UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

E. DAVID WESCOTT and RUSSELL JOHNSON BEAUPAIN, Plaintiffs v. HON. VALERIE STANFILL, et al., Defendants.	**1:24-CV-00286-LEW**

MOTION TO DISMISS OF DEFENDANTS CHIEF JUSTICE VALERIE STANFILL, AMY QUINLAN, AND MAINE BOARD OF OVERSEERS OF THE BAR, WITH INCORPORATED MEMORANDUM OF LAW

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants Valerie Stanfill, in her official capacity as Chief Justice of the Maine Supreme Judicial Court; Amy Quinlan, in her official capacity as State Court Administrator for the State of Maine Judicial Branch; and the Maine Board of Overseers of the Bar (collectively, the Maine State Defendants) move to dismiss the claim of Plaintiffs E. David Wescott and Russell Johnson Beaupain (RJB) against them.

Plaintiffs' claim against the Maine State Defendants fails as a matter of law for several reasons. First, Plaintiffs' Section 1983 claim against the Board of Overseers of the Bar is barred by sovereign immunity. Second, given the attenuated connection between Mr. Wescott's money and the speech of the organizations that Plaintiffs challenge, Maine's Interest on Lawyers' Trust Accounts (IOLTA) program does not compel Plaintiffs' subsidization of that speech. Third and finally, even if Plaintiffs' First Amendment rights are implicated, the IOLTA program promotes an important—even compelling—state interest that cannot be achieved through significantly less restrictive means, namely the improvement of access to justice in Maine.

Background[1]

A. IOLTA Program Background

The IOLTA program is not unique to Maine; every State, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands has a version of it.[2] The programs arose roughly forty years ago in response to Congress authorizing federally insured banks to pay interest on a limited category of demand deposits, interest that could be transferred to other entities. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 221 (2003); 12 U.S.C.A. § 1832 (West 2024). Florida developed the first IOLTA program in 1981, *see Brown*, 538 U.S. at 221, and Maine followed suit. The Maine Supreme Judicial Court (SJC) created the IOLTA program via Bar Rule in the mid-1980s,[3] and in 2007, it made participation in the program mandatory.[4] Am. Compl. ¶ 68.

[1] The Background section contains factual allegations from Plaintiffs' Amended Complaint, which are assumed to be true only for purposes of this Motion to Dismiss. *See Cardigan Mtn. Sch. v. New Hampshire Ins. Co.*, 787 F.3d 82, 84 (1st Cir. 2015). The Background section also relies on documents referred to or attached to the Amended Complaint, *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008), documents integral to the Amended Complaint, and other relevant matter that can be judicially noticed, such as public records, *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993).

[2] *See* Comm'n on IOLTA, *Status of IOLTA Programs*, Am. Bar Ass'n, https://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs (last visited Oct. 8, 2024). The Court may take judicial notice of this public webpage, and those cited below, because the uncontroversial propositions for which they are cited are not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *see also, e.g.*, *Piper v. Talbots, Inc.*, 507 F. Supp. 3d 339, 343 (D. Mass. 2020) (taking judicial notice of public business website); *cf. Magoni v. Smith & Lacquercia*, 483 F. App'x 613, 616 (2d Cir. 2012) (summary order) (taking judicial notice of brand of wheelchair given it was confirmed by publicly-available website)

[3] *See IOLTA: Interest on Lawyers Trust Accounts*, Bd. of Overseers of the Bar, https://www.mebaroverseers.org/attorney_services/registration/iolta.html (last visited Oct. 8, 2024).

[4] According to the American Bar Association, in forty-five states, the District of Columbia, and Puerto Rico, IOLTA is mandatory; in five states, lawyers can opt out; and in the U.S. Virgin Islands, lawyers must opt in. *See* Comm'n on IOLTA, *supra* n.2.

With a few exceptions,[5] and at no cost to lawyers or their clients, Maine's IOLTA program requires every lawyer in private practice in the State to deposit funds held in trust for clients in accordance with Maine Rule of Professional Conduct 1.15 and Maine Bar Rule 6. But neither Maine Rule of Professional Conduct 1.15 nor Maine Bar Rule 6 requires *clients* to do anything at all. Nor does either rule require that lawyers take any action with respect to funds that clients have *paid* them, as opposed to funds they hold for their clients.

Further, by rule, only a subset of client funds must be deposited in an IOLTA account, namely 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."[6] Me. R. Prof. Conduct 1.15(b)(4); Me. Bar R. 6(a), (c)(1). The interest generated on IOLTA accounts, in turn, is pooled "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." Me. Bar R. 6(e)(3).

B. Maine Justice Foundation and the Organizations that it Supports

Maine Bar Rule 6 designates the Maine Justice Foundation (MJF) as the recipient of the pooled interest from IOLTA accounts. *See* Am. Compl. ¶¶ 12-13; Me. Bar R. 6(e)(3). MJF is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code

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[5] Exempted attorneys include those who do not have an office within the State of Maine or do not hold any client funds. Me. Bar R. 6(b)(2).

[6] Other client funds must be deposited in accordance with Maine Rule of Professional Conduct 1.15(b)(3), and net interest earned on those accounts is paid to the client.

(501(c)(3) Organization).[7] In 2021, 2022, and 2023, MJF received $882,668, $973,621, and $2,414,929, respectively, in funds from IOLTA accounts. Am. Compl. ¶ 13.

MJF is not authorized simply to use IOLTA funds as it sees fit. Rather, MJF must distribute those funds—after deducting administrative costs—to organizations that serve the IOLTA program's purpose as set forth in Maine Bar Rule 6(e)(3), and report to the SJC on that work each year. *See* Me. Bar R. 6(e). In recent years, MJF has distributed the pooled interest from IOLTA accounts to the following civil legal-aid organizations: Cumberland Legal Aid Clinic, Immigrant Legal Advocacy Project, Legal Services for Maine Elders, Maine Equal Justice, Pine Tree Legal Assistance, and Maine Volunteer Lawyers Project. *See* Am. Compl. ¶¶ 15-59. These organizations—with the exception of the Cumberland Legal Aid Clinic, which is part of the University of Maine School of Law—are 501(c)(3) Organizations[8] that are subject to restrictions on their activities set forth in federal law.[9] 26 U.S.C.A. §§ 501-506 (West 2024).

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[7] *See* I.R.S. Form 990, Me. Just. Found. 1 (2020), available at https://justicemaine.org/wp-content/uploads/2020-IRS-Form-990.pdf. The Court may take judicial notice of the contents of these tax forms because they are matters of public record and their accuracy is not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011); *see also, e.g.*, *Hindu Am. Found., Inc. v. Kish*, No. 2:22-cv-01656-DAD-JDP, 2023 WL 5629296, at *2 (E.D. Cal. Aug. 31, 2023) (taking judicial notice of Form 990).

[8] *See Cumberland Legal Aid Clinic*, Univ. of Me. Sch. of L., https://mainelaw.maine.edu/public-service/clac/ (last visited Oct. 8, 2024); *Financials*, Immigrant Legal Advocacy Project, https://ilapmaine.org/financials (last visited Oct. 8, 2024); *I.R.S. Form 990*, *Legal Servs. for the Elderly* 1 (2023), available at https://pdf.guidestar.org/PDF_Images/2023/010/359/2023-010359131-202422269349301827-9.pdf?_gl=1*1r90ntc*_gcl_au*MTQyNjYyOTk4Ny4xNzI3MzczNjAz*_ga*NjY1MzI0NzczLjE3MjczNzM2MDQ.*_ga_5W8PXYYGBX*MTcyNzM3MzYwMy4xLjEuMTcyNzM3MzcyNi4xNC4wLjA; *Me. Equal Just.*, Me. Equal Just., https://maineequaljustice.org/ (last visited Oct. 8, 2024); *Our Mission and Services*, Pine Tree Legal Assistance, https://www.ptla.org/our-mission-and-services (last visited Sept. 26, 2024); *About*, Me. Volunteer Lawyers Project, https://www.vlp.org/about (last visited Oct. 8, 2024).

[9] *See, e.g.*, 26 U.S.C.A. § 504 (West 2024) (prohibiting 501(c)(3) Organizations from engaging in substantial lobbying or advocacy on behalf of, or in opposition to, a candidate for public office).

Cumberland Legal Aid Clinic is a clinical program located in Portland, Maine.[10] Am. Compl. ¶ 15. The Clinic provides legal services to low-income individuals and immigrants through student attorneys under the supervision of fully licensed attorneys. *Id.* The Clinic received $116,578 from MJF through the IOLTA program in the 2023 fiscal year. Am. Compl. ¶ 17.

The Immigrant Legal Advocacy Project (ILAP) provides legal services to low-income immigrants and advocates for laws and policies affecting immigrants.[11] ILAP has received funding not only from MJF, but also from other individuals and organizations. For example, while it received $111,754 from MJF through the IOLTA program for the 2022 fiscal year, Am. Compl. ¶ 23, that same year it received $1,661,392 in contributions and grants, and it spent $1,505,555 on direct legal services; $282,895 on community education; and $66,596 on what ILAP called "systemic advocacy."[12] ILAP received $251,892 from MJF through the IOLTA program in the 2023 fiscal year. Am. Compl. ¶ 23.

Legal Services for Maine Elders (LSE) provides legal services to individuals over the age of sixty. Am. Compl. ¶ 31. It also participates in legislative advocacy through its full-time Public Policy Advocate. *Id.* ¶ 34. LSE has received funding not only from MJF, but also from other individuals and organizations. For example, while it received $270,627 from MJF through the

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[10] The Cumberland Legal Aid Clinic receives funding from the other sources, including the University of Maine School of Law and the Campaign for Justice. *See* Am. Compl. ¶ 18; *Campaign for Justice*, Campaign for Just., https://www.campaignforjustice.org/ (last visited Oct. 8, 2024).

[11] *See Mission & Values*, Immigrant Legal Advocacy Project, https://ilapmaine.org/about (last visited Oct. 8, 2024).

[12] I.R.S. Form 990, Immigrant Legal Advocacy Project 1-2 (2022), available at https://static1.squarespace.com/static/5af48320e74940b55a6583bb/t/64ee42a669d125554aa67592/1693336230688/ILAP+2022+Form+990+Public+Version+-+No+Sch+B.pdf; *see also* Immigrant Legal Advocacy Project, 2022 Financials & Supporters 3-8 (2022), https://static1.squarespace.com/static/5af48320e74940b55a6583bb/t/66d06ce5bba6943ec378e0fd/1724935405943/2022+ILAP+Financials+%26+Donors_for+web.pdf.

IOLTA program in fiscal year 2023, *id.* ¶ 32, that same year it received $2,824,580 in contributions and grants, and it spent $2,367,530 on legal services, medical care information assistance, outreach, education, public policy, and legislative advocacy.[13]

Maine Equal Justice (MEJ) provides legal services to low-income individuals, advocates for fair public policies, and partners with communities and agencies to those ends. *See* Am. Compl. ¶ 36. It has received funding not only from MJF, but also from other individuals and organizations. For example, while MEJ received $362,224 from MJF through the IOLTA program for the 2023 fiscal year, *id*. ¶ 37, that same year it received $2,580,805 in contributions and grants, and it spent $558,513 on litigation and other advocacy, $1,276,882 on increasing economic opportunity and improving income support, $207,859 on developing strategies to improve access to health care for low-income individuals, and $1,184,979 on other program services.[14]

Pine Tree Legal Assistance (PTLA) provides legal assistance to low-income Mainers, disseminates information to Mainers about their civil legal rights, and offers community legal education.[15] It has received funding not only from MJF, but also from other individuals and organizations. For example, while PTLA received $92,851 from MJF through the IOLTA program for the 2022 fiscal year, *id*. ¶ 49, that same year it received $8,628,855 in contributions and grants,

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[13] I.R.S. Form 990, Legal Servs. for the Elderly 1-2 (2023), available at https://pdf.guidestar.org/PDF_Images/2023/010/359/2023-010359131-202422269349301827-9.pdf?_gl=1*1r90ntc*_gcl_au*MTQyNjYyOTk4Ny4xNzI3MzczNjAz*_ga*NjY1MzI0NzczLjE3MjczNzM2MDQ.*_ga_5W8PXYYGBX*MTcyNzM3MzYwMy4xLjEuMTcyNzM3MzcyNi4xNC4wLjA; *see also LSE's Funding Sources*, Legal Servs. for Me. Elders, https://mainelse.org/content/lses-funding-sources (last visited Oct. 8, 2024).

[14] I.R.S. Form 990, Me. Equal Just. Partners 1, 3, 39 (2023), available at https://maineequaljustice.org/site/assets/files/5168/2408_990_mej_12-31-23_final.pdf; *see also* Me. Equal Just., Financial Report December 31, 2023 & 2022 9 (June 11, 2024), https://maineequaljustice.org/site/assets/files/5170/mej_review_financial_statement_12-31-23_final.pdf.

