No. 20-

IN THE

Supreme Court of the United States

LADONNA DEGAN, RIC TERRONES, JOHN MCGUIRE, REED HIGGINS, MIKE GURLEY, LARRY EDDINGTON, STEVEN MCBRIDE,

Petitioners,

v.

THE BOARD OF TRUSTEES OF THE DALLAS POLICE AND FIRE PENSION SYSTEM,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

CAREN FREEDMAN
New Mexico State Bar No. 7905
DURHAM, PITTARD & SPALDING, LLP
505 Cerrillos Road, Suite A209
Santa Fe, New Mexico 87501
(505) 986-0600

DAVID M. FELDMAN
Texas State Bar No. 06886700
FELDMAN & FELDMAN, P.C.
3355 West Alabama Street, Suite 1220
Houston, Texas 77098
(713) 986-9471

KIRK L. PITTARD
Texas State Bar No. 24010313
Counsel of Record
THAD D. SPALDING
Texas State Bar No. 00791708
RICK THOMPSON
Texas State Bar No. 00788537
DURHAM, PITTARD & SPALDING, LLP
223 West Jefferson Boulevard
Dallas, Texas 75208
(214) 946-8000
kpittard@dpslawgroup.com

Counsel for Petitioners

297275

QUESTIONS PRESENTED

Prior to 2017, retired Dallas police and firefighters had the right to withdraw the earned and accrued retirement funds deposited in their Deferred Retirement Option Plan accounts in a lump sum at any time. In 2017, the Texas Legislature amended the Dallas Pension Statute, prohibiting retirees from accessing the corpus of these funds and replacing the right to access with small annuity payments over the expected lifetime of the retiree. The questions presented are:

1. Whether a retiree's ownership interest in earned and accrued retirement funds deposited in a retirement account is a cognizable property interest for purposes of a Fifth Amendment Takings claim. The Fifth Circuit's conclusion that there is no cognizable property interest is in direct conflict with the Texas Supreme Court's conclusion that the retirement funds at issue in this case are a protected property interest.

2. When deciding a Takings Claim under the Fifth Amendment to the United States Constitution where the property at issue is money, whether courts should use a *per se* analysis, a regulatory/*ad hoc* analysis, or some other analysis that more appropriately takes into account the unique nature of money ownership as distinct from the ownership of real or personal property—an issue over which federal courts of appeals are in conflict.

3. In light of this Court's longstanding recognition of the bundle of rights associated with property ownership, whether prohibiting access to the corpus of earned and accrued retirement funds violates the Takings Clause of the Fifth Amendment to the United States Constitution.

LIST OF PARTIES

Pursuant to United States Supreme Court Rule 14.1(b)(i), the Petitioners notify the Court that the caption in this case contains the names of all the parties.

LIST OF PROCEEDINGS

- *LaDonna Degan, Ric Terrones, John McGuire, Reed Higgins, Mike Gurley, Larry Eddington, Steven McBride v. The Board of Trustees of the Dallas Police and Fire Pension System*, Cause No. 3:17-CV-01596-N, U.S. District Court for the Northern District of Texas. Judgment entered March 14, 2018. (Pet. App. at D).

- *LaDonna Degan, Ric Terrones, John McGuire, Reed Higgins, Mike Gurley, Larry Eddington, Steven McBride v. The Board of Trustees of the Dallas Police and Fire Pension System*, Cause No. 18-10423, U.S. Fifth Circuit Court of Appeals. Court certified only the Texas state constitutional issue to the Texas Supreme Court on March 20, 2019. (Pet. App. at C).

- *LaDonna Degan, Ric Terrones, John McGuire, Reed Higgins, Mike Gurley, Larry Eddington, Steven McBride v. The Board of Trustees of the Dallas Police and Fire Pension System*, Cause No. 19-0234, Texas Supreme Court. Judgment entered on January 31, 2020. (Pet. App. at B).

- *LaDonna Degan, Ric Terrones, John McGuire, Reed Higgins, Mike Gurley, Larry Eddington, Steven McBride v. The Board of Trustees of the Dallas Police and Fire Pension System*, Cause No. 18-10423, U.S. Fifth Circuit Court of Appeals. Judgment entered on April 27, 2020. (Pet. App. at A).

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The opinion of the Fifth Circuit Court of Appeals is found at *Degan v. The Board of Trustees of the Dallas Police and Fire Pension System*, 956 F.3d 813 (5th Cir. 2020) (Pet. App. at C).

JURISDICTION

By a Writ of Certiorari under 28 U.S.C. SEC. 1254 (1), this Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered April 27 2020, Petition for Rehearing En Banc denied May 22, 2020.

STATEMENT OF NOTIFICATION REQUIRED BY RULE 29.4

This case challenges the constitutionality of a Texas Statute. Neither the State of Texas nor any agency, officer, or employee thereof is a party to this proceeding. 28 U.S.C. SEC. 2403(b) may apply. This Petition is being served on the Attorney General of the State of Texas. In accordance with 28 U.S.C. sec. 2403(b) and Tex. Gov't Code sec. 402.010 (a-1), Petitioners filed the required Challenge to Constitutionality of State Statute form for the Texas Attorney General's Office with United States Court of Appeals for the Fifth Circuit on June 25, 2020. The notice of Challenge to the Constitutionality of State Statute was forwarded by the Fifth Circuit Court to the Texas Attorney General's office on June 25, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Takings Clause of the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*

U.S. Const. amend. V (emphasis added).

Additionally, this case involves the 2017 amendments to the Dallas Pension Statute which provides in relevant part:

> Except as provided by Subsections (e-1) and (l) of this section, the balance in the DROP account of a member who terminated from active service on or before September 1, 2017, or who terminates from active service shall be distributed to the member in the form of an annuity, payable either monthly or annually at the election of the member, by annuitizing the amount credited to the DROP account over the life expectancy of the member as of the date of the annuitization using mortality tables

> recommended by the pension system's qualified actuary. The annuity shall be distributed beginning as promptly as administratively feasible after the later of, as applicable:
>
> > (1) the date the member retires and is granted a retirement pension; or
> >
> > (2) September 1, 2017.

Tex. Rev. Civ. Stat. art. 6243a-1, sec. 6.14 (e) (Vernon 2017).

Furthermore, this case involves the following Pension Plan Amendment that was enacted pursuant to the authority provided by Tex. Rev. Civ. Stat. art 6243a-1 (Vernon 2017):

> Effective as of June 8, 2017, all DROP withdrawal requests that are on file with DPFP, including any DROP withdrawal requests that were submitted pursuant to Section 4 and 5 of the Addendum as in effect prior to June 8, 2017, shall be null and void except for those requests filed pursuant to Section 6 in connection with an unforeseeable emergency or for purposes of a minimum annual distribution elected under Section 7. All DROP withdrawal elections made under Sections 6 and 7 will remain in place for all subsequent DROP distributions under this Addendum until revoked by the distributee in writing.

STATEMENT OF THE CASE

LaDonna Degan, Ric Terrones, John McGuire, Reed Higgins, Mike Gurley, Larry Eddington, and Steve McBride are all retired Dallas police officers and

firefighters (collectively referred to herein as "First Responders"). Each of the First Responders has earned and accrued retirement funds in a Deferred Retirement Option Plan ("DROP") account maintained by the Dallas Police and Fire Pension System ("Pension System") which is a public retirement system established pursuant to Texas Government Code § 810.001. ROA.575-576. The Pension System is governed by a board of trustees ("Board"). ROA.546.

A. The Texas Legislature prohibits the First Responders from accessing the earned and accrued retirement funds in their DROP accounts.

The DROP accounts belonging to each of the First Responders contained earned and accrued retirement funds. ROA.582.[1] On May 31, 2017, Texas Governor Greg Abbott signed H.B. 3158 into law, making various changes to the Dallas Pension Statute. ROA.580. The Board adopted amendments to the Pension Plan reflecting the changes made by H.B. 3158. ROA.581-582, .620-622.

Prior to H.B. 3158, the First Responders had a legal right to access their earned and accrued retirement funds in their DROP accounts and could withdraw their funds in partial or lump sum amounts at any time. *Degan v. Board of Trustees of the Dallas Police and Fire Pension*

1. In light of the standard of review concerning a 12(b)(6) motion to dismiss, record citations to facts are to allegations contained in the First Responders' Complaint. These facts must be taken as true, and the Court should indulge all reasonable inferences in favor of the First Responders. *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 796 (5th Cir. 2011); *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 440 n.8 (5th Cir. 2000).

System, 594 S.W.3d 309, 311, 314, 316 (Tex. 2020); Act of May 27, 1993, 73rd Leg. R.S., ch. 872, § 1, 1993 Tex. Gen. Laws 3465 (amended 2017) (current version at Tex. Rev. Civ. Stat. Ann. art. 6243a-1);[2] ROA.1022-1023. As a result of H.B. 3158, the Dallas Pension Statute now prohibits the First Responders from accessing the corpus of their retirement funds by prohibiting any withdrawal of retirement funds from DROP accounts.[3] ROA.580-81. Instead, H.B. 3158 annuitized the funds in each First Responders' DROP account to be paid out over the life expectancy of the retiree (allowing the Pension System to use the corpus of the First Responders' retirement funds to finance other pension priorities). ROA.580; Tex. Rev. Civ. Stat. art. 6243a-1, sec. 6.14 (e) (Vernon 2017). Although each of the First Responders had retirement funds in their DROP accounts, because of the Legislature's and the Board's actions, those accounts now show a zero balance. It is this prohibition of access to the corpus of their own retirement funds that is the basis for the First Responders' Takings claim.[4]-

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2. The citation to this statutory section prior to the 2017 amendments was Tex. Rev. Civ. Stat. Ann. art. 6243a-1, § 6.14(d) (Vernon 2011).

3. H.B. 3158 provides only for certain limited withdrawals allowed under the "financial hardship" provision, the standards of which are to be adopted by the Board. ROA.580-581. Upon information and belief, only one or two such limited withdrawals have been approved since September 2018.

4. The Fifth Circuit concluded that the First Responders failed to state a Takings claim because "they do not have a property interest in the *method* of withdrawing DROP funds." *Degan v. Board of Trustees of the Dallas Police and Fire Pension System*, 956 F.3d 813, 814-15 (5th Cir. 2020). Yet, the First Responders have never pled, briefed, or argued that they have a property interest in a method. To the contrary, the First Responders have consistently

B. The First Responders asserted claims under the Takings Clause of the Fifth Amendment to the United States Constitution.[5]

The First Responders alleged that the funds contained in their DROP accounts are their personal property. ROA.588. Under the Fifth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment, a governmental entity may not take personal private property for public use without just compensation. ROA.588. The First Responders brought suit pursuant to 42 U.S.C. SEC. 1983, seeking injunctive and declaratory relief, asserting that H.B. 3158 and the amendments implemented pursuant to the legislation violate the Fifth Amendment to the United States Constitution. ROA.590. The district court had jurisdiction over this matter pursuant to 28 U.S.C. SEC. 1331.

C. Procedure in this case.

The Board filed a 12(b)(6) motion to dismiss the First Responders' claims. ROA.884-1023. The First Responders filed a Response, ROA.1465-1495, and the Board filed a Reply. ROA.1496-1510. On March 14, 2018,

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pled and argued that they have a property interest in the corpus of their retirement funds held in their DROP accounts. By concluding that the First Responders seek to protect a property interest in a method, the Fifth Circuit fundamentally changed the claims the First Responders actually made and thus altered the Takings analysis conducted by the court.

5. The First Responders also asserted a claim under Article XVI, Section 66 of the Texas Constitution which prohibits the reduction or impairment of certain retirement benefits that have accrued. ROA.589. The claims under the Texas Constitution are not the subject of this Petition.

the district court granted the Board's motion to dismiss, ROA.1667-1692, and entered a final judgment the same day. ROA.1693. The First Responders filed a notice of appeal on April 5, 2018. ROA.1694-1696.

The Fifth Circuit certified to the Texas Supreme Court issues concerning the First Responders' claims under the Texas Constitution.[6] The Texas Supreme Court concluded that the First Responders' retirement funds in their DROP accounts are protected benefits under Texas law. *Degan v. Board of Trustees of the Dallas Police and Fire Pension Sys.*, 594 S.W.3d 309, 312 (majority) (concluding that the First Responders' DROP funds are a constitutionally protected benefit under Texas law), 319 (dissent) (same) (Tex. 2020). Nevertheless, the Texas Supreme Court ultimately concluded that H.B. 3158 did not violate Article XVI, Section 66 of the Texas Constitution and returned the case to the Fifth Circuit for a determination regarding whether H.B. 3158 violated the Fifth Amendment to the United States Constitution.

Without hearing oral argument, the Fifth Circuit affirmed the district court's dismissal of the First Responders' Takings Claim under the United States Constitution. The Fifth Circuit concluded that there was no cognizable property interest that would support a Takings Claim under the Fifth Amendment. *Degan v. Board of Trustees of the Dallas Police and Fire Pension System*, 956 F.3d 813, 814-15 (5th Cir. 2020). The Fifth Circuit also concluded that because the First Responders will receive annuity payments and the Texas Legislature

6. Dissimilar to the Fifth Amendment to the United States Constitution, Article XVI, § 66 of the Texas Constitution prohibits the reduction or impairment of certain public retirement benefits.

and the Board were attempting to protect the pension fund, there had been no violation of the Takings Clause. *Id.* at 815-16.

REASONS FOR GRANTING THE PETITION

Under a Fifth Amendment Takings analysis, courts look to independent sources of law, such as state law, to determine if there is a cognizable property interest that is protected by the Fifth Amendment. The First Responders alleged that they had a property interest in the retirement funds in their DROP accounts. Indeed, in answering a certified question in this case, the Texas Supreme Court concluded that the retirement funds are protected under the Texas Constitution. Yet, the Fifth Circuit recast the alleged property interest as the "method of withdrawal." The First Responders have always pled, briefed, and argued that the property interest at issue in this case is the retirement funds in their DROP accounts. Therefore, the Fifth Circuit's reframing of the interest and conclusion that there is no cognizable property interest, creates a direct conflict with the Texas Supreme Court concerning whether a property right exists that is protected by the Fifth Amendment.

Additionally, Fifth Amendment Takings law has developed with regard to the proper standards for analyzing the taking of real and personal property. However, due to a split in the federal circuit courts, no clear standard has emerged concerning a Takings analysis when the property at issue is money.

Money in an account is dissimilar to real property that can be physically occupied or personal property over

which one can exercise physical dominion and control. Money in an account is not paper bills that can literally be confiscated, but is instead represented by numbers on an account statement. Traditional Takings analyses that concern the physical occupation of or dominion over property ill equip courts to analyze Takings claims when the property right infringed is the right to access money in an account.

