No. 01-

IN THE
Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, ALLEN D. BROWN, DENNIS H. DAUGS, GREG HAYES, and L. DIAN MAXWELL,
Petitioners,
v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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Date: March 7, 2002

QUESTIONS PRESENTED

In *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), the Court held that the interest on clients' funds held in so-called IOLTA accounts ("Interest on Lawyers' Trust Accounts") was the property of the clients. This case presents two questions:

1. Whether the regulatory scheme for funding state legal services by systematically seizing this property violates the Takings Clause of the Fifth Amendment to the Constitution so that the property owners are entitled to relief.

2. Whether injunctive relief is available to enjoin a State from committing such a violation of the Takings Clause, where the legislative scheme in issue clearly contemplates that no compensation would be paid to the owners of the interest taken, and where the small amount due in any individual case often renders recovery through litigation impractical.

PARTIES TO THE PROCEEDING

Aside from the parties named in the caption, the following were Defendants/Appellees in the court of appeals: Kevin Kelly, in his official capacity as President of the Legal Foundation of Washington; and Barbara Durham, James M. Dolliver, Richard P. Guy, and Philip A. Talmadge, in their official capacities as Justices of the Supreme Court of Washington. Those five individuals no longer serve in the capacities listed and thus are no longer parties to this proceeding.

Petitioner Washington Legal Foundation is a nonstock corporation; it has no parent corporation, and no publicly held company owns any its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Washington Legal Foundation, Allen D. Brown, Dennis H. Daugs, Greg Hayes, and L. Dian Maxwell respectfully petition this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (App. 1a-51a) is reported at 271 F.3d 835. The opinion of the court of appeals panel that initially heard this case (App. 52a-85a) is reported at 236 F.3d 1097. The opinion of the district court granting Respondents' motions for summary judgment and denying Petitioners' motion for summary judgment (App. 86a-96a) is not reported. The order granting *en banc* review (App. 97a) is reported at 248 F.3d 1201.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2001. On February 8, 2002, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The relevant provisions of the Fifth Amendment to the Constitution and of the Washington State Admissions to Practice Rules and Rules of Professional Conduct are set forth in the Appendix to this Petition. App. 98a-108a.

STATEMENT OF THE CASE

This case challenges the constitutionality of the Washington State IOLTA ("Interest on Lawyers Trust Accounts") program. Under that program, funds belonging to certain individuals hiring lawyers and real estate professionals in Washington are used -- without the consent and usually without the knowledge of those individuals -- to finance a variety of legal services programs. Petitioners seek review of a 7-4 *en banc* decision of the U.S. Court of Appeals for the Ninth Circuit that the IOLTA program does not violate their rights under the Takings Clause of the Fifth Amendment.

1. By an order dated June 19, 1984, the Supreme Court of Washington created the Washington IOLTA program. Pursuant to that order, the court incorporated and established Respondent Legal Foundation of Washington ("LFofW") as a nonprofit corporation, with Articles of Incorporation and Bylaws promulgated by the Court. The order also amended Disciplinary Rule ("DR") 9-102 of the Washington Code of Professional Responsibility ("CPR"), which imposed obligations on Washington attorneys regarding "Preserving Identity of Funds and Property of a Client." The amendment provided that an attorney receiving client funds that were "nominal in amount" or were "expected to be held for a short period of time" must create an unsegregated interest-bearing account (an "IOLTA account") and direct the depository institution to pay interest earned on the account to the LFofW. CPR DR 9-102(C)(1) and (4). The amendment further provided that all client funds were to be placed into the IOLTA account unless they were deposited in another interest-bearing account that resulted in the creation of "a

positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). DR 9-102(C)(3). The court subsequently replaced the Code of Professional Responsibility with the Rules of Professional Conduct ("RPC"); the provisions of CPR DR 9-102 were incorporated into RPC 1.14.[1]

Both before and after 1983, many real estate transactions in Washington have been consummated by escrow companies and title insurance companies, without the assistance of attorneys. In those cases, legal documents used to complete the transactions have been selected by trained laypersons familiar with the legal requirements of such transactions. In the early 1980s, the Supreme Court of Washington ruled that such laypersons were engaged in the unauthorized practice of law. *Bennion, Van Camp, Hagan & Ruhl v. Kassler Escrow, Inc.,* 96 Wn.2d 443, 635 P.2d 730 (1981). That decision was controversial among some members of the state legislature, who argued that the court had exceeded its constitutional bounds by attempting to regulate a field theretofore regulated by the legislature. The court attempted to settle the controversy in 1983 by adopting Admission to Practice Rule ("APR") 12. APR 12 established a procedure whereby nonlawyers could be licensed to select appropriate legal documents for use in real estate settlements. APR 12 established a Limited Practice Board with the responsibility for licensing such LPOs (Limited Practice Officers, also known as Certified Closing Officers).

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[1] A copy of the most recent version of RPC 1.14 is set forth at App. 99a-102a.

