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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICKEY FOWLER; LEISA MAURER, and a class of similarly situated individuals,

Plaintiffs-Appellants,

v.

TRACY GUERIN, Director of the Washington State Department of Retirement Systems,

Defendant-Appellee.

No. 16-35052

D.C. No. 3:15-cv-05367-BHS

ORDER

Filed March 13, 2019

Before: Ronald M. Gould and Sandra S. Ikuta, Circuit Judges, and John R. Tunheim,* Chief District Judge.

Order;

Dissent by Judge Bennett

***** The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

SUMMARY**

Civil Rights

The panel denied a petition for panel rehearing and denied a petition for rehearing en banc on behalf of the court.

In the underlying opinion, the panel reversed the district court's denial of a stipulated motion to certify a class and dismissal, as prudentially unripe, of an action brought by Washington public school teachers seeking an order that the Director of Washington State Department of Retirement Systems return daily interest that was allegedly wrongfully withheld from plaintiffs' state-managed retirement accounts. The panel held that the district court erred in dismissing plaintiffs' takings claim as prudentially unripe because the withholding of interest that had accrued on plaintiffs' accounts constituted a *per se* taking, as to which the prudential ripeness test did not apply. The panel further held that the plaintiffs' claim could be certified for class treatment under Fed. R. Civ. P. 23(b)(2) because the relief sought of correcting the records system for the class members' accounts was in the nature of injunctive relief.

Dissenting from the denial of rehearing en banc, Judge Bennett, joined by Judge R. Nelson as to Part III, stated that the merits panel wrongfully stripped the State of Washington of its Eleventh

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** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Amendment immunity from suit by permitting a damages claim to proceed against the State under the guise of an injunction. Judge Bennett further stated the panel erred in concluding that Washington's decision to abrogate the common law rule of daily interest violated the Takings Clause.

COUNSEL

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ORDER

The panel, as constituted above, has unanimously voted to deny the petition for panel rehearing. Judges Gould and Ikuta voted to deny the petition for rehearing en banc, and Judge Tunheim has so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

BENNETT, Circuit Judge, with whom R. NELSON, Circuit Judge, joins as to Part III, dissenting from the denial of rehearing en banc:

I respectfully dissent from our decision not to rehear this case en banc. I believe that the panel made two fundamental errors of enormous scope, both of which we should have corrected en banc.

First, the panel has wrongfully stripped the State of Washington of its Eleventh Amendment immunity from suit by permitting a damages claim to proceed against the State under the guise of an injunction requiring the State to return to Plaintiffs "their" property. The 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. That decision, which contravenes clear Supreme Court and Ninth Circuit precedent and creates a circuit split, strips the Eleventh Amendment of much of its vitality. It 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.

Having bypassed Washington's immunity from suit, the panel then created a Fifth Amendment property right no court has ever recognized. According to the panel, when a state chooses to hold individuals' funds in an interest-bearing account, that account must, constitutionally, accrue interest day-to-day, because that was the way the common law worked in centuries past:

> Because the right to daily interest is deeply ingrained in our common law tradition, this

> property interest is protected by the Takings Clause regardless of whether a state legislature purports to authorize a state officer to abrogate the common law.

Fowler v. Guerin, 899 F.3d 1112, 1119 (9th Cir. 2018).

In other words, neither the Washington legislature, nor the legislatures of its sister states, nor even Congress, may constitutionally allow interest to accrue weekly, monthly, or annually on retirement (or other) accounts they establish by statute. The panel's decision is wholly untethered to the text of the Fifth Amendment and unsupported by any case. Many states and the United States currently have retirement systems with interest-bearing accounts that, just like Washington's, do not accrue interest daily. If the panel is correct, these states and the United States are all currently violating the Fifth Amendment and have been for decades.

Both of the panel's errors—stripping Washington of its constitutional immunity from suit and creating a never-before-recognized constitutional right—independently warrant rehearing en banc. Thus I respectfully dissent.

I

I start with a bit of background. Washington State public school teachers participate in the Teachers Retirement System, which is a part of the Public Employees Retirements System ("PERS"). This case concerns PERS Plan II, a defined benefit retirement plan. Wash. Rev. Code § 41.32.760. "A defined-benefit plan gives current and former employees property interests in their pension benefits

but not in the assets held by the trust." *Johnson v. Ga.-Pac. Corp.*, 19 F.3d 1184, 1189 (7th Cir. 1994).

To fund Plan II benefits, participants and their employers make monthly contributions throughout their employment, and their individual accounts reflect those contributions. *Id.* § 41.45.050. However, a state agency maintains the funds in a comingled account that is not itself interest-bearing. *Id.* §§ 41.50.077, 080. Rather, the State invests the funds, and those investments have a return of about eight percent annually. The State uses contributions and investment returns to pay benefits to participants upon retirement.

Washington law requires the Director of the Department of Retirement Systems (the "Director") to "make an allowance of regular interest" on the participants' PERS Plan II contributions, Wash. Rev. Code § 41.50.215, and defines "regular interest" as "such rate as the director may determine," *id.* § 41.32.010(38). The Washington legislature expressly "affirms that the authority of the director . . . includes the authority and responsibility to establish the amount and all conditions for regular interest, if any." *Id.* § 41.50.033(3). The Director thus has complete statutory "authority to determine *how interest is earned*." *Probst v. State Dep't of Ret. Sys.*, 271 P.3d 966, 970 (Wash. Ct. App. 2012) (emphasis added). For more than forty years, PERS Plan II accounts earned interest quarterly, and "do[] not 'earn' or accrue regular interest on a day by day basis." Wash. Admin. Code § 415-02-150(5). Where a withdrawal or transfer of a participant's funds takes place mid-quarter, no interest accrues on the funds between the end of the previous quarter and the date

of the withdrawal or transfer. The Washington Court of Appeals has stated as a definitive matter of state law: "The legislature's intent to abrogate the daily interest rule . . . is plainly evident." *Probst*, 271 P.3d at 971.

Because only tenure and yearly compensation define Plan II participants' retirement benefits, the amount of money in an individual participant account becomes immaterial upon the participant's retirement and eligibility for benefits. But if a participant leaves service early and withdraws his or her contributions, or transfers them to a different retirement fund, the participant receives (or transfers) the amount shown in the individual account. Otherwise, "PERS . . . employees have no claim on the fund until they complete their term of employment and qualify for a pension." *Bowles v. Wash. Dep't of Ret. Sys.*, 847 P.2d 440, 454 (Wash. 1993) (en banc).

Here, Plaintiffs are Washington teachers who participated in PERS II before transferring their PERS II accounts into a new plan where the accounts became seed money for an employee investment account. Because Plaintiffs' account transfers took place mid-quarter, their accounts did not earn any interest between the end of the previous quarter and the date of transfer. Plaintiffs' lawsuit seeks to recover that purportedly "taken" interest.

With this background in mind, I turn to discuss the two areas of the panel's opinion that I believe should have been addressed en banc.

II

"The Eleventh Amendment confirms that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." *Green v. Mansour*, 474 U.S. 64, 68 (1985) (internal quotation marks omitted). Where, as here, a plaintiff sues a state official in his or her official capacity, sovereign immunity bars the claim. *See Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1989) ("The Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest." (internal quotation marks omitted)); *see also Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity . . . should be treated as suits against the State.").

A claim under the Takings Clause seeks "not 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). Thus "the Eleventh Amendment bars reverse condemnation actions brought in federal court against state officials in their official capacities." *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008). Our holding in *Seven Up Pete Venture*, which is in agreement with every court of appeals to consider the issue,[1] should have ended the

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[1] *See, e.g.*, *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526 (6th Cir. 2004); *John G. & Marie Stella Kenedy Mem. Found. v. Mauro*, 21 F.3d 667, 674 (5th Cir. 1994); *Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637, 638-39 (11th Cir. 1992); *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir. 1980); *Citadel Corp. v. P.R. Highway Auth.*, 695 F.2d 31, 33 n.4 (1st Cir. 1982).

panel's analysis. Plaintiffs here are suing the Director in her official capacity for violations of the Takings Clause—precisely the sort of claim that we, and each of our sister circuits to consider the issue, have held violates the Eleventh Amendment immunity that the states enjoy. By permitting the Plaintiffs' claims to proceed, the panel departs from this long and heretofore unbroken line of authority.

A

By construing Plaintiffs' claim as seeking an "injunction," the panel tries to shoehorn the claim into *Ex parte Young*'s narrow Eleventh Amendment exception for "a suit for prospective relief against a state official in his official capacity" to correct an ongoing violation of the Constitution. *Cardenas v. Anzai*, 311 F.3d 929, 934-35 (9th Cir. 2002) (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). *Edelman v. Jordan*, 415 U.S. 651 (1974) taught us long ago that plaintiffs cannot sidestep the Eleventh Amendment merely by using forward-looking labels to achieve what is, in essence, a backwards-looking result.

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," *Edelman*, 415 U.S. at 668, or where "the state is the real, substantial party in interest . . . as when the judgment sought would expend itself on the public treasury or domain, or interfere with public administration," *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (internal citation and quotation marks omitted). Under *Edelman* and *Stewart*, Plaintiffs' claims clearly do not fall within the *Ex parte Young*

exception. Regardless of the prospective label that Plaintiffs give their claim, it is functionally retrospective, and the Supreme Court commands us to treat it that way. *Edelman*, 415 U.S. at 668.

1

The panel holds that the relief sought is prospective because the Plaintiffs are merely seeking an injunction for the return of money that the Director "skimmed" from their accounts. *Fowler*, 899 F.3d at 1120. This characterization incorrectly assumes that the accounts in fact accrued interest that the Director then took from the Plaintiffs. As discussed *supra* p. 6, though, the Plaintiffs' accounts "do[] not 'earn' or accrue regular interest on a day by day basis." Wash. Admin. Code § 415-02-150(5). Because the interest never existed until credited by the Director (and here the Plaintiffs' actual claimed constitutional violation is the failure to credit), Plaintiffs cannot claim that the Director wrongly took it from them. Properly understood, the Plaintiffs' claims are for money supposedly *owed to them*, not money actually *taken from them*—a critical distinction for Eleventh Amendment purposes. *See Edelman*, 415 U.S. at 668 (stating that where "equitable restitution" "is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the . . . state," "it is in practical effect indistinguishable in many aspects from an award of damages against the State").

By asking the district court to order the state to pay money it allegedly owes but withheld from them, Plaintiffs seek a purely retrospective damages award.

2

Ex parte Young is also inapplicable here because the State, not the Director, is the real party in interest. As in *Edelman*, the "restitution award" "will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in this action." 415 U.S. at 668. The Director of the Washington DRS is, of course, not personally liable—the money at issue will have to come from the State.

And although the panel opinion hardly addresses the State treasury's liability—"the most salient factor in Eleventh Amendment determinations," *Hess v. Port Authority Trans-Hudson*, 513 U.S. 30, 48 (1994)—the record here shows clearly that the state treasury will be liable for any award to the Plaintiffs, whether or not the court calls the award an injunction.

Plaintiffs' employers (local school districts) make employer contributions to the PERS II fund, and those districts receive their funding for employee benefits directly from the State. *See Bowles*, 847 P.2d at 450 (noting that where a state retirement plan has a defined-benefits structure, "employer contributions must be increased to whatever level becomes necessary to fund the statutorily defined benefits" and thus "all risk of a shortfall rests on state and local government employers and ultimately, on taxpayers"). If Plaintiffs get their "injunction" and receive money from the PERS II fund, someone (the State) will have to provide the money needed to replenish the fund.

The panel says that the State treasury will be safe from a judgment in Plaintiffs' favor because the relief that Plaintiffs seek is simply interest that accrued on Plaintiffs' accounts but that the State did not credit to them. *Fowler*, 899 F.3d at 1120. Again, this misstates Washington law: the "taken" interest is not in the PERS II fund because it never came into existence to begin with. But even if that were not the case and Plaintiffs sought their own money that sits in the wrong retirement fund, that money is being used to fund PERS II retirement benefits, and the State, to meet its PERS II obligations, would still have to replace the amounts transferred with money from the treasury.