Money is ubiquitous and a government's need for money to fund public projects is a never-ending balance of taxing and spending priorities. Obtaining money for public use through non-revenue methods raises important constitutional issues. There is a big difference between taxing citizens for the public fisc and passing laws that take away access to earned and accrued money in order to use that money for other pension priorities. Because most citizens in the country have an account of some sort that contains earned and accrued money, it is important for this Court to resolve the conflict among the circuit courts concerning the appropriate standard for analyzing Takings claims involving money.

Finally, in the Takings context, this Court has emphasized the importance of considering government actions on the bundle of rights associated with property ownership—the right to possess, use, transfer, devise, and exclude others. Despite the fact that every strand of the bundle of rights the First Responders once had in their retirement funds has been eviscerated by H.B. 3158, the Fifth Circuit nevertheless concluded that no Taking has occurred. This conclusion is in direct conflict with this Court's Takings jurisprudence and with *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), in particular.

I. By determining that there is no cognizable property interest that would support a Takings Claim, the Fifth Circuit's decision conflicts with the Texas Supreme Court's determination that the First Responders' retirement funds are protected benefits under Texas law.

The first critical question in a Takings analysis is whether there is a cognizable property interest that is the subject of the government action. The existence of a property interest is determined by reference to "existing rules or understandings that stem from an independent source such as state law." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 163-64 (1998).

The property at issue in this case is the corpus of the retirement funds the First Responders earned and that had accrued and been deposited in their DROP retirement accounts. In *Degan v. Board of Trustees of the Dallas Police and Fire Pension Sys.*, 594 S.W.3d 309 (Tex. 2020), the Texas Supreme Court concluded that these funds are constitutionally protected benefits under Texas law. *Degan*, 594 S.W.3d at 312 (majority), 319 (dissent), (citing Tex. Const. art. XVI, § 66). However, despite the First Responders consistently pleading, briefing, and arguing that the property at issue in this case is the corpus of the retirement funds in their DROP accounts, the Fifth Circuit recast the alleged property interest as the "method of withdrawing DROP funds." *Degan v. Board of Trustees of the Dallas Police and Fire Pension System*, 956 F.3d 813, 814-15 (5th Cir. 2020). This is equivalent to concluding that the method of accessing real property (by road or air) is the alleged property interest as opposed to the real property itself. After redefining the alleged

property interest, the Fifth Circuit then concluded that the First Responders have no property interest that would support a Takings claim. *Id.*

In addition to redefining the actual property interest at issue in this case, in reaching this conclusion, the Fifth Circuit relied upon a series of cases that predated the Texas Supreme Court's opinion in *Degan* and which concerned distinct law related to pension benefits in the City of Houston, while the pension benefits in the City of Dallas are governed by completely different law.[7] *Degan*, 956 F.3d at 815 (citing *Van Houten v. City of Fort Worth*, 827 F.3d 530, 540 (5th Cir. 2016), which relied upon *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937), *superseded by constitutional amendment*, Tex. Const. art. XVI, Section 66). Consequently, the Fifth Circuit's determination that there is no property interest in this case that would support a Takings claim cannot be reconciled with this Court's precedent requiring reference to state law to determine whether a cognizable property interest exists. The Fifth Circuit's conclusion also directly conflicts with the Texas Supreme Court's determination that the First Responders have a constitutionally protected property interest in the retirement funds in their DROP accounts.

7. *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, at 16, 16 n.10 (Tex. 2015) (noting these distinct and different bodies of law that govern pension benefits in Texas).

II. There is a conflict in this Court and among the federal circuit courts regarding the proper Takings analysis when the property at issue is money.

A. *Per se* taking.

In the context of Fifth Amendment Takings law, two distinct analyses have emerged. This Court has articulated the *per se* analysis, which considers whether there is a direct government appropriation or physical invasion of private property. *See Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537 (2005). A regulatory action can also constitute a *per se* taking where the government requires an owner to suffer a permanent physical invasion of property, however minor, or a regulatory action that completely deprives an owner of all economically beneficial use of his property. *Id.* at 538.

B. Regulatory/*ad hoc* taking.

This Court has also articulated a regulatory/*ad hoc* analysis which considers whether government regulation of private property is so onerous that its effect is tantamount to a direct appropriation or ouster, such that a regulatory taking is compensable under the Fifth Amendment. *Id.* at 537. This Court has acknowledged that it had been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but it did identify "'several factors that have particular significance.'" *Lingle*, 544 U.S. at 538 (quoting *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978)). In *Penn Central*, this Court focused on three factors: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with

distinct investment-backed expectations," and (3) "the 'character of the governmental action'—for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Id.* at 538-39. Each of these inquiries "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* at 539. Thus, each test "focuses directly upon the severity of the burden that government imposes upon private property rights." *Id.* This "inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 540. Neither complete dispossession nor divesting of title is required for a regulatory taking. *Cienega Gardens v. United States*, 331 F.3d 1319, 1339 (Fed. Cir. 2003). Furthermore, "a taking need not be permanent to be compensable." *Id.* at 1339.

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *Penn Cent.*, 438 U.S. at 146 (quoting *United States v. Dickenson*, 331 U.S. 745, 748 (1947)). "[E]ven where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment. But the converse is not true. A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable use' of his property. '[I]t is the character of the invasion, not

the amount of the damages resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.'" *Penn Cent.*, 438 U.S. at 149 (quoting *United States v. Cress*, 243 U.S. 316, 328 (1917) (citations omitted)).

C. Conflicting Takings standards.

When the property at issue is money, in one case this Court used a *per se* analysis and in another case dissenting justices on this Court used a regulatory/*ad hoc* analysis. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003) (discussing money in terms of a *per se* takings analysis); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172, 176 (1998) (majority not discussing what the proper standard should be and four dissenting justices discussing money in terms of an *ad hoc* takings analysis) (Souter, J., joined by JJ. Stevens, Ginsburg, Breyer).

The Circuits are also in conflict over what the proper analysis is when money is the property at issue. The First Circuit has used a *per se* analysis in a Takings case concerning interest generated from insurance premiums. *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Galarza*, 484 F.3d 1, 27, 29-30, 32-33 (1st Cir. 2007) (plaintiff sufficiently pled the taking of a constitutionally protected property interest alleging the government physically appropriated insurance premiums resulting in monetary interest lost as a result of the withholding of the premiums). The Ninth Circuit has also used a *per se* analysis concerning the taking of money. In *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567 (9th Cir. 2020), the court reversed a summary judgment for the defendant under a *per se* takings analysis

concerning the issuance of a debit card to a released inmate in lieu of the cash that was confiscated from her at the time of the arrest, where service fees reduced the amount of money on the card. *Id.* at 569, 570-71, 575-76. In *Schneider v. California Dept. of Corrections*, 345 F.3d 716, 720 (9th Cir. 2003), the court used a *per se* analysis concerning the state's failure to pay interest on state prison inmates' trust accounts that contained inmates' personal funds. *See also McIntyre v. Bayer*, 339 F.3d 1097 (9th Cir. 2003) (using a *per se* analysis regarding taking of interest earned on funds in inmate trust account); *Fowler v. Guerin*, 899 F.3d 1112, 1117 (9th Cir. 2018) (using a *per se* analysis concerning the Washington State Department of Retirement Systems withholding of interest accrued on teacher retirement accounts).

However, in *Southeast Arkansas Hospice v. Burwell*, 815 F.3d 448, 450 (8th Cir. 2016), the Eight Circuit used a regulatory/*ad hoc* analysis concerning an alleged taking of refunded Medicare reimbursement payments based on a statutory repayment cap. Likewise, in *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 974, 976 (1st Cir. 1993), the First Circuit used a regulatory/*ad hoc* analysis concerning interest on lawyers' trust accounts. The District of Columbia Circuit has even relied upon this Court's precedent to suggest that a *per se* analysis is not appropriate for Takings claims related to money. In *Colorado Springs Production Credit Assoc. v. Farm Credit Admin.*, 967 F.2d 648 (D.C. Cir. 1992), the court stated "[t]hat all permanent and total deprivations of money do not fall in [a *per se* analysis] is clear; the Supreme Court has several times analyzed such deprivations as other than *per se* takings." *Id.* at 657 (citing *United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989); *Hodel v. Irving*,

481 U.S. 704, 714-17 (1987); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 222-23 (1986)). The D.C. Circuit further stated that "the [Supreme] Court's recent decision in *Yee v. City of Escondido*, 503 U.S 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (U.S. 1992) may well limit, if only implicitly, the category of *per se* takings to 'unwanted physical occupation[s]' of . . . property." *Colorado Springs*, 967 F.2d at 657 (citing *Yee*, 112 S. Ct. at 1531).

Not only is there confusion among the circuit courts as to which standard should be used, but there is also disagreement within the Fifth Circuit concerning whether either standard is appropriate when the property at issue is money or whether some other standard should apply. In fact six Fifth Circuit judges have noted that a different analysis altogether is required. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 293 F.3d 242, 249 (5th Cir. 2002) (Wiener, J., dissenting, joined by JJ. King, Benavides, Stewart, Parker and Dennis noting that the few cases concerning the Takings Clause in the context of money, while not wholly on point, confirm that "when the property at issue is money, a distinct analysis—separate from per se or ad hoc, or any other method used for real and tangible personal property—is required.").

This circuit split, evident conflict in the law, and the importance of clarifying the relevant standard has also been the subject of numerous law review articles. *See, e.g.,* Michael B. Kent, Jr., *Symposium 2016: The Modern Metropolis: Contemporary Legal Issues in Urban Communities*, 4 Belmont L. Rev. 1, 16-25 (2017); Rebecca Rogers, Comment, *Interest, Principal, and Conceptual Severance*, 46 B.C. L. Rev. 863, 870-90 (2005); James J.

Holland, *"Taking" Another Look at IOLTA: Applying* Loretto*'s "Per Se" Test to Government Exactions of Money*, 39 Willamette L. Rev. 219, 224-44 (2003); Kristi L. Darnell, Note, *Pennies from Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 Wash. L. Rev. 775, 785-89, 802-04 (2002).

Resolving the analytical standard is critical for Takings jurisprudence. For in this case, the Fifth Circuit concluded that "the situation here is not like that of a government occupying a property without compensation." *Degan v. Board of Trustees of the Dallas Police and Fire Pension System*, 956 F.3d 813, 815 (5th Cir. 2020). Thus, the court of appeals analyzed the Takings claim under a *per se* analysis as if the money at issue was in paper bills which someone could physically occupy. This is a problematic approach because large sums of money are generally not physically held—rather large sums of money are deposited in accounts and represented by numbers on an account balance sheet. Thus, under the Fifth Circuit's *per se* analysis, there could never be a constitutional Taking of money that is deposited in an account because numbers on an account balance sheet cannot be invaded or physically occupied. *See* Kent, *supra*, at 23. Nevertheless, an appropriation of money would appear to be synonymous with an invasion or occupation. *See id.* This demonstrates why a traditional *per se* analysis requiring a physical invasion or occupation, while it could be synonymously applied, is awkward when considering the taking of money.

Likewise, in considering the *Penn Central* factors associated with a regulatory/*ad hoc* analysis, the Fifth Circuit concluded that all factors weigh against a

compensable Taking. *Degan*, 956 F.3d at 815. Yet, instead of actually considering the economic impact to the First Responders by denying them access to the corpus of their funds, the Fifth Circuit summarily concluded that there would be no adverse economic impact because the First Responders would receive annuity payments. *Id.* at 815.[8] Furthermore, despite evidence in the record setting forth the various investments the First Responders intended to make with their retirement funds (i.e. paying for children's and grandchildren's education, home repairs, necessary living expenses), the Fifth Circuit concluded that the fact the First Responders can no longer receive lump sum distributions and now may only receive lifetime annuity payments "does not support the conclusion that their investment-backed expectations were 'taken.'" *Id.* at 815-16. Finally, in considering the character of the government action element, the Fifth Circuit once again reverted to an inapropos analogy concerning real and personal property: "there is no invasion of real estate or appropriation of physical property." *Id.* at 816. These conclusions reached by the Fifth Circuit in order to conclude that no compensable Taking has occurred demonstrate why the regulatory/*ad hoc* analysis is also ill suited for a Takings case involving money in a retirement account.

8. The following sentence constitutes the Fifth Circuit's entire analysis of the "economic impact" element: "Plaintiffs will continue to receive payments to compensate them for the DROP accounts." *Id.* at 815.

III. The Fifth Circuit's opinion conflicts with this Court's Takings jurisprudence which requires consideration of the effect of a government's actions on property rights

This Court has articulated a "bundle of rights" associated with property ownership. Those rights include the right to possess, use, transfer, devise, and exclude others. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Hodel v. Irving*, 481 U.S. 704, 716 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433-34 (1982) ("[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). In the context of a Takings analysis, this Court has noted that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002) (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)). In fact, in concluding that a Taking had not occurred in *Andrus*, this Court noted that "it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the [property]." *Andrus*, 444 U.S. at 66. Under *Andrus*, the converse would also be true: if the claimant no longer had the right to possess, transport, donate, or devise, a Taking would have occurred.

Citing *Andrus*, the Fifth Circuit concluded that "merely limiting an individual's access to a property interest does not constitute a taking." *Degan*, 956 F.3d at 815 n.1 (citing *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

While this might be true if other strands of property rights remained intact, this statement by the Fifth Circuit cannot be squared with this Court's recognition in *Andrus* that the retention of some property rights (i.e. the right to possess, transport, donate, and devise) is crucial to the determination that no Taking has occurred. *Andrus*, 444 U.S. at 66.

In the present case, as a result of H.B. 3158, the First Responders' access to the corpus of their own retirement funds is not merely limited; their access is completely prohibited. It is also undisputed that for each First Responders' lifetime, now they can no longer possess, use, transport, devise, or exclude others from using the corpus of the funds in their DROP accounts. Despite every strand of the bundle of rights having been eviscerated by H.B. 3158, the Fifth Circuit nevertheless concluded that no Taking has occurred. This conclusion is in direct conflict with this Court's Takings jurisprudence and with *Andrus* in particular.

CONCLUSION

This case presents the Court with important issues that must be resolved concerning a Fifth Amendment Takings analysis involving money. A conflict exists between the Fifth Circuit's opinion and the Texas Supreme Court regarding a fundamental issue of federal law—what constitutes a property interest for Fifth Amendment purposes. Additionally, a circuit split and conflicting analyses by this Court warrant resolution to clarify how money is to be treated in a Takings analysis. Finally, as governments around the country continue to make decisions concerning how to compensate public

retirees, it is important for this Court to determine whether prohibiting access to earned and accrued retirement funds presents a cognizable Takings claim under the Fifth Amendment.

