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July 17, 2024

By FedEx Overnight Delivery and email to efilingsupport@supremecourt.gov.

The Honorable Scott. S. Harris
Clerk of the Court
United States Supreme Court
And Sarah Simpson
One First Street, N.E.
Washington, DC 20543
Attn: Jeffrey Atkins, Esq. and Sarah Simpson

Re: *Allison Cole-Kelby v. State of California; Office of California State Controller et al.*, No. 23-15413 (9th Cir.)

Dear Mr. Harris,

Please find enclosed for filing in the above-captioned case, the original and two copies of an Application for an Extension of Time Within Which To File A Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit addressed to Justice Elena Kagan and a certificate of service.

If you have any questions, please call me at (415) 328-5447.

Thank you for your courtesies,

Sincerely
Samuel Kornhauser
Counsel of Record for Applicant

Counsel for Respondents

Mark Rifkin, Counsel for Cote and for Sykes

24. 24A _____

IN THE
SUPREME COURT OF THE UNITED STATES

Allison Cole-Kelly, Individually and on Behalf of All Others Similarly Situated

Applicant

State of California; Office of the California State Controller; Betty T. Yee, in her Official Capacity as California State Controller

Respondents,

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Counsel for Applicant Allison Cole-Kelly

July 17, 2024

PARTIES TO THE PROCEEDINGS BELOW

Applicant Allison Cole-Kelly was the plaintiff in the district court and the appellant in the court of appeals. Allison Cole-Kelly's case No. 23-5413 [9th Cir.] was consolidated for hearing and decision in the Ninth Circuit with the Cote v. Office of the California State Controller et al. No. 23-15375 (9th Cir) and Sykes v Office of the California State Controller et al. No. 23-15377 (9th Cir.) appeals. Respondents the State of California, Office of the California State Controller and Betty T. Yee, in her official capacity as California State Controller, were the defendants in the district court and the appellees in the court of appeals.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, applicant Allison Cole-Kelby's an individual and has no affiliated entities. Applicant does not issue any stock.

RELATED CASES

Cote v. Office of the California State Controller, et al. No. 23-15375 (9th Cir.)

Sykes v. Office of the California State Controller, et al. No. 23-15377 (9th Cir.); (Supreme Court No. 23A-1095)

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Elena Kagen, Associate Justice of the Supreme Court and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. §2101(c) and Rules 12.4, 13.5, 22, and 30.2 and 30.3 of the Rules of this Court, applicant Allison Cole-Kelly respectfully requests a six (6) day extension of time, up to and including July 28, 2024, or a twenty-one (21) day extension of time, up to and including August 12, 2024 (if the application of Jennifer I. Sykes and Alexander Cote for an additional fifteen (15) day extension is granted) within which to file her petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit Court of Appeals entered its judgment and issued an opinion on March 14, 2024. Applicant, Cole-Kelly, timely petitioned for panel rehearing or rehearing en banc which petition was denied on April 23, 2024. The Ninth Circuit's opinion (which is unreported) is attached hereto as Exhibit A. The denial of Cole-Kelly's petition for rehearing is attached hereto as Exhibit B. The order of the District Court dismissing applicants' complaints in these actions is attached hereto as Exhibit C.

Ms. Cole-Kelly's petition for writ of certiorari is currently due on July 22, 2024. Counsel for Ms. Cole-Kelly were preparing to timely file her petition for writ of certiorari on July 22, 2024, however, pursuant to ongoing discussions with counsel for Sykes and for Cote, the undersigned counsel for Cole-Kelly and counsel for Sykes and for Cote just recently agreed to file a joint petition for writ of certiorari pursuant to Rule 12.4 as their three cases were jointly decided by the Ninth Circuit in the same opinion and involved identical or closely related questions. Since applicants' counsel agreed to file a joint petition for writ of certiorari less than ten (10) days before Cole-Kelly's petition is due and because the Sykes and Cote applicants were granted an extension to July 28, 2024 to file their petition for writ of certiorari and because Cole-Kelly and Sykes and Cote will be filing a joint petition for writ of certiorari, Cole-Kelly believes there are extraordinary circumstances and good cause for Cole-Kelly seeking this extension to July 28, 2024 less than ten (10) days before her July 22 petition for writ of certiorari is due.

