

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 00-50139

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS,
and MICHAEL J. MAZZONE,

Plaintiffs-Appellants,

v.

TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION; RICHARD TATE,
in his official capacity as Chairman of the Texas Equal Access to Justice
Foundation; THOMAS R. PHILLIPS, Chief Justice, NATHAN R. HECHT,
Justice, CRAIG T. ENOCH, Justice, PRISCILLA R. OWENS, Justice
JAMES A. BAKER, Justice, GREG ABBOTT, Justice, DEBORAH G. HANKINSON,
Justice, HARRIET O'NEILL, Justice, and ALBERTO R. GONZALES, Justice,
in their official capacities as Justices of the Supreme Court of Texas,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION**

**BRIEF OF APPELLEES TEXAS EQUAL ACCESS TO
JUSTICE FOUNDATION AND ITS CHAIRMAN**

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CERTIFICATE OF INTERESTED PERSONS

Washington Legal Found., et al. v. Texas Equal Access to Justice Found., et al., No. 00-50139

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Appellants: Washington Legal Foundation
William R. Summers
Michael J. Mazzone

The Washington Legal Foundation is a nonprofit corporation organized under 501(c)(3) of the Internal Revenue Code. It has no parent corporations and no stock owned by a publicly held corporation.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees respectfully request oral argument. The case has previously been before a panel of this Court and the U.S. Supreme Court. It involves a substantial factual record and questions of constitutional law. Appellees believe that oral argument will allow them to respond to the numerous points that may be of concern to panel members. In view of pre-existing commitments and to the extent it fits the Court's own schedule, counsel would respectfully request that argument not be set for early September.

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ISSUES PRESENTED FOR REVIEW

(1) Whether, in light of the detailed factual record developed below, which established that Appellants have suffered no financial loss whatsoever, the District Court correctly ruled that the Texas Interest on Lawyers Trust Account (“IOLTA”) program does not violate the Just Compensation Clause of the Fifth Amendment.

(2) Whether, in light of the detailed factual record developed below, which established that Appellants are not compelled to make any actual financial contribution and are not associated with any ideological or political message, the District Court correctly ruled that the Texas IOLTA program does not violate Appellants’ First Amendment rights.

(3) Whether the District Court correctly ruled that Appellants’ claims against the Justices of Texas Supreme Court are barred by the doctrine of legislative immunity.

STATEMENT OF THE CASE

This case involves a constitutional challenge to the Texas IOLTA Program. Appellants Washington Legal Foundation (“WLF”), William Summers (“Summers”), and Michael J. Mazzone (“Mazzone”) filed suit against the Texas IOLTA program on February 7, 1994 in the United States District Court for the Western District of Texas. The suit named Texas Equal Access to Justice Foundation (“TEAJF”), which operates the program; its then-Chairman, W. Frank Newton, in his official capacity only; and the then-serving nine Justices of the Supreme Court of Texas, in their official capacities only (the “Justices”), as Defendants.

On January 19, 1995, the District Court granted summary judgment, finding that Appellants could not satisfy the first requirement of a Fifth Amendment challenge, namely, a showing of a property right in the interest generated by the IOLTA funds. Record on Appeal (“R.A.”) at 962. The court held that in the absence of such property rights, Appellants could not state a claim under either the Fifth or First Amendments. *Id.*

On September 12, 1996, this Court reversed the grant of summary judgment and remanded the case to the District Court for further proceedings. R.A. at 998. This Court declined to determine whether IOLTA violated Appellants’ constitutional rights, but affirmed the dismissal of Appellants’ claim for a refund of money paid to TEAJF, holding that TEAJF is an arm of the State of Texas entitled to Eleventh Amendment immunity. *Id.* 1000, 1004. The Court denied TEAJF’s Petition for rehearing *en banc*.

The Supreme Court granted *certiorari*, but limited the Question Presented to whether “interest earned on client trust funds held by lawyers in IOLTA accounts [is] a property interest of the client or lawyer, cognizable under the Fifth Amendment.” On June 15, 1998, the Supreme Court affirmed the opinion of this Court, holding that interest paid on IOLTA accounts in Texas belongs to the owner of the principal. *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). Like this Court, the Supreme Court expressly declined to reach the issue of whether the IOLTA program constitutes a taking that requires compensation under the Fifth Amendment. *Id.* Instead, the Supreme Court remanded the case for further proceedings. *Id.* Four dissenting Justices, who wrote that they would have found no possible property interest, expressed doubts as to the Plaintiffs’ ability to satisfy the other prongs of a takings challenge.

The case came before United States District Chief Judge James Nowlin for a non-jury trial on September 22-23, 1999. On January 4, 2000, Judge Nowlin issued an order granting the Justices’ motion for judgment on the pleadings, on the ground that the Justices were legislatively immune from suit. Record Excerpts (“R.E.”) 3. On January 28, 2000, Judge Nowlin issued a Memorandum Opinion and Order dismissing all remaining claims, and holding that the IOLTA Program does not violate the Fifth or First Amendments. R.E. 4. Appellants appealed from both the January 4 and the January 28 orders.

STATEMENT OF FACTS

Two key facts found by the District Court are dispositive of this case. First, given the legal and practical limitations on earning interest for small retainers outside of the IOLTA program, Summers (the only client with a deposit at issue) admits that he has not suffered any financial loss as the result of any purported “taking” of his property by the state of Texas. Second, because IOLTA funds legal services, rather than specific causes, Summers has not been forced to contribute even one penny to any specific ideological or political cause to which he objects.

I. THE HISTORY AND DEVELOPMENT OF THE TEXAS IOLTA PROGRAM

For as long as law has been practiced, lawyers and clients have found it desirable, for a variety of reasons, to place money in which the client retains an interest under the lawyer’s control. The deposit of client money in an attorney’s trust account, however, also creates the opportunity for an attorney to abuse a client’s trust. Transcript of Trial (“Tr.”) at 217-18. Absent an agreement with the client, rules of professional conduct have always required client funds to be kept in separate accounts from the lawyer’s funds so detailed records can be kept of such accounts and so client funds are available on demand. TEX. DISCIPLINARY R. PROF. CONDUCT 1.14. Moreover, ethical rules have always prohibited attorneys from benefiting in any way from client’s funds. *Id.* To satisfy these requirements, attorneys have historically aggregated client funds into demand deposit “trust accounts” in their law firms’ names. Since federal banking law did not permit the payment of interest on demand-

deposit accounts (i.e., checking accounts), neither lawyers nor their clients received interest income from such deposits. Only the financial institution benefited from the deposit. R.E. 4 at 3.

II. CHANGES IN FEDERAL BANKING LAW MAKE IOLTA POSSIBLE

In 1980, Congress authorized, with some significant limitations, Negotiable Order of Withdrawal (“NOW”) accounts, permitting banks to pay interest on demand deposits. 12 U.S.C. § 1832. Lawyers were then able to deposit client funds into interest-bearing checking accounts, while simultaneously satisfying the ethical requirement that client trust funds be available on demand. Indeed, as fiduciaries, lawyers were obligated to deposit these funds into interest-bearing accounts if they were capable of generating interest income in excess of the cost of maintaining the account. Tr. at 217-18.

However, even with NOW accounts available, lawyers still receive some funds incapable of earning interest for the client. Client funds are often simply too small in amount or are likely to be held for too short a time to earn interest in excess of the costs associated with opening and maintaining an account. Further, NOW account rules allow only individuals or not-for-profit institutions to earn interest on a demand deposit. Corporate and partnership funds are ineligible. 12 U.S.C. § 1832(a)(2).

Since the banking amendments were passed, all 50 states have adopted ethical rules permitting or requiring attorneys to maintain aggregated, interest-bearing trust accounts for the safekeeping of client funds that are, in the lawyer’s judgment,

ineligible for or incapable of generating net interest for the client. These accounts, known as IOLTA accounts, generate revenue for non-profit foundations designated by law to provide legal services to the needy. The Texas IOLTA program is, like others nation-wide, able to generate interest because it aggregates otherwise fallow funds, reduces accounting expenses, and, most importantly, because many banks, which otherwise would benefit from the “float,” voluntarily participate in the IOLTA Program. In Texas, TEAJF is the designated non-profit foundation that receives and distributes the interest to various grantees. TEX. STATE BAR R., Art XI, §§ 3, 4; TEXAS R. EQUAL ACCESS 9(a), 10.

The Texas IOLTA rules call for attorneys to establish interest-bearing accounts for the client if an opportunity is available for the client to generate net interest in such an account. R.E. 4 at 4.; Rule 6; Tr. at 170, 173-74, 220. Recent rule revisions make clear that Texas lawyers should consider any lawful method by which clients could financially benefit from a trust deposit, including pooled accounts. R.E. 4 at 4; Tr. at 222. To the extent a lawyer is willing to shoulder the costs associated with IOLTA alternatives without passing them onto the client, the lawyer need not consider such costs in its net interest equation. Tr. at 222-23; R.E. 8 at 5.