Respectfully submitted,

CAREN FREEDMAN
New Mexico State Bar
No. 7905
DURHAM, PITTARD
& SPALDING, LLP
505 Cerrillos Road, Suite A209
Santa Fe, New Mexico 87501
(505) 986-0600

DAVID M. FELDMAN
Texas State Bar No. 06886700
FELDMAN & FELDMAN, P.C.
3355 West Alabama Street,
Suite 1220
Houston, Texas 77098
(713) 986-9471

KIRK L. PITTARD
Texas State Bar No. 24010313
Counsel of Record
THAD D. SPALDING
Texas State Bar No. 00791708
RICK THOMPSON
Texas State Bar No. 00788537
DURHAM, PITTARD
& SPALDING, LLP
223 West Jefferson Boulevard
Dallas, Texas 75208
(214) 946-8000
kpittard@dpslawgroup.com

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 27, 2020

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10423

LADONNA DEGAN; RIC TERRONES; JOHN MCGUIRE; REED HIGGINS; MIKE GURLEY; LARRY EDDINGTON; STEVEN MCBRIDE,

Plaintiffs-Appellants,

v.

THE BOARD OF TRUSTEES OF THE DALLAS POLICE AND FIRE PENSION SYSTEM,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC. No. 3:17-CV-1596.

April 27, 2020, Filed

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

Appendix A

Several retired City of Dallas police officers and firefighters (collectively, "Plaintiffs") sued the Board of Trustees of Dallas Police and Fire Pension System (the "Board") over changes to their pension fund they contend violate the United States and Texas Constitutions. Plaintiffs alleged that limiting their ability to withdraw from their Deferred Retirement Option Plan ("DROP") funds constituted an unlawful taking under the Fifth Amendment of the United States Constitution and violated article XVI, section 66, of the Texas Constitution ("Section 66"), which prohibits reducing or otherwise impairing a person's accrued service retirement benefits.

Concluding that this case involved important and determinative questions of Texas law, we certified two questions to the Supreme Court of Texas regarding Plaintiffs' Texas constitutional claim. *Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys.*, 766 F. App'x 16, 17 (5th Cir. 2019) (per curiam). Specifically, we asked (1) whether the method of withdrawing DROP funds is a service retirement benefit protected under Section 66, and (2) whether the Board's decision to change the withdrawal method for Plaintiffs' DROP funds violates Section 66. *Id.* at 20. We stayed Plaintiffs' federal claim, concluding that their takings claim depended on how the Supreme Court of Texas answered the certified questions. *Id.* at 17, 20.

The Supreme Court of Texas accepted our certification and recently issued an opinion answering the questions. *Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys.*, 594 S.W.3d 309 (Tex. 2020). It held that (1) although Plaintiffs' DROP funds are service retirement benefits

protected by Section 66, the method of withdrawing DROP funds is not, and (2) the Board's decision to change the withdrawal method of Plaintiffs' DROP accounts did not violate Section 66. *Id.* at 312, 317. We ordered supplemental briefing by the parties on whether any further issues remain to be resolved by this court. The parties agree that these answers dispose of Plaintiffs' state law claim, but they disagree as to the resolution of the remaining federal constitutional claim. Plaintiffs argue that they still have a valid claim, arguing both a per se taking and a regulatory taking.

We hold that Plaintiffs failed to state a takings claim because they do not have a property interest in the method of withdrawing DROP funds, and thus we affirm the district court's dismissal of their takings claim. "The Fifth Amendment . . . provides that 'private property' shall not 'be taken for public use, without just compensation.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 163-64, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998) (quoting U.S. CONST. amend. V). Thus, to allege a takings claim, Plaintiffs must have a property interest in their method of withdrawing DROP funds. "[T]he existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." *Id.* at 164 (internal quotation marks and citation omitted); *see also Van Houten v. City of Fort Worth*, 827 F.3d 530, 540 (5th Cir. 2016) (holding that "the right to public pension benefits in Texas is subject to legislative power" and "[l]egislative reduction of such benefits therefore cannot be the basis of a . . . takings clause challenge").

Here, Texas law determines whether Plaintiffs have a protected right to their method of withdrawal, and the Supreme Court of Texas has held that Plaintiffs have no such protected right. *Degan*, 594 S.W.3d at 312, 317. Because Plaintiffs have no property interest in the method of withdrawing DROP funds, they failed to state a takings claim.[1] *Degan* makes clear that the situation here is not like that of a government occupying a property without compensation. *See, e.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945), and *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946)).[2] Thus, there is no per se taking.

---

1. Plaintiffs contend that because they have a property interest in their accrued DROP funds, this property interest extends to having the right to withdraw from them. But Plaintiffs cite no authority for support; to the contrary, merely limiting an individual's access to a property interest does not constitute a taking. *See Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979) (holding that the government's restriction on an individual's ability to dispose of his or her private property did not amount to a taking because the individual retained other rights associated with his or her property); *Matagorda Cty. v. Russell Law*, 19 F.3d 215, 224 (5th Cir. 1994) (holding that the "mere delay in exercising a property right" did not constitute a taking).

2. By contrast, temporary restrictions on what an individual may do with their property—but where the government does not appropriate it—are not subject to the same rule. *See Tahoe-Sierra Pres. Council*, 535 U.S. at 323-24.

Having concluded that this withdrawal is not a per se taking, we briefly address the regulatory taking arguments Plaintiffs make. "A regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking under *Penn Central [Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)]." *Horne v. Dep't of Agric.*, 576 U.S. 351, 135 S. Ct. 2419, 2429, 192 L. Ed. 2d 388 (2015). *Penn Central* provided three factors: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1937, 198 L. Ed. 2d 497 (2017). All factors weigh against the Plaintiffs.

Plaintiffs will continue to receive payments to compensate them for the DROP accounts. Further, at the time the Plaintiffs chose their method of withdrawal from their DROP accounts, they had only three options: they could withdraw the funds as (A) a single-sum distribution; (B) a monthly annuity based on the member's life; or (C) substantially equal monthly or annual payments designated by the member. *See* Tex. Rev. Civ. Stat. Ann. art. 6243a-1, § 6.14(d)(1)-(3) (2011). They are now subject to option B, but that does not support the conclusion that their investment-backed expectations were "taken."

As far as governmental action, this is not a traditional takings claim; there is no invasion of real estate or appropriation of physical property. *See Penn Cent.*, 438 U.S. at 124 (concluding that "[a] 'taking' may more readily

be found when the interference with property can be characterized as a physical invasion"). Texas and the Board are working to save a pension fund by modifying its mechanics. The goal is to protect the pension fund, including the Plaintiffs' funds. Thus, this factor also weighs against the Plaintiffs. All told, they have not pleaded a regulatory taking.

We AFFIRM the district court's dismissal for failure to state a claim.

APPENDIX B — OPINION AND DISSENT OF THE SUPREME COURT OF TEXAS, DATED JANUARY 31, 2020

IN THE SUPREME COURT OF TEXAS

NO. 19-0234

LADONNA DEGAN, RIC TERRONES, JOHN MCGUIRE, REED HIGGINS, MIKE GURLEY, LARRY EDDINGTON, AND STEVEN MCBRIDE,

Appellants,

v.

THE BOARD OF TRUSTEES OF THE DALLAS POLICE AND FIRE PENSION SYSTEM,

Appellee.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Argued September 17, 2019

JUSTICE DEVINE delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE LEHRMANN, JUSTICE BLACKLOCK, JUSTICE BUSBY, and JUSTICE BLAND joined.

JUSTICE BOYD filed a dissenting opinion, in which JUSTICE GREEN joined.

JUSTICE GUZMAN did not participate in the decision.

Appendix B

In this case, we consider two questions of Texas law certified from the United States Court of Appeals for the Fifth Circuit. Such questions are authorized by our Constitution and provided for in our appellate rules. Tex. Const. art. V, § 3-c; Tex. R. App. P. 58. The questions concern whether changes made by the Texas Legislature in 2017 to Deferred Retirement Option Plans violate a state constitutional provision that prohibits the reduction or impairment of certain accrued retirement benefits. *See* Tex. Const. art. XVI, § 66. We consider the certified questions below and conclude that the 2017 legislative reforms here do not violate the Constitution.

I

The Dallas Police and Fire Pension System is a public pension fund that provides comprehensive retirement, death, and disability benefits for approximately 9,300 active and retired City of Dallas police officers, firefighters, and their qualified survivors. Like many states, the State of Texas has created a series of defined benefit plans for government employees. Pension systems for police and firefighters in cities like Dallas are largely controlled by the Texas Legislature through Article 6243a-1. *See* Tex. Rev. Civ. Stat. Ann. art. 6243a-1 (Supp. 2019). Under that statute, a local Board of Trustees, selected by the mayor in consultation with the city council and by the members and pensioners of the pension system, administers the pension system under a compliant plan document. *Id.* art. 6243a-1, § 3.01(a), (b).

Under the plan, individuals become members of the pension system once they commence training at the police

or firefighter academy. The member and the city contribute to the member's account during the member's active service. Section 6 of the plan enumerates four general categories of benefits: "retirement pension" options, "disability benefits," "death benefits," and a "Deferred Retirement Option Plan" (commonly referred to by its initials DROP). *See generally id.* art. 6243a-1, §§ 6.01–.14. The pension system began offering DROP accounts in 1993 as an incentive to retain experienced police officers and firefighters after they attained eligibility to retire.

Before DROP's existence, an active police officer or firefighter who became eligible to retire had two options under the pension system: The member could remain on the job and continue to grow his or her pension under the system's pension formula, or the member could retire and begin drawing his or her accrued pension in the form of a monthly annuity payment. DROP introduced a third option: A member could freeze his or her retirement benefit and continue working, receiving both a salary and an annuity payment from his or her retirement account.

While the member electing DROP continues on the job, the monthly annuity is paid into the member's DROP account. Once the member has left active service, future annuity payments are redirected to the member, who is also now eligible to withdraw funds from his or her DROP account. DROP accounts initially collected an attractive interest rate and provided the member several options for withdrawing these funds at the end of active service. Under these options, the member could elect a lump-sum distribution, an annuity based on the member's life

expectancy, or disbursement based on monthly or annual payments designated by the member. *See* Act of June 18, 1993, 73rd Leg., R.S., ch. 872, § 1, 1993 Tex. Gen. Laws 3432, 3465-66 (formerly TEX. REV. CIV. STAT. ANN. art. 6243a-1, § 6.14(d)(1)–(3) (1993)).

DROP accounts became very popular. Eventually, the amount of money drawn into these accounts, together with a member's right to elect a lump-sum distribution on leaving active service, threatened the liquidity and stability of the pension system. These concerns, in turn, motivated the Legislature to pass House Bill 3158 in 2017. This Bill amended the applicable pension statute to eliminate lump-sum payments and to permit only the annuitized option for DROP account withdrawals. TEX. REV. CIV. STAT. ANN. art. 6243a-1, § 6.14(e); *see* Act of May 31, 2017, 85th Leg., R.S., ch. 318, § 1.42, 2017 Tex. Gen. Laws 639, 696 (H.B. 3158) (amending TEX. REV. CIV. STAT. ANN. art. 6243a-1).

In the underlying litigation, seven Dallas System retirees (the "Retirees") challenge as unconstitutional the 2017 statutory amendments, which eliminate their ability to request lump-sum distributions from their respective DROP accounts. The Retirees contend that the funds in DROP are accrued service retirement benefits and that the change to how these funds may be withdrawn effectively reduces or impairs the accrued benefit in violation of the Texas Constitution, article XVI, section 66(d). That provision prohibits changes that reduce or impair certain accrued benefits, stating that:

> (d) On or after the effective date of this section, a change in service or disability retirement benefits or death benefits of a retirement system may not reduce or otherwise impair benefits accrued by a person if the person:
>
> > (1) could have terminated employment or has terminated employment before the effective date of the change; and
> >
> > (2) would have been eligible for those benefits, without accumulating additional service under the retirement system, on any date on or after the effective date of the change had the change not occurred.

Tex. Const. art. XVI, § 66.

Concluding that Section 66's application here was unsettled under Texas law, the Fifth Circuit certified the following questions to this Court:

> 1. Whether the method of withdrawal of funds from Deferred Retirement Option Plan is a service retirement benefit protected under article XVI, section 66 of the Texas Constitution.
>
> 2. If the answer to Question 1 is "yes," then whether the Board of the Dallas Police and Fire Pension's System's decision, pursuant to the Texas statute in question, to alter previous

> withdrawal elections and annuitize the DROP funds over the respective life expectancy of the Plaintiffs violates Section 66 of the Texas Constitution.

Degan v. Bd. of Trs. of Dall. Police & Fire Pension Sys., 766 Fed. Appx. 16, 20 (5th Cir. 2019) (per curiam). The Circuit's opinion further summarizes the parties' constitutional disagreement to be "whether DROP accounts are 'service retirement benefits' (and therefore protected by Section 66) and whether the DROP withdrawal change reduces or impairs the benefit (and therefore prohibited by Section 66)." *Id.* at 18.

II

The Circuit's first question recognizes that Section 66 protects from reduction or impairment only certain kinds of benefits. For example, it does not apply to health benefits, life insurance benefits, or to some disability benefits. Tex. Const. art. XVI, § 66(c). And while the constitutional protection expressly applies to service retirement benefits, *id.* § 66(d), the Circuit's opinion notes a disagreement "about whether DROP accounts are 'service retirement benefits.'" 766 Fed. Appx. at 18. The first certified question nevertheless assumes that DROP is a service retirement benefit by inquiring whether the method of withdrawal of funds from DROP is itself a benefit protected by the Constitution. As usual, the Circuit disclaims any intention or desire that we confine our reply to the precise form or scope of the questions certified. *Id.* at 20. Because of the acknowledged disagreement, we

begin with whether DROP is a service retirement benefit as the first question assumes.

The Retirees submit that a DROP account must be a service retirement benefit under our reasoning in *Eddington v. Dallas Police & Fire Pension System*, 589 S.W.3d 799, 2019 Tex. LEXIS 243, 2019 WL 1090799 (Tex. Mar. 8, 2019). There, we noted that, contextually, Section 66 recognizes a pensioner's annuity payments as a protected service retirement benefit. *Id.* at , 2019 Tex. LEXIS 243 at *13, 2019 WL 1090799, at *5. Because a DROP account consists of a collection of these annuity payments and accrued interest in what we have previously described as a "forced savings account," it logically follows that the funds in that account are likewise a service retirement benefit. *Id.* at ___, 2019 Tex. LEXIS 243, 2019 WL 1090799, at *1.

That conclusion finds further support in the text of the constitutional provision and underlying statute. Section 66 expressly excludes certain types of benefits, but DROP is not among those excluded. *See* Tex. Const. art. XVI, § 66(c). Moreover, all of the "Benefits" available under the system's pension plan are listed in section 6 of the plan and underlying statute, and DROP is enumerated as a benefit in the same manner as the others. *See* Tex. Rev. Civ. Stat. Ann. art. 6243a-1, § 6.14. We therefore agree that the funds deposited in the DROP account (and accrued interest) are a service retirement benefit to which the protection afforded by Section 66 may apply.

Although the parties have previously taken contrary positions on DROP's status as a service retirement benefit

for purposes of Section 66, they agree in this Court that the method of withdrawing funds from DROP is not itself a service retirement benefit. During argument, the Retirees conceded as much, agreeing that our answer to the first question, as phrased, should be no. The parties, however, have different views on the consequences that flow from that negative answer.

