No. 18-1545

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Director Tracy Guerin contends the Ninth Circuit did something "unprecedented" when it only applied established principles from this Court's opinions on the Takings Clause and sovereign immunity. By misstating facts concerning the retirement accounts at issue and Washington state law, she tries to create the impression that the Ninth Circuit "created a new constitutional mandate," Pet. 1. Guerin says this case concerns public funds, not private property, and the funds did not "earn interest," Pet. 18-19, when the record shows this case concerns teachers' private property under Washington law-retirement accounts earning 5.5% annual interest holding *employee* contributions.

Guerin's petition (1) ignores her agreement that injunctive relief to return the teachers' property by correcting their accounts would be the remedy and, (2) ignores precedents establishing that there is no sovereign immunity to a claim against a government officer seeking the return of property that was unconstitutionally taken. Although Guerin concedes that any hypothetical indirect financial impact will not be on the state, but school districts (Pet 7, 35), she complains the Ninth Circuit made no factual inquiry whether the school districts are arms of the state, even though she submitted no facts. Pet. 33-35. This Court, however, has held that a school district is not an arm of a state.

To conform to the issues that were decided below, the questions are the following:

1. *Webb's*, *Phillips*, and *Brown* all hold that "interest follows principal" and a state violates the Takings Clause when it denies owners of principal accrued interest by

crediting it to others. Did the Ninth Circuit err when it ruled that Guerin could not take the teachers' accrued interest earned at the rate of 5.5% annual interest (dating back to before 1996) by crediting some of it to others based on her much later 2018 regulation purporting to exercise unfettered discretion over how to credit accrued interest?

2. Under Washington law the interest earned on the teachers' *employee* retirement contributions is the teachers' private property rather than the state's. Where a state officer (Guerin) stipulated that the skimmed interest can be returned simply by correcting the account records she controls, and no public funds are involved, does this remedy constitute an award of damages against the state itself simply because she is a state officer handling accounting functions for retirement funds that are not the state's property?

RELATED CASES

- *Mickey Fowler and Leisa Maurer v. Tracy Guerin*, No. 16-35052, United States Court of Appeals Ninth Circuit. Judgment Entered August 16, 2018.

- *Mickey Fowler and Leisa Fowler v. Marcie Frost*, No. CV15-5367 BHS, United States District Court Western District of Washington. Judgment Entered December 22, 2015.

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COUNTERSTATEMENT OF THE CASE

A. Factual Record.

Guerin's petition omits record citations, contains significant factual inaccuracies, and misstates Washington law to create an appearance that questions other than those presented above were decided and to erroneously imply this case has similarity to other cases involving different state retirement programs. The following briefly summarizes the record facts in this case.

The parties' litigation began more than 16 years ago, before an agency, then to state trial and appellate courts, and federal trial and appellate courts. In a 2015 joint status report in district court, the Director[1] agreed that "the complete record and all pertinent materials to decide this matter…is contained within the administrative, superior court, and appellate record in the Washington state courts for *Probst v. DRS*, 167 Wn. App. 180, 271 P.3d 966 (2012) and 185 Wn. App. 1015, 2014 WL 7462567 (2014). See Dkt. No. 1 Complaint ¶¶52-73 (prior proceedings) [Pet. A59-63] and Dkt. No. 14 Def. Mot. at 2-6 (prior proceedings)." ER 74. The Ninth Circuit had an excerpt of this record before it.

Plaintiffs are teachers who are members of Washington's Teachers Retirement System (TRS) Plan 3. *Fowler*, A28. Defendant is the Director of the Department

1. In this brief, Tracy Guerin, the petitioner, is referred to by name with respect to actions she has personally taken and arguments she has personally made. Her position title, Director, refers to her predecessors.

of Retirement Systems (DRS), Tracy Guerin, who controls the accounting function for plaintiffs' retirement accounts holding contributions and interest.

Prior to 1996, these teachers were in TRS Plan 2, a defined benefit pension plan for school teachers. ER 5. In Plan 2, pensions are funded by contributions from employers and employees plus investment returns. Pet. 7-8. Employee contributions were placed in interest-bearing accounts, ER 23-24, 31, 34, but the amount of money in the employee accounts did not affect the teachers' benefits because a defined benefit pension in Plan 2 is based on years of service and average final salary, not on the account balance. ER 30; Pet. 7; Alaska 12, 22. The undisputed record shows the contributions in their individual accounts in Plan 2 always earned 5.5% annual interest compounded quarterly. ER 23, 36, 37, 39; Pet A57.

In 1996, Washington created a new hybrid defined benefit and defined contribution plan, TRS Plan 3. Pet. 9. It gave teachers the option of transferring their employee contributions (including interest) from TRS Plan 2 to Plan 3. Under Plan 3 the teachers who transferred had a defined benefit plan (half of TRS 2's defined benefit) funded solely by employer contributions and a defined contribution plan funded solely by employees' own contributions plus interest. ER 30; Pet. A53; Revised Code of Washington (RCW) 41.32.817.

The teachers opted to transfer their Plan 2 employee contributions plus accrued interest to TRS Plan 3 investment accounts. ER 19; *Fowler*, A28. Unbeknownst to the teachers, the Director had been using an undisclosed computer accounting program that did not credit interest

on employee contributions during the quarters they were made (even though the teachers' contributions were placed in interest-bearing accounts after receipt) and also did not credit interest on deposits for a quarter or more when it treated accounts as empty (even when the funds actually remained in the account for the entire quarter). Pet. 9 n. 5; ER 31-32, 66-67; *Fowler*; A27-28; Pet. A55-A57; *Probst*, A70. Guerin characterizes that practice, by understatement, as "not a straightforward quarterly crediting method." Pet. 9 n. 5. Thus, when the teachers transferred their contributions in 1996, the Director did not provide them "the interest earned during that quarter or the prior quarter," *Fowler*, A28.

The erroneous computer program reduced the amounts transferred to the teachers' newly created Plan 3 investment accounts because the program did not transfer the interest actually earned at the established rate of "5.5% annual interest compounded quarterly." ER 23, 36-37, 39; *Fowler*, A27-28; Pet. A59. The Ninth Circuit referred to this withholding as interest being "skimmed" from the teachers' accounts. *Id.* at A27-28, A37. The Ninth Circuit found the Director "kept the [skimmed] interest and used it to pay benefits to other members." *Id.* at A28; ER 59 (interest at the stated 5.5% annual rate, but not credited, is "allocated" to others).

