No. 01-1325

IN THE
Supreme Court of the United States

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

v.

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

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

BRIEF IN OPPOSITION FOR LEGAL FOUNDATION OF WASHINGTON AND ITS PRESIDENT

DAVID J. BURMAN
Counsel of Record
NICHOLAS P. GELLERT
KATHLEEN M. O'SULLIVAN
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 583-8888
Attorneys for Respondents Legal Foundation of Washington and Katrin E. Frank

QUESTIONS PRESENTED

1. Does *per se* takings analysis apply to a regulation that requires legal professionals to place clients' small or short-term deposits of principal, incapable of providing a positive net return to the client, in pooled trust accounts with banks that agree to pay some interest on the accounts to a state-created foundation for access to justice?

2. Does the Just Compensation Clause of the Fifth Amendment require that compensation be paid for a taking that does not result in any financial loss to the owner?

PARTIES TO THE PROCEEDING

In addition to the current parties named in the caption, the following were previously parties in this action.

1. During the course of this case, the following successively have been presidents of the Legal Foundation of Washington, and thus technically were defendants themselves in their respective official capacities: Kevin F. Kelly (during 1997), Bradley C. Diggs (1998), Dwight S. Williams (1999), the Honorable Gregory J. Tripp (2000), and the Honorable Cynthia Imbrogno (2001).

2. When Petitioners commenced this case, they named all the then-Justices to the Supreme Court of Washington as defendants in their official capacities. Petitioners then voluntarily dismissed their claims against Justice Richard B. Sanders. The following former Justices were parties, but have been replaced by the Justices that are named in the caption: Barbara Durham, James M. Dolliver, Richard P. Guy, and Philip A. Talmadge.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

No. 01-1325

IN THE
Supreme Court of the United States

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

v.

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

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

BRIEF IN OPPOSITION FOR LEGAL FOUNDATION OF WASHINGTON AND ITS PRESIDENT

In *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998), the Court expressly declined to reach the questions of whether Interest on Lawyers' Trust Account ("IOLTA") rules result in a taking and, if so, whether any just compensation must be paid.

Upon remand by the Court in *Phillips*, the District Court held a trial on the merits, made findings of fact, and answered the two questions not answered in *Phillips* in favor of the Texas IOLTA program. *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 86 F. Supp. 2d 624 (W.D. Tex. 2000). On appeal, a divided three-judge panel of the Fifth Circuit reversed. *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 270 F.3d 180 (5th Cir. 2001) ("*TEAJF*"). The Fifth Circuit applied a *per se* analysis to the question whether a taking had occurred, *id.* at 188, and then evaded the just compensation question by relying on the particular procedural posture of that case, *id.* at 189-90. A petition for rehearing *en banc*, filed on October 26, 2001, is pending before the Fifth Circuit.

In this case, the Ninth Circuit, sitting *en banc*, answered both questions unresolved in *Phillips*. The Ninth Circuit, carefully analyzing the summary judgment record, determined that the appropriate analysis on the first question was the multi-factor approach of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978). Applying this analysis, the Ninth Circuit held that the State of Washington's IOLTA program did not result in a taking. The court alternatively held that, even if a taking had occurred, the proper amount of just compensation was zero. The Ninth Circuit remanded Petitioners' First Amendment claims to the District Court, which has not yet addressed those claims.

Accordingly, the first two circuits to analyze the first question unanswered in *Phillips* disagree whether IOLTA rules are subject to *per se* takings analysis. Because the Fifth Circuit avoided answering the question of what amount of compensation, if any, is due if IOLTA regulations do result in a taking, there is not a split on this question. At best, there is a disagreement as to whether

that subsequent question is a necessary part of the constitutional analysis.

Despite the current split between the Fifth Circuit and the Ninth Circuit, the Court should deny the Petition. The split will be eliminated if the Fifth Circuit grants the pending petition for rehearing *en banc* and thereby vacates its panel decision. In any event, the Court will have other opportunities to address these issues at a later date, either in this case (which currently is interlocutory because of the remand on the First Amendment issue), in *TEAJF*, or in a subsequent case.

There is no split in the circuits on Petitioners' second Question Presented, which asks the Court to resolve, in the abstract, what circumstances might justify a federal court in enjoining a taking by a State or a State actor. This question was only reached by the Ninth Circuit in the context of the peripheral issue of whether the Washington Legal Foundation ("WLF") has standing – an issue that WLF does not even challenge directly in the Petition. Accordingly, if the Court grants the Petition to resolve the questions left open in *Phillips*, Respondents submit that review should be confined to the two Questions Presented as phrased herein by Respondents.[1]

---

[1] References in this Opposition to "Respondents" means the Legal Foundation of Washington and its current president, Katrin E. Frank, as the remaining respondents are submitting a separate brief. The Petition is unclear at times as to which of the individual Petitioners it is referring. When necessary to differentiate between the individuals, Respondents will refer to the two clients making claims, Brown and Hayes, as the "Client Petitioners" and the two Limited Practice Officers who asserted claims, Daugs and Maxwell, as the "LPO Petitioners."

