.org/wp-content/uploads/2016/07/MembersGuide2Retirement_Full.pdf; R.I. Gen. Laws § 36-10-8; Emps.' Ret. Sys. of Rhode Island, *Frequently Asked Questions for Members*, http://www.ersri.org/im-a-member/frequently-asked-questions-for-members/#gsc.tab=0 (last visited June 4, 2019).

Carolina, South Dakota, Virginia, and Wisconsin, all credited annually; Alaska, credited semi-annually; Kansas, credited quarterly.[4]

The federal program credits interest on a refund of employee contributions on a monthly basis. 5 U.S.C. § 8401(19)(D)(ii); 5 C.F.R. § 841.605(b)(1); U.S. Office of Personnel Management, *CSRS/FERS Handbook*: *Refunds* ch. 32, at 28 (April 1998) (H.1: "No interest is paid on a refund of FERS contributions: . . . For a fractional part of a month."), https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c032.pdf.

This case concerns the Washington Teachers' Retirement System (TRS). The method of crediting interest in TRS, which is similar to the method used by the federal government and many states, is described in more detail below.

---

[4] Alabama Emps.' Ret. Sys., *ERS Member Handbook* 9 (2013), https://www.rsa-al.gov/uploads/files/ERS_Member_Handbook_T2_bookmarked.pdf; Alaska Dep't of Admin., Ret. & Benefits, *Public Employees Retirement System Information Handbook* 6 (2011), http://doa.alaska.gov/drb/pdf/pers/handbook/2011/PERS_handbook_2011_web.pdf; Kansas Pub. Emp. Ret. Sys., *KPERS 3 Benefits*, https://www.kpers.org/active/kpers3.html (last visited June 5, 2019); Kentucky Ret. Sys., *Comprehensive Annual Financial Report* 39-40 (2017), https://kyret.ky.gov/Publications/Books/2017%20CAFR%20(Comprehensive%20Annual%20Financial%20Report).pdf; Pub. Emps. Ret. Ass'n of New Mexico, *PERA Member Handbook* 11 (2017), http://www.nmpera.org/assets/uploads/forms-kits-handbooks/2017MemberHandbook_10.2017.pdf; N.C. Gen. Stat. § 135-7(b); S.D. Codified Laws § 3-12-47.8; Va. Code § 51.1-147(C); Wis. Stat. § 40.04(4)(a)(2)-(3); Wisconsin Dep't of Emp. Trust Funds, *Your Benefit Handbook* 6-7 (Dec. 2018), http://etf.wi.gov/publications/et2119.pdf.

A. TRS Is a Statutory Retirement Benefit Program for Teachers

TRS is a governmental retirement system for public school teachers in the State of Washington. Wash. Rev. Code § 41.32.020. TRS is subdivided into three distinct plans, but Plan 1 is not at issue in this case. Wash. Rev. Code § 41.32.005.

Plan 2 is a defined benefit plan: upon retirement, members are entitled to a monthly benefit based on their years of service and compensation. Wash. Rev. Code § 41.32.760. Both teachers and their employers are required to make contributions into the Plan 2 fund throughout each teacher's career. Wash. Rev. Code §§ 41.45.050, .061; Wash. Rev. Code § 41.50.075(2). Employer contributions are made by school districts, which receive payments from the state general fund to pay the employer contributions. *See* Wash. Rev. Code 28A.150 (describing basic education); *McCleary v. State*, 173 Wash. 2d 477, 495-511, 269 P.3d 477 (2012) (funding of basic education is a paramount state function). The amount of employee and employer contributions is calculated by the State Actuary, who considers expected income and outlays to ensure that the pension fund has sufficient funds to meet future obligations. *See* Wash. Rev. Code §§ 41.45.010, .060.

The Department of Retirement Systems (Department) does not hold or invest pension funds. Instead, the employee and employer contributions are placed in a co-mingled fund in the custody of the State Treasurer and managed by the Washington State Investment Board. Wash. Rev. Code § 41.50.075. The co-mingled fund is not an interest bearing account;

it is an investment fund. Wash. Rev. Code §§ 41.50.075(2), .080. The fund is used to pay the monthly benefits to TRS members upon retirement as those benefits become due. Wash. Rev. Code § 41.50.075(2).

As a defined benefit plan, Plan 2 benefits received upon retirement do not vary based on the amount of employee contributions. But there are circumstances in which the amount of employee contributions becomes relevant, such as when an employee seeks a refund upon withdrawal from government service before retirement or, as here, transfers to a different retirement plan sponsored by the State. Washington has by statute, and implementing administrative rules, determined what Plan 2 members are entitled to in those circumstances.

First, the Department is required to track each teacher's contributions to Plan 2 in what is called an "individual account." Wash. Admin. Code § 415-02--150. If a teacher separates from service and elects not to receive a pension, the teacher has a statutory right to request a refund of the amount the teacher contributed, as tracked in the individual account. Wash. Admin. Code § 415-02-150. Second, the Director of the Department may also credit interest to a teacher's individual account. Wash. Rev. Code § 41.50.033; Wash. Rev. Code § 41.32.010(38). The Director has complete discretion over whether any interest is applied, the rate of interest, when interest is credited, and "the amount and all conditions for regular interest, if any." Wash. Rev. Code § 41.50.033(3). The total amount of the teacher's contributions, plus interest that has been credited, is

statutorily defined as the teacher's "accumulated contributions." Wash. Rev. Code § 41.32.010(1).

Since 1977, the Director has applied the same methodology to the regular interest challenged here. App. 82a. The Department grants 5.5% annual interest on contributions, compounded quarterly based on the accumulated contributions in an account on the last day of the prior quarter.[5] Wash. Admin. Code § 415-02-150(3).