The Board contends that a negative answer to the first question ends the task certified to us by the Circuit. The Retirees respond that it does not end our inquiry because the retirement service benefits at issue here are the funds in their DROP accounts, and the constitutional question is whether the changes restricting their access to these funds is a prohibited reduction or impairment to that underlying benefit. We agree that this is the appropriate issue and that it is generally captured in the second certified question, which asks whether the Board's "decision, pursuant to the Texas statute in question, to alter previous withdrawal elections and annuitize the DROP funds over the respective life expectancy of the Plaintiffs violates Section 66 of the Texas Constitution." 766 Fed. Appx. at 20. We turn, then, to the Constitution's application to that question.

III

Our guiding principle when interpreting the Texas Constitution is to give effect to the intent of the voters who adopted it. *Cox v. Robison*, 105 Tex. 426, 150 S.W. 1149, 1151 (Tex. 1912). We presume that the framers carefully chose the language, and we interpret their words accordingly.

Leander Indep. Sch. Dist. v. Cedar Park Water Supply Corp., 479 S.W.2d 908, 912 (Tex. 1972). In determining the intent of the framers and adopters of a constitutional proposition, we may consider contextual factors such as "the history of the legislation, the conditions and spirit of the times, the prevailing sentiments of the people, the evils intended to be remedied, and the good to be accomplished." *Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009) (internal citation omitted).

The history of Section 66 indicates that its impetus was a Depression-era decision from this Court that subordinated the pension rights of public servants to the authority of the state to diminish or abolish future pension payments. *See City of Dall. v. Trammell*, 129 Tex. 150, 101 S.W.2d 1009, 1017 (Tex. 1937) (holding that a "pensioner has no vested right" to future pension payments). In *Trammell*, the Court considered whether a public employee, after retirement, had "a vested right to participate in the pension fund to the extent of the full amount of monthly installments granted to him at retirement." *Id.* at 1011. At issue was whether that monthly amount could be reduced. Exemplifying Texas's historical view of public pensions as a "gratuity," the Court held that a pensioner had no vested right to future pension installments and, therefore, the Legislature could reduce accrued benefits or abolish the pension system altogether. *Id.* at 1013, 1017.

Section 66 directly responds to that holding as a 2008 Texas Attorney General opinion explains:

> The effect the Legislature—the makers—intended in adopting House Joint Resolution 54 . . . proposing the constitutional amendment was to insure that retirement benefits (the monthly pension payments) of vested municipal employees would not be reduced or impaired by subsequent, unilateral legislative action.

Tex. Att'y Gen. Op. No. GA-0615 (2008). Legislative history thus confirms that Section 66 was added to the Constitution to overrule our decision in *Trammell* by protecting the amount of monthly pension payments from reduction or impairment through subsequent changes to the system. Tex. Const. art. XVI, § 66; *see also Van Houten v. City of Fort Worth*, 827 F.3d 530, 537-38 (5th Cir. 2016) ("Section 66 reverses the core unfairness of the *Trammell* decision by ensuring that earned benefits cannot be reduced.").

Both the Fifth Circuit and this Court have previously considered the protection afforded by Section 66. In *Van Houten*, the Fifth Circuit considered whether Section 66(d) prohibited pension reforms designed to decrease expected, but as-yet unearned, benefits. 827 F.3d at 534. The employees who objected to the reforms argued that the formula used to calculate the benefit vested and became constitutionally protected, along with the benefit, when the employee reached retirement age. *Id.* at 535. Thus, in the employees' view, Section 66 foreclosed even wholly prospective formula adjustments. *Id.* The Circuit disagreed. It concluded that, in the context of the constitutional provision, "benefits" refers to payments

but does not encompass the formula by which those payments are calculated. *See id.* at 535-37 (discussing the "numerous indications that the term 'benefits' refers only to payments"). As the Fifth Circuit observed, "Section 66(d) prohibits the impairment of *accrued* benefits for *vested* employees." *Id.* at 534 (emphasis in original). Thus, the pension reform that altered the rate at which future benefits accrued did not violate the constitutional provision.

Later, our decision in *Eddington* agreed with *Van Houten*'s contextual understanding of the term "benefit" as referring to the pension's annuity payments and not the formula by which those payments are calculated. *Eddington*, __ S.W.3d at __, 2019 Tex. LEXIS 243 at *6, 2019 WL 1090799, at *5. We further agreed "that 'accrued' benefits under Section 66(d) are those that have been earned by service, not those that may be earned by future service." *Id.* at ___, 2019 Tex. LEXIS 243 at *12, 2019 WL 1090799, at *4 (citing *Van Houten*, 827 F.3d at 535). Pensioners in that case contended that Section 66 prohibited the pension system from reducing the interest rate paid on their DROP accounts. We did not agree that the change invoked Section 66's protection because the interest-rate reduction applied prospectively and therefore did not affect accrued benefits. *Id.* at __, 2019 Tex. LEXIS 243, 2019 WL 1090799, at *1.

The Circuit suggests the issue here is much closer because the statutory reform introduced by House Bill 3158 "seems to retroactively nullify a retiree's election about" payment from a DROP account and "seems to

relate to . . . previously accrued or granted benefits." 766 Fed. Appx. at 19. The Retirees similarly argue that the change here does not apply prospectively to the accrued benefits in their DROP accounts, as was the case of the interest-rate reduction in *Eddington*, but rather has a retrospective impact on those funds. Before the change, the Retirees ostensibly controlled the rate at which they could draw funds from their DROP accounts. They could elect to withdraw the funds as a single-sum distribution, as a monthly annuity based on the member's life, or in substantially equal monthly or annual payments designated by the member. *See* Act of June 18, 1993, 73rd Leg., R.S., ch. 872, § 1, 1993 Tex. Gen. Laws 3432, 3465–66 (formerly TEX. REV. CIV. STAT. ANN. art. 6243a-1, § 6.14(d)(1)–(3) (1993)). The 2017 amendment to the statute (H.B. 3158) eliminated all but the monthly annuity option for distributing DROP funds. *See* TEX. REV. CIV. STAT. ANN. art. 6243a-1, § 6.14(e). The Retirees complain that this change violates Section 66 by retroactively voiding previous elections and effectively denying them access to their accrued benefits. They essentially contend that the funds in their DROP accounts have been reduced or impaired because the Retirees no longer have unfettered access to them.

But the reform here does not negatively affect the amount of money in the Retirees' DROP accounts. The monthly annuity payments and earned interest collected in those accounts are neither reduced nor impaired. Only the rate at which the Retiree is permitted to withdraw these funds is affected. While an outright denial of access to these funds might reasonably be considered an

impairment, the complaint here is that the pensioner's choices about access have been impaired by the statutory reform that eliminates two of the three previous methods of distribution. The Dissent characterizes the statutory choice under former law as a property right that attaches to DROP funds as they accumulate, and, as such, a right entitled to protection under Section 66. *Post* at __. But *Eddington* distinguishes between pension annuity payments and plan terms, observing that nothing in Section 66's text "suggests that all retirement plan terms are protected benefits" and rejecting the general notion that DROP is "a contract between the System and a member that cannot be changed." *Eddington*, ___ S.W.3d at ___, 2019 Tex. LEXIS 243 at *12, 2019 WL 1090799, at *4-*5. The legislative history, moreover, bears this out. *See, e.g.*, House Comm. on Pensions & Invs., Bill Analysis, Tex. H.J. Res. 54, 78th Leg., R.S. (2003) (deleting language in earlier version of Section 66 stating that "membership in such a plan is a contractual relationship"). Instead of a strict contractual regime, Texas chose a more flexible approach allowing for prospective changes to benefits not yet granted. *See* Tex. Leg. Council, Analyses of Proposed Constitutional Amendments, Sept. 13, 2003 Election, at 101 (July 2003) (noting that Section 66 allows prospective changes to "adjust retirement benefits if necessary to respond to changing economic times") [hereafter "Legislative Analyses"], *available* at https://tlc.texas.gov/docs/amendments/analyses03.pdf.

The constitutional complaint here is similar to the one rejected by the Fifth Circuit in *Van Houten*. There, the employees argued that Section 66 prohibited changes

to the benefit formula after vesting in the plan—that is, after the employee became eligible to retire. The Circuit rejected the notion that the formula also vested at that time, "meaning that even wholly prospective formula adjustments are foreclosed by Section 66." *Van Houten*, 827 F.3d at 535. The Circuit further rejected a 2008 Texas Attorney General Opinion construing Section 66(d) to "prohibit[] a change in the method of determining the compensation base of vested employees if such action reduces or impairs retirement benefits that the employee would have been eligible to receive on or before the effective date of the change." Tex. Att'y Gen. Op. No. GA-0615, at 11. "The Circuit disagreed with the opinion's analysis, noting that, after finding Section 66's text and legislative history unhelpful, the opinion based its ultimate holding on 'other state supreme courts, particularly those of New York, Illinois, and Alaska.'" *Eddington*, __ S.W.3d at __, 2019 Tex. LEXIS 243 at *10, 2019 WL 1090799, at *4 (citing *Van Houten*, 827 F.2d at 536). "It was problematic, the Circuit noted, to assume that Texas had suddenly decided to copy these states, particularly with respect to public pension protection [an area in which Texas was known to be an outlier]." *Id.* (citing *Van Houten*, 827 F.2d at 537). Indeed, Section 66 strikes a careful constitutional balance, granting "those retirement systems the flexibility the systems need to adjust retirement benefits if necessary to respond to changing economic times, while still protecting the benefits that local government employees have already earned." Legislative Analyses at 101.

Although not bound by the *Van Houten* decision, we nevertheless noted our agreement with the Circuit's

analysis of the constitutional text. *Eddington*, ___ S.W.3d at ___, 2019 Tex. LEXIS 243 at *3, 2019 WL 1090799, at *4 . Thus, *Eddington* similarly construed the term "'benefits'" in Section 66 as "'refer[ring] to payments[,]'" and the protected payments as "the pensioner's annuity payments." *Id.* at ___, 2019 Tex. LEXIS 243 at *13, 2019 WL 1090799, at *5 (quoting *Van Houten*, 827 F.3d at 535).

The Board argues that, in contrast to the payments protected under Section 66, the Retirees' claim here seeks to constitutionalize a lump-sum method of withdrawing DROP funds. The Board maintains that such a method is simply a plan term that determines how DROP funds are distributed and, like other plan terms, is subject to change. The Board concludes that Section 66 protects only monthly pension annuity payments and not the methodology for DROP withdrawals, and thus does not apply to the change at issue here. But labeling the change as a mere methodology or plan term does not directly address the constitutional question. The changes determined to be constitutional in *Van Houten* and *Eddington* were so, not because they were terms or methodologies, but because they did not reduce or impair an accrued benefit. Had the benefit formula in *Van Houten* or the interest rate reduction in *Eddington* been applied retroactively to reduce an accrued benefit, the constitutional protection would have plainly been invoked. But the pension reforms in those cases did not negatively adjust prior accruals or take back earned interest and thus did not implicate Section 66.

The question of this reform's retroactive effect is more nuanced, however. The underlying statute previously

permitted a DROP participant to elect one of three alternative methods of distribution from the fund—an election that, under the statute, could be changed at any time before the participant left active service. *See* Act of June 18, 1993, 73rd Leg., R.S., ch. 872, § 1, 1993 Tex. Gen. Laws 3432, 3465–66 (formerly TEX. REV. CIV. STAT. ANN. art. 6243a-1, § 6.14(d), (f) (1993)). Thus, the change is retrospective in the sense that previous elections about how the DROP participant anticipated having the funds distributed are superseded by the statutory amendment mandating monthly annuity payments. But does that change implicate Section 66 by reducing or impairing the accrued benefit? The Retirees argue that it does because their election to take a lump-sum distribution has a greater net value to them than the annuity that replaces it under the pension reform. Even assuming that to be true, we fail to see how the benefits in their respective accounts have been reduced or impaired by the elimination of this election or the flexibility it provided under former law.

In *Eddington*, we observed once again that issues of constitutional construction may include "a provision's history, the conditions and spirit of the times in which it was adopted, the prevailing sentiments of the people who framed and adopted it, the evils intended to be remedied, and the good to be accomplished." *Eddington*, ___ S.W.3d at ___, 2019 Tex. LEXIS 243 at *14, 2019 WL 1090799, at *5 (internal quotation marks omitted). Without question, Section 66's purpose was to overrule our Depression-era decision in *Trammell*. As the Fifth Circuit has observed, "Section 66 reverses the core unfairness of the *Trammell* decision by ensuring that earned benefits cannot be

reduced." *Van Houten*, 827 F.3d at 537-38. But unlike *Trammell*, the change here does not take away an accrued or granted annuity payment. And like *Eddington*, the reforms here do not affect the Retirees' non-DROP monthly pension annuity payments or the dollar amount of the funds previously credited to DROP. *Eddington*, ___ S.W.3d at ___, 2019 Tex. LEXIS 243 at *11, 2019 WL 1090799, at *5. Moreover, the reform at issue does not retroactively reverse lump-sum distributions already paid out under former law; it merely changes the method of withdrawal going forward by requiring the pension system to distribute all DROP funds with interest in the form of an annuity.

* * *

Under the Texas Constitution, the pension system must be managed according to sound actuarial principles for the benefit of its membership. TEX. CONST. art. XVI, § 67(a). The Government Code further imposes a duty on the Board of Trustees to hold pension system assets in trust for the benefit of all participants, which includes "the members and retirees of the system and their beneficiaries." TEX. GOV. CODE § 802.201. Separate from the Board's ministerial duty to hold these assets in trust is its obligation to manage the pension system according to sound actuarial principles that do not reduce or otherwise impair constitutionally protected benefits. TEX. CONST. art. XVI, §§ 66(f), 67(a).

While Section 66 modifies Texas's former "gratuity" approach to pension benefits for non-statewide plans by

protecting some benefits, Section 66 does not prohibit prospective pension reforms. *See Van Houten*, 827 F.3d 538 (noting Texas's "long-held flexible approach permitting municipalities to revise their pension plans in light of changing economic conditions"). It does, however, prohibit the reduction or impairment of an accrued service retirement benefit, which we have interpreted as protection for the pensioner's vested annuity payments. A pension reform that abandons a more flexible distribution scheme—a scheme that allowed the pensioner to elect how the accrued benefits would be paid over time—in favor of a more predictable scheme—one that preserves access through a vested annuity—does not violate the constitutional prohibition.

We therefore conclude that House Bill 3158, the 2017 amendment to Article 6243a-1, does not violate Article XVI, Section 66 of the Texas Constitution. Our answer to both certified questions is no.

John P. Devine
Justice

Opinion Delivered: January 31, 2020

Appendix B

JUSTICE BOYD, joined by JUSTICE GREEN, dissenting.