[15] *See Our Mission and Services*, Pine Tree Legal Assistance, https://www.ptla.org/our-mission-and-services (last visited Oct. 8, 2024).

and it spent $5,952,788 on providing civil legal assistance to low-income individuals, $145,412 on legal referral services, $310,280 on technology support for other organizations, and $220,622 on other technology grants.[16] PTLA received $366,386 from MJF through the IOLTA program in fiscal year 2023. Am. Compl. ¶ 49.

Maine Volunteer Lawyers Project (VLP) engages volunteer attorneys to provide civil legal aid to those who cannot afford it.[17] It has received funding not only from MJF, but also from other individuals and organizations.[18] In fiscal year 2023, VLP received $714,038 from MJF through the IOLTA program. Am. Compl. ¶ 55.

Each of the above-referenced organizations has also received funding from the Campaign for Justice. But that money is entirely separate from the IOLTA program, notwithstanding Plaintiffs' allegations to the contrary. *See* Am. Compl. ¶¶ 18, 24, 33, 38, 50, 56. Specifically, Campaign for Justice funds consist *only* of voluntary donations. *See* Me. Bar R. 6(f) ("As part of its notification to attorneys to file annual registration statements, the Board may invite attorneys to make a voluntary contribution to the Campaign for Justice to assist in the funding of legal services for low income individuals.").

C. Procedural History

In June 2023, Mr. Wescott transmitted a retainer of $2,500 to Plaintiff RJB, a law firm in Bangor, Maine. Am. Compl. ¶¶ 6, 89. RJB deposited that retainer in its IOLTA account, and the interest that it generated was transferred to MJF pursuant to the IOLTA program. *Id.* ¶ 91.

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[16] I.R.S. Form 990, Pine Tree Legal Assistance 1-2, 33 (2022), available at https://ptla.org/sites/default/files/Pine%20Tree%20Legal%202022%20Public%20Disclosure%20990%20Form.pdf.

[17] *See Our Story*, Me. Volunteer Lawyers Project, https://www.vlp.org/about (last visited Oct. 8, 2024).

[18] *See id.*

On August 8, 2024, Plaintiffs filed this suit, alleging under 42 U.S.C. § 1983 that the IOLTA program violates their First and Fourteenth Amendment rights because it compels their subsidization of speech with which they disagree. Compl. ¶¶ 58-74. Plaintiffs filed an Amended Complaint on September 12, 2024, making the same basic allegations.[19] Am. Compl. ¶¶ 80-96.

Plaintiffs' claim rests on the premise that some of the "causes" supported by the IOLTA program through the above-described organizations are, in their view, "morally, ethically, religiously, and politically abhorrent." Am. Compl. ¶ 88. But in their Amended Complaint, Plaintiffs simply list some of the activities of these organizations. They have not identified the specific "causes" or speech with which they disagree, nor have they plausibly alleged that any such speech was supported by interest generated on Mr. Wescott's retainer. Plaintiffs likewise have not defined—or explained what qualifies as—"systemic advocacy," though they repeatedly assail it in their Amended Complaint.

Nonetheless, Plaintiffs seek a declaratory judgment that Maine Bar Rule 6 violates the First and Fourteenth Amendments and that it is unconstitutional for IOLTA funds to be used for "systemic advocacy." *See* Am. Compl. p. 17. Alternatively, Plaintiffs request that this Court enjoin Defendants from requiring participation in IOLTA and direct Defendants to provide notice that IOLTA funds will be used for "systemic advocacy." *Id.* at 17-18.

[19] Plaintiffs do not specify whether they intend to levy a facial or as-applied First Amendment challenge to Maine Bar Rule 6. Based on the allegations of the Amended Complaint, the Maine State Defendants treat Plaintiffs' claims as an as-applied challenge. *See, e.g.*, Am. Compl. ¶¶ 1, 94 (seeking invalidation of Maine Bar Rule 6 "as it is being implemented by" Defendants). Specifically, Plaintiffs appear to take issue with Maine Bar Rule 6 only to the extent that it simultaneously requires IOLTA participation and permits IOLTA funds to be used for "systemic advocacy." *See, e.g.*, Am. Compl. ¶ 76. That said, even if Plaintiffs intend to pursue a facial challenge, it fails for the reasons identified in Parts B and C below. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) (successful First Amendment facial challenge generally requires showing that law has no constitutional application or no plainly legitimate sweep, or that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep" (cleaned up)); *accord Hightower v. City of Boston*, 693 F.3d 61, 78-81 (1st Cir. 2012).

Argument

A motion to dismiss brought under Rule 12(b)(1) tests whether the Court has subject-matter jurisdiction over the claims in a complaint. Plaintiffs have the burden of alleging facts that establish the jurisdictional requirements. *Wal-Mart P.R., Inc. v. Zaragoza-Gomez*, 834 F.3d 110, 116 (1st Cir. 2016).

A motion to dismiss brought under Rule 12(b)(6), by contrast, tests the legal sufficiency of a complaint. A complaint will survive a motion to dismiss under Rule 12(b)(6) only when it alleges "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). When adjudicating such a motion, the Court "take[s] the complaint's well-pleaded facts as true" and "draw[s] all reasonable inferences in the plaintiffs' favor." *Barchock v. CVS Health Corp.*, 886 F.3d 43, 48 (1st Cir. 2018). Although a complaint need not contain detailed factual allegations, the plaintiff must make "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In other words, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Bell Atl. Corp.*, 550 U.S. at 555 & 557); *see also Barchock*, 886 F.3d at 48 ("Well-pleaded facts must be 'non-conclusory' and 'non-speculative.'" (cleaned up)).

A. Plaintiffs' Section 1983 claim against the Board of Overseers of the Bar is barred by sovereign immunity.

The Eleventh Amendment of the United States Constitution "bars a citizen from bringing a federal court action against his or her own State, including instrumentalities of the state, such as state agencies." *Town of Barnstable v. O'Connor*, 786 F.3d 130, 138 (1st Cir. 2015) (cleaned up). "States and their agencies are entitled to sovereign immunity 'regardless of the relief sought.'"

Poirier v. Mass. Dep't of Corr., 558 F.3d 92, 97 (1st Cir. 2009) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)).

The Board of Overseers of the Bar is an "arm of the state" because it is a regulatory board established by the Supreme Judicial Court through the Maine Bar Rules. *See Irizarry-Mora v. Univ. of Puerto Rico*, 647 F.3d 9, 12-13 (1st Cir. 2011) (setting forth "arm-of-the-state" test); *see also* Me. Bar R. 1(a) ("The Board is established as the statewide agency to administer the regulations of lawyers."). Indeed, it is a "quasi-judicial agent of the Court," and the SJC has intended that the Board "be immune from suit." Me. Bar R. 12. It is therefore an arm of the state for purposes of sovereign immunity. *Cf. Johnson v. Bd. of Bar Overseers of Mass.*, 324 F. Supp. 2d 276, 286 (D. Mass. 2004) (Massachusetts Board of Bar Overseers is arm of the State).

Plaintiffs have not alleged that the Board waived its sovereign immunity from Section 1983 claims, and Congress has not abrogated that immunity. *Quern v. Jordan*, 440 U.S. 332, 342-45 (1979); *see also Brait Builders Corp. v. Mass., Div. of Cap. Asset Mgmt.*, 644 F.3d 5, 11 (1st Cir. 2011) (sovereign immunity protects state agency absent waiver or abrogation). Therefore, Plaintiffs' claim against the Board should be dismissed for lack of subject-matter jurisdiction.

B. Plaintiffs fail to plausibly allege sufficient facts to establish that the IOLTA program compels their speech.

Plaintiffs have not plausibly alleged sufficient facts establishing that the IOLTA program compels their speech. For multiple reasons, the IOLTA program does not require Plaintiffs to support IOLTA recipient organizations or their expressive activities.

Initially, though the IOLTA program is mandatory in the sense that all client funds held in trust must be deposited in accordance with Maine Rule of Professional Conduct 1.15 and Maine Bar Rule 6, Plaintiffs could have structured their relationship so as not to be subject to those rules.

Had they agreed to a payment arrangement that did not involve RJB holding funds in trust—e.g., a nonrefundable retainer, a flat fee, or a pay-as-you-go arrangement—then none of Mr. Wescott's money would have had to be deposited in an IOLTA account.[20] *See* Me. Bar R. 6(a) (directing deposit of "all funds *held in trust*" in IOLTA account (emphasis added)). That Plaintiffs voluntarily chose to utilize a traditional retainer arrangement, which triggered the mandates of the IOLTA program, demonstrates that they were not *compelled* by Maine Bar Rule 6 to do anything at all.

But even assuming that Mr. Wescott's funds had to be deposited in an IOLTA account, Plaintiffs' speech still was not compelled. An essential element of any such claim is that the plaintiff was forced to speak. The core decisions in compelled speech cases accordingly involve direct expressive activity like students reciting the pledge of allegiance, *see W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 (1943); a driver including a state's motto on his license plate, *Wooley v. Maynard*, 430 U.S. 705, 713-15 (1977); a crisis pregnancy center displaying information about family planning, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 763-65 (2018); or a baker producing a cake that supports same-sex marriage, *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 629 (2018).

The plaintiff must also demonstrate an impact on their speech in a compelled speech *subsidization* case like this one, albeit with an important caveat. Given that the plaintiff in such a case does not challenge their compelled *direct* speech, but rather speech that results from their monetary support, they must "demonstrate a close association between [their]self and the . . . speech with which [they] disagree[]." *Carroll v. Blinken*, 768 F. Supp. 1030, 1034 (S.D.N.Y. 1991); *accord Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 979 (1st Cir. 1993) ("To affect First Amendment rights, there must be a connection between dissenters and the organization so that

[20] Plaintiffs' conclusory assertion to the contrary, *see* Am. Compl. ¶ 92, should not be credited because it is contradicted by Maine Rule of Professional Conduct 1.15 and Maine Bar Rule 6.

dissenters reasonably understand that they are supporting the message propagated by the recipient organizations."); *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989) ("[T]he right to be free from compelled affirmation of belief presuppose[s] a coerced nexus between the individual and the specific expressive activity."). When that connection is weak, the offensive message is not attributable to the plaintiff, and the First Amendment is not implicated. *See, e.g.*, *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 239 (2000) (Souter, J., concurring) ("Indirectly transmitting a fraction of a student activity fee to an organization with an offensive message is in no sense equivalent to restricting or modifying the message a student wishes to express."); *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring) (concluding that Bar dues did not create "an identification of dues payor and expenditure so intimate as to amount to a 'compelled affirmation'").

Were it otherwise, the First Amendment would have nearly limitless reach in the compelled speech context. Our federal and state tax dollars, for example, are routed to a variety of private speakers who transmit messages with which many may disagree. Subsidized artists may convey political statements; scientists may use state funds to explore the origins of life in the universe; and public prosecutors may adopt controversial legal positions. But no taxpayer could ever plausibly claim that those messages implicate *their* First Amendment rights because the relationship to their subsidy is far too remote. *See Frame*, 885 F.2d at 1132 ("When the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated.").

That is the case here, too. RJB, for its part, has no connection at all to the speech of IOLTA recipient organizations because, as a law firm, it provided no subsidy to those organizations. The funds held in an IOLTA account are not the law firm's funds, but rather funds held by the law firm "on behalf of clients." Me. Bar R. 6(c)(1). The interest earned on IOLTA accounts is therefore not the property of the law firm, but rather that of the client. *See Brown*, 538 U.S. at 235. RJB accordingly has not provided any subsidy and has not been forced to engage in or support any speech. Rather, it has simply maintained an IOLTA account and deposited Mr. Wescott's funds in it, neither of which is expressive activity. RJB's First Amendment claim accordingly fails as a matter of law.

As to Mr. Wescott, his speech has not been compelled, either. This is not an instance of a *direct* contribution to an organization like in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. 878, 886-88, 897 (2018), where workers were required to subsidize a union to represent them, or *Keller v. State Bar of California*, 496 U.S. 1, 4-5 (1990), where attorneys were required to pay dues to a state bar association that in turn engaged in advocacy. Rather, as explained below, the connection between Mr. Wescott and a given IOLTA recipient organization, never mind any particular message conveyed by one of those organizations, is too attenuated to implicate the First Amendment. *See Southworth*, 529 U.S. at 240 (Souter, J., concurring) (recognizing that degree of "connection between the fee payer and offensive speech . . . loomed large in our decisions in the union and bar cases").

Consider the impossibility of tracing Mr. Wescott's money to the expressive activity of IOLTA recipient organizations. He tendered a retainer to RJB, which in turn deposited it in an IOLTA-approved account. *See* Am. Compl. ¶¶ 89-92; *see also* Me. Bar R. 6(c)(1). That account generated interest, which was automatically remitted, on at least a quarterly basis and together with all such other interest generated by IOLTA accounts, to MJF. *See* Me. Bar R. 6(c)(4). Upon receiving IOLTA funds, which amounted to nearly $2.5 million in 2023,[21] MJF allocated a portion

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[21] *See* Me. Just. Found., Annual Financial IOLTA Report (Apr. 8, 2024) at Tab 2, https://justicemaine.org/wp-content/uploads/2023-IOLTA-Annual-Financial-Report.pdf [hereinafter MJF 2023 Report]. The report is incorporated into the Amended Complaint by reference. *See, e.g.*, Am. Compl. ¶ 13 n.1; *Medina-Velazquez v. Hernandez-Gregorat*, 767 F.3d 103, 105 (1st Cir. 2014).

of those funds to offset its own administrative costs, set aside a portion in reserves,[22] and disbursed the remainder to six organizations that provide legal services to those in need in Maine. *See* Me. Bar R. 6(e)(3). Each of those organizations, in turn, deposited the disbursements as they saw fit, potentially intermingling them with money from other sources—private donations, government appropriations, and the like. Finally, in Plaintiffs' telling, each of these six organizations used some portion of the IOLTA funds that they received to engage in expressive activity.

