SUPREME COURT OF THE UNITED STATES

No. 01–1325

ALLEN D. BROWN AND GREG HAYES, PETITIONERS *v.* LEGAL FOUNDATION OF WASHINGTON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 26, 2003]

JUSTICE STEVENS delivered the opinion of the Court.

The State of Washington, like every other State in the Union, uses interest on lawyers' trust accounts (IOLTA) to pay for legal services provided to the needy. Some IOLTA programs were created by statute, but in Washington, as in most other States, the IOLTA program was established by the State Supreme Court pursuant to its authority to regulate the practice of law. In *Phillips* v. *Washington Legal Foundation,* 524 U. S. 156 (1998), a case involving the Texas IOLTA program, we held "that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Id.,* at 172. We did not, however, express any opinion on the question whether the income had been "taken" by the State or "as to the amount of 'just compensation,' if any, due respondents." *Ibid.* We now confront those questions.

I

As we explained in *Phillips, id.,* at 160–161, in the course of their legal practice, attorneys are frequently

required to hold clients' funds for various lengths of time. It has long been recognized that they have a professional and fiduciary obligation to avoid commingling their clients' money with their own, but it is not unethical to pool several clients' funds in a single trust account. Before 1980 client funds were typically held in non-interest-bearing federally insured checking accounts. Because federal banking regulations in effect since the Great Depression prohibited banks from paying interest on checking accounts, the value of the use of the clients' money in such accounts inured to the banking institutions.

In 1980, Congress authorized federally insured banks to pay interest on a limited category of demand deposits referred to as "NOW accounts." See 87 Stat. 342, 12 U. S. C. §1832. This category includes deposits made by individuals and charitable organizations, but does not include those made by for-profit corporations or partnerships unless the deposits are made pursuant to a program under which charitable organizations have "the exclusive right to the interest."[1]

In response to the change in federal law, Florida adopted the first IOLTA program in 1981 authorizing the use of NOW accounts for the deposit of client funds, and providing that all of the interest on such accounts be used for charitable purposes. Every State in the Nation and the District of Columbia have followed Florida's lead and adopted an IOLTA program, either through their legislatures or their highest courts.[2] The result is that, whereas

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[1] Letter from Federal Reserve Board General Counsel Michael Bradfield to Donald Middlebrooks (Oct. 15, 1981), reprinted in Middlebrooks, The Interest on Trust Accounts Program: Mechanics of Its Operation, 56 Fla. B. J. 115, 117 (1982).

[2] Five IOLTA programs were adopted by state legislatures. See Cal. Bus. & Prof. Code Ann. §6211(a) (West 1990); Conn. Gen. Stat. §51–81c (Supp. 2002); Md. Bus. Occ. & Prof. Code Ann. §10–303 (2000); N. Y.

