NO. 91250-5

SUPREME COURT
OF THE STATE OF WASHINGTON

JEFFREY PROBST, and a Class of similarly situated individuals,

Plaintiffs,

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

Plaintiffs-Petitioners,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Defendant-Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In 2012, the Court of Appeals decided *Probst v. Dept. of Retirement Systems,* 167 Wn. App. 180, 271 P.2d 966 (2012). The Court issued the mandate and remanded the case to the trial court. In response to Plaintiffs' motion to recall the mandate, the Court found the trial court had complied with the Court's decision. The Court denied recall of the mandate in August 2013, and reaffirmed denial in a written opinion in December 2014. Rather than address the sole issue that might be subject to appeal – whether the Court of Appeals abused its discretion in deciding that the trial court complied with the *Probst* mandate – Plaintiffs now seek an untimely review of the merits of the 2012 *Probst* opinion.

Plaintiffs cannot obtain a new review of the merits of a final appellate decision through a request to recall a mandate. The only issue in a request to recall a mandate is whether the trial court order following remand complied with the Court of Appeals' decision.

Plaintiffs incorrectly filed a petition for review under RAP 13.4 as if the Court of Appeals decision denying recall of the mandate was a decision terminating review. The Court of Appeals' denial of recall of the mandate was an interlocutory decision rather than a decision terminating review. An interlocutory decision requires a motion for discretionary review under RAP 13.5, which contains review considerations much

narrower than RAP 13.4. Plaintiffs have not argued that denial of recall of the mandate should be reviewed under RAP 13.5 and could not satisfy the review considerations under that rule.

II. IDENTITY OF RESPONDENT

The Washington State Department of Retirement Systems (DRS) administers pension plans for most public employees in Washington.

III. COURT OF APPEALS DECISIONS

The Court of Appeals' decisions underlying the Petition For Review are the order, and later decision, denying recall of the mandate in *Probst*, 167 Wn. App. 180. The December 30, 2014, unpublished decision denying recall of the mandate is filed under Wash. Ct. App. No. 45128-0-II, 2014 WL 7467567. The August 2013 order denying recall of the mandate is in the Court of Appeals file for *Probst,* Wash. Ct. App. No. 40861-9-II (the Supreme Court did not request this file from the Court of Appeals in its February 6, 2015 letter). [1] A copy of the 2013 order denying recall of the mandate is attached to this Answer as Appendix 1 for ease of reference.[2]

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[1] To distinguish the decisions on recall of the mandate from the *Probst* decision, the 2012 *Probst* decision will be cited as "*Probst*", the 2013 mandate recall denial will be cited as "Order Denying Motion to Recall Mandate," and the 2014 decision will be cited as "*Fowler*" (the named plaintiff in the teachers' appeal of the *Probst* administrative decision).

[2] The author of the *Probst* opinion signed the 2013 order denying the *motion* for recall of the mandate, but did not state reasons for the denial. *See* Order Denying Motion to Recall Mandate (Appendix). In its 2014 decision rejecting Plaintiffs' *appeal* of the

IV. ISSUES

None of the issues identified by Plaintiffs are properly before this Court. DRS identifies the issues as:

1. Can Plaintiffs now petition for review of issues decided by a Court of Appeals opinion in 2012, where Plaintiffs did not petition for review of that opinion, the mandate issued, the mandate has not been recalled, and the Court of Appeals in this case determined that the trial court complied with the mandate of the 2012 opinion?

2. Did the Court of Appeals misconstrue the meaning of its own mandate in the earlier 2012 opinion when determining the trial court had properly exercised its discretion in implementing the mandate?

