No. 01-1325

In The
Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, et al.,

Petitioners,

vs.

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 CONFERENCE OF CHIEF JUSTICES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Conference of Chief Justices consists of the highest justice or judge in each of the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands. The purpose of the Conference of Chief Justices is to provide an opportunity for consultation among the highest judicial officers of the several States, commonwealths, and territories, concerning matters of importance in the operation of state courts and judicial systems. The goal of the Conference is to improve the administration of justice.

The case of *Washington Legal Foundation v. Legal Foundation of Washington* involves a direct challenge to an initiative by the States to improve the quality and equality of justice in state courts. All fifty States, the District of Columbia, and the Virgin Islands have adopted an Interest On Lawyer Trust Account (IOLTA) program, the ultimate purpose of which is to generate funding for improved delivery of legal services to the poor. While there are minor variations in IOLTA programs from State to State, the essential premise is the same – nominal or short-term client deposits in lawyer trust accounts, which by themselves are incapable of generating interest in excess of the banking costs of account management, can be pooled into fewer accounts thereby reducing banking costs and earning interest in excess of costs. The interest is earmarked for the nonprofit IOLTA foundations, which fund legal services for the poor.

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[1] This brief has been exclusively authored by counsel for *amicus curiae* as indicated on the cover of the brief, none of whom is an attorney for any of the parties to this litigation. There was no monetary contribution to the preparation or submission of this brief made by any person or entity other than the *amicus curiae*.

IOLTA programs, for the most part, were initiated by the highest court of each State. Even in the five States where IOLTA was a product of legislative rather than judicial action, the Conference of Chief Justices has a strong interest in the continuance of the program because of IOLTA's contributions to the administration of justice. The Conference voted unanimously to authorize the filing of this *amicus curiae* brief at its meeting on July 30, 2002. This *amicus curiae* brief is being filed with the written consent of all parties.

SUMMARY OF ARGUMENT

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), the Court explained that a Fifth Amendment Takings Clause analysis ordinarily involves an ad hoc inquiry that focuses particularly on the following factors: 1) the economic impact of the challenged regulation on the claimant; 2) the extent to which the regulation interferes with distinct investment-backed expectations; and 3) the character of the governmental action, including whether the challenged public program is merely adjusting the benefits and burdens of economic life in order to promote the common good. In the present case, all of the *Penn Central* factors heavily support respondents' argument that the State of Washington's IOLTA program does not constitute a taking.

First, the State of Washington's IOLTA program imposes no economic burden on those individuals whose lawyer trust account deposits[2] are pooled in an IOLTA account. The only trust account deposits that are eligible for pooling in an IOLTA account are those which are too

[2] All of the arguments in this brief apply equally to trust account deposits or escrow deposits. For ease of reference, we use the term "trust account" to include all such deposits.

nominal or too short-term to earn interest for the client. *See*, *e.g.*, Washington Rule of Professional Conduct 1.14(c). Thus, the interest generated by IOLTA accounts, and earmarked for state efforts to afford equal justice, is interest that the various owners of the pooled monies could not, and would not, generate on their own. The net economic impact of IOLTA programs on such individuals, therefore, is zero. The present case stands in sharp contrast to *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 156-58 (1980), where the Takings Clause claimant deposited $1.8 million into an interpleader fund for nearly a year, a deposit that was neither nominal nor short-term, and which therefore was independently capable of generating interest for the depositor.

Second, Washington's IOLTA program does not interfere with reasonable investment-backed expectations. To be worthy of constitutional protection, an individual's expectations must be "based on objective rules and customs that can be understood as reasonable by all parties involved." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring). Moreover, "reasonable expectations must be understood in light of the whole of our legal tradition." *Id.* The sources of a client's reasonable investment-backed expectations regarding monies deposited into a pooled IOLTA account consist of banking laws, banking practices, economic realities, a lawyer's ethical obligations regarding trust accounts, state law IOLTA rules, and IOLTA account deposit contracts. Consideration of these "objective rules," "customs," and "legal traditions," mixed in with a healthy dose of economic reality, demonstrates the fallacy of claiming that the owner of monies subject to IOLTA pooling has a reasonable investment-backed expectation of receiving a pro rata share of any interest borne by the pooled account. Individuals who make nominal or short-term deposits into lawyer trust accounts have never had a reasonable investment-backed expectation of receiving interest, in either the pre-IOLTA or post-IOLTA world.

Before certain changes in federal banking law in 1980, there was no opportunity for any client to earn interest on client funds held by his lawyer in trust, regardless of the size of the principal. Even after banking law changes permitted interest-bearing demand accounts (NOW accounts), such accounts offered no hope of earning interest for those clients whose deposits were nominal or short-term in nature. The post-IOLTA world is no friendlier to client expectations of receiving interest on lawyer trust account deposits that, on their own, are either too nominal or too temporary to generate any earnings for the client. Although IOLTA programs permit (and in some States, like Washington, require) lawyers to pool such accounts in order to create a single account with interest-bearing capacity, the terms of a lawyer's deposit contract with the bank clearly establish that whatever interest is generated will be used to fund the nonprofit IOLTA foundation. *See, e.g.*, Washington Rule of Professional Conduct 1.14(c). Thus, in regard to a client's expectations of earning interest on short-term or nominal deposits in a lawyer trust account, IOLTA programs have changed nothing. With or without IOLTA, no trust account depositor has ever possessed a reasonable investment-backed expectation of receiving interest from the types of deposits that are subject to IOLTA pooling.

