

**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.*

---

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

---

**BRIEF OF APPELLANTS**

---

Michael J. Mazzone  
9 Greenway Plaza, Suite 2300  
Houston, TX 77046  
(713) 940-6001

Charles Fried  
1525 Massachusetts Ave.  
Cambridge, MA 02138  
(617) 495-4636

Pro Se

Daniel J. Popeo  
Richard A. Samp  
2009 Massachusetts Ave., NW  
Washington, DC 20036

May 30, 2000

(202) 588-0302  
Counsel for Plaintiffs Summers and WLF

**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.

**Appellants' Counsel:** Charles Fried  
Daniel J. Popeo  
Richard A. Samp

**Appellees:** Texas Equal Access to Justice Foundation  
Richard Tate  
Hon. Thomas R. Phillips  
Hon. Nathan R. Hecht  
Hon. Craig T. Enoch  
Hon. Priscilla R. Owens  
Hon. James A. Baker  
Hon. Greg Abbott  
Hon. Deborah G. Hankinson  
Hon. Harriet O'Neill  
Hon. Alberto R. Gonzales

**Appellees' Counsel:** Hughes & Luce, L.L.P.  
Darrell E. Jordan  
David J. Schenck  
Beth W. Bivans  
Hale and Dorr  
Richard A. Johnston  
Francine Rosenzweig  
Office of the Texas Attorney General  
Rande K. Herrell

---

**Richard A. Samp**  
**Attorney of Record for Appellants**

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellants respectfully request oral argument. The case has previously been before a panel of this Court and the U.S. Supreme Court. It raises complex issues of constitutional law.

Appellants believe that oral argument will allow them to respond to the numerous points that may be of concern to panel members.

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES .....	iv
INTRODUCTION .....	1
STATEMENT OF JURISDICTION .....	3
STATEMENT OF ISSUES PRESENTED FOR REVIEW .....	4
STATEMENT OF THE CASE .....	4
STATEMENT OF FACTS .....	7
SUMMARY OF ARGUMENT .....	21
ARGUMENT .....	23
I. THE IOLTA PROGRAM VIOLATES APPELLANTS' FIFTH AMENDMENT RIGHTS BY TAKING THEIR PROPERTY WITHOUT JUST COMPENSATION.....	23
A. Physical Appropriation of Any Property, Including Personal Property, Is Subject to Per Se Takings Analysis .....	25
B. The <i>Webb's</i> Takings Analysis Mandates a Finding That a Taking Has Occurred .....	29
C. The IOLTA Program Constitutes a Taking Even Under <i>Penn Central's Ad-Hoc</i> Analysis .....	33
D. Appellants Are Entitled to a Remedy for Appellees' Violations of Their Rights Under the Takings Clause.....	38
E. The Evidence at Trial Established that Most Clients Could Benefit if They Were Permitted to Opt Out of IOLTA.....	43
II. THE IOLTA PROGRAM VIOLATES APPELLANTS' FIRST AMENDMENT RIGHTS BY FORCING THEM TO FINANCE SPEECH THEY FIND OBJECTIONABLE.....	51
III. THE JUSTICES ARE NOT ENTITLED TO LEGISLATIVE IMMUNITY .....	55

CONCLUSION.....58

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>Cases:</b>	
<i>Abood v. Detroit Bd. Of Educ.</i> , 431 U.S. 209 (1977) .....	52, 53, 54
<i>Bd. Of Regents v. Southworth</i> , 120 S. Ct. 1346 (2000) .....	52
<i>Boston Chamber of Commerce v. Boston</i> , 217 U.S. 189 (1910) .....	18, 41
<i>City of New York v. Sage</i> , 239 U.S. 57 (1915) .....	41
<i>Concrete Pipe &amp; Products of Cal., Inc. v. Construction Laborers Pension Trust Of Southern Cal.</i> , 508 U.S. 602 (1993) .....	33
<i>Eastern Enterprises v. Apfel</i> , 524 U.S. 498 (1998) .....	31, 35
<i>Glickman v. Wileman Bros. &amp; Elliott</i> , 521 U.S. 457 (1997) .....	54
<i>Hayes County Guardian v. Supple</i> , 969 F.2d 111 (5th Cir. 1992), <i>cert. denied</i> , 506 U.S. 1087 (1993) .....	52
<i>Hodel v. Irving</i> , 481 U.S. 704 (1987) .....	36
<i>Keller v. State Bar of California</i> , 496 U.S. 1 (1990) .....	22, 52, 54
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982) .....	25, 40
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992) .....	25
<i>Matagorda County v. Law</i> , 19 F.3d 215 (5th Cir. 1994) .....	34

	<b>Page</b>
<i>Penn Central Transportation Co. v. New York City</i> 438 U.S. 104 (1978) .....	26, 33, 34, 38
<i>Phillips v. Washington Legal Found.</i> , 524 U.S. 156 (1998) .....	<i>passim</i>
<i>Ruckelshaus v. Monsanto</i> , 467 U.S. 986 (1984) .....	34
<i>Shea v. Int’l Assoc. Of Machinists and Aerospace Workers</i> , 154 F.3d 508 (5th Cir. 1998).....	53
<i>Snoeck v. Brussa</i> , 153 F.3d 984 (9th Cir. 1998).....	57
<i>Supreme Court of Virginia v. Consumers Union of the United States, Inc.</i> , 446 U.S. 719 (1980) .....	55
<i>Texas v. Biggar</i> , 873 S.W.2d 11 (Tex. 1994).....	42
<i>United States v. General Motors</i> , 323 U.S. 373 (1945) .....	40
<i>United States v. Sperry Corp.</i> , 493 U.S. 52 (1989) .....	32, 33
<i>Washington Legal Found. v. Texas Equal Access to Justice Found.</i> , 94 F.3d 996 (5th Cir. 1996), <i>aff’d</i> , 524 U.S. 156 (1998) .....	2, 5, 33, 38, 42
<i>Washington Legal Found. v. Texas Equal Access to Justice Found.</i> , 106 F.3d 640 (5th Cir. 1997).....	2, 6
<i>Washington Legal Found. v. Texas Equal Access to Justice Found.</i> , 86 F. Supp.2d 624 (W.D. Tex. 2000) .....	<i>passim</i>
<i>Webb’s Fabulous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980) .....	<i>passim</i>

<i>Yee v. City of Escondido</i> , 503 U.S. 1003 (1992) .....	25
---	----

**Page**

**Constitutional Provisions, Statutes, and Regulations:**

U.S. Const., amend. I .....	<i>passim</i>
-----------------------------	---------------

U.S. Const., amend. V, Takings Clause .....	<i>passim</i>
---	---------------

U.S. Const., amend. XI .....	38, 39
------------------------------	--------

Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 .....	8
--	---

12 U.S.C. § 371a .....	8, 13
------------------------	-------

12 U.S.C. § 1464(b)(1)(B) .....	8
---------------------------------	---

12 U.S.C. § 1828(g) .....	8
---------------------------	---

12 U.S.C. § 1832 .....	8, 13
------------------------	-------

12 U.S.C. § 1832(a)(2) .....	49
------------------------------	----

12 U.S.C. § 3501-3509 .....	8-9
-----------------------------	-----

28 U.S.C. § 1291 .....	3
------------------------	---

28 U.S.C. § 1331 .....	3
------------------------	---

28 U.S.C. § 1343 .....	3
------------------------	---

28 U.S.C. § 1983 .....	3
------------------------	---

Tex. State Bar R. Art XI .....	9, 10, 11
--------------------------------	-----------

§ 5 .....	10
-----------	----

Rules Governing the Operation of the Texas Equal Access to Justice Program .....	<i>passim</i>
--	---------------

Rule 4 .....	11
--------------	----

Rule 6 .....	11, 44, 45, 46, 47, 48, 51
--------------	----------------------------

Rule 7 .....	12
--------------	----

Rule 24 .....	13, 56
---------------	--------

Rule 24(d) .....	56
------------------	----

Rule 25 .....	56
---------------	----

Texas Disciplinary Rules of Professional Conduct, Rule 1.14 .....	12
---	----

12 C.F.R. § 204.2(b)(1) .....	12
-------------------------------	----

12 C.F.R. § 204.2(b)(3)(i).....	12
12 C.F.R. § 204.2(b)(3)(ii).....	12

**Page**

**Miscellaneous:**

I. Brant, <i>James Madison: The Nationalist</i> (1948) .....	23
TEAJF, “Guidelines for Attorneys” (1999) .....	45, 46

## INTRODUCTION

This case is a constitutional challenge to the Texas IOLTA ("Interest on Lawyers' Trust Accounts") program. Under that program, funds belonging to certain individuals hiring lawyers in Texas are used -- without the consent and usually without the knowledge of those individuals -- to finance a variety of legal services programs. The IOLTA program violates Appellants' rights under the Fifth and First Amendments.

Evidence regarding the structure and functioning of the IOLTA program was largely uncontested at trial. The evidence demonstrated that: (1) Appellees have established a mandatory IOLTA program which requires Appellants and other similarly situated lawyers and clients to place certain funds into IOLTA depository accounts; (2) interest generated from those accounts is given to Appellee Texas Equal Access to Justice Foundation ("TEAJF"); (3) TEAJF distributes those funds to a variety of organizations for purposes of filing lawsuits and providing other legal services to "low income persons"; and (4) Appellants object to many of the IOLTA-funded activities in which those recipient organizations engage.

Previously, this Court ruled, and the Supreme Court agreed, that the

interest generated by IOLTA accounts is the private property of those whose funds generated the interest. *Washington Legal Found. v. Texas Equal Access to Justice Found.* ["*TEAJF I*"], 94 F.3d 996 (5th Cir. 1996), *aff'd*, 524 U.S. 156 (1998). Record Excerpts ("R.E.") 7. The district court nonetheless ruled, following remand and a two-day bench trial, that Appellants' confiscation of that private property does not constitute a "taking" of private property for which compensation is required by the Fifth Amendment. *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 86 F. Supp.2d 624 (W.D.Tex. 2000).