This multi-step process fatally weakens the connection between Mr. Wescott and any particular speech. While Plaintiffs do not clearly identify the specific expressive activity of IOLTA recipient organizations with which they disagree, even if they had, it would be impossible to know whether, and to what degree, interest generated on Mr. Wescott's retainer was used to those ends.[23] That speech therefore is not attributable to him and does not violate his First Amendment rights. *Cf. Rumsfeld v. F. for Acad. & Institutional Rts.*, 547 U.S. 47, 66 (2006) (highlighting dissociation of law school from military recruiters' speech by noting that, before their presence was required, "an observer . . . [would have] no way of knowing whether the law school [was] expressing its disapproval of the military, all the law school's interview rooms [were] full, or the military recruiters decided . . . that they would rather interview someplace else."); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997) (holding that government assessments for industry advertising do not abridge the First Amendment partly because they "do not compel any person to engage in any actual or symbolic speech").

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[22] MJF 2023 Report 5 (explaining that funds set aside for reserves ensure that funds will be available to these organizations should they encounter economically challenging circumstances).

[23] For the reasons identified above, Plaintiffs do not—and indeed cannot—identify the specific advocacy for which IOLTA funds are used. Instead, they simply allege repeatedly, in conclusory fashion, that IOLTA funds are used for "systemic advocacy." Am. Compl. ¶¶ 21, 30 35, 39, 53, 59.

The disconnect between Mr. Wescott and the expressive activity that Plaintiffs challenge—which, again, is at best left to implication in the Amended Complaint—is compounded by the fact that the six IOLTA recipient organizations are not a monolith. By Plaintiffs' admission, each provides legal representation to different groups, advocates for different causes, and ultimately directs their funding in different ways to support their clients. *See* Am. Compl. ¶¶ 15-59. As Justice Souter reasoned in his concurrence in the seminal compelled speech case, *Board of Regents of University of Wisconsin System v. Southworth*, when the government "collect[s] [a] fee that indirectly funds [a] jumble of other speakers' messages," no speech has been compelled. 529 U.S. at 239-40 (Souter, J., concurring). Here, too, no particular message can be isolated from any of these six organizations and attributed to interest that was generated on Mr. Wescott's retainer, such that he has not been compelled to subsidize speech with which he disagrees. *See Carroll*, 768 F. Supp. at 1034-35 (allocation of portion of student activity fee to group a student objected to did not violate First Amendment for lack of "close association").

That said, even if there were a sufficiently direct connection, and interest on Mr. Wescott's retainer was distributed directly to a cause that he found offensive and clearly identified as such, the IOLTA program *still* would not violate his First Amendment rights. Unlike in *Janus* or *Keller*, the allegedly compelled subsidy—here, interest generated by an IOLTA account—is not money that Mr. Wescott would otherwise have pocketed. The funds deposited in IOLTA accounts are only those so "small in amount or held for [such] a short period of time" that they "cannot earn interest or dividends for the client in excess of the costs incurred to secure such income." Me. R. Prof. Conduct 1.15(b)(4); Me. Bar R. 6(a), (c)(1). Thus, but for the IOLTA program, Mr. Wescott's money would not have generated any net interest, such that the IOLTA program's existence has caused him no loss. The Supreme Court of the United States employed similar reasoning in *Brown*, 538 U.S. at 239-40, when it concluded that although a similar IOLTA program effectuated a taking for purposes of the Fifth Amendment, the clients whose funds had been deposited were not entitled to any compensation for use of the interest generated.

Similarly, the IOLTA program does not govern the conduct of Mr. Wescott. It does not require him to do anything at all. That the IOLTA program effectuates a taking under *Brown*, albeit one that does not run afoul of the Fifth Amendment, underscores that it is *government* that is collecting the interest generated by IOLTA accounts, and *government* that is directing the collected funds, here via MJF, to recipient organizations. *Individuals* like Mr. Wescott are not forced by Maine's IOLTA program to use their own money to support such organizations.

These distinctions are significant. A compelled subsidy implicates the First Amendment because it associates an individual with *support* of speech with which they disagree. Thomas Jefferson made clear that he objected to "compel[ling] a man to furnish contributions of money" to support opinions with which he disagreed, A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950), and the Supreme Court has similarly concluded that the First Amendment prohibits forcing individuals to "provide financial support" for a particular message, *Janus*, 585 U.S. at 893. Here, Mr. Wescott has "provided" no "support" at all. He suffered no loss, "gave" nothing, and expressed nothing in support of speech with which he disagrees. Maine Bar Rule 6 does not compel him to do otherwise. *See Wash. Legal Found.*, 993 F.2d at 980 (concluding that the IOLTA program does not compel speech in part because the plaintiffs had not been "compelled . . . to join, affirm, support or subsidize ideological expression of IOLTA recipient organizations in any way").

In short, Plaintiffs were not required to choose a payment arrangement that triggered IOLTA participation, and they are in any event insufficiently associated with the expressive activity of the six organizations that receive IOLTA funds. Plaintiffs' speech has not been compelled, and the IOLTA program does not violate their First Amendment rights.

C. Even if the IOLTA program compels Plaintiffs' speech, it survives First Amendment scrutiny.

Plaintiffs' challenge to the IOLTA program is meritless for an additional reason. Even if it compels their speech, the program supports access to justice in Maine, a compelling state interest that cannot be achieved through significantly less restrictive means. *See, e.g.*, *Gaspee Project v. Mederos*, 13 F.4th 79, 82-83, 95-96 (1st Cir. 2021) (affirming dismissal of the plaintiff's First Amendment claim because Rhode Island's Independent Expenditures and Electioneering Communications for Elections Act survived exacting scrutiny). The IOLTA program therefore passes constitutional muster.

When assessing the constitutionality of compelled support or subsidization of an organization, courts generally apply "exacting" scrutiny. *See, e.g.*, *Janus*, 585 U.S. at 894-95; *United States v. United Foods, Inc.*, 533 U.S. 405, 413-14 (2001). To satisfy exacting scrutiny, a compelled subsidy must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Janus*, 585 U.S. at 894. The compelling state interest must be sufficiently neutral, *Wooley*, 430 U.S. at 717, and the subsidy must be disbursed in a neutral way, *Southworth*, 529 U.S. at 233-34.

Beginning with the state's interest in a mandatory IOLTA program—namely, to improve access to justice in Maine, *see* Me. Bar R. 6(e)(3); *see also* Report of the Judicial Branch IOLTA Working Group 7 (December 2019) [hereinafter IOLTA Working Group] [24]—such an interest is plainly compelling. In *Brown v. Legal Foundation of Washington*, when ruling that the State of Washington's IOLTA program did not effectuate an unconstitutional taking, the Court determined that "[e]ven if there may be occasional misuses of IOLTA funds, the overall, dramatic success of

[24] The report and the statements of nonconcurrence are incorporated into the Amended Complaint by reference. *See* Am. Compl. ¶¶ 62-64, 66; *Medina-Velazquez*, 767 F.3d at 105. Because the report and the statements of nonconcurrence are not easily accessible online, the Maine State Defendants have attached it to their Motion as Exhibit A.

these programs [serves a] *compelling interest* in providing legal services to literally millions of needy Americans." 538 U.S. at 231-32 (emphasis added). The Supreme Court drew a similar conclusion in *Keller v. State Bar of California*, when it upheld forced bar membership dues over a First Amendment challenge in part because states have a strong interest "in regulating the legal profession and improving the quality of legal services." *Keller*, 496 U.S. at 13-14; *accord File v. Martin*, 33 F.4th 385, 391-92 (7th Cir. 2022); *Schell v. Chief Just. & Justs. of Okla. Sup. Ct.*, 11 F.4th 1178, 1186-95 (10th Cir. 2021); *Taylor v. Buchanan*, 4 F.4th 406, 407-10 (6th Cir. 2021).

The IOLTA program is likewise sufficiently neutral. While Plaintiffs object to the six IOLTA recipient organizations as allegedly "uniformly left-leaning," Am. Compl. ¶ 74, and levy generalized objections to how these organizations are selected, *id.* ¶ 78, they have not alleged with specificity how the program reflects viewpoint discrimination. The applicable Maine Bar Rule is neutral. *See* Me. Bar R. 6. Plaintiffs likewise concede that the organizations collectively provide services to a diverse set of individuals in need in Maine, *see, e.g.*, Am. Compl. ¶¶ 15, 31, 36, 51, and they have not identified a single organization that they believe has been unfairly excluded from the IOLTA program. The mere fact that Plaintiffs disagree with some unidentified portion of the speech of the six IOLTA recipient organizations does not undermine the neutrality of the IOLTA program. *See Southworth*, 529 U.S. at 232 (noting, in the context of concluding that a student activity fee passed constitutional scrutiny, that "[i]t is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to their personal beliefs").

Maine's IOLTA program also undoubtedly serves its stated interest in improving access to justice. It provides a reliable source of funding to legal services organizations to fill gaps in Maine's justice system, and it has done so to great effect for decades. *See* IOLTA Working Group 2-3, 7, 9-10 (describing magnitude and importance of IOLTA disbursements); *see also Keller*, 496 U.S. at 13-14 (approving use of mandatory bar funds for purposes "germane" to the State's interest); *Lathrop v. Donahue*, 367 U.S. 820, 843 (1961) ("[I]n order to further the State's legitimate interests in raising the quality of professional services, [the State] may constitutionally require that the costs of improving the [legal] profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the [State Bar] created to attain the objective also engages in some legislative activity."); *McDonald v. Longley*, 4 F.4th 229, 250 (5th Cir. 2021) (use of mandatory state bar dues to provide legal services for the poor is "germane to both regulating the legal profession and improving the quality of legal services").

Further, while each of the six IOLTA recipient organizations provides *direct* legal services to their clients, the other legal services that they provide—which may be what Plaintiffs refer to as "systemic advocacy"—are equally essential to advancing the State's interest. Pursuing a client's interests self-evidently can, for example, require work before multiple branches of government. And when multiple clients present the same concerns, the most efficient way to address them may not necessarily be through litigation on behalf of individual clients, but rather by advocacy for legislative or administrative changes. To that end, ILAP may push for improvements to immigration courts; MEJ may seek enhancements in access to housing; and PTLA may work to secure public benefits for groups of clients.

For this reason, there is no bright line between direct client representation and what Plaintiffs appear to refer to as "systemic advocacy." Work beyond direct representation is an integral part of the legal services that IOLTA recipient organizations provide to clients and illustrates the broad range of ways that they advance the IOLTA program's goal of increasing access to justice in Maine. *See* IOLTA Working Group 6-10 (explaining how legislative lobbying enabled by IOLTA is key to client representation and promoting access to justice).

Finally, the State's goal of improving access to justice is not achievable through means significantly less restrictive of associational freedoms—assuming, for argument's sake, that associational freedoms are restricted by the IOLTA program at all. By relying solely on interest generated from client funds that would not exist absent the IOLTA program, the program operates by a means far less restrictive than direct fees or taxes, as were at issue in *Janus*. Further, unlike in *Janus*, where the Supreme Court concluded that "labor peace" could be achieved through means less restrictive than agency fees, *see* 585 U.S. at 895-96, IOLTA recipient organizations would not be able to provide a similar level of legal services absent IOLTA funding, or through a merely voluntary program, *see, e.g.*, *Wash. Legal Found. v. Texas Equal Access to Just. Found.*, 270 F.3d 180, 183-84 (5th Cir. 2001) (explaining that when the IOLTA program was voluntary in Texas it generated $1 million annually as opposed to over $5 million annually when the program became mandatory); *cf.* IOLTA Working Group 10 (describing reliance on IOLTA for general operating funds). And, as explained above, restricting the advocacy activity of IOLTA recipient organizations (beyond the degree to which they are already restricted by their status as 501(c)(3) Organizations) would significantly hinder their ability to serve their clients and, more broadly, improve access to justice in Maine.

The IOLTA program accordingly withstands exacting First Amendment scrutiny.

Conclusion

The Maine State Defendants respectfully request that the Court dismiss the claim against them in Plaintiffs' Amended Complaint and enter judgment in their favor.

Dated: October 15, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2024, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all registered participants as identified in the CM/ECF electronic filing system for this matter.

