No. 01-1325

IN THE
Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, et al.,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice. It has over 410,000 members, who come from each of the fifty states, the District of Columbia, and the U.S. territories.

One of the core functions of the ABA is to promote the ethical behavior of lawyers. The central ethical obligation of lawyers is to protect the interest of their clients, including any client property deposited with the lawyers. ABA Model Rule of Professional Conduct ("ABA MRPC") 1.15 (1997). Lawyers have an additional ethical obligation to improve access to justice for the poor. *See* ABA MRPC 6.1. The ABA views the future availability and effectiveness of IOLTA ("Interest on Lawyers' Trust Accounts") programs as essential to efforts to improve the legal system by broadening access to civil justice under MRPC 6.1, and consistent with the ethical obligation of lawyers to their clients under MRPC 1.15. It therefore files this brief in support of Respondents.

The ABA's historical involvement with IOLTA programs makes it uniquely qualified to assist this Court in gaining a full understanding of such programs and the bases for their widespread support from lawyers, as well as from

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[1] Letters of consent have been filed with the Clerk. No counsel for a party authored any part of this brief, and no one other than *amicus* and its counsel has made a monetary contribution to its preparation or submission. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

the organized bar, state judiciaries and legislative bodies. For two decades, the ABA has supported the creation and maintenance of IOLTA programs in every state and the District of Columbia. The ABA formed an Advisory Board and Task Force on IOLTA in 1981. Two years later, the ABA Board of Governors officially approved state-authorized IOLTA programs. *See* Resolution, ABA Board of Governors (April 1983) (approving "in principle the concept of state programs, where authorized by the law of that state, for the use of interest on lawyer trust funds for the support of law-related public service activities"). Meanwhile, the ABA Standing Committee on Ethics and Professional Responsibility reviewed the ethical implications of IOLTA rules and concluded that participation in state-authorized IOLTA programs was consistent with lawyers' professional and ethical responsibilities, including in particular the ethical obligation of lawyers to protect their clients' property.[2] If the ABA believed that IOLTA programs in effect took money from or had an adverse economic impact on clients, as Petitioners assert, the ABA would vigorously oppose them.

Since the early 1980s the ABA has continued to support the adoption of IOLTA programs. After the success of early IOLTA programs, the ABA House of Delegates in 1988 resolved to encourage states to adopt or convert to mandatory IOLTA programs:

> BE IT RESOLVED, that the American Bar Association encourages each state which has a voluntary Interest on Lawyers' Trust Accounts (IOLTA) program to convert and adopt a comprehensive IOLTA program in which all lawyers in the state who are required to

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[2] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 348 (1982).

> maintain trust accounts will be required to participate.

Resolution, ABA House of Delegates (February 1988). In 1991, the ABA House of Delegates reaffirmed its support for IOLTA programs:

> BE IT RESOLVED, that the American Bar Association reaffirms its support for state programs which generate interest on lawyers' trust account funds for the purpose of law-related public service to the poor.
>
> BE IT FURTHER RESOLVED, that funds generated by IOLTA programs should not be used as a substitute for public funding for obligations of government arising under the Constitution, statutes, or otherwise, and that the allocation of such funds should be determined in each state by an independent body, in light of that state's needs and priorities.

Resolution, ABA House of Delegates (February 1991). Today, the ABA operates a Commission on IOLTA and an IOLTA Clearinghouse, which together monitor and provide information about the operation of IOLTA programs across the country. Through the Commission, the ABA helps the states adopt rules and enforcement mechanisms to ensure that client funds are deposited in IOLTA accounts only if they can generate no net interest for clients.

STATEMENT

IOLTA programs nationwide represent a creative and legitimate means – carefully crafted by representatives of the legal profession and state governments – of stemming the decline of legal services available to the poor. State IOLTA rules provide for client funds to be deposited in IOLTA accounts only when they cannot generate net interest for clients as a result of bank fees or other transaction costs. By avoiding many of these transaction costs, IOLTA programs are able to generate net interest that is then used to fund nonprofit organizations that provide legal services to those in need – a result that even Petitioners concede is socially beneficial. Pet. Br. at 35.

After the introduction of IOLTA-like programs in several English-speaking jurisdictions around the world, Florida adopted the first United States IOLTA program in the late 1970s. *See In re Interest on Trust Accounts*, 356 So. 2d 799 & n.25 (Fla. 1978) (describing history of IOLTA programs in other countries). Thereafter, the Conference of Chief Justices resolved in February 1979 to endorse and encourage the development and implementation of IOLTA programs. *See* Conference of Chief Justices, *Interest on Trust Accounts*, Res. V (Feb. 13, 1979). Additional states and jurisdictions then began developing, adopting and refining IOLTA programs, and today these programs enjoy overwhelming support from state political and judicial bodies. All fifty states, the District of Columbia, and the Virgin Islands now have established IOLTA programs – by court rules in forty-seven jurisdictions and by state legislation in five. In promulgating and approving IOLTA rules, courts have acted with full knowledge of (and sensitivity towards) both the ethical obligations of lawyers and the limitations imposed by the Takings Clause in the federal Constitution and equivalent clauses in state constitutions.