On September 21, 1995, the Supreme Court of Washington adopted a new APR 12(h) and 12.1 in order to make LPOs subject to the IOLTA Program. APR 12(h) and 12.1 make clear that LPOs' obligations to maintain and use IOLTA accounts are identical to attorneys' IOLTA obligations.[2] APR 12(h) provides that LPOs must comply with APR 12.1. APR 12.1 in turn provides that all funds received in connection with a transaction being closed by an LPO must be placed in an interest-bearing account. The interest-bearing account must be an IOLTA account (with interest payable to the LFofW), except that the funds may be placed in a non-IOLTA interest-bearing account if and only if doing so results in the creation of "a positive net return for the client" (defined as interest paid on the account less maintenance costs and the costs of accounting for the interest). APR 12.1(c)(2) and (3).

Since IOLTA's inception in 1985, interest generated by Washington IOLTA accounts has generally amounted to between \$2.5 and \$4.0 million per year. App. 7a. LFofW is authorized under its Articles of Incorporation to award grants to § 501(c)(3) corporations, the only limitation on grants being that they must be for the purpose of providing legal services and education to the public in civil law matters.

2. The escrow and title insurance industries provide escrow services in Washington to buyers and sellers in connection with real estate transactions. Those services include holding customer funds in escrow accounts for a short period of time while the transactions are being completed.

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[2] Copies of APR 12(h) and 12.1 are set forth at App. 103a-108a.

Historically, escrow companies and title companies have placed customer trust funds into non-interest-bearing checking accounts. The accounts were non-interest-bearing because federal law (since the Depression) has prohibited federally-insured banks and savings and loans from paying interest on *checking* accounts. *See* 12 U.S.C. §§ 371a, 1464(b)(1)(B), 1828(g). *See also* Declaration of Gerald R. Wheeler ¶ 5, App. 110a.[3] Federal restrictions on interest payments by financial institutions have been relaxed somewhat since 1980, so that banks are now authorized to offer Negotiable Order of Withdrawal (NOW) accounts, which operate like traditional checking accounts yet are not considered "demand" accounts and thus are permitted to pay interest. 12 U.S.C. § 1832. However, escrow and title companies have never deemed NOW accounts to be realistic options for their trust funds due to the difficulty in crediting the proper amount of interest to each person whose funds have passed through the escrow account. App. 110a. Another reason that NOW accounts have not been employed is that they may not be used for funds belonging to a for-profit corporation, and escrow and title companies on occasion handle corporate funds. 12 U.S.C. § 1832(a)(2); App. 110a.

Although banks have not paid interest on escrow accounts, in lieu thereof they have provided what are referred to in the industry as "earnings credits." App. 111a. These credits can generally be applied against fees that would otherwise be payable to the bank for a wide variety of

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[3] The Wheeler Declaration, set forth at App. 109a-112a, was attached to the motion for summary judgment filed by Petitioners in the district court.

services rendered by the bank. *Id.* Such credits directly reduce costs to customers for services, including escrow trust accounting services and wire transfers. *Id.*

The adoption of APR 12(h) and 12.1 has significantly altered that historical practice. APR 12.1 provides that all funds received in connection with a transaction being closed by an LPO must be placed in an interest-bearing account; as a practical matter, that requires placing the funds into an IOLTA account with interest payable to LFofW. Following the adoption of APR 12(h) and 12.1, many Washington banks have been unwilling to offer earnings credits on escrow accounts. In the absence of such credits, bank customers are now paying for many services that formerly were "free" (in the sense that earnings credits generally were more than sufficient to offset charges for such services). App. 111a. Some or all of those costs inevitably are passed along by escrow and title companies to their customers. App. 112a. Some escrow companies have taken to including those bank charges as a separate item on closing statements. *Id.* Others simply include the bank charges as part of general overhead costs; since overhead costs are a major factor in determining a company's pricing structure, the bank charges ultimately are borne in whole or in part by escrow customers. *Id.*

3. Petitioners Allen D. Brown and Greg Hayes regularly purchase and sell real estate as part of their business dealings. In connection with recent real estate transactions, they have placed their funds in the custody of their escrow companies, and those companies (without the consent of Petitioners) deposited the funds into IOLTA accounts. App. 14a.

Petitioner Dennis H. Daugs owns and operates a small escrow company in Federal Way, Washington. He regularly holds client funds entrusted to him in connection with real estate transactions. App. 15a. As a licensed LPO, he is subject to APR 12.1. Mr. Daugs has determined, however, that compliance with APR 12.1 and payment to LFofW of interest income belonging to his clients would violate his fiduciary obligations to his clients to protect their property. Accordingly, he has refused to participate in the IOLTA program, thereby exposing himself to potential disciplinary action.

Petitioner L. Dian Maxwell is employed by Pacific Northwest Title Company of Washington ("PNW Title"), which provides escrow services in connection with real estate closings. Up until 1996, Ms. Maxwell was a licensed LPO. After Rule 12.1 was adopted, PNW Title determined that it could avoid being subject to the IOLTA program (and thus could save the estimated $50 per transaction cost of participating in the IOLTA program) by requiring all of its employees involved in real estate closings to surrender their LPO licenses. App. 16a.[4] In order to keep her job, Ms. Maxwell surrendered her license. *Id.*

Petitioner Washington Legal Foundation ("WLF") is a public interest law firm whose members include several of the other Petitioners, as well as Washington citizens similarly situated to the other Petitioners.