Third, IOLTA programs promote the common good without imposing an economic burden on any individual or group of individuals. As the Court explained in *Penn Central*, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. IOLTA programs unquestionably promote the common good by providing millions of dollars for legal services for the poor, thereby making a valuable contribution to the States' obligation to provide their citizens equal access to state courts. Thus, the present case again sharply contrasts with *Webb's*, where the government offered no justification to support its retention of $100,000 interest earned on interpleaded funds that were independently capable of earning that interest separate and apart from the government-administered account. *See* 449 U.S. at 163.

In rare situations, a governmental regulation works such a destructive impact on real property interests that *Penn Central*'s third factor – the character of the governmental action – becomes controlling, making it unnecessary to weigh other factors. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 432, 434-35 (1982). The Court, however, has applied this "per se taking" analysis only to governmental regulations of real property that act like a governmental exercise of eminent domain, the classic example of a traditional taking. *See id.* at 432-36; *Lucas*, 505 U.S. at 1018-19 (1992). Thus, the Court has found a per se taking in only two narrowly defined and distinctive situations: 1) when the governmental action compels the property owner to suffer a permanent physical invasion of his real property, *Loretto*, 458 U.S. at 432-36; and 2) when governmental land use regulation denies an owner "all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015-18.

Because the States' IOLTA programs do not even interfere with real property, they are hardly comparable to an exercise of eminent domain. Therefore, this is not a case where the character of the governmental action is so destructive of recognized property values that it should be regarded as a per se taking. The Court has never found a per se taking in cases involving an alleged governmental taking of money, did not do so in *Webb's* (*see* 449 U.S. at 160-65), and should not venture down that path today. Indeed, the Court has acknowledged that alleged takings of money will rarely constitute a taking under any analysis, much less a taking per se. *See, e.g.*, *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (emphasizing that the "loss of future profits . . . provides a slender reed upon which to rest a takings claim.").

This case is ultimately about whether the Takings Clause of the Fifth Amendment can be interpreted to authorize a substantial intrusion into an area that fundamentally is a matter of state concern. There are few arenas in which the States have stronger interests than in the administration of their own judicial systems. Moreover, the States frequently have a constitutional obligation to provide equal access to the state judicial system, an obligation that the States are pursuing in part through IOLTA programs. In light of such significant state interests and obligations, the Court should require a much stronger demonstration of a "taking" of property than can be shown in this case before reading the Takings Clause to interfere with all fifty States' efforts to improve the administration of justice in their courts.

ARGUMENT

STATE IOLTA PROGRAMS DO NOT EFFECT A FIFTH AMENDMENT TAKING OF PROPERTY.

Nearly a quarter century ago, this Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-25 (1978), reviewed the factors that had shaped its Fifth Amendment Takings Clause jurisprudence. The *Penn Central* Court explained that determining whether governmental action constitutes a taking ordinarily involves an ad hoc inquiry in which the following factors enjoy particular significance: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation interferes with distinct investment-backed expectations; and 3) the character of the governmental action, including whether the challenged public program is merely adjusting the benefits and burdens of economic life in order to promote the common good. *Id.* at 124. The *Penn Central* analysis generally continues to govern this Court's contemporary application of the Takings Clause to governmental programs that have an alleged impact on property rights. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001); *Tahoe-Sierra Preservation Counsel v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1481-84 (2002).

In only two narrowly defined situations involving governmental interference with real property, the Court has decided that a "per se taking" approach is preferable to a full *Penn Central* analysis: first, when the governmental action compels the property owner to suffer a permanent physical invasion of his real property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-36 (1982); and second, when governmental land use regulation denies an owner "all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-18 (1992). Yet, even in these rare situations, the Court has not ignored the *Penn Central* analysis, but has simply recognized that the third *Penn Central* factor – the character of the governmental action – will weigh so heavily in favor of the property owner that it necessarily will be the controlling factor in such cases. *See, e.g.*, *Loretto*, 458 U.S. at 426, 432, 434-35. In other words, in *Loretto* and *Lucas*, the character of the governmental action was so destructive of real property values that the government could not avoid the conclusion that it had "taken" the owner's property. *See Loretto*, 458 U.S. at 435 (permanent physical occupation of real property "is perhaps the most serious form of invasion of an owner's property interest"); *Lucas*, 505 U.S. at 1017 (governmental regulation that totally deprives a landowner of all productive or economically beneficial use of land is an "extraordinary circumstance"). Consequently, there was no need to consider additional factors that could not, in any analysis, have changed the outcome. *See Loretto*, 458 U.S. at 432, 434-35; *Lucas*, 505 U.S. at 1015.[3]

In all cases not falling under *Lucas* and *Loretto*'s per se taking approach, a full consideration of all the *Penn Central* factors is warranted, including, of course, inquiry into whether a legitimate public interest is advanced in support of the governmental restraint on property. *See Penn Central*, 438 U.S. at 124-25; *Lucas*, 505 U.S. at 1015-16; *Loretto*, 458 U.S. at 434-35. In the typical case, the Court's "usual assumption" is that the state program at issue is simply "adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124; *Lucas*, 505 U.S. at 1017. The Court's deference to governmental programs that affect property – deference accorded in all but the "relatively rare situations" involved in *Lucas* and *Loretto* – is founded on this Court's assertion 80 years ago in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), that "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *See Lucas*, 505 U.S. at 1018.