Funds generated by IOLTA accounts are administered by bar foundations and independent nonprofit corporations, as well as through special programs established by the states, state supreme courts or state bar associations. Nationwide, IOLTA programs generated approximately $162 million in 2001.[3] Income collected through each IOLTA program is distributed as grants. About 90% of the grants support either the provision of direct legal services or pro bono legal services to the poor. In 2001, these legal services grants were distributed to over 900 different programs, which provided assistance in a wide range of areas including housing, public benefits and consumer matters. Other IOLTA grants fund alternative dispute resolution programs, victim services, *pro se* litigation, young lawyers public service projects and loans and scholarships to law students.[4]

But even with IOLTA, our nation faces a crisis in serving civil legal needs, particularly of the poor. The ABA conducted a Comprehensive Legal Needs Study ("CLNS") throughout the 1990s to learn about the legal needs of Americans, what they do about those needs, and how satisfied they are with the outcomes. The CLNS study concluded that in the last twenty years, legal services to individuals and households have declined as a proportion of all legal services provided by the civil justice system.[5] The most frequently unmet needs relate to medical access and insurance, utilities, and public benefits.[6] Not surprisingly, economically disadvantaged segments of the population

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[3] American Bar Association, IOLTA Handbook 98 (2002).

[4] *See Civil Justice: An Agenda for the 1990s* (1989), *at* http://www.abanet.org/legalservices/downloads/sclaid/accessconf.pdf.

[5] *See* Albert Cantril, *Agenda for Access: The American People and Civil Justice* (1996), *at* http://www.abanet.org/legalservices/downloads/sclaid/agendaforaccess.pdf.

[6] *See* National Survey of the Civil Legal Needs of the Poor, *in* ABA Consortium on Legal Services and the Public, Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and the Public Generally 28 (1989).

suffer most acutely from a lack of access to civil justice. A 1989 study conducted by the Spangenberg Group revealed that approximately 80% of the legal problems of the poor go unaddressed.[7]

Because IOLTA funds represent the second largest funding source for the provision of legal services to the poor in this country, the situation would be worse still without IOLTA. According to a survey conducted by the ABA Center for Pro Bono in 1991, IOLTA programs fund approximately 26% of the budgets for bar association-sponsored pro bono programs. Indeed, the most recent statistics of the ABA Project to Expand Resources for Legal Services show that IOLTA revenues provide approximately 15% of funding for *all* legal services to the poor. The continuation of IOLTA is therefore of vital importance to the provision of needed legal services.

SUMMARY OF ARGUMENT

A. Because money is fungible, an alleged taking of money is categorically different from an appropriation of tangible personal or real property, to which a *per se* takings analysis may apply. Petitioners' claim that an appropriation of money must be evaluated as a *per se* taking runs counter to takings jurisprudence generally, which applies the multi-factor regulatory takings test even where governmental action has severe monetary impacts. Thus, the alleged taking here must be analyzed under regulatory takings principles, just as this Court has analyzed alleged takings of money in the past. As Respondents explain in their brief, such an analysis leads to the conclusion that the Washington IOLTA program does not effect a taking at all.

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[7] *See Civil Justice: An Agenda for the 1990s* (1989), *at* http://www.abanet.org/legalservices/downloads/sclaid/accessconf.pdf.

B. Even if a taking had occurred, no compensation would be due to Petitioners. It has long been settled that the measure of compensation under the Fifth Amendment is what the owner of the property has lost, not what the State has gained. Here, Petitioners have suffered no pecuniary loss. While Petitioners may have lost the right to exclude others from the use of the interest earnings on their deposits, such a loss in these circumstances has no economic significance for purposes of just compensation under the Fifth Amendment. In any event, Petitioners lost the right to exclude others from using interest earnings on their deposits not as a result of Washington's adoption of an IOLTA program, but as a result of their voluntary decision to deposit funds into escrow that could not earn net interest.

C. The fact that Petitioners are owed nothing in the way of just compensation resolves the case. Because the Constitution forbids only takings without just compensation, there can be no constitutional violation when no compensation would be due. Nothing in the Fifth Amendment or in takings jurisprudence supports Petitioners' notion that a taking of valueless property can be enjoined, while the taking of valuable property can proceed, subject only to the owner's right to seek compensation.

ARGUMENT

I. THE IOLTA PROGRAM DOES NOT IMPOSE A COMPENSABLE BURDEN ON ANY PERSON

The Court of Appeals correctly held that there are two independent reasons why the Washington IOLTA program does not violate the Takings Clause: the IOLTA rules do not effect a taking under the Fifth and Fourteenth Amendments, and even if they did, no compensation would be due.

A. The IOLTA Program Does Not "Take" Any Property From Clients.

The Court of Appeals correctly decided that the Washington IOLTA program does not "take" any property from clients. Thus, the ABA supports the arguments in Respondents' brief that regulatory rather than *per se* takings analysis applies here and that, under regulatory takings analysis, there is no taking. Because this brief focuses on the just compensation issue, however, its treatment of the takings issues will be confined to a few observations.

