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

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND TRIAL LAWYERS FOR PUBLIC JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an "Interest on Lawyer Trust Account" program violates the Just Compensation Clause of the Fifth Amendment where the program causes no economic harm to the claimants and thus just compensation for any taking would be zero.

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INTEREST OF THE *AMICI CURIAE* [1]

The National League of Cities (NLC) is a non-profit organization whose members include 49 state municipal leagues and approximately 1,800 member cities and towns. Through the member state municipal leagues, NLC also represents more than 18,000 municipalities.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk.

The International Municipal Lawyers Association (IMLA) is a non-profit organization that has served as an advocate for municipal attorneys since 1935. Its members include lawyers from more than 1,400 municipalities. IMLA serves as the legal voice for the nation's local governments and thus has a vital interest in legal issues that affect municipalities.

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm dedicated to creating a more just society. Through precedent-setting litigation, TLPJ prosecutes cases designed to enhance consumer and victims' rights, environmental protection, civil rights and liberties, workers' rights, America's civil justice system, and the protection of the poor and powerless. In particular, TLPJ has long fought to preserve an open and accessible system of justice in this country.

Amici have diverse and sometimes competing interests. Notwithstanding these differences, we share an abiding interest in protecting appropriate access to justice and ensuring that takings jurisprudence continues to allow local officials to protect the public interest without fear of inappropriate and exorbitant compensation awards. *Amici* also are united in our view that Interest on Lawyer Trust Account ("IOLTA") programs do not violate the Just Compensation Clause of the Fifth Amendment.

SUMMARY OF ARGUMENT

The Just Compensation Clause does not proscribe takings of private property, but merely conditions any taking on the payment of just compensation. *E.g., First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The just compensation requirement serves to put the claimant "in as good a position pecuniarily as if [the] property had not been taken." *Olson v. United States*, 292 U.S. 246, 255 (1934). Where a taking causes no pecuniary harm, just compensation for the taking is zero and

no violation of the Just Compensation Clause occurs. Courts repeatedly have declined to award relief for both direct and inverse condemnations where the taking caused the claimant no economic harm. Because respondents' IOLTA program does not cause petitioners economic harm, just compensation for any taking would be zero. Thus, even assuming *arguendo* that a taking occurred, the IOLTA program does not violate the Just Compensation Clause.

Petitioners' contention that *every* taking requires affirmative relief, regardless of whether it causes economic harm, is a radically new *per se* remedial rule that would apply to both direct and inverse condemnations. It would improperly curtail the sovereign power of eminent domain, contravene longstanding precedent, and disregard this Court's wise admonition to resist "'[t]he temptation to adopt what amount to *per se* rules in either direction'" in takings cases. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478, 1481 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

ARGUMENT

Respondents' briefs show that they should prevail on two independent grounds. First, the IOLTA program does not constitute a taking of petitioners' property. Second, assuming for the sake of argument that a taking has occurred, there is no violation of the Just Compensation Clause because the IOLTA program caused petitioners no economic harm and thus no compensation is due.

This amicus brief focuses on respondents' second showing, supplementing it in three ways. First, we describe many situations in which courts have found no violation of the Just Compensation Clause—notwithstanding the existence of an uncompensated taking—because the taking caused no economic harm. Second, we demonstrate that

nothing in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), suggests that a violation of the Just Compensation Clause may occur where the claimant suffers no economic harm. Indeed, the subsequent history of *Loretto* in state court shows that despite the taking of Loretto's property, the court held that there was no constitutional violation because Loretto failed to show that she suffered economic harm. Third, we explain how petitioners' position would dramatically disrupt the ability of local governments to protect the public interest through the exercise of their sovereign power of eminent domain.

I. NO VIOLATION OF THE JUST COMPENSATION CLAUSE OCCURS WHERE A TAKING CAUSES NO ECONOMIC HARM AND THUS JUST COMPENSATION IS ZERO.

