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 RESPONDENTS LEGAL FOUNDATION OF WASHINGTON AND ITS PRESIDENT

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QUESTIONS PRESENTED

1. Whether Washington's IOLTA ("Interest on Lawyer Trust Account") regulations "take" private property without payment of just compensation within the meaning of the Just Compensation Clause of the Fifth Amendment.

2. Whether injunctive relief is an available remedy under the Just Compensation Clause for a "taking" that does not result in any financial loss to the plaintiff.

CORPORATE DISCLOSURE STATEMENT

Respondent Legal Foundation of Washington has no parent corporation, and no publicly owned company owns any stock in it.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

1. Historic Regulation of Lawyer Trust Accounts

Clients traditionally have allowed lawyers to control certain funds temporarily, such as funds for retainers, settlement agreements, and real estate closings. Lawyers' ethical regulations require them to keep such funds:

- separate from the lawyer's own accounts, so lawyers hold them in trust accounts, *see, e.g.,* Canons of Prof'l Ethics, Canon 11 (1908) (amended 1933); and
- safe, so lawyers place them with eligible banks in accounts from which the lawyer can immediately recover the funds upon the client's demand, *see, e.g.*, Model Code of Prof'l Responsibility DR 9-102(B) (1969).

Lawyers historically placed these client funds into pooled bank accounts that paid no interest. For many years following the Depression, federal law prevented banks from paying interest on any demand deposits. *See* 12 U.S.C. §§ 371a, 1464(b)(1)(B), 1828(g). Even absent a prohibition on paying interest, there often was no economic justification to seek a return on the monies. Interest does not flow automatically from principal; someone must invest the principal. As the dissenting Ninth Circuit judges acknowledged, "seeking interest made no economic sense" unless the expected interest "exceed[ed] the value of the lawyer's time needed to establish a separate account." Pet. App. 54a.

2. The Advent of IOLTA Rules

In 1980, Congress authorized Negotiable Order of Withdrawal ("NOW") accounts, which bear interest even though the funds are available on demand. *See* 12 U.S.C. § 1832. In the wake of the change in banking law, state regulators of lawyers (the states' highest courts and bar associations) began to question whether it was appropriate or necessary to allow the banks to retain all the earnings that arose as a result of the pooling of client funds in non-interest lawyer trust accounts. Accordingly, some states began expressly to require lawyers to place client funds in accounts with eligible banks that would, when possible, pay positive net interest to the clients. That still left situations, small or short-term deposits, where the bank would not pay interest in excess of fees and other charges to the client.

States enacted rules requiring lawyers to place the funds that could not earn net interest for their clients in pooled accounts with banks that agreed to pay at least some amount of interest to a fund for improving access to the legal system. Starting with Florida and ending, after *Phillips v. Washington Legal Found.*, 524 U.S. 156, 160 n.1 (1998), with Indiana, every state and the District of Columbia have implemented such IOLTA regulations.

Washington first adopted IOLTA regulations in 1984. *IOLTA Adoption Order*, 102 Wn.2d 1101 (1984), JA 148; *see also* Washington Rule of Prof'l Conduct ("RPC") 1.14, Pet. App. 99a. The rule does not require that clients turn funds over to lawyers, but applies once the client voluntarily decides to do so. At that point, the client does not control where the lawyer places the funds.[1] If a deposit controlled by a lawyer is capable of providing "a positive net return to the client," then the lawyer must deposit the

[1] The lack of client control is key for federal income tax purposes. *See* Rev. Rul. 87-2, 1987-1 C.B. 18 (ruling that interest generated by an IOLTA account does not constitute income of the client or lawyer "because neither the clients nor the lawyers have control over . . . such interest") (amplifying Rev. Rul. 81-209, 1981-2 C.B. 16). If clients have the option of deciding whether their funds would be placed into an IOLTA account, the IRS is likely to deem all net interest on IOLTA accounts taxable income of all clients whether they object to IOLTA or not.

funds with an eligible bank in an account in which interest will be paid to the client.[2] RPC 1.14(c). In adopting Washington's IOLTA regulations, the Washington Supreme Court "ma[de] clear that those funds available for the IOLTA program are those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client." JA 149. The net interest generated from these accounts is provided to Respondent Legal Foundation of Washington ("LFW"), a nonprofit organization established by the Washington Supreme Court, RPC 1.14(c)(4), for "a laudable public goal – the funding of legal services for those unable to afford them." Pet. Br. at 22.

The IOLTA rules do not perform alchemy. Rather, an IOLTA account generates positive income on pooled funds, which otherwise could not generate net interest, by eliminating the costs associated with separately tracking each transaction (including, for instance, when each check clears the issuer's bank), and then allocating tiny gross amounts of interest to each individual client. In addition, an IOLTA account avoids certain charges (for instance, tax reporting for each individual client) that would be incurred even if it were economically rational to allocate the gross recovery to each individual client. These economic

[2] In particular, the lawyer must determine whether the funds could earn net interest for the client if placed in a non-IOLTA account, or even in a "pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client." RPC 1.14(c)(2). "Sub-accounting is a banking product where an entity such as a law firm opens a master account in its name and a linked sub-account for each client for whom the firm is holding funds." *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 86 F. Supp. 2d 624, 639 (W.D. Tex. 2000), *rev'd*, 270 F.3d 180 (5th Cir. 2001), *reh'g, en banc, denied*, 293 F.3d 242 (5th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3092 (June 26, 2002) (No. 02-01) (the "*TEAJF*" case).

forces combine to create net income in an IOLTA account that could not be generated for the individual clients whose funds are pooled in the account. *See* Brief for Forty-Nine State Bar Associations and the National Association of IOLTA Programs as Amici Curiae in Support of Respondents.

3. Washington's Extension of Its IOLTA Rules to Non-Lawyers Licensed to Prepare Legal Documents

Preparation of real estate sales documents constitutes the practice of law in Washington. *Hagan & Van Camp v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 635 P.2d 730 (1981). Rather than require the involvement of lawyers in real estate transactions, the Washington Supreme Court adopted Washington Admission to Practice Rule ("APR") 12, 98 Wn.2d 1101 (1982), Pet. App. 103a, which provides for the licensing of certified closing officers, commonly known as Limited Practice Officers ("LPOs").[3]

Like lawyers and their firms, escrow or title companies that employ LPOs often temporarily control client funds. *See, e.g.*, JA 56. Before the IOLTA rules were extended to LPOs, escrow companies routinely deposited all client funds in non-interest-bearing accounts, Pet. App. 110a; Pet. Br. at 5; *see* JA 85, 111, often at institutions selected for the benefits they indirectly provided to the escrow company. Even after the authorization of NOW accounts, escrow companies routinely placed all client funds in non-interest-bearing accounts due to "the inconvenience of subaccounting for interest earned by multiple depositors." Pet. Br. at 5. As a result of placing their

[3] This brief refers to lawyers and LPOs collectively as "legal practitioners."

clients' funds in non-interest-bearing accounts, affiliates of escrow companies often received an indirect benefit known as "earnings credits." Some banks provide earnings credits to an affiliate of an escrow company in return for the escrow company steering trust accounts to the bank. The "credits" relate to the balance in the escrow company's trust accounts, and the bank allows these credits to offset bank charges on other transactions, or uses the credits to pay the affiliate for accounting services the affiliate provides to the escrow company.[4] The Washington State Bar Association identified the self-dealing spurred by earnings credits as a reason to extend the IOLTA rules to LPOs. JA 143.

In 1995, the Washington Supreme Court adopted APR 12(h) and APR 12.1, which applied the IOLTA rules to LPOs. 127 Wn.2d 1145 (1995); Pet. App. 104a. Like lawyers, escrow companies utilizing LPOs are now required to deposit client funds in an IOLTA account only when an interest-bearing account with subaccounting will not provide a positive net return to the client. APR 12.1(c)(2)(iii).

4. Application of the IOLTA Rules to Petitioners

Petitioners Brown and Hayes are clients who used the services of LPOs and had small or short-term deposits placed in IOLTA accounts. Petitioners did not file the case

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[4] A set of agreements laying out the relationship between the bank, the escrow company, and the escrow company affiliate appears at JA 62-75. The bank grants the earnings credits to the escrow company affiliate, not the escrow company, because banks are forbidden from "directly or indirectly" paying any interest on demand deposits. 12 C.F.R. § 217.3. Despite the term "indirectly," the Federal Reserve Board has interpreted this regulation as permitting banks to pay benefits to an affiliate of the depositor, so long as the affiliate is not the depositor's subsidiary. JA 78.

as a class action. The focus of this case is on Brown's and Hayes' interaction with the IOLTA rules.