V. STATEMENT OF THE CASE

A. Plaintiffs' Administrative Appeal

Plaintiffs claimed they were entitled to receive common law daily interest on money in their individual pension accounts. *Probst*, 167 Wn. App. at 186. Pursuant to a 1977 Director's policy memorandum, DRS paid quarterly interest on the balance in the accounts at the close of the prior quarter. *Id.* at 183, 192. On Plaintiffs' administrative appeal, the

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same "compliance with mandate" issue, the Court of Appeals stated that it had already denied recall of the mandate, but exercised its discretion under RAP 1.2 to provide a response to Plaintiffs' arguments for recall of the mandate. *See Fowler,* 2014 WL 7467567 at *3-6.

presiding officer affirmed use of the Director's policy to determine interest. *Id.* at 184.

B. Judicial Review Of DRS Administrative Decision

Plaintiffs petitioned for judicial review of the administrative order. *Probst*, 167 Wn. App. at 184-85. The Thurston County superior court affirmed the DRS decision, ruling the Director had the authority to issue the interest policy and statutes did not require DRS to pay daily interest. *Id.* at 185.

Plaintiffs then petitioned the Court of Appeals to review the DRS administrative order under the Administrative Procedures Act (APA). *Probst*, 167 Wn. App. at 185. The Court of Appeals rejected Plaintiffs' argument that statutes or common law required DRS to pay daily interest on the accounts, and held that pension statutes give the DRS Director the discretion to determine interest on individual accounts. *Id.* at 191. However, the Court also held the quarterly interest policy was invalid due to lack of evidence DRS considered alternate interest policies, rendering the policy arbitrary and capricious. *Id.* at 193-94. The Court remanded the administrative decision for further proceedings. *Id.* at 194. Plaintiffs did not petition for review of the decision rejecting their legal entitlement to daily interest and their arguments on related issues.

C. Implementation Of The Mandate And Denial Of The Motion To Recall Mandate

After issuance of the *Probst* mandate, Plaintiffs asked the superior court to enter a judgment requiring DRS to pay daily interest to Plaintiffs. *Fowler,* 2014 WL 7462567 (Wash.App. Div. 2), at *2. DRS requested a remand of the administrative decision to DRS for rulemaking to allow correction of the interest policy found invalid by the Court of Appeals. *Id.* The superior court concluded it had no authority to determine DRS interest policy because only DRS had statutory discretion to set interest rates. *Id.* at *5. The superior court further concluded the Court of Appeals holding that the DRS interest policy was arbitrary and capricious was not a decision directing a particular new interest policy. *Id.* The superior court remanded the administrative action to DRS. *Id.* at *2.

Plaintiffs moved to recall the *Probst* mandate, claiming that the interest policy should not have been remanded to DRS for rulemaking because *Probst* held that the DRS failure to pay daily interest was arbitrary and capricious. *Fowler,* 2014 WL 7462567, at *2. In August 2013, the Court of Appeals denied Plaintiffs' motion to recall the mandate without comment. *Id.;* Order Denying Motion to Recall Mandate (*See* Appendix 1).

Simultaneous with their *motion* to recall the mandate, Plaintiffs filed an *appeal* seeking to enforce the mandate. As the Court of Appeals determined, Plaintiffs made the same arguments in their motion to recall the mandate as they did in their appeal. *Fowler,* 2014 WL 7462567 at *2. Despite the denial of their motion to recall the mandate, Plaintiffs pursued the appeal. *Id.* On appeal, the Court of Appeals held it had "already decided the issues in this appeal when [it] denied the motion to recall after consideration" and Plaintiffs "are not entitled to a second review of the same issues with a different panel." *Id.* at *3. The Court nonetheless exercised its discretion under RAP 1.2 to address the merits of Plaintiffs' argument. *Id.*

The Court of Appeals first noted that "[w]hether the superior court properly implemented our mandate in *Probst* is the only issue properly before us." *Fowler,* 2014 WL 7462567, at *2. With regard to that issue, the Court rejected Plaintiffs' argument that the *Probst* mandate required the trial court to order daily interest:

> Therefore, contrary to the Fowlers' assertion, we held that the DRS acted arbitrarily and capriciously by not giving due consideration to the facts and circumstances when it elected to continue the historical method of calculating interest; *we did not hold that the DRS was required to pay daily interest.*

Id. at *4 (emphasis added).