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[4] Because PNW Title no longer employs LPOs, its customers now must employ outside counsel to prepare the form legal documents used in connection with real estate transactions.

4. Petitioners filed this action in January 1997 in U.S. District Court for the Western District of Washington, alleging that the IOLTA program violated their rights under the First and Fifth Amendments. Named as defendants were LFofW, its President, and the nine justices of the Supreme Court of Washington -- sued in their official capacities only.

In January 1998, the district court issued an Order and Judgment granting Respondents' motions for summary judgment and denying Petitioners' motion for summary judgment. App. 86a-96a. The district court stated that the existence of a property right in IOLTA interest was "a prerequisite to establishing either a First or Fifth Amendment claim." *Id.* at 92a. The court held that Petitioners lacked any property rights in the IOLTA interest and, accordingly, dismissed their constitutional claims. *Id.* at 94a. The court also rejected Petitioners' alternative claim that the IOLTA program violated their Fifth Amendment rights by failing to compensate them for the use of their funds. *Id.* at 96a.

In January 2001, a Ninth Circuit panel reversed.[5] App. 52a-85a. The panel determined that the interest income in IOLTA accounts belongs to those whose funds generated the income, and that "a government appropriation of that interest for a public purpose is a taking entitling them to just compensation under the Fifth Amendment." App. 85a. The panel remanded the case to the district court for determi-

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[5] While the appeal was pending, this Court issued its decision in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). *Phillips* held, in a case involving the Texas IOLTA program, that interest earned on IOLTA accounts belongs to those whose funds generated the interest.

nation of an appropriate remedy. *Id.* Rejecting Respondents' argument that the IOLTA program could be upheld under the *ad hoc* approach to Takings Clause claims articulated in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978), the panel stated, "When the government permanently appropriates all of the interest on IOLTA trust funds, that is a *per se* taking, as when it permanently appropriates by physical invasion of real property." App. 77a (citing *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992)). The panel rejected Respondents' argument that the Takings Clause provides greater protection against government interference with real property rights than against government expropriation of intangible personal property. The panel stated, "This [argument] would imply the nonsensical proposition that a taking would *less* readily be found if a state entirely confiscated people's money from their bank accounts or IRA's than if it installed a sign on their land." App. 74a.

On May 9, 2001, the Ninth Circuit granted Respondents' petition for rehearing *en banc* and vacated the panel decision. App. 97a. On November 14, 2001, the *en banc* appeals court voted 7-4 to affirm the district court in part, vacate in part, and remand. Initially, the court *sua sponte* addressed Petitioners' standing. The court held that Respondents had confiscated funds belonging to Petitioners Brown and Hayes and thus that those two Petitioners had standing to challenge the IOLTA program. App. 14a.

The court also held that Petitioners Daugs, Maxwell, and WLF lacked standing because Washington had not confiscated any property belonging to them, and thus they had no basis for claiming compensation. App. 15a-19a.

Those Petitioners had never, in fact, sought compensatory relief; rather, they had sought injunctive relief. The court's apparent confusion on this point ended up having no effect on its ultimate disposition of their claims, however, because the court held that the injunctive relief sought by Petitioners Daugs, Maxwell, and WLF is not available in Takings Clause cases: "[T]he remedy for the Fifth Amendment violation alleged here is to provide the property owner with just compensation, if a taking has occurred." App. 19a.

Turning to the merits, the court held that Petitioners Brown and Hayes were, indeed, the owners of the interest earned on their IOLTA funds, and it vacated the district court's holding to the contrary. The court rejected Respondents' efforts to distinguish *Phillips*, holding that any differences between Texas and Washington property law with respect to ownership of interest income were "immaterial." App. 24a. The court nonetheless held that Respondents' confiscation of Petitioners' property did not violate the Takings Clause. First, the court concluded that Petitioners' Takings Clause claims should be judged under the *ad hoc* method of analysis outlined in *Penn Central* rather than the *per se* analysis outlined in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 441 (1982). App. 27a-32a. The court said, "The *per se* analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money." App. 27a. The court thought that application of the *ad hoc Penn Central* approach was especially appropriate in this case because: (1) the property being confiscated from Petitioners was being used to promote the common good, App. 29a; and (2) "Given the highly-regulated nature of the banking industry, individuals should expect that their commercial transactions, including their bank deposits, will be regulated." App. 31a.

The court noted that courts applying an *ad hoc* analysis often look to three factors in determining whether a taking has occurred: (1) the economic impact of the government's action; (2) the extent of interference with investment-backed expectations; and (3) the character of the governmental action. App. 32a. Applying those factors, the court concluded that the expropriation of Petitioners' property did not violate the Takings Clause because: (1) the expropriation had no economic impact on Petitioners Brown and Hayes since the expropriated interest would not have come into existence but for the IOLTA program and they had not proven that they were affected by the loss of "earnings credits" on the escrow accounts, App. 33a-38a; (2) the expropriation did not interfere with their "investment-backed expectations" since they could not have expected to earn interest on their funds in the absence of IOLTA, App. 38a-39a; and (3) the "character of the government action" could best be "viewed as a regulation of the uses of Brown's and Hayes's property consisting of the principal and the accrued interest in aggregation," not as a confiscation of 100% of the interest income. App. 39a. The court concluded, in light of the highly regulated nature of banking transactions and the ethical obligations of lawyers and LPOs to assist in providing legal services to the indigent, "the IOLTA regulations are not out of character for either the commercial industry or the professions they affect." App. 40a.

