

**No. 00-50139**

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

WASHINGTON LEGAL FOUNDATION, WILLIAM R. SUMMERS,  
and MICHAEL J. MAZZONE,  
*Plaintiffs-Appellants,*

v.

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

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

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**PETITION OF THE JUSTICES OF THE SUPREME COURT OF TEXAS,  
THE TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION,  
AND ITS CHAIRMAN FOR REHEARING EN BANC**

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## CERTIFICATE OF INTERESTED PERSONS

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

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

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

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

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**STATEMENT PURSUANT TO  
FEDERAL RULE OF APPELLATE PROCEDURE 35(b)(1)**

Pursuant to Fed. R. App. P. 35(b)(1), the undersigned counsel states that this proceeding presents the following questions of exceptional importance:

1. Whether “per se ” taking analysis applies to monetary payments to the government, including payments that result in no economic loss to the claimant;
2. Whether the Just Compensation Clause requires payment of compensation to a claimant who has suffered no economic loss; and
3. Whether a federal court may enjoin state action under the Just Compensation Clause without determining the amount of compensation due, if any, and without requiring the claimant to seek compensation from the State.

The panel’s holding that “just compensation” is not measured by the economic loss to the claimant conflicts with the following decisions of the Supreme Court, among others: *United States v. 564.54 Acres of Monroe & Pike County Land*, 441 U.S. 506 (1979); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280 (1926); and *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910).

The panel’s holding that “per se” taking analysis applies to monetary payments conflicts with the following decisions of the Supreme Court: *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998); *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993); *United*

*States v. Sperry Corp.*, 493 U.S. 52 (1989); *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987); and *Connolly v. PBGC*, 475 U.S. 211, 224 (1986).

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Robert A. Long, Jr.

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This case presents constitutional questions of exceptional importance to the State of Texas, every other State, and the American legal system.<sup>1</sup> At issue is the constitutionality, under the Fifth Amendment’s Just Compensation Clause, of the Texas Interest on Lawyers Trust Accounts (“IOLTA”) program. Following a remand from the U.S. Supreme Court and a trial on the merits, the District Court found that plaintiffs suffered *no* economic loss from the IOLTA program and entered judgment for the defendants. A divided panel of this Court dismissed the District Court’s factual findings as “not relevant” and held that: (1) the IOLTA program is a “per se” taking, (2) the Just Compensation Clause is violated even though the plaintiffs’ economic loss is zero, and (3) plaintiffs can obtain equitable relief from a federal court. The panel’s decision dramatically expands Just Compensation jurisprudence, with implications that extend far beyond IOLTA programs. The panel’s decision conflicts with decisions of the Supreme Court and other courts of appeals. The Ninth Circuit recently granted rehearing en banc on the “per se taking” question.<sup>2</sup> The panel’s decision in this case goes much further

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<sup>1</sup> All 50 States, the District of Columbia, and the Virgin Islands have established IOLTA programs. *Amicus* briefs supporting the Texas program have been filed with this Court by, among others, the Conference of Chief Justices (which includes the Chief Justice of every State), the American Bar Association, and the State Bar of Texas.

<sup>2</sup> *Washington Legal Foundation v. Legal Foundation of Washington*, 236 F.3d 1097, *vacated and rehearing en banc granted*, 248 F.3d 1201 (9th Cir. 2001).

than the Ninth Circuit panel’s decision, and presents an even stronger candidate for en banc review.

### **ISSUES PRESENTED FOR EN BANC CONSIDERATION**

1. Whether “per se ” taking analysis applies to monetary payments to the government, including payments that result in no economic loss to the claimant.
2. Whether the Just Compensation Clause requires payment of compensation to a claimant who has suffered no economic loss.
3. Whether a federal court may enjoin state action under the Just Compensation Clause without determining the amount of compensation due, if any, and without requiring the claimant to seek compensation from the State.

### **COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE**

**1. Initial Proceedings.** A single client and his lawyer, supported by a public interest group, filed this action challenging the constitutionality of the Texas IOLTA program. The District Court (Nowlin, J.) entered summary judgment for the defendants. 873 F. Supp. 1 (W.D. Tex. 1995). On appeal, this Court vacated in part and remanded, holding that interest earned on funds held in IOLTA accounts is property of the client for purposes of the Just Compensation Clause. 94 F.3d 1000 (1996).<sup>3</sup>

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<sup>3</sup> Judge Benavides, joined by then-Chief Judge Politz and Judges King, Wiener, Stewart, and Parker, voted to rehear the case en banc. 106 F.3d 640 (5th Cir. 1997).

