NO. 91250-5



**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

MICKEY FOWLER, *et al.*, and a class of TRS Plan 3 members,

Petitioners

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent.

# WASHINGTON EDUCATION ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REVIEW

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## I. GROUNDS FOR REVIEW

Amicus curiae Washington Education Association requests that this Court accept review based on RAP 13.4(b)(3) and RAP 13.4(b)(4). This case involves both significant constitutional questions of law and an issue of substantial public interest that should be determined by the Supreme Court.

This Court should grant Fowler's Petition for Review because it involves a significant question of constitutional law that was not resolved by the Court of Appeals in either ***Probst v. Dep't of Retirement Systems***, 167 Wn.App. 180, 271 P.2d 966 (2012) or ***Probst, Fowler v. Dep't. of Retirement Systems***, 2014 WL 7462567 (Wash.App. Div. 2).[1]

Additionally, the case involves issues of substantial public interest due to the large numbers of teachers who are adversely affected because they have been denied interest on funds that were transferred from Teachers' Retirement System ("TRS") Plan 2 to Plan 3 nearly twenty years ago.

## II. ADDITIONAL RELEVANT PROCEDURAL HISTORY

The Court of Appeals in ***Probst*** refrained from ruling on the constitutional issue, stating that the case was resolved on other grounds.

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[1] For the purposes of this brief, ***Probst v. Dep't of Retirement Systems***, 167 Wn.App. 180, 271 P.2d 966 (2012) will hereinafter be referenced as "***Probst***" and ***Probst, Fowler v. Dep't. of Retirement Systems***, 2014 WL 7462567 (Wash.App. Div. 2) will hereinafter be referenced as "***Fowler.***"

*Id.* at 183. The Court of Appeals remanded without instructions to the trial court, denied DRS' motion for reconsideration and awarded costs to Plaintiffs, finding that Plaintiffs were the prevailing party. CP 132-135.[2] The trial court remanded the matter to DRS for rulemaking, without requiring repayment of interest or giving parameters for way that interest should be paid. CP 208-209.

The Fowler class then moved to recall the Mandate issued in ***Probst*** and appealed the trial court's order because the trial court's order will not make class whole or ensure repayment of the interest that has not been paid. Nor does this Order recognize that the Plaintiff class was the prevailing party in ***Probst***. CP 208-09.

The Court of Appeals, in ***Fowler***, has erroneously held that the Department's failure to pay interest to class, an injury that has existed for over 20 years, is speculative. In the ***Fowler*** decision, the Court of Appeals appears to allow the Department of Retirement Systems to engage in rulemaking to justify and continue its longstanding underpayment of interest to the Plaintiff class.

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[2] In the Ruling on Costs, in response to DRS' argument that Fowler was not the prevailing party, the Court of Appeals held that Fowler was the prevailing party and awarded costs to Fowler. CP 134-35. DRS's argument, in its Answer to the Petition for Review, that Fowler should have appealed the Court of Appeals' decision, is without merit since the Court of Appeals determined that Plaintiffs prevailed.

## III. ARGUMENT

### A. REVIEW MUST BE ACCEPTED TO RESOLVE A CONSTITUTIONAL QUESTION OF LAW.

Over 25,000 teachers who transferred from TRS 2 to TRS 3 in 1996-97 have been waiting for over 20 years to receive the full amount of interest that their principal earned prior to the time that their funds were transferred. Now, that amount of outstanding unpaid interest has earned additional interest which has not been deposited in the teachers' retirement accounts. This court should accept review to resolve an existing constitutional issue that should have been resolved by the Court of Appeals.

The Court of Appeals in ***Probst*** did not decide the constitutional issue because it ruled the matter was resolved on other grounds. ***Id.*** at 183, fn. 4. But, the underlying underpayment of interest was not resolved by the Court of Appeals and remains unresolved. The trial court's remand to permit rulemaking is inconsistent with the Court of Appeal's statement that the matter has been resolved on other grounds. Rulemaking to justify the nonpayment of the disputed amount of interest cannot make the plaintiffs whole or resolve the case, which can only be resolved by this court's review of the constitutional claim.

There is a constitutionally protected property interest in earned

interest income. ***Phillips v. Washington Legal Foundation***, 524 U.S. 156, 165-66, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (IOLTA case). In ***Phillips***, the United States Supreme Court clearly held that the interest earned on the owner's funds are the private property of the owner of the funds for the purpose of the Takings Clause, explaining that interest follows principal and therefore that interest earned on the funds belongs to the owner of the funds that generated the interest. ***Id.***, 524 U.S. at 165-66 and n. 5.