STATEMENT OF THE CASE

Petitioners' statement of the case in places ignores important facts and the procedural context in which the evidence was presented. In the District Court, Respondents moved for summary judgment on the sole basis that Petitioners did not have a cognizable property interest, as *Phillips* had not yet been decided. By contrast, Petitioners moved for summary judgment on all issues. Thus, the issues now before the Court are presented in the context of Petitioners' motion for summary judgment.

A. The IOLTA Rules Support Legal Services by Getting Banks to Share a Portion of Their Profits on Deposited Funds on Which Clients Cannot Achieve a Positive Net Return.

It cannot be overemphasized that the IOLTA rules mandate that only funds incapable of achieving a positive net return for the client are to be deposited into an IOLTA account. Funds capable of achieving a positive net return for the client must be deposited in a manner calculated to obtain that return.

The placement in pooled IOLTA accounts of small or short-term client deposits that are incapable of achieving a positive net return for the client does not result in any economic loss to the client. Prior to the IOLTA rules, these funds still were pooled in bank accounts that paid no interest to the clients. The banks were able to retain all the earnings that they achieved on these pooled bank accounts.

In *Phillips*, the Court held that an incident of ownership of principal funds is ownership of interest actually accrued on those funds. 524 U.S. at 168. *Phillips* did not suggest that owners

never gave away this incident of ownership to banks. Neither before nor after the passage of the IOLTA rules have clients received, or even controlled, this incident of ownership when their principal funds could not achieve a positive net return for them. Rather, clients allowed their lawyers to deposit such funds with banks that, in exchange for holding and protecting the principal funds, are given complete control over any accrued interest or other profit.

The effect of the IOLTA rules is to reduce the discretion given to lawyers as to where to deposit client funds. Previously, lawyers had complete discretion over which banks held their clients' funds and thus which banks were given the right to keep the interest accrued on deposited funds incapable of achieving a positive net return. For instance, a lawyer's decision could be based on a particular bank's support of a particular charity. Pursuant to the IOLTA rules, lawyers must deposit the funds at a bank that meets certain qualifications to protect the integrity of the deposit (i.e., is insured). And when the deposits are incapable of achieving a positive net return for the client, the lawyers must deposit the funds at a bank that has agreed to pay a portion of its profits on those accounts to the Legal Foundation of Washington to support indigent legal services – a cause that Petitioners and the dissenters below acknowledge is laudable. App. 51a.

B. Petitioners Do Not Fully and Accurately Describe the Evidence Presented With Respect to Washington's Extension of IOLTA to Limited Practice Officers.

Petitioners' statement of the case discusses the system of "earnings credits" that some escrow companies utilize to derive a financial benefit for themselves from depositing their customers' funds that they are holding in escrow at particular banks. Petitioners intimate that the Client Petitioners lost something of value as a result of Washington's extension of its IOLTA rules to Limited Practice Officers ("LPOs").[2]

Escrow companies are prohibited by regulation from deriving any benefit from the funds that they hold in escrow. Wash. Admin. Code § 208-680E-011. This regulation is not specific to escrow companies that employ LPOs. It is true, notwithstanding the edict of the regulation, some escrow companies selected banks for the indirect benefits that they provided to the escrow companies in the form of earnings credits.[3] Petitioners assert that these credits "directly reduce costs to customers for services." Petition at 6. This assertion is not supported by the record. Indeed, there is at most a genuine issue as to whether these credits provide even an indirect and partial cost reduction to some customers of such escrow companies. App. 36a.

---

[2] Petitioners, however, later assert that Washington's extension of its IOLTA rules to LPOs is "immaterial to the constitutional analysis," Petition at 15, and the remainder of the Petition makes no reference to earnings credits.

[3] Escrow companies historically placed all client funds, regardless of the size of the deposit, in pooled non-interest-bearing accounts. As a result, these escrow companies achieved the benefit of earnings credits even on funds that were capable of earning a positive net return for the client if deposited in an individual interest-bearing account.

Some banks may not provide earnings credits on IOLTA accounts. Petitioners contend that this results in higher costs to the escrow companies, which they argue "inevitably are passed along by escrow and title companies to their customers." Petition at 6. Again, Petitioners have failed to prove this allegation, and they are not entitled to such an unreasonable inference. Respondents presented the only real expert opinion on this issue, which was that there was nothing "inevitable" about the effect of the loss of earnings credits on customers, as opposed to escrow and title companies. App. 36a.[4]

Most importantly, regardless what experts opine generally might happen, the reality is that neither of the Client Petitioners established that they paid any more for their real estate closings as a result of the IOLTA rules. They offered no evidence that they were charged any additional fee. Indeed, they did not even offer evidence that their funds were deposited at a bank that ceased paying earnings credits to their escrow companies. The Client Petitioners simply did not suffer any financial impact from the IOLTA rules.