> *The superior court correctly interpreted our mandate to say that the DRS has the authority to determine how to calculate interest, but it must undergo the appropriate processes.* It follows that it is reasonable to remand to the DRS to allow it to undergo the appropriate processes to exercise its authority. The superior court did not abuse its discretion.

Id. at *5 (emphasis added; footnote omitted). The Court also rejected Plaintiffs' arguments that the Court's decision did not require APA rulemaking, and that Plaintiffs' "takings" argument was ripe for review before DRS developed a new interest policy. *Id.* at *5-6.

VI. ARGUMENT

A. Review By This Court Of The Court Of Appeals' Interpretation Of Its Own Mandate Is Not Warranted

As the Court of Appeals correctly determined, the only issue properly before it on appeal was "[w]hether the superior court properly implemented our mandate in *Probst*." *Fowler,* WL 7462567, at *2. Despite averring in the *Fowler* appeal that Plaintiffs' appeal was brought "to enforce [the Court of Appeals'] mandate in *Probst,*" Plaintiffs have abandoned this argument in their current Petition, instead attempting to seek untimely review of the merits of the 2012 *Probst* decision. *See* Appellants Opening Br. at 1; Pet. Review at 5-20. Plaintiffs fail to argue why this Court should review the sole issue properly before the Court of Appeals. Thus, this Court should not consider it.

In any event, Plaintiffs may not raise in this Petition the issues decided in *Probst.* If Plaintiffs wanted this Court to review the merits of the *Probst* opinion, they should have petitioned in 2012 for review of the *Probst* opinion.[3] Moreover, review of the Court of Appeals' interpretation of its own mandate is not proper under RAP 13.4 and is not merited under the criteria in RAP 13.5, which are the criteria appropriately applied to review of interlocutory decisions.

B. Plaintiffs Cannot Petition For Review Of Issues Decided In The 2012 *Probst* Decision

Plaintiffs' Petition for Review of the unappealed, three-year-old *Probst* decision should be denied. The Petition violates rules governing both finality of decisions and requests to recall the mandate.

Plaintiffs explicitly identify *Probst v. DRS,* 167 Wn. App. 180, 271 P.3d 966 (2012) as a decision on review and, secondarily, identify the 2014 unpublished Court of Appeals decision confirming the denial of

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[3] Plaintiffs assert that they could not appeal the earlier decision because they were not aggrieved parties. Pet. Review at 1 n.1. An aggrieved party is one whose "proprietary, pecuniary, or personal rights are substantially affected." *State v. G.A.H.*, 133 Wn. App. 567, 575, 137 P.3d 66 (2006). Here, the *Probst* opinion rejected the Plaintiffs' claim that they were entitled to common-law daily interest, and held that the DRS Director was given discretion to establish the interest policy. *Probst*, 167 Wn. App. at 191. Since their claim for daily interest was rejected, which affected their pecuniary interest, Plaintiffs were aggrieved. Plaintiffs' argument seems to be that, although the *Probst* opinion unequivocally rejected their claim that they were entitled by law to daily interest, they misunderstood the opinion to hold the opposite. *See Fowler*, 2014 WL 7462567 at *4. Such misunderstandings neither prevented Plaintiffs from being aggrieved by the *Probst* opinion, nor are they reason to disregard well-established appellate rules regarding finality of opinions.

Plaintiffs' request to recall the *Probst* mandate. Pet. Review at 1. The first three of the four issues raised in the Petition directly challenge the merits of the Court's decision on issues in *Probst*. Pet. Review at 1-2 (issues 1, 2, and 3). The fourth issue mentions the mandate, but it is another attempt to challenge *Probst* because it is a claim that the Court of Appeals failed to use Plaintiffs' request to recall the mandate as a vehicle to "correct the Court of Appeals errors on the merits" in *Probst*.[4] Pet. Review at 2 (issue 4), 20.