On January 9, 2020, Governor Greg Abbott posted on Twitter to celebrate "National #LawEnforcementAppreciationDay" and to thank "the men and women of law enforcement who bravely serve our communities and keep us safe."[1] That night, as winter storms approached the State, he posted another tweet, asking Texans to keep "all of Texas' first responders in their prayers."[2] The following morning, a driver lost control on an icy Lubbock highway, striking and killing Lubbock police officer Nicholas Reyna and Lubbock firefighter Eric Hill and critically injuring firefighter Matt Dawson while they were helping others who had been involved in two previous accidents.[3] Numerous Texas officials, agencies, organizations, and individuals tweeted condolences and gratitude for these first responders' commitment to public service.[4] Uniformly, the expressions were sincere, meaningful, and appropriate.

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1. Gov. Greg Abbott (@GovAbbott), TWITTER (Jan. 9, 2020, 12:03 PM), https://twitter.com/GovAbbott/status/1215363534995050496.

2. *Id.* (Jan. 9, 2020, 7:00 PM), https://twitter.com/GovAbbott/status/1215468476900552705.

3. KCBD Staff, *Firefighter, Police Officer Struck, Killed While Working Wreck on I-27*, KCBD, Jan. 12, 2020, https://www.kcbd.com/2020/01/11/firefighter-police-officer-struck-killed-while-working-wreck-i-/.

4. *See* City of Lubbock (@cityoflubbock), TWITTER (Jan. 11, 2020, 3:24 PM), https://twitter.com/cityoflubbock/status/1216138816190386178.

But Texans know that thoughtful expressions aren't nearly enough. When it comes to public employees' retirement and death benefits, Texans have bound their government to actively preserve what public employees have entrusted to it. In 2003, Texans ratified a constitutional amendment providing that local public retirement systems cannot retroactively "reduce or otherwise impair" a public officer's or employee's retirement benefits. TEX. CONST. art. XVI, § 66(d), (e), (f). Honoring this constitutional guarantee has proven difficult, however, as public pension systems have struggled to maintain solvency for one reason or another. *See Eddington v. Dall. Police & Fire Pension Sys.*, 589 S.W.3d 799, 2019 Tex. LEXIS 243, 2019 WL 1090799, at *2 (Tex. Mar. 8, 2019).

The Dallas Police and Fire Pension System provides retirement, death, and disability benefits for roughly 9,300 police officers and firefighters. In 1993, the pension system began offering a Deferred Retirement Option Plan as an incentive to retain experienced first responders who would otherwise leave their departments when they became eligible for retirement. *See* Act of May 26, 1993, 73d Leg., 3 R.S., ch. 872, § 1, 1993 Gen. Laws 3432, 3465–67. Under the DROP, police officers and firefighters who become eligible for retirement can elect to continue serving and drawing their salary while also receiving retirement payments in the form of a monthly annuity deposited into their DROP accounts. When the officers or firefighters ultimately leave active service, they begin receiving their monthly retirement payments and can also access the funds that have accrued in their DROP accounts. As originally designed, the retirees could elect to withdraw

all of their DROP funds as one single lump-sum payment, through partial lump-sum payments as needed, through self-designated equal payments over a specific period of time, or through monthly annuity payments calculated on the retiree's life expectancy.

In 2016, word got out that the pension system was substantially underfunded and might require an infusion of extra funds to honor all of its payment obligations. Hearing this news, retirees began withdrawing their DROP funds at increasing rates. In response, the pension system's board of trustees temporarily froze all DROP withdrawals and then adopted a DROP addendum restricting retirees' access to the funds in their DROP accounts. The Texas legislature eventually stepped in and amended the statute that governs public employee pension systems. TEX. REV. CIV. STAT. art. 6243a-1, § 6.14(e); *see* Act of May 30, 2017, 85th Leg., 4 R.S., ch. 318, §§ 1.01–.50, 2017 Tex. Gen. Laws 639, 639–709 (amending TEX. REV. CIV. STAT. art. 6243a-1). Under the amended statute, retirees can no longer withdraw all of their DROP-account funds or take self-designated partial payments when they leave active service; instead, subject to a few limited exceptions, the only way they can access their DROP-account funds is through monthly or annual annuity payments based on their life expectancy.

The appellants in this case all elected to enter the DROP when they began working for the Dallas police and fire departments. When they became eligible for retirement, they chose to remain in active service and allowed their retirement payments to be deposited into

their DROP accounts. No one disputes that the funds in those accounts belong exclusively to the appellants, and not to the State or the pension system. The appellants all allege that they relied on the fact that they could withdraw all or part of their DROP funds when they left active service, but the statutory amendments now prevent them from doing so.

Before the 2017 amendments, for example, Larry Eddington had more than $ 800,000 in his DROP account, and he planned to withdraw substantial partial payments to supplement his pension and pay additional living expenses; but now, he is limited to an annuity payment of just over $ 5,000 per month. LaDonna Degan requested a lump-sum distribution to cover her daughter's medical-school tuition and expenses. John McGuire needed the funds to pay for his daughter's college education and for post-retirement business activities he had planned. Mike Gurley requested a lump-sum distribution to pay tuition for his daughter's last semester of college. Ric Terrones requested distributions to pay for major home repairs. Reed Higgins relied on lump-sum withdrawals to supplement his monthly pension and to pay for major home repairs, and has now had to seek additional employment to provide for his family. Steven McBride used to take out funds two or three times a year to cover his living and home-related expenses. The funds in their DROP accounts—which they each exclusively own—remain the same, but because of the 2017 amendments, these retired first responders can no longer access the funds as provided when they opted to participate in the DROP.

Appendix B

The issue is whether the 2017 amendments violate article XVI, section 66 of the Texas Constitution, which prohibits pension-plan changes that retroactively "reduce or otherwise impair" the first responders' retirement benefits. TEX. CONST. art. XVI, § 66(d), (f). No one disputes that the legislature and the pension system changed the DROP withdrawal provisions as a good-faith effort to resolve an impending financial crisis. And we must presume that they "intended for the law to comply with the United States and Texas Constitutions, to achieve a just and reasonable result, and to advance a public rather than a private interest." *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 381 (Tex. 2002) (citing TEX. GOV'T CODE § 311.021; *Spence v. Fenchler*, 107 Tex. 443, 180 S.W. 597, 605 (Tex. 1915)). "Nevertheless, the Legislature may not authorize an action that our Constitution prohibits." *Id.*

The Court concludes that the monthly retirement payments deposited into an employee's DROP account and the interest the account accrues on those funds qualify as "benefits" that section 66 protects, but the "method of withdrawal" of funds from the account does not. *Ante* at ___. Based on these conclusions, the Court holds that the 2017 amendments did not "reduce or otherwise impair" the retirees' benefits because they did not "take away an accrued or granted annuity payment," affect "the dollar amount of the funds previously credited to DROP," or "negatively affect the amount of money in" the DROP accounts, but instead "merely change[d] the method of withdrawal." *Ante* at ___.

I agree that, because the 2017 amendments did not retroactively decrease the amount of the monthly payments or prospectively lessen the amount of funds in the DROP accounts, they did not "reduce" the first responders' retirement benefits. But the Constitution guarantees that the benefits will not be "reduced *or otherwise impaired*." TEX. CONST. art. XVI, § 66(d), (e), (f). While concluding that the amendments do not "reduce" the benefits, the Court completely ignores whether the amendments "otherwise impair" the benefits.

The Constitution does not define the terms "reduce or otherwise impair," so we must consider their common, ordinary meanings. *See Anadarko Petroleum Corp. v. Hous. Cas. Co.*, 573 S.W.3d 187, 192-93 (Tex. 2019). To "reduce" is "to diminish in size, amount, extent, or number." *Reduce*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1905 (2002). "Otherwise" means "in a different way or manner." *Otherwise*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1598 (2002). To "impair" is "to diminish the value of (property or a property right)." *Impair*, BLACK'S LAW DICTIONARY 754 (7th ed. 1999); *see also Impair*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1131 (2002) ("to make worse: diminish in quantity, value, excellence, or strength"). Giving effect to *all* of the Constitution's words, section 66 prohibits any change that *either* diminishes the amount of the funds in the DROP accounts *or* in some other way diminishes the value of the first responders' right to those funds.

Although the Court begins its analysis by reciting platitudes about the framers' chosen language and how

courts must interpret the Constitution's words, *ante* at ___, it never actually makes any effort to interpret the words "reduce" or "impair" or to distinguish their related but different meanings. Instead, the Court lumps the two terms together and turns immediately to "contextual factors," including the provision's "purpose" and legislative history, the "conditions and spirit of the times, the prevailing sentiments of the people, the evils intended to be remedied, and the good to be accomplished." *Ante* at ___ (citing *Harris Cty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009)). While these contextual factors may be helpful, they can never replace the text itself. We begin with and "rely heavily on the literal text," *Harris Cty. Hosp. Dist.*, 283 S.W.3d at 842, so much so that courts need not consider contextual evidence at all when the meaning of the text itself is plain. *Eddington*, ___ S.W.3d at ___, 2019 Tex. LEXIS 243 at *14, 2019 WL 1090799, at *5; *see also Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997) ("When interpreting our state Constitution, we rely heavily on its literal text and are to give effect to its plain language." (citations omitted)). Inexplicably, the Court in this case ignores the text and considers only the context instead.

As the Court observes, allowing access only through monthly lifetime annuity payments does not diminish the amount of funds in the DROP accounts. *Ante* at ___. But it does diminish the value of the first responders' right to those funds. Everyone agrees the first responders are the exclusive owners of the funds in their DROP accounts. These funds are "accrued" benefits—those "that have been earned by service, not those that may be earned

by future service." *Eddington*, ___ S.W.3d at ___, 2019 Tex. LEXIS 243 at *12, 2019 WL 1090799, at *4. As the exclusive owners of the funds, the first responders enjoy a "bundle of rights" that includes the right to possess, use, and transfer those funds as they may wish, and to exclude others from doing the same. *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 382-83 (Tex. 2012) ("Some of the key rights in American jurisprudence that make up the bundle of property rights include the rights to possess, use, transfer and exclude others.") (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979); *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945)). Prior to the 2017 amendments, the first responders had the legal right to exercise that "bundle of rights" whenever they left active service. After the amendments, they may no longer exercise their bundle of rights as they see fit. Instead, the pension system enjoys the right to possess, use, and transfer the funds as it sees fit, so long as it does not reduce the total amount of those funds. The amendments diminished the value of the funds to those who actually own them, and thus "otherwise impaired" the benefits.

As the Court notes, "nothing in Section 66's text 'suggests that *all* retirement plan terms are protected benefits.'" *Ante* at ___ (quoting *Eddington*, ___ S.W.3d at ____, 2019 Tex. LEXIS 243,2019 WL 1090799, at *4-*5) (emphasis added). A prospective-only change in the formula for calculating the amount of future payments, which does not in any way reduce or impair the payments that have already been earned, does not violate section 66. *Van Houten v. City of Fort Worth*, 827 F.3d 530, 538

(5th Cir. 2016). Nor does a prospective-only change in the interest rate those funds may earn in the future. *Eddington*, ___ S.W.3d at ___, 2019 Tex. LEXIS 243 at *12, 2019 WL 1090799, at *5. But a change that restricts or prohibits access to funds already earned does. Funds previously deposited into a first responder's DROP account are "protected benefits," and section 66 prohibits any plan-term change that retroactively "reduces or otherwise impairs" those benefits. The change at issue here did not merely prospectively alter a contractual right. Instead, it diminished the value of an accrued property right by restricting access to that property. While it did not "reduce" the amount of the funds accrued, it "otherwise impaired" those benefits in violation of section 66.

By conceding that "an outright denial of access to these funds might reasonably be considered an impairment," the Court acknowledges that the Constitution protects the first responders' *access* to the funds in their DROP accounts. *Ante* at ___. Yet contrary to the reasons the Court provides for its ultimate holding, an outright denial of access to the funds would not "negatively affect the amount of money in" the DROP accounts. *Ante* at ___. Nevertheless, the Court concedes that a denial of access would "impair" the benefits even though it wouldn't "reduce" them. Having made that concession, the only remaining question is: how much of an "impairment" does it take to violate the Constitution? Could the pension system delay all DROP-account withdrawals for a period of fifty years, or twenty-five, or ten, or two? Could it limit withdrawals to no more than $ 10,000, $ 1,000, $ 100, or even $ 10 per month?

The Constitution answers that question: neither the legislature nor the pension system may "reduce" (*diminish* the amount) or "otherwise" (in any other way) "impair" (*diminish* the value of) the funds in the DROP accounts. It does not prohibit only changes that "reduce or completely impair," or "substantially impair," or "unreasonably impair" the benefits; it prohibits changes that "reduce or *otherwise* impair" the benefits. We need not engage in the kind of line-drawing to which the Court alludes, because the Constitution's text leaves no room for it.

To be sure, the 2017 amendments did not completely eliminate the first responders' DROP benefits or outright deny access to them, but that's not what the Constitution prohibits. These appellants elected to participate in the DROP, agreed to continue working once they became eligible for retirement, and permitted their retirement payments to be deposited into an account they could not access until they ultimately left active service. But they did all this under a plan that gave them the right to decide at that point whether to withdraw all of their funds, withdraw partial payments, or fund an annuity based on their life expectancy. By retroactively depriving them of that right and forcing them to accept only lifetime annuity payments, the 2017 amendments "otherwise impaired" the accrued DROP benefits by diminishing their value to their exclusive owners. Because the Court holds otherwise, I respectfully dissent.

_____

Jeffrey S. Boyd
Justice

Opinion delivered: January 31, 2020

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 20, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10423

LADONNA DEGAN; RIC TERRONES; JOHN MCGUIRE; REED HIGGINS; MIKE GURLEY; LARRY EDDINGTON; STEVEN MCBRIDE,

Plaintiffs-Appellants,

v.

THE BOARD OF TRUSTEES OF THE DALLAS POLICE AND FIRE PENSION SYSTEM,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-1596.

March 20, 2019, Filed

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

Appendix C

PER CURIAM:*

Several beneficiaries of the City of Dallas pension fund for police and firefighters (collectively "Plaintiffs") sued the City over changes to the pension fund they contend violate the United States and Texas Constitutions. Because we conclude that the Texas constitutional questions should be certified to the Supreme Court of Texas and that the resolution of those questions will impact the case as a whole, we certify the questions set forth below and stay the remainder of the case pending the outcome in the Supreme Court of Texas (i.e., whether certification is accepted and, if it is, what result is reached).

We briefly discuss the facts and the arguments and then articulate the certified question.

I. BACKGROUND

The City of Dallas has provided its police and firefighters a pension fund program since at least 1997. The pension fund was created in accordance with state law and is administered by the Board of Trustees of the Dallas Police and Fire Pension System ("the Board").