---

[4] Petitioners suggest that "all funds received in connection with a transaction being closed by an LPO" are placed in IOLTA accounts "as a practical matter." Petition at 6. LPOs have a regulatory obligation to obtain a positive net return for their clients under the IOLTA rules when that is possible. What Petitioners really are saying is that LPOs do not bother to obtain a positive net return for clients for whom this is possible. This does not constitute State action. In any event, the Client Petitioners do not contend that their deposits were of sufficient size or length that they could have obtained a positive net return on those funds if deposited outside of an IOLTA account.

SUMMARY OF REASONS FOR DENYING THE PETITION

1. The Court should deny the Petition because the Fifth Circuit has yet to rule on the petition for rehearing *en banc* in *TEAJF*, and a decision by that court to grant rehearing will eliminate the split in the circuits upon which the Petition relies.

2. There also are a number of practical reasons why the Court should deny the Petition even if the Fifth Circuit does not grant the petition for rehearing *en banc*. For one, this case comes to the Court on Petitioners' motion for summary judgment. As a result, if the Petition were granted, the Court could conclude that issues of fact prevent it from finally resolving the important constitutional questions. Moreover, the summary judgment record was prepared prior to the Court's decision in *Phillips*. In contrast, there was a full trial in *TEAJF* upon remand from *Phillips* that was specifically focused on the questions left open by the Court in *Phillips*.

There also could be some confusion among those unfamiliar with LPOs if the Court were to grant review in this case. IOLTA regulations exist in 50 states and the District of Columbia, but Washington's extension of IOLTA to LPOs is unique. Respondents agree with Petitioners' current contention that it makes no difference to the constitutional analysis, *see* Petition at 15, but Petitioners may later attempt to argue to the contrary (as they did below).

Even if the Court believes that this case presents an appropriate vehicle for resolving the questions left unanswered by *Phillips*, it will have an opportunity to do so at a later date. This case will continue on remand to the District Court to decide Petitioners' First Amendment claims. The Court should wait until

the issues on remand have been resolved below rather than accepting review at this interlocutory stage.

3. The Ninth Circuit correctly decided the two issues that the Court did not reach in *Phillips*. On the issue whether the IOLTA rules result in a taking, the central points of disagreement between the parties (and between the *en banc* Ninth Circuit and the Fifth Circuit panel) regard "the character of the governmental action," *see Penn Central*, 438 U.S. at 124, and the specific property to be considered – the entirety of Petitioners' property interests or only the interest that accrued in the IOLTA accounts. Although Petitioners concede in their Questions Presented that IOLTA is a regulatory program, the Petition otherwise ignores the regulatory aspects of Washington's IOLTA rules.

Regardless how these points are resolved, there remains one undeniable constant: The government action imposes no economic impact on clients and thus imposes no interference with clients' investment-backed expectations. Petitioners do not attempt to argue otherwise, instead pressing for expanded application of *per se* takings analysis. Petitioners do this because they cannot prevail absent such an expansion of *per se* takings analysis.

The Petition does not challenge the Ninth Circuit's conclusion that, even if there is a taking, the appropriate just compensation is zero. It instead incorrectly leaps to the issue of whether equitable relief is available. Petitioners put the remedy wagon before the liability horse. The Fifth Amendment does not forbid takings; it bars takings without the payment of just compensation.

4. There is no split in the circuits as to the availability of injunctive relief. The Ninth Circuit only touched on the question as part of its analysis of whether the WLF had representative

standing. In contrast, the Fifth Circuit in *TEAJF* reached the issue in the posture of its erroneous conclusion that defendants had conceded that injunctive relief was available to the client plaintiff. *TEAJF*, 270 F.3d at 194-95. Respondents have made no such concession in this case.

To argue for injunctive relief, Petitioners rely on precedents dealing with federal programs and thus with the breadth of the Tucker Act, 28 U.S.C. § 1491. Those cases did not address the federalism implications of a federal court's enjoining an alleged taking by a State. They certainly do not compel the conclusion that injunctive relief is available in these circumstances.

ARGUMENT

I. THE COURT SHOULD NOT GRANT THE PETITION TO REVIEW WHETHER IOLTA RULES EFFECT A *PER SE* TAKING FOR WHICH JUST COMPENSATION HAS BEEN DENIED.

A. The Ninth Circuit's Decision That Washington's IOLTA Rules Did Not Cause a Taking Is Consistent With the Court's Decisions.