First, money is categorically different from physical property because it is fungible and because payment of money to government is a widely shared burden. As this Court wrote in *United States v. Sperry Corp.*, 493 U.S. 52, 59-64 (1989), "It is artificial to view" withdrawals of money "as physical appropriations of property. Unlike real or personal property, money is fungible." 493 U.S. at 62 n.9. The *Sperry* Court therefore rejected the argument Petitioners advance here – that "physical appropriation" of money is a *per se* taking. *Id.* Indeed, the Court consistently has analyzed appropriations of money under the multi-factor test applicable to regulatory takings.[8] *See Eastern Enters. v. Apfel*, 524 U.S. 498, 523-24 (1998) (plurality opinion) (compulsory payment of health care benefits to retirees);[9] *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 643-44 (1993) (employer's

[8] In *Sperry* itself, as in other fees for services cases, the Court truncated the traditional regulatory analysis, recognizing that the concerns underlying the Takings Clause are not implicated by such fees. 493 U.S. at 60-62.

[9] The other five Justices in *Eastern Enterprises* concluded that takings analysis was entirely inapplicable to the monetary liability at issue there. *See Eastern Enters.*, 542 U.S. at 540-41 (Kennedy, J., concurring); *id*. at 555 (Breyer, J., dissenting).

withdrawal liability to multiemployer pension plans); *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987) (mandatory assignment of child support payments to the state); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) (withdrawal liability to multiemployer pension plans); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) (interest earned on interpleader fund).[10]

Second, treating every use of money as a *per se* taking cannot be squared with the regulatory takings case law generally. That case law recognizes that many property regulations diminish the monetary value of property, thereby effectively taking money out of the pockets of property

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[10] Despite Petitioners' reliance on *Webb's* (cited in Pet. Br. at 30 & 33 n.12), the Court in that case explicitly discussed two of the three variables traditionally applied in regulatory taking analysis. The Court first considered whether the government had interfered with the claimants' investment-backed expectations, holding that they had "more than a unilateral expectation" with respect to the interest generated by the interpleader fund. 449 U.S. at 161. The Court skipped discussion of the second factor, severity of the economic impact, as no analysis of the economic harm imposed was needed because it was undisputed that the fund had generated net interest allocable to each claimant. *Id.* at 162. The Court then considered the third factor, the nature of the government interest, and found that the government had not asserted any regulatory interest whatsoever. Therefore, it concluded, the measure was little more than a forced contribution to general revenues rather than a measure to "adjust[] the benefits and burdens of economic life to promote the common good." *Id.* at 163 (quoting *Penn Central v. City of New York*, 438 U.S. 104, 124 (1978)). In reaching this conclusion, the Court reserved the possibility that it might uphold a statute that allowed a county to retain interest earned "where the interest would be the only return to the county for the services it renders," *id.* at 165, thus leaving no doubt that a regulatory takings analysis (rather than a *per se* approach) applied.

owners, or actually require owners to spend money to comply with the regulations. *See, e.g.*, *Penn Central v. City of New York*, 438 U.S. 104, 124-27 (1978). But despite their monetary impacts, such regulations are not considered *per se* takings.

Third, treating every demand for money as a *per se* taking cannot be squared with the principle that taxes are virtually always permissible under the Fifth Amendment. This principle applies not just to federal taxes, where Congress' power to tax is established by the Constitution, *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24-25 (1916), but also to state and local taxes, where the Constitution contains no similar grant of authority. *See, e.g.*, *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 at 375-76 (1974). Even if the IOLTA rule does not assess a tax, as Petitioners argue, Pet. Br. at 27, the fact that taxes do not constitute takings undercuts the logic of Petitioners' argument that all appropriations of property, including appropriations of money, are necessarily *per se* takings. *Cf. Penn Central*, 438 U.S. at 124 (contrasting "physical invasions" of property with programs "adjusting the benefits and burdens of economic life" and indicating that taxes fall in the latter category).[11]

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[11] Petitioner urges that taxes are somehow different because they are of legislative origin, while state judiciaries have promulgated most (but not all) IOLTA programs. Pet. Br. at 27 & n.9. But takings analysis does not generally depend on whether the legislature is the source of the alleged taking. And passage by a legislature does not guarantee that taxes will fall on a broader group of citizens than other appropriations. *See, e.g.*, *Alco Parking Corp.*, 417 U.S. 369 (tax on parking lot owners). Moreover, even if the label "tax" has some talismanic significance, the limited differences between taxes and other appropriations of money could not justify treating taxes as exempt from takings analysis but other monetary appropriations as takings *per se*. Instead, as this Court

Here, the Washington IOLTA program imposes less of a burden than most taxes or regulations, and is as broadly targeted as many. The State simply has regulated the use of certain funds, requiring that they be deposited in IOLTA accounts instead of noninterest bearing accounts. It then uses the resulting interest, which has no economic value to the owners, to fund a concededly laudable social goal. The absence of any tangible – or even material – burden on any person provides an ample "rational justification" for this approach to funding IOLTA programs. Pet. Br. at 19.

B. Even Assuming the IOLTA Program "Takes" Some Property Right From Clients, No Compensation Is Due Because That Property Has No Economic Value.

