1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WASHINGTON LEGAL FOUNDATION, :

4 ET AL., :

5 Petitioners :

6 v. : No. 01-1325

7 LEGAL FOUNDATION OF :

8 WASHINGTON, ET AL. :

9 - - - - - - - - - - - - - - - - -X

10 Washington, D.C.

11 Monday, December 9, 2002

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 11:04 a.m.

15 APPEARANCES:

16 CHARLES FRIED, ESQ., Cambridge, Massachusetts; on behalf

17 of the Petitioners.

18 DAVID J. BURMAN, ESQ., Seattle, Washington; on behalf of

19 Respondent Legal Foundation of Washington.

20 WALTER DELLINGER, ESQ., Washington, D.C.; on behalf of

21 Respondents Justices of the Supreme Court of

22 Washington.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 JUSTICE STEVENS: We'll hear argument in

4 Number 01-1325, Washington Legal Foundation against the

5 Legal Foundation of Washington.

6 Mr. Fried, you may proceed when -- whenever

7 you're ready.

8 ORAL ARGUMENT OF CHARLES FRIED

9 ON BEHALF OF THE PETITIONERS

10 MR. FRIED: Thank you, Justice Stevens, and may

11 it please the Court:

12 I wish to argue four propositions. First, that

13 the interest in these IOLTA accounts is the private

14 property of Brown and Hayes, the clients. Second, that it

15 was not regulated; it was taken. Third, that it has

16 value. And fourth, that an injunction or declaratory

17 relief is an appropriate and practicable form of relief in

18 this case.

19 Now --

20 QUESTION: Before you start, Mr. Fried, may I

21 ask you one broad question? You don't agree, I take it,

22 with the conclusion of the dissent in the court of

23 appeals, which I don't think agreed with your fourth

24 point.

25 MR. FRIED: No. I think we are entitled to a

1 declaration, or to an -- or an injunction just as was
2 received in Eastern -- in Eastern Enterprises, just as was
3 received in Hodel v. Irving, just as was received in
4 Nollan and Dolan. And in our -- in our complaint filed,
5 we asked for declaratory or injunctive relief, so I think
6 that is available, and it is a practical and proper form
7 of relief in this case.
8 QUESTION: The only point I was really want --
9 you -- you do not understand the dissenters in the Ninth
10 Circuit to have gone that far, though, do you?
11 MR. FRIED: How -- how far, Justice Stevens?
12 QUESTION: To have held that you're entitled to
13 injunctive relief.
14 MR. FRIED: They did not go that far. They --
15 no, they did not. No, they did not. `
16 QUESTION: In fact, they specifically said this
17 equitable relief would not enjoin takings, but would
18 simply stop Washington Supreme Court from requiring the
19 LPO's to comply with the IOLTA rules.
20 MR. FRIED: Well, if the injunctive relief,
21 which we asked for -- and here in the -- the complaint, I
22 believe, is on page 100 of the -- 100 of the joint
23 appendix. I think it's on -- no, I'm sorry. It's -- yes,
24 in the -- in the joint appendix. We ask specifically for
25 injunctive and declaratory relief in general.

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1 Now --
2 QUESTION: Mr. Fried, what plaintiffs have
3 standing to ask for injunctive relief in this case?
4 MR. FRIED: Certainly Brown and Hayes. There's
5 a question whether Daugs and Maxwell do, but certain --
6 QUESTION: But in the -- in the complaint was an
7 injunction sought on behalf of Brown and Hayes?
8 MR. FRIED: Yes. An injunction was sought in
9 general. A general injunction was sought. I'm sorry.
10 I'm not putting my hand on the -- on the section in the
11 complaint, but --
12 QUESTION: I -- I thought it read to the
13 contrary, that it was on behalf of the LPOs.
14 MR. FRIED: It was on behalf of the LPOs, but
15 then finally -- yes. Now I have it. Thank you. In the
16 joint appendix on page 30, we ask specifically that they
17 permanently enjoin the defendants. This is paragraph 3.
18 So we asked for that relief, yes.
19 QUESTION: And -- and you ask for it now on
20 behalf of Brown and Hayes, not --
21 MR. FRIED: We certainly do.
22 QUESTION: -- on behalf of the foundation.
23 MR. FRIED: We -- we ask for it on behalf of any
24 and all parties in this case.
25 QUESTION: Mr. Fried, the question that Justice

1 Stevens raised, which I was then addressing, was not what
2 was in your complaint, but what was the position of the
3 dissenting judges in the Ninth Circuit. And I read from
4 that dissent -- so you are clearly asking for something
5 that the dissenters did not say you would be entitled to
6 when they said --
7 MR. FRIED: We are asking for more than the
8 dissenters would have given us. That is correct, Justice
9 Ginsburg.
10 QUESTION: Yes. They said the equitable relief
11 would not enjoin takings.
12 MR. FRIED: Yes. We are asking for more than
13 that. We are asking for it because it's very clear on
14 this Court's precedents that where compensatory relief
15 would be impracticable, or is not contemplated in the
16 program, an injunction is -- is proper. And this Court
17 has on numerous occasions in very similar cases granted
18 injunctive relief.
19 QUESTION: You -- you mentioned your complaint,
20 and then we have this passage in the dissent. When did
21 the idea of an injunction of the takings -- when was that
22 squarely presented to any court? Because it would seem
23 that if you had presented it, that this is rather curious,
24 what we get in the dissent.
25 MR. FRIED: It's been presented throughout,

1 Justice Ginsburg, and in fact, in the Fifth Circuit case,
2 which is virtually identical to this case, not only was it
3 presented, but an injunction was granted. And exactly the
4 injunction which we received --
5 QUESTION: If you just could tell me at what
6 point you made it clear to the court that you were seeking
7 not what is described here, that is, that the -- that the
8 injunction would be addressed to the compliance of the
9 LPO's with the IOLTA rules.
10 MR. FRIED: I think that the -- I submit,
11 Justice Ginsburg, that that paragraph, which I have read
12 to you, makes that clear.
13 QUESTION: But that paragraph --
14 MR. FRIED: And in the summary -- and I'm -- I'm
15 informed that it was also made clear in our summary
16 judgment motion. So that the courts were well aware, as
17 the complaint should have made them aware, but also were
18 well aware that we were seeking an injunction for all
19 parties in all respects. And after all, that is precisely
20 the relief that was obtained in the Fifth Circuit case.
21 QUESTION: Let -- let me see if I can help you
22 get to the other major parts of your case by asking this
23 question.
24 In Loretto, could the property owners have
25 obtained an injunction against piercing the building for