[3] Thus, because *Loretto* and *Lucas* – and similar cases – would arrive at the same result even upon a painstaking application of the traditional ad hoc methodology, the per se taking approach employed in *Loretto* and *Lucas* is hardly a rejection of the *Penn Central* analysis, but rather a *confirmation* of it. Petitioners themselves acknowledge, at pages 16-17 of their brief: "[T]he *per se* test truncates the fuller *Penn Central* analysis of all surrounding factors only where those factors cannot possibly alter the conclusion that a taking has occurred[.]" Petitioners' attempt to downplay this reality in an effort to avoid a *Penn Central* analysis is undermined not only by *Penn Central*'s description of the ad hoc analysis as the general approach to Takings Clause cases, but also by *Loretto* and *Lucas* themselves, which 1) *are* an application – though a short-circuited application – of *Penn Central*; and 2) inevitably would have come to the same conclusion pursuant to a full ad hoc application of the *Penn Central* analysis, thereby rendering such a methodology unnecessary.

Because IOLTA programs promote the common good without burdening any individual, they are deserving of this Court's usual Takings Clause deference.

A straightforward application of the *Penn Central* analysis to this case demonstrates that the States' IOLTA programs work no taking that would require compensation to the individuals whose use of the legal system occasions making the type of lawyer trust account deposit subject to IOLTA pooling.[4] Each of the three *Penn Central* factors weighs heavily in favor of upholding the State of Washington's IOLTA program. Moreover, this is not one of those "relatively rare situations" where the character of the governmental action so conclusively demonstrates a per se taking that consideration of other relevant factors becomes unnecessary.

A. Application Of The *Penn Central* Factors Demonstrates That IOLTA Programs Do Not Constitute A Taking.

1. IOLTA Programs Impose No Economic Burden On Those Individuals Whose Lawyer Trust Account Deposits Are Subject to IOLTA Pooling.

IOLTA programs prohibit the use of IOLTA accounts to pool client monies that are independently capable of producing interest for the client. *See*, *e.g.*, Washington Rule of Professional Conduct 1.14(c). The only trust account deposits that are eligible for pooling in an IOLTA account are those which are either too nominal or too

[4] The arguments that weigh heavily in support of a holding that IOLTA works no taking also support an argument that, even if there somehow is a taking, just compensation in these unique circumstances would be nil, as respondents demonstrate.

temporary to earn net interest for the client. *Id.* In other words, the only interest generated by IOLTA's pooled accounts is interest that the individual owners of the pooled monies could not, and would not, generate on their own. Unless the Court accepts petitioners' strained view of IOLTA, whereby an individual can see the interest generated in part by his deposit in the pooled account, while remaining blind to the fact that it was IOLTA pooling that enabled his deposit to enjoy interest-bearing potential in the first place, the net economic impact of IOLTA must be regarded as zero.

The absence of economic impact in the present case stands in sharp contrast to *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). In that case, Eckerd's Pharmacies agreed to purchase Webb's Fabulous Pharmacies for $1.8 million but, at closing, Webb's debts appeared to be greater than the purchase price. *Id.* at 156. In order to protect itself, Eckerd's filed a complaint of interpleader and tendered the purchase price to the court. *Id.* at 156-57. Almost a year later, the court appointed a receiver for Webb's and a dispute arose when the clerk refused to turn over the interest that was earned on the interpleader fund while it was held by the court, interest which eventually amounted to over $100,000. *Id.* at 157-58. This Court held that the county's refusal to turn over the interest on the interpleader fund was an unconstitutional taking without just compensation. *Id.* at 164-65.

The primary distinction between *Webb's* and the present case is that, unlike the deposits subject to IOLTA pooling, the year-long $1.8 million deposit in *Webb's* was independently capable of generating interest for the benefit of the principal's owner. The *Webb's* deposit was neither nominal nor short-term. Additionally, because the clerk in *Webb's* had already deducted an administrative fee, it was apparent that the year-long $1.8 million deposit was independently capable of earning interest in excess of administrative costs. 449 U.S. at 162. Therefore, unlike

IOLTA interest, which cannot be realized in the absence of the pooled IOLTA account, the interest in *Webb's* could have been earned separate and apart from the interpleader fund. Consequently, also unlike the present case, there was no possible way that the clerk in *Webb's* could take credit for creating the deposit's interest-bearing potential. In short, the governmental action in *Webb's* caused an obvious – and severe – economic injury to the owner of the interpleader fund's principal, with no governmental justification whatsoever. *Id.* at 163. The Court in *Webb's* emphasized that the Takings Clause stands as a shield against just such arbitrary uses of governmental power. *Id.* at 164. In contrast, the States' IOLTA programs place no economic burden on trust account depositors, and the legal services afforded by IOLTA programs to those who could not otherwise afford them undercuts any charge of governmental arbitrariness.

A second fundamental distinction between *Webb's* and the present case is that the interpleader fund in *Webb's* was not designed to benefit the county, but rather was maintained specifically for the ultimate benefit of Webb's creditors. *Id*. at 161. Indeed, that was the very point of Eckerd's decision to file the interpleader action and deposit the purchase price for Webb's assets into the fund. *Id.* at 156-57. But the States' purpose in requiring that nominal or short-term deposits be placed into IOLTA accounts is to generate funding for the States' IOLTA foundations and their public interest programs. IOLTA pooling is not done in order to achieve the impossible – *i.e.*, to produce interest for the various owners of the nominal or short-term deposits, interest that inevitably would be swallowed up by the banking and accounting costs of attempting to subdivide it among all the depositors.

