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BROWN ET AL. *v.* LEGAL FOUNDATION OF WASHINGTON ET AL.

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

No. 01–1325. Argued December 9, 2002—Decided March 26, 2003

Every State uses interest on lawyers' trust accounts (IOLTA) to pay for legal services for the needy. In promulgating Rules establishing Washington's program, the State Supreme Court required that: (a) *all* client funds be deposited in interest-bearing trust accounts, (b) funds that cannot earn net interest for the client be deposited in an IOLTA account, (c) lawyers direct banks to pay the net interest on the IOLTA accounts to the Legal Foundation of Washington (Foundation), and (d) the Foundation use all such funds for tax-exempt law-related charitable and educational purposes. It seems apparent from the court's explanation of its IOLTA Rules that a lawyer who mistakenly uses an IOLTA account for money that could earn interest for the client would violate the Rule. That court subsequently made its IOLTA Rules applicable to Limited Practice Officers (LPOs), nonlawyers who are licensed to act as escrowees in real estate closings. Petitioners, who have funds that are deposited by LPOs in IOLTA accounts, and others sought to enjoin respondent state official from continuing this requirement, alleging, among other things, that the taking of the interest earned on their funds in IOLTA accounts violates the Just Compensation Clause of the Fifth Amendment, and that the requirement that client funds be placed in such accounts is an illegal taking of the beneficial use of those funds. The record suggests that petitioners' funds generated some interest that was paid to the Foundation, but that without IOLTA they would have produced no net interest for either petitioner. The District Court granted respondents summary judgment, concluding, as a factual matter, that petitioners could not make any net returns on the interest accrued in the accounts and, if they could, the funds would not be subject to the IOLTA program; and that, as a legal matter, the constitutional issue focused on what an owner has lost, not what the taker has gained, and that petitioners had lost nothing. While the case was on appeal, this Court decided in *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 172, that interest generated by funds held in IOLTA accounts is the private property of the owner of the principal. Relying on that case, a Ninth Circuit panel held that Washington's program caused an unconstitutional taking of petitioners' property and remanded

the case for a determination whether they are entitled to just compensation. On reconsideration, the en banc Ninth Circuit affirmed the District Court's judgment, reasoning that, under the ad hoc approach applied in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, there was no taking because petitioners had suffered neither an actual loss nor an interference with any investment-backed expectations, and that if there were such a taking, the just compensation due was zero.

Held:

1. A state law requiring that client funds that could not otherwise generate net earnings for the client be deposited in an IOLTA account is not a "regulatory taking," but a law requiring that the interest on those funds be transferred to a different owner for a legitimate public use could be a *per se* taking requiring the payment of "just compensation" to the client. Pp. 231–235.

(a) The Fifth Amendment imposes two conditions on the State's authority to confiscate private property: the taking must be for a "public use" and "just compensation" must be paid to the owner. In this case, the overall, dramatic success of IOLTA programs in serving the compelling interest in providing legal services to literally millions of needy Americans qualifies the Foundation's distribution of the funds as a "public use." Pp. 231–232.

(b) The Court first addresses the type of taking that this case involves. The Court's jurisprudence concerning condemnations and physical takings involves the straightforward application of *per se* rules, while its regulatory takings jurisprudence is characterized by essentially ad hoc, factual inquiries designed to allow careful examination and weighing of all relevant circumstances. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 322. Petitioners separately challenged (1) the requirement that their funds must be placed in an IOLTA account and (2) the later transfers of interest to the Foundation. The former is merely a transfer of principal and therefore does not effect a confiscation of any interest. Even if viewed as the first step in a regulatory taking which should be analyzed under the *Penn Central* factors, 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. 438 U. S., at 124. A *per se* approach is more consistent with the Court's reasoning in *Phillips* than *Penn Central*'s ad hoc analysis. Because interest earned in IOLTA accounts "is the 'private property' of the owner of the principal," *Phillips*, 524 U. S., at 172, the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in *Loretto* v. *Teleprompter Manhattan CATV Corp.*,

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458 U. S. 419, which was a physical taking subject to *per se* rules. The Court therefore assumes that petitioners retained the beneficial ownership of at least a portion of their escrow deposits until the funds were disbursed at closings, that those funds generated interest in the IOLTA accounts, and that their interest was taken for a public use when it was turned over to the Foundation. This does not end the inquiry, however, for the Court must now determine whether any "just compensation" is due. Pp. 233–235.

2. Because "just 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. Pp. 235–241.

(a) This Court's consistent and unambiguous holdings support the conclusion that the "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain. *E. g., Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195. Applying the teachings of such cases to the question here, it is clear that neither petitioner 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. Thus, if petitioners' net loss was zero, the compensation that is due is also zero. Pp. 235–237.

(b) Although 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 that there is a need for further hearings to determine whether petitioners are entitled to compensation from respondents. The Washington Supreme Court's Rules unambiguously require lawyers and LPOs to deposit client funds in non-IOLTA accounts whenever those funds could generate net earnings for the client. If petitioners' money could have generated net income, the LPOs violated the court's Rules, and any net loss was the consequence of the LPOs' incorrect private decisions rather than state action. Such mistakes may give petitioners a valid claim against the LPOs, but would provide no support for a compensation claim against the State or respondents. Because Washington's IOLTA program mandates a non-IOLTA account when net interest can be generated for the client, the compensation due petitioners for any taking of their property would be nil, and there was therefore no constitutional violation when they were not compensated. Pp. 237–240.

271 F. 3d 835, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissent-

ing opinion, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, *post,* p. 241. KENNEDY, J., filed a dissenting opinion, *post,* p. 253.

Charles Fried argued the cause for petitioners. With him on the briefs were *Daniel J. Popeo*, *Richard A. Samp*, *James J. Purcell*, and *Donald B. Ayer.*

David J. Burman argued the cause for respondents Legal Foundation of Washington et al. With him on the brief were *Nicholas P. Gellert*, *Kathleen M. O'Sullivan*, *Carter G. Phillips*, and *Stephen B. Kinnaird.*

Walter Dellinger argued the cause for respondent Justices of the Washington Supreme Court. With him on the brief were *Christine O. Gregoire*, Attorney General of Washington, and *Maureen Hart*, Senior Assistant Attorney General.*

**James S. Burling* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Richard M. Frank*, Chief Assistant Attorney General, *J. Matthew Rodriquez*, Senior Assistant Attorney General, *Daniel L. Siegel*, Supervising Deputy Attorney General, *Christiana Tiedemann*, Deputy Attorney General, *Thomas F. Reilly*, Attorney General of Massachusetts, and *William W. Porter* and *Amy Spector*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Janet Napolitano* of Arizona, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Earl I. Anzai* of Hawaii, *James E. Ryan* of Illinois, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Jennifer M. Granholm* of Michigan, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Mike McGrath* of Montana, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *David Samson* of New Jersey, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Betty D. Montgomery* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Sheldon Whitehouse* of Rhode Island, *Charlie Condon* of South Carolina, *Mark Barnett* of South Dakota, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Darrell V. McGraw, Jr.*, of West Virginia, and *Anabelle Rodríguez* of Puerto Rico; for the City and County of San Francisco by *Andrew W.*

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

Schwartz and *John D. Echeverria;* for AARP et al. by *John H. Pickering*, *Seth P. Waxman*, *Stephen W. Preston*, *Jody Manier Kris*, *Stuart R. Cohen*, *Rochelle Bobroff*, *Michael Schuster*, *Donald M. Saunders*, *Burt Neuborne*, *David S. Udell*, and *Laura K. Abel;* for the American Bar Association by *Alfred P. Carlton, Jr.*, *Paul M. Smith*, and *Stephen M. Rummage;* for the Conference of Chief Justices by *Brian J. Serr*, *Drew S. Days III*, *Beth S. Brinkmann*, and *Seth M. Galanter;* for the National League of Cities et al. by *Timothy J. Dowling;* for 49 State Bar Associations et al. by *Richard A. Cordray*, *Joanne M. Garvey*, *Charles N. Freiberg*, and *Thomas P. Brown;* and for the Chief Justice and Justices of the Supreme Court of Texas et al. by *John Cornyn*, Attorney General of Texas, *Robert A. Long, Jr.*, *Caroline M. Brown*, *Julie Caruthers Parsley*, *John M. Hohengarten*, *Darrell E. Jordan*, and *David J. Schenck*.

Christopher G. Senior filed a brief for the National Association of Home Builders as *amicus curiae*.

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 before 1980 the banks

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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

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

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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 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 Con-

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. 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 nom-

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duct to require attorney participation in IOLTA. See 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)).

> inal 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).
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> "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 institu-

tion 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 uncon-

stitutional 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 enumer-

> ated 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 apparent 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 nonlawyers 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 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

[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 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 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 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

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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.

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 legitimacy 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.

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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).

[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).

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 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 unambiguous 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 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

[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.

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 2-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). As explained above, this is inconsistent with the Court's just compensation precedents. See *supra*, at 235–237.

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,

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 224–225. Thus, if the LPOs who deposited petitioners' money in IOLTA accounts could have generated net 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

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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 244 (dissenting opinion). 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").

these accounts. Indeed, if the funds were able to make any net return, they would not be subject to the IOLTA program." 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]

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 reme-

[11] Contrary to JUSTICE SCALIA's assertion, this conclusion does not depend on the fact that interest "was created by the beneficence of a state regulatory program." *Post*, at 241. It rests instead on the fact that just compensation for a net loss of zero is zero.

dial question presented in the certiorari petition. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

The Court today concludes that the State of Washington may seize private property, without paying compensation, on the ground that the former owners suffered no "net loss" because their confiscated property was created by the beneficence of a state regulatory program. In so holding the Court creates a novel exception to our oft-repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken. What is more, the Court embraces a line of reasoning that we explicitly rejected in *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156 (1998). Our precedents compel the conclusion that petitioners are entitled to the fair market value of the interest generated by their funds held in interest on lawyers' trust accounts (IOLTA). I dissent from the Court's judgment to the contrary.

I

In 1984 the Supreme Court of Washington issued an order requiring lawyers to place all client trust funds in "identifiable interest-bearing trust accounts." App. 150. If a client's funds can be invested to provide a "positive net return" to the client, the lawyer must place the funds in an account that pays interest to the client. If the client's funds cannot earn a "positive net return" for the client, the funds are to be deposited in a pooled interest-bearing IOLTA account with the interest payable to the Legal Foundation of Washington (LFW), a nonprofit organization that provides legal services for the indigent. A lawyer is not required to obtain his client's consent, or even notify his client, regarding the

use of client funds in IOLTA accounts or the payment of interest to LFW. *Id.*, at 151. The Supreme Court of Washington dismissed all constitutional objections to its 1984 order on the now-discredited ground that any interest that might be earned on IOLTA accounts would not be "property" of the clients. *Id.*, at 158; cf. *Phillips*, *supra*.

As the Court correctly notes, Washington's IOLTA program comprises two steps: First, the State mandates that certain client trust funds be placed in an IOLTA account, where those funds generate interest. Second, the State seizes the interest earned on those accounts to fund LFW. *Ante*, at 234. With regard to step one, we held in *Phillips*, *supra*, that any interest earned on client funds held in IOLTA accounts belongs to the owner of the principal, not the State or the State's designated recipient of the interest. As to step two, the Court assumes, *arguendo*, that the appropriation of petitioners' interest constitutes a "taking,"[1] but holds that just compensation is zero because without the mandatory pooling arrangements (step one) of IOLTA, petitioners' funds could not have generated any interest in the first place.[2] *Ante*, at 239–240. This holding contravenes our

[1] Although the Ninth Circuit concluded that Washington's IOLTA scheme did not constitute a "taking" of petitioners' property, *Washington Legal Foundation* v. *Legal Foundation of Wash.*, 271 F. 3d 835, 861 (2001), the Court does not attempt to defend this aspect of the decision. *Ante*, at 235.

[2] The Court's ruminations on whether the State's IOLTA program satisfies the Fifth Amendment's "public use" requirement, *ante*, at 231–232, come as a surprise, inasmuch as they address a nonjurisdictional constitutional issue raised by neither the parties nor their *amici*. Petitioners' sole contention in this Court is that the State's IOLTA program violates the just compensation requirement of the Takings Clause. Brief for Petitioners 18–48; Reply Brief for Petitioners 1–20.

In needlessly addressing this issue, the Court announces a new criterion for "public use": The requirement is "unquestionably satisfied" if the State could have raised funds for the same purpose through a "special tax" or a "system of user fees," *ante*, at 232. This reduces the "public use" requirement to a negligible impediment indeed, since I am unaware of *any* use

decision in *Phillips*—effectively refusing to treat the interest as the property of petitioners we held it to be—and brushes aside 80 years of precedent on determining just compensation.

II

When a State has taken private property for a public use, the Fifth Amendment requires compensation in the amount of the market value of the property on the date it is appropriated. See *United States* v. *50 Acres of Land*, 469 U. S. 24, 29 (1984) (holding that just compensation is "'market value of the property *at the time of the taking*'" (emphasis added) (quoting *Olson* v. *United States*, 292 U. S. 246, 255 (1934))); *Kirby Forest Industries, Inc.* v. *United States*, 467 U. S. 1, 10 (1984); *United States* v. *564.54 Acres of Monroe and Pike County Land*, 441 U. S. 506, 511 (1979); *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U. S. 470, 474 (1973); *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 130 (1950); *United States* v. *New River Collieries Co.*, 262 U. S. 341, 344 (1923). As we explained in *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377 (1946), "just compensation . . . is not the value to the owner for his particular purposes or to the condemnor for some special use

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to which state taxes cannot constitutionally be devoted. The money thus derived may be given to the poor, or to the rich, or (insofar as the Federal Constitution is concerned) to the girlfriend of the retiring Governor. Taxes and user fees, since they are not "takings," see *United States* v. *Sperry Corp.*, 493 U. S. 52, 63 (1989), are simply not subject to the "public use" requirement, and so their constitutional legitimacy is entirely irrelevant to the existence *vel non* of a public use.

By raising the analogy of a tax or user fee the Court does, however, usefully call attention to one of the more offensive features of the takings scheme devised by the Washington Supreme Court: A tax or user fee would be enacted by a democratically elected legislature. The IOLTA scheme, by contrast, circumvents politically accountable decisionmaking, and effects a taking of clients' funds through application of a rule purportedly regulating professional ethics, promulgated by the Washington Supreme Court. (The taking has nothing to do with ethics, of course.)

but a so-called 'market value.'" Our cases have recognized only two situations in which this standard is not to be used: when market value is too difficult to ascertain, and when payment of market value would result in "'manifest injustice'" to the owner or the public. See *Kirby Forest Industries, Inc.*, *supra*, at 10, n. 14.

In holding that any just compensation that might be owed is zero, the Court neither pretends to ascertain the market value of the confiscated property nor asserts that the case falls within one of the two exceptions where market value need not be determined. Instead, the Court proclaims that just compensation is to be determined by the former property owner's "net loss," and endorses simultaneously two competing and irreconcilable theories of how that loss should be measured. The Court proclaims its agreement with the Ninth Circuit majority that just compensation is the interest petitioners *would have earned* had their funds been deposited in *non-IOLTA* accounts. *Ante*, at 239–240. See also 271 F. 3d 835, 862 (CA9 2001) ("[W]ithout IOLTA, neither Brown nor Hayes would have earned interest on his principal because by regulatory definition, their funds would have not otherwise been placed in an IOLTA account"). At the same time, the Court approves the view of the Ninth Circuit *dissenters* that just compensation is the amount of interest *actually earned* in petitioners' IOLTA accounts, minus the amount that would have been lost in transaction costs had petitioners sought to keep the money for themselves. *Ante*, at 238–239, n. 10. The Court cannot have it both ways—as the Ninth Circuit itself realized—but even if it could, neither of the two options from which lower courts may now choose is consistent with *Phillips* or our precedents that equate just compensation with the fair market value of the property taken.

A

Under the Court's first theory, just compensation is zero because, under the State Supreme Court's Rules, the only

funds placed in IOLTA accounts are those which could not have earned net interest for the client *in a non-IOLTA* savings account. App. 150. This approach defines petitioners' "net loss" as the amount of interest they would have received had their funds been deposited in separate, non-IOLTA accounts. See *ante*, at 239 ("[I]f the [Limited Practice Officers (LPOs)] who deposited petitioners' money in IOLTA accounts could have generated net 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").

This definition of just compensation has no foundation in reason. Once interest is earned on petitioners' funds held in IOLTA accounts, that money is petitioners' property. See *Phillips*, 524 U. S., at 168 ("[A]ny interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal"). It is at *that* point that the State appropriates the interest to fund LFW—*after* the interest has been generated in the pooled accounts—and it is at *that* point that just compensation for the taking must be assessed. It may very well be, as the Court asserts, that petitioners could not have earned money on their funds absent IOLTA's mandatory pooling arrangements, but just compensation is not to be measured by what would have happened in a hypothetical world in which the State's IOLTA program did not exist. When the State takes possession of petitioners' property—petitioners' money—and transfers it to LFW, the property obviously has *value*. The conclusion that it is devoid of value because of the circumstances giving rise to its creation is indefensible.

Consider the implications of the Court's approach for a case such as *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980), which involved a Florida statute that allowed the clerk of a court, in his discretion, to invest interpleader funds deposited with that court in interest-bearing certificates, the interest earned to be deemed " 'income of

the office of the clerk of the circuit court.'" *Id.*, at 156, n. 1 (quoting Fla. Stat. §28.33 (1977)). The appellant in *Webb's* had tendered nearly $2 million to a state court after filing an interpleader action, and we held that the state court's retention of the more than $100,000 in interest generated by those funds was an uncompensated taking of private property.[3] 449 U. S., at 164.

But what would have been just compensation for the taking in *Webb's* under today's analysis? It would consist not of the amount of interest *actually earned* by the principal, but rather of the amount that *would have been earned* had the State not provided for the clerk of court to generate the interest in the first place. That amount would have been zero since, as we noted in *Webb's*, Florida law did not require that interest be earned on a registry deposit, *id.*, at 161. Section 28.33's authorization for the clerk of court to invest the interpleader funds, like the Washington Supreme Court's IOLTA scheme, was a state-created opportunity to generate interest on moneys that would otherwise lie fallow. As the Florida Supreme Court observed, "[i]nterest accrues *only because of section 28.33*. In this sense the statute takes only what it creates." *Beckwith* v. *Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 953 (1979) (emphasis added).

In *Webb's* this Court *unanimously* rejected the contention that a state regulatory scheme's generation of interest that

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[3] A *separate* Florida statute, Fla. Stat. §28.24 (1977), which was not even challenged in *Webb's*, 449 U. S., at 158, provided that the Clerk of the Circuit Court would make "charges for services rendered," including charges for receiving money into the registry of court, §28.24(14). These charges were *not* deducted from the gross interest earned, as the Court suggests, *ante*, at 238–239, n. 10, but from the *principal*, before any interest had been generated on the interpleader fund. See 449 U. S., at 157–158. The creditors in *Webb's* sued to recover the *entire interest* that had been earned on the fund pursuant to §28.33, *id.*, at 158, and we held that "*any interest* on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal," *id.*, at 162.

would otherwise not have come into existence gave license for the State to claim the interest for itself. What can possibly explain the contrary holding today? Surely it cannot be that the Justices look more favorably upon a nationally emulated uncompensated taking of clients' funds to support (hurrah!) legal services to the indigent than they do upon a more local uncompensated taking of clients' funds to support nothing more inspiring than the Florida circuit courts. That were surely an unprincipled distinction. But the real, principled basis for the distinction remains to be disclosed. And until it is disclosed, today's endorsement of the proposition that there is no taking when "the State giveth, and the State taketh away," has potentially far-reaching consequences. May the government now seize welfare benefits, without paying compensation, on the ground that there was no "net los[s]," *ante*, at 237, to the recipient? Cf. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).[4]

What is more, the Court's reasoning calls into question our holding in *Phillips* that interest generated on IOLTA accounts is the "private property" of the owners of the principal. An ownership interest encumbered by the right of the government to seize moneys for itself or transfer them to the nonprofit organization of its choice is not compatible with any notion of "private property." True, the Fifth Amendment allows the government to appropriate private property without compensation if the market value of the property is zero (and if it is taken for a "public use"). But

[4] The Court claims that its holding "does not depend on the fact that interest was created by a state regulatory program," and "rests instead on the fact that just compensation for a net loss of zero is zero." *Ante*, at 240, n. 11 (internal quotation marks omitted). This simply disclaims the ultimate ground by appealing to the proximate ground: The *reason* the Court finds there has been a "a net loss of zero" is that the interest on petitioners' funds is entirely attributable to the merging of those funds into the IOLTA account—*but for* IOLTA, they would have earned no interest at all. That is to say, no compensation is due on the interest because the "interest was created by a state regulatory program."

the Court does not defend the State's action on the ground that the money taken is worthless, but instead on the ground that the interest would not have been created but for IOLTA's mandatory pooling arrangements. The Court thereby embraces precisely the line of argument we rejected in *Phillips:* that the interest earned on client funds in IOLTA accounts could not be deemed "private property" of the clients because those funds "cannot reasonably be expected to generate interest income on their own." 524 U. S., at 169 (internal quotation marks omitted); cf. *id.*, at 183 (BREYER, J., dissenting).