1 the little antenna or the wire on the grounds that there
2 was no compensation? I doubt it. I would think the
3 government, after Loretto, would continue to be able to
4 poke the holes in -- in the wall -- or maybe I'm wrong --
5 even though compensation was negligible. Could there have
6 been an injunction there, and if the answer is, well, no,
7 why can there be an injunction here? And maybe that gets
8 you to the --
9 MR. FRIED: They --
10 QUESTION: -- the nature of the taking that
11 occurred in this case.
12 MR. FRIED: The -- I think that's exactly the
13 reason. If there were an -- if there is compensation in
14 this case, exactly as the Court said in Eastern
15 Enterprises, it would -- in effect, compensation being
16 dollar-for-dollar is the equivalent of shutting down the
17 program. And that was the case in Webb's as well.
18 I -- I might just mention, Justice Kennedy, that
19 the respondents throughout this case say that the Eastern
20 Enterprises case, which is very important to our
21 injunctive claim, was really only a plurality. There was
22 not a majority for the Court. I don't believe that the
23 fifth Justice, which was yourself, disagreed with the
24 remedy.
25 And indeed, the fifth Justice said that this was

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1 not a takings case -- Eastern Enterprise -- because unlike
2 this very case we have, this was not the -- the -- you
3 said, rather the exaction is a forced contribution to
4 general government revenues. I'm sorry. I'm reading the
5 wrong -- I'm reading the wrong passage.
6 In the Eastern -- Eastern Enterprises case, you
7 said that the reason -- the reason that you didn't think
8 that was a takings case was that a valuable interest in an
9 intangible or even a bank account or accrued interest,
10 which is, of course, this case, had not been appropriated.
11 Well, this is a bank account and accrued interest --
12 QUESTION: Well, what about my hypothetical on
13 Loretto? I -- I take it Loretto establishes that there
14 was an invasion, a taking --
15 MR. FRIED: Yes.
16 QUESTION: -- but let's -- let's assume that the
17 compensation was just so minimal it just really couldn't
18 be calculated. It was 10 cents or something. Could you
19 have had an injunction against installation of the
20 antennas in Loretto on the ground that the compensation
21 can't be figured? I think not. And if that's -- if my
22 conclusion is right about that, how is your case
23 different?
24 MR. FRIED: My -- our case is different because
25 in this case, as in Webb's, as in Eastern Associates, to

1 give compensation is to simply erase the program. While
2 in the case where physical property is taken, to give
3 compensation still leaves it open to use that property
4 while -- where what you have is money and you must make
5 compensation for that, then to make compensation for a
6 dollar is to pay a dollar. That's what the Court said in
7 Eastern Enterprises.
8 QUESTION: Why doesn't that just prove that you
9 have the wrong clause of the Constitution? That is, your
10 clause of the Constitution, the one you're pushing, says,
11 nor shall private property be taken for public use without
12 just compensation. Foreseeing that you can take the
13 property for public use, you just have to pay money for
14 it. Just compensation.
15 Now, if paying the just compensation can't work
16 out, or it's too hard or, you know, the person doesn't
17 have enough of an interest to get anything, that doesn't
18 mean the government can't take it. It just -- if there's
19 something wrong with it, it means that that that which is
20 wrong with it is that it violates the Due Process Clause,
21 not the Just Compensation Clause.
22 MR. FRIED: That would be correct if Webb's had
23 been a due process case, but it was not. It was a takings
24 case. And in Webb's, they didn't say you can take that
25 interest so long as you pay just compensation for it.

1 They say, you've got to stop.

2 QUESTION: Then the rationale -- you'd say

3 even -- I mean, occasionally some case does have something

4 that's a little hard to follow, but the -- the theory that

5 that is consistent with the Just Compensation Clause,

6 rather than the Due Process Clause, is?

7 MR. FRIED: That it makes no sense. It's not

8 that it's hard to calculate. We would be happy to argue

9 how you would calculate it. The point is that to

10 calculate it and to pay the just compensation is to shut

11 down the program. It makes no sense. There's no program

12 left after you have paid just compensation.

13 QUESTION: Yes, but if -- if it is shown -- and

14 I guess we don't know here because it hasn't been

15 determined. If it is shown that no compensation is due

16 because it wouldn't have earned or produced anything, then

17 how is it a taking? I mean, that's -- because the Takings

18 Clause refers to the taking without just compensation. If

19 the compensation is 0, how is it a taking?

20 MR. FRIED: The compensation is not 0, and the

21 premise of the --

22 QUESTION: If. If it were, how -- how is it a

23 taking?

24 MR. FRIED: If it were. But the --

25 QUESTION: Well, then what is your answer? Is

1 it a taking if the just compensation is 0?

2 MR. FRIED: Yes. It is a taking, but it is --

3 as the -- because this Court --

4 QUESTION: How is it in -- in the language of

5 the clause?

6 MR. FRIED: Because this Court in Phillips has

7 held that economic -- that -- that there is private

8 property and it has value even though it has no realizable

9 economic value.

10 But we do not concede that there is no economic

11 value here, and the fact that it could not have earned

12 interest --

13 QUESTION: But that has not been determined, has

14 it?

15 MR. FRIED: Yes, it has. It`has been

16 determined. It has been determined and conceded by the

17 respondents that there is interest in this case of $5

18 and $2. They go on to argue, ah, yes, but absent the

19 IOLTA program, that would not have been earned. This

20 Court in Webb's specifically addressed that point and

21 said, we accept the proposition that apart from the

22 statute, Florida law does not require that interest be --

23 be earned on registered deposits. So it was quite clear.

24 This is just another version of --

25 QUESTION: But weren't those gross figures

1 rather than net figures? Those --

2 MR. FRIED: Those are gross figures, yes,

3 Justice Stevens.

4 QUESTION: But can we assume, along with

5 Justice O'Connor's question, that there's no net loss to

6 the property owner? We assume the -- the interest is

7 the -- goes with the principal, and therefore it's

8 property, and property has been taken. But has there been

9 any net loss to the person from whom the property has been

10 taken?

11 MR. FRIED: Perhaps and perhaps not. Let's say

12 that there has not. I -- we argue that that does not

13 matter. It is the gross -- it is the gross interest that

14 is in -- involved here --

15 QUESTION: Even if it had been --

16 MR. FRIED: -- and that is the point --

17 QUESTION: Do you agree if it was a taking and

18 you were to get just compensation, you would get the net

19 loss rather than the gross loss?