Plaintiffs' contention that the State treasury will not be the immediate source of funding for a judgment in their favor misses the mark. We have found sovereign immunity to apply even where "the state is not directly liable for a judgment against [the named defendant]." *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 381 (9th Cir. 1993) (barring, on sovereign immunity grounds, a suit against a partially state-funded railroad because "state law provides to [the railroad] a financial safety net of broad dimension"); *see also Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 225-26 (D.C. Cir. 1986) ("Given the practicalities of Maryland and Virginia's financial commitments to WMATA, a judgment against WMATA would directly affect the treasuries of Maryland and Virginia."). Likewise here, the State is statutorily obligated to adequately fund the retirement accounts at issue, and a judgment in Plaintiffs' favor that requires a debit from the

PERS II account would clearly require the State to expend additional funds to cover the difference.

B

The sole case on which the panel relies to hold that the Plaintiffs' claim falls outside the Eleventh Amendment's ambit is *Taylor v. Westly*, 402 F.3d 924 (9th Cir. 2005). But *Taylor* involved an escheat statute whereby supposedly abandoned property was seized by the State of California and held in express trust for the property's owners. *Id.* at 931-32. We ultimately allowed only the plaintiffs' due process claims to proceed, reasoning that "[m]oney that the state holds for the benefit of private individuals is not the state's money, any more than towed cars are the state's cars." *Id.* at 932.

In the years since we decided *Taylor*, we have essentially limited its application to escheat statutes. *See N.E. Med. Servs., Inc. v. Cal. Dep't of Health Care Servs.*, 712 F.3d 461, 469 (9th Cir. 2013). To paraphrase *Northeast Medical Services*, here, unlike in *Taylor*, the State "did not receive the [interest] pursuant to a unique statutory scheme. There is no [Washington] law requiring the state to hold the [interest] in a custodial trust. Any monetary award to the [Plaintiffs] would necessarily come from the state treasury." *Id.*[2] *Taylor* simply does not shoulder the weight that the panel places upon it.

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[2] Undergirding the panel's discussion of *Taylor* is the apparent assumption that the allegedly missing interest is held in trust for the Plaintiffs' benefit. *See Fowler*, 899 F.3d at 1120 ("Washington's sovereign immunity [does not] shield[] investment funds held for the benefit of its employees."). Not so. The relevant Washington retirement accounts "are not

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The ruling here strikes at the very heart of the federalism interests the Eleventh Amendment was designed to protect. Not just Washington, but its sister states as well, will no doubt read this decision for what it is—an invitation to plaintiffs with money claims against states to press those claims in federal court, the Eleventh Amendment notwithstanding. We should have taken this case en banc to withdraw that invitation.

III

The panel erred in concluding that the Washington legislature's unremarkable decision to abrogate the common law rule of daily interest violated the Takings Clause. This decision has far-reaching consequences for other government pension plans, like those established by the United States and states in and outside the Ninth Circuit that credit interest less frequently than daily.

A

The panel held that the Plaintiffs have a constitutionally protected property interest in daily interest earnings, notwithstanding clear state law to the contrary.[3] This holding is unprecedented. As far

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trusts." *Retired Pub. Emp. Council of Wash. v. Charles*, 62 P.3d 470, 481 (Wash. 2003) (en banc).

[3] It is an odd constitutional right the panel creates. Even were the panel correct, there is no right to interest at any particular *rate*. So, Washington could, for example, even under the panel's view of the law, provide for 0.01% interest, compounded daily, but not for ten percent interest, compounded monthly, quarterly, or annually.

as I know, no court has held that when a state establishes and holds a retirement (or other account) for someone, and chooses to pay interest on that account, the owner of the funds has a constitutional right to daily interest that a state cannot abrogate. In reaching this conclusion the panel ignored Supreme Court guidance permitting states "great latitude" in awarding interest, misapplied the "interest follows principal" rule, and improperly created a new property right to daily interest.

1

Assuming the Plaintiffs have an ownership interest in the principal in their individual accounts, it does not follow they are entitled to daily interest. The Supreme Court has recognized that state governments have "great latitude in regulating the circumstances under which interest may be earned." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 168 (1998). The panel disregards the traditional discretion afforded to the states and holds, instead, that when a state awards interest, it *must* do so on a daily basis. As explained below, though, neither the panel nor the Plaintiffs identify any authority for the proposition that when a state decides to provide some amount of interest, it must, as a matter of constitutional law, do so daily.

In this case, the Director has done what the Court has permitted: "regulating the circumstances under which interest may be earned." *Id.* Pursuant to her statutory authority (Wash. Rev. Code § 41.50.033(3)), the Director has defined the Teachers' property rights with respect to interest in the Plan II account: "if 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"; that account "does not 'earn' or accrue regular interest on a day by day basis." Wash. Admin. Code § 415-02-150(3), (5).[4]

Because the Supreme Court has preserved a state's right to define how it pays interest, and by extension, the property rights related to how interest is earned, the panel erred in concluding that the Plaintiffs state a claim under the Fifth Amendment.

2

The panel did not expressly invoke the "interest follows principal" rule discussed in *Schneider v. California Department of Corrections*, 151 F.3d 1194, 1199 (9th Cir. 1998), but "clarified" *Schneider*'s holding to conclude the Plaintiffs were entitled to daily interest. *Fowler*, 899 F.3d at 1118. The panel's understanding of the interest-follows-principal rule, though, is deeply flawed. The rule that the principal's owner is entitled to interest earned thereon does not mean that all funds in a state account must earn interest, and by extension cannot require a state voluntarily awarding interest to do so daily.

In this case, the Plaintiffs are seeking *additional* interest earned on a state-held account that the State pools with other individual accounts in a non-interest bearing fund. The facts of this case therefore fundamentally differ from *Schneider*,

[4] And again, under Washington law, the statutory right to access an individual account only accrues if an individual seeks a refund or transfer of contributions—otherwise, the individual's right is only to a pension.

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980), *Phillips*, and *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), all of which involved claims for the return of interest actually generated in a third-party bank account. In *Schneider*, for example, the Department of Corrections placed inmate funds into an account maintained by a third-party, and the inmate's claims could proceed only to the extent that those third-party accounts actually bore interest. *See* 151 F.3d at 1201 ("On remand, the district court shall permit discovery to determine whether or not interest actually accrues on the prisoners' ITA funds.").

The same is true of *Phillips* and *Brown*—both cases involved Interest on Lawyers Trust Account ("IOLTA") programs, and considered whether the state committed a taking by mandating that interest actually generated on a lawyer's client trust fund (which was generated in a bank or other financial institution) be used for charitable purposes. Likewise, *Webb's* involved interest actually earned in an account maintained at a local bank by the clerk of court. 449 U.S. at 157 n.1. In all three cases interest actually accrued to accounts because of the contractual relationship between the depositor and the financial institution that held the principal for the attorney. *See Phillips*, 524 U.S. at 159 (assessing ownership of interest generated in an IOLTA fund held by a bank); *Brown*, 538 U.S. at 228-29 (determining whether an attorney and clients stated a takings claim for IOLTA interest); *Tex. State Bank v. United States*, 423 F.3d 1370, 1379 (Fed. Cir. 2005) ("In contrast to *Webb's*, *Phillips*, and *Brown*, where the deposited funds were held by third party banks, here Texas State did not

provide funds to a third party that were then deposited in an interest-bearing account in a private bank[.]").

Because the pooled PERS funds here do not bear interest, the individual account holders cannot use the "interest follows principal" rule to claim a constitutional right to a share of that non-existent interest. Rather, their entitlement to interest arises entirely from Washington law.

Under Washington law, the individual accounts, which employees can access to withdraw or transfer funds, bear interest (at a rate of 5.5% with the accrual and compounding rules set by statute and the Director). But the "interest follows principal" cases neither hold, nor suggest, that where a state has discretion whether to award interest on a retirement account, and chooses to do so, it offends the Takings Clause by doing so less frequently than daily.

3

Even if the panel was correct in holding that (1) the contributions in the Plan II account can form the basis for an independent claim on the earnings of that account; and (2) the Plaintiffs had a property interest in the Plan II account, the panel was still wrong to hold the State could not statutorily modify the common law daily-interest rule, as the *Probst* court found the State had, based on seventy-five years of Washington statutes.

The only basis the panel provided for its holding that interest must accrue daily is the "impressive common law pedigree" of the daily interest rule. *Fowler*, 899 F.3d at 1118. It may be that

interest *de die in diem* was the default at common law, but states are free to modify common law default rules, and the panel never explains why this rule is any different.

"Property interests . . . are created and their dimensions are defined by existing rules or understandings . . . that secure certain benefits and support certain claims of entitlement to those benefits." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

Even assuming that the panel correctly identified a common law rule favoring daily interest, it does not remotely follow that the rule is immutable and immune from legislative modification. At common law, the entitlement to a proportionate share of an annual rate of payment was highly dependent on context. Annuities, for example, were earned and paid annually and not apportioned if the annuitant died before the day payment was due. *See In re Bailey's Estate*, 23 Pa. C. C. 139, 142 (Pa. Orphans' Ct. 1899). Dividends for share of stock in corporations and rent were similarly not subject to apportionment. *See Mann v. Anderson*, 32 S.E. 870, 871 (Ga. 1899); *Bank of Pa. v. Wise*, 3 Watts 394, 403 (Pa. 1834).

I am unaware of any court to hold that a state violates the Fifth Amendment by statutorily modifying any of these common law rules. To the

contrary, cases cited in the panel opinion suggest that a state could permissibly do so. *See Mann*, 32 S.E. at 871 ("Interest was apportionable at common law because it was held to accrue de die in diem, and therefore to be susceptible of intermediate division. This is the rule of the common law, *and there is no statutory force of law in this state which changes this rule* in reference to dividends declared on stock in corporations." (emphasis added)); *see also Nehls v. Sauer*, 93 N.W. 346, 347 (Iowa 1903) (observing that Iowa modified by statute the common law rule against apportionment in the case of life tenancies but not annuities); Edwin A. Howes, Jr., *The American Law Relating to Income and Principal*, 73-74 (Little, Brown, & Co. 1905) (identifying states that have, by statute, modified the rule against apportionment of annuities).

It is therefore not enough that the panel identify a common law rule that might otherwise govern in the absence of contrary state legislation. The panel must also demonstrate why the common law rule that interest is apportioned daily is so much a fixture of the legal landscape that the Plaintiffs "have more than an abstract need or desire [or] a unilateral expectation of it," *Roth*, 408 U.S. at 577, to justify setting aside otherwise lawful state modification of the rule. And 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.

B

Rehearing en banc is also warranted here because of the tremendous potential impact of the panel's incorrect decision. It is no small thing to hold that a significant aspect of a State's retirement system is unconstitutional, particularly when the state has used that system, in some form, since the 1930s. *See Probst*, 271 P.3d at 972 (citing Washington Laws of 1937, ch. 221 § 1(22)). The impact of the panel's decision, though, will be felt well beyond Washington's borders.

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.[5] Congress and the administrators of the Federal Employees Retirement System ("FERS") will, I imagine, be very surprised to discover that they are committing an unconstitutional taking by failing to pay daily interest on refunds of employees' contributions to FERS defined-benefit plans.[6]

In addition to Washington and the United States, public employee retirement systems in Alabama, Alaska, Connecticut, Kansas, Kentucky, South Dakota, Virginia, and Wisconsin all apportion

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[5] Or, for that matter, any account that a private party maintains with a state.

[6] *See* 5 U.S.C. § 8401(19)(D)(ii); 5 C.F.R. § 841.605(b)(1) (interest based on number of full months); CSRS and FERS Handbook, Chapter 32, § 32B1.1-3(H), p. 28 (available at https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c032.pdf) ("No interest is paid on a refund of FERS contributions: For a fractional part of a month.").

interest on retirement account funds less frequently than daily.[7] By the panel's logic, these states are committing an unconstitutional taking, and I have little doubt that lawyers in these jurisdictions will use the panel's opinion as a basis for Takings Clause challenges to these retirement plans.

