No. 18-1545

In The Supreme Court of the United States

TRACY GUERIN,

Petitioner,

v.

MICKEY FOWLER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF ALASKA, IDAHO, HAWAI'I, LOUISIANA, MONTANA, OKLAHOMA, AND SOUTH DAKOTA IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are the States of Alaska, Idaho, Hawai'i, Louisiana, Montana, Oklahoma, and South Dakota.

The amici States have a strong interest in safeguarding their sovereign immunity from suit, which plays a vital role in our federal system. They thus have an interest in maintaining this Court's bright-line distinction between suits against state officers for prospective relief—which are allowed under a narrow exception to sovereign immunity—and suits for retroactive relief—which are not.[2] The Ninth Circuit's ruling etches away that distinction and erodes state sovereignty.

The amici States also have a strong interest in tailoring their public pension programs to fit their unique actuarial and administrative needs. The amici States provide public pensions to hire and retain qualified public servants. Actuaries and pension administrators work together to set rates and policies so that these pensions will be properly funded and efficiently administered. In doing so, they consider when employees can withdraw money in lieu of receiving normal pension benefits, and whether, when, and how much interest should be applied to such withdrawals. The Ninth

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[1] Timely notice was given to counsel of record pursuant to Supreme Court Rule 37.

[2] *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

Circuit's ruling undermines the legitimacy of the many pension systems that are structured to provide interest less frequently than daily.

SUMMARY OF ARGUMENT

The Court should grant certiorari because the Ninth Circuit's ruling erodes state sovereign immunity and undermines the legitimacy of many public pension programs throughout the country.

Every state administers public pension programs. Pensions are funded by employee contributions, employer contributions, and returns on the investment of those contributions. Pension payments are based on an employee's years of service and average salary, not her contributions to the pension fund, so the amount an employee contributed to the fund is usually not relevant to her pension payments. But when state law allows an employee to withdraw or transfer her contributions instead of receiving pension payments, it becomes necessary to know how much she can withdraw or transfer.

Some states give employees interest on their withdrawn contributions, while others do not. The states that do give interest calculate it at different frequencies and rates.

In this case, the Ninth Circuit concluded that because daily interest is a traditional common-law rule, employees have a constitutionally protected property

right to daily interest on their withdrawn or transferred contributions, notwithstanding any state-created pension program calculating interest less frequently. The Ninth Circuit also allowed employees to sue the State of Washington for interest it believed should have been earned, but was not.

This ruling weakens state sovereign immunity and conflicts with this Court's decision in *Edelman v. Jordan*, 415 U.S. 655 (1974), by allowing a claim for retroactive monetary relief to proceed against a state in federal court.

This ruling also calls into question the many state and federal pension programs that do not provide daily interest on contribution withdrawals. In doing so, it conflicts with the long-standing axiom that statutes can abrogate common law rules. Although in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), this Court carved out a narrow exception from that axiom by holding that interest earned on the principal belongs to the owner of the principal, notwithstanding state law to the contrary, this Court has never suggested that interest must be calculated *daily*. Nor has this Court ever suggested that interest is owed on the principal even if interest is never earned. Whereas the Ninth Circuit has unduly expanded the "interest follows principal" exception, other circuits have narrowed it. The Court should grant certiorari to resolve this conflict and curb an onslaught of litigation challenging the country's many varied public pension programs.

ARGUMENT

I. The Ninth Circuit's approval of a claim for retroactive relief against a state contravenes *Edelman v. Jordan* and erodes state sovereign immunity.

The Ninth Circuit's dismissive treatment of state sovereign immunity directly conflicts with *Edelman v. Jordan*[3] and will pave the way for other creatively reframed lawsuits for damages against states. If the relief the plaintiffs seek in this case counts as "prospective," the *Ex parte Young* exception will swallow the state sovereign immunity rule. The Court should not allow the Ninth Circuit to erode such a fundamental principle of federalism.

The Court has recognized the "vital role" state sovereign immunity plays in "our federal system."[4] For "over a century" the Court has "reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"[5] "After independence, the States considered themselves fully sovereign nations," and "'[a]n integral component' of the States' sovereignty was 'their immunity from private suits.'"[6] This is "a fundamental aspect" of

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[3] 415 U.S. 655 (1974).