Jud. Law §497 (West Supp. 2003); Ohio Rev. Code Ann. §4705.09(A)(1) (Anderson 2000). The remaining programs are governed by rules adopted by the highest court in the State. See Ala. Rule Prof. Conduct 1.15(g) (1996); Alaska Rule Prof. Conduct 1.15(d) (2001); Ariz. Sup. Ct. Rule 44(c)(2) (2002); Ark. Rule Prof. Conduct 1.15(d)(2) (1987–2002); Colo. Rule Prof. Conduct 1.15(e) (2002); Del. Rule Prof. Conduct 1.15(h) (2002); D. C. Rules of Court, App. B(a) (2002); Fla. Bar Rule 5–1.1 (2002 Supp.); Ga. Bar Rule 1.15(II) (2002); Haw. Sup. Ct. Rule 11 (2002); Idaho Rule Prof. Conduct 1.15(d) (2003); Ill. Rule Prof. Conduct 1.15(d) (2002); Ind. Rule Prof. Conduct 1.15(d) (2000); Iowa Code Prof. Responsibility DR 9–102 (rev. ed. 2002); Kan. Rule Prof. Conduct 1.15(d)(3) (2002); Ky. Sup. Ct. Rule 3.130, Rule Prof. Conduct 1.15 (2002); La. Stat. Ann., Tit. 37, ch. 4, App., Art. 16, Rule Prof. Conduct 1.15(d) (West Supp. 2003); Me. Code Prof. Responsibility 3.6(e)(4) (2002); Mass. Rule Prof. Conduct 1.15 (2002); Mich. Rule Prof. Conduct 1.15(d) (2002); Minn. Rule Prof. Conduct 1.15(d) (2002); Miss. Rule Prof. Conduct 1.15(d) (2002); Mo. Sup. Ct. Rule Prof. Conduct 4–1.15 (2002); Mont. Rule Prof. Conduct 1.18(b) (2002); Neb. Code Prof. Responsibility DR 9–102 (2000); Nev. Sup. Ct. Rule 217 (2000); N. H. Sup. Ct. Rule 50 (2002); N. J. Rules Gen. Application 1:28A–2 (2003); N. M. Rule Prof. Conduct 16–115(D) (June 2002 Supp.); N. C. Rule Prof. Conduct 1.15–4 (2001); N. D. Rule Prof. Conduct 1.15(d)(1) (2002); Okla. Rule Prof. Conduct 1.15(d) (2002); Ore. Code Prof. Responsibility DR9–101(D)(2) (2002); Pa. Rule Prof. Conduct 1.15(d) (2002); R. I. Rule Prof. Conduct, Art. V, 1.15(d) (2001); S. C. App. Ct. Rule 412 (1990); S. D. Tit. 16, ch. 16–18, App., Rule Prof. Conduct 1.15(e) (1995); Tenn. Sup. Ct. Rule 8, Code Prof. Responsibility DR 9–102(C)(2) (2002); Tex. Rule Prof. Conduct 1.14 (2002); Utah Sup. Ct. Rule, Rule Prof. Conduct 1.15 (2002); Vt. Rule, Code Prof. Responsibility DR 9–103 (2002); Va. Sup. Ct. Rules, pt. 6, §II, Rule Prof. Conduct 1.15 (2002); Wash. Rule Prof. Conduct 1.14 (2002); W. Va. Rule Prof. Conduct 1.15(d) (2002); Wis. Sup. Ct. Rule 20:1.15 (2002); Wyo. Rule Prof. Conduct 1.15(d) (2002).

In Virginia, the legislature has overridden the State Supreme Court's IOLTA Rules. See 1995 Va. Acts ch. 93 (making lawyer participation in the IOLTA program optional rather than mandatory by adding Va. Code Ann. §54.1–3915.1 (2002)). In Indiana, the program was created by legislation but was struck down by the Indiana Supreme Court as an impermissible encroachment on the court's power to regulate the practice of law. See *In re Public Law No. 154–1990*, 561 N. E. 2d 791 (1990). Later, the Indiana Supreme Court adopted an IOLTA program. See Ind. Rule Prof. Conduct 1.15(d) (2000); Remondini, IOLTA Arrives in Indiana: Trial Judges to Play Key Role in

before 1980 the banks retained the value of the use of the money deposited in non-interest-bearing client trust accounts, today, because of the adoption of IOLTA programs, that value is transferred to charitable entities providing legal services for the poor. The aggregate value of those contributions in 2001 apparently exceeded $200 million.[3]

In 1984, the Washington Supreme Court established its IOLTA program by amending its Rules of Professional Conduct. *IOLTA Adoption Order*, 102 Wash. 2d 1101. The amendments were adopted after over two years of deliberation, during which the court received hundreds of public comments and heard oral argument from the Seattle-King County Bar Association, designated to represent the proponents of the Rule, and the Walla Walla County Bar Association, designated to represent the opponents of the Rule.

In its opinion explaining the order, the court noted that earlier Rules had required attorneys to hold client trust funds "in accounts separate from their own funds," *id.*, at 1102, and had prohibited the use of such funds for the lawyer's own pecuniary advantage, but did not address the question whether or how such funds should be invested.

Pro Bono Plan, 41 Res Gestae 9 (1998). Likewise, in Pennsylvania, the state legislature passed the original program but the Pennsylvania Supreme Court took over the program in 1996, suspending the state statute and amending the Rules of Professional Conduct to require attorney participation in IOLTA. See A. Azen, Building a Base for Pro Bono in Pennsylvania, 24 Pa. Law. 28 (Mar.–Apr. 2002).