It follows from the preceding distinction of *Webb's* that *Penn Central's* economic impact analysis should focus on the economic burden imposed by the IOLTA program taken as a whole. Petitioners ignore this reality and attempt to demonstrate an adverse economic impact by divorcing IOLTA's productive pooling mechanism from IOLTA's very purpose. Although petitioners argue that economic impact should be assessed in light of "the world as it is," in "the real world where IOLTA exists," *see* Pet. Br. 32-33, it is evident that what petitioners really want is only part of the "real world" of IOLTA – the pooling part that bestows interest-bearing potential on petitioners' otherwise unproductive monies. What petitioners do not want is the part that allegedly "burdens" them – the part that provides the incentive for the pooling, the part that assigns the interest to the IOLTA foundation. It is hardly a "real world" form of accounting that records debits but not credits; but it is only by taking IOLTA pooling for granted that petitioners can pretend to have suffered a burdensome economic impact from a program that bestows interest-bearing potential on their otherwise unproductive monies. The Court's Takings Clause jurisprudence has never ignored economic reality; and economic reality in the present case requires an assessment of economic burden in light of the IOLTA program viewed in its entirety.[5] Petitioners, therefore, cannot establish economic impact by artificially dissecting IOLTA in an attempt to isolate and attack those parts of IOLTA that they do not like, while simultaneously claiming the benefits of those parts that they do.

[5] Viewing IOLTA in its entirety also requires consideration of other parts of the program that petitioners have not challenged, and that work to the benefit of trust account depositors generally, including the IOLTA program's requirement that all deposits independently capable of earning interest – because they are sufficiently large or long-term – be placed in an interest-bearing account with the interest paid to the depositor. *See* Washington Rule of Professional Conduct 1.14(c). This requirement did not exist prior to IOLTA.

Petitioners additionally argue that they have suffered economic harm as a result of various banks' decisions to terminate "earnings credit" programs. *See* Pet. Br. 6. But petitioners never explain how a governmental program can be held constitutionally accountable for the financial fallout caused by *private* institutions' voluntary responses to that program. This line of causation is so tenuous – IOLTA caused private banks to reduce their "earnings credit" programs, which caused private escrow and title companies to lose some of their "perks" for doing business with those banks, which caused those private companies to pass along to their customers (*e.g.*, petitioners) some of the cost of those lost perks – that whatever "earnings credit losses" have been sustained are not even fairly attributable to state *action* much less to a state *taking*. In other constitutional contexts, this Court has been careful to hold governmental entities responsible only when there is a far more direct line of causation between governmental action and individual harm than that demonstrated by petitioners' "earnings credit" argument. *See, e.g.*, *Bryan County v. Brown*, 520 U.S. 397, 412-15 (1997).

Finally, petitioners argue that they have been "singled out" and therefore uniquely suffer IOLTA's economic impact. *See* Pet. Br. 22-31. Even assuming arguendo that IOLTA programs somehow cause a harmful economic impact, petitioners' claim that they have been singled out does not withstand scrutiny. Given that IOLTA programs produce millions of dollars annually by pooling nominal or short-term deposits incapable of generating interest on their own, and given the common use of lawyer trust accounts and escrow, whatever "burden" is imposed by IOLTA, if any, is easily being spread across hundreds of thousands, if not millions, of citizens. Petitioners certainly have produced no evidence to the contrary – *i.e.*, that just a few individuals have been singled out. Moreover, even assuming that relatively few users of the justice system have been subjected to this utterly nonexistent "burden," the States have a legitimate reason for so "singling them out." The monies of individuals like petitioners are singled out for IOLTA pooling precisely because of the *absence* of economic impact on those whose trust account deposits are too nominal or too short-term to generate income on their own. Collecting a fee from all users of the justice system, or all users of lawyer trust accounts, might also be a constitutional means of funding legal services for the poor; but, unlike IOLTA programs, such alternatives *would* impose an economic impact on users of the justice system. In sum, IOLTA "singles out" only those who will suffer no economic disadvantage as a consequence of IOLTA. It is difficult to think of a governmental program that is either more well-aimed or less economically burdensome.

2. Individuals Whose Trust Account Deposits Are Eligible for Pooling in an IOLTA Account Have No Reasonable Investment-Backed Expectations of Enjoying the Interest Produced by the Pooled Account.

No client has ever possessed a reasonable investment-backed expectation of receiving interest from the types of trust account deposits that are subject to IOLTA pooling. To be worthy of constitutional protection, an individual's expectations must be "based on objective rules and customs that can be understood as reasonable by all parties involved." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). Moreover, "reasonable expectations must be understood in light of the whole of our legal tradition," and "courts must consider all reasonable expectations whatever their source." *Id.* In the present case, the sources of a client's reasonable investment-backed expectations regarding monies deposited into a pooled IOLTA account consist of banking laws, banking practices, economic realities, a lawyer's ethical obligations regarding trust accounts, state law IOLTA rules, and IOLTA account deposit contracts. Consideration of these "objective rules," "customs," and "legal traditions," mixed in with a healthy dose of economic reality, demonstrates the fallacy of claiming that the owner of monies subject to IOLTA pooling has a reasonable investment-backed expectation of receiving a pro rata share of the interest borne by the pooled account.

Individuals, like petitioners, who make nominal or short-term deposits into lawyer trust accounts, have never had a reasonable investment-backed expectation of receiving interest in either the pre-IOLTA or post-IOLTA world. Before certain changes in federal banking law in 1980, there was no opportunity for the client to earn interest on client funds held by the lawyer in trust, regardless of the size of the principal.[6] Even after banking law changes permitted interest-bearing demand accounts (NOW accounts), such accounts offered no hope of earning interest for those clients, like petitioners, whose deposits were nominal or short-term in nature.[7]

[6] Ethical rules have always required that lawyer trust account monies be available on a client's demand. Before 1980, banking laws did not permit interest-bearing demand accounts. Therefore, prior to 1980, the only banking option available to attorneys for holding a client's funds in trust was a non-interest-bearing demand deposit account.