[4] *Pennhurst*, 465 U.S. at 99.

[5] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

[6] *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (quoting *Federal Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751–752 (2002)).

the states' "inviolable sovereignty" that was "well established and widely accepted at the founding."[7] "A state's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued."[8] Thus, sovereign immunity "largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals."[9] The Eleventh Amendment—which confirms the states' pre-existing immunity—was enacted "not to change but to restore the original constitutional design."[10]

State sovereign immunity serves two principal functions in our federal system. First, its "preeminent purpose" is "to accord States the dignity that is consistent with their status as sovereign entities."[11] Second, it protects the states' "financial integrity."[12] "[A]t the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages."[13] And the Eleventh Amendment was adopted in response to state fears that "federal courts would force them to pay their

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[7] *Id.*

[8] *Pennhurst*, 465 U.S. at 99 (emphasis in original).

[9] *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994).

[10] *Franchise Tax Bd.*, 139 S. Ct. at 1493 (quoting *Alden v. Maine*, 527 U.S. 706, 722 (1999)).

[11] *S.C. State Ports Auth.*, 535 U.S. at 760.

[12] *Alden*, 527 U.S. at 750.

[13] *Id.*

Revolutionary War debts, leading to their financial ruin."[14] "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process," and this delicate balance "must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen."[15] These functions of state sovereign immunity remain as vital today as they were at the founding.

In this case, the Ninth Circuit bypassed state sovereign immunity by shoehorning this case into the *Ex parte Young* exception, which allows suits for prospective injunctive relief against state officers to stop them from violating federal law in the future. But the *Ex parte Young* exception is narrow, and this case does not fit it.[16] Allowing federal courts to stop future violations "has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to" federal law.[17] But the "need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This is the significance of *Edelman v. Jordan.*"[18]

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[14] *Hess*, 513 U.S. at 39 (quoting *Pennhurst*, 465 U.S. at 151 (Stevens, J., dissenting)).

[15] *Alden*, 527 U.S. at 751.

[16] *See Pennhurst*, 465 U.S. at 102 (explaining that the *Ex parte Young* exception "has not been provided an expansive interpretation").

[17] *Id.* at 105.

[18] *Id.*

Edelman v. Jordan makes clear that the *Ex parte Young* exception does not allow retroactive relief to remedy past violations of federal law.[19] In *Edelman*, the plaintiffs sought both prospective relief—an injunction requiring future compliance with federal time limits for processing and paying certain benefits—and retroactive relief—payment of past benefits wrongly withheld.[20] But the Court barred the latter claim, declining "to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States."[21] The Court rejected the theory that ordering retroactive payment of the wrongly withheld benefits was permissible because it could be characterized as "equitable restitution" rather than "damages."[22] The Court has since observed that "*Edelman*'s distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States."[23]

The Ninth Circuit's decision upsets this careful balance and conflicts with *Edelman*. If the relief sought here counts as "prospective," the *Ex parte Young* exception will swallow the sovereign immunity rule. The plaintiffs here, just like the plaintiffs in *Edelman*,

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[19] *Id.* at 102–03.

[20] *Edelman*, 415 U.S. at 655.

[21] *Pennhurst*, 465 U.S. at 105.

[22] *Edelman*, 415 U.S. at 666.

[23] *Pennhurst*, 465 U.S. at 106.

seek not just forward-looking relief, but also backward-looking relief. They seek correction of an alleged wrong that happened in the past: they argue that the State of Washington should have, but did not, credit their retirement accounts with a certain amount of interest, and they want the federal courts to fix this. Of course, this requested fix would happen in the future, but if that were enough to make relief "prospective," then even a run-of-the-mill damages remedy would be "prospective."

Nor is any principled distinction to be found in the Ninth Circuit's observation that the relief would "involve applying a computerized formula" to "electronic records." Pet. App. 37a. This could be said of any modern financial transaction, but the essence is the same either way: just like the plaintiffs in *Edelman*, the plaintiffs here want to be credited with money that they believe should have been credited to them in the past, but was not. The Ninth Circuit also does not succeed in analogizing the requested relief to the return of cars towed and held by the State. Pet. App. 37a. Here, it is undisputed that the interest the plaintiffs seek was never either in their possession or credited to their accounts. The plaintiffs thus are not asking the State to "return" their "towed cars"—they are asking the State to give them new cars that they believe they should have been given in the past but have never actually possessed. Such relief is undeniably retroactive, is indistinguishable from classic monetary damages, and is thus barred by state sovereign immunity under *Edelman*.