Petitioners appear to suggest that a different constitutional analysis might apply to a legislative program than to one adopted by the State's judiciary. See Brief for Petitioners 23, n. 7; Tr. of Oral Arg. 50–51. We assume, however, that the procedure followed by the State when promulgating its IOLTA Rules is irrelevant to the takings issue.

[3] See Brief for AARP et al. as *Amici Curiae* 11 (citing ABA Commission on Interest on Lawyers' Trust Accounts, IOLTA Handbook 98, 208 (Jan. 1995, updated July 2002)).

Commenting on then-prevalent practice the court observed:

> "In conformity with trust law, however, lawyers usually invest client trust funds in separate interest-bearing accounts and pay the interest to the clients whenever the trust funds are large enough in amount or to be held for a long enough period of time to make such investments economically feasible, that is, when the amount of interest earned exceeds the bank charges and costs of setting up the account. However, when trust funds are so nominal in amount or to be held for so short a period that the amount of interest that could be earned would not justify the cost of creating separate accounts, most attorneys simply deposit the funds in a single noninterest-bearing trust checking account containing all such trust funds from all their clients. The funds in such accounts earn no interest for either the client or the attorney. The banks, in contrast, have received the interest-free use of client money." *Ibid.*

The court then described the four essential features of its IOLTA program: (a) the requirement that *all* client funds be deposited in interest-bearing trust accounts, (b) the requirement that funds that cannot earn net interest for the client be deposited in an IOLTA account, (c) the requirement that the lawyers direct the banks to pay the net interest on the IOLTA accounts to the Legal Foundation of Washington (Foundation), and (d) the requirement that the Foundation must use all funds received from IOLTA accounts for tax-exempt law-related charitable and educational purposes. It explained:

> "1. *All* client funds paid to any Washington lawyer or law firm must be deposited in identifiable interest-bearing trust accounts separate from any accounts containing non-trust money of the lawyer or law firm.

The program is mandatory for all Washington lawyers. New CPR DR 9–102(A).

"2. The new rule provides for two kinds of interest-bearing trust accounts. The first type of account bears interest to be paid, net of any transaction costs, to the client. This type of account may be in the form of either separate accounts for each client or a single pooled account with subaccounting to determine how much interest is earned for each client. The second type of account is a pooled interest-bearing account with the interest to be paid directly by the financial institution to the Legal Foundation of Washington (hereinafter the Foundation), a nonprofit entity to be established pursuant to the order following this opinion. New CPR DR 9–102(C)(1), (2).

"3. Determining whether client funds should be deposited in accounts bearing interest for the benefit of the client or the Foundation is left to the discretion of each lawyer, but the new rule specifies that the lawyer shall base his decision solely on whether the funds could be invested to provide a positive net return to the client. This determination is made by considering several enumerated factors: the amount of interest the funds would earn during the period they are expected to be deposited, the cost of establishing and administering the account, and the capability of financial institutions to calculate and pay interest to individual clients. New CPR DR 9–102(C)(3).

. . . . .

"5. Lawyers and law firms must direct the depository institution to pay interest or dividends, net of any service charges or fees, to the Foundation, and to send certain regular reports to the Foundation and the lawyer or law firm depositing the funds. New CPR DR 9–102(C)(4).

> "The Foundation must use all funds received from lawyers' trust accounts for tax-exempt law-related charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, as directed by this court. See Articles of Incorporation and Bylaws of the Legal Foundation of Washington, 100 Wash. 2d, Advance Sheet 13, at ii, vi (1984)." *Id.,* at 1102–1104.

In its opinion the court responded to three objections that are relevant to our inquiry in this case. First, it rejected the contention that the new program "constitutes an unconstitutional taking of property without due process or just compensation." *Id.,* at 1104. Like other State Supreme Courts that had considered the question, it distinguished our decision in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U. S. 155 (1980), on the ground that the new "'program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances.'" 102 Wash. 2d, at 1108 (quoting *In re Interest on Trust Accounts*, 402 So. 2d 389, 395 (Fla. 1981)).