In 1996, Washington created TRS Plan 3, which included a component allowing Plan 2 members to transfer the accumulated contributions into a defined contribution plan. Wash. Rev. Code §§ 41.32.817(5), .831. Members who transferred within a statutory window received an additional transfer payment of 65% of the amount of their accumulated contributions. Wash. Rev. Code § 41.32.8401. The named Plaintiffs in this case elected to transfer from Plan 2 to Plan 3 within the statutory window. App. 58a-59a. The Department transferred the entire amount of each Plaintiff's accumulated contributions to their new Plan 3 account. Consistent with the established methodology, their transferred accumulated contributions included all interest that had been credited—i.e., interest through the quarter-end immediately preceding their transfer.

---

[5] The Department's methodology is not a straightforward quarterly crediting method, because it does not credit any interest for the prior quarter if the balance in the account at the end of any quarter is zero. Wash. Admin. Code § 415-02-150(3). But this difference is immaterial to the legal issues in the case, so the Department refers to its methodology as quarterly crediting for ease of reference.

B. Washington Courts Hold That Plaintiffs Are Not Entitled to Daily Interest Under State Law

In 2009, Plaintiffs and a class of similarly situated individuals sought judicial review in state court under the Washington Administrative Procedure Act, claiming in part that, pursuant to the common law, they were *earning* interest on pension contributions daily, even though their accounts were only credited with interest on a quarterly basis. App. 76a-77a. They claimed that they should have received daily interest for the period between the date of their transfer to Plan 3 and the prior quarter-end, and that application of the quarterly interest methodology was an unconstitutional taking of their property without just compensation. App. 69a.

Washington courts rejected their claim. In a published opinion, the Washington Court of Appeals held that, under Washington statutes, the Department had sole discretionary authority to determine how interest was earned and credited on Plan 2 contributions. App. 79a-80a. The court explicitly rejected the claim that members were entitled to daily interest as a matter of common law. App. 79a-80a. The court found that Washington's statutes had abrogated any common law right to daily interest on the accounts over which the Department had complete discretion regarding the earning and crediting of interest. App. 79a-80a. However, the Washington Court of Appeals remanded on other grounds, finding that the Department failed to consider alternatives to the quarterly interest methodology. App. 83a-84a. The court did not address the takings claim. App. 83a-84a. Plaintiffs did not

seek review of this opinion to the Washington Supreme Court. On remand and after due consideration, the Department promulgated an administrative rule codifying the policy that had been in effect since 1977. *See* Wash. Admin. Code § 415-02-150.

C. Proceedings in this Case

In 2015, after Washington's courts held that state law did not require the Department to pay the Plaintiffs daily interest (but before the new rule codifying the methodology was adopted), the Plaintiffs filed this action. Plaintiffs asked the federal court to conclude that the quarterly crediting of interest used by the Department effected a taking in violation of the Fifth Amendment to the United States Constitution. App. 44a. Plaintiffs sought an injunction to transfer funds into their Plan 3 accounts that they contended should have been included when their Plan 2 accumulated contributions were transferred to their newly created Plan 3 accounts. App. 64a. Most of Plaintiffs' transfers occurred in 1996-1997. App. 58a.

1. The district court dismissed the case as unripe

The district court dismissed the case as unripe because at that time the Department was still considering its interest crediting methodology on remand from the Washington Court of Appeals. App. 47a-48a. The Department raised several alternative grounds for dismissal, but the district court did not address them. App. 47a-48a.

2. The panel opinion reversed

On appeal, the Ninth Circuit reversed, holding that the failure to credit daily interest on the TRS members' contributions constituted a per se taking and was ripe for review. App. 32a. The panel also rejected three alternative arguments for affirming the dismissal.

First, the panel rejected the Department's argument that there could be no takings here because under state law, the TRS members were not entitled to daily interest. App. 33a-35a. The panel determined that the right to daily interest was a property right ingrained in common law tradition that could not be abrogated without prompting a Takings Clause analysis. App. 34a. The panel relied on Supreme Court and Ninth Circuit authority that had previously held that "interest follows principal" is a traditional common law right that could not be abrogated by state law. App. 33a-34a. (citing *Schneider v. California Dep't of Corr.*, 151 F.3d 1194, 1200 (9th Cir. 1998) (quoting *Phillips*, 524 U.S. at 167)).

Second, the panel rejected the Department's issue preclusion and *Rooker-Feldman* bases for dismissal, finding that the prior state court opinion had not addressed the constitutional takings claim. App. 36a.

Finally, the panel rejected an Eleventh Amendment argument that the suit was foreclosed because it sought retrospective monetary relief against the State. App. 37a. The panel reasoned that the Plaintiffs did not seek a money award but instead an injunction to transfer money into their new Plan 3 account. App. 37a. The panel also concluded that

Eleventh Amendment immunity did not apply because the money to be transferred would come from the co-mingled investment fund held for the benefit of employees rather than the state treasury. App. 37a. The panel did not address the Department's argument that the co-mingled fund is comprised in significant part by employer contributions ultimately paid by the State, nor did it engage in a traditional Eleventh Amendment analysis as to whether the State was the real party in interest. *See* App. 37a. Instead, the panel relied on precedent addressing the return of unclaimed property held by a state—a case explicitly excluding a takings claim analysis—to conclude that the investment fund does not include the State's money. App. 37a (citing *Taylor v. Westly*, 402 F.3d 924, 932 (9th Cir. 2005)).

3. The Ninth Circuit rejected the petition for rehearing en banc, with a dissenting opinion

The Department petitioned for rehearing and rehearing en banc, which was denied. App. 3a. In a dissenting opinion, Judge Bennett argued that the panel's unprecedented and incorrect opinion would have far-reaching consequences beyond Washington: "The panel's holding will cast significant doubt on the legitimacy of retirement systems administered by numerous states and the federal government that apportion interest less frequently than daily." App. 21a-22a (citing the federal retirement system and those of eight states other than Washington that do not provide daily interest).