20 MR. FRIED: No. We would get the gross loss.

21 I think the --

22 QUESTION: You -- you again, Mr. Fried, are

23 going quite beyond the position of the original panel,

24 later the dissenters in the Ninth Circuit, who made it

25 clear -- and this is on page 83a of the original panel

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1 decision -- that said, just as a client is not entitled to
2 the full amount that a lawyer collects for him, but only
3 that amount less the lawyer's reasonable expenses and
4 fees, so just compensation for the interest taken by
5 IOLTA, after IOLTA causes the interest fund to exist, is
6 something less -- is something less -- than the amount of
7 the interest.
8 MR. FRIED: That is what the dissent says.
9 We do not agree with that.
10 What we agree with is what this Court said in
11 Phillips when this Court said that -- and it used the
12 example of the rents -- the government may not seize rents
13 received by the owner of a building because it can prove
14 that the costs incurred in collecting the rents exceed the
15 amounts collected. If the argument that's being made now
16 were correct, then that statement would be incorrect
17 because it would mean --
18 QUESTION: Well, isn't the difference --
19 MR. FRIED: -- that the government may seize
20 those rents.
21 QUESTION: Isn't the difference, Mr. Fried, that
22 in the -- in the rent example, what the -- what the
23 members of the Court were assuming was that if somebody
24 wants to be a bad businessperson, he's perfectly free to
25 do it, and until he goes bankrupt, or loses the property,

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1 he can collect the rent.

2 The situation here is different because the

3 situation here is such that there's nothing to collect.

4 The -- the way the background principles of the banking

5 statutes are set up, or -- which are effected by the

6 banking statutes means that the -- the rent, the penny,

7 the interest, never gets to the person who owns the

8 principal. And isn't that why -- isn't that exactly why

9 Phillips does not determine the result in this case?

10 MR. FRIED: I think not, Justice --

11 Justice Souter, because the Court in Phillips said

12 specifically this interest -- so it assumes there is --

13 this interest is the private property of the clients,

14 Brown and Hayes. It said that this is -- that's what this

15 Court said. It is their property. Now, it doesn't

16 disappear as their property because they would incur

17 expenses in collecting it.

18 QUESTION: Well, I may not be the -- the best

19 expert on what the -- what the majority meant by that.

20 (Laughter.)

21 QUESTION: But I think thought what the majority

22 meant by that was that when you aggregate, as -- as is the

23 case in these IOLTA accounts, of course there is a

24 fractional sense that is attributable to every item

25 that -- a fractional sense of the interest that's

1 attributable to every item that goes into the aggregation,
2 but it doesn't follow from that that any of that
3 attributable amount could ever be netted out and ever be
4 received under the banking statutes by those individuals
5 to whom it is attributable. If, in fact, it were the
6 other way, then the IOLTA scheme would force a separate
7 NOW account to have been set up.
8 MR. FRIED: The -- the Court certainly did not
9 say that any of that interest could be netted out and paid
10 net to Brown and Hayes, but it did say, quite
11 unambiguously, that that interest -- not in some general
12 sense, but exactly that interest -- was the private
13 property of clients, Brown and Hayes.
14 Now --
15 QUESTION: But was it taken from them? So, I
16 mean, I -- I can see why you see Webb is very, very
17 similar, but the difference that I saw is that Webb says
18 the money should be deposited in an ordinary interest-
19 bearing account, and here it's being deposited in a -- in
20 an account that is really the creation of the government's
21 program that just couldn't have borne interest unless you
22 collect all these funds together. So without this
23 program, the person couldn't have earned interest.
24 Now, has the government taken that? If they
25 have taken it, then why didn't the government take it when

1 they -- when they tax it. Suppose the tax law was illegal
2 because it's very unreasonable. Why wouldn't that then be
3 a taking? Why wouldn't the government take it when the
4 government has a currency reg that imposes certain
5 conditions upon the use of that interest?
6 I'm back to the same point. Why isn't this
7 really a due process problem, not a takings problem?
8 MR. FRIED: Well, that's a -- I mean, that is --
9 that is an argument which depends on traversing the
10 premise established by this Court in Webb's and Phillips.
11 QUESTION: That's why I -- I said the difference
12 in Webb's is that in Webb's it's an ordinary interest-
13 bearing account. Here it's an account that is nonexistent
14 without the IOLTA program coming in and saying we will put
15 funds together, and those funds could not have earned
16 interest on their own.
17 MR. FRIED: Well, that is the argument that the
18 Solicitor General made in Phillips, that this is
19 government-created property, and it was rejected.
20 QUESTION: I'm making the same argument in
21 respect to taking.
22 MR. FRIED: And it was rejected by this Court.
23 It was rejected.
24 QUESTION: But do you agree with that -- that
25 premise? Couldn't a -- a group of attorneys or real

1 estate brokers form their own consortium and say in order
2 to avoid wasting this interest, we're going to put the
3 interest in a special fund and we'll give clients a check-
4 off system where we'll expend it the way they want?
5 Private -- private enterprise could do exactly what IOLTA
6 is doing, could it not?
7 MR. FRIED: It might very well.
8 QUESTION: If -- if the government let it, and
9 just because the government doesn't want to let it,
10 doesn't mean the government has a right to do it on its
11 own. Isn't that your point, or isn't it --
12 MR. FRIED: Well, that is -- that's one of the
13 points.
14 QUESTION: Well, it could do it theoretically,
15 but as a practical matter, computing the -- the various
16 payouts would -- would be so expensive that -- and the
17 payouts so small that it's just not practicable. Isn't
18 that --
19 MR. FRIED: If I could just address the
20 gross-versus-net point. The interest to which we are
21 entitled, to which the clients are entitled, is -- it was
22 calculated by respondents -- $5 and $2. That is the
23 amount to which they are entitled. It may well be that
24 along the way, the accountants will say, fine, and we'd
25 like $3.50 of that, and the lawyers may say, fine, and we

