SUPREME COURT OF THE UNITED STATES

No. 01–1325

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

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

[March 26, 2003]

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

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

I

In 1984 the Supreme Court of Washington issued an order requiring lawyers to place all client trust funds in "identifiable interest-bearing trust accounts." App. 150. If a client's funds can be invested to provide a "positive net return" to the client, the lawyer must place the funds in

an account that pays interest to the client. If the client's funds cannot earn a "positive net return" for the client, the funds are to be deposited in a pooled interest-bearing IOLTA account with the interest payable to the Legal Foundation of Washington (LFW), a nonprofit organization that provides legal services for the indigent. A lawyer is not required to obtain his client's consent, or even notify his client, regarding the use of client funds in IOLTA accounts or the payment of interest to LFW. App. 151. The Supreme Court of Washington dismissed all constitutional objections to its 1984 order on the now-discredited ground that any interest that might be earned on IOLTA accounts would not be "property" of the clients. App. 158; cf. *Phillips*, *supra*.

As the Court correctly notes, Washington's IOLTA program comprises two steps: First, the State mandates that certain client trust funds be placed in an IOLTA account, where those funds generate interest. Second, the State seizes the interest earned on those accounts to fund LFW. *Ante*, at 16. With regard to step one, we held in *Phillips*, *supra*, that any interest earned on client funds held in IOLTA accounts belongs to the owner of the principal, not the State or the State's designated recipient of the interest. As to step two, the Court assumes, *arguendo*, that the appropriation of petitioners' interest constitutes a "taking,"[1] but holds that just compensation is zero because without the mandatory pooling arrangements (step one) of IOLTA, petitioners' funds could not have generated any interest in the first place.[2] *Ante*, at 20–22. This holding

---

[1] Although the Ninth Circuit concluded that Washington's IOLTA scheme did not constitute a "taking" of petitioners' property, *Washington Legal Foundation* v. *Legal Foundation of Wash.*, 271 F. 3d 835, 861 (2001), the Court does not attempt to defend this aspect of the decision. *Ante*, at 16–17.

[2] The Court's ruminations on whether the State's IOLTA program

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

II

When a State has taken private property for a public use, the Fifth Amendment requires compensation in the amount of the market value of the property on the date it is appropriated. See *United States* v. *50 Acres of Land*, 469 U. S. 24, 29 (1984) (holding that just compensation is

---

satisfies the Fifth Amendment's "public use" requirement, *ante*, at 13–14, come as a surprise, inasmuch as they address a nonjurisdictional constitutional issue raised by neither the parties nor their *amici*. Petitioners' sole contention in this Court is that the State's IOLTA program violates the just compensation requirement of the Takings Clause. Brief for Petitioners 18–48; Reply Brief for Petitioners 1–20.

In needlessly addressing this issue, the Court announces a new criterion for "public use": The requirement is "unquestionably satisfied" if the State could have raised funds for the same purpose through a "special tax" or a "system of user fees," *ante*, at 13. This reduces the "public use" requirement to a negligible impediment indeed, since I am unaware of *any* use to which state taxes cannot constitutionally be devoted. The money thus derived may be given to the poor, or to the rich, or (insofar as the Federal Constitution is concerned) to the girlfriend of the retiring governor. Taxes and user fees, since they are not "takings," see *United States* v. *Sperry Corp.*, 493 U. S. 52, 63 (1989), are simply not subject to the "public use" requirement, and so their constitutional legitimacy is entirely irrelevant to the existence *vel non* of a public use.

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

"'market value of the property *at the time of the taking*'" (emphasis added)) (quoting *Olson* v. *United States*, 292 U. S. 246, 255 (1934)); *Kirby Forest Industries, Inc.* v. *United States*, 467 U. S. 1, 10 (1984); *United States* v. *564.54 Acres of Monroe and Pike County Land*, 441 U. S. 506, 511 (1979); *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U. S. 470, 474 (1973); *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 130 (1950); *United States* v. *New River Collieries Co.*, 262 U. S. 341, 344 (1923). As we explained in *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377 (1946), "just compensation . . . is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.'" Our cases have recognized only two situations in which this standard is not to be used: when market value is too difficult to ascertain, and when payment of market value would result in "'manifest injustice'" to the owner or the public. See *Kirby Forest Industries, Inc.*, *supra*, at 10, n. 14.