Judge Bennett argued that the panel had "wrongfully stripped the State of Washington of its Eleventh Amendment immunity" by allowing what was factually a claim for money damages to proceed in the guise of an injunction requiring the State to "return" Plaintiffs' property. App. 4a. In Judge Bennett's view, "[t]he property was never Plaintiffs', and, in any case, is simply money—uncredited interest that will now be paid to Plaintiffs from the State's treasury." App. 4a. Judge Bennett first noted that takings claims are viewed unanimously by the Circuits that have addressed the issue as a claim for damages for the unconstitutional denial of just compensation, which are subject to Eleventh Amendment immunity. App. 8a-9a. Next, Judge Bennett argued that the panel's effort to cast the claim as one merely for an injunction was contradicted by this Court's opinion in *Edelman*, 415 U.S. 651, which held that the Court examines whether the claim is functionally for retrospective monetary relief rather than deferring to a label of prospective injunctive relief. App. 9a. If the panel opinion stands, Judge Bennett predicted future claims for money damages will similarly be recast as injunctive relief claims for "return" of money that plaintiffs allege is their property. App. 4a, 22a-23a.

Judge Bennett also denounced the panel's creation of a "never-before-recognized constitutional right" to daily interest. App. 5a. Judge Bennett determined that the panel's ruling conflicts with this Court's precedent that gives great latitude to states to determine the circumstances in which interest is earned, and improperly relies on cases addressing the taking of interest that had actually been earned in a

third-party account before being taken by the government. App. 16a-18a. Judge Bennett also explained that the daily interest rule is largely dependent on context, has historically been subject to statutory modifications, and that the panel did not cite any authority suggesting the rule was not subject to legislative modification. App. 19a-20a.

A second judge, Judge Nelson, joined the dissent's criticism of the panel's creation of a new constitutional right to daily interest. App. 4a.

ARGUMENT

A. In Conflict with this Court's Longstanding Precedent, the Ninth Circuit Used the Takings Clause to Create a New Property Right

The Ninth Circuit's opinion conflicts with this Court's precedent by employing the Takings Clause as a means of creating a property right. This Court has long held that "the Constitution protects rather than creates property interests[.]" *Phillips*, 524 U.S. at 164 (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). As this Court has explained, "[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Roth*, 408 U.S. at 577; *see also Georgia v. Randolph*, 547 U.S. 103, 144 (2006) (noting that the Court has "consistently held" that property rights are created by other bodies of law—not the Constitution). In direct conflict with this fundamental rule, the Ninth Circuit disregarded the state law defining government employee pension rights and created a new property right to daily

accrual of interest. In addition to granting new rights to Washington employees, this misuse of the Takings Clause impacts interest accrual under the federal pension system, as well as multiple state systems. The Court should accept certiorari to reverse this anomalous application of the Takings Clause and restore legislative authority to define the scope of public employees' property rights to government pension funds.

1. The Ninth Circuit disregarded this Court's recognition of state authority to limit entitlement to interest

State governments have "great latitude in regulating the circumstances under which interest may be earned." *Phillips*, 524 U.S. at 168. Despite this Court's consistent recognition of state authority to define this property right, the Ninth Circuit held that if Washington gives government employees a pension, and opts to provide any interest on pension funds, it is compelled to provide interest daily. This decision effectively robs the state of any authority to regulate the circumstances under which interest is earned.

Washington's limited award of interest on government employee pension contributions is precisely the kind of action this Court endorsed in *Phillips*. The Director of the Department of Retirement Systems properly exercised her statutory authority by defining the employees' right to accrual of interest on Plan 2 contributions. "[I]f the amount in your individual account on the last day of a quarter is more than zero dollars, the department will calculate an amount of regular interest to be credited to your account[.]" Wash. Admin. Code § 415-02-150(3);

Wash. Rev. Code § 41.50.033(3) (setting forth Director's authority). The regulation further explains that "[y]our individual account does not 'earn' or accrue regular interest on a day by day basis." Wash. Admin. Code § 415-02-150(5). The Ninth Circuit erred in holding that the Constitution forbids the State's interest policy. Certainly, an employee can file a claim challenging the State's interpretation or application of its regulations. In fact, the Plaintiffs did so here, and lost their challenge in state court. App. 73a. But the Fifth Amendment does not override a state's statutory authority to determine the amount of public pension benefits in favor of a new, court-defined property right.

2. The Ninth Circuit improperly applied the common law to transform a statutorily defined benefit into a court-created property right

In creating a new property right to daily interest, the Ninth Circuit incorrectly relied on the common law principle that "earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Phillips*, 524 U.S. at 167. In applying the common law rule that interest follows principal, this Court has held that the government cannot take interest that has been earned on an account. The doctrine is inapplicable to this case. Here, the dispute is not about who has a right to the interest earned on funds placed in a private account. Rather, the issue is whether a state that pays interest in its statutory pension system is constitutionally required to base interest on a purported common law rule rather than its

statutes. This Court has never recognized such a constitutional requirement.

The Ninth Circuit improperly extended *Phillips* to create a right to an award of daily interest. App. 32a, 34a-35a. *Phillips* provides no support for the Ninth Circuit's invention of a constitutional right to earn additional interest from the State. In *Phillips*, the Court examined a Texas law that required attorneys to place client funds in a private interest-bearing account. *Phillips*, 524 U.S. at 160. The Court applied the common law doctrine that "interest follows principal" and held that "any interest that *does* accrue" on the client's funds is the property of the client. *Id.* at 168. Like *Phillips*, all of this Court's cases addressing the right to interest on funds involved claims for interest that had actually accrued and been credited in a third-party bank account. *E.g.*, *Brown v. Legal Found. of Washington*, 538 U.S. 216, 221 (2003) (addressing whether a state commits a taking when it requires the interest actually earned on legal client accounts to be given to charity); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 157 (1980) (addressing the right to interest actually earned on funds maintained by the clerk of the court in a local bank). There is nothing in this Court's precedent that supports the Ninth Circuit's determination that the Takings Clause creates a property right to interest that Washington has not awarded.