R.E. 4. The court based that ruling on its finding that the confiscation of Appellants' property does not constitute a "loss" for Fifth Amendment purposes because (the court found) Appellants are no worse off than if the IOLTA program had never existed. *Id.* In so ruling, the trial court essentially adopted the reasoning of the dissenting Justices of the Supreme Court and the dissenting Judges of this Court, who argued that IOLTA interest should not be deemed the private property of IOLTA depositors because the Takings Clause protects only "net" interest and because -- even after the confiscation of IOLTA interest -- the depositors are no worse off than if the IOLTA program had never existed. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 174 (1998) (Souter, J.,

dissenting); *Washington Legal Found. v. Texas Equal Access to Justice Found.* ["*TEAJF II*"], 106 F.3d 640, 644 (5th Cir. 1997) (Benavides, J., dissenting from denial of rehearing *en banc*). But the reasoning of the majority of this Court and the Supreme Court mandates the opposite conclusion: Appellants are entitled to Fifth Amendment compensation for the confiscation of their property even if (as Appellees allege) Appellants could not have generated net interest from their funds if they had not been required to participate in the IOLTA program.

The First Amendment violation is equally plain. Appellant William Summers objects to being required to finance the ideological/expressive activities of TEAJF. Such compelled funding violates his First Amendment rights in the absence of any evidence that *compelled* support of the expressive activities is necessary; it is not enough for a defendant merely to demonstrate that the activities serve some important governmental purpose.

### **STATEMENT OF JURISDICTION**

***Subject Matter Jurisdiction in the District Court.*** The district court had jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343; the action arose under the U.S. Constitution, and it seeks redress of the deprivation, under color of state law, of rights secured under the Constitution. Appellants' right to judicial

review of the actions complained of is secured by 28 U.S.C. § 1983.

***Jurisdiction in the Court of Appeals.*** The Court of Appeals has jurisdiction over this appeal under 28 U.S.C. § 1291, which provides jurisdiction over appeals from final judgments of a federal district court. The district court issued a final judgment dismissing all parties' claims on January 28, 2000. A timely Notice of Appeal was filed on February 22, 2000.

### **ISSUES PRESENTED FOR REVIEW**

(1) Whether the Texas IOLTA program -- by confiscating interest income belonging to Appellants -- violates their Fifth Amendment rights against the uncompensated taking of private property.

(2) Whether the Texas IOLTA program -- by compelling Appellant Summers to provide financial support for expressive activities to which he objects -- violates his First Amendment rights against compelled speech.

(3) Whether Appellants' claims against the Justices of Texas Supreme Court are barred by the doctrine of legislative immunity.

Each of these questions presents an issue of law and thus is subject to *de novo* review. Where noted, Appellants challenge specific findings of fact; those findings are subject to a clearly erroneous standard of review.

### **STATEMENT OF THE CASE**

Appellants Washington Legal Foundation ("WLF"), William Summers, and Michael J. Mazzone filed suit against the Texas IOLTA program on February 7, 1994 in the U.S. District Court for the Western District of Texas, Austin

Division. Named as defendants were TEAJF; the Chairman of TEAJF, in his official capacity only; and the nine Justices on the Supreme Court of Texas, in their official capacities only (the "Justices").<sup>1</sup>

On January 19, 1995, the district court granted TEAJF's motion for summary judgment. Record Appendix ("R.A.") 962-987. The court found that IOLTA depositors lacked any property rights in the interest generated by their funds; and that in the absence of such rights, they could not state claims under either the Fifth Amendment's Takings Clause or the First Amendment. *Id.*

On September 12, 1996, this Court reversed the grant of summary judgment for TEAJF and remanded the case to the district court for further proceedings. *TEAJF I*, R.E. 7. Labeling the IOLTA program a "modern-day attempt at alchemy" whose supporters claim to have created property from nothing, the Court concluded that "it seems obvious that the interest earned in the IOLTA accounts is the property of the clients whose money is held in those accounts." *Id.* at 1000. The Court declined to determine whether IOLTA violated Appel-

---

<sup>1</sup> Except as otherwise indicated, the term "TEAJF" will refer to Appellees collectively.

lants' constitutional rights; rather, it remanded the case "for reconsideration in light of the principles explained in this decision and for further factual development of the record." *Id.* at 1004. The Court affirmed the district court's dismissal of Appellants' claim for a refund of money paid to TEAJF, holding that TEAJF is an arm of the State of Texas and thus possesses Eleventh Amendment immunity from damage claims. On February 14, 1997, the Court denied TEAJF's Petition for rehearing *en banc*. *TEAJF II*, 106 F.3d 640.

The U.S. Supreme Court subsequently agreed to review this Court's decision, but it 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, holding that interest paid on IOLTA accounts belongs to those whose funds generated the interest. *Phillips*, 524 U.S. at 172. The Supreme Court remanded the case for further proceedings, including a determination of whether the confiscation of IOLTA interest income constitutes a "taking" within the meaning of the Fifth Amendment and, if so, whether Appellants are entitled to compensation. *Id.*

Following extensive post-remand discovery and denial of cross-motions for

summary judgment, the case came before U.S. District 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. R.E. 3.<sup>2</sup> On January 28, 2000, Judge Nowlin issued a Memorandum Opinion and Order dismissing all remaining claims; the judge found that TEAJF's confiscation of Appellants' property violated neither the Fifth nor First Amendments. R.E. 4. Appellants have appealed from both the January 4 and the January 28 orders.

### **STATEMENT OF FACTS**

It is (and has been for centuries) a common practice for attorneys to hold funds belonging to their clients in connection with their practice of law. Indeed, the vast majority of today's attorneys could not as a practical matter operate their law practices without collecting client funds and holding them in trust for their clients. The experience of Appellant Michael Mazzone is typical of lawyers throughout the nation. He testified that, in those instances in which a client's ability to pay his/her bills was open to question, his firm felt obliged to require the client to pay a retainer that could be used to cover unpaid bills. Trial

---

<sup>2</sup> The order did not address Appellants' argument that the Justices had waived any

Transcript ("Tr.") 40. *See also* Def. Ex. 2 (policy of Mr. Mazzone's law firm was to obtain retainer from all new clients).

Prior to 1980, a lawyer generally held client trust funds in a non-interest bearing, federally-insured checking account in which all of his/her clients' trust funds were pooled. Pooled accounts provided for administrative convenience and ready access to funds. Such accounts were non-interest bearing because federal law had (since the Depression) prohibited federally-insured banks from paying interest on *checking* accounts. *See* 12 U.S.C. §§ 371a, 1464(b)(1)(B), 1828(g). When a client placed larger sums in trust with an attorney, however, such funds were generally placed in interest-bearing *savings* accounts because the interest generated outweighed the inconvenience caused by the absence of check-writing capability.

Starting in 1980, the combination of gradual relaxation of federal restrictions on interest payments by financial institutions and the improved technology available to those institutions greatly expanded the opportunities

---

legislative immunity by failing to assert it during the first five years of this litigation.

available for earning interest on deposited funds. The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (amending various sections of Title 12 U.S.C.) expanded the interest-generating capacity of bank deposits in several crucial ways. In particular, it authorized creation of interest-bearing Negotiable Order of Withdrawal (NOW) accounts, which operate like traditional checking accounts but are exempt from interest-payment restrictions because they are not deemed "demand" accounts under federal banking law. 12 U.S.C. § 1832. It also withdrew, over a six-year period, most controls over the maximum rate of interest that financial institutions were permitted to pay on savings accounts. 12 U.S.C. §§ 3501-3509.

These and other regulatory changes, coupled with advances in technology, have produced a range of options through which bank customers are able to earn a market rate of interest on their funds while at the same time enjoying the convenience of check writing. These options include the ability to transfer funds freely among different types of accounts; thus, for example, funds can earn high rates of interest in a savings account before being transferred to a checking account when they are to be disbursed.

***Creation of IOLTA Programs.*** Efforts to create IOLTA programs began

in the 1970s; Florida started the movement to persuade lawyers to deposit client funds in savings accounts and pay the interest to state bar organizations. Under such programs, interest earned on pooled attorney trust accounts is paid to foundations established by state supreme courts, and those foundations in turn distribute funds to groups that hire attorneys who purport to represent the interests of low-income individuals. The 1980 financial decontrol legislation gave that movement added impetus by increasing the income-producing potential of bank deposits.

The IOLTA program in Texas was created by order of its Supreme Court effective May 9, 1984. The order, now codified as Article XI of the State Bar Rules, provided that an attorney receiving client funds that were "nominal in amount" or were "reasonably anticipated to be held for a short period of time" was permitted to place the funds into an unsegregated interest-bearing bank account (an "IOLTA account") and to pay interest earned on those funds to a nonprofit corporation to be established by rules to be promulgated by the Supreme Court of Texas. TEX. STATE BAR R. art. XI, § 5, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon 1984).

To implement Article XI, the Supreme Court of Texas by order dated April

30, 1984 adopted its "Rules Governing the Operation of the Texas Equal Access to Justice Program" (the "IOLTA Rules"). R.E. 8 at 9-19. The IOLTA Rules established TEAJF as the nonprofit corporation that was to receive funds paid into the IOLTA program. Consistent with Article XI, the IOLTA Rules specified that funds forwarded to TEAJF from IOLTA accounts were to be awarded as grants solely to nonprofit organizations that "have as a primary purpose the delivery of legal services to low income persons." *Id.* at 13.

During the first four years of operation of the IOLTA program (1985-88), funds forwarded from IOLTA accounts to TEAJF never exceeded \$1 million a year. On December 13, 1988, the Supreme Court of Texas amended Article XI and the IOLTA Rules to make participation in the Texas IOLTA program mandatory. Pursuant to the amended Article XI and the amended IOLTA Rules, attorneys in Texas who "hold client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time" *must* place the funds in an unsegregated "interest-bearing insured depository account," with the interest earned thereon to be paid to TEAJF. Rule 4; *id.* at 9.

The issue of whether client trust funds "are nominal in amount or held for a short period of time," and thus required to be placed in IOLTA accounts, is

addressed by Rule 6 of the IOLTA Rules. Rule 6 requires funds to be placed in IOLTA accounts if such funds:

[C]ould 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 cost of establishing and maintaining the account*, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain interest on such funds for the client. Also to be considered are the nature of the proceeding or transaction involved and the likelihood of delay in the need for such funds in such proceeding or transaction.