The other plaintiffs consisted of one LPO (Daugs) who refuses to comply with Washington's IOLTA rules, a former LPO (Maxwell) who surrendered her LPO license to avoid the IOLTA rules, and an advocacy group (the Washington Legal Foundation, or "WLF"). As discussed below at section III.A, these parties have not challenged the Ninth Circuit's determination that they lack standing. *See* Pet. App. 12a-19a (ruling that LPOs had no claim to interest because they did not own the principal deposited in IOLTA accounts and that WLF lacked representational standing); *see also TEAJF*, 270 F.3d at 188 (only the client, not the legal practitioner, has any claim). We discuss the record regarding the LPO Petitioners only because it provides insight into the practices of escrow companies and how the IOLTA rules work.[5]

a. Brown and Hayes

In connection with a purchase of real property, Brown delivered $90,521.29 to Land Title Company in April 1997. JA 53, 130. Land Title deposited these funds in an IOLTA account at Skagit State Bank, which paid LFW 1% interest and granted earnings credits that indirectly benefited Land Title. *Id.* 130. Brown's transaction closed two days later. *Id.*

At 1% interest, LFW received less than $5 on Brown's deposit (assuming the funds earned interest during the entire two days they were on deposit), less any "reasonable check and deposit processing charges" imposed by the

[5] This brief refers to Daugs and Maxwell together as the "LPO Petitioners," and to Daugs, Maxwell, and WLF collectively as the "Non-Client Petitioners" to distinguish them from Brown and Hayes.

bank. APR 12.1(c)(1). Brown submitted no evidence that LFW had a net gain from his deposit, nor did he submit any evidence that his legal practitioner could have or, in the absence of the IOLTA rules, would have placed this two-day deposit in a bank account that would have earned a positive net return for Brown. If Brown's legal practitioner could have earned a positive net return for Brown on his funds, Washington's IOLTA rules prohibited the deposit in an IOLTA account. APR 12.1(c)(3). Brown admitted that "[w]ithout IOLTA in place I may not have earned anything." JA 130.

In addition to being a client, Brown was an owner and officer of Land Title Company and another similar company that employs LPOs. JA 126-27. He admitted that the stockholders of escrow companies benefited from earnings credits. *Id.* 130-31. Brown believed that escrow companies charged higher fees after the implementation of the IOLTA rules, but he produced no evidence to support this subjective belief.[6]

On August 14, 1996, Hayes delivered $1,000 to Fidelity National Title Company, which constituted Hayes' share of an earnest money deposit. JA 54, 117-18. Hayes did not expect to earn interest on his deposit. *Id.* 120. These funds were placed in an IOLTA account. *Id.* 50. On August 28, two days before closing, Hayes delivered an additional $6,396.66, his portion of the remainder of the purchase price. *Id.* 54. Hayes assumed that Fidelity deposited these funds in the IOLTA account as well. *Id.* 120.

[6] As Brown testified, "[D]on't ask me how much but I mean I think that's what I was driving at, I think our fees would be higher." JA 133. Brown also "believed" that some benefit of earnings credits provided to escrow company affiliates was passed on to clients, but again he was not certain that this occurred or to what extent. *Id.* 131-33.

Even at 2%, *gross* interest on the two deposits by Hayes was less than $2. That is what Hayes believes was "taken" from him as a result of the IOLTA rules. JA 123-24. Hayes submitted no evidence that LFW had a net gain from his deposit, nor did he submit any evidence that his legal practitioner could have or, in the absence of the IOLTA rules, would have earned a positive net return for Hayes. Moreover, if that were possible, his legal practitioner acted in violation of the IOLTA rules in having the money deposited in an IOLTA account.

Like Brown, Hayes "believe[s]" that the IOLTA rules result in higher fees for escrow services, JA 124, but he also produced no evidence to support his subjective belief.[7] Petitioners submitted an affidavit from an LPO at Fidelity in which she stated that the bank used by Fidelity ceased paying earnings credits after the implementation of the IOLTA rules. However, she did not state that Fidelity had raised its rates as a result, or that Hayes paid more for Fidelity's services than he would have prior to the IOLTA rules. *Id.* 50-52.

Neither Brown nor Hayes attempted to establish directly, or through more than conclusory assertions, that he suffered any economic loss as a result of the IOLTA rules. In fact, neither did. And, although Petitioners assert

[7] Hayes acknowledged that he did not "have any idea" whether he had been charged additional fees by his escrow company as a result of the IOLTA rules. JA 124. He also admitted that he did not consider the title company's fees in deciding which title company to use. *Id.* 119. He had no information about how Fidelity set its escrow fees or whether those fees had risen as a result of IOLTA. *Id.* 121, 124. As the LPO Petitioners admitted, companies base escrow fees on market conditions, not on small variations in the cost of doing business. *Id.* 87-88, 96-97, 100. The sworn declaration of the only qualified expert on this economic issue (Keith Leffler) established that Petitioners' speculation as to the impact of earnings credits on escrow fees has no economic basis. *Id.* 135-38.

that neither Brown nor Hayes consented to the deposit of their funds in IOLTA accounts, neither Brown nor Hayes alleged that he attempted to put any restrictions on where his legal practitioner placed his funds, or that he objected at the time to their placement in an IOLTA account.

b. Daugs and Maxwell

Daugs is an LPO who owns an escrow closing company (SeaTac Escrow) and an affiliated nonsubsidiary company (SeaTac Systems) that provides accounting services only to SeaTac Escrow. JA 81-83. The fees SeaTac Systems charges are paid by Columbia State Bank, where SeaTac Escrow has accumulated earnings credits by steering client funds into accounts that pay Daugs' clients no interest. *See id.* 62-75.

In ten years, Daugs' clients have never put any limitations on the use of their funds. JA 91-92. Daugs never placed any client funds in an IOLTA account. *Id.* 86. Despite that, none of his clients have ever received interest because he deposits all client funds in a non-interest-bearing account in violation of the IOLTA rules. *Id.* He asserts that if he complied with the IOLTA rules, and if the bank cut off earnings credits, he would have to raise his escrow fees or go out of business. *Id.* 89-90. Daugs submitted no evidence of what it actually costs SeaTac Systems to perform the accounting services or even how much profit SeaTac Systems, and thus Daugs, derives from the earnings credits. Daugs does not disclose to his clients the existence of the earnings credits system or his self-dealing. *Id.* 92. Daugs is not aware of any clients who oppose the placement of their funds in an IOLTA account. *Id.*

Maxwell has been an employee of Pacific Northwest Title Company ("PNW Title") since 1985. JA 93. She believes that PNW Title, its vendor of accounting services (which is owned by the same company that owns PNW

Title), and the bank where it maintains trust accounts have an agreement whereby the bank awards earnings credits to pay for accounting services. *Id.* 103-04. Maxwell admitted that she did not know whether fees in Washington for closing escrows would increase if banks did not award earnings credits on trust accounts. *Id.* 114.

Maxwell was an LPO until 1996, when PNW Title requested that she and its other LPOs surrender their licenses. JA 59. PNW Title determined that it could avoid the IOLTA rules by letting its LPOs go. *Id.* 58. It continued not to arrange for payment of interest to clients. *Id.* 110-11. PNW Title informs clients that they need to prepare the necessary documents or have an attorney do so. *Id.* 109-10. Thus, escrow companies can avoid the IOLTA rules, and so can clients, by selecting an escrow company that has done so. If Petitioners' speculation is correct, the escrow companies that avoid the IOLTA rules should have lower fees, but Petitioners offered no evidence to show this.

5. Procedural History

On cross-motions for summary judgment, the District Court granted summary judgment in favor of Respondents and against Petitioners. JA 2-3. The District Court ruled, prior to *Phillips*, that Petitioners had no property interest in the interest paid to LFW or in earnings credits, and did not reach the other issues in the case. Pet. App. 94a, 96a.

After *Phillips*, a three-judge panel of the Ninth Circuit reversed the District Court. Pet. App. 52a. Sitting *en banc*, however, the Ninth Circuit affirmed the District Court on other grounds. The Ninth Circuit concluded that Respondents had not taken Petitioners' property and that, even if they had, the just compensation due was zero.

The Ninth Circuit held that only Brown and Hayes had standing. Pet. App. 19a. Weighing the three factors set forth in *Penn Central Transp. Co. v. City of New York*, 438

U.S. 104 (1978), the *en banc* court concluded that (1) the IOLTA rules had no economic impact on the owners of the principal funds because no interest would have been earned by them on those funds absent the IOLTA rules, and because Brown and Hayes failed to establish as a factual matter that they suffered any economic loss, Pet. App. 33a-38a; (2) Brown and Hayes could not have expected a deposit eligible for IOLTA to achieve a positive net return, and thus the IOLTA rules did not interfere with their investment-backed expectations, *id.* 38a-39a; and (3) the governmental action is properly characterized as a regulation of the uses of Brown's and Hayes' property (constituting the principal and any interest incident thereto, in the aggregate) in the context of the highly regulated fields of banking and law, *id.* 39a-40a.

As an alternative basis for its holding, the Ninth Circuit applied the well-established rule that just compensation is the amount of the owner's loss, not the government's gain, and concluded that Brown and Hayes lost nothing. *Id.* 41a. Their funds were too small or held for too short a period to have earned net interest for them. Even without the IOLTA rules, their funds would have been placed in non-interest-bearing accounts because that was the escrow companies' admitted practice. The *en banc* court further concluded that Brown's and Hayes' "loss" of the "right" to prevent their principal from earning interest had "no economic value." *Id.* 42a.

Four judges, including the three on the original panel, dissented on the taking issue, largely adopting the panel opinion, *id.* 46a, but even they would have remanded on whether there was any compensation due to Brown or Hayes, *id.* 79a.

SUMMARY OF ARGUMENT

The Just Compensation Clause of the Fifth Amendment does not bar every taking of property for public use; it bars taking "without just compensation." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Petitioners not only must establish a taking, but also that they were not provided just compensation for that taking.

Petitioners fail to rebut the presumption that the IOLTA rules are constitutional, instead arguing that *Phillips* "largely disposes of the remaining questions in this case," Pet. Br. at 15, and relying on the unsupported assertion, chanted repeatedly, that the IOLTA rules "burden" a small number of individuals who by "happenstance" choose to use a legal practitioner. *Id.* at 28.

