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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Ninth Circuit incorrectly held that the Takings Clause requires states to apply the common law rule of daily interest accrual—despite contrary state law. It compounded that error by holding that the Eleventh Amendment allows suit for recovery of interest allegedly withheld from Plaintiffs. This decision conflicts with both *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), which held that states have great latitude in determining how interest is earned, and *Edelman v. Jordon*, 415 U.S. 651, 668 (1974), which held that sovereign immunity bars an action "measured in terms of a monetary loss resulting from a past breach of a legal duty[.]"

Despite Plaintiffs' efforts, they cannot make these conflicts disappear. Plaintiffs contend there is no conflict with this Court's takings precedent because the Ninth Circuit simply enforced a state law right to interest. But the Ninth Circuit held just the opposite: that the Takings Clause required the State to apply the common law rule of interest accrual, regardless of state law. In creating a new property right to daily accrual of interest, the opinion calls into question every state and federal program that has modified the common law rule of daily accrual.

Similarly, Plaintiffs incorrectly claim that the Ninth Circuit opinion is consistent with Eleventh Amendment case law because it requires return of money the State took from their accounts. But under state law, the accounts never earned the claimed interest. Because the interest was never earned, the Ninth Circuit could only award the backward looking relief the Eleventh Amendment forbids: State

payment of money that Plaintiffs contend is *owed* to them as a result of a past breach of duty. And while Plaintiffs say the State is not the defendant, the Ninth Circuit decision conflicts with numerous courts of appeals that have properly recognized that state retirement systems are entitled to sovereign immunity as an arm of the State.

The Court should grant review.

ARGUMENT

A. The Ninth Circuit Opinion Conflicts with this Court's Precedent by Using the Takings Clause to Create a Property Right

Plaintiffs fail to acknowledge that the Ninth Circuit "created a Fifth Amendment property right [to daily accrual of interest] no court has ever recognized." Pet. App. 4a (Bennett, J., dissenting). Thus, they offer no rebuttal to the petition and amici's demonstration that this newly created property right conflicts with settled precedent. Instead, they attempt to defend a fictional Ninth Circuit opinion based on fictional state law and facts.

1. The Ninth Circuit created a property right to daily accrual of interest

Plaintiffs repeatedly argue that the Ninth Circuit opinion does not conflict with this Court's precedent because it merely holds that interest earned "under Washington law" was not provided to them. *E.g.*, BIO 12, 14. This is exactly the opposite of what the Ninth Circuit held. The Ninth Circuit recognized that Washington law did *not* require the Department to pay daily interest. Pet. App. 33a. Instead, it found

a common law "property right" to the daily accrual of interest that "is protected by the Takings Clause regardless of whether a state legislature purports to authorize a state officer to abrogate the common law." Pet. App. 34a-35a.

It is this new, immutable property right to daily interest that no court has ever recognized. This new right conflicts with this Court's recognition that the Constitution protects, but does not create, property rights. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). This new right also conflicts with *Phillips*, 524 U.S. at 168, which recognized that states have "great latitude" in determining how interest is earned. Unlike *Phillips*, this case does not involve a state appropriation of interest that was actually earned in a third-party account; this case involves whether states have authority to regulate how interest is earned as part of a government benefits program.

Plaintiffs' refusal to grapple with the Ninth Circuit's actual opinion suggests that they have no response, and renders their arguments relying on this Court's interest-follows-principal cases inapposite. BIO 12 (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Phillips*, 524 U.S. 156; *Webb's Fabulous Pharms. v. Beckwith*, 449 U.S. 155 (1980)).

In actuality, the Ninth Circuit opinion, in conflict with *Phillips*, negates the great latitude states have to regulate the circumstances in which interest is earned.

2. This is not a dispute about state law

Rather than address the conflict that the Ninth Circuit creates, Plaintiffs resurrect arguments about state law that did not (and could not) form the basis of the Ninth Circuit's opinion and that have been rejected by Washington courts.

Washington law regarding government pension funds is clear: the Department "has authority to determine how interest is *earned*," the Washington legislature abrogated the common law rule that interest accrues daily, and the Department is not required "to pay daily interest on balances transferred from Plan 2 to Plan 3." Pet. App. 76a, 80a (emphasis added). Plaintiffs' rehashed state law arguments about the difference between "crediting" and "accrual," and the alleged retroactive application of law, have been rejected by Washington courts and are irrelevant here. BIO 14-17; Pet. App. 76a, 79a-80a. Similarly, Plaintiffs' repeated assertion that the Department credited interest based on an "erroneous computer program" and suggestion that the Director arbitrarily determined interest on a retroactive basis are baseless. BIO 3-4. The quarterly interest methodology challenged here was instituted as Department policy in 1977 and has not changed since. Pet. App. 82a.

Simply put, Washington law allows the Department to determine how interest is earned on employee contributions, and the Ninth Circuit improperly stripped Washington (and by logical extension the federal government and all other states)

of the authority to do so. Plaintiffs' failure to even attempt a defense of the Ninth Circuit speaks volumes.