"Beginning where the Supreme Court left off in *Phillips*," App. 2a, the Ninth Circuit, sitting *en banc*, carefully analyzed whether Washington's IOLTA rules resulted in a taking from the Client Petitioners without payment of just compensation.[5] The

[5] The Fifth Circuit and the Ninth Circuit agreed that the legal professionals (whether they be LPOs or lawyers) have no cognizable takings claim because the only alleged taking is of the property of the

Ninth Circuit determined that it should answer the first question – whether a taking had occurred – under the *Penn Central* framework. App. 27a-32a. In reaching this conclusion, the Ninth Circuit correctly observed that the takings analysis cannot focus only on the interest paid by banks to the Legal Foundation of Washington, but must look at the combination of the principal and interest, because the accrued interest "'attaches as a property right incident to the ownership of the underlying principal'" rather than a stand-alone property right. App. 26a (quoting *Phillips*, 524 U.S. at 168).

Weighing the three factors set forth in *Penn Central*, the Ninth Circuit concluded that (1) the IOLTA rules had no economic impact on the owners of the principal funds because no interest would have been earned by them on those funds absent the IOLTA rules, and because Petitioners failed to establish that they suffered any economic impact as a result of an alleged loss of "earnings credits," App. 33a-38a; (2) by definition under Washington's IOLTA rules, the Client Petitioners could not have expected their principal to achieve a positive net return, so the IOLTA rules could not have interfered with their investment-backed expectations, App. 38a-39a; and (3) the government action at issue is properly characterized as a regulation of the uses of the Client Petitioners' property (constituting the principal and any interest incident thereto, in the aggregate) in the context of the highly regulated fields of banking and law, App. 39a-40a.[6]

---

client, the owner of the principal, not of the legal professionals. *See TEAJF*, 270 F.3d at 188; App. 13a.

[6] The Fifth Circuit did not undertake the *Penn Central* analysis in *TEAJF*. Petitioners nevertheless contend that "the Fifth Circuit *clearly believed* that the Texas IOLTA program effected an uncompensated taking of private property regardless whether it was examined using a *per se* or *Penn Central* analysis." Petition at 16-17 (emphasis supplied). In fact, the Fifth Circuit provided no indication of its views under *Penn Central*, which requires consideration of a regulation's economic impact on the takings claimant. 438 U.S. at 124. The Fifth Circuit expressly stated

The Ninth Circuit's *en banc* decision abides by the prior decisions of the Court and is consistent with the Court's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. __, No. 00-1167 (Apr. 23, 2002).

As the Ninth Circuit recognized, the Court carefully and explicitly limited its holding in *Phillips*: "'We express no view as to whether these funds have been 'taken' by the State; nor do we express an opinion as to the amount of 'just compensation, if any, due respondents.'" App. 25a-26a (quoting *Phillips*, 524 U.S. at 172). Unable to assert a direct conflict with *Phillips*, and despite the explicit disclaimer in *Phillips*, Petitioners contend that the Ninth Circuit's decision is in tension with certain "*language*" in *Phillips*, "*indicating* that establishing a Takings Clause claim is not dependent on a showing that the plaintiff could benefit by opting out." Petition at 19 (emphasis supplied). Petitioners quote the following language from *Phillips*: "'We have never held that a physical item is not "property" simply because it lacks a positive economic or market value.'" *Id.* (quoting *Phillips*, 524 U.S. at 169). The Court's statement concerned the issue of whether the interest income earned on IOLTA accounts constituted an incident of ownership of the deposited principal funds, not the issues presented in this case.

---

that, under the *per se* rule, "the economic impact on the owner is a non-factor in the takings analysis." *TEAJF*, 270 F.3d at 188 n.6.

Moreover, Petitioners' suggestion that *Penn Central* has become a "toothless check on government powers" such that the Court "has expressed an interest in 'restoring balance to [the *Penn Central*] inquiry,'" Petition at 17 n.6 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring))), is incorrect. There certainly is no split in the circuits on whether the Court should overrule *Penn Central*. Justice O'Connor's statement about "restor[ing] balance" to the *Penn Central* inquiry reiterates the importance of weighing all the *Penn Central* factors and does not call for abandonment of the *Penn Central* approach.

The Court recently reaffirmed that the Ninth Circuit was correct in rejecting Petitioners' attempt to manufacture a *per se* takings claim by focusing solely on one narrow, isolated aspect of the property (just the interest allegedly earned in the IOLTA accounts in which the Client Petitioners' principal funds were deposited), while ignoring the effect the IOLTA regulations have on the property (the principal) as a whole. The Court repeated "*Penn Central's* admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'" *Tahoe-Sierra*, slip op. at 27 (quoting *Penn Central*, 438 U.S. at 130-31; citing *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)). *See also Phillips*, 524 U.S. at 175 n.3 (Souter, J., dissenting) (observing that it would be error to read the majority opinion in *Phillips* as allowing one to focus only on the client's interest in the interest actually generated, rather than on the client's complete package of incidents of ownership in the principal funds deposited in evaluating whether a taking without just compensation occurred).