**2. The Supreme Court’s Decision.** The U.S. Supreme Court granted review and affirmed by a vote of 5-4. *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). Noting that principal deposited in IOLTA accounts belongs to the clients, and invoking “[t]he rule that ‘interest follows principal,’” the Court held that interest earned on client funds in IOLTA accounts is property of the client for purposes of the Just Compensation Clause. 524 U.S. at 165. The Court remanded for consideration of two additional questions, stating explicitly: “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.” *Id.* at 172.

In an opinion written by Justice Souter, four Justices objected to the Court’s announcement of an “abstract proposition” that “may ultimately turn out to have no significance.” *Id.* The four Justices agreed (and no Justice disagreed) that both the “taking” and the “just compensation” questions are “serious ones for [plaintiffs.]” *Id.* at 176. As to the “taking” question, the Justices observed that “we start with *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).” *Id.* at 176. This case involves “no physical occupation or seizure of tangible property,” “no apparent economic impact,” and nothing even “resembling an investment” or a “basis for reasonably expecting to obtain net interest,” and thus “application of *Penn Central* would not bode well” for the plaintiffs. *Id.*

As to “just compensation,” “the client’s inability to earn net interest outside IOLTA . . . raises serious questions about entitlement to any compensation.” *Id.* at 177. Citing numerous Supreme Court decisions, the four Justices said that “a court presumably would look to the claimant’s putative property interest as it was or would have been enjoyed in the absence of IOLTA,” and “would measure any required compensation by the claimant’s loss, not the government’s (or the public’s) gain.” *Id.* (citing, *inter alia*, *United States v. 564.54 Acres of Monroe & Pike County Land*, 441 U.S. 506, 510 (1979); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949); *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 194-95 (1910)).

**3. The District Court’s Decision on Remand.** On remand, the District Court conducted a trial on the merits, made painstaking findings of fact, and answered both the “taking” and the “just compensation” questions in favor of the defendants. 86 F. Supp. 2d 624. Applying the just compensation cases cited by Justice Souter, the District Court viewed “[t]he factual issue before the Court” as “what is the monetary amount . . . lost by Mr. Summers because his funds were placed in IOLTA?” *Id.* at 638. The District Court carefully considered and rejected the plaintiffs’ evidence that Mr. Summers could have earned money through “in-firm pooling,” “sub-accounting,” or a “net benefit theory.” “[B]ased upon all the evidence before it,” (including Mr. Summers’s admission that “he was

no worse off because of IOLTA”), the Court made a factual finding that “Mr. Summers’s loss is zero.” *Id.* at 643. Accordingly, the court held, “[w]ith regard to *this case* and *Mr. Summers’ monies*, Plaintiffs have failed to carry their burden of proof.” *Id.*

The District Court also found that no “taking” had occurred. It held that *per se* analysis is not appropriate, distinguishing this case from cases such as *Loretto* that involved “the physical invasion of real property,” and finding *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), to be “easily distinguishable” because in this case “there is no money to confiscate outside the mechanisms which make IOLTA possible.” *Id.* at 645.<sup>4</sup>

**4. The Panel’s Decision.** A divided panel of this Court reversed. The panel viewed the Supreme Court’s prior decision as dispositive, and therefore viewed the District Court’s findings of fact as irrelevant. *See* Slip op. 16 (“[T]he linchpin for this case has already been inserted by the Supreme Court”); *id.* at 15 n.6 (findings of fact “not relevant” “in the light of *Phillips* and *Loretto*”). As to the “taking” question, the panel held that application of “*per se*” taking analysis is compelled by *Phillips* and two decisions it cites, *Webb’s* and *Loretto*. The panel distinguished a line of Supreme Court cases holding that *per se* analysis does not

apply to a “governmental appropriation of money” on the ground that these cases involved fees for government services.

As to “just compensation,” the panel held that “once a taking is found, the question becomes what amount of, not whether, just compensation is due.” Slip op. 17 (citing *Phillips* and *Loretto*). The panel acknowledged the District Court’s finding that the plaintiffs suffered no economic loss, Slip op. 14, and made no attempt to quantify the amount of “just compensation” due to the plaintiffs. Instead, the panel noted that, because the defendants have Eleventh Amendment immunity, the plaintiffs “seek only prospective declaratory and injunctive relief.” *Id.* at 19.