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EXHIBIT A

Report of the Judicial Branch IOLTA Working Group

December 2019

The IOLTA Judicial Branch Working Group

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Member, Maine State Senate

Hon. Barbara A. Cardone
Member, Maine House of Representatives

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The Majority Report[1]

I. Background

A. IOLTA in Maine

In Maine, an IOLTA account is defined as a "pooled trust account earning interest or dividends . . . in which a lawyer holds funds on behalf of client(s), which funds are so small in amount or held for such 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." Maine Bar Rule 6(b)(1). As is true in 45 other states, Maine's IOLTA program is mandatory, meaning all attorneys must participate.[2]

The Maine Justice Foundation is responsible for distributing IOLTA funds. Me. Bar. Rule 6(e). In recent years, the Maine Justice Foundation has distributed IOLTA funds to six providers, which are commonly referred to as Maine's "core" non-profit providers of civil legal aid: Cumberland Legal Aid Clinic ("CLAC"), a clinical program at the University of Maine School of Law; Immigrant Legal Advocacy Project ("ILAP"), Maine's only state-wide immigration legal services organization; Legal Services for the Elderly ("LSE"), a state-wide legal service provider for disadvantaged Mainers over the age of 60; Maine Equal Justice ("MEJ"), a civil legal aid organization focused on systemic advocacy for its low-income clients using an array of tools, including legislative and administrative advocacy and impact litigation; Pine Tree Legal Assistance ("PTLA"), a state-wide civil legal service provider; and the Volunteer Lawyers Project ("VLP"), which provides legal services through attorney volunteers.

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[1] Eight of the ten members of the Working Group join in the majority report. Judge Clifford and Attorney Smith do not join in the majority report. Their written comments are appended to this report.

[2] *See* Maine Bar Rule 1.15; *see also* ABA, "Status of IOLTA Programs," Apr. 13, 2017, www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs/.

Because interest rates have been low over the past decade, IOLTA distributions have been modest. In FY 2018 and FY 2019, $444,000 and $600,000 were distributed to these six entities.[3]

The sole guidance provided by Maine Bar Rule 6 is 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." Me. Bar Rule 6(e)(3). At present, IOLTA funds are otherwise unrestricted.

B. The Use of IOLTA Funds for Legislative Lobbying in Maine

Three of the providers who receive IOLTA funds currently engage in some amount of legislative lobbying, in addition to their direct services work: ILAP, MEJ, and LSE.[4] Together, these three entities received approximately 42.5% of Maine's IOLTA funds over FYs 2018 and 2019.

The legislative lobbying of these organizations takes different forms. Employees of these organizations have testified before federal and state legislative bodies, both on behalf of clients and at the request of legislators. They have also worked on ballot measures, although, to our knowledge, none has used IOLTA funds for ballot measure lobbying activity.

C. The Formation of the Judicial Branch IOLTA Working Group

On June 27, 2016, the Maine Supreme Judicial Court promulgated a proposed amendment to Rule 6 that would have prohibited IOLTA funds from being spent on, *inter alia*, legislative

[3] By contrast, in FY 2007, Maine's IOLTA revenue exceeded $1.6 million.

[4] PTLA is funded by the Legal Services Corporation, and is therefore barred by federal law from doing any legislative lobbying. 42 U.S.C. § 2996e(c).

lobbying and political candidate advocacy.[5] In addition, the proposed amended Rule 6 limited the use of IOLTA funds for the Maine Justice Foundation's administrative costs.

Ultimately, after reviewing comments from members of the Maine Bar and other interested parties, the Court issued a final amended Rule 6. The amended Rule 6, promulgated on June 27, 2019, included new reporting and requirements applicable to the Maine Justice Foundation, as well as a ceiling on the percentage of IOLTA funds the Maine Justice Foundation was permitted to use on administrative costs. However, the Court declined—at least at that time—to include any amendments to Rule 6 concerning the use of IOLTA funds by IOLTA beneficiaries.

On July 18, 2019, Chief Justice Leigh Saufley issued a directive forming the Judicial Branch IOLTA Working Group ("the Working Group"). Specifically, the Chief Justice asked this Working Group "to obtain broad-based stakeholder input and analysis of a recent proposal to prohibit the use of court-mandated IOLTA funds for legislative lobbying and political candidate advocacy."[6]

Thereafter, the Working Group undertook this research and analysis as directed. Members of the Working group met in person monthly from August through October 2019; and

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[5] *See* "State of Maine Supreme Judicial Court Proposed Amendment to Maine Bar Rules," available at https://www.courts.maine.gov/rules_adminorders/rules/proposed/2019-05-08_bar/m_bar_r_proposed_amends_2019-05-08.pdf

[6] The Maine Supreme Judicial Court's Proposed Amendment to the Maine Bar Rules included additional restrictions on the spending of IOLTA funds "for political or ideological activities," including, *inter alia*, "supporting or opposing ballot initiatives or referenda" and "voter registration, voter education, voter signature gathering, or get-out-the-vote actions." However, the Court's July 18, 2019 directive unequivocally directs this Committee to limit its analysis to a narrower rule precluding "the use of court-mandated IOLTA funds for legislative lobbying and political candidate advocacy." Likewise, the "Background to IOLTA Rule Amendment" accompanying the June 27, 2016 amendment to Maine Bar Rule 6, explicitly circumscribes the "the scope of consideration for the working group," "emphasiz[ing] that any potential limitation would apply only to the lobbying generally understood to be legislative and candidate-based lobbying and not to the variety of systemic advocacy that includes litigation or administrative advocacy."

met by conference telephone in November; and communicated throughout this period and subsequently by email exchange.

II. Political Candidate Advocacy Is Illegal Under Federal Law

The first question with which this Working Group was tasked—whether the Court should prohibit the use of IOLTA funds for political candidate advocacy—is easily resolved. Under federal law, charitable corporations exempt from taxation under 26 U.S.C. § 501(c)(3) cannot "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3); *see also Citizens Union of N.Y. v. AG of N.Y.*, No. 16 cv 9592 (DLC), 2019 U.S. Dist. LEXIS 169438, at *8 (S.D.N.Y. Sep. 30, 2019) ("A 501(c)(3) may not participate in political campaigns.").

All of the organizations to which the Maine Justice Foundation distributes, and has distributed, IOLTA funds are 501(c)(3) organizations. Accordingly, under federal law, all organizations that receive IOLTA funds are prohibited from taking part in political candidate advocacy.

III. Legislative Lobbying

This Working Group was next asked to examine whether legal service providers should be permitted to use IOLTA funds for legislative lobbying. We have concluded that a prohibition on using IOLTA funds for legislative lobbying would be ill-advised. Below we set forth (A) some of the reasons why we believe it is appropriate to continue to allow IOLTA funds to be used for legislative lobbying, and (B) our responses to some of the common criticisms against the use of IOLTA funds for legislative lobbying.

A. Reasons to Continue Allowing Lobbying to Be Funded with IOLTA Funds

1. Legislative lobbying constitutes legal work

At the outset, it is important to note that, when performed by an attorney, legislative lobbying constitutes the practice of law. Indeed, the Maine Rules of Professional Conduct specifically contemplate—and regulate—the appearance of attorneys before legislative bodies. *See* Me. R. Prof. Conduct 1.0 (M) (defining "tribunal" as including, among other things, "a legislative body"); Me. R. Prof. Conduct 3.9 ("A lawyer representing a client before a legislative body . . . in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions" set forth in the Maine Rules of Professional Conduct); *see also* Me. R. Prof. Conduct 3.9, comment 2 (explaining that "legislatures . . . have a right to expect lawyers to deal with them as they deal with courts").

Lawyers are required to represent their clients competently and zealously. Where competent and zealous representation requires legislative lobbying, we see no reason to foreclose the use of IOLTA funds for the purpose. Indeed, to the extent that a restriction on the use of IOLTA funds for the provision of certain categories of legal services were to affect the nature and quality of the representation provided by legal service providers, such a restriction would arguably compel legal service providers to violate the spirit, if not the letter, of the Maine Rules of Professional Conduct. *See, e.g.*, Me. R. Prof. Conduct 5.4(c). ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.")

Because legislative lobbying is part of the practice of law, attempts to curtail legislative lobbying by legal aid providers undermine a central mission of legal services: to provide equal access to justice. As Retired Justices Daniel Wathen, Howard Dana, Jr., and Warren Silver noted in their comment regarding the proposed amendments to Rule 6, by limiting the ability of legal service providers to lobby but "leav[ing] those methods available to others, the system [would] tilt[] in the direction of 'justice for some,' not all . . . . Such a tilt undermines public confidence in the legal system, threatening the integrity of civil society as well as the best interests of those with the least."[7]

2. Legislative lobbying is consistent with the purpose of IOLTA

The purpose of IOLTA funds is to provide much-needed support to Maine's legal service providers. Importantly, it has been long understood by the Maine Bar that the provision of legal services is not an end in and of itself. Rather, the provision of legal aid is a critical component of alleviating poverty, an epidemic that is malignant to widespread civil participation in, and belief in, civil society.

For example, in 1990, the 50-member Maine Commission on Legal Needs—chaired by Senator Edmund Muskie[8]—issued a report ("the Muskie Commission Report") containing "recommendations for action to establish equal access to justice for all Maine citizens."[9] Because the Muskie Commission Report is widely considered "the touchstone for all future efforts to

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[7] Comment from Daniel Wathen, Howard H. Dana, Jr., and Warren Silver, submitted May 29, 2019.
[8] Other prominent members of this commission included,, among others, Governor John R. McKernan, Chief Justice Vincent L. McKusick, Judge Frank M. Coffin, then-attorney Howard H. Dana, Jr.
[9] Report of the Maine Commission on Legal Needs: An Action Plan for the 1990's (May 1, 1990) ("The Muskie Commission Report"), at 1.

improve access to justice in Maine," its framing of the role of legal services is worth considering.[10]

By its plain language, that report saw itself not simply as investigating the pathways to expand access to legal services to Maine's poor, but as "increas[ing] the capacity of the poor under the present system to deal with poverty." *Id.* at 2. Thus, the Muskie Commission Report rejected the notion that legal service providers should focus solely, or even primarily, on "securing the basic necessities of existence for the poor," instead emphasizing the importance of **increasing** the "system effort to direct resources to bring about political and economic changes that would address the underlying causes and broad social effects of poverty."[11] Among other things, the Maine Commission recommended increasing the ability of legal service providers to effect "systemic change" through "legislative advocacy."[12]

3. Legislative lobbying is useful to the Legislature

The "nature of our adversarial system of justice" is "premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal quotation marks omitted). As in the adjudicative process, advocacy of opposing interest groups plays a critical role in the formation of legislation. Indeed, evidence suggests that lobbyists have increased power in states where the legislators serve part-time, as well as in states with term limits.[13] Maine has both.

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[10] Calien Lewis, "How Volunteers Saved Legal Aid in the 1990s," *Maine Policy Review* (2002), at 44; *see also* Hon. Kermit V. Lipez, "Reflections of an Access to Justice Chair," *Maine Lew Review* (2010), at 590 n.13 (noting that "the 'Muskie Commission Report' is a critical document in the history of legal services in Maine").
[11] The Muskie Commission Report at 7.
[12] *Id.*
[13] *See, e.g.,* Gary Moncrief and Joel A. Thompson, "Lobbyists' views on term limits," *Spectrum: The Journal of State Government* (Fall 2001) at 14 (describing a survey wherein a "substantial majority of the lobbyists perceive that interest groups gained influence" after term limits were implemented); Steffen W. Schmidt *et al.*, *American Government and Politics Today – Texas Edition, 2011-2012* (2012), at 817

As is underscored by the written comments of several legislators—and as was underscored to us by the legislator-members of our Working Group—legislation is shaped, at least in part, by the advocacy of interested parties.[14] It stands to reason that the legislator will be better equipped to reach the best result when a range of different viewpoints are heard from on a given issue.

4. The scarcity of resources for legal aid

In Maine, as in the rest of the country, there are insufficient funds to ensure representation for indigent persons in all civil cases.[15] That was so even when IOLTA raised substantially more funds than it does now and remains true today.

Groups commissioned to examine the shortage of legal aid providers in Maine have long understood that legislative lobbying plays a critical and cost-effective role in protecting the rights of indigent clients. For example, in 1993, the Commission to Study the Future of Maine's Courts—chaired by Hon. Harriet P. Henry—issued a report highlighting the "inadequate funding" of legal services in Maine, and underscoring that "[p]ublic advocacy is an important aspect of [indigent] legal services work as it may result in programmatic changes more

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(explaining that the time constraints of a part-term legislature tend to make legislators more reliant on lobbyists).

[14] *See, e.g.*, Comment from Representative Andrew M. Gattine, submitted May 29, 2019 ("Just as is true in courts, we find in the State House that skilled delivery of all parties' positions by trained advocates improves the process. Yet, again just as in the courts, if one side in the conversation is unrepresented or underrepresented, fair consideration of all interests, and a just resolution of competing objectives, may prove elusive."); Comment from Representative Barbara Cardone, submitted May 28, 2019 ("Just as judges rely on attorneys in the courtroom, legislators rely on lobbying for the clear articulation of legal arguments and an understanding of the policies underlying proposed bills.").