Neither their rhetoric nor their reliance on *Phillips* gets Petitioners anywhere. The IOLTA rules impose no burden on Brown and Hayes, and the question presented in *Phillips* was limited to the "property issue" – whether the interest earned on IOLTA accounts constituted a property interest cognizable under the Fifth Amendment. 524 U.S. at 160. The Court took pains to answer only that question, and "express[ed] no view" on the taking or just compensation questions, *id.* at 172, despite the dissenting Justices' contention that the Court should consider all three questions together, *id.* at 173 (Souter, J., dissenting).[8]

[8] Petitioners incorrectly suggest that Justice Souter "appears to have recognized" that the determination of the property issue effectively answered the taking inquiry. Pet. Br. at 14. Quite to the contrary, Justice Souter (and the three Justices who joined his dissent) concluded that the question answered in *Phillips* "may ultimately turn out to have no significance in resolving the real issue raised in this case, which is whether the [IOLTA] scheme violates the Takings Clause of the Fifth Amendment." 524 U.S. at 172 (Souter, J., dissenting).

Phillips held that any interest earned on client funds is generally the property of the client. 524 U.S. at 172. The Court in *Phillips* did not determine the circumstances in which it might deem clients to have relinquished their right to receive or control the earning of interest. Brown and Hayes indisputably relinquished receipt and control, by using an LPO and acquiescing in the practice of the escrow company trade (both pre-IOLTA and where IOLTA is inapplicable) to place client funds in accounts that pay no interest to the client. Also, *Phillips* acknowledged but did not resolve the important factual question of "[w]hether client funds held in IOLTA accounts could generate *net interest*." *Id.* at 169 (emphasis supplied). On remand in *TEAJF*, the District Court found that the answer was no, 86 F. Supp. 2d at 638-39,[9] and the Ninth Circuit reached the same conclusion here. In neither case did the individual client plaintiffs prove that their funds could have generated net interest in a non-IOLTA account.

The Ninth Circuit correctly decided both of the issues left undecided in *Phillips*. There has been no taking, and the amount of just compensation due is zero because Brown and Hayes suffered no economic loss whatsoever from the IOLTA rules.

IOLTA regulates the handling of client trust funds by legal practitioners. Washington's rules require legal practitioners to deposit client trust funds for the benefit of clients where net interest can be earned for the client. In other circumstances, Washington's rules require the funds to be handled in a way that benefits the legal system as a whole rather than promotes self-dealing by legal

[9] *See* Brief of the Chief Justice and Justices of the Supreme Court of Texas and the Texas Equal Access to Justice Foundation as Amici Curiae in Support of Respondents.

practitioners or permits windfalls to banks. Petitioners acknowledge that the IOLTA rules are a regulation of the trust funds themselves; two of the alleged property rights that they claim are taken by the rules are the rights to prevent interest from being earned on their funds and to have their funds invested in accounts that will yield earnings credits for affiliates of some legal practitioners. Such "rights" (if cognizable at all) are incidents of their property in the principal, not in the interest. The IOLTA rules apply to the whole of the client's affected property: principal and potential interest. Because the IOLTA rules are a regulation of the handling of client trust funds, the proper framework is that set forth in *Penn Central*. Petitioners' claims fail under that standard.

Although Petitioners recognize that there cannot be a *per se* taking where there is no taking under *Penn Central*, Petitioners seek an unprecedented extension of the *per se* rule. Petitioners contend that a temporary taking of one incident of ownership of money (investment, or the right to preclude investment by others) that the owner can avoid, and that in any event causes the owner no economic loss, is a *per se* taking. Petitioners strain to categorize the character of governmental action here as akin to a physical appropriation, despite their having acknowledged in their Questions Presented that IOLTA is a regulatory program that they repeatedly acknowledge has a laudable public goal. Only one strand or incident of Brown's and Hayes' property rights (considered as a whole rather than the interest on the IOLTA accounts in isolation) was affected, not the entire bundle of their property interests. More importantly, it is the one incident that clients had already ceded to their legal practitioners and to the banks in which their funds were deposited. Brown and Hayes were not "singled out" capriciously, but precisely because they were among the many people who have temporarily provided funds of a small amount, or for a short period, to a legal practitioner for safekeeping.

The state compels neither the pragmatic decisions of clients in these circumstances to relinquish money temporarily to legal practitioners, nor the private arrangements regarding earnings credits incentives. Thus, there is no required acquiescence, and no taking. *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992).

No compensation is due clients who voluntarily relinquish their ability to invest money, either nominal in amount or for a short period, deposited in banks by their legal practitioners. The banks retained the earnings they could make on the funds, or used a portion to encourage LPOs to place such accounts in these banks. Petitioners admit that, both before and after the enactment of Washington's IOLTA rules, escrow and title companies have chosen, without client objection, to deposit their clients' funds in accounts that pay no interest to the clients. With or without IOLTA, Brown and Hayes would not have received a net return on their deposits.

In recognition of the lack of any direct injury-in-fact to Brown and Hayes, they claim to have incurred costs as a result of the alleged inability of the affiliates of their escrow companies to obtain earnings credits. But Petitioners failed to do more than speculate that they incurred any such costs. Even if they had, such indirect costs do not constitute a compensable loss under the Just Compensation Clause.

At bottom, Petitioners are unable to challenge the Ninth Circuit's conclusion that just compensation here is zero. Instead, they leap to the issue of whether equitable relief is available even where there has been no taking without just compensation. There is no authority for awarding injunctive relief to remedy a "taking" for which no compensatory relief is due.

ARGUMENT

I. WASHINGTON'S IOLTA RULES DID NOT TAKE PETITIONERS' MONEY.

A. Under the Traditional Test, the IOLTA Rules Did Not Effect a Taking.

Petitioners are correct on one point – any taking under the *per se* rule must also be unconstitutional under the traditional, multi-factor test summarized in *Penn Central*. *See* Pet. Br. at 16-17, 31. The purpose of the *per se* rule is to shorten the analysis in certain circumstances, not to reach a different result.

Petitioners bear the burden of establishing that Washington's IOLTA rules effected an unconstitutional taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987). This is a fact-intensive inquiry, *see Penn Central*, 438 U.S. at 123-24, on which Petitioners brought forth virtually no facts to meet their burden.

Many regulations result in a distribution of the benefits and burdens of life. They transfer wealth from one group of citizens to another group. In this sense, such regulations result in a direct or indirect appropriation by the government on behalf of the benefited group. In a challenge to a regulation, one of the key factors is the reasonableness of the governmental action. *See United States v. Sperry Corp.*, 493 U.S. 52, 63 (1989); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163 (1980); *Penn Central*, 438 U.S. at 123.

The contention that the IOLTA rules are so unreasonable that they have "no conceivable rational basis" is unpersuasive. Pet. Br. at 29. Petitioners admit that the IOLTA rules serve the "laudable public goal" of access to justice. *Id.* at 22; *see also id*. at 35. The regulations of lawyers' conduct, of which the IOLTA rules are a key part, protect clients from having clients' funds commingled with (or providing any other benefit to) the lawyers' funds, and by keeping their funds safe and available on demand. Petitioners do not challenge the process by which Washington adopted the IOLTA rules. This case does not involve a challenge by clients of lawyers to the IOLTA rules, and Petitioners have not proved that the clients of LPOs have suffered any economic harm. It is hard to imagine a broader, less burdensome, more fair distribution of the "burdens" among the public than a rule applicable to all who use the legal system and provide small or short-term deposits to a legal practitioner, and a rule that supports legal services for the poor with the net interest that clients were incapable of generating on their own.

Among the compelling indications of the reasonableness of the IOLTA rules are that:

- all 50 states and the District of Columbia have adopted them, *see* Brief of the States of California, Massachusetts, et al., as Amici Curiae Supporting Respondents;
- in the vast majority of states, the state's highest court has used its rulemaking authority to adopt them, *see Phillips*, 524 U.S. at 159 n.1; *see* Brief of the Conference of Chief Justices as Amicus Curiae in Support of Respondents; and
- the national and state lawyers' organizations, whose clients are allegedly affected, support IOLTA. *See* Brief of the American Bar Association as Amicus Curiae in Support of Respondents; Brief for Forty-Nine State Bar Associations and the National Association of IOLTA Programs as Amici Curiae in Support of Respondents.

1. Economic Impact

The IOLTA rules have no negative economic impact on clients whatsoever. To the contrary, Washington's IOLTA rules have a positive economic effect on those clients whose legal practitioners deposit their funds in accounts that earn interest for the client. Pet. App. 33a.

Petitioners argue that they "have never conceded" that "they could have realized little or no value from their funds in the absence of IOLTA." Pet. Br. at 32. More to the point is that they never have contended that any net interest could have been realized on Brown's or Hayes' funds absent the IOLTA rules. Therefore, Petitioners' economic argument falls back on the unique factual circumstances of clients of Washington LPOs and on Petitioners' tenuous assertion that Brown and Hayes suffered an indirect loss of an indirect benefit from private earnings credits arrangements. *Id.* at 32 n.11. Petitioners relegate this argument to a footnote for good reason. The property identified in *Phillips* was interest, not earnings credits. Earnings credits were never the property of Petitioners, as the District Court below found. Pet. App. 96a.

Petitioners' argument regarding earnings credits is an abrupt detour from their Petition, which represented that, "[a]lthough the Texas IOLTA program applies only to trust funds held by attorneys while the Washington IOLTA program applies to real estate escrow funds as well, that distinction is *immaterial to the constitutional analysis*." Pet. at 15 (emphasis supplied). However, the alleged connection between earnings credits and the IOLTA rules is unique to the State of Washington. It should have no effect on the issue of the constitutionality of Washington's IOLTA rules as applied to clients of lawyers, or the constitutionality of other states' IOLTA rules. If earnings credits are the basis for Petitioners' claims, they are hardly worthy of review by the Court.