The central fact of this case is that Washington's IOLTA program has not caused petitioners economic harm. As shown in respondents' briefs and the rulings below, the funds at issue would not have earned interest absent the IOLTA program. Thus, petitioners have suffered no pecuniary loss.[2]

In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), this Court deferred consideration of the significance

[2] *E.g.*, Pet. App. 33a (Ninth Circuit: "Thus, because no interest would be earned on client funds deposited by escrow and title companies absent the IOLTA program, requiring those companies to place client funds in IOLTA accounts has no economic impact on the owners of the principal. Indeed, if there be any economic impact, it is a positive one."); Pet. App. 38a (Ninth Circuit: "[T]he alleged loss of the escrow and title companies' earnings credits had no economic impact on [the claimants]."); Pet. App. 87a (District Court: "[IOLTA] programs are premised on the idea that the interest created by the pooled funds could not create a net profit * * * for the client-depositor."); Pet. App. 94a (District Court: "[I]n no event can the client-depositors make any net return on the interest accrued in these accounts. Indeed, if the funds were able to make any net return, they would not be subject to the IOLTA program.").

of this fact as it relates to the issue of just compensation, expressing "no view" as to the amount of just compensation, if any, that would be due if the IOLTA program were deemed a taking of property. *Id.* at 172. Because the compensation issue is now squarely before the Court, petitioners' inability to receive any net interest on funds subject to IOLTA has become "the most salient fact" of the case. *Id.* at 173 (Souter, J., with whom Stevens, Ginsburg, & Breyer, JJ., join, dissenting).

The Just Compensation Clause—"nor shall private property be taken for public use, without just compensation"—is different in kind from most other provisions of the Bill of Rights. It does not prohibit government conduct, but merely conditions the taking of property on the payment of adequate compensation. As the Court noted in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Just Compensation Clause "makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id*. at 315.

With respect to both direct and inverse condemnations, "there is no constitutional violation 'unless or until the state fails to provide an adequate postdeprivation remedy for the property loss.'" *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714-15 (1999) (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984))). In other words, where the condemnor provides adequate compensation, the property owner "suffer[s] no constitutional injury from the taking alone." *Del Monte Dunes*, 526 U.S. at 710.[3]

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[3] *Accord, Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) (where the government provides adequate compensation, "the

Moreover, it is black-letter law that where a taking causes no economic harm, just compensation is zero. To be sure, "property is more than economic value." *Phillips*, 524 U.S. at 170. But just compensation is not. Just compensation considers only the economic value of the property. The constitutional guarantee of just compensation is designed simply to put "the owner of the condemned property 'in as good a position *pecuniarily* as if [the] 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) (emphasis added)); *accord*, *United States v. Reynolds*, 397 U.S. 14, 16 (1970) ("The owner is to be put in the same position monetarily as he would have occupied if [the] property had not been taken.").

Applying these principles, courts repeatedly have held that, notwithstanding the existence of an uncompensated taking, no violation of the Just Compensation Clause occurs where the challenged government action causes no economic harm to the claimant. In particular, courts have refused to award compensation where a taking did not interfere with the claimant's profitable operations, where special benefits conferred by a taking nullified any alleged economic harm, and where the condemned land was valueless. We set forth representative examples of each of these scenarios below.[4]

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property owner cannot claim a violation of the Just Compensation Clause"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013, 1018 n. 21 (1984) (same); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11-12 (1990) (same).