Second, it rejected the argument that it was unethical for lawyers to rely on any factor other than the client's best interests when deciding whether to deposit funds in an IOLTA account rather than an account that would generate interest for the client. The court endorsed, and added emphasis, to the response to that argument set forth in the proponents' reply brief:

> "'Although the proposed amendments list several factors an attorney should consider in deciding how to invest his clients' trust funds, . . . all of these factors are really facets of a single question: Can the client's money be invested so that it will produce a net benefit for the client? If so, the attorney must invest it to earn interest for the client. Only if the money cannot

> earn net interest for the client is the money to go into an IOLTA account.'
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> "Reply Brief of Proponents, at 14. This is a correct statement of an attorney's duty under trust law, as well as a proper interpretation of the proposed rule as published for public comment. However, in order to make it even clearer that IOLTA funds are only those funds that *cannot, under any circumstances*, earn *net* interest (after deducting transaction and administrative costs and bank fees) for the client, we have amended the proposed rule accordingly. *See* new CPR DR 9–102(C)(3). The new rule makes it absolutely clear that the enumerated factors are merely facets of the ultimate question of whether client funds could be invested profitably for the benefit of clients. If they can, then investment for the client is mandatory." 102 Wash. 2d, at 1113–1114.

The court also rejected the argument that it had failed to consider the significance of advances in computer technology that, in time, may convert IOLTA participation into an unconstitutional taking of property that could have been distributed to the client. It pointed to the fact that the Rule expressly requires attorneys to give consideration to the capability of financial institutions to calculate and pay interest on individual accounts, and added: "Thus, as cost effective subaccounting services become available, making it possible to earn net interest for clients on increasingly smaller amounts held for increasingly shorter periods of time, more trust money will have to be invested for the clients' benefit under the new rule. The rule is therefore self-adjusting and is adequately designed to accommodate changes in banking technology without running afoul of the state or federal constitutions." *Id.,* at 1114.

Given the court's explanation of its Rule, it seems ap-

parent that a lawyer who mistakenly uses an IOLTA account as a depositary for money that could earn interest for the client would violate the Rule. Hence, the lawyer will be liable to the client for any lost interest, however minuscule the amount might be.

In 1995, the Washington Supreme Court amended its IOLTA Rules to make them applicable to Limited Practice Officers (LPOs) as well as lawyers. LPOs are non-lawyers who are licensed to act as escrowees in the closing of real estate transactions. Like lawyers, LPOs often temporarily control the funds of clients.

II

This action was commenced by a public interest law firm and four citizens to enjoin state officials from continuing to require LPOs to deposit trust funds into IOLTA accounts. Because the Court of Appeals held that the firm and two of the individuals do not have standing,[4] *Washington Legal Foundation* v. *Legal Foundation of Washington*, 271 F. 3d 835, 848–850 (CA9 2001), and since that holding was not challenged in this Court, we limit our discussion to the claims asserted by petitioners Allen Brown and Greg Hayes. The defendants, respondents in this Court, are the justices of the Washington Supreme Court, the Foundation, which receives and redistributes

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[4] The firm is the Washington Legal Foundation, "a nonprofit public interest law and policy center with members and supporters nationwide, [that] devotes a substantial portion of its resources to protecting the speech and property rights of individuals from undue government interference." App. 13. The two individuals found to have no standing are LPOs who alleged that the 1995 amendment adversely affected their earnings because banks that had previously provided them with special services no longer did so; they did not allege that any of their own funds had been "taken."

the interest on IOLTA accounts, and the president of the Foundation.

In their amended complaint, Brown and Hayes describe the IOLTA program, with particular reference to its application to LPOs and to some of the activities of Recipient Organizations that have received funds from the Foundation. Brown and Hayes also both allege that they regularly purchase and sell real estate and in the course of such transactions they deliver funds to LPOs who are required to deposit them in IOLTA accounts. They object to having the interest on those funds "used to finance the Recipient Organizations" and "to anyone other than themselves receiving the interest derived from those funds." App. 25. The first count of their complaint alleges that "being forced to associate with the Recipient Organizations" violates their First Amendment rights, *id.,* at 25, 27–28; the second count alleges that the "taking" of the interest earned on their funds in the IOLTA accounts violates the Just Compensation Clause of the Fifth Amendment, *id.,* at 28–29; and the third count alleges that the requirement that client funds be placed in IOLTA accounts is "an illegal taking of the beneficial use of those funds." *Id.,* at 29. The prayer for relief sought a refund of interest earned on the plaintiffs' money that had been placed in IOLTA accounts, a declaration that the IOLTA Rules are unconstitutional, and an injunction against their enforcement against LPOs. See *id.,* at 30.