Worse, Petitioners rely on a misleading description of the record in this case with respect to earnings credits. Putting aside the legality of the scheme they describe, discussed *infra* at notes 13-14 and accompanying text, Petitioners did not present sufficient evidence to survive summary judgment as to the fact or amount of injury to Brown and Hayes from the "loss" of earnings credits. Even the original Ninth Circuit panel and *en banc* dissent concluded that the amount of any loss to Brown and Hayes from earnings credits was unknown, and "a remand is necessary." Pet. App. 79a.

Petitioners' Statement of the Case asserts as "fact" that earnings credits "directly reduce costs to customers for services," and that the loss of earnings credits means that "bank customers are now paying for many services that formerly were 'free.'" Pet. Br. at 6. This is a bald misstatement of the record. In their argument section, Petitioners only go so far as asserting that there is a genuine issue of material fact concerning the issue of cost reduction from earnings credits "lost" as a result of the IOLTA rules. *Id.* at 36 n.14. But the mere speculation that some benefit from earnings credits trickled down to clients, and then was "lost" after the IOLTA rules, *compare* Pet. App. 112a *with* JA 135-38, would not be sufficient to survive summary judgment.

Earnings credits are provided to a nonsubsidiary affiliate of the escrow company. As the Federal Reserve Board concluded, earnings credits are "not a direct financial benefit to the depositor," i.e., the escrow company, JA 78, let alone a direct benefit to the owner of the funds deposited by the escrow company.

Brown's funds were deposited in a bank that continued to pay earnings credits. Petitioners thus point to Hayes, but there is no evidence that Hayes paid a higher fee as a result of selecting a title company that utilized a bank that no longer granted earnings credits.[10] Hayes

[10] Petitioners rely on the affidavit of the LPO at Fidelity who handled Hayes' real estate purchase. Pet. Br. at 36-37 n.14. It states only that the bank that Fidelity chose to utilize had ceased granting earnings credits to Fidelity. Because this affidavit contains no testimony that Hayes paid any more for Fidelity's services than he would have paid prior to the IOLTA rules, the only reasonable inference is

(Continued on following page)

admitted that he did not consider fees in deciding which title company to use; his choice was based on location, not pricing. JA 119. So even if Hayes suffered any economic "loss," which he failed to prove, it was not compelled by the state – but by Hayes' choices to select a title company without regard to price and to select one that employed LPOs.

2. Investment-Backed Expectations

Brown and Hayes had no investment-backed expectations regarding the funds at issue. Brown did not suggest otherwise. Hayes admitted that, regardless of IOLTA, he did not expect to earn interest on his deposit. JA 120. In the real world, where the admitted general practice of escrow and title companies is not to place *any* client funds in interest-bearing accounts because of such "inconvenience[s]" as subaccounting, Pet. Br. at 5, clients of LPOs could not have had any investment-backed expectation that their funds would be deposited in an account that earned interest for the client.[11] To the extent that the

that prices paid by clients such as Hayes did not rise as a result of the IOLTA rules. In any event, like Brown, Hayes could have found an escrow company that still utilized a bank that granted earnings credits. JA 130. Petitioners' general averments and conclusory allegations are insufficient to withstand summary judgment even on the question of constitutional injury-in-fact. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

[11] The bank is free to pool its depositors' funds and invest them as it sees fit for its own gain; the bank's only obligation to the depositor is to repay, on demand, the amount due under the contract with the depositor. *See Bank of Marin v. England*, 385 U.S. 99, 101 (1966); *New York County Nat'l Bank v. Massey*, 192 U.S. 138, 145 (1904). It is " 'a fundamental rule of banking law that in the case of a general deposit of money in a bank, the moment the money is deposited it actually becomes the property of the bank, and the bank and the depositor assume the legal relation of debtor and creditor.' " *Allied Sheet Metal*

(Continued on following page)

LPOs failed to follow Washington's IOLTA rules, as the Ninth Circuit correctly noted, "such a violation cannot be attributed to the State." Pet. App. 34a.

At oral argument in *Phillips*, Petitioners' counsel admitted that clients have no expectation that their legal practitioners will invest their short-term or small deposits that are incapable of earning net interest. Transcript of Oral Argument at 54 (Jan. 13, 1998). Petitioners chose to participate in a system for their benefit – a heavily regulated system involving lawyers, escrow officers, and banks. As the United States pointed out in its *Phillips* brief, "government has historically regulated the capacity of money to earn interest." Brief for the United States as Amicus Curiae Supporting Petitioners at 15. As the United States also noted, it is "the client's decision to set the nominal or short-term funds aside for legal services." *Id.* at 12. Brown and Hayes had no reasonable, investment-backed expectation that their funds would generate any interest.

Nor could Brown and Hayes have had a reasonable investment expectation in the earnings credits system. Not only, as discussed above, have they not shown that they stood to profit from these private arrangements between escrow company affiliates and banks, but the system is illegal.[12] Washington law prohibits escrow companies, whether or not they employ LPOs, from deriving any benefit from the funds that they hold in

Fabricators, Inc. v. Peoples Nat'l Bank of Wash., 10 Wn. App. 530, 537, 518 P.2d 734 (1974) (quoting 10 Am. Jur. 2d *Banks* § 339 (1963)); *see also Blake v. State Sav. Bank*, 12 Wash. 619, 622-23, 41 P. 909 (1895).

[12] Petitioners erroneously state that LFW raised this issue for the first time in opposition to Petitioners' motion for summary judgment. Pet. Br. at 24 n.8; *but see* Memorandum in Support of LFW's Motion for Summary Judgment at 3-4, 11.

escrow.[13] Wash. Admin. Code § 208-680E-011. The Washington State Bar Association identified the unlawfulness of the earnings credits system as one of the reasons to extend the IOLTA rules to LPOs in the first place. JA 143 (citing Wash. Admin. Code § 308-128E-011, the prior and identical version of Wash. Admin. Code § 208-680E-011).[14]

3. Character of Governmental Action

As the IOLTA rules had no economic impact on, and impaired no investment-backed expectations of, Brown or Hayes, there is no taking under *Penn Central*. Recognizing this failing, Petitioners' Brief at times argues that the character of the governmental action is dispositive. Petitioners repeatedly characterize the IOLTA rules as

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[13] State rules of professional conduct uniformly bar lawyers from financially benefiting from their clients' funds. *See* Model Rules of Prof'l Conduct R. 1.15(a) (1999). It follows that lawyers may not accept a financial benefit from banks for placing their client trust accounts in non-interest-bearing accounts instead of IOLTA accounts. *See* Virginia State Bar Legal Ethics Opinion No. 1440 (Nov. 18, 1991).

[14] Petitioners' assertion that "the Washington State Department of Licensing (which regulates escrow companies in the State) has long been aware of, and approves of, the 'earnings credits' system," Pet. Cert. Reply Br. at 7, is incorrect. The alleged "approval" is a nonbinding letter from a governmental agency that has not regulated escrow companies for years, a letter that does not even mention the term "earnings credits," that does not disclose that the escrow company would benefit from earnings credits, and that does not address the legality, under Wash. Admin. Code § 208-680E-011 or § 308-128E-011, of an escrow company deriving a financial benefit from funds held in escrow. *See* Addendum to Petitioners' Ninth Circuit Reply Brief (filed Oct. 13, 1998): Letter from Hugh W. Hawkins, Jr. to Robert Mitchell and Rolund Runion (Oct. 26, 1988); Letter from Runion, Department of Licensing, to Hawkins (Nov. 1, 1988). These letters were not part of the record before the District Court. Since 1995, the Washington Department of Financial Institutions has regulated escrow companies. Wash. Rev. Code § 43.320.011; Wash. Admin. Code § 208-680A-020.

"singling out" "a few individuals" to "bear" the "burden" of funding legal services for the benefit of many. *See, e.g.,* Pet. Br. at 16, 27. At the same time, Petitioners state that the IOLTA rules affect a "huge" number of individuals "on a daily basis." *Id.* at 42. These individuals are "singled out" precisely because they would not obtain an economic benefit from their small or short-term deposits. As the record in this case and in *TEAJF* shows, "no one, including the plaintiffs, is being asked to 'bear' a public burden in any sense that impinges on the notions of fairness and justice." *TEAJF,* 293 F.3d at 247 (Wiener, J., supp. dissenting op. from denial of pet. for rehearing *en banc*).

Petitioners attempt to remove the IOLTA rules from their regulatory context by exclusively focusing on those real estate transactions affected by Washington's IOLTA rules. Washington's IOLTA rules apply to all who are engaged in the practice of law in Washington, including LPOs, and Petitioners ignore that APR 12.1 is but one part of a regulatory program enacted to protect the interests of clients who place their money in the hands of legal practitioners. Petitioners' repeated assertion that the IOLTA rules have "no regulatory purpose," Pet. Br. at 16, 29, is flat wrong.[15] The IOLTA rules help protect clients from legal practitioners who might commingle, or otherwise attempt to benefit from, their clients' funds. The IOLTA rules protect against legal practitioners' self-interest in deciding where to deposit client funds, and simply adjust the benefits and burdens of economic life. Given the highly regulated nature of the banking and legal professions, the rules governing lawyer trust accounts, of which IOLTA is a part, reasonably advance important public purposes. *See* Brief for Respondent Justices of the Washington Supreme Court.

[15] At such times, Petitioners' Brief implies that this case involves a claim under the Due Process Clause. It does not. *See* JA 27-29.