[7] The bank's service charges would exceed the interest earned by a separate account composed only of one depositor's nominal or short-term funds. Even when lawyers, prior to IOLTA, chose to pool the nominal or short-term trust account deposits of multiple clients, only the banks enjoyed the interest. Ethical rules prohibited (and still do) lawyers from profiting off of their clients' trust funds; and banking fees and administrative expenses would have exceeded the interest earned from such pooled accounts if banks had been asked to divvy up the interest among all the depositors. That lawyers have no economic advantages over banks may explain why petitioners have produced no evidence of any law firm practices, prior to (or after) the advent of IOLTA programs, whereby law firms donated trust account management and subaccounting services to their clients in order to generate

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The post-IOLTA world is no friendlier to client expectations of receiving interest on lawyer trust account deposits that, on their own, are either too nominal or too temporary to generate any earnings for the client. Although IOLTA programs permit (and in some States, like Washington, require) lawyers to pool such accounts in order to create a single account with interest-bearing capability, the terms of a lawyer's deposit contract with the bank clearly establish that whatever interest is generated will be used to fund the nonprofit IOLTA foundation. *See, e.g.*, Washington Rule of Professional Conduct 1.14(c). Thus, in regard to a client's expectations of earning interest on short-term or nominal deposits in a lawyer trust account, IOLTA programs have changed nothing. Clients had no expectation of enjoying interest before IOLTA and have no expectation after.

Holding that an individual has no reasonable investment-backed expectation of receiving any portion of the interest generated by a pooled IOLTA account is perfectly consistent with the purpose of the Takings Clause, which "protects private expectations to ensure private investments." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). Attempting to divide the IOLTA interest among the owners of the pooled deposits not only would be economically futile, but also would make no meaningful contribution to "ensuring private investment." Because the private incentive in making a deposit into a lawyer trust account (or into escrow) is *not* to earn interest, but rather to ensure

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insignificant amounts of interest for those clients with nominal or short-term trust account deposits. Consequently, there is nothing that would support a reasonable investment-backed expectation, pre-IOLTA or post-IOLTA, that lawyers will provide free of charge whatever services are necessary to generate interest for the client. Indeed, the efforts needed to manage such accounts would likely defeat the convenience of having lawyer trust accounts in the first place.

the timely receipt of legal services, or to facilitate a legal transaction (such as a real estate transaction), the States' retention of IOLTA interest can hardly be expected to chill private "investment" in legal or real estate services. Even assuming that an owner of nominal or short-term deposits subject to IOLTA pooling subjectively expects to earn interest, that is not a reasonable investment-backed expectation. Indeed, in light of banking laws, banking practices, economic realities, a lawyer's ethical obligations, state law IOLTA rules, and IOLTA account deposit contracts – which surely qualify as those "objective rules and customs" that define reasonable investment-backed expectations – it is untenable to claim that the nominal or short-term deposits subject to IOLTA pooling are "investments" motivated by growth potential. (One might as well "invest" by putting money in a shoe box under the bed.)

Petitioners point to nothing that would support an individual's expectation of earning interest on the nominal or short-term deposits subject to IOLTA's pooling requirement; and positive law (in the form of the IOLTA program) affirmatively precludes such an expectation. This Court has consistently recognized that such pre-existing laws generally should be taken into account in weighing the property owner's reasonable investment-backed expectations. Although the Court in *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-30 (2001), rejected the proposition that laws already in effect at the time the property owner acquires title *always* foreclose expectations that are inconsistent with those laws, the Court's opinion in *Palazzolo* in no way denies that such pre-existing laws are a common and important source of reasonable expectations. *See id.* at 626, 629-30; *see also id.* at 632-36 (O'Connor, J., concurring) (emphasizing that acquiring title to property after the challenged regulation has gone into effect is a factor that normally militates against a finding that the state program has worked a "taking"; it is just not a conclusive factor.)

Indeed, positive state law plays an even stronger role here than in cases, like *Lucas* and *Palazzolo*, that involve real property.[8] It is true that members of this Court have expressed varying views regarding the interaction between reasonable expectations and positive law when real property is at stake. *See*, *e.g., Palazzolo*, 533 U.S. at 635-636 (O'Connor, J., concurring) ("Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred."); *id.* at 637 (Scalia, J., concurring) ("In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the 'background principles of the State's law of property and nuisance') should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking.") (internal citations omitted); *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring) ("In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source."). But the Court has recognized that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless." *Lucas*, 505 U.S. at 1027-28.

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[8] The concern underlying the Court's holding in *Palazzolo* dealt uniquely with land use regulation. *See id.* at 627-28. Because it often

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That the IOLTA rules themselves can legitimately define the reasonable expectations of property owners is especially true in a case like this, where the State's IOLTA rules were in force long before the client's "investment" of nominal or short-term monetary deposits into a lawyer trust account. Individuals simply do not invest with the reasonable expectation that years of litigation might be able to overturn plainly applicable rules. Thus, with respect to the present case, it is entirely appropriate for the State to defend its IOLTA program against a Takings Clause attack by arguing that IOLTA rules, as well as the IOLTA deposit contracts, expressly foreclose any client expectations of receiving interest on the nominal or short-term deposits subject to IOLTA pooling.