*Id.* at 11 (emphasis added).<sup>3</sup> In other words, attorneys are required to factor into their "net interest" calculation their firm's internal costs in establishing and maintaining an interest-bearing account for their clients, *regardless whether* (as will usually be the case) those internal costs are no greater than the internal costs associated with maintaining an IOLTA account.

IOLTA Rule 7 specifies that an IOLTA account "shall be a trust account from which withdrawals or transfers may be made on demand (subject only to any notice period which the financial institution is required to reserve by law or regulation) established in any bank, credit union or savings and loan association. .

---

<sup>3</sup> Rule 6 was amended in 1998 in response to this lawsuit. Earlier versions of Rule 6 appeared to require that funds be placed into IOLTA accounts unless the attorney could generate *net* interest for his/her client by placing client funds in a *separate* interest-bearing account for each client's deposit. Rule 6 now states that attorneys are permitted to pool client funds in an effort to generate net interest.

. " *Id.* Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct states that *any* client trust funds (not just IOLTA funds) held by an attorney "shall be kept in a separate account . . . maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person." *Id.* at 25.

The parties are in agreement that IOLTA Rule 7 and RPC 1.14 permit client funds to be deposited into either a savings account or a NOW account. R.A. 1948 (Stipulated Fact (f)).<sup>4</sup>

---

<sup>4</sup> Accordingly, Judge Nowlin's finding that client trust funds may not be placed in savings accounts because they are not "demand" accounts (R.E. 4, at 25) is incorrect. Judge

---

Nowlin apparently was led astray by use of the phrase "on demand" in IOLTA Rule 7; he apparently interpreted that phrase as meaning that trust funds could only be placed in accounts that qualify as "demand" accounts under federal banking law, a category that does not include savings accounts. If Texas law really did require that client trust funds be deposited only in "demand" accounts as defined by federal law, then they could not be deposited in NOW accounts either; neither savings accounts nor NOW accounts are "demand" accounts under federal law. 12 C.F.R. §§ 204.2(b)(1), (b)(3)(i), and (b)(3)(ii). Thus, Judge Nowlin's finding would be a death knell for the IOLTA program because all trust funds would have to be placed into ordinary checking accounts; federal law prohibits payment of interest on such accounts. *See* 12 U.S.C. § 371a.

A lawyer's option to place client trust funds into *either* savings accounts *or* NOW accounts is significant to this case for two separate reasons. First, because savings accounts bear higher interest rates than do NOW accounts (Tr. 165), their availability significantly increases lawyers' ability to generate interest for their clients. Second, their availability provides lawyers with the ability to generate interest on funds owned by corporations and partnerships. Funds may be deposited in NOW accounts only if the "beneficial interest" in the deposited funds is owned by one or more individuals or nonprofit corporations, thereby excluding the funds of partnerships and for-profit corporations from NOW accounts. 12 U.S.C. § 1832.

The IOLTA Rules provide for severe enforcement measures against any attorney who fails to comply with IOLTA's requirements. For example, Rule 24 provides for the automatic suspension of the law license of any attorney who fails to submit an annual "compliance statement" certifying that he is maintaining an IOLTA account in accordance with the IOLTA Rules. R.E. 8, at 17.

The switch from a voluntary to a mandatory IOLTA program became effective as of July 1, 1989. As a result of that switch, interest income generated by the Texas IOLTA program has increased several-fold -- to nearly \$10 million dollars in its highest year. In 1998-99, TEAJF distributed \$5.3 million in IOLTA-funded grants. R.A. 1947 (Stipulated Fact (d)). Nationwide, IOLTA programs generate more than \$120 million annually (Tr. 216), indicating that on a typical day about \$10 billion in client funds is being held in IOLTA accounts.

***Appellants' Relationship with the IOLTA Program.*** Appellants in this action are an attorney licensed to practice law in the State of Texas (Michael J. Mazzone); a citizen of Texas who currently has funds being held in an IOLTA account (William Summers); and a public interest law firm (the Washington Legal Foundation).

Mr. Mazzone is a shareholder in the Houston, Texas law firm of Dow,

Cogburn & Friedman, P.C. ("Dow Cogburn"). Tr. 39. In accordance with the IOLTA Rules, the law firm has maintained an IOLTA account into which it regularly deposits clients funds that are (as defined by IOLTA Rule 6) either nominal in amount or are reasonably anticipated to be held for a short period of time. Tr. 48, 63.

Mr. Summers is a Texas citizen who has retained Mr. Mazzone as an attorney on a variety of matters since 1993. In May 1993, Mr. Summers gave Mr. Mazzone a \$1,000 check as a retainer in connection with a lawsuit that had been filed in San Saba County, Texas against Mr. Summers. January 28, 2000 Memorandum Opinion ("Mem. Op.") 6, R.E. 4. Although TEAJF disputed the point, Judge Nowlin found that the \$1,000 retainer belonged to Mr. Summers. Mem. Op. 7. Mr. Mazzone deposited the \$1,000 check into Dow Cogburn's IOLTA account. Tr. 48. Mr. Summers did not learn that his funds had been deposited in an IOLTA account (or even of the existence of the IOLTA program) until Mr. Mazzone approached him about it in January 1994. Tr. 51, 111, 115-16. Mr. Summers's funds remained in the account through the time of trial in September 1999.<sup>5</sup>

---

<sup>5</sup> The San Saba litigation was finally dismissed in September 1998. Mem. Op. 6. In

In August 1999, Mr. Summers gave Mr. Mazzone an additional retainer of \$250, in connection with a real estate transaction. Tr. 63-64. Mr. Mazzone deposited those funds into a Dow Cogburn IOLTA account. *Id.* Judge Nowlin found that Mr. Mazzone acted in conformity with the IOLTA Rules when he deposited each of the two retainers in an IOLTA account. Mem. Op. 8. Dow Cogburn's IOLTA account at Texas Commerce Bank has paid interest at all times from 1993 to the present; the interest rate has varied from 2% per annum to a current rate of .9%. Tr. 48.

Mr. Summers objected to the deposit of his funds into an IOLTA account, both when he first learned of the IOLTA program and at the time of trial. Tr. 115, 122-24. He did not, however, consider seeking a new attorney who would not require a retainer and thus would not place his funds into an IOLTA account, because he had known Mr. Mazzone for a long time and trusted Mr. Mazzone's

---

the meantime, Mr. Mazzone had begun representing Mr. Summers in connection with other matters, and they agreed in 1998 that Mr. Mazzone would continue to hold the retainer in connection with these other matters. Tr. 58, 119.

legal counsel. Tr. 117.

***District Court Decision.*** The district court's January 4, 2000 order held that the Justices are legislatively immune from suit. Appellants have sought an injunction prohibiting the Justices from "taking disciplinary action against any attorney for failing to place client trust funds into an IOLTA account."

Complaint, R.E. 6, at 15. Judge Nowlin ruled that the Justices play no role in enforcing compliance with the IOLTA program and that they have legislative immunity from any claim that they acted improperly in adopting the IOLTA program. Order 7-9, R.E. 3. He ruled that the power to suspend attorneys for noncompliance with the IOLTA Rules resides solely with the Clerk of the Texas Supreme Court. *Id.* at 7.

On January 28, 2000, the district court issued its Memorandum Opinion rejecting Appellants' Fifth and First Amendment claims and simultaneously issued a Final Judgment dismissing all claims. The court rejected TEAJF's claim that Appellants lacked standing to sue; it found that the retainer funds paid to Mr. Mazzone belonged to Mr. Summers personally, that Mr. Mazzone acted properly in depositing the funds in his firm's IOLTA account, and that Mr. Summers's June 1999 bankruptcy filing did not affect his standing. Mem. Op. 5-8. The

court also rejected TEAJF's argument that it should reconsider the U.S. Supreme Court's *Phillips* decision on the ground that *Phillips* had been based on a misunderstanding of Texas property law. Mem. Op. 8-10.

The district court next addressed Appellants' First Amendment claims. The court held that in order to make out a claim that one has been compelled to provide financial support to groups whose expressive activities one finds objectionable, a plaintiff must show: (1) there has been an involuntary contribution; (2) the message supported by the involuntary contribution is political or ideological; and (3) the message does not support the government's policy interests. Mem. Op. 15. The court assumed without deciding that Mr. Summers had made an involuntary contribution to IOLTA. Mem. Op. 16. The court also found that at least some of the litigation funded by TEAJF met the court's "political or ideological" requirement. Mem. Op. 17-18. However, the court rejected Appellants' First Amendment claims based on Appellants' failure to make the third showing; the court found that the funded activities "are germane to an otherwise lawful regulatory program and support a substantial public interest -- that of supplying legal services to the poor." Mem. Op. 19.

The district court also rejected Appellants' Fifth Amendment claims. The

court initially noted that the Supreme Court in *Phillips* determined that interest paid on IOLTA accounts is the private property of IOLTA depositors, and remanded the case for determination of two other issues: whether TEAJF's confiscation of that interest amounts to a Fifth Amendment "taking," and the amounts of "just compensation," if any, due Appellants. Mem. Op. 20.

The district court addressed those issues in reverse order, addressing initially the issue of just compensation. The court stated, as a guiding principle, that in determining the amount of just compensation, "the question is what has the owner lost, not what has the taker gained." Mem. Op. 21 (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)). The court did not address the principal argument that Appellants have made throughout the litigation: that the amount of their loss should be measured by the objective value of the property that was confiscated from them (less whatever minor costs TEAJF may have incurred in administering the IOLTA program), regardless of the circumstances under which that property came into existence.