Edelman's limit on the scope of the *Ex parte Young* exception is far more administrable and respectful of the states' vital sovereignty if maintained as a clear line between prospective and retroactive relief. The Court should grant review to reinforce this line.

II. The Ninth Circuit's daily interest requirement challenges the legitimacy of public pension programs nationwide.

The states' status as "sovereign entities" gives them not only immunity from suit, but also the power to govern themselves, including by creating and administering public pension systems as they see fit. The Ninth Circuit's rule unduly restricts that freedom and will—as Judge Bennett's dissent observes—"cast significant doubt on the legitimacy of retirement systems administered by numerous states and the federal government that apportion interest less frequently than daily." Pet. App. 21a. The Court should settle this issue now to curb an onslaught of litigation challenging the country's many varied public pension programs.

There are nearly 300 state pension systems.[24] Over 20 million people are members of state

[24] U.S. Census Bureau, *2017 Annual Survey of Public Pensions: State & Local Tables*, *available at* https://www.census.gov/data/tables/2017/econ/aspp/aspp-historical-tables.html.

pensions.[25] In 2017, state pensions paid out $6.23 billion in withdrawals.[26]

Each state administers its pension programs differently, but the frameworks are the same. Employees all contribute portions of their paychecks towards a pension fund; employers make contributions as well; those contributions are transmitted to the state, or an arm of the state; the state invests those contributions in a diversified investment fund; and that fund is used to pay pensions to eligible retirees.[27]

In general, an employee cannot simply withdraw or transfer her contributions at will—rather, states dictate if, how, and when contributions may be withdrawn. For example, when employee contributions are mandatory, an employee cannot withdraw her contributions until her employment ceases.[28] And some pension programs do not allow an employee to withdraw

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[25] *Id.*

[26] *Id.* This represents approximately two percent of total payments from state pensions that year. *Id.*

[27] *See* Nat'l Pub. Pension Coalition, *Public Pensions—Frequently Asked Questions*, https://protectpensions.org/learn/pensions-frequently-asked-questions/ (last visited July 9, 2019).

[28] *See, e.g.*, Minn. Stat. § 353.34(1)(a) ("Application for a refund may not be made before the date of termination of public service."); N.C. Gen. Stat. § 135-5(f) (permitting return of accumulated contributions after employment ceases and upon application for a refund); Va. Code Ann. § 51.1-161 (permitting refunds for members who are no longer employed).

her contributions at all once she becomes eligible for retirement.[29]

Although the purpose of pensions is to provide a steady stream of income for retirees, many employees choose to withdraw their contributions instead of receiving pensions. Withdrawing contributions is often the most prudent option for employees who did not work enough years to become eligible to receive pensions.[30] Some members who would otherwise be eligible for pensions prefer to withdraw their contributions and invest the money themselves. Others choose lump-sum payouts in the face of financial hardships. And others, like the Washington employees in this case, choose to transfer their contributions from one state-sponsored retirement plan to another. Pet. 9.

Although all contributions to a pension fund are pooled and invested together, states keep track of each employee's individual contributions for accounting purposes.[31] Once an eligible retiree begins receiving

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[29] *See, e.g.*, Conn. Gen. Stat. § 5-166(e) ("A member who is eligible for retirement when he leaves state service may not elect to withdraw his retirement contributions in lieu of receiving retirement income payments at such time as they are payable . . . .").

[30] *See, e.g.*, Alaska Stat. § 39.35.370(a)(1) (requiring five years of service before becoming eligible for pension); Idaho Code Ann. § 59-1302(36) (defining "vested member" as member with at least five years of service); Conn. Gen. Stat. § 5-162 (requiring ten years of state service to retire between the ages of 55 and 65 and receive monthly retirement income).

[31] *See, e.g.*, Alaska Stat. § 39.35.100(b) (requiring maintenance of individual account to record employee's mandatory contributions); Kan. Pub. Emps. Ret. Sys., *Valuation Report as of December 31, 2017*, 13 (describing plan that requires keeping "a

periodic pension payments, the amount she contributed to the fund usually becomes irrelevant because her benefits are calculated based on her salary and years of service, not her past contributions.[32] But if an employee withdraws or transfers her contributions, the state needs to know how much she contributed.