3. Plaintiffs cannot avoid conflict by mischaracterizing the petition

Contrary to Plaintiffs' assertions, the Department does not argue that states may abrogate the interest-follows-principal rule, or that the Ninth Circuit required that states provide interest on any funds held by them. *Contra* BIO 10, 13. Rather, the Department argues that the Ninth Circuit decision conflicts with this Court's precedent because it held that when a State opts to provide interest, it must accrue interest daily. Pet. 16.

Plaintiffs' refusal to address the argument that the Ninth Circuit improperly limited the State's authority to determine whether interest was earned, as opposed to whether earned interest must be provided to employees, explains their ultimately irrelevant discussion of whether the funds are private or public. BIO 13-14. The Department does not argue that interest was earned but did not belong to the employees; it argues that the interest was not earned.

Plaintiffs' attempt to avoid the arguments in the petition by arguing they are newly raised is also without merit. BIO 13 (citing *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998)). This Court in *Yeskey* declined to consider issues that had not been addressed by the lower courts. *Yeskey*, 524 U.S. at 212-13. Here, the petition addresses issues central to the Ninth Circuit opinion. Plaintiffs cite no authority suggesting petitions to this Court may not raise issues addressed by the lower court.

B. The Ninth Circuit Opinion Conflicts with an Unbroken Line of Eleventh Amendment Authority from This and Other Courts

The Ninth Circuit decision directly conflicts with this Court's long line of decisions holding that the Eleventh Amendment bars suit against state officials "when the State is the real, substantial party in interest." *E.g.*, *Pennhurst St. Sch. Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). Plaintiffs contort the facts to avoid explaining how their claims for retroactive damages can meet *Ex parte Young*'s slim exception to the Eleventh Amendment for prospective relief to correct an ongoing constitutional violation. *Ex parte Young*, 209 U.S. 123 (1908). But they "cannot sidestep the Eleventh Amendment merely by using forward-looking labels to achieve what is, in essence, a backwards-looking result." Pet. App. 9a (Bennett, J., dissenting). Sovereign immunity bars this action because the damages are "measured in terms of a monetary loss resulting from a past breach of a legal duty" and the judgment will be paid from state funds rather than "the pockets of the individual state officials." *Edelman*, 415 U.S. at 668.

1. This is precisely the type of retrospective damage award this Court held is barred by the Eleventh Amendment

Plaintiffs contend that the Ninth Circuit did not violate the Eleventh Amendment because they

seek an injunction.[1] BIO 22. But calling this an injunction cannot change the determinative fact that this is a request for retrospective damages. As *Edelman* explains, when the relief granted "requires payment of state funds, not as a necessary consequence of compliance in the future . . . but as a form of compensation" the monetary relief "is in practical effect indistinguishable in many aspects from an award of damages against the State." *Edelman*, 415 U.S. at 668.

Here, the relief sanctioned by the Ninth Circuit is exactly the type of compensation the Eleventh Amendment bars. This case does not involve a return of money taken from Plaintiffs' accounts: it requires payment of state funds to compensate the Plaintiffs for interest they were allegedly owed but *not* paid. Under Washington law, the Plaintiffs' accounts "[did] not 'earn' or accrue regular interest on a day by day basis." Wash. Admin. Code § 415-02-150(5). As a result, Plaintiffs can only seek money they contend is owed to them, not money previously paid or taken from them. The Ninth Circuit opinion thus squarely conflicts with *Edelman*.

When, as here, the action accrues at the time compensation is denied, a claim under the Takings Clause seeks "not just compensation *per se* but rather damages for the unconstitutional denial" of the

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[1] Plaintiffs argue that the Department stipulated that they "sought injunctive relief requiring [the Director] to return their property." BIO 25. The Department never agreed that the relief sought was properly characterized as the return of property. It agreed to the mechanics of an award if Plaintiffs were successful in their characterization of the relief.

requested compensation. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999). Plaintiffs are unable to cite a single case supporting the Ninth Circuit decision, allowing suit for damages against a state official in her official capacity, for a violation of the Takings Clause.

Plaintiffs' reliance on cases addressing actions to recover property taken and held by the government do not advance their takings argument. For example, Plaintiffs cite *Taylor* and *Malone*, both of which addressed actions for the return of property allegedly taken from the property owners. BIO 23 (citing *Taylor v. Westly*, 402 F.3d 924, 931-32 (9th Cir. 2005) (concerning property held in trust for the property owners); *Malone v. Bowdoin*, 369 U.S. 643, 644-45 (1962) (addressing a claim for return of land allegedly taken from claimants and occupied by the government)).[2] But Washington is not holding Plaintiffs' property—the interest Plaintiffs seek was never credited to them.

There is no exception from the Eleventh Amendment for actions seeking monetary damages for a state official's past breach of a legal duty. *Edelman*, 415 U.S. at 668.

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[2] Plaintiffs' reliance on *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), is equally unavailing. Plaintiffs cite this case for the proposition that the appropriate remedy is "return of the interest, not damages paid from the State treasury." BIO 25. But *Eastern Enterprises* involved a request for an injunction against assessment of health care premiums—not compensation or return of money previously paid. *E. Enters.*, 524 U.S. at 520.