Among the advantages of the pension fund are Deferred Retirement Option Plans or DROP accounts. DROP accounts are a statutory creation of the Texas

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

legislature. *See* Tex. Rev. Civ. Stat. Ann. art. 6243a-1, § 6.14 (2011).[1] They were created for City employees who reach retirement age but who elect to continue working. *See id.* § 6.14(a). Rather than retiring and receiving the pension funds they would be entitled to, employees continue working and the money they would have received each month under the pension is credited to an individual DROP account. *See id.* § 6.14(c). There, the employees' money continues to garner interest. *See id.* § 6.14(c). Once employees leave active service, they begin receiving their monthly pension payments instead of the payments being credited to the DROP account. *Id.* § 6.14(a). They can also begin accessing the funds that previously built up in their DROP account. *Id.* § 6.14(a). By statute, employees were previously able to elect one of three ways to receive the DROP funds that were paid on top of their remaining pension benefits: (1) as "a single-sum distribution," (2) as "an annuity to be paid in equal monthly payments for the life of the member," or (3) as "substantially equal monthly or annual payments" in an amount designated by the member. *Id.* § 6.14(d).

The pension fund began to suffer various financial problems. In 2014, the Board proposed reducing the interest rate that applied to the increasingly dominant DROP accounts. *See Eddington v. Dall. Police & Fire Pension Sys.*, No. 17-0058, 589 S.W.3d 799, 2019 Tex. LEXIS 243, 2019 WL 1090799, at *2 (Tex. Mar. 8, 2019). Members of the fund approved the proposal and the

1. The allegations in the complaint cover 1997 to the present, and article 6243a-1 has been amended multiple times during that period.

interest rate began to gradually drop. *Id.* But losses in the pension fund continued. The problem worsened when DROP participants increasingly began electing lump-sum withdrawals instead of spreading them out over time. The pension fund entered the same downward spiral that happens during a bank run.

Mayor Michael Rawlings halted the run in December 2016 by filing a state court lawsuit against the Board and the pension fund. He received a temporary restraining order prohibiting the pension fund from paying out funds from any DROP accounts. The next month, the Board adopted an addendum that temporarily prohibited any DROP withdrawals except for "required minimum distributions and unforeseeable emergency withdrawals." The addendum nullified "all DROP withdrawal requests on file with [Dallas Police and Fire Pension], including requests for both lump sum payments and monthly installments." After the temporary freeze, participants would then receive distributions based on their pro-rata share of DROP funds and a formula defined by the plan. Retirees could also elect to receive an annual distribution of $30,000 or $36,000 depending on the year. Finally, the addendum granted retirees the option of withdrawing funds for certain unforeseeable emergencies.

Months after the Mayor's and Board's actions, the Texas Legislature amended the pension statute. *See* Act of May 30, 2017, 85th Leg., R.S., ch. 318, 2017 Tex. Sess. Law Serv. Ch. 318 (H.B. 3158) (amending, *inter alia*, Tex. Rev. Civ. Stat. Ann. art. 6243a-1). Instead of permitting retirees to elect lump-sum or adjusted monthly payments,

the statute now permits only an annuitized option. *See* Tex. Rev. Civ. Stat. Ann. art. 6243a-1, § 6.14(e). By its terms, the change applies to those who had already left active service and were receiving DROP payments, as well as those who would leave active service in the future. *Id.*

Many years before these events, Texas voters had approved a constitutional amendment protecting public retirement systems like Dallas's pension fund. The amendment is embodied in article XVI, section 66 of the Texas Constitution. At its heart, the amendment protects "service . . . retirement benefits" from being "reduce[d] or otherwise impair[ed]." Tex. Const. art. XVI, § 66(d). ("Section 66").

After the pension statute was amended, Plaintiffs filed suit under the United States Constitution's Takings Clause and under the Texas Constitution challenging their inability to obtain lump-sum distributions. Plaintiffs consist of individuals who elected lump-sum withdrawals and adjusted monthly payments. Each made their election prior to the 2017 amendment of the pension statute. Some had already begun receiving adjusted monthly payments, which were discontinued in favor of the annuitized amount. The district court ruled against the Plaintiffs, and they timely appealed.

II. DISCUSSION

The parties disagree about whether DROP accounts are "service retirement benefits" (and therefore protected by Section 66) and whether the DROP withdrawal change

reduces or impairs the benefit (and therefore prohibited by Section 66). Plaintiffs filed an opposed motion to certify the Section 66 questions to the Supreme Court of Texas.[2] The motion was carried with the case and ultimately referred to this panel for consideration of the merits of this case and the motion to certify.[3]

The Texas Constitution grants the Supreme Court of Texas the power to answer questions of state law certified by a federal appellate court. TEX. CONST. art. V, § 3-c(a). Texas rules provide that we may certify "determinative questions of Texas law having no controlling Supreme Court [of Texas] Precedent" to the Supreme Court of Texas. TEX. R. APP. P. 58.1.

Generally, three considerations govern the decision to certify. *See Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015). In sum, the three factors are (1) the closeness of the question; (2) considerations of comity in the particular case; and (3) practical limitations

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2. The Board asserts that Plaintiffs failed to make a claim under Section 66. We disagree. Their complaint clearly asserted violations of the Texas Constitution and referenced Section 66. Additionally, the district court considered and ruled upon the constitutionality of the Board's actions in light of Section 66. We thus conclude that the matter is properly before us.

3. In their supplemental briefing after the *Eddington* case issued, Plaintiffs took the position that *Eddington* shows that they should prevail on a key issue and provides "sufficient guidance" on the rest, making certification unnecessary. As discussed below, we do not agree that *Eddington* clearly disposes of the different issues presented here.

such as the possibility of delay and difficulty of framing the issue. *Id.*

We conclude that consideration of these factors warrants certification. First, the question of whether the DROP withdrawal change violates Section 66 is open. In *Eddington v. Dallas Police and Fire Pension System*, a DROP participant challenged the reduction of the interest rate on DROP funds. *See* 2019 Tex. LEXIS 243, 2019 WL 1090799, at *2. The court rejected his claim because "the change was prospective only and did not impact benefits accrued or granted within the meaning of the constitutional provision." *Id.* *1.

It is unclear to what extent, if any, that reasoning applies here and, perhaps unsurprisingly, the parties' supplemental briefing evinces vastly different readings of *Eddington*. According to the complaint, all Plaintiffs had elected how they would receive payments from their DROP accounts before the DROP withdrawal change became effective. Some of them had already received payments for years before the change. The DROP withdrawal change thus seems to retroactively nullify a retiree's election about how to receive funds in a DROP account. Additionally, unlike interest rate changes, the DROP withdrawal change seems to relate to how and when a retiree can access the pension funds they previously accrued or granted benefits; all the funds in the accounts were earned through previous service and then credited based on time since retirement eligibility. This issue is thus much closer than the issue in *Eddington* or our previous case *Van Houten v. City of Fort Worth*,

827 F.3d 530, 538 & 540 n.10 (5th Cir. 2016) (deciding without certification that future, unearned benefits were not "accrued benefits" under Section 66).

The other two factors heavily favor certification. Comity is particularly important here. *Swindol*, 805 F.3d at 522. This case is about the validity of a state statute's application, the interpretation of the state constitution, and the future of municipal pension funds in the state involving critical employees (first responders) of a large city. Finally, no "practical limitations" hinder certification because the Supreme Court of Texas has already analyzed a closely related issue and developed a reputation for a speedy, organized docket. *Id.* No delay is likely, and neither party will be prejudiced by certification. We thus certify two questions to the Supreme Court of Texas.

III. CERTIFIED QUESTIONS

1. Whether the method of withdrawal of funds from Deferred Retirement Option Plan is a service retirement benefit protected under article XVI, section 66 of the Texas Constitution.

2. If the answer to Question 1 is "yes," then whether the Board of the Dallas Police and Fire Pension's System's decision, pursuant to the Texas statute in question, to alter previous withdrawal elections and annuitize the DROP funds over the respective life expectancy of the Plaintiffs violates Section 66 of the Texas Constitution.

We disclaim any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified.

Accordingly, we CERTIFY the foregoing questions, direct the Clerk's Office to forward this opinion to the Supreme Court of Texas to determine whether to accept the certification, and STAY the remainder of this case pending determination by the Supreme Court of Texas.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION, FILED MARCH 14, 2018

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3:17-CV-01596-N

LADONNA DEGAN, *et al.*,

Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE DALLAS POLICE AND FIRE PENSION SYSTEM, *et al.*,

Defendants.

ORDER

This Order addresses (1) Defendant The Board of Trustees (the "Board") of the Dallas Police and Fire Pension System's motion to dismiss Plaintiffs LaDonna Degan, Ric Terrones, John McGuire, Reed Higgins, Mike Gurley, Larry Eddington, and Steven McBride's complaint [75] and (2) the Board's motion to strike Plaintiffs' surreply to the motion to dismiss [89]. For the reasons set forth below, the Court grants both motions.

Appendix D

I. BACKGROUND

The Dallas Police and Fire Pension System (the "Pension System") is a public pension fund that provides comprehensive retirement, death, and disability benefits for approximately 9,300 active and retired City of Dallas police officers and firefighters and their qualified survivors. The Board serves as the governing body of the Pension System. It administers the Pension System according to a Combined Pension Plan Document (the "Plan"), established by Texas law. *See* TEX. REV. CIV. STAT. ANN. art 6243a-1. The Board has "full discretion and authority" to construe and interpret the Plan and "to do all acts necessary to carry out the purpose of" the Plan. Plan § 3.01(s).

The Pension System contains a feature called the Deferred Retirement Option Plan, or "DROP." DROP originally permitted active Pension System members eligible for retirement to continue working at their normal pay rate, while the monthly pension benefits they would have received upon retirement were credited to the members' DROP accounts and held in trust. After leaving active service, a retiree could elect to leave the funds to accrue interest in her DROP account, or withdraw the funds under the procedures set forth in the Plan. The Plan provided:

> The Pension System shall adopt uniform policies from time to time for the deferral of amounts into and the disbursement of amounts from the DROP accounts of DROP participants who have

> terminated Active Service and are eligible for a retirement pension. The policies shall provide flexibility to such DROP participants in . . . making total or partial withdrawals from their DROP accounts to the extent consistent with the qualification of the Plan under Section 401 of the [Internal Revenue] Code and efficient administration.

Plan § 6.14 (e). Under this provision, the Board previously adopted a withdrawal policy that permitted retired DROP participants to withdraw DROP funds in three forms: (1) a lump sum payment of some or all of the retiree's DROP balance; (2) substantially equal payments made over a specific period; or (3) regular installment amounts added to the member's monthly benefit payment. January 14, 2016 DROP Policy § E(3).

In 2016, after negative news about the Pension System surfaced, a run on DROP accounts occurred. On December 5, 2016, City of Dallas Mayor Mike Rawlings filed suit in state district court, seeking a writ of mandamus and injunction prohibiting the Board from distributing DROP funds. On December 8, 2016, the state court entered an unopposed temporary restraining order (the "TRO") prohibiting the Board from distributing any DROP funds pending a temporary injunction hearing. Pursuant to the TRO, the Board directed staff to immediately cease all DROP distributions except for those necessary to satisfy required minimum distribution payments. The Board indicated that it would adopt changes to the DROP policy at a later date.

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On January 12, 2017, the Board adopted a DROP Policy Addendum (the "Original Addendum"). The Original Addendum stated in relevant part:

> Except for required minimum distributions and unforeseeable emergency withdrawals . . . no DROP withdrawals will be available before March 31, 2017 . . . .
>
> As of the effective date of this Addendum, all DROP withdrawal requests on file with [the Pension System], including requests for both lump sum payments and monthly installments, shall be null and void.

January 12, 2017 DROP Policy Addendum §§ 3(a), 4(a).

The Original Addendum set forth three mechanisms for distributing DROP funds beginning March 31, 2017: (1) pro rata shares of a monthly "distribution pool" as determined by the Board; (2) at the retiree's election, a minimum annual distribution of $30,000 for 2017 and $36,000 for subsequent years; and (3) distributions due to unforeseeable emergencies. *Id.* §§ 4–7. After the Board adopted the Original Addendum, Mayor Rawlings sought no further relief in state court. He later nonsuited his claims. Shortly after the Board adopted the Original Addendum, Plaintiffs filed this suit, claiming that the Original Addendum deprived them of their property interests in violation of their substantive and procedural due process rights [1].

Meanwhile, the Texas Legislature was working on proposed changes to the Pension System. On May 23 and 25, respectively, the Texas Senate and House each unanimously passed H.B. 3158, which amends the Dallas Pension statute, TEX. REV. CIV. STAT. ANN. art 6243a-1. Act of May 30, 2017, 85th Leg., R.S., ch. 318, § 1.01. The Texas Governor signed H.B. 3158 into law on May 31, 2017. Among other things, H.B. 3158 changes the way DROP funds are distributed. In particular, it mandates that, effective September 1, 2017, DROP funds are to be annuitized and paid to DROP participants over their projected life expectancies. Members can thus no longer withdraw their DROP funds as a lump sum or roll over the balances of their DROP accounts into their individual retirement accounts ("IRAs").

On June 8, 2017, the Board adopted an amendment to the Original Addendum (the "Revised Addendum") reflecting the changes wrought by H.B. 3158. Lump sum distributions are no longer available under the Revised Addendum. Instead, DROP members will receive annuitized monthly or annual DROP distributions throughout their projected life expectancies. Participants may also apply for hardship-based distributions before or after annuitization. The Revised Addendum will remain in place until the Board implements new rules and policies pursuant to H.B. 3158. H.B. 3158 and the Revised Addendum have no net effect on the value of the DROP funds; they merely change the timing of DROP distributions. *See* H.B. 3158 § 1.42; *see also* June 8, 2017 Amendment to DROP Policy Addendum.

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On August 1, 2017, Plaintiffs amended their complaint [67]. Plaintiffs now allege that the Original Addendum, H.B. 3158, and the Revised Addendum deprive them of protected property interests without due process in violation of the Fourteenth Amendment to the United States Constitution. Plaintiffs further claim that the Board's actions surrounding H.B. 3158 effect a taking without just compensation in violation of the Fifth Amendment Takings Clause. Finally, Plaintiffs seek a declaratory judgment that the Board's implementation of H.B. 3158 violates both the United States and Texas Constitutions. The Board now moves to dismiss Plaintiffs' amended complaint [75]. For the reasons set forth below, the Court grants the Board's motion.

II. THE RULE 12(B)(6) LEGAL STANDARD

When considering a Rule 12(b)(6) motion to dismiss, a court must determine whether the plaintiff has asserted a legally sufficient claim for relief. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). A viable complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To meet this "facial plausibility" standard, a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court generally accepts well-pleaded facts as true and construes the complaint in the light most favorable to the plaintiff. *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 816 (5th Cir. 2012). But a court does not accept as true "conclusory

allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007). A plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted).