Sometimes states credit interest to individual employee contribution accounts so that when an employee withdraws or transfers her contributions, she also receives accrued interest on them—but whether, when, and how much interest accrues varies from state to state, and even within states. Over a dozen states credit interest on individual accounts less frequently than daily. Some states, like Alabama, Alaska, Kansas, Kentucky, New Mexico, North Carolina, South Dakota, Virginia, and Wisconsin credit interest annually.[33]

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hypothetical account" for each member with employee contribution credits, employer pay credits, and interest credits), *available at* https://www.kpers.org/valuationreport123117.pdf.

[32] Nat'l Pub. Pension Coalition, *Public Pensions—Frequently Asked Questions*, https://protectpensions.org/learn/pensions-frequently-asked-questions/ (last visited July 9, 2019).

[33] Ala. Emps.' Ret. Sys., *ERS Member Handbook* 9 (2013) ("[I]nterest is credited on the previous year's average balance at the rate of four percent per annum."), *available at* https://www.rsa-al.gov/uploads/files/ERS_Member_Handbook_T1_bookmarked.pdf; Alaska Div. of Ret. and Ben., *Alaska Teachers' Ret. Sys. Info. Handbook* 6 (2011) (posting to employee contribution accounts 4.5 percent interest, compounded annually, on July 31), *available at* http://doa.alaska.gov/drb/pdf/trs/handbook/2011/TRS_handbook_2011_04_membership.pdf; Kan. Pub. Emps. Ret. Sys., *Withdrawal Application* 3 ("KPERS 1 & KPERS 2 members: Interest is credited annually on June 30. If you withdraw before June 30, you will not receive your interest for the current year."),

States like Alaska and Kansas, which administer multiple types of pension plans, credit interest at different frequencies, depending on the plan.[34] Other states, like Washington, credit interest quarterly.[35] Minnesota applies interest only "to the first day of the month in

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available at https://kpers.org/forms/kwithdrawalbooklet.pdf; Ky. Ret. Sys., *Comprehensive Annual Financial Report* 37 (2018) ("Interest is paid each June 30 on members' accounts at a rate of 2.5%."), *available at* https://kyret.ky.gov/Publications/Books/2018%20CAFR%20(Comprehensive%20Annual%20Financial%20Report).pdf; Pub. Emps. Ret. Ass'n of N.M., *PERA Member Handbook* 11 (2017) ("Each year, interest on your employee contributions is credited to your account balance as of June 30."), *available at* http://www.nmpera.org/assets/uploads/forms-kits-handbooks/2017MemberHandbook_10.2017.pdf; N.C. Gen. Stat. §§ 135-1 (defining "accumulated contribution" as compensation deductions accredited to member's individual account plus "regular interest"), 135-7(b) (crediting regular interest annually); S.D. Codified Laws § 3-12C-108; S.D. Ret. Sys., *Class A Handbook* 7–8 (2018) ("For administrative efficiencies, interest is credited annually on June 30."), *available at* http://sdrs.sd.gov/docs/ClassAFoundationMemberHandbook.pdf; Va. Code Ann. § 51.1-147(C) (interest accrues annually and is credited annually to members' contribution accounts); Wis. Stat. § 40.04(4)(a)(2)–(3) (crediting interest on Dec. 31).

[34] *See, e.g.*, Kan. Pub. Emps. Ret. Sys., *Withdrawal Application* 3 (KPERS 1 & KPERS 2 credited annually; KPERS 3 credited quarterly), *available at* https://kpers.org/forms/kwithdrawalbooklet.pdf; Alaska Stat. § 39.35.100(b) (crediting interest to public employee contribution accounts semi-annually); Alaska Stat. § 14.25.145 (crediting interest to teacher contribution accounts annually).