In holding that any just compensation that might be owed is zero, the Court neither pretends to ascertain the market value of the confiscated property nor asserts that the case falls within one of the two exceptions where market value need not be determined. Instead, the Court proclaims that just compensation is to be determined by the former property owner's "net loss," and endorses simultaneously two competing and irreconcilable theories of how that loss should be measured. The Court proclaims its agreement with the Ninth Circuit majority that just compensation is the interest petitioners *would have earned* had their funds been deposited in *non-IOLTA* accounts. *Ante*, at 21–22. See also *Washington Legal Foundation* v. *Legal Foundation of Wash.*, 271 F. 3d 835, 862 (CA9 2001) ("[W]ithout IOLTA, neither Brown nor Hayes would have earned interest on his principal because by regulatory definition, their funds would have not oth-

erwise been placed in an IOLTA account"). At the same time, the Court approves the view of the Ninth Circuit *dissenters* that just compensation is the amount of interest *actually earned* in petitioners' IOLTA accounts, minus the amount that would have been lost in transaction costs had petitioners sought to keep the money for themselves. *Ante*, at 20–21, n. 10. The Court cannot have it both ways—as the Ninth Circuit itself realized—but even if it could, neither of the two options from which lower courts may now choose is consistent with *Phillips* or our precedents that equate just compensation with the fair market value of the property taken.

A

Under the Court's first theory, just compensation is zero because, under the State Supreme Court's Rules, the only funds placed in IOLTA accounts are those which could not have earned net interest for the client *in a non-IOLTA* savings account. App. 150. This approach defines petitioners' "net loss" as the amount of interest they would have received had their funds been deposited in separate, non-IOLTA accounts. See *ante*, at 21–22 ("[I]f the [Limited Practice Officers (LPOs)] who deposited petitioners' money in IOLTA accounts could have generated net income, the LPOs violated the court's Rules. Any conceivable net loss to petitioners was the consequence of the LPOs' incorrect private decisions rather than any state action.").

This definition of just compensation has no foundation in reason. Once interest is earned on petitioners' funds held in IOLTA accounts, that money is petitioners' property. See *Phillips*, 524 U. S., at 168 ("[A]ny interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal"). It is at *that* point that the State appropriates the interest to fund LFW—*after* the interest has been generated in the pooled accounts—and it is at *that* point that just compensation

for the taking must be assessed. It may very well be, as the Court asserts, that petitioners could not have earned money on their funds absent IOLTA's mandatory pooling arrangements, but just compensation is not to be measured by what would have happened in a hypothetical world in which the State's IOLTA program did not exist. When the State takes possession of petitioners' property—petitioners' money—and transfers it to LFW, the property obviously has *value*. The conclusion that it is devoid of value because of the circumstances giving rise to its creation is indefensible.

Consider the implications of the Court's approach for a case such as *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155 (1980), which involved a Florida statute that allowed the clerk of a court, in his discretion, to invest interpleader funds deposited with that court in interest-bearing certificates, the interest earned to be deemed "'income of the office of the clerk of the circuit court.'" *Id.*, at 156, n. 1 (quoting Fla. Stat. §28.33 (1977)). The appellant in *Webb's* had tendered nearly $2 million to a state court after filing an interpleader action, and we held that the state court's retention of the more than $100,000 in interest generated by those funds was an uncompensated taking of private property.[3] 449 U. S., at

---

[3] A *separate* Florida statute, Fla. Stat. §28.24 (1977), which was not even challenged in *Webb's*, 449 U. S., at 158, provided that the Clerk of the Circuit Court would make "charges for services rendered," including charges for receiving money into the registry of court, §28.24(14). These charges were *not* deducted from the gross interest earned, as the Court suggests, *ante*, at 20–21, n. 10, but from the *principal*, before any interest had been generated on the interpleader fund. See 449 U. S., at 157–158. The creditors in *Webb's* sued to recover the *entire interest* that had been earned on the fund pursuant to §28.33, *id.*, at 158, and we held that "*any interest* on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately

164.

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

In *Webb's* this Court *unanimously* rejected the contention that a state regulatory scheme's generation of interest that would otherwise not have come into existence gave license for the State to claim the interest for itself. What can possibly explain the contrary holding today? Surely it cannot be that the Justices look more favorably upon a nationally emulated uncompensated taking of clients' funds to support (hurrah!) legal services to the indigent than they do upon a more local uncompensated taking of clients' funds to support nothing more inspiring than the Florida circuit courts. That were surely an unprincipled distinction. But the real, principled basis for the distinction remains to be disclosed. And until it is disclosed, today's endorsement of the proposition that there is no taking when "the State giveth, and the State taketh

---

to be the owners of that principal," *id.*, at 162.