In order to further safeguard a client’s entitlement to any income generated by his or her funds, the Texas IOLTA Rules mandate that an attorney review, at reasonable intervals, whether changed circumstances require client funds be

removed from an IOLTA account. Tr. at 177, 224. Finally, where an attorney determines that funds were incorrectly placed into an IOLTA account, he or she may seek a refund of any interest earned. TEAJF routinely grants such refunds. Tr. at 224.

Nationwide, IOLTA programs generate more than \$139 million annually, helping to provide basic legal services to an estimated 1,700,000 people. The Texas IOLTA Program currently generates approximately \$5 million annually.

SUMMARY OF THE ARGUMENT

One key fact, conclusively established after a full trial on the merits, disposes of Appellants' Fifth Amendment argument: Appellants simply cannot show any financial loss. Even if the interest on Summer's retainer is his property under *Phillips*, Appellants cannot prove a taking of property or a requirement of just compensation due under the Just Compensation Clause. Appellants' failure to prove either a taking or entitlement to compensation is fatal to their Fifth Amendment claim.

Appellants' First Amendment claim, which they all but abandoned at trial and which receives only passing attention at the end of their Brief, is defeated by Appellants' concession that they are not in any manner associated with any speech funded by the Texas IOLTA Program. Further, Appellants also have failed to demonstrate that Summers, the only Appellant still clinging to a First Amendment argument, has been compelled to make any financial contribution to any specific ideological or political message in violation of the First Amendment.

As a result, Appellants' claims should be rejected in their entirety. This Court should affirm the judgment of the District Court dismissing Plaintiffs' claims and conclude that the operation of the Texas IOLTA Program does not violate the Fifth or First Amendments.

ARGUMENT

I. THE STANDARD OF REVIEW

Upon remand by this Court and the Supreme Court for factual determinations, this case was tried before Judge Nowlin. Appellants, as Plaintiffs, had the burden of proving the two claims they pleaded. A takings claim under the Fifth Amendment requires, at a bare minimum, some evidence of loss. Likewise, a First Amendment claim for compelled speech requires at least some evidence of an actual contribution to specific ideological or political speech. Judge Nowlin correctly concluded that Appellants had failed to meet their burden on either claim.

Appellants cannot now retry the case outside of the record, much as they might wish (and indeed attempt). This is an appeal from an adverse judgment after full discovery and a trial on the merits. Under Federal Rule 52(a), factual issues are reviewed only for clear error. The Supreme Court has described this standard as requiring affirmance wherever the "district court's account of the evidence is plausible in light of the record viewed in its entirety." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). The Seventh Circuit, in a formulation later adopted in this Circuit, put it more colorfully: "[t]o be clearly erroneous, a decision must strike us as

more than just maybe or probably wrong; it must . . . strike as wrong with the force of a five-week-old unrefrigerated dead fish. To be clearly erroneous, the . . . decision must be dead wrong.” *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988). *See City Pub. Serv. Bd. v. General Elec. Co.*, 935 F.2d 78, 82 (5th Cir. 1991). Only the law is reviewed *de novo*.

II. THE COURT SHOULD NOTE THE SPECIFIC FACTS RELATING TO APPELLANTS’ CLAIMS

While Appellants now seek to portray the Fifth and First Amendment issues in a factual vacuum, with relation to no one in particular, it is important to begin by noting the parties and their claims. This is not a class action case. Indeed, in the years that this case has been pending, no Texas client, apart from Summers, has joined this litigation. Instead, Summers is joined only by his lawyer, Mazzone, and the Washington Legal Foundation.

Mazzone obtained Summers’ initial deposit in connection with a lawsuit against Summers and a closely held corporation he managed. Tr. at 41. Summers gave Mazzone’s firm a check drawn on the account of another corporation in which he held a 60% interest. Tr. at 125. The billing records at Mazzone’s firm credited the deposit to the corporate defendant. Tr. at 78-79. Importantly, federal law has always forbidden corporate money from being deposited into interest bearing demand accounts. *See* 12 U.S.C. §1832. Thus, even without IOLTA these funds would have

been ineligible for deposit into an interest-bearing demand account if any corporation had a beneficial interest in them.

At the time he took the retainer, Mazzone did not tell his client, Summers, that the deposit would go into an IOLTA account or offer any alternative. Tr. at 89-90. Shortly before this suit was filed, Mazzone requested that his firm change its billing records to reflect the retainer deposit as coming from Summers personally, and not his corporation. Tr. at 82-84. Moreover, even when the suit for which this rather unusual retainer had been given came to an end and Mazzone's firm had been paid, Mazzone did not return the funds to Summers but decided to keep them indefinitely, purportedly in connection with other litigation against Summers. Tr. at 58. Summers had no understanding of IOLTA and did not know (even at the time of the trial) what the exact uses for the IOLTA funds were. Tr. at 132. Mazzone only told Summers that the retainer was in an IOLTA account at the time he recruited Summers as a co-plaintiff in this litigation. Tr. at 89-90.

These funds remained on deposit in Mazzone's IOLTA account until just prior to trial, despite the conclusion of the litigation for which they had been given more than four years earlier. Tr. at 58. At no point did Mazzone contact TEAJF to claim that the funds were deposited in error or to otherwise request a refund for Summers. Tr. at 93, 132. In the weeks leading up to the trial of this case, Mazzone took another retainer from Summers. Tr. at 97. Mazzone explained that Summers might one day

buy a house and that in addition to his normal litigation practice, it was not at all unusual for him to represent clients who might buy homes. Tr. at 97-99.

Mazzone and the Washington Legal Foundation are the other Appellants here. Mazzone made clear at the trial that he asserts no claim of his own. Tr. at 66. Instead, he appears only as a purported fiduciary of Summers. *Id.* With regard to Washington Legal Foundation, apart from evidence showing that Summers became a member shortly before this suit was filed, there is no evidence of any other member ever having been denied any income or property in Texas. Indeed, there is no evidence that it has any members in Texas. Nor is there evidence that Washington Legal Foundation itself has ever made a deposit affected by IOLTA. Accordingly, only Appellant Summers presents any justiciable claims.¹ His claims fail.

III. THE DISTRICT COURT CORRECTLY RULED THAT THERE IS NO FIFTH AMENDMENT VIOLATION BECAUSE SUMMERS FAILED TO PROVE THAT THE TEXAS IOLTA PROGRAM DEPRIVED HIM OF PROPERTY AND DENIED HIM JUST COMPENSATION

The District Court's ruling that no Fifth Amendment taking occurred should be affirmed. The Court's detailed and well-supported factual findings demonstrate that Appellant Summers suffered no financial loss as a result of IOLTA. The law applicable to this claim is quite clear: without a financial loss there is no taking, no requirement of just compensation and, therefore, no Fifth Amendment violation.

¹ "It is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such a fashion as to comply with laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

A. Summers Was Obligated to Prove Both a Deprivation and a Denial of Just Compensation

In order to prevail on a Fifth Amendment takings claim, a plaintiff must demonstrate that he not only (1) possesses a protected property interest; but that (2) the government has “taken” his property; and (3) denied him just compensation. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 315 (1987); *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). The Supreme Court remanded the case for a determination as to the second and third prongs.

In order to establish a taking under the second prong of this analysis, Summers was required to prove three elements at trial: (1) the Texas IOLTA Program created a substantial economic impact on him; (2) the IOLTA Program interfered with reasonable investment-backed expectations; and (3) the nature of the IOLTA Program did not justify the injury. *Penn Cent. Transp. v. City of New York*, 438 U.S. 104 (1978). Summers’ inability to show any economic loss whatsoever conclusively negates the economic impact and interference elements. Moreover, the nature of the Texas IOLTA Program, which provides low-income citizens with access to the Texas justice system further undermines Summers’ claim. Summers simply did not prove a taking at trial, and this Court should affirm the judgment.

Summers also failed to prove that any just compensation was due. The amount of gain to the Texas IOLTA Program is irrelevant to the inquiry of just compensation;

instead, Summers must prove his own measurable loss. *Marion & Rye Valley R. v. United States*, 270 U.S. 280, 282 (1926). Again, Summers did not establish any entitlement to just compensation because he failed to demonstrate any loss. “Only takings without just compensation infringe the [Fifth] Amendment.” *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 1665 (1997).