[35] *See, e.g.*, Wash. Admin. Code § 415-02-150(3).

which the refund is processed."[36] And Idaho and Massachusetts credit interest on a monthly basis.[37]

Some states limit whether and when they refund any interest at all on contributions that an employee withdraws or transfers. For instance, Alabama does not refund any interest on contributions if an employee works less than three years.[38] Alabama credits interest to individual employee contribution accounts, but when an employee withdraws her contributions—even if that employee worked more than three years—Alabama does not refund the full amount of interest credited.[39] In Kansas, when an employee ceases service before she has worked enough years to become eligible for regular pension payments, interest accrues for either two or five years after the end of her employment, depending on her pension plan, but then stops accruing.[40] Ohio credits interest to teachers' retirement accounts, but only when teacher contributions are refunded at retirement.[41] And some states, such as

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[36] Minn. Stat. § 353.34(2)(a).

[37] Idaho Admin. Code § 59.01.07.101 ("Regular interest . . . shall accrue to and be credited monthly to a member's accumulated contributions."); Mass. Gen. Laws ch. 32, § 22 (interest on "completed months").

[38] Ala. Emps.' Ret. Sys., *ERS Member Handbook* 7, 9 (2013), *available at* https://www.rsa-al.gov/uploads/files/ERS_Member_Handbook_T1_bookmarked.pdf.

[39] *Id.* (correlating the percentage of credited interest that an employee is refunded with the employee's years of service).

[40] Kan. Pub. Emps. Ret. Sys., *Withdrawal Application* 3, *available at* https://www.kpers.org/forms/kwithdrawalbooklet.pdf.

[41] Ohio Rev. Code Ann. § 3307.142(A)(2).

Florida, Louisiana, and Rhode Island, provide no interest at all when refunding contributions.[42]

Not only do states vary in whether and how often they provide interest on employee contributions, but they also vary in how often they compound interest. Some states compound interest when they credit interest to individual accounts.[43] But other states—like Massachusetts and Minnesota, which credit interest on a monthly basis—compound interest annually.[44]

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[42] *See, e.g.*, Fla. Ret. Sys., *Pension Plan Member Handbook* 22 (2019) ("Your refund will not include contributions made by your employer, nor will it include interest earnings."), *available at* https://www.rol.frs.state.fl.us/forms/member_handbook.pdf; La. State Emps.' Ret. Sys., *Member's Guide to Retirement* 11 (2019), ("Accumulated contributions include all employee contributions paid by a member, excluding interest paid on the repayment of a refund."), *available at* https://lasersonline.org/wp-content/uploads/2016/07/MembersGuide2Retirement_Full.pdf; R.I. Gen. Laws § 36-10-8 ("A member who withdraws from service or ceases to be a member for any reason other than death or retirement shall be paid on demand a refund consisting of the accumulated contributions standing to his or her credit in his or her individual account, without interest.").

[43] *See, e.g.*, Alaska Div. of Ret. and Ben., *Alaska Teachers' Ret. Sys. Info. Handbook* 6 (2011) (posting interest, compounded annually, to employee contribution accounts on July 31), *available at* http://doa.alaska.gov/drb/pdf/trs/handbook/2011/TRS_handbook_2011_04_membership.pdf; Alaska Div. of Ret. and Ben., *Alaska Pub. Emps. Ret. Sys. Info. Handbook* 6 (2011) (posting interest, compounded semi-annually, to employee contribution account on June 30 and December 31), *available at* http://doa.alaska.gov/drb/pdf/pers/handbook/2011/PERS_handbook_2011_web.pdf.

[44] *See, e.g.*, Mass. Gen. Laws ch. 32, § 22(6)(c); Minn. Stat. § 353.34(2)(a).

States also vary the interest rates that they apply.[45] And those rates can vary from year to year.[46]

Just as states have their own individual methods for administering their pension systems, so too does the federal government. The federal government administers two different pension systems: the Civil Service Retirement System and the Federal Employees Retirement System. Retired and vested members of both systems may receive a pension based on their earnings and years of service.[47]

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[45] *See, e.g.*, Alaska Stat. § 39.35.100(b) (giving Alaska Retirement Management Board discretion to determine rate of interest); Conn. Gen. Stat. § 5-166(b)(2) (crediting interest for withdrawals at a rate of five percent per year, and for a partial year at a rate of five-twelfths of one percent multiplied by the full number of months completed during that year); Ky. Ret. Sys., *Comprehensive Annual Financial Report* 37 (2018) (paying interest annually at a rate of 2.5 percent), *available at* https://kyret.ky.gov/Publications/Books/2018%20CAFR%20(Comprehensive%20Annual%20Financial%20Report).pdf; N.M. Stat. Ann. § 22-11-15(A) (giving Educational Retirement Board discretion in setting interest rate for refunds).