IV

If the Eleventh Amendment is to continue to have meaningful force, we cannot permit plaintiffs to attain otherwise prohibited retrospective relief against a state's treasury simply by describing that relief in terms of an injunction or other equitable remedy. Nor should we as a court create a property right to daily interest when nothing in the precedents of the Supreme Court or this court have ever even suggested that when a state awards interest, it must do so daily. The effects of the panel's novel holding will

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[7] *See* Alaska Public Employees Retirement System Information Handbook, at 6 (available at http://doa.alaska.gov/drb/pdf/pers/handbook/2011/PERS_handbook_2011_web.pdf) (semi-annual); Alabama Employees' Retirement System, Members Handbook, at 9 (available at https://www.rsa-al.gov/uploads/files/ERS_Member_Handbook_T2_bookmarked.pdf) (interest based on previous year's average balance); Conn. Gen. Stat. § 5-166(b)(1) (monthly); Kansas Public Employees Retirement System Application for Withdrawal of Contributions (available at https://www.kpers.org/forms/k13.pdf) (annually or quarterly, depending on plan); Kentucky Employees Retirement System Comprehensive Annual Financial Report, 2017, at 39-40 (available at https://kyret.ky.gov/Publications/Books/2017%20CAFR%20(Comprehensive%20Annual%20Financial%20Report).pdf) (annually); S.D. Codified Laws § 3-12-47.8 (annually); Va. Code Ann. § 51.1-147(C) (annually); Wisc. Stat. § 40.04(4)(a)(2), (3) (interest based on previous year's closing balance).

be felt around the country in the form of legal challenges to state and federal retirement plans that similarly award interest less frequently than daily. We should have taken this case en banc to correct our errors.

I respectfully dissent.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICKEY FOWLER; LEISA MAURER, and a class of similarly situated individuals, *Plaintiffs-Appellants*, v. TRACY GUERIN, Director of the Washington State Department of Retirement Systems, *Defendant-Appellee*.	No. 16-35052 D.C. No. 3:15-cv-05367-BHS OPINION

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted May 10, 2018
Seattle, Washington

Filed August 16, 2018

Before: Ronald M. Gould and Sandra S. Ikuta,
Circuit Judges, and
John R. Tunheim,* Chief District Judge.

Opinion by Judge Gould

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* The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

SUMMARY**

Class Action / Constitutional Law / Ripeness

The panel reversed the district court's denial of a stipulated motion to certify a class and dismissal, as prudentially unripe, of an action brought by Washington public school teachers seeking the return of interest allegedly skimmed from their retirement accounts.

Plaintiffs brought this class action seeking an order that the Director of the Washington State Department of Retirement Systems return interest that was allegedly skimmed from their state-managed retirement accounts. Specifically, plaintiffs alleged a takings claim in their suit in federal court that the Director violated the Fifth and Fourteenth Amendments by withholding some of the daily interest earned on their accounts.

The panel held that the district court erred in dismissing the plaintiffs' takings claim as prudentially unripe. The panel held that the Director's withholding of the interest accrued on the plaintiffs' accounts constituted a *per se* taking as to which *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)'s prudential ripeness test did not apply. The panel also held that the plaintiffs' taking claim was *per se* because the Director's withholding of interest earned on funds in interest-bearing accounts was a direct appropriation of private property.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel considered the Director's alternative grounds for summary judgment that were not reached by the district court, and rejected them. First, the panel held that the plaintiffs stated a takings claim for daily interest withheld by the Director. The panel clarified that the core property right recognized in *Schneider v. California Department of Corrections*, 151 F.3d 1194 (9th Cir. 1988), covered interest earned daily, even if payable less frequently. Second, the panel held that the takings claim was not barred by issue preclusion or by the *Rooker-Feldman* doctrine. The panel held that no state-court judgment resolved the precise issue presented in this case, and the plaintiffs did not complain of any error by the state court or seek relief from the state court's judgments. Finally, the panel held that the plaintiffs' takings claim was not foreclosed by the Eleventh Amendment.

The panel also held that the district court erred in denying the motion for class certification on the ground that the plaintiff's claim for "an indivisible injunction" for all members was really one for individualized monetary damages. The panel held that the plaintiffs' claim could be certified for class treatment under Fed. R. Civ. P. 23(b)(2) because the relief of correcting the entire records system for the class members accounts was in the nature of injunctive relief.

The panel remanded for the district court to reconsider class certification, and if necessary, to permit further discovery before deciding if the class shall be given the requested injunctive relief.

COUNSEL

Stephen K. Festor (argued), Stephen K. Strong, David F. Stobaugh, and Alexander F. Strong, Bendich

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Jeffrey A.O. Freimund (argued) and Michael E. Tardif, Freimund Jackson & Tardif PLLC, Olympia, Washington, for Defendant-Appellee.

OPINION

GOULD, Circuit Judge:

Washington public school teachers Mickey Fowler and Leisa Maurer bring this class action to order the Director of the Washington State Department of Retirement Systems ("DRS") to return interest that was allegedly skimmed from their state-managed retirement accounts. The district court denied the stipulated motion to certify a class and then dismissed the action as prudentially unripe. We conclude that both of those decisions were in error.

I

Washington public school teachers participate in the Teachers' Retirement System, a public retirement system managed by DRS. *See* Wash. Rev. Code §§ 41.32.010, .020, .025. The Teachers' Retirement System comprises three retirement plans named "Plan 1," "Plan 2," and "Plan 3."

This case concerns savings that were held in Plan 2. Plan 2 contributions are invested in a comingled trust fund by the Washington State Investment Board. DRS does not handle deposits, but rather tracks teachers' contributions and credits their individual accounts for accumulated interest. *See id.* § 41.32.010(1)(b). Interest is credited at "such rate as the director [of DRS] may determine." *Id.* § 41.32.010(38). Since 1977, DRS has credited

Plan 2 accounts with a 5.5% annual rate compounded quarterly. DRS determines the amount of interest to credit to Plan 2 accounts based on the accounts' balances at the end of the prior quarter. Therefore, DRS does not credit accounts with the interest earned on the funds in the account during that quarter. In addition, if a Plan 2 account has a zero balance at the end of a quarter, the account is not credited with interest earned on any funds in that account during either that quarter or the prior quarter.

Fowler and Maurer (collectively, "Teachers") were originally members of Plan 2, but in 1996 they transferred their holdings into newly created Plan 3 accounts. Because the Teachers transferred their Plan 2 holdings mid-quarter, and thus had a zero balance in their Plan 2 accounts at the end of the quarter in which they transferred their holdings, DRS did not credit their accounts for the interest earned during that quarter or the prior quarter. Instead, DRS kept the interest and used it to pay benefits to other members.

In 2005, another Washington State employee filed a class action suit in state court challenging DRS's interest rate calculations. *See Probst v. State Dep't of Ret. Sys.*, 271 P.3d 966, 968 (Wash. Ct. App. 2012). When this employee settled his claim, the Teachers became the class plaintiffs. *Id.*

The Teachers' state-court complaint alleged that DRS deprived them of earned daily interest on their Plan 2 accounts by not providing interest through the date on which their funds were transferred to Plan 3 accounts. *Id.* The Washington Superior Court rejected the Teachers' arguments, but on appeal the Washington Court of Appeals reversed

in part. Without reaching the Teachers' constitutional arguments, that court held that DRS's interest rate policy was arbitrary and capricious under state law because there was no record showing the agency gave the issue "due consideration." *Id.* at 971-73. The Superior Court subsequently remanded the case to DRS to initiate a new rulemaking.

DRS began the rulemaking process in July 2013. The Teachers appealed the Superior Court's remand to the agency, however, and the Washington Court of Appeals affirmed the Superior Court's order in an unpublished decision. *Probst v. Dep't of Ret. Sys.*, No. 45128-0-II, 2014 WL 7462567 (Wash. Ct. App. Dec. 30, 2014).

The Teachers then filed this suit in federal court. The complaint omits the Teachers' state-law claims and alleges solely that the Director of DRS ("Director") violated the Fifth and Fourteenth Amendments by withholding some of the daily interest earned on their Plan 2 accounts.

The parties filed a stipulated motion to certify a class of all active and retired members of the Teachers' Retirement System who had transferred from Plan 2 to Plan 3 before January 20, 2002. The district court denied the stipulated motion without prejudice, concluding that the parties' explanation was not detailed enough for the court to fulfill its independent responsibility to ensure that the requirements of Rule 23 were met.

The district court then granted the Director's motion for summary judgment, concluding that this case was prudentially unripe pending the conclusion of DRS's new interest calculation rulemaking.

The Teachers timely appealed. Less than a month before oral argument in this case, DRS's new rule took effect and retroactively affirmed its prior interest calculation method. *See* Wash. Admin. Code § 415-02-150.

II

The first question presented is whether the Teachers' takings claim is prudentially unripe.[1] We review a dismissal for lack of ripeness *de novo*. *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1130 (9th Cir. 2013). Because the dismissal was entered on summary judgment, we view the facts in the light most favorable to the Teachers. *See Millennium Labs., Inc. v. Ameritox, Ltd.*, 817 F.3d 1123, 1129 (9th Cir. 2016).

The district court held that the Teachers' claim was unripe under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Williamson County* sets forth two prudential hurdles for takings claims. First, a takings claim is unripe until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the [challenged] regulations to the property at issue." *Id.* at 186. Second, the plaintiff must have sought and

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[1] Unlike constitutional ripeness, prudential ripeness is a disfavored judge-made doctrine that "is in some tension with [the Supreme Court's] recent reaffirmation of the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014)). The Court has not yet had occasion to "resolve the continuing vitality of the prudential ripeness doctrine." *Id.*

been denied "compensation through the procedures the State has provided." *Id.* at 194.

By its terms, *Williamson County* applies only to regulatory, not *per se*, takings. In *Williamson County*, a land developer obtained Planning Commission approval of a plat for residential development. 473 U.S. at 177. When the county changed its zoning ordinances, the Planning Commission required the developer to change the plat. *Id.* at 179. Instead, the developer filed suit, arguing that the Planning Commission had taken its property without just compensation by disapproving its original development plan. *Id.* at 182. The Supreme Court granted certiorari on "the question whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Id.* at 185. But the Court ultimately determined that this issue of regulatory taking was not yet ripe, because the developer had not sought variances from the county's ordinances, and therefore had "not yet obtained a final decision regarding how it will be allowed to develop its property." *Id.* at 190. Nor had the developer used state procedures for obtaining just compensation. *Id.* at 194.

Although *Williamson County* acknowledged that a regulation that "goes too far" may constitute a taking, *id.* at 186 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)), this line of jurisprudence is not applicable when the government directly takes a person's property. The Court explained the distinction in *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2427 (2015). According to the Court, before *Pennsylvania Coal*, "the Takings Clause was

understood to provide protection only against a direct appropriation of property—personal or real." *Id.* "*Pennsylvania Coal* expanded the protection of the Takings Clause, holding that compensation was also required for a 'regulatory taking'—a restriction on the use of property that went 'too far.'" *Id.* (quoting *Pa. Coal*, 260 U.S. at 415). However, "a physical *appropriation* of property gave rise to a *per se* taking, without regard to other factors." *Id.* A *per se* taking triggers a "categorical duty to compensate the former owner" under the Takings Clause. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (quoting *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)).

Here, the Teachers bring a *per se* taking claim because DRS's withholding of interest earned on funds in interest-bearing accounts is a direct appropriation of private property. The Supreme Court addressed this issue in a pair of cases concerning states' Interest on Lawyers' Trust Account ("IOLTA") programs. First, in *Phillips v. Washington Legal Foundation*, the Court held that "the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." 524 U.S. 156, 172 (1998). Then in *Brown v. Legal Foundation of Washington*, the Court held that the law requiring interest on those funds to be transferred to a third party is evaluated not as a regulatory taking, but as a *per se* taking. 538 U.S. at 235.

As a result, DRS's withholding of the interest accrued on the Teachers' accounts constitutes a *per se* taking to which *Williamson County*'s prudential ripeness test does not apply. The district court erred in dismissing the Teachers' takings claim as prudentially unripe.

III

Given the many years that this case has been held up in the courts, we proceed to consider the Director's alternative grounds for summary judgment that were not reached by the district court because those grounds may provide a basis to affirm the district court. *See Kohler v. Bed Bath & Beyond of Cal., LLC*, 780 F.3d 1260, 1263 (9th Cir. 2015). We review the grant of summary judgment *de novo*. *Id.* We will uphold the summary judgment if, viewing the evidence in the light most favorable to the non-moving party, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(a)).