1 want actually $4 of that. And it may well be that at the
2 end of the day they don't have any money. That's not any
3 of the government's business.
4 QUESTION: But that -- that was not the position
5 that any judge has brought so far because the original
6 panel that held in your favor said, yes -- and I don't
7 want to repeat myself, but something less. It would be
8 something less than the amount of interest.
9 I have a question that -- that's puzzling me
10 about this theoretically we could have it separate.
11 I thought that the program can only work, as far as the
12 tax law is concerned, if the client has no control over
13 the disposition of --
14 MR. FRIED: That is correct.
15 QUESTION: -- that interest.` If the client has
16 control, then it's taxable to the -- then it -- interest
17 like any other interest would be taxable.
18 So, here, the IOLTA has this peculiar aspect to
19 it. You can it's interest belonging to the client, but
20 that client has no right to dispose of it as long as it's
21 going to be nontaxable income.
22 MR. FRIED: The client has a right to dispose of
23 it, but -- or ought to have a right, under the
24 Constitution, has a right to dispose of it --
25 QUESTION: But then it would be interest --

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1 MR. FRIED: -- but he will pay taxes.
2 QUESTION: Yes. But that's another --
3 MR. FRIED: That's -- that's life.
4 QUESTION: -- another -- I would like to go back
5 to a very basic question, and it's -- it's essentially
6 this. If you had not -- no IOLTA program with the tax
7 advantage that you get that makes the whole thing work,
8 and we went back, we just got this injunction, stop it
9 all, it seems to me the big gainer, the person who is
10 really benefitting, and who lost the last time around is
11 the bank because the bank had the free use of these funds,
12 and IOLTA comes along and takes it. It really takes it
13 away from the banks. And then if you succeed, it goes
14 back to the bank. Am I right that that's the --
15 MR. FRIED: It may. It may go back to the bank,
16 which, in a competitive industry, would presumably work
17 its way down to the -- to the clients, but I don't need to
18 make that argument.
19 QUESTION: Why -- why don't you, though, have to
20 make exactly the same argument if IOLTA goes down the
21 drain -- compulsory IOLTA goes down the drain on your
22 theory? Why don't you have to make the same argument
23 about the -- the background government regulation which,
24 in effect, gives the interest to the bank?
25 MR. FRIED: It doesn't give the interest to the

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1 bank.

2 QUESTION: Sure, it does. It says, look, bank,

3 you can take in money, but you can't pay out any interest

4 on it. You can't pay out interest on a straight checking

5 account and you can't pay out NOW interest to a

6 corporation. Therefore, in effect, you get to keep it.

7 MR. FRIED: Well, the --

8 QUESTION: And the -- the effect of that, it

9 seems to me, is just as much to deprive your client of the

10 $5, if there is any deprivation at all, as -- as it is to

11 deprive it when it says IOLTA gets it instead of the bank.

12 MR. FRIED: Yes.

13 QUESTION: Except your -- your client is not

14 compelled by -- by those banking regulations to deposit

15 any money in the bank, is he?

16 MR. FRIED: No, it is not.

17 QUESTION: And your client, I suppose, is not

18 compelled to engage in this consensual transaction with

19 the broker.

20 MR. FRIED: It is -- the client is compelled to

21 engage in it if he wishes to buy and sell real estate.

22 QUESTION: And the client --

23 MR. FRIED: He's not compelled to buy and sell

24 real estate.

25 QUESTION: And the client is compelled to

1 deposit the money if it wishes to get banking services.
2 But in no instance -- either the IOLTA case, or the
3 background regs case -- does the government say to the
4 person with $10 in his pocket, you've got to put it in the
5 bank, or you've got to spend that money on real estate.
6 MR. FRIED: Well, indeed, not.
7 QUESTION: But the compulsion is the same one
8 way or the other.
9 QUESTION: I think -- I think the point is
10 that -- that your client must -- must be willing -- what
11 is it -- must deposit money in the bank if he wants to
12 deposit money in the bank. That's the compulsion here.
13 MR. FRIED: He must --
14 QUESTION: He must deposit money in the bank if
15 he wants to deposit money in the bank.`
16 MR. FRIED: He must deposit money in the bank if
17 he wants to buy and sell real estate, the way you have to
18 pay money to a grocer if you want to eat.
19 If I may, I'd reserve the balance of my time for
20 rebuttal. Thank you.
21 QUESTION: Mr. Burman.
22 ORAL ARGUMENT OF DAVID J. BURMAN
23 ON BEHALF OF RESPONDENT
24 LEGAL FOUNDATION OF WASHINGTON
25 MR. BURMAN: Justice Stevens, and may it please

1 the Court:

2 I would like to start with the question that

3 Justice O'Connor posed because I think it goes to the

4 heart of the flaw in plaintiffs' case. There is an

5 independent requirement -- an independent element of their

6 cause of action which is that they show that there was

7 just compensation due and denied by the State of

8 Washington. That has not happened here.

9 QUESTION: So the position of the State of

10 Washington is that it can take any property so long as it

11 doesn't have -- so long as compensation can't be

12 calculated.

13 MR. BURMAN: No. The position is that there is

14 no unconstitutional taking if we would pay compensation.

15 Certainly the -- the plain language of`the clause says the

16 property may be taken.

17 QUESTION: Doesn't -- doesn't the State have

18 some duty to recognize that the Constitution protects

19 property and it shouldn't take property that doesn't

20 belong to it?

21 MR. BURMAN: In certain circumstances, the Just

22 Compensation Clause acts a shield.

23 QUESTION: So -- so if you can get it --

24 MR. BURMAN: The process might well --

25 QUESTION: So if you can get away with taking

1 property just because it can't be valued, then you can
2 take it.
3 MR. BURMAN: That is not --
4 QUESTION: That's the position of the State of
5 Washington.
6 MR. BURMAN: That is the position of this
7 Court's cases, not the position of the State of
8 Washington, which does not go that far. Our position is
9 that --
10 QUESTION: Well, there might be some due process
11 claim, mightn't there?
12 MR. BURMAN: One was not stated here.
13 QUESTION: We're trying -- what -- what we're
14 looking at here is a takings claim.
15 MR. BURMAN: Correct. Other`plaintiffs might
16 well have a due process claim. These plaintiffs may well
17 still have a First Amendment claim since their real
18 complaint with this is their subjective ideological one,
19 subjectivity which this Court has said is not the business
20 of the Just Compensation Clause.
21 QUESTION: Once again, I -- $5 and $2. It's not
22 a whole lot of money, but it's their money. Why -- why do
23 you say it can't be calculated?
24 MR. BURMAN: Under this Court's cases, it is not
25 their money. The Court has been very careful to say that