The panel held that equitable relief is appropriate on two alternate grounds. First, the defendants have conceded that they are “subject to [plaintiffs’] prospective injunction claims.” *Id.* at 20. Second, while recognizing that the contrary view “has some support,” the majority held that plaintiffs are not required to seek just compensation from the State of Texas. *Id.*<sup>5</sup>

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<sup>4</sup> The District Court also rejected plaintiffs’ contention that the IOLTA program violates the First Amendment. 86 F. Supp. 2d at 632-36. Separately, the District Court held that the Justices of the Texas Supreme Court are absolutely immune from suit. 86 F. Supp. 2d at 617.

<sup>5</sup> The panel held that the Justices of the Texas Supreme Court are not entitled to legislative immunity from suit. *Id.* at 30-31. The panel did not recognize that neither individual Justices nor the Texas Supreme Court can independently initiate enforcement of non-compliance under the Texas IOLTA program. The panel did not reach plaintiffs’ argument that the Texas IOLTA program violates the First Amendment. *Id.* at 2.

**5. The Dissent.** Judge Wiener dissented. He observed that the trial has “brought us to precisely the moment Justice Souter foretold by proving that [the plaintiffs’] loss – and, therefore, the “just compensation that they are due – is zero.” Slip op. 1. Applying the “constitutional truism” that “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation,” Judge Wiener concluded that the Texas IOLTA program does “not violate the plaintiffs’ constitutional rights because just compensation for zero is zero.” *Id.* at 1-2 (internal quotation and citation omitted).

Although Judge Wiener “would have resolved the [taking] issues differently,” he focused on the “just compensation” issue. “[J]ust compensation’ is payment of value for equal value,” and “[n]one can argue that the equal value of zero is anything other than zero.” *Id.* at 7. The panel decision ignores the District Court’s factual finding that the plaintiff “suffered no loss – zero.” *Id.* Under governing Supreme Court precedent, “when the owner’s loss is zero, he is owed no compensation.” *Id.* at 10.

Judge Wiener strongly disagreed that defendants conceded plaintiffs’ entitlement to equitable relief. *See* Slip op. 2 (“The defendants have done no such thing.”) Judge Wiener observed that there is “a vast difference between conceding that the Eleventh Amendment is not a *bar* to the assertion of a *claim*, on the one hand, and conceding *entitlement* to the *relief sought* by asserting a claim, on the

other.” *Id.* at 3. In Judge Wiener’s view, the real issue is not whether equitable relief is appropriate, but whether *any* relief is appropriate. “[T]he plaintiffs, having themselves proved that they have not been denied just compensation, nonetheless ask us to impose a prior restraint on a program that has found favor in all fifty states.” *Id.* at 15.

### ARGUMENT

This case presents questions of exceptional importance. The future of the Texas IOLTA program – and, at least potentially, IOLTA programs in every State – is at stake. IOLTA programs are “a primary source of funding” for legal assistance to low-income families and individuals. *See* 106 F.3d at 641 (opinion of Benavides, J., dissenting from denial of rehearing en banc). Moreover, the panel’s decision raises fundamental questions about the scope of the Just Compensation Clause. The panel’s trio of holdings – that per se takings analysis applies to government exactions of money, that every taking requires payment of compensation (even if the claimant suffers no economic loss), *and* that claimants may bypass state remedies in favor of federal court decrees – represent a breathtaking expansion of Just Compensation law. The panel’s decision will encourage constitutional challenges to a wide range of government actions.<sup>6</sup> The

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<sup>6</sup> Justice Souter cited withholding of income taxes as one of many possible examples. 524 U.S. at 178-79. The only exception the panel recognizes to “per se” analysis applies to fees for (continued...)

decision conflicts with multiple decisions of the Supreme Court, some of which the panel did not acknowledge. The panel viewed the Supreme Court’s opinion in *Phillips* as compelling answers to both the “taking” and “just compensation” questions, rendering the District Court’s findings of fact “not relevant.” *See* Slip op. 15 n.6. If the panel’s reading of *Phillips* is correct, all nine Justices of the Supreme Court were mistaken. The five Justices who joined the Court’s opinion said they were “express[ing] no view” on the “taking” and “just compensation” questions. 524 U.S. at 172. The four dissenting Justices concluded that, on remand, both the “taking” and the “just compensation” questions might well be answered in favor of the constitutionality of IOLTA programs. *Id.* at 176.