Summers argues that because the Supreme Court concluded that clients possess a property interest in the interest generated by IOLTA deposits, the use of that interest automatically constitutes an unconstitutional taking. This argument is belied by the remands to the District Court (required by both this Court and the Supreme Court) for a fact-based determination as to whether a compensable taking occurred. As evidenced by the District Court’s opinion, Appellants have not satisfied the second or third elements of the three-part “takings” test. And, although the District Court did not reach the issue, Summers also failed the first prong — he did not show that he owned the principal. The IOLTA accounts at issue are both general accounts. When money is deposited into a general account, the depositor relinquishes all title to the funds. The relationship becomes one of debtor and creditor, with the financial institution as debtor. *Hudnall v. Tyler Bank & Trust Co.*, 458 S.W.2d 83, 186 (Tex. 1970); *Bandy v. First State Bank of Overton*, 835 S.W.2d 609, 618-19 n.4 (Tex. 1992); *Marine Bank v. Fulton Bank*, 69 U.S. 252, 256 (1864); *Citizens Bank of Maryland v. Strumpf*, 116 S.Ct. 286, 290 (1995). The evidence at trial showing that the IOLTA accounts at issue are general accounts, conclusively established that the bank, and not

Summers, owned the principal, and therefore, under the Supreme Court’s analysis, also owned the interest.²

Any doubts concerning whether Summers automatically prevails by having defeated the earlier summary judgment are eliminated by reviewing the Court’s opinion. *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). The majority emphasized that its holding was limited to the initial question of whether a property interest existed, stating: “[W]e express no view as to whether these funds have been ‘taken’ by the State; nor do we express an opinion as the amount of ‘just compensation’ if any, due to the respondents.” *Id.* In so doing, the majority recognized that the interest at issue “may have no economically realizable value to its owner.” *Id.* at 1933. The four dissenting Justices in *Phillips* also emphasized the limited nature of the majority’s holding, noting that “three distinct issues are implicated by a takings claim: whether the interest asserted by the Appellant is property, whether the government has taken that property, and whether the Appellant has been denied just compensation for the taking.” *Id.* at 1934 (Souter, J., dissenting). *Id.* The dissenting Justices went a step further in their analysis, predicting that a proper application of the Just Compensation Clause “would not bode well” for Summers. *Id.* Thus all nine Supreme Court Justices envisioned on

² See TEAJF’s Motion to Certify Question to Texas Supreme Court filed herewith (challenging the conclusion that Summers owned the principal here in light of well-established Texas state law regarding the formation of general accounts in which the bank takes title to the funds and the depositor is left with mere contractual right to return of the funds).

remand the type of rigorous factual analysis undertaken by Judge Nowlin, with the outcome to be determined by the factual record presented by the parties.³

B. The Penn Central “Ad Hoc” Analysis is Applicable to this Case

With the factual record now complete, it is clear, under a proper application of Fifth Amendment Takings analysis, that there has been no “taking” of Summers’ “property” for which “just compensation” is owed. At the outset, it is important to note that the takings analysis is influenced by the type of property affected. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). At the apex are interests in real property. *Id.* Interests in personal property are less rigorously protected from governmental action. *Id.* at 1027-28. Finally, interests in future income potential lie at the bottom of the Fifth Amendment’s property hierarchy. *Andrus v. Allard*, 444 U.S. 566 (1979).

The District Court properly applied the Supreme Court’s “ad hoc, factual” takings inquiry articulated in *Penn Central*. Appellants eschew this standard, claiming shelter under the “*per se*” standard applicable in certain real property cases. In *Lucas*, the Court recognized two discrete exceptions to the normal *Penn Central ad hoc* analysis. In exceptional cases, *per se* takings are “compensable without case-specific inquiry into the public interest advanced in support of the restraint.” 505 U.S. at 1015. These exceptions originate from the law of real property: (1) “regulations that compel

³ Indeed, it is now clear that Summers cannot benefit from the rule announced by the Supreme Court in *Phillips*. As it turns out, Summers did not own the principal. *See supra* n.2 and accompanying text.

the property owner to suffer a physical invasion of his property” and (2) regulations that deny all “economically beneficial or productive use of land.” *Id.* at 1015. Contrary to Appellants’ suggestion, this *per se* takings analysis for real property cases has no conceivable application here.

First, the Supreme Court has already repeatedly rejected the notion that money should be subjected to a *per se* analysis. *See, e.g., United States v. Sperry*, 493 U.S. 52, 62 (1989); *Eastern Enters. v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 2149 (1998); *Concrete Pipe & Prods. Of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986). The Court’s most illuminating statement of this proposition came in *Sperry*. There, the Supreme Court rejected Appellants’ argument that the *per se* test could be applied to the alleged taking of money, stating in a unanimous opinion: “Such a rule would be an extravagant extension of *Loretto*.” 493 U.S. at 62 n. 9.

Most recently, the Court revisited the question of “taken” money in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 213, 214 (1998). At issue in that case was a monetary requirement imposed on an employer requiring it to contribute funds for health-care costs of its former employees. Although a plurality of the Court determined that the regulation violated the Takings Clause, the Court emphasized that deprivations affecting money do *not* involve *per se* analysis. Specifically, the Court stated that such monetary liability “is not, of course, a permanent physical occupation of ... property of the kind that we have viewed as a *per se* taking.” *Id.* at 2149.

The distinction between fungible currency and physical invasions of land is well recognized. As Justice Scalia stressed in *Lucas*, the takings analysis “has been traditionally guided by the understanding of our citizens regarding the content of, and the State’s control over, the ‘bundle of rights’ that they acquire when they obtain title to property.” *Lucas*, 505 U.S. at 1027. When one acquires land, he assumes that he will have permanent and exclusive control of it. When one turns currency over to a bank, he has no expectation that he has the right to control the use to which the funds are put. Indeed, were every government regulation that allegedly deprived someone of the use or enjoyment of his money subjected to *per se* takings analysis, scarcely any law could survive.⁴

Numerous lower federal courts likewise recognize that monetary assessments cannot be viewed as *per se* takings. As recently stated by the Federal Circuit,

even though taxes or special municipal assessments indisputably “take” money from individuals or businesses, assessments of that kind are not treated as *per se* takings under the Fifth Amendment. Nor are other, less conventional [monetary] assessments viewed as *per se* takings requiring compensation without any inquiry into their reasonableness

⁴ Appellants’ theory would compel courts to routinely strike down all types of monetary assessments that are not, and cannot rationally be, conceived as takings. This theory would implicate, for example, general taxes, special assessments, user fees, mandatory bar dues, public library funds, public utility charges, and fines of all kinds imposed in civil and criminal proceedings. This theory would also lead to the ultimate conclusion that government restrictions on rates charged customers, or rents charged to tenants, are necessarily unconstitutional as a taking, despite the fact that the Supreme Court has routinely upheld them against takings challenges. See e.g., *In re Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (rate setting not a taking); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rejecting takings challenge to rent control).

Branch First v. United States, 69 F.3d 1571, 1576 (Fed. Cir.), *cert. denied*, 117 S. Ct. 55 (1996); *see also Atlas Corp. v. United States*, 895 F. 2d 745, 756 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990) (‘requiring money to be spent is not a taking of property’); *see also Chalmers v. Winston*, 2000 WL 553210 (E.D. Va. May 2000) (rejecting the applicability of the *per se* analysis to an inmate’s Fifth Amendment challenge to a prison’s policy of not crediting interest earned on prisoner wage accounts); *Schneider v. Calif. Dep’t of Corrections*, 91 F. Supp. 2d 1316 (N.D. Cal. 2000) (same).⁵

Since Appellants are unable to rebut any of these numerous authorities rejecting a *per se* analysis in this situation, they turn to *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), which, they admit, was decided before the *per se* test had even been articulated by the Supreme Court. Appellants’ Brief at 6 n.6. *Webb’s* of course does not even remotely imply a *per se* analysis or suggest a conflict with the Supreme Court’s numerous holdings to the contrary.

In *Webb’s*, the Supreme Court invalidated a Florida statute that appropriated interest on funds deposited into the Court’s registry. While Appellants argue that *Webb’s* demonstrates that a *per se* takings analysis is applicable even when the appropriated property is money, a close reading of *Webb’s* reveals otherwise. In fact,

⁵ The D.C. Circuit has also noted: “that all permanent and total deprivations of money do not fall into th[e] subset [of *per se* takings] is clear; the Supreme Court has several times analyzed such deprivation as other than *per se* takings.” *Colorado Springs Prod. Credit Ass’n v. Farm Credit Admin.*, 967 F.2d 648, 657 (D.C. Cir. 1992); *see also Nixon v. United States*, 978 F.2d 1269, 1285 (D.C. Cir.

the *Webb*'s Court never once used the words “*per se*” but, instead, employed an analysis carefully examining whether the monetary assessment served any legitimate public purpose, including whether it was “reasonably related to the cost of using the courts.” 449 U.S. at 163. (“Neither the statute nor appellees suggest any reasonable basis to sustain the taking of the interest earned by the interpleader fund.”).⁶ A careful reading demonstrates that the Court was, in fact, applying an *ad hoc* analysis including the adjustment of the “benefits and burdens of economic life to promote the common good,” the “general welfare,” “fairness and justice” and the lack of a “reasonable basis to sustain the taking of interest.” *Webb*'s, 449 U.S. at 163. The Court analyzed “[w]hat would *justify* the county’s retention of that interest,” an inquiry that would be wholly irrelevant in the context of a *per se* analysis. *Id.* (emphasis added).