1 what we look at, because the Just Compensation Clause is a
2 type of indemnity provision that is worried about
3 responding with -- to loss of pecuniary or monetary
4 value -- the Court in the parcel aggregation cases, such
5 as Boston Chamber and Sage, made it very clear that if it
6 is not economically practicable, if the costs of
7 aggregation would exceed the benefit, there is no just
8 compensation.
9 QUESTION: But you're -- there you're talking
10 about something that has to be sold for money. This is
11 quite calculable. We know exactly how much interest was
12 paid, and we know that that interest belonged -- under our
13 case law, belongs to these plaintiffs. What -- what is
14 the problem? $5 and $2.
15 MR. BURMAN: Answering the question of whether
16 it's property, as the Court made clear in Phillips, does
17 not answer the question of whether there is a taking, or
18 the question of whether there is just compensation.
19 QUESTION: Well, who has the $5 and $2?
20 MR. BURMAN: The government does, as it had the
21 additional value in the cases such as the Boston Chamber
22 case, and in --
23 QUESTION: Mr. Burman, am I right? It's not
24 $5 and $2. That's gross. And with the --
25 MR. BURMAN: That is gross. And, in fact, in

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1 Webb's, the very case they rely upon, the Court said the
2 government can deduct the cost of protecting that money
3 before you calculate what is due. That is exactly what
4 happened --
5 QUESTION: Right. That's why he says he wants
6 the injunction.
7 MR. BURMAN: Webb's did not have an injunction.
8 QUESTION: I know it didn't. It didn't need it.
9 And his point was -- his point was that since -- if you
10 could theoretically give the compensation, which is
11 impossible for the reason you say --
12 MR. BURMAN: It's --
13 QUESTION: It's impossible. They're not
14 entitled to anything in cash. But look, if you could do
15 it theoretically, there would be no more program, so give
16 us an injunction because it comes to the same thing.
17 MR. BURMAN: Where the textual language is just
18 compensation, and where the value is economic or pecuniary
19 or monetary loss, as this Court's cases often say, it's
20 not just that there is no way to remedy this problem.
21 There is no remedy called for by the Constitution. The
22 remedy is just compensation. I take this --
23 QUESTION: Suppose -- suppose there were a State
24 in which a group of lawyers or real -- people with real
25 estate accounts got together and say, we really should

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1 pool this interest and we'll give our clients a choice of
2 four different things that they can allocate the money to.
3 And we're just going to do that as a service, and we think
4 it's good business. Actually we might -- the company that
5 does this might make a few dollars themselves.
6 If that were in place, could the State of
7 Washington do what it does now, say, you know, this looks
8 like a good idea? We think we'll take it for what we
9 like.
10 MR. BURMAN: That may be a very different case.
11 These plaintiffs have never tried that. That is not their
12 complaint. They make no allegation --
13 QUESTION: But can -- do they even have the
14 possibility of trying that given the regulation that you
15 now have?
16 MR. BURMAN: Actually, we don't know that.
17 QUESTION: You've taken away, in effect, a
18 business opportunity, have you not?
19 MR. BURMAN: No. We don't know that that's the
20 case because they've never presented it to the State
21 supreme court.
22 QUESTION: Well, it's certainly profitable for
23 you to do it. Why do you think you can do what private
24 business can't?
25 MR. BURMAN: Our burden is not to come up with

1 hypotheticals for other cases that they might bring.
2 These two plaintiffs brought their case.
3 QUESTION: Well, your burden is to answer
4 hypotheticals --
5 MR. BURMAN: Yes.
6 QUESTION: -- that establish whether or not a
7 property interest is being taken in violation of the
8 Constitution here.
9 MR. BURMAN: Correct, Your Honor.
10 QUESTION: And you say that simply because it
11 can't be computed, A, because of the small amounts, and B,
12 because of the government's unique program, that it is not
13 property anymore.
14 MR. BURMAN: And the difference is what is
15 unique about the government's program and what Boston
16 Chamber says would be relevant, if individuals could do
17 it, was aggregation that reduces the transaction costs.
18 In a hypothetical where --
19 QUESTION: Now, does -- does this mean --
20 let's -- you know, banks pay higher -- higher amounts for
21 certain deposits above a certain amount. And you're
22 saying that if the government passes a law that says
23 I have to -- I have to deposit my $5,000, together with
24 other people's $5,000, thereby getting additional interest
25 for all of it -- right -- you can keep the interest

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1 because I wouldn't have gotten it anyway.

2 MR. BURMAN: Justice Scalia --

3 QUESTION: What a -- what a wonderful scam.

4 (Laughter.)

5 MR. BURMAN: There is an element of compulsion

6 there that is not present here, and there is no -- you --

7 you posit no regulatory purpose. This arose out of a

8 clear regulatory purpose to --

9 QUESTION: I don't care if there's a regulatory

10 purpose or not. I mean, that -- that may go to some

11 other -- some other element, but as -- as to whether

12 you've taken my property, the interest was paid because of

13 my $5,000, and then you come back and say, oh, yeah, but

14 you wouldn't have gotten that much because you wouldn't

15 have been -- well, that's true. I wouldn't have, but the

16 fact is I was in with those other people and I did get

17 them more money, and that more money is mine.

18 MR. BURMAN: And -- and they should present that

19 argument. It may well be that they could come up with a

20 scheme that would reduce the transaction costs and create

21 a net value, and the plain language of the rule says if

22 that happens, the lawyer has to honor it.

23 QUESTION: They're -- they're arguing --

24 MR. BURMAN: It is the lawyer's obligation.

25 QUESTION: All right. I think they're saying, I

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1 agreed with you. You know, I agreed with you. But I
2 wrote a dissent. So they're saying that was a dissent.
3 You lost. Now, it is the law of the United States that
4 this is property. Indeed, it is their clients' property.
5 Now, you tell me on that assumption, since I
6 lost, why is it not a taking of that property for which
7 they are entitled to just compensation, and, in this case,
8 the just compensation would have to take the form of an
9 injunction. Now, unless -- I'm -- I'm anxious to hear the
10 answer to that point.
11 MR. BURMAN: You lost only on the question of
12 whether the majority should have looked at those
13 additional elements. The majority was very clear to say
14 we express no opinion. We state no view on these other
15 questions. That would be nonsensical if in fact it
16 follows automatically from what the majority said, but
17 clearly that's not the case.
18 QUESTION: Good. So tell me why it doesn't.
19 MR. BURMAN: With respect to the injunction
20 question, if I could jump ahead to -- to that part of your
21 hypothetical, Eastern Enterprises, we believe, is a
22 different situation where, as in the Youpee case, the
23 Court basically said Congress could not have intended this
24 circularity, and so we are not going to read the statute
25 that way. This is different when you have the State, and