[15] *See, e.g.*, Justice Action Group, "Justice For All: A Report of the Justice Action Group: Statewide Access to Justice Planning Initiative: Executive Summary" (Oct. 10, 2007), at 3 (noting that "[s]tudies in Maine and nationally consistently show that roughly 75% of the litigants in the civil justice system are not represented by counsel. Virtually all of these individuals are unable to pay for an attorney or to obtain assistance from already overburdened legal aid providers and pro bono attorneys").

economically than case-by-case litigation."[16] The American Bar Association has reached a similar conclusion.[17]

We continue to believe that, particularly given the chronic dearth of funds for indigent legal services, Maine's legal service providers should be encouraged to use legislative advocacy as a cost-effective tool to advocate for systemic change for their clients.

5. General operating funds are critical to the health of legal aid providers

Documentation provided to this Working Group by the providers demonstrates that a substantial amount of their funds is restricted. For example, in 2018, only 23% of MEJ's funds were unrestricted, and only 10.5% of LSE's funds were unrestricted in 2019. Unlike many other funding sources that legal aid organizations rely on, IOLTA funds are unrestricted. Indeed, a substantial portion of LSE and MEJ's nonrestricted funds come from IOLTA.[18]

General operating funds enable nonprofit organizations like the legal aid providers to sustain their day-to-day operations. These funds also enable nonprofits to build a strong and sustainable infrastructure to provide the programs and services that will have the greatest impact. The legal aid providers have come to rely on IOLTA as relatively unrestricted general operating support to sustain day-to-day operations. Adding restrictions on what IOLTA cannot be used for will add additional administrative and accounting burden.

6. Federal law ensures that lobbying does not become the primary purpose of legal aid providers

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[16] The Report of the Commission to Study the Future of Maine's Courts (Feb. 28, 1993) at 37.
[17] The American Bar Association's Standards of the Provision of Legal Aid (2006), Standard 3.2, ("Such advocacy can be a more efficient way to address important issues than costly and complicated litigation that challenges or seeks to interpret an adverse statute, appropriation, rule, regulation or policy after it is adopted.")
[18] According to data provided by the legal service providers, in 2019, LSE had $206,752 in non-restricted funs, about 38 percent of which ($78,000) came from IOLTA. In 2018, MEJ had $273,532 in non-restricted funds, approximately 28 percent of which ($77,256) came from IOLTA.

All six of the providers receiving Maine IOLTA funding are 501(c)(3) non-profit organizations. Federal law provides a safe harbor for modest levels of lobbying by 501(c)(3) organizations, while strictly limiting the amount of lobbying in which such organizations may engage. Specifically, 501(c)(3) organizations risk losing their tax-exempt status if "a substantial part of the activities of such organization consists . . . attempting, to influence legislation." 26 U.S.C. § 501(h)(1).[19] This provision reflects an attempt of the I.R.S. and Congress to balance the federal government's legitimate interest in preventing tax exempt organizations from focusing primarily on lobbying with the concern that an absolute ban on lobbying by 501(c)(3) organizations would preclude non-profits from being involved in the process of policy-making.[20]

We believe that the balance struck by federal law for non-profits is suitable for Maine's legal aid providers as well. For the reasons stated above, we believe that, as with other tax-exempt non-profits, there is value in legal aid providers being involved in the process of law making. At the same time, federal law provides an assurance that, while certain IOLTA providers may engage in legislative lobbying, legislative lobbying will not become central to the work of Maine's legal aid providers.

7. Maine's IOLTA rule, as currently written, is not an outlier

Although we do not have access to data on every other state's IOLTA program, we have reason to believe that the vast majority of states do not prohibit the use of IOLTA funds for legislative lobbying. A survey conducted by the Maine Justice Foundation in 2018 received responses from 33 other states. Over 70% of the respondents indicated that their states had "no laws or rules restricting the use of IOLTA dollars at all or other than the fundamental

[19]Under the "expenditure test," a 501(c)(3) organization's lobbying ceiling is determined by the organization's exempt purpose expenditures. Organizations that expend less than $500,000 can spend no more than 20% of their exempt purpose expenditures on lobbying. 26 U.S.C. § 4911(c)(2).
[20] Department of the Treasury, *IRMs 7.25: Exempt Organizations Determinations Manual* (2001), at 124

requirement to support legal aid."[21] Moreover, of the states that granted funds to legal aid organizations that engage in systemic advocacy, less than 20% of respondents "did not allow IOLTA funds to be used for lobbying."[22]

B. Responses to Arguments for a Ban on Legal Lobbying

Most of the comments submitted to the Maine Supreme Judicial Court opposed the proposed amendments to Rule 6. However, there were a handful of comments supporting the Proposed Amended Rule 6.[23] Other arguments in support of a restriction on legislative lobbying with IOTLA funds were raised during meetings of this Working Group. Many of the concerns raised about the use of IOLTA funds for legislative lobbying were substantive. Below we highlight the central arguments in support of the ban on the use of IOLTA funds for legislative lobbying, as we understand them, and our reasoning as to why we find ultimately find them unconvincing.

1. Allowing IOLTA funds to go to legislative lobbying "is not different than forcing union members to support the political desires of their leaders"

One argument set forth in the comments—and in at least one of the statements in non-concurrence appended to this report—is that the use of IOLTA funds for legislative lobbying constitutes compelled speech. Presumably, this argument stems from the United States Supreme Court's recent decision in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). There, the

[21] Maine Justice Foundation, "An Examination of Maine's IOLTA Program (Interest on Lawyers Trust Account)," Oct. 2016, at 6.
[22] *Id.*
[23] It is worth highlighting the apparent magnitude of the opposition to a curtailment of IOLTA funds within our bar. By our count, the Court received 37 comments regarding the proposed rule, mostly from Maine attorneys, judges, state legislators, and other interested parties. We counted four comments—each submitted by an individual attorney—written in support of the proposed ban on the use of IOLTA funds for legislative lobbying and other types of systemic advocacy. Almost all of the other comments opposed the rule. Several of the comments in opposition to the rule were submitted by multiple Maine attorneys. One comment in opposition was submitted on behalf of 601 individuals, most of whom are Maine attorneys.

Supreme Court reiterated, and expanded, the long-standing principle that the "compelled funding of the speech of other private speakers or groups" runs afoul of the First Amendment. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 309 (2012).

We see two problems with this line of reasoning.

First, by definition, IOLTA funds in Maine has **no** value to individual clients. *See* Maine Bar Rule 6(b)(1) (defining an IOLTA account as a "pooled trust account earning interest or dividends . . . in which a lawyer holds funds on behalf of client(s), **which funds are so small in amount or held for such 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**"). In the seminal decision on the constitutionality of IOLTA programs, the Supreme Court held that, while "the interest earned in the IOLTA accounts 'is the "private property" of the owner of the principal,'" *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003) (quoting *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172 (1998), clients whose funds were pooled in IOLTA accounts had, by definition, suffered no loss justifying compensation under the takings clause. *Id.* at 240 ("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.").

Because the funds contributed to IOLTA cannot be traced back to clients, the use of IOLTA funds for legislative lobbying cannot constitute compelled speech.

Second, if the Maine Supreme Judicial Court were to determine that the distribution of IOLTA funds constituted compelled speech, there would be no principled way to distinguish the use of IOLTA funds for legislative lobbying and the use of IOLTA funds for the subsidization of legal services for the poor. To be sure, certain clients whose funds are pooled into IOLTA accounts would not condone the use of IOLTA funds being used to subsidize legislative lobbying by some or all of the legal service providers to whom IOLTA funds are distributed. It is equally clear, however, that certain clients would not condone the distribution of IOLTA funds to certain legal aid providers altogether, or to the entire project of IOLTA. For example, there are almost certainly landlords whose funds are pooled in IOLTA accounts and who, if asked, would oppose the distribution of funds to legal services providers who defend tenants in eviction cases. Likewise, there are undoubtedly clients who, if asked, would oppose the distribution of IOLTA funds to organizations that provide representation to non-citizens. In other words, to credit the contention that IOLTA funds for legislative lobbying constitute compelled speech would be to discredit the entirety of the IOLTA project.

2. The use of funds for legislative lobbying comes at the expense of direct legal services

One commenter expressed concern about the use of IOLTA funds being diverted “from direct services to indigent clients and, instead, allocat[ing] them to political candidates and lobbyists.” There is no question that there are inadequate funds for indigent civil legal services in Maine. But as is explained above, we believe that this militates against a ban on the use of IOTLA funds for legislative lobbying, not in favor of it.

3. The “politicization” of IOLTA

Supporters of a ban on the use of IOLTA funds for legislative lobbying have contended that the funding of legislative advocacy risks the politicization of the IOLTA program. We would submit, however, that it is impossible to render legal services to low income clients “apolitical,” in the sense used by the proponents of this view: all activity that intersects with government is political, at least in one sense. Within political spheres of power and influence, representation of the interests of low-income populations, who have less power and influence than other segments of society, is critically important to ensure fairness and access to justice. Far from being impermissibly "political," promoting access to justice and improving the administration of justice are core principles deeply embedded in our legal system and have long been woven into the fabric of the ethical rules applicable to both judges and lawyers.

While certain clients may be uncomfortable with the notion that their funds are being used in part to fund legislative lobbying on behalf of the poor, as discussed above, this objection to "politicization" could be made with equal force with respect to individual cases brought on behalf of indigent clients. One might imagine that landlords would prefer that IOLTA funds not be used to defend eviction cases; that persons who object to the provision of public benefits would prefer that IOLTA funds not be used for public benefits cases; or that persons who believe that the asylum laws are frequently abused would prefer that ILAP receive no IOLTA funds.[24] In other words, to the extent that stakeholders object to the provision of legal services to the poor as "political," the restriction of funds to individual cases will not solve that problem.[25]

4. Legal aid providers are veering from their original mission

Finally, another criticism of the current rule is that, by allowing legal aid providers to use IOLTA funds to lobby the legislature, the Court has allowed IOLTA to veer from its intended purpose. As one commentator put it, "[c]learly, such involvement [in legislative lobbying] is very far from the mission intended for the use of IOLTA funds."

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[24] As Attorney Smith notes in his Separate Statement of Non-Concurrence, "Immigration policy is truly one of the 'hot button' issues of our time." Smith Non-Concurrence at 6.

[25] One "political" example mentioned by proponents of a lobbying restriction has been the support by a legal services provider for the ballot initiative to enact Medicaid expansion. Maine Equal Justice did indeed take a leading role in lobbying for enactment of expansion. However, as noted in Maine Equal Justice's comment on proposed rule 6, "It is worth noting that MEJ did not utilize IOLTA funds to engage in the effort to expand Medicaid by referendum. Yet it is also worth noting that this was non-partisan, issue-based advocacy that was clearly in the best interests of our clients. There is no reason to exclude this tool for low-income Mainers only, leaving it available only to those who can afford private lawyers." Comment of Maine Equal Justice, submitted June 6, 2019.

For the reasons set forth above, we respectfully disagree. We believe that, nearly from the inception of IOLTA in Maine, there was a recognition that legislative lobbying was a critical component of one of the central goals of legal aid providers—that is, to "bring about political and economic changes that would address the underlying causes and broad social effects of poverty."[26]

IV. Recommendations

For the above stated reasons, we do not believe that significant changes to Maine Bar Rule 6 are warranted. The Supreme Judicial Court could consider making it explicit that the Maine Justice Foundation can provide IOLTA funds only to charitable corporations exempt from taxation under § 501(c)(3). Such a provision will ensure that, in the future, organizations receiving IOLTA funds will be precluded from using funds for political candidate advocacy, and that the amount of lobbying performed by organizations receiving IOLTA funds will remain limited by federal law. At present, all of the legal services providers that receive IOLTA funds are 501(c)(3) organizations. Without a requirement, however, it is possible—at least theoretically—that other types of organizations could receive IOLTA funding in the future.

[26] The Muskie Commission Report at 7.

STATEMENT IN NONCONCURRENCE OF IOLTA WORKING GROUP MEMBER ACTIVE RETIRED JUSTICE ROBERT W. CLIFFORD

I agree with the recommendation of the majority members of the Judicial Branch IOLTA Working Group that Rule 6(a) should be amended to ensure that the Maine Justice Foundation should provide IOLTA funds only to charitable corporations exempt from taxation under IRC § 501(C)(3).

I disagree with, and do not join in, most of the recommendations of the majority of the members of the Working Group. I, along with Working Group member, Attorney Stephen C. Smith, support the adoption of a proposed amendment to M.R. Civ. P. 6(e) that would prohibit IOLTA funds from being expended to provide direct or indirect support for political or ideological activities, including:

(A) supporting or opposing candidates for elective office;

(B) supporting or opposing ballot initiatives or referenda;

(C) lobbying in support of or in opposition to pending or proposed legislation;

(D) seeking public support through the media, including social media, to support or oppose legislation, ballot initiatives or referenda, or candidates for elective office; or

(E) voter registration, voter education, voter signature gathering, or get-out-the-vote actions.

In my judgment, IOLTA funds should be limited to providing direct legal services to low income and qualifying individuals and that such funds should not be used to provide direct or indirect support of political or ideological activities.

