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

APPELLANTS' PETITION FOR EN BANC REHEARING

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The undersigned counsel of record for Appellants certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representatives are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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STATEMENT CONCERNING REHEARING EN BANC

The Panel's decision conflicts with this Court's opinion in *Van Houten v. City of Fort Worth*, 827 F.3d 530 (5th Cir. 2016) and the Texas Supreme Court's decision in *Klumb v. Houston Municipal Employees Pension Sys.*, 458 S.W.3d 1 (Tex. 2015) concerning the applicable law for determining whether a property interest exists to support a Takings claim under the Fifth Amendment to the United States Constitution.

The Panel's decision is also inconsistent with the United States Supreme Court's opinion in *Andrus v. Allard*, 444 U.S. 51 (1979) concerning the bundle of property rights that must be adversely affected in order to constitute an unconstitutional taking.

Additionally, the Panel's decision is inconsistent with this Court's opinion in *Matagorda Cty. v. Russell Law*, 19 F.3d 215 (5th Cir. 1994) concerning at what point delaying access to property constitutes an unconstitutional taking.

Finally, this case presents an issue of exceptional importance concerning the standard for analyzing a Takings claim when the property at issue is money.

STATEMENT OF THE ISSUES

First Issue: The treatment of pension benefits as property varies in Texas. Pension law in Houston does not recognize a property interest in retirement benefits. However, pension law in Dallas does recognize such a property interest. The En Banc Court should acknowledge this distinction and, upon doing so, determine whether the Panel's application of Houston pension law to a Dallas pension system is consistent with this Court's and Texas Supreme Court's precedent which recognize these separate and distinct bodies of law.

Second Issue: Multiple judges on this Court have recognized that a distinct analysis—apart from a *per se* or regulatory/*ad hoc* analysis—is necessary to evaluate a Takings claim when the subject property is money. The En Banc Court should clearly articulate the proper standard.

Third Issue: Under any Takings analysis, the En Banc Court should determine whether prohibiting access to the corpus of a retiree's earned and accrued retirement funds for the lifetime of the retiree constitutes an unconstitutional taking.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The Dallas Police and Fire Pension Board ("Board") made changes to certain accrued retirement benefits pursuant to H.B. 3158 which was enacted into law in 2017. Appellants filed suit alleging that H.B. 3158 violated the Takings Clause of the Fifth Amendment to the United States Constitution and article XVI, Section 66 of the Texas Constitution ("Section 66").[1] 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. The district court granted the Board's motion to dismiss and entered a final judgment. ROA.1667-1693. The First Responders filed a notice of appeal. ROA.1694-1696.

This Court certified issues to the Texas Supreme Court concerning whether the changes made by H.B. 3158 violated Section 66 of the Texas Constitution. The Texas Supreme Court determined that H.B. 3158 did not violate Section 66. *Degan v. Board of Trustees of the Dallas Police and Fire Pension Sys.*, 594 S.W.3d 309 (Tex. 2020). Therefore, the only remaining issue for this Court was whether H.B. 3158 violated the Takings Clause of the United States Constitution. On April 27, 2020, a Panel of this Court, consisting of Circuit Judges Haynes, Barksdale, and

[1] The Takings Clause prohibits a governmental entity from taking personal private property for public use without just compensation. Article XVI, Section 66 of the Texas Constitution prohibits any changes in service retirement benefits from reducing or impairing benefits accrued by a person. ROA.589.

Southwick, affirmed the district court's dismissal of the First Responders' Takings claim. *See* Panel Op. attached as **Appendix A**).

STATEMENT OF FACTS

A. Parties

Appellants, LaDonna Degan, Ric Terrones, John McGuire, Reed Higgins, Mike Gurley, Larry Eddington, and Steve McBride are all retired Dallas police officers and firefighters ("First Responders"). Each of the First Responders had 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.

B. The Texas Legislature prohibits the withdrawal of earned and accrued retirement funds in DROP accounts.

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

Prior to H.B. 3158, the First Responders had a statutory right to access their earned and accrued funds in their DROP accounts by withdrawing their funds in partial or lump sum amounts. *Degan*, 594 S.W.3d at 311, 314, 316; Tex. Rev. Civ. Stat. Ann. art. 6243a-1, § 6.14(d) (Vernon 2011); ROA.1022-1023. Now, H.B. 3158

denies access by prohibiting any withdrawal of retirement funds from DROP accounts.[2] ROA.580-81. Instead, H.B. 3158 annuitized the amounts in each First Responders' DROP account to be paid out over the life expectancy of the retiree. ROA.580. It was this prohibition of access to the corpus of their own retirement funds that was the basis for the First Responders' Takings claim.[3]

C. A Panel of this Court concluded that H.B. 3158 did not violate the Takings Clause.

Without oral argument, a Panel of this Court concluded that the actions taken by the Texas Legislature and the Board did not violate the Takings Clause. In reaching this conclusion, the Panel concluded that there is no cognizable property interest that would support a Takings claim. Panel Op. at 3-4. The Panel also concluded that because the First Responders will continue to receive annuity payments, and the Texas Legislature and the Board were attempting to protect the pension fund, there has been no violation of the Takings Clause. Panel Op. at 4-5.