The court then examined various means by which attorneys might be able to derive a benefit for their clients by keeping client trust funds out of IOLTA accounts. First, it examined the feasibility of attorneys maintaining a pooled,

interest-bearing trust account, with the attorney allocating interest among those clients whose funds are in the account. The district court referred to this practice as "in-firm pooling." Mem. Op. 23-25. The only witness who testified at trial from personal experience with an "in-firm pooling" system was Robert Randell, Appellants' expert witness who maintains a private law practice in New York City. Mr. Randell testified that for many years he has generated interest for all his clients' trust funds by using an in-firm pooling system. The court held that Mr. Randell's testimony did not establish that Mr. Summers or any other Texas IOLTA depositor had suffered a loss at the hands of TEAJF, because the IOLTA Rules do not prevent Texas attorneys from using such a system "if it earns net interest for the clients. In fact, to do so is mandated by IOLTA." Mem. Op. 24. But the court also held that Mr. Randell's in-firm pooling system is *prohibited* by Texas law, because his system involves deposit of client funds into a money-market savings account (with transfer to a checking account at the time of disbursement); the court held that Texas ethics rules prohibit depositing client funds in savings accounts because they are not "demand account[s]." Mem. Op. 25. Finally, the court held that Mr. Randell's system is workable only for attorneys with a small number of trust deposits. *Id.*

Second, the court considered the feasibility of attorneys' use of sub-accounting products offered by banks. As the court explained, sub-accounting is a banking product where an entity such as a law firm opens a master account in its name and a linked sub-account for each client for whom the firm is holding funds. Mem. Op. 25. Mr. Randell testified that sub-accounting products are widely used by lawyers in at least seven states but are not available in Texas, most likely because of its restrictive IOLTA Rules. Tr. 164-65. The court nonetheless found that the costs of sub-accounting products generally exceed the interest generated thereby, thus rendering them infeasible as a method of generating net interest for clients. Mem. Op. 30. The court held that sub-accounting products could generate net interest in cases involving large sums of money or funds to be held for long periods of time, but that IOLTA Rules do not require that such funds be placed into IOLTA accounts. *Id.*

The court concluded, "based upon the evidence before the Court regarding in-firm pooling and sub-accounting, that without IOLTA the interest generated by Mr. Summers' principal would possess no economically realizable value." Mem. Op. 32. The court held that Appellants were not entitled to any compensation under the Takings Clause in the absence of evidence that they could have derived

economically realizable value from their trust funds in the absence of IOLTA.

*Id.*<sup>6</sup>

The district court next addressed the issue of whether a "taking" had occurred. First, the court held that "*per se* takings" analysis (under which a property owner virtually always is entitled to compensation whenever the government confiscates or physically invades private property) is inapplicable to this case, because it is only applicable to cases involving the physical invasion of *real* property. Mem. Op. 34. Applying an "*ad hoc* analysis" to Appellants' taking claim, the court determined that no taking has occurred because Appellants have not suffered any loss, and because they had no "investment-backed expectations" that they would recover the IOLTA interest. Mem. Op. 37-40.

### **SUMMARY OF ARGUMENT**

This Court correctly described Appellees' argument as legal alchemy when

---

<sup>6</sup> The "just compensation" section of the Memorandum Opinion does not address the fact that Appellants are not now seeking *any* compensation but rather are seeking injunctive and declaratory relief.

it first heard this case. The magical nature of Appellees' claims has only become plainer since the Supreme Court's decision in *Phillips*. The IOLTA program has generated tens of millions of dollars in interest for the benefit of TEAJF. The Supreme Court has ruled that this interest is the property of Appellants. Yet TEAJF argues that if Appellants were allowed to keep what the Supreme Court has said is theirs, it would suddenly vanish. Only by paying the interest to us, argues TEAJF, will this money continue to exist. As with any magic trick, there must be some sleight of hand going on somewhere. In this brief we look up the magician's sleeve and show where the fallacies are. But even if one continued to be dazzled, the facts remain that the interest in these accounts belongs to Appellants (the Supreme Court has said so) and that IOLTA compulsorily takes it from them and gives it to TEAJF. Where else do those millions come from? So, quite simply, this is a taking, and because it is uncompensated it must stop.

Appellees' First Amendment violation is equally plain. It is uncontested that Mr. Summers's funds are being used, over his objection, to finance expressive activities that he does not support. The First Amendment prohibits such compelled financial support, regardless how worthy Appellants may believe their cause to be. In explaining the First Amendment's prohibition against

compelled speech, the Supreme Court on numerous occasions has cited approvingly to Thomas Jefferson's view that to "compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." See, e.g., *Keller v. State Bar of California*, 496 U.S. 1, 10 (1990) (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)). In the absence of *any* evidence justifying the financing of legal services groups by means of *compelled* exactions from Mr. Summers rather than, say, through general tax revenues, the IOLTA program cannot withstand First Amendment challenge.

## ARGUMENT

### I. THE IOLTA PROGRAM VIOLATES APPELLANTS' FIFTH AMENDMENT RIGHTS BY TAKING THEIR PROPERTY WITHOUT JUST COMPENSATION

*Phillips* has established that IOLTA interest is the property of those clients whose funds generated the interest. It follows that Texas's appropriation of that interest for itself constitutes an uncompensated "taking" of the interest in violation of the Fifth Amendment's Taking Clause.<sup>7</sup> That the interest came into existence as a result of a program mandated by the state is irrelevant. In *Webb's Fabulous Pharmacies*, the Supreme Court held that Florida's attempted appropriation of

---

<sup>7</sup> The Takings Clause provides: "nor shall private property be taken for public use

interest generated by funds deposited in a court registry violated the Takings Clause. The Court stated unequivocally, "But the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

---

without just compensation."

Appellants recognize that when the government is administering a fund, it is permitted to charge a reasonable fee for its services. *Webb's*, 449 U.S. at 162-163. But TEAJF has never attempted to characterize its 100% appropriation of funds earned on IOLTA accounts as a fee for TEAJF's administration of those funds;<sup>8</sup> rather, it has justified its appropriation initially by contending that IOLTA depositors lack any property rights in IOLTA interest and (post-*Phillips*) by contending that depositors' property rights in IOLTA interest are insufficiently weighty to merit Takings Clause protection. Nor has TEAJF sought to characterize IOLTA as a tax or a "users' fee" on users of the legal system. That clearly was not TEAJF's rationale in establishing the IOLTA program. If it *were* TEAJF's rationale, the program would be arbitrary indeed. It would fall haphazardly on those who place small sums in the hands of their attorneys and not on others who place larger sums or on those who make extensive use of the legal

---

<sup>8</sup> Indeed, the Supreme Court in *Phillips* rejected any such argument out of hand:

Our holding does not prohibit a State from imposing reasonable fees it incurs in generating and allocating interest income. . . . But here the State does not, *indeed cannot*, argue that its confiscation of respondents' interest income amounts to a fee for services performed. Unlike in *Webb's*, where the State safeguarded and invested the deposited funds, funds held in IOLTA accounts are managed entirely by banks and private attorneys.

*Phillips*, 524 U.S. at 171 (emphasis added).

system yet have no need to put money into the custody of their lawyers. In sum, TEAJF has no arguable basis for its actions other than as an exercise of its eminent domain powers; providing a check on the exercise of such powers is the overriding purpose of the Takings Clause.

**A. Physical Appropriation of Any Property, Including Personal Property, Is Subject to Per Se Takings Analysis**

The Supreme Court has made clear that government action virtually *always* is compensable when (as here) the government appropriates private property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) ("Where the government authorizes a physical occupation of property (*or actually takes title*), the Takings Clause generally requires compensation.") (emphasis added). In such cases, compensation is required "no matter how minute the intrusion, and no matter how weighty the public purpose behind it." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

The analysis applied in cases involving government invasion or appropriation of private property is generally referred to as "*per se* takings" analysis. The district court held that *per se* takings analysis is inapplicable here because it applies only to the physical appropriation of real property, while the property

confiscated from Appellants was personal property. Mem. Op. 34. But the court made no effort to explain why it should make a difference for Takings Clause purposes that the property confiscated by the government is personal property instead of real property; the authorities cited by the court make no such distinction.

The Supreme Court has never declined to apply a *per se* analysis to government confiscation of money in any case even remotely resembling this one. In *Webb's*, the one Supreme Court case factually similar to this case, the Supreme Court explicitly rejected the argument of the county government that the plaintiffs' Takings Clause claim should be judged under the multi-factor balancing test articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Webb's*, 449 U.S. at 163.<sup>9</sup> The Court explained that the *Penn Central* balancing test was inapplicable because the government had:

[N]ot merely "adjusted the benefits and burdens of economic life to promote the common good." [*Penn Central*, 449 U.S.] at 124. Rather, the exaction is a forced contribution to general governmental revenues, and is not reasonably related to the costs of using the courts.

---

<sup>9</sup> The Court's failure to use the term "*per se* taking" is readily explainable: *Webb's* was decided in 1980, and the Court did not coin that phrase until some years later.

*Id.*

The district court's efforts to distinguish *Webb's* are unavailing. The court asserted, for example, that *Webb's* is distinguishable because the plaintiffs in that case (200 entities claiming to be creditors of an insolvent company) could have earned net interest on the interpleaded funds "regardless of whether [the money] was interpleaded into the court or held in a private bank account." Mem. Op. 36.

That assertion is incorrect. At no time prior to the Florida court proceedings had the *Webb's* claimants ever had control over the interpleaded funds; the funds were proceeds derived from the sale of the insolvent company's assets. Indeed, unlike Mr. Summers (whose title to the IOLTA deposits is not in question) the claimants' rights to receive *any* portion of the interpleaded funds was not established until the conclusion of the state court insolvency proceedings (*i.e.*, after the interest at issue had already been generated). *Webb's* explicitly acknowledged that the Florida court was under no obligation to deposit the interpleaded funds in an interest-bearing bank account; but once the Florida court did so, the Takings Clause prohibited it from confiscating the interest for itself. *Webb's*, 449 U.S. at 162.

The district court also attempted to distinguish *Webb's* by noting that the

Florida court in *Webb's* attempted to confiscate all the interest income from the interpleaded funds *in addition to* charging a fee for administering the fund. Mem.

Op. 35. The court said:

On this basis the instant case is easily distinguishable from *Webb's*. In the instant case there is no money to confiscate outside the mechanisms which make IOLTA possible, therefore it cannot qualify as a confiscatory taking.