Applying the same analysis that led it to conclude that no taking had occurred, the court went on to find, in the alternative, "We . . . hold that even if the IOLTA program constituted a taking of Brown's and Hayes's private property, there would be no Fifth Amendment violation because the value of their just compensation is nil." App. 45a.

The court recognized that by vacating the district court's holding that Petitioners lacked property rights in the IOLTA interest, it had revived Petitioners' First Amendment claims. Rather than addressing the merits of those claims, the court remanded them for initial consideration in the district court. *Id.*

Judge Kozinski dissented, joined by Judges Trott, Kleinfeld, and Silverman. App. 45a-51a. Judge Kozinski argued that this Court's *Phillips* decision required application of *per se* takings analysis to the expropriation of Petitioners' property; he asserted, "*Penn Central*'s *ad hoc* approach deals with regulatory takings -- a difficult and vexing corner of takings law." App. 48a. He endorsed the panel's conclusion that Respondents' actions constituted a compensable taking of Petitioners' property, stating, "[I]t . . . strikes me as peculiar and quite dangerous to say that the government has greater latitude when it takes money than when it takes other kinds of property." App. 50a.

REASONS FOR GRANTING THE WRIT

This case presents important questions of law concerning the Takings Clause of the Fifth Amendment, questions that have divided the courts of appeals. This Court should grant review of the two questions presented.

First, the decision below conflicts with that of the U.S. Court of Appeals for the Fifth Circuit in *Washington Legal*

Found. v. Texas Equal Access to Justice Found. ["*TEAJF*"], 270 F.3d 180 (5th Cir. 2001), on the issue of whether IOLTA programs effect an unconstitutional taking. In *TEAJF*, the Fifth Circuit had before it a Takings Clause challenge to the Texas IOLTA program, a program identical to the Washington IOLTA program in all relevant respects. The Fifth Circuit resolved the issues in the case in a manner diametrically opposed to the court below, holding that Texas's uncompensated expropriation of client funds in connection with its IOLTA program constituted a *per se* violation of the Takings Clause. *Id.* at 186.

IOLTA programs are now in existence in all 50 States and the District of Columbia. Collectively they raise between $100 million and $150 million each year. Yet although millions of Americans have had their funds expropriated to support IOLTA programs, most are not even aware of IOLTA's existence. The Fifth Circuit's decision striking down the Texas program has now called into question the constitutionality of IOLTA programs throughout the country.

Further, the decision below is demonstrably incorrect under existing decisions of this Court. The court below refuses to take seriously a number of this Court's decisions including *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *United States v. Sperry Corp.*, 493 U.S. 52 (1989); and *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998). Indeed, as the Ninth Circuit's many citations show, it relied not on this Court's decision in *Phillips* but on the dissent from that decision. *See, e.g.*, App. 10a, 32a, 42a.

Grant of certiorari is necessary because the decision of the Ninth Circuit is inconsistent with the teachings of this Court and because it is in direct conflict with the decision of the Fifth Circuit on the constitutionality of IOLTA programs in particular, and more generally on the proper analysis of government programs that confiscate money.

Second, the decision below creates a second, substantial conflict in the circuits by its ruling that prospective injunctive relief is not an appropriate remedy in the event that the IOLTA program results in a Takings Clause violation. This decision is in conflict with the Fifth Circuit's ruling in *TEAJF*, which ordered entry of injunctive relief against IOLTA's continued violations of the Takings Clause. It is also in conflict with decisions of the Second and D.C. Circuits holding that injunctive relief is available in cases where takings result from government action involving direct transfer of money. The Ninth Circuit's narrow view of the availability of injunctive relief is also in conflict with this Court's cases which permit injunctive relief where there is no reasonable, certain, or adequate monetary remedy. The Court should grant certiorari on this issue as well.

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS OVER WHETHER EXPROPRIATION OF IOLTA FUNDS CONSTITUTES A FIFTH AMENDMENT TAKING

A. The Ninth Circuit's Decision That IOLTA Effects No Unconstitutional Taking Directly Conflicts with the Fifth Circuit's *TEAJF* Decision

The court below held that the Washington IOLTA program's expropriation of Petitioners' property should be examined, for purposes of ruling on Petitioners' Takings Clause claims, using a *Penn Central ad hoc* analysis. App. 27a-32a. The court then determined that that expropriation did not constitute a Fifth Amendment taking and, alternatively, that Petitioners suffered no loss and thus were entitled to no Fifth Amendment compensation. App. 40a, 41a. Each of those rulings is in direct conflict with the Fifth Circuit's *TEAJF* decision, which struck down the nearly identical Texas IOLTA program. The Court should grant review in order to resolve that conflict.