All the parties before the Court, the national legal groups providing briefs as amici curiae in support of Respondents, and even the Ninth Circuit dissenters below agree that the programs funded by IOLTA have a worthy purpose. *See* Brief for AARP, Legal Counsel for the Elderly, Inc., National Legal Aid and Defender Organization, and the Brennan Center for Justice as Amici Curiae in Support of Respondents. In a brief submitted to the Fifth Circuit in *TEAJF*, the WLF wrote that "[we] yield to none in our affirmation of the importance of equal access to justice." Appellants' Response to Petition for Rehearing en Banc at 4 (filed Dec. 11, 2001). For these reasons, the IOLTA rules are distinguishable from those in *Webb's*, where there was no apparent regulatory purpose.

Even ignoring the regulatory purposes, the IOLTA rules – at most – provide for a reasonable assessment on small or short-term deposits provided to a legal practitioner. Unlike in *Webb's*, there is no other fee charged for protecting the client's principal, and it would not be possible for the clients to gain a positive net return from the funds that they provided to their legal practitioner. Petitioners' contention that user fees must be directly proportionate to the cost of government service is not supported by *Webb's* and would invalidate many federal fees, including those for patent and HSR processing. Nothing in the Court's Just Compensation Clause jurisprudence supports, let alone requires, such a result. Moreover, in these circumstances the lack of any economic impact on the client justifies the "assessment."

B. The *Per Se* Takings Approach Is a Rare Exception Inapplicable to IOLTA Regulations.

Because the IOLTA rules are not a taking under *Penn Central*, they cannot be a *per se* taking under Petitioners' own argument. In any event, the IOLTA rules do not fall within either of the existing *per se* categories, and the Court should not adopt a new *per se* rule to fit the unusual facts of this case.

1. *Per Se* v. Multi-Factor Analysis

The Court carefully restricts *per se* rules due to the risk they present to balanced and practical decision-making. As Justice Holmes stated, a taking "is a question of degree – and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).[16] Only last Term, the Court echoed Justice Holmes when it stated that it was "[r]esisting '[t]he temptation to adopt what amount to *per se* rules in either direction.'" *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1478 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).[17] "'The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.'" *Id.* at 1481 n.23 (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)). The "default rule" remains the "more fact specific inquiry" of *Penn Central*. *See id.* at 1484. Only for "relatively rare, easily identified" government conduct is the

[16] "There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate." *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

[17] Antitrust law presents an analogous instance of the Court's care with respect to *per se* rules. The Court has cautioned against deeming, as a *per se* restraint, conduct it has not repeatedly examined. *See Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 10 (1979). "[E]asy labels do not always supply ready answers." *Id.* at 8. The Court has never examined whether the rules challenged here effect a taking. As Petitioners note, the factual circumstances to which they seek to have the *per se* rule extended are "admittedly unusual." Pet. Br. at 29; *see also id.* at 26.

per se approach appropriate. *Id.* at 1479; *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 1018 (1992) (*per se* takings are "extraordinary" and only occur in "relatively rare situations").

The Court in *Tahoe-Sierra* also repeated *Penn Central*'s admonition that "we must focus on 'the parcel as a whole.'" 122 S. Ct. at 1483 (quoting *Penn Central*, 438 U.S. at 130-31, and citing *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993)). Petitioners attempt to manufacture a *per se* takings claim by focusing solely on one narrow aspect of the property (the interest credited to LFW on the IOLTA accounts in which Brown's and Hayes' principal funds were deposited), while ignoring the effect the IOLTA regulations have on the property (the principal and all its incidents) as a whole. The IOLTA rules dictate how and where the legal practitioner holds the principal funds that clients relinquish to the legal practitioner. The net interest generated in the IOLTA accounts is a byproduct and thus does not stand alone for purposes of Just Compensation Clause analysis. The interest is but one incident of ownership of the whole, rather than a separable property interest, even more so than the coal in the ground in *Keystone Bituminous Coal*.

a. The First *Per Se* Category Is Inapplicable to IOLTA.

The IOLTA rules do not meet any of the three elements of the first *per se* category: a (1) permanent (2) physical invasion of (3) tangible property. First, the alleged taking is not permanent; it is only during the brief time periods (two days for Brown, two and 16 days for Hayes) in which a client relinquishes control of his funds to his legal practitioner. Second, it does not make sense to speak of money being physically occupied or invaded. *See Andrus*, 444 U.S. at 65-66 (distinguishing between loss of future profits and physical invasion). Third, the incident of property at issue here – interest, or the right not to earn interest – is intangible.

"Not every physical *invasion* is a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982). For example, a temporary physical invasion is not a *per se* taking, and is not necessarily an unconstitutional taking at all, particularly where the owner has made no effort to "exclud[e] *all* persons from his property." *Id.* at 434 (emphasis supplied) (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980)). In *Loretto*, the Court specifically distinguished between permanent physical occupations and regulations involving "deprivation of the right to use and obtain a profit from property," where the government has "broad power" to regulate. *Id.* at 436, 441. In this case, Brown and Hayes voluntarily relinquished control and use of their funds during the brief period of deposit.

The Court has limited the first *per se* category to physical invasions of real property, and has never applied it to a temporary taking of intangible personal property. *Lucas* cites *Loretto* as an example of the first *per se* category. 505 U.S. at 1015. *Loretto* involved a challenge to a law that permitted cable television companies to physically invade real property to install cable wires. The Court specifically noted that "permanent physical occupation of real property" was what constituted a *per se* taking, and remanded the case to the state courts for a determination of the amount of just compensation, if any, due.[18] 458 U.S.

[18] It is far from "clear" that "a *per se* taking by permanent physical occupation may occur through actions that actually enhance the overall value of the property in issue." *See* Pet. Br. at 34 n.13. In support of their contention, Petitioners rely on a point by the dissent in *Loretto*, which the majority criticized as "speculative and . . . contradicted" by the record. 458 U.S. at 437 n.15.

at 427, 441. In addition, a physical taking occurs "only where [the government] *requires* the landowner to submit to the physical occupation of his land." *Yee*, 503 U.S. at 527. There is no similar compelled submission in this case.

b. The Second *Per Se* Category Is Inapplicable to IOLTA.

The second *per se* category is equally inapplicable, as it applies only to real property. *Lucas*, 505 U.S. at 1015 (concluding categorical treatment is appropriate "where regulation denies all economically beneficial or productive use of land"). The law has long treated real property differently from personal property. *See id.* at 1027-28. In *Lucas*, the Court expressly distinguished personal property from land because of "the State's traditionally high degree of control over commercial dealings, [which] ought to [make the property owner] aware of the possibility that new regulation might even render his property economically worthless." *Id.* As Petitioners admit, Pet. Br. at 27, the Just Compensation Clause continuum offers less protection to personal property than land, and less to money than to other forms of property. *See Phillips*, 524 U.S. at 168 ("'[A]nticipated gains ha[ve] traditionally been viewed as less compelling than other property-related interests.'") (quoting *Andrus*, 444 U.S. at 66).

2. The Fungible Nature of Money Makes Application of *Per Se* Analysis Particularly Inappropriate.

Unlike real or personal property, money does not require the assistance of the Just Compensation Clause to make it interchangeable with its fair market value. It is impersonal and has no intrinsic value, only the value conferred by the government as a means of legal tender. On the basis of money's fungibility, the Court has explicitly rejected the argument that the appropriation of money constitutes a physical taking. *Sperry*, 493 U.S. at 62 n.9. The Court need not decide here whether the *per se* rule would apply if the government simply confiscated preexisting monetary assets, or appropriated income that monetary assets would have generated for the owner apart from a regulatory program. The key insight of *Sperry* is that money is fungible, and a regulation of the use of money by regulated persons cannot result in a taking if there is no net economic loss.

The Court has repeatedly recognized the distinction between regulations of real property and regulations imposing direct or indirect monetary assessments or fees. For example, in a challenge to the Coal Act's imposition of monetary liability on an employer for an employee benefits fund, a plurality of the Court stated that this "is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a *per se* taking." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 530 (1998) (citing *Loretto*, 458 U.S. at 441). The Court made the same distinction in a case involving the exaction of a percentage of any award made by the Iran Claims Commission. *Sperry*, 493 U.S. at 62 n.9 ("It is artificial to view deductions [from] a monetary award as physical appropriations of property" because "[u]nlike real or personal property, money is fungible.").

Petitioners suggest, by a "*cf.*" citation, that *Sperry* is limited to cases involving a fee imposed for services. Pet. Br. at 28. But that was not the rationale used in *Sperry*, and *Phillips* imposes no such limitation. *Sperry* does not support Petitioners' assertion that only fees-for-services regulations, taxes, and forfeitures fall outside of the *per se* rule. The Court has refused, in at least four cases not involving government fees, to apply *per se* analysis to government assessments of money. *See Eastern Enterprises*, 524 U.S. at 529-30 (plurality holding that Coal Act's retroactivity effected a taking under *Penn Central* framework); *Concrete Pipe*, 508 U.S. at 643-44 (Multiemployer

Pension Plan Amendments Act's imposition of withdrawal liability on employers did not effect a taking under *Penn Central*); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) (same); *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987) (changes to standard for eligibility for Federal Aid to Families with Dependent Children did not effect a taking under *Penn Central*).