away," has potentially far-reaching consequences. May the government now seize welfare benefits, without paying compensation, on the ground that there was no "net los[s]," *ante*, at 19, to the recipient? Cf. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).[4]

What is more, the Court's reasoning calls into question our holding in *Phillips* that interest generated on IOLTA accounts is the "private property" of the owners of the principal. An ownership interest encumbered by the right of the government to seize monies for itself or transfer them to the nonprofit organization of its choice is not compatible with any notion of "private property." True, the Fifth Amendment allows the government to appropriate private property without compensation if the market value of the property is zero (and if it is taken for a "public use"). But the Court does not defend the State's action on the ground that the money taken is worthless, but instead on the ground that the interest would not have been created but for IOLTA's mandatory pooling arrangements. The Court thereby embraces precisely the line of argument we rejected in *Phillips*: that the interest earned on client funds in IOLTA accounts could not be deemed "private property" of the clients because those funds "cannot reasonably be expected to generate interest income on their own." 524 U. S., at 169 (internal quotation marks omitted); cf. *id.*, at 183 (BREYER, J., dissenting).

---

[4] The Court claims that its holding "does not depend on the fact that interest was created by a state regulatory program," and "rests instead on the fact that just compensation for a net loss of zero is zero." *Ante*, at 22, n. 11 (internal quotation marks omitted). This simply disclaims the ultimate ground by appealing to the proximate ground: The *reason* the Court finds there has been a "a net loss of zero" is that the interest on petitioners' funds is entirely attributable to the merging of those funds into the IOLTA account—*but for* IOLTA, they would have earned no interest at all. That is to say, no compensation is due on the interest because the "interest was created by a state regulatory program."

B

The Court's rival theory for explaining why just compensation is zero fares no better. Contrary to its aforementioned description of petitioners' "net loss" as the amount their funds would have earned in non-IOLTA accounts, *ante*, at 21–22, the Court declares that just compensation is "the *net value* of the interest that was *actually earned* by petitioners," *ante*, at 20–21, n. 10 (emphasis added)—net value consisting of the value of the funds, *less* "transaction and administrative costs and bank fees" that would be expended in extracting the funds from the IOLTA accounts, *ibid.* To support this concept of "net value," the Court cites nothing but the cases discussed earlier in its opinion, *ante*, at 17–18, which establish that just compensation consists of the value the owner has lost rather than the value the government has gained. In this case, however, there is *no difference* between the two. Petitioners have lost the interest that *Phillips* says rightfully belongs to them—which is precisely what the government has gained. The Court's apparent fear that following the Constitution in this case will provide petitioners a "windfall" in the amount of transaction costs saved is based on the unfounded assumption that the State must return the interest directly to petitioners. The State could satisfy its obligation to pay just compensation by simply returning petitioners' money to the IOLTA account from which it was seized, leaving others to incur the accounting costs in the event petitioners seek to extract their interest from the account.

In any event, our cases that have distinguished the "property owner's loss" from the "government's gain" say *nothing whatever* about reducing this value to some "net" amount. Remarkably, the Court does not cite the recent case of ours that *specifically addresses* this issue, and that does so in the very context of an IOLTA-type scheme. *Phillips* flatly rejected the notion that just compensation

may be reduced by transaction costs the former owner would have sustained in retaining his property. See *id.*, at 170 ("The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected")[5]; see also *Olson* v. *United States*, 292 U. S., at 255 ("It is the property and not the cost of it that is safeguarded by [the] Constitutio[n]"). And if the Federal Government seizes someone's paycheck, it may not deduct from its obligation to pay just compensation the amount that state and local governments would have taxed, on the ground that it need only compensate the "net los[s]," *ante*, at 19, to the former owner. That is why we have repeatedly held that just compensation is the "market value" of the confiscated property, rather than the "net loss" to the owner. "Market value" is not reduced by what the owner would have lost in taxes or other exactions. "'[J]ust com-

---

[5] All the Court can muster in response to *Phillips*' rejection of its view that the government may seize property for which the administrative costs of retention exceed market value is a hypothetical posed by the Ninth Circuit dissenters in support of their suggestion to remand. *Ante*, at 20–21, n. 10. The doctrine of *stare decisis* adopts a different hierarchy: This Court's precedents are to be followed over dissenting opinions in the Courts of Appeals.