Petitioners do not deny that the IOLTA rules may legitimately influence an IOLTA depositor's expectations regarding IOLTA-generated interest. But, once again, petitioners carefully pick and choose which parts of the IOLTA program they deem relevant to reasonable investment-backed expectations. This leads to the odd argument that, on the one hand, IOLTA's pooling mechanism supports petitioners' expectations of earning interest, but, on the other hand, IOLTA's clear assignment of the interest to the nonprofit IOLTA foundation should not be considered to undermine those expectations. Petitioners' "half-a-loaf" expectations are so inherently

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takes years for a land owner's regulatory takings claim to ripen, the *Palazzolo* Court found that it would give the government too much power to reduce the amount of private property rights remaining to citizens if courts automatically refused to permit Takings Clause challenges to be brought by land owners who acquired title after the governmental regulation at issue went into effect. *Id.* The decision in *Lucas* likewise concerned state laws that deprive a landowner of all productive or economically beneficial use of *land*. 505 U.S. at 1027-29. Such land-based concerns have nothing to do with the present case.

unrealistic – expecting to receive the benefits of a program whose very purposes they are attempting to thwart – that those expectations can hardly "be understood as reasonable by all parties involved." *See Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). In any event, it seems disingenuous for the petitioners to argue that the reasonableness of their expectations is supported by the very program that is the target of their Takings Clause attack.

3. The Character of IOLTA is That of a Public Program That Promotes the Common Good Without Burdening Any Individual.

The third *Penn Central* factor concerns the character of the governmental action alleged to constitute a taking. 438 U.S. at 124. The *Penn Central* Court explained that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* The Court acknowledged in *Lucas* that it ordinarily indulges an assumption that the latter is true. 505 U.S. at 1017-18. The present case involves a Takings Clause challenge to a state program, operated in similar respects by all fifty States, that seeks only to apply an unused economic resource toward the State's obligation under the federal constitution to afford its citizens equal justice under the law. By enacting IOLTA programs with the goal of facilitating equal justice under the law, the fifty States are promoting the common good. Not only is there substantial public good produced by the States' IOLTA contributions to equal justice, but also, as demonstrated earlier, the attendant economic burden on those whose deposits are subject to IOLTA pooling is zero.

The "common good" done by IOLTA programs goes to the heart of the role played by the justice system in American society. At bottom, the justice system is designed to be a peaceful dispute resolution mechanism. Societal peace and stability are fostered when citizens take their disputes to court rather than settling them in the street. For the justice system to achieve these broad social goals effectively, it must operate in a way that inspires public confidence. When access to the courts is financially beyond the reach of large numbers of citizens, public confidence in society's primary dispute resolution mechanism is undermined, which can quickly lead to a breakdown of peace, order, and stability. Given these self-evident fundamentals, IOLTA programs serve not just the poor, and the typical causes of the poor, but provide benefits to everyone. Thus, as in *Penn Central*, 438 U.S. at 134-35, where "the preservation of landmarks benefit[ted] all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole," so too does IOLTA benefit society as a whole by improving the quality of justice and therefore the quality of life.

The present case therefore is readily distinguishable from *Webb's*, where the government offered no justification whatsoever – no police power justification, no government service, no program, nothing – in support of its retention of $100,000 interest earned on interpleaded funds that were independently capable of earning that interest separate and apart from the government-administered account. 449 U.S. at 163. It was the sheer arbitrariness of the governmental action in *Webb's* that was fatal to the government's case. *Id.* at 163-64. Similarly, petitioners' hypotheticals involving blatant governmental arbitrariness – *e.g.,* confiscating an individual's bank account or car utterly without reason (*see* Pet. Br. 27) – are plainly inapposite. Such illustrations are more analogous to the arbitrary and unjustifiable governmental action in *Webb's* than they are to public programs, such as IOLTA, that promote the common good without depriving any individual of economically realistic investment-backed expectations.

B. IOLTA Programs Are Wholly Unlike Those Governmental Regulations That This Court Has Found So Inherently Destructive Of Real Property Values As To Constitute Takings Per Se.

The Court has applied a categorical "per se taking" approach only in those rare circumstances where the character of the governmental action is so dramatically destructive of recognized property values that consideration of the government's justification (as well as other *Penn Central* factors) could not possibly permit the government to avoid the conclusion that it has taken property. *See Lucas*, 505 U.S. at 1015. As noted above (*see* pages 7-8), the Court has recognized only "two discrete categories of regulatory action" as constituting takings per se. *Id.* First, governmental regulations necessarily constitute a taking if they compel the property owner to suffer a physical invasion of real property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Second, a per se taking occurs "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. Washington State's IOLTA program plainly does not fit this Court's description of either type of per se taking. Indeed, the state regulation in the instant case is entirely unlike those considered in *Loretto* and *Lucas*.

In *Loretto*, a New York statute required landlords to permit a cable television company to install its facilities on the landlord's property. 458 U.S. at 423-24. The Court held that a taking necessarily occurs when the government compels a property owner to suffer a physical intrusion that "reaches the extreme form of a permanent physical occupation." *Id.* at 426. The *Loretto* Court explained that it has invariably found a taking when faced with "a constitutional challenge to a permanent physical occupation of real property." *Id.* at 427. The *Loretto* Court's reference to invasions of "real property" is not an accident. Each of the precedents that the *Loretto* Court cited in support of its per se taking conclusion, dating back to 1872, involved permanent physical occupation of real property. *See, e.g.*, *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872) (dam that permanently flooded plaintiff's land); *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893) (permanent placement of telegraph poles on plaintiff's land); *Western Union Telegraph Co. v. Pennsylvania R. Co.*, 195 U.S. 540 (1940) (permanent placement of telegraph lines over plaintiff's right of way); *United States v. Causby*, 328 U.S. 256 (1946) (frequent flights immediately above plaintiff's land); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (take-over of plaintiff's coal mine); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (deprivation of plaintiff's right to exclude others from his private marina). Throughout the *Loretto* opinion, the Court repeatedly describes its precedent as recognizing a per se taking in the event of a permanent physical invasion of real property. *See, e.g.*, 458 U.S. at 427 ("permanent physical occupation of real property"), 427 n.5 ("physical [trespassory] takeover"), 428 ("physical invasion of the real estate of the private owner"), 430 ("permanent occupations of land"), 430 n.7 ("physical occupation of real property"), and 435 (permanent occupation of "physical property").