In 1996, when the teachers withdrew their contributions plus accrued interest to transfer to new Plan 3 defined contribution accounts, no statute or regulation gave the Director authority over crediting of interest. Nor did the Director have any authority to deny interest; the statutes mandated (as they still do) passing accrued interest on to members who withdraw or transfer. RCW 41.04.445(4),

41.32.817(5). The Director could only set the interest rate, RCW 41.32.010(38), and in 1978, the Director chose 5.5% annual interest, compounded quarterly. *Fowler*, A28; *Probst*, A70. The agency simply had an erroneous computer program that resulted in non-crediting of some accrued interest.

The inaccurate computer program was discovered in 2002 by Jeffrey Probst after he transferred to PERS Plan 3.[2] ER 46; *Probst* A70, Pet. A59. He discovered the transferred amount in his retirement account was short, and he requested the Director to transfer to his Plan 3 account all the interest he had earned at the Director's promised rate of "5.5% annual interest compounded quarterly." ER 23, 46; Pet. A59; *Probst*, A70.

The parties partially settled the claims in *Probst* in 2008. The settlement included the post-2002 transferring members of both TRS and PERS.[3] These transfers were not affected by the agency's statute of limitations defense. ER 41; *Probst*, A59-60; Pet. A70-71. The settlement did not include the teachers who transferred to TRS Plan 3 between 1996 and 2002. They were certified for a new subclass in 2009. *Probst*, A71-72.

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2. PERS refers to the Public Employees Retirement System. PERS Plan 2 is a defined benefit plan for many state and local public employees. PERS Plan 3 has an individual retirement account like TRS Plan 3. TRS is separate from PERS and includes only school teachers who are not state employees. RCW Ch. 41.32, teachers; RCW Ch. 41.40, public employees. The dissent on the petition for rehearing in *Fowler* confuses the two separate plans for reasons related to Guerin's sovereign immunity argument. Pet. A5, 7, 11.

3. The agency conceded the PERS and TRS plans both had the same non-crediting problem. *Probst*, A72 n. 5.

Before the *Probst* settlement was finalized, unbeknownst to the teachers, DRS asked the Legislature to give the Director authority over crediting, saying its bill "stems from the result of recently settled [*Probst*] litigation." SB 6167, House Bill Report 2007. The new statute, RCW 41.50.033, states the "amounts [of interest] to be credited and the method of doing so shall be at the director's discretion." Pet. A85. Since then, the Director has used the 2007 law (and her long-promised regulation under this statute, finally adopted in 2018) as a defense against the teachers. *Probst* A75-76; *Fowler* A30. This is emphasized in the petition, Pet. 4, 8-9, 16-17, where Guerin cites the regulation as if it existed in 1996 and treats the regulation as if it overcame the record and changed the historical facts concerning the interest earned by the teachers, apparently because it purports to be retroactive. WAC 415-02-150.

The Superior Court rejected the agency's statute of limitations defense because the teachers "would have had the expectation that interest was being calculated as of the date of the transfer." ER 67. But it ruled against the teachers based on the 2007 statute. Pet. A60.

The Washington Court of Appeals said that under the 2007 statute the Director had discretion to decide when interest is credited and therefore rejected the teachers' statutory claims. *Probst*, A75-77. It also held, however, that DRS's prior practice of not crediting some accrued interest was "unfair," "contrary to industry standards," and "arbitrary and capricious" under the Washington Administrative Procedure Act. *Probst*, A81-83; Pet. A61-62. It did not reach the teachers' Takings Clause argument about skimming accrued interest. *Probst*, A69-70, n. 1; *Fowler*, A29.

On remand, the Superior Court remanded the case to the agency for rulemaking, Pet. A61-62, and then the Director issued a notice of rulemaking, WSR 13-15-128. ER 92; *Fowler*, A30. The remand for rulemaking was affirmed. *Probst v. DRS*, 2014 WL 7462567 (Wash. App. 2014) (unpublished) (saying the Takings Clause argument was "premature" until the Director issued a rule. *Id.* at *6.).

Frustrated with the lengthy delay, the teachers brought this action in federal court to obtain relief on the federal taking claim because the state courts kept deferring the issue and the Director was engaged in an interminable rulemaking process (ultimately taking five years).

B. Proceedings in Federal District Court.

The teachers filed this action against the Director in June 2015. In the parties' joint status report the Director agreed that the teachers' claim is "that when they withdrew their contributions and interest from TRS Plan 2 to transfer to their new individual Plan 3 accounts, not all of their interest earned on their accounts was transferred to their new individual Plan 3 accounts, which plaintiffs allege constitutes an unconstitutional taking of property." ER 74. The Director agreed that "[p]laintiffs seek an order requiring her to transfer that earned interest to their individual Plan 3 accounts." The Director also "agree[d] that the injunctive relief to the class will likely involve a computerized formula to determine the amount of interest that should be moved to class members' TRS Plan 3 accounts." ER 75.

Thereafter, the Director stipulated to class certification under FRCP 23(a) and (b)(2). ER 18-20. In this stipulation the Director agreed that the "plaintiffs allege interest was 'taken' by the defendant and therefore remains in the Plan 2/3 trust fund for the benefit of others. Plaintiffs allege that the...Director of the Department of Retirement Systems (DRS), should be required to correct class members' Plan 3 accounts." ER 18. The Director further stipulated injunctive "relief will likely be based on a formula applied to defendant's computerized records to calculate the interest up to the present." ER 19; *Fowler*, A37 (quoting stipulation).

The District Court denied without prejudice the stipulated motion for class certification. ER 15-17. The Director moved for summary judgment, arguing that the teachers' action should be dismissed based on (1) the Rooker-Feldman doctrine; (2) claim preclusion from the state court proceedings; (3) Eleventh Amendment immunity; and (4) the merits of the taking claim. The District Court sua sponte asked for briefing on prudential ripeness under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1995); ER 12-14; Pet. A44. The District Court subsequently dismissed the teachers' action on prudential ripeness grounds. *Id.* at A48.