The Court also suggests that the confiscation of petitioners' property is "comparable to" the Clerk's fee under Fla. Stat. §28.24 (1977), which we discussed in *Webb's Fabulous Pharmacies, Inc.,* v. *Beckwith*, 449 U. S. 155 (1980). *Ante*, at 20–21, n. 10. The Clerk's fee imposed pursuant §28.24(14) had nothing to do with "transaction costs" but was a fee *for services rendered by the State itself.* 449 U. S., at 157. Here, the State does not even attempt to characterize its retention of petitioners' interest in that fashion. While petitioners, their escrow companies, and the banks holding their funds may very well incur costs in returning the IOLTA-generated interest to the clients, this does not convert the State's seizure into a fee. In any event, as noted earlier, *ante*, at 6, n. 3, we neither approved nor disapproved the State's retention of fees pursuant to §28.24(14) in *Webb's* because the parties did not challenge it. 449 U. S., at 158.

pensation' means the full monetary equivalent of the property taken." *United States* v. *Reynolds*, 397 U. S. 14, 16 (1970).

But the irrationality of this aspect of the Court's opinion does not end with its blatant contradiction of a precedent *(Phillips)* promulgated by a Court consisting of the same Justices who sit today. Even if "net value" (rather than "market value") *were* the appropriate measure of just compensation, the Court has no basis whatsoever for pronouncing the "net value" of petitioners' interest to be zero. While the Court is correct that under the State's IOLTA rules, petitioners' funds could not have earned net interest *in separate, non-IOLTA accounts*, *ante* at 20–21, n. 10, that has no bearing on the transaction costs that petitioners would sustain in removing their earned interest from the IOLTA accounts.[6] The Court today arbitrarily forecloses clients from recovering the "net interest" to which (even under the Court's definition of just compensation) they are entitled. What is more, there is no reason to believe that petitioners themselves do not fall within the class of clients whose funds, though unable to earn interest in non-IOLTA accounts, nevertheless generate "net interest" in IOLTA accounts. That is why the Ninth Cir-

---

[6] The Court quotes the Washington Supreme Court's definition of IOLTA funds as "only those funds that cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client." *Ante*, at 20–21, n. 10 (quoting *IOLTA Adoption Order*, 102 Wash. 2d 1101, 1114 (1984) (emphasis deleted). It is true that IOLTA funds cannot earn net interest for the client *in non-IOLTA accounts*, and, prior to our decision in *Phillips*, also could not earn net interest for the client in IOLTA accounts because state law declared such interest to be the property of LFW. After *Phillips*, however, IOLTA funds *can* earn net interest for the client when placed in IOLTA accounts—because all interest earned by funds in IOLTA accounts is the client's property. See *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 160 (1998).

cuit dissenters (who shared the Court's second theory of just compensation but not the first) voted to remand to the District Court for a factual determination of what the "net value" of petitioners' interest actually is.

To confuse confusion yet again, the Court justifies its decision *not* to remand by simply falling back upon the *different* theory of just compensation espoused by the Ninth Circuit *majority*—namely, that just compensation will always be zero because the funds would not have earned interest for the clients in a *non-IOLTA* savings account. *Ante*, at 21–22. See also 271 F. 3d, at 862 ("Brown and Hayes are in actuality seeking compensation for the value added to their property by Washington's IOLTA program"). That does not conform, of course, with the Court's previously announced standard for just compensation: "the net value of the interest that was *actually earned* by petitioners." *Ante*, at 20–21, n. 10 (emphasis added).[7] Assessing the "net value" of interest "actually

[7] In this *reprise* of its first theory, designed to cover the embarrassing fact that its second theory does not support its disposition, the Court makes the assertion that, even if some lawyer mistakenly placed into the IOLTA account client funds that *could* have generated net earnings independently (thus rendering even the Court's first theory factually inapplicable), compensation would *still* not be required, because "[a]ny conceivable net loss [would be] the consequence of the [lawyer's] incorrect private decisio[n] rather than any state action." *Ante*, at 21. That is surely not correct. Even on the Court's own misbegotten theory, the taking occurs when the IOLTA interest is transferred to LFW, and compensation is not payable only if the principal generating that interest could not have earned interest otherwise. How the principal got into the IOLTA account—mistakenly or otherwise—has nothing to do with whether there has been a "taking" of "value." The government would owe just compensation for a taking of real property even if the action of some third party had caused the property mistakenly to be included on the list of properties scheduled for condemnation. The notion that the government can keep the property without compensation, and relegate the owner to his remedies against the private party, is nothing short of bizarre. Imagine the fruitful application of this

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

* * *

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

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

---

principle of "intervening private fault" in other fields: "Yes, you were subjected to a brutally unlawful search and seizure in connection with our raid upon a street corner where drugs were being distributed. But since the only reason you were at that corner is that a taxi dropped you at the wrong address, you must look to Yellow Cab for your remedy."