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[2] H.B. 3158 only provides for certain limited withdrawals allowed under the "financial hardship" provision, the standards of which are to be adopted by the Board. ROA.580-581.

[3] The Panel 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." Panel Op. at 2. 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 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 Panel fundamentally changed the claims the First Responders actually made and thus altered the Takings analysis conducted by the Panel.

SUMMARY OF THE ARGUMENT

By applying law to a Dallas pension system that is only applicable to pension systems in Houston, the Panel's decision is inconsistent with the legal precedent underpinning this Court's opinion in *Van Houten v. City of Fort Worth*, and the Texas Supreme Court's opinion in *Klumb v. Houston Municipal Employees Pension System*. Furthermore, the Panel's decision is inconsistent with the United States Supreme Court's opinion in *Andrus v. Allard* and this Court's decision in *Matagorda County v. Russell Law* concerning how Takings claims are analyzed. Additionally, this case presents an exceptional circumstance involving conflicting standards articulated by the United States Supreme Court and an expressed lack of clarity by this Court regarding the standard that should be used to analyze a Takings claim when the property at issue is money. For these reasons, the Court should grant en banc review.

ARGUMENT AND AUTHORITIES

A. There are two distinct bodies of law governing public pension funds in the State of Texas depending on the geographic location. The law applicable in Dallas is fundamentally different than the law applicable in Houston. The Panel applied Houston law to Dallas.

The first critical question in a Takings analysis is whether the claimant has a property interest in the subject property. Unique to Texas, there are two distinct bodies of law that govern public pension funds, depending on the geographic location of the pension system, which affect the answer to this question.[4]

Houston and San Antonio are governed by the 1937 *City of Dallas v. Trammell* case, under which pensioners *do not have a property interest* in their pension benefits. *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937). The rest of the state, including Dallas, is governed by Section 66, a Texas constitutional amendment ratified in 2003, under which pensioners *do have a property interest* in their pension benefits. *Degan*, 594 S.W.3d at 312 (majority), 319 (dissent) (concluding that the First Responders' DROP funds are a constitutionally protected benefit under Texas law). The Texas Supreme Court has noted that these two distinct bodies of law can result in very different outcomes

[4] While Section 66 was intended to reverse the Texas Supreme Court's ruling in *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937), the City of San Antonio is expressly excluded from Section 66 and the City of Houston opted out of Section 66. Section 66(b); *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 16, n.10 (Tex. 2015) (noting that the "City of Houston voters opted to exercise an exemption authorized by [Section 66]."). Therefore, while Section 66 governs everywhere else in Texas, *Trammell* still governs the pension systems in San Antonio and Houston.

concerning the existence of property rights in pension benefits. *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, at 16, 16 n.10 (Tex. 2015) (noting that while there is no vested property right in pension benefits under *Trammell*, "a different scenario might be presented if article XVI section 66 of the Texas Constitution were applicable.").

In the present case, the Panel cited *Trammel* law which governs Houston, under which there is no property interest in pension benefits, and misapplied it to Dallas which is governed by Section 66, under which there is a property interest in pension benefits. Panel Op. at 3-4. By misapplying Houston *Trammell* law to Dallas, the Panel concluded that the First Responders in Dallas have no property interest that would support a Takings claim. Panel Op. at 3-4.

This misapplication of pension law can be traced back to the Panel's reliance on *Van Houten v. City of Fort Worth*, 827 F.3d 530, 540 (5th Cir. 2016) for the proposition 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." Panel Op. at 3. In *Van Houten*, this Court was quoting *Trammell* which held that the right to a pension plan benefit "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, and this necessarily constitutes a qualification upon the anticipated pension and a reserved right to

terminate or diminish it.'" *Van Houten*, 827 F.3d 530 at 539-40 (quoting *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1014 (Tex. 1937)). Further demonstrating that the *Van Houten* Court was relying on *Trammel* law which governs Houston, the *Van Houten* Court noted that the view described above was reaffirmed by the Texas Supreme Court in *Klumb v. Houston Municipal Employees Pension System*, 458 S.W.3d 1 (Tex. 2015), a case concerning changes to a local pension plan *in Houston*. *Van Houten*, 827 F.3d 530 at 540. Therefore, the Panel conflated two distinct bodies of law and misapplied this Court's precedent in *Van Houten* to Dallas when it is apparent that *Van Houten* was discussing Houston *Trammel* law.