[46] *See, e.g.*, S.D. Codified Laws § 3-12C-108 (requiring Board each year to set rate of interest applicable to withdrawals); Minn. Stat. §§ 353.34(2)(b), 354.49(2)(a) (providing for different annual compound interest rates on refunds during different years); NY Retire. & Soc. Sec. Law § 11(b)(4) (requiring comptroller to engage an actuary to promulgate rates of interest at least every five years).

[47] OPM.gov, *CSRS Information: Computation*, https://www.opm.gov/retirement-services/csrs-information/computation/ (last visited July 9, 2019); OPM.gov, *FERS Information: Computation*, https://www.opm.gov/retirement-services/fers-information/computation/ (last visited July 9, 2019).

Alternatively, federal employees can withdraw their contributions in lieu of receiving a pension.[48] When an employee under the Federal Employees Retirement System chooses to withdraw contributions instead of receiving a pension, the federal government provides interest, compounded annually, but does not include interest if an employee worked a year or less, and no interest is included for a fractional part of a month that an employee worked.[49] When an employee under the Civil Service Retirement System receives a refund of contributions, the federal government includes interest only if the employee worked more than one but less than five years.[50]

The variety of public pension programs in the United States exemplifies this Court's recognition that states are "laboratories" of experimentation.[51] The Court should grant review because the Ninth Circuit's rule strips states of the power to choose how to administer their own pension systems and calls into question many pension systems throughout the country.

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[48] OPM.gov, *FERS Information: Former Employees*, https://www.opm.gov/retirement-services/fers-information/former-employees/ (last visited July 9, 2019); OPM.gov, *CSRS Information: Former Employees*, https://www.opm.gov/retirement-services/csrs-information/former-employees/ (last visited July 9, 2019).

[49] 5 U.S.C. § 8401(19)(D).

[50] 5 U.S.C. § 8331(8)(C); *see also* OPM.gov, *CSRS Information: Former Employees*, https://www.opm.gov/retirement-services/csrs-information/former-employees/ (last visited July 9, 2019).

[51] *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

III. The Ninth Circuit's daily interest requirement conflicts with the axiom that states can abrogate common-law rules.

The Court has repeatedly acknowledged that a statute may abrogate a common-law rule.[52] The Court carved out a narrow "interest follows principal" exception to that general axiom in *Phillips v. Washington Legal Foundation*,[53] but the Ninth Circuit's daily interest requirement unduly broadens this exception. The Ninth Circuit's decision (1) ignores the Court's instruction in *Phillips* that states have discretion in determining how interest is earned, (2) disregards the broader axiom that states may generally abrogate common-law rules, and (3) conflicts with other circuits' narrow interpretations of *Phillips*.

First, the Ninth Circuit's mandatory daily interest requirement conflicts with the very case it relies on—*Phillips v. Washington Legal Foundation*. In that case, the Court considered whether interest earned on client funds held in lawyers' trust accounts was "private property" subject to the Takings Clause of the Fifth Amendment.[54] The Court concluded that states may not "legislatively abrogat[e] the traditional rule that 'earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.' "[55] The Court held that "the interest that *does*

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[52] *See, e.g.*, *United States v. Texas*, 507 U.S. 529, 534 (1993).

[53] 524 U.S. 156 (1998).

[54] *Id.*

[55] *Id.* at 167 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

accrue attaches as a property right incident to the ownership of the underlying principal."[56] In other words, "interest follows principal."[57] But the Court also explicitly recognized that "the government has great latitude in regulating the circumstances under which interest may be earned."[58] That "great latitude" gives states discretion in regulating when, how, and at what rate interest accrues. The Ninth Circuit's decision removes this discretion.

Second, the Ninth Circuit's expansive view of *Phillips*' "interest follows principal" exception eviscerates the general axiom that states can abrogate common law rules by statute. This Court has not extended the "interest follows principal" exception beyond *Phillips*. And it has not articulated what other "traditional rules," if any, might be immune to legislative change.