B

The Court's rival theory for explaining why just compensation is zero fares no better. Contrary to its aforementioned description of petitioners' "net loss" as the amount their funds would have earned in non-IOLTA accounts, *ante,* at 239–240, the Court declares that just compensation is "the *net value* of the interest that was *actually earned* by petitioners," *ante,* at 239, n. 10 (emphasis added)—net value consisting of the value of the funds, *less* "transaction and administrative costs and bank fees" that would be expended in extracting the funds from the IOLTA accounts, *ibid.* To support this concept of "net value," the Court cites nothing but the cases discussed earlier in its opinion, *ante,* at 235–237, which establish that just compensation consists of the value the owner has lost rather than the value the government has gained. In this case, however, there is *no difference* between the two. Petitioners have lost the interest that *Phillips* says rightfully belongs to them—which is precisely what the government has gained. The Court's apparent fear that following the Constitution in this case will provide petitioners a "windfall" in the amount of transaction costs saved is based on the unfounded assumption that the State must return the interest directly to petitioners. The State could satisfy its obligation to pay just compensation by simply returning petitioners' money to the IOLTA account

from which it was seized, leaving others to incur the accounting costs in the event petitioners seek to extract their interest from the account.

In any event, our cases that have distinguished the "property owner's loss" from the "government's gain" say *nothing whatever* about reducing this value to some "net" amount. Remarkably, the Court does not cite the recent case of ours that *specifically addresses* this issue, and that does so in the very context of an IOLTA-type scheme. *Phillips* flatly rejected the notion that just compensation may be reduced by transaction costs the former owner would have sustained in retaining his property. See 524 U. S., at 170 ("The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected");[5] see also *Olson* v. *United States*, 292 U. S., at 255 ("It is the property and not the cost of it that is safeguarded by [the] Constitutio[n]").

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[5] All the Court can muster in response to *Phillips*' rejection of its view that the government may seize property for which the administrative costs of retention exceed market value is a hypothetical posed by the Ninth Circuit dissenters in support of their suggestion to remand. *Ante*, at 238–239, n. 10. The doctrine of *stare decisis* adopts a different hierarchy: This Court's precedents are to be followed over dissenting opinions in the Courts of Appeals.

The Court also suggests that the confiscation of petitioners' property is "comparable to" the clerk's fee under Fla. Stat. §28.24 (1977), which we discussed in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980). *Ante*, at 238–239, n. 10. The clerk's fee imposed pursuant to §28.24(14) had nothing to do with "transaction costs" but was a fee *for services rendered by the State itself.* 449 U. S., at 157. Here, the State does not even attempt to characterize its retention of petitioners' interest in that fashion. While petitioners, their escrow companies, and the banks holding their funds may very well incur costs in returning the IOLTA-generated interest to the clients, this does not convert the State's seizure into a fee. In any event, as noted earlier, *supra*, at 246, n. 3, we neither approved nor disapproved the State's retention of fees pursuant to §28.24(14) in *Webb's* because the parties did not challenge it. 449 U. S., at 158.

And if the Federal Government seizes someone's paycheck, it may not deduct from its obligation to pay just compensation the amount that state and local governments would have taxed, on the ground that it need only compensate the "net los[s]," *ante*, at 237, to the former owner. That is why we have repeatedly held that just compensation is the "market value" of the confiscated property, rather than the "net loss" to the owner. "Market value" is not reduced by what the owner would have lost in taxes or other exactions. "'[J]ust compensation' means the full monetary equivalent of the property taken." *United States* v. *Reynolds*, 397 U. S. 14, 16 (1970).

But the irrationality of this aspect of the Court's opinion does not end with its blatant contradiction of a precedent *(Phillips)* promulgated by a Court consisting of the same Justices who sit today. Even if "net value" (rather than "market value") *were* the appropriate measure of just compensation, the Court has no basis whatsoever for pronouncing the "net value" of petitioners' interest to be zero. While the Court is correct that under the State's IOLTA rules, petitioners' funds could not have earned net interest *in separate, non-IOLTA accounts*, *ante*, at 238–239, n. 10, that has no bearing on the transaction costs that petitioners would sustain in removing their earned interest from the IOLTA accounts.[6] The Court today arbitrarily forecloses clients from

[6] The Court quotes the Washington Supreme Court's definition of IOLTA funds as "only those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client." *Ante*, at 239, n. 10 (quoting *IOLTA Adoption Order*, 102 Wash. 2d 1101, 1114 (1984) (emphasis deleted)). It is true that IOLTA funds cannot earn net interest for the client *in non-IOLTA accounts*, and, prior to our decision in *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156 (1998), also could not earn net interest for the client in IOLTA accounts because state law declared such interest to be the property of LFW. After *Phillips*, however, IOLTA funds *can* earn net interest for the client when placed in IOLTA accounts—because all interest earned by funds in IOLTA accounts is the client's property. See *id.*, at 160.

recovering the "net interest" to which (even under the Court's definition of just compensation) they are entitled. What is more, there is no reason to believe that petitioners themselves do not fall within the class of clients whose funds, though unable to earn interest in non-IOLTA accounts, nevertheless generate "net interest" in IOLTA accounts. That is why the Ninth Circuit dissenters (who shared the Court's second theory of just compensation but not the first) voted to remand to the District Court for a factual determination of what the "net value" of petitioners' interest actually is.

To confuse confusion yet again, the Court justifies its decision *not* to remand by simply falling back upon the *different* theory of just compensation espoused by the Ninth Circuit *majority*—namely, that just compensation will always be zero because the funds would not have earned interest for the clients in a *non-IOLTA* savings account. *Ante,* at 239–240. See also 271 F. 3d, at 862 ("Brown and Hayes are in actuality seeking compensation for the value added to their property by Washington's IOLTA program"). That does not conform, of course, with the Court's previously announced standard for just compensation: "the net value of the interest that was *actually earned* by petitioners." *Ante,* at 239, n. 10 (emphasis added).[7] Assessing the "net value" of inter-

[7] In this *reprise* of its first theory, designed to cover the embarrassing fact that its second theory does not support its disposition, the Court makes the assertion that, even if some lawyer mistakenly placed into the IOLTA account client funds that *could* have generated net earnings independently (thus rendering even the Court's first theory factually inapplicable), compensation would *still* not be required, because "[a]ny conceivable net loss [would be] the consequence of the [lawyer's] incorrect private decisio[n] rather than any state action." *Ante,* at 239. That is surely not correct. Even on the Court's own misbegotten theory, the taking occurs when the IOLTA interest is transferred to LFW, and compensation is not payable only if the principal generating that interest could not have earned interest otherwise. How the principal got into the IOLTA account—mistakenly or otherwise—has nothing to do with whether there has been a "taking" of "value." The government would owe just compensation for a taking of real property even if the action of some third party

est "actually earned" requires a factual determination of the costs petitioners would incur if they sought to keep the IOLTA-generated interest for themselves. By refusing to undertake this inquiry, the Court reveals that its contention that the value of interest "actually earned" is the measure of just compensation is a facade. The Court's affirmance of the decision below can only rest on the reasoning adopted by the Ninth Circuit majority (notwithstanding its rejection in *Phillips*): that property created by virtue of a state regulatory program may be taken without compensation.

* * *

Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended. One must hope that that is the case. For to extend to the entire run of Compensation Clause cases the rationale supporting today's judgment—what the government hath given, the government may freely take away—would be disastrous.

The Court's judgment that petitioners are not entitled to the market value of their confiscated property has no basis in law. I respectfully dissent.

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had caused the property mistakenly to be included on the list of properties scheduled for condemnation. The notion that the government can keep the property without compensation, and relegate the owner to his remedies against the private party, is nothing short of bizarre. Imagine the fruitful application of this principle of "intervening private fault" in other fields: "Yes, you were subjected to a brutally unlawful search and seizure in connection with our raid upon a street corner where drugs were being distributed. But since the only reason you were at that corner is that a taxi dropped you at the wrong address, you must look to Yellow Cab for your remedy."

JUSTICE KENNEDY, dissenting.

The principal dissenting opinion, authored by JUSTICE SCALIA, sets forth a precise, complete, and convincing case for rejecting the holding and analysis of the Court. I join the dissent in full.

It does seem appropriate to add this further observation. By mandating that the interest from these accounts serve causes the justices of the Washington Supreme Court prefer, the State not only takes property in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States but also grants to itself a monopoly which might then be used for the forced support of certain viewpoints. Had the State, with the help of Congress, not acted in violation of its constitutional responsibilities by taking for itself property which all concede to be that of the client, *ante*, at 235; *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 172 (1998), the free market might have created various and diverse funds for pooling small interest amounts. These funds would have allowed the true owners of the property the option to express views and policies of their own choosing. Instead, as these programs stand today, the true owner cannot even opt out of the State's monopoly.

The First Amendment consequences of the State's action have not been addressed in this case, but the potential for a serious violation is there. See *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977); *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990). Today's holding, then, is doubly unfortunate. One constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course.

SENATE BILL NO. 31

INTRODUCED BY B. USHER

BY REQUEST OF THE SENATE SELECT COMMITTEE ON JUDICIAL OVERSIGHT AND REFORM

A BILL FOR AN ACT ENTITLED: “AN ACT PROVIDING OPTIONS FOR THE HANDLING OF INTEREST ON ATTORNEY TRUST ACCOUNTS; AND PROVIDING THAT PARTICIPATION IN THE INTEREST ON LAWYER TRUST ACCOUNT PROGRAM IS VOLUNTARY.”

WHEREAS, when lawyers hold funds that belong to a client, the lawyers shall deposit the funds into a trust account where the money should be held in trust for the client; and

WHEREAS, the Montana Supreme Court ordered that Montana lawyers deposit their clients' money in a specialized interest-bearing trust account called an IOLTA account (Interest on Lawyer Trust Account); and

WHEREAS, in an IOLTA account, the interest on the client's money is not paid to the client; instead, the Montana Supreme Court ordered that the interest on the client's money from the IOLTA program must be paid to the Montana Justice Foundation, an organization of the Montana Supreme Court's choosing; and

WHEREAS, before the Montana Supreme Court's order making participation in the IOLTA program mandatory, participation was voluntary; and

WHEREAS, through the IOLTA program, the Montana Supreme Court in essence taxes the client's interest income at a rate of 100% and then spends the client's money on its favored organization; and

WHEREAS, the Montana Legislature is the only body empowered by Article VIII, section 1, of the Montana Constitution to levy taxes, and Article VIII, section 14, of the Montana Constitution, vests solely in the Legislature the power to appropriate funds; and

WHEREAS, according to the website of the Montana Justice Foundation, the Montana Supreme Court has unconstitutionally taxed and appropriated more than $8 million to the Montana Justice Foundation; and

WHEREAS, Rule 1.18 of the Montana Rules of Professional Conduct for lawyers provides: "No client may elect whether his/her funds should be deposited in an IOLTA Trust Account, [or] receive interest or dividends earned on funds in an IOLTA Trust Account", meaning the lawyer shall deposit the client's funds into an IOLTA account even if the client objects; and

WHEREAS, a fundamental principle of lawyer ethics is to always act with client consent and always "abide by a client's decisions concerning the objectives of representation", as provided in Rule 1.2(a) of the Montana Rules of Professional Conduct, and by forcing lawyers to deposit their client's funds into IOLTA accounts over a client's objection, the Montana Supreme Court is compelling lawyers to violate this ethical principle; and

WHEREAS, Article V, section 1, of the Montana Constitution provides that the Legislature alone has "legislative power" to enact laws, including the power to tax and appropriate funds, as provided in Article VIII, section 1, and Article VIII, section 14, of the Montana Constitution, respectively, and Article III, section 1, of the Montana Constitution provides that no branch of government "shall exercise any power properly... belonging to either of the others"; and

WHEREAS, under the Montana's Constitution, the proper method to enact the IOLTA program would have been for the Legislature to pass an appropriate bill pursuant to Article V, section 11; for example, this constitutional process was followed, as provided in section 33-25-201(3) through (7), MCA, when the Legislature enacted a similar concept to the IOLTA program for title companies to use pooled interest-bearing accounts for trust money to provide funding for the Montana Land Title Association Foundation; and

WHEREAS, instead of following the proper constitutional process to enact the IOLTA program, the Montana Supreme Court simply issued an order authorizing the taxation at a rate of 100% on clients' funds held by their attorneys and appropriated these funds to the Montana Justice Foundation in violation of the Montana Constitution; and

WHEREAS, the Montana Legislature finds that the Montana Supreme Court should disband the mandatory IOLTA program or make it voluntary in order to comply with the Montana Constitution; and

WHEREAS, by making participation in the IOLTA program voluntary, the IOLTA program would no longer be an unconstitutional tax and spend program but, rather, would be a voluntary donation by a lawyer's client following written consent.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Attorney trust account interest.** With the client's written consent, a

lawyer may deposit a client's money in:

(1) a non-interest-bearing trust account;

(2) an interest-bearing trust account in which the client's funds earn interest that belongs to the client, in which case the lawyer shall remit the client's interest income to the client at reasonable intervals of time; or

(3) a trust account subject to the Montana supreme court's interest on lawyer trust accounts program, through which the interest is paid to an organization of the Montana supreme court's choosing.

NEW SECTION. **Section 2. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 37, chapter 61, part 4, and the provisions of Title 37, chapter 61, part 4, apply to [section 1].

- END -

(d) Construction. – Nothing in this section shall be construed as requiring a local law enforcement agency to acquire and implement an online crime reporting system that allows individuals to file online reports of crimes."

SECTION 23.(b) This section becomes effective October 1, 2025.

MODIFY LAW GOVERNING ELECTRONIC SIGNATURES OF COURT DOCUMENTS

SECTION 24.(a) Notwithstanding any provision of law or rule to the contrary, the chief district court judge and the senior resident superior court judge of their respective districts may establish rules to allow for the court's manual signature of (i) orders of the court executed outside of court and (ii) fee application orders from private assigned counsel submitted on the appropriate form (AOC-CR-225). This section does not apply to criminal judgments. Where manual signatures are permitted, the party obtaining the court's manual signature shall bear sole responsibility for filing the executed document with the clerk through eFile and Serve. For purposes of this section, the term "manual signature" means the act of physically signing a paper document with a pen, pencil, or other writing utensil.

SECTION 24.(b) This section is effective when it becomes law and expires two years after that date.

IOLTA EXPENDITURES

SECTION 25. All funds received by the North Carolina State Bar, and administered by the North Carolina Interest on Lawyers' Trust Accounts (NC IOLTA) Board of Trustees, from banks by reason of interest earned on general trust accounts established by lawyers pursuant to Rule 1.15-2(b) of the Rules of Professional Conduct, or interest earned on trust or escrow accounts maintained by settlement agents pursuant to G.S. 45A-9, including any interest dividends, or other proceeds earned on or with respect to these funds, shall not be encumbered or expended for the purpose of awarding grants or for any purpose other than administrative costs during the period beginning July 1, 2025, and ending June 30, 2026.

SEVERABILITY, SAVINGS CLAUSE, AND EFFECTIVE DATE

SECTION 26.(a) If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application and, to this end, the provisions of this act are severable.

SECTION 26.(b) Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

2025 SESSION

25-0390
09/11

HOUSE BILL ***253***

AN ACT relative to interest-bearing pooled trust accounts maintained by lawyers.

SPONSORS: Rep. Corcoran, Hills. 28; Rep. Belcher, Carr. 4

COMMITTEE: Judiciary

ANALYSIS

This bill requires attorneys in control of interest-bearing pooled trust accounts to remit quarterly the interest or dividends to the public defender's office, provided that the public defender's office complies with certain restrictions.

- -

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

25-0390
09/11

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Five

AN ACT relative to interest-bearing pooled trust accounts maintained by lawyers.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Short Title. This act may be known as and cited to as the "New Hampshire Public Defender Funding and Pooled Trust Accounts Reform Act."

2 New Section; Attorneys and Counselors; Regulation of the Practice of Law. Amend RSA 311 by inserting after section 13 the following new section:

311:14 Interest-Bearing Pooled Trust Accounts; New Hampshire Public Defender.

I. Any lawyer who has an office in New Hampshire or practices in New Hampshire; is not a judge, attorney general, public defender, United States attorney, district attorney, on duty with the armed services, or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law; and is a not corporate counsel or teacher of law and is not otherwise engaged in the private practice of law shall remit interest or dividends, as the case may be, from all interest-bearing pooled trust accounts that they control, at least quarterly, to the New Hampshire public defender's office.

II. The New Hampshire public defender's office shall be eligible to receive the funds identified in paragraph I only if they have not contributed any funds to any non-profit organization or political campaign during that quarter. The public defender's office shall also publish its budget in full and according to accepted accounting norms, no later than 90 days after the close of the fiscal year.

III. If the New Hampshire public defender's office fails to comply in full with paragraph II, the funds identified in paragraph I shall be remitted to the general fund.

IV. The supreme court and the New Hampshire bar association are authorized to establish rules governing the provisions in this section, but shall not make or enforce any rule inconsistent with the provisions of this section.

2 Effective Date. This act shall take effect 60 days after its passage.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

E. DAVID WESCOTT and RUSSELL JOHNSON BEAUPAIN, *a limited liability company*,	)	
Plaintiffs	)	
v.	)	No. 1:24-cv-00286-LEW
HON. VALERIE STANFILL, *in her official capacity as Chief Justice, Maine Supreme Judicial Court,* AMY QUINLAN, ESQUIRE, *in her official capacity as State Court Administrator for the State of Maine Judicial Branch,* MAINE JUSTICE FOUNDATION, and MAINE BOARD OF OVERSEERS OF THE BAR,	)	
Defendants	)	

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

Maine, like nearly every other state, has an Interest on Lawyers' Trusts Accounts ("IOLTA") program. IOLTA-generated interest is pooled to give free legal aid to poor Mainers and otherwise support access to the justice system. Plaintiff David Wescott is a Maine citizen and Plaintiff Russell Johnson Beaupain LLC ("RJB") is a law firm hired to represent him. They claim Maine's IOLTA program forces them to subsidize certain speech in violation of their First Amendment rights. Plaintiffs have filed their Complaint naming three State Defendants for their role in promulgating and enforcing IOLTA rules: Chief Justice Valerie Stanfill of the Maine Supreme Judicial Court, State Court

Administrator Amy Quinlan, and the Maine Board of Overseers of the Bar. Plaintiffs also sue private entity Maine Justice Foundation ("MJF"), which is charged with receiving and distributing IOLTA funds.

Before the Court are both Defendants' Motions to Dismiss (ECF Nos. 21, 22). Defendants argue that Plaintiffs have failed to state a plausible claim and lack standing with respect to Defendant Maine Justice Foundation, and that the Board of Overseers is shielded by sovereign immunity. On this last point, Plaintiffs agree. Plaintiffs' claims against the Board are thus dismissed. With respect to the remaining claims, for the following reasons Defendants' motions are granted and Plaintiffs' claims are dismissed.

BACKGROUND

Maine and forty-four other states have mandatory IOLTA programs. In general, IOLTA programs take funds that cannot otherwise generate income for clients or their attorneys, place them in an interest-bearing account, and use the interest to achieve charitable goals. Maine Bar Rule 6 provides that when an attorney holds client funds that are nominal or short-term "such that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income," the attorney must place those funds into an IOLTA account. Me. Bar R. 6(e); *see also* R. 1.15. Institutions holding IOLTA funds release the interest to Defendant Maine Justice Foundation. R. 6(c)(4)(A). Maine Justice Foundation, in turn, distributes this interest "to provide services that maintain and enhance resources available for access to justice in Maine, including those services that achieve improvements in the administration of justice and provide legal services,

education, and assistance to low-income, elderly, or needy clients." *Id.* R. 6(e). Maine Justice Foundation has given IOLTA generated money to:

> Cumberland Legal Aid Clinic, a Maine School of Law student clinic that represents low-income clients in civil cases;
>
> Immigrant Legal Advocacy project, which is the only state-wide immigration legal services organization and engages in legislative lobbying to that end;
>
> Legal Services for Maine Elders, which offers free legal aid to Mainers over 60 and engages in legislative lobbying;
>
> Maine Equal Justice, a nonprofit that provides direct legal services and participates in community organizing and legislative lobbying;
>
> Pine Tree Legal Assistance, an organization that provides free civil legal assistance, disseminates information on civil legal rights, and provides community legal education; and
>
> Maine Volunteer Lawyers Project, which recruits volunteer attorneys to give free legal advice and representation.

