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 FOR FORTY-NINE STATE BAR ASSOCIATIONS AND THE NATIONAL ASSOCIATION OF IOLTA PROGRAMS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Does the Just Compensation Clause of the Fifth Amendment, as applied through the Fourteenth Amendment, require the State of Washington to pay compensation for an alleged "taking" of funds through its IOLTA program, which does not result in any financial loss to the owner of those funds?

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INTEREST OF THE *AMICI CURIAE*[1]

The Legal Foundation of Washington administers an "Interest on Lawyers Trust Account" ("IOLTA") program. Essentially the same type of program has been adopted in every other State, as well as in the District of Columbia. Like all of the IOLTA programs, Washington's program operates on the premise that sums of money too small or held for too short a time to generate a return for their owners should not be shunted into non-interest-bearing trust accounts that benefit only the financial institutions holding these deposits, as occurred in the past. Rather, these otherwise unusable assets should be utilized to help pay for legal services to the poor. Petitioners' takings claim is consciously designed to extinguish such programs around the country.

With dramatic cutbacks in funding for the Legal Services Corporation, IOLTA programs have become a very important nationwide source for legal services to the poor. IOLTA programs collect revenue on IOLTA accounts and use this revenue to fund legal services to the poor. In recent years, as the Federal government's financial support for these services has declined and become more uncertain, legal aid societies have been able to draw upon the resources provided by IOLTA programs to continue their work. If petitioners succeed in disabling IOLTA programs, then the continued activities of non-profit organizations like these legal aid societies will be jeopardized. The consequent harm to those who lack the resources to have meaningful access to our courts is obvious.

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[1] This brief was not written in whole or part by counsel for any party, and aside from *amici curiae*, their members, and their counsel, no one made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Counsel for petitioners and respondents have consented to the filing of this brief. Letters evidencing such consent are on file in the Clerk's office.

The *amici curiae* that have joined this brief have a particular interest in the continued existence of IOLTA programs. The National Association of IOLTA Programs ("NAIP") is the coordinating umbrella organization for all of the state IOLTA programs. Its members are the fifty-one organizations that administer IOLTA programs in each of the fifty states and the District of Columbia. The forty-nine state bar associations, whose names are set out in the Addendum to this Brief, were involved in the creation of the IOLTA programs in their respective States and have helped sustain those programs since their inception.

The *amici curiae* represent, quite literally, the broadest possible cross-section of the American legal profession. Their participation here attests to the high regard that attorneys and other legal professionals have for the benefits and importance of IOLTA programs. For all the reasons stated, the *amici curiae* have a direct interest in the constitutional issues raised in this case, the resolution of which will dictate whether IOLTA programs will be able to continue to operate in every jurisdiction where they have been approved and implemented.

SUMMARY OF ARGUMENT

The Washington Legal Foundation has embarked on a longstanding and wide-ranging campaign against IOLTA programs, premised on a misunderstanding of the Constitution. The Just Compensation Clause of the Fifth Amendment does not, as the Washington Legal Foundation insists, prohibit all "takings" as a matter of law. Rather, it guarantees "just compensation" to people from whom the government takes private property. The clause actually *protects* the government's authority to take property for public use, as long as it provides fair and adequate compensation to the property owner.

All amounts deposited under the terms of the IOLTA program are funds that cannot yield a return on their own account. The program is expressly restricted to amounts that are too insignificant, or deposits that are too transitory, to yield any interest for the clients who own them. It is important to understand how IOLTA programs succeed in generating income where the individual deposits could not. This occurs, in the main, not because of banking regulations, tax charges, and other government provisions—as some courts have apparently been led to believe. Instead, IOLTA accounts operate by eliminating the considerable administrative charges involved in calculating, identifying, tracking, and allocating revenues to discrete individuals (whether in separate bank accounts for each client or pooled on a firm-by-firm or attorney-by-attorney basis). When these unavoidable costs are offset against the miniscule sums generated by small or short-term accounts, they preclude any actual return on an individual basis. Because of this central fact, which is undisputed in this case, IOLTA accounts generate income where there had been none before, and the income thus generated could never benefit any individual client.