The Ninth Circuit concluded that "core" property rights that cannot be abrogated by statute include rights that are "deeply ingrained in our common law tradition." Pet. App. 34a. And because daily interest has an "impressive common law pedigree," the Ninth Circuit considered daily interest to be one of those "core" property rights. Pet. App. 34a. But that a common-law property right is old cannot be the sole measure for whether it can be abrogated. Legislation has abrogated numerous ancient common-law property rights, such as primogeniture—"the common-law right of the

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[56] *Phillips*, 524 U.S. at 168 (emphasis in original).

[57] *Id.* at 165.

[58] *Id.*

firstborn son to inherit his ancestor's estate"[59]—and a husband's right to his wife's estate upon marriage.[60] Moreover, as the Petition points out, nearly every state has abrogated the common-law right to daily interest as applied to successive interests. Pet. 23.

Third, in contrast to the Ninth Circuit, other circuits have given proper attention to context, and narrowly construed *Phillips*' "interest follows principal" exception to the general axiom that states can abrogate common-law rules. This is best illustrated in cases concerning whether the interest earned on prison inmate trust accounts belongs to prisoners. Pet. 20 n.6. The Ninth Circuit has held that prisoners have a right to the interest on their accounts, applying *Phillips*' "interest follows principal" exception without considering the idiosyncratic context that prison presents.[61] But the three other circuits to have considered this same issue have paid careful attention to the context of the

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[59] Black's Law Dictionary (11th ed. 2019) (non-paginated electronic version) (defining "primogeniture" and dating the term to the fifteenth century); *see Davis v. Rowe*, 27 Va. 355 (6 Rand. 1828) (recognizing that the 1785 Act of Descents abrogated the common law course of descents).

[60] *Neilson v. Kilgore*, 145 U.S. 487, 491 (1892) ("The relation of husband and wife is therefore formed subject to the power of the state to control and regulate both that relation and the property rights directly connected with it, by such legislation as does not violate those fundamental principles which have been established for the protection of private and personal rights against illegal interference.").

[61] *See Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1998).

property right.[62] Instead of looking at trust accounts generally, they analyzed prisoners' rights at common law, and concluded that the common-law rule that "interest follows principal" does not apply to prisoners, who have historically had lesser property rights.[63]

Here, as in the prisoner's trust account case, the Ninth Circuit has again disregarded context in applying *Phillips*' "interest follows principal" exception. The Ninth Circuit failed to consider that an employee's right to withdraw her contributions at all is limited by statute—otherwise, her right is only to receive pension benefits upon attaining eligibility.[64] The right to receive interest on withdrawn contributions—much less daily interest—derives from the limited right to withdraw contributions, and can likewise be limited by statute.

The Ninth Circuit's daily interest requirement also disregards the contractual nature of pensions.[65]

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[62] *See Young v. Wall*, 642 F.3d 49 (1st Cir. 2011); *Givens v. Ala. Dep't of Corr.*, 381 F.3d 1064 (11th Cir. 2004); *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000).

[63] *Id.*

[64] *See supra* notes 28–29.

[65] *See, e.g.*, *Bd. of Trustees of Policemen's and Firemen's Retirement Fund of City of Gadsden v. Cary*, 373 So.2d 841, 842 (Ala. 1979) (per curiam) (analogizing compulsory pension system to a unilateral contract); Ariz. Const. art. 29, § 1 ("Membership in public retirement system is a contractual relationship . . . ."); Alaska Const. art. XII, § 7 ("Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship."); *Pyle v. Webb*, 489 S.W.2d 796, 798 (Ark. 1973) (calling teacher pension program a contract between teacher and State); *Miller v. State*, 557 P.2d 970, 974 (Cal. 1977) ("[P]ension

When a person enters into an employment contract, he agrees to the terms of employment. When a state offers employment that includes a mandatory employee-contribution pension program, the state offers the opportunity to receive a pension in exchange for contributions and fulfillment of a certain number of years of state service.[66] Although employees have a limited right to withdraw their contributions if they do not receive a pension, any interest—and when that interest is credited and compounded and at what rate—is a