IOLTA is a program that generates funds from bank accounts of attorneys or clients. The use of funds for systemic advocacy and lobbying purposes, purposes that are inherently political and that may be contrary to the political views of the owners of the IOLTA accounts from which they are mandatorily taken, is, in my view, improper.

SEPARATE STATEMENT OF NON-CONCURRENCE OF STEPHEN C. SMITH

December 2019

TABLE OF CONTENTS

PAGE

I. Background 3

A. Scope of the Committee 3

II. Discussion 6

A. Use of IOLTA Funds for Political Activities is Compelled Speech 6

B. Use of IOLTA Funds for Political Purposes Unnecessarily Ties up Funds that Should be used to Provide Direct Legal Services to the Poor 13

C. Use of IOLTA Funds for Political Purposes Will Erode Public Trust in the Judicial Branch and Creates a Separation of Power Issue 13

D. Miscellaneous Issues 15

1. Legislative Lobbying Constitutes Legal Work 15
2. Legislative Lobbying is Consistent with the Purposes of IOLTA 15
3. Legislative Lobbying is Useful to The Legislature 15
4. The Scarcity of Resources for Legal Aid 16
5. General Operating funds are critical to the health of legal aid providers 16
6. Federal law ensures that lobbying does Not become the primary purpose of Legal aid providers 16
7. The Medicaid Expansion Defense 18

Conclusion 19
Recommendations.. 20

I. BACKGROUND

On May 8, 2019 the Maine Supreme Judicial Court promulgated a proposed amendment to M. Bar R. 6(e) to prohibit the use of interest on lawyer's trust accounts ("IOLTA") funds for: (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, or (5) voter registration, voter education, voter signature gathering, or get out to vote actions. The Court also proposed amendments to M. Bar R. 6 regarding accounting practices and setting a cap for use of IOLTA funds for administrative purposes.

After receiving comments, and on June 27, 2019, the Court moved forward with amendments to Rule 6 regarding accounting practices, but the Court established a working group to address the issue of the use of IOLTA funds for different types of systemic advocacy. The purpose of the working group was to "obtain broad based stakeholder input and analysis of a recent proposal to prohibit the use of Court mandated IOLTA funds for legislative lobbying and political candidate advocacy."

A. <u>Scope of the Committee</u>

As a preliminary matter I disagree with the perceived or actual restrictions on the scope of the IOLTA working group. Specifically, the order establishing the IOLTA working group clearly states that the IOLTA working group is to obtain broad based stakeholder input "of a recent proposal to prohibit the use of court mandated IOLTA funds for legislative lobbying and political candidate advocacy."

This language confirms that the scope of the committee should be to review and address the entirety of the original proposed amendment to Maine Bar Rule 6(e)(3), mentioned above. The Majority has taken a very narrow reading of the order establishing the IOLTA working group. The Majority limits its scope of review to legislative lobbying and political candidate advocacy, and ignores the other issues listed in the original amendments.

The court's use of the term "legislative lobbying" and "political candidate advocacy" as stated in the July 18, 2019 order are broad enough terms that they would encompass the five activities listed in the original proposed amendments to Maine Bar Rule 6(e)(3).

The following additional points relevant to the discussion:

- As noted by the by the 2007 "Separate Statement of Non-Concurrence in Amendments to the Bar Rules by Clifford J." (hereinafter "Non-Concurrence of Clifford J."), participation at that time in the IOLTA program was voluntary. Only after the 2007 rule change was participation mandatory.

- Not every state has a mandatory IOLTA program.[1]

- "The six legal services groups for whom 80% of the IOLTA funds are earmarked have been 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." 2007 Separate Statement of Non-Concurrence in Amendments to the Bar Rules by Alexander J. (hereinafter "Non-Concurrence of Alexander J.").

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[1] American Bar Association, *Status of IOLTA Programs*, *available at*: www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs/

- It costs money to run a law office, including the costs of regulatory compliance. *See e.g.,* The Right To Counsel in Maine, Sixth Amendment Center, April 2019 Report to the Maine Legislative Council (In relevant part beginning on Page 71) citing numerous studies concerning the significant cost associated with running a law office-including administrative overhead. While I do not parse the numbers related to IOLTA compliance, a dedicated future litigant may do so.

- The Majority admits what should be obvious, money is fungible and IOLTA's unrestricted grants are critical to their overall operations and overhead:

> Documentation provided to this Working Group by the providers demonstrates that a substantial amount of their funds are restricted. For example, in 2018, only 23% of MEJ's funds were unrestricted, and only 10.5% of LSE's funds were restricted in 2019. Unlike many other funding sources that legal aid organizations rely on, IOLTA funds are unrestricted. Indeed, a substantial portion of LSE and MEJ's nonrestricted funds come from IOLTA.
>
> General operating funds enable nonprofit organizations like the legal aid providers to sustain their day-to-day operations. These funds also enable nonprofits to build a strong and sustainable infrastructure to provide the programs and services that will have the greatest impact. The legal aid providers have come to rely on IOLTA as relatively unrestricted general operating support to sustain day-to-day operations. Adding restrictions on what IOLTA cannot be used for will add additional administrative and accounting burden.

Majority Report, Page 9.

- Maine Equal Justice is one recipient of funds for "systemic advocacy." Its 2018 newsletter touts its political agenda, including its efforts on Medicaid expansion. The newsletter notes in passing that Medicaid expansion was passed with "nearly 60% of the vote."[2] Put another way, nearly 40% of Mainers opposed Medicaid expansion. It is not a stretch to think that among the 40% are lawyers and clients who inadvertently furthered their opponent's cause. Assertions that IOLTA money was not directly spent on the campaign ignore the Majority's own admission that unrestricted grant monies are important to the funding of the overall structure of the organization.

[2] Maine Equal Justice Partners, *Equal Justice on the Move*, *available at*: https://mejp.org/sites/default/files/EJOTM-Newsletter-Summer-2018.pdf

- Another recipient is the Immigration Legal Advocacy Project (ILAP). Its website proudly proclaims:

> ILAP leads important advocacy efforts at the local, state and federal levels to improve laws and policies that affect all immigrants in Maine and prevent the passage of those that would have a negative impact. In this work, we partner closely with the Maine Immigrants' Rights Coalition, ACLU of Maine, Maine Equal Justice, University of Maine School of Law and other organizations and groups across the state.[3]

Immigration policy is truly one of the "hot button" issues of our time. Like MEJ's systemic advocacy, it is not a stretch to imagine that if a significant segment of the legal-fee-paying public were "woke," or aware IOLTA funds were being used for political purposes, they might not agree with ILAP's agenda.

II. DISCUSSION

A. Use of IOLTA Funds for Political Activities is Compelled Speech

In 2007, at the time of the promulgation of the original IOLTA rule, Justice Alexander noted the then relevant legal framework and predicted what was to come:

> There is not much law on the legality of using forced IOLTA contributions for political purposes. What law there is suggests that a challenge to use of compulsory contributions for political purposes might succeed. In *Phillips v. Washington Legal Foundation*, the U.S. Supreme Court held that the interest income generated by funds held in IOL TA accounts is the private property of the owner of the principle. 524 U.S. 156, 172 (1998). This conclusion was reached after a Texas businessman filed suit alleging that the Texas IOLTA program violated the Fifth Amendment by taking his property without just compensation. Id. at 163. The Court based its holding on the premise that the Constitution merely protects, rather than creates, private property interests, and therefore property interests must be independently created. *Id*. at 171. ("The State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of that interest, as the State does nothing to create value; the value is created by respondents' funds.")

[3] Immigrant Legal Advocacy Project, *Systemic Advocacy*, *available at*: https://ilapmaine.org/systemic-advocacy

Although Phillips held that the interest generated by IOLTA programs was the private property of the owner of the principle, the Court subsequently held in *Brown v. Legal Foundation of Washington*, that IOLTA funds constituted a public use, and that just compensation is "measured by the property owner's loss rather than the government's gain." 538 U.S. 216, 237 (2003). Therefore, the private party "is entitled to be put in as good a position peculiarly as if his property had not been taken." Id. at 236. Nevertheless, the Court held that by the very construct of IOLTA, the owner's opportunities to earn net interest in a separate, individual account must be zero, and thus there is no taking in violation of the Fifth Amendment. Id. at 240. Brown involved a takings challenge. The concern here is the potential for a First Amendment challenge.

Justice Kennedy, dissenting in Brown, warned that the Court would one day be confronted with First Amendment challenges to IOLTA programs and suggested "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." 538 U.S. 216, 253 (2003) (Kennedy, J., dissenting). Justice Kennedy stated that "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." *Id.* Recent jurisprudence on similar issues suggests that a First Amendment challenge would present a real risk that could seriously damage the IOLTA program. In *Locke v. Karass*, --- F.3d ---, 2007 U.S. App. LEXIS 18763 (1st Cir. 2007), the First Circuit approved the compulsory taking of deductions from public employee salaries to support legal services related to union organizing and bargaining activities. In so holding, the court distinguished what it held to be the proper use of funds for legal services related activities from what it suggested would be improper use of funds to "subsidize or financially support the political or ideological activities of the union" Id., *12 (citing *Machinists v. Street*, 367 U.S. 740, 744 ((1961) (it is a violation of First Amendment to permit forcible collection of funds from employees "to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed").3 It is not much of a stretch to say the same about political uses of government mandated attorney and client contributions to IOLTA.

“Non-Concurrence of Alexander J.”

Justice Alexander was prescient. In 2018, the Supreme Court held an Illinois law requiring public employees to subsidize a union violated the free speech rights of nonunion members. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2460, 2464 (2018) ("'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.'") (quoting Thomas Jefferson, citations omitted).

The Majority attempts to address *Janus* but in doing so erroneously conflates Janus's essential First Amendment holding against compelled speech with Fifth Amendment "takings" jurisprudence by suggesting that because it is difficult or impossible to attribute a value to IOLTA interest, that there is no compelled contribution.

The Majority tries to find support in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003) and its predecessor, *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172 (1998) for the proposition that IOLTA funds have no value to the client. The Majority should not find comfort in *Brown*. As Justice Kennedy specifically noted in his dissent

> 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.

Brown v. Legal Found., of Wash., 538 U.S. 216, 253 (2003) (Kennedy, J. dissenting).

The Majority further misses the point in focusing exclusively on the financial burdens imposed. While the context of *Janus* concerns forced financial contributions, it is based on older and more applicable cases. In *Wooley v. Maynard*, 430 U.S. 705 (1977) the

Court held that the State of New Hampshire could not compel a driver to display the motto "Live Free or Die" on its license plate. In so holding the Court noted that

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. *See Board of Education v. Barnette,* 319 U. S. 624, 319 U. S. 633-634 (1943); *id.* at 319 U. S. 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *Id.* at 319 U. S. 637. This is illustrated by the recent case of *Miami Herald Publishing Co. v. Tornillo,* 418 U. S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. We concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit:
>
> "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate,' *New York Times Co. v. Sullivan,* 376 U.S. [254,] 376 U. S. 279 [(1964)]."*Id.* at 376 U. S. 257 (footnote omitted).
>
> The Court in *Barnette, supra,* was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville District v. Gobitis,* 310 U. S. 586 (1940), the Court held that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." 319 U.S. at 319 U. S. 636. Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette,* we are faced with a state measure which forces an individual, as part of his daily life -- indeed, constantly while his automobile is in public view -- to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so,

> the State "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 319 U. S. 642.
>
> New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message -- or suffer a penalty, as Maynard already has. As a condition to driving an automobile -- a virtual necessity for most Americans -- the Maynards must display "Live Free or Die" to hundreds of people each day. [Footnote 11] *The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the Majority, and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable*.

Wooley v. Maynard, 430 U.S. 705, 714-715 (1977) (emphasis added).

As predicted by Justices Kennedy and Alexander, the First Amendment challenge was squarely addressed in *Janus*.

> The right to eschew association for expressive purposes is likewise protected. Roberts v. United States Jaycees, 468 U. S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); see Pacific Gas & Elec., supra, at 12 ("[F]orced associations that burden protected speech are impermissible"). As Justice Jackson memorably put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 642 (1943) (emphasis added).

Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2463 (2018).

The Majority states that this compelled speech is acceptable because the interest on IOLTA funds has such a small or no value. However, an identical argument was raised to the United States Supreme Court in *Phillips* and was rejected. *Phillips*, 524 U.S. 156, 170 ("While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property.").

Accordingly, while the interest income *may* have minimal value or no economically realizable value to its owner, the client still retains possession and control. In addition, the Majority's argument that the IOLTA funds retain minimal value, or cannot be traced back to their owners and thereby justifying its use for political purposes, is similar to the example that the Supreme Court cited in *Phillips*, where the Court noted that "[t]he 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." *Id.*

I extract from these precedents the rather common-sense holding that speech cannot be compelled-irrespective of cost or popularity of the speech in question. Just because the client cannot prove that the IOLTA funds retain more than minimal value doesn't justify the use of the client's funds for political purposes. Those clients have their own separate political beliefs and to the extent that their funds are being used to support political campaigns, bills, legislation, or ballot initiatives with which the client disagrees, they should not be forced to subsidize, even indirectly, political beliefs that they do not share.