Plaintiffs' first issue is alleged error in the *Probst* holding that there is no legal requirement to pay common law daily interest on public pension accounts. Pet. Review at 5-8; *see Probst,* 189-981; *Fowler,* 2014 WL 7462567 at *4 ("we did not hold [in *Probst*] that the DRS was required to pay daily interest"). Plaintiffs' second issue is alleged error in *Probst*'s holding that the Court's decision on statutory grounds rendered unnecessary a decision on Plaintiffs' constitutional "takings" claim. Pet. Review at 8-15; *see Probst*, 167 Wn. App. at 183 n. 1; *Fowler,* 2014 WL 7462567 at *6 (constitutional argument is "premature and is not ripe for

[4] Plaintiffs claim this Court should accept review to "correct" the Court of Appeals conclusion that RAP 12.9(a) allows a party to question a trial court's compliance with the mandate through a motion to recall the mandate or an appeal, but not both. Pet. Review at 19-20. DRS believes the Court of Appeals correctly understood the use of the disjunctive "or" in RAP 12.9(a). But even if incorrect, Plaintiffs cannot be aggrieved by this decision because the Court of Appeals heard their appeal despite having already denied their motion to recall the mandate. Plaintiffs may not seek review of any issues concerning the disjunctive nature of RAP 12.9 if they are not aggrieved. *See* RAP 3.1.

review" until DRS develops new interest rules). Plaintiffs' third issue is alleged error in holding that the administrative appeal should be remanded to DRS to develop a rule setting a new interest policy to replace the invalidated policy. Pet. Review at 15-19; *see Probst,* 167 Wn. App. at 194; *Fowler,* at *6 ("The superior court correctly ruled that the APA applied to this case and properly remanded the action to DRS for proceedings consistent with our holding in *Probst*.")

Plaintiffs cannot petition for review of the merits of *Probst* because RAP 12.7 provides that a Court of Appeals decision is final after the Court issues its mandate, unless the Court recalls the mandate, which did not occur here. RAP 12.7(b) states:

> (b) Supreme Court. *The Supreme Court loses the power to change or modify a decision of the Court of Appeals upon issuance of the mandate of the Court of Appeals* in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9.

(emphasis added). In this case, when Plaintiffs decided not to petition for review of the *Probst* decision, the mandate issued and Plaintiffs lost their ability to appeal the merits of the *Probst* decision unless and until the mandate was recalled. The Court of Appeals denied Plaintiffs' motion to recall the mandate and resolved their appeal by again rejecting their claim that the trial court did not comply with the mandate. *Fowler*, 2014 WL 7462567 at *2-3.

Plaintiffs do not argue in their Petition that the Court of Appeals incorrectly determined that the trial court properly exercised its discretion in implementing the mandate. *See* Pet. Review. Thus, the mandate recall denial established that the trial court judgment complies with the appellate decision and is the law of the case. *State ex rel. Seattle v. Dep't of Public Utils.*, 33 Wn.2d 896, 903, 207 P.2d 712 (1949).

In arguing that the Court of Appeals erred by failing to reconsider the merits of *Probst* on their appeal requesting recall of the mandate (Pet. Review at 19-20), Plaintiffs misinterpret RAP 12.9. While RAP 12.9 provides for "a separate review of the lower court decision entered after review of the mandate," the "separate review" is not a reconsideration of the merits of the earlier decision. The review concerns whether "the trial court has complied with an earlier decision of the appellate court in the same case." RAP 12.9(a). The "appeal" decides the same issue of trial court compliance with the mandate as a motion to recall the mandate does. Under RAP 12.9, the Court of Appeals review of trial court compliance with the mandate can discuss reasons why the Court did not recall the mandate, but cannot re-adjudicate the issues in the unappealed *Probst* decision.