Plaintiffs find the causes these organizations support "morally, ethically, religiously, and politically abhorrent." Pls.' Am. Compl. ¶ 88. Nearly two years ago, Plaintiff Wescott paid $2,500 to Plaintiff RJB to retain the firm's legal services. RJB placed that money in an IOLTA account and the generated interest was released to the Maine Justice Foundation. In Plaintiffs' view, this is exactly the form of compelled speech that the Founders decried.

Plaintiffs thus launch an as-applied constitutional challenge to the IOLTA program. Plaintiffs seek a declaratory judgment that Rule 6 of the Maine Bar Rules is unconstitutional as currently enforced, a declaratory judgment that IOLTA funds can never be used for certain enumerated purposes, an injunction barring Defendants from enforcing Rule 6 and/or enjoining Defendants from mandating participation in the IOLTA program.

Defendant Maine Justice Foundation responds that Plaintiffs lack standing. State Defendants add that Plaintiffs have failed to allege facts sufficient to plausibly support their First Amendment claim.

DISCUSSION

A. STANDING

In its Motion to Dismiss (ECF No. 22), the Maine Justice Foundation asserts that Plaintiffs lack standing to pursue a claim against it. Standing is a threshold jurisdictional inquiry. Article III courts are constitutionally limited to hearing a "case" or "controversy." U.S. CONST. art. III, § 2. To satisfy this requirement, a plaintiff needs to demonstrate they have suffered an "'injury in fact' . . . 'fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Plaintiffs bear the burden of "demonstrat[ing] standing for each claim they press' *against each defendant*, 'and for the form of relief that they seek.'" *Murthy v. Missouri*, 144 S. Ct. 1972, 1988 (2024) (emphasis added) (quoting *Transunion LLC v. Ramirez*, 594 U.S. 413, 431).

Plaintiffs' prayer for relief requests this Court (1) declare Rule 6 a violation of the First and Fourteenth Amendments as applied to Plaintiffs and enjoin Defendants from enforcing it, (2) declare it unconstitutional for IOLTA funds to be used for certain purposes,[1] or alternatively (3) enjoin Defendants from requiring lawyers to participate in

[1] Plaintiffs specifically request I declare it unconstitutional for IOLTA funds to be used "for the five purposes set forth in Paragraph 38 of this Complaint." Pls. Am. Compl. (ECF No. 18) at 17. Paragraph 38 *(continued next page)*

the IOLTA program. Maine Justice Foundation neither promulgated nor enforces Rule 6. Accordingly, it argues correctly that Plaintiffs' have no standing to sue it.

Plaintiffs assert that traceability is met because Maine Justice Foundation's distribution of funds "is a link in the chain that inflicts Plaintiffs' harm . . . [a] simple, first-year law school 'but for' causation." Pls. Response to Maine Justice Foundation's Mot. (ECF No. 24) at 2-3. Plaintiffs also suggest that redressability is met because "a decision of *this Court* would redress Plaintiffs' harm." *Id.* at 4. Plaintiffs' theory on standing seems to suggest that they could sue anyone involved in carrying out Maine's IOLTA program because, in the course of rendering a judgment, this Court could enjoin state enforcement of Rule 6. Based on that rationale, their hypothetical first-year law student would certainly find it appropriate for Plaintiff Wescott to sue Plaintiff RJB. "But for" RJB placing Wescott's money in an IOLTA account, Wescott's alleged harm would not have occurred.

Luckily for our law student, there is helpful precedent. "[W]hen a statute is challenged as unconstitutional, the proper defendants are the government officials whose role it is to administer and enforce it." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) (addressing redressability); *see also N.H. Right to Life PAC v. Gardner*, 99 F.3d 8,

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of the Amended Complaint contains no such list. I assume this is a typographical error as Paragraph 38 of the Original Complaint (ECF No. 1) lists:

> (1) supporting or opposing candidates for elected office,
>
> (2) supporting or opposing ballet initiatives or referenda,
>
> (3) lobbying in support of or in opposition to pending proposed legislation,
>
> (4) seeking public support through the media including social media to support or oppose legislation, valid initiatives or referenda for candidates for elected office,
>
> (5) voter registration, voter education, voter signature gathering, or get out to vote actions.

Compl. ¶ 38.

13 (1st Cir. 1996) ("[W]hen a plaintiff seeks a declaration that a particular statute is unconstitutional, the proper defendants are the government officials charged with administering and enforcing it."). This axiomatic principle stems from the fact that Plaintiffs can obtain complete redressability from a favorable ruling solely against State Defendants whereas the same is not true for a favorable ruling solely against MJF.

If this Court enjoined only Maine Justice Foundation from enforcing Rule 6 the effect would be the same as if I enjoined RJB from complying with Rule 6, or as if I enjoined banks that disperse IOLTA funds to Maine Justice Foundation from enforcing Rule 6. The effect being nothing because those entities do not enforce Rule 6. The Maine Justice Foundation, just like RJB, is mandated to take certain actions under Rule 6. But Maine Justice Foundation itself does not police whether it has taken the appropriate actions or if it has the authority to stop dispersing IOLTA funds without incurring a penalty. *See* Me. Bar R. 6(e)(1) (requiring the Maine Justice Foundation to report to the Maine Supreme Judicial Court on IOLTA spending).

Plaintiffs plead that this Court may still enjoin Maine Justice Foundation from distributing Plaintiffs' IOLTA interest. But absent an order also enjoining State Defendants from enforcing Rule 6 such an injunction would be meaningless. If Rule 6 is constitutional, Maine Justice Foundation would be wrongfully enjoined. If Rule 6 is unconstitutional, then State Defendant's would be enjoined from enforcing it and Plaintiffs would not have to participate in the IOLTA program, regardless of what the Foundation does. Accordingly, Plaintiffs' lack standing in their claim against Maine Justice

Foundation in the sense that the claim against the Foundation wants redressability. Plaintiffs' claim against Defendant Maine Justice Foundation is DISMISSED.

B. FAILURE TO STATE A CLAIM

State Defendants Chief Justice Stanfill and Court Administrator Quinlan also contend that the Plaintiffs have failed to state a claim under the Federal Rules. To avoid dismissal Plaintiffs must provide "a short and plain statement of the claim showing [they] are entitled to relief." Fed. R. Civ. P. 8(a)(2). In practice, this means Plaintiffs' Amended Complaint (ECF No. 18) must provide "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In applying this standard, the Court will accept factual allegations as true and consider whether the facts, along with reasonable inferences that may arise from them, describe a plausible, as opposed to merely conceivable, claim. *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011); *Sepúlveda-Villarini v. Dep't of Educ. of P.R.*, 628 F.3d 25, 29 (1st Cir. 2010). But the Court may ignore conclusory statements that merely recite elements of the claim. *Cheng v. Neumann*, 51 F.4th 438, 443 (1st Cir. 2022) ("We do not credit legal labels or conclusory statements, but rather focus on the complaint's non-conclusory, non-speculative factual allegations and ask whether they plausibly narrate a claim for relief.").

The State Defendants argue that Plaintiffs have failed to allege facts plausibly showing the IOLTA program compels speech. First, Defendants point out that the IOLTA program only applies to nominal or short-term client funds held in trust by an attorney, so Plaintiff, RJB could structure its clients' payments to avoid Rule 6 entirely. Second, Defendants urge that even if Plaintiffs are as a practical matter forced into participating in

the IOLTA program, Plaintiffs have not demonstrated a sufficient connection between their allegedly compelled action and the speech at issue.

In *Washington Legal Foundation v. Massachusetts Bar Foundation*, the First Circuit considered a near-identical situation: plaintiffs alleged "the collection and use of interest . . . generated from the IOLTA trust accounts . . . deprive [plaintiffs] of [their] right to freedom of speech and association." 993 F.2d 962, 978 (1st Cir. 1993). The First Circuit determined in a subsidized speech claim, "there must be a connection between dissenters and the organization so that dissenters reasonably understand that they are supporting the message propagated by the recipient organizations." *Id.* at 979.[2] The First Circuit found no such connection:

> The process by which the IOLTA program collects and uses the accrued interest does not affect the plaintiffs' funds held in IOLTA accounts nor does it require any other expenditures or efforts by the plaintiffs. Put simply, the plaintiffs have not been compelled by the IOLTA Rule to contribute their money to the IOLTA program. Rather, the IOLTA program recipient organizations benefit from an anomaly created by the practicalities of accounting, banking practices, and the ethical obligation of lawyers. The interest earned on IOLTA accounts belongs to no one, but has been assigned, by the Massachusetts Supreme Judicial Court, to be used by the IOLTA program.

[2] In reaching this principle, the First Circuit considered precedent from several cases involving union fees and bar association dues. These cases followed *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which was recently overruled. *See Janus v. Am. Fed'n of State, Cnty, & Mun. Emps.*, 585 U.S. 878, 886 (2018). Plaintiffs plead *Washington Legal Foundation* "was predicated expressly on the holding of [*Abood*] which *Janus* directly overruled." Pls.' Response to State Defs. (ECF No. 23) at 11. But this overruling has no bearing on the First Circuit's nexus requirement. Both *Janus* and *Abood* dealt with mandatory, direct fees that subsidized unions and clearly implicated the First Amendment. *Janus* found that the state interest recognized in *Abood*—maintaining "labor peace" and preventing "free riders"—could not survive scrutiny because there were less restrictive means to achieve those ends. *Janus*, 585 U.S. at 895-901. In other words, *Janus* does not proscribe *Washington Legal Foundation*'s threshold inquiry into whether a particular state program is a form of compelled speech. And in any event, I am cautious to assume the First Circuit shares Plaintiffs' view of *Janus*'s effect on *Washington Legal Foundation*. *See Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 349 (1st Cir. 2004) ("Until a court of appeals revokes a binding precedent, a district court within the circuit is hard put to ignore that precedent unless it has unmistakably been cast into disrepute by supervening authority.").

Id. at 980 (footnote omitted); *see also id.* n.16 ("We note that the plaintiff-lawyers are required by the IOLTA Rule to set up IOLTA accounts in banks and deposit appropriate client funds therein. Because a comparable effort would be necessary to set up non-interest bearing accounts for the deposit of client funds, we find it inconsequential for First Amendment analysis."). In the context of takings, the Supreme Court has endorsed the conclusion that clients are not entitled to IOLTA generated interest and "any conceivable net loss to [clients is] the consequence of [attorney's] incorrect private decisions rather than any state action." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 239-40 (2003) ("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." (internal quotation marks omitted)).

In the end, Plaintiffs have submitted a complaint alleging facts the First Circuit has already found insufficient to state a claim. Plaintiffs contend that at this stage I must accept their factual allegation "that the IOLTA program creates the public perception that [their] participation in the IOLTA program implies [their] endorsement of the views Defendants use IOLTA funds to support." Pls.' Response to State Defs. at 12. Such an endorsement is predicated on Plaintiffs' statement that the IOLTA "interest would otherwise accrue to [Wescott's] benefit." Am. Compl. ¶ 82. That is simply false. Unless RJB is mismanaging Wescott's funds, absent the IOLTA program Wescott would not see a penny of interest as it would not cover the financial institution's cost of handling his funds. While I accept

well-plead facts as true, I am not "bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555.

Thus, the statements Plaintiffs request I accept as true are exactly the kind of conclusory, element-of-the-offense statements the Court is entitled to ignore. *See Cheng*, 51 F.4th at 443. Discounting these statements, Plaintiffs fail to allege facts sufficient to support a plausible First Amendment claim because they cannot establish being compelled to subsidize any speech.

CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss (ECF Nos. 21 and 22) are GRANTED and Plaintiffs' claims are DISMISSED.

SO ORDERED.

Dated this 2nd day of April, 2025.

/s/ Lance E. Walker
Chief U.S. District Judge

No. 25-1324

United States Court of Appeals
for the
First Circuit

E. DAVID WESCOTT, an individual residing in Dedham, County of Hancock, State of Maine; RUSSELL JOHNSON BEAUPAIN, a Maine Limited Liability Company,

Plaintiffs – Appellants,

V.

HON. VALERIE STANFILL, in their Official Capacity as Chief Justice, Maine Supreme Judicial Court; AMY QUINLAN, ESQ., in their Official Capacity as State Court Administrator for the State of Maine, Judicial Branch; MAINE JUSTICE FOUNDATION,

Defendants – Appellees,

MAINE BOARD OF OVERSEERS OF THE BAR,

Defendant.

On Appeal from the United States District Court for the District of Maine
No. 1:24-cv-00286, Hon. Lance E. Walker

OPENING BRIEF OF APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument. This appeal requires the Court to determine whether a decision of the United States Supreme Court, *Janus v. American Federation of State, County, & Municipal Employees*, 585 U.S. 878 (2018), has overruled this Court's prior ruling in *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993), such that mandatory IOLTA programs violate fundamental First and Fourteenth Amendment freedoms when they divert the interest accrued on client funds to causes that the client or the attorney finds repugnant. Appellants respectfully submit that, in light of the importance and potential complexity of the legal issues in this matter, oral argument will aid the Court.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2202. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court erred in dismissing Appellants' as-applied challenge to the constitutionality of Maine's IOLTA program for failure to state a claim on the grounds that Maine Bar Rule 6 does not compel Appellants' use of the IOLTA program and thus does not compel Appellants' speech, even though Appellants sufficiently pleaded that there is no practicable alternative to the IOLTA program available to them?

[This issue is addressed in Argument Section I.A.]

II. Whether Appellants' speech is compelled (in violation of the First and Fourteenth Amendments) where recipient organizations use IOLTA funds to espouse positions on matters of substantial public concern that are repugnant to Appellants' sincerely held moral, ethical, religious, and political beliefs?

[This issue is addressed in Argument Sections I.B and I.C.]

III. Whether the district court erred in holding that Maine Justice Foundation could not be a proper defendant, and that Appellants lack standing to sue it, because it is a private actor, even though its role in administering the IOLTA program is compelled by state law?

[This issue is addressed in Argument Section II.]

STATEMENT OF THE CASE

I. Introduction

Like many states, Maine has an Interest on Lawyers' Trust Accounts ("IOLTA") program that collects the interest accrued on lawyer-held retainer funds and distributes it to nonprofit organizations. But unlike many states, Maine uses the interest—millions of dollars in some years—for "systemic advocacy" and "legislative lobbying" in support of various political causes. App. A10, A19.

Appellants—a law firm (Russell Johnson Beaupain, "RJB") and its client (E. David Wescott)—do not support these causes, which include "queer justice," "immigration justice," "Medicaid expansion," "racial equity," and facilitating "work permits for asylum seekers." App. A13-A15. They sincerely believe that the IOLTA-funded causes are "morally, ethically, religiously, and politically abhorrent." App. A22. But Maine Bar Rule 6 mandates that "***every*** lawyer practicing or admitted to practice in Maine shall, as a condition thereof, be conclusively deemed to have consented to the [IOLTA] program." Maine Bar R. 6(g). Like it or not, if Appellants wish to have a lawyer-client relationship in which the lawyer holds the client's retainer funds during the representation, the interest from those funds *must* go to support causes that Appellants oppose rather than accruing to the client's benefit.

Thomas Jefferson stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

Irving Brant, *James Madison: The Nationalist* 354 (1948). And, thankfully for Appellants, the Supreme Court has recently confirmed that requiring individuals to provide financial support for causes they detest "seriously impinges on First Amendment rights," counts as compelled speech, and "cannot be casually allowed." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 585 U.S. 878, 893 (2018). That is why, relying on *Janus*, Appellants brought this challenge to Maine's IOLTA program as compelling their speech and their subsidy in violation of fundamental First and Fourteenth Amendment freedoms.

The district court viewed its hands as tied by a decision of this Court that predates *Janus* by 25 years: *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993). But *Washington Legal Foundation* relied on old caselaw that the Supreme Court expressly disavowed in *Janus*. Appellants thus ask the Circuit to make clear that *Washington Legal Foundation* is no longer good law, that it does not foreclose their challenge, and that *Janus* instead prohibits Maine's IOLTA program from compelling Appellants to support the causes it funds.

II. Relevant Factual Background

The following facts are taken from Appellants' Amended Complaint, App. A7-A24. Because this appeal arises from the grant of a motion to dismiss, this Court must take Appellants' factual allegations as true "even if seemingly incredible." *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011).

A. Maine's IOLTA Program.

In 2007, the Maine Supreme Judicial Court ("Law Court") made it mandatory for lawyers in Maine to participate in the State's IOLTA program. App. A19. In 2019, a working group established by the Law Court published its report, App. A48-A64, approving the use of IOLTA funds for "systemic advocacy and legislative lobbying." App. A19. And in 2020, following a public hearing, the Law Court decided to continue to allow such usage of IOLTA funds. *Id.* The use of IOLTA funds for systemic advocacy diverts funds from other uses such as providing direct legal services to the poor. App. A21.

B. Maine Bar Rule 6.

Maine Bar Rule 6 ("Rule 6") is the mechanism by which the Law Court implements Maine's IOLTA program.[1] Rule 6 requires Appellant RJB to maintain an IOLTA account and to certify its IOLTA compliance annually. App. A21; Rule 6(b).

There is no practicable alternative available to Appellants for the handling of client retainer funds. App. A22. If there were, Appellants would have used that alternative rather than having RJB store Wescott's retainer funds in a mandatory IOLTA account. *Id.* To be sure, a provision in Rule 6(c)(1) states that IOLTA-

[1] The full text of the relevant sections—6(a), (b), (e), and (g)—appears at pages 10-12 of this brief, *infra*.

qualifying "funds are small in amount or held for a short period of time such that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income." Rule 6(c)(1). But the Law Court and its designees—not Appellants—are the arbiters of IOLTA compliance, and Rule 6 imposes upon Appellants an imminent threat of severe penalties—up to and including disbarment for RJB's attorneys—if Appellants fail to store client funds in compliance with Rule 6. App. A22. Appellants thus hold a sincere belief that they are compelled by Rule 6 to participate in the IOLTA program even if there exists some theoretical possibility of storing a client's funds in a separate interest-bearing account that would permit the interest to accrue to the client's benefit. *Id.*

C. Maine Justice Foundation.

When lawyers place client retainer funds into a Maine IOLTA account, the interest is automatically transferred to the Maine Justice Foundation ("MJF"), a nonprofit organization. App. A10. In 2021, 2022, and 2023, MJF received $882,668; $973,621; and $2,414,929; respectively, in IOLTA funds. *Id.*

Although MJF is a "private" entity, it is directed expressly by Rule 6 to establish IOLTA-related guidelines (such as for determining which banks are eligible to offer IOLTA accounts), to deduct fees (amounting to up to 22% the collected IOLTA funds) for its role in administering the IOLTA program, and to distribute the remaining funds so as "to provide services that maintain and enhance

resources available for access to justice in Maine, including those services that achieve improvements in the administration of justice and provide legal services, education, and assistance to low-income, elderly, or needy clients." Rule 6(e). MJF chooses the organizations that receive these funds through a "murky" process that favors organizations that "are almost universally 'left-wing' in their political orientation." App. A20.

D. IOLTA Recipient Organizations.

MJF has chosen six organizations to receive IOLTA funds: (1) Cumberland Legal Aid Clinic (an organization that has sent student attorneys to the U.S.-Mexico border to assist entering asylum-seekers, and which gives "priority to potential clients based on sexual orientation and immigration status," App. A11); (2) Immigration Legal Advocacy Project (an organization that proclaims, "there cannot be immigration justice without queer justice," App. A13); (3) Legal Services for the Elderly (an organization that employs a full-time public policy advocate to engage in systemic advocacy, App. A14); (4) Maine Equal Justice (an organization that advocates Medicaid expansion and programs that "eliminate disparities for racial and ethnic populations," App. A15); (5) Pine Tree Legal Assistance (an organization that "prioritize[s] . . . Maine residents most affected by racism and discrimination," App. A16); and (6) Volunteer Lawyers Project (an organization that engages in systemic advocacy and promotes anti-discrimination seminars, App. A18).

E. Appellants' Client-Retainer Transaction.

In June 2023, Appellant Wescott transmitted a $2,500 retainer to Appellant RJB for deposit in RJB's mandatory IOLTA account. App. A22. Because this was an advance payment, it accrued interest during the course of RJB's representation of Wescott. *Id.* But for Rule 6 and the IOLTA program, the interest would have accrued to Wescott's benefit. *Id.* But the interest instead went to MJF. *Id.*

RJB has no practicable alternative to participating in the IOLTA program because of the threat of enforcement and penalties, including disbarment, that would accompany its decision not to do so. *See* App. A22-23. Wescott has no choice but to pay his retainer funds to a law firm that participates in the IOLTA program. *Id*. The alternative of hiring counsel outside the State of Maine, for instance, is not practicable. App. A23.