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1 it's different where, even the dissenters in the Ninth
2 Circuit below admitted that the amount due, if any, is
3 going to be smaller than the gross interest. In cases
4 such as Webb's, in cases such as Sperry, even in Phillips,
5 the Court seemed to acknowledge that the deduction made
6 sense.
7 QUESTION: But Justice Breyer's question I think
8 was, is there or is there not a taking of property here?
9 MR. BURMAN: There is property. We believe
10 there is no taking, and Mr. Dellinger will address that
11 perhaps more directly than I will. But it is --
12 QUESTION: How -- how would you define what's
13 happened to the property? It's been regulated out of
14 existence?
15 MR. BURMAN: The property was transferred, just
16 as in Connolly, just as in Eastern Enterprises.
17 QUESTION: Oh, it's been transferred but not
18 taken.
19 MR. BURMAN: Correct. It has not been taken by
20 applying the multi-factor test that the Court says applies
21 when you have a transfer of dollars, which is what
22 happened in those cases. And when you apply that test,
23 these plaintiffs admit no investment expectation, no net
24 economic loss.
25 QUESTION: It -- it seems to me an odd rule that

1 it's not a right of the owner to decide to whom the owner
2 can transfer the property.
3 MR. BURMAN: These owners transferred the
4 property to an intermediary on its way to a third party.
5 It would be a really odd rule if somehow the right to
6 exclude was independent of the economic value of money.
7 Just as interest may follow principal, it would make sense
8 that the right to exclude has to follow the economic value
9 when you send it to an --
10 QUESTION: Mr. Burman, let me ask you something
11 as a practical matter. If the Court disagreed with you
12 and concluded there was a taking and they were entitled to
13 some relief, can the problem be solved by simply adding a
14 little explanatory provision in the proposed escrow
15 instructions, that if you don't want your money in the
16 combined account, you can do something else with it?
17 MR. BURMAN: The -- the --
18 QUESTION: Otherwise, it's going in the IOLTA
19 account.
20 MR. BURMAN: The problem if -- as I understand
21 it, is that if you give the client the right to opt out,
22 the IRS says that becomes taxable. We're not saying that
23 you net out the taxes --
24 QUESTION: It would become taxable to the person
25 opting out.

1 MR. BURMAN: Correct, and that --
2 QUESTION: But not to everybody else. If the --
3 if -- if the person entering into the escrow says, having
4 understood it, look, if I opt out, I'm not going to get
5 anything, so I don't care, you can do this, would -- could
6 it still function?
7 MR. BURMAN: It -- I believe it might well be
8 able to function, and I think it's important that there's
9 no compulsion --
10 QUESTION: How could it? They're client --
11 QUESTION: Are you sure it's not taxable to the
12 person who opts out?
13 MR. BURMAN: It is -- it may be taxable to the
14 person who opts out.
15 QUESTION: Not to the others?
16 MR. BURMAN: It may not be to the others.
17 I don't know the --
18 QUESTION: Why not? Because that person would
19 have disposition either way.
20 MR. BURMAN: Oh, if they had the right. You --
21 and -- you're correct.
22 QUESTION: And -- and in order to have this
23 scheme work, the client cannot have any control over the
24 disposition.
25 MR. BURMAN: I stand corrected.

1 QUESTION: So you couldn't do -- you couldn't do
2 this --
3 MR. BURMAN: And it's not the tax that needs to
4 be netted out. It's the cost of individually recording,
5 tracking, paying, and reporting to the IRS that eats up
6 these nominal amounts. That is the problem here.
7 If I could make one correction to something
8 Mr. Fried said. There is no compulsion here. You don't
9 have to go to an escrow agency that has an LPO or a
10 lawyer. You can go to one that does not have one. In
11 Washington and many States, that's the case. There is no
12 compulsion here --
13 QUESTION: Except correct one -- or explain one
14 thing to me. I thought that if it netted out so that
15 there was no net amount available to the depositor,
16 that -- I mean, the other way around. If it netted out
17 that there was -- something was due, even 5 or 10 cents,
18 then that would be improper, and you'd have to give them
19 the money back.
20 MR. BURMAN: Absolutely. Banks effectively
21 encumber interest with their charges. That's what the
22 plaintiffs' complaint alleges. They say prior to IOLTA,
23 banks paid no interest. They bundled and effectively
24 encumbered it there. When required to separate it out, I
25 can guarantee you, you won't be allowed to go to a bank

1 and say, I'd like to withdraw my $100 and my 5 cents of
2 interest and maybe I'll pay a year $5 in service charges
3 later if I feel like it. That does not happen. This is
4 money that is encumbered, and you should look at the net
5 amount.
6 If there is no value lost, there is no taking
7 under this Court's cases.
8 Kimball Laundry could not be more clear. In
9 Kimball Laundry, the Court said for any --
10 QUESTION: -- back to my example. My example of
11 you -- you compel a bunch of people to -- to
12 contribute $5,000 apiece. No money lost? I could not
13 have made that -- that additional -- that additional
14 interest on the $5,000. So It's perfectly okay for the
15 State to say, hey, you know, this -- this interest is
16 ours. We made it on your money, but you couldn't have
17 gotten it otherwise. That seems to me extraordinarily
18 strange.
19 MR. BURMAN: If you compelled them to do it,
20 that might be a different case. It is Mr. Fried's
21 proposal, which I believe if he had a narrower argument he
22 would have made it, but he gives you the radical and
23 startling argument that you only look at the gross amount
24 and even -- and that even if there is no net value due,
25 which in case after case -- such as Kimball Laundry and

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1 Marion & Rye -- the Court has said, if no economic value
2 lost, no fair market value, no violation.
3 Here you have a perfectly functioning market.
4 The banks. They decide what is the fair market value of
5 the time value of money and they encumber it within the
6 costs --
7 QUESTION: Well, it's not a perfectly
8 functioning market when you have Federal and State
9 regulations.
10 MR. BURMAN: That's part of the baseline that
11 they do not challenge.
12 QUESTION: If that's your definition of a
13 functioning market, the -- it's the Federal Government
14 that says it has to be deducted -- it has to be spent for
15 charity purposes.
16 MR. BURMAN: It's --
17 QUESTION: And I take it that regulation isn't
18 attacked. I'm not sure why.
19 MR. BURMAN: Correct. They do not attack it.
20 It's the Federal Government that creates a tax system that
21 requires a lot of record-keeping. They do not challenge
22 that baseline cost, and our argument is that for that
23 reason, there is no value lost, no violation --
24 QUESTION: Now, what choice did the plaintiffs
25 have in going into this arrangement or not?