B. By misapplying Houston *Trammell* law to Dallas pension benefits, the Panel concluded there was no cognizable Takings claim.

In a Takings analysis, 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); *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 269 (5th Cir. 2012). The Texas Supreme Court has concluded that the First Responders' DROP funds are a constitutionally protected benefit under Texas law. *Degan*, 594 S.W.3d at 312 (majority), 319 (dissent). Thus, under Section 66, which governs Dallas, the First Responders have a property interest in their retirement funds in their DROP account for purposes of a Takings analysis. *See Degan*, 594 S.W.3d at 312 (majority), 319, 320 ("[e]veryone agrees the first responders are the exclusive

owners of the funds in their DROP accounts" and it is not disputed that the DROP funds are accrued benefits) (Boyd, J., dissenting).[5]

The Panel's misapplication of this Court's description of Houston law in *Van Houten* to a Dallas pension fund was critical to the Panel's determination that the First Responders had no property interest that would support a Takings claim. Panel Op. at 3-4. This Court should grant en banc review to make clear that this Court's recitation of Houston law in *Van Houten* cannot be applied to the Dallas Pension System. Furthermore, in light of the Panel's misapplication of Houston law to Dallas, the En Banc Court should re-analyze the First Responders' Takings claim in light of the law that is applicable to Dallas which recognizes a property interest in pension benefits.

C. The En Banc Court should clarify the proper standard for analyzing a Takings claim involving money.

The United States Supreme Court has analyzed a Takings claim involving money under a *per se* analysis. *Brown v. Legal Foundation of Washington,* 538 U.S. 216, 235 (2003) (discussed money in terms of a *per se* takings analysis). The United States Supreme Court has also analyzed the taking of money under a regulatory/*ad*

[5] While the Majority in *Degan* disagreed with the Dissent's ultimate conclusion that the changes made by H.B. 3158 violated Section 66, the Majority did not dispute the Dissent's finding that the First Responders' rights to their DROP funds is a property right. *Degan*, 594 S.W.3d at 315. The Majority noted that the "Dissent characterizes the statutory choice under former law as a property right that attaches to DROP funds as they accumulate," but did not otherwise address property rights or a Takings analysis under the U.S. Constitution. *Id.*

hoc analysis. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) (discussed money in terms of an *ad hoc* takings analysis). And in this Court, six 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.").

Here, the Panel concluded that "there is no invasion of real estate or appropriation of physical property." Panel Op. at 4. Whether money is in paper bills or coins placed under a mattress or whether money is represented by numbers on an account balance sheet, money is property. While physically taking the mattress money would obviously be an appropriation of the funds under a *per se* Takings analysis, prohibiting access to money in an account has the same effect. This would portend that the taking of the DROP funds should be analyzed under a *per se* analysis. But even under a regulatory/*ad hoc* analysis, (1) the adverse economic impact on the owner is unmistakable, (2) without access to funds, the interference with investment-backed expectations is palpable, and (3) the character of government action using these impounded funds to pay other pension obligations is

questionable. This highlights the need for clearer guidance when a Takings claim involves money.

So that the Court may speak with one voice, the En Banc Court should revisit the lack of clarity by both the United States Supreme Court and this Court and clearly articulate the proper takings analysis when the property at issue is money.

D. The Panel's rationale for concluding that no unconstitutional taking occurred is in conflict with United States Supreme Court, Fifth Circuit, and Texas Supreme Court precedent.

1. The First Responders' bundle of rights in their retirement funds has been completely negated.

As noted above, the Texas Supreme Court has concluded that the First Responders' DROP funds are an accrued benefit that they own and is a constitutionally protected benefit under Texas law. *Degan*, 594 S.W.3d at 312 (majority), 319, 320 (dissent).[6] To further expound on the First Responders' property rights, the Dissent in *Degan* noted that "[a]s 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." *Degan*, 594 S.W.3d at 320 (citing *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 382-83 (Tex. 2012); *Kaiser Aetna v. United States*, 444 U.S. 164,

[6] *See also Degan*, 594 S.W.3d at 316 (distinguishing *Van Houten v. City of Fort Worth*, 827 F.3d 530 (5th Cir. 2016) and *Eddington v. Dallas Police and Fire Pension System*, 589 S.W.3d 799 (Tex. 2019) from the changes made by H.B. 3158 because in those cases the plan changes did not affect an accrued benefit).

176 (1979); *United States v. Gen. Motor Corp.*, 323 U.S. 373, 378 (1945)). Prior to the enactment of H.B. 3158, the First Responders enjoyed the full "bundle of rights" in their retirement funds in their DROP accounts. Now, as a result of H.B. 3158, the Board enjoys these property rights instead of the First Responders. *Degan*, 594 S.W.3d at 320 (dissent).