Wescott sincerely believes that, by contributing the interest on his funds to the IOLTA-supported causes, he has been compelled to support causes that he finds morally, ethically, religiously, and politically abhorrent. *Id.* RJB sincerely believes that, by participating in the IOLTA program, it has been compelled to support causes that it finds morally, ethically, religiously, and politically abhorrent. *Id.* RJB's participation in the IOLTA program also imposes administrative costs on RJB, and it furthers the public perception that RJB endorses the views of the organizations to which MJF distributes IOLTA funds. App. A21.

III. Procedural History

Appellants filed their Complaint in the District of Maine on August 8, 2024, and subsequently filed their Amended Complaint on September 12, 2024. App. A3-A4, A7. The Amended Complaint named four defendants: (1) Hon. Valerie Stanfill, Chief Justice of the Law Court ("Stanfill"); (2) Amy Quinlan, State Court Administrator of the Maine Judicial Branch ("Quinlan"); (3) Maine Justice Foundation; and (4) the Maine Board of Overseers of the Bar. App. A9-10. The State Defendants (Stanfill and Quinlan) and the Maine Board of Overseers of the Bar filed a joint motion to dismiss. App. A25. MJF filed a separate motion to dismiss. App. A87. Appellants conceded that the Board of Overseers was not a proper defendant but otherwise opposed the motions to dismiss. App. A99, A111. The State Defendants and MJF replied. App. A116, A125.

On April 2, 2025, the district court granted the motions to dismiss, holding that (1) Appellants failed to state a claim because they could not demonstrate that their use of the IOLTA program was compelled or that the recipient organizations' use of their IOLTA funds for advocacy and lobbying amounted to compelled speech and (2) Appellants lacked standing to sue MJF. App. A133-A139. That same day, the district court issued its judgment, and Appellants timely filed their notice of appeal. App. A140-A141.

This appeal follows.

TEXT OF RULE UNDER REVIEW
(MAINE BAR RULE 6)

For the Court's convenience, the full text of Maine Bar Rule 6(a), (b), (e), and (g) is provided below in the same format in which it is publicly available online at this link: https://mebaroverseers.org/regulation/bar_rules.html?id=638764.

RULE 6. Maintenance of Trust Accounts in Approved Institutions: IOLTA

(a) Clearly Identified Trust Accounts in Eligible Institutions Required. Every lawyer admitted to practice in Maine shall deposit all funds held in trust in this jurisdiction in accordance with Rule 1.15 of the Maine Rules of Professional Conduct in accounts clearly identified as IOLTA accounts in eligible institutions and shall take all steps necessary to inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise.

(b) Reporting and Certification[.] Every lawyer admitted to practice in Maine shall annually certify to the Board in connection with the annual renewal of the lawyer's registration, that, to the lawyer's knowledge after reasonable investigation:

(1) (A) the lawyer or the lawyer's law firm maintains at least one IOLTA account; and (B) the lawyer has taken reasonable steps to ensure that all client funds are held in IOLTA accounts meeting the requirements of these Rules; or

(2) the lawyer is exempt from maintaining an IOLTA account because the lawyer:

(A) is not engaged in the private practice of law;

(B) does not have an office within Maine;

(C) is (1) a judge employed full-time by the United States Government, the State of Maine or another state government; (2) on active duty with the armed services; or (3) employed full-time as an attorney by a local, state, or federal government, and is not otherwise engaged in the private practice of law;

(D) is counsel for a corporation or non-profit organization or a teacher or professor employed by an educational institution, and is not otherwise engaged in the private practice of law;

(E) has been exempted by an order of the Court that is cited in the certification; or

(F) holds no client funds.

(c) IOLTA Account Requirements.

[omitted]

(d) Verification of Bank Accounts.

[omitted]

(e) Maine Justice Foundation.

(1) *IOLTA Accounting*.

(A) Beginning in 2020, on or before April 15 of each year, the Maine Justice Foundation shall complete a financial analysis of the IOLTA funds received and distributed by the Foundation during the previous calendar year and shall prepare an Annual Financial Report that will be available to the public.

(B) The Annual Financial Report shall

(i) Be prepared according to generally accepted accounting principles;

(ii) Include the specific allocation of IOLTA funds to the various providers, programs, and projects for the previous year;

(iii) Include the total funds that were set aside for reserves;

(iv) Include the total IOLTA funds that were allocated to administrative costs of the Maine Justice Foundation; and

(v) Include the categories of the rates paid by participating Banks.

(C) Copies of the Annual Financial Report of IOLTA funds shall be provided to the Supreme Judicial Court on or before April 15 each year.

(2) *Administrative Costs of the Maine Justice Foundation*. Effective in the calendar year beginning on January 1, 2021, no more than 22% of annual IOLTA funds may be allocated to the administrative costs of the Maine Justice Foundation, except that a floor of $120,000 in administrative costs from IOLTA funds is hereby established. To allow prospective budgeting of administrative costs, the calculation

of the 22% for any upcoming calendar year shall be determined by computing the average of the annual IOLTA funds received during the three calendar years preceding the calendar year before the year for which the administrative budget is being established and multiplying that number by 0.22.[1]

(3) *Use of IOLTA Funds.* IOLTA funds received and distributed pursuant to this Rule are intended to provide services that maintain and enhance resources available for access to justice in Maine, including those services that achieve improvements in the administration of justice and provide legal services, education, and assistance to low-income, elderly, or needy clients.

(f) Receipt of Voluntary Contributions.
[omitted]

(g) Consent by Lawyers. Every lawyer practicing or admitted to practice in Maine shall, as a condition thereof, be conclusively deemed to have consented to the reporting, verification, and production requirements mandated by this rule. Such consent specifically includes authorization to the disclosure by financial institutions of all bank or trust account records and information as requested of them by Bar Counsel for the purposes of verification and investigation pursuant to Rule 6(d).

(h) Costs.

[omitted]

SUMMARY OF THE ARGUMENT

First, the district court erred in holding that Appellants failed to state a First Amendment claim under *Janus v. American Federation of State, County, & Municipal Employees*, 585 U.S. 878 (2018). Appellants amply alleged that they have no choice but to participate in Maine's IOLTA program: the "alternatives"—such as not taking a client retainer, or not using IOLTA accounts and hoping for the best—are not practicable. Moreover, the threat of severe penalties from noncompliance cautions Appellants toward using an IOLTA account when there is any doubt about its mandatory nature. As a result, interest on retainer funds that would otherwise accrue to the client's benefit is diverted—by Appellees—to organizations that engage in lobbying and advocacy on matters of substantial public concern. That amounts to a compelled subsidy under *Janus*. And because no compelling interest justifies such a subsidy, it violates the First Amendment as incorporated through the Fourteenth Amendment against the State of Maine.

Second, the district court erred in holding that Appellants lack standing to sue Maine Justice Foundation ("MJF") for want of redressability. Although MJF is a private nonprofit organization, it is a state actor for purposes of its joint participation with the State in administering and implementing the IOLTA program. That is because Maine Bar Rule 6 expressly mandates MJF to play the core role in administering the program, collecting the funds, and distributing the funds. MJF is

thus a proper defendant for a constitutional challenge to the IOLTA program. And because MJF chooses the recipient organizations—and does so in a way that diverts IOLTA funds towards lobbying and advocacy on matters of substantial public concern, rather than towards providing viewpoint-neutral legal aid to the poor—an order enjoining MJF from such unconstitutional actions would redress Appellants' harms.

This Court should thus reverse the district court's dismissal of Appellants' Amended Complaint, declare Maine Bar Rule 6 unconstitutional as applied to Appellants on the facts alleged in the Amended Complaint, and remand this matter for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM.

Standard of Review

Appellants bring an as-applied challenge to Maine Bar Rule 6 ("Rule 6") as it is currently implemented by Appellees. To prevail, Appellants need not prove that Rule 6 is unconstitutional in every application; rather, they must establish only that it plausibly infringes on their own First Amendment rights. *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008). Indeed, at this stage of the litigation, Appellants need only *allege* such infringement. *Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 52-53 (1st Cir. 2013). This Court reviews the district court's dismissal of Appellants' Amended Complaint *de novo*, and, in doing so, it must accept Appellants' factual allegations as true, drawing "all reasonable inferences therefrom" in Appellants' favor. *Id.* For the reasons that follow, this Court should reverse.

First Amendment Principles

The First Amendment, as incorporated through the Fourteenth Amendment, forbids states from abridging "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (forbidding a state from requiring individuals to display the official state motto on their license plates); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (forbidding states from requiring students to say the pledge of allegiance). It likewise

protects both the right to associate oneself with various causes and the corresponding freedom *not* to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. [. . .] Freedom of association therefore plainly presupposes a freedom not to associate.").

The Supreme Court has affirmed that *compelled* speech causes "additional damage" beyond the evils worked by *suppression* of speech: "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 585 U.S. 878, 893 (2018) (quoting *Barnette*, 319 U.S. at 633).

In *Janus*, the Court confronted an Illinois scheme that required public employees either to join a union or, alternatively, to pay an "agency fee" (a percentage of union dues) that did not directly fund the union's "political and ideological projects" but instead funded the union's collective bargaining, lobbying, litigation, and various other activities and unspecified services. 585 U.S. at 887-88. A public employee (Janus) sued the union, alleging that "he oppose[d] 'many of the

public policy positions that [it] advocates,' including the positions it takes in collective-bargaining." *Id.* at 889. Janus alleged that, "if he had the choice, he "would not pay any fees or otherwise subsidize [the Union]." *Id.* But he had no choice, and so his employer withdrew an agency fee of $44.58 per month from his paycheck. *Id.*

The Supreme Court struck down the agency-fee program as violating the First Amendment, holding that "[c]ompelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns" to compelling a person to *speak*. *Janus*, 585 U.S. at 893. Under then-existing law, the agency-fee revenue could not be used for political or ideological projects that were "not germane to collective bargaining." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 219 (1977). But the Court in *Janus* recognized that the revenue could nevertheless be used to support contentious viewpoints *within* the collective-bargaining context:

> Unions can also speak out ***in collective-bargaining*** on controversial subjects such as climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions. These are sensitive political topics, and they are undoubtedly matters of profound "value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011). We have often recognized that such speech "occupies the highest rung of the hierarchy of First Amendment values" and merits "special protection." *Id.* at 452.

Janus, 585 U.S. at 913-14 (emphasis added).

It did not matter that the Janus paid only $44.58 per month. It did not matter that Janus's funds were pooled with those of many thousands of other employees'

funds, making it impossible to trace Janus's specific contribution to the support of a specific viewpoint. And it did not matter that Janus had the (Hobson's) choice to work somewhere else. The Supreme Court held squarely that "this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.* at 885-86.

In reaching that conclusion, it applied "exacting scrutiny," wherein the State must show "a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* But it applied exacting scrutiny (rather than strict scrutiny) only because the Court found it "unnecessary to decide the issue of" whether strict scrutiny should apply, given that "under even the more permissive" standard of "exacting scrutiny," the agency fee was plainly unconstitutional. *Id.* at 895. The State's purported interest of achieving "labor peace" (*i.e.*, avoiding conflict that might arise from the existence of more than one union) did not require the imposition of mandatory agency fees because, *inter alia*, unions elsewhere functioned just fine without such fees, and because union aims could be achieved through other less-restrictive means such as requiring non-members to pay for union services (like representation in disciplinary matters) if and when they sought out such services. *Id.* at 899-901.

In reaching its conclusion, *Janus* also declared that *Abood*, which had upheld agency fees as constitutional, "was wrongly decided and is now overruled." *Janus*,

585 U.S. at 930. And it did so expressly on First Amendment grounds. *Id.* at 926 ("It is an odd feature of our First Amendment cases that political patronage has been deemed largely unconstitutional, while forced subsidization of union speech (which has no such pedigree) has been largely permitted. [. . .] By overruling *Abood*, we end the oddity of privileging compelled union support over compelled party support and bring a measure of greater coherence to our First Amendment law.").

Other cases buttress the teaching from *Janus* that the First Amendment forbids the government from compelling individuals to support viewpoints that they oppose. *See, e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 760 (2018) (upholding the right of pro-life pregnancy clinics to provide care without being compelled to distribute notices informing patients of free or low-cost abortion providers); *Wooley*, 430 U.S. at 717; *Barnette*, 319 U.S. at 642.

Two more principles bear mention. First, it is well settled that how one spends money is inextricably intertwined with the causes one supports—and is thus a close surrogate for speech. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) ("Section 441b's prohibition on corporate independent expenditures is thus a ban on speech"). Second, a plaintiff challenging an unconstitutional expenditure of money need not trace specific dollars from source to destination in order to enjoin the invidious expenditure. *See, e.g.*, *Flast v. Cohen*, 392 U.S. 83, 102-04 (1968) (permitting taxpayers to challenge Congress's expenditure of federal tax dollars in

violation of the Establishment Clause even though the challenger could not possibly trace the taxpayer's own tax dollars, which were necessarily pooled with the tax dollars of millions of other taxpayers, to a specific invidious expenditure).

These principles together make clear that a state violates the First and Fourteenth Amendment freedom against compelled speech when it takes funds that would otherwise belong to a citizen and uses those funds to support causes that the citizen opposes.

A. The district court erred in holding that Appellants' use of the IOLTA program was not compelled by Maine Bar Rule 6.

The district court dismissed the Amended Complaint for failure to state a claim, holding that Appellants had failed to allege sufficient facts to establish that the IOLTA program compels their participation in the first place. App. A136. And it held that, even if it did compel their participation, the use of Appellants' funds did not amount to compelled speech because Appellants failed to demonstrate "a sufficient connection between their allegedly compelled action and the speech at issue." App. A137. Both holdings are incorrect.

1. The district court disregarded Appellants' factual allegation that no practicable alternative to the IOLTA exists.

The district court credited the State Defendants' position that "RJB could structure its clients' payments to avoid Rule 6 entirely." App. A136. That disregarded, contrary to the pleading-stage standard, Appellants' allegations that

"[t]here is no practicable alternative available to Plaintiffs RJB and Wescott to store client retainer funds other than to maintain an IOLTA account" and that, "[i]f there were any practicable alternative available, Plaintiffs RJB and Wescott would employ that alternative." App. A22.

The district court cited, as a basis for its holding, a provision of Rule 6 that defines IOLTA-qualifying funds as those that "are small in amount or held for a short period of time such that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income." Rule 6(c)(1). But the Law Court and its designees—not Appellants—are the arbiters of IOLTA compliance, and Rule 6 imposes upon Appellants an imminent threat of severe penalties—up to and including disbarment for RJB's attorneys—if Appellants fail to store client funds in compliance with Rule 6. App. A22. Appellants thus hold a sincere belief that they are compelled by Rule 6 to participate in the IOLTA program even if there exists some theoretical possibility of storing a client's funds in a separate interest-bearing account that would permit the interest to accrue to the client's benefit. *Id.* At the pleading stage, Appellants are entitled to the "reasonable inference" that Rule 6 does not provide any mechanism for them to opt out of IOLTA participation. *Rodríguez-Reyes*, 711 F.3d at 52. Their participation is compelled.

2. The district court improperly drew a negative inference that, in the absence of the IOLTA program, no interest would accrue to Appellant Wescott's benefit.

The district court further rejected Appellants' allegation that, were it not for the IOLTA program, "interest would otherwise accrue to Wescott's benefit." App. A138 (quoting Am. Compl. ¶ 82, App. A14). The district court wrote:

> That is simply false. Unless RJB is mismanaging Wescott's funds, absent the IOLTA program Wescott would not see a penny of interest as it would not cover the financial institution's cost of handling his funds. While I accept well-plead [*sic*] facts as true, I am not "bound to accept as true a legal conclusion couched as a factual allegation."

App. A138-A139 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

This was erroneous because the district court presumed, as a factual inference drawn *against* rather than in favor of Appellants, that the only reason RJB would be storing Wescott's retainer funds in an IOLTA account rather than in a separate, non-IOLTA interest-bearing account is because RJB was "mismanaging" the funds. App. A138. The proper inference to draw in RJB's favor is instead that if RJB is in doubt about whether a retainer is sufficiently large (or will be held for a sufficiently long period) to permit its deposit into a separate, non-IOLTA interest-bearing account, then RJB feels compelled to err on the side of using an IOLTA account so as to avoid the threat of enforcement and punishment for noncompliance. *See* App. A22-A23. Appellants have sufficiently pleaded that Rule 6 compels their participation in the IOLTA program and that they feel compelled to participate in the program even

though they are thereby compelled to support politics and ideologies that they vehemently oppose.

Notably, the district court quoted *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 239-40 (2003), in support of the inference it drew against Appellants. App. A138. The district court's quote is notable because it specifically quoted the Supreme Court's language that recognized that the potential, if any, for client retainer funds to generate net interest to a client is a "factual finding" and not a legal conclusion:

> 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.

App. A138 (quoting *Brown*, 538 U.S. at 239-40) (emphasis added). Yet the district court here ruled that Appellants' allegation—*i.e.*, that the interest on Wescott's retainer "would otherwise accrue to Wescott's benefit" in the absence of the IOLTA program—was "a legal conclusion couched as a factual allegation." App. A139.

Brown had come to the Supreme Court on summary judgment—not at the pleading stage—so it was proper for the Court there to review the district court's own factual findings in light of the evidence of record. *Brown*, 538 U.S. at 230. And the evidence in that case showed that, unlike with Maine's IOLTA program, there was a "categorical requirement in Washington's IOLTA program that mandate[d]

the choice of a non-IOLTA account when net interest can be generated for the client." *Id.* at 240. Such a requirement would leave no doubt that a law firm was not only able to, but was required to, use a non-IOLTA account in circumstances where the retainer funds could accrue to the client's benefit. But no such requirement exists in Rule 6. *See* Rule 6(b) (listing six exemptions to the IOLTA program, including an exemption for a lawyer who "holds ***no*** client funds," but not including any exemption for a lawyer who, for instance, reasonably believes that his client funds will accrue sufficient interest to provide a net return to the client) (emphasis added).

Brown is also distinguishable in that it contains no discussion of the threat of enforcement, which Appellants rely on to assert that they feel compelled to use an IOLTA account to store client retainers. And, more broadly, the plaintiffs in *Brown* raised a regulatory-taking challenge, not a First Amendment challenge. *Brown*, 538 U.S. at 235. *Brown* does not decide this case.

B. The district court erred in holding that Appellants did not adequately plead a sufficient connection between their compelled use of the IOLTA program and the speech at issue (*i.e.*, the messages communicated by the organizations receiving IOLTA funds).

The district court also credited the State Defendants' position that Appellants failed to demonstrate "a sufficient connection between their allegedly compelled action and the speech at issue." App. A137. It relied on this Court's 1993 opinion in *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 978

(1st Cir. 1993), which upheld the Massachusetts IOLTA program against both First and Fifth Amendment challenges.

There, as to the First Amendment challenge, this Court first held that the challengers (which included lawyers and clients) had standing to sue and then considered whether their participation in the IOLTA program was in fact compelled even though there were theoretical options to avoid using an IOLTA account. 993 F.2d at 978. The Court held that the challengers' participation was in fact compelled in light of the challengers' allegations and the reasonable inferences to which they were entitled:

> The IOLTA Rule obligates lawyers to deposit client funds which they hold for short terms or in minimal amounts into IOLTA accounts. The plaintiffs allege facts which, when taken as true, establish that avoiding the IOLTA Rule has significantly limited Attorney Tuttle's practice of law and negatively affected his livelihood. Attorney Howes alleges that he has had to comply with IOLTA to maintain his practice of law despite his belief that the IOLTA Rule compels him to support politics and ideologies with which he disagrees.
>
> Claimants cannot be required by government action to relinquish First Amendment rights as a condition of retaining employment. As alleged by the plaintiffs, the burden on Tuttle and Howes of avoiding the IOLTA Rule is more than an inconvenience, although it is less extreme than forcing loss of employment. Reviewing the dismissal of their claims, we take the plaintiffs' factual allegations as true and we draw the inference in their favor that they cannot engage in the full practice of law without holding client funds which would trigger compliance with the IOLTA Rule. Therefore, based on the stated assumptions and inference, the IOLTA Rule is compulsory as to the two plaintiffs who are lawyers for purposes of deciding this case.

> A different question is presented as to the compulsory effect of the IOLTA Rule on plaintiffs who are clients. Although the IOLTA Rule does not directly regulate clients, its effect is compulsory because lawyers generally deposit appropriate funds from clients into IOLTA accounts without the knowledge or consent of their clients. Therefore, the IOLTA Rule effectively coerces clients' compliance through the practices of their lawyers.