This Court has recently reaffirmed that a state's mere taking of "property" does not necessarily violate the Takings Clause. "[O]nly takings without 'just compensation' infringe [the Fifth] Amendment." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997). In *Phillips v. Washington Legal Found.,* 524 U.S. 156 (1998), this Court recognized that IOLTA accounts might present a situation in which no compensation would be due even if a taking occurred. *See id.* at 172. The record here makes clear that is the case, for despite Petitioners' repeated references to the "burden" that IOLTA imposes on them, the simple truth is that they have not suffered any loss – economic or otherwise – that is compensable under this Court's takings jurisprudence. Thus, no constitutional violation has occurred.

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has held, monetary appropriations must be subject to regulatory takings analysis.

1. Petitioners Are Not Entitled to Compensation Unless They Have Suffered an Economic Loss.

At its core, the requirement of just compensation assures that a property owner will be indemnified for the economic value of any property interest taken by the government. That value is generally determined with reference to the "market value" of the property. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 6 (1949). In assessing market value, courts look not to the value attributed to the property as a result of an owner's "unique need for property or idiosyncratic attachment to it." *Id.* at 5. Rather, the compensation required under the Fifth Amendment embraces "only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent." *Id.*

It is equally well settled that compensation under the Fifth Amendment is calculated exclusively from the property owner's point of view and excludes any special value that the government may have for the land or that it may add to the land by virtue of using its condemnation power. When there is a difference between the private property owner's "loss" and the government's gain, "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 319 (1987); *see also Kimball Laundry*, 338 U.S. at 5. If the taking itself generates value, therefore, that value is not properly considered in arriving at just compensation. *See United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956) (excluding special value to condemnor in assessing compensation); *United States ex rel. Tenn. Valley Auth. v. Powelson,* 319 U.S. 266, 276 (1943). As Justice Holmes wrote for the Court in *New York v. Sage*, 239 U.S. 57, 61 (1915), a city cannot be "made to pay for any part [of value] it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by intervention of eminent domain."

Under these principles, it is plain that just compensation for a taking is zero when the market value of the taken property is zero. When the transaction costs attendant to the individual owner exercising control over or making use of the property would exceed the economic benefits of doing so, the owner is not entitled to any compensation if the property is taken. The Court made this point in *United States v. Virginia Elec. & Power Co.* ("*VEPCO*"), 365 US. 624 (1961), where it considered how to value a taken "flowage easement," which had given a private power company the right to flood riparian lands for hydropower. The Court observed that if market forces "such as difficulty of assemblage of all necessary lands" made "it certain that the flowage easements would never be exercised by the . . . Power Company or its assigns," then "nothing" would be payable to the owner of the easements – even though the government would realize value by destroying the property right to build a reservoir. *Id.* at 634 (quoting *Augusta Power Co. v. United States*, 278 F.2d 1 (5th Cir. 1960)) (ellipses in original). Likewise, in *Powelson*, this Court denied any compensation to a landowner for the claimed "water power value" deriving from the possibility of constructing a hydroelectric dam on the owner's land because it would not have been "profitable" to construct and operate such a dam. 319 U.S. at 274.

This Court reached a similar conclusion in *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280 (1926), which involved an award for the seizure of a railroad during World War I. Although the Court assumed the railroad had been taken, it nonetheless denied the owner any compensation, reasoning that "[n]othing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss." *Id.* at 281; *see also Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 304 (1976) ("A number of factors, of course, could operate to eliminate the existence of compensable value in the leasehold interest."); *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241-42, 257-58 (1897). Other courts also have found that governments owe zero compensation even for *per se* takings when those takings impose no net financial loss on the private owners.[12]

Petitioners are therefore plainly incorrect that every taking "violate[s]" the Takings Clause and must result in a remedy. Pet. Br. at 17. A taking requires only just compensation, nothing more. And where there is no economic value lost, just compensation is zero.

2. Petitioners Have Not Suffered an Economic Loss.

The Washington IOLTA program does not result in any economic loss. While this Court held in *Phillips* that the interest earned by Petitioners' funds is their private property, 524 U.S. at 172, the Court also recognized that "[t]he Federal Government, through the structuring of its banking and taxation regulations, imposes costs on" the interest "if private citizens attempt to exercise control over it." *Id.* at 171. For funds placed in IOLTA accounts, these transaction costs along with other transaction costs, by definition, *exceed* the

[12] *See Unisys Finance Corp. v. Resolution Trust Corp.,* 979 F.2d 609, 612 (7th Cir. 1992) (Posner, J.); *California v. United States*, 169 F.2d 914 (9th Cir. 1948); *Fulmer v. Nebraska Dep't of Roads*, 134 N.W.2d 798, 800 (Neb. 1965). Denial of compensation is common where the federal government takes roads from states because the taking frequently imposes no financial burden on the states. *See, e.g., California v. United States,* 395 F.2d 261, 264-65 & n.8 (9th Cir. 1968) (collecting cases).

economic value of their property (*i.e.*, the gross interest) itself. In other words, regardless of Washington State's treatment of interest earned on IOLTA accounts, Petitioners could not have obtained those earnings themselves. Thus, the value of the interest to Petitioners is absolutely zero.