In sum, the lower court followed well-established precedent and correctly rejected the application of the *per se* analysis to this case.

C. The IOLTA Program Does Not Constitute A Taking Under *Penn Central*

The District Court correctly concluded, based on the detailed factual record before it, that the IOLTA Program does not effect a taking under the traditional “*ad hoc*” factual inquiry articulated by the Supreme Court in *Penn Central*. The factual

1992) (distinguishing between tangible personal property, which the Court said was subject to the *per se* doctrine, and money, which is not).

⁶ See also *United States v. Sperry*, 493 U.S. at 62 n.8: “We failed [in *Webb*'s] to discern any *justification* for the deduction of the interest other than the bare transfer of private property to the county.” (emphasis added).

record conclusively established that the IOLTA Program has no direct economic impact on Summers and in no way interferes with his reasonable investment backed expectations.

1. *The IOLTA Program Has No Adverse Economic Impact On Summers*

The District Court found that “the economic impact of the regulation on [Appellants] is nil.” R.E. 4 at 21. This factual conclusion is bolstered by the facts and expert testimony adduced at trial.

(a) **Summers Admitted, And The District Court Found, That He is No Worse Off Financially as a Result of IOLTA**

The most disingenuous aspect of Appellants’ brief is their continued assertion that Summers has somehow suffered a “loss” as a result of the IOLTA Program. *See, e.g.,* Appellants’ Brief at 33-34. This is simply not a sustainable claim. Summers explicitly admitted at trial that he is financially “no worse off” with IOLTA than without. Tr. at 136.

Judge Nowlin correctly determined that Appellants simply cannot overcome this lack of injury.

it is without doubt that at a minimum Plaintiffs must present evidence to this Court that Summers is materially worse off because of IOLTA. At trial, Summers testified that he’s no worse off because of IOLTA.

* * *

Plaintiffs have failed to present evidence of a loss. The Court finds that, based upon all the evidence before it,

Summers' loss is zero. The Court finds that with regard to Plaintiffs' net benefit, Plaintiffs' loss is also nothing.

R.E. 4 at 32. Appellants have failed to show any error in the findings of fact, much less clear error as Rule 52(a) requires.

The detailed factual record at trial and Judge Nowlin's resulting findings conclusively established that the Texas IOLTA Program imposes no adverse economic impact on Summers (or other clients who deposit funds in law firm escrow accounts). The District Court found that the IOLTA Program applies, by definition, only to client escrow funds that could not generate net interest for the client. R.E. 4 at 23.

Moreover, the District Court also found that under the IOLTA Program, if Texas attorneys are able, through some technology or mechanism, to generate net interest for their clients, they are required to do so rather than depositing the funds in an IOLTA account. Even so, the District Court found that none of the financial mechanisms or theories propounded by Appellants would provide Summers with an economically beneficial alternative to the IOLTA program. It is undisputed that in-firm pooling sub-account and products are simply not available in Texas. Even if they were, the costs of using these products would outweigh any net interest earned. Indeed, Mazzone testified that he did not consider them to be viable options for either of Summers' deposits. Tr. at 102. Thus, Appellants' arguments over "subaccounting" and "pooling" establish nothing.

As Judge Nowlin stated:

the Court carefully considered the various evidence presented at trial regarding in-firm pooling, sub-accounting and net benefit theory. In light of the evidence before the Court, the Court finds that Mr. Summers did not suffer a compensable loss.

R.E. 4 at 23.

(b) **The IOLTA Program Applies Only To Funds That Cannot Generate Net Income For The Client Outside the IOLTA Program**

The only funds eligible for deposit in an IOLTA account are those that have no reasonable possibility of generating interest in excess of the costs associated with the establishment, maintenance and delivery of such interest. Rules Governing the Operation of the Texas Equal Access To Justice Foundation (the “Rules”), Rule 6. If, and only if, the lawyer determines that funds are of insufficient size or duration to generate a net financial return to the client, should the lawyer direct the deposit into an IOLTA account. R.E. 4 at 4; *see also* Tr. at 176-77, 220-22.⁷

Despite Appellants’ arguments to the contrary, the District Court correctly found that funds often are simply either too small in amount or will not be held for sufficient duration to earn interest in excess of the costs of generating, reporting and

⁷ Claude Ducloux, a Texas lawyer, testified to the economic realities of IOLTA in his practice. Ducloux testified that in 1999, the average monthly interest per client generated on his IOLTA account was \$0.60. Tr. at 272. Further, his non-IOLTA interest bearing accounts typically result in a net loss (*i.e.* in August, 1999, Ducloux’s account contained \$32,000, generated \$10.00 in interest and incurred \$12.00 in bank charges). Tr. at 275. Approximately half of the IOLTA accounts in the State of Texas do not generate sufficient funds to offset fees, resulting in a negative balance. Tr. at 225. Consequently, on those IOLTA accounts, TEAJF actually loses money. *Id.* The negative balance fees are paid by TEAJF. Tr. at 237.

delivering any such interest. R.E. 4, at 38; Tr. at 171, 272-273, 345. Even Appellants' own expert conceded that in his practice, there are times when he does not place client funds in an interest-bearing account because it is too little money or for too short a period of time to gain a net benefit for the client. Tr. at 164-65.

The IOLTA Program unquestionably applies to funds that, prior to the adoption of the IOLTA Program, did not earn any interest for the client, but that were used solely to benefit the banks. R.E. 4, at 3. Historically, attorneys placed client deposits incapable of generating income by reason of their size or length of retention in their unproductive, commingled, non-interest bearing trust accounts. Tr. at 218-29. Similarly, the historical evolution with respect to client funds of sufficient size or duration demonstrates that any such interest has always been allocated to the client. The implementation of the IOLTA Program has not altered this result. Tr. at 215-218, 386.

(c) There Are No Commercially-Available Products That Would Enable IOLTA-Qualifying Funds to Generate Financial Benefits to Clients in the Absence of the IOLTA Program

Despite Appellants' continued fascination with the concept of bank sub-accounting products, and although the IOLTA rule would permit Appellants to use such products in lieu of an IOLTA account if they could generate net interest to the client, there simply are no banks in Texas that offer such products.⁸ Indeed, Mazzone

⁸ There are no banks in Texas that currently market sub-accounting products for attorneys or law firms in the State of Texas. Tr. at 92, 162, 274, 331, 389. Moreover, in most instances, it would be

conceded that it was not clear that even he would use such an account if it were available. Tr. at 92; *see also* R.A. at 1948.

Even if bank sub-accounting products were readily available in Texas, the District Court correctly concluded that sub-accounting would not be economical because the bank fees and the law firm administrative costs would exceed the small amounts of interest earned. R.E. 4 at 30.⁹ Specifically, the District Court found that Appellants had failed to establish sub-accounting as a viable mechanism through which Summers or anyone else could have earned net interest on his funds.

[t]he cost of sub-accounting in lawyer and staff hours in addition to bank charges exceed the cost of IOLTA. These costs make that 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. In these cases, the client funds would not be placed in IOLTA. Therefore, the court finds that Plaintiffs have failed to establish through the evidence before the court that Summers' funds could theoretically earn net interest in a sub-account.

impractical, inconvenient, and unreasonable for Texas attorneys to use out-of-state banking products via modem or e-mail. Tr. at 388. However, to the extent that a Texas lawyer has client consent and does not mind the inconvenience of out-of-state banking, the IOLTA rules permit a lawyer to use out-of-state banking products. R.E. 4 at 25 n.7; Tr. at 209.

⁹ For example, according to Ducloux, in order for a bank sub-account product to generate net interest on his IOLTA-type funds, the product would have to be free, and he would have to absorb the value of all the time he would spend operating and keeping track of the 25 sub-accounts he would require. Tr. at 274-77. Some of the potential bank costs include: fees to open each new account; fees to close a sub-account; monthly fees for each sub-account; fees for transfers in excess of allotted amounts; fees applied to master checking account, including monthly maintenance fees; and per check and per deposit charges. The administrative costs include: creation and maintenance of such accounts; tax disclosure requirements; transfer of funds between master and sub-account; reconciling accounts; and tracking individual accounts. Records of all individual client accounts, including all transfers, must be kept by the attorney. In many instances, the number of transactions involved can more than double, since funds must first typically be deposited to the master account, transferred to the sub-account, and then transferred back to the master account prior to disbursement. Tr. at 398-400, 390-410.