In Washington's Teachers' Retirement System, there are no private funds placed in a third-party account. The funds involved in this case are statutory assessments paid to support public pensions. Employees can only use the funds as provided by statute and they earn interest only as provided

by statute. Public employee pension systems like this one are purely creatures of statute, so ownership of funds and interest thereon (if any) is necessarily determined by statute, not common law.

The Ninth Circuit's decision also conflicts with the Federal Circuit's ruling in *Texas State Bank v. United States*, 423 F.3d 1370 (Fed. Cir. 2005). There, the court relied on this same distinction in rejecting a takings claim by a state-chartered bank that was required to deposit funds with the Federal Reserve Board. The bank claimed that even though the account at the Federal Reserve Board was not an interest-bearing account, it was entitled to any earnings that the Federal Reserve Board obtained by using the funds on deposit. *Id.* at 1378. The Federal Circuit rejected the claim, reasoning that "[t]he 'interest follows principal' cases relied upon by [the bank] all involved situations where third parties held plaintiffs' funds in separate interest-bearing accounts." *Id.* (citing *Webb's Fabulous Pharmacies*, 449 U.S. at 157-61; *Phillips*, 524 U.S. at 164; *Brown*, 538 U.S. at 235). Thus, the Ninth Circuit's failure to recognize the distinction between the government confiscating interest that had actually been credited by a third party in a third-party-controlled private account, and interest that the government chose not to provide on a government-controlled fund, conflicts with the *Texas State Bank* reasoning.

3. The State did not violate the Takings Clause by statutorily modifying a common law rule

Even if the daily-accrual rule were applicable in the context of a benefits program a state opts to create by statute, there is no basis for the Ninth Circuit's conclusion that the rule cannot be abrogated. *See* App. 19a. This Court has consistently recognized that states may legislatively modify a common law rule. *E.g.*, *United States v. Texas*, 507 U.S. 529, 533-34 (1993) (recognizing legislature can abrogate common law rule when statutory purpose is evident); *Munn v. Illinois*, 94 U.S. 113, 134 (1876) ("common-law regulation of trade or business may be changed by statute").

Here, the Ninth Circuit extended the general common law rule that "interest follows principal" to include a common law right to a daily award of interest. But unlike the interest follows principal rule, the common law rule of daily accrual of interest is largely dependent on context that is absent in this case.[6]

---

[6] This is not the first time the Ninth Circuit has singled itself out from the other circuits by ignoring context when extending *Phillips*. In *Schneider v. California Department of Corrections*, 345 F.3d 716 (9th Cir. 2003), it held that the state could not direct the interest earned on prison inmate trust accounts to a general inmate welfare fund and ignored the common law history of limited prisoner property rights. Every other circuit that has addressed this issue has disagreed with the Ninth Circuit. *Young v. Wall*, 642 F.3d 49 (1st Cir. 2011); *Givens v. Alabama Dep't of Corr.*, 381 F.3d 1064 (11th Cir. 2004); *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000).

At common law, certain interest was deemed to accrue daily, regardless of when it was payable. *E.g.*, 32 Lord Mackay of Clashfern, *Halsbury's Laws of England* § 127, at 78 (4th ed. 2005). But unlike the interest follows principal rule, the daily accrual rule was largely dependent on context. It applied to interest on debts or notes, but not to interest on public funds or annuities. *See Wilson v. Harman*, 2 Ves. Sen. 672, 673, 27 Eng. Rep. 189 (1755); Edwin A. Howes, Jr., *The American Law Relating to Income and Principal* 73, 78 (Little Brown & Co. 1905). At least some of the ancient case law relied on by the Ninth Circuit appeared to view the rule as a default that could be changed by statute. App. 34a (e.g., *Mann v. Anderson*, 106 Ga. 818, 32 S.E. 870, 871 (1899) (stating that the rule that interest accrues daily "is the rule of the common law, and there is no statutory law of force in this state which changes this rule in reference to dividends declared on stock in corporations")).

The rule has been addressed in case law primarily to determine whether interest on principal payable on a periodic basis (e.g., quarterly) is apportionable between successive beneficiaries of the interest when the beneficiary changes mid-quarter. Every case cited by the panel opinion addressed this scenario. *See* App. 34a (citing *Wilson*, 2 Ves. Sen. at 672; *Mann*, 32 S.E. 870; *In re Flickwir's Estate*, 136 Pa. 374, 20 A. 518 (1890)); *see also* 32 *Halsbury's Laws of England* § 127, at 78. Neither the Ninth Circuit nor the Plaintiffs cited a single case applying the rule in the context of a statutory benefits program, or even to the somewhat analogous context of interest accruing

on funds deposited in a bank account.[7] *See* App. 20a ("the fact that no court has, before now, held that state governments cannot modify the daily interest rule when they hold cash strongly suggests that the rule is not so deeply ingrained in our tradition that states may not modify it without running afoul of the Takings Clause").