The Director contends that the Teachers fail to state a claim because there has been no taking of property, and that even if the Teachers do state a claim, that claim is barred by issue preclusion, the *Rooker-Feldman* doctrine, and the Eleventh Amendment. We address each argument in turn.

A

The Director argues that the Teachers' takings claim fails on its merits because there has been no taking of private property here. In the state-court litigation, the Washington Court of Appeals held that the state statutory scheme "do[es] not require the DRS to pay daily interest." *Probst*, 271 P.3d at 971. The Director asserts that there can be no federal takings claim without this state-law property right.

We rejected a similar argument in *Schneider v. California Department of Corrections*, 151 F.3d 1194 (9th Cir. 1998). There we observed that "constitutionally protected property rights can—and

often do—exist *despite* statutes . . . that appear to deny their existence." *Id.* at 1199. Citing the Supreme Court's opinion in *Phillips*, we noted that "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Id.* at 1200 (quoting 524 U.S. at 167). We then held that there is "a 'core' notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny." *Id.* This "core" is "defined by reference to traditional 'background principles' of property law." *Id.* at 1201. In that case, we concluded that interest income earned on an interest-bearing account falls within this class of fundamental property rights. *Id.*

We now clarify that the core property right recognized in *Schneider* covers interest earned daily, even if payable less frequently. The rule that interest accrues *de die in diem*— "from day to day"—has an impressive common law pedigree, *see, e.g.*, *Wilson v. Harman*, 2 Ves. Sen. 672, 672, 27 Eng. Rep. 189, 189, and has been widely adopted by American courts, *see, e.g.*, *Mann v. Anderson*, 32 S.E. 870, 871 (Ga. 1899); *Owens v. Graetzel*, 126 A. 224, 227 (Md. 1924); *Clapp v. Astor*, 2 Edw. Ch. 379, 384 (N.Y. Ch. 1834); *In re Flickwir's Estate*, 20 A. 518 (Penn. 1890). Indeed, in the state-court proceedings, DRS did not dispute that "at common law, interest was deemed to accrue daily, regardless of when it was payable." *Probst*, 271 P.3d at 970 n.6 (citing 32 *Halsbury's Laws of England* § 127, p. 78 (4th ed. 2005)). Because the right to daily interest is deeply ingrained in our common law tradition, this property interest is protected by the Takings Clause regardless of whether a state legislature purports to authorize a state officer to

abrogate the common law. *See Schneider*, 151 F.3d at 1201.

We hold that the Teachers state a takings claim for daily interest withheld by DRS.

B

Next, the Director contends that the Teachers' claim is barred by two related doctrines: issue preclusion and *Rooker-Feldman*.

Federal courts must give the same preclusive effect to state-court judgments as would be given in the courts of that state. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). In Washington, the issue preclusion doctrine bars the relitigation of issues that were actually litigated and necessarily decided in a prior proceeding involving the same parties. *Sprague v. Spokane Valley Fire Dep't*, 409 P.3d 160, 183 (Wash. 2018). Washington courts look to four factors in determining whether issue preclusion applies, including whether the issues decided are "identical." *Id.*

In a related vein, and pursuant to the *Rooker-Feldman* doctrine, federal district courts lack jurisdiction to hear direct or "de facto" appeals from the judgments of state courts. *See Noel v. Hall*, 341 F.3d 1148, 1156 (9th Cir. 2003). "It is a forbidden de facto appeal under *Rooker-Feldman* when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court." *Id.* at 1163. This doctrine occupies "narrow ground," *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005), however, and "does not preclude a plaintiff from bringing an 'independent claim' that, though

similar or even identical to issues aired in state court, was not the subject of a previous judgment by the state court," *Cooper v. Ramos*, 704 F.3d 772, 778 (9th Cir. 2012) (quoting *Skinner v. Switzer*, 562 U.S. 521, 532 (2011)).

According to the Director, the Washington Court of Appeals has already adjudicated two issues on which the Teachers' takings claim depends: whether the Teachers are entitled to daily interest, and whether their takings claim is premature. The Director also argues that the Teachers now seek both a direct and de facto appeal of the state court's decisions on these issues.

We disagree. The Washington Court of Appeals' first decision expressly declined to reach the merits of the Teachers' constitutional takings claim. *Probst*, 271 P.3d at 967 n.1. Its discussion of the Teachers' entitlement to daily interest turned solely on an issue of Washington statutory law, not federal constitutional law. *See id.* at 970-71. And the state court's subsequent decision did not decide the issues before us either. It found premature only the Teachers' speculation that the forthcoming DRS rulemaking would effect a taking, not their argument here that DRS effected a taking by retaining some of their earned interest years ago. *See Probst*, 2014 WL 7462567, at *2, *6.

No state-court judgment resolved the precise issues presented in this case, and the Teachers do not complain of any error by the state court or seek relief from the state court's judgments. The Teachers' takings claim is not barred by issue preclusion or by the *Rooker-Feldman* doctrine.

C

Finally, the Director contends that the Teachers' takings claim is foreclosed by the Eleventh Amendment. In the Director's view, the Teachers seek monetary damages, which would mean that the State is the real party in interest and that a money award would impermissibly be paid from the State's treasury. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 & n.11 (1984).

But as the Director previously has conceded, and as the Teachers' complaint plainly shows, the Teachers actually seek an injunction ordering the Director to return savings taken from them. Rather than requiring payment of funds from the State's treasury, *see id.*, this relief "will likely involve applying a computerized formula to DRS electronic records to determine the amount of interest that should be moved to the class members' . . . [P]lan 3 accounts." Prospective injunctive relief of this sort is readily distinguishable from a compensatory damages award. *See Taylor v. Westly*, 402 F.3d 924, 935-36 (9th Cir. 2005).

Further, Washington's sovereign immunity shields the State's general fund, not investment funds held for the benefit of its employees. *See id.* at 932. "Money that the state holds in custody for the benefit of private individuals is not the state's money, any more than towed cars are the state's cars." *Id.* The Eleventh Amendment does not stand in the way of a citizen suing a state official in federal court to return money skimmed from a state-managed account. *See id.* at 935.

In sum, none of the Director's alternative arguments justifies the district court's grant of summary judgment in this case.

IV

Before mistakenly granting summary judgment, the district court denied the parties' stipulated motion to certify a class. We review the class certification decision for abuse of discretion. *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1090 (9th Cir. 2010). We have often said that "an error of law *is* an abuse of discretion." *Id.* at 1091.

The district court denied the stipulated motion based on its concern that a Rule 23(b)(2) class would be inappropriate here. As the district court pointed out, Rule 23(b)(2) "does not authorize the class certification of monetary claims." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). But as explained above, the Teachers do not bring a claim requiring individualized determinations of eligibility for damages. The Teachers instead seek an injunction ordering the Director to apply a single formula to DRS's electronic records to correct the amount of interest credited to class members' accounts. In the language of *Dukes*, DRS's policy of denying daily interest "is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). The district court erred in denying the motion for class certification on the ground that the Teachers' claim for "an indivisible injunction benefitting all its members at once" was really one for individualized monetary damages. *Id.* at 362. The claim can be certified for class treatment

under Rule 23(b)(2) because the relief of correcting the entire records system for the class member accounts is in the nature of injunctive relief.

V

For the foregoing reasons, we reverse the decision that this case is not ripe, and we remand for the district court to reconsider class certification and, if necessary, to permit further discovery before deciding if the class shall be given the requested injunctive relief.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICKEY FOWLER, et al., Plaintiffs, v. MARCIE FROST, Director of the Washington State Department of Retirement Systems, Defendant.	JUDGMENT IN A CIVIL CASE CASE NO. CV15-5367BHS

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_**XX**_ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

The Court has **ORDERED** that Defendant's motion for summary judgment (Dkt. 14) is **GRANTED** with respect to ripeness and **DENIED as moot** with respect to the remaining arguments. Plaintiffs' complaint is **DISMISSED without prejudice** for lack of jurisdiction.

Dated this 22nd day of December, 2015.

William M. McCool
Clerk of Court

Gretchen Craft, Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICKEY FOWLER, et al., Plaintiffs, v. MARCIE FROST, Director of the Washington State Department of Retirement Systems, Defendant.	CASE NO. CV15-5367BHS ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFFS' COMPLAINT WITHOUT PREJUDICE

This matter comes before the Court on Defendant Marcie Frost's ("Frost") motion for summary judgment (Dkt. 14). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants the motion in part and denies it in part for the reasons stated herein.

I. PROCEDURE AND FACTUAL BACKGROUND

A. Retirement Plans

Plaintiffs Mickey Fowler and Leisa Maurer ("Plaintiffs") are public school teachers in the Snoqualmie Valley School District. Dkt. 1 ("Comp.") ¶¶ 10-11; *see also* Dkt. 18, Declaration of Stephen Festor ("Festor Dec."), App. at 97. In Washington, public school teachers participate in the Teachers' Retirement System ("TRS"), a public retirement system managed by the Washington State

Department of Retirement Services ("DRS"). Festor Dec., App. at 69-70. The TRS is comprised of three separate retirement plans: Plan 1, Plan 2, and Plan 3. *Id.* at 70.

Plaintiffs are current members of Plan 3, and former members of Plan 2. *See* Comp. ¶ 18; Festor Dec., App. at 97. As members of Plan 2, Plaintiffs made contributions to their Plan 2 accounts from each paycheck. Comp. ¶ 18. DRS tracked the contributions and accumulated interest in individual accounts. Festor Dec., App. at 51. All contributions were transferred to a state-managed comingled trust fund for investment purposes. *Id.* at 1, 57.

Plaintiffs' contributions to Plan 2 accrued interest at a rate specified by DRS. *Id.* at 70. DRS set the rate of interest at 5.5%, compounded quarterly. *Id.* at 65, 67, 70. DRS used the quarter's ending balance to calculate interest. *Id.* at 14, 17, 19. If an account had a zero balance at the end of the quarter, it earned no interest for that quarter. *Id.* at 19.

In 1996, Plaintiffs transferred their contributions from Plan 2 to Plan 3. *See id.* at 97. Plaintiffs disagree with the method DRS used to calculate the interest on funds transferred between the two TRS accounts.

B. State Court Suit

In February 2009, Plaintiffs challenged DRS' method of calculating interest on funds transferred

between TRS accounts in state court.[1] *See Probst v. Dep't of Ret. Sys.* (*Probst I*), 167 Wn. App. 180, 184 (2012). The superior court dismissed their claims, and Plaintiffs appealed. *Id.* at 185. On appeal, Plaintiffs argued: (1) common law required DRS to pay daily interest on the funds transferred between Plan 2 and Plan 3; (2) DRS' failure to pay daily interest was arbitrary and capricious; and (3) DRS' failure to pay daily interest constituted an unconstitutional taking. *Id.* at 182.

In March 2012, the Washington Court of Appeals reviewed DRS' method of calculating interest under Washington's Administrative Procedure Act ("APA"), and reversed and remanded the case. *Id.* at 186, 194. Although the court determined "DRS has authority to decide how to calculate interest," the court held that DRS' method of calculating interest "was arbitrary and capricious because the agency did not render a decision after due consideration." *Id.* at 183. The court also determined "the TRS statutes do not require the DRS to [pay] daily interest on balances transferred from Plan 2 to Plant 3." *Id.* at 191. Finally, the court declined to address Plaintiffs' takings claim because the court was able to decide the case under the APA. *Id.* at 183 n.1.

On remand, Plaintiffs argued judgment should be entered in their favor. *Probst v. Dep't of Ret. Sys.* (*Probst II*), 185 Wn. App. 1015, 2014 WL 7462567, at

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[1] The suit was initially brought by Jeffrey Probst, a member of the Public Employees Retirement System, in January 2005. *Probst I*, 167 Wn. App. at 183-84. Plaintiffs continued litigating the suit after Probst reached a settlement with DRS. *Id.* at 184.

*2 (2014). The superior court disagreed, and remanded the case to DRS for further administrative proceedings. *Id.* Plaintiffs appealed. *Id.*

In December 2014, the Washington Court of Appeals held the superior court correctly interpreted *Probst I* by remanding the case to DRS. *Id.* at *6. The court also determined that Plaintiffs' takings claim was speculative and premature because DRS had not yet adopted a new interest calculation method. *Id.* Plaintiffs' case was remanded to DRS for further rulemaking. *Id.* at *2, *6. DRS has not issued a new rule. Comp. ¶ 68.