Most of the pretrial discovery related to the question of whether the 1995 Amendment to the IOLTA Rules had indirectly lessened the earnings of LPOs because LPOs no longer receive certain credits that the banks had provided them when banks retained the interest earned on escrowed funds. Each of the petitioners, however, did identify a specific transaction in which interest on his escrow deposit was paid to the Foundation.

Petitioner Hayes and a man named Fossum made an

earnest money deposit of $2,000 on August 14, 1996, and a further payment of $12,793.32 on August 28, 1996, in connection with a real estate purchase that was closed on August 30, 1996. *Id.,* at 117–118. The money went into an IOLTA account. Presumably those funds, half of which belonged to Fossum, were used to pay the sales price, "to pay off liens and obtain releases to clear the title to the property being conveyed." *Id.,* at 98. The record does not explain exactly how or when the ultimate recipients of those funds received or cashed the checks issued to them by the escrowee, but the parties apparently agree that the deposits generated some interest on principal that was at least in part owned by Hayes during the closing.

In connection with a real estate purchase that closed on May 1, 1997, petitioner Brown made a payment of $90,521.29 that remained in escrow for two days, see *id.,* at 53; he estimated that the interest on that deposit amounted to $4.96, but he did not claim that he would have received any interest if the IOLTA Rules had not been in place.[5] The record thus suggests, although the facts are not crystal clear, that funds deposited by each of the petitioners generated some interest that was ultimately paid to the Foundation. It also seems clear that without IOLTA those funds would not have produced any net interest for either of the petitioners.

After discovery, the District Court granted the defendants' motion for summary judgment. As a factual matter the court concluded "that in no event can the client-depositors make any net returns on the interest accrued in these accounts. Indeed, if the funds were able to make

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[5] "Q Are you saying that without IOLTA in place you would have earned $4.96 on this transaction?

"A Without IOLTA in place I may not have earned anything but it would have been earned in the sense of earning credits for the title company in this case." *Id.,* at 130.

any net return, they would not be subject to the IOLTA program." *Washington Legal Foundation* v. *Legal Foundation of Washington*, No. C97–0146C (WD Wash., Jan. 30, 1998), App. to Pet. for Cert. 94a. As a legal matter, the court concluded that the constitutional issue focused on what an owner has lost, not what the "'taker'" has gained, and that petitioners Hayes and Brown had "lost nothing." *Ibid.*

While the case was on appeal, we decided *Phillips* v. *Washington Legal Foundation*, 524 U. S 156 (1998). Relying on our opinion in that case, a three-judge panel of the Ninth Circuit decided that the IOLTA program caused a taking of petitioners' property and that further proceedings were necessary to determine whether they are entitled to just compensation. The panel concluded: "In sum, we hold that the interest generated by IOLTA pooled trust accounts is property of the clients and customers whose money is deposited into trust, and that a government appropriation of that interest for public purposes is a taking entitling them to just compensation under the Fifth Amendment. But 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." *Washington Legal Foundation* v. *Legal Foundation of Washington*, 236 F. 3d 1097, 1115 (2001).

The Court of Appeals then reconsidered the case en banc. 271 F. 3d 835 (CA9 2001). The en banc majority affirmed the judgment of the District Court, reasoning that, under the ad hoc approach applied in *Penn Central Transp. Co.* v. *New York City,* 438 U. S. 104 (1978), there was no taking because petitioners had suffered neither an actual loss nor an interference with any investment-backed expectations, and that the regulation of the use of their property was permissible. Moreover, in the majority's view, even if there were a taking, the just compensation due was

zero.

The three judges on the original panel, joined by Judge Kozinski, dissented. In their view, the majority's reliance on *Penn Central* was misplaced because this case involves a "per se" taking rather than a regulatory taking. 271 F. 3d, at 865–866. The dissenters adhered to the panel's view that a remand is necessary in order to decide whether any compensation is due.

In their petition for certiorari, Brown and Hayes asked us not only to resolve the disagreement between the majority and the dissenters in the Ninth Circuit about the taking issue, but also to answer a question that none of those judges reached, namely, whether injunctive relief is available because the small amounts to which they claim they are entitled render recovery through litigation impractical. We granted certiorari. 536 U. S. 903 (2002).