To the contrary, both historical and modern sources show that banking institutions did not uniformly accrue interest on a daily basis. For example, treatises from the early 1900s acknowledge that interest may be credited monthly, quarterly, or semi-annually "according to the custom of the bank." *See* James Sweet, *Sweet's Modern Business Arithmetic: A Treatise on Modern and Practical Methods of Arithmetical Calculation* § 805, at 228 (1908), https://archive.org/details/sweetsmodernbus00sweegoog; *see also* J.A. Lyons, *The New Business Arithmetic: A Treatise on Commercial Calculations* §§ 424, 425, at 287-88 (1912), https://archive.org/details/newbusinessarith00lyonrich/page/n3. Treatises similarly demonstrate that banks often did not allow interest on sums withdrawn before the interest was

[7] Although interest accruing on funds in a bank account bears some resemblance to the accounts here, the employees have far less of a property interest in the funds in their individual accounts than typical bank depositors have in their accounts. As recognized by the dissenting opinion below, the employees' rights to these accounts is set by statute, and employees may not even access these accounts unless they seek a refund or transfer of contributions—otherwise, the right is only to the statutory pension benefits. App. 16a; *see also Bowles v. Dep't of Ret. Sys.*, 121 Wash. 2d 52, 79, 847 P.2d 440 (1993) (employees have no claim on the fund until they complete their term of employment and qualify for a pension).

credited. Lyons, § 424, at 287 ("No interest is allowed on money withdrawn before interest day."); William H. Kiffin, Jr., *The Savings Bank and Its Practical Work* 172-74 (1913) (including example of bank bylaws stating: "At whatever time money may be drawn out, interest thereon shall be credited only to the *last previous* dividend day" and "*no interest* shall be paid for *fractional parts of a month* . . . ."), https://archive.org/details/savingsbankandi01knifgoog/page/n10. Although less common, the same is true today.[8] Banks have not historically applied the daily accrual of interest rule to funds on deposit in every circumstance. There is no common law justification for requiring the Department to pay daily interest here.

In addition, the rule that interest is apportioned between successive interests because interest accrues daily—the only circumstance that the Ninth Circuit pointed to where the daily interest rule was applied in the common law—has been abrogated by forty-seven states through adoption of the Uniform Principal and Income Act. *See* Charles E. Rounds, Jr. & Charles E. Rounds, III, *Loring and Rounds: A Trustee's Handbook* § 6.2.4.3, at 639-40 (Wolters Kluwer 2016) (quoting *Restatement (Third) of*

---

[8] *See, e.g.*, Troy Segal, *What does it mean when interest 'accrues daily?'* (Investopedia Apr. 2, 2018) ("Interest can accrue on any time schedule; common periods include daily, monthly and annually."), https://www.investopedia.com/ask/answers/040315/what-does-it-mean-when-interest-accrues-daily.asp; Jack Guttentag, *A Not So Simple Truth About Interest*, Wash. Post, Jan. 26, 2008 (describing monthly accrual of interest), http://www.washingtonpost.com/wp-dyn/content/article/2008/01/25/AR2008012501739.html.

Restitution and Unjust Enrichment § 47 cmt. f)); Uniform Law Comm'n, *Principal and Income Act (2000)* (interactive fact sheet), https://www.uniformlaws.org/committees/community-home?CommunityKey=b20aa74e-cae7-4557-b93b-a4b416c17407 (last visited June 5, 2019).

In short, the daily interest rule shares none of the hallmarks that made the interest-follows-principal rule one that cannot be changed without prompting a Takings Clause analysis. The Ninth Circuit's elevation of the daily interest rule to immutable status conflicts with *Phillips* and this Court should grant certiorari to address this conflict.

4. The Ninth Circuit's rationale invalidates numerous state and federal laws that provide for interest on a non-daily basis

The federal government and at least thirteen other states have laws similar to Washington's that provide less than daily interest on employee retirement contributions. As the dissenting opinion recognized, the panel's holding "will cast significant doubt on the legitimacy" of these retirement systems. App. 21a.

Just like Washington's TRS Program, the Federal Employment Retirement System does not provide daily interest when it refunds an employee's contributions. Instead, it accrues and pays interest on a monthly basis. *See* 5 U.S.C. § 8401(19)(D)(ii); 5 C.F.R. § 841.605(b)(1), (3); U.S. Office of Personnel Management, *CSRS/FERS Handbook*: *Refunds*, ch. 32, at 28 (April 1998) (H.1: "No interest is paid on a refund of FERS contributions: . . . For a fractional part

of a month."), https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c032.pdf.

Washington and the federal government are not alone. Many other state retirement systems similarly do not always credit or pay daily interest, including systems in Alabama, Alaska, Connecticut, Idaho, Kansas, Kentucky, Maryland, Massachusetts, New Mexico, North Carolina, South Dakota, Virginia, and Wisconsin.[9]

---

[10] Alabama Emps.' Ret. Sys., *ERS Member Handbook* 9 (2013) (interest credited on previous years' average balance; amount of interest refunded discounted depending on years of service), https://www.rsa-al.gov/uploads/files/ERS_Member_Handbook_T2_bookmarked.pdf; Alaska Stat. § 39.35.100 (interest credited semi-annually); Alaska Stat. § 14.25.145 (teacher retirement system credited annually); Alaska Dep't of Admin., Ret. & Benefits, *Public Employees Retirement System Information Handbook* 6 (2011), http://doa.alaska.gov/drb/pdf/pers/handbook/2011/PERS_handbook_2011_web.pdf; Conn. Gen. Stat. § 5-166(b)(2) (additional interest for partial year computed as number of complete months employed times rate applied to year-end balance); Idaho Admin. Code r. 59.01.07.101 ("Regular interest . . . shall accrue to and be credited monthly to a member's accumulated contributions."); Kansas Pub. Emp. Ret. Sys., *KPERS 3 Benefits* (interest on employee contributions paid quarterly), https://www.kpers.org/active/kpers3.html (last visited June 5, 2019); Kentucky Ret. Sys., *Comprehensive Annual Financial Report* 39-40 (2017), https://kyret.ky.gov/Publications/Books/2017%20CAFR%20(Comprehensive%20Annual%20Financial%20Report).pdf (interest paid each June 30 based on account balance at end of preceding year); Md. Code Regs. 22.01.09.02(B)(2) (interest on refunds paid through end of prior month); Mass. General Laws ch. 32, § 22(6)(c) (interest credited monthly); Pub. Emps. Ret. Ass'n of New Mexico, *PERA Member Handbook* 11 (2017) (interest credited annually), http://www.nmpera.org/assets/uploads/

The Ninth Circuit's creation of a new, constitutionally protected property right to daily interest will have wide impacts on federal and state budgets and retirement systems. This Court should grant certiorari to prevent this unwarranted harm.