That the State has the ability to benefit from the interest earned on Petitioners' principal when deposited in an IOLTA account and combined with other similar interest earnings does not change the fact that clients cannot realize economic value from their funds on deposit. As in *Sage*, this means only that there is a divergence here between Petitioners' "loss" and the government's gain. But it is Petitioners' loss alone that matters, for the just compensation requirement demands only that the owner of taken property be put "in as good a position pecuniarily as if his property had not been taken." *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *accord Marion & Rye Valley*, 270 U.S. at 281 (test is whether the owner was "subjected by the Government to pecuniary loss"). Petitioners' suggestion that just compensation is equal to the value of the interest to the State, Pet. Br. at 17, 33, ignores this firmly established principle.

Because clients suffer no direct financial "loss" from the supposed taking of their interest earnings, Petitioners suggest they may have lost some indirect benefit from "earnings credits" that some Washington escrow companies received prior to IOLTA's implementation. *See* Pet. Br. at 36 n. 14. Even assuming Petitioners had lost the benefit of earnings credits, which Petitioners have not shown, and that such credits could be characterized as Petitioners' "property" (a proposition that goes far beyond the holding and rationale of *Phillips*), that loss would be related only indirectly to the alleged taking. The Takings Clause does not require states to compensate property owners for such indirect losses. Parties to escrows would be worse off financially by reason of an IOLTA rule only if: (i) a bank accepting IOLTA deposits has decided to end a preexisting practice of offering earning credits; (ii) the cessation of those credits materially affects an escrow company's finances; and (iii) the escrow company decides to pass any resulting costs on to customers. That effect is too indirect and contingent to merit compensation under the Fifth Amendment. When the government takes property

> it must pay [the owner] for what is taken, not more; and [the owner] must stand whatever indirect or remote injuries are properly comprehended within the meaning of "consequential damage" as that conception has been defined in such cases. Even so, the consequences often are harsh.

United States v. General Motors Corp., 323 U.S. 373, 382 (1945). This Court thus has denied compensation for the destruction of a business as "an unintended incident of the taking of land," *Mitchell v. United States*, 267 U.S. 341, 345 (1924), and it has denied compensation to a condemnee who was required to purchase a "replacement facility . . . more costly than the condemned facility." *United States v. Fifty Acres of Land*, 469 U.S. 24, 34 (1984); *see also United States v. Bodcaw Co*., 440 U.S. 202, 203 (1979) (*per curiam*) (reaffirming that "indirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled"). So, too, even if Petitioners had shown an economic impact from the supposed loss of earnings credits, they would not be entitled to compensation under the Fifth Amendment for their loss.

3. The Interaction of Background Laws With IOLTA Does Not Alter the Economic Analysis.

Petitioners attempt to resurrect their claim by contending that Respondents' argument rests on the proposition that the government is seizing only what it has created. Pet. Br. at 32. But that is not Respondents' claim at all. Rather, Respondents argue (and the court below agreed) that the economic value of the interest to Petitioners is zero. And it does not matter that this is so in part because "[t]he Federal Government . . . imposes costs" on Petitioners' interest earnings if they attempt to extract them from their bank. 524 U.S. at 171. To begin with, the costs associated with the federal government's requirement of completing a 1099 income tax form and sending it out is only one reason that Petitioners' funds cannot generate net interest. Bank fees, accounting costs and other nongovernmental administrative expenses also make it infeasible to earn net interest on small or short duration deposits. *See generally* Amicus Brief of National Association of IOLTA Programs in Support of Respondents (describing expenses attendant to trust account administration).

In any event, the mere fact that Washington's IOLTA program operates within the framework of federal banking and taxation laws in no way obligates Washington State to compensate Petitioners for their inability to gain any economic benefit from their property under federal law. The State is a "separate sovereign" from the federal government. The State's actions, therefore, cannot be combined with federal action to create a constitutional violation. *Cf. Heath v. Alabama*, 474 U.S. 82, 88-89 (1985) (state and federal action cannot be combined to violate Fifth Amendment's Double Jeopardy Clause). Any assertions that Petitioners *might* have received interest payments under some nonexistent but hypothesized future banking system are simply irrelevant under this Court's rule that such speculative losses are noncompensable. *See Powelson*, 319 U.S. at 274-76, 285 (disallowing valuation based upon hypothetical use of property where possibility of use was remote and speculative); *McGovern v. City of New York*, 229 U.S. 363, 372 (1912) (same).

Most fundamentally, this Court's takings jurisprudence does not allow Petitioners to value their property as if it existed in a vacuum free of all legal obligations. Petitioners pretend they can value the interest in IOLTA accounts as if that interest – unlike all other interest in bank accounts – could be reaped without tax reporting, transaction costs or other costs associated with banking regulations. Pet Br. at 17, 32-34 & n.13**.** But Petitioners cannot rest their case on a hypothetical world in which their principal could be placed in bank accounts free from the general rules and regulations governing our economy. Instead, the Court's basic rule that one must assess the value of private property according to its "market value," *Kimball Laundry*, 338 U.S. at 6, means that *valid, preexisting governmental regulations* must figure into the amount of just compensation due. *See* 26 Am. Jur. 2d Eminent Domain § 319 & nn.36-39 (2002) (citing numerous cases for proposition that "existing zoning classifications and restrictions should be taken into consideration, since the availability or nonavailability of such land for particular uses affects its market value"). This is why this Court denied compensation in *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 312 U.S. 592 (1941), for destruction of property along a navigable stream. Because the common law had long given the federal government the right to flood such land to improve navigation, the government's common law right had destroyed the land's market value before it was ever condemned.