C. Present Suit

On June 1, 2015, Plaintiffs filed the instant suit in this Court under 42 U.S.C. § 1983. *Id.* ¶ 1. Plaintiffs' sole claim is an alleged violation of the Takings Clause of the Fifth Amendment, as applied to the states by the Fourteenth Amendment. *Id.* ¶ 75.

On August 13, 2015, Frost moved for summary judgment. Dkt. 14. On August 31, 2015, Plaintiffs responded. Dkt. 17. On September 4, 2015, Frost replied. Dkt. 19. On October 15, 2015, the Court requested additional briefing on ripeness. Dkt. 22. On October 30, 2015, the parties filed their opening briefs. Dkts. 23, 24. On November 6, 2015, the parties filed their responsive briefs. Dkts. 26, 27.

II. DISCUSSION

Frost moves for summary judgment, seeking dismissal of Plaintiffs' takings claim on several grounds. Dkt. 14.

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party

contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

C. Ripeness

Frost challenges the ripeness of Plaintiffs' takings claim, arguing DRS has not yet adopted a new interest calculation policy and thus Plaintiffs' claim is not ripe for review. Dkts. 14, 23.

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). "If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *West Linn Corp. Park L.L.C. v. City of West Linn*, 534 F.3d 1091, 1099 (9th Cir. 2008).

For a federal takings claim to be ripe, "the party bringing the challenge must overcome two prudential hurdles." *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1146 (9th

Cir. 2010). The Supreme Court articulated these two requirements in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). First, the plaintiff must demonstrate "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. Second, the plaintiff must "seek compensation through the procedures the State has provided for doing so." *Id.* at 194.

Plaintiffs argue they do not need to exhaust state remedies in this case. Dkt. 24. The primary problem, however, is the ongoing administrative proceeding. Under Washington law, DRS has discretion to determine how interest should be calculated on funds transferred between TRS accounts. *See* RCW 41.50.033(1) ("The director shall determine when interest, if provided by a plan, shall be credited to accounts in . . . . the teachers' retirement system . . . . The amounts to be credited and the methods of doing so shall be at the director's discretion . . . ."); *see also Probst I*, 167 Wn. App. at 188-89. In *Probst I*, the Washington Court of Appeals held that DRS' calculation method was arbitrary and capricious. 167 Wn. App. at 183. In *Probst II*, the court remanded Plaintiffs' suit to DRS for further rulemaking. 2014 WL 7462567, at *2, *6. DRS has not yet reached a final decision as to how interest will be calculated on funds transferred between TRS accounts, and the agency's definitive position on the matter is unknown at this time. The outcome of DRS' rulemaking process could very well impact Plaintiffs' federal takings claim, but the nature and extent of

any such impact is unclear. In the absence of a final decision from DRS, a decision from this Court would be an advisory opinion. *See Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("The federal courts established pursuant to Article III of the Constitution do not render advisory opinions.").

The Court is sympathetic to the fact that Plaintiffs have been litigating this issue for many years. Despite the length of this litigation, Plaintiffs" federal takings claim is not yet ripe for review. The Court therefore grants Frost's motion as to ripeness, and dismisses this case without prejudice.

III. ORDER

Therefore, it is hereby **ORDERED** that Frost's motion for summary judgment (Dkt. 14) is **GRANTED** with respect to ripeness and **DENIED as moot** with respect to the remaining arguments. Plaintiffs' complaint is **DISMISSED without prejudice** for lack of jurisdiction.

Dated this 22nd day of December, 2015.

Benjamin H. Settle
Benjamin H. Settle
United States District Judge

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON[*]

MICKEY FOWLER, LEISA MAURER, and a class of similarly situated idividuals, Plaintiffs, v. MARCIE FROST, Director of the Washington State Department of Retirement Systems, Defendant.	No. _____ CLASS ACTION COMPLAINT

Plaintiffs in this class action complaint allege as follows:

I. NATURE OF THE ACTION

1. This action is brought under 42 U.S.C. § 1983 for a violation of the Takings Clause of the United States Constitution's Fifth Amendment, applicable to the states through the Fourteenth Amendment.

2. Plaintiffs bring the action as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of all public school teachers who transferred from the Washington State Teachers Retirement System ("TRS") Plan 2 to TRS Plan 3 between 1996 and January 20, 2002.

3. When Plaintiffs withdrew their contributions and interest from their TRS Plan 2

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* All errors in original document have been retained.

individual accounts to transfer to new TRS Plan 3 individual accounts, not all of the interest earned on their contributions at the 5.5% annual interest rate was transferred to their new TRS Plan 3 accounts and this interest remains in the TRS Plan 213 account.

4. Defendant refuses to provide Plaintiffs all of the interest that their contributions earned in their TRS Plan 2 individual accounts.

5. Defendant's failure to provide Plaintiffs the interest earned on their accumulated contributions affects more than 20,000 public school teachers who transferred from TRS Plan 2 to Plan 3.

6. For years Plaintiffs have sought relief in the Washington state court system. The Thurston County Superior Court and the Washington Court of Appeals have both declined or refused to consider Plaintiffs' Takings claim. Although the seizure of property occurred almost 20 years ago, the Washington Court of Appeals said it was "premature" to resolve Plaintiffs' Takings claim.

7. The Washington Supreme Court recently denied review of the Court of Appeals' decision.

8. Plaintiffs are harmed by Defendant continuing to retain the interest earned on Plaintiffs' accumulated contributions, Plaintiffs therefore request that the Court resolve their Takings claim.

II. JURISDICTION

9. This actions is brought under 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

III. PARTIES

10. Plaintiff Mickey Fowler is a resident of King County, Washington, and he works as a public school teacher in the Snoqualmie Valley School District.

11. Plaintiff Leisa Maurer (f/k/a Leisa Fowler) is a resident of King County, Washington, and she works as a public school teacher in the Snoqualmie Valley School District.

12. Defendant Marcie Frost is the Director of the Washington State Department of Retirement Systems (hereinafter "DRS"). At all times alleged in this Complaint, defendant was acting under the color of state law. By statute defendant has "complete charge of and supervisory powers" over DRS. RCW 41.50.020.

IV. CLASS ACTION ALLEGATIONS

13. Plaintiffs bring this action as a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who transferred from TRS Plan 2 to TRS Plan 3 between 1996 and January 20, 2002.

14. The class consists of more than 20,000 individuals. The members of the class are so numerous that joinder of all class members is impracticable.

15. Plaintiffs will, fairly and adequately protect the interests of the class members and have retained counsel competent and experienced in class actions and employee benefits litigation. Plaintiffs

have no interests that are adverse or antagonistic to those of the class.

16. Because the amount of interest that was not received by Plaintiffs and individual class members is relatively small, the expense and burden of individual litigation make it virtually impossible for the class members to individually seek redress for the wrongful conduct alleged herein.

17. Common questions of law and fact exist to all members of the class. The questions of law and fact common to the class include, but are not limited to:

a. Whether class members have a common law property right to the interest earned on their contributions in TRS Plan 2 at the promised rate of 5.5% annual interest compounded quarterly that is protected by the United State Constitution;

b. Whether class members have a statutorily created property right to the interested earned on their contributions in TRS Plan 2 at the promised rate of 5.5% annual interest compounded quarterly that is protected by the United State Constitution; and

c. The appropriate remedy for the class members.

V. FACTS

The Retirement Plans: TERS Plan 2 and TRS Plan 3.

18. Plaintiffs ("plaintiffs" includes class members) are public school teachers who were previously members of TRS Plan 2, under which part

of each paycheck was deducted to contribute toward retirement. RCW 41.32.780; RCW 41.32.042. DRS managed the accumulated contributions by tracking the contributions and interest in individual member accounts. RCW 41.32.042. The funds therefrom were invested through a large comingled trust fund. In TRS Plan 2, when a teacher retires, these funds go to fund the pension payments.

19. In 1996, the Washington Legislature created TRS Plan 3 and gave TRS Plan 2 members an option to transfer their accumulated contributions and accrued interest to TRS Plan 3. RCW 41.32.817.

20. If a teacher chose to transfer from TRS Plan 2 to TRS Plan 3, the teachers' funds (accumulated contributions with interest) were withdrawn from TRS Plan 2 and transferred to TRS Plans 3 individual investment (defined contribution) accounts. RCW 41.32.817(5); 41.32.831(2); RCW 41.34.060.

21. The *employers' contributions* for transferring teachers remained in the TRS Plan 2/3 fund to provide a pension at one-half the pension amount the teachers would have received in TRS Plan 2. RCW 41.32.840(1).

22. The Legislature also provided a transfer incentive payment to encourage transfers to TRS Plan 3 before January 1998, by matching a portion of the funds placed by the teachers in their TRS 3 accounts. RCW 41.32.8401.

23. Plaintiffs here all transferred their accumulated contributions and earned interest from

their individual TRS Plan 2 accounts to new individual TRS Plan 3 defined contribution accounts.

Plaintiffs Have a Constitutionally Protected Common Law Property Right and Constitutionally Protected Statutory Property Right to Receive All of the Interest Earned on Their Contributions in TRS Plan 2 at the Interest Rate of 5.5% Annual Interest Compounded Quarterly.

24. The Takings Clause of the Fifth Amendment, through the Fourteenth Amendment, prohibit states from taking private property for public use without just compensation.

25. Core common law property rights that pre-date the Constitution are protected by the Taking Clause.

26. The common law for more than 250 years has recognized the property right that an owner of funds held in an account has to the interest that is earned on those deposited funds.

27. The common law rule "interest follows principal" recognizes a protected property interest in earned interest income.

28. The common law rule, and also the industry standard, is that interest is earned on funds held in an account from the date(s) of deposit to the date(s) of withdrawal.

29. Based on these common law rules protected by the Constitution, Plaintiffs have a protected property right in all interest that accrues on their mandatory employee contributions in TRS Plan 2, from the time the contributions were deposited

to the precise date they withdraw all funds from the Plan 2 accounts.

30. No statute, rule, or practice could authorize Defendant to withhold that property from Plaintiffs without violating the Takings Clause of the Fifth Amendment.

31. A statute may create new property rights that are protected by the Constitution.

32. RCW 41.04.445(4) mandated that when Plaintiffs withdrew their funds from their TRS Plan 2 accounts to transfer and deposit the funds into their new individual TRS Plan 3 accounts, that Plaintiffs receive all "accrued interest" earned on their funds.

33. Plaintiffs have a statutorily created, and thus Constitutionally protected, property right to the interest earned on their funds at the stated rate of 5.5% annual interest compounded quarterly.

Defendant's Erroneous Accounting Practice

34. The industry standard and the common law rule is that the owner of funds on deposit in an interest-bearing account earns interest on the funds from the date of deposit to the date of withdrawal, *i.e.*, daily interest

35. When employees owe DRS money for restoring previously withdrawn contributions, DRS charges the employees daily interest from the date of the withdrawal to the date the contributions are re-paid.

36. Due to a previously secret accounting practice, however, DRS did not pay the Plaintiffs or other public employees interest from the date they

made their contributions to the date the contributions were withdrawn. from their individual accounts.

37. When the Plaintiffs' funds were in TRS Plan 2, DRS had an undisclosed practice under which DRS "posted" or credited interest to TRS members' individual accounts on the fourth. Saturday of the last month in each quarter, and the amount of interest credited by the defendant is based only on the ending account balance in the prior quarter. DRS therefore paid no interest to Plaintiffs on contributions during the quarter in which they are deposited.

38. Plaintiffs' deposits made during a quarter did not receive even simple interest, *i.e.*, interest to be added to the principal at the end of the quarter.

39. In addition, when a TRS Plan 2 account was shown as zero ($0) in DRS's database on the fourth Saturday of a quarter on which interest was credited, for whatever reason—even when the zero balance was just a computer accounting entry and the money actually remained in the account through the end of the quarter—Plaintiffs received no interest at all for that entire quarter on Plaintiffs' balance at the end of the previous quarter, as well as no interest for the deposits made either during that quarter or the previous quarter.

40. In DRS's software, the data entry (posting) dates, rather than the dates money was actually withdrawn, determined whether members received any interest in a quarter

41. DRS's computer program treats employee contributions as withdrawn before the end

of a quarter even though the transfer occurs after the quarter ends.