Moreover, because counsel for Cole-Kelly and for Sykes and for Cote have now agreed to collaborate in the drafting and presentation of a joint petition for writ of certiorari and joint appendix, they will require fifteen (15) additional days to draft and prepare and file a joint petition for writ of certiorari. Counsel for Sykes and Cote indicated that they were in the process of applying for an additional

fifteen (15) day extension from July 28, 2024 to August 12, 2024 to file their petition for writ of certiorari. However, now that counsel for Cole-Kelly and Sykes and Cote have agreed to file a joint petition for writ of certiorari, Cole-Kelly joins in and also requests an extension to August 12, 2024 to file its petition for writ of certiorari so that only one petition for all three cases is filed on August 12, 2024. This Court's jurisdiction would be invoked under 28 U.S.C. §1254 (1).

These cases present an important issue regarding the meaning and application of the Takings Clause of the Fifth Amendment of the United States Constitution. This Court has held that just compensation must be paid whenever private property is used for public purposes.

The Takings Clause mandates that "just compensation" be paid to the owners of private property whenever their property is put to private use. *Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021); Murr v. Wisconsin, 582 U.S. 383, 392 (2017); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 164 (1980).* Just compensation is required whether the public use of private property is permanent or merely temporary. A taking occurs as soon as the property is used by the State for public purposes without paying for it. *Knick v. Township of Scott, Pennsylvania, 139 S. Ct. 2162, 2170 (2019).*

As will be discussed in their joint petition for writ of certiorari, Cole-Kelly's (and Sykes's and Cote's) joint petition for writ of certiorari should be granted because the Ninth Circuit's March 14, 2024 decision in this case - holding that Eleventh Amendment sovereign immunity bars their Fifth Amendment taking without just compensation claims - because it conflicts with the decisions of this Court in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, CA* 482 U.S. 304, 316, n. 9 (1987) holding that Eleventh Amendment sovereign immunity does not bar a Fifth Amendment takings claim for monetary compensation.

The Ninth Circuit's decision also conflicts with the *Cedar Point Nursery v. Hassid* 141 S. Ct. 2063, 2074 (2021) holding that a property owner who establishes that he/she has had his/her property taken by the state without just (any) compensation has a *per se* Fifth Amendment claim against the state for money, including retrospective harm for the period the state deprived the owner of possession/use of his/her property.

A writ of certiorari should also be granted because the Ninth Circuit's decision in these cases - that the California unclaimed property statute, C.C.P. §1540(c), which provides that the state is not required to pay any interest or compensation to the owners of unclaimed property which the State has taken and used to pay its obligations, is constitutional - conflicts with the decisions of the

Seventh Circuit Court of Appeals in *Cerajeski v. Zoeller* 735 F.3d 577, 581-582 (7th Cir. 2013); *Kolton v. Frerichs* (J. Easterbrook) 869 F.3d 532, 533 (7th Cir. 2017); and *Goldberg v. Frerichs* 912 F.3d 1009, 1010 (7th Cir. 2019) which hold that a state's possession and use of unclaimed property without paying the owner interest or the time value for such use, *is* a taking for which the state must justly pay the owner. In reaching its decisions the Seventh Circuit relied upon this Court's precedent that "the Takings Clause protects the time value of money just as much as it does money itself". Id (citing *Brown v. Legal Foundation of Washington, 538 U.S. 216, 235 (2003); Phillips v. Washington Legal Foundation, 524 U.S. 156, 165-72 (1998); and Webb's Fabulous Pharmacies, Inc. 449 U.S. at 162-65).* In *Goldberg v. Frerichs, 912 F. 3d 1009, 1011 (7th Cir. 2010),* the Seventh Circuit again held that the state may not use unclaimed property for public purposes without paying just compensation, regardless of the form of the property and regardless of whether or not it appreciated in value.