By the same token, if the State took a parcel of real property that had long been subject to certain federal land use regulations, the owner would be entitled only to the amount for which he could have sold that land to another private party with those federal regulations in place. *See Kirby Forest Indus. v. United States,* 467 U.S. 1, 10 (1984) (just compensation is measured by "what a willing buyer would pay in cash to a willing seller at the time of the taking") (quoting *564.54 Acres,* 441 U.S. at 511); *United States v. Commodities Trading Corp.,* 339 U.S. 121, 124 (1950) (measuring market value of taken property in light of governmental price ceiling in place at time of seizure, even though property would have been worth more absent that ceiling); *United States v. 174.12 Acres of Land,* 671 F.2d 313, 314-16 & n.3 (9th Cir. 1982) (land must be valued in light of environmental laws that limit development).[13] To calculate the value of the owner's land unmoored from such background legal obligations would lead to the impermissible result that property would be worth more when condemned than when the owner still has possession of it.

This is not to say, of course, that the government may enact regulations imposing prohibitive transaction costs on the use of property and then later take the property without affording the owner any compensation. Property owners may challenge such regulations themselves under the Takings Clause, and courts will invalidate them if they impose a substantial economic impact without sufficient governmental justification. *See, e.g., Penn Central,* 438 U.S. at 124. In addition, if governmental regulations unfairly impose transaction costs on some entities but not others, the

[13] This Court in *Powelson* recognized that even land use regulations that are not yet in place may affect the measure of just compensation if they would be "an appropriate exercise of police power" and are likely enough to be enacted to "affect[] present values." 319 U.S. at 284.

disfavored class may invoke equal protection principles in opposition to the regulations. But here, Petitioners do not contest the validity of the federal government's banking or taxation regulations, and Respondents have no control over those regulations. That being the case, the Court must assess the value of Petitioners' interest against the backdrop of the federal government's exercise of its traditional regulatory powers.

4. Any Abstract Right to Control or Exclude Others From Obtaining the Interest in Funds Placed in IOLTA Accounts Lacks Compensable Value.

Unable to point to any financial loss inflicted by IOLTA, Petitioners insist that IOLTA imposes nonpecuniary losses on clients. They assert that they have lost important – even if "not easily quantif[iable]" – rights to control their property and to exclude others from it. *See* Pet. Br. at 37, 35. Although this Court noted in *Phillips* that these intangible rights are "valuable rights that inhere in the property," 524 U.S. at 170, the Court acknowledged that "the interest income at issue here may have no economically realizable value to its owner," *id.*, and did not discuss whether the Fifth Amendment requires compensation for loss of the intangible rights to control and exclude. A review of this Court's takings jurisprudence shows that a loss of these rights is not compensable and reveals that, even if it generally were, Petitioners surrendered those rights independent of any State action under the IOLTA program.

a. The rights to control and exclude others from property generally lack any compensable economic value.

The loss of the right to exercise dominion over one's money is not a compensable loss under the Fifth Amendment. It bears repeating that the constitutional mandate of just compensation requires a monetary payment sufficient to compensate only for the owner's *financial* loss. An owner is to be put "in as good a position *pecuniarily* as if his property had not been taken." *564.54 Acres of Land*, 441 U.S. at 510 (emphasis added) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)); *see also United States v. Reynolds*, 397 U.S. 14, 16 (1970) ("'[J]ust compensation' means the full *monetary* equivalent of the property taken.") (emphasis added). No decision from this Court has ever awarded monetary compensation for the loss of a purely noneconomic right.

This prerequisite of a pecuniary loss forecloses Petitioners' loss-of-dominion claim. This Court repeatedly has held that although the rights to retain possession of one's property and to exclude others from it are important sticks in the bundle of property rights, neither has any automatic economic value. In *Commodities Trading Corp.,* for example, the owner argued that it should be compensated for the fact that the government's seizure of its property deprived it of its "'right to hold' [its property] until [it] wanted to sell." 339 U.S. at 125-26. This Court, however, refused to award compensation for this "retention value" on the ground that it was too speculative and would lead to "haphazard" calculations untethered to any market value. *Id.* at 126-28. In *Pruneyard Shopping Ctr. v. Robins,* 447 U.S. 74 (1980), this Court held that a state's literal taking of the right to exclude individuals from a private shopping mall was not compensable because that right was not "essential to the use or economic value of their property." *Id.* at 84. Finally, the owner's flowage easement discussed in *VEPCO* undoubtedly included the right to exercise some dominion and control over the riparian lands, but the Court made clear that the loss of this right was not compensable if the easement itself lacked any positive economic value. *See* 365 U.S. at 634. There is no reason to break new ground here.