It is undisputed that the principal held in the plaintiffs' retirement accounts is the property of the plaintiff. ***State ex rel. State Employees' Retirement Bd. v. Yelle***, 31 Wn.2d 87, 111 (1948). As a matter of law, the interest belongs to the individual as well and cannot be held as the property of the state without violating the constitution.

The Court of Appeals in ***Probst*** determined that Legislature abrogated common law rule allowing for daily interest when it enacted RCW 41.50.033 in 2007. ***Probst***, 167 Wn.App, at 189-90. However, this portion of the ***Probst*** decision is incorrect. To the extent that this decision is incorporated into the ***Fowler*** decision, this Court should review it now.

Regardless of 2007 legislation, there were pre-existing statutes that required accrued interest to be paid to TRS members. See RCW 41.04.445(1)(c) and (4).

Moreover, the United States Supreme Court has plainly and clearly held that a State may not sidestep the Takings Clause or abrogate the common law by disavowing traditional property interests. See ***Phillips***, 524 U.S. at 167. As noted in ***Phillips***, *supra*:

> A State, by *ipse dixit*, may not transform private property in to public property without compensation simply by legislatively abrogating the traditional rule that "earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."
>
> ***Phillips***, 524 U.S. at 167, citing ***Webb's Fabulous Pharmacies, Inc. v. Beckwith***, 449 U.S.155, at 164, 101 S.Ct. 446, at 452, 66 L.Ed.2d 358 (1980).

The State is not entitled to assume ownership of the interest as it has done with a portion of the interest earned on the funds of class members. In ***Webb's Pharmacies***, the United States Supreme Court held that a statute authorizing the court clerk to confiscate interest earned on deposited funds owned by private individuals violated the Takings Clause and could not be enforced. ***Id.*** See ***Phillips***, *supra* at 167.

Here, the State, by statute has mandated that accrued interest on the funds of the members of the TRS be deposited to the members' accounts. RCW 41.04.445(1)(c) clearly applies to members of TRS, which includes all plaintiffs. This statute provides that all contributions to TRS, on behalf of a retirement systems member **plus accrued interest** earned thereon must be paid to the retirement systems member. The ***Probst*** court

erroneously held that RCW 41.04.445 did not apply to Plaintiffs. 167 Wn.App at 189, fn 7. The Court of Appeals was wrong as the statute specifically states that it applies to all TRS members.

Nevertheless, under the United States Supreme Court's precedent from ***Phillips*** holding that interest follows principal, any statute such as RCW 41.50.033 that abrogates this precedent cannot withstand the scrutiny of the Takings Clause.

Applying the principles from ***Phillips***, *supra*, in ***Dean v. Lehman***, 143 Wn.2d 12, 18 P.3d 523 (2001), this Court held that accrued interest earned on an inmate savings accounts could not be distributed to the Inmate Betterment Fund. Rather, this Court held that interest income "is sufficiently fundamental that States may not appropriate it without implicating the Takings Clause." ***Dean***, 143 Wn.2d at 35, citing ***Schneider v. California Department of Corrections***, 151 F.3d 1194 (9th Cir. 1998). This Court relied on the basis proposition that "interest follows principal," citing the United States Supreme Court holding in ***Phillips***, *supra*. This Court further noted that even if there had been no statute providing that inmates were entitled to accrued interest upon their release, the seizure of earned interest by the State would be an unconstitutional taking. ***Dean***, *supra* at 36.

This case also involves an unconstitutional taking based on this

Court's precedent in ***Bowles v. Dep't of Retirement Systems***, 121 Wn.2d 52, 847 P.2d 440 (1993); ***State ex. rel. State Ret. Bd v. Yelle***, 31 Wn.2d 87, 201 P .2d 172 (1948). The Department of Retirement Systems has erroneously taken the position throughout the litigation that the employee contributions and the interest on the earned on those contributions are the property of the retirement system. DRS' Response Brief, at 1, 8 filed 3/24/11.[3] That argument is contrary to decisions issued by this Court in these two above-cited cases.

In ***Bowles***, this Court held that "employees contributions [to the retirement system] are not public funds" and are instead employee funds of a "proprietary nature." 121 Wn.2d at 75. Consequently, the ***Bowles*** court approved the common fund for payment of attorneys' fees, holding that use of the common fund took the fees from the members' account, did not involve the use of state funds and thus, did not amount to unconstitutional lending of state credit prohibited by the Constitution of the state of Washington. Id. at 74- 7 5.