Therefore, even assuming *arguendo* that the IOLTA program did somehow effect a "taking" of property within the meaning of the constitutional terms, that result is not accomplished without "just compensation." Under the two tests that the Court has applied to determine the amount of "just compensation" in different circumstances—the "fair market value" test and the "value to the owner" test—the amount of earnings on funds that are eligible for state IOLTA programs is zero. The Court has consistently rejected the application of a "value to the taker" measure for just compensation. Such a measure would compensate what is acquired, not what is taken, and thus would be directly inconsistent with the text of the Takings Clause. Moreover, the Court has held in various contexts that the government is not required to provide compensation to the property owner for elements of the property's value that the government itself has created, which is obviously true of the IOLTA program itself. In sum, because petitioners have never suffered any compensable loss—*i.e.*, no loss with any monetary value—they have no valid constitutional claim under the Just Compensation Clause.

ARGUMENT

Attorneys receive money from their clients to escrow, or hold in trust, for all sorts of reasons. Attorneys put only some of this money in IOLTA accounts. Before depositing a particular client's fund in an IOLTA account, an attorney must go through a process to determine whether that deposit could either be deposited on its own or be pooled with other funds to earn an amount of interest sufficient to offset the expenses necessary to generate and distribute that interest to the client. The possibility of earning any net return—once the unavoidable costs of calculating, identifying, tracking, and allocating individual funds is taken into consideration—obviously depends on the projected time that funds will be held and available interest rates. An attorney may put into an IOLTA account only those funds that are not capable of generating any net interest for the clients who own them once the unavoidable costs of administering discrete revenue flows are offset against the interest they would be able to generate.

Therefore, none of the individual deposits placed in IOLTA accounts could generate interest on its own for an individual client, in view of applicable administrative charges, service charges, accounting costs, tax reporting costs, and banking restrictions. Because these funds are either nominal in amount or held only for a short term (or both), there is simply no possibility that these funds would be able to earn any interest income that could benefit the individual clients for whom the funds are held. Once again, it bears emphasis that this central fact is undisputed in this case.

I. STATE IOLTA PROGRAMS ARE BASED SOLELY ON FUNDS THAT COULD NOT EARN INTEREST ABSENT THE IOLTA PROGRAM ITSELF.

A. IOLTA Programs Supplement Attorneys' Longstanding Fiduciary Duties To Keep Their Clients' Funds Safe and Separate.

Clients frequently ask attorneys (and, in Washington, LPOs), to hold their money in escrow or trust. Attorneys, as fiduciaries for their clients, have long been obliged to keep those funds safe and separate from their own funds. Washington, like every other State and the District of Columbia, has developed rules that regulate how attorneys handle their clients' funds. Washington's IOLTA program, like those adopted by each of the other forty-nine States and the District of Columbia, makes up but a small part of the regulatory framework that governs the treatment and disposition of client funds.

A lawyer is, in every sense of the word, her client's fiduciary. In this capacity, attorneys in this country have, for nearly two centuries, been understood to have three obligations when given money by a client: to keep their clients' money safe; to keep it separate from their own; and to provide an accounting of their clients' funds. David Hoffman in his early statement of rules for the legal profession discussed all three obligations. One of Hoffman's "fifty resolutions" stated: "I will retain no client's funds beyond the period in which I can, with safety and ease, put him in possession of them." David Hoffman, *A Course of Legal Study* 762 (2d ed. 1836). Another stated: "I will on no occasion blend with my own, my client's money: if kept distinctly as his, it will be less liable to be considered as my own." *Id.*

These obligations have had a place in the canons, now rules, of professional ethics adopted by the American Bar Association ("ABA") since their first introduction nearly a century ago. The original Canons of Professional Ethics modified Hoffman's statement only slightly: "Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him." Canons of Prof'l and Judicial Ethics, Canon 11 (1908). The American Bar Association later refined this provision to bring it completely in line with Hoffman's original instruction: "Money of the client . . . should not under any circumstances be commingled with [the lawyer's] own or be used by him." Canons of Prof'l and Judicial Ethics, Canon 11 (1933).

These somewhat generally stated obligations became more specific in response to a directive from then-President of the ABA, Lewis F. Powell, Jr., to consider further amendments to the Canons. Disciplinary Rule 9-102 of the resulting Model of Code of Professional Responsibility ("ABA Code") preserved the prohibition on commingling. *See* D.R. 9-102(A) (1969). The Code added additional detail to the obligation to keep clients' funds safe. The Code required lawyers to deposit money received from a client in an identifiable bank account, maintained in the lawyer's name, at an in-state bank. *See* D.R. 9-102(A). The Code further demanded that lawyers notify their clients when they received funds from third parties on their clients' behalf and to keep records relating to attorney trust accounts. *See* D.R. 9-102(B). When the ABA later replaced the Code with the Model Rules of Professional Conduct ("ABA Rules"), it preserved the requirements that attorneys place their clients' funds in bank accounts separate from their own, notify clients upon receipt of money from a third party, and preserve records related to attorney trust accounts for some period of years following termination of representation. *See* Model Rules of Prof.'l. Conduct, Rule 1.15 (1983).