Thus, there is a clear split between the Ninth Circuit and the Seventh Circuit regarding payment of just compensation for the state's use of unclaimed property warranting this Court's review.

Granting Cole-Kelly's request for an extension to file a joint certiorari petition and granting Sykes's and Cote's request for an extension is necessary

because their respective counsel need the additional time to jointly draft and prepare a joint petition and appendix.

For these reasons, there are extraordinary circumstances and good cause for an extension of time up to and including August 12, 2024 for Cole-Kelly (and Sykes and Cote) to file a joint certiorari petition in this case to review the judgment of the United States Court of Appeals for the Ninth Circuit of the Cole-Kelly and Sykes and Cote cases.

Respectfully Submitted

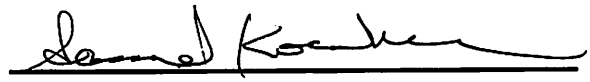

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EXHIBIT A

FILED

MAR 14 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXANDER COTE, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

OFFICE OF THE CALIFORNIA STATE CONTROLLER; BETTY T. YEE, in her official capacity as California State Controller,

Defendants-Appellees.

No. 23-15375

D.C. No. 4:22-cv-04056-HSG

MEMORANDUM*

JENNIFER I. SYKES, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

OFFICE OF THE CALIFORNIA STATE CONTROLLER; BETTY T. YEE, in her official capacity as California State Controller,

Defendants-Appellees.

No. 23-15377

D.C. No. 4:22-cv-04133-HSG

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

ALISON COLE-KELLY, Individually and on Behalf of All Those Similarly Situated,

Plaintiff-Appellant,

v.

BETTY T. YEE, in her official capacity as California State Controller; STATE OF CALIFORNIA,

Defendants-Appellees.

No. 23-15413

D.C. No. 4:22-cv-02841-HSG

Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding

Submitted March 12, 2024**
San Francisco, California

Before: S.R. THOMAS, McKEOWN, and CHRISTEN, Circuit Judges.

Plaintiffs-Appellants Alexander Coté, Jennifer Sykes, and Alison Cole-Kelly appeal a district court's dismissal without leave to amend of their putative class action against Defendent-Appellee the California State Controller. We have jurisdiction over this appeal of the district court's dismissal under 28 U.S.C.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 1291. We affirm the judgment of the district court. Because the parties are familiar with the factual and procedural history of the case, we need not recount it here.

"Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed de novo." *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011) (emphasis omitted). "We review for abuse of discretion a district court's dismissal . . . without leave to amend." *Benavidez v. County of San Diego*, 993 F.3d 1134, 1141–42 (9th Cir. 2021). "A district court acts within its discretion to deny leave to amend when amendment would be futile . . . ." *V.V.V. & Sons Edible Oils Ltd. v. Meenakshi Overseas, LLC*, 946 F.3d 542, 547 (9th Cir. 2019) (ellipsis in original) (quoting *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725–26 (9th Cir. 2000)). We review "the question of futility of amendment de novo." *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1172 (9th Cir. 2016).

Plaintiffs claim that California's Unclaimed Property Law (UPL) violates the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 19 of the California Constitution. *San Remo Hotel L.P. v. City And County of San Francisco*, 27 Cal. 4th 643, 664 (2002) (construing the California Constitution's takings clause "congruently" to the United States Constitution's Takings Clause). They argue that California's Unclaimed Property

Law is unconstitutional because it does not require interest to be paid on escheated property while held by the state nor once reclaimed. Cal. Civ. Proc. Code § 1540(c). Plaintiffs seek declaratory and injunctive relief to remedy this injury.