In its holding, the ***Bowles*** court cited ***State ex rel. State Employees' Retirement Bd. v. Yelle***, 31 Wn.2d 87(1948) . In ***Yelle***, our Supreme Court considered whether employee contributions and the interest earned on those contributions in the state employees' retirement

[3] See http://www.courts.wa.gov/content/briefs/A02/408619%20Respondent's.pdf.

system are public funds, and held that the employee contributions and interest in the employees' individual accounts are not state funds. ***Id.*** at 111. The Supreme Court, in part, based its decision on the fact that "any member withdrawing his contributions from the employees' savings fund is entitled to interest thereon[.]" ***Id.*** at 113.

In sum, this Court should accept review to finally determine whether the State's retention of a portion of the interest owing to the Plaintiff class, starting as of the date that funds were transferred from TRS Plan 2 to TRS Plan 3 and continuing to the present date, constitutes an unconstitutional taking of these funds.

B. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THIS CASE CONCERNS A MATTER OF SUBSTANTIAL PUBLIC IMPORTANCE.

The outstanding issue is of substantial importance to the plaintiff class, made up of a large number of currently active and retired teachers. This matter is of substantial importance not only because of the large number of people that are affected but also because of the length of time both that Plaintiffs have been denied interest that is rightfully theirs and that the case has been pending without resolution in the courts. A timely resolution of the merits of the constitutional issue will greatly benefit the Plaintiff class.

The class has not been paid the interest that it is owed. The

Department has admitted that it has retained the disputed amount of interest. See DRS's Answer to Fowler's Petition, at 18. See also AR 577, 643.

Like the rule prohibiting the statutory abrogation of common law property rights, neither a statute nor an administrative rule may be given retroactive effect, regardless of the intent of the legislature, where the effect would be to interfere with vested property rights. ***Gillis v. King County***, 42 Wn.2d 373, 376, 255 P.2d 546 (1953).

Pension rights are contractual rights which vest at the beginning of the employment relationship. The State cannot alter that contract without mutual consent. ***Washington Federation of State Employees, AFL-CIO, Council 28, AFSCME v. State***, 98 Wn.2d 677, 686, 658 P.2d 634 (1983).

Any decision that interferes with the denial of the deposit of the full amount of interest to the retirement accounts of the individual members of the class interferes with the vested property rights of those members. This court should accept review to resolve this issue of substantial importance to the members of the class.

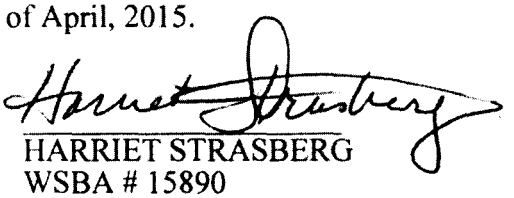
A result in favor of the Plaintiffs would have no overall cost to the State. The amount of money in dispute is currently held in the Plan 2/3 employer trust fund. If this court were to grant review and find that an unconstitutional taking has occurred, compliance would merely require the

State to transfer funds from the employer trust fund to the employees' Plan 3 accounts.

## IV. CONCLUSION

Amicus WEA requests that this Court grant of the Fowler Petition for Review and resolve the constitutional takings issue as these are matters of substantial public importance.

Respectfully submitted this 3rd day of April, 2015.



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CERTIFICATE OF SERVICE

I, Harriet Strasberg, declare under penalty of perjury that I am over the age of 18 and competent to testify as follows:

On this date, I personally served a true and correct copy of the preceding Washington Education Association's Amicus Curiae Brief in Support of the Fowler's Petition for Review, Washington Education Association's Amended Motion to File Amicus Curiae Brief and this Certificate of Service via email and US Mail postmarked on the date below as follows:

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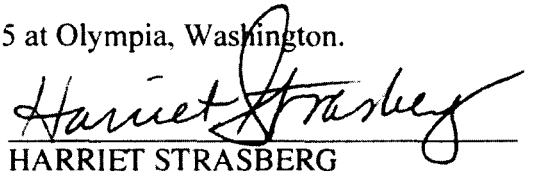
I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED: April 3, 2015 at Olympia, Washington.



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To the Clerk of the Washington Supreme Court:

Attached for filing in Supreme Court Case No. 91250-5 - Mickey Fowler, et ux., et al. v. Department of Retirement Systems, please find the following:

1. My cover letter to the Clerk
2. Washington Education Association's Amended Motion to File a Brief Amicus Curiae in this matter; and
2. Washington Education Association's Amicus Curiae Brief in Support of the Petition for Review.

Thank you for your consideration in this matter.

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