**1. The Panel’s Application of Per Se Taking Analysis to Monetary Payments Is Incorrect and Conflicts with Decisions of the Supreme Court.**

“Per se” taking analysis is strong medicine: it requires a court to view government action as a “taking” without any inquiry into the character of the action, its economic impact, or the extent (if any) to which it interferes with investment-backed expectations. Because of the dramatic consequences that flow from a decision to apply per se analysis, the Supreme Court has been cautious

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government services. Many state and local taxes and other assessments are not fees for services, and thus may be attacked as per se takings under the panel’s ruling. Moreover, because a taking occurs when government “takes property from A and gives it to B,” *Calder v. Bull*, 3 U.S. 386, 388 (1798), many other laws (*e.g.*, laws allowing banks to benefit from funds they hold, such as the rule requiring lawyers to deposit client funds with a bank) may be unconstitutional.

about extending it beyond permanent physical invasions of real property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 1018 (1992) (per se analysis limited to “extraordinary” and “rare” situations). In particular, the Court repeatedly has refused to apply per se analysis to government exactions of money. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-30 (1998) (plurality opinion) (requirement that companies “turn over a dollar amount established by the [government] . . . is not, of course, a permanent physical occupation of . . . property of the kind that we have viewed as a *per se* taking”); *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989) (“artificial to view deductions [from] a monetary award as physical appropriations of property” because, “[u]nlike real or personal property, money is fungible”); *see also Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust for S. Cal., Inc.*, 508 U.S. 602, 643-44 (1993); *Bowen v. Gilliard*, 483 U.S. 587, 606 (1987); *Connolly v. PBGC*, 475 U.S. 211, 224 (1986).<sup>7</sup> The reason for the Court’s caution is plain: if per se analysis is extended to payments of money, a wide variety of common government actions may be transformed into takings. The panel’s decision creates precisely that danger.

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<sup>7</sup> Lower courts have reached the same result. *See, e.g., Branch First v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (monetary assessments “are not treated as *per se* takings”); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) (“[r]equiring money to be spent is not a taking of property”).

The panel wrongly brushes aside the multiple Supreme Court decisions that decline to apply per se analysis to exactions of money, asserting that in each case “the government provided a service and charged a reasonable fee for that service.” Not so. Four of the five cases cited above did *not* involve a government fee for service, and in the fifth case (*Sperry*), the Court’s *reason* for not applying per se analysis – that money is fungible – had nothing to do with the fact that a fee for service was involved. 493 U.S. at 62 n.9.

Contrary to the panel’s conclusion, application of per se analysis is not compelled by *Phillips*, *Webb’s*, and *Loretto*. As noted above, not one member of the Supreme Court thought that *Phillips* compels an answer to the “taking” question. *Webb’s* was decided before the Supreme Court recognized (in *Loretto*) that “per se” analysis applies to permanent physical invasions of real property. The opinion in *Webb’s* cites and relies on *Penn Central*, and application of the *Penn Central* factors – in particular, the facts that the property owner suffered a substantial economic loss and its reasonable, investment-backed expectations were defeated – sharply distinguishes *Webb’s* from this case. See 106 F.3d at 643 (Benavides, J., dissenting from denial of rehearing en banc) (“A careful reading of *Webb’s* makes clear that the existence of interest proceeds to which the depositors were entitled was a prerequisite to the Court’s decision.”) *Loretto*, as Justice Souter observed, dealt with a permanent physical invasion of real property, made

no finding about whether the value of that property had been enhanced, and held nothing about the legal consequences of such a finding. 524 U.S. at 177.<sup>8</sup> *See also id.* at 177-78 (noting the difference between “government’s seizure of funds from the pocket of a failing business owner” and “IOLTA’s disposition of funds the client never had or could have received.”).

In short, not only is the panel’s application of per se taking analysis not compelled by Supreme Court precedent, it conflicts with a line of Supreme Court decisions declining to extend per se analysis to payments of money. The Ninth Circuit recently granted en banc review of the “per se taking” issue; this Court should do the same.<sup>9</sup>

**2. The Panel’s Holding That Payment of “Just Compensation” Is Required When There Has Been No Economic Loss Is Incorrect and Conflicts with Decisions of the Supreme Court.**

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<sup>8</sup> In a footnote, the panel makes the mystifying statement that a “physical taking[] of tangible property” is “in play” in this case. *Id.* at n. 9. “Tangible property” can be “felt or touched.” *Black’s Law Dictionary* 1456 (6th ed. 1990). Interest on a bank account is a classic form of *intangible* property; a “physical invasion” of intangible property is a contradiction in terms.