In ruling on a Rule 12(b)(6) motion, a court generally limits its review to the face of the pleadings. *See Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999). However, a court may also consider documents outside of the pleadings if they fall within certain limited categories. First, a "court is permitted . . . to rely on 'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). Second, a "written document that is attached to a complaint as an exhibit is considered part of the complaint and may be considered in a 12(b)(6) dismissal proceeding." *Ferrer*, 484 F.3d at 780. Third, a "court may consider documents attached to a motion to dismiss that 'are referred to in the plaintiff's complaint and are central to the plaintiff's claim.'" *Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010) (quoting *Scanlan v. Tex. A & M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003)). Finally, "[i]n deciding a 12(b)(6) motion to dismiss, a court may permissibly refer to matters of public record." *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994)

(citations omitted); *see also, e.g.*, *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (stating, in upholding district court's dismissal pursuant to Rule 12(b)(6), that "the district court took appropriate judicial notice of publicly-available documents and transcripts produced by the [Food and Drug Administration], which were matters of public record directly relevant to the issue at hand"). The Court takes judicial notice of the public records cited in the Board's motion to dismiss, including the Plan, records of the Board's actions, and the Dallas Mayor's suit to enjoin DROP distributions.

III. THE COURT GRANTS THE BOARD'S MOTION TO DISMISS PLAINTIFFS' DUE PROCESS CLAIMS

Plaintiffs first allege that the Board's implementation of H.B. 3158 and the Revised Addendum violate their Fourteenth Amendment due process rights. Plaintiffs argue that they have protected property interests in their earned and vested DROP funds. The Court agrees with Plaintiffs that DROP funds can indeed constitute property. *See, e.g.*, *Stavinoha v. Stavinoha*, 126 S.W.3d 604, 612 (Tex. App. – Houston [14th Dist.] 2004, no pet.) (treating vested DROP benefits as community property); *see also Ridgely v. FEMA*, 512 F.3d 727, 735 (5th Cir. 2008) (stating that constitutionally protected property interests "are not created by the Constitution itself . . . . 'Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source' and 'that secure certain benefits and that support claims of entitlement to those benefits.'"

(quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972))). But even though Plaintiffs have identified a protected property interest, determining whether a due process violation has occurred requires further analysis.

A. Plaintiffs Have Not Shown A Deprivation of Property

Plaintiffs have failed to show that they were "deprived" of their DROP funds so as to trigger procedural due process protections. Plaintiffs argue that their property interests in the DROP funds necessarily entail the right to unlimited on-demand withdrawals of the funds. But Plaintiffs point to no state law authorizing such unlimited access. Nor does the Plan grant Plaintiffs unfettered access to their DROP accounts. Instead, the Plan permits DROP withdrawals only to the extent that such withdrawals are consistent with efficient Plan administration:

> The Pension System shall adopt uniform policies from time to time for the deferral of amounts into and the disbursement of amounts from the DROP accounts of DROP participants who have terminated Active Service and are eligible for a retirement pension. The policies shall provide flexibility to such DROP participants in . . . making total or partial withdrawals from their DROP accounts to the extent consistent with the qualification of the Plan under Section 401 of the [Internal Revenue] Code and *efficient administration*.

Plan § 6.14(e) (emphasis added). And neither H.B. 3158 nor the Revised Addendum actually takes Plaintiffs' DROP funds. Instead, the provisions merely alter the timing of when Plaintiffs receive their funds. Plaintiffs will receive all of their DROP funds, including previously credited interest plus additional interest at federal treasury rates. *See* H.B. 3158 § 1.42(e-2); *see also* June 8, 2017 Amendment to DROP Policy Addendum. The actuarial value of Plaintiffs' DROP funds thus remains unchanged. As a result, Plaintiffs cannot demonstrate that they have been deprived of their interests in the DROP funds in a constitutional sense. Plaintiffs' failure is fatal to both their due process and takings claims.[1]

B. Plaintiffs Have Failed to State a Procedural Due Process Claim

Plaintiffs argue that H.B. 3158 and the Revised

1. Whether Plaintiffs challenge the Original Addendum in addition to H.B. 3158 and the Revised Addendum is unclear. For example, Plaintiffs' Amended Complaint asserts that the Original Addendum "deprived Plaintiffs of access to their DROP funds, without any meaningful opportunity to be heard[.]" Am. Compl. ¶ 35 [67]. But in their response to the Board's motion to dismiss, Plaintiffs apparently view the Original Addendum favorably, arguing that "the arbitrariness of the [Revised Addendum] is demonstrated by its deviation from the [Original] Addendum adopted by the Board in January 2017." Pls.' Resp. 18 [86]. Because the Original Addendum is no longer in place, the issue appears to be moot. And whether or not Plaintiffs challenge the Original Addendum, Plaintiffs' failure to allege a deprivation of their DROP funds – as a result of either the Original or the Revised Addendum – necessarily dooms both their due process and takings claims.

Addendum deprive them of their property without due process of law. Even if Plaintiffs could demonstrate that they were deprived of their interests in the DROP funds – which they have not – Plaintiffs have failed to show that (1) they were entitled to due process protections and (2) even if they were entitled to procedural protections, the procedures the Board afforded Plaintiffs were insufficient.

"Procedural due process imposes constraints on governmental decisions [that] deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the . . . Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The Supreme Court "consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Id.* at 333. However, "[w]here a rule . . . applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption," so legislative bodies may implement general policies without providing notice-and-hearing procedures to all affected parties. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). As a result, "it is well established law that once an action is characterized as legislative, procedural due process requirements do not apply." *Jackson Court Condos., Inc. v. City of New Orleans*, 874 F.2d 1070, 1074 (5th Cir. 1989). This is because when a legislative action "affects a general class of persons, those persons have all received procedural due process – the legislative process." *Cnty. Line Joint Venture v. City of Grand Prairie, Tex.*, 839 F.2d 1142, 1144 (5th Cir. 1988).

Here, the Texas Legislature's passage of H.B. 3158 was unquestionably a legislative act. As a result, Plaintiffs were not entitled to individualized notice and hearing procedures with respect to the bill. *See Jackson*, 874 F.2d at 1074. And the Revised Addendum merely amends the Plan to comply with H.B. 3158; it imposes no additional burdens on Plaintiffs. Because H.B. 3158 was a legislative action, and the Revised Addendum merely implements H.B. 3158, Plaintiffs "all received procedural due process – the legislative process." *Cnty. Line*, 839 F.2d at 1144.

Further, even if Plaintiffs were entitled to such additional procedures, Plaintiffs have failed to show that the procedures the Board afforded them were insufficient.[2] Plaintiffs do not allege that they were denied notice of and an opportunity to participate in the legislative proceedings that resulted in H.B. 3158. And the Board adopted both the Original and Revised Addenda at duly noticed public meetings at which Plaintiffs had an opportunity to be heard. This is all procedural due process requires. *See, e.g., Marco Outdoor Adver., Inc. v. Reg. Transit Auth.*, 489 F.3d 669, 673 (5th Cir. 2007) ("The 'root requirement' of due process is 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" (emphasis in original) (quoting *McKesson Corp. v. Div. of Alcoholic Beverages*

2. Plaintiffs do not attempt to address what additional or substitute procedures would have satisfied due process requirements here. Instead, they assert only that the Board "took away [Plaintiffs'] property rights without due process being afforded to Plaintiffs." Am. Compl. ¶ 29 [67].

and Tobacco, Dept. of Bus. Regulation of Fla., 496 U.S. 18, 37 (1990)). The Court thus holds that Plaintiffs have failed to state a Fourteenth Amendment procedural due process claim.[3]

C. Plaintiffs Have Failed to State a Substantive Due Process Claim

Plaintiffs next assert that H.B. 3158 and the Revised Addendum violate their substantive due process rights. As an initial matter, the substantive due process doctrine "prohibits only the most egregious official conduct . . . and will rarely come into play." *Jordan v. Fisher*, 823 F.3d 805, 812–13 (5th Cir. 2016) (internal quotation marks omitted). Substantive due process protections "have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (citations omitted). Where substantive due process claims do not implicate a fundamental right, the Fifth Circuit applies rational basis review to the challenged actions. *Reyes v. NTTA*, 861 F.3d 558, 561 (5th Cir. 2017). "[G]overnmental actions involving social and economic regulation that do not interfere with the exercise of fundamental rights . . . are presumed to be constitutionally valid." *Yur-Mar, L.L.C. v. Jefferson Par. Council*, 451 Fed. App'x 397, 401 (5th Cir. 2011) (citations omitted). Plaintiffs do not allege that either H.B. 3158 or the Revised Addendum implicates

3. In fact, Plaintiffs appear to concede that they have not stated a procedural due process claim. Plaintiffs failed to address the Board's procedural due process arguments in their response to the Board's motion to dismiss.

any fundamental right. Indeed, they appear to recognize that rational basis review applies. *See* Pls.' Resp. at 18 (discussing rational basis test). Because the challenged regulations are economic in nature and implicate no fundamental rights, the Court will review them under the "notoriously deferential" rational basis standard. *Reyes*, 861 F.3d at 561–62.

To survive rational basis review, the government's actions must be "rationally related to a legitimate government interest." *Id.* at 561 (citing *FM Props. Op. Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996)). The government's asserted interest "need not be the actual or proven interest, as long as there is a connection between the policy and a 'conceivable' interest." *Reyes*, 861 F.3d at 63 (quoting *FM Props.*, 93 F.3d at 175).

Here, the Board's asserted interests include improving the Pension System's projected solvency and preserving its ability to provide benefits to the approximately 9,300 police officers and firefighters it serves. Given that the Pension System was projected to become insolvent within the next decade if the Texas Legislature and the Board did not act, the Board's asserted interests were certainly legitimate. And H.B. 3158 and the Revised Addendum are at the very least rationally related to these interests. Among other things, they limit the Pension System's unrestricted cash outflows, reduce its unfunded liability, and increase its funded ratio. Because the challenged actions are at least rationally related to the Board's legitimate interests, Plaintiffs have failed to state a substantive due process claim upon which relief can be granted. *See Reyes*, 861 F.3d at 561.

IV. THE COURT GRANTS THE BOARD'S MOTION TO DISMISS PLAINTIFFS' TAKINGS CLAIM

Plaintiffs next assert that H.B. 3158 and the Revised Addendum deprive them of their DROP funds without just compensation in violation of the Fifth Amendment Takings Clause. As set forth in section III(A) *supra*, Plaintiffs have not shown that they were deprived of their DROP funds so as to trigger any constitutional protections. But even if Plaintiffs had sufficiently alleged a deprivation, the Court holds that Plaintiffs have failed to state a takings claim for other, independent reasons.[4]

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4. The Board asserts that the Fifth Circuit's recent decision in *Van Houten* means that legislative changes to pension benefits categorically "cannot be the basis of a . . . takings clause challenge." 827 F.3d at 540. But *Van Houten* addressed only prospective changes to *unvested* pension benefits. The *Van Houten* court did note that any contractual right to pension benefits "is a right expressly 'made subject to the reserved power of the Legislature to amend, modify, or repeal the law upon which the pension system is erected.'" 827 F.3d at 539–40 (quoting *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937)). But it also recognized that the Texas Legislature passed Article XVI, Section 66 of the Texas Constitution ("Section 66") specifically to overturn *Trammell* in the context of *vested* pension benefits. *Van Houten*, 827 F.3d at 537–38 ("As we have interpreted it, Section 66 reverses the core unfairness of the *Trammell* decision by ensuring that *earned benefits* cannot be reduced." (emphasis added)). Indeed, the Texas Supreme Court case the Fifth Circuit referenced in its takings discussion specifically stated that its analysis might have differed had Section 66 been at issue. *See Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 16 (Tex. 2015). But because the City of Houston had opted out of Section 66, the issue was not presented. *Id.* Because Plaintiffs have vested interests in their DROP funds, *Van Houten* does not categorically bar their takings claim.

Appendix D

A. Legal Standard

"The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth [Amendment]. . . provides that private property shall not 'be taken for public use, without just compensation.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citations omitted). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Id.* at 537 (citations omitted). This is known as a *per se* taking. *Id.* at 538. However, the Supreme Court has "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Id.* In determining "how far is 'too far,'" however, courts "must remain cognizant that 'government regulation – by definition – involves the adjustment of rights for the public good.'" *Id.* (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)). The Supreme Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Indeed, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Lingle*, 544 U.S. at 538 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

The Supreme Court has established two "relatively narrow" categories of government action that generally

will qualify as *per se* takings. *Lingle*, 544 U.S. at 538. First, "where government requires an owner to suffer a permanent physical invasion of her property –however minor – it must provide just compensation." *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). Second, where government action "completely deprive[s] an owner of '*all* economically beneficial use[]' of her property," a "total regulatory taking" has occurred and the government must pay just compensation. *Lingle*, 544 U.S. at 538 (emphasis in original) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019, 1026 (1992)).

Outside of these categories, courts examine regulatory takings challenges under the standards set forth in *Penn Central*. *Lingle*, 544 U.S. at 538. The *Penn Central* Court acknowledged that it had been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but it did identify "'several factors that have particular significance.'" *Id.* (quoting *Penn Cent.*, 438 U.S. at 124). *Penn Central* focused on three factors: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the 'character of the governmental action' – for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Lingle*, 544 U.S. at 538–39 (quoting *Penn Cent.*, 438 U.S. at 124).

B. Plaintiffs Have Failed to State a *Per Se* Takings Claim

Plaintiffs argue that the Board, through H.B. 3158 and the challenged Addenda, has "unlawfully seized the funds held in Plaintiffs' DROP accounts, denying Plaintiffs' and the class members' ability to direct how and when such funds are distributed." Pls.' Resp. 7 [86]. Plaintiffs thus appear to be asserting a *per se* takings claim. *See Lingle*, 544 U.S. at 537–38. Plaintiffs analogize their asserted deprivation to the takings at issue in *Loretto*, 458 U.S. 419, and *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015). But each of those cases involved an actual physical invasion or deprivation of property. In *Loretto*, the Supreme Court held that a state law requiring landlords to permit the direct physical attachment of permanent cable installations on their property effected a *per se* taking. 458 U.S. at 438. And in *Horne*, the Court held that a *per se* taking occurred when the government required plaintiff raisin growers to transfer actual raisins, along with title to the raisins, to the government. 135 S. Ct. at 2428. Plaintiffs have not alleged any such physical invasion or deprivation here. As a result, Plaintiffs have failed to state a *per se* takings claim.

C. Plaintiffs Have Failed to State a Regulatory Takings Claim

Plaintiffs have also failed to state a regulatory takings claim.[5] "A regulatory restriction on use that does not

5. Whether Plaintiffs intend to assert a regulatory takings claim is unclear. For the sake of completeness, the Court examines

entirely deprive an owner of property rights may not be a taking under *Penn Central*," 438 U.S. 104. *Horne*, 135 S. Ct. at 2429. Thus, the Court analyzes regulatory takings claims under the factors set forth in *Penn Central* to determine whether a compensable taking has occurred. Here, the Court holds that Plaintiffs have failed to sufficiently allege that H.B. 3158 and the Addenda effect a regulatory taking of their DROP funds.