The Court has recognized two discrete exceptions to the analysis of *Penn Central*, both of which involve real property: a regulation that (1) results in a "physical 'invasion'" of property or (2) "denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The "default rule" remains the "more fact specific inquiry" of *Penn Central*. *Tahoe-Sierra*, slip op. at 28; *see also Lucas*, 505 U.S. at 1017-18 (*per se* takings are "extraordinary" and only occur in "relatively rare situations"). The second category of *per se* takings is clearly inapplicable. The first category is limited to physical invasions of real property. *See Lucas*, 505 U.S. at 1015, citing as an example *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), which involved a challenge to a law that required landlords to permit cable television companies to physically

invade real property to install cable wires. The Court specifically noted in *Loretto* that "permanent physical occupation of real property" was what constituted a *per se* taking. *Loretto*, 458 U.S. at 427.[7]

In *Tahoe-Sierra*, the Court observed that application of *per se* takings analysis applies to "physical appropriations" that are "easily identified." *Tahoe-Sierra*, slip. op. at 19. In the case of real property, "whether a permanent physical occupation has occurred presents relatively few problems of proof." *Loretto*, 458 U.S. at 437. Money is fungible, and the line between physical appropriations and the spreading of the burdens and benefits of life is not so easily identified. *Penn Central*, 438 U.S. at 123-24. To apply the *per se* takings analysis to monetary payments would open a broad range of government actions to constitutional challenge. *See Phillips*, 524 U.S. at 178-79 (Souter, J., dissenting) (citing withholding of income taxes as an example).

The Court has repeatedly recognized the distinction between regulations of real property and regulations imposing direct or indirect monetary assessments or fees. For example, in a takings challenge to the Coal Act's imposition of monetary liability on an employer for an employees' benefits fund, the Supreme Court stated that this "is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a *per se* taking." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 530 (1998) (citing *Loretto*, 458 U.S. at 441). The Court made the same distinction in a case involving the exaction of a percentage of any award made by the Iran Claims Commission. *See United*

---

[7] Although the Petition states that "the infringement in *Loretto* was found to be a taking despite evidence that the infringement *increased* the value of the property at issue," Petition at 20, this statement relies on a point made by the dissent in *Loretto*, which the majority criticized as "speculative." *See Loretto*, 458 U.S. at 437 n.15.

States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989) (it is "artificial to view deductions [from] a monetary award as physical appropriations of property" because "[u]nlike real or personal property, money is fungible").

Petitioners argue that *Phillips* limited *Sperry* to cases involving a fee imposed for services. Petition at 21. But that was not the rationale used in *Sperry*, and *Phillips* imposes no such limitation. The Court's only discussion of *Sperry* in *Phillips* was by a "*cf*." citation for the unremarkable proposition that "[o]ur holding does not prohibit a State from imposing reasonable fees it incurs in generating and allocating interest income." *Phillips*, 524 U.S. at 171. This statement does not support Petitioners' conclusion that only fees-for-services regulations fall outside of the *per se* rule.[8] The Court has refused, in at least four cases not involving a government fee for service, to apply *per se* analysis to government assessments of money. *See Eastern Enterprises*, 524 U.S. at 529-30; *Concrete Pipe*, 508 U.S. at 643-44; *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986).[9]

Petitioners try to make much of the short opinion in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *Webb's* does not support application of the *per se* rule here because that case was decided before *Loretto*, in which the Court concluded that the *per se* applies to physical invasions of

---

[8] In addition, the Court has emphasized that nonregulatory takings carried out by physical occupations of property occur "only where [the government] requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis omitted). The required submission is not present in this case.

[9] Lower courts have understood that the Court has differentiated between money and real property. *See, e.g., Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (government exactions of money "are not treated as *per se* takings").

real property. The Court's analysis in *Webb's* is inconsistent with Petitioners' suggestion that it applied a *per se* takings approach, as the Court repeatedly cited *Penn Central* and analyzed the question, "What would justify the county's retention of that interest?" 449 U.S. at 162. Such an inquiry into public purpose is irrelevant in a *per se* analysis. As to the facts of *Webb's*, it was undisputed that the principal could earn a net return and that its owners expected to receive a net return on the interpleaded funds. Even Petitioners admit that neither of these circumstances exists here.