Mem. Op. 36. That argument fails to distinguish *Webb's*; there was "no money to confiscate" in that case either, apart from the Florida court "mechanisms" (i.e., the deposit of interpleaded funds in an interest-bearing account) that resulted in interest being earned. While the district court was correct that *Webb's* did not challenge the Florida court's right to charge an administrative fee, Appellants similarly do not object to paying for any service that TEAJF might perform for them. But as the Supreme Court held in *Phillips*, TEAJF "does not, indeed cannot, argue that its confiscation of respondents' interest income amounts to a fee for services rendered." *Phillips*, 524 U.S. at 171. TEAJF provides no services to Mr. Mazzone and Mr. Summers; rather, all it does is accept an interest payment each month from Dow Cogburn's bank. Finally, the district court's statement that TEAJF's appropriation of Mr. Summers's interest income is not "confiscatory" in nature is directly contrary to *Phillips*, which characterized

IOLTA programs as "confiscatory regulations (as opposed to those regulating the use of property)." *Id.* at 167.

Under a *per se* takings analysis, the only relevant factual issue is whether the plaintiffs' property has, in fact, been appropriated or occupied by the government. The evidence is uncontested that Mr. Summers' \$1,000 retainer has been generating interest in an IOLTA account since 1993 at a rate of between .9% and 2% interest per year. Tr. 29. As mandated by the IOLTA rules, that interest has been forwarded to TEAJF on a monthly basis, yet TEAJF has refused to provide compensation.<sup>10</sup> That evidence is sufficient to establish a Takings Clause

---

<sup>10</sup> In its Memorandum Opinion, the district court speculated (without citation to evidence) that perhaps Mr. Summers' interest income was never forwarded to TEAJF because perhaps the bank service charges on Dow Cogburn's IOLTA account may have exceeded the interest generated by that account. Mem Op. 32. That speculation is contrary to the assumptions under which this case was tried and contrary to the evidence at trial. Appellants note initially that the Complaint alleges that Mr. Summers' interest income was forwarded to TEAJF. R.E. 6, at 10. TEAJF (which was in a position to know whether it received income from Dow Cogburn's bank) never disputed that allegation and did not list that allegation in the Pre-Trial Order as among the disputed issues of fact. Moreover, at trial, Mr. Summers testified that his interest income was being forwarded to TEAJF over his objection. Tr. 115. Plaintiffs' Exhibit 8 is a copy of one of Dow Cogburn's monthly bank statements from its Texas Commerce Bank IOLTA account; the statement shows interest being forwarded to TEAJF. Appellants have attached the bank statement to this brief as Attachment A. One of TEAJF's witnesses, Dean Frank Newton, testified that TEAJF directs attorneys to close down their IOLTA accounts if they consistently over a one-year period fail to generate interest sufficient to cover bank service charges. Tr. 254. That Dow Cogburn's IOLTA account has remained open ever since Mr. Summers's funds were first deposited in it in 1993 demonstrates that the account was generating interest in excess of service charges. In any event, it is ludicrous to suggest that the IOLTA account at a large firm like Dow Cogburn, where the account balance exceeds several hundred thousand dollars on any given day, cannot generate

violation.

**B. The *Webb's* Takings Analysis Mandates a Finding That a Taking Has Occurred**

Given the striking factual similarity between this case and *Webb's*, *Webb's* provides the rule of decision for the application of the Takings Clause to Appellants' claims. Under the *Webb's* takings analysis, Appellants have established that a taking has occurred.

The district court expressed doubt, however, that the Supreme Court actually employed a *per se* takings analysis in *Webb's*. Rather, the district court concluded that the *Webb's* analysis "seems to fall somewhere in between a *per se* analysis and regulatory ad hoc analysis." Mem. Op. 36. The district court appears to have arrived at that conclusion because the *Webb's* Court did not end its analysis (and order the payment of compensation) as soon as it determined that Florida had confiscated private property. Rather, *Webb's* looked at three additional factors before concluding that Florida had violated the Takings Clause:

---

sufficient interest to cover its bank's monthly service charge.

(1) Florida's "exaction" was "a forced contribution to general government revenues"; (2) it was "not reasonably related to the cost of using the courts"; and (3) "[n]o police power justification [was] offered for the deprivation." *Webb's*, 449 U.S. at 163.

The Supreme Court's consideration of those three factors is not an indication that *Webb's* did not apply a *per se* takings analysis. But even if the district court is correct, this Court should still find that a taking has occurred because all three factors that led the *Webb's* Court to determine that a taking had occurred are also present in this case.

First, the IOLTA program is a forced contribution to government revenues, yet TEAJF has never asserted that it constitutes a tax. The program was instituted by the Supreme Court of Texas, which does not claim the power under the Texas Constitution to impose a tax. Moreover, the program would be of doubtful validity even if denominated a "tax," given that it is imposed at the rate of 100% of income. Second, as noted above, the U.S. Supreme Court explicitly rejected the argument that the IOLTA program can be viewed as a fee for services rendered. *Phillips*, 524 U.S. at 171. Third, the IOLTA program cannot be justified as a valid exercise of Texas's police powers. TEAJF does not contend

that it is expropriating IOLTA interest income as part of an effort to regulate the legal profession. Rather, TEAJF's sole purpose is to raise revenues for what it deems a worthy cause.

The Supreme Court on occasion has expressed reluctance to apply mechanically a *per se* takings analysis to government confiscation of money. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 529 (1998) (plurality). That reluctance is borne of the Court's recognition that money's fungibility renders somewhat artificial any effort to distinguish between exactions directed at a specific pool of money and all other exactions. Because of money's fungibility, it makes little difference whether the government seizes \$100 from one's bank account or simply orders it paid; logic suggests that the same Takings Clause analysis should apply in both situations.

The Supreme Court addressed this precise issue in *United States v. Sperry Corp.*, 493 U.S. 52 (1989). There, Sperry (the claimant) had received a \$2.8 million award from the Iran-United States Claims Tribunal; before paying the award to Sperry, the Tribunal deducted a \$56,000 fee to cover its costs in providing claimants with a forum within which to raise their claims against Iran. Sperry argued that *per se* takings analysis should apply (and thus that

compensation should *automatically* be required) because the \$56,000 fee was appropriated from a specific pot of funds: the \$2.8 million claims award. The Court rejected that argument, explaining:

It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately.

*Sperry Corp.*, 493 U.S. at 62 n.9. But *Sperry* does *not* support TEAJF's assertion that money is not entitled to the same Takings Clause protection as real property or other forms of personal property.

Instead of focusing on whether the government has confiscated a specific pot of money, the Supreme Court in Takings Clause cases involving monetary exactions has focused on the factors set forth in *Webb's*. Where (as in *Sperry*) the government exaction is a fee for services rendered by the government, the Court has held that no compensation is required. *Id.* at 63.<sup>11</sup> But where the government

---

<sup>11</sup> Both this Court and the Supreme Court have already distinguished *Sperry* from this case on precisely that ground. *TEAJF I*, 94 F.3d at 1002 n. 38, R.E. 7; *Phillips*, 524 U.S. at 171.

expropriation of cash is neither a fee for service nor an assessment as part of a regulatory scheme of a larger activity and not "out of proportion" to the benefits the paying party realized from that activity (*Concrete Pipe & Products of Cal. Inc. v. Construction Laborers Pension Trust of Southern Cal.*, 508 U.S. 602, 645 (1993)), but rather is simply a seizure of all the revenue generated by a private pool of funds, *Webb's* makes clear that the Takings Clause is *always* violated unless just compensation is provided.

**C. The IOLTA Program Constitutes a Taking Even Under *Penn Central's Ad-Hoc* Analysis**

The district court rejected Appellants' argument that a *per se* Takings Clause analysis was applicable to this case; rather, the district court applied the "ad hoc, factual" takings inquiry set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Mem. Op. 37. For the reasons set forth above, that ruling was incorrect as a matter of law. But even under a *Penn Central* analysis, TEAJF's confiscation of Appellants' interest income violates the Takings Clause.

While there is no precise formula for determining under *Penn Central* whether government action constitutes a taking for which compensation is required, courts generally focus on three factors: (1) the character of the

government action; (2) its economic impact; and (3) its interference with reasonable investment-backed expectations. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984).

Consideration of those factors leads to the conclusion that the IOLTA program violates the Takings Clause. First, the "character of the government action" factor (a factor not considered by the district court) strongly suggests that the IOLTA program constitutes a compensable taking. The Supreme Court has explained that a "taking may more readily be found when the interference with property can be characterized as a physical invasion, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124 (internal quotations omitted). *See also Matagorda County v. Law*, 19 F.3d 215, 224 (5th Cir. 1994) (Takings Clause "almost invariably" is found to have been violated where the government has "physically invaded or permanently appropriated" the claimants' assets).

The IOLTA program permanently expropriates privately-owned interest income for government use. Indeed, under a virtually identical set of facts, *Webb's* held that government expropriation of interest income could *not* be

deemed a mere "adjust[ment of] the benefits and burdens of economic life to promote the common good." *Webb's*, 449 U.S. at 163. As the Supreme Court has explained, the "character of the government action" factor focuses in particular on whether individual property owners have been unfairly singled out by the government; where the government action "singles out" certain employers to bear a burden that is "unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause." *Eastern Enterprises*, 524 U.S. at 537 (plurality). IOLTA depositors are similarly being "singled out" to bear the burden of solving a problem (the unmet demand for legal services among indigents) that they had no role in creating. Indeed, given TEAJF's inability to cite even a single instance in which Takings Clause compensation was denied under factual circumstances analogous to those here, the "character of the government action" factor should be sufficient by itself to support a finding that a compensable taking has occurred.

Second, the "economic impact" factor also tips decidedly in Appellants' favor. The IOLTA program expropriates 100% of the interest earned on client funds in IOLTA accounts. It is irrelevant that the amount of interest income

expropriated from any one IOLTA depositor may not be large; the point is that *all* of the property is taken. It is precisely such skewed allocation of burdens that the Takings Clause was designed to prevent. The Supreme Court has made clear that the small amount of each depositors' loss does not undercut Appellants' takings claims, because "[t]he Fifth Amendment draws no distinction between grand larceny and petty theft." *Hodel v. Irving*, 481 U.S. 704, 727 (1987) (Stevens, J., concurring).