993 F.2d at 978 (internal citations omitted).

Having decided that the challengers' *participation* in the IOLTA program was compelled, the Court then went on to decide whether the program compelled their *speech*. *Id.* at 978-80. It held that the program did not—but its holding rested expressly on *Abood*, which the Supreme Court disavowed in *Janus*. *Wash. Legal Found.*, 993 F.2d at 978-80. Under *Abood*, a compelled subsidy was permissible so long as it did not directly support "political or ideological causes that were not germane to the collective-bargaining purpose of the agency-shop requirement." *Wash. Legal Found.*, 993 F.2d at 979 (quoting *Abood*, 431 U.S. at 235-36). The catch is that *Abood*'s language left the door wide open to compelled subsidies supporting political or ideological causes that *were* germane to collective bargaining. But in *Janus*, the Supreme Court made clear that any compelled subsidy of "private speech on matters of substantial public concern" is anathema to the First Amendment. *Janus*, 585 U.S. at 885-86. And, whereas *Washington Legal Foundation* purported to require more than a challenger's own averments to establish "a connection between dissenters and the organization so that dissenters reasonably understand that

they are supporting the message propagated by recipient organizations," 993 F.2d at 979, *Janus* removed any such barrier, crediting Janus's own statements that he opposed the union's positions. 585 U.S. at 889. *Washington Legal Foundation* is, therefore, no longer good law. It stems from an era that wrongfully permitted compelled subsidies of speech on matters of public concern—what *Janus* referred to as an "anomaly" in the Court's "First Amendment jurisprudence." *Id.* at 925.

Even if *Washington Legal Foundation* retains some vitality, it is distinguishable: there, the Court wrote that the interest generated was "not the clients' money," 993 F.2d at 980. But here, Appellants have alleged that, but for the IOLTA program, interest on at least certain retainer funds would accrue to the client's benefit. And, whereas in *Washington Legal Foundation* the Court found that the IOLTA program does not "require any other expenditures or efforts by the plaintiffs," *id.*, Appellants here have alleged that the program imposes "significant costs" including "costs of regulatory compliance." App. A19.

Finally, the district court cited *Washington Legal Foundation* for the proposition, also quoted above, that "there must be a connection between dissenters and the organization so that ***dissenters*** reasonably understand that they are supporting the message propagated by the recipient organizations." App. A137 (quoting *Wash. Legal Found.*, 993 F.2d at 979) (emphasis added). Thus, even if *Washington Legal Foundation* is still good law, and even if there must indeed be

such a connection, there ***is*** such a connection here. The quoted language requires the "dissenters" (*i.e.*, Appellants) to understand that their funds are supporting the recipient organizations' messages. The Amended Complaint makes clear that they do—and that they vehemently oppose those messages. App. A13-A15, A22. The district court erred in holding that Rule 6 does not compel Appellants' speech.

C. Maine Bar Rule 6 fails First Amendment scrutiny.

Because Appellants adequately pleaded that Rule 6 compels their participation in the IOLTA program and thereby compels their speech, *Janus* controls—and *Janus* requires reversal.

In the context of compelling ordinary individuals to support messages they oppose, courts apply strict scrutiny, not the less-searching "exacting scrutiny" test. *See Gaspee Project v. Maderos*, 13 F.4th 79, 84-85 (1st Cir. 2021) (explaining that strict scrutiny typically applies to regulations that burden political speech and departing from that, so as to apply the lower "exacting scrutiny" standard, only because the case before it involved "disclosure and disclaimer regimes" rather than ordinary speech); *Frudden v. Pilling*, 742 F.3d 1199, 1207 (9th Cir. 2014) ("Because RGES compels students to endorse a particular viewpoint, strict scrutiny applies.").

The "daunting two-step examination" called "strict scrutiny" requires the State to establish a compelling interest and to prove that the law in question (here, the IOLTA program) is truly necessary to achieve that interest. *Students for Fair*

Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206 (2023). The Supreme Court in *Students for Fair Admissions*, however, made clear that "elusive" and "[in]coherent" goals are never compelling. There, universities argued that permitting racial preferences (so-called "affirmative action") in college admissions decisions furthered compelling interests:

> Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."

Id. at 214 (internal citations omitted).

The Supreme Court called these goals "commendable" but resoundingly rejected ***all*** of them as "not sufficiently coherent for purposes of strict scrutiny." *Id.* The universities' interests were too elusive, too immeasurable, and too imprecise to qualify as compelling interests. *Id.* at 214-15. ("Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature.").

If none of those interests are compelling for the reasons set forth in *Students for Fair Admissions*, then Maine's claimed interest ("to improve access to justice in Maine," App. A41) must likewise fall far short. Improving access to justice may well

be a worthy goal, but it is elusive, incoherent, immeasurable, and imprecise—at least as much so as the universities' goals were in *Students for Fair Admissions*. For that reason (*i.e.*, the lack of a compelling interest), the IOLTA program fails strict scrutiny.

Appellees below supported their compelling-interest argument with decisions of various courts that all predate *Students for Fair Admissions* and are thus abrogated to the extent that they uphold an incoherent, elusive goal as a compelling interest. *See* App. A41-A42. The Supreme Court in *Brown* stated that the IOLTA program in that case was "serving the compelling interest in providing legal services to literally millions of needy Americans"—but there, unlike here, the IOLTA program *actually funded indigent litigants' legal fees* rather than systemic advocacy. 538 U.S. at 232. Likewise, the Supreme Court in *Keller v. State Bar of California* upheld bar membership dues in part on the grounds that the State could use those funds to improve "the quality of legal services," 496 U.S. 1, 13 (1990)—but nothing in that opinion contemplates funding systemic advocacy or lobbying for specific causes, and, in any event, *Keller* relied on *Abood*, which has since been overruled by *Janus*.

Moreover, even under "exacting scrutiny"—which the Court applied in *Janus* not because it was necessarily the appropriate scrutiny but rather because the compelled-speech regime failed *even the lower standard* of exacting scrutiny—the IOLTA program still fails. Under exacting scrutiny, the State must prove "a

compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 585 U.S. at 894. Although courts have referred to exacting scrutiny as "a less intense standard of constitutional review," *Gaspee Project*, 13 F.4th at 85, it nevertheless requires a compelling interest—and the IOLTA program must therefore fail for the same reason it fails strict scrutiny: it furthers no compelling interest at all. Even if "improving access to justice," App. A122, were a qualifying compelling interest, that interest can readily be achieved through alternative means like using tax dollars or voluntary contributions to fund the State's desired initiatives. Admittedly, if the State attempted to use tax dollars to fund these causes, it might be met with disagreement from the taxpayers. But perhaps that is precisely why the First Amendment prohibits the State from compelling individuals to subsidize such causes in the first place.

The agency fee in *Janus* could not be used for "the union's political and ideological projects"—and yet it was declared unconstitutional. *Id.* at 887. But the Law Court considered and *rejected* even that sort of modest limitation on the use of IOLTA funds, preferring a narrower rule that permitted more politically charged uses of the funds. *See* App. A52 (Majority Report, Exh. A to Motion to Dismiss, at 4 n.6) (explaining that "additional restrictions on the spending of IOLTA funds 'for political or ideological activities'" were rejected in 2019). There is thus *less* restriction on Maine's use of IOLTA funds for politically charged causes than there

was in *Janus*, highlighting the unconstitutionality of Rule 6 as currently implemented.

Finally, even if the Court views the IOLTA program as appropriately tailored to an acceptably compelling interest, the program still fails First Amendment scrutiny because it is not viewpoint neutral. Accepting the facts as presented in the Amended Complaint, the IOLTA program diverts funds to causes that are "left-wing in their political orientation as generally understood in the context of twenty-first America." App. A20. Such a preference for the views of one swath of society at the expense of opposing views is "particularly egregious." *Vidal v. Elster*, 602 U.S. 286, 293 (2024).

In sum, the IOLTA program compels Appellants' speech. It does so in furtherance of the State's aims and the recipient organizations' aims, not in support of any compelling interest. And it fails First Amendment scrutiny, regardless of whether strict or exacting scrutiny applies.

II. THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS' CLAIMS AGAINST MAINE JUSTICE FOUNDATION FOR LACK OF STANDING.

Standard of Review

The district court dismissed Appellants' claim against MJF for lack of Article III standing. App. A133-A136. This Court reviews that dismissal *de novo*. *Gustavsen v. Alcon Labs., Inc.*, 903 F.3d 1, 6 (1st Cir. 2018). For the reasons that follow, the

district court erred in holding that MJF was a private actor and that Appellants therefore lacked standing to lodge their First Amendment claims against MJF.

Article III Standing

Federal courts have constitutional authority to decide only "cases" and "controversies." U.S. Const. art. III § 2; *see Muskrat v. United States*, 219 U.S. 346, 356 (1911). The requirement of standing is "rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). To bring suit, a plaintiff must have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues" before the court. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

The "irreducible constitutional minimum" of standing is that, for each claim, a plaintiff must allege an actual or imminent injury that is traceable to each defendant and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). The district court granted MJF's motion to dismiss for lack of standing on the grounds that the third element (redressability) of this three-element test was lacking. App. A135-A136.

A. MJF is a state actor for purposes of administering Rule 6.

In its ruling on standing, the district court treated MJF as though it were no different from any other private entity, explaining that an order enjoining MJF from enforcing Rule 6 "would be the same as" an order that "enjoined RJB from

complying with Rule 6," with the "effect being nothing because those entities do not enforce Rule 6":

> "[W]hen a statute is challenged as unconstitutional, the proper defendants are the government officials whose role it is to administer and enforce it." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) (addressing redressability); *see also N.H. Right to Life PAC v. Gardner*, 99 F.3d 8, 13 (1st Cir. 1996) ("[W]hen a plaintiff seeks a declaration that a particular statute is unconstitutional, the proper defendants are the government officials charged with administering and enforcing it."). This axiomatic principle stems from the fact that Plaintiffs can obtain complete redressability from a favorable ruling solely against State Defendants whereas the same is not true for a favorable ruling solely against MJF.
>
> If this Court enjoined only Maine Justice Foundation from enforcing Rule 6 the effect would be the same as if I enjoined RJB from complying with Rule 6, or as if I enjoined banks that disperse IOLTA funds to Maine Justice Foundation from enforcing Rule 6. The effect being nothing because those entities do not enforce Rule 6. The Maine Justice Foundation, just like RJB, is mandated to take certain actions under Rule 6. But Maine Justice Foundation itself does not police whether it has taken the appropriate actions or if it has the authority to stop dispersing IOLTA funds without incurring a penalty. *See* Me. Bar R. 6(e)(1) (requiring the Maine Justice Foundation to report to the Maine Supreme Judicial Court on IOLTA spending).

App. A134-A135.

But decisions of this Court and the Supreme Court make clear that MJF is a state actor because it is a joint participant with the State of Maine in implementing the IOLTA program, and thus it is a proper defendant in this constitutional challenge. *See Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 809 (2019) ("A private entity can qualify as a state actor in a few limited circumstances," such as "when the

government compels the private entity to take a particular action [or] when the government acts jointly with the private entity."); *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001) ("[A] nominally private entity may be a state actor when it is entwined with governmental policies."); *Santiago v. Puerto Rico*, 655 F.3d 61, 68 (1st Cir. 2011). And a defendant "may be a state actor for some purposes but not for others." *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996).

The "joint participation" (or "joint action") theory of state action best establishes that, for the purpose of administering Maine's IOLTA program, MJF is a state actor. This Court has held that a private entity is treated as a state actor when "the government 'has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity.'" *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 21 (1st Cir. 1999) (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961)). In *Burton*, for instance the Supreme Court held that a private restaurant's racial discrimination was state action where the restaurant was located in a government-owned parking building and paid its rent to the government. 365 U.S. at 723-24.

Here, MJF's administration of the IOLTA program is expressly *dictated* by Maine Bar Rule 6. There can be no doubt that MJF, through a "private" entity, is operating as an arm of the Law Court in choosing the recipients of IOLTA funds,

determining criteria for IOLTA-eligible financial institutions, paying its own administration costs out of IOLTA revenue, and distributing IOLTA funds to the organizations that it chooses. The State would have to amend the Bar Rules in order to extract MJF from administering and enforcing the IOLTA program. That is a classic "position of interdependence." *Perkins*, 196 F.3d at 21.

In the district court's view, the outcome would be no different if Appellant Wescott had simply sued his law firm to allege the constitutional harms alleged herein. App. A134-A135. But RJB is not the one choosing to use Wescott's funds to subsidize speech on matters that Appellants oppose: MJF is.

B. Appellants' harm is redressable by an injunction against MJF.

The district court's ruling on standing concluded that because MJF did not "enforce" penalties for noncompliance with Rule 6, Appellants' injuries were not redressable by a ruling against MJF. App. A135-A136. That is incorrect. Appellants have pleaded that MJF chooses the recipient organizations and distributes the funds. App. A11-A18, A20. Thus, the district court could redress Appellants' injuries by enjoining MJF from distributing IOLTA funds in a manner that causes the funds to subsidize speech on matters of "substantial public concern." *Janus*, 585 U.S. at 914

Finally, even if this Court is inclined to agree with the district court's characterization of MJF as a private actor, the pleading-stage posture of the matter should give it pause: this Court has explained that the "inquiry" into whether a given

private entity qualifies as a state actor "is typically factbound," making it inappropriate for resolution on a motion to dismiss. *Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 8 (1st Cir. 2015); *see also Burton*, 365 U.S. at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

CONCLUSION

For the foregoing reasons, Appellants respectfully ask this Court to reverse the district court's dismissal of Appellants' Amended Complaint, declare Maine Bar Rule 6 unconstitutional as applied to Appellants on the facts alleged in the Amended Complaint, and remand this matter for further proceedings.

Date: June 26, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Fed. R. App. P. 27 and 32 because the countable portion thereof contains 8,530 words and was typed in 14-point Times New Roman font.

Respectfully submitted,

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Counsel for Appellants

CERTIFICATE OF SERVICE

I certify that on June 26, 2025, a copy of the foregoing brief was served upon opposing counsel by electronic filing.

Respectfully submitted,

/s/ Kyle Singhal
Kyle Singhal
Counsel for Appellants

ADDENDUM

District Court Order Granting Motion to Dismiss

Appeal No. 25-1324

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

E. DAVID WESCOTT, an individual residing in Dedham, County of Hancock, State of Maine; RUSSELL JOHNSON BEAUPAIN, a Maine Limited Liability Company,

Plaintiffs-Appellants

v.

HON. VALERIE STANFILL, in their Official Capacity as Chief Justice, Maine Supreme Judicial Court; AMY QUINLAN, ESQ., in their Official Capacity as State Court Administrator for the State of Maine, Judicial Branch; MAINE JUSTICE FOUNDATION,

Defendants - Appellees,

MAINE BOARD OF OVERSEERS OF THE BAR,

Defendant.

On Appeal from Order of U.S. District Court for the District of Maine
Docket No. 1:24-CV-00286-LEW

BRIEF OF APPELLEE MAINE JUSTICE FOUNDATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee Maine Justice Foundation states that it is a non-profit corporation, has no parent corporation, does not issue stock, and has no publicly-held affiliates.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court correctly concluded that the Maine Interest on Lawyers' Trusts Accounts ("IOLTA") program does not compel Appellants' speech in violation of the First Amendment.

II. Whether the District Court correctly concluded that Appellants lacked standing to bring their claim against Maine Justice Foundation ("MJF").

STATEMENT OF THE CASE

I. Factual Background

Pursuant to Maine Bar Rule 6 and Maine Rule of Professional Conduct 1.15, Maine lawyers in private practice are required to deposit client funds held in trust that are "small in amount or held for a short period of time such that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income" into an IOLTA account. *See* Me. Bar R. 6; Me. R. Prof. Conduct 1.15 (together, the "IOLTA Rule"). An IOLTA account "is a pooled trust account earning interest or dividends at an eligible [financial] institution in which a lawyer or law firm holds funds on behalf of clients." Me. Bar R. 6(c)(1). On at least a quarterly basis, the financial institutions maintaining lawyers' IOLTA accounts must transmit the interest and dividends generated by those accounts (minus any reasonable fees) to MJF. Me. Bar R. 6(c)(4)(A).

Maine Bar Rule 6 directs MJF to distribute the IOLTA funds it receives (minus certain administrative costs) to "services that maintain and enhance resources available for access to justice in Maine, including those services that achieve improvements in the administration of justice and provide legal services, education, and assistance to low-income, elderly, or needy clients." Me. Bar R. 6(e). MJF must also prepare an Annual Financial Report for the Maine Supreme Judicial Court (the "SJC") and the public that specifies, among other things, the allocation of IOLTA funds to the various legal aid providers. *Id.*

The Chief Justice of the SJC and the State Court Administrator are responsible for promulgating, implementing, and amending the rules governing the conduct of lawyers, including the IOLTA Rule. App. A10. The SJC's authority includes the authority to impose restrictions on the use of IOLTA funds by the recipient organizations. App. A11. In 2019, the SJC did in fact consider imposing restrictions on the use of IOLTA funds for legislative lobbying, campaigning, and voter advocacy. App. A18. The SJC ultimately declined to impose such a restriction. App. A19.

The Maine Board of Overseers of the Bar (the "Board"), which was established by the SJC, is responsible for overseeing and enforcing compliance with the rules promulgated by the SJC, including the IOLTA Rule. *Id.*; *see also* Me. Bar R. 1(a) (noting the Board is "the statewide agency to administer the

regulation of lawyers," which includes "prosecutorial" and "adjudicative" functions); Me. Bar R. 2(b) (describing the duties of the Board's Bar Counsel, including the duty to prosecute disciplinary proceedings); Me. Bar R. 6(d), (g) (granting the Board's Bar Counsel authority to investigate and verify "the accuracy and integrity of all bank accounts maintained" by lawyers and granting participating financial institutions the authority to disclose records of IOLTA accounts to Bar Counsel).

Unlike the Board and the SJC, MJF is a private nonprofit organization that is not tasked with the creation or enforcement of the IOLTA Rule. App. A10. Appellants have not alleged – because there is no basis to do so – that MJF has any authority to promulgate, amend, or enforce the IOLTA Rule. *See generally* App. A7-27 (Complaint). Nor has MJF taken any action to compel Appellants' compliance with the IOLTA rule even in the absence of formal authority. Appellants do not allege MJF has ever communicated with Appellants, communicated about Appellants, or otherwise taken any action to force Appellants into compliance with the Rule. *Id.* In fact, the Amended Complaint does not allege MJF does *anything* with respect to Appellants. *Id.*

To the contrary, Appellants correctly allege that MJF merely receives and distributes funds pursuant to the IOLTA Rule. MJF "is *directed* to receive interest from IOLTA accounts" by the IOLTA Rule, as promulgated and enforced by the

SJC and the Board. App. A10; *see also* Me. Bar R. 6(4)(A). The IOLTA Rule subsequently directs MJF to distribute that interest to organizations maintaining and enhancing access to justice in Maine, and MJF does so by distributing IOLTA-funded grants to the specified legal aid organizations. Me. Bar R. 6(e)(3); *see also* App. A10-18 (describing legal aid organizations in receipt of IOLTA funds); Appellants' Brief at 6 (stating MJF "is directed expressly by Rule 6" to distribute IOLTA funds to organizations maintaining and enhancing access to justice). MJF does not impose any restrictions on the IOLTA funds provided to the legal aid organizations, nor does MJF require the legal aid organizations to take any specific actions. *See* App. A58.

In short, MJF is simply an intermediary between the financial institutions holding IOLTA accounts and the legal aid organizations ultimately receiving IOLTA funds. *See id.* A113 (referring to MJF as "a conduit rather than enforcer of the IOLTA program").

II. Procedural Background

Appellants are a law firm, Russell Johnson Beaupain ("RJB"), and a client of the firm, E. David Wescott ("Wescott"), who paid a retainer to the firm that was held in an IOLTA fund. *Id.* A8, 16. Appellants filed their initial Complaint in the United States District Court for the District of Maine on August 8, 2024. On September 12, 2024, Appellants filed their Amended Complaint, alleging, pursuant

to 42 U.S.C. § 1983, that Appellees Hon. Valerie Stanfill (in her official capacity as Chief Justice of the SJC), Amy Quinlan, Esq. (in her official capacity as State Court Administrator for the State of Maine Judicial Branch) (together, the "State Appellees"), and the Board, along with MJF, violated their right under the First Amendment (as made applicable to the states under the Fourteenth Amendment) to be free from compelled speech (Count I). *See id.* A7-27. The Amended Complaint remains the operative complaint for purposes of this appeal.

In essence, Appellants claimed the IOLTA Rule forces them to contribute "to causes that they find morally, ethically, religiously, and politically abhorrent"—causes such as "defeat[ing] racism and bigotry in all its forms;" "[c]ombating [d]isability [b]ased [d]iscrimination;" and hosting a "[f]orum on [h]ate [c]rime." *Id.* A.11-12.