B. The Ninth Circuit's Decision on the Just Compensation Question Is Consistent With the Court's Decisions.

The Ninth Circuit's conclusion that, even if a taking had occurred, no compensation was due the Client Petitioners, App 41a-45a, is not in conflict with any decision of the Court. In examining whether just compensation is due, "the question is, What has the owner lost? not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). Petitioners offer no precedent to support their argument that this rule has no relevance here, where the property allegedly taken is money. To use Petitioners' words, it is "readily ascertainable" what the Client Petitioners lost – zero. App. 38a.

After all, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 194 (1985). *See also Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("In view . . . of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as

part of the burden of common citizenship.") (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-09 (1923)); *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280, 282 (1926) ("[E]ven if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the government to pecuniary loss.").

Petitioners are unable to seriously challenge the Ninth Circuit's conclusion that, even if a taking had occurred, the appropriate just compensation is zero. Petitioners instead leap to the issue of whether equitable relief is available. The Fifth Circuit made this same leap in *TEAJF*. After stating that "once a taking is found, the question becomes what amount of, not whether, just compensation is due," *TEAJF*, 270 F.3d at 189, the Fifth Circuit proceeded to ignore the very question it posited – to what amount of compensation was the client entitled? Ignoring that the trial record in that case established that the correct "amount" of just compensation was zero, the Fifth Circuit skipped to an analysis of equitable relief.[10]

Thus, there really is no split in the circuits as to whether the just compensation for the alleged taking caused by IOLTA rules is zero. Rather, the disagreement relates to whether it makes any difference to the constitutional analysis that Petitioners did not (because they cannot) establish any financial loss. Under the plain language of the Constitution, it must make a difference. The original Ninth Circuit panel decision (which the *en banc* dissent adopted) similarly recognized that the just compensation question could not be ignored, but believed that a remand was necessary

---

[10] *See TEAJF*, 270 F.3d at 200 (Wiener, J., dissenting) ("We need not pause to ponder whether freestanding equitable relief can *ever* be an appropriate remedy for an unconstitutional taking, for *in this case* there is no unconstitutional (i.e., uncompensated) taking.").

to answer the question what amount, if any, compensation was owed after concluding that a taking had occurred. App. 85a ("just compensation for the takings may be less than the amount of the interest taken, or nothing, depending on the circumstances, so determining the remedy requires a remand").

C. The Two-Circuit Split on the Questions Left Undecided in *Phillips* Will Be Eliminated if the Fifth Circuit Grants the Petition for Rehearing *En Banc*, and if the Split Is Not Eliminated, the Court Will Have Subsequent Opportunities to Address Those Questions.

It would be premature to grant the Petition to review the questions left undecided in *Phillips*. Most importantly, the principal basis for the Petition – the split between the Ninth Circuit and the Fifth Circuit – would be eliminated if the Fifth Circuit grants the pending petition for rehearing *en banc*. Despite the passage of time since that petition was filed, there is reason to believe that it still will be granted. For example, *Tahoe-Sierra* provides further support that the conclusions of the Fifth Circuit are incorrect. The Fifth Circuit concluded that the Court's decision in *Phillips* on the private property question predetermined the outcome of the questions the Court refused to reach. *TEAJF*, 270 F.3d at 188 ("the linchpin for this case has already been inserted by the Supreme Court"). The Fifth Circuit then applied the *per se* takings analysis of *Lucas*, 505 U.S. at 1015, to hold that Texas' IOLTA rules effected a taking of the interest income of a client's funds. 270 F.3d at 188. The Fifth Circuit also inappropriately focused solely on the interest accrued because of IOLTA in conducting its takings analysis.

Even if the Fifth Circuit ultimately denies the petition for rehearing *en banc*, the Court will have other opportunities in the near future to decide the questions unanswered by *Phillips*.

TEAJF itself would provide the Court with a vehicle to decide those issues within the same action as *Phillips*, and with the benefit of a full trial on the merits following the Court's remand in *Phillips*. The existence of factual findings from a trial record, as opposed to the summary judgment record in this case, might prove useful to the Court in resolving the issues. *See Tahoe-Sierra*, slip op. at 30 ("recovery on either a bad faith theory or a theory that the state interests were insubstantial is foreclosed by the District Court's unchallenged findings of fact").

The Court also will have another opportunity to review the questions presented in the Petition within this case. There has yet to be any resolution of Petitioners' claim that Washington's IOLTA rules violate their First Amendment rights. The Ninth Circuit remanded that issue to the District Court. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court").[11]

II. THIS IS AN INAPPROPRIATE CASE TO DECIDE WHAT CIRCUMSTANCES MIGHT WARRANT INJUNCTIVE RELIEF IN A TAKINGS CASE.

The Court should decline Petitioners' invitation to delve into an analysis of when a federal court may enjoin a taking by a State or State actor. There is no split between the circuits on this issue. Nor was the record developed on that issue below. Moreover,

---

[11] At a minimum, the Court should hold the Petition until the Fifth Circuit acts on the petition for rehearing *en banc*. Respondents are informed that, if the Fifth Circuit were to deny the petition, TEAJF is prepared to file a petition for writ of certiorari within a few weeks. This would allow the Court to be fully informed as to which of these two cases is best suited for certiorari, or even grant review in both.