The plaintiffs in *TEAJF* raised a Takings Clause challenge to the Texas IOLTA program that is identical to the challenge raised by Petitioners. Although 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. Indeed, the Ninth Circuit repeatedly made clear that it did not distinguish, for purposes of Takings Clause analysis, between IOLTA programs that apply only to attorney trust funds and Washington's more expansive

IOLTA program. *See, e.g.,* App. 25a (*Phillips'*s analysis of Takings Clause issues under the Texas IOLTA program is fully applicable to Petitioners' real estate escrow funds), App. 33a.

Moreover, the Ninth Circuit made no effort to distinguish the Fifth Circuit's *TEAJF* decision on those or any other grounds. The Ninth Circuit explicitly disagreed with *TEAJF*'s conclusion that the Texas IOLTA program was subject to a *per se* takings analysis:

> [G]iven the monetary nature of the property in question, the public nature of the IOLTA program, and the highly regulated nature of the banking industry, we believe that the better approach [than the Fifth Circuit's "*per se* method of analysis"] is that of *Penn Central.*

App. 31a.

The Ninth Circuit's conclusion -- after examining the Washington IOLTA program using a *Penn Central* analysis -- that the program does not constitute a taking, App. 40a-41a, is also in direct conflict with *TEAJF.* Given the Fifth Circuit's conclusion that *per se* takings analysis was applicable, there was no need for it to undertake an explicit *Penn Central* analysis. *See TEAJF,* 270 F.3d at 186-188. Nonetheless, the Fifth Circuit clearly believed that the Texas IOLTA program effected an uncompensated taking of private property regardless whether it was examined using a *per se* or *Penn*

Central analysis, because every *per se* taking would necessarily be a taking if analyzed under *Penn Central*.[6]

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[6] As the Court explained in *Lucas*, government action generally is deemed a *per se* taking in two situations: (1) where the government confiscates or physically invades private property; or (2) where regulation denies all economically beneficial or productive use of land. *Lucas,* 505 U.S. at 1015. In such cases, "'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative." *Loretto,* 458 U.S. at 426. In other words, there is no need to go through a full-fledged *Penn Central* analysis in such cases; but even if one did so, one would still conclude that the government action effected a Fifth Amendment taking because one of the three principal factors examined in any *Penn Central* analysis (the "character of the government action" factor) would point so strongly in the direction of finding a taking. It follows from the rationale of *Lucas* and *Loretto* that every *per se* taking is also a taking when analyzed under *Penn Central.*

In undertaking its *Penn Central* analysis and addressing the "character of government action," the Ninth Circuit determined that Washington's confiscation of Petitioners' property could best be viewed "as a regulation of the uses of Brown's and Hayes's property, consisting of the principal and interest in aggregation." App. 39a. That peculiar characterization of Washington's actions (deeming confiscation of property to be no more than a form of "regulation") threatens to transform *Penn Central* analysis into the toothless check on government powers that some critics already contend that it is. The Court has expressed an interest in "restor[ing] balance to [the *Penn Central*] inquiry." *Palazzolo v. United States*, 121 S. Ct. 2448, 2467 (2001) (O'Connor, J., concurring). Petitioners submit that, should the Court ultimately determine that IOLTA programs should be examined under the *Penn Central* framework, this case would provide an ideal occasion to restore balance to the *Penn Central* analysis by making clear that government confiscation of property should not be characterized as mere "regulation" of the property.

Finally, the Ninth Circuit's holding that Petitioners suffered no compensable loss (and thus that there was no Fifth Amendment violation even if the IOLTA program constituted a taking of their property) is also in direct conflict with *TEAJF*. The Ninth Circuit based its "no compensable loss" finding on its conclusion that Petitioners were no worse off than if, hypothetically, they had been permitted to keep their funds out of the IOLTA program. App. 44a. In contrast, the Fifth Circuit in *TEAJF* assumed for the sake of argument that the plaintiffs could not have benefitted financially by opting out of the Texas IOLTA Program, *TEAJF,* 270 F.3d at 189 n.10; but it nonetheless concluded both that a Fifth Amendment taking of the plaintiffs' property had occurred and that the taking amounted to a loss that entitled plaintiffs to injunctive and declaratory relief. *Id.* at 189-194.

The defendants in *TEAJF* filed a motion for rehearing *en banc* on October 26, 2001, and the Fifth Circuit has not yet ruled on the motion. Nonetheless, the conflict between the Fifth and Ninth Circuit is not made any less stark by the pendency of that motion. Unless the Court grants review in this case, attorneys and bar authorities across the country will continue to be in a quandary regarding whether IOLTA programs violate the Fifth Amendment.[7] At most, the pendency of the motion for rehearing *en banc* suggests that

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[7] Not surprisingly, given the conflicting Fifth and Ninth Circuit decisions, the constitutionality of IOLTA programs has become a hotly debated topic in States throughout the country. For example, a Fifth Amendment challenge to the Massachusetts IOLTA program was recently filed in federal district court in Massachusetts. *See Citizens for the Preservation of Constitutional Rights, Inc. v. Marshall*, No. 02-cv-10125MLW (D. Mass., filed Jan. 23, 2002).

the Court may wish to defer consideration of this Petition until the Fifth Circuit rules on the motion.