At the very most, Petitioners, by virtue of the IOLTA rule, have lost their right "to let their principal lie fallow," that is, "the right to place the principal in a noninterest-bearing checking account" and thus ensure that it earns nothing. *Washington Legal Found.*, 271 F.3d at 863. But that right has no market value. *See Washington Legal Found. v. Texas Equal Access to Justice Found.*, 293 F.3d 242, 248, 254-55 (5th Cir. 2002) (Wiener, J., dissenting from denial of rehearing en banc). Even in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), in which the state physically appropriated a landlord's property and, by doing so, confiscated "the landlord's interest in . . . insisting that some negligible unoccupied space remain unoccupied," this Court declined to hold that any compensation necessarily was due for the loss. *Id.* at 437 n.15, 441 (internal quotation omitted). That compensation issue turned on whether loss of the right to exclude diminished the worth of the property compared with identical property with the cable lines installed. *See id.* Here, loss of the right to let interest lie fallow does not change its market value, as that value was zero to begin with.[14] Put another

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[14] As we have shown above, this Court has repeatedly held that just compensation is zero when no economic value is lost even when real property is taken, and many lower courts have followed this principle. At least one lower court has suggested, however, that a plaintiff may recover nominal damages when it proves the State has taken economically valueless real property rights from it. *See St. Genevieve Gas Co. v. TVA*, 747 F.2d 1411, 1414 (11th Cir.

way, the market would not place positive economic value on the right to prevent others from accessing interest that the owner could not himself access.

Indeed, ordering monetary compensation solely for Petitioners' alleged loss of the right to let interest earnings lie fallow would contravene the fundamental rule that just compensation is calculated with reference only to objective losses of property value and would open the floodgates to takings claims based on purely abstract losses. Due to "the need for a clear, easily administrable rule governing the measure of 'just compensation,'" *Kirby Forest*, 467 U.S. at 10 n.15, this Court consistently has emphasized that "just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner." *Fifty Acres of Land*, 469 U.S. at 35; *accord Kimball Laundry*, 338 U.S. at 5. Even assuming Petitioners have a special, subjective value for keeping the State from creating and using the otherwise inaccessible interest from their escrowed funds, that value is not subject to objective quantification and, hence, is not compensable.

Nothing in the Just Compensation Clause's insistence on objective measurements, of course, undermines the concept that "property is more than economic value." *Phillips*, 524 U.S. at 170. On the contrary, this Court's decisions acknowledge that subjective, individualized factors often cause individuals to value their property more highly than its objective worth. *See, e.g., Kirby Forest*, 467 U.S. at

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1984). Even if this decision is correct, it is distinguishable. The loss of dominion and control over a unique and tangible object, such as real property, is different from a loss of control over something fungible, such as money. *See Unisys Finance Corp.*, 979 F.2d at 612 (loss of worthless security interest does not entitle owner to any compensation).

10 n.15. Yet these cases simultaneously hold that such considerations – important as they are – are too imprecise to warrant remuneration for their loss:

> The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. *As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use*.

Kimball Laundry, 338 U.S. at 5 (emphasis added). Thus, while there is no doubt that positive economic value is not essential to property ownership, or even to a person's valuing their property highly, positive economic value is the *sine qua non* of entitlement to compensation under the Fifth Amendment.

Petitioners' analogy to a letter or family heirloom does not change this fact. Pet. Br. at 37. While government would be precluded altogether from taking a letter or family heirloom if doing so served no "public purpose," as the Takings Clause requires, or its action was so arbitrary as to violate the Due Process Clause, a government taking that survived such scrutiny would be subject to the same method of valuation as is used in every other case. Indeed, Petitioners do not even suggest an alternative method of valuation. Nor do they explain why noneconomic value should be considered in valuing a letter or heirloom when it is routinely excluded in valuing an individual's home or land for just compensation purposes. Simply put, the mere loss of dominion over property with no pecuniary value is not compensable.

b. Petitioners surrendered their rights to control and exclude others from their interest earnings independent of any State action under the IOLTA program.

Finally, even if the right to exercise dominion over property were itself compensable under some circumstances, it would not matter here, for Petitioners would not have been able to invoke that right even in the absence of IOLTA. Petitioners voluntarily placed their funds into escrow, knowing they would be deposited in banks. In the absence of IOLTA, the funds would have been deposited in noninterest bearing accounts because they were too small to earn net interest.[15] The depository banks therefore would have had the right to pool Petitioners' funds with the funds of other depositors, invest those funds, and dispose of the resulting earnings as the banks saw fit. The banks even could have donated a portion of their profits from investing Petitioners' principal to the Legal Foundation of Washington – without asking Petitioners for permission. Thus, irrespective of the IOLTA program, Petitioners gave up their right to dominion

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[15] When Petitioners argue that certain individuals have been "singled out" to bear the burden of the IOLTA program, Pet. Br. at 16, 22-23, they are referring to the fact that, under program rules, client funds may be deposited in IOLTA accounts only if they cannot generate net interest for the clients themselves. In other words, the clients who are "singled out" are those for whom IOLTA programs will have no adverse economic impact and impose no burden at all. The ethical responsibilities of lawyers to their clients require this limitation, which is one of the virtues of IOLTA programs.

or control over the profit that might accrue on deposits too small to return net interest to them.

Moreover, even if clients generally could prevent a private nonprofit organization from obtaining the interest on their principal, individuals have no such "'right to hold' [their property] as against a Government taking." *Commodities Trading Corp.,* 339 U.S. at 126. And once the State takes funds, it may use them for any legitimate public purpose it chooses. As Justice Kennedy recently explained for a unanimous Court:

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other extractions binding on protesting parties.