42. A DRS document shows that employees were considered to have no account balance at the end of the quarter (March 31), and therefore the computer provides the employees "no interest for quarter" on the previous quarter's balance—even when actually the "transfer occurs" for the employees after the quarter ends, on April 2:

Earnings example — Plan 2 to Plan 3
Self-Directed Accounts

March 15	March 28	March 31	April 2
Transfer reported by employer	Account balance begins process of transfer to Plan 3	No account balance at end of quarter—no interest for quarter	Transfer occurs —member then earns return on investments

43. Plaintiffs were never told that they had not received all of the interest earned on their funds, and based on their account statements it was mathematically impossible for the Plaintiffs to determine they were not receiving all of the interest earned on their contributions in TRS Plan 2.

44. Plaintiffs effectively received less than the stated 5.5% annual interest rate, compounded quarterly, on their contributions.

45. DRS's interest practice was kept secret, while Plaintiffs were repeatedly told that their contributions earned 5.5% annual interest compounded quarterly.

Plaintiffs' Interest Remains in the Wrong Account, the TRS Plan 2/3 Fund, When It 'Belongs in Their Individual TRS Plan 3 Defined Contribution Accounts.

46. Most class members transferred from TRS Plan 2 to TRS Plan 3 in 1996-97. The transfer to TRS Plan 3 meant that Plaintiffs would cut in half their defined benefit pension (from 2% of final compensation per year of service down to 1% per year). The employers' contributions, plus investment gains, remained in the TRS Plan 2/3 fund to pay for the reduced defined benefit.

47. In exchange for the reduced pension benefit in TRS Plan 3, Plaintiffs withdrew all funds in their Plan 2 member accounts, including interest, to place these funds (plus the transfer incentive) into new self-directed investment accounts in TRS Plan 3.

48. The beginning principal balance of the Plaintiffs' individual TRS Plan 3 accounts was thus the total of all the Plaintiffs' TRS Plan 2 contributions, with all, the interest that accrued in the those TRS Plan 2 accounts, plus a transfer incentive.

49. The amount transferred to the Plaintiffs' TRS Plan 3 accounts was important because anything less than the full amount would diminish both future investment returns and the amount available for the Plaintiffs' retirements.

50. When the Plaintiffs transferred to TRS Plan 3, Plaintiffs did not receive all of the interest their contributions earned at the rate of 5.5% annual interest compounded quarterly.

51. Plaintiffs' property remains in the wrong account, *i.e.*, the interest remains in the TRS Plan 2/3 fund rather than the Plaintiffs' individual TRS Plan 3 defined contribution accounts. The not-transferred funds earned interest at the accrued 5.5% annual interest rate, or at the rate specified in RCW 41.50.145(2) and RCW 41.45.035.

VI. PRIOR PROCEEDINGS

52. In 2002, Public Employee Retirement System ("PERS") member Jeff Probst discovered that he had not received all of the interest earned on his contributions when he transferred from PERS Plan 2 to PERS Plan 3. He subsequently filed both an administrative claim with DRS and a class action in the Thurston County Superior Court.

53. The DRS Presiding Officer expressly acknowledged that Probst (and Plaintiffs) did not receive 5.5% annual interest rate compounded quarterly on their contributions, but she said the interest earned on the accounts is "what the agency determines it to be, not simply the stated rate."

54. The Presiding Officer denied the administrative claim.

55. Probst filed a petition for judicial review after his administrative claim was rejected, which was consolidated with the class action.

56. Probst settled his petition for judicial review and the class action claims of all PERS members (and some TRS members) prior to a dispositive ruling from the trial court. The settlement resolved the claims of those class members who transferred from TRS Plan 2 to TRS Plan 3 after

January 20, 2002, while it preserved the claims of the teachers who transferred to TRS Plan 3 prior to that date, *i.e.*, the Plaintiffs' claims in this action.

57. While the *Probst* settlement was pending, unbeknownst to the Plaintiffs and counsel, in 2007 the Washington Legislature enacted a statute concerning crediting interest. Ch. 493, Laws of Washington 2007, codified at RCW 41.50.033.

58. After the *Probst* settlement, Plaintiffs filed a supplemental complaint in 2009 in Thurston County Superior Court, filed under the same cause number as the settled *Probst* claims.

59. Thurston County Superior Court Judge Paula Casey ruled the Plaintiffs' claim was not barred by the statute of limitations under the discovery rule, but she said the 2007 statute gave DRS authority to determine what interest was credited to the teachers' contributions more than a decade earlier.

60. The Plaintiffs appealed. The Washington Court of Appeals reversed, ruling (based on the facts summarized at ¶¶138-49 above) that even if the 2007 statute gave DRS some discretion over interest, DRS had abused its discretion in the 1990s (and earlier) by arbitrarily and capriciously withholding some of the interest earned when the teachers' funds were in their TRS Plan 2 accounts. *Probst v. Dep't of Retirement Systems*, 167 Wn.App. 180, 191-94, 271 P.2d 966 (2012).

61. The Court held that it was arbitrary and capricious for DRS to keep that interest because, among other reasons, DRS's quarterly posting method was contrary to industry standards and unfair

because it deprived the teachers of some of the interest earned on their contributions. *Id.* at 193-94, referring to facts summarized above at ¶¶38-49.

62. The Court of Appeals thereafter "reverse[d] the DRS's order as it pertains to the class that the Fowlers represent and remand[ed] for further proceedings." *Id.* at 194.

63. The Court of Appeals said it would not address the teachers' argument that DRS keeping earned interest and/or applying the 2007 statute retroactively to permit DRS to keep accrued interest is an unconstitutional taking of Plaintiffs' property. *Probst*, 167 Wn.App. at 183 n. 1. The Court said it would not reach the constitutional issues because it had resolved the case on other grounds. *Id.*

64. Following remand to the trial court, Plaintiffs' filed a motion to require DRS to calculate the interest that it had withheld from the Plaintiffs. DRS maintained, however, that the Court of Appeals had not resolved the case at all.

65. DRS argued that the Court of Appeals' mandate required a remand to DRS for rulemaking to create a new factual record and to issue a new retroactive rule that "can be applied in this case [to actions in 1996-97] and [upon which] a new administrative decision can be issued, which can then be appealed for further review if necessary."

66. DRS argued that the Court of Appeals' decision overturned the 5.5% annual interest rate. Plaintiffs disagreed, but if DRS were correct, the return on TRS Plan 2 accounts has the rate specified in RCW 41.45.035.

67. Thurston County Superior Court Judge Christopher Wickham granted DRS's motion to remand the case to DRS over Plaintiffs' opposition: Although there had been 10 years of litigation and the trial court said "[n]o case should take as long as this case has taken," and "this case needs closure[,]" he ruled that under the Administrative Procedure Act ("APA") the case should be remanded to DRS.

68. DRS has since said it would start a rulemaking process to renew and retroactively justify the interest policy that the Court of Appeals said was arbitrary and capricious. WSR 13-15-128. But it has taken no further action.

69. DRS said that issuance of the new rule justifying its practice could be followed by another administrative adjudication and decision, followed by an entirely new appeal through the courts. According to DRS, Plaintiffs would have to start all over again after DRS enacted a rule.

70. Plaintiffs appealed again, contending, among other things, that the trial court's remand to DRS for retroactive rulemaking violated the Court of Appeals' mandate because rulemaking could not retroactively correct an "arbitrary and capricious" practice that had already been fully completed at that time of the majority of the Plan 3 transfers in 1996-97.

71. Plaintiffs also contended, as they did in the Superior Court, that the remand of the case to DRS wrongly denied them a hearing on their Takings claim.

72. The Court of Appeals rejected the appeal and said it was "premature" to rule on the Plaintiffs' Takings claim, even though the Plaintiffs' interest has remained in the wrong account (TRS Plan 2/3) for almost 20 years and the Plaintiffs have been denied that interest and their ability to direct the investment of those funds in their defined contribution TRS Plan 3 accounts for the same amount of time. 185 Wn.App. 1015 (2014) (unpublished).

73. Plaintiffs filed a petition for review in the Washington Supreme Court, which was denied. 347 P.3d 458 (2015).

VII. CLAIMS

74. This action is brought under 42 U.S.C. §1983.

75. Defendant violated the Takings Clause in the Fifth Amendment, applied through the Fourteenth Amendment, by failing to pay the Plaintiffs all of the interest their contributions earned in TRS Plan 2 at the rate of 5.5% annual interest compounded quarterly.

76. Plaintiffs' property (accumulated interest) remains in the TERS Plan 2/3 account rather than in their TRS Plan 3 individual defined contribution accounts.

VIII. RELIEF REQUESTED

Plaintiffs request relief as follows:

A. This action should be certified as a class action under Rule 23;

B. The Court should declare that defendant has violated the Takings Clause of the Fifth Amendment;

C. The Court should order Defendant to: (1) calculate the interest wrongly withheld from the Plaintiffs from the dates the Plaintiffs made the contributions to the dates they were withdrawn, (2) recalculate the separate "transfer payment" paid into the TRS Plan 3 individual accounts to include the interest wrongly withheld, (3) calculate the earnings or interest on the funds that were not transferred from the dates the Plaintiffs transferred to TRS Plan 3, and from the dates of the transfer incentive payment, respectively, to the date the money is finally deposited into their Plan 3 accounts, and (4) transfer the funds calculated as remaining in the TRS Plan 2/3 account (and the remaining transfer payments) to the Plaintiffs' TRS Plan 3 accounts;

D. The Court award reasonable costs and attorney fees, under the common fund doctrine and 42 U.S.C. §1988; and

E. The Court grant such other relief as maybe just and proper.

DATED this 1st day of June, 2015.

Respectfully submitted,

BENDICH STOBAUGH & STRONG, P.C.

s/ David F. Stobaugh
David F. Stobaugh, WSBA #6376
Stephen K. Strong, WSBA #6299
Stephen K. Foster, WSBA #23147
Attorneys for Plaintiffs

PROBST v. DEP'T OF RET. SYS.

167 Wn. App. 180, 271 P.3d 966

[No. 40861-9-II. Division Two. March 13, 2012.]

JEFFREY PROBST, *Individually and on Behalf of a Class of Similarly Situated Individuals*, et al., *Appellants,* v. THE DEPARTMENT OF RETIREMENT SYSTEMS, *Respondent.*

[1] Pensions - Public Employees – Administrative Decision - Judicial Review - Governing Law. Judicial review of a final order by the Department of Retirement Systems in a dispute over public employee pension benefits is governed by the Administrative Procedure Act (ch. 34.05 RCW).

[2] Administrative Law - Judicial Review - Appellate Review - Burden of Proof - In General. Under RCW 34.05.570(1)(a), in proceedings before an appellate court for review of an administrative adjudicator's order, the party seeking relief from the order has the burden of showing that the order is invalid.

[3] Statutes - Construction - Administrative Construction - Review - Standard of Review. An appellate court reviews de novo an administrative adjudicator's construction of a statute and may substitute its judgment for that of the administrative adjudicator.

[4] Statutes - Construction - Administrative Construction - Deference to Agency - Test. An appellate court will accord deference to an agency's interpretation of a statute only if (1) the agency is charged with the admini-

stration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise.

[5] **Statutes - Construction - Administrative Construction - Deference to Agency - Agency Authority.** A court does not defer to an administrative agency's determination of the scope of its own authority.

[6] **Statutes - Construction - Question of Law or Fact - In General.** The meaning of a statute is a question of law.

[7] **Statutes - Construction - Legislative Intent - In General.** A court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent.

[8] **Statutes - Construction - Legislative Intent - Statutory Language - Plain Meaning - In General.** A court gives effect to a statute's plain meaning as an expression of legislative intent. In determining the plain meaning of a statute, a court may look to the statute as a whole, including related enactments.

[9] **Administrative Law - Agency Authority - Implied Powers - Scope.** Administrative agencies have implied authority to do everything lawful and necessary to effectuate the powers granted to them.

[10] **Statutes - Construction - Superfluous Provisions.** A statute is construed so that no portion is nullified or rendered meaningless or superfluous.