C. Proceedings in the Ninth Circuit.

The teachers appealed. Less than a month before the May 2018 oral argument, after a five-year delay, Guerin finally issued a rule codifying the formerly secret interest accounting practice embedded in the computer program that withheld all accrued interest that was not credited.

Fowler, A30; WAC 415-02-150. The teachers, not Guerin, informed the Ninth Circuit of her new rule and the Ninth Circuit asked for supplemental briefing. Guerin again, as in her Respondent's Brief, asked the Court to rule based on the existing record and, if the Court of Appeals did not agree that the case was premature, to rule on the same four alternative grounds for affirmance argued in the district court. Guerin Supplemental Brief 2 n. 1.

The Ninth Circuit panel, Ronald M. Gould and Sandra S. Ikuta, Circuit Judges, and John R. Tunheim, Chief District Judge for the District of Minnesota, reversed on prudential ripeness, finding that under *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003), "the withholding of the interest accrued on the Teachers' accounts constitutes a per se taking" to which *Williamson County* does not apply. *Fowler*, Pet. A32. The Ninth Circuit ruled against Guerin on her other four grounds for affirmance. It held, applying the "interest follows principal" rule of *Phillips v. Washington Legal Foundation*, 156 U.S. 156, 165, 167 (1998), that Guerin could not use her 2018 regulation to deny interest that had accrued under the established rate – 5.5% annual interest compounded quarterly – by simply not crediting some interest. *Fowler*, A32, 33-34.

Guerin petitioned for rehearing en banc, raising new arguments that were mainly based on factual misstatements without record citations. Answer to Petition for Rehearing at 1, 15. The panel denied rehearing and recommended against rehearing en banc. On a vote of the 24 active judges, rehearing en banc was denied, with a dissent by Judge Bennett. Judge Bennett accepted misstatements in the rehearing petition and

added misunderstandings of fact and Washington law. For example, Bennett confuses crediting interest with accruing interest and confuses the rate of interest with the compounding period, see Pet. A14, n. 3. He misunderstands what it means to have an account. Pet. A17-18. He conflates PERS with the separate TRS system (p. 4 n. 2 *supra*). And he says the teachers' accounts did not earn interest, not based on the record which shows they did, but solely by citing Guerin's 2018 post hoc regulation. Pet. A6, A10.

D. Proceedings Since the Ninth Circuit's Decision.

After the Ninth Circuit issued its mandate, the teachers renewed their previous motion for an accounting in the parallel state court case, *Probst v. DRS*, Thurston County No. 05-2-00131-1, on the basis of the Ninth Circuit decision. The Superior Court denied the motion without prejudice pending the outcome of Guerin's petition for certiorari.[4]

In the District Court the teachers renewed their motion for class certification. Guerin agreed there could be declaratory relief concerning the unconstitutionality of the interest practice (*Fowler v. Guerin*, 2019 WL 3337964 *3): "Guerin does not oppose class certification to the extent plaintiffs are seeking relief in the form of a declaration that defendant violated the takings clause of the Fifth Amendment." But Guerin sought to postpone certification of the class for injunctive relief, despite her

4. Guerin says the teachers may pursue their Takings Clause claim in state court whatever the outcome of its Eleventh Amendment sovereign immunity argument in this case. Pet. 31 and n. 11. Assuming this is correct, Guerin's argument about sovereign immunity is rather theoretical.

previous agreement. *Id.* The District Court certified the class. *Id.* at *4. The teachers may seek to expand the class to bring the class up to the present. *Id.*

ARGUMENT

A. Introduction.

Director Guerin contends the Ninth Circuit created a "new constitutional mandate," but her arguments show that she actually complains (incorrectly) that the Ninth Circuit misapplied established principles of law. First, Guerin argues the Ninth Circuit created a right to interest on contributions for all defined benefit plans. Actually, the Ninth Circuit only applied the rule "interest follows principal" where, as a matter of Washington law, employees' contributions were their property and earned 5.5% annual interest and those employee contributions and accrued interest were transferred to a defined contribution plan, except for the "skimmed" interest. Second, Guerin contends the Ninth Circuit "ignored settled Eleventh Amendment analysis." Actually, the Ninth Circuit cited Guerin's agreement that the teachers could receive prospective injunctive relief requiring her to return their property. Further, Guerin concedes that any indirect effect of returning the teachers' money would fall on school districts and she failed to submit any evidence or arguments that school districts are arms of the state. Contrary to Guerin's fact-free arguments, the Ninth Circuit applied established principles of law.

B. The Ninth Circuit's *Fowler* Decision Was Simply the Routine Application of Well-Established Principles; Petitioner's Argument that the Decision Established a "New Property Right" and Is "Unprecedented" Depends Entirely on Mischaracterizing the State Retirement Program and Washington Law.

1. The *Fowler* Decision Is a Straightforward Application of the Court's Decision in *Phillips v. Washington Legal Foundation*.

Director Guerin contends "the Ninth Circuit [determined] that the Takings Clause creates a property right to interest that Washington has not awarded." Pet. 18. She says "the Ninth Circuit created a new constitutional mandate that a state must provide daily interest for state retirement benefit programs." Pet. 1. Guerin says that rule is "unprecedented" and "would invalidate laws of the federal employment retirement system and retirement systems of numerous states in addition to Washington." *Id.* And a few other states, whose statutes would supposedly be "invalidated," adopt Guerin's argument. Alaska[5] summarized Guerin's argument (Alaska 23):

> 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 [in *Texas State Bank v. U.S.*]. *Phillips* did not hold that a person always has a right to receive interest on a principal sum that is held by another. Rather,

5. Alaska submitted an amici brief on behalf of several states.

> the Court stressed that "the interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal." Following *Phillips*, the Federal Circuit has a repeatedly held that there is no property right to "interest" on a non-interest bearing account. (Emphasis original; citations omitted.)