Board of Regents of the Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 229 (2000). If Petitioners believe otherwise, they may pursue their First Amendment claim. But the Fifth Amendment exists only to ensure compensation for objective losses, not to protect against any symbolic harm from allegedly compelled association.

In the end, it must be remembered that "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as its does from technical concepts of property law." *United States v. Fuller*, 409 U.S. 488, 490 (1973) (citation omitted). As the Court observed in another takings case, "there would be no justice in paying for a loss suffered by no one in fact." *United States v. Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 76 (1913). That is the case here.

II. NO INJUNCTIVE RELIEF IS AVAILABLE HERE BECAUSE THE STATE HAS NOT DENIED ANYONE JUST COMPENSATION

Petitioners' inability to establish any compensable loss is fatal to their request for an injunction against Washington's IOLTA program. Any discussion of remedies under the Takings Clause must begin with the fundamental principle that the Constitution permits the government to take private property for public use so long as it pays just compensation. "As its language indicates, and as the Court has frequently noted, [the Fifth Amendment] does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English*, 482 U.S. at 314. Consequently, "no constitutional violation occurs until just compensation has been denied." *Williamson County Reg'l Planning Com. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 n.13 (1985). Because Washington owed no just compensation here, no constitutional violation has occurred. As Judge Wiener explained in his Fifth Circuit dissent:

> [t]he very fact of their inability to prove compensatory monetary loss should end the case, not trigger a search for alternative equitable remedies. The absence of value means, quite straightforwardly, that the appropriation of the plaintiffs' property in this case is not proscribed by the Fifth Amendment.

Washington Legal Found., 293 F.3d at 254 (Wiener, J., dissenting from denial of rehearing *en banc*). Thus, the fact that Petitioners' property had no value means that Petitioners are not entitled to any form of relief, injunctive or otherwise.

Moreover, even if this Court were to conclude that Petitioners' property had been taken and that just compensation was not zero, Petitioners would not be entitled to an injunction. Rather, they would have to seek compensation. As a general rule, injunctive relief is not available "when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984).[16] Such is the case here. This Court's decision in *First English* leaves no doubt that, so long as a state waives its sovereign immunity, as Washington has done, the Fifth Amendment itself directly affords the ability to bring a suit in federal court for the Takings Clause's textually dictated remedy – compensation. 482 U.S. at 315-17.[17]

There is only one potential exception to this rule, but it offers no help to Petitioners. In a case involving a federal (not state) taking, a plurality of this Court has stated that when "every dollar" taken by the government would be refunded in a suit for just compensation, making it "utterly pointless" for the government to take the money, the presumption is that a Tucker Act remedy is unavailable and that an injunction is therefore the proper remedy. *Eastern Enters. v. Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion)

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[16] Justice O'Connor, concurring in part and dissenting in part, did not question the relevant portion of the Court's analysis. *Id*. at 1021. Every Justice participating in the case agreed that injunctive relief was impermissible.

[17] Petitioners claim that a federal remedy is inadequate as it leaves states "free to continue practices found to violate the Takings Clause simply because they are willing to pay damages." Pet Br. at 47. But the Takings Clause simply is not "violated" so long as just compensation is available. Moreover, if this Court were to conclude that the IOLTA program constituted a taking and nonzero compensation was owed, a remedy would be available in the Washington courts. If such a remedy was unavailable previously, it was because the Washington Supreme Court Justices believed no compensation was owed.

(internal quotation omitted). But this is not the position in which Petitioners find themselves. Even if this Court were to agree with Petitioners that they are entitled to *some* compensation, there is no plausible argument that Petitioners' loss could be measured by the exact amount of interest gained by the IOLTA program.[18] Thus, it would not be "utterly pointless" for the state government to take the interest and require Petitioners to seek compensation, for the government would gain more than it paid in compensation – as it has the right to do.

But the greater obstacle to Petitioners' claim is that no compensation is owed, so no injunction can issue. Petitioners object that every taking must have a remedy and thus an injunction must be available where compensation is not warranted. That would lead to the absurd result that individuals may block takings of economically valueless property but may not prevent takings of extremely valuable property. An individual could stop the government from using interest in an IOLTA account but could not stop the government from taking his home. An individual could stop the government from taking an heirloom worth nothing but could not stop the government from taking an heirloom worth $1 or $1 million, and which had great sentimental value. Such a perverse rule is not the law.

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[18] Indeed, even the dissenters in the Ninth Circuit recognized that Petitioners' loss could not be measured simply by the amount of interest gained by the IOLTA program. *See* 271 F.3d at 881-82. Those judges suggested, as do Petitioners in certain places, that compensation could be calculated according to lost "earnings credits" and/or the right to exclude others from their property. But neither these items nor nominal damages would be equivalent financially to the amount of Petitioners' interest earnings.

Petitioners' discussion of remedies, in sum, seeks legal relief in a situation in which there is no constitutional violation. But just as there can be no right without a remedy, *see, e.g., Marbury v. Madison,* 1 Cranch 137, 162-63 (1803), there can be no remedy without a right.

CONCLUSION

For these reasons, the ABA respectfully requests that the Court affirm the decision below.

Respectfully submitted.

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