B. The Ninth Circuit's Decision That No Taking Occurred Is Inconsistent with the Decisions of This Court

Review is warranted for the additional reason that the Ninth Circuit's decision that no compensable taking occurred is plainly inconsistent with this Court's decisions. The court below was unable to point to a single decision of this Court for the proposition that the government may confiscate private property with a readily ascertainable value and yet not be required to pay compensation to the owners of that property.

The court below viewed as decisive its factual finding that Petitioners could not have derived any financial benefit from opting out of the IOLTA program. That ruling cannot be squared with *Phillips,* which is replete with language indicating that establishing a Takings Clause claim is not dependent on a showing that the plaintiff could benefit by opting out.[8] Although noting that "[w]hether client funds

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[8] Indeed, the Question Presented in *Phillips,* as reframed by the Court, stated:

> Is interest earned on client trust funds held by lawyers in IOLTA accounts a property interest of the client or lawyer, cognizable under the Fifth Amendment of the United States Constitution, despite the fundamental precept of IOLTA that such funds, absent the IOLTA program, could *not* earn interest for the client or lawyer.

(continued…)

held in IOLTA accounts could generate net interest is a matter of some dispute," *Phillips* stated that that dispute was not relevant to its determination. *Phillips,* 524 U.S. at 169. The Court explained:

> We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), we held that a property right was taken even when infringement of that right arguable *increased* the market value of the property at issue. *Id.* at 437 n.15.

Id. at 169-70. If the infringement in *Loretto* was found to be a taking despite evidence that the infringement *increased* the value of the property at issue, then surely Petitioners' takings claims cannot be defeated by a factual finding that they could not have generated net interest on their funds in the absence of the IOLTA program.

The decision below is also inconsistent with *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155 (1980), a case whose fact pattern is remarkably similar to *Phillips* and this case. *Webb's* involved interest earned on funds being held in a Florida court registry in connection with an insolvency proceeding. The court deposited the funds in an interest-bearing account and attempted to keep the interest for itself. This Court held that the Florida court violated the Takings Clause by failing to distribute the interest to those later adjudged to have valid claims to the funds in the court

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[8](...continued)
521 U.S. 1117 (1997) (emphasis added).

registry. *Webb's*, 449 U.S. at 162. *Webb's*' conclusion that Florida's expropriation of money without compensation violated the Takings Clause cannot meaningfully be distinguished from this case. *Webb's* held that the claimants (200 putative creditors of an insolvent company) were entitled to compensation under the Takings Clause for the interest earned on their funds, even though the claimants had no way of earning interest on their own -- as *Webb's* recognized, Florida would have been within its rights to have kept the funds in a non-interest-bearing account and thus earned no interest. *Id.* The court below did not attempt to explain how its decision that no taking had occurred and no compensation was required could be squared with *Webb's*.

In support of its position, the Ninth Circuit relied on *United States v. Sperry Corp.,* 493 U.S. 52 (1989). App. 27a. But as *TEAJF,* the Ninth Circuit panel, and Judge Kozinski's dissent all pointed out, *Sperry* provides no support for the Ninth Circuit's distinction between government confiscation of real and personal property. *TEAJF*, 270 F.3d at 187 (*Sperry* bars application of *per se* analysis only in cases in which the government is imposing a fee for services rendered); App. 49a-50a; App. 74a-75a. Indeed, this Court held in *Phillips* that *Sperry* is inapplicable in Takings Clause cases where, as here, the government does not contend that its confiscation of money is designed to ensure payment for services rendered:

> Our holding does not prohibit a State from imposing reasonable fees it incurs in generating and allocating interest income. *See* [*Webb's*, 449 U.S.] at 162; cf. *United States v. Sperry Corp.,* 493 U.S. 52, 60 (1989) (upholding the imposition of a "reasonable 'user fee'"

> on those utilizing the Iran-United States Claims Tribunal). But here the State does not, indeed cannot, argue that its confiscation of respondents' interest income amounts to a fee for services performed.

Phillips, 524 U.S. at 171.

The Ninth Circuit's holding that Petitioners are not entitled to any compensation for the expropriation of their money is also at odds with numerous decisions of this Court. *See, e.g., Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155, 164 (1980); *United States v. Pewee Coal Co.,* 341 U.S. 114, 118 (1951) (plurality opinion). In support of its holding, the court below cited a series of cases in which this Court has considered how to compute the value of property taken by the government. App. 41a-45a. These cases have held that where the value of the property taken is subject to question (as will often be true of real property), compensation is to be based on the loss suffered by the property owner, not the benefit derived by the government. *See, e.g., Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). But that line of cases has no relevance here, where the property taken is money and thus has a readily ascertainable value. In addition, as the Court noted in *Phillips*, "valuable rights . . . inhere in . . . property," and such rights are protected under the Takings Clause even if the owner could not realize income from the exercise of those rights. *Phillips,* 524 U.S. at 170.