However, we have already decided this question in two cases: *Turnacliff v. Westly*, 546 F.3d 1113 (9th Cir. 2008), and *Suever v. Connell*, 579 F.3d 1047 (9th Cir. 2009). These cases bind us, and preclude relief. In addressing an estate administrator's challenge to the 2002 version of California's Unclaimed Property Law that guaranteed some interest, we held that "when the Estate abandoned its property, it forfeited any right to interest earned by that property." *Turnacliff*, 546 F.3d at 1119; *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). We confirmed that holding in *Suever*, where we rejected claims for retroactive interest under the same 2002 statute because "state sovereign immunity clearly precludes Plaintiffs from successfully obtaining *more* than [their escheated principal and sales proceeds therefrom] in the form of interest." 579 F.3d at 1059. We also rejected claims for an injunction that required the "payment of interest on any claims for unclaimed property that escheated under" the 2003 California Unclaimed Property Law that paid no interest. *Id.* at 1057. And we rejected claims for equitable relief that were "indistinguishable in effect from claims for money damages against the State and, as such, . . . barred by the Eleventh Amendment." *Id.* at 1059–60.

There is no principled difference to be drawn between the statutes those decisions considered and the one before us today. Plaintiffs' property has validly escheated to the state. The current statute does not guarantee interest, Cal Civ. Proc. Code § 1540(c) (2021) ("Interest shall not be payable on any claim paid under this chapter."), and we addressed a nearly identical statute that did not guarantee interest in *Suever*. 579 F.3d at 1057; *see* Cal Civ. Proc. Code § 1540(c) (2003) ("No interest shall be payable on any claim paid under this chapter."). As we held in *Suever*: "[T]he State is not constitutionally required to pay *any* interest under the UPL . . . ." 576 F.3d at 1056. The district court applied our precedents correctly. To the extent the plaintiffs' claims are for money damages against the state, they are barred by the Eleventh Amendment. *Id.* at 1059. To the extent any claims escape the Eleventh Amendment, plaintiffs cannot establish an entitlement to the interest they seek. *Turnacliff*, 546 F.3d at 1119.

To overcome the weight of our precedent, plaintiffs cite to several out-of-circuit cases, which do not bind this court, and several Supreme Court decisions. A three-judge panel may overrule circuit precedent only where an "intervening higher authority" is "clearly irreconcilable" with the reasoning of that decision. *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1141 (9th Cir. 2022) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).

Turnacliff and *Suever* were decided after the cited Supreme Court cases, and therefore the cited cases cannot constitute "intervening higher authority." *Miller*, 335 F.3d at 900.[1]

The district court properly applied *Turnacliff* and *Suever* in dismissing the plaintiffs' claims as precluded by Ninth Circuit precedent.

AFFIRMED.

[1]Plaintiffs also suggest the panel call for en banc review or certify their questions to the Supreme Court. En banc review is not warranted because we are not faced with "contradictory precedents" nor an "irreconcilable conflict" in our case law. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1478–79 (9th Cir. 1987). As to whether this panel should certify plaintiffs' questions to the Supreme Court, mere "doubts" about a Court of Appeals' prior panel decisions are insufficient to invoke "so exceptional a jurisdiction" as the Supreme Court's on certification. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

EXHIBIT B

FILED

APR 23 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXANDER COTE, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. OFFICE OF THE CALIFORNIA STATE CONTROLLER; BETTY T. YEE, in her official capacity as California State Controller, Defendants-Appellees.	No. 23-15375 D.C. No. 4:22-cv-04056-HSG Northern District of California, Oakland ORDER
JENNIFER I. SYKES, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. OFFICE OF THE CALIFORNIA STATE CONTROLLER; BETTY T. YEE, in her official capacity as California State Controller, Defendants-Appellees.	No. 23-15377 D.C. No. 4:22-cv-04133-HSG Northern District of California, Oakland

ALISON COLE-KELLY, Individually and on Behalf of All Those Similarly Situated, Plaintiff-Appellant, v. BETTY T. YEE, in her official capacity as California State Controller; STATE OF CALIFORNIA, Defendants-Appellees.	No. 23-15413 D.C. No. 4:22-cv-02841-HSG Northern District of California, Oakland

Before: S.R. THOMAS, McKEOWN, and CHRISTEN, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc is **DENIED**.