[4] The Ninth Circuit held that "even if the IOLTA program constituted a taking of * * * private property, there would be no Fifth Amendment violation because the value of their just compensation is nil." Pet. App. 45a. *Amicus* Home Builders mischaracterizes this ruling as "requiring a calculation of just compensation before a Fifth Amendment taking can be found to exist." NAHB Br. 3. The ruling on its face, however, plainly assumes the existence of a taking and observes that despite the assumed taking, there would be no constitutional violation

A. Takings That Do Not Reduce the Value of the Claimant's Property

In *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280 (1926), the Court addressed a takings claim based on a presidential proclamation that the government was temporarily taking control of the claimant's railroad. In fact, however, the government never exercised actual control or interfered with its operations. *Id.* at 282-83. Writing for a unanimous Court, Justice Brandeis found no constitutional violation, concluding that even assuming that the government's proclamation worked a taking, no economic harm resulted and thus no compensation was due:

> For even if there was technically a taking, the judgment for defendant was right. Nothing 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 282. The Court emphasized that no evidence "show[ed] that the alleged taking had subjected the company to any pecuniary loss or had deprived it of anything of pecuniary value." *Id*. at 286.

Likewise, in *Fulmer v. State*, 134 N.W.2d 798 (Neb. 1965), the Nebraska Supreme Court relied on the lack of economic harm in refusing to award compensation for a condemnation of a permanent easement that prohibited advertising on farmland adjacent to an interstate highway. The state submitted evidence showing that any income from advertising would be so small as to be disregarded by potential purchasers, and thus there was no difference in the value of the land before and after the taking. *Id.* at 800. The

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because no compensation would be due. The Home Builders' misreading of the Ninth Circuit in this regard renders its brief largely beside the point.

court concluded that the "evidence supports the finding that the landowner was not damaged by the taking of the easement." *Id*.

In *State v. Wabash R.R. Co.*, 889 S.W.2d 181 (Mo. Ct. App. 1994), the state condemned a permanent easement on a portion of a railroad right-of-way for an interstate off-ramp, as well as a temporary construction easement. *Id.* at 181-82. The court affirmed a jury award of zero damages because the evidence "established that no interference to the [railroad's] use of the land occurred and the railroad's evidence failed to show any damage to the remaining parcel." *Id*. at 184.

In the same way, the IOLTA program has not caused petitioners any pecuniary loss. Thus, the program does not violate the Just Compensation Clause regardless of whether it works a taking.

B. Takings With Offsetting Special Benefits

No constitutional violation occurs for an uncompensated taking where special benefits conferred by the taking nullify any economic harm. For instance, the Federal Circuit declined to award relief for a taking of property near the notorious Stringfellow Acid Pits in California. *Hendler v. United States*, 175 F.3d 1374 (Fed. Cir. 1999) (Plager, J.). The court had previously concluded that a physical taking occurred where the government installed wells on the claimants' land to monitor ground water as part of a cleanup under the federal Superfund program. *Id*. at 1377-78. Nevertheless, the Federal Circuit affirmed the trial court's denial of compensation because the special benefits conferred on the land by the cleanup outweighed the value of the easements taken by the government. *Id*. at 1379-1383. In so ruling, the court invoked "the underlying equitable principle that the Government's obligation is, to the extent possible following the Government's intrusion, to restore the landowner to the position he was in absent any government

action." *Id.* at 1382. Because the challenged cleanup activities caused no economic harm, no compensation was due. *Id*. at 1383.

Similarly, in *Bartz v. United States*, 633 F.2d 571 (Ct. Cl. 1980) (per curiam), the Federal Circuit's predecessor relied on offsetting benefits in refusing to award compensation for an alleged taking of farmland by recurring flooding purportedly caused by the Coralville Dam on the Iowa River. *Id.* at 576-77. The court concluded that any economic injuries from the flooding "were heavily countervailed by the benefits to the [claimants'] farmlands as a whole." *Id*. at 577-78.

Condemnations of land for public highways often give rise to offsetting special benefits that result in zero-compensation awards. For example, in *State v. Templeman*, 693 P.2d 125 (Wash. Ct. App. 1984), the trial court entered a judgment on a jury verdict of zero dollars as just compensation for a condemnation of portions of two parcels comprising about 65 acres for a state highway project. Expert testimony showed that the claimants' holdings would be worth more after the road improvements. *Id.* at 126. The appeals court affirmed the judgment. *Id*. at 129.