Nor in *Webb's* did the Court apply the *per se* rule. *Webb's* was decided two years before the Court's outlining of the *per se* rule in *Loretto* for permanent physical invasions of real property. The Court in *Webb's* repeatedly cited *Penn Central* and analyzed the question, "What would justify the county's retention of that interest?" 449 U.S. at 162. That inquiry into public purpose and the property owner's expectations, *id.* at 161, is irrelevant in a *per se* analysis. As to the facts of *Webb's*, it was undisputed that the $1.8 million in principal could earn a net return and that its owners "had more than a unilateral expectation" of receiving a net return on the funds. *Id.* at 161. The statute at issue there required that all interpleader money be deposited in an interest-bearing account, *id.* at 156 n.1, whereas the IOLTA rule at issue here states that the only money that should be placed in an IOLTA account is money that could not otherwise earn interest on its own. And even that money is voluntarily given by the client to the legal practitioner, with no compulsion by the state.

The Court's holding that rent control statutes "are not *per se* takings" also undermines use of the *per se* rule here. *Federal Communications Comm'n v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). Rent controls regulate money, and arguably "take" money from landlords by prohibiting them from controlling their investment by raising their rents to market levels. Nonetheless, "States have broad power" to enact such regulation. *Loretto*, 458 U.S. at 440; *see also Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988) (declining to reconsider the constitutionality of rent control as a *per se* taking).

Petitioners ask to establish a third *per se* category for temporary denial of control over investment of money, even where the owner of the money would not have invested it, let alone earned any money from that "investment." Other than the Fifth Circuit's decision in *TEAJF* (which half of the acting Fifth Circuit judges voted to rehear), *see* 293 F.3d at 243, no court has recognized such a third *per se* category, or even found a taking from the IOLTA rules at all. The newest basis for Petitioners' argument for a dramatic expansion of the *per se* rule is that the IOLTA rules "burden" a "haphazardly selected" and small number of individuals. Pet. Br. at 23. Petitioners sprinkle similar slogans, with no real analysis, throughout their brief. *See, e.g., id.* at 15-16, 17, 22-23. This is not the test for whether to adopt the *per se* rule.

In any event, there is no "burden" imposed by the IOLTA rules, as Brown and Hayes could not have obtained a positive net return on their short-term deposits. For that very reason, the IOLTA rules are not "haphazard" in whom they "happen to" affect. These regulations supplement long-standing rules governing the handling of clients' funds, protect trust accounts of vast numbers of clients of legal practitioners across the country, and utilize changes in banking law to benefit legal services. Petitioners assert that individuals like Brown and Hayes have "no particular connection to the provision of legal services," Pet. Br. at 16, but that is the very service they are getting from LPOs in the State of Washington.[19]

[19] Perhaps Petitioners believe that LPOs' services are not legal services, but that issue of state law was decided by the Washington Supreme Court prior to Washington's adoption of an IOLTA rule for lawyers or LPOs, *Kassler Escrow*, 96 Wn.2d 443, and is not in dispute.

The Court has never before found a taking unconstitutional where the claimant failed to prove that he suffered any economic loss (and thus no compensation was due). It would be a dramatic expansion of the Court's takings doctrine to classify this type of taking as falling under the *per se* rule. If *per se* analysis is applied to government regulation of money here, a variety of other government acts are likely to be *per se* takings, including regulations of interest rates, banking, minimum wages, and rules requiring taxpayers to pre-pay income tax via withholding. In this difficult area, a new *per se* exception would soon be swallowed by exceptions to the exception.

3. Petitioners Were Not Required to Acquiesce.

"[R]equired acquiescence is at the heart of the concept of occupation" and thus is critical to application of the *per se* rule under *Loretto*. *Florida Power*, 480 U.S. at 252; *see Yee*, 503 U.S. at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land."). Petitioners' argument that a *per se* taking occurred rests on the conduct of private parties. As the Ninth Circuit correctly concluded, Brown and Hayes "gave dominion and control to their respective title and escrow companies." Pet. App. 44a. They relinquished the decision where to deposit their funds and under what terms.

If legal practitioners violate the IOLTA rules by depositing in an IOLTA account client funds that are capable of earning a net return for the client, any resulting "taking" is not caused by the rules but by the conduct of private parties. A "fundamental fact of our political order" is that the Constitution applies to state action, not acts of private parties. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

This is particularly true as to earnings credits. Earnings credits are a private arrangement between banks and escrow company affiliates. Such credits provide escrow companies with an incentive to deposit their clients' funds in non-interest-bearing accounts at the bank offering the most earnings credits. The decision of a bank to cease offering the earnings credits incentive to its customers cannot be attributed to the state, and thus cannot give rise to a takings claim. *See American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (holding that "a *private insurer's* decision" to withhold medical benefits under state workers' compensation statute was not state action). Like the private insurers in *Sullivan*, who were free to withhold medical benefits with or without the state's approval, a private bank is free to reduce the earnings credits incentive with or without the state's approval.

Before the IOLTA rules were in effect, LPOs allowed the banks to keep any earnings from their clients' funds, or arranged to share the benefits with banks indirectly. The state action here regulates those engaged in the practice of law in Washington, not clients. Indeed, the state is attempting to protect clients from legal practitioners' self-interest in selecting a bank and terms of deposit. Thus, if the IOLTA rules "take" anything, it is from the banks that previously kept any net interest earned from their pooling of these small or short-term deposits.

II. NO COMPENSATION IS DUE BROWN AND HAYES BECAUSE THEY DID NOT SUFFER ANY ECONOMIC LOSS.

Washington's IOLTA rules do not violate the Just Compensation Clause because, even if a "taking" of property occurred, neither Brown nor Hayes suffered any economic harm whatsoever. As the *en banc* Ninth Circuit correctly concluded, this is an independent basis for rejecting Petitioners' claims. Because the analysis here is so straightforward, the Court may wish to consider only the just compensation question and affirm on that basis.

Petitioners did not seek summary judgment as to what just compensation they are owed, but simply sought a ruling that a "taking" had occurred for which Petitioners claimed entitlement to compensatory and injunctive relief. They did not create a genuine issue of fact as to whether they suffered any economic injury in fact or whether any amount of compensation is actually due. Petitioners' Brief uses the word "money" 36 times without once mentioning the amount of money that Brown and Hayes allegedly "lost." Their argument is purely abstract. In "the real world," Pet. Br. at 33, this is a case about two clients who have lost nothing.

The Court often refers to the "Just Compensation Clause" of the Fifth Amendment, highlighting that a taking is not unconstitutional unless the state fails to pay just compensation. *See, e.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997); *Williamson County*, 473 U.S. at 195; *United States v. 564.54 Acres of Land*, 441 U.S. 506, 608 (1979). This is not merely a matter of academic interest. The Just Compensation Clause does not prevent the government from acting; it merely requires the government to pay for the consequences of acting, when the action rises to the level of a taking without just compensation.

All eleven judges on the *en banc* panel agreed that if Brown and Hayes suffered no loss as a result of Washington's IOLTA rules, no just compensation is due. Pet. App. 41a-45a (majority op.), 79a-84a (dissenting op.). Even the Fifth Circuit acknowledged that "a 'taking' is distinct from 'just compensation,'" *TEAJF*, 270 F.3d at 189, a legal distinction that Petitioners agree is "[o]bvious[ ]," Pet. Br. at 34 n.13. In some cases, as here, the amount of just compensation is zero, and that, under the plain language of the Fifth Amendment, is the end of the inquiry. *See*

Brief of the National League of Cities, International Municipal Lawyers Association, and Trial Lawyers for Public Justice as Amici Curiae in Support of Respondents.

The burden is on Petitioners to prove that they suffered a specific and uncompensated loss from the IOLTA rules, which they have not attempted to do. Instead, they outline three arguments (in two pages) that fail to survive scrutiny: (1) just compensation is "exactly equal" to the amount of interest "taken," Pet. Br. at 36; (2) just compensation is the "less clearly determinate value" of the "loss" of the "right" to prevent others from earning interest on their short-term deposits, *id.* at 37; and (3) just compensation is a disputed issue of material fact on the "value of the earnings credits that would have been applied to their real estate transactions absent the IOLTA program," *id.* at 36 n.14.

A. The Clients Lost No Interest.

Not even the Ninth Circuit dissenters accepted Petitioners' first argument. *See* Pet. App. 83a ("just compensation for interest taken by IOLTA after IOLTA causes the interest fund to exist is something less than the amount of the interest"). Brown and Hayes submitted no evidence that their legal practitioners could have placed their short-term deposits in a bank account that would have earned any net interest for Brown and Hayes. *A fortiori*, they could not have earned the "exact amount" (an amount not in the record) of net interest paid to LFW after deduction of fees charged to LFW. This amount, if positive, resulted from the pooling of Brown's and Hayes' funds with those of numerous other clients in a way that avoided certain bank and legal practitioner fees and the cost of preparing IRS reports. Brown admitted in his deposition that "without IOLTA in place I may not have earned anything." JA 130.

For IOLTA-eligible accounts, the banking, tax-reporting, and legal practitioners' costs in opening a new or separate subaccount would have exceeded any interest paid to LFW. As the District Court's factual findings in the *TEAJF* trial demonstrate, these costs "exceed the costs of IOLTA" and "make net interest to clients infeasible except in cases where large sums of money are held or when client funds are held for long periods of time." *TEAJF*, 86 F. Supp. 2d at 641-42.

In determining the amount of just compensation due, "the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). Petitioners offer no precedent to support their argument that this rule has no relevance where the property allegedly taken is money. To use Petitioners' words, it is "readily ascertainable" what Brown and Hayes lost. Pet. Br. at 17. They lost zero. *See* Pet. App. 38a. In these circumstances, "there would be no justice in paying for a loss suffered by no one in fact." *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76 (1913).