EXHIBIT C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ALISON COLE-KELLY, Plaintiff, v. BETTY T. YEE, et al., Defendants.	Case No. 22-cv-02841-HSG **ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS** Re: Dkt. Nos. 16, 24, 23, 35
ALEXANDER COTE, Plaintiff, v. OFFICE OF THE CALIFORNIA STATE CONTROLLER, et al., Defendants.	Case No. 22-cv-04056-HSG Re: Dkt. No. 32
JENNIFER I. SYKES, Plaintiff, v. OFFICE OF THE CALIFORNIA STATE CONTROLLER, et al., Defendants.	Case No. 22-cv-04133-HSG Re: Dkt. No. 23

Pending before the Court are Defendants' motion to dismiss (Dkt. No. 23) in *Cole-Kelly v. Yee*, 22-cv-02841-HSG ("*Cole-Kelly*"); Defendants' motion to dismiss (Dkt. No. 32) in *Coté v. Office of the California State Controller*, 22-cv-04056-HSG ("*Coté*"); and Defendants' motion to dismiss (Dkt. No. 23) in *Sykes v. Office of the California State Controller*, 22-cv-04133-HSG. Also pending before the Court are the *Cole-Kelly* Plaintiffs' motion for partial summary judgment (Dkt. No. 35), Plaintiffs' motion to certify class (Dkt. No. 16), and Plaintiffs' motion to

consolidate related cases and appoint class counsel (Dkt. No. 24). The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b). The Court **GRANTS** Defendants' motions to dismiss and **TERMINATES AS MOOT** the *Cole-Kelly* Plaintiffs' motion for partial summary judgment, motion to certify class, and motion to consolidate related cases and appoint class counsel.

I. FACTUAL BACKGROUND

Cole-Kelly, *Coté*, and *Sykes* are three related putative class actions that challenge the constitutionality of California's Unclaimed Property Law ("UPL"), C.C.P. § 1500 *et seq.*, under the United States Constitution and the California Constitution.[1] As alleged in the *Coté* complaint, "[t]he UPL applies to unclaimed property that is held by a third party, for example, a bank, insurance company, corporation, or public utility. Unclaimed property is generally defined as any financial asset left inactive by its owner for a period of time, typically three (3) years. Under the UPL . . . such property is temporarily transferred to the custody of the State." *Coté* Dkt. No. 1 at ¶ 17. Plaintiffs further allege that the UPL "is not a true escheat statute; it gives the State custody, not ownership, of unclaimed property." *Id.* Third parties are required to self-report any unclaimed property and "transfer property to the State once the property meets the UPL's definition of unclaimed property and pay the State interest at the rate of twelve percent (12%) per annum for property not timely reported or delivered." *Id.* ¶ 19. According to the *Coté* plaintiffs, "[t]he State collects hundreds of millions of dollars in unclaimed or abandoned property annually but returns just a fraction of that amount to the property owners. The State retains and uses the interest, dividends, accruals, earnings, investment returns, and other benefits earned on and from unclaimed property for public purposes." *Id.* ¶ 20. The *Coté* complaint alleges that "the Controller does not

[1] The *Cole-Kelly* complaint brings three claims: 1) claim for declaratory and prospective injunctive relief on behalf of plaintiff and the class: unconstitutionality under 5th Amendment, 2) claim for declaratory and prospective injunctive relief on behalf of plaintiff and the class: unconstitutionality under Article I, Section 19, and 3) violation of equal protection and due process (42 U.S.C. § 1983). *See generally Cole-Kelly* Dkt. No. 1. The *Coté* and *Sykes* complaints bring the same two claims: 1) claim for declaratory and prospective injunctive relief on behalf of plaintiff and the class for violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, 2) claim for declaratory and injunctive relief on behalf of plaintiff and the class for violation of Article I, Section 19 of the California Constitution. *See generally Coté* Dkt. No. 1; *Sykes* Dkt. No. 1.

pay interest, dividends, accruals, earnings, investment returns, or other benefits above the original amount of the unclaimed property to the owner or person entitled to recover the unclaimed property and is prohibited by statute from doing so." *Id.* ¶ 21. For this reason, the *Coté* complaint alleges that "[t]he State deprives Plaintiff and all other Class members of just compensation on unclaimed or abandoned property it uses for public purposes." *Id.* ¶ 22. The *Cole-Kelly* and *Sykes* complaints make similar allegations. *See Cole-Kelly* Dkt. No. 1 ¶¶ 10-38; *Sykes* Dkt. No. 1 ¶¶ 17-22.