<sup>9</sup> As Judge Wiener noted, plaintiffs’ position has a “dog in the manger” quality, *i.e.*, it seeks to deny others access to something that is of no practical benefit to the plaintiffs. Indeed, the plaintiffs go beyond the proverbial dog in the manger, which at least has physical possession and control of hay it cannot use. Mr. Summers never had, or could have had, possession or control of the interest generated by his principal. In the absence of IOLTA, the bank would enjoy free use of his principal; Mr. Summers would have no right to control the banks’ use of his money, let alone to “possess” non-existent interest. *Cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980) (Rehnquist, J., for a unanimous court) (holding that even where “there has literally been a ‘taking’ of” the “right to exclude others,” there is no “‘taking’ in the constitutional sense” if the value of the property is not unreasonably impaired.)

As Judge Wiener observed, “[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.” *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194 (1985); *see also Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997).<sup>10</sup> Numerous decisions of the Supreme Court – decisions that are discussed in the opinions of Justice Souter, Judge Wiener, and Judge Nowlin, as well as in the briefs of defendants and their *amici* – establish that “just compensation” “seeks to place a claimant in as good a position pecuniarily as if his property had not been taken.” *Phillips*, 524 U.S. at 177 (Souter, J., dissenting); *see, e.g., Marion & Rye Valley Ry. Co. v. United States*, 270 U.S. 280, 282 (1926) (where “nothing of value was taken,” it follows that “nothing [is] recoverable as just compensation,” even if “technically” there has been a taking).

Remarkably, the panel did not acknowledge these Supreme Court decisions, let alone explain how its decision is faithful to them. Instead, the panel simply declares: “[O]nce a taking is found, the question becomes what amount of, not whether, just compensation is due.” Slip op. 17. Once again, the panel rests its decision on *Phillips*, but *Phillips* does not support the panel’s ruling. *See* 524 U.S.

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<sup>10</sup> For this reason, dozens of Supreme Court opinions refer to the “Just Compensation Clause” rather than the “Takings Clause.” *See, e.g., Suitum*, 520 U.S. at 734; *Williamson*, 473 U.S. at 195.

at 172 (Court expresses no opinion “as to the amount of ‘just compensation,’ if any, due”). The panel also cites *Loretto*, but that case also does not support the panel’s holding. As Justice Souter noted, *Loretto* involved a permanent physical invasion of real property, made no finding about the effect of the invasion on the value of the property, and held nothing about the legal consequences of a finding that the value of the property had been enhanced. *Id.* at 177.

The panel’s “just compensation” ruling represents a significant and unwarranted expansion of Just Compensation Clause jurisprudence. The panel’s decision calls into question a wide range of financial exactions by governments. *See* note 6 above. En banc review is warranted because of these far-reaching ramifications, as well as the importance of the IOLTA program itself.

**3. The Panel’s Holding That Claimants May Obtain Injunctive Relief Without Seeking Just Compensation Is Contrary to Decisions of the Supreme Court.**

If the State provides an adequate procedure for seeking just compensation, “the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” *Williamson County Reg’l Planning Comm’n*, 473 U.S. at 195. The requirement that state procedures be exhausted is not only an element of the constitutional cause of action but – consistent with the Eleventh Amendment and other constraints on federal court

jurisdiction over States – permits state decisionmakers in the first instance to assess the value of what has been “taken” from the aggrieved property owner.<sup>11</sup>

The panel’s decision to grant equitable relief without requiring recourse to state remedies turns this scheme on its head. It does so by relying on a series of decisions construing the availability of injunctive relief against the *federal government*. Slip op. at 20-28. In applying those decisions to *state governments*, the panel unwisely injects the federal courts into matters that should be resolved through state processes.

Moreover, the majority’s conclusion that injunctive relief is appropriate appears to rest on an unstated assumption that every dollar of interest generated by the IOLTA program would result in a dollar of just compensation. Slip op. at 29 (If compensation were available, “the very purpose of the program would be thwarted.”) That assumption flies in the face of the District Court’s factual finding that “Mr. Summers’s loss is zero” and the many cases holding that just compensation is measured by “what has the owner lost, not what has the taker gained.” *Boston Chamber of Commerce*, 217 U.S. at 195.

## CONCLUSION

The petition for rehearing en banc should be granted.

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<sup>11</sup> The Supreme Court was well aware of this Court’s Eleventh Amendment ruling, yet it remanded for determination of “the amount of ‘just compensation,’ if any, due.” 524 U.S. at (continued...)

Respectfully submitted,

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172. The panel decision fails to follow this instruction from the Supreme Court.

## CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing Petition for Rehearing En Banc, together with an electronic copy on disk, were served upon the attorneys of record of all parties to the above cause in accordance with Rule 25 of the Federal Rules of Appellate Procedure and Local Rule 28.3(m) on this 26<sup>th</sup> day of October, 2001, by first-class mail, postage prepaid as follows:

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