In their prayer for relief, Appellants asked the District Court to:

> (l) declare that Rule 6, as currently enforced, violates the First and Fourteenth Amendments by compelling speech of lawyers or clients, and enjoin Defendants from enforcing it insofar as it permits mandatory IOLTA funds to subsidize systemic advocacy or legislative lobbying;
>
> (2) declare that it is unconstitutional for Defendants to permit IOLTA funds to be used for [a. supporting or opposing candidates for elected office, b. supporting or opposing ballet initiatives or referenda, c. lobbying in support of or in opposition to pending proposed legislation, d. seeking public support through the media including social media to support or oppose legislation, valid initiatives or referenda for candidates for elected office, or e. voter registration, voter education, voter signature gathering, or get out to vote actions];

> (3) alternatively, enjoin Defendants from requiring lawyers to participate in the IOLTA (that is, allow an opt-out provision) and require Defendants to provide notice to lawyers and clients that interest from IOLTA funds may be used for systemic advocacy (thereby permitting clients to make an informed decision whether to use the services of a lawyer who does *not* opt out); and
>
> (4) award Plaintiffs' reasonable attorneys' fees, litigation expenses, and costs pursuant to 42 U.S.C. § 1988 and any other applicable law.

Id. A18, 23-24.[1]

On October 15, 2024, the State Appellees and the Board filed a Motion to Dismiss the Amended Complaint on both substantive and, with respect to the Board, procedural grounds. *Id.* A25-86. MJF filed a separate Motion to Dismiss on the same day. *Id.* A87-94. In its Motion to Dismiss, MJF adopted in full the arguments set forth by the State Appellees and the Board in their Motion to Dismiss, and separately argued, pursuant to Fed. R. Civ. P. 12(b)(1), that Appellants lacked standing to pursue their claim against MJF. *Id.* A90-92. On November 5, 2024, Appellants agreed to drop the Board, but otherwise opposed both Motions. *Id.* A95-115. The State Appellees and MJF filed their replies on November 19, 2024. *Id.* A116-129.

[1] As the District Court noted in its Order, Appellants' second request in their Prayer for Relief contains a typographical error, which is corrected in the above list. *See* App. A133-134.

On April 2, 2025, the District Court granted both Motions to Dismiss. *Id.* A130-39 (the "Order"). The Court agreed with MJF that Appellants lacked standing to pursue their claim against MJF because MJF does not enforce the IOLTA Rule. App. A136. The Court further agreed with the State Appellees that Appellants failed to adequately state a claim for violation of the First Amendment. App. A139. The Court issued its final judgment on the same day, and Appellants' subsequently filed the instant appeal. *Id.* A140-41.

SUMMARY OF THE ARGUMENT

The bulk of Appellants' brief focuses on their argument that MJF is a state actor—an issue that was not argued by either party below and was not the basis of the District Court's decision below. *See* Appellants' Brief at 33-36. Even in the one paragraph of their brief addressing standing, Appellants do not grapple with the District Court's decision—which correctly concluded that Appellants could not establish standing because MJF did not issue or enforce the IOLTA Rule—instead advancing a new theory that is not supported by any allegations in the Complaint and that makes little sense. Appellants' arguments are both wrong and irrelevant. This Court should affirm the District Court's correct decision on standing.

Additionally, for the reasons set forth in the State Appellees' Brief, which MJF adopts in full, this Court should affirm the District Court's conclusion that Appellants failed to allege a valid claim under the First Amendment.

ARGUMENT

I. The District Court correctly concluded that Appellants lack standing to bring their claim against MJF.

A. Standard of Review

This Court "reviews de novo a district court's grant of a motion to dismiss for lack of standing." *Blum v. Holder*, 744 F.3d 790, 795 (1st Cir. 2014). Standing is governed by Fed. R. Civ. P. 12(b)(1), which addresses challenges to "a court's subject-matter jurisdiction." *NPG, LLC v. City of Portland, Maine*, No. 2:20-CV-00208-NT, 2020 WL 4741913, at *3 (D. Me. Aug. 14, 2020); *see also Pagan v. Calderon,* 448 F.3d 16, 26 (1st Cir. 2006) (noting question of plaintiff's Article III standing is part of court's duty to satisfy itself as to its jurisdiction).[2] "Establishing subject matter jurisdiction is the plaintiff's burden." *Id.* at *5. When a motion challenges subject matter jurisdiction based on the allegations in the pleadings, the Court accepts all well-pleaded facts as true. *Id.* The Court does not, however, credit "conclusory assertions or unfounded speculation." *Id.*

[2] Plaintiffs argue the Court should not have dismissed MJF at the pleading stage because the question of whether a private entity is a state actor is "factbound." Appellants' Brief at 37 (quoting *Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 8 (1st Cir. 2015)). But, as discussed below, the Court did not determine MJF was not a state actor, but instead determined Appellants lacked standing to sue MJF. "Standing is a threshold issue in every federal case and goes directly to a court's power to entertain an action"; thus, the District Court was correct to address standing at the outset of this case. *Berner v. Delahanty*, 129 F.3d 20, 23 (1st Cir. 1997).

B. Appellants' argument that MJF is a state actor is irrelevant to the question of whether Appellants have standing to sue MJF.

Appellants contend the District Court erred by "holding that MJF was a private actor and that Appellants therefore lacked standing to lodge their First Amendment claims against MJF." Appellants' Brief at 33. But the District Court made no such holding. MJF did not argue in its motion to dismiss that it was not a state actor for purposes of Appellants' section 1983 and Fourteenth Amendment claims, and the District Court accordingly did not analyze nor make any conclusions as to that issue.

As discussed more fully below, the District Court determined that Appellants lack standing to sue MJF because MJF is not charged with promulgating or enforcing the IOLTA Rule, and thus is neither the cause of Appellants' purportedly compelled speech nor able to redress the purported compulsion of speech. The District Court's analysis did not hinge on whether MJF is a state actor, but instead on whether MJF is a "government official[] *whose role it is to administer and enforce*" the IOLTA Rule. App. A134 (quoting *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) (emphasis added)).

Appellants misread the Order as holding that Appellants' lack of standing to sue MJF is predicated on MJF's status as a private entity. Based on their misunderstanding of the Order, Appellants go on to argue that MJF "is a state actor . . . and thus it is a proper defendant in this constitutional challenge." Appellants'

Brief at 34. Appellants appear to confuse the concept of standing with the concept of "state action" with respect to the Fourteenth Amendment and section 1983.[3] In fact, every case Appellants cite to support their appeal of the District Court's ruling on standing relates to the "state action" concept. *Id.* at 34-36. The "state action" requirement, however, is simply different from the question of standing, which is what the District Court actually addressed below.

Appellants correctly note that, while "[p]rivate parties acting in their individual capacities are not ordinarily acting under color of state law," *see Off. of Pub. Guardian v. Elliot Hosp.*, 630 F. Supp. 3d 345, 352 (D.N.H. 2022), private parties "can qualify as . . . state actor[s] in a few limited circumstances," including when "the government 'has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity.'" Appellants' Brief at 34-35 (quoting

[3] Because the Fourteenth Amendment "is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'" *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982). Similarly, section 1983 only "provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . .'" *Id.* (quoting 42 U.S.C. § 1983). Because "the state action requirement under . . . [the] Federal Constitution[] and the 'under color of state law' requirement of 42 U.S.C. § 1983 are essentially the same," they "may be collapsed into a single state action analysis." *Tynecki v. Tufts Univ. Sch. of Dental Med.*, 875 F. Supp. 26, 30 (D. Mass. 1994); *see also Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 17 (1st Cir. 1999) (noting the "state action" requirement is "coextensive" with the "under color of state law" requirement).

Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 809 (2019) and *Perkins v. Londonderry Basketball Club*, 196 F.3d 13, 21 (1st Cir. 1999)). Appellants then go on to argue that MJF satisfies this "joint participant" theory of state action because "MJF's administration of the IOLTA program is expressly *dictated* by Maine Bar Rule 6" such that MJF "is operating as an arm of the Law Court." Appellants' Brief at 35.

All of this is a red herring. The standing inquiry before the District Court was whether Appellants' alleged injuries were traceable to MJF such that those injuries would likely be redressed by a decision against MJF. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997). Regardless of whether MJF was acting as a private entity or a state entity, the District Court correctly concluded MJF was the *wrong* entity to sue, because it is not the entity whose role it is to enforce the IOLTA Rule. App. A134.

Case law bears out this distinction. For example, in *Bronson v. Swensen*, the Tenth Circuit addressed a challenge to a provision of the Utah Constitution prohibiting plural marriage and a corresponding statute making plural marriage a felony. 500 F.3d 1099, 1102 (10th Cir. 2007). The plaintiffs—who subscribed to the religious doctrine of plural marriage—sued the Clerk of Salt Lake County, who denied the plaintiffs' application for marriage on the basis that one of the plaintiffs was already married. *Id.* at 1103. The parties stipulated that, for purposes of section

1983, the clerk who denied their marriage application "acted under color of state law in denying the application." *Id.* The problem for the plaintiffs in *Bronson*, however, was that the clerk was the *wrong* state actor, because the clerk had no "responsibility for *enforcing*" the challenged law. *Id.* at 1110; *see also Shell Oil Co. v. Noel,* 608 F.2d 208, 211 (1st Cir. 1979) (affirming dismissal of claim against state official for lack of standing); *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957 (8th Cir. 2015) (same); *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1299 (11th Cir. 2019) (same); *Socialist Workers Party v. Leahy*, 145 F.3d 1240, 1248 (11th Cir. 1998) (same).

In short, virtually every word of Appellants' argument on appeal is simply irrelevant.

C. Appellants lack standing to sue MJF because their constitutional injury is not fairly traceable to MJF and cannot be redressed by MJF.

1. A plaintiff must establish standing against each defendant for each claim and each form of relief they seek.

"The Constitution restricts the jurisdiction of federal courts to 'Cases' and 'Controversies,' U.S. Const. art. III, § 2, and '[t]hat limitation ... is fundamental to the federal judiciary's role within our constitutional separation of powers.'" *NPG, LLC*, 2020 WL 4741913, at *3 (quoting *Reddy v. Foster*, 845 F.3d 493, 499 (1st Cir. 2017)). Article III standing consists of three elements: First, "the plaintiff must have suffered an injury in fact." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61

(1992) (citation modified). Second, "there must be a causal connection between the injury and the conduct complained of." *Id.* Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* Last June, the Supreme Court reiterated that "standing is not dispensed in gross," and that "'plaintiffs must demonstrate standing for each claim that they press' against each defendant, 'and for each form of relief that they seek.'" *Murthy v. Missouri*, 603 US 43, 61 (2024) (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021)).

2. The District Court found that Appellants could not establish standing because MJF did not issue or enforce the rule that Appellants challenge.

The District Court concluded that Appellants lack standing to pursue their claim against MJF, explaining that the injury of which Appellants complain—compelled speech by threat of enforcement of the IOLTA Rule—is not redressable by a decision against MJF because MJF does not enforce the IOLTA Rule. App. A135 ("If this Court enjoined only [MJF] from enforcing Rule 6 the effect would be the same as if I enjoined RJB from complying with Rule 6, or as if I enjoined banks that disperse IOLTA funds to [MJF] from enforcing Rule 6. The effect being nothing because those entities do not enforce Rule 6."). The Court similarly noted that an injunction enjoining MJF from distributing Plaintiffs' IOLTA interest would be meaningless in the absence of an order also enjoining the State Appellees

from enforcing the IOLTA Rule, because "[i]f Rule 6 is constitutional, [MJF] would be wrongfully enjoined. If Rule 6 is unconstitutional, then State [Appellees] would be enjoined from enforcing it and [Appellants] would not have to participate in the IOLTA program, regardless of what [MJF] does." *Id.* The Court correctly concluded that where, as here, a rule is challenged as unconstitutional, the proper defendants are the government officials charged with enforcing that rule. *Id.*

3. This decision was correct because MJF did not promulgate the rule at issue and has no enforcement authority with respect to it.

The Amended Complaint is clear that Appellants' "immediate gripe" is with the existence of IOLTA Rule as written. *Support Working Animals, Inc. v. Governor of Florida*, 8 F.4th 1198, 1203 (11th Cir. 2021). In their own words: "Plaintiffs ask this Court to invalidate Maine Bar R. 6, as it is being implemented by the Supreme Judicial Court of the State of Maine, which requires lawyers to segregate client funds into Interest on Lawyers' Trust Accounts . . . and thereby requires lawyers and their clients to support causes that they oppose." *See* App. A8; *see also id.* A23-24 (prayer for relief).[4] Yet Appellants did not—because they

[4] To the extent Appellants also seek declaratory relief, *see* App. A23-24 (prayer for relief), their claim against MJF fares no better than their claim for injunctive relief—a federal court may only grant declaratory relief "[i]n a case of actual controversy within [that court's] jurisdiction," and "the phrase 'case of actual controversy' . . . refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III*." In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 916 F.3d 98, 111 (1st Cir. 2019) (quoting 28 U.S.C. § 2201(a) and *MedImmune,*

could not—allege that MJF has any connection to the IOLTA Rule's existence or enforcement. *See generally id.* A7-24. MJF did not promulgate the IOLTA Rule, has no authority to amend the rule, and cannot discipline any attorney who fails to comply with the rule. *Id.* Nor has MJF taken any action under the auspices of having such authority. *Id.* Appellants do not allege MJF has ever contacted them, communicated to others about them, or otherwise sought to compel their compliance with the IOLTA rule. *Id.*

Instead, Appellants allege MJF simply receives and distributes money pursuant to the Rule. *Id.* A10; *see also id.* A113 (describing MJF as a "conduit rather than enforcer of the IOLTA program"). Put simply, MJF has no authority to compel Appellants to subsidize the speech with which they apparently disagree, and Appellants do not contend that it has tried to do so in the absence of any such authority. An injunction enjoining MJF from enforcing the IOLTA rule would be meaningless, because the rule is not MJF's to enforce.

In light of the above, the District Court correctly concluded that the proper defendants to this constitutional challenge to the IOLTA Rule are the government officials who enforce the rule—the State Appellees. *Bronson*, discussed above, is illustrative. There, the Court determined the plaintiffs lacked standing to bring their

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Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007)). Appellants' claim against MJF is not justiciable under Article III for the reasons discussed above—namely, MJF has no actual or purported authority to enforce the IOLTA rule.

challenge to the laws prohibiting plural marriage against the clerk who denied them a marriage license based on the "well-established" principle "that when a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." 500 F.3d at 1110. Because the clerk had no power to initiate any criminal prosecution of the plaintiffs, the court determined there was "no nexus between *this defendant's* past or possible future conduct and plaintiffs' fear of criminal prosecution under Utah law," and therefore concluded plaintiffs did not satisfy the causation and redressability requirements for Article III standing. *Id.* at 1110-1112. The court rejected the plaintiffs' argument that an injunction instructing the clerk to issue them a marriage license would redress their injury, explaining that any such relief "would not flow from [the clerk's] enforcement of Utah's criminal prohibition of polygamy" because the clerk had "no authority to enforce that prohibition." *Id.* at 1111.

Bronson is not unique. In *Okpalobi v. Foster*, the Fifth Circuit addressed a suit against a state governor and attorney general seeking to enjoin the "operation and effect" of a statute which created a private right of action against medical doctors performing abortions. 244 F.3d 405, 409 (5th Cir. 2001). The court determined the plaintiffs lacked Article III standing to sue the governor and

attorney general because, under the statute's own terms, those defendants were not charged with enforcing the statute. *Id.* at 426-27. Where "the injury alleged by the plaintiffs [wa]s not, and c[ould] not possibly be, *caused* by the defendants," and "their injury [could] not be *redressed* by the[] defendants," the court determined the plaintiffs lacked standing to pursue their claims against those defendants. *Id.* at 427. Similarly, in *Support Working Animals*, the Eleventh Circuit analyzed a suit against the attorney general to enjoin enforcement of a state constitutional amendment outlawing gambling on greyhound racing. 8 F.4th 1198, 1200 (11th Cir. 2021). The court determined that because the attorney general was not vested with any authority to enforce the amendment, the plaintiffs could not show they had suffered (or would imminently suffer) any injury fairly traceable to the attorney general, and an injunction enjoining the attorney general from enforcing the amendment would not redress the plaintiffs' alleged injuries. *Id.* at 1202-05.

As the cases above demonstrate, and as the District Court rightly explained, the principle that the government officials tasked with enforcing a law are the proper defendants in a challenge to that law is "axiomatic." App. A134; *see also Shell Oil,* 608 F.2d at 211 (no standing to sue Attorney General and Governor for law creating only a private right of action, because "an officer of a state is an appropriate defendant" to a suit challenging a law's constitutionality only "if he has some connection with the enforcement of the act"); *Digital Recognition*

Network, 803 F.3d at 957 (no standing to sue Governor and Attorney General "because the injury of which [plaintiff] complain[ed] [wa]s not 'fairly traceable' to either official."); *Lewis*, 944 F.3d at 1299 (no standing to sue Attorney General where challenged law "doesn't contemplate enforcement by the Attorney General"); *Socialist Workers Party*, 145 F.3d at 1248 (no standing to sue county supervisors of elections because "where the plaintiff seeks a declaration of the unconstitutionality of a state statute and an injunction against its enforcement, a state officer, in order to be an appropriate defendant, must, at a minimum, have some connection with enforcement of the provision at issue"); § 3531.5 Causation, 13A Fed. Prac. & Proc. Juris. § 3531.5 (3d ed.) (collecting cases).

Appellants seek to "invalidate Maine Bar R. 6, as it is being implemented by the Supreme Judicial Court of the State of Maine." App. A8. The IOLTA Rule's existence and enforcement lie solely in the hands of the State Appellees.[5] MJF is a mere subject of the IOLTA Rule—like RJB, the financial institutions, and the legal aid organizations, MJF has no authority to implement, amend, or enforce the rule. Accordingly, MJF is not the cause of Appellants' constitutional injury, nor can it redress Appellants' constitutional injury. That ability lies solely with the State

[5] The Board also plays a role in the enforcement of the IOLTA Rule. However, the fact that Appellants agreed to drop the Board from this case following their procedural error in suing the Board instead of its members, *see* App. A95, should have no bearing on the Court's analysis of standing as to MJF.

Appellees. This Court should therefore affirm the District Court's order dismissing Appellants' claim against MJF for lack of standing.

4. Appellants' one-paragraph challenge to this holding is based entirely on an attempt to re-frame their claim around MJF's "choice" of recipient organizations.

In their brief on appeal, Appellants do not really challenge any of this. Instead, in a one paragraph argument, they try to reinvent their claim, arguing for the first time that MJF's purported choice of organizations that receive IOLTA funds is central to their claim. Appellants' Brief at 36. Appellants claim MJF's ability to choose the recipient organizations differentiates MJF from the other entities (such as RJB, the financial institutions, and the legal aid organizations) acting pursuant to the IOLTA Rule. *Id.* This argument fails for two reasons.

First, that is simply not the claim in this case. Appellants never alleged in the Amended Complaint that MJF chooses the recipients of IOLTA funds, never alleged that any alternative choice of organization that is not adverse to Appellants' interests exists, and, critically, never sought relief seeking to enjoin MJF from choosing organizations that engage in systemic advocacy. *See generally* App. A7-24.

Appellants presumably did not make these claims because they could not. Appellants contend all of the core non-profit legal aid providers in Maine are "left-wing" in their political orientation and therefore adverse to their interests. *Id.* A20;

see also Legal Aid Resources in Maine, State of Maine Judicial Branch, https://www.courts.maine.gov/help/legal/legal-aid.html (last visited August 13, 2025) (listing Maine's core non-profit legal aid providers). MJF merely distributes funds to these legal aid providers pursuant to the IOLTA Rule's requirement that IOLTA funds "provide services that maintain and enhance resources available for access to justice in Maine, including those services that achieve improvements in the administration of justice and provide legal services, education, and assistance to low-income, elderly, or needy clients." Me. Bar R. 6(e)(3). Appellants notably do not allege the existence of any "right-wing" or politically neutral organization that fits the IOLTA Rule's requirements and that MJF has declined to provide with IOLTA funding.

Second, even were that the claim, it would fail as a matter of law because no order against MJF could redress their injury. What Plaintiffs want is to not have their money used for what they call "systemic advocacy." App. A23-24. MJF has no ability to make any choice within the confines of the Rule that would address that concern. It is empowered only to turn over monies to the entities that meet the Rule's criteria. There is no suggestion that it is doing otherwise. Appellants have not alleged, for example, that MJF has any authority to impose restrictions on the use of IOLTA funds. In fact, Appellants have alleged the opposite—the SJC, not MJF, is the body which considers whether or not to impose restrictions on the use

of IOLTA funds. App. A18-19. MJF does not have the power to impose restrictions not authorized by the Rule, especially where the SJC itself considered those very restrictions and declined to impose them.