Through these many iterations, these precepts were generally understood to require attorneys to generate interest for their clients whenever the deposits they held were able to do so. In 1962, the ABA's Standing Committee on Ethics and Professional Responsibility (charged with interpreting the ABA's Canon's of Professional Ethics) was asked whether attorneys could keep interest earned on commingled clients' funds when it was "quite difficult to allocate" the interest to particular clients. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Opinion 545 (1962). The committee answered that keeping the interest generated by the commingled sum would violate Canon 11. *Id.* The Standing Committee reiterated this point five years later when asked whether an attorney could use the interest generated on a commingled sum to defray the costs of setting up the account. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Opinion 991 (1967). The Standing Committee concluded that this arrangement would also violate Canon 11. *Id.* The Committee revisited these issues in 1982 in a formal opinion devoted to the issue of placing clients' funds at interest. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 348 (1982). There, the Committee explained that an attorney, as a trustee for his or her clients funds, "may be liable for lost earnings on funds left with [the attorney] for investment and kept uninvested for an unreasonably long time." *Id.* at 149 (citing 2 A.W. Scott, *The Law of Trusts* §§ 180.3, 181 (3d ed. 1967 and Supp. 1981)). The Committee added that "an extreme violation of the lawyer's fiduciary duty to invest a client's funds . . . would provide a basis for professional discipline." *Id.*

Washington's Rules of Professional Conduct ("WRPC") mirror the ABA Rules. Attorneys have three primary obligations: they must hold their clients' funds separate from their own, keep those funds safe, and provide an accounting. *See* WRPC 1.14; Pet. App. 101a. Like the ABA Rules and the antecedent ABA Code, WRPC provide attorneys with a specific set of instructions about how to keep client funds safe and separate from their own. Attorneys must put client funds in one or more trust accounts. *See* WRPC 1.14; Pet. App. 101a. These trust accounts must provide for withdrawal on demand. *See id.* They must be held by "banks, savings and loans or depositary institutions insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, the Washington Credit Union Share Guaranty Association, or the Federal Savings and Loan Insurance Corporation." *Id.*

Washington's IOLTA program supplements these basic obligations. Under WRPC, an attorney who is given money by a client must determine whether that money can be used to generate net interest for the client. *See* WRPC 1.14(3); Pet. App. 101a ("In determining [where to put client funds], a lawyer shall consider only whether the funds to be invested could be utilized to provide a positive net return to the client, as determined by taking into consideration the following factors . . ."). If the funds are able to generate interest, then the attorney must put that sum into a trust account established specifically for that client or into a trust account that pools money belonging to many clients with the lawyer or law firm calculating and paying interest to each client separately based on each client's activity in the account. WRPC 1.14(2); Pet. App. 101a.

If a particular sum *cannot* yield a return for the client through either of these means, then the attorney must place that sum into an IOLTA account. *Id.* The typical reason that a particular deposit cannot generate a return for the client, either in an account of its own or pooled with other sums of money given to that lawyer, is that the amount is too small, or the deposit is held for too short a time, to offset the administrative costs that are unavoidably necessary to calculate, identify, track, and allocate whatever miniscule amount of interest could be derived. Although IOLTA programs vary considerably from state to state, it is generally understood that attorneys who receive money from a client must, whenever possible, use that money to generate interest revenues for the client. Only funds that cannot yield a return for their individual client-owners may be put in IOLTA accounts.

B. The Mechanics of IOLTA Programs Eliminate the Possibility of Any Compensable Loss.

Outside observers, including some of the courts that have considered the challenges to IOLTA programs, have suggested that these programs annually generate millions of dollars through financial legerdemain or a "modern day attempt at alchemy." *See*, *e.g.*, *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 94 F.3d 996, 1000 (5th Cir. 1996), *aff'd*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998) ("*TEAJF I*"). This is simply not the case. Some amounts of money are simply too small or are held for too short a time to generate a return, once they are offset against the unavoidable administrative costs of calculating, identifying, tracking, and allocating revenues to discrete sources of individual funds. Just as banks have historically combined the deposits of thousands of checking account depositors and earned much more on the combined sum than could possibly be earned on any individual deposit, IOLTA accounts combine, quite literally, millions of insignificant amounts of money and manage to generate millions of dollars when no return could be generated from any individual deposit.[2]

IOLTA programs work principally by eliminating the costs incurred to administer funds for each individual client and return discrete revenues to each such individual. The nature of this process is widely misunderstood, and this misunderstanding has generated much unfounded judicial skepticism. A more accurate and complete understanding of the mechanics of the IOLTA program is thus essential in order to resolve correctly the constitutional issues presented in this case.