1 MR. BURMAN: As in Yee and PruneYard and Florida
2 Power, the plaintiffs voluntarily went into a transaction.
3 They gave up their right to exclude. They gave up this
4 interest for an intermediary for it to move on.
5 QUESTION: If they wanted to engage in the real
6 estate transaction, did they have another choice?
7 MR. BURMAN: Certainly. They could have filled
8 out the forms themself, and gone to an escrow agent that
9 did not employ an LPO or a lawyer.
10 Thank you.
11 QUESTION: Thank you, Mr. Burman.
12 ORAL ARGUMENT OF WALTER DELLINGER
13 ON BEHALF OF RESPONDENTS
14 JUSTICES OF THE SUPREME COURT OF WASHINGTON
15 MR. DELLINGER: Justice Stevèns, and may it
16 please the Court:
17 To establish a violation of the Just
18 Compensation Clause, let's remember there have to be three
19 elements. There has to be property -- established by
20 Phillips. There has to be a taking in the constitutional
21 sense, and there has to be a denial by the State of just
22 compensation.
23 Mr. Burman has suggested why that is missing in
24 this case because there has been no just compensation
25 that's denied. The justices of the Washington Supreme --

1 QUESTION: Well, but -- but that's the issue
2 before us. I'm just not sure of a precedent which says
3 that if just compensation can't be calculated, the
4 government is free to take someone's property for itself.
5 And -- and I'm just baffled by what that principle might
6 be.
7 MR. DELLINGER: Justice Kennedy, it is a taking
8 when the government takes your property without a
9 sufficient regulatory basis. And the compensation they
10 owe you, if it is zero, and zero is paid, there is no
11 violation. I know it is somewhat surprising since the
12 founding generation was so wedded to rights of property,
13 but the Fifth Amendment expressly confirms the authority
14 of government to take property for public purposes, State,
15 local, and National. They have to pay`just compensation.
16 If they take $1 million of your property and pay
17 you $999,000, they've violated the clause. If they -- if
18 your property is worth $10, and they pay you $10, they
19 haven't violated. And if it loses $10 in value, and it's
20 worth zero, then they owe you nothing. There's no denial,
21 no violation of the Fifth Amendment.
22 Professor Fried would say in that instance, if
23 the value declines from $10 to zero, you enjoin them from
24 taking it. That's not the answer. The answer is that the
25 compensation is zero.

1 Now, in this case, by definition, as the
2 justices of the Supreme Court of Washington -- insofar as
3 the English language would permit it -- said we do not
4 want to take property that individuals could earn on their
5 own. They say at page 149 of the joint appendix from the
6 original IOLTA order, in adopting these amendments to the
7 Code of Professional Responsibility, we make clear that
8 those funds available for the IOLTA program are only those
9 that cannot under any circumstances earn net interest.
10 And they even were careful at page 165 of the
11 joint appendix to say that as cost-effective subaccounting
12 services become available, making it possible to earn net
13 interest on smaller amounts for increasingly shorter
14 periods of time, more trust money will have to be invested
15 for a client's benefit under the new rule. The rule is
16 self-adjusting. Unquote.
17 QUESTION: So you give -- you give the same
18 answer to my $5,000 hypothetical that your -- your brother
19 would. Right?
20 MR. DELLINGER: My answer is that --
21 QUESTION: I mean, so long as the government
22 sets it up that way and I couldn't make any more money,
23 the money that the government makes on my money is the
24 government's. Right?
25 MR. DELLINGER: Yes, because this Court's cases

1 make it clear, Justice Scalia, that the amount of just
2 compensation that is due is the amount of your loss. And
3 if your loss is zero, there's no denial of just
4 compensation.
5 QUESTION: I don't think the cases make clear
6 what you have to deduct from it. What if -- what if it
7 would be clear that I would have had to have to sue for
8 it, and -- and I would have had to expend attorney's fees?
9 Does that all have to be deducted from the just
10 compensation?
11 MR. DELLINGER: No. I would not -- I would not
12 count that as all. The -- the proper measure is what a
13 willing buyer would pay a willing seller. In this
14 instance, I think, it's the -- what is taken is the
15 ability to use one's money to earn money for a period of
16 time. What would a willing buyer pay for that?
17 If I have a few thousand dollars to invest
18 for 72 hours and say to Professor Fried, you can pay me
19 for the value of that -- my right to earn that money; if
20 he goes to the bank and the bank says, you can deposit
21 here for 72 hours, but when you come back, you will owe us
22 money, he's going to pay me zero.
23 Now, if --
24 QUESTION: That's if you took his right to earn
25 interest. But that's not what you took here. You

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1 took $7. He did earn interest. It was not some abstract
2 right to earn interest that was taken. What was taken
3 was $7.
4 MR. DELLINGER: I think that is a
5 mischaracterization of the facts, Justice Scalia, that the
6 money that he put in, if invested at that rate, in a world
7 without transaction costs, would have earned that amount
8 of money, but that world doesn't exist in the -- in the
9 Milky Way.
10 QUESTION: Whose money earned the $7?
11 MR. DELLINGER: The $7 --
12 QUESTION: His money earned it, didn't it? And
13 didn't we say in our earlier case that if it's his money
14 that earned the interest, the interest belongs to him?
15 MR. DELLINGER: That's not the case because
16 the --
17 QUESTION: Mr. Dellinger, isn't the -- isn't
18 it -- it's their money that earned it. Isn't interest by
19 definition that which is netted out that the bank pays
20 you?
21 MR. DELLINGER: Precisely, it's --
22 QUESTION: And if that is the definition of
23 interest, then there was no $5. There was no interest
24 earned on this amount. Isn't that --
25 MR. DELLINGER: That is exactly correct,

1 Justice Souter.

2 QUESTION: Or did -- did they -- I'd like to --

3 just to spend a couple of minutes at some point addressing

4 the question of whether -- whether the program took it

5 from him. That is to say, I guess there's a sense in

6 which -- suppose a robber had come and said to the

7 depositor, your money or your life. I mean, what would

8 the depositor have done? I guess he'd be dead. This

9 money wouldn't have existed. Did he take it from him?

10 Did he obtain it from him? There -- there is a problem

11 there that I'd just like you to address.