Put simply, the Ninth Circuit did *not* decide whether there is a "property right to 'interest' on a non-interest bearing account." *Id.* It held that interest "actually earned" under Washington law was skimmed off by Guerin's post hoc 2018 rule on crediting. *Fowler*, Pet. A27-28, A32-35, A37. Nothing new in constitutional law was created by this holding; it follows directly from *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *Phillips*, 524 U.S. 156; and *Brown*, 538 U.S. 216, as well as previous Ninth Circuit decisions applying those precedents. *McIntyre v. Bayer*, 339 F.3d 1097 (9th Cir. 2003); *Schneider v. Calif. Dept. of Corr.*, 151 F.3d 1194 (9th Cir. 1998) (*Schneider I*); *Schneider v. Calif. Dept. of Corr.*, 345 F.3d 716 (9th Cir. 2003) (*Schneider II*). Indeed, Guerin concedes that "[t]he panel relied on Supreme Court and Ninth Circuit cases that had previously held that 'interest follows principal' is a traditional and common law right that could not be abrogated by state law."[6] Pet. 12, citing *Schneider* and *Phillips*. In her Respondent's brief below,

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6. This concession makes Guerin's lengthy discussion of "abrogation" of common law, Pet. 20-24 (also Alaska 18-20), irrelevant. Further, the Uniform Principal and Income Act does not abrogate a principal owner's right to interest, as Guerin contends (Pet. 25), but rather affirms that owners of principal have the right to dispose of their interest in any manner they wish. *Phillips*, 524 U.S. at 167-68.

Guerin's argument was only one-half page and it argued only that state law abrogated the rule that interest follows principal. Her current arguments are new and therefore should not be considered. *Penn. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1988).

Guerin does not contend the Ninth Circuit was wrong in its decisions leading to *Fowler*, except to say that in *Schneider* the Ninth Circuit differs from other circuits by "ignoring context." Pet. 20; Alaska 20. Actually, all circuits *agreed with the Ninth Circuit* that accrued interest may not be credited to others under the Takings Clause; they only questioned whether the Ninth Circuit gave "due weight to the truncation of *prisoners*' property rights." *Young v. Wall*, 642 F.3d 49, 54 (1st Cir. 2011) (emphasis added); *Washlefske v. Winston*, 234 F.3d 179, 185-86 (4th Cir. 2000). Indeed, in *Givens v. Alabama Dep't of Corr.*, 381 F.3d 1064, 1068 (11th Cir. 2004), the Eleventh Circuit said that, while prisoners in Alabama do not have a property right to interest, "[c]ertainly, non-inmates have such a property right." In *Washlefske*, the Fourth Circuit agreed that "it is true that at common law interest follows principal" and disagreed only about the rights of *prisoners*. 234 F.3d at 185-86. Accordingly, the alleged conflict among the circuits only exists for an element of *Schneider* not present here – *prisoners*' property rights.

The Ninth Circuit's *Fowler* decision flows directly from the specific facts of this case, *not* from any argument that all retirement contributions must earn interest. Pet. 18-19, 22 n. 22. Here, retirement accounts containing the teachers' employee contributions belong to the teachers under Washington law, and so does the interest earned on their accounts. In *State Ret. Bd. v. Yelle*, 31 Wn.2d

87, 201 P.2d 172, 181-82 (Wash. 1948), the Washington Supreme Court held that public employee retirement accounts *belong to the members* "and are *not state funds*." *Id*. (emphasis added). The Court explained that employee contributions and interest are not public funds because, in part, "any member [who] withdraws his contributions…is entitled to interest thereon." *Id*. See also *Bowles v. DRS*, 121 Wn.2d 52, 847 P.2d 440, 452 (Wash. 1993) ("employees' contributions are *not public funds*" [emphasis added]); RCW 41.04.445(4) ("All member *contributions plus accrued interest earned thereon* shall be paid [by DRS] to the member upon the withdrawal of funds or lump sum payment of accumulated contributions" [emphasis added]).[7]

Accordingly, under Washington law the teachers are the owners of the accounts containing their contributions and they are entitled to all the interest that accrues in their accounts. *Yelle*, 201 P.2d at 181-82; *Dean v. Lehman*, 143 Wn.2d 12, 18 P.3d 523, 535-36 (Wash. 2001) (following Ninth Circuit's decision in *Schneider* and applying Washington statute similar to RCW 41.04.445(4) above); see also RCW 41.32.010(1)(b) and -.010(38); RCW 41.32.817(5). Thus, Guerin's statement that the contributions are not the teachers' funds – *i.e.*, "there are no private funds" in TRS accounts, Pet. 18 – is directly contrary to Washington law. Just as Alaska says it should, Br. 2-3, the Ninth Circuit recognized that Washington law created the right to interest. *Fowler*, Pet. A28-29.

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7. The members have no claim on their contributions, however, when they receive a defined benefit pension. Pet 7; Alaska 12, 22.

Guerin recognizes the *Fowler* opinion relied on *Phillips* and *Schneider*, Pet. 12, but then contends the Court misapplied ("conflicts with") *Phillips*. Pet. 15. While she concedes that under *Phillips* the teachers have a property right to "any interest that *does* accrue" on their accounts, Pet. 18, Guerin contends that interest accrues only to the extent that she determines in her total unilateral discretion that the accrued interest is also credited, relying on the 2018 regulation she adopted two weeks before oral argument below. Pet. 4, 8-9, 16-17; *Fowler*, A30.

Guerin disregards what it means to "accrue" interest. "Accrued interest" means "interest earned, though not credited or otherwise paid." Dictionary of Banking Terms (4th ed. 2000), p. 7; see also Webster's Third New International Dictionary (1976), p. 13: "accrued interest" is "interest earned since the last settlement date but not yet due or payable." "Crediting" interest is not the same thing as "accruing" interest because "crediting" is just a periodic accounting of earned interest that has already accrued on an account. A failure to "credit" interest does not affect whether that interest was "actually earned," as Guerin would like it (Pet. 18). If it did, *Phillips* would have been decided differently because there the client funds "accrued" interest, but under Texas law the interest was credited to the legal foundation, rather than to the clients. 524 U.S. at 162-63. The Supreme Court ruled that the accrued interest is the property of the client and could not be diverted to charity. *Id.* at 168.

The key question here is what interest is "accrued" or is "actually earned" on teachers' accounts, since Guerin admits the teachers have a right to that interest. Pet. 18.

And she concedes that under *Phillips* this right "could not be abrogated by state law." Pet. 12. The Ninth Circuit said that interest accrues daily, following longstanding tradition and common law. *Fowler*, A34. Guerin purports to abrogate daily interest accruals in her 2018 regulation. Pet. 16-17; WAC 415-02-150(5). Guerin, however, disregards what interest is; "interest" is simply the amount of money, in dollars and cents, that accrues over a certain period of time at a particular interest rate, as in *Brown*, *supra*, 538 U.S. at 229 ("Brown made a payment of $90,521.29 that remained in escrow for two days… he estimated that the interest on that deposit amounted to $4.96.").