At its core, this is not a case about anything that MJF does. It is a case about whether the Rule must be different. Appellants have the correct parties for that challenge in the State Appellees. MJF adds nothing and should not have to spend its own resources participating in a case that is not about it.

II. The District Court correctly concluded that the Maine IOLTA program does not compel Appellants' speech in violation of the First Amendment.

MJF adopts in full the arguments set forth by the State Appellees in their brief and incorporates those arguments as if set forth herein.

CONCLUSION

Appellants challenge a rule promulgated and enforced entirely by the State Appellees. MJF—a small non-profit with no enforcement authority over the subject rule—should not be required the bear the costs and distraction of complex litigation over which it has no control. For these reasons and the reasons discussed above, this Court should affirm the decision of the District Court dismissing Appellants' claim against MJF for lack of standing.

DATED: August 18, 2025

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CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), as it contains 5,252 words, excluding the parts of the brief exempted by Fed. R. App. 32(f).

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CERTIFICATE OF SERVICE

I, Gavin G. McCarthy, Esq., hereby certify that on August 18, 2025, I electronically filed the within document with the Clerk of the Court using the CM/ECF system which will send a notification of such filings to all counsel of record.

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No. 25-1324

United States Court of Appeals
for the
First Circuit

E. DAVID WESCOTT, an individual residing in Dedham, County of Hancock, State of Maine; RUSSELL JOHNSON BEAUPAIN, a Maine Limited Liability Company,

Plaintiffs – Appellants,

v.

HON. VALERIE STANFILL, in their Official Capacity as Chief Justice, Maine Supreme Judicial Court; AMY QUINLAN, ESQ., in their Official Capacity as State Court Administrator for the State of Maine, Judicial Branch; MAINE JUSTICE FOUNDATION,

Defendants – Appellees,

MAINE BOARD OF OVERSEERS OF THE BAR,

Defendant.

On Appeal from the United States District Court for the District of Maine
No. 1:24-cv-00286, Hon. Lance E. Walker

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ARGUMENT

I. Rule 6 unconstitutionally compels Plaintiffs' IOLTA participation.

The crux of this case is whether Rule 6 compels Appellants' participation in the IOLTA program. It does.

The State Defendants unabashedly gaslight Appellants, querying aloud why "Mr. Wescott could not have found another attorney" who did not require upfront payment. Stanfill Br. 18-20. That "alternative" to using an IOLTA account is absurd on its face—it is no different from arguing that the plaintiff in *Janus* was not truly compelled to pay the agency fee because, after all, he could have found another job. *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 585 U.S. 878, 889 (2018).

The State Defendants' next argument, however—that Maine Rule of Professional Conduct 1.15(b)(3) not only permits but requires attorneys *not* to use an IOLTA account in certain situations—invites a closer look. Stanfill Br. 21, 32. At first glance, Rule 1.15(b)(3) appears to provide the State Defendants an out by permitting lawyers to opt out of using the IOLTA. The rule states, "Unless the client directs otherwise, when a lawyer or law firm ***reasonably expects*** that client funds ***will*** earn interest or dividends for the client in excess of the costs incurred to secure such income, such funds shall be deposited in a client trust"—*not* in an IOLTA account. Rule 1.15(b)(3) (emphasis added). The catch, however, is that the rule applies only when a law firm *expects* that the retainer *will* generate enough interest

to exceed the costs of maintaining a separate client trust account—and only when that expectation is viewed as "reasonable." Rule 1.15(b)(3) is insufficient to provide an opt-out for Appellants and other similarly situated persons for two reasons.

First, it fails to provide an opt-out where the law firm *does not have an expectation* as to whether the firm will hold funds for long enough to generate sufficient interest to permit the opt-out. Consider an example with simple numbers: assume a law firm takes (as RJB did here) a $2500 retainer and has the option to place the funds in a (non-IOLTA) client trust account bearing 4% simple interest annually. That would amount to $100 in interest per year. Assume the client trust account costs $50 to open but has no ongoing monthly service charge. Rule 1.15(b)(3) would thus permit (and indeed require) a lawyer to use the client trust account rather than the IOLTA if the lawyer "reasonably expect[ed]" to keep the retainer on hand for more than six months (so as to generate enough interest to offset the $50 cost of opening the account and then some).

But what if the lawyer *does not know* whether it will hold the funds for, say, two weeks (during which time it would earn a mere four dollars and change) or for two years (during which time it would earn $200)? Rule 1.15(b)(3) provides *no* opt-out for a lawyer who has *no expectation* of how long a retainer might be held. RJB would prefer to be able to store client funds in non-IOLTA accounts *regardless* of the amount of interest that each retainer might generate during the time it is held.

App. A22. But Rule 6 forbids RJB from doing so. The State Defendants fundamentally misunderstand this point, writing that Appellants' factual allegation that Mr. Wescott could have gained interest from his retainer "can be true only if RJB violated Maine Rule of Professional Conduct 1.15(b)(3) by placing funds that ***would have generated net interest*** in an IOLTA account." Stanfill Br. 32 (emphasis added). What the State Defendants get wrong is that Rule 1.15(b)(3) does not sweep so broadly as to permit an opt-out any time a retainer ***might*** generate net interest. It applies only when the law firm ***reasonably expects*** that it ***will***. The fact that, in this case, Mr. Wescott's retainer would have earned interest in excess of the costs of earning it does not prove that RJB ***expected*** that it would do so. More to the point at the pleading stage, adopting the State Defendants' argument would require this Court to assume, as a factual matter, that RJB *did* in fact have an expectation that Mr. Wescott's retainer would be held long enough to generate net interest.

The State Defendants' argument also elides the distinction between Maine's Rule 1.15(b)(3) and the rule in *Brown v. Legal Foundation of Washington*, which *prohibited* a law firm's IOLTA use when a retainer was "***able*** to make ***any*** net return." 538 U.S. 216, 240 (2003) ("[I]f the funds were able to make any net return, they would not be subject to the IOLTA program.") (emphases added). If Maine's rules so clearly prohibited IOLTA use when there was even the possibility of some net interest, as Washington's apparently do, then Appellants' allegations might be

harder to credit. But at the pleading stage, the Court must credit Appellants' allegations anyhow, and Appellants have amply alleged that there is no practicable alternative to using the IOLTA—and that, if there were, they would do so. App. A22.

Second, the State Defendants ignore that Rule 1.15(b)(3) imposes an external "reasonableness" constraint: it is not enough for a law firm to declare in good faith that the law firm expects to generate net interest from a retainer. Rather, that expectation must be reasonable. Appellants have amply alleged that, because Defendants enforce the rules (meaning Defendants would be the ones determining whether Appellants' decision to opt out of the IOLTA was reasonable), Appellants are compelled into IOLTA participation by the threat of imminent punishment that would accompany Defendants' determination that RJB had flouted Rule 6. App. A22.

In sum, there is no opt-out for people like Mr. Wescott and firms like RJB. RJB's use of the IOLTA is not the result of "RJB's mismanagement of Mr. Wescott's funds," as the State Defendants allege (Stanfill Br. 32), but is instead the direct result of Rule 6's mandate.

As for the remainder of the State Defendants' arguments, *Janus* suffices to foreclose them. *See* Blue Br. 16-19, 30-32. Defendants attempt to distinguish the IOLTA from the agency fees in *Janus*, but both involve the same constitutional evil: forcing individuals to subsidize speech that they oppose.

II. MJF is a proper defendant.

MJF spills much ink assailing what it perceives as errors in Appellants' interpretation of the district court opinion. *See* MJF Br. 9-12 (arguing that Appellants have confused standing with state action). Appellants would argue that it was the *district court*, not Appellants, who confused standing with state action: after all, the district court expressly analogized MJF to such private entities as law firms and banks in trying to articulate why MJF, unlike the State Defendants, was not a proper target of Appellants' constitutional challenge. *See* App. A135.

At bottom, however, the parties appear to agree that the district court viewed MJF as an improper defendant because MJF "do[es] not enforce Rule 6." App. A135. What matters is that the district court was incorrect: MJF *does* exercise administrative and enforcement power in carrying out the IOLTA program. *See* Blue Br. 35-36. MJF decides whether organizations qualify for IOLTA funds, thereby enforcing the program's substantive requirements. *See* Maine Bar Rule 6(c), 6(e). MJF can cut off funding to organizations that don't meet its interpretation of Rule 6's requirements. *See id.* And, through its distribution decisions, MJF enforces Maine's policy choices about which causes deserve support. Blue Br. 36.

MJF responds that it is like the clerk in *Bronson v. Swensen*, 500 F.3d 1099, 1102 (10th Cir. 2007), a mere conduit that "simply receives and distributes money." MJF Br. 15. But that ignores MJF's agency in deciding *who* gets the money. Sure,

MJF "cannot discipline any attorney who fails to comply with the rule," MJF Br. 15. But MJF exercises executive authority as to "the complained-of provision[s]" of the IOLTA—namely, the provisions that direct IOLTA funds to MJF-chosen causes that Appellants do not wish to support. MJF Br. 16 (quoting *Bronson*, 500 F.3d at 1110). MJF next responds that Appellants "try to reinvent their claim" on appeal, acting as though this is "the first time" that Appellants have attacked MJF's role in deciding who receives IOLTA funds. MJF Br. 19. But that is not true. The Amended Complaint alleged, *inter alia*, that (1) MJF receives the IOLTA interest (App. A10), (2) MJF provides "IOLTA-funded grants" to recipient organizations (App. A11-14, A16-17), and (3) the recipient organizations are "selected through an ill-defined process with little or no public visibility or participation, and only limited accountability to assure that funds are spent effectively" (App. A19). And Maine Bar Rule 6(e) (entitled "Maine Justice Foundation") clearly empowers MJF with broad discretion in how it disburses the funds—MJF is no automaton or "conduit" that carries out only ministerial duties. *See, e.g.*, Rule 6(e)(3) ("*Use of IOLTA Funds.* IOLTA funds received and distributed pursuant to this Rule are intended to provide services that maintain and enhance resources available for access to justice in Maine, including those services that achieve improvements in the administration of justice and provide legal services, education, and assistance to low-income, elderly, or needy clients.")

The reasonable inference in Appellants' favor based on Appellants' allegations and the plain text of Rule 6(e) is that MJF is exercising enforcement power in disbursing IOLTA funds. MJF is thus a proper defendant in this case.

III. Defendants' remaining arguments and those of *Amici Curiae* are unavailing.

Appellants' opening brief anticipated and addressed the remaining arguments in Defendants' briefing that are not directly addressed in Sections I and II, *supra*:

- Defendants argue that *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 978 (1st Cir. 1993), remains good law after *Janus*. *See* Stanfill Br. 23-28. But it does not. *See* Blue Br. 24-28.
- Defendants argue that the connection between Appellants' retainer funds and IOLTA organizations' speech is "too attenuated" to raise First Amendment concerns. Stanfill Br. 29-35. But Appellants have adequately alleged that Appellants themselves—the dissenters—reasonably understand the connection between their funds and the IOLTA organizations' messages, which Appellants oppose. *See* Blue Br. 27-28.
- Defendants argue that even if Rule 6 compels Appellants' speech, it survives strict (or alternatively, exacting) scrutiny because it promotes "access to justice." Stanfill Br. 35-42. But such elusive and incoherent goals, regardless of their merit or popularity, are insufficiently

compelling to override fundamental First Amendment freedoms. *See* Blue Br. 28-32.

* * *

Various IOLTA-affiliated non-profit organizations have also tendered a brief of *amici curiae* in this matter.[1] But their arguments provide no rescue to Rule 6. *Amici* argue first that the relief Appellants seek would undermine Maine's IOLTA program. *See Amici* Br. 7-11. But that matters only if "access to justice" is a compelling interest in the first place. It is not. *See* Blue Br. 28-31. And even if it is, Maine can reasonably satisfy that interest by using tax dollars or voluntary contributions instead of a compelled subsidy. *See* Blue Br. 31.[2]

Amici argue next that the release of *cy pres* awards to public-interest organizations has survived First Amendment scrutiny and, thus, so must Rule 6. *See*

[1] As of the filing of this reply, this Court had not yet granted *amici*'s unopposed motion for leave to file the brief, but Appellants nevertheless address the arguments presented therein in anticipation of the Court's grant of such leave.

[2] In the event that the Court agrees that First Amendment scrutiny applies (that is, that Rule 6 compels Appellants' participation in the IOLTA program and thereby compels their speech), reversal is required even if the Court is inclined to believe Defendants' (and *amici*'s) argument that these alternatives such as voluntary contributions would be inadequate. *See* Stanfill Br. 42, *Amici* Br. 17. That is because the presence and viability of less-restrictive alternatives is a factual question inapt for resolution at the pleading stage, and, regardless of whether strict scrutiny or exacting scrutiny applies, it is Defendants who bear the burden on that question. *See Cent. Me. Power Co. v. Me. Comm'n on Governmental Ethics*, No. 24-1265, 2025 U.S. App. LEXIS 17168, *17 (1st Cir. July 11, 2025).

Amici Br. 12. But the *cy pres* context is entirely different: there, no individual beneficiary has a legitimate expectation to the transferred funds in the first place—because, as *amici* state, these transfers occur only "after all individual claims have been satisfied." *Id.* Some courts have upheld such *cy pres* transfers because the challengers had no claim to the funds. *See id.* 13. Other courts have upheld the transfers on the grounds that the objectors could opt out. *See id.* 14. But there is no true opt-out available to Appellants. *See* Section I, *supra*. After all, one of Appellants' sought remedies in their Amended Complaint is simply an injunction against "requiring lawyers to participate in the IOLTA (that is, allow an opt-out provision)." App. A23 (prayer for relief). If Defendants had agreed to provide an opt-out, we would not be here.

Amici conclude by explaining that "IOLTA seeks to 'provide legal services to literally millions of needy Americans'" and painting Maine's program as falling in line with that purpose. *Amici* Br. 16-17 (quoting *Brown*, 538 U.S. at 232); *see Amici Br.* 16-22. But, again, Maine's program goes well beyond providing nonpartisan legal aid to indigent litigants. App. A11-18. If it were not so, we would not be here.

In short, Rule 6 compels Appellants' participation in the IOLTA program. *See* Section I, *supra*. Because it compels their participation, it thereby compels their speech. *See* Blue Br. 27-28. And because it compels their speech, it triggers strict scrutiny, which it cannot survive. *See* Blue Br. 28-32. This Court must reverse.

CONCLUSION

For the foregoing reasons and those set forth in their Opening Brief, Appellants respectfully ask this Court to reverse the district court's dismissal of the Amended Complaint, declare Maine Bar Rule 6 unconstitutional as applied to Appellants, and remand this matter for further proceedings.

Date: August 30, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Fed. R. App. P. 27 and 32 because the countable portion thereof contains 2,324 words and was typed in 14-point Times New Roman font.

Respectfully submitted,

/s/ Kyle Singhal
Kyle Singhal
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CERTIFICATE OF SERVICE

I certify that on August 30, 2025, a copy of the foregoing brief was served upon opposing counsel by electronic filing.

Respectfully submitted,

/s/ Kyle Singhal
Kyle Singhal
Counsel for Appellants

No. 25-1324

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

E. DAVID WESCOTT, an individual residing in Dedham, County of Hancock, State of Maine; RUSSELL JOHNSON BEAUPAIN, a Maine Limited Liability Company,

Plaintiffs-Appellants,

v.

HON. VALERIE STANFILL, in their Official Capacity as Chief Justice, Maine Supreme Judicial Court; AMY QUINLAN, ESQ., in their Official Capacity as State Court Administrator for the State of Maine, Judicial Branch; MAINE JUSTICE FOUNDATION,

***Defendants-Appellees*,**

MAINE BOARD OF OVERSEERS OF THE BAR,

***Defendant*.**

On Appeal from the United States District Court, District of Maine

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF IOLTA PROGRAMS, MASSACHUSETTS IOLTA COMMITTEE, RHODE ISLAND BAR FOUNDATION, AND FUNDACIÓN FONDO DE ACCESO A LA JUSTICIA

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CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1(a), counsel for amici respectfully submits this Corporate Disclosure Statement and certifies that:

1. **Amici have no parent corporations.**
2. **No publicly held corporation owns 10% or more of the stock or ownership interest in amici.**

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INTERESTS OF AMICI[1]

The IOLTA program amici submit this amicus brief to provide the court with a balanced and realistic overview of the role of the IOLTA program in supporting legal aid providers, as well as the law applicable to IOLTA programs.

The National Association of IOLTA Programs (NAIP) is a non-profit, non-partisan membership organization for funders of civil legal aid throughout all United States jurisdictions and the Canadian provinces and territories. NAIP supports the growth and development of Interest on Lawyers Trust Account (IOLTA) programs to increase access to justice for all. NAIP was established in 1986 to enhance legal services and justice for low-income and underserved individuals through the growth and development of IOLTA programs as effective grant-making organizations.

The Massachusetts IOLTA Committee was created in 1985 by the Massachusetts Supreme Judicial Court. It aims to increase

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[1] Under Fed. R. App. P. 29(a)(4), counsel for amici certify that amici and their counsel authored this brief in its entirety and that no party or its counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution to this brief's preparation or submission. All parties consented to the filing of this brief.

access to justice for all residents of the Commonwealth by funding civil legal services programs for people who cannot afford a lawyer and projects to improve the administration of justice. Funds received by the IOLTA Committee are distributed among three charitable entities: the Boston Bar Foundation, the philanthropic arm of the Boston Bar Association; the Massachusetts Bar Foundation, the philanthropic arm of the Massachusetts Bar Association; and the Massachusetts Legal Assistance Corporation. In the 2023-24 grant cycle, these three charities made grants using funds from the IOLTA Committee totaling $19.7 million to 102 organizations and projects across Massachusetts.

The Rhode Island Bar Foundation is a non-profit organization that operates grant programs that will award $1,400,000 in grants in 2025 to legal aid organizations and access to justice programs in Rhode Island. The Foundation receives interest from Rhode Island attorneys' IOLTA accounts, which it manages and disburses through its grant program. Rhode Island's IOLTA program has been successfully operating since 1985.

Fundación Fondo de Acceso a la Justicia (in English, Access to Justice Fund Foundation) is a non-profit organization, created by

law in 2013, that operates a grant program with the purpose of ensuring the availability and effectiveness of civil legal aid for individuals, families and communities with limited economic resources in Puerto Rico. Every year, the Foundation receives between $50,000 and $100,000 in IOLTA funds.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Equal justice under law is not merely a caption on the façade of the Supreme Court. It is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists . . . [I]t is fundamental that justice should be the same, in substance and availability, without regard to economic status." With these words, Justice Lewis Powell succinctly captured the importance of access to justice in the American legal system. But financial limitations prevent many Americans from accessing legal advice. Striving to bring Justice's Powell's aspiration closer to reality, legal aid organizations around the country aim to provide high-quality legal services to underserved populations.

The money to fund these vital organizations must come from somewhere. And a critical source for funding is the Interest on Lawyers Trust Accounts ("IOLTA") program. IOLTA programs permit

lawyers to deposit funds that are nominal in amount or are to be held for a short period of time in pooled, interest-bearing accounts. Interest accrued from these deposits is distributed by state IOLTA programs to fund legal services for low-income residents.

Appellants say that they are filing a constitutional challenge to vindicate their First and Fourteenth Amendment rights against compelled speech. In reality, appellants' claims and the relief they request would undermine Maine's entire IOLTA system. The result would be a significant loss of funds for legal services organizations that provide vital support to the most underserved. The Supreme Court recognizes a "compelling government interest" in ensuring that the poor have access to justice. That interest is at issue here. This Court should affirm the district court.

BACKGROUND

I. A brief history of IOLTA programs

Attorneys often need to hold client funds, whether they are holding a retainer fee or keeping a settlement award in trust. Under the rules of professional conduct, attorneys may not comingle client funds with their own. *See* Model Rules of Professional Conduct 1.15 (a) ("A lawyer shall hold property of clients or third persons

that is in a lawyer's possession in connection with a representation separate from the lawyer's own property."). Before the 1980s, attorneys would often hold these funds in a trust account that pooled the funds of multiple clients. *See* James D. Anderson, *The Future of IOLTA: Solutions to Fifth Amendment Takings Challenges Against IOLTA Programs*, 1999 U. Ill L. Rev. 717, 721 (1999). These accounts were generally checking accounts that allowed the lawyer to have access to the funds on demand. *Id.* Under banking regulations at the time, such accounts could not accrue interest and essentially provided an interest-free loan to banks. *Id.*

In 1980, Congress authorized the creation of Negotiable Order of Withdrawal ("NOW") accounts, which allowed federally insured banks to pay interest on deposits, but only if the interest went to charitable organizations. *See* Hillary A. Webber, *Equal Justice Under the Law: Why IOLTA Programs Do Not Violate the First Amendment*, 53 Am. U. L. Rev. 491, 495 (2003). With this change in banking regulation, states established IOLTA programs to create NOW accounts for client funds. *Id.* Under this program, attorneys who handle small or short-term client funds that will not earn the client net income place the funds into pooled, interest-bearing accounts, with

the interest sent to state IOLTA programs to fund legal aid organizations. American Bar Association, *How Does IOLTA Work?*, https://tinyurl.com/29nc8nms (last visited August 2, 2025).