IOLTA programs are not, as has often been suggested, mere beneficiaries of Depression-era banking regulations. Although federal law prevents corporations and partnerships from earning interest on money in checking accounts and bars them from putting money in NOW accounts, as petitioners observe, *see* Petitioner's Brief ("Pet. Br.") at 23-24, financial institutions have devised ways to pay corporations and partnerships interest on their demand deposits.[3] IOLTA programs do not gener-

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[2] To take just one of many examples, in 2001, the Texas IOLTA program generated more than $5.6 million in interest on 17,890 accounts that pooled deposits from nearly 40,000 attorneys. *See* ABA, *IOLTA Handbook* at 88, 189 (2002). If each participating attorney averaged 25 IOLTA deposits in 2001, the Texas IOLTA program pooled just shy of 1,000,000 discrete deposits.

[3] Bank of America, for example, allows firms to sweep "excess funds" from a checking account into a money market account. By taking advantage of sweep accounts, corporations and firms can "earn competitive market returns." *See* Overnight Automated Sweeps, avail-

ate revenue because corporate and other deposits have no other interest-bearing vehicle available to them. Instead, IOLTA accounts create revenue by eliminating considerable, but often overlooked, transaction costs that prevent any net value from being returned to the owners of individual deposits.

The nub of the explanation is that it costs money to make money. Accounts must be opened. Deposits must be made. If funds are pooled and interest is to be allocated to each of the accounts making up a pool, transactions on each pooled deposit must be tracked, and the interest generated by the combined sum and the bank charges assessed against the account must be accurately allocated to each individual element according to its specific contribution to the total pool. The clients that earn interest must receive federal 1099 forms. Each of these unavoidable tasks must be performed in light of a particular bank's policies on deposit availability, check clearing and collection, minimum and tiered balance requirements, and interest compounding. Due to advances in information technology, these tasks take less time and effort than in the lead-pencil and paper-ledger past, but they still take *some* time and *some* effort. Accordingly, it costs a client money to have her attorney, someone working for her attorney, or the bank perform these tasks. For any given amount of money invested and interest rate earned, there is a period of time that is simply too short to generate enough revenue to cover the

able at <<http://corp.bankofamerica.com/portal/portal/controller/controller.jsp?path=wcm/invst_sol/auto_ovngt_swps/content.xml>> (last visited October 1, 2002). Such services are not, of course, free. Charges to cover the administrative costs of such services typically run $150 per month or more. The case before the Court does not, of course, raise the issue because the client-plaintiffs in this case are both individuals, not corporations.

administrative costs necessarily incurred to generate that revenue for any individual client.[4]

IOLTA accounts eliminate many of the transaction costs that make it impossible for a particular amount of money to generate any net return for an individual. Because the sums deposited into IOLTA accounts cannot generate revenue for the individual client, attorneys need not incur the costs of calculating, identifying, tracking, and allocating the interest generated by a pooled account to each of the constituent parts. Moreover, the IRS does not attribute the interest generated by IOLTA accounts to individual clients whose funds are deposited in such accounts, precisely because these revenues will not constitute income to the client. *See* Rev. Rul. 81-209, 1981-2 C.B. 16. This eliminates the additional expenses that would otherwise be associated with generating and distributing Federal tax forms.

Petitioners never even attempt to suggest otherwise. In a departure from the typical case raising a claim under the Just Compensation Clause, petitioners do not complain that Washington has wreaked on them any concrete financial loss by taking their property. Indeed, neither of the petitioners who can assert that his money ended up in an IOLTA account has shown any financial loss at all.