After all, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194. The purpose of the Just Compensation Clause is to place the property owner in the same position as if no taking had occurred. *564.54 Acres of Land*, 441 U.S. at 509. Brown and Hayes are not seeking to put themselves in the same position. They seek a windfall – to recover interest that would be unavailable but for the IOLTA rules.

The ability to earn interest on bank deposits was regulated well before the IOLTA rules came into existence. As the Court recognized in *Phillips*, the "Federal Government, through the structuring of its banking and taxation regulations, imposes costs on [the interest] if private citizens attempt to exercise control over it." 524 U.S. at 171. The Just Compensation Clause calculus considers the costs imposed by these unchallenged, pre-IOLTA banking and tax regulations because just compensation is "the fair market value of the property on the date it is appropriated. . . . [It is] what a willing buyer would pay in cash to a willing seller." *Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 & n.15 (1984) (internal quotation marks and citation omitted) (noting that the Court tolerates the "occasional inequity" resulting from the fair market value standard).[20] As both the Fifth and Ninth Circuits agree, what a willing buyer would pay in cash to a willing seller necessarily takes into account valid, pre-existing governmental regulations. *See United States v. 62.50 Acres of Land,* 953 F.2d 886, 890-92 (5th Cir. 1992) (federal, state, and local environmental regulations properly considered in determining market value of property) (citing *United States v. 174.12 Acres of Land*, 671 F.2d 313, 316 (9th Cir. 1982)). Here, if an individual client chose not to relinquish control over his small, short-term deposit, but instead had invested it in an interest-bearing account, he would then have had to incur transaction costs (bank fees and accounting costs associated with completing a 1099 federal income tax form) greater than any interest generated. Petitioners offered no evidence to the contrary.

B. The Lost Opportunity to Prevent Funds From Earning Interest Temporarily Is Not an Economic Loss for Which Just Compensation Is Due.

Petitioners' second argument on just compensation – that the amount due is the "loss" of the opportunity to control whether their principal earns interest for anyone –

[20] Similarly, government is not required to compensate a property owner for value that government added to the property. *City of New York v. Sage*, 239 U.S. 57, 61 (1915); *see also United States v. Virginia Elec. & Power Co.,* 365 U.S. 624, 629 (1961); *United States ex rel. Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 275-76 (1943).

also fails. In the first place, this is exactly the opportunity that Brown and Hayes voluntarily gave up by utilizing an escrow company with LPOs, by allowing the escrow company and bank to decide whether the principal is invested while on deposit, and by allowing LPOs like Daugs to put non-IOLTA deposits in accounts whose interest, at best, benefited only the LPO, not the client. As Petitioners admit, this "loss" has "no readily determinable fair market value." Pet. Br. at 37. Without citing to any case, and ignoring the statement in *Phillips* that the intangible "right" to exclude "may have no economically realizable value to its owner," 524 U.S. at 170, Petitioners baldly assert that such a "loss" "clearly ha[s] *some* value," Pet. Br. at 37. It has no economic value. Under *PruneYard*, even when "there has literally been a 'taking' of" the "right to exclude others," there is no "'taking' in the constitutional sense" if the value of the property is not unreasonably impaired. 447 U.S. at 82 (internal quotation marks and citation omitted).

The question is whether Brown and Hayes proved that they suffered any economic loss; if not, under the Court's decisions, they are not entitled to nominal damages because their sole textual remedy is "just compensation." *See Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280, 282 (1926) ("For, even if there was technically a taking, the judgment for [the government] 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."); *United States v. Cress*, 243 U.S. 316, 328 (1917) (an unconstitutional taking requires proof of "substantial" damage). *See also Perry v. United States*, 294 U.S. 330, 355 (1935) (no claim against federal government for nominal damages). Brown and Hayes did not proffer any evidence in the lower courts as to the value of their alleged loss of the right to control.

Similarly, the Court has rejected arguments that just compensation includes an amount for the sentimental or subjective "value" of property. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("[L]oss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship.") (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-09 (1923)); *see also United States v. 50 Acres of Land*, 469 U.S. 24, 35 (1984) (just compensation is fair market value, not "subjective values which are only of significance to an individual owner"); *United States v. Miller*, 317 U.S. 369, 375 (1943) (just compensation does not include "special value" to the owner).

At most, the IOLTA rules prevented the LPOs to whom Brown and Hayes freely gave their deposits from putting that money in a non-IOLTA, non-interest-bearing account, where the interest value would go to the bank or LPO, not to the clients. The Ninth Circuit correctly concluded that this is a "loss" of no economic value and therefore "not compensable under the Fifth Amendment." Pet. App. 45a (internal quotation marks and citation omitted). A voluntary loss of temporary dominion over the deposits to ensure that no interest would be earned by someone else is, at best, merely "subjective value" the Court previously has found to be noncompensable.

C. The Effect on Earnings Credits, a Red Herring Unique to Washington LPOs, Did Not Result in Any Direct Loss for Which Just Compensation Is Due.

In addition to their alternative arguments that just compensation is either easy or hard to quantify, Petitioners claim in a footnote that they are at least entitled to a trial on the amount of just compensation. They contend "that the Ninth Circuit failed to credit Petitioners' evidence regarding lost earnings credits." Pet. Br. at 36-37 n.14 (citing JA 51-52).

As discussed above in section I.A.1, Petitioners misstate the summary judgment record with respect to earnings credits. The record simply does not support Petitioners' assertion that Brown and Hayes lost anything as a result of any impact of IOLTA on the availability of earnings credits to escrow affiliates. Moreover, as discussed in section I.A.2, the system of earnings credits is illegal. Even if earnings credits were legal, and if there were a genuine issue of fact as to whether the decision of a bank to stop paying these credits to escrow company affiliates resulted in an indirect cost increase to Hayes, the Constitution does not require that states compensate property owners for such an indirect loss. *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979) ("[I]ndirect costs to the property owner caused by the taking of his land are generally not part of the just compensation to which he is constitutionally entitled."); *see United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945) (concluding that the property owner "must stand whatever indirect or remote injuries" are caused by the taking); *Mitchell v. United States*, 267 U.S. 341, 345 (1925) (denying compensation for the destruction of a property owner's business as "an unintended incident of the taking of land").

The just compensation here is zero, and thus there was no loss for which "just compensation" is due.

III. INJUNCTIVE RELIEF IS UNAVAILABLE AND INAPPROPRIATE.

Petitioners are trying to use injunctive relief to evade their burden of proving the fact and amount of damage. The Just Compensation Clause guarantees just compensation; as even the Ninth Circuit dissent found, the Clause does not generally allow for "prevention of the taking."

Pet. App. 79a (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)). Indeed, where the claimant's only interest is financial, traditional equitable principles should never justify equitable relief rather than damages. *Cf. Mertens v. Hewitt Assocs.,* 508 U.S. 248, 255 (1993) ("Money damages are, of course, the classic form of *legal* relief.").

Petitioners argued in their Petition that injunctive relief should be the rule where a Just Compensation Clause plaintiff cannot prove any economic loss. Pet. at 29. They now take a narrower approach, seeking only a remand to the District Court to exercise its discretion, *see* Pet. Br. at 46 n.22, apparently guided largely by whether it would be futile for Brown and Hayes to seek a remedy in state court. Before turning to the question of injunctive relief, however, it is important to address Petitioners' standing to seek injunctive relief and whether the Court should reach the injunctive issue at all.

A. The Non-Client Petitioners Lack Standing.

The Petition presents no question as to the Ninth Circuit's ruling that the Non-Client Petitioners lack standing, and that issue is not subsumed within the Questions Presented. The Non-Client Petitioners are separate parties. The court below decided their claims on a separate ground. It is not necessary for the Court to reach that basis to decide, as to Brown and Hayes, the Questions Presented.[21] Indeed, the first question that Petitioners present expressly refers to the entitlement to relief of "property owners," and the second expressly refers to the

[21] Because Brown and Hayes had no property interest in the earnings credits themselves, they lack standing to claim a loss of any benefit from earnings credits. *See supra* note 10; *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

"owners of the interest taken." Petitioners' Brief refers 25 times to the rights of "property owners." While the LPO Petitioners in fact act as if they own the right to benefit from their clients' money, they do not assert that they are "property owners" or "owners of the interest taken."[22]

Moreover, the Non-Client Petitioners make no effort to explain why the Court should grant them third-party standing. In light of the presumption against such standing, *Singleton v. Wulff*, 428 U.S. 106, 113 (1976), that silence dooms their argument. The Court should not allow them to make their initial argument in their reply brief. In any event, the silence merely reflects the fact that there is no reason for third-party standing here. The property owners have standing, are able to press their own rights, and are doing so. *See Powers v. Ohio*, 499 U.S. 400, 411 (1991).

B. The Court Need Not Address the Injunctive Relief Question.

The District Court and the Ninth Circuit did not reach the issue of the appropriate remedy because they found no constitutional violation, and Petitioners did not make the showing necessary for the issuance of an injunction. Even the original three-judge panel (adopted by the *en banc* dissent) would have remanded to the District Court for that court to determine a remedy. Pet. App. 79a. Petitioners now seek no more than such a remand, which would

[22] The LPO Petitioners might argue in their reply that they have "legal title" to their clients' funds. *See* Pet. Cert. Reply Br. at 8. Nonetheless, Petitioners have never made any claim that such legal title was taken, or that it included the right to receive or benefit from any interest a bank might agree to pay. At most, the assertion of legal title reconfirms that clients surrendered to their legal practitioners the clients' right to control the investment of their principal.

include a trial based on earnings credits. Pet. Br. at 36-37 n.14. The Court should not speculate about whether the District Court would be within its discretion in entering some unspecified form of injunctive relief on whatever unknown showing Petitioners might make if remand were even appropriate. Such unnecessary speculation is risky and ill-advised in these circumstances.