Similarly, the Court in *Lucas* was every bit as emphatic in limiting its per se taking approach to certain types of governmental interference with real property. *Lucas* involved state land use regulations that barred the landowner from erecting any permanent habitable structures on his beachfront property, thereby rendering his parcels valueless. 505 U.S. at 1006-07. After acknowledging its categorical treatment of *Loretto*-like cases, the *Lucas* Court explained that "[t]he second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." 505 U.S. at 1015. The Court repeatedly referred to the use of "land" and "real property" throughout the opinion. *See, e.g., id*. at 1016, 1017, 1018, 1019. The *Lucas* Court suggested that governmental deprivation of all beneficial uses of a property owner's land is akin to the physical appropriation of real property identified as a per se taking in *Loretto*. 505 U.S. at 1017.

This Court's application of the per se approach to certain types of governmental interference with real property helps to harmonize the Court's traditional view of takings with the relatively more recent "regulatory takings" cases. The classic illustration of a traditional taking is the government's exercise of its eminent domain power – literally "taking" land to build a road, a dam, etc. Although the typical regulatory taking case involves governmental interference of a different character, there are some alleged regulatory takings that are highly analagous to an exercise of eminent domain. *See Lucas*, 505 U.S. at 1018-19. The per se takings cases do no more than announce that if the governmental regulation acts like a traditional eminent domain taking, the Court will find that a taking occurred. For example, *Lucas* involved a coastal landowner's allegation of a regulatory taking but, because the State's land use regulation deprived the property owner of all economically beneficial or productive use of his land, the regulation acted like an exercise of eminent domain. *See id.* That explains the significant legal distinction between governmental regulation that deprives the landowner of 100% of the land's value (which is subject to a per se analysis) and regulation that deprives the owner of 95% of the land's value (which is subject to *Penn Central*'s ad hoc inquiry). *See id.* at 1019-20 n.8. Only the former triggers a per se analysis because only the former acts like an exercise of eminent domain.

Loretto is also instructive because it provides several examples of governmental interference with property that do *not* constitute takings under any analysis, whether ad hoc or per se. Temporary flooding of land, even though it may cause the permanent loss of sums of money (either in the form of lost profits or the cost of repairs), is not a taking. 458 U.S. at 428 (citing several cases). Ordering certain gold mines to cease operations during war time in order to conserve manpower and equipment for use in other mines that are more essential to the war effort, despite causing the permanent loss of those profits that otherwise could have been earned during the time operations were prohibited, is not a taking. 458 U.S. at 431 (*citing United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958)). Prohibiting the sale of eagle feathers, although it causes traders of bird artifacts to suffer a permanent loss of those future profits that would otherwise have been earned, is not a taking. 458 U.S. at 433-34 n.10 (*citing Andrus v. Allard*, 444 U.S. 51 (1979)). Indeed, in *Andrus*, the Court emphasized that the "loss of future profits – unaccompanied by any physical property restriction – provides a slender reed upon which to rest a takings claim." 444 U.S. at 65-66.

The Court's discussion of Takings Clause precedent in *Loretto* reveals a clear distinction between the permanent physical occupation of real property, which constitutes a per se taking, and the permanent loss of certain amounts of money – whether in the form of lost future profits, or losses due to the cost of repairs – which normally do not constitute takings, much less takings per se. The alleged lost interest income in this case should be treated no differently. Even the New York landmark preservation law at issue in *Penn Central*, which caused the owners of Grand Central Terminal to suffer substantial losses of monetary value, was ruled not to effect a taking. 438 U.S. at 138. Therefore, even if it is possible to view IOLTA as somehow causing petitioners to suffer a "loss" of interest that could not have been earned outside of an IOLTA account, there is no case in all of the Court's Takings

Clause jurisprudence that treats governmental interference with money as a per se taking.

Webb's is the only case cited by petitioners where the Court found that governmental interference with money constituted a taking. Yet, even despite the relatively obvious taking in that case, the Court did not employ the per se approach. *See* 449 U.S. at 161-64. Rather, the Court in *Webb's* considered the purpose of the governmental action (there was no apparent program; the government's action looked totally arbitrary), the economic burden on the claimant ($100,000 of interest that could have been earned separate and apart from the interpleader account), and the property owner's expectations (the interpleader fund was specifically held for the ultimate benefit of Webb's creditors, not for the government). *See id.* Thus, even though *Webb's* presented a relatively easy takings issue, and even though the governmental action readily appeared to constitute a taking, the Court plainly did not apply a per se taking approach. Moreover, when the Court decided *Loretto* just two years later, and methodically marshaled precedent in support of its categorical treatment of "physical invasions," there was not even a mention of *Webb's*. *See Loretto*, 458 U.S. at 426-35. Later, in *Lucas*, the Court expressly drew a distinction between those types of governmental interference with land that constitute per se takings, and governmental interference with personal property, which normally does not constitute a taking under any analysis. 505 U.S. at 1027-28.