Petitioner Allen Brown predicates his claim on a deposit of $90,521.29 that he gave to Land Title Com-

[4] For example, at an annual interest rate of 2%, which is higher than the rate currently prevailing on money market or NOW accounts, *see*, *e.g.*, *Latest Interest Rates*, Bankrate.com, *available at* <<http: //www.bankrate.com/brm/ rate/dep_home.asp>> (last visited Oct. 10, 2002), a $2,000 deposit will generate 77 cents in gross interest in 7 days. By contrast, the average fee for an interest-bearing checking account in the United States is $10.59 per month. *See Key findings from Bankrate's checking study*, Bankrate.com *available at* <<http: //www.bankrate.com/brm/news/chk/ chkstudy/20020926b.asp>> (last visited Oct. 10, 2002).

pany in 1997. *See* J.A. 53, 130. Land Title Company apparently placed that deposit in an IOLTA account earning 1% interest, where it remained for only two days. Mr. Brown has not, however, presented any evidence that—with or without IOLTA—Land Title could have done anything to generate any interest income for him on his two-day deposit. When questioned on this topic at his deposition, he conceded as much, admitting that "without IOLTA in place, [he] may not have earned anything." J.A. 130. What this testimony fails to elucidate is that even *with* IOLTA *or some other pooling mechanism* in place, such a brief deposit as this one could not earn any revenue *after* the additional costs that would have to be incurred to segregate and track the individual revenues generated were offset against the minuscule amount of interest accrued.

Petitioner Gregory Hayes has likewise presented no plausible evidence of any compensable loss. Mr. Hayes bases his claim on a $1,000 deposit of earnest money that he gave to Fidelity National Title Company on August 14, 1996, along with an additional $6,396.66 that he gave to Fidelity on August 28—two days before his transaction closed on August 30. *See* J.A. 54. He has presented no evidence that, even absent IOLTA, Fidelity could have done anything with his individual deposits to generate any return for him, once the various administrative costs that would have to be incurred on his individual holdings were taken into account.

Notwithstanding the actual record in this case, the original panel of the Ninth Circuit baldly asserted that "it is not quite correct to say that IOLTA as structured does not deprive clients of any money." Pet. App. 77a. The panel did not cite any evidence to support this utterly erroneous conclusion. Instead, it assumed that attorneys, in the face of the very specific fiduciary duty that they owe their clients, either botch the calculation of whether any given client deposit could be used to generate interest for the client or shirk the responsibility to make that decision altogether. *See id.* 78a. Without any support in the record, the panel surmised that "client[s] may lose an economically significant amount of interest . . . where the funds 'are expected to be' deposited for a much shorter period than they actually are." *Id.* The panel also assumed, again without any evidentiary support, that "[a]s a practical matter, [attorneys] have a substantial incentive not to be bothered with crediting clients with their interest," *id.*, even though such conduct would subject the attorneys to punishment under the disciplinary rules currently in effect in all of the States and the District of Columbia. The panel decision thus merely perpetuated petitioners' myth, without any factual basis, that IOLTA programs generate revenue through some mysterious and perhaps illicit means.[5]

The facts of the actual story are precisely the same, if somewhat better developed, in the parallel case of *Tex. Equal Access to Justice Found. v. Wash. Legal Found.*, U.S. No. 02-01, which is currently pending on petition for certiorari. As those petitioners have pointed out, the Texas case went to trial following remand from this Court's opinion in *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998). After a two-day bench trial, the district court found as a factual matter "that the only plaintiff with funds in a Texas IOLTA account . . . suffered no

[5] Even if there were a record to support the panel's conclusion on this point, any "taking" would result not from state action but from the decisions of private parties. *See* Brief for Respondents Legal Foundation of Washington and Its President at 32. In any event, IOLTA programs generally give refunds to clients whose money is deposited into IOLTA accounts in such situations. *See Tex. Equal Access to Justice Found. v. Wash. Legal Found.*, Trial Transcript at 224.

loss—zero. Indeed, Mr. Summers himself testified candidly and unequivocally to that fact." *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 270 F.3d 180, 198 (5th Cir. 2001) (Wiener, J. dissenting). Although a split panel of the Fifth Circuit reversed the decision of the district court to uphold the Texas IOLTA program in the face of claims under the First and Fifth Amendments, the panel majority did not disturb this finding on appeal, incorrectly deeming this critical fact to be irrelevant. *See id*. at 199 n.17.

II. EVEN IF THE IOLTA PROGRAM DID EFFECT A "TAKING" OF PROPERTY, THERE IS NO LACK OF "JUST COMPENSATION" AND HENCE NO CONSTITUTIONAL VIOLATION.