As discussed below, Petitioners admit that *Eastern Enterprises* was a plurality decision proposing a new rule for federal court adjudication of Just Compensation Clause claims against federal defendants. This case does not require a determination whether such a rule should apply in cases against state defendants. The parties did not even present the District Court with a record as to the appropriateness of injunctive relief, and certainly did not do so with the guidance of *Eastern Enterprises*, which was decided while this case was on appeal. The Court should not address the injunctive relief question; instead, if it decides to reverse on liability, the Court should instruct the lower court to consider *Eastern Enterprises* in determining an appropriate remedy, if any.

C. If the Court Reaches the Issue, It Should Find That Injunctive Relief Is Unavailable.

Petitioners do not dispute that injunctive relief is an extraordinary remedy in general, and particularly in Just Compensation Clause cases. They grudgingly admit that there is no constitutional violation unless the government has refused to pay just compensation. Pet. Br. at 18, 34 n.13. "The very fact of their inability to prove a compensable monetary loss should end the case, not trigger a search for alternative equitable remedies." *TEAJF*, 293 F.3d at 254 (Wiener, J., supp. dissenting op. from denial of pet. for rehearing *en banc*). Petitioners rely on *Eastern Enterprises*, which they summarize as authorizing, for the first time,[23] injunctive relief against "direct transfer[s]" by the federal government from "property owners," on the theory that it would be pointlessly circular for a federal court to require the United States to repay the same sum that was exacted. Pet. Br. at 40; *see* 524 U.S. at 521-22.

Justice Kennedy rejected the plurality's Just Compensation Clause analysis, and the four dissenters found the Just Compensation Clause inapplicable. But even on its face, the plurality rationale with regard to alleged pointless compensation for "direct transfers" ordered by the federal government does not apply here. This is not a direct transfer. The federal courts here are dealing with state governmental action, not federal. Brown and Hayes have not shown that they suffered even any indirect "loss" due to changes in earnings credits practices.

It would not be pointless to determine how much, if any, financial injury Brown or Hayes suffered. Petitioners admit that Respondents might not owe all that was paid by the banks to LFW but only "some or all." Pet. Br. at 42. Petitioners have come forward with no logical argument to recover all the interest without deducting the fees and costs that would have been imposed absent IOLTA. If Respondents do not owe "all," it is not pointless to require Petitioners to meet their burden of proving the precise amounts, if any, that are due.

[23] Contrary to Petitioners' suggestion, the Court in *Webb's* did not order or authorize injunctive relief. In that case, which was appealed from the Florida Supreme Court, the Court found unconstitutional a seizure of accrued interest in the absence of any argument that the financial impact on the principal owner was less than the interest, or that there was a state law damages remedy. *See* 449 U.S. at 158, 161.

Moreover, the plurality analysis in *Eastern Enterprises* addressed what it viewed as a complete absence of a damages remedy, and did not justify injunctive relief as a method of dealing with the numerosity of claimants or the small size of individual claims.[24] The Court surely has no more authority in these circumstances than does Congress to abrogate states' sovereign immunity where state remedies are "less convenient than federal remedies" but not therefore "constitutionally inadequate." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 644 (1999); *cf. Hudson v. Palmer*, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring) ("When adequate remedies are provided and followed, no uncompensated taking . . . can result."). The most the federal court should order is that the state create a more efficient claims process.

In addition to practical considerations, Petitioners argue that the Ninth Circuit has irrefutably established that Washington courts will not treat them fairly in seeking remedies for future seizures. This is incorrect. In the first place, the Ninth Circuit held only that Brown's and Hayes' damages claims were ripe for federal court resolution because most members of the highest Washington court were parties to this action and had defended the merits of the IOLTA program. Respondents are free to challenge that holding, because success in doing so would not change the result below – dismissal of Petitioners' Just Compensation Clause claims.[25]

[24] The only court to reach the injunctive relief question is the Fifth Circuit in *TEAJF*, and it relied heavily on its erroneous conclusion that the defendants had conceded that injunctive relief could be awarded. *Compare* 270 F.3d at 190 *with id.* at 196 (Wiener, J., dissenting). Respondents made no such concession.

[25] Before the Ninth Circuit, Respondent LFW questioned whether Petitioners' claims were ripe for federal court review under *Williamson*

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Beyond that, however, the Ninth Circuit did not even rule as to those future claims to be addressed should the Court find that there is liability in this case. Injunctive relief is a remedy only as to future takings without just compensation. As to those, as Petitioners note, "[s]tates and their officers are expected to conform their conduct to the dictates of the Constitution." Pet. Br. at 47. Even if Petitioners are correct that their current claims are ripe in federal court, Petitioners have not attempted to explain why state remedies would be inadequate as to future claims after this case has been decided. There is no reason to assume that Washington judges in future cases will not follow the law as announced by the Court in this case. The Court assumes such fidelity every time it reverses and

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County, 473 U.S. at 186. The Ninth Circuit concluded that it would be futile for Petitioners to pursue their current claims in state court and thus that Petitioners could seek relief in federal court. Pet. App. 21a (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999)). The Ninth Circuit relied on the Washington Supreme Court Justices' assertion in this federal case that no Fifth Amendment violation has occurred. *Id.* But the Justices who are parties to this action might not be the final authority on Petitioners' claims. Appeals from the Washington Court of Appeals to the Washington Supreme Court are discretionary. Wash. R. App. P. 13.3. Moreover, the Justices might recuse themselves in such a challenge. *See Schmier v. United States Court of Appeals*, 279 F.3d 817 (9th Cir. 2002) (in case challenging constitutionality of Ninth Circuit rule, all judges of the Ninth Circuit recused themselves, and judges sitting by designation decided case). None of the Washington Supreme Court Justice Respondents was a member of the court that adopted the IOLTA rule in 1984. The Justices who adopted the rule determined it was constitutional on the basis that the clients had no property interest in the interest earned on principal funds deposited in IOLTA accounts, which leaves Petitioners free to argue that there has been an intervening change in the law and that the IOLTA rules must be reevaluated by the present Justices. And, of course, the Court could review any decision of the highest state court on issues of federal law.

remands a decision of a highest state court. *See Bush v. Gore*, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, J., concurring) (describing the Court's function in Just Compensation Clause cases as performing an "independent evaluation" of state law to which the state courts must ultimately adhere).

Petitioners assert that the plurality rationale in *Eastern Enterprises* is equally applicable to "claims filed against a State or local government." Pet. Br. at 42. Federal courts do not always treat state and local governments the same as the federal government. Petitioners fail to address any of the principles of special deference to state governments except the Eleventh Amendment, which they mention in passing and then ironically only for the proposition that it might prevent payment of damages in actions against a state in federal court. Pet. Br. at 47 n.23. However, a federal court should not be empowered to enjoin a state merely because the Eleventh Amendment prohibits the federal court from awarding monetary relief. *See Alden v. Maine*, 527 U.S. 706, 748 (1999).

Federal injunctive relief is both less justified under the plain language of the Constitution and more intrusive of state interests, because it halts or limits a state program, in this case a well-considered and laudable one. *Cf. id.* ("the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine," if the states at the time had not retained constitutional sovereign immunity in their own courts).[26] A rule allowing

[26] Washington courts hear cases raising federal constitutional challenges to state action. *State ex rel. Robinson v. Superior Court*, 182

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federal courts to second-guess the practicalities of state monetary remedies would cause pointless federal litigation and threaten state decisions that a public policy is so important that the state is willing to pay just compensation. The federal courts' equitable power is not boundless. As the Court stated in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999), "[w]e do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief. To accord a type of relief that has never been available before–and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent–is to invoke a 'default rule,' not of flexibility but of omnipotence." (Citation omitted.)

Finally, Petitioners refer to their core objection as being that the IOLTA rules operate similarly to a tax. Pet. Br. at 27 n.9. Federal courts have long been reluctant to interfere with state taxes, applying rational basis review. *See Stebbins v. Riley*, 268 U.S. 137, 140-41 (1925) (citing *Dane v. Jackson*, 256 U.S. 589, 599 (1921)) (rejecting takings challenge to state regulatory taxing provision). As outlined above in section I.A.1, the rational basis test is satisfied here. And Congress has prohibited federal courts from enjoining state tax laws. 28 U.S.C. § 1341.

On this summary judgment record, there is no basis for granting injunctive relief.

Wash. 277, 281-84, 46 P.2d 1046 (1935) (*cited in Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 317 n.15 (1997) (Souter, J., dissenting)).

D. If Injunctive Relief Is Available at All, Petitioners Must Make an Extraordinary Showing on Remand.

If the Court finds a taking, just compensation due, and that injunctive relief is an option in this case, the Court should instruct the District Court to grant injunctive relief on remand only if Petitioners make an extraordinary showing.

In addition to examining the adequacy of the legal remedy, the lower court must balance the public interest against the private hardship. *See Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("[T]he doctrine of equitable discretion . . . permits a court to refuse relief . . . when that would unduly impair the public interest. . . . [I]t is simply untenable that there must be a judicial remedy for every constitutional violation."). That balance is not close. Even Petitioners repeatedly laud the public interest here. In every state, either the highest court or the legislature has adopted IOLTA rules. There is no private interest beyond avoiding an allegedly inconvenient action in state court. The fact that almost all clients will continue not to care that they are not receiving any net return on their IOLTA-eligible funds is a reason to preserve the public benefits of IOLTA, not to end them.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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