III

While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a "public use" and "just compensation" must be paid to the owner.[6] In this case, the first condition is unquestionably satisfied. If the State had imposed a special tax, or perhaps a system of user fees, to generate the funds to finance the legal services supported by the Foundation, there would be no question as to the legiti-

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[6] Often referred to as the Just Compensation Clause, the final Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." It applies to the States as well as the Federal Government. *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 239 (1897).

macy of the use of the public's money.[7] The fact that public funds might pay the legal fees of a lawyer representing a tenant in a dispute with a landlord who was compelled to contribute to the program would not undermine the public character of the "use" of the funds. Provided that she receives just compensation for the taking of her property, a conscientious pacifist has no standing to object to the government's decision to use the property she formerly owned for the production of munitions. Even if there may be occasional misuses of IOLTA funds, the overall, dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the Foundation's distribution of these funds as a "public use" within the meaning of the Fifth Amendment.

Before moving on to the second condition, the "just compensation" requirement, we must address the type of taking, if any, that this case involves. As we made clear just last term:

> "The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the

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[7] As the dissenters in the Ninth Circuit observed in their original panel opinion: "IOLTA programs spread rapidly because they were an exceedingly intelligent idea. Money that lawyers deposited in bank trust accounts always produced earnings, but before IOLTA, the clients who owned the money did not receive any of the earnings that their money produced. IOLTA extracted the earnings from the banks and gave it to charities, largely to fund legal services for the poor. That is a very worthy purpose." 236 F. 3d 1097, 1115 (2001).

In his dissent from the en banc opinion, Judge Kozinski wrote: "It is no doubt true that the IOLTA program serves a salutary purpose, one worthy of our support. As a citizen and former member of the bar, I applaud the state's effort to provide legal services for the poor and disadvantaged." 271 F. 3d 835, 867 (CA9 2001).

government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries,' *Penn Central*, 438 U. S., at 124, designed to allow 'careful examination and weighing of all the relevant circumstances.' *Palazzolo* [v. *Rhode Island*], 533 U. S. [606,] 636 [2001] (O'CONNOR, J., concurring).

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States* v. *Pewee Coal Co.*, 341 U. S. 114, 115 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945), *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982); or when its planes use private airspace to approach a government airport, *United States* v. *Causby*, 328 U. S. 256 (1946), it is required to pay for that share no matter how small. But a government regulation that merely prohibits landlords from evicting

> tenants unwilling to pay a higher rent, *Block* v. *Hirsh*, 256 U. S. 135 (1921); that bans certain private uses of a portion of an owner's property, *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926); *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470 (1987); or that forbids the private use of certain airspace, *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), does not constitute a categorical taking. 'The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.' *Yee* v. *Escondido*, 503 U. S. 519, 523 (1992). See also *Loretto*, 458 U. S., at 440; *Keystone*, 480 U. S., at 489, n. 18." *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 321–323 (2002).

In their complaint, Brown and Hayes separately challenge (1) the requirement that their funds must be placed in an IOLTA account (Count III) and (2) the later transfers to the Foundation of whatever interest is thereafter earned (Count II). The former is merely a transfer of principal and therefore does not effect a confiscation of any interest. Conceivably it could be viewed as the first step in a "regulatory taking" which should be analyzed under the factors set forth in our opinion in *Penn Central*. Under such an analysis, however, it is clear that there would be no taking because the transaction had no adverse economic impact on petitioners and did not interfere with any investment-backed expectation. See 438 U. S., at 124.

Even the dissenters in the Court of Appeals did not disagree with the proposition that *Penn Central* forecloses the conclusion that there was a regulatory taking effected by the Washington IOLTA program. In their view, however, the proper focus was on the second step, the transfer

of interest from the IOLTA account to the Foundation. It was this step that the dissenters likened to the kind of "*per se*" taking that occurred in *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U. S. 419 (1982).

We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis. As was made clear in *Phillips*, the interest earned in the IOLTA accounts "is the 'private property' of the owner of the principal." 524 U. S., at 172. If this is so, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto*.