RAP 12.9 is consistent with long-standing authority prohibiting appellate courts from reconsidering the merits of an appeal on a request to

recall a mandate. *See Frye v. King County,* 157 Wash. 291, 289 P.2d 18 (1930); *Kosten v. Flemming,* 17 Wn.2d 500, 136 P.2d 449 (1943). More recently, this Court, citing *Kosten*, stated:

> [W]e reaffirmed the rule that the court may not recall the remittitur [mandate] after it has been transmitted at the end of the time fixed by law or established by practice, for the purpose of altering its judgment or decision.

Reeploeg v. Jensen, 81 Wn.2d 541, 547, 503 P.2d 99 (1972).

The only issues that can be considered after issuance of a mandate are whether there was "inadvertent error, mistake, fraud, or lack of jurisdiction" affecting the appellate court decision, or whether "the lower court has entered a judgment not conforming with the mandate of the court." *Id.* Cases since adoption of RAP 12.9 continue to follow this established law. *E.g., Shumway v. Payne,* 136 Wn.2d 383, 393, 964 P.2d 349 (1998) ("The Court of Appeals then issued its mandate, relieving the appellate courts in this state of jurisdiction to revisit and act on the merits of the case." [citing *Reeploeg*]); *State v. Wade,* 133 Wn. App. 855, 868-9, 138 P.3d 168 (2006) ("We may not recall a mandate for purposes of reexamining the case on its merits." [citing *Shumway* and *Kosten*]).

Plaintiffs' Petition seems to assert that *Bank of America v. Owens,* 177 Wn. App. 181, 311 P.3d 594 (2011), somehow authorizes an appellate court to re-decide an earlier decision when the court decides a motion to

recall a mandate. Pet. Review at 19. Plaintiffs' argument is unclear and is incorrect if this meaning is their intent.

In *Bank of America,* the Supreme Court affirmed a Court of Appeals decision on a complicated lien priority issue in a divorce/bankruptcy case. A party filed both a motion to recall the mandate and a direct appeal to the Supreme Court challenging whether a trial court priority order complied with the appellate decision. The Supreme Court denied recall of the mandate to the Supreme Court, but transferred to the Court of Appeals the appeal of the trial court compliance issue (the same issue as the motion to recall). The Supreme Court had affirmed a Court of Appeals decision on the lien priority issue, so the Court of Appeals was actually the best forum to determine trial court compliance with the appellate decision.

The Court of Appeals decided the mandate issue by giving directions to the trial court about how to comply with the earlier Court of Appeals' decision. *Bank of America,* 177 Wn. App. at 191-94. Neither the Supreme Court nor the Court of Appeals re-adjudicated the merits of the original appellate decision.

Plaintiffs cite RAP 2.5(c), an exception to the law of the case doctrine, as authority for the Court of Appeals to reconsider *Probst* on a second "appeal." *See* Pet. Review at 1 n. 1. RAP 2.5(c)(2) potentially

applies when there are trial court proceedings on a remanded case and there is a new appeal of a new final judgment. This brings the case back before the appellate court. *See Eserhut v. Heister,* 62 Wn. App. 10, 812 P.2d 902 (1991). Here, there was no appeal of a final decision on the remanded administrative matter, but a request to recall the mandate to challenge whether the superior court's remanding of the administrative action to DRS complied with the Court of Appeals' intent. The merits of the remanded matter never came back before the Court of Appeals, so RAP 2.5(c) has no application.[5] To the extent that Plaintiffs argue for consideration of the merits of *Probst* even if the trial court complied with the mandate (*see* Appellant's Opening Br. at 13), RAP 12.7 bars consideration of the issues unless the mandate is recalled.