[11] **Statutes - Construction - Common Law - Derogation of Common Law - In General.** When a statute is inconsistent with the common law, the statute is deemed to abrogate the common law.

[12] **Pensions - Teachers Retirement - Plan 3 - Transfer From Plan 2 - Accumulated Contributions - Interest - Determination - Statutory Provisions - Effect.** Under RCW 41.50.033(1), which gives discretion to the Department of Retirement Systems to determine the "amounts [of interest] to be credited" to accounts in the teachers' retirement system, the department has the implied authority to determine how interest is earned when a teachers' retirement system member transfers accumulated contributions from Plan 2 to Plan 3 under RCW 41.32.817. The department's discretionary authority under RCW 41.50.033(1) to determine how interest is earned is inconsistent with and, thus, abrogates the common law rule that interest is earned daily.

[13] **Administrative Law - Judicial Review - Arbitrary and Capricious - What Constitutes.** An agency's decision is arbitrary and capricious if the decision is the result of willful and unreasoning disregard of the facts and circumstances.

[14] **Pensions - Public Employees - Contributions - Interest Calculation - Quarterly Interest Calculation Method - Validity.** Inasmuch as the Department of

> Retirement Systems has recognized that its use of the quarterly method to calculate interest on contributions to its retirement systems is unfair and that advantages would be realized by moving to a more frequent interest calculation method, the department's continuing use of the quarterly interest calculation method without identifying any reasons for doing so is arbitrary and capricious.

Worswick, J., delivered the opinion for a unanimous court.

Nature of Action: A member of the public employees' retirement system and members of the teachers' retirement system who transferred their retirement funds from Plan 2 to Plan 3 sought relief on claims that the Department of Retirement Systems breached its statutory and fiduciary duties by failing to pay accrued interest on the sums transferred between the plans.

Superior Court: After ruling that the claims of the members of the teachers' retirement system were not statutorily time barred, the Superior Court for Thurston County, No. 05-2-00131-1, Paula Casey, J., on May 21, 2010, entered a summary judgment in favor of the department, ruling that the department had the authority to calculate interest as it did, that the department was not statutorily required to pay daily interest, and that the department did not act arbitrarily and capriciously.

Court of Appeals: Holding that the department was not statutorily required to pay daily interest, but that the department acted arbitrarily and capriciously by using a quarterly interest

calculation method, the court reverses the judgment and remands the case for further proceedings.

Stephen K. Festor, David F. Stobaugh, and Stephen K. Strong (of *Bendich Stobaugh & Strong PC*); *Catherine Wright Smith* (of *Edwards Sieh Smith & Goodfriend PS*), for appellants.

Robert M. McKenna, Attorney General, and *Sarah E. Blocki, Assistant; and Timothy J. Filer* and *Samuel T. Bull* (of *Foster Pepper PLLC*), for respondent.

[As amended by order of the Court of Appeals May 8, 2012.]

¶1 Worswick, J. - Mickey and Leisa Fowler are class representatives for plaintiffs who are members of the Teachers' Retirement System (TRS) and who transferred from TRS Plan 2 to TRS Plan 3 before January 20, 2002. The superior court dismissed their claim that the Department of Retirement Systems (DRS) was required to pay class members daily interest on the full balance of employee contributions transferred between Plan 2 and Plan 3. The Fowlers appeal, arguing that (1) common law required the DRS to pay daily interest, (2) the DRS's failure to pay daily interest was arbitrary and capricious, and (3) the DRS's failure to pay daily interest effected an unconstitutional taking. We reverse, holding that although the DRS had authority to decide how to calculate interest, the DRS's interest calculation method was arbitrary and capricious because the agency did not render a decision after due consideration.[1]

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[1] Because we decide this case on the grounds of arbitrary

FACTS

¶2 In March 2002, Jeffrey Probst, a member of the Public Employees' Retirement System (PERS), requested to transfer his retirement plan from PERS Plan 2, a defined benefit plan, to PERS Plan 3, a plan that is part defined benefit and part defined contribution. Probst contacted the DRS when he realized that his contributions for the last quarter of his enrollment in PERS Plan 2 had not accumulated interest, which, according to the DRS, was earned at a five and a half percent annual rate, compounded quarterly.

¶3 The DRS informed Probst that in order to receive interest on his full transferred balance, he would have had to wait until after the end of the quarter to transfer between plans. This is because the DRS uses the quarter's ending balance to calculate interest, and if an account has a zero balance at the end of the quarter, it earns no interest for that quarter. The DRS uses this calculation method for both PERS and TRS. Probst appealed before the DRS, claiming that (1) the DRS erroneously denied him accrued interest on his transferred balance, contrary to statute; (2) the DRS had failed to inform him of how interest was credited; and (3) the DRS erroneously deemed his transfer to have occurred before it actually did.

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and capricious agency action, we do not reach the Fowlers' constitutional takings argument. *Cmty. Telecable of Seattle, Inc. v. City of Seattle, Dep't of Exec. Admin.*, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008) (appellate courts avoid deciding constitutional issues where case may be fairly resolved on other grounds).

¶4 In January 2005, Probst filed a class action suit challenging the same interest calculation practices as his DRS appeal. Probst's suit claimed that the DRS breached its statutory and fiduciary duties by failing to pay accrued interest to Probst and a class of similarly situated individuals. In October, in Probst's DRS appeal, the DRS presiding officer granted summary judgment in favor of the DRS. Probst sought judicial review of the presiding officer's decision in superior court. In March 2006 the parties filed a joint motion to consolidate Probst's judicial review case with his class action lawsuit, which the superior court granted.

¶5 In June 2008 the superior court approved a partial settlement of the claims at issue. The settlement class included both PERS and TRS members who had transferred from Plan 2 to Plan 3 of their respective retirement systems after January 20, 2002. The class did not include TRS members who had transferred from TRS Plan 2 to Plan 3 before that date because the DRS argued that such claims were time barred. Aside from the statute of limitations issue, the excluded class members had the same claims against the DRS as the settlement class. The parties agreed in the settlement agreement to base any litigation by those excluded from the settlement class on the record developed in Probst's case, subject to the right to seek additional discovery or dispute the relevance or admissibility of materials in the record.

¶6 The Fowlers became class plaintiffs in February 2009 when they filed an amended supplemental complaint as TRS members excluded from the settlement agreement. The Fowlers alleged

that (1) the DRS breached a duty to accurately account for TRS member funds, (2) the DRS breached a duty to provide pertinent information to TRS members, and (3) the DRS breached a duty under the common law to pay daily interest on TRS members' accounts. The Fowlers sought declaratory and/or equitable relief, monetary relief, prejudgment interest, and attorney fees. The parties then stipulated to the certification of a class of plaintiffs consisting of all TRS members who transferred between Plan 2 and Plan 3 before January 20, 2002.

¶7 The superior court ruled that the Fowlers' claims were not time barred because the statute of limitations did not begin to run until the plaintiffs discovered the injury. The superior court further ruled that the director of the DRS had the authority to calculate interest as it did and that the statutory language at issue did not require the DRS to pay daily interest. The superior court also ruled that the DRS had not acted arbitrarily and capriciously. The superior court thus affirmed the DRS's decision that the DRS was not required to pay daily interest[2] and dismissed the Fowlers' claims. The Fowlers appeal.

[2] Although the DRS rendered its decision based on the PERS statutes, the DRS uses the same interest calculation for TRS as for PERS. Thus, the DRS decision applied with equal force to the Fowlers' case.

ANALYSIS

I. STANDARD OF REVIEW

[1,2] ¶8 We review a final DRS order under the Administrative Procedure Act (APA).[3] *Int'l Ass'n of Fire Fighters Local 3266 v. Dep't of Ret. Sys.*, 97 Wn. App. 715, 717, 987 P.2d 115 (1999). Under the APA, a party challenging agency action bears the burden of demonstrating that the action was invalid. RCW 34.05.570(1)(a). Although RCW 34.05.570(3) provides nine bases for overturning an agency order in an adjudicative proceeding, we address only two: whether the DRS erroneously interpreted or applied the law or acted arbitrarily or capriciously. RCW 34.05.570(3)(d), (i).

II. DRS's AUTHORITY

A. *Plain Meaning of TRS Statutes*

¶9 The Fowlers argue that the TRS statutes require the DRS to pay daily interest to TRS members who transfer from TRS Plan 2 to Plan 3. The DRS responds that the TRS statutes give the DRS authority to decide how TRS members earn interest. We agree with the DRS.

[3-5] ¶10 We review questions of statutory interpretation de novo and may substitute our interpretation for that of an agency. *Jenkins v. Dep't of Soc. & Health Servs.*, 160 Wn.2d 287, 308, 157 P.3d 388 (2007). We accord deference to an agency's interpretation of a statute if "(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the

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[3] Ch. 34.05 RCW.

statute falls within the agency's special expertise." *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007). But we do not defer to an agency on the scope of the agency's authority. *US West Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 56, 949 P.2d 1321 (1997).

[6-8] ¶11 The meaning of a statute is a question of law. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002). Our fundamental objective is to ascertain and carry out the legislature's intent. *Campbell & Gwinn*, 146 Wn.2d at 9. We give effect to a statute's plain meaning as an expression of legislative intent. *Campbell & Gwinn*, 146 Wn.2d at 9-10. But we may look to the statute as a whole, including related enactments, to determine plain meaning. *Campbell & Gwinn*, 146 Wn.2d at 10-12.

[9-12] ¶12 RCW 41.32.817 permits TRS Plan 2 members to transfer to Plan 3. That section provides that upon transfer to Plan 3, "[t]he *accumulated contributions* in plan 2 . . . shall be transferred to the member's account in the defined contribution portion established in chapter 41.34 RCW,[4] pursuant to procedures developed by the department." RCW 41.32.817(5) (emphasis added). RCW 41.32.010(1)(b) defines "accumulated contributions" for Plan 2 members as "the sum of all contributions standing to the credit of a member in the member's individual account . . . together with the regular interest thereon." And RCW 41.32.010(38) defines "regular interest" as "such rate as the director may determine."

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[4] Chapter 41.34 RCW provides parameters for contributions to Plan 3 retirement systems.

¶13 These sections show that the legislature has delegated to the DRS authority to determine the *rate* of interest credited when TRS members transfer between Plan 2 and Plan 3. But they do not specify whether the DRS may determine when and how interest is *earned*. However, in 2007, the legislature passed a new statute, RCW 41.50.033. Laws of 2007, ch. 493, § 1. This statute clarifies the legislature's intent regarding the DRS's authority, providing,

> (1) The director shall determine when interest, if provided by a plan, shall be credited to accounts in . . . the teachers' 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 RCW . . . 41.32.010(23).[5]
>
> (3) The legislature affirms that the authority of the director under RCW 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 [this act] to be curative, remedial, and retrospectively applicable.

RCW 41.50.033 (emphasis added).

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[5] When RCW 41.50.033 was passed, the definition of "regular interest," was codified at former RCW 41.32.010(23) (2007) (Laws of 2007, ch. 50, § 1). The definition of "regular interest" has since been renumbered to RCW 41.32.010(38), but has not changed.

¶14 Thus, in RCW 41.50.033, the legislature expressly gave the DRS authority to determine not only the methods of crediting "regular interest," but the *amount* to be credited. However, the Fowlers argue that this did not give the DRS authority to determine how interest would be earned, only how it would be credited. The Fowlers argue that "crediting" interest is merely a bookkeeping function and is distinct from the actual earning of interest. Br. of Appellants at 35.

¶15 Under the plain meaning of the words "amount to be credited," the DRS has authority to determine how interest is earned. Authority over the *amounts* credited is de facto authority over how interest is earned. If the DRS was required to pay daily interest under RCW 41.50.033, then the DRS would lack any authority to determine the amounts credited—the amounts to be credited would be fixed according to the rate of interest and the DRS would not have authority to vary them.

¶16 Agencies have implied authority to do everything lawful and necessary to effectuate the powers granted to them. *Tuerk v. Dep't of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994) (quoting *State ex rel. Puget Sound Navigation Co. v. Dep't of Transp.*, 33 Wn.2d 448, 481, 206 P.2d 456 (1949)). In order for the DRS to determine the amounts to be credited as RCW 41.50.033 expressly provides, it is necessary for the DRS to have authority to determine how interest is earned. Thus, under the plain meaning of the statute, the DRS has implied authority to determine how interest is earned.