2. The state treasury is liable for the judgment

Regardless of whether the money judgment is called an injunction, the State remains the real party in interest because the state treasury is liable for payment of the damages. In determining whether the Eleventh Amendment is applicable, "the most salient factor" is the state treasury's liability. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945). The judgment in this case will be paid from the State's Plan 2 fund—not from the Director's personal funds. The Plan 2 fund is for payment of benefits to teachers when they retire or separate from service. As the Ninth Circuit dissent from rehearing en banc recognizes, the State "will have to provide the money" if the fund has to be replenished after payment of a judgment. Pet. App. 11a (citing *Bowles v. Dep't of Ret. Sys.*, 847 P.2d 440, 450 (Wash. 1993)).

The Eleventh Amendment extends immunity not only to a State, but also to entities considered "an arm of the State." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Four other Circuits have concluded that retirement systems similar to Washington's are arms of the State for Eleventh Amendment purposes. *See McGinty v. New York*, 251 F.3d 84, 100 (2d Cir. 2001); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 548 (4th Cir. 2014);

Ernst v. Rising, 427 F.3d 351, 359 (6th Cir. 2005); *Pub. Sch. Ret. Sys. of Mo. v. State St. Bank & Trust Co.*, 640 F.3d 821, 833 (8th Cir. 2011).

Plaintiffs contend that their case is distinguishable because their claim is against the Director for return of property she is individually controlling, rather than against the State or a state agency for payment of damages. BIO 24. But where, as here, the funds sought will come from an arm of the State, and not from an individual, the suit is against the State. *Ford Motor Co.*, 323 U.S. at 464. Plaintiffs' argument finds no support in *Hutto*. BIO 24 (quoting *Hutto*, 773 F.3d at 549). *Hutto* rejected a lawsuit seeking an injunction for the return of money from a state pension fund, and specifically found that "[s]tate officials sued in their official capacities for retrospective money damages have the same sovereign immunity accorded to the State." *Hutto*, 773 F.3d at 549.

Nor does Plaintiffs' citation to *Mount Healthy* support their argument. BIO 28 (citing *Mt. Healthy*, 429 U.S. at 280-81). In *Mount Healthy*, the Court held that Ohio's school districts are not immune from suit because, under Ohio law, they do not function as an arm of the State. BIO 28. Here, there is no argument that school districts are immune from suit. Rather, the Department explained that *in addition* to direct liability for any shortfall in the Plan 2 fund, the State also will pay if the loss is recouped over time by assessing higher employer contribution rates, because school districts receive payments from the state treasury to pay employer contributions. Pet. 35. As the circuit courts of appeals have acknowledged,

sovereign immunity is applicable even when the State is not directly liable for a judgment. *Morris v. Wash. Metro. Area Transit Auth.*, 781 F.2d 218, 225-26 (D.C. Cir. 1986); *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 381 (9th Cir. 1993).

In sum, the Ninth Circuit decision violates the Eleventh Amendment by subjecting the state treasury to liability.

C. The Ninth Circuit Opinion Will Have Far-Reaching Impact

The Ninth Circuit's new rule that the government must provide daily interest on any funds for which it provides interest calls into question the Federal Employment Retirement System and many state retirement systems. Pet. 24-25; Amici States' Br. 14-16. That is because those retirement systems do not provide daily interest when employee contributions are refunded. Pet. 24-25.

Plaintiffs never dispute that the federal government and many states do not provide daily interest on employee contribution accounts. Instead, they ignore the Ninth Circuit ruling that the right to daily interest is protected by the Takings Clause regardless of state or federal law to the contrary. Pet. App. 34a-35a. In light of the Ninth Circuit's edict, Plaintiffs' attempt to minimize its harmful impact by saying that "[p]resumably the other states provide employees whatever interest they are entitled to under state law" is nonsensical. *See* BIO 31. The

entire premise of the Ninth Circuit opinion is that the *Constitution* requires daily interest even though state law does not. Pet. App. 34a-35a.

Plaintiffs' attempt to distinguish this case based on the type of retirement account is also illogical. BIO 30. The Ninth Circuit's sweeping decision that daily interest is constitutionally required is not limited to a particular type of government retirement plan, or even limited to retirement plans. It creates a property right to daily interest accrual whenever a government decides to provide interest on funds it holds. Pet. App. 34a. Plaintiffs' claim that this case involves "only individual defined contribution accounts" is also false. BIO 30. This case involves interest accrual on employee contributions to Plan 2, a defined *benefit* retirement program. Pet. App. 50a.

In addition, Plaintiffs offer no principled distinction between this action and a suit for money damages for past breach of a legal duty. The opinion will thus have far-reaching and harmful impacts in contradiction to this Court's precedent. As Judge Bennett aptly explained in his dissent: "It takes little in the way of imagination to foresee future plaintiffs recasting their otherwise-barred claims for money damages against a state as injunctive relief claims for return of what is supposedly their property." Pet. App. 4a.

CONCLUSION

For the foregoing reasons and those stated in the petition for writ of certiorari, the petition should be granted.

RESPECTFULLY SUBMITTED.

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