R.E. 4, at 30. Moreover, bank sub-accounting products often impose limitations that hinder the usefulness of such products.¹⁰

Likewise, Appellants' dependence on in-firm pooling as a supposed antidote to IOLTA is equally misplaced. As with sub-accounting, the District Court explicitly found that Appellants had "failed to establish that Summers' monies could earn net interest if placed in an in-firm pooled account." R.E. 4 at 25. As the evidence established, in-firm pooling, whereby an attorney places all client funds in a single, interest-bearing account, has extremely limited availability, viability and practicability as a mechanism for generating net interest for client funds. Tr. at 273-74, 296, 395.¹¹

Further, there are no in-firm pooling products currently available and being marketed to law firms in Texas. Tr. at 275, 347. Most significantly, even if in-firm pooling software products were to become widely available, many clients' funds

¹⁰ Some examples include: forfeiture of interest where funds are withdrawn and balance is zero for any ten-day period before the interest is posted; restrictions on the number of checks or transfers that may be used with such accounts; and prohibition on allowing checks to be written from sub-accounts which requires that the attorney physically transfer funds to the master checking account before writing a check. Tr. at 184-85, 340-45; *see also* R.E. 4 at 29-30; Tr. at 389-418.

¹¹ Only individuals, sole proprietors and certain non-profit entities are allowed under federal banking law to have or receive the benefit from interest-bearing checking accounts. 12 U.S.C. § 1832 (1989). Corporations, including professional corporations, limited liability companies and partnerships are ineligible for NOW accounts. Consequently, only solo practitioners may open such an interest-bearing account for in-firm pooling, and may only hold funds for clients eligible to benefit from such an account. Although traditional savings accounts may theoretically be used for in-firm pooling, under current banking laws there are significant restrictions on the number of withdrawals and transfers, which often make these accounts an unsuitable repository for client funds. Tr. at 293. For a savings or a money market account, one can only make six transfers that are automatic or preauthorized (three of those can be by check). All other transfers must be in person by messenger. Tr. at 340-342. Moreover, if one uses a savings account, one must also have a checking account for withdrawals. Consequently, every time a lawyer disburses funds, he must transfer accounts. Tr. at 154, 345, 387.

would still be incapable of generating net income for the client because of the high costs associated with in-firm pooling. Tr. at 276.¹²

For a pooled account, an attorney must keep track of when deposits were made and withdrawn; calculate the specific interest earned for each individual client (which would depend on the amount of time the deposit was held and the interest rate at the time); and allocate, track and record this interest.¹³ These tasks involve significant costs, which Appellants conveniently overlook in their analysis.¹⁴

Moreover, the District Court specifically found that while Texas lawyers are mandated to make use of in-firm pooling if net interest is feasible, the in-firm pooling scenario described by Appellants' expert involves "funds that in most cases would earn a net benefit for the client without in-firm pooling." R.E. 4 at 24. The District

¹² IOLTA accounts avoid many costs which would be applicable to in-firm pooling management that are not applicable to an IOLTA account include: obtaining a certified tax-payer identification number from each client on a form W-9 prescribed by the IRS; postage required to transmit information to the IRS and client; responding to clients who receive 1099 forms and question the amounts; potential costs to perform back-up withholding, IRS penalties; obtaining the information from the bank regarding check collection, interest payment methods, compounding methods, rate changes, minimum and tiered balances, etc. - in order to allocate the interest paid on one account to many clients; spreadsheet software; programming spreadsheet software; entering data required to run the spreadsheet program; allocating bank charges among various clients; keeping records of all transactions and; ensuring that each client's own costs (per check, per deposit etc.) are properly allocated, returned and maintained. Tr. at 276-78, 347-50, 401-04.

¹³ While Appellants' expert claims that in-firm pooling is an "instantaneous computer process," bearing no cost or inconvenience, such statements must be understood within the context of his law practice. Tr. at 154-55. Not only does he have the luxury of having his wife perform the tasks related to in-firm pooling, but, most significantly, on average he only has half a dozen clients. Tr. at 193-94. Moreover, he charges his clients an administrative fee of 1% on principal and interest to administer and maintain a pooled account. Tr. at 156.

¹⁴ For example, it would cost Ducloux an average of \$2.80 to create \$0.93 of income for his clients, and it would cost \$333 in bookkeeper expenses to distribute \$110 of interest. Tr. at 280-288.

Court also found that Appellants' proposed mechanism for generating interest "fails to address the small amounts of money held for short periods of time that could not earn interest at all." R.E. 4 at 24-25. In fact, the Court specifically found that "Mr. Randell's unique situation, where he deals with a small number of transactions, larger amounts of money, and over a lengthy time period is not illustrative for purposes of any determination regarding IOLTA." R.E. 4 at 25. Certainly, it has no application to any deposit at issue in this case.

(d) **Appellants Have Not Demonstrated That Summers Has Lost Any "Net Benefit" He Would Otherwise Receive Outside of the IOLTA Program**

Appellants continue to assert that Summers somehow lost a "net benefit," even if he did not lose any net interest. The District Court justifiably rejected this strained "net benefit" theory, which is based on the assumption that since the internal law firm costs associated with maintaining an interest-bearing account and an IOLTA account are supposedly identical, those costs should be excluded in determining whether funds can earn interest in excess of costs.¹⁵ Appellants' Brief at 11.

The District Court, after carefully considering Appellants' net benefit argument, found that the "testimony at trial established otherwise." R.E. 4, at 13. The District Court rejected this "net benefit" argument because of its faulty premise that IOLTA and non-IOLTA costs are identical. In fact, the Court found that the costs associated

¹⁵ According to Mazzone, "even if the interest did not exceed the expenses, it would still lower the expenses and it's . . . better to be \$500 in the red than a thousand dollars in the red." Tr. at 47; *compare* Tr. at 295.

with non-IOLTA accounts, including the lawyer and bank charges associated with generating, reporting and delivering interest, are significantly higher than the costs for IOLTA accounts. R.E. 4 at 23, 38; Tr. at 344, 384, 396-99. Indeed, this disparity partially explains why IOLTA accounts can earn net interest that could not otherwise be earned by attorney trust accounts. IOLTA accounts involve much lower (1) in-firm administrative costs; and (2) bank fees, which are typically paid by IOLTA or waived by banks. R.E. 4 at 22-23, 27. The Court specifically and correctly rejected Appellants' position that costs would be "precisely the same," stating that "there are innate costs to the firm or lawyer in a non-IOLTA account that differ from those in an IOLTA account." Judge Nowlin stated:

Appellants argue that the internal costs are costs the lawyer or law firm will incur regardless of whether the funds are placed in an IOLTA or non-IOLTA account. . . The court finds that the testimony at trial established otherwise.

R.E. 4 at 23.¹⁶

Appellants also allege that Rule 6 of the IOLTA Rules acts as an impediment to a client's receipt of this amorphous "net benefit," as it provides that funds should be placed in an IOLTA account if such funds:

could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the costs of establishing and maintaining the account.

¹⁶ The District Court held that "Appellants' arguments about net benefit and theoretical costs are made somewhat in a vacuum. Appellants failed to present any evidence that Summers' money, either the \$1,000 or the \$250, did and could generate net benefit or net interest if not for IOLTA...Appellants have failed to carry their burden of proof." R.E. 4 at 31.

Appellants are incorrect. First, as noted above, Judge Nowlin specifically found that “the costs of administering the money placed in a non-IOLTA account exceed those in an IOLTA account,” which directly contradicts Appellants’ assertion that a “net benefit” is plausible for a client with IOLTA-type funds. R.E. 4 at 38. Second, in an effort to accommodate even the remotest possibility that a “net benefit” could be generated, TEAJF revised the Texas IOLTA Guidelines in December 1999 to clarify that, in calculating the potential for interest to be generated, lawyers are free to disregard costs if they elect to absorb them instead of passing them along to clients. R.E. 8 at 5; Tr. at 222-23. Whereas the previous Guidelines provided that “the lawyer should consider all costs associated with such an account,” the new Guidelines, which are available to all Texas attorneys, provide that: “the lawyer may, but is not required to, consider all costs associated with such an account. However, attorneys are reminded that they may, if they choose, bear all costs associated with the account so that the client may earn net interest.” *Id.* Thus, Appellants’ argument that the IOLTA rules act as an impediment to the creation of a net benefit for a client is without merit.

2. *IOLTA Does Not Interfere With Investment Backed Expectations*

The effect of IOLTA on reasonable, investment-backed expectations also demonstrates that no taking has occurred. As Judge Nowlin determined: “Plaintiffs cannot hold a legitimate investment-backed expectation of interest when funds placed in IOLTA cannot by definition earn net interest.” R.E. 4 at 39.