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laws . . . establish contractual rights."); *Justus v. State*, 336 P.3d 202, 211 (Colo. 2014) (distinguishing parts of pension statutes that create contractual right from parts of pension statutes that do not); *In re State Emps.' Pension Plan*, 364 A.2d 1228, 1234 (Del. 1976) (discussing that participation in pension creates contractual relationship between the State, as the employer, and the employee); *Florida Sheriffs Ass'n v. Dep't of Admin., Div. of Ret.*, 408 So.2d 1033, 1036 (Fla. 1981) (discussing contractual relationship established by retirement statutes); Ill. Const. art. 13, § 5 (membership in pension system creates contractual relationship); *Bd. of Trustees of Pub. Emps.' Ret. Fund v. Hill*, 472 N.E.2d 204 (Ind. 1985) (concluding judge's participation in retirement fund created contract); *Brazelton v. Kansas Pub. Emps. Ret. Sys.*, 607 P.2d 510, 514 (Kan. 1980) (recognizing that members of retirement systems have contractual rights based on retirement statutes); *MacLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1058 (Mass. 2000) (recognizing a "relaxed" contract that arises in the context of pension benefit plans); *Bowles v. Wash. Dep't of Ret. Sys.*, 847 P.2d 440, 446 (Wash. 1993) ("[P]ublic employee pension rights are contractual in nature.").

[66] *See United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17 n.14 (1977) ("In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State.").

product of contract. And contracts need not track the common law.

The idea that there is always a property right to interest—daily or otherwise—regardless whether interest is *earned* also conflicts with the Federal Circuit's interpretation of *Phillips*' "interest follows principal" exception. *Phillips* did not hold that a person always has a right to receive interest on a principal sum that is held by another. Rather, the Court stressed that "the interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal."[67] Following *Phillips*, the Federal Circuit has repeatedly held that there is no property right to "interest" on a non-interest bearing account.[68] For instance, in *Leider v. United States*,[69] the Federal Circuit concluded that a creditor in a bankruptcy proceeding did not have a property right to interest that "never was generated."[70] In that case, a creditor failed to cash his check for a distributive share, and the uncashed check was returned to the bankruptcy court and

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[67] 524 U.S. at 168 (emphasis in original).

[68] *See, e.g.*, *Texas State Bank v. United States*, 423 F.3d 1370, 1380 (Fed. Cir. 2005) (concluding that Texas State lacked a property interest in a share of the earnings generated by its mandated reserves in the Federal Reserve); *United States Shoe Corp. v. United States*, 296 F.3d 1378, 1384 (Fed. Cir. 2002) (concluding that exporter had no private right to interest on tax refund, reasoning that "[f]or the accrued interest to rise to the level of private property, the principal must be held in an identified private account"); *Leider v. United States*, 301 F.3d 1290 (Fed. Cir. 2002).

[69] 301 F.3d 1290 (Fed. Cir. 2002).

[70] *Id.* at 1297.

deposited with the United States.[71] When the creditor petitioned the bankruptcy court for his money two years later, he received his distributive share, but no interest.[72] He sued, arguing that the government's failure to pay interest constituted a taking.[73] The Federal Circuit concluded that "because there existed no interest, there was nothing that could be taken."[74]

By contrast, the Ninth Circuit's ruling here suggests that interest must accrue in the first place. The Ninth Circuit has previously espoused this idea of "constructive interest."[75] But the fact that states track employee contributions to pension funds and sometimes pay interest when contributions are withdrawn does not mean that the contributions actually *earn* interest. Employee contributions are pooled and invested. The pooled funds grow as the investments grow. But no interest—much less daily interest—is earned on the contributions. Nonetheless, according to the Ninth Circuit, and in conflict with the Federal Circuit, employees have a property right to interest that constructively should have been earned. Reading the Ninth Circuit's decision in this case in any other way would lead to an absurd result: it would permit a state to circumvent the Ninth Circuit's mandatory daily interest rule simply by providing no interest at all.

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[71] *Id.* at 1293.

[72] *Id.*

[73] *Id.* at 1297.

[74] *Id.*

[75] *Schneider*, 151 F.3d 1201.

The Ninth Circuit's broad expansion of the "interest follows principal" exception to the general axiom that states may abrogate common-law rules is untethered from context and diverges from other circuits' more nuanced, contextually-based understanding of *Phillips*.

CONCLUSION

For these reasons, this Court should grant the petition.

Respectfully submitted,

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