The purpose of interest is "to compensate one for the time value of money." *Gore v. Glickman*, 137 F.3d 863, 868 (5th Cir. 1998).[8] Thus, an "interest rate" is the measure of how much interest will accrue over time on a given amount of money and "time" for an interest rate is measured in days. *O'Brien v. Shearon Hayden Stone*, 90 Wn.2d 680, 586 P.2d 830, 836 (Wash. 1978) (interest "per annum" means "by the year" and "a year is considered to be 365 days").[9] Accordingly, the concept of "annual interest" inherently assumes that interest accrues daily because we calculate years in 365 days – the same as the

8. *Accord*, *Brabson v. U.S.*, 73 F.3d 1040, 1044 (10th Cir. 1996); *In the Matter of Continental Ill. Sec. Litigation*, 962 F.2d 566, 571 (7th Cir. 1992); *Homestreet Inc. v. Dept. of Revenue*, 166 Wn.2d 444, 210 P.3d 297, 301 (Wash. 2009).

9. *Accord*, *American Timber & Trading Co. v. Fist Nat. Bank of* Oregon, 511 F.2d 980, 983-84 (9th Cir. 1973); *Kreisler & Kreisler LLC v. National City Bank*, 657 F.3d 729 (8th Cir. 2011); *Gulf Federal Savings and Loan Association of Jefferson Parish*, 651 F.2d 259 (5th Cir. 1981) (each discussing the methods used to determine annual or per annum interest).

common law rule, *de die in diem*. *Fowler*, A33-34. Thus, any "annual" interest rate assumes that interest is accrued on each of the year's 365 days at the specified interest rate, here 5.5%.

Nonetheless, Guerin wants to somehow omit days from the calculation of "annual" interest. She tries to do this by simply equating "crediting" with "earning" as though they were the same thing.[10] Pet. 9. Guerin says her crediting "methodology is not a straightforward quarterly crediting method, because it does not credit any interest for the prior quarter if the balance on the account at the end of any quarter is zero." Pet. 9 n. 5. In *American Timber*, the Ninth Circuit noted that calculating borrowers' interest based on a 360-day year, but applying it to a 365-day year, changed a 12% interest rate to 12.167%.[11] 511 F.2d at 982. Guerin's crediting practice is more drastic. For example, applying Guerin's crediting method, if a teacher transferred on December 31 (and thus had no account balance at the end of the fourth quarter), he received no interest for Q3 or Q4 on the entire account (Pet. 9 n. 5; Pet. A56-57) and thus received interest for only 180 days out of 365, the interest rate on the account balance is reduced from the promised 5.5% to approximately 2.7% for that year.

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10. At oral argument in the Ninth Circuit, Judge Ikuta explained that "earning" interest and "crediting" interest are two different things: "[Guerin is] saying 'earned' happens when the State decides to 'credit' an account. I read that in [Guerin's] briefs and I couldn't quite understand that because 'crediting' an account is an accounting function. It's making the numbers go up in the account, but 'earning' is the time value of money that happens on a time basis." Oral Argument at 16:40.

11. DRS itself uses a 365-day calendar year to determine the daily interest owed to DRS by employers and employees. ER 44.

The record shows that the Director undisputedly did not credit the teachers with some interest that was "actually earned" on their accounts at the established rate. Pet. 9, n. 5; *Fowler*, A27-28; ER 23-24, 31, 34, 36-37, 39. Indeed, Guerin admitted below that the earned interest not credited to the teachers' accounts is diverted ("allocated") to others. ER 59. The Ninth Circuit referred to this diversion of accrued, but not credited, interest as "skim[ing]." *Fowler*, A27-28, 37. The Ninth Circuit noted "DRS kept the [skimmed] interest and used it to pay benefits to other members." *Id.* at A28. The Court said "the withholding of the interest accrued on the teachers' accounts constitutes a per se taking." *Id.* at A32. The *Fowler* decision is entirely consistent with *Phillips* because there, as here, the funds accrued interest (ER 23-24, 31, 34, 36-39), but the interest was allocated to others. 524 U.S. at 162-63; ER 59.

Phillips assumes (524 U.S. at 168) that states have some latitude over interest calculation, such as setting the interest rate and compounding period. Both Guerin and the amici emphasize that states vary greatly in rates of interest and how and when interest is earned on defined benefit retirement accounts. Pet. 5-6; Alaska Br. 11-16. This case does not concern that latitude; in Washington, the Director determined the "regular rate of interest" for retirement accounts back in 1978, pursuant to statute. RCW 41.32.010(38); ER 23, 36, 37, 39 ("5.5% annual interest compounded quarterly"); *Fowler*, Pet. A27. In her recent 2018 regulation Guerin reiterated the 5.5% annual interest rate, but said she determined in her discretion that some accrued interest will just not be "credited." *Fowler*, A28, A30; WSR 18-03-1837; WAC

415-02-150 (2018).[12] This is the same as the earlier secret and inaccurate computer program by which the teachers were simply not credited with or paid the regular 5.5% annual interest, as discovered by Jeff Probst. *Probst*, A70-71; ER 46; Pet. A58-59.

Guerin's 2018 regulation is only a *post hoc* rationalization for that inaccurate computer program by which some earned interest was not credited on the teachers' accounts, by just making that old computer program into official policy. Guerin's position is that interest is not earned unless she, in her unfettered discretion, decides that it will be "credited." Pet. 9, 16-17; WAC 415-02-150. And her discretion to outright deny, by simply not crediting, accrued interest (at the promised 5.5% annual interest rate) is supposedly unlimited. At argument in the Ninth Circuit, when asked if Guerin could, in her discretion, credit interest "every other quarter," her counsel responded "yes." Ninth Circuit Oral Argument at 18:56. Because Guerin contends that the accounts still earn the time-value of money (5.5% interest rate) and that the "value," *i.e.*, the rate, did not change, Pet. A87, then her position is she can retroactively declare that whole quarters (not just days) never occurred. In essence, Guerin's argument is that for transfers that occurred in 1996, the 2007 statute and the 2018 regulation gave her the discretion to abrogate "time" in the time-value of money inherent in any annual interest rate. Nothing in *Phillips* says that a state can abrogate time. For example,

12. Guerin's 2018 regulation describes the crediting practice with examples. WAC 415-02-150 §3(b). It also says interest does not accrue daily. *Id.* But it continues to define "regular" interest as 5.5% "per year." *Id.*

in *Brown* the plaintiff had a right to interest accrued over only 2 days. 538 U.S. at 229.