12 MR. DELLINGER: Justice Breyer, I think the

13 cases make it clear that you look to what a willing buyer

14 would pay a willing seller.

15 QUESTION: That's compensation, but I wonder

16 what about -- I mean, there is a sense in which the

17 program took the money, but who did it take it from? Did

18 it take it from the property owner? Is there a sense --

19 or do you concede the point that there's a taking?

20 MR. DELLINGER: The money that is -- the money

21 that is acquired -- taken in the common language sense --

22 comes from the money that is generated by the pool of

23 funds. It's not money that could have been paid to the

24 individual client. And these rules make it clear that if

25 you could pay it to the individual client, because you

1 can't -- you can't find out who he or she is, or allocate
2 the money to them. So it has no net value.
3 QUESTION: I thought we decided that issue in
4 Phillips. I mean, you could argue that point --
5 QUESTION: Yes.
6 QUESTION: -- but didn't we decide that point in
7 Phillips, that there was a taking --
8 QUESTION: I don't know if we did that. I mean,
9 property --
10 QUESTION: -- and that the property did
11 belong --
12 MR. DELLINGER: Well, you -- you did decide in
13 Phillips that the interest was property, but you have to
14 look to what the value is.
15 QUESTION: Somebody's property or the property
16 of -- of the --
17 MR. DELLINGER: It is the -- it is the property
18 of the client, and if there is an -- a way of getting net
19 interest to the client, these rules require it.
20 Now, several of the examples suggest --
21 QUESTION: Mr. Dellinger, does -- Washington has
22 the same program as in Texas? That is, if a mistake is
23 made, and this money could have earned net interest, then
24 you can get a refund.
25 MR. DELLINGER: Absolutely correct. You -- you

1 inform the IOLTA program that the money could have earned
2 net interest, and if that's true, the interest comes to
3 you.
4 Now, several of the examples were in a sense
5 more naked wealth transfers. What's different about this
6 program -- we've -- we've addressed the fact that
7 there's -- this third element of a denial of just
8 compensation is missing, but I do want to address the fact
9 that we don't believe that this is a taking because if you
10 apply this Court's Penn Central analysis, all of the
11 factors point in the same direction, in addition to the
12 absence of investment-backed expectations.
13 This is a program that serves an important
14 regulatory goal of avoiding the appearance of self-dealing
15 by lawyers.
16 Now, it -- it raises money for an important
17 cause. And we don't deny the importance of that to the
18 program. It is a cause -- ensuring equal access to
19 justice -- which enhances confidence in the system of
20 justice, and helps the petitioners and everyone else who
21 uses that system.
22 But the relevant regulatory interest noted by
23 the justices at the beginning of their process is that
24 where lawyers are placing funds of their clients in a
25 bank, and the banks are in a position to benefit the

1 lawyers, you have a risk of violating one of the first
2 principles of legal ethics that lawyers are not to benefit
3 directly or indirectly from their clients' funds.
4 QUESTION: So the -- so the property can be
5 misused and the State can take the property. That's --
6 that's your formulation.
7 MR. DELLINGER: That is not the formulation.
8 The -- the funds have to be taken from the bank. They
9 can't remain with the bank because of the serious ethical
10 problem that was noted in the briefing to the justices
11 that the banks are earning interest and providing benefits
12 to the very lawyers, or in the case the real estate escrow
13 agents who placed the money there. If you can't
14 economically return it to the client, if that cannot --
15 if that is not economically feasible, and you can't
16 ethically leave it with the bank, then it has to go
17 somewhere. It doesn't have to go to IOLTA. It has to go
18 to some charitable use to avoid this ethical problem.
19 QUESTION: Why can't -- why can't the private
20 system design mechanisms so that clients and attorneys can
21 designate the cause to which they want it to go? Then,
22 they're having control over their property.
23 MR. DELLINGER: Well, there are two problems
24 with that kind of -- of client control. One is the tax
25 consequences to the client. If the client directs where

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1 the funds go, the interest would be attributable to the
2 client.
3 And secondly, if you --
4 QUESTION: Well, I suppose if the client
5 designated a charity, that would be a charitable
6 deduction. Maybe or maybe not.
7 MR. DELLINGER: That's correct. It -- it --
8 I think that goes to the right to control, and the
9 government often regulates the right to control one's
10 property, particularly in a heavy -- heavily regulated
11 industry such as banking.
12 QUESTION: Mr. Dellinger, in -- in that --
13 I want to get clear on that example. If there were such a
14 designation, leaving the tax consequence aside, isn't --
15 isn't it true on the facts under the Washington scheme
16 that the cost of identifying the amount that would go to
17 the charity would be greater than that amount so that, in
18 effect, ultimately the -- the charity would net nothing,
19 there would be no tax, a tax return would have to be filed
20 saying zero. Is -- is that right?
21 MR. DELLINGER: That is -- that is precisely
22 right.
23 Now, if you -- if you choose to have a law firm
24 do your transaction, but the client says, I want some
25 other escrow agent, and not the lawyer, then you don't get

1 into IOLTA.

2 But here, I think we have a dispositive flaw in

3 that there is simply no just compensation. And the reason

4 there is no compensation is that it's actually quite

5 complicated to track and allocate all of these funds.

6 It may seem counterintuitive that you can't allocate that

7 interest back. But in Texas, for example, if you look at,

8 I think, footnote 2 of the -- of the brief of 49 State

9 bars, in Texas, where they made $5.5 million, it was on

10 40,000 attorneys' trust accounts that may have had as many

11 as 1 million discrete deposits. And if we're wrong

12 that -- and there's somehow you can allocate it back, you

13 do so.

14 Now, the --

15 QUESTION: Well, you could have separate funds.

16 You could -- you could have four different funds that

17 attorneys could choose. You could choose Save the Whales,

18 or help -- help litigation fee --

19 QUESTION: Or you can have an injunction.

20 MR. DELLINGER: It is possible but it is not

21 required. I don't believe that the Fifth Amendment has a

22 dog in the fight over -- over what charitable use the

23 State of Washington chooses when they serve this important

24 purpose of making sure that there is -- that there is not

25 this ethical conflict.

1 There are really five different ways that we
2 could win this case, just -- because there are so many
3 pieces on the gameboard.
4 You could conclude that it's not a taking
5 principally because it has a valid regulatory purpose.
6 It's not -- two, it's not a taking because of
7 the absence of any real investment-backed expectations.
8 