Prior to the implementation of the Texas IOLTA Program, clients were unable to earn any interest on funds held for a short term and/or of nominal value. Consequently, Plaintiffs could not have *any* investment-backed expectation in earning interest on their IOLTA deposits. As Justice Souter noted in his dissent in *Phillips*, there cannot be any reasonable investment-backed expectations associated with IOLTA-eligible funds because the funds, by definition, are not expected to earn a return for the clients outside of the IOLTA Program. 118 S. Ct. at 1936. Plaintiffs, therefore, have failed to establish the second element of the *Penn Central* test.

3. *The Nature of the Governmental Action Does Not Warrant a Finding That a Taking Has Occurred*

A taking may more readily be found when the interference with property can be characterized as “a physical invasion by government, than when interference arises from some public program adjusting the benefits and burden of economic life to promote the common good.” *Penn Central*, 438 U.S. at 124. As discussed above, there is no basis upon which the IOLTA Program could be described as constituting a “physical invasion” upon property. *See, e.g., Sperry*, 493 U.S. at 62. Rather, the IOLTA Program is undeniably a “public program . . . to promote the common good.” *Id.*; R.E. 4 at 24. Indeed, at trial former Texas Supreme Court Chief Justice Jack Pope described the “severe crisis” in Texas over denial of basic legal services to low-income citizens that led that Court to establish the IOLTA program. Tr. at 311-17.

Meaningful access to the legal system is not only a legitimate public goal, it is quite often an affirmative constitutional obligation of government. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 & n.5 (1982); *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). Moreover, the IOLTA Program is part of a regulatory scheme that protects clients and safeguards client funds.

Appellants' assertion that they are somehow burdened by the IOLTA Program is without merit. Appellants' Brief at 34-35. The District Court specifically determined that there is no burden on Appellants:

Plaintiffs in the instant action could not maintain they are being unfairly singled out to bear a burden, when they are in fact, bearing no burden at all. The IOLTA program costs Plaintiffs nothing. The governmental action in this case does not implicate fundamental principals of "justice and fairness" because there is no cost to Plaintiffs.

R.E. 4 at 39; *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.")

It is clear from the nature of the government action that the IOLTA Program does not constitute a taking. Thus, for the additional reason that Appellants cannot prevail on the third element of the *Penn Central* analysis, their claim must fail.

D. Appellants Have Not Been Denied Just Compensation

Even if the Court were to find that Appellants somehow had proven all three elements of the *Penn Central* test as to whether a taking occurred, Appellants failed to show that they have been denied just compensation. “Only takings without just compensation infringe the [Fifth] Amendment.” *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 734 (1997); *see also English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304, 315 (1987); *United States ex. rel. TVA v. Powelson*, 319 U.S. 266, 276 (1943) (government is not obligated to compensate a property owner “for a loss of theoretical creation, suffered by no one in fact.”).

The District Court held “that without IOLTA the interest generated by Summers’ principal would possess no economically realizable value.” R.E. 4 at 28.

As noted by the District Court:

of all the terms used in the Takings Clause, “just compensation” has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires a full and perfect equivalent for the property taken.

R.E. 4 at 21.

In considering the issue of just compensation, the Supreme Court has sought to place the claimant “in as good a position pecuniarily as if his property had not been taken.” *United States v. 564.54 Acres of Land*, 441 U.S. 506, 510 (1979) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934)). The Supreme Court repeatedly has refused to recognize any entitlement to compensation premised upon the gain realized

by the putative taker rather than the actual loss to the property owner. *See Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.) (“And the question is, What has the owner lost? Not, What has the taker gained?”).¹⁷

Appellants claim that “if \$100 in interest is taken from an IOLTA depositor, then the amount of his loss is \$100.” Appellants’ Brief at 39. This statement flatly ignores the just compensation case law. If TEAJF gains \$100 through the net interest paid on a client’s principal, that \$100 is the government’s gain. The owner’s loss, under the case law, must be measured prior to the government intervention. *United States v. Pewee Coal Co.*, 341 U.S. 114, 121 (1951) (Reed, J. concurring) (“Where the owner’s losses are what they would have been without the taking, the owner has suffered no loss or damage for which compensation is due.”).¹⁸

Here, the District Court correctly found that “[i]n light of evidence before the Court . . . Summers did not suffer a compensable loss.” R.E. 4 at 23. Without the IOLTA Program, Summers would have earned no interest at all. Because the economic value of the loss is zero, he cannot claim he has been denied just

¹⁷ *See also Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) (“Because gain may be wholly unrelated to the deprivation imposed upon the owner, it must . . . be rejected as a measure of public obligation to requite for that deprivation.”); *United States v. Causby*, 328 U.S. 256, 261 (1946); *United States v. Miller*, 317 U.S. 369, 375 (1943).

¹⁸ Appellants have also asserted that the IOLTA Program seizes the beneficial use of a client’s property. However, Summers cannot reasonably object to the fact that the funds that he gave to his law firm and the firm deposited in a bank account create income that is controlled by others. Indeed, Appellants’ asserted right to retain control over deposited funds ignores long held and widely recognized principles of banking law: banks, not depositors, typically decide how to invest funds deposited in individual accounts. The abolition of the IOLTA Program would not give Summers any more control over the use of his retainer: the money would be invested by the law firm’s bank in its discretion, and the resulting interest would benefit the bank rather than the IOLTA program.

compensation. In short, Summers is in the same position now that he would have been in the absence of the IOLTA Program – earning no interest on the principal in his law firm’s non-interest bearing account.

In prior cases courts have reached similar “zero compensation” outcomes where, though they have found that government action may “technically” constitute a taking, “nothing [is] recoverable as just compensation, because nothing of value was taken.” *Marion & Rye Valley R. v. United States*, 270 U.S. 280, 282 (1926).

Appellants’ reliance on *Webb’s* to justify an award of compensation is misplaced because *Webb’s* is not analogous. As Judge Nowlin noted, but for the state’s intervention, the funds in *Webb’s* could have, and would have, earned net interest for its owners.¹⁹ The owners collectively had a legitimate expectation of earning interest after deduction of administrative and bank costs and expenses. The IOLTA Program deals exclusively with client funds that, in the absence of the IOLTA Program, would have earned no net interest for the client. *Webb’s* did not address the issue posed here of whether a taking has occurred in the context of funds that are otherwise barren. As distinct from *Webb’s*, a client’s property entitlement in

¹⁹ The Supreme Court in *Webb’s* was careful to circumscribe the applicability of its holding, stating “[W]e hold that under the *narrow* circumstances of this case - where there is a separate and distinct state statute authorizing a clerk’s fee ‘for services rendered’ based upon the amount of principal deposited; where the deposited fund concededly is private; and where the deposit in the court’s registry is required by state statute in order for the creditor to avail itself of statutory protection . . . Seminole County’s [actions] constituted a taking violative of the Fifth and Fourteenth Amendments.” *Webb’s*, 449 U.S. at 164-65 (emphasis added).

the interest generated in an IOLTA account has no net value. As stated by Judge Nowlin,

Distinguishable from *Webb's*, the instant case is one where the client's money cannot be placed in an IOLTA fund unless it cannot earn interest elsewhere...In *Webb's*, there was net interest in issue. Net interest could have been earned on that money regardless of whether it was interpleaded into the Court or held in a private bank account. In this case, the legislative and regulatory framework makes the net interest impossible outside of the context of IOLTA; but for IOLTA, the money necessarily would lie fallow.

R.E. 4, at 36.

Appellants maintain that Judge Nowlin mistakenly determined that the creditor's funds in *Webb's* would have generated net interest for the creditors regardless of whether the funds were interpleaded, as the creditors did not have control over the funds prior to the court proceedings. This is false. As noted by the *Webb's* Court, the creditors had a clear interest in the funds from the moment they were placed in an interpleader fund. The funds were being held for the ultimate benefit of these creditors, even if the specific share allocation had not yet been determined. *Webb's*, 449 U.S. at 161.

The *Webb's* court determined that the creditors had a "state-created property right to their respective portions of the fund." *Id.* Moreover, the Court explicitly acknowledged that as a matter of Florida law, interest was to be earned on the deposited funds. *Id.* As stated:

Webb's creditors, however, had more than a unilateral expectation. The deposited fund was the amount received as the purchase price for *Webb's* assets. It was property held only for the ultimate benefit of *Webb's* creditors, not for the benefit of the court and not for the benefit of the county. And it was held only for the purpose of making a fair distribution among those creditors. Eventually, and inevitably, that fund, less proper charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court.

Webb's, 449 U.S. at 161.

E. Appellants' Resort to the Injunctive Remedy Fails

A successful claimant under the Fifth Amendment is entitled to compensation, not an injunction. *Logan*, 455 U.S. at 430 & n.5; *Boddie*, 401 U.S. at 380. Appellants attempt to avoid the just compensation requirement altogether by asserting that their principal concern all along has been in obtaining prospective relief rather than in obtaining monetary damages. Appellants' Brief at 38.