As in these offset cases, petitioners have suffered no economic harm from the IOLTA program and thus are entitled to no relief under the Just Compensation Clause.

C. Takings of Valueless Land

An uncompensated taking causes no constitutional violation where the condemned land is valueless. In *State v. The Mill*, 887 P.2d 993 (Colo. 1995), the Supreme Court of Colorado declined to award compensation or other relief for the condemnation of a 61-acre parcel previously used for uranium milling operations where the parties stipulated that the market value of the property in its contaminated state was

zero. *Id*. at 997-98. The court noted that "[i]f the property owner were allowed to collect the value of the property in its decontaminated state, the property owner would not only be spared the expense of cleanup, but would also receive the increase in market value resulting from the cleanup," a result the court denounced as "windfall profits." *Id*. at 1006.

So too here. Petitioners have suffered no economic harm from the IOLTA program and thus any relief afforded them under the Just Compensation Clause would be an unfair windfall. Such a result cannot be justified under a constitutional provision whose application is informed by "fairness and justice." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[5]

II. *LORETTO* CONFIRMS THAT NO VIOLATION OF THE JUST COMPENSATION CLAUSE OCCURS ABSENT ECONOMIC HARM.

Petitioners and their *amici* argue that this Court's ruling in *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982), shows that government action may violate the Just Compensation Clause regardless of whether that action

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[5] This Court also has reached zero-compensation results under other constitutional provisions. For instance, in *Perry v. United States*, 294 U.S. 330 (1935), the Court ruled that the Congress exceeded its constitutional powers and breached contracts by abrogating gold clauses under which the principal and interest on various government obligations were payable in gold coin. *Id*. at 346-54. Nevertheless, the Court held that the claimant was not entitled to any relief because it failed to show economic harm in view of other congressional action withdrawing gold coin from circulation and prohibiting its exportation. Stressing that the claimant could "recover no more than the loss he has suffered" and "is not entitled to be enriched" (*id.* at 354-55), the Court concluded that the claimant had not shown "that in relation to buying power he has sustained any loss whatever." *Id*. at 357. Thus, the Court wrote, compensation "would appear to constitute, not a recoupment of loss in any proper sense, but an unjustified enrichment." *Id.* at 358.

causes economic harm to the claimant. They note that *Loretto* holds that a taking may occur even where the challenged government action enhances the value of the property at issue. Pet. Br. 34 n.13; NAHB Br. 5-6; PLF Br. 3-4. Their reliance on *Loretto* is misplaced.

Loretto involved the physical occupation of real property, a circumstance that easily distinguishes it from the case at bar. As respondents show, *Loretto* thus has little relevance to the issue of whether a taking has occurred. But with respect to the issue of just compensation, the full history of *Loretto* shows exactly the opposite of what petitioners suggest. This Court's "very narrow" holding in *Loretto* (458 U.S. at 419) expressly declined to address whether the Just Compensation Clause required compensation for the taking, and instead remanded that issue to the state court. *Id*.

On remand, the state court refused to award Loretto attorneys' fees as a prevailing party because she failed to "establish the deprivation of any federal right." *Loretto v. Group W Cable*, 522 N.Y.S.2d 543, 545 (App. Div. 1987). The court observed that although Loretto established that the defendant took her property, "that alone does not amount to the deprivation of a right." *Id.* After noting that in takings cases "no constitutional violation occurs until just compensation is denied," *id*. at 546 (quoting *Williamson County*), the state court concluded that Loretto had failed to demonstrate a right to compensation and thereby "prove any underlying constitutional violation." *Id*. The court stressed that Loretto's showing of a taking was thus "of purely academic interest." *Id*.