First, the Court examines the economic impact of the challenged regulations. *See Penn Cent.*, 438 U.S. at 124. The economic impact of H.B. 3158 and the Addenda, while not wholly inconsequential, is not so severe as to constitute a regulatory taking of Plaintiffs' property. H.B. 3158 and the Addenda do not deprive Plaintiffs of their DROP funds. Instead, they merely alter the timing for Plaintiffs to receive their funds. And Plaintiffs may request DROP withdrawals through hardship procedures established by the Board, further mitigating the economic impact of the challenged provisions. A regulation does not effect a taking solely because the property owner cannot make "the most beneficial use of the property." *Id.* at 125. Although Plaintiffs are no longer able to withdraw their DROP funds at will, the amount of the funds has not been reduced. Plaintiffs will receive the actuarial equivalent of their DROP funds via the annuitization provision. The economic impact of H.B. 3158 and the Addenda thus weighs against the conclusion that a regulatory taking occurred.

Plaintiffs' takings claim under both the *per se* and regulatory frameworks.

Second, the Court examines the extent to which the challenged regulations interfere with the parties' distinct investment-backed expectations. *Id*. at 124. Plaintiffs imply that they participated in DROP under the assumption that, once they were eligible to access their DROP funds, they could continue to withdraw the funds at will. But the Plan itself authorized the Board to adjust DROP distribution policies as necessary for efficient Plan administration. *See supra* Section I. The Plan also authorized members themselves to amend the Plan if certain requirements were satisfied. Plan § 8.01. And, as stated above, Plaintiffs' DROP funds have not actually decreased; instead, Plaintiffs will receive the annuitized funds over time. "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *Custom Seal, Inc. v. Duro-Last Roofing, Inc.*, No. 6:11-CV-122, 2012 WL 12930886, at *5 (E.D. Tex. Sept. 20, 2012) (quoting *N.Y. Cent. R. Co. v. White*, 243 U.S. 188, 198 (1917)). Indeed, "[i]f every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 270 n.24 (1994) (quoting L. Fuller, The Morality of Law 60 (1964)). The Court thus holds that the second *Penn Central* factor also weighs against holding that a regulatory taking occurred.

Finally, the Court examines the "character of the governmental action." *Penn Cent.*, 438 U.S. at 124. The Supreme Court has stated that "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program

adjusting the benefits and burdens of economic life to promote the common good." *Id.* (citations omitted). Here, the Board has not "physically invade[d] or permanently appropriate[d] any of [Plaintiffs'] assets for its own use." *Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 225 (1986). Instead, it merely has changed the way that DROP funds will be distributed going forward. Such an "adjustment to the benefits and burdens" of the Pension System's members does not effect a regulatory taking of Plaintiff's DROP funds. After examining the *Penn Central* factors in the particular circumstances of this case, the Court thus holds that Plaintiffs have failed to state a regulatory takings claim.

V. THE COURT GRANTS THE BOARD'S MOTION TO DISMISS PLAINTIFFS' CLAIM FOR DECLARATORY JUDGMENT

Plaintiffs seek a declaratory judgment that the Board's implementation of H.B. 3158 violates the United States and Texas Constitutions because it deprives them of their vested property rights in the DROP funds. As set forth above, Plaintiffs have failed to sufficiently allege that such a deprivation occurred. The Court thus grants the Board's motion to dismiss Plaintiffs' declaratory judgment claim.

VI. H.B. 3158 AND THE REVISED ADDENDUM DO NOT VIOLATE THE TEXAS CONSTITUTION

Finally, Plaintiffs argue that H.B. 3158 and the Revised Addendum unlawfully impair their interests in

the DROP funds in violation of the Texas Constitution.[6] In 2003, the Texas Legislature added Article XVI, section 66 ("Section 66") to the Texas Constitution. Section 66 reads:

> (d) On or after the effective date of this section, a change in service or disability retirement benefits or death benefits of a retirement system may not reduce or *otherwise impair* benefits accrued by a person if the person:
>
> > (1) could have terminated employment or has terminated employment before the effective date of the change; and
> >
> > (2) would have been eligible for those benefits, without accumulating additional service under the retirement system, on any date on or after the effective date of the change had the change not occurred.
>
> (e) Benefits granted to a retiree or other annuitant before the effective date of this section and in effect on that date may not be reduced or *otherwise impaired*.

TEX. CONST. ART. XVI § 66 (emphasis added).

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6. Plaintiffs do not formally assert an independent Section 66 claim, but the Court considers their Section 66 argument for the sake of completeness.

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The history of Section 66 demonstrates that the provision concerns changes in vested benefits themselves – not changes in the timing of when pensioners receive them. In *City of Dallas v. Trammell*, the Texas Supreme Court held that a retiree's interest in his accrued monthly pension payments was subordinate to the Texas Legislature's right to reduce the amount of his accrued benefits thereunder. 101 S.W.2d 1009, 1011, 1013 (Tex. 1937). The Texas Legislature intended Section 66 to reverse *Trammell* by prohibiting the reduction or impairment of such benefits. Two recent decisions construing Section 66 illustrate this point.

The first decision is *Van Houten v. City of Fort Worth*, a case involving the city of Fort Worth's police officers and firefighters' pension fund. 827 F.3d 530 (2016). The city enacted pension reforms that prospectively decreased (1) the rate at which future retirement benefits accrued and (2) cost-of-living adjustments to the plan for current employees. *Id.* at 533. A group of Fort Worth police officers and firefighters sued the city, alleging that the pension reforms violated Section 66. *Id.* at 532. The district court held that the pension reforms complied with Section 66 and granted summary judgment for the city. *Id.* at 533. The Fifth Circuit affirmed. *Id.* at 532. It reasoned that (1) Section 66(d) "prohibits the impairment of *accrued* benefits for *vested* employees"; (2) "[t]here is an understood difference between the concepts of benefit *accrual* and *vesting*"; and (3) "[t]his understanding essentially resolves the case." *Id.* at 534. (emphases in original). The Court then noted that:

> When it comes to public pension protection, Texas is known to be an outlier. In 1937, the Texas Supreme Court decided [*Trammell*] and held that pensioners' rights to accrued benefits were subject to the legislative power of the state "to amend, modify, or repeal the law upon which the pension system is erected." [101 S.W.2d at 1014]. The ruling meant that C.W. Trammell, a retired Dallas police officer whose monthly pension was cut from $183.33 to $72.16, had no recourse. While other states enacted laws to protect public pensions from similar cuts, Texas held its course – until the enactment of Section 66. As one Texas appellate court put it, Section 66 "was proposed and adopted specifically to change the result of the *Trammell* decision, albeit 70 years later." *Davidson v. McLennan Cty. Appraisal Dist.*, No. 10-11-00061- CV, 2012 WL 3799149, at *5 (Tex. App. – Waco Aug. 30, 2012, pet. denied) (mem. op.).
>
> As we have interpreted it, Section 66 reverses the core unfairness of the *Trammell* decision by ensuring that earned benefits cannot be reduced. By going no further, our interpretation of Section 66 stays true to Texas' long-held flexible approach permitting municipalities to revise their pension plans in light of changing economic conditions.

Van Houten, 827 F.3d at 537–38. *Van Houten* thus stands for the propositions that Section 66 (1) reverses the core

holding in *Trammell* and (2) permits prospective changes to the public pension plans it covers. *Id.* at 538. But *Van Houten* leaves open the question at issue here: that is, what constitutes an "impairment" under Section 66.

The second recent case construing Section 66 is *Eddington v. Dallas Police and Fire Pension System*, 508 S.W.3d 774 (Tex. App. – Dallas 2016, pet. filed). *Eddington* is a Dallas Court of Appeals case arising from the Board's decision to amend the Plan to reduce future DROP account interest rates and require participants to accelerate their withdrawals of DROP funds. *Id.* A group of current and retired City police officers sued the Pension System and the Board's chair, asserting that the amendments violated Section 66's prohibition on reducing or impairing retirement benefits. *Id.* at 775. The trial court ruled that the challenged amendments did not violate Section 66 and dismissed the plaintiffs' claims. *Id.* The Dallas Court of Appeals affirmed. *Id.* at 776. At the outset, the court noted that the parties did "not dispute that the Texas Legislature's passage of Section 66 was intended to reverse the result of *Trammell*." *Id.* at 784. Then, assuming without deciding that DROP was a "service retirement benefit" for Section 66 purposes, the court held that the DROP interest rate was "not among the 'benefits' protected by Section 66." *Id.* at 788 (citing *Van Houten*, 827 F.3d at 535). The court also rejected the plaintiffs' argument that the accelerated DROP withdrawal requirements impaired or reduced their DROP benefits. *Eddington*, 508 S.W.3d at 789. The court noted that, other than being prevented from benefitting from the DROP interest rate, the plaintiffs had not shown

any reduction or impairment in their DROP benefits as a result of the accelerated withdrawal requirement. *Id.*

Both *Van Houten* and *Eddington* demonstrate that the Texas Legislature intended Section 66 to reverse *Trammell*. And *Trammell* approved reductions in the *amount* of pension benefits – not changes in the timing by which pensioners might receive them. 101 S.W.2d at 1013. Thus, Section 66 can be reasonably interpreted as protecting the value, not the distribution timing, of covered pension benefits. But Plaintiffs now contend that, by changing the timing of their receipt of the DROP benefits, H.B. 3158 and the Revised Addendum impair the benefits in violation of Section 66. The Court disagrees.

As an initial matter, the parties do not dispute that Plaintiffs have a vested interest in their accrued DROP benefits. But that alone is insufficient to find a violation of Section 66. To violate Section 66, the challenged Plan amendments must either reduce or impair the DROP benefits. Plaintiffs do not contend that H.B. 3158 and the Revised Addendum reduce the DROP benefits. Nor could they: both H.B. 3158 and the Revised Addendum leave the value of the DROP benefits untouched. Instead, Plaintiffs argue that the challenged amendments *impair* the DROP benefits.

According to Black's Law Dictionary, to "impair" is "to diminish the value of (property or a property right)." *Black's Law Dictionary* 869 (10th ed. 2014). Thus, while a "reduction" would mean a direct decrease in the DROP

benefits themselves, an "impairment" encompasses any other action that might diminish the benefits' value. For example, altering the timing for DROP participants to receive their benefits without permitting interest to accrue on the funds such that the net present value of the benefits actually decreased would likely qualify as an impairment under Section 66. But H.B. 3158 and the Revised Addendum effect no such impairment. Plaintiffs will receive every dollar of their DROP funds, and the funds will accrue interest at the T-Bill rate such that their net present value will remain unchanged. And while the T-Bill rate is lower than the rate at which the funds originally accrued interest, Section 66 does not create a right to future interest rates. *See Eddington*, 508 S.W.3d at 788 ("the DROP interest rate is not among the 'benefits' protected by Section 66." (citing *Van Houten*, 827 F.3d at 535)). Because H.B. 3158 and the Revised Addendum change only the timing of DROP distributions, Plaintiffs have failed to show that they reduce or impair the DROP benefits in violation of Section 66.

The Texas Legislative Council's[7] reading of Section 66 supports this view. The Council interpreted Section 66 to mean that "any change made to certain benefits provided by certain retirement systems cannot reduce

7. The Texas Legislative Council is a "nonpartisan legislative agency that provides bill drafting, computing, research, publishing, and document distribution services to the Texas Legislature and the other legislative agencies." TEXAS LEGISLATIVE COUNCIL, http://www.tlc.state.tx.us/ (last visited March 7, 2018). The council also serves as an information resource for Texas agencies and citizens. *Id.*

benefits that a person was entitled to receive before the date of the change." Tex. Leg. Council, Condensed Analysis of Proposed Const. Amendments, September 13, 2003 Election at 99 (2003). It stated that, "[u]nder the amendment, any reduction in the retirement or death benefits that the retirement systems provide cannot be applied retroactively to benefits that a person has accrued or is entitled to receive before the date the reduction takes effect." *Id.* Nowhere did the Council refer to changes in *distribution timing* for accrued pension benefits.

Given Section 66's history and subsequent interpretation, it stands to reason that the Texas Legislature intended Section 66 to prohibit changes that would reduce or otherwise impair retirees' *benefits* – not the timing of when they can receive them. *See* Tex. Const. Art. XVI § 66. H.B. 3158 and the Revised Addendum effect no such reduction or impairment. They merely alter the timing for DROP participants to receive the unimpaired funds going forward. The Court believes the Texas Supreme Court is unlikely to hold that a change in distribution timing that leaves the underlying funds untouched reduces or impairs those funds within the meaning of Section 66.

CONCLUSION

The Court grants the Board's motion to dismiss Plaintiffs' first amended complaint [75]. Because Plaintiffs have not requested leave to amend, the Court grants the Board's motion with prejudice. The Court also grants the

Appendix D

Board's motion to strike Plaintiffs' surreply to the Board's motion to dismiss [89].[8]

Signed March 14, 2018.

/s/
David C. Godbey
United States District Judge

8. The Court has reviewed Plaintiffs' surreply and determined that, even if the Court denied the Board's motion to strike, the surreply would not have affected the Court's holding in this case.

APPENDIX E —DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 22, 2020

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10423

LADONNA DEGAN, RIC TERRONES, JOHN MCGUIRE; REED HIGGINS, MIKE GURLEY, LARRY EDDINGTON, STEVEN MCBRIDE,

Plaintiffs-Appellants,

v.

THE BOARD OF TRUSTEES OF THE DALLAS POLICE AND FIRE PENSION SYSTEM,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion: April 27, 2020, 5 Cir., _____, _____ F.3d _____)

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

Appendix E

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT: (Dated 5/22/20)

/s/ Catharina Haynes
UNITED STATES CIRCUIT JUDGE

APPENDIX F — QUOTED LANGUAGE FROM DALLAS PENSION STATUTE AND FROM DALLAS POLICE AND FIRE PENSION PLAN

Relevant language from the Dallas Pension Statute as amended in 2017 by House Bill 3158

Except as provided by Subsections (e-1) and (l) of this section, the balance in the DROP account of a member who terminated from active service on or before September 1, 2017, or who terminates from active service shall be distributed to the member in the form of an annuity, payable either monthly or annually at the election of the member, by annuitizing the amount credited to the DROP account over the life expectancy of the member as of the date of the annuitization using mortality tables recommended by the pension system's qualified actuary. The annuity shall be distributed beginning as promptly as administratively feasible after the later of, as applicable:

(1) the date the member retires and is granted a retirement pension; or

(2) September 1, 2017.

Tex. Rev. Civ. Stat. art. 6243a-1, sec. 6.14 (e) (Vernon 2017).

Appendix F

Relevant language to the Dallas Police and Fire Pension Plan as amended in 2017 pursuant to the authority provided by House Bill 3158

Effective as of June 8, 2017, all DROP withdrawal requests that are on file with DPFP, including any DROP withdrawal requests that were submitted pursuant to Section 4 and 5 of the Addendum as in effect prior to June 8, 2017, shall be null and void except for those requests filed pursuant to Section 6 in connection with an unforeseeable emergency or for purposes of a minimum annual distribution elected under Section 7. All DROP withdrawal elections made under Sections 6 and 7 will remain in place for all subsequent DROP distributions under this Addendum until revoked by the distributee in writing.