By prohibiting access to the corpus of their funds and instead paying out monthly annuities over the First Responders' life expectancies, H.B. 3158 did not just affect one or two bundles of rights associated with an interest in property, but negated every bundle of rights associated with owning property. This makes the Panel's citation to and reliance upon the United States Supreme Court's opinion in *Andrus v. Allard*, 444 U.S. 51 (1979) particularly problematic.

The Panel cites *Andrus* for the proposition that the government's restrictions 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. Panel Op. at 3 n.1. Importantly, in *Andrus* the United States Supreme Court said "[i]n this case, 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. This case is nothing like *Andrus*. Here, the First Responders no longer have the right to possess, transport, donate or devise the corpus of their retirement funds that were once held in their DROP accounts. After H.B. 3158, no property right

remains. Thus, the First Responders do not possess any of the bundle of rights recognized under the law. Therefore, the Panel's decision is in conflict with the United States Supreme Court's opinion in *Andrus*.

2. The First Responders are prohibited from accessing the corpus of their DROP funds for a lifetime.

The Panel's decision is also in conflict with this Court' opinion in *Matagorda County v. Russell Law*, 19 F.3d 215 (5th Cir. 1994). The Panel cited *Matagorda* for the proposition "that the 'mere delay in exercising a property right' did not constitute a taking." Panel Op at 3 n.1. What this Court in fact acknowledged in *Matagorda* was that "[u]nmitigated delay, coupled with diminishment of distinct investment-backed expectations, *may, at some point*, infringe on the entire 'bundle' of rights enjoyed by the Appellants to the point that a compensable taking occurs." *Matagorda*, 19 F.3d at 225. In the present case, there is much more than unmitigated delay. There is a complete delay for the lifetime of each First Responder. At no time during their lives will access such as the First Responders once had to their own retirement funds be restored. Therefore, the delay in accessing the corpus of their retirement funds is total.

Moreover, the First Responders' investment-backed expectations are completely destroyed when access to the corpus of their retirement funds is

prohibited.[7] Whether interference with investment-backed expectations is based on traditional return on investment considerations or on value judgements and basic needs (i.e. investing in a child's education, personal shelter, or health), the purpose of considering a claimant's investment-backed expectations is to determine whether the claimant obtained their property "in reliance on a state of affairs that did not include the challenged regulatory regime." *Cienega Gardens v. United States*, 331 F.3d 1319, 1345-46 (Fed. Cir. 2003). This Court has even recognized that "[r]etroactive legislation, as opposed to the prospective kind, can present more severe problems of unfairness because it can upset legitimate expectations and settled transactions." *United States Fidelity & Guaranty Co. v. McKeithen*, 226 F.3d 412, 418 (5th Cir. 2000) (discussing an upset to the plaintiff's reliance on prior law). And the Texas Supreme Court confirmed that the changes implemented by H.B. 3158 are "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 pension annuity payments." *Degan*, 594 S.W.3d at 316. Here, the First Responders' investment-backed expectations in the corpus of

[7] Without citing any authority, the Panel concluded that, although the First Responders once had complete access to lump-sum distributions of their retirement funds, and now they only receive monthly annuity payments, it "does not support the conclusion that their investment-backed expectations were 'taken.'" Panel Op. at 4. Whether investment-backed expectations include investment in a child's education, investment in shelter or healthcare, or investment in other financial vehicles, the Panel never explained how investment-backed expectations are not adversely affected when one has no access to their own funds.

their DROP funds have been wholly eliminated. And the adverse impact is enhanced by the First Responders' reliance on the regulatory scheme that existed when they elected to have their retirement funds deposited into their DROP accounts, but which was completely and retroactively upended by H.B. 3158. As a result, the Panel's decision does not comport with this Court's legal pronouncements in *Matagorda*.

CONCLUSION

The Panel's Takings analysis is fundamentally at odds with precedent from the United States Supreme Court, Fifth Circuit, and Texas Supreme Court. And the exceptional importance of a clearly articulated standard for analyzing a Takings claim involving money cannot be overstated. Therefore, the First Responders ask the En Banc Court to grant rehearing of this case, request briefing on the merits, and set this case for oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Appellant's Petition for En Banc Rehearing* has been forwarded to the following via the Federal Rules of Civil Procedure on May 8, 2020.

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Date: **May 8, 2020**

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

APPENDIX TO APPELLANTS' PETITION FOR EN BANC REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
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Clerk

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

Before BARKSDALE, SOUTHWICK, and HAYNES, Circuit Judges.

HAYNES, Circuit Judge:

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 (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 (2002) (citing *United States v. Gen.*

[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 (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).

Motors Corp., 323 U.S. 373 (1945), and *United States v. Petty Motor Co.*, 327 U.S. 372 (1946)).[2] Thus, there is no per se taking.

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 (1978)]." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2429 (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 (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

[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.

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.