The District Court previously held that the Eleventh Amendment bars such a claim in federal court against the State of Texas. *Id.* However, Appellants cannot avoid the final requirement of the takings analysis by simply asserting that they presently seek no compensation. The remedy sought by Appellants is irrelevant to the initial inquiry of whether the Fifth Amendment has been violated. In order to uphold Appellants' Fifth Amendment claim, the Court must answer "yes" to the question "is just compensation due?" On the basis of the factual record at trial, "Yes" is simply not the answer here.

Nor can Appellants claim the right to injunctive relief in this case even if they had been denied just compensation. Appellants cannot claim any relief where they have not availed themselves of state remedies. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985). It is clear that Appellants have deliberately refused to seek any refund or other relief under the IOLTA rules. It is plain that Mazzone was aware of these remedies within IOLTA long before he took Summers' most recent deposit. Tr. at 58.

Appellants cite a handful of cases in which a compensation remedy was in fact unavailable as evidence that they can obtain an injunction here. Of course, in none of those cases was the remedy unavailable simply because the Appellant had made the decisions to by-pass the simple administrative expedient of requesting a refund. Nor do they establish a right to sue in federal court where money damage awards against states are precluded by the Eleventh Amendment. Appellants' decision in this case to sue in federal rather than state court and to forego state remedies, including damages, dooms their claim of injunction relief.

F. Appellants Have Not Shown The Type Of Compulsion Required Under The Fifth Amendment

Appellants' Fifth Amendment claim has another basic flaw. In order to prevail, Summers must show that he has been compelled *by the state* to surrender his funds to the public.²⁰ It is plain, however, from the undisputed evidence at trial, that the state

²⁰ The District Court stated that for the purposes of its constitutional analysis the court would "assume that Summers was required to involuntarily contribute to IOLTA." R.E. 4 at 15.

did not compel Summers to make either his initial \$1000 deposit or his more recent \$250 deposit.²¹ The most reasonable interpretation of the facts is that the deposits, and certainly the later one, were made solely for the purposes of creating a litigation claim. *See, e.g.*, Tr. at 88.

To prevail under the Fifth Amendment, a plaintiff must show (1) that he has been compelled by the state to surrender some valuable property, (2) under circumstances calling for just compensation, and (3) thereafter be denied that compensation. *See, e.g., Ruckelshaus v. Monsanto Corp.*, 467 U.S. 986, 1007 (1984). Where, as here, the first factor is missing, there simply is no claim. *Id.*; *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). Here, Appellants elected to place and retain Summers' funds in an IOLTA account despite numerous opportunities to avoid the IOLTA Program or to obtain a refund. There is no compulsion here. Appellants' Fifth Amendment claim must fail as a result.²²

²¹ In fact, Mazzone testified that he had a number of alternatives open to him and that other lawyers he spoke with who disapproved of IOLTA had simply shut down their trust accounts. Tr. at 66-68. Similarly, Mazzone, despite his professed dislike of the IOLTA Program, never offered any alternative that would have allowed Summers to earn net interest (and thus avoid any connection with the Texas IOLTA program), including taking more money, holding it longer or pooling. Tr. at 75. Summers also testified that the State "didn't force" him to participate in the IOLTA Program. Tr. at 132.

²² Any suggestion by Appellants' that Summers has been subjected to an unconstitutional taking by virtue of his loss of the right to exclude others from use of his funds also fails. Even if one generously assumes that a right to exclude exists with respect to money, Summers surrendered that right when the funds were deposited in a bank that assumed the complete right to determine how the funds would be used. This is especially true in the case of a "general account." *See supra* note 2 and accompanying text. Moreover, "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 66 (1979). Unlike real property, money derives its value from its status as legal tender, not from the right to exclusive possession. Where the right to exclude is not essential to the economic value of the property, a deprivation of the right to exclude will not constitute a taking under the Fifth Amendment. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82, 84 (1980) (although

IV. THE DISTRICT COURT CORRECTLY RULED THAT THE TEXAS IOLTA PROGRAM DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE SUMMERS IS NOT COMPELLED TO SUPPORT ANY DISCERNABLE POLITICAL OR IDEOLOGICAL MESSAGE

A. Summers Has Conceded That He Is Not Associated With Any Discernable Message

Appellants acknowledge that Summers is not publicly associated with any discernable speech with which he disagrees.²³ Indeed, at trial, Summers admitted that he did not believe the people of Texas identified him personally with any of the causes funded by the IOLTA program. Tr. at 116. As a factual matter, the District Court found that “no specific message is dictated by the variety of services that TEAJF funds” and that Summers is free to distance himself from the message, if any, advanced by any IOLTA-funded litigation. R.E. 4 at 14; *see also Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (rejecting a compelled speech claim where the views of the petition circulators would “not likely be identified with” those of the complaining landowner). Appellants have not briefed this and thus it must be treated as abandoned.

“there ha[d] literally been a ‘taking’” of the right to exclude, there was no taking in a constitutional sense because the owners of the shopping center had “failed to demonstrate that the ‘right to exclude others’ is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a ‘taking’”).

²³ Only Summers still pursues any First Amendment claim, and he has limited his claim to one of compelled financial contribution. Mazzone has abandoned any claim under the First Amendment. Tr. at 65. Washington Legal Foundation has shown no such First Amendment interest of its own.

B. Appellants' Compelled Speech Theory Is Not Supported By The Authorities On Which They Rely And Must Be Rejected In Light Of Other Relevant Precedent They Ignore

Appellants continue to argue that the IOLTA Program constitutes “compelled financial support” of speech and that all public funding through the IOLTA Program violates Summers’ First Amendment rights. This argument is not supported by the facts or the precedent cited by Appellants. Consequently, the judgment of the District Court on Appellants’ First Amendment claim should be affirmed.

1. Summers Is Not Compelled To Financially Support Any Speech

Summers claims the Texas IOLTA Program compels him to make financial contributions to support private speech. Appellants cite a line of cases in which, under some circumstances, compelled financial support of speech is prohibited. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). In making their compelled financial support claim, however, Appellants struggle to identify any relevant speech component and ignore the fact that the Texas IOLTA Program does not take any money from Summers or even require him to forego any opportunity to earn money. They also overlook more appropriate judicial precedent, fail to acknowledge that the Texas IOLTA Program does not fund specific speech, and ignore the Program’s status as a valid public program. For all of these reasons, Summers’ First Amendment claim must fail.

While in some cases a compelled financial contribution can constitute an abridgement of the freedom of speech, Summers has no such claim here. A First

Amendment claim of “compelled financial contribution” requires an *actual* financial contribution that is used to advance some message – union dues in *Abood, Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984), and *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); and attorneys dues in *Keller v. State Bar of California*, 496 U.S. 1 (1990). In this case, Summers made no financial contribution at all. Indeed, the District Court specifically found that “the IOLTA program costs Appellants nothing at all.” R.E. 4 at 39.²⁴

The “compelled financial contribution” cases require a showing of three factors. First, there must be an *involuntary* contribution. Second, the message supported by the contribution must be political or ideological. Finally, even if there exists an involuntary contribution to support a message that is political or ideological, no First Amendment violation exists if the message relates to a core governmental function. Appellants cannot legally or factually establish any of these three elements of a compelled financial contribution claim, let alone all of them.

2. *Appellants Have Not Shown That IOLTA Compelled An Involuntary Contribution*

“Compelled financial contribution” cases turn on compulsion. The court below did not resolve this issue of compulsion because it was not necessary to its ruling.

²⁴ Although not dispositive to its ruling, the District Court also recognized that the validity of the compelled financial contribution claim was “highly related” to the Court’s findings regarding whether Summers’ funds would “generate interest that would equate to a measurable contribution.” R.E. 4 at 16. The District Court did not reach this issue with regard to the First Amendment, but clearly found that Summers had no economic loss for purposes of his Fifth Amendment claim. He, thus, made no contribution for purposes of the First Amendment analysis.

However, as a factual matter, Summers has not proven this element of the First Amendment claim. The leading case on compulsion is *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980). *Pruneyard* unequivocally negates Appellants' First Amendment claim. There, a shopping center owner objected to a California law that required the owner to permit solicitation of signatures and other expressive activity on his property. The property owner contended that this use of his property constituted "compelled speech." The Supreme Court disagreed, stating that:

the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellant's property. There consequently is no danger of governmental discrimination for or against a particular message.