A. Any Takings Claim Requires a Compensable Loss Under the Just Compensation Clause.

IOLTA accounts do not deprive clients whose funds are placed in them of the opportunity to earn a return on those funds. As discussed above, with or without IOLTA, some amounts of money are simply too small or are held for too short a time to earn interest sufficient to pay for the unavoidable costs necessary to generate the interest for an individual client. Thus, even if the Court were to find that IOLTA programs did somehow effect a "taking" of property within the meaning of the constitutional terms, that result is not accomplished without "just compensation." The Court has consistently rejected the application of a "value to the taker" measure for just compensation, and under the two tests that the Court has applied to determine the amount of "just compensation" in different circumstances—the "fair market value" test and the "value to the owner" test—the amount of earnings on funds that are eligible for state IOLTA programs is zero. Moreover, applying Fifth Amendment protections to an asserted property interest that does not have any compensable value is not consistent with the purposes that underlie the Takings Clause—*i.e.*, to authorize the government to take property for public use in return for compensating the property owner for the value of property that was taken.

This Court has repeatedly held that the amount due a plaintiff under the Just Compensation clause is "what . . . the owner lost, and not what . . . the taker gained." *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913). Accordingly, the Fifth Amendment entitles a property owner to be "put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson v. United States*, 292 U.S. 246, 255 (1934). Because petitioners have not lost anything of any monetary value here, they have no valid claim under the Just Compensation Clause.

This conclusion is consistent with a long line of decisions by the Court that have explored and delineated the meaning of the "just compensation" requirement. Justice Holmes long ago summarized the proper test under this component of the Takings Clause as a determination of "what has the owner lost? not, what has the taker gained?" *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). The Court has linked this principle to the definition of the term "compensation," noting, for example, that "[b]ecause gain to the taker" may be "wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). The same principle inheres (to the owner's benefit) in the Court's determination of when a taking occurs, for it is "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign [that] constitutes the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-05 (1984).

Indeed, the facts of the *Boston Chamber of Commerce* case, in particular, bear a careful comparison to the facts underlying the IOLTA program. There the City of Boston exercised its power of eminent domain to lay out a public street upon a parcel of land. The ownership rights in this parcel were divided among several different parties—the Boston Chamber of Commerce owned the fee of the land; a wharf company had an easement of way, light, and air over the land; and a bank held a mortgage on the land, subject to the easement. *See* 217 U.S. at 193. These parties agreed to take the position in the resulting litigation that the value of the land taken should be assessed as an unrestricted fee. The City refused to assent to this claim, and noted that the easement considerably lessened the value of the underlying fee interest. It was ultimately stipulated by the parties that if the City prevailed in its view of the matter, the amount of just compensation for the parcel would be $5,000, whereas if the consortium of interests were to prevail, the price would be $60,000. *Id.*

The Massachusetts state courts held for the City, and this Court affirmed. It began by stating that the "only question to be considered is whether when a man's land is taken, he is entitled, by the Fourteenth Amendment, to recover more than the value of it as it stood at the time." 217 U.S. at 194. It noted that the complaining parties were seeking to have their property valued in a manner that presupposed the uniting of their distinct interests, even though it was highly unlikely and in any event not at all certain that this would ever have occurred without the government's exercise of its eminent domain authority. In a striking summary of the issue, therefore, the

Court observed that the real question was whether, *"by a simple joinder of parties after the taking, the city could be made to pay for a loss of theoretical creation, suffered by no one in fact." Id.* (emphasis added). The Court found this question to be easily answered in favor of the City, commenting that this "statement of the contention seems to us to be enough." *Id.*

The Court went on, however, to articulate more fully the rationale for this conclusion:

> [T]he Constitution does not require a disregard of the mode of ownership,—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is, what has the owner lost? not, what has the taker gained? We regard it as entirely plain that the petitioners were not entitled, as a matter of law, to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement.

217 U.S. at 195.

Applying this same analysis to this IOLTA program, it is clear that even if a "taking" were to be found, the amount of "just compensation" required to be paid to parties such as the petitioners here is zero. Under the rules governing the program, the funds deposited in the IOLTA accounts are either too small or are held for too brief a period to generate any interest income standing on their own. It is *only* the aggregation of these funds pursuant to the IOLTA program itself, and the consequent elimination of the costs necessary to attribute each increment of revenue to distinct individual sources, that makes it possible to generate any income at all. As in the *Boston Chamber of Commerce* case, however, the complaining parties here are demanding that the courts assess their property interests in a manner that "disregard[s] the mode of ownership" and treats each distinct account as though it were part of an unencumbered whole when it has never been held, and would never be held, in this fashion apart from the IOLTA program itself. *See id.* at 195. Thus the real question here too is whether, "by a simple joinder of parties after the [assumed] taking, the [government] could be made to pay for a loss of theoretical creation, suffered by no one in fact." *Id.* at 194. Once again, the mere "statement of the contention" is more than enough to refute it. *Id.*