The trial court's contrary conclusion (Mem. Op. 38) ignored the *Phillips* decision. *Phillips* held that interest earned on IOLTA accounts belongs to IOLTA depositors; thus, any program that confiscates that interest is a loss to IOLTA depositors. Nonetheless, the trial court held:

Plaintiffs assert that the economic impact factor tips in their favor, because IOLTA expropriates 100% of the interest earned on IOLTA. The Court finds that the costs of administering the money placed in a non-IOLTA account exceeds those in an IOLTA account. Those costs would subsume the interest earned if not for IOLTA. The client's funds would be unable to generate net interest absent IOLTA. Therefore the impact of the regulation on Plaintiffs is nil.

Mem. Op. 38. But the hypothetical issue of what might have happened in the absence of the IOLTA program is not a relevant consideration. Rather, the issue is whether TEAJF is entitled to confiscate the income that has in fact been earned

and which (according to *Phillips*) belongs to IOLTA depositors. Under those circumstances, there is no question that TEAJF's failure to distribute the IOLTA interest income to its rightful owners results in a loss to IOLTA depositors.<sup>12</sup>

Nor does the third factor -- interference with reasonable investment-backed expectations -- cut against a "compensable taking" finding. True, individuals who place funds in trust with their attorneys are unlikely to be doing so for investment purposes. But it is also true that clients, like anyone else, have an eminently reasonable expectation that any interest earned on their funds will redound to their benefit. The Supreme Court in *Webb's* held that the Takings Clause had been violated without evidence that Florida had interfered with any investment-backed expectations of receipt of interest. The plaintiffs (putative creditors of an

---

<sup>12</sup> Appellants do not contest TEAJF's right to deduct expenses it incurs in generating interest before paying "net" interest to Mr. Summers and other IOLTA depositors. But the evidence is unrebutted that such expenses (if any) do not exceed the interest generated; indeed, the IOLTA program has been generating in excess of \$5 million per year in net interest in recent years. TEAJF owes no obligation to IOLTA depositors to operate the IOLTA program so as to generate net interest or to operate any program at all, but having done so it is obligated to pay over that net interest to its rightful owners. *Webb's*, 449 U.S. at 161-63.

insolvent corporation) could not have had any such expectations because they had no right to insist that the interpleaded funds be deposited in an interest-bearing account. *Webb's*, 449 U.S. at 161.

In sum, even if a *Penn Central* analysis is applied, TEAJF's confiscation of Appellants' interest income violates the Takings Clause.

**D. Appellants Are Entitled to a Remedy for Appellees' Violations of Their Rights Under the Takings Clause**

The district court held that, regardless whether TEAJF had violated their rights under the Takings Clause, Appellants are not entitled to just compensation (or any other form of relief) because (the court found) they have suffered no loss as a result of the IOLTA program. Mem. Op. 21-33. The court erred as a matter of law; Appellants are entitled to relief from Appellees' constitutional violations regardless whether they have suffered the type of loss upon which the court focused.

Appellants' entitlement to just compensation is of limited relevance to this appeal, because ever since this Court's 1995 decision in *TEAJF I* Appellants have not been seeking *any* monetary compensation.<sup>13</sup> Rather, Appellants have been

---

<sup>13</sup> The Court ruled in *TEAJF I* that TEAJF is an arm of the State of Texas and thus possesses Eleventh Amendment immunity from damage claims. *TEAJF I*, 94 F.3d at 1005,

seeking injunctive and declaratory relief. Thus, in determining a proper remedy, the focus should be on whether Appellees (in the absence of an injunction) are likely to continue to violate Appellants' constitutional rights, not on the amount of damages suffered by Appellants as a result of Appellees' past violations.<sup>14</sup> The evidence at trial established that Mr. Summers will continue to suffer violations of his constitutional rights in the absence of an injunction: his IOLTA funds

---

R.E. 7. WLF respectfully disagrees with that ruling and will raise it anew if the case returns to the Supreme Court. But in light of that ruling, Appellants at trial did not seek to recover the interest income already paid to TEAJF.

<sup>14</sup> TEAJF argued at trial that injunctive relief is *never* appropriate in Takings Clause cases; rather, TEAJF argued, virtually *any* government confiscation of private property is permissible so long as the government is willing to pay compensation. The district court did not rule on that argument, presumably because the court agreed with Appellants that TEAJF had waived the argument by failing to raise it until 1999, five years after suit was filed. In any event, TEAJF's argument is without merit. If TEAJF were correct that relief under the Takings Clause is limited to compensatory damages, then States would be wholly exempt from complying with the Takings Clause -- because the Eleventh Amendment bars federal suits to recover compensatory damages from States.

continue to earn interest for TEAJF. Tr. 62-64.

In any event, the district court erred as matter of law in finding that the Fifth Amendment does not require "just compensation" under the facts of this case. The court's basis for that finding (Appellants suffered no loss) failed to focus on the property confiscated from Appellants: the interest earned on IOLTA accounts, property which unquestionably has monetary value. Rather, the court held that "loss" should be determined based on a comparison to the financial position Appellants would have been in if, hypothetically, there had never been an IOLTA program. Mem. Op. 22. The court held (erroneously, as Appellants demonstrate below) that Appellants are no worse off than if the IOLTA program had never come into existence and therefore the Fifth Amendment does not require the payment of compensation. Mem. Op. 32-33. But that rationale wholly ignores the holding of *Phillips* that the interest earned on IOLTA accounts is the private property of IOLTA depositors. *Webb's* makes clear that those whose interest income has been expropriated in violation of the Takings Clause are entitled to compensation equal to the value of the interest income expropriated -- without regard to whether the claimants, if left to their own devices, could have

generated net interest income. *Webb's*, 449 U.S. at 161-63.<sup>15</sup>

Moreover, the notion that Takings Clause compensation is dependent on a showing that the government has deprived a property owner of a commercially exploitable asset was rejected by *Phillips*. The Court explained:

[P]roperty is more than economic value, *see [Loretto]* at 435; it also consists of "the group of rights which the so-called owner exercises in his dominion of the physical thing," such "as the right to possess, use, and dispose of it." [*United States v. General Motors [Corp.]*, 323 U.S. 373,] 378 [(1945)]. While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property. . . . The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents

---

<sup>15</sup> The 200 claimants in *Webb's* had no means of obtaining interest on their own because they had no control over the interpleaded funds that had been placed into the court registry. Indeed, at the time that interest was being generated on the interpleaded funds, the claimants' ownership rights to those funds had not yet been established; they were putative creditors of an insolvent company who had filed as-yet-unapproved claims with the company's receiver.

exceed the amount collected.

*Phillips*, 524 U.S. at 170. As *Phillips* held, "possession, control, and disposition" are "valuable rights" that inhere in Appellants' property. It follows that Appellants suffered a loss when TEAJF deprived them of those rights by expropriating their property.

In holding that no compensation is due even if TEAJF violated the Takings Clause, the district court cited a series of cases in which the Supreme Court has considered how to compute the value of property taken by the government. Mem. Op. 21-22. These cases have held that where the value of the property taken is subject to question, 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*, 217 U.S. 189, 195 (1910). But that line of cases has no relevance here, where the value of the property taken is readily ascertainable: if \$100 in interest is taken from an IOLTA depositor, then the amount of his loss is \$100.<sup>16</sup>

---

<sup>16</sup> Moreover, the district court misapplied this line of cases by invoking it in support of an argument that Appellants are entitled to *no* compensation. In every one of the cases cited by the district court, the plaintiffs were entitled to *some* compensation for the government's taking of their property; the only issue was the proper amount of compensation to be paid. Also, in each of these cases, the plaintiffs were trying to take advantage of the government's need to go forward with an important public project and to "hold up" the government for premium compensation based on the government's need to obtain the plaintiff's property. *See, e.g., City of New York v. Sage*, 239 U.S. 57, 61 (1915) (land needed by city to construct

---

reservoir). Here, there is no argument that Appellants are attempting to take advantage of the government's particularized need for their property. Rather, it is TEAJF that is attempting to take advantage of what it deems a quirk in the banking laws to garner income for itself. TEAJF has no need for Appellants' property in particular; it is just searching for new revenues.

Moreover, both this Court in *TEAJF I* and the Supreme Court in *Phillips* cautioned against basing Takings Clause decisions on a claimant's ability to generate a profit if left to his own devices, particularly where (as here) it is other government rules that stand as an obstacle to generating a profit. *TEAJF I*, 94 F.3d at 1004 n.47, R.E. 7 (although various tax law provisions may make it more difficult for IOLTA depositors to earn net interest on their own, Takings Clause issues should not "hinge . . . on the fickle tax code"). *Phillips* explained that IOLTA interest should not be deemed "government-created value" that is exempt from the Takings Clause because:

[T]he value [of IOLTA interest] is created by respondents' funds. The Federal Government, through the structuring of its banking and taxation regulations, imposes costs on this value if private citizens attempt to exercise control over it. Waiver of these costs if the property is remitted to the State hardly constitutes "government-created value."

*Phillips*, 524 U.S. at 171. IOLTA may not establish rules prohibiting alternatives to the program from which it feeds and then defend the program by claiming that clients could not realize a benefit outside of the program because of those very rules. *See Texas v. Biggar*, 873 S.W.2d 11, 13-14 (Tex. 1994) (Texas may not "rig the market in its favor" in order to reduce compensation owed for taking property. "If government is able to use its power as sovereign to adjust the value

of just compensation, the constitutional protection is rendered meaningless.").

**E. The Evidence at Trial Established that Most Clients Could Benefit if They Were Permitted to Opt Out of IOLTA**

As Appellants have demonstrated above, they are entitled to prevail on their constitutional claims *regardless* whether they could have derived any benefit if they had been permitted to opt out of the IOLTA program. Nevertheless, the evidence at trial clearly established that IOLTA depositors *could* benefit if permitted to opt out of the program. That evidence provides an additional reason for reversing the judgment below, because the district court's judgment was based on an erroneous conclusion that IOLTA depositors could *not* benefit in this manner.