Extending the per se analysis to cases involving an alleged taking of money would prove unworkable. Even in the case of land, this Court has noted the difficulty of identifying the "denominator" – *e.g.*, whether a deprivation of all beneficial uses of two acres of a landowner's ten acres of land holdings is a 100% loss of value of two acres or merely a partial loss of value of ten acres. *See Lucas*, 505 at 1016-17 n.7. Extending the per se taking approach to cases involving an alleged taking of money would pose an even more intractable "denominator" problem. Unless individuals are permitted to argue that the challenged regulation caused them to lose 100% of the value of the monetary amount that was allegedly lost (which would make *every* deprivation of money a per se taking), *Penn Central*'s warning about artificial segmentation of property (until the point of total destruction of some portion is reached) must be heeded. *See* 438 U.S. at 130 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.").[9]

Moreover, an extension of the per se analysis to cases involving the alleged taking of money, without careful identification of the correct denominator, could have far-reaching detrimental consequences for the States' ability to fund state governmental programs, and would likely invite Takings Clause attacks on state income taxes, property taxes, and sales taxes. Petitioners acknowledge

[9] Although the discussion in *Penn Central* is limited to real property, it is petitioners who are asking the Court to extend to alleged monetary losses the per se approach heretofore limited to certain regulations of real property. But petitioners cannot have it both ways. Consistent with their logic, all of the rules governing per se takings of real property should apply to this case, including *Penn Central*'s rule foreclosing the use of an artificial denominator. Thus, unless petitioners can argue "interest follows principal" in order to establish a property right in the interest, *see Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), but then argue that the interest should be considered separate and apart from the principal when attempting to establish a per se taking of 100% of their interest, the deposited principal amounts must be considered part of the "denominator" when assessing the nature of IOLTA's impact on petitioners. And the petitioners were in no way completely deprived of the economically viable use of their principal; quite to the contrary, the principal deposit was working for them, whether facilitating the timely delivery of legal services, or the successful completion of a real estate transaction.

that taxes and user fees are not takings (Pet. Br. 27-28), but fail to explain how their proposed per se rule would permit States to continue using such revenue-gathering strategies without having to defend numerous lawsuits. Per se is per se. Presumably the States would have to justify these programs by showing that any particular plaintiff is receiving just compensation, even though many of the benefits of state governmental programs are enjoyed only by others, or by groups to which the plaintiff does not belong.

Finally, extending the per se analysis to cases involving an alleged taking of money would carry an increased potential – as indicated by the current case – of identifying as a per se taking that which a full *Penn Central* analysis would reveal to be a non-taking. Such an overuse of the categorical approach would inject an unnecessary element of arbitrariness into this Court's Takings Clause jurisprudence. Therefore, the earlier demonstration that a full *Penn Central* analysis indicates that IOLTA does not work a taking also shows the impropriety of extending the per se takings approach to the present case.

C. Petitioners' Expansive View Of The Takings Clause Substantially Intrudes On The States' Ability To Pursue Efficient Strategies For Funding State Programs.

A decision that IOLTA programs constitute an unconstitutional taking will have widespread negative implications for States' efforts to efficiently fund an essential state initiative – ensuring the equality of justice in state courts. This Court has often recognized the magnitude of a State's interest in the administration of its own justice system. *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991). Indeed, this Court has determined that the Constitution itself requires the States to ensure equal justice for the poor by providing counsel and other litigation services to the indigent. *M.L.B. v. S.L.J.*, 519 U.S. 102, 110-16, 119-24 (1996) (collecting and reaffirming cases). In light of such significant state interests and obligations, the Court should require a much stronger showing of a taking than exists in the present case before reading the Constitution to interfere with all fifty States' efforts to improve the administration of justice in their courts.

This Court has been especially sensitive to state interests in its Takings Clause jurisprudence. *See, e.g., Lucas*, 505 U.S. at 1017-18 ("our usual assumption [is] that the [State] is simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned.") (citations omitted), 1027 ("the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power."), and 1027-28 ("And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might render his property economically useless.").

At a time when governmental institutions across the land – both state and federal – are routinely criticized for economic waste and bureaucratic inefficiency, it is ironic that the States would be attacked for devising an efficient approach to reducing the wasteful costs and fees associated with the maintenance of lawyer trust accounts, a cost savings that is directed toward improving the quality of justice available to state citizens in state courts. Indeed, the posture of this case indicates that petitioners may be motivated more by the desire to undo IOLTA programs nationwide than by the desire to recover the "few dollars and some-odd cents" of interest attributable to their portion of the pooled account, interest that inevitably would be exceeded by the accounting costs of attempting to divide it among all the nominal or short-term depositors. Of course, if petitioners prevail, those clients whose deposits currently are placed in IOLTA accounts will still earn zero on their "investment."

At bottom, this lawsuit is less about whether individuals are losing small amounts of interest than how that interest is collectively spent. And fundamental principles of federalism counsel against using the Constitution to thwart how a State chooses to spend money that it has generated through its own regulation of lawyer trust accounts. Whether IOLTA interest is spent to provide equal access to the courts for the poor, or used to help state governmental entities defend suits sounding in constitutional tort, should not matter. And, under the Constitution, it does not matter. The Court, therefore, should deny petitioners' attempt – and deter future litigants' attempts – to distort the Takings Clause in a way that facilitates substantial intrusions into legitimate state efforts to administer and fund essential state programs.

CONCLUSION

For the reasons set forth above and in respondents' briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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