The central allegation in all three cases is that the UPL is unconstitutional under both the United States Constitution and the California Constitution because it unconstitutionally deprives property owners of any "time value"[2] accrued by their property during the time it is controlled by the State. Accordingly, the constitutionality of the UPL is a dispositive issue in all three cases.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Rule 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff need only plead "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). A claim is facially plausible when a plaintiff pleads "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).

In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party."

[2] Plaintiffs in all three cases refer to the concept of "time value." *See e.g., Cole-Kelly* Dkt. No. 40 ("Opp.") at 1; *Sykes* Dkt. No. 38 ("Opp.") at 13; *Coté* Dkt. No. 49 ("Opp.") at 13. For clarity, the Court will refer to "interest" throughout this order. Although the Court understands that "time value" may include other forms of appreciation—such as dividends, accruals, or other earnings—it finds that this does not change the analysis or outcome.

Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless, courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

Even if the court concludes that a 12(b)(6) motion should be granted, the "court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (quotation omitted).

III. DISCUSSION

A. Three-Judge Panel

As a preliminary matter, the *Cole-Kelly* Plaintiffs argue that Defendants' motion to dismiss and Plaintiffs' motion for partial summary judgment in *Cole-Kelly* should be decided by a three-judge panel under 28 U.S.C. § 2284. *Cole-Kelly* Opp. at 20-21. Section 2284 provides that three-judge panel "shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284. This case does not involve the apportionment of congressional districts or a statewide legislative body so, under § 2284, Plaintiffs must identify an applicable "Act of Congress" that requires a three-judge panel. In support of their request, Plaintiffs argue that "[w]here, as here, an action seeks to establish the unconstitutionality of a state statute and to enjoin the state and its officers from enforcing that allegedly unconstitutional statute, a party can move, pursuant to 28 U.S.C. § 2284, to have a three-judge district court panel decide the issues." *Cole-Kelly* Opp. at 20-21. The two cases Plaintiffs cite in support both concern 28 U.S.C. § 2281, which stated:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Hicks v. Miranda, 422 U.S. 332, 342 n.12 (1975) (quoting 28 U.S.C. § 2281 (repealed 1976)); *see*

also Fla. Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 79-80 (1960).

Section 2281, however, was repealed in 1976. *See* 28 U.S.C. § 2281 (repealed 1976); *see also Tedards v. Ducey*, 951 F.3d 1041, 1060 n.37 (9th Cir. 2020) (stating that "[In 1968], Congress required that any case seeking an injunction against a state officer to prevent enforcement of an allegedly unconstitutional state statute be heard by a special three-judge district court," but noting in the citation to the statute that it was "repealed 1976"); *Larry P. By Lucille P. v. Riles*, 793 F.2d 969, 978 n.4 (9th Cir. 1984) (explaining that § 2281 "was repealed in 1976").

The Court knows of no current authority or other basis on which it could grant Plaintiffs' request, and Plaintiffs point to none. Accordingly, Plaintiffs' request for a three-judge panel is **DENIED**.

B. Sovereign Immunity

Defendants argue in the *Cole-Kelly* motion to dismiss that "any claims against the State of California and its agencies are barred by the Eleventh Amendment." *Cole-Kelly* Mot. at 8. Defendants further argue that because "officials sued in their official capacities are not persons within the meaning of § 1983 . . . a plaintiff is barred from suing defendants in their official capacities for money damages, absent congressional abrogation or waiver of sovereign immunity." *Id.* at 8-9 (quotations omitted). The Defendants make similar arguments in the *Coté* and *Sykes* motions to dismiss. *See Coté* Mot. at 9-10; *Sykes* Mot. 9-10. The *Sykes* and *Coté* Plaintiffs argue that "the Eleventh Amendment does not bar claims for prospective injunctive relief to remedy a state's ongoing violations of federal law." *Coté* Opp. at 16; *Sykes* Opp. at 16. The *Cole-Kelly* Plaintiffs also argue that "the interest (or time value) on the unclaimed property is the property of the owners, not the State" so "Plaintiffs' claim for a return of their interest is a claim for a return of their property, and not a claim for damages against the state." *Cole-Kelly* Opp. at 20 (footnotes and citations omitted); *see also Coté* Opp. at 17 (making similar arguments); *Sykes* Opp. at 17 (same). The *Coté* and *Sykes* Plaintiffs further argue that "even if retrospective relief would be sought, the self-executing aspect of the Fifth Amendment provides relief." *Coté* Opp. at 16; *Sykes* Opp. at 16.