Put another way, if the IOLTA interest has no value-as asserted by the Majority - then what are we arguing about? If there is no value to the IOLTA money, the Majority should simply concede the point. Courts, however, usually have little trouble dismissing the "no value" argument in other contexts. For example, the argument that exchanging child pornography pictures on the internet is not an exchange of value is readily dismissed by the observation that simply furthering the marketplace and ecosystem inherent in the exchange has value to those choosing to participate.

The issue is not simply whether a client or lawyer might directly benefit from the interest created but whether they might wish to deny aid and succor to their ideological opponents by the use of such financial legerdemain[4]. Some lawyers and clients would happily deposit their monies in a zero interest account which does not pay them interest but which does not also contribute to their adversaries' favored causes. I suspect banks would be ready to oblige.

I further question the Majority's assertion that if the Court were to ban the use of IOLTA funds for legislative lobbying and political activities, that this would somehow detrimentally impact the poor in Maine. If funds are not used for political activities there will be more funds to use to support the poor.

The Majority provides an example of a landlord whose funds in an IOLTA account are, in part, used to finance and defend the landlord's tenants in an eviction case. This example is a red herring. It is hard to see how financing the representation of a defendant in an eviction case would constitute a "political activity," "legislative lobbying" or "supporting a political candidate." Providing direct legal aid to the poor in the legal framework given by an elected Legislature is an appropriate use of IOLTA funds. Further, it is offensive to assume all landlords are wealthy when the reality is quite different. If the

[4] The Majority instinctively understands the value of the IOLTA Tax. As Sun Tzu noted in the "Art of War" around 500 BC "Hence a wise general makes a point of foraging on the enemy. One cartload of the enemy's provisions is equivalent to twenty of one's own, and likewise a single PICUL of his provender is equivalent to twenty from one's own store."

Majority is confused by how to draw the line between political and legal advocacy, I suggest reviewing the legal long-used standards applied by the Legal Services Corporation and PTLA.

B. Use of IOLTA Funds for Political Purposes Unnecessarily Ties up Funds that Should be used to Provide Direct Legal Services to the Poor

Justice Alexander pointed out in 2007 that use of IOLTA funds for political purposes diverts funds that otherwise could be used to provide direct legal services for the poor. "Non-Concurrence of Alexander J., Section C."

Justice Alexander noted that only 20% of the legal services of the poor are being met in Maine.

Justice Alexander noted four areas where he believed that IOLTA funds would be best used. Those areas were: (1) better support for children and parents separating as a result of divorce, parental rights and protection from abuse; (2) training for trial and appellate advocacy for indigent clients; (3) credit and collections counseling and advocacy; and (4) landlord/tenant conciliation dispute resolution program. These are examples of where the current use of IOLTA funds for political purposes would be better spent, and prohibiting the use of IOLTA funds for a political purpose would increase the funding for providing direct legal services and ensuring that a greater portion of the poor are receiving legal services.

C. Use of IOLTA Funds for Political Purpose Will Erode Public Trust in the Judicial Branch and Creates a Separation of Powers Issue

The damage to the public's perception of the judicial branch cannot be understated should a legal challenge arise pertaining to the political use of IOLTA funds. In our State and Country's polarized political environment, information that the judicial branch would allow

IOLTA funds to be used for political purposes is certain to upset Maine citizens who disagree with the *politics* of the agencies that receive IOLTA funds. Moreover, this would create the public perception that the judicial branch favors one political party or ideology over another, thereby undermining the judicial branches' impartiality and objectivity as a separate branch of government. The Maine Justice Action Group, for example, describes itself as follows:

> JAG is a judge-led coalition of leaders of Maine's legal community, including state and federal judges, legislative leaders, Maine's six core nonprofit civil legal aid providers, the Katahdin Counsel Recognition Program, University of Maine School of Law, Maine Justice Foundation, the Maine State Bar Association, the Maine Trial Lawyers Association, practicing attorneys and others who are passionate about helping all Maine people have access to civil justice.[5]

It is a clever system:

1. The judiciary imposes an extra-legislative tax on IOLTA client funds;
2. The judiciary gives the funds to the Maine Justice Foundation;
3. The Maine Justice Foundation's leadership is appointed without democratic input;
4. The Maine Justice Foundation allocates the funds to its favored "core" organizations;
5. The judiciary coordinates with the core organizations through a "judge led" coordinating group to systemically advocate through the legislature, referendum and other inherently political processes for change favored by the leadership of the groups.

[5] Maine Justice Foundation, *Justice Action Group*, *available* at: https://www.justicemaine.org/grants-and-programs/justice-action-group/

6. In the event of a lawsuit concerning the advocated policy (*a la* Medicare expansion) the judiciary gets to decide who wins.

D. Miscellaneous Issues

The Majority suggests a number of issues which will only be addressed in passing.

1. **Legislative Lobbying Constitutes Legal Work.** While it may well be "legal" work to lobby, nothing compels one side or the other to subsidize, either administratively or financially any such work. Organizations are free to solicit and use private funds for private concerns.

2. **Legislative Lobbying Is Consistent with the Purposes of IOLTA.** The Majority appeals to authority by citing many public comments and reports such as the Muskie Commission in support of the effort to retain "systemic advocacy" as a proper use of IOLTA funds. The First Amendment, however, is designed to protect the minority, even a minority of one, from the zealousness of the great and good pursuing their own righteous agendas.

3. **Legislative Lobbying is Useful to The Legislature.** Legislative lobbying is useful. The Majority cites the role of the "advocacy of interested parties" giving a "range of viewpoints" in achieving better legislation. The issue is funding of only one side of the debate with public funds. There would be strong disagreement if IOLTA money were used to lobby on behalf of Big Tobacco, Maine Right to Life, or the NRA. Yet each of these interests would further the goals asserted by the Majority in their own way.

4. **The Scarcity of Resources For Legal Aid.** The Majority raises the specter of scarcity of resources for legal aid, suggesting that IOLTA funds help leverage the public purse to greater effect. As discussed above, this concept largely depends on whose ox is being gored. Those familiar with the retail practice of law can well understand the impact of those same scarce legal resources being used to hire a lawyer or paralegal to help a single mother facing a motion to modify, a father falsely accused of neglect, or any other worthy cause. The legal fight should take place within a framework of laws determined by an elected legislature chosen by competing factions of voters with varying degrees of passion. The Majority vision would put a thumb on the scale of that process at the legislative level by taxing the resources of those not aligned with the legal aid organizations and damage the perception of judicial neutrality by involving "judge led" coalitions in the process.

5. **General Operating funds are critical to the health of legal aid providers.** This issue is more thoroughly discussed above. The answer is simple. Legal aid providers should focus on providing direct legal aid and the "critical" flow of funds should not be interrupted. If such groups want to engage in systemic advocacy then they should solicit funds from those who share their views and not tap the public purse.

6. **Federal law ensures that lobbying does not become the primary purpose of legal aid providers.** This statement concerning federal tax law does not address the charge given to this Commission. Federal law, however, provides

> an easy answer to the conundrums put forth by the Majority as to where the line should be drawn between systemic advocacy and individual legal aid. The answer is near and clear. The receipt of IOLTA money should be subject to similar restrictions as are placed on the Legal Services Corporation at the federal level and PTLA at the State level.

The Majority asserts that because the "core" groups using IOLTA funds are all currently 501(c)3 groups that the IOLTA paying public should be assured that:

> We believe that the balance struck by federal law for non-profits is suitable for Maine's legal aid providers as well. For the reasons stated above, we believe that, as with other tax-exempt non-profits, there is value in legal aid providers being involved in the process of law making. At the same time, federal law provides an assurance that, while certain IOLTA providers may engage in legislative lobbying, legislative lobbying will not become central to the work of Maine's legal aid providers.

Majority Report, Page 11.

During the Working Group, discussion arose that the ideological preferences of the current "core" group of providers appeared rather uniformly "left." It was posited during discussions that groups from the "right" would not likely be favorably considered should they apply for IOLTA funds. Perhaps sensing a weakness in their position, the Majority has recommended a change to the current scheme to allow funds go only to 501(c)3 corporations.[6] This proposal is seemingly designed to inoculate the IOLTA system from politicization charges and to further provide grounds for denying future groups who might apply for funds who do not pass the "appropriate" ideological screen. The Majority's hope is ill-founded.

In 1995, the NRA challenged Portland's ban on possession of firearms in public housing on behalf of a low income client.[7] The NRA is a 501(c)3 corporation. [8] As noted on their website, the NRA engages in systemic advocacy as defined by the Majority.[9] The NRA notes that it cannot take on every case it might because its resources are finite. *Id.* Maine Right To Life,[10] The Federalist Society,[11] and the "Koch Foundation"[12] likewise are all 501(c)3 corporations engaged in "systemic advocacy". In addition to commonly heard criticisms of the above groups, a new criticism can be found: They are insufficiently creative, bold or connected enough to tap the public purse to advance their interests. I doubt that the Majority will welcome such competing ideologies to the IOLTA regime.

7. **The Medicaid Expansion Defense.** The Majority asserts, in response to one specific objection, that IOLTA funds were not used to further the recent Medicaid

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[6] Majority Report, Page 16

[7] Associated Press, *Maine Supreme Court forbids Public Housing Gun Ban*, April 4, 1995, *available at*: https://apnews.com/02f36e3a2e6c4bce896461e8f7776709; https://law.justia.com/cases/maine/supreme-court/1995/656-a-2d-1200-0.html

[8] Snopes.com, *Is the NRA a Tax-Exempt Nonprofit Organization*, *available at*: https://www.snopes.com/fact-check/nra-tax-exempt-non-profit/

[9] National Rifle Association, *NRA Referrals and NRA-Supported Litigation*, June 24, 2013, *available at:* https://www.nraila.org/articles/20130624/nra-referrals-and-nra-supported-litigation

[10] Maine Right to Life Committee Educational Fund, *2015 Form 990*, *available at*: https://apps.irs.gov/pub/epostcard/cor/237447675_201512_990_2017010314049925.pdf

[11] The Federalist Society for Law and Public Policy Studies, *2017 Form* 990, *available at*: https://apps.irs.gov/pub/epostcard/cor/363235550_201809_990_2019051016286746.pdf

[12]Charles Koch Foundation, *2017 Form 990*, *available at*: https://apps.irs.gov/pub/epostcard/cor/480918408_201712_990PF_2019012816035874.pdf

expansion referendum.[13] As the Majority admits, however, "Maine Equal Justice did indeed take a leading role in lobbying for enactment of expansion." As it has also noted:

> General operating funds enable nonprofit organizations like the legal aid providers to sustain their day-to-day operations. These funds also enable nonprofits to build a strong and sustainable infrastructure to provide the programs and services that will have the greatest impact. The legal aid providers have come to rely on IOLTA as relatively unrestricted general operating support to sustain day-to-day operations. Adding restrictions on what IOLTA cannot be used for will add additional administrative and accounting burden.

Majority Report, Page 10.

None of the core groups, is agreeing that such groups should be prohibited from using IOLTA funds for direct referendum purposes. Further, Maine Equal Justice representatives have stated that "systemic advocacy" can now be used to maintain or expand support for abortion. It does not take much to imagine such advocacy going beyond abortion to the use of taxpayer funds for sex reassignment surgery, assisted suicide and other controversial medical frontiers.

CONCLUSION

(1) The use of mandatory IOLTA money violates the First Amendment rights of clients who do not hold to the agendas of the recipient organizations.

[13] Majority Report, footnote 24.

(2) The use of mandatory IOLTA money violates the First Amendment rights of lawyers who are forced to financially support systemic advocacy with regulatory and compliance costs. Lawyers' First Amendment rights are further implicated by the lending of their personal and professional imprimatur to whatever cause is being advocated.

(3) The direct or indirect involvement of the judiciary with "systemic advocacy" undermines separation of powers, and the appearance of impartiality and faith in the judicial system.

(4) The methodology by which "core" groups are chosen and funded is murky, arbitrary, and does not allow for competing viewpoints.

(5) The use of IOLTA money for systemic advocacy diverts funds from direct legal services to the poor.

RECOMMENDATIONS

(1) The Court should adopt its original proposal banning IOLTA money from the five areas previously described.

(2) Organizations which receive IOLTA money should be required to adopt federal legal standards now applicable to the Legal Services Corporation.

(3) To the extent that the Court does not adopt recommendations (1) and (2), above, the Court allow lawyers to opt out of the IOLTA program and to require notice that IOLTA money may be used for systemic advocacy be given to each client depositing money in IOLTA accounts with a provision that the client be allowed to opt out even if the lawyer chooses to opt in.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

E. DAVID WESCOTT and RUSSELL JOHNSON BEAUPAIN, Plaintiffs v. HON. VALERIE STANFILL, et al., Defendants.	**1:24-CV-00286-LEW**

REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS OF MAINE STATE DEFENDANTS

Defendants Amy Quinlan and Valerie Stanfill (collectively, State Defendants) submit this reply memorandum in further support of their motion to dismiss the Amended Complaint filed by Plaintiffs E. David Wescott and Russell Johnson Beaupain (RJB). In their Opposition to State Defendants' Motion to Dismiss (Opp'n), Plaintiffs concede that their claims against the Maine Board of Overseers of the Bar (Board) are barred by sovereign immunity. Opp'n at 1. Their claims against the Board should therefore be dismissed. *See Brait Builders Corp. v. Mass., Div. of Cap. Asset Mgmt.*, 644 F.3d 5, 11 (1st Cir. 2011). As to Plaintiffs' remaining claims, as explained in State Defendants' Motion to Dismiss (Mot.), Plaintiffs fail to plausibly allege that the IOLTA program compels their speech.[1] Mot. at 10-16. Moreover, even if it does, the IOLTA program passes both exacting scrutiny—the appropriate scrutiny level here—and strict scrutiny. Mot. at 17-20.