B. The Ninth Circuit Strips States of Eleventh Amendment Immunity in Conflict with this Court's Precedent

In violation of the Eleventh Amendment, the Ninth Circuit allowed a claim for retrospective monetary relief to proceed in federal court against the State. The Ninth Circuit's analysis stretches *Ex parte Young*'s narrow exception far beyond this Court's precedent and "strips the Eleventh Amendment of much of its vitality." App. 4a. The Ninth Circuit's attempts to avoid the limitations of *Ex parte Young*, 209 U.S. 123 (1908), similarly conflict with this Court's opinions. First, the Ninth Circuit's recasting of a retrospective claim for money damages into a prospective injunction to transfer money conflicts with *Edelman*, 415 U.S. at 668. Second, the Ninth Circuit's recasting of money damages as the "return"

---

forms-kits-handbooks/2017MemberHandbook_10.2017.pdf; N.M. Code R. § 2.82.3.13 (interest paid quarterly on refunds in teacher retirement system); N.C. Gen. Stat. § 135-7(b) (interest credited annually); S.D. Codified Laws § 3-12-47.8 (interest on early withdrawal as annually compounded on preceding June 30); Va. Code § 51.1-147(C) (interest credited annually; accrual begins at end of fiscal year in which contribution made); Wis. Stat. § 40.04(4)(a)(2)-(3) (interest credited annually, rate applied to prior year's closing balance); Wisconsin Dep't of Emp. Trust Funds, *Your Benefit Handbook* 6-7 (Dec. 2018) (interest credited annually and does not accrue until January 1 after received), http://etf.wi.gov/publications/et2119.pdf.

of money allegedly taken conflicts with *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 470 (1945). Finally, the Ninth Circuit's decision conflicts with precedent from other circuits by summarily concluding that the funds to be transferred would not come from the State.

The Eleventh Amendment is a vital doctrine of sovereign immunity and federalism. *E.g.*, *Edelman*, 415 U.S. at 661. It bars lawsuits in federal court against state officials when the State is the real, substantial party in interest. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). The State is the real party in interest if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Id.* at 101 n.11 (internal quotation marks omitted). This Court has recognized an exception to the Eleventh Amendment where a plaintiff seeks prospective, injunctive relief. *Ex parte Young*, 209 U.S. at 159-60. But as the dissenting opinion below recognized, "*Ex parte Young* is inapplicable where the relief sought 'is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials[.]'" App. 9a (quoting *Edelman*, 415 U.S. at 668).

Here, the Ninth Circuit eviscerated Eleventh Amendment immunity by allowing a claim against the State where Plaintiffs plainly seek retrospective monetary relief. In state court, where the Eleventh Amendment distinction between prospective and retrospective relief is not relevant, Plaintiffs argued that they were seeking money damages. *Probst v.*

Dep't of Ret. Sys., No. 45128-0, 2014 WL 7462567, at *5-6 (Wash. Ct. App. Dec. 30, 2014) (unpublished), *review denied sub nom. Fowler v. Dep't of Ret. Sys.*, 182 Wash. 2d 1027 (2015). And they had reason to do so. It is undisputed that the interest Plaintiffs seek was never credited to their individual accounts. The Plaintiffs sued alleging that those amounts should have been (but were not) included when their Plan 2 contributions were transferred to Plan 3 accounts. App. 55a-56a. They now seek the money they allege should have been provided over twenty years ago. *See* App. 29a, 49a (defining the putative class of Plaintiffs as TRS members who transferred from Plan 2 to Plan 3 *before January 20, 2002*). The lawsuit is thus barred by the Eleventh Amendment because it seeks relief for a "monetary loss resulting from a past breach of a legal duty." *Edelman*, 415 U.S. at 668. If this lawsuit can be labeled prospective injunctive relief, then "[i]t takes little in the way of imagination to foresee future plaintiffs recasting their otherwise-barred claims for money damages against a state as injunctive relief claims for return of what is supposedly their property." App. 4a.

The Ninth Circuit offers several rationales for escaping Eleventh Amendment immunity, but each has already been rejected by this Court.

First, the Ninth Circuit's willingness to accept the Plaintiffs' label of the suit as seeking injunctive relief rather than money damages conflicts with *Edelman*. In *Edelman*, the Court held that the Eleventh Amendment barred a claim that was effectively a retrospective claim for monetary relief, even though the lawsuit was framed as a request for injunctive relief for equitable restitution. *Edelman*,

415 U.S. at 668; *see also Pennhurst*, 465 U.S. at 102 ("a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief"). In distinguishing the Eleventh Amendment exception set out in *Ex parte Young*, the Court reasoned that "the retroactive position of the District Court's order here, which requires the payment of a very substantial amount of money which that court held should have been paid, but was not, stands on quite a different footing." *Edelman*, 415 U.S. at 664. Just like in *Edelman*, here Plaintiffs frame their requested relief as an injunction for equitable relief, but the gravamen of their just compensation claim is that the Department should have, but did not, pay them daily interest before transferring their Plan 2 contributions to Plan 3. Just as in *Edelman*, the Eleventh Amendment bars their claim.