Although all U.S. jurisdictions have established IOLTA programs, regulations of these programs vary. Webber, *Equal Justice Under the Law*, at 496-97. Forty-seven jurisdictions require attorneys who maintain client trust accounts to participate in IOLTA; four allow attorneys to opt out of IOLTA; and one, the Virgin Islands, allows attorneys to opt into IOLTA.[2] In every U.S. jurisdiction, IOLTA programs provide resources to support critical legal aid for the poor.

II. The function of Maine's IOLTA program

Maine's program is typical of how IOLTA programs function around the nation. *See* Maine Bar Rule 6(a) ("Every lawyer

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[2] American Bar Association, *Status of IOLTA Programs*, https://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs/ (last accessed August 4, 2025). Every jurisdiction that has changed its IOLTA program has moved to a mandatory, rather than an opt-out or voluntary program, suggesting a strong nationwide preference for this IOLTA structure. American Bar Association, *Status of IOLTA Programs*, https://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs/ (last accessed August 4, 2025).

admitted to practice in Maine shall deposit all funds held in trust in this jurisdiction in accordance with Rule 1.15 of the Maine Rules of Professional Conduct in accounts clearly identified as IOLTA accounts in eligible institutions."). The Maine Supreme Judicial Court created the program and entrusted the Maine Justice Foundation ("MJF"), a charitable organization dedicated to promoting access to justice for low-income Mainers, to operate it. Maine Justice Foundation, *IOLTA: Interest on Lawyers' Trust Accounts*, https://justicemaine.org/iolta/ (last visited August 2, 2025). Although MJF supports various charitable organizations, six legal aid organizations receive IOLTA funds. *See* Maine Justice Foundation, *Maine Justice Foundation Grantees*, https://justicemaine.org/wp-content/uploads/Maine-Justice-Foundation-Grantees.pdf (last accessed August 2, 2025).

ARGUMENT

I. The relief sought by appellants would undermine Maine's IOLTA program.

Appellants "seek a declaratory judgment that Rule 6 of the Maine Bar Rules is unconstitutional as currently enforced, a declaratory judgment that IOLTA funds can never be used for certain enumerated purposes, an injunction barring defendants from

enforcing Rule 6 and/or enjoining Defendants from mandating participation in the IOLTA program." Appellants' Br. 3. With respect to the Foundation, they assert that the Foundation uses "IOLTA funds in a manner that causes the funds to subsidize speech on matters of substantial public concern." *Id.* at 36 (citation omitted). Although the broad relief they request includes the elimination of mandatory participation in the IOLTA program, appellants particularly object to interest on client funds being distributed "to organizations that engage in lobbying and advocacy on matters of substantial public concern." *Id.* at 13.

a. Systemic advocacy is part of legal aid providers' core work.

Preventing IOLTA funding recipients from engaging in advocacy would undermine their core work. Appearances before legislative bodies by legal aid providers are contemplated, and regulated by many states, including Maine. *Report of the Judicial Branch IOLTA Working Group*, Majority Report, at 6 (December 2019) (citing Me. R. Prof. Conduct 1.0 (M), Me. R. Prof. Conduct 3.9).

Legislative lobbying is particularly important in the context of legal aid representation, where attorneys often seek to improve clients' access to critical benefits and protections. Imagine, for

instance, an organization that provides survivors of domestic violence with legal support. That organization will commit resources to helping individuals obtain restraining orders or securing access to shelters. The organization may also lobby for laws that make it easier for abuse survivors to obtain restraining orders or make shelters more readily accessible. Doing so aims to improve the situation of all survivors of domestic violence, including their current and future clients. In this way, the legal aid provider can be most efficient in promoting the needs and interests of their underserved clients.

Lobbying efforts of IOLTA-funded organizations also provide useful information to legislators. Legal services organizations funded by IOLTA have years of experience working with underserved communities and understand the legal needs of those communities. The advocacy of these knowledgeable and interested organizations helps to inform legislators as they shape policies. *Report of the Judicial Branch IOLTA Working Group*, Majority Report, 8-9. Preventing IOLTA-funded organizations from engaging in

such advocacy would deprive policymakers of a valuable source of information on the needs of their low-income constituents.

The Maine IOLTA program is intended "to increase access to justice for individuals and families living in poverty."[3] And the Maine Bar sees its IOLTA program as "a critical component of alleviating poverty." *Report of the Judicial Branch IOLTA Working Group*, Majority Report, 7. Systemic advocacy for underserved clients is a central part of the IOLTA program.

b. Appellants' proposed relief threatens IOLTA funding for all aspects of legal aid services.

While seeking an end to all "systemic advocacy," appellants also object to several specific legal aid services that they don't like, including "Medicaid expansion," and "facilitating 'work permits for asylum seekers.'" Appellants' Br. at 3. But providing legal aid services to individual clients includes doing those and other things appellants don't like. IOLTA funding recipients may, for instance, help legal immigrants file applications for U.S. citizenship or assist low-income residents with accessing Medicaid benefits. And while

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[3] National Association of IOLTA Programs, *IOLTA Basics*, https://iolta.org/what-is-iolta/iolta-basics/ (last accessed August 2, 2025).

appellants have sued about activities they find objectionable, other law firms and clients might object to other services that IOLTA recipients provide. For instance, an attorney with strong opposition to the military could object to IOLTA recipients providing services to veterans. A committed libertarian client might object to the provision of any legal aid services about government programs. If appellants can obtain an IOLTA exemption for themselves, that ruling would leave IOLTA funding subject to the veto of the smallest minority of attorneys and their clients. This is not a vindication of appellants' rights: it is the demolition of legal aid funding.

Many attorneys and their clients could object to something that some IOLTA recipient does. And since money is fungible, the interest accrued on their IOLTA accounts might be contributing to that cause. The only fully effective ways of ensuring that no IOLTA funds go to something that some lawyer or client might object to are either to end funding of legal aid programs altogether or to restrict legal aid to some narrow subset of widely approved projects (perhaps even that subject to an ideological veto by lawyers or law firm clients). The latter approach would effectively amount to a mass censorship initiative, undermining the ability of legal aid

organizations to provide deeply needed, if not universally popular, legal services.

c. Courts reject First Amendment compelled speech challenges to *cy pres* awards in class actions.

This is far from the first case where litigants have claimed that a mechanism for funding legal aid infringes the First Amendment rights of persons with an asserted interest in the same funds. The same attack has been made—and repeatedly failed—in class action litigation.

Class action litigation settlements approved by federal district judges commonly include provisions for settlement fund distributions to class members, with undistributed residual funds transferred in "*cy pres*" awards to public interest organizations, including IOLTA plans and legal aid providers. Principles of the Law of Aggregate Litig. § 3.07 cmt. a, (b) ("[M]any courts allow a settlement that directs funds to a third party when funds are left over after all individual claims have been satisfied" especially when further class distributions would be "impossible or unfair."); Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 12:32 (6th ed. 2025) ("[C]ourts in every circuit, and appellate courts in most,

have approved the use of *cy pres* for unclaimed class action awards.").

Plaintiff class members occasionally object to settlement terms, and some objectors have argued that *cy pres* awards are unconstitutional because they violate the First Amendment rights of class members who oppose the activities of the *cy pres* award recipients. These "compelled speech" constitutional objections have all been rejected by district courts and courts of appeals (followed by certiorari petitions denied by the Supreme Court). *See Jones v. Monsanto Co.*, 38 F.4th 693, 699 (8th Cir. 2022) (holding "class members have not been compelled to subsidize speech when residual funds are distributed cy pres" because "residual funds do not belong to class members"), *cert. denied*, 143 S. Ct. 2458 (2023)); *Hyland v. Navient Corp.*, 48 F.4th 110, 122 (2d Cir. 2022) (internal citations omitted) (rejecting objectors' argument that *cy pres* awards compel speech; the settlement did not implicate the First Amendment because the role of the court was to "determine[] whether [the settlement] was fair, reasonable, and adequate" and "[n]othing about the settlement required the court to establish the terms of the agreement.") *cert. denied*, 143 S. Ct. 1747 (2023)). And courts have found

that there is no compelled speech in *cy pres* cases where class members can opt out of the class, much as lawyers can choose to structure their remuneration to avoid depositing funds in IOLTA accounts. *See In re Google Inc. Street View Elec. Commc'ns Litig.*, 21 F.4th 1102, 1118 (9th Cir. 2021) (rejecting objectors' argument that a *cy pres* distribution compels subsidization of speech, holding no compelled speech occurs where class members can opt out), *cert. denied*, 143 S. Ct. 107 (2022)); *Hawes v. Macy's Inc.,* No. 1:17-cv-754, 2023 WL 8811499 (S.D. Ohio Dec. 20, 2023) (ignoring amicus' First Amendment challenge to *cy pres* awards in class settlements but rejecting the proposed settlement on unrelated grounds); *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 621, 624–25 (N.D. Ohio 2016) (rejecting argument that a *cy pres* award compelled class members to subsidize political speech, saying the claim was "short on supporting case law"), *aff'd sub nom. In re Polyurethane Foam Antitrust Litig.*, No. 16-3664 (6th Cir. 2017)); *In re Motor Fuel Temperature Sales Pracs. Litig., No. 07-MD-1840-KHV, 2015 WL 5010048 (D. Kan. Aug. 21, 2015), aff'd, 868 F.3d 1122 (10th Cir. 2017), cert. denied*, 138 S. Ct. 2679 (2018)) (finding that *cy pres* awards do not violate the First Amendment because "class members ha[ve] an

opportunity to opt out of the settlement," meaning "they have not been required to contribute money…" and therefore there was no compelled speech).

Taken together, this body of precedent makes clear that district courts and courts of appeals—with the Supreme Court's refusal to intervene—have rejected compelled speech First Amendment challenges to legal aid funding. There is no basis to treat this compelled speech argument any differently.

II. IOLTA serves a compelling state interest by supporting legal aid programs that provide critical legal services

a. Provision of legal services is a compelling state interest.

The parties here disagree about whether strict or exacting scrutiny applies. Under strict scrutiny, the state must show that a law is "the least restrictive means of achieving a compelling state interest." *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2302 (2025) (citations omitted). Under the "exacting scrutiny" test, a subsidy may only be sustained if it "serve[s] a "compelling state interes[t] . . . that cannot be achieved through means significantly less

restrictive of associational freedoms." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 310 (2012) (citation omitted).

Under either standard, the law at issue must serve a compelling state interest. Appellants rely on the Supreme Court's decision in *Janus* for the proposition that the state cannot establish mandatory funding programs. *See* Appellants' Br. at 16-19. In *Janus*, the Supreme Court was considering whether an Illinois law compelling public employees to subsidize union political activities by paying union dues was constitutional. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 885-86 (2018). In determining that it was not, the Court held that the union respondents had not shown a compelling state interest. *Id.* at 895-97. The Court found that the "risk of 'free riders'" was an insufficient reason to compel subsidization. *Id.* at 897. And while maintaining "labor peace" was a compelling state interest, the Court found no evidence labor peace could be not obtained through less restrictive means. *Id.* at 895-96.

This case concerns a very different interest than those the Court considered in *Janus*. IOLTA seeks to "provid[e] legal services to literally millions of needy Americans." *Brown v. Legal Found. of*

***Washington*, 538 U.S. 216, 232, (2003). And the Supreme Court has already held that this is a "compelling interest" in the Fifth Amendment context. *Id.* Furthermore, as discussed above, the overwhelming reliance of United States jurisdictions on mandatory IOLTA programs demonstrates that those states have found this approach to be the most effective means of running these programs. The relief that appellants seek would jeopardize the function of the Maine IOLTA program. And relying only on alternatives to IOLTA, such as taxpayer-funded aid or funding through bar dues, would only place more burdens on speech, because the IOLTA program is an established and reliable way to provide legal aid funds. Unlike in *Janus*, the IOLTA program is actually the least restrictive means of achieving the state's interest in providing legal services to the poor.**

b. IOLTA is a nonpartisan program designed to fund services for underserved populations, not to advance ideological agendas.

While appellants present IOLTA as a hotbed of leftist social activism, this is a gross misrepresentation, as Maine's program shows. Maine Bar Rule 6(e)(3) states that IOLTA funds "are intended to provide services that maintain and enhance resources available for access to justice in Maine, including those services

that achieve improvements in the administration of justice and provide legal services, education, and assistance to low-income, elderly, or needy clients." Though appellants attempt to present Maine's IOLTA program as systemically biased in favor of left-wing causes, in fact Maine's IOLTA recipients provide legal services to many demographics on a nonpartisan basis, the elderly, rural people and veterans. Recipients of IOLTA funds are simply organizations that aid the poor.

c. Maine IOLTA recipients provide vital legal services that aid low-income and underserved populations.

IOLTA programs fund organizations which provide valuable legal services to at-risk Americans. While each state's IOLTA program operates differently and funds different organizations, Maine's program is representative of how IOLTA functions. Six organizations receive IOLTA funding. A close inspection of those organizations shows how devastating a loss of IOLTA funds would be to low-income Mainers.

Pine Tree Legal Assistance "provide[s] free civil legal assistance in cases where it can make a difference in one's ability to meet one's basic human needs or in enforcing one's basic human rights, including access to housing, food, income, safety, education,

and healthcare."[4] To that end, it provides services ranging from assisting survivors of domestic violence and sexual assault with their civil legal needs,[5] providing tax support to low-income residents,[6] and helping Maine veterans obtain the benefits and support to which they are entitled.[7] Pine Tree Legal Assistance also provides significant assistance in helping Maine tenants avoid eviction. Indeed, from 2019 to 2022, Pine Tree Legal Assistance provided 80% of tenant representation in Maine eviction cases.[8]

The Volunteer Lawyers Project "recruits volunteer lawyers to try to provide free legal information, advice, and representation to Mainers with low incomes with certain civil legal problems."[9] This

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[4] Pine Tree Legal Assistance, *Our Mission and Services*, https://www.ptla.org/our-mission-and-services (last accessed August 3, 2025).

[5] Pine Tree Legal Assistance, *The Family Law and Victim Rights Unit*, https://www.ptla.org/family-law-and-victim-rights-unit (last accessed August 3, 2025).

[6] Pine Tree Legal Assistance, *Low Income Taxpayer Clinic*, https://www.ptla.org/low-income-taxpayer-clinic# (last accessed August 3, 2025).

[7] Pine Tree Legal Assistance, *Military Services Homepage*, https://www.ptla.org/military-services-homepage (last accessed August 3, 2025).

[8] Pine Tree Legal Assistance, *Maine Evictions 2019-2022* (May 12, 2023), https://www.ptla.org/sites/default/files/Eviction%20Report%20May%202023%20Final.pdf (last accessed August 21, 2025).

[9] Volunteer Lawyers Project, *Organization Overview*, https://www.vlp.org/ (last accessed August 3, 2025).

includes providing support with family law cases, appeals of denials of benefits, workers' rights claims, and small claims cases.[10]

Legal Services for Maine Elders works "to provide free, high quality legal services to people who are 60 and older when their basic human needs are at stake and advocate for people facing challenges accessing Medicare benefits."[11] This includes providing legal assistance to older Maine residents facing abuse and financial exploitation, predatory lending, evictions and discharges from long-term care facilities, and appeals of MaineCare[12] denials.[13] In 2023, Legal Services for Maine Elders handled 4,300 cases, nearly half of which were dedicated to securing health and housing benefits for

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[10] Volunteer Lawyers Project, *Need Legal Help?*, https://www.vlp.org/for-those-seeking-legal-assistance (last accessed August 3, 2025).
[11] Legal Services for Maine Elders, *Our Mission and Programs*, https://mainelse.org/content/our-mission-and-programs (last accessed August 3, 2025).
[12] MaineCare is the state equivalent of Medicaid.
[13] Legal Services for Maine Elders, *Legal Help*, https://mainelse.org/content/legal-help (last accessed August 3, 2025).

senior Mainers.[14] Such services are critical for Mainers facing exploitation or bureaucratic impediments to accessing vital services.

Cumberland Legal Aid Clinic (since renamed the Clinics at Maine Law) houses various legal aid clinics established at the University of Maine School of Law.[15] In addition to providing general criminal defense, family law and consumer law services,[16] clinic participants provide legal resources to underserved communities in rural Maine,[17] and offer representation for victims of domestic violence, abuse, and stalking.[18] In fact, in 2024, more than 40% of the clinic's 519 active cases were part of its Protection from Abuse

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[14] Legal Services for Maine Elders, *2023 Report*, https://mainelse.org/sites/default/files/2024-09/2023%20Annual%20Report.pdf (last accessed August 21, 2025).

[15] Maine Law, *Clinics and Centers*, https://mainelaw.maine.edu/academics/clinics-and-centers/ (last accessed August 3, 2025).

[16] Maine Law, *General Practice Clinic*, https://mainelaw.maine.edu/academics/clinics-and-centers/general-practice/ (last accessed August 3, 2025).

[17] Maine Law, *Rural Practice Clinic*, https://mainelaw.maine.edu/academics/clinics-and-centers/rural-practice-clinic/ (last accessed August 3, 2025).

[18] Maine Law, *Protection from Abuse*, https://mainelaw.maine.edu/academics/clinics-and-centers/protection-abuse/ (last accessed August 3, 2025).

Program.[19] The clinic serves the dual purpose of providing law students with invaluable practical experience and offering high-quality legal services to underserved Maine residents.

Maine Equal Justice helps low-income residents access benefits, including scholarship funding, Food Assistance (SNAP), and childcare subsidies.[20]

The Immigrant Legal Advocacy Project "provides a full range of immigration legal services to meet the needs of Maine's diverse immigrant communities."[21] This includes assisting asylum seekers with their claims,[22] assistance with permanent residence and citizenship applications,[23] and support for human trafficking

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[19] University of Maine School of Law, *2024 Annual Report*, at 5, https://digitalcommons.mainelaw.maine.edu/cgi/viewcontent.cgi?article=1018&context=clac-annual-report (last accessed August 21, 2025).

[20] Maine Equal Justice, *Legal Help from Maine Equal Justice*, https://maineequaljustice.org/site/assets/files/4221/legal_help_flyer.pdf (last accessed August 3, 2025).

[21] Immigrant Legal Advocacy Project, *Direct Legal Services*, https://ilapmaine.org/direct-legal-services (last accessed August 3, 2025).

[22] Immigrant Legal Advocacy Project, *Asylum*, https://ilapmaine.org/asylum-program (last accessed August 3, 2025).

[23] Immigrant Legal Advocacy Project, *Permanent Residency and Citizenship*, https://ilapmaine.org/permanent-residency-and-citizenship (last accessed August 3, 2025).

victims.[24] In the process, they assist low-income Maine immigrants seeking to improve their legal status and establish themselves as contributing members of Maine society.

These organizations provide unique services for underserved Maine residents, improving access to the legal system for the populations they serve, which is a "compelling interest," *Brown,* 538 U.S. at 232. Resources for these organizations are limited. If IOLTA is weakened as appellants propose in the lawsuit, these organizations will lose access to a critical source of funding. Depriving legal aid organizations of this funding will cut vital lifelines for low-income people needing legal services.

CONCLUSION

This Court should affirm.

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[24] **Immigrant Legal Advocacy Project, *Relief for Survivors of Domestic Violence, Human Trafficking, and Other Crimes*, https://ilapmaine.org/relief-for-survivors (last accessed August 3, 2025).**

Dated: August 25, 2025

Respectfully submitted,

By: *<u>/s/ Ethan H. Townsend</u>*

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CERTIFICATE OF COMPLIANCE

The counsel below certifies compliance of the foregoing amicus brief with the following requirements of the Federal Rules of Appellate Procedure and the Local Rules of this Court.

1. **This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 4,146 words, including footnotes, but excluding the parts of the brief exempted by Fed. R. App. P. 32(f).**
2. **This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook of 14 points.**

Dated: August 25, 2025 **Respectfully submitted,**

By: *<u>/s/ Ethan H. Townsend</u>*

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2025, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the First Circuit by using the CM/ECF system. Counsel in the case are registered CM/ECF users and such service will be accomplished by the CM/ECF system.

By: *<u>/s/ Ethan H. Townsend</u>*