[1] Plaintiffs clarify that they are bringing only an as-applied challenge to Maine Bar Rule 6. Opp'n at 7 & n.2.

ARGUMENT

A. Plaintiffs have not plausibly alleged the requisite close connection between themselves and the speech that they claim they are compelled to support.

Plaintiffs' attempt to fortify the central premise of their claim, that the IOLTA program compels speech, boils down to two contentions: (1) there is no "practicable alternative" to the IOLTA program, Opp'n at 4-5 (citing Am. Compl. ¶¶ 85-87), and (2) Plaintiffs are entitled to a reasonable inference that Plaintiffs were being compelled to support the six IOLTA recipient organizations, Opp'n at 10-12. Neither contention has merit.

To begin, Plaintiffs' assertion that they "had no choice" but to participate in the IOLTA program should not be credited because it is contradicted by the rules governing the IOLTA program on their face. As State Defendants explained in their Motion, Maine Bar Rule 6 applies only when law firms hold client funds *in trust*. Mot. at 10-11. There is no dispute that Plaintiffs can, at their discretion, use any of several common arrangements that do not require a trust—e.g., a nonrefundable retainer, a flat fee, or a pay-as-you-go arrangement. *See* Me. Bar R. 6(a), (c)(1); Mot. at 10-11. Their participation in the IOLTA program is, by the express terms of the applicable rule, not required, and their speech is accordingly not compelled.

Plaintiffs' argument as to why there is a sufficient connection between their funding and the allegedly "left-leaning" activities of IOLTA recipient organizations is also paper thin and insufficient. Initially, Plaintiff RJB offers no explanation as to how a law firm, which only places its clients' money in trust, has any financial connection to the support of the IOLTA recipient organizations at all. Its First Amendment rights are plainly not implicated here.

As to Plaintiff Wescott, Plaintiffs' argument amounts to an ipse dixit. Plaintiff Wescott alleges that his retainer eventually makes its way in some form to "left-wing" organizations, such that the IOLTA program must compel speech. Opp'n at 5-6. But for the reasons explained in State Defendants' Motion, the sheer number of links in the alleged causal chain renders any connection between Mr. Wescott and the activities of IOLTA recipient organizations so distant as to be meaningless under the First Amendment. *See* Mot. at 13-14. Indeed, it is no different than the connection between a taxpayer and the beneficiary government program—i.e., of no First Amendment significance. *See United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989).

Plaintiffs' Opposition nonetheless relies heavily on *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. 878 (2018). But the connection between Mr. Janus's financial support and the challenged speech in that case is far more direct than that alleged here. In *Janus*, the Supreme Court concluded that forcing a public sector employee to pay an "agency fee," which was remitted directly to the union that represented that employee's bargaining unit, compelled speech in violation of the First Amendment. *Id.* at 887-88, 891-916, 929-30. The "agency fee" supports the union's activities in collective bargaining as well as other related activities, such as lobbying, social and recreational activities, advertising, litigation, and other services. *Id.* at 888.

Here, unlike in *Janus*, the IOLTA program, a vehicle of the State of Maine, is not a compelled subsidy for two important reasons. First, contrary to Mr. Janus, Mr. Wescott makes no payment directly to the IOLTA recipient organizations. *See* Opp'n at 12. Rather, the IOLTA program does not exact a fee from either the law firm or a client of the law firm; interest that accrues from client money that a law firm exacts on a client is directed to MJF. *See* Me. Bar R. 6(c)(4)(A). Plaintiffs fail to plausibly identify a ready connection to the speech at issue, one sufficient to suggest compelled support in violation of the First Amendment. *See* Mot. at 11-12; *Frame*, 885 F.2d at 1132-33; *Lathrop v. Donohue*, 367 U.S. 820, 859 (1961) (Harlan, J., concurring); *Carroll v. Blinken*, 768 F. Supp. 1030, 1034 (S.D.N.Y. 1991).

Certainly, in *Janus*, the Court did just that; it identified the activities that nonmembers directly paid for through agency fees. *Janus*, 585 U.S. at 888. But here, Plaintiffs do little more than highlight a handful of projects in which IOLTA recipient organizations have engaged, and they have not plausibly alleged that IOLTA program funds supported those expressive activities, never mind that Mr. Wescott's accrued interest did so. Opp'n at 5-6; *see, e.g.*, *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 239-40 (2000) (Souter, J., concurring) (explaining that when a government "collect[s] [a] fee that indirectly funds [a] jumble of other speakers' messages," no speech has been compelled). Even if Plaintiffs need not trace money back to Mr. Wescott or RJB, as explained in State Defendants' Motion, the expressive activity of the six organizations is not attributable to Mr. Wescott nor RJB because Mr. Wescott and RJB were not required to do anything at all by the applicable Maine Bar Rules. Mot. at 16.

Unlike *Janus*, there are multiple intervening steps between the client's fund being placed in a trust account and the disbursement of the pooled interest to the six named civil legal aid organizations. Mr. Wescott paid a retainer to RJB; RJB deposited that retainer in a trust account; and that interest was pooled with other interest accrued separating from the client any connection it had with the accrued interest. Am. Compl. ¶¶ 89-92; Me. Bar R. 6(c)(1), (4). MJF then distributed the pooled interest to civil legal aid organizations in Maine. Am. Compl. ¶ 72; *see* Me. Bar R. 6(e)(3). In light of these multiple steps, Plaintiffs are not entitled to a reasonable inference that interest accrued on Mr. Wescott's retainer went to support causes that he and RJB oppose. *See* Mot. at 13-15.

On this point, Plaintiffs' reliance on *Flast v. Cohen* is misplaced. *See* Opp'n at 9. In that case, the Court ruled that Plaintiffs had standing, by virtue of being taxpayers, to challenge congressional action as being in violation of the Establishment Clause of the First Amendment. 392 U.S. 83, 94-106 (1968). The Court made no pronouncement as to the merit of the taxpayers' underlying claim, nor ever suggested that the taxpayers' speech had been compelled in violation of the First Amendment. *Id.* at 106 & n.26. Here, State Defendants do not argue that Plaintiffs lack standing; rather, as State Defendants showed in their Motion, Plaintiffs' Amended Complaint should be dismissed because they have failed to plausibly allege that their speech has been compelled in violation of the free speech principles of the First Amendment.

Second, Mr. Janus lost money, while Mr. Wescott and RJB have not lost any money.[2] *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 239-40 (2003). That is, given that the funds subject to IOLTA by their nature would not have otherwise generated payable interest, Me. Bar R. 6(c)(1), Mr. Wescott does not lose money by virtue of the IOLTA program. Because he loses no money, he is not forced to "support," in any sense of that term, the speech of those organizations.

B. Although exacting scrutiny is the proper standard here, the IOLTA program also survives even strict scrutiny.

As State Defendants explained in their Motion to Dismiss, exacting scrutiny is the proper standard to apply to the IOLTA program, because it concerns compelled subsidization of speech of an organization, rather than direct speech itself. Mot. at 17-20; *see Janus*, 585 U.S. at 894-95; *United States v. United Foods, Inc.*, 533 U.S. 405, 413-14 (2001); *cf. Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 608 (2021). The IOLTA program readily meets exacting scrutiny. *See* Mot. at 17-20. Even if the Court were to apply strict scrutiny to the IOLTA program, however, it passes constitutional muster. *See* Mot. at 17-20. Strict scrutiny requires that the state establish a compelling interest and that the burden or regulation at issue is narrowly tailored to achieve that interest. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015).

Contrary to Plaintiffs' assertion, the state's interest here is plainly compelling. The IOLTA program's goal is to provide access to justice in Maine—such as providing legal services to those

[2] The Rule also provides that IOLTA involves only money that is held for such a short period of time or accrues a nominal amount so as to be subject to an interest-bearing account. Me. Bar R. 6(c)(1).

in need—which the Supreme Court has made clear is a compelling interest. *See* Me. Bar R. 6(e)(3); Mot. at 17-18; *Brown*, 538 U.S. at 231-32. Contrary to Plaintiffs' contention, the interest is not "elusive" or "incoherent." Opp'n at 13; *see, e.g.*, *Wash. Legal Found. v. Tex. Equal Access to Just. Found.*, 86 F. Supp. 2d 624, 636 n.6 (W.D. Tex. 2000) (suggesting that Texas has a compelling interest in "making legal services accessible to all citizens" and stating that Texas's "interest in making legal services accessible would be achieved less effectively absent the existence of IOLTA").

Plaintiffs' contention that Maine's IOLTA program does not fund indigent legal fees misconstrues the IOLTA program, *Brown*, and State Defendants' Motion to Dismiss. Opp'n at 12-16. Like the IOLTA program analyzed in *Brown*, the IOLTA program in Maine funds the provision of legal services to those in need through IOLTA recipient organizations. Further, while the IOLTA program in *Brown* required that funds "received from IOLTA accounts" be used "for tax-exempt law-related charitable and educational purposes," *Brown*, 538 U.S. at 224-25, Maine's IOLTA program is narrower. It is "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." Me. Bar R. 6(e)(3).

In any event, Plaintiffs do not argue that the IOLTA program is not narrowly tailored to achieve the interest of improving access to justice in Maine. *See* Opp'n at 15. Instead, they argue that the state could achieve access to justice for those in need by levying taxes on its citizens, or by soliciting voluntary contributions. Opp'n at 15. But neither alternative is a viable substitute. First, levying a tax is more restrictive than the IOLTA program because IOLTA costs nothing to the client or the law firm. It would also spread costs beyond the legal field to those with no connection to the justice system. Second, as explained in State Defendants' Motion, IOLTA recipient organizations would not be able to provide a similar level of legal services through voluntary contributions because there would be a decrease in the amount of interest that is accrued to support these organizations. Mot. at 20; *see, e.g.*, *Wash. Legal Found. v. Tex. Equal Access to Just. Found.*, 270 F.3d 180, 183-84 (5th Cir. 2001); *cf.* Report of the Judicial Branch IOLTA Working Group at 9-10 (December 2019). The IOLTA program is accordingly narrowly tailored to achieve the State's goal of improving access to justice.

Finally, contrary to Plaintiffs' argument, the IOLTA program is sufficiently neutral. Opp'n at 15. As noted in the Working Group Report, MJF "has distributed IOLTA funds to six providers, which are commonly referred to as Maine's 'core' non-profit providers of civil legal aid." IOLTA Working Group Report at 2. Plaintiffs have not identified any organization that has been unfairly excluded from the IOLTA program. *See generally* Am. Compl.; Opp'n. Additionally, Plaintiffs incorrectly assert that "the IOLTA program diverts funds to causes that are 'left-wing in their political orientation.'"[3] Opp'n at 15. The record shows that these six organizations provide direct legal services to a diverse population of individuals with different needs. *See* Mot. at 3-7; Am. Compl. ¶¶ 15-59; IOLTA Working Group Report at 3. Like in *Southworth*, the funds here are distributed to the "core" civil legal aid providers in Maine, and because they are distributed in a viewpoint neutral way, such a disbursement does not offend the First Amendment. *See* Mot. at 18-19; *Southworth*, 529 U.S. at 232.

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[3] By alleging that the state expresses a preference for "left-wing" causes, Plaintiffs cherry-pick projects in which these six named civil legal aid organizations have engaged and statements from the Report of the Judicial Branch IOLTA Work Group. Report of the Judicial Branch IOLTA Working Group at 2-3, 8, 12 n.23 (December 2019); Opp'n at 5 n.1, 15 (stating "systemic advocacy . . . [i]n short[] refers to promoting left-leaning laws and policies in the State of Maine"). As explained in the IOLTA Working Group Report, these organizations engage in direct legal services along with some amount of legislative lobbying, impact litigation, and administrative advocacy. IOLTA Working Group Report at 2-3, 6-8, 12-14. Plaintiffs also ignore, or at least fail to concede, that activities they disagree with, such as legislative lobbying, are activities the organizations do not engage in to an extent that would jeopardize their 501(c)(3) tax status. *See* IOLTA Working Group Report at 10-11; Mot. at 4 & n.9.

CONCLUSION

For the above reasons, and those set forth in their Motion to Dismiss, State Defendants respectfully request that the Court dismiss the claims against them in Plaintiffs' Amended Complaint and enter judgment in their favor.

Dated: November 19, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2024, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all registered participants as identified in the CM/ECF electronic filing system for this matter.

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