We therefore assume that Brown and Hayes retained the beneficial ownership of at least a portion of their escrow deposits until the funds were disbursed at the closings, that those funds generated some interest in the IOLTA accounts, and that their interest was taken for a public use when it was ultimately turned over to the Foundation. As the dissenters in the Ninth Circuit explained, though, this does not end our inquiry. Instead, we must determine whether any "just compensation" is due.

IV

"The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985). All of the Circuit Judges and District Judges who have confronted the compensation question, both in this case and in *Phillips*, have agreed that the "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain. This conclusion is supported by consistent and unambigu-

ous holdings in our cases.

Most frequently cited is Justice Holmes' characteristically terse statement that "the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195 (1910). Also directly in point is Justice Brandeis' explanation of why a mere technical taking does not give rise to an obligation to pay compensation:

> "We have no occasion to determine whether in law the President took possession and assumed control of the Marion & Rye Valley Railway. For even 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." *Marion & Rye Valley R. Co.* v. *United States*, 270 U. S. 280, 282 (1926).

A few years later we again noted that the private party "is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson* v. *United States*, 292 U. S. 246, 255 (1934).

In *Kimball Laundry Co.* v. *United States*, 338 U. S. 1 (1949), although there was disagreement within the Court concerning the proper measure of the owner's loss when a leasehold interest was condemned, it was common ground that the government should pay "not for what it gets but for what the owner loses." *Id.,* at 23 (Douglas, J., dissenting). Moreover, in his opinion for the majority, Justice Frankfurter made it clear that, given "the liability of all property to condemnation for the common good," an owner's nonpecuniary losses attributable to "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." *Id.,*

at 5.

Applying the teaching of these cases to the question before us, it is clear that neither Brown nor Hayes is entitled to any compensation for the nonpecuniary consequences of the taking of the interest on his deposited funds, and that any pecuniary compensation must be measured by his net losses rather than the value of the public's gain. For that reason, both the majority[8] and the dissenters[9] on the Court of Appeals agreed that if petitioners' net loss was zero, the compensation that is due is also zero.

V

Posing hypothetical cases that explain why a lawyer might mistakenly deposit funds in an IOLTA account when those funds might have produced net earnings for the client, the Ninth Circuit dissenters concluded that a remand of this case is necessary to decide whether petitioners are entitled to any compensation.

> "Even though when funds are deposited into IOLTA accounts, the lawyers expect them to earn less than it would cost to distribute the interest, that expectation can turn out to be incorrect, as discussed above. Several hypothetical cases illustrate the complexities of the remedies, which need further factual development on remand. Suppose $2,000 is deposited into a lawyer's trust account paying 5% and stays there for two days. It earns about $.55, probably well under the

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[8] "We therefore hold that even if the IOLTA program constituted a taking of Brown's and Hayes's private property, there would be no Fifth Amendment violation because the value of their just compensation is nil." 271 F. 3d, at 864.

[9] *Id.,* at 883–884.

cost of a stamp and envelope, along with clerical expenses, needed to send the $.55 to the client. In that case, the client's financial loss from the taking, if a reasonable charge is made for the administrative expense, is nothing. The fair market value of a right to receive $.55 by spending perhaps $5.00 to receive it would be nothing. On the other hand, suppose, hypothetically, that the amount deposited into the trust account is $30,000, and it stays there for 6 days. The client's loss here would be about $29.59 if he does not get the interest, which may well exceed the reasonable administrative expense of paying it to him out of a common fund. It is hard to see how just compensation could be zero in this hypothetical taking, even though it would be in the $2,000 for 2 days hypothetical taking. It may be that the difference between what a pooled fund earns, and what the individual clients and escrow companies lose, adds up to enough to sustain a valuable IOLTA program while not depriving any of the clients and customers of just compensation for the takings. This is a practical question entirely undeveloped on this record. We leave it for the parties to consider during the remedial phase of this litigation." 271 F. 3d, at 883.[10]

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[10] The first hypothetical posed by the Ninth Circuit dissenters illustrates the fundamental flaw in JUSTICE SCALIA's approach to this case. Under his view that just compensation should be measured by the gross amount of the interest taken by the State, the client should recover the $.55 of interest earned on a two-day deposit even when the transaction costs amount to $2.00. Thus, in this case, under JUSTICE SCALIA's approach, even if it is necessary to incur substantial legal and accounting fees to determine how many pennies of interest were earned while petitioners' funds remained in escrow and how much of that interest belonged to them rather than to the sellers, the Constitution would require that they be paid the gross amount of that interest, rather than an amount equal to their net loss (which, of course, is zero).