447 U.S. at 87.

As in *Pruneyard*, there is no compelled interest here. Just as the compulsion was lacking in *Pruneyard* because the shopping center owner voluntarily opened his premises to a wide audience, here too compulsion is lacking because Summers and Mazzone chose to enter a contract for legal services that included a deposit that could not earn net interest and was, therefore, placed in an IOLTA account. Summers could have declined to make a deposit, could have made a different deposit, or could have gone to a different lawyer, who would not have required a retainer. He chose not to do so. Moreover, as noted, since Summers has no property interest in the deposit or the

interest that might be earned on it, he cannot have been “compelled” to surrender anything to anyone.²⁵

3. *Appellants’ Cannot Point to Any Ideological or Political Content*

Even if this Court were to assume an involuntary contribution as the Court below chose to do, Appellants have not proven any political or ideological content. As the Supreme Court recently made clear, there is no “broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities.” *Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457, 471 (1997). Rather, a compelled contribution violates the First Amendment only where the dissenter’s objection rests “on political or ideological disagreement with the content of the message.” *Id.* In *Glickman*, the Court rejected an argument that the *Abood* line of compelled contribution cases, which involve forced or compelled dues, supported the appellant’s challenge. These cases were declared inapposite because the challenged generic advertising regulations “do not compel the producers to endorse or to finance any *political or ideological* views.” *Id.* (emphasis added) “*Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a First Amendment interest in not being compelled

²⁵ Further, under *Pruneyard*, there is no threat that the property owner will be “linked” with the message. Appellants concede that most clients do not even know about IOLTA, let alone what groups IOLTA funds. Summers did not learn of IOLTA until long after his funds were placed in an IOLTA account. Tr. at 89-90.

to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" *Glickman*, 521 U.S. at 471.

Since commercial advertising is not "political" or "ideological," the *Glickman* Court found no First Amendment violation despite an involuntary contribution to actual speech. *Id.* The same reasoning led the Fifth Circuit to reject a compulsory speech objection to the use of student fees to fund a student newspaper, which did not raise a political or ideological issue because providing for a student newspaper was, itself, a non-controversial idea. *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992), *cert denied*, 506 U.S. 1087 (1993).

In this case, IOLTA is a program dedicated to helping ensure access to the justice system for low-income citizens. The District Court correctly found that "[t]he concept of helping ensure equal access to the justice system for low income citizens is in itself a non-controversial idea . . . and therefore does not qualify as a political or ideological activity." R.E. 4 at 17-18 (*citing Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) and *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992)). The District Court therefore rightly concluded that "[t]o the extent Summers complains that the IOLTA program is in itself expressive activity his claim fails." R.E. 4 at 18.²⁶ Indeed, the District Court found that "Summers does not object to the

²⁶ Appellants claim that the District Court actually found that litigation funded by the IOLTA program was political or ideological in nature. However, Appellants mischaracterize the court's actual finding. The court noted that certain litigation "could be ascribed certain political or ideological components" and could "*potentially* qualify as expressive activity." R.E. 4 at 18. The court found that even assuming the potential for such expressive activity, Appellants' First Amendment claim nonetheless

use of IOLTA funds because it creates a ‘crisis of conscience;’ but, rather, because he simply objects to the TEAJF’s control over the IOLTA funds.” R.E. 4 at 17.

4. *The Texas IOLTA Program is a Valid Public Program and Serves a “Core Governmental Function”*

Even if Appellants were able to establish the other elements of a First Amendment claim, their case would still fail because, at bottom, they object to compelled financial contributions to a valid public entity that serves a core governmental function and is engaging in government speech. There is no First Amendment right to be free from making payments to the government simply because of an objection to the use to which those payments will be put. *See, e.g., United States v. Lee*, 455 U.S. 252 (1982) (rejecting religious exemption from payment of Social Security taxes); *see also Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). Were it otherwise, there would be no national defense, law enforcement or other activity to which some object.

TEAJF is a public body established by the Texas Supreme Court. In its operation of the Texas IOLTA Program, TEAJF engages in “state action” and is entitled to Eleventh Amendment immunity. As with other state and federally-funded programs, disgruntled citizens cannot claim a First Amendment violation simply because their money is spent in support of a program with which they disagree. *See*,

failed. The District Court did *not*, as Appellants now suggest, find that any such potential litigation actually did exist or did qualify as expressive conduct. In fact, the evidence at trial was to the contrary. *See* Tr. at 227, 236, 252, 261.

e.g., *Buckley v. Valeo*, 424 U.S. 1, 92 (1976) (“Every appropriation . . . uses public money in a manner to which some taxpayers object”); *NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) (“*Abod* has never been applied to the government [I]f it were, taxation would become impossible.”). Indeed, if Appellants are correct, the portion of the mandatory filing fee applicable to all civil cases, which is also used to fund TEAJF, would also be unconstitutional.

The District Court correctly found that “[t]he sole purpose of the TEAJF is to fund legal services for the poor. Its activities in funding various programs are germane to this government interest.” R.E. 4 at 19. The court therefore concluded that Appellants’ First Amendment claim failed. This conclusion was correct and should be affirmed. As noted earlier, the Supreme Court has repeatedly held that providing access to the legal system is not only a core governmental function, under some circumstances, it is an affirmative constitutional mandate applied to the states under the Due Process Clause. *Logan*, 455 U.S. at 430 n.5; *Boddie*, 401 U.S. at 380.

Review of a core function under the “germaneness” test was recently explored in *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991). In *Lehnert*, the Court held that a union’s expenditure of mandatory dues from non-members would be constitutional so long as it was “germane to collective bargaining.” 500 U.S. at 519; *see also Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 118 S. Ct. 1761 (1998).

Using funds of those who can afford access to the legal system, at no cost to those individuals, to help provide access to those who cannot is a legitimate

governmental interest justifying compelled contributions. *Keller* has already established that “improving the quality of legal services” is an important state interest. 496 U.S. at 13-14. IOLTA indisputably “improves” the quality of legal services to low income citizens. In Texas, IOLTA funds are used directly to ensure equal access to justice in civil cases, thereby satisfying even the most rigorous “germaneness” test.

As the court below found: “IOLTA accomplishes and is germane to the ‘government’s vital policy interest’ of making legal services accessible to all.” R.E. 4 at 19. Thus, under *Lehnert* and its progeny, Appellants’ First Amendment claim simply fails.

C. Even If Appellants Had Not Failed To Show The Elements Of A Compelled Financial Contribution Claim Under The First Amendment, Their Claim Still Fails

Appellants base their claim on Summers’ objection to “all” IOLTA funding — there is no objection to a particular grantee, let alone a particular message or viewpoint. Simply put, the question is whether the Texas IOLTA Program independently survives constitutional scrutiny because it is a content-neutral and narrowly tailored program. The court below specifically found that IOLTA is a content neutral program, that furthers an important governmental interest and is unrelated to the suppression of free speech, and that the incidental burdens on the First Amendment freedoms were no greater than essential to the furtherance of that interest. R.E. 4 at 20 n.6. Given these factual findings, no First Amendment violation exists in this case.

In analyzing the First Amendment, the Supreme Court has applied strict scrutiny to laws that “compel speakers to utter or distribute speech bearing a particular message.” *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994), *aff’d*, 520 U.S. 180, 117 S. Ct. 1174 (1997). However, where, as with IOLTA, a regulation is “unrelated to the content of speech” the court applies an intermediate level of scrutiny.²⁷ A content-neutral regulation does not violate the First Amendment if:

it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O’Brien, 391 U.S. 367, 377 (1968); *see also Board of Regents of Univ. of Wisconsin v. Southworth*, 120 S. Ct. 1346 (2000) (upholding a mandatory student fee used to fund a program to facilitate extracurricular student speech that was concededly political and/or ideological if the program is viewpoint neutral).

Thus, a regulation must be “narrowly tailored” to “promote[] a substantial government interest that would be achieved less effectively absent the regulation.” *Ward*, 491 U.S. at 799, quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985). Improving the quality of legal services is a substantial governmental interest. *See, e.g., Keller*, 496 U.S. at 13-14 (recognizing the state’s interest in “improving the quality of legal services”). Moreover, it is clear that such interest would be achieved

²⁷ There should be no disagreement with the proposition that IOLTA is a content-neutral program. The “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.” *Ward v.*

less effectively absent IOLTA. In short, Judge Nowlin correctly concluded that the IOLTA Program is a content-neutral regulation that is narrowly tailored to a substantial governmental interest. R.E. 4 at 20 n.6.

CONCLUSION

Appellees respectfully request that this Court affirm the judgment of the District Court and for such other and further relief to which Appellees may be justly entitled.

Respectfully submitted,

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Rock Against Racism, 491 U.S. 781, 791 (1989). The IOLTA Program simply provides funding for equal access to justice. Its purpose is unrelated to any particular message.

ATTORNEYS FOR APPELLEES TEXAS
EQUAL ACCESS TO JUSTICE
FOUNDATION AND ITS CHAIRMAN

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned attorney certifies that this Appellees' Brief contains 13,671 words and, therefore, complies with the type-volume limitations set forth in Rule 32(a)(7).

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorney of record of all parties to the above cause in accordance with Rule 25 of the Federal Rules of Appellate Procedure and Local Rule 28.3(n) on this 1st day of August, 2000 as follows:

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