Guerin's "discretion" argument also turns *Phillips* upside down. The holding that "interest follows principal," 524 U.S. at 165, would, under her approach, change to "interest follows principal in 5.5% interest-bearing accounts only to the extent that the Director, in her discretion, decides to *credit* that interest to the account owner and otherwise it may be diverted." *Cf.* Pet. 9, 16-17; ER 59. It nevertheless remains undisputed that the teachers' accounts *earned* 5.5% annual interest compounded quarterly; Guerin just did not credit all the earned interest.[13] Pet. 9, 16-17; ER 23, 34-39; *Fowler*, A27-28, 32.

Guerin's notion that accrued interest can be withheld just by saying interest is not "earned" unless she unilaterally decides it should be "credited," and then simply not crediting it, has been rejected by this Court. In *Webb's*, 449 U.S. 155 (1980), prior to *Phillips*, the Court

13. Like funds deposited at a bank, account owners are paid interest on interest-bearing accounts at a rate lower than the investment returns in the state trust fund. At oral argument, Judge Ikuta disagreed with Guerin's contention that the teachers' interest-bearing accounts were different from interest-bearing bank accounts. Judge Ikuta explained that "[money] doesn't sit in a bank account either. We all know that the bank takes all of the money that's deposited and invests it…[Y]ou can't go to your bank and ask to see your money in the account so I'm not sure I see that much of a difference here." Oral Argument at 19:58. Here, the comingled trust fund, including the teachers' funds, earned over 8% annual return on a "smoothed" basis, greater than the 5.5% rate promised to the teachers. ER 71-72.

held a Florida statute allowing the state to keep interest earned on the funds deposited with the clerk of the court violated the Takings Clause. *Id.* at 164. The Court explained that interest cannot be withheld by defining away the principal owner's rights by statute (*id.*):

> [E]arnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property…[A] State by *ipse dixit*, may not transform private property into public property…This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.

Webb's rejected Florida's argument, similar to Guerin's here, that deposited funds are "considered 'public money'" from the date of deposit until they leave the account, and its argument "[t]here is no unconstitutional taking because interest on the clerk's … registry account is not private property." *Id.* at 159. This Court again applied the "interest follows principal" rule in *Brown*, 538 U.S. at 229. Interest accrued over even two days belonged to clients, *id.*, and there was no taking only when the amount of accrued interest for those days was less than the administrative cost of distribution. *Id.* at 239-40.[14]

14. Here, administrative costs were levied before the accounts earned interest. RCW 41.50.110.

C. The Director Agreed That If a Taking Occurred the Court Could Issue an Injunction Directing Her to Correct the Accounts She Controls and Therefore Under Established Precedents of this Court Applied by the Ninth Circuit There Is No Sovereign Immunity Issue.

Eleventh Amendment immunity applies when the State is a party and the judgment is "paid from public funds in the state treasury." *Edelman v. Jordan,* 415 U.S. 651, 663 (1974). Here the teachers seek an injunction requiring Guerin, who is in charge of their accounts, to correct their account balances by transferring their skimmed interest held in the "comingled trust fund" to their defined contribution account. *Fowler*, A27, Pet. A38. No public funds are involved because under Washington law both the teachers' retirement contributions and accrued interest are the property of the teachers. (See authorities cited *supra* at 13-14.) Under Washington law, the teachers' funds for TRS Plan 3 are held in trust for their exclusive benefit. RCW 41.34.120.

Moreover, the lawsuit is not against the State or the Department of Retirement System, but, rather, against Guerin, the official under Washington law who is in charge of accounting for the teachers' property and who purported to exercise her discretion to withhold accrued interest contrary to the "interest follows principal" rule of *Phillips*, *Webb's*, and *Brown*.[15] Indeed, Guerin

15. This case differs from that in *Hutto v. South Carolina Retirement System*, 773 F.3d 536, 540-41 (4th Cir. 2014), the case on which Guerin and amici repeatedly rely. There, the plaintiffs sued the South Carolina Retirement System, an arm of the state, concerning a defined benefit plan, to obtain refunds on top of

twice stipulated that the teachers' action only seeks an injunction directing her to correct the teachers' accounts. The injunction here thus only directs Guerin to return the teachers' interest, relief she agreed would be appropriate.

The injunction procedure that Guerin agreed to, and the Ninth Circuit found appropriate in *Fowler*, flows directly from *Taylor v. Westly*, 402 F.3d at 924 (9th Cir. 2005), upon which the Ninth Circuit relied in *Fowler*. *Taylor* cites and discusses Supreme Court precedents, holding there is no sovereign immunity for suits against government officials seeking the return of property that is unconstitutionally taken. *Taylor*, 402 F.3d at 932-35, discussing *United States v. Lee,* 106 U.S. 196 (1882), and *Malone v. Bowdoin,* 369 U.S. 643 (1962). In *Malone* this Court reaffirmed that there is no sovereign immunity for a lawsuit against a government officer seeking the return of property that the plaintiff alleges was unconstitutionally taken. *Malone,* 369 U.S. at 647-48; see also *Tindal v. Wesley,* 167 U.S. 204 (1897) (action not against State for purposes of Eleventh Amendment immunity when individual sues State official for the return of property under official's control). The Director does not argue that *Taylor* was wrong in rejecting sovereign immunity when the plaintiff seeks an injunction for the return of property unconstitutionally taken. Pet. 13, 30 n. 10.