These hypotheticals persuade us that lawyers and LPOs may occasionally deposit client funds in an IOLTA account when those funds could have produced net interest for their clients. It does not follow, however, that there is a need for further hearings to determine whether Brown or Hayes is entitled to any compensation from the respondents.

The Rules adopted and administered by the Washington Supreme Court unambiguously require lawyers and LPOs to deposit client funds in non-IOLTA accounts whenever those funds could generate net earnings for the client. See *supra*, at 8–9. Thus, if the LPOs who deposited petitioners' money in IOLTA accounts could have generated net

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As explained above, this is inconsistent with the Court's just compensation precedents. See *supra*, at 17–18.

Ironically, JUSTICE SCALIA seems to believe that our holding in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U. S. 155 (1980), would support such a bizarre result. In *Webb's*, however, the transaction cost that is comparable to the postage in the Ninth Circuit's hypothetical (and to the potential professional fees in this case) is the Clerk's fee of $9,228.74, which was deducted from the amount held in the interpleader fund. See *id.,* at 157, 160. The creditors in *Webb's* recovered an amount equal to their net loss. Indeed, in *Webb's* we expressly limited our holding to "the narrow circumstances of this case," *id*. at 164, and reserved decision on the question whether any compensation would have been due if the Clerk had not charged a separate fee. See *id.,* at 164–165.

JUSTICE SCALIA is mistaken in stating that we hold that just compensation is measured by the amount of interest "petitioners *would have earned* had their funds been deposited in *non-IOLTA* accounts." *Post*, at 4. We hold (1) that just compensation is measured by the net value of the interest that was actually earned by petitioners and (2) that, by operation of the Washington IOLTA Rules, no net interest can be earned by the money that is placed in IOLTA accounts in Washington. See *IOLTA Adoption Order*, 102 Wash.2d 1101, 1114 (1984) ("IOLTA funds are only those funds that *cannot, under any circumstances*, earn *net* interest (after deducting transaction and administrative costs and bank fees) for the client").

income, the LPOs violated the court's Rules. Any conceivable net loss to petitioners was the consequence of the LPOs' incorrect private decisions rather than any state action. Such mistakes may well give petitioners a valid claim against the LPOs, but they would provide no support for a claim for compensation from the State, or from any of the respondents. The District Court was therefore entirely correct when it made the factual finding "that in no event can the client-depositors make any net return on the interest accrued in these accounts. Indeed, if the funds were able to make any net return, they would not be subject to the IOLTA program." *Washington Legal Foundation* v. *Legal Foundation of Washington*, No. C97–0146C (WD Wash., Jan. 30, 1998), App. to Pet. for Cert. 94a.

The categorical requirement in Washington's IOLTA program that mandates the choice of a non-IOLTA account when net interest can be generated for the client provided an independent ground for the en banc court's judgment. It held that the program did "not work a constitutional violation with regard to Brown's and Hayes's property: Even if their property was taken, the Fifth Amendment only protects against a taking without just compensation. Because of the way the IOLTA program operates, the compensation due Brown and Hayes for any taking of their property would be nil. There was therefore no constitutional violation when they were not compensated." 271 F. 3d, at 861–862.

We agree with that holding.[11]

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[11] Contrary to the dissent's assertion, this conclusion does not depend on the fact that interest "was created by the beneficence of a state regulatory program." *Post*, at 1. It rests instead on the fact that just compensation for a net loss of zero is zero.

VI

To recapitulate: It is neither unethical nor illegal for lawyers to deposit their clients' funds in a single bank account. A state law that requires client funds that could not otherwise generate net earnings for the client to be deposited in an IOLTA account is not a "regulatory taking." A law that requires that the interest on those funds be transferred to a different owner for a legitimate public use, however, could be a *per se* taking requiring the payment of "just compensation" to the client. Because that compensation is measured by the owner's pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case. It is therefore unnecessary to discuss the remedial question presented in the certiorari petition. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.