C. Plaintiffs Cannot Obtain Review Under RAP 13.4 And Failed To File A Motion For Discretionary Review Of The Interlocutory Decision Under RAP 13.5

Plaintiffs request Supreme Court review by a petition for review under RAP 13.4, which governs review of Court of Appeals decisions terminating review. The Court of Appeals issued a decision on the merits

[5] The order remanded an administrative action to an administrative agency because, under the APA, the agency, rather than the court, had the jurisdiction to conduct proceedings required by the appellate decision. The APA provides that all original proceedings on administrative matters are at the administrative level; court jurisdiction is appellate only. *See* RCW 34.05.510; *Judd v. Am. Tel. and Tel. Co.,* 116 Wn. App. 761, 66 P.3d 1102 (2003); *Wells Fargo v. Dept. of Revenue,* 166 Wn. App. 342, 271 P.3d 268 (2012).

of this case in *Probst* and unconditionally terminated review in 2012. *See* RAP 12.3(a) (definition of decision terminating review). *Probst* is now a final decision not subject to review under RAP 13.4 because the Court of Appeals issued, and did not recall, the *Probst* mandate after expiration of the time that Plaintiffs could seek review of *Probst*. *See* RAP 12.7. Thus, Plaintiffs' arguments that the Supreme Court should accept review of this case, based on considerations governing acceptance of review under RAP 13.4, are improper.

After the Court of Appeals decision on December 30, 2014, the sole possible issue for Supreme Court review would have been the Court of Appeals' interlocutory decision re-affirming its 2013 denial of Plaintiffs' motion to recall the mandate. Review of an interlocutory decision must be sought by filing a motion for discretionary review of the interlocutory decision under RAP 13.5, and satisfying review considerations different from those in RAP 13.4.[6] *See* RAP 13.3(c); RAP 13.5(b).

Plaintiffs did not file a motion for discretionary review of the Court of Appeals' denial of their request to recall the mandate. Plaintiffs' Petition does not argue that the Court of Appeals erred by failing to recall the mandate. *See* Pet. Review at 19-20. Instead, Plaintiffs argue the Court

[6] Motions for discretionary review of interlocutory decisions under RAP 13.5 are decided by the Clerk or Commissioner rather that the Court. RAP 13.5(c); RAP 17.2(a).

of Appeals erred by failing to reconsider the merits of *Probst* in response to Plaintiffs' appeal of the mandate issue. *Id.,* at 20. RAP 12.9 governs motions to recall and appeals on mandate issues. Neither this rule nor case law provide any authority to re-adjudicate the merits of a final appellate decision on a request to recall a mandate. *See* pp. 9-13 *supra.*

Plaintiffs cannot satisfy RAP 13.5 considerations for review. The first two considerations require that the Court of Appeals make "obvious" or "probable" errors. RAP 13.5 (b)(1) and (2). Since the mandate recall issue involves the Court of Appeals' interpretation of its own mandate, Plaintiffs have a high bar to reach in showing that the Court was wrong. They do not even attempt to show error, and the Court of Appeals explained fully how the trial court's implementation of the mandate was consistent with its earlier opinion.[7] *Fowler,* 2014 WL 7462567 at *3-5.

The third RAP 13.5 review consideration requires that there be a departure from "the accepted and usual course of judicial proceedings." RAP 13.5(b)(3). Plaintiffs' argument here is that the Court of Appeals erred in its *Probst* decision on the merits or, perhaps, in its interpretation

[7] If the mandate is not recalled, the lower court (or administrative agency in an APA case) will, in a case in which there are further proceedings after the mandate, make a new decision on the matter remanded by the appellate court. The decision on the remanded matter can then be appealed for review of the new resolution, or even reconsideration of the grounds for the original decision if Plaintiffs can meet RAP 2.5 criteria. The denial of recall of the mandate does not frustrate appellate review of the ultimate outcome of the remanded matter.

of a rule. There is no claim that the Court acted outside its jurisdiction or normal judicial procedures.