Second, the Ninth Circuit claims that the Eleventh Amendment does not apply because the lawsuit merely seeks the "return" of money, not damages. App. 37a. As discussed above, this claim reflects the artful pleading of Plaintiffs' claims rather than its practical impact. And it also conflicts with this Court's holding that a lawsuit seeking a refund of taxes paid to the State was barred by the Eleventh Amendment. *Ford Motor Co.*, 323 U.S. at 470 (cited with approval in *Reich v. Collins*, 513 U.S. 106, 110 (1994) ("We should note that the sovereign immunity States enjoy in *federal* court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum.")). If the Ninth Circuit's rationale were correct, Plaintiffs could avoid the dictates of *Ford Motor Co.* by claiming to seek the

"return" of money allegedly assessed illegally by the State. Instead, *Ford Motor Co.* properly recognized that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit . . . ."[10] *Ford Motor Co.*, 323 U.S. at 464.

The Ninth Circuit's opinion also conflicts with other Circuit Courts, which have closely followed this Court's holding that a Takings Clause claim does not seek "just compensation *per se* but rather damages for the unconstitutional denial of such compensation." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999). Consistent with *Del Monte Dunes*, the Circuit Courts have held that a Takings Clause claim for just compensation is a retrospective claim for monetary relief barred by the Eleventh Amendment. *E.g.*, *Hutto v. South Carolina Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526-28 (6th Cir. 2004); *John G. & Marie Stella Kenedy Mem'l Found. v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994); *Robinson v. Georgia*

---

[10] The Ninth Circuit relied on one of its earlier opinions addressing funds of unclaimed property that had not yet fully escheated to the State. App. 37a (citing *Taylor*, 402 F.3d at 935-36). As discussed by the dissenting opinion, *Taylor* is inapplicable here. App. 13a. *Taylor* addressed unclaimed property that was by statute held in trust for its rightful owner. *Taylor*, 402 F.3d at 931. By contrast here, the relevant statutes gave complete discretion to the Department of Retirement Systems as to whether and how much to credit interest, and the TRS Plan 2 retirement funds are not trusts under Washington law. *See* Wash. Rev. Code § 41.50.033; *Retired Pub. Emps. Council of Washington v. Charles*, 148 Wash. 2d 602, 622-23, 62 P.3d 470 (2003).

Dep't of Transp., 966 F.2d 637, 640 (11th Cir. 1992); *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982); *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980). Even the Ninth Circuit had acknowledged this previously. *Suever v. Connell*, 579 F.3d 1047, 1058-60 (9th Cir. 2009); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 955 (9th Cir. 2008). Although Plaintiffs may have a remedy in state court, they may not bring claims for retrospective monetary relief in federal court. *See Hutto*, 773 F.3d at 552 ("the Eleventh Amendment bars Fifth Amendment taking claims against States *in federal court* when the *State's courts* remain open to adjudicate such claims").[11] Here, the Ninth Circuit ignored this voluminous case law and allowed a takings claim for just compensation to proceed in federal court.

Finally, the Ninth Circuit conflicts with other Circuit Courts by failing to engage in any analysis as to whether the State is the real party in interest where an agency head is the named party. Instead, the court simply asserted in a few sentences that the money would not come from the general fund of the State but from investment funds in a retirement system. App. 37a.

This assertion without analysis conflicts with the Second, Fourth, and Sixth Circuits, all of which engaged in the proper analysis and concluded that suits against state retirement systems were effectively against the State for Eleventh Amendment

---

[11] Washington state courts do adjudicate Takings Clause claims against the State. *E.g.*, *Manufactured Hous. Cmtys. of Washington v. State*, 142 Wash. 2d 347, 13 P.3d 183 (2000).

immunity purposes. *McGinty v. New York*, 251 F.3d 84, 100 (2d Cir. 2001); *Hutto*, 773 F.3d at 548; *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005); *see also Pub. Sch. Ret. Sys. of Missouri v. State Street Bank & Trust Co.*, 640 F.3d 821, 833 (8th Cir. 2011) (applying Eleventh Amendment analysis to determine retirement system was arm of the State for purposes of denying diversity jurisdiction).

The *Hutto* opinion from the Fourth Circuit provides the starkest conflict. Just like this case, the plaintiffs there filed a Takings Clause claim against a government retirement system. *Hutto*, 773 F.3d at 540. Just like this case, the plaintiffs sought an injunction for the return of money allegedly taken. *Id.* at 541. The amounts sought to be "returned" were employee contributions that the plaintiffs alleged they were unlawfully required to make. *Id.* But unlike the Ninth Circuit here, the Fourth Circuit did not simply assert that the State was not the real party in interest because the payment would come from an investment fund; it engaged in a reasoned analysis.

The *Hutto* court examined a claim against the South Carolina retirement system, which is very similar to Washington's. The court concluded that the claim against the retirement system was barred because the retirement system was functionally an arm of the state. *Id.* at 548. The South Carolina retirement system and Washington's retirement system share the following similarities that the *Hutto* court found relevant: (1) although the funds are not general funds of the State, the State is ultimately responsible for any shortfalls in the fund; (2) the operation of the retirement system is highly regulated by statute; (3) the State Treasurer is the custodian of,

and accountant for, all funds and holdings of the retirement systems; (4) a separate state agency makes investment decisions over the funds and that agency is comprised of state officials or state-appointed members; (5) the Department is considered a state agency; and (6) the Department's jurisdiction is statewide.[12] The Second and Sixth Circuits also found that lawsuits against similar retirement systems are barred by the Eleventh Amendment. *McGinty*, 251 F.3d at 100 (dismissing ADEA claim against New York retirement system on Eleventh Amendment grounds); *Ernst*, 427 F.3d at 359 (dismissing Equal Protection claim filed against Michigan retirement system on Eleventh Amendment grounds).