Petitioners ask the Court to expand legal concepts set forth in cases involving federal programs to a case challenging a State program.

A. The Circuits Are Not Split on the Question Whether Injunctive Relief Is Available.

Having concluded that no taking occurred and, even if it did, that the just compensation to which the Client Petitioners were entitled was zero, the Ninth Circuit had no occasion to decide whether the Client Petitioners were entitled to injunctive relief. Instead, the sole discussion of injunctive relief related to whether the WLF had standing. App. 18a-19a.

The Ninth Circuit did not squarely reach the question that Petitioners pose, because it is predicated on the Client Petitioners' first proving a taking without payment of just compensation, which they were unable to do. Consequently, there is no record on the question implicit in the Petition: whether an adequate provision for obtaining just compensation exists in either federal or state court. Consequently, Petitioners' criticism that the Ninth Circuit did not fully define the circumstances in which injunctive relief might be available, Petition at 24, is disingenuous. Because of its different procedural posture, *TEAJF* is not in conflict. The Fifth Circuit held that a taking had occurred and jumped over the just compensation question. *TEAJF*, 270 F.3d at 189. That court then reached the remedy issue, *id.* at 189-91, unlike the original Ninth Circuit panel that indicated that remedy should be decided on remand to the District Court.[12] App. 85a. Moreover, the

[12] After concluding that a taking had occurred, the original Ninth Circuit panel (which the *en banc* dissent adopted) determined that a remand was appropriate as to remedy. App. 85a. In doing so, the panel observed that *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), "does prevent the court in most circumstances from enjoining the taking itself," and that "[t]he clients are entitled to just compensation, not to prevention

Fifth Circuit identified as the primary basis for holding that injunctive relief was available its conclusion that the defendants had conceded that injunctive relief could be awarded. 270 F.3d at 190.[13] Respondents made no such concession.

The Petition erroneously downplays these procedural differences between this case and *TEAJF*. Petitioners also fail to articulate what specific circumstances they contend justify equitable relief. Although they try to argue that the facts of this case support entry of an injunction, they justify that result by possible other "imagined" circumstances. Petition at 30.[14]

In short, Petitioners ask the Court to provide general guidance on abstract questions with implications for the balance between branches of government and between separate sovereigns. The Court should decline to do so.

B. The Court Has Never Recognized the Availability of Injunctive Relief in the Circumstances of This Case.

Each of the Just Compensation Clause cases to which Petitioners cite as allowing an injunction involved claims against the United States. Thus, the cases dealt with the power of the

---

of the taking . . . ." App. 79a. In any event, a record on the availability of monetary relief would have been developed on remand.

[13] As the dissent pointed out, this conclusion is of questionable validity. *Id*. at 196 (Wiener, J., dissenting).

[14] The Petition obfuscates several other important questions. For instance, the Petition is not even clear as to which parties it contends might be entitled to an injunction. The Ninth Circuit held that the LPO Petitioners lacked standing because they had no cognizable property interests. App. 16a-17a. Petitioners do not challenge this conclusion, yet at the end of the Petition assert that "all Petitioners should be permitted to go forward with their Fifth Amendment claims." Petition at 30.

federal courts to award injunctive relief against the United States where it had not waived sovereign immunity for monetary relief under the Tucker Act, 28 U.S.C. § 1491, not the appropriateness of enjoining a taking in general.[15] They certainly do not support the proposition that the federal courts may enjoin States or State actors from taking property when the State, as here, has waived its sovereign immunity to suits for inverse condemnation in its courts.

Recognizing that they cannot establish the lack of an available procedure for obtaining just compensation (if it is due), Petitioners make the remarkable argument that the federal courts should be able to enjoin a taking whenever it would be inconvenient or difficult for a plaintiff to obtain monetary relief. The Petition asserts that the Court "appears to have recognized" in *Babbitt v. Youpee*, 519 U.S. 234 (1997), that equitable relief is appropriate whenever the amount at issue is "so minimal as to make a legal action for damages impractical." Petition at 29-30.