The Ninth Circuit addressed sovereign immunity in the context of claims for interest in

Suever II: "while the Eleventh Amendment is no bar to Plaintiffs' claims for return of their escheated principal and the sales proceeds therefrom, state sovereign immunity clearly precludes Plaintiffs from successfully obtaining *more* than that amount in the form of interest . . . ." *Suever v. Connell (Suever II)*, 579 F.3d 1047, 1059 (9th Cir. 2009) (emphasis in original).

Plaintiffs' argument that their claim for a return of the interest is a claim for the return of *their* property (and therefore not barred by the Eleventh Amendment) is foreclosed by the reasoning in *Turnacliff* regarding the interest earned by unclaimed or abandoned property. In *Turnacliff*, Plaintiffs argued, in part, that "the Controller's action ran afoul of the Takings Clause of the Fifth Amendment, because he did not pay to the Estate the actual interest that the unclaimed property earned while California held it." *Turnacliff v. Westly*, 546 F.3d 1113, 1115 (9th Cir. 2008). The court acknowledged that in a previous case it had held that "prisoners possess a constitutionally cognizable property right in the interest earned on the principal held in Inmate Trust Accounts." *Id.* at 1119 n.3 (citing *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1998)). The court discussed *Schneider's* holding that "'[t]he "interest follows principal" rule's common law pedigree, and near-universal endorsement by American courts—including California's' left us with 'little doubt that interest income of the sort at issue' [there] was 'sufficiently fundamental that States may not appropriate it without implicating the Takings Clause.'" *Id.* (quoting *Schneider*, 151 F.3d at 1201). The *Turnacliff* court, however, also stated that "[b]y contrast, we are unaware of . . . any authority for the proposition that interest earned by unclaimed or abandoned property belongs to the property owner." *Id.*

Given the Ninth Circuit's statement in *Turnacliff*, this Court declines to find that the interest earned by unclaimed or abandoned property belongs to the property owner. Consequently, Plaintiffs' claims for the payment of any interest accrued by their property while the property was in State custody are barred by the Eleventh Amendment. *Suever II*, 579 F.3d at 1059 (explaining that "Plaintiffs are not entitled to *more* than the actual property that the State took into its possession or the proceeds of that property . . . . Rather, such claims for additional compensation, whether described as 'restitution' or otherwise, are indistinguishable in effect from claims for money damages against the State and, as such, are barred by the Eleventh Amendment" (emphasis

in original) (quotations omitted)).[3]

C. Constitutionality of UPL

To the extent that any of Plaintiffs' claims are not barred by the Eleventh Amendment, these claims fail to state a claim upon which relief can be granted because the claims are not tenable under current Ninth Circuit law.

The Ninth Circuit has "squarely rejected the proposition that property owners have a compensable Fifth Amendment right to interest earned on unclaimed property that escheats to the State of California." *Suever II*, 579 F.3d at 1056.[4] It has stated that "insofar as [a district court's] order requires prospective payment of interest, or payment of interest on any claims for unclaimed property that escheated under the *current* version of the UPL . . . *Turnacliff* requires reversal." *Id.* 1057 (emphasis added).[5] The Court has also explicitly stated that "[a]s previously noted, we have declared that the current version of the UPL is facially constitutional." *Id.*

The Ninth Circuit could not be more clear: Plaintiffs' claims are not legally viable. If Plaintiffs want to change Ninth Circuit law, they will have to persuade an en banc panel of that court to do so.[6]