Likewise, in *City of New York v. Sage*, 239 U.S. 57 (1915), the Court held that the compensation due for a lot taken to build a reservoir did not include the enhanced value of the property "due to its union with other lots." *Id.* at 61. Rather, the owner's loss must be measured by the property's value distinct from the power of the government to make plots more valuable by combining them with others: "The City is not to be made to pay for any part of what 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 the intervention of eminent domain." *Id.*; *see also United States ex rel. TVA v. Powelson*, 319 U.S. 266, 274, 280-85 (1943) (refusing to compensate landowner for value of his property when combined with other properties to facilitate hydroelectric project); *Olson*, 292 U.S. at 256 ("Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled.").

The same basic principles can also be gleaned from yet another series of decisions that are applicable here. The Court has long held that when the government effects a taking of property, basic fairness dictates that the government is not required to compensate the property owner for elements of the property's value that the government itself has created. In *United States v. Fuller*, 409 U.S. 488 (1973), for example, the federal government took a ranch from an owner who leased nearby land under the Taylor Grazing Act. The owner claimed that his ranch should be valued based on its potential use "in conjunction with" the grazing areas, but the Court rejected this claim. *Id.* at 489; *see also id.* at 499 (Powell, J., dissenting) ("compensation need not be afforded for an increase in market value stemming from the very Government undertaking which led to the condemnation"); *Powelson*, 319 U.S. at 266 (value created was business opportunity dependent on owner's privilege to use the state's power of eminent domain; no compensation required).

This longstanding principle extends at least as far back as *McGovern v. City of New York*, 229 U.S. 363 (1913). In that case, the City took title to various parcels of land in order to incorporate them as part of a reservoir. The complaining parties sought to recover as "just compensation" the enhanced value of the land when used for that purpose; in response, the City sought to limit compensation to the fair market value of each parcel at the time it was purchased. *Id.* at 371-72. This Court sided with the City. Again, a central tenet of its analysis was that there were "hundreds of titles to different parcels of that land," which were only "brought together by a taking under eminent domain." *Id.* at 372. The likelihood that this could have occurred by any other means "might be regarded as too remote and speculative to have any legitimate effect upon the valuation." *Id.* As a result, the complaining party "was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be practical consideration and actually to influence prices." *Id.* (citing *Boston Chamber of Commerce*, 217 U.S. at 195).

If those same bounds are applied to the operation of the IOLTA program here, then any alleged "taking" of property would not be compensable because the individual client's funds are, by strict definition, incapable of generating income to any individual client net of administrative expenses, and any value derived from the funds is created solely by the operation of the IOLTA program itself, which eliminates the considerable administrative charges involved in calculating, identifying, tracking, and allocating miniscule sums generated by discrete funds. The likelihood that each individual client fund would be able to generate interest income, absent the implementation of the IOLTA program, is nil. The complaining parties thus are not entitled to claim the value of that "hypothetical possibility," whose manifestation in concrete form is solely attributable to the government's unilateral action. *McGovern*, 229 U.S. at 372.

Indeed, the problem goes even further in this case because, as explained above, even if individual client funds were aggregated with other funds, they could not generate income attributable to individual sources because of the transaction costs that must be incurred to calculate, allocate, identify, and track individual funds. "Because the fair market value of the earnings of IOLTA-eligible funds is $0, the client would be entitled to nothing." *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 106 F.3d 640, 644 (5th Cir. 1996) (denying rehearing and rehearing *en banc*) (Benavides, J., dissenting). Because these client funds would be unable to earn interest on their own, and the only "profit" previously derived from them had redounded to the sole benefit of someone other than the client (*i.e.*, financial institutions), both the value to the owner and the fair market value of these accounts is zero.

B. Having Lost Nothing of Any Value, Monetary or Otherwise, Petitioners Have No Valid Claim Under the Just Compensation Clause.

Petitioners have not shown that they have lost anything of value as a result of Washington's IOLTA program. Therefore, they do not have a valid claim under the Just Compensation Clause. Petitioners cannot resuscitate their claim by pointing out that IOLTA accounts in Washington succeed in generating revenue for the Legal Foundation of Washington or by claiming that they have valuable "non-economic" rights at stake.