Youpee does not support this argument. The Court did not provide any explanation in *Youpee* why it affirmed the entry of declaratory and injunctive relief. Nor do the underlying decisions provide an explanation. *Youpee v. Babbitt*, 67 F.3d 194 (9th Cir. 1995); *Youpee v. Babbitt*, 857 F. Supp. 760 (D. Mont. 1994). A subsequent plurality of the Court observed that *Youpee* and *Hodel v. Irving*, 481 U.S. 704 (1987), presented "situations analogous" to that presented in *Eastern Enterprises*, and thus

---

[15] The plurality in *Eastern Enterprises* based its decision on Congress' withdrawal of Tucker Act jurisdiction for monetary claims arising under the Coal Act. 524 U.S. at 521 ("Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act"). *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995), and *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397 (D.C. Cir. 1997) – both decided before *Eastern Enterprises* – are based on the same rationale. *See In re Chateaugay*, 53 F.3d at 493; *Riley*, 104 F.3d at 401-02.

those cases "assumed the lack of a compensatory remedy . . . without discussing the applicability of the Tucker Act." *Eastern Enterprises*, 524 U.S. at 521.[16]

Petitioners' argument is especially problematic in the context of federal court review of a State program. It would be remarkable for a federal court to enjoin a State merely because it would be inconvenient for a plaintiff to obtain monetary relief in state court. *Cf. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 644 (1999) (Congress does not have authority to abrogate the States' sovereign immunity where primary point of witnesses who testified before Congress "was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies"). Similarly, a federal court should not be empowered to enjoin a State merely because the Eleventh Amendment prohibits the *federal court* from awarding monetary relief. *See Alden v. Maine*, 527 U.S. 706, 748 (1999) ("the need for the *Ex parte Young* rule would have been less pressing, and the rule would not have formed so essential a part of our sovereign immunity doctrine" if the Court believed the States did not retain constitutional sovereign immunity in their own courts) (citing *Ex parte Young*, 209 U.S. 123 (1908)); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270-71 (1997) (most important application of *Ex parte Young* "is where there is

---

[16] Further evidence that there was no monetary remedy available to the plaintiffs in those cases is the fact that the appeals were not to the Federal Circuit, in which exclusive jurisdiction lies for appeals from final decisions of the district courts exercising jurisdiction under the "Little Tucker Act," 28 U.S.C. § 1346(a). 28 U.S.C. § 1295. In addition, in *Hodel* and *Eastern Enterprises*, there was considerable disagreement about whether the Takings Clause was even applicable, or whether the government action should be evaluated under the Due Process Clause. *See Hodel*, 481 U.S. at 731 n.14 (Stevens, J., concurring); *Eastern Enterprises*, 524 U.S. at 539 (Kennedy, J., concurring and dissenting in part). Petitioners do not assert that the IOLTA rules violate due process.

no state forum available to vindicate federal interests"). Petitioners elected not to pursue their claims in state court.[17] It would be completely incongruous if Petitioners could now use their selection of a federal forum as a justification for a broader remedy than would be available in state court.

Given the context in which equitable relief was discussed in the Ninth Circuit *en banc* decision, this is not an appropriate case for the Court to address this difficult issue with important federalism implications. Thus, if the Court grants the Petition, review should be limited to the two Questions Presented in this Opposition.

CONCLUSION

The Ninth Circuit carefully analyzed and correctly decided the two questions left unanswered by *Phillips*. The Fifth Circuit

---

[17] Before the Ninth Circuit, Respondents questioned whether Petitioners' claims were ripe for federal court review under *Williamson County*, 473 U.S. at 186. The Ninth Circuit concluded that it would be futile for Petitioners to pursue their claims in state court and thus that Petitioners could seek relief in federal court without litigating first in state court. App. 21a (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999)). The Ninth Circuit relied on the fact that the Justices of the Washington Supreme Court have asserted in this federal action that no Fifth Amendment violation has occurred. *Id.* It is not self-evident that the Justices who are parties to this action would be the final authority on Petitioners' claims. First, appeals from the Washington Court of Appeals to the Washington Supreme Court are discretionary. Washington Rule of Appellate Procedure 13.3. Moreover, the Justices might recuse themselves in such a challenge to the constitutionality of the IOLTA rules. *See Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d 817 (9th Cir. 2002) (in case challenging constitutionality of Ninth Circuit rule, all judges of the Ninth Circuit recused themselves, and judges sitting by designation decided case). Of course, the Court could review any decision of the highest state court, however constituted, on issues of federal law.

panel decision in *TEAJF* is the only other appellate ruling since *Phillips* on these issues. Although the Fifth Circuit's decision currently conflicts with the Ninth Circuit's *en banc* decision, the Fifth Circuit may still resolve that split by granting the petition for rehearing *en banc*. Review of this case is premature because of the likelihood that the split will be eliminated and the lack of finality on Petitioners' First Amendment claims. If the Petition is granted, review should be confined to the Questions Presented as set forth herein by Respondents.

Respectfully Submitted,

DAVID J. BURMAN
Counsel of Record
NICHOLAS P. GELLERT
KATHLEEN M. O'SULLIVAN
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
(206) 583-8888
Attorneys for Respondents Legal Foundation of Washington and Katrin E. Frank