¶17 The Fowlers' argument on this point also contravenes the principle that courts do not construe words of a statute to be nullities. *Taylor v. City of Redmond*, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977) ("[I]t is a fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of same."). If we accepted the Fowlers' argument, the words "amounts to be credited" in RCW 41.50.033(1) would be superfluous. Former RCW 41.32.010(23) already gave the DRS authority to determine the rate of interest before the legislature enacted RCW 41.50.033. And the words "and the methods of doing so" in RCW 41.50.033(1) clearly gave the DRS authority to determine the procedures for crediting interest. As such, in order for all the words of RCW 41.50.033(1) to have legal effect, the words "amounts to be credited" must give the DRS some authority beyond setting the rate of interest and the procedures for crediting it. The words "amounts to be credited" must authorize the DRS to determine how interest is earned, otherwise the words are superfluous.

B. *Common Law Daily Interest Rule*

¶18 The Fowlers argue that, rather than giving the DRS authority to decide how interest is earned, the TRS statutes incorporate the common law rule

that interest is earned daily.[6,7] In *Potter v. Wash. State Patrol,* 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008), our Supreme Court held that the courts should not recognize an abrogation or derogation of the common law absent clear evidence of legislative intent. But we have recognized that if a statute is inconsistent with the common law, it is deemed to abrogate the common law. *State v. Butler*, 126 Wn. App. 741, 750, 109 P.3d 493 (2005) (citing *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wn.2d 219, 517 P.2d 585 (1973)).

¶19 The Fowlers cite *Faulkenbury v. Teachers' and State Employees' Retirement System,* 133 N.C. App. 587, 515 S.E.2d 743 (1999), to support their argument that "regular interest" incorporates the common law daily interest rule. *Faulkenbury* held that, under a North Carolina statute that was silent

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[6] The Fowlers rely in part on 32 *Halsbury's Laws of England* § 127 at 78 (4th ed. 2005), for the proposition that, at common law, interest was deemed to accrue daily, regardless of when it was payable. Our Supreme Court has previously relied on *Halsbury's Laws of England* to determine the common law. *See, e.g.*, *Becker v. Lagerquist Bros.*, 55 Wn.2d 425, 429 n.4, 348 P.2d 423 (1960). Although our Supreme Court has not spoken on the daily interest common law rule, the DRS does not contest that the rule is valid common law in Washington.

[7] To make this argument, the Fowlers rely in part on an analogy to RCW 41.04.445. That statute provides that employers must pay "accrued interest" on balances withdrawn from the retirement systems or paid to the employee as a lump sum. RCW 41.04.445(4). The term "accrued interest" is undefined in chapter 41.04 RCW. The Fowlers argue that this undefined term incorporates the common law daily interest rule for the purposes of chapter 41.32 RCW. But the words "accrued interest" never appear in the relevant TRS statutes. We decline to interpret an undefined term in a tangentially related statute as controlling over the plain meaning of the statutes directly at issue.

as to when "regular interest" would accrue, the common law daily interest rule applied. 515 S.E.2d at 746-47. In contrast here, the statutes at issue expressly give the DRS authority to determine when interest accrues. *Faulkenbury* is therefore distinguishable and unpersuasive.

¶20 The Fowlers further cite *Teacher Retirement System v. Duckworth*, 153 Tex. 141, 260 S.W.2d 632 (Tex. Civ. App. 1953). There, the Court of Civil Appeals of Texas held that the agency administering a teacher retirement system lacked authority to abrogate the common law regarding the apportionment of annuities. 260 S.W.2d at 635. But the court based this conclusion on the fact that the statute was clear and unambiguous in adopting the common law rule. 260 S.W.2d at 637. *Duckworth* is distinguishable and unpersuasive here, where the legislature has clearly expressed its intent to give the DRS authority to determine how interest is earned.

¶21 The legislature's intent to abrogate the daily interest rule as to the TRS is plainly evident in RCW 41.50.033. Giving the DRS authority to determine how interest is earned is inconsistent with the common law rule that interest is earned daily, abrogating the common law rule.

¶22 Moreover, even before RCW 41.50.033 was enacted, there was clear evidence that the legislature did not intend for "regular interest" to mean daily interest. RCW 41.50.215, originally enacted in 1937,[8] provides that "at the close of each fiscal year the department shall make an allowance of regular

[8] Laws of 1937, ch. 221, § 7(2).

interest on the balance which was on hand at the beginning of the fiscal year in each of the teachers' retirement system funds as they may deem advisable." As noted above, we look to related provisions to determine the plain meaning of statutory language. RCW 41.50.215 deals with regular interest on TRS fund balances and thus is related to chapter 41.32 RCW. And RCW 41.50.215 does not contemplate the words "regular interest" incorporating the common law daily interest rule because it directs the DRS to credit "regular interest" based on beginning-of-year balances, not year-round daily balances. This provides clear evidence that, when the legislature defined for "regular interest" in RCW 41.32.010, it intended to abrogate the common law.

¶23 Because there is clear evidence that the legislature intended to abrogate the common law, the Fowlers' arguments fail. We hold that the TRS statutes do not require the DRS to pay daily interest on balances transferred from Plan 2 to Plan 3.

III. ARBITRARY AND CAPRICIOUS AGENCY ACTION

[13, 14] ¶24 The Fowlers next argue that, if the DRS had discretion to determine how interest is earned, the way the DRS calculates interest is arbitrary and capricious because it rendered its decision to use the quarterly interest calculation method without due consideration. We agree.

¶25 An agency's decision is arbitrary and capricious if it results from willful and unreasoning

disregard of the facts and circumstances.[9] *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010). "'Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.'" *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 47, 959 P.2d 1091 (1998) (internal quotation marks omitted) (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6,* 118 Wn.2d 1, 14, 820 P.2d 497 (1991)); *see also Hayes v. City of Seattle*, 131 Wn.2d 706, 717, 934 P.2d 1179 (1997) (holding agency action arbitrary and capricious where agency's findings were too conclusory to show consideration of the facts and circumstances).

¶26 Before the legislature created the DRS, it directly controlled the state retirement systems by

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[9] The Fowlers cite *Trustees of California State University v. Riley*, 74 F.3d 960 (1996), to argue that any accounting method that can be termed "inaccurate" is arbitrary and capricious. There, the Ninth Circuit Court of Appeals held that the Department of Education's method of calculating interest based on month-end balances instead of daily account balances was arbitrary and capricious under the federal Administrative Procedures Act. 74 F.3d at 966-67. The Ninth Circuit based this holding on the fact that the month-end accounting method caused "arbitrary and highly inaccurate calculations" that were "vulnerab[le] to manipulation." 74 F.3d at 967. *Trustees of California State University* did not address the relevant question under the Washington APA however: whether the agency acted in willful and unreasoning disregard of the facts and circumstances. The Fowlers cite no Washington law to support their contention that any calculation method that can be termed "inaccurate" is per se arbitrary and capricious under the Washington APA.

statute. Since the inception of the TRS in 1937, the legislature had defined "regular interest" as interest "compounded annually." Laws of 1937, ch. 221, § 1(22). In 1947, the legislature specified that regular interest was to be credited to TRS retirement funds based on "the balance which was on hand at the beginning of the fiscal year." Laws of 1947, ch. 80, § 19. In 1976, the legislature created the DRS and gave it authority to administer Washington's retirement systems. Laws of 1975-76, 2d Ex. Sess., ch. 105, §§ 4, 5.

¶27 In 1977, the director of the DRS issued a memorandum stating that "regular interest" would be set at five and a half percent annually, to be credited each quarter based on the previous quarter's accumulated balance. In 1978, the director circulated another memorandum reaffirming this calculation method but stated, "Programs should be developed to provide the means to credit interest monthly on the prior month end balance. I will provide instructions when the appropriate time arrives for instituting the monthly interest program." Administrative R. at 880-81. The record reveals no action taken to implement this planned change in interest calculation.

¶28 In 1989, the DRS evaluated a proposal to delay processing of interest payments to accommodate late employer transfers to the DRS. The DRS evaluated the impact of such a change and elected to continue using its current interest procedures. However, the DRS did not consider at that time whether to alter the quarterly interest calculation method in favor of more frequent compounding.

¶29 In 1992, in conjunction with developing a new database system, the DRS considered whether to continue using its quarterly interest calculation method. The agency considered alternatives including continuing its existing practices or moving to one of several methods for compounding interest monthly. In evaluating this decision, the agency recognized that the quarterly interest calculation method was unfair because an employer's late transfers to the DRS could lead to the employee being denied interest, a similar problem to the denial of interest that later occurred with transfers to Plan 3. Despite this problem, the DRS elected to continue using the quarterly interest calculation method. Nothing in the record shows that the DRS considered any advantages in continuing the quarterly calculation method; rather, the DRS elected to continue using the existing method despite the recognized unfairness it created.

¶30 Furthermore, in 2002, a DRS employee raised concern that the quarterly interest calculation method did not conform to industry standards. The record reflects that a DRS manager agreed that the matter should be considered. But the record does not show that the DRS undertook any consideration of the benefits and drawbacks of retaining the quarterly calculation method.

¶31 All in all, the record reflects that the DRS elected to continue using its historical interest calculation method without due consideration of the facts and circumstances. The DRS consistently recognized the advantages that would be realized by moving to a more frequent interest calculation, but rejected such a move without identifying any reasons for doing so. The decision to continue using the

quarterly interest calculation method was therefore undertaken in willful and unreasoning disregard of the facts and circumstances, making it arbitrary and capricious.

¶32 We accordingly reverse the DRS's order as it pertains to the class that the Fowlers represent and remand for further proceedings.

Penoyar, C.J., and Van Deren, J., concur.

After modification, further reconsideration denied May 8, 2012.

RCW 41.50.033

Crediting interest to retirement system accounts.

(1) The director 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 RCW * 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 RCW 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.

NOTES:

Reviser's note: *(1) RCW 41.40.010 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (15) to subsection (31).

**(2) RCW 41.32.010 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (23) to subsection (38).

***(3) RCW 41.35.010 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (12) to subsection (26).

****(4) RCW 41.37.010 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (12) to subsection (23).

*****(5) RCW 41.26.030 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (23) to subsection (24). RCW 41.26.030 was subsequently amended by 2018 c 230 § 1, changing subsection (24) to subsection (25).

******(6) RCW 43.43.120 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (8) to subsection (17).

WAC 415-02-150

How is regular interest awarded and credited to Plan 1 and Plan 2 accounts?

(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) If 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 on the last day of the quarter using the following formula:

$$1/4 \times R \times B$$

Regular interest will be credited consistent with this subsection, whether or not you are in active service.

(a) In the formula in subsection (3) of this section, "R" represents the rate of regular interest. The director has the statutory authority to set the rate of regular interest. Consistent with that authority, the rate of regular interest is set at 5.5 percent per year, until changed by the director consistent with his or her discretionary authority.

(b) In the formula in subsection (3) of this section, "B" represents the balance in your individual account at the close of business on the last day of the prior quarter. "B" may be equal to zero dollars.

(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.

(6) Example: Jon had $50,000 in his PERS Plan 2 individual account at the end of the day on September 30, 2017 (the last day of the third quarter). He has $50,200 in his PERS Plan 2 individual account on December 31, 2017, immediately before regular interest for fourth quarter is credited. For fourth quarter, the regular interest to be credited to his account is calculated as follows:

$$1/4 \times 5.5\% \times \$50{,}000 = \$687.50$$

This regular interest is credited to his individual account for a total of $50,887.50 ($50,200.00 + $687.50) at the end of the day on December 31, 2017.

(a) If Jon transfers from PERS Plan 2 to PERS Plan 3 on January 25, 2018, he receives no additional regular interest for the period from January 1 through January 25.

(b) If Jon separates from service on February 15, 2018, and withdraws the amount in his individual account, he receives no additional regular interest for the period from January 1 through February 15.

(7) This rule applies retroactively to November 3, 1977, to all Plan 1 and Plan 2 individual accounts in the public employees' retirement system, teachers' retirement system, law enforcement officers' and fire fighters' retirement system, school employees' retirement system, and public safety employees' retirement system, and prospectively for the Washington state patrol retirement system Plan 1 and Plan 2.