The district court concluded *as a matter of law* that clients could not possibly be injured from operation of the IOLTA program because, if there is any way for attorneys to generate "net interest" for their clients, the IOLTA Rules require them to do so. Therefore, the district court concluded, by definition the only funds that are in the IOLTA program are those incapable of generating "net interest." Mem. Op. 23-33.<sup>17</sup>

---

<sup>17</sup> For example, the district court considered the un rebutted testimony of Robert

---

Randell (Appellants' expert witness) regarding his use of "in-firm pooling" (pooling client funds in an interest-bearing savings account). Mr. Randell testified that for many years he has generated interest for all his clients' trust funds by using in-firm pooling. The court held that Mr. Randell's testimony did not establish that Mr. Summers or any other Texas IOLTA depositor had suffered a loss at the hands of TEAJF, because the IOLTA Rules do not prevent Texas attorneys from using such a system "if it earns interest for the clients. In fact, to do so is mandated by IOLTA." Mem. Op. 24.

The court adopted similar reasoning in rejecting Appellants' claims that use of bank subaccounting products would permit attorneys to provide a benefit to clients if permitted to opt out of the IOLTA program. The court conceded that use of subaccounting products would enhance an attorney's ability to generate "net interest" for his clients in cases where larger sums of money are to be held or the client funds are to be held for a longer period of time. Mem. Op. 30. But, the court continued:

In these cases, the client funds would not be placed in IOLTA. Therefore, the Court finds that Plaintiffs have failed to establish through evidence before the Court that Mr. Summers' funds could theoretically earn net interest in a sub-account.

*Id.*

The district court's conclusion is flawed because it is based on a misapplication of IOLTA Rule 6, the rule that instructs attorneys on how to determine if client funds are unlikely to generate net interest -- and thus must be placed into an IOLTA account. Rule 6 defines net interest as gross interest less "*the costs of establishing and maintaining the account*, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain interest on such funds for the client." IOLTA Rule 6 (emphasis added). Defining net interest in this manner (*i.e.*, requiring law firm overhead to be included in the calculus) ensures that almost all client funds will be deposited in an IOLTA account, because only very large sums of money held for extended periods of time are likely to generate net interest as so defined. Indeed, Mr. Randell testified that Rule 6 would prohibit him from using his in-firm pooling system if he practiced law in Texas, because many of the client trust funds he holds could not generate net interest *as defined by Rule 6*. Tr. 159-60.<sup>18</sup>

---

<sup>18</sup> In guidelines that it provides to Texas attorneys to help them in making the "net interest" calculation under Rule 6, TEAJF sets forth an extensive list of all the costs that must be taken into account. In making the "net interest" determination, attorneys are to consider "all costs associated with [a non-IOLTA, interest-bearing] account," including five types of "internal costs" (*i.e.*, costs internal to the law firm) and three types of "external costs" (*i.e.*, fees imposed by the bank). Pl. Exh. 1 ("Guidelines for Attorneys" brochure) at 5, R.E. 8.

---

These costs must be taken into account because, TEAJF reasons, "[t]hese costs will be either directly or indirectly passed on to the client." *Id.* The guidelines also suggest that, if all the enumerated costs are taken into account, \$1,000 in client trust funds (the precise amount of Mr. Summers's initial retainer payment to Mr. Mazzone) is unlikely to generate "net interest" for the client unless the attorney anticipates holding the funds for at least *five years* at 2% annual interest. *Id.* at 7.

But whether client funds can generate net interest as defined by Rule 6 was not the issue that the district court purported to address. The issue presented by Appellants and addressed by the district court was whether clients could derive a net financial *benefit* if their funds were deposited in an interest-bearing non-IOLTA account rather than in an IOLTA account. Contrary to the district court's analysis, whether a client would derive a "net benefit" in a non-IOLTA account is determined by computing the client's gross interest and then subtracting the *additional* costs that the lawyer will incur as a result of holding client funds in an interest-bearing rather than an IOLTA account. Most, if not all of the costs of handling trust funds will be *precisely* the same regardless whether the funds are held in an IOLTA account or a non-IOLTA interest-bearing account; e.g., each account will have to be reconciled at the end of every month to determine what portion of the account belongs to each client whose funds have been deposited.

Accordingly, as Mr. Randell testified, the costs of operating a non-IOLTA interest-bearing account are not significantly different from the costs of operating an IOLTA account. Tr. 160. Because switching funds from an IOLTA account to a non-IOLTA, interest-bearing account does not increase costs, any interest paid on the non-IOLTA account constitutes a "net benefit" to the client. The

client may still not be earning net interest (as defined by Rule 6) after all the firm's overhead costs are factored in,<sup>19</sup> but at least he is better off than if his funds remained in an IOLTA account.<sup>20</sup> Thus, the district court's ruling on the

---

<sup>19</sup> Few firms will impose a separate fee for the overhead costs of operating a trust account. But, as TEAJF's "Guidelines for Attorneys" points out, "[t]hese costs will be either directly or indirectly passed on to the client" (R.E. 8, at 5) -- usually as part of the attorney's hourly fee.

<sup>20</sup> A hypothetical example may help to illustrate Appellants' point. Let us assume that a lawyer holds \$1,000 in trust for his client and expects to have the money for one year. If the

benefit-to-the-client issue -- no one has suffered a loss because if there is any way that a lawyer can benefit his clients, he is required to do so -- was fatally flawed because it ignores the impact of using the "net interest" definition in Rule 6 in

---

lawyer's bank pays 1.5% interest per year on its accounts, the lawyer could expect the client funds to generate \$15 in interest over the course of one year. Let us further assume that the client's proportionate share of the law firm's overhead attributable to its trust accounts is \$12/year, and that his proportionate share of bank fees is \$8/year. Under Rule 6, the funds should be placed into an IOLTA account, because no net interest could be generated (the \$15.00 in interest is exceeded by the \$20.00 it costs to generate that interest). If the funds are placed into an IOLTA account, the net charge to the client is \$12/year (the law firm's internal costs, which ultimately will be borne by the client); TEAJF pockets \$7.00 (the excess of gross interest over bank fees). If the funds are placed into a non-IOLTA interest-bearing account, the client's position improves by \$7.00 -- he receives the \$15.00 in interest, reduced by the \$8.00 in bank fees. Thus, in this hypothetical, the client can derive a *net benefit* from keeping funds out of the IOLTA program even though he cannot earn *net interest* (as defined by Rule 6) on his funds.

determining whether clients will benefit from opting out of IOLTA.<sup>21</sup>

As the district court found and as Mr. Randell readily conceded, there may be instances in which operating a non-IOLTA interest-bearing account for clients will increase costs slightly; for example, a Form 1099 must be sent to the IRS for each individual (but *not* corporations) earning in excess of \$10 interest per year. Mem. Op. 25. But this does not substantially diminish the overall net benefit available to clients whose funds are deposited in non-IOLTA, interest-bearing accounts. Indeed, the district court appeared to concede that a substantial number of clients would benefit under Mr. Randell's in-firm pooling system; the court's

---

<sup>21</sup> The district court's discussion of this "net benefit" argument indicates that the court misunderstood Appellants' argument. The court apparently believed that the "net benefit" argument entailed allowing *attorneys* to pocket the interest earned on their clients' funds and then passing the savings along to clients. Mem. Op. 30-32. Suffice to say that Appellants have never advocated permitting attorneys to take all or part of the interest earned on client trust funds.

only response was to assert that the responsibility lies with the attorney, not with TEAJF, if the attorney fails to take advantage of that system. Mem. Op. 24. Because the court's conclusion was based on a misreading of Rule 6 (which *mandates* that client funds be deposited in an IOLTA account unless net interest can be generated, even if the client could derive a net benefit by opting out), it cannot be sustained.

Thus, one way Appellees accomplish their magic trick (*i.e.*, "creating" property out of nothing) is to require attorneys to calculate their administrative cost in investing their clients' funds in determining if those investments yield net interest, while ignoring that cost in respect to funds invested in IOLTA accounts. If that cost is what brings the return from those funds below zero in one case so must it in the other, because that cost is virtually the same in both, as is the return from the funds.

Moreover, the district court's determination was undoubtedly colored by its incorrect finding that Texas does not permit Texas attorneys to place client funds in savings accounts (as Mr. Randell does). Mem. Op. 25. As explained *supra* at page 12, the IOLTA Rules permit client funds to be deposited into either a savings account or a NOW account. Indeed, the parties stipulated in advance of

trial that attorneys have that option. R.A. 1948 (Stipulated Fact (f)).

Apparently searching for an explanation for why the IOLTA program could possibly generate so much income if only nominal or short-term funds are customarily deposited in IOLTA accounts, the court stated, "The main source of net interest derived from IOLTA is generated by corporate and partnership monies which are disallowed from earning interest by federal banking law." Mem. Op. 32. That finding is clearly erroneous; there is *no* evidence in the record (and the court cited none) suggesting that corporate and partnership money makes up the bulk of IOLTA funds.<sup>22</sup> Moreover, the court's premise is incorrect: while corporations and partnerships may not deposit funds in NOW accounts (8 U.S.C. § 1832(a)(2)), they are free to deposit funds in interest-bearing savings accounts.

The secret of IOLTA's financial success lies elsewhere. The IOLTA Rules

---

<sup>22</sup> Appellants' anecdotal experience has been precisely the opposite: there is little corporate money in the IOLTA program, perhaps because they are less likely than individuals to be asked by their attorneys to pay retainers.

require every firm that holds client funds to maintain an IOLTA account into which so-called nominal or short-term funds must be deposited. Practically, this ensures that funds that no one would deem "nominal" or "short-term" will be deposited into IOLTA accounts. By *mandating* that attorneys handling client funds maintain IOLTA accounts, the IOLTA Rules ensure that virtually all client funds will end up there -- because very few firms will maintain two separate client trust accounts (requiring twice the administrative cost to maintain) on a permanent basis. Thus, the IOLTA program heavily weights the lawyer's decision-making process in favor of depositing all client funds in an existing IOLTA account instead of incurring the substantial costs of opening a new interest-bearing, non-IOLTA account for each eligible client.