D. The Issues In *Probst v. DRS* Were Correctly Decided By The Court Of Appeals In 2012

Most of Plaintiffs' argument in their Petition is about the issues raised or decided in *Probst*. For reasons stated in prior sections, following denial of the motion to recall the mandate, the Court of Appeals' unappealed *Probst* decision, and the superior court judgment implementing that decision, the issues stated in the Petition are no longer subject to review.[8] Although these issues are not properly before the Supreme Court, DRS will respond briefly to these issues so that the Court is informed of the DRS position on all matters raised in the Petition.

1. Plaintiffs' Claim For Accrued Interest Depends On Acceptance Of Their Rejected Argument That Common Law Requires Statutory Pension Systems To Pay Daily Interest

Plaintiffs contend that DRS statutes require payment of "accrued" interest on pension accounts. Pet. Review at 5-8. The accrued interest Plaintiffs claim they did not receive is daily interest. *Id.* at 6. *Probst* held that there was no legal requirement for DRS to pay daily interest. *Probst*,

[8] Any new rules adopted and decisions made by DRS on remand to implement the *Probst* decision are subject to review under APA procedures in the same manner that the original policies/orders were subject to review.

167 Wn. App. at 191; *Fowler,* 2014 WL 7462567 at *4. Therefore, failure to pay daily interest did not deprive Plaintiffs of interest accrued on sums in their accounts.

2. Plaintiffs' Takings Claims Are Either Premature Or Moot

Plaintiffs assert DRS has unconstitutionally "taken" interest by withholding interest accrued on their accounts. Pet. Review at 8-15. The Court of Appeals correctly rejected this assertion because the interest owed to Plaintiffs is unknown until DRS adopts a new interest policy and makes new decisions. *Fowler,* 2014 WL 7462567 at *6. Therefore, one cannot presently determine if there might be a constitutional shortfall in what Plaintiffs have received.

In addition, the basis Plaintiffs have heretofore advanced for their takings claim is that they did not receive daily interest. *Probst* rejected legal entitlement to daily interest in 2012. Plaintiffs have not identified law requiring DRS to pay interest other than what is established by DRS under its statutory authority to determine pension interest policy. *See* RCW 41.32.010(38).

3. Plaintiffs' Improper Rulemaking Claim Is Contradicted By The Administrative Procedure Act

Plaintiffs argue DRS should not adopt a new interest policy through APA rulemaking. Pet. Review at 15-19. DRS adopted the 1977 policy invalidated by *Probst* under the "old" 1959 APA, which had narrower rulemaking provisions than the "new" 1988 APA.

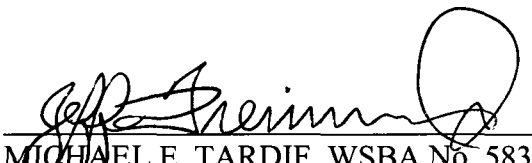
The *Probst* opinion invalidated the DRS interest policy because of lack of a record of "due consideration." *Probst,* 167 Wn. App. at 191-94. This created a need to adopt a new policy under 1988, rather than 1959, APA procedures. The 1988 APA provides agency policies should be adopted through rulemaking. RCW 34.05.320. Rulemaking requires a comprehensive formal record of the process, information considered, and reasons for the policy or rule adopted. *See* RCW 34.05.320, .325, .370, and .380. The Court of Appeals' denial of Plaintiffs' motion to recall the mandate correctly allowed the superior court to remand to DRS to follow APA statutes.

VII. CONCLUSION

The Department of Retirement Systems respectfully asks the Supreme Court to deny Plaintiffs' Petition for Review.

RESPECTFULLY SUBMITTED this 30th day of March, 2015.

FREIMUND JACKSON & TARDIF, PLLC



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CERTIFICATE OF SERVICE

I certify that I served a copy of Answer to Petition for Review on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of March, 2015, at Olympia, WA.

KRISTY JENNE