As discussed above, a property owner with a claim under the Just Compensation clause is not completely forbidden to base her claim of compensation on the value that is created when her land is combined with the land of another. Such a claim is permitted, however, only "if the union of properties necessary is so practicable that the possibility would affect the market price." *Sage*, 239 U.S. at 61. Put slightly differently, in order to establish compensable value based on the combination of one's own property with another's property, the complaining party must show "a reasonable probability of the [property] in question being combined with other[s] . . . in the reasonably near future." *Powelson*, 319 U.S. at 275-76.

This possibility does not revive petitioners' claim here. IOLTA programs do not create value simply by pooling small amounts of money together. With or without the pooling of accounts, the sums of money placed in IOLTA accounts simply could not generate any return for their owners, once the costs associated with calculating, identifying, tracking, and allocating those individual revenues to discrete sources are introduced into the equation. IOLTA accounts generate a return for their beneficiaries by eliminating the substantial transaction costs that would be incurred to calculate, identify, track, and allocate each constituent fragment of interest revenue to its original source in the funds of one or another individual. Put differently, with or without the aggregation accomplished by the IOLTA program, there remains absolutely no probability that individual clients could earn a return from the money that is placed in an IOLTA account.

Having no claim to have lost anything of value, monetary or otherwise, petitioners fall back to the proposition that they can invoke the Just Compensation clause to protect valuable "non-economic interests" in the interest income generated by IOLTA accounts. Although it is far from clear that these supposed "non-economic interests" can ever support a valid constitutional claim under the Just Compensation Clause, there is certainly no such thing as an alleged "non-economic interest" in pure money.

Money is simply a means of exchange. It has notational value, rather than intrinsic or sentimental value. The bundle of rights that an owner exercises over a particular sum of money—possession, use and disposition—has a precise economic value. The economic value of these rights is captured by the cost of the lost opportunity to invest that sum of money for any particular period of time. *See* Richard A. Brealey and Stewart C. Myers, *Principles of Corporate Finance* 11-12 (5th ed. 1996) (explaining that opportunity cost is calculated by "discount[ing] expected future payoffs by the rate of return offered by comparable investment alternatives"). In this case, the value of the various sticks in the ownership bundle is worth precisely nothing. The amounts of money placed in IOLTA accounts cannot be used to generate any return for their client owners, and they thus lose nothing in having them taken away. Put simply, the right to possess, control, or dispose of $0 is worth exactly $0.

At bottom, petitioners have nothing more than an ideological objection to the continued existence of Washington's IOLTA program. *Cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church and State*, 454 U.S. 464, 465 (1982) ("the psychological consequence presumably produced by observation of conduct with which one disagrees" is an insufficient basis to challenge conveyance of property). The Just Compensation Clause does not provide a legitimate vehicle for would-be conscientious objectors to government programs to vent their spleen. The animating purpose behind the Just Compensation Clause is not, as the Court has noted on many occasions, to limit government interference with private property but "rather to secure compensation" when a taking occurs. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987). It is apparent that the just compensation for a putative "loss" with no value is, and can only be, $0.

* * * * *

Finally, *amici* believe that this case cannot be decided in a vacuum, divorced from its important practical consequences. Over the past two decades, IOLTA programs have been implemented in every jurisdiction nationwide, at the behest of thousands of thoughtful attorneys, judges and legislators who have shaped and then blessed their implementation. Their operation is of increasing importance to assure the continued availability of legal services to many deserving individuals and families who cannot afford to hire a lawyer on their own.

As Judge Benavides pointed out in a prior round of these IOLTA litigations, petitioners' claim threatens the very survival of these programs, which are "a primary source of funding for public interest legal organizations" at a time "when these organizations are already struggling for their lives financially." *Texas Equal Access*, 106 F.3d at 641-42 (Benavides, J., dissenting). Surely the public interest does not require the Court to sacrifice the substantial benefits of these innovative programs merely for the sake of extending doctrines of property law that were designed to apply in very different circumstances, and went only so far as to ensure that just compensation would be afforded for any monetary losses incurred. None of the core principles of the Court's takings jurisprudence would be threatened in the least by upholding the constitutional validity of the unique programs at issue in this case.

CONCLUSION

For the foregoing reasons, as well as those stated by respondents, the judgment below should be affirmed.

Respectfully submitted,

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October 2002

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