The district court also held that Mr. Randell's in-firm pooling system, in addition to being impermissible in Texas because it involves use of a savings account, could not handle large numbers of clients and thus was "unfeasible" except for the unusual lawyer (like Mr. Randell) who usually does not hold funds from more than six clients at a time. Mem. Op. 24. But there is no evidence in the record suggesting that Mr. Randell's system would not work with greater numbers of clients, and Mr. Randell testified that it would. Tr. 192. Moreover,

there is no evidence in the record suggesting that most Texas IOLTA accounts handle a greater number of clients at any one time; and the testimony of Frank Newton (former Chairman of TEAJF and one of its expert witnesses) indicated that IOLTA accounts the size of Mr. Randell's are more the norm than the exception. Tr. 254.

Appellants are entitled to judgment on their constitutional claims without regard to whether they could have benefitted from investing their trust funds outside the IOLTA program. Moreover, as explained above, the district court's finding that they could not have benefitted was based on a misapplication of Rule 6's "net interest" definition; large amounts of client trust funds are required by Rule 6 to be deposited in IOLTA accounts even though clients could benefit if the funds were deposited in non-IOLTA accounts.

## **II. THE IOLTA PROGRAM VIOLATES APPELLANTS' FIRST AMENDMENT RIGHTS BY FORCING THEM TO FINANCE SPEECH THEY FIND OBJECTIONABLE**

The facts underlying Appellants' First Amendment compelled-speech claims are largely undisputed. After *Phillips*, it is uncontrovertible that Mr. Summers's funds are being used to finance the IOLTA program. The uncontested facts also show that the IOLTA program finances expressive activities, and that

Mr. Summers objects to his funds being used in that manner. Under those facts, Appellants are entitled to judgment on their First Amendment claim.

The district court held that in order to make out a First Amendment compelled-financial-support claim, a plaintiff must make three showings: (1) there has been an involuntary contribution; (2) the message supported by the involuntary contribution is political or ideological; and (3) the message does not support the government's policy interests. Mem. Op. 16. The court rejected Appellants' First Amendment claim based *solely* on their failure to make the third showing. Mem. Op. 19. The court erred in requiring the third showing; the government may not compel individuals to subsidize speech with which they disagree based solely on a claim that the cause being supported is worthy.

The Supreme Court has made clear that constitutional restrictions on compelled speech extend to compelled financial support of private organizations. Thus, First Amendment rights are implicated by compelled support of, *e.g.*, a state bar association (*Keller v. State Bar of California*, 496 U.S. 1 (1990)); a labor union by a public-sector employee (*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)); or a student organization by a public university student (*Bd. of Regents v. Southworth*, 120 S. Ct. 1346 (2000); *Hays County Guardian v.*

*Supple*, 969 F.2d 111, 123 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993)).

Mr. Summers testified that he objects to being forced to support *any* of the IOLTA-funded legal services activities. Tr. 122-23.<sup>23</sup> In light of those

---

<sup>23</sup> At one point in its decision, the district court guessed at the basis for Mr. Summers's objections, stating, "Mr. Summers does not object to the 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." Mem. Op. 17. The significance the court attached to that statement is not clear, because the court nonetheless found that at least some of the IOLTA-funded activities were sufficiently ideological to meet the second part of the court's three-part test. Mem. Op. 18. Nonetheless, any examination of Mr. Summers's conscience in order to discern the basis for his objection to IOLTA-funded activities is wholly improper. *Abood* held that a requirement that a compelled-speech plaintiff specify his objections would itself be a violation of the plaintiff's First Amendment rights. *Abood*, 431 U.S. at 241. *Accord*, *Shea v. Int'l*

objections, the IOLTA program violates Mr. Summers's First Amendment rights by forcing him to provide financial support to expressive activities to which he objects.

The district court's assertion that such compelled funding can be excused "if the message supports the government's policy interests" is a wild distortion of case law. The Supreme Court held in *Abood* that there are limited circumstances under which the state's interest in requiring compelled contributions is sufficiently compelling to overcome First Amendment concerns. *Abood* upheld labor contracts permitting unions to collect a fee from a non-union employee to cover the employee's *pro rata* share of the union's federally-mandated collective bargaining function, but prohibited the collection of fees to pay for activities not related to that function. *Abood*, 431 U.S. at 220-222. The Court's justification for permitting unions to impose a collective bargaining fee on nonmembers was that doing so was the only way to avoid the "free rider" problem whereby employees could take advantage of (but not pay for) the collective bargaining ser-

---

*Assoc. of Machinists and Aerospace Workers*, 154 F.3d 508, 514 (5th Cir. 1998).

vices that unions are required by federal law to provide for all employees in a bargaining unit. *Id.* The Court in *Keller* articulated a similar rationale for permitting a state bar to impose on each attorney in a state a *pro rata* share of the costs of administration of the state's legal system, while at the same time prohibiting a state bar from using mandatory dues to engage in political or ideological activities. *Keller*, 496 U.S. at 13-17. Thus, *Abood* and *Keller* stand for the proposition that all compelled speech implicates the First Amendment but that labor unions and state bars have sufficient bases for *compelling* employees/attorneys to support their core, nonideological functions. *See also Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 472 (1997) ("*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which *compelled* association was justified.") (quoting *Keller*, 496 U.S. at 13) (emphasis added).

TEAJF fails that *Abood/Keller* test. Regardless how important its funded activities may be, TEAJF has not provided any rationale to justify *compelling* Mr. Summers to finance those activities. There is no "free rider" problem here; Mr. Summers does not benefit in any way from the IOLTA program. If Texas believes that additional funding is needed to finance litigation on behalf of the

indigent, then the legislature is free to increase the annual appropriation it already makes to TEAJF. But the First Amendment does not permit TEAJF to require Mr. Summers to provide funding for private activities to which he objects and from which he receives no particularized benefit.

### **III. THE JUSTICES ARE NOT ENTITLED TO LEGISLATIVE IMMUNITY**

There is no question that lawmakers (including judges when acting legislatively) are immune from suit for their legislative acts. *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731-34 (1980). Thus, the Justices of the Texas Supreme Court are entitled to legislative immunity from any claim that they acted unconstitutionally in adopting the IOLTA program. But Appellants named the Justices as defendants not because they *adopted* the IOLTA Rules but because they *enforce* them.

In 1999, five years after suit was filed, the Justices argued for the first time that they are entitled to legislative immunity -- on the ground that the power to enforce the IOLTA rules lies elsewhere. The Justices have waived the argument because their delay has prejudiced Appellants; had it been raised earlier, Appellants would have had ample opportunity to substitute in as a defendant the individual(s) determined to possess enforcement authority.

In any event, the district court's decision that the Justices lack IOLTA enforcement authority is incorrect. The procedure for disciplining attorneys who fail to comply with the IOLTA Rules is set forth in IOLTA Rule 24:

- (1) All attorneys licensed by the Court are to report annually to TEAJF information necessary to demonstrate that they are complying with the IOLTA rules;
- (2) If an attorney fails to provide sufficient information and TEAJF cannot resolve the matter informally, TEAJF is to furnish the attorney's name to the State Bar of Texas;
- (3) The State Bar then provides a notice of noncompliance by certified mail. If the attorney fails to file a compliance statement within 30 days thereafter, then: (a) the State Bar shall so notify the Clerk of the Supreme Court of Texas; and (b) "the attorney shall be immediately suspended as an attorney licensed to practice law in the State of Texas until a compliance statement is filed."

The portion of Rule 24 in quotation marks makes clear that the Court is not delegating to any other body the task of suspending noncompliant attorneys. The Rule does not say, for example, that "the Clerk of the Supreme Court shall suspend the attorney," or "the State Bar of Texas shall suspend the attorney." Rather, Rule 24(d) commands that noncompliant attorneys "shall be immediately suspended." The failure to specify some subordinate body whose job it is to determine whether suspension is warranted or even to perform the ministerial act of suspension indicates that the suspension is automatic and is to be imposed by

virtue of Rule 24(d) itself -- a rule written by the Supreme Court. Moreover, Rule 25 permits attorneys to seek an exemption from any of the IOLTA Rules (including Rule 24), and the Justices are the final arbiters of any exemption request.

The district court nonetheless granted judgment to the Justices on the ground that enforcement authority lies with the Clerk of the Supreme Court, who performs the final ministerial act of accepting notification of noncompliance. R.E. 3, at 7. To suggest that the Clerk holds enforcement authority independent of that of the Justices (his employers) is disingenuous. Under analogous circumstances, the Ninth Circuit ruled that the justices of the Nevada Supreme Court, not the members of a subordinate commission, were the proper defendants in a suit challenging rules promulgated by the court. *Snoeck v. Brussa*, 153 F.3d 984, 987 (9th Cir. 1998).

## CONCLUSION

Appellants respectfully request that the Court reverse the decision below and remand the case with directions that Appellants be granted the injunctive and declaratory relief requested on their Fifth and First Amendment claims.

Respectfully submitted,

---

Michael J. Mazzone  
9 Greenway Plaza  
Houston, TX 77046  
(713) 940-6001

---

Charles Fried  
1525 Massachusetts Ave.  
Cambridge, MA 02138  
(617) 495-4636

Pro Se

---

Daniel J. Popeo  
Richard A. Samp  
Washington Legal Foundation  
2009 Massachusetts Ave., NW  
Washington, DC 20036  
(202) 588-0302

May 30, 2000

Counsel for Plaintiffs Summers and WLF

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 30, 2000, two written copies of the foregoing Appellants' Brief, and one copy on a 3.5" computer disk, were deposited in the U.S. Mail, first-class postage prepaid, addressed as follows:

Rande K. Herrell, Esq.  
Financial Litigation Section  
Office of the Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

Darrell E. Jordan, Esq.  
David J. Schenck, Esq.  
Beth W. Bivans, Esq.  
Hughes & Luce, L.L.P.  
1717 Main St., Suite 2800  
Dallas, TX 75201

Richard A. Johnston, Esq.  
Francine Rosenzweig, Esq.  
Hale and Dorr  
60 State Street  
Boston, MA 02109

---

Richard A. Samp

## CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th Cir. R. 32.2.7(b)(3), THE BRIEF CONTAINS:

13,986 words.

2. THE BRIEF HAS BEEN PREPARED:

in proportionally spaced typeface using WordPerfect, Version 6.0, in 14-point CG Times typeface.

3. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5th Cir. R. 32.2.7, MAY RESULT IN THE COURT STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

---

Richard A. Samp