Guerin argues that the *Fowler* opinion "conflicts" with *Hutto*, Pet. 30, 32-33, but she never cited it (or any of the

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their pension payments. The other pension plan cases relied on by Guerin (Pet. 32) and amici (NCPERS 13-15) are the same as *Hutto*, defined benefit plans where the plaintiffs sought money damages from states.

pension cases cited here) in the Ninth Circuit. Moreover, *Hutto* – the principal case relied on by Guerin and amici – recognized, as the Ninth Circuit did in *Taylor* and *Fowler*, that actions for the return of property are not barred by sovereign immunity when they are brought against the officials who have control over private property. The *Hutto* court found that these cases did not apply because Hutto had sued the State itself (773 F.3d at 552 (parallel citations omitted)):

> The plaintiffs direct our attention to numerous cases in which suits to recover property illegally seized by the government were held not to have been barred by sovereign immunity. But in none of those cases did the plaintiffs sue either the sovereign itself or its alter ego. For example, in *United States v. Lee,* 106 U.S. 196, 222 (1882), the Court permitted an ejectment action to proceed *against federal officers* who served as custodians of the estate of General Robert E. Lee because the suit was not against the United States. In *Tindal v. Wesley,* 167 U.S. 204 (1897), the Court permitted a suit *against two state officials* to recover property wrongly held by them on behalf of the State, because the case was "a suit against individuals," *id.* at 221, and the Court could not perceive how it could "be regarded as one against the state," *id.* at 218.

Accord, *Suever v. Connell* (case relied on by Guerin, Pet. 31), 579 F.3d 1047, 1058-59 (9th Cir. 2009): "the Eleventh Amendment does not bar claims by plaintiffs for return of their own property…because such claims are not for 'damages' against the State."

Guerin accuses the Ninth Circuit of "recasting" the relief sought by the teachers from "money damages into a prospective injunction." Pet. 26. But there was no "recasting" by the Ninth Circuit; it relied on Guerin's concession that the teachers sought injunctive relief requiring her to return their property: "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[,] [r]ather than requiring payment of funds from the State's treasury[.]" *Fowler*, A37.

In a claim involving the taking of interest, such as the one here, the appropriate remedy for the unconstitutional taking is the return of the interest, not damages paid from the State treasury. In *Webb's*, a case involving interest, this Court reversed a Florida Supreme Court decision that denied the plaintiff the specific interest that was taken from it, as a lower court had held. 449 U.S. at 158-59. In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998), this Court also said that "a claim for compensation 'would entail an utterly pointless set of activities'" when the "compensation" due would simply be the return of the money wrongly taken.[16]

16. Guerin and the Bennett dissent cite *City of Monterey v. Del Monte Dunes at Monterey Ltd*, 526 U.S. 687, 710 (1999), a regulatory taking case where the issue was the right to a jury trial. Guerin contends – by a misleading partial quotation – that it establishes that all taking cases are actions for damages (Pet. 30) and that the *Fowler* opinion conflicts with *Del Monte Dunes* and circuit court cases. *Id.* Actually, the Court in *Del Monte Dunes* explained that some taking cases are for the return of property in which the proper remedy is an injunction. 526 U.S. at 713. In contrast to the situation here, the Eleventh Amendment immunity taking cases cited by Guerin, Pet. 30-31, were actions against

Guerin and amici argue that because the teachers seek their own money, *i.e.,* the accrued interest on their accounts that the Director skimmed, their taking claim is barred by sovereign immunity under *Edelman*, 415 U.S. 651; Pet. 26. This is the same argument the defendant in *Taylor* made: "any recovery would come in the form of money from the state, which *Edelman* prohibits." *Taylor,* 402 F.3d at 935. The Ninth Circuit, relying on Supreme Court cases, rejected the argument because in *Edelman* "the plaintiffs unquestionably sought money that belonged to the government" and "[t]hey did not seek reinstatement of possession of property that they owned." *Id.* The *Taylor* Court said that "[p]roperly viewed, the claim is for return of property held in trust for the owners, not for compensation for property full title to which has passed to the state. This makes the claim one for return under *Lee* and *Malone*, not one for compensation from the state's general fund under *Edelman.*" *Id.* As the Ninth Circuit concluded in both *Taylor* and *Fowler* -- "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." *Fowler*, quoting *Taylor*, Pet. A37. Here, as in *Taylor*, no public funds are involved.[17] Rather the teachers seek an injunction, as Guerin agreed, that would correct the accounts she controls by crediting the "skimmed" interest.

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states that would result in a judgment against states that would be paid by public funds in the state treasuries. They were not actions for injunctions for the return of property.

17. Guerin contends *Fowler* conflicts with *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459 (1995) (Pet. 29), but *Ford Motor* is nothing like *Fowler.* Ford sued the state and sought a money judgement to be paid by the state treasury for taxes it had paid.

D. Eleventh Amendment Immunity Also Does Not Apply Because the State Agrees That the Teachers' Employer School Districts, Not the State Itself, Are Responsible for Any Indirect Effects and Under Mt. Healthy, 429 U.S. 274 (1997), the School Districts Are Not Part of the State for Purposes of Eleventh Amendment Immunity.

Implicitly recognizing that no public funds would be affected by an injunction returning the teachers' interest, Guerin argues that the state funding might be indirectly affected because the TRS Plan 2 fund might theoretically need additional funds which would be obtained "by increasing employee and employer contribution rates" for school districts. Pet. 34-35, citing RCW §§41.45.010, -.060 ("employee and employers contribution rates set to fully fund TRS Plan 2 system"); see also Pet. 7, "employer contributions made by school districts." Thus, Guerin acknowledges that the teachers' "employers here are school districts," not the state, and that the school districts, not the state itself, will be responsible if any increased contributions were needed. Pet. 7, 34-35. (Amici failed to notice this important point.) The state's obligation here is accordingly unaffected even indirectly (if employer contributions were involved), because any indirect effect, if any, of the injunction will fall on the school districts.[18] This is in contrast to *Hutto* where Hutto sued the state

18. Whether contribution rates for school districts might increase is doubtful because the TRS 2/3 fund has almost $14.5 billion, with assets exceeding liabilities by almost $0.5 billion. https://www.drs.wa.gov/administration/annual-report/cafr/CAFR-2018.pdf p. 24. And there has been no determination of the amount that Guerin should transfer to plaintiffs' TRS Plan 3 accounts.

and the effects of the judgment would fall on the state because it was both the employer owing contributions and because the state constitution required it to fully fund the defined benefit plan with funds from the public treasury. 773 F.3d at 544-45. Guerin nonetheless implicitly argues that because the employer school districts receive funding from the state, Eleventh Amendment immunity should apply here. *Id.* at 7, 35. In doing so Guerin completely ignores this Court's decision holding a school district has no Eleventh Amendment immunity because it is not an arm of the state.