[3] The *Cole-Kelly* Plaintiffs argue that "*Suever* and *Turnacliff* are not the law of the circuit" based on the Supreme Court's decision in *Liu v. Securities and Exchange Commission*, 140 S. Ct. 1936, 1946 (2020). *See Cole-Kelly* Opp. at 19-20. *Liu* involved a civil enforcement action brought by the SEC. The Court held "that a disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under" a statute "that historically exclude[d] punitive sanctions." *Liu*, 140 S. Ct. at 1940. Given the different context of the *Liu* case and its holding, Plaintiffs have not met the high standard of "clear irreconcilability" required before district courts can "consider themselves bound by the intervening higher authority and reject the prior opinion of [the Ninth Circuit] as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc).

[4] The *Coté* and *Sykes* Plaintiffs argue that "[t]he law has developed since the Ninth Circuit Court of Appeals determined that owners of unclaimed property have no Fifth Amendment right to interest itself actually earned on their property while held by the State . . ." *Coté* Opp. at 2; *Sykes* Opp. at 2. However, the cases cited by Plaintiffs are out-of-circuit cases that have no precedential value within the Ninth Circuit, and cannot override this circuit's decisions on the question.

[5] *Suever II* was decided in 2009, well after the law's 2003 amendment. *See Cole-Kelly* Opp. (explaining that the current version of § 1540(c) was enacted in 2003).

[6] The Court finds that Plaintiffs' claims that the alleged taking also violated the due process and equal protection provisions of the Constitution are derivative and fail for the same reason. *See Cole-Kelly* Dkt. No. 1 ¶ 73 ("The California Controller and Treasurer violated Plaintiff's and the Classes' due process and equal protection rights, by taking Plaintiff's and the Class's property without just compensation, thereby causing harm to Plaintiff and the Class."); *Coté* Dkt. No. 1 ¶ 52 ("The UPL violates the Fifth and Fourteenth Amendments of the United States Constitution in that it directs that unclaimed property transferred to the custody of the Controller must be paid

IV. CONCLUSION

Because the "pleading[s] could not possibly be cured by the allegation of other facts," *Lopez*, 203 F.3d at 1127 (quotation omitted), the Court **GRANTS WITHOUT LEAVE TO AMEND** Defendants' motions to dismiss: Dkt. No. 23) in *Cole-Kelly*, Dkt. No. 32 in *Coté*, and Dkt. No. 23 in *Sykes*.

This order also **TERMINATES AS MOOT** Plaintiffs' motion for partial summary judgment (Dkt. No. 35), Plaintiffs' motion to certify class (Dkt. No. 16), and Plaintiffs' motion to consolidate related cases and appoint class counsel (Dkt. No. 24) in *Cole-Kelly*.

The Clerk is directed to enter judgment in favor of Defendants and to close the three cases.

IT IS SO ORDERED.

Dated: 3/13/2023

Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

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to the State's General Fund and used by the State for public purposes without the payment of just compensation to property owners, upon claiming the property, for the State's use of that property while in its custody for public purposes."); *Sykes* Compl. ¶ 52 (same).

Defendants point out that "[a]side from a provision in California's Constitution proscribing 'damage' to property without compensation, the Takings Clauses in the United States and California Constitutions have been construed 'congruently.'" *Coté* Mot. at 3 n.1 (quoting *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 664 (2002)); *Sykes* Mot. at 3 (same); *Cole-Kelly* Mot. at 3 n.2 (same). The *Coté* and *Sykes* Plaintiffs agree, and the *Cole-Kelly* Plaintiffs do not argue otherwise. *See Coté* Opp. at 1 n.2; *Sykes* Opp. at 1 n.2; *see generally Cole-Kelly* Opp. The Court therefore finds that Plaintiffs' claims under Article I, Section 19 of the California Constitution also fail for the same reason.

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2024, I electronically filed and overnighted by Fed-Ex the following document with the United States Supreme Court:

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

And emailed it to counsel for respondents and counsel for Sykes and Cote.

/s/ Samuel Kornhauser
Samuel Kornhauser