Far from showing that every taking must result in the payment of compensation regardless of economic injury, the full history of *Loretto* confirms that courts should not award compensation where the challenged measure causes no economic harm to the claimant. Because Loretto failed to show that the statute at issue caused economic harm, she

could not show a constitutional violation that entitled her to attorneys' fees as a prevailing party. In the same way, petitioners' inability to demonstrate economic harm from the IOLTA program precludes them from showing a violation of the Just Compensation Clause.

III. PETITIONERS' POSITION WOULD IMPROPERLY CURTAIL THE SOVEREIGN POWER OF EMINENT DOMAIN.

Ignoring the longstanding precedent discussed above, Petitioners and their *amici* take an extraordinary position. They argue that even in the absence of economic harm, the Just Compensation Clause compels relief for "non-economic rights" and "nonmonetary" components of their property interest. Pet. Br. 35; PLF Br. 3. In particular, they emphasize that the IOLTA program impairs petitioners' right "to control the uses to which their property is put" or to have a "voice" in how the interest generated by IOLTA accounts is spent. Pet. Br. 36-37; PLF Br. 4.

Petitioners essentially assume that interference with a claimant's subjective view on how condemned property should be used is compensable. This contention reflects a fundamental misunderstanding of the government's authority to take property. The power to condemn property is "intimately involved with sovereign prerogative." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959). The very purpose of this sovereign power is to allow the government to take property without the owner's consent and without regard to the owner's desires regarding the disposition of that property. *See San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., with whom Stewart, Marshall, & Powell, JJ., join, dissenting) (citing 6 J. Sackman, *Nichols' Law of Eminent Domain* § 1.11 (3d ed. rev. 1980)). Because the measure of just compensation is a purely "pecuniar[y]"

standard (*Olson, supra*), the claimant's personal predilection regarding how the property should be used is utterly irrelevant to the amount of compensation due for any taking.

Of course, some infringements of so-called "non-economic" interests, such as the right to exclude, do cause economic harm. And when such an infringement constitutes a taking, the Fifth Amendment requires compensation to redress the economic harm. But as the *Loretto* case shows, absent economic harm, a taking that impairs the right to exclude or other non-economic interests results in no constitutional violation. *See* Section II, *supra*. By relying on their own subjective views of how the property at issue should be used, petitioners contravene longstanding rulings that "just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner." *United States v. 50 Acres of Land*, 469 U.S. 24, 35 (1984); *accord, Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

Petitioners spend considerable rhetorical energy insisting that their non-economic interests must "have *some* value." Pet. Br. 17, 37. But they cite no appraisal evidence showing the value of their non-economic interests. Because petitioners have not shown economic harm caused by the IOLTA program, they are already in as good a position pecuniarily as they would have been in the absence of the program. Just compensation for any taking would be zero, and thus no constitutional violation has occurred.

Consider the implications of petitioners' position for workaday condemnations. Most takings claimants would prefer to keep the condemned property. Under petitioners' theory, a claimant could seek compensation not only for economic harm caused by the taking, but also for the "non-economic" injury caused by the failure to consider the claimant's voice as to how the property should be used. On this view, absent adequate compensation for these interests—

which petitioners acknowledge have "no readily determinable fair market value" (Pet. Br. 37)—the claimant could seek injunctive relief to block the exercise of eminent domain authority. Such a result would be unprecedented in the annals of takings jurisprudence and seriously undermine the ability of public officials to exercise the sovereign authority to condemn property in the public interest.

Petitioners and their *amici,* in effect, ask this Court to devise two new *per se* rules of takings liability: one *per se* rule that deems every IOLTA program in the country to be a taking of private property, and a second *per se* rule that requires compensation for every taking, regardless of whether the claimant has suffered economic harm. Each of these proposals contravenes the Court's wise admonition to resist "[t]he temptation to adopt what amount to *per se* rules in either direction" in takings cases. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478, 1481 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). The text of the Constitution and longstanding precedent require that any such temptation be resisted here as well.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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