In short, the decision below is wrong and is at odds in almost every conceivable way not only with the Fifth Circuit's *TEAJF* decision but also with numerous decisions of this Court. This Court's review is necessary.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER EQUITABLE RELIEF IS AVAILABLE IN CERTAIN TAKINGS CASES

A. There is a Split in the Circuits Over the Availability of Equitable Relief for Governmental Takings that Result From Compelled Transfers of Money

The *en banc* court below held that "prospective injunctive relief is an inappropriate remedy" in this case, and thus that WLF lacked standing to pursue claims for declaratory and injunctive relief. App. 17a-19a.[9] The court held that WLF could not seek to enjoin the IOLTA program on behalf of its members because the only "appropriate relief" was the determination of just compensation, which "necessarily require[d] the participation of the individual members . . . ." App. 19a.

While acknowledging that "equitable relief may be available under other circumstances in a takings case," the Ninth Circuit briskly dismissed the appropriateness of such relief here with the unexplained citation of two cases.[10] The

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[9] The court similarly found that Petitioners Daugs and Maxwell lack standing because they have no claim for (and are not seeking) monetary relief, the only form of relief (in the court's view) available in Takings Clause claims of this sort. App. 15a-17a.

[10]The citations to this Court's decision in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) and to *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992), do not suggest a reason for denying access to (continued...)

court neither defined the circumstances in which such relief is available nor engaged in any detailed analysis of whether, in this case, compensation would adequately remedy the alleged violation of Fifth Amendment rights. *See Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1016 (1984).

The Ninth Circuit's determination that equitable relief is not an appropriate remedy in this case is in direct conflict with the Fifth Circuit's decision in *TEAJF*. There, in a similar challenge to the Texas IOLTA program, the court held that equitable relief was the most appropriate remedy because "the very purpose of the program would be thwarted" if the program were allowed to continue but then Texas were required to provide compensation. *TEAJF*, 270 F.3d at 194. The Fifth Circuit cited this Court's plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), in support of its conclusion that the plaintiffs could seek equitable relief; it held that Texas could not possibly have intended, if its IOLTA program were later determined to violate the Fifth Amendment, to continue to collect funds that would then immediately be refunded as Takings Clause

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[10](...continued)
equitable relief here. *Duke Power* involved a challenge to a statute in a case where, as this Court held, declaratory relief was certainly proper given the inadequacy of the statutory damage remedy available. In *Transohio*, the D.C. Circuit held that plaintiffs had no property interest to be "taken" by the government, *id*. at 613, and stated in dicta that "injunctive relief [is available] in the few cases where a Claims Court remedy is so inadequate that the plaintiff would not be justly compensated." *Id*. (quotations omitted). This cursory and opaque treatment of the issue by the Ninth Circuit ignored substantial reasons, apparent from this Court's cases and discussed below, for finding that equitable relief is available in cases such as this one.

compensation: "because the purpose of IOLTA is to take the interest generated from client-funds and use it to fund legal services for the indigent, it is obvious that the program makes no provision for payment of just compensation." *Id.*

The Ninth Circuit's decision also conflicts with the decisions of two other circuits that equitable relief is available in cases where the legislative scheme at issue requires a direct transfer of money. In *In re Chateauguay Corp.*, 53 F.3d 478 (2d Cir. 1995), the Second Circuit held that it had jurisdiction over claims for equitable relief in a challenge to the Coal Industry Retiree Health Benefit Act which required former coal companies to contribute to healthcare plans for retired miners. The court drew a distinction between statutes which burden real or tangible property, and "those requiring direct transfers of money to the government." *Id.* at 493. "We hold that where the challenged statute requires a person or entity to pay money to the government, it must be presumed that Congress had no intention of providing compensation for the deprivation through the Tucker Act. Common sense dictates such a presumption." *Id.*

In *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 402 (D.C. Cir. 1997), the D.C. Circuit followed the reasoning of *Chateauguay* and held that equitable relief was available "in cases involving straightforward mandates of cash payment to the government." It found that although suits for compensation under the Tucker Act may be an appropriate remedy where the government has taken property, district courts retain equitable jurisdiction to remedy takings involving "'direct transfers of money to the government.'" *Id.* (citations omitted).

Accordingly, there is a split in the Circuits, between the Fifth, Second and D.C. Circuits, on one hand, and the Ninth Circuit, on the other, on whether equitable relief is available for governmental takings involving the direct transfer of money. Given the recurring nature of this issue, this Court should grant certiorari to ensure that citizens of all States enjoy the same remedial rights with regard to governmental takings of money.

B. The Decision Below is Contrary to the Decisions of this Court, Which Recognize the Availability of Equitable Relief in the Absence of a Reasonable, Certain and Adequate Damage Remedy

The decision below is wrong, because it fails to heed this Court's directive that equitable relief is appropriate in takings cases where there is no "reasonable, certain and adequate provision for obtaining compensation" from the government. *Cherokee Nation v. S. Kansas R. Co.*, 135 U.S. 641, 659 (1890). This principle has sometimes led to the denial of any equitable relief where an adequate remedy to secure compensation existed. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984); *Presault v. Interstate Commerce Comm.*, 494 U.S. 1, 13 (1990). However, it has also led this Court to make clear that equitable relief is available where compensation is uncertain, inadequate, or entirely unavailable, in view of all of the circumstances.