Although the question of whether the State is the real party in interest is a factual inquiry, there must be an actual inquiry rather than a conclusory assertion. At a minimum, the Ninth Circuit conflicts with these Circuits in failing to even engage in the inquiry.

The Ninth Circuit's lack of analysis regarding whether the State is the real party in interest similarly conflicts with Circuit Court authority

---

[12] *See Bowles*, 121 Wash. 2d at 71 ("risk of a shortfall rests on state and local government employers and ultimately, on taxpayers"); Wash. Rev. Code 41.32 (teacher retirement system highly regulated by statute); Wash. Rev. Code §§ 41.50.077, .080 (funds held by State Treasurer and invested by Washington State Investment Board); Wash. Rev. Code § 43.33A.020 (composition of State Investment Board); Wash. Rev. Code § 41.40.010(13)(a) (statewide jurisdiction of Department); Wash. Rev. Code § 41.32.010(41) (teacher retirement system statewide); Wash. Rev. Code § 34.05.010(2) (definition of "agency" for state Administrative Procedure Act).

(including its own) by ignoring the principle that Eleventh Amendment immunity applies when the State is functionally liable, even if not legally liable. *E.g.*, *United States ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 137 (4th Cir. 2014) (holding that an entity may be an arm of the State if it is functionally liable, even if not legally liable); *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 225-26 (D.C. Cir. 1986) (state financial commitments to transit authority meant that judgment against transit authority would impact Maryland and Virginia treasuries); *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 381 (9th Cir. 1993) (applying Eleventh Amendment immunity to suit against partially state-funded railroad because state law provided "financial safety net" to railroad). Applying that rationale, even if the Department were not considered the State for Eleventh Amendment purposes, sovereign immunity would apply.

Here, whatever the merits of Plaintiffs' claims, the individual employee accounts never reflected the disputed interest amounts. Nor was the claimed interest placed in the co-mingled investment fund in which employee contributions were deposited. That fund never included amounts representing the daily interest Plaintiffs claim was owed because the State Actuary and legislature set contribution rates reflecting demographic and economic assumptions from the quarterly interest model. *See* Wash. Rev. Code §§ 41.45.010, .060 (describing actuarial methods for setting contribution rates and fund reserves). Thus, retrospectively paying daily interest would at some point require an infusion of new funds not anticipated by the State Actuary, likely by increasing

employee and employer contribution rates. Wash. Rev. Code §§ 41.45.010, .060 (employee and employer contribution rates set to fully fund TRS Plan 2 system and other retirement systems).

Although TRS employers are school districts, the school districts receive payments from the state general fund to pay the employer contributions. *See* Wash. Rev. Code 28A.150; *see also McCleary*, 173 Wash. 2d at 495-511 (funding of public schools is a paramount state function including salaries and benefits for teachers). The requirement of new funds would therefore necessarily come at least in part from the state treasury. The Plaintiffs' request in federal court for those additional funds is therefore barred by Eleventh Amendment immunity.

C. The Ninth Circuit's Opinion Weakens Public Pensions by Applying a New, Unfounded Rule Retrospectively

The combination of errors here—creation of a new and incorrect rule and applying it retrospectively to require payments from the State—is particularly toxic to public pension systems. Public pension programs remain solvent by estimating future liabilities and investment return assumptions. *See* Keith Brainard, *Public Pension Funding 101: Key Terms and Concepts*, Benefits Magazine, Apr. 2013, at 30, https://www.nasra.org/files/Articles/Benefits101-1304.pdf. Many pension programs thus consider this actuarial analysis when setting contribution rates or otherwise arranging for the pension program to be sufficiently funded. *Id.*

Changing the interest payout calculations that public pension programs have been relying on for decades will thus have far-reaching impacts.[13] Public pension systems already face daunting challenges in ensuring sufficient funding for future pensions. *See* Richard Eisenberg, *The Next Retirement Crisis: America's Public Pensions*, Forbes (Online), Oct. 22, 2018, https://www.forbes.com/sites/nextavenue/2018/10/22/the-next-retirement-crisis-americas-public-pensions/#20db06c426f2. Adding unexpected liabilities to public pension systems will only exacerbate these challenges.

The Ninth Circuit's strained analysis of Eleventh Amendment immunity will have an even wider impact. The Ninth Circuit diminishes nearly to the point of extinction the difference between a claim for retrospective monetary relief and prospective injunctive relief. The decision will encourage plaintiffs to attempt similar end runs around the Eleventh Amendment. This Court has taken great pains to weed out artful pleading in many contexts. *E.g.*, *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017) (looking to substance of plaintiffs' complaint rather than artful pleading to determine if relief was sought for denial of free appropriate public education);

---

[13] Changing the amount of interest the TRS program must pay will also result in a windfall for the Plaintiffs here. Their contribution rates and the amount of the bonus transfer payment the Plaintiffs received when transferring from Plan 2 to Plan 3 were determined in part based on the assumption of future payments of quarterly interest. Had the Department presaged the Ninth Circuit's unprecedented opinion, it would likely have required greater employee contributions or provided smaller bonus transfer payments.

Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475 (1998) (allowing removal to federal court even where plaintiff has artfully pleaded claims to avoid stating federal question). The Court should grant certiorari to prevent the proliferation of artful pleading that will inevitably result from the Ninth Circuit's opinion here.

CONCLUSION

The Court should grant certiorari to correct the Ninth Circuit's grave errors that conflict with this Court's and Circuit Court precedent.

RESPECTFULLY SUBMITTED.

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL
Solicitor General

PETER B. GONICK*
ANNE E. EGELER
Deputy Solicitors General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6200
peter.gonick@atg.wa.gov
**Counsel of record*

June 11, 2019