In *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 280-81 (1997), this Court said that Eleventh Amendment sovereign immunity does not extend to "counties and similar municipal corporations." The issue was whether a school board "is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." *Id.* at 250. The Court concluded that although the school board "receives a significant amount of money from the State[,]" the local school board "is more like a county or city than it is like an arm of the State" and thus there was no sovereign immunity *Id.* at 280-81. Guerin is now asking the Court to overrule, or at a minimum distinguish *Mt. Healthy*, without even discussing the case.

Guerin does not mention any of the cases applying *Mt. Healthy* in finding that school districts are not arms of the state for purposes of Eleventh Amendment immunity. See, *e.g.*, *Holz v. Nenana City Public School Dist.*, 347 F.3d 1176, 1181-82 (9th Cir. 2003) (Alaska) (school districts are

not arms of the state even though nearly all their funds come from the state); *Savage v. Glendale Union High School*, 343 F.3d 1036 (9th Cir. 2003) (Arizona); *Eason v. Clark County School Dist.*, 303 F.3d 1137, 1141 (9th Cir. 2003) (Nevada). Nor does it cite, mention, or discuss *Kanongata'a v. Washington Interscholastic Activities Assn.*, No. C05-1956C, 2006 WL 1727891 (W.D. Wash.), in which the District Court applied *Mt. Healthy* and found that school districts in Washington are not arms of the state and therefore they have no sovereign immunity.

Guerin criticizes the Ninth Circuit for failing to conduct a "factual inquiry" about whether "the State is the real party in interest." Pet. 33. But even though she admits the school districts are the responsible entity, the Director submitted no evidence and made no argument to show that the school districts are entitled to Eleventh Amendment immunity. "[S]overeign immunity is akin to an affirmative defense, which the defendant bears the burden of proving." *Hutto*, 777 F.3d at 543 (case relied on by Guerin). Therefore Guerin cannot complain about the lack of a factual inquiry when she failed to raise this issue below and submitted no evidence.

Moreover, after the Ninth Circuit ruled, Guerin told the district court that declaratory relief is proper on their taking claim. See p. 9 *supra*. This agreement, coupled with the fact that the indirect effect of the injunction, if any, will fall on the school districts, not the state, further shows that there is no significant sovereign immunity issue warranting review.

E. Director Guerin, the Amici, and Judge Bennett All Discuss Defined Benefit Plans; This Case Involves a Defined Contribution Plan and Does Not Threaten the Legitimacy of Pension Plans Nationwide.

Judge Bennett's dissent, amici, and Guerin all maintain that the Ninth Circuit's opinion in *Fowler* threatens "the legitimacy of many public pension programs through the country." Bennett Dissent Pet. A21-22; Alaska 2, 9; NCPERS 2; Pet. 4-6, 35-37. They predict dire consequences because: "the vast majority of governmental employees participate in a defined benefit plan." NCPERS 13; see also Pet. 4, 15-19. This "parade of horribles" argument ignores the unique facts of this case and of Washington law.

This case involves only individual defined contribution accounts. Rather than a state-guaranteed public pension, the teachers in TRS Plan 3 defined contribution plan are entitled only to their contributions, interest, and investment returns. The State makes no promises about the investment returns and all the investment risk is on the teachers, not the state. In contrast, as noted by amicus, NCPERS 12, under a defined benefit plan – such as TRS Plan 2 – all the investment risk is on the state, which is contractually responsible for the stream of payments to retired employees if the investments are insufficient. *Wash. Fed of State Employees*, 26 P.3d at 1005 n. 5; *Bowles*, 847 P.2d at 450; Pet. 33 n. 12. All the retirement plan cases, such as *Hutto*, on which Guerin and the amici rely, involve *defined benefit plans* under which the State is contractually responsible for the stream of payments to employees if there is a shortfall in the fund. No one has pointed to a state retirement system that is like Washington's TRS Plan 3 *defined contribution plan*.

Amici say they are concerned that the Ninth Circuit opinion may lead to challenges to their plans' provisions for refunds of employee contributions from defined benefit plans upon termination of employment. Alaska 12. Because a defined benefit plan promises the employee a pension, there is no constitutional requirement that a government allow refunds of employee contributions or to provide interest on those contributions in a defined benefit plan.[19] Creation of a right to refunds, and any interest thereon, are purely matters of state law, just as Guerin and amici say. Pet. 15-16; Alaska 10. But once interest accrues at the rate set by the state it cannot be taken away under *Phillips*. Presumably the other states provide employees whatever interest they are entitled to under state law and do not "credit" interest that belongs to employees to someone else, as Washington does.

Here, Washington law gives the teachers a property right to their contributions earning 5.5% annual interest compounded quarterly. See p. 13-14, *supra*. This became particularly important when Washington created TRS Plan 3 and encouraged the teachers to transfer their contributions plus interest to the new defined contribution plan. When the teachers transferred in 1996 the Director's secret and inaccurate computer program resulted in the non-crediting of earned interest when the teachers transferred their contributions plus interest to TRS Plan 3

19. *Texas State Bank v. Unites States*, 423 F.3d 1370 (Fed. Cir. 2005) (case relied on by Guerin and amici), illustrates this point. The Federal Reserve did not place the bank's reserves in an interest-bearing account and therefore there was no taking of interest. Here the teachers' contributions were placed in an interest-bearing account entitling them to the interest at the established rate, 5.5% annual interest compounded quarterly.

in 1996. Guerin defends the taking of the interest based on a 2007 statute and a 2018 regulation she adopted giving her discretion over crediting. The teachers do not seek a refund, rather a correction by Guerin to the accounts that she controls. The facts of this case are unique.

Guerin is also in a unique position because she is personally in charge of the teachers' accounts and she can simply correct them without using public funds. Indeed, she agreed that if the teachers prevailed she could be ordered to correct their accounts.

The Ninth Circuit applied established precedents to the unique facts of this case and consequently its *Fowler* decision does not threaten "the legitimacy of public programs nationwide." Alaska 9.

CONCLUSION

Guerin's Petition should be denied.

Respectfully submitted.

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