For example, in *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978), plaintiffs challenged the Price Anderson Act on the grounds that "in the event of a nuclear accident their property would be 'taken' without any assurance of just compensation." *Id.* at 69. This Court found that it had jurisdiction over claims for declaratory relief brought "before potentially uncompensated damages are sustained" because "the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking . . . ." *Id.* at 71 n.15. Although *Duke Power* clearly presents a dramatic case for equitable relief, this Court has not limited equitable relief to the unique circumstance of potential danger from a nuclear accident.

Like the Second, Fifth, and D.C. Circuits, this Court has also granted equitable relief in cases involving statutory schemes requiring the direct transfer of the property-owners' money. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court reviewed a Florida statute which permitted the clerk of the court to retain interest accrued on funds of private persons held in interpleader accounts. Describing its task as the determination of "whether the second exaction by Seminole County amounted to a 'taking' -- it was obviously uncompensated -- within the Amendment's proscription," *id.* at 160, the Court struck the statute down as unconstitutional.[11]

The Court's reasoning in allowing declaratory and/or injunctive relief in takings cases involving monetary transfers

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[11] Similarly, in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1985), and *Concrete Pipe and Products v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993), two cases dealing with contributions mandated by the Multiemployer Pension Plan Amendments Act, the Court appeared to proceed on the premise that equitable relief was available to remedy any taking, when it asserted jurisdiction over the claims for injunctive and declaratory relief. In both cases, the Court ultimately found no unconstitutional taking.

was made explicit by the plurality opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Eastern sought a declaratory judgment finding the Coal Act's requirement that certain coal companies fund health plans for retired miners violated the Constitution. The plurality found that equitable relief was available because a suit for compensation was not:

> In cases such as this one, it cannot be said that monetary relief against the Government is an available remedy. . . . Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act, for '[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.' *In re Chateauguay Corp.*, 53 F.3d at 493. . . . In that situation, a claim for compensation 'would entail an utterly pointless set of activities.' *Student Loan Marketing Assn. v. Riley*, 104 F.3d 397, 401 (C.A. D.C. 1997).

Id. at 521. The plurality held that equitable relief was appropriate under the circumstances. *Id.* at 522.

The rationale of *Eastern Enterprises*, under which damages are an inadequate remedy and injunctive relief is appropriate when a government program takes money outright to support governmental objectives, is directly applicable here. The Fifth Circuit was correct in concluding that the IOLTA program "makes no provision for payment of just compensation." *TEAJF*, 270 F.3d at 194. Indeed, "[i]f the interest earned on client-funds were available as just compensation for the clients, the very purpose of the program would be thwarted; therefore, it would defy logic, to say the least, to presume the availability of a just compensation remedy." *Id.* Equitable relief is thus appropriate in this case where the IOLTA program effects a direct transfer of the property-owners' interest.

No reasonable, certain and adequate compensation remedy exists here for the additional reason that the amount at issue is so minimal as to make a legal action for damages impractical. In that situation, the only effective remedy for such a pattern of governmental conduct is invalidation of the practice in issue. This Court appears to have recognized that fact in *Babbitt v. Youpee*, 519 U.S. 234, 245 (1997), where the Court granted declaratory relief and struck down the Indian Land Consolidation Act, which eliminated the ability of tribe members to pass fractional interests in property upon their deaths, mandating that the fractional interests would pass instead to the tribe. The statute specifically targeted small fractional interests -- those that constituted less than 2% of the total acreage of the parcel and that were incapable of earning more than $100 in a year, *id.* at 240-41 -- and it appears that because these interests were so small, individual tribe members could not practicably sue to recover compensation for the value of the land thus taken. In that circumstance, the Court did not require each member of the tribe to seek compensation; it granted equitable relief to enjoin the takings in the first place.

The same reasoning applies here. Under IOLTA, the government confiscates small amounts of interest -- amounts so small that the costs of litigation will often, if not always, exceed the amount of any individual recovery. In such a case, it is likewise fair to conclude that no damage remedy is practicably available, and equitable relief must be available to prevent government action amounting to a systematic and deliberate taking.

Other circumstances can be imagined which justify the conclusion that an equitable remedy must be available for a constitutional taking.[12] Contrary to the suggestion of the court below, the range of such situations is neither mysterious nor extraordinarily narrow. It is rather simply those cases in which it can fairly be said, under all the circumstances, that there is no reasonable, certain and adequate compensation remedy available to takings claimants. This Court should grant certiorari to clarify that equitable relief is certainly available on the facts presented here, and thus that all Petitioners should be permitted to go forward with their Fifth Amendment claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] For example, a state actor's failure to waive sovereign immunity or immunity from federal court suit under the Eleventh Amendment, may be one such circumstance rendering suits for compensation either unavailable or impractical. In this regard, Petitioners note that Respondents raised the Eleventh Amendment as an affirmative defense in their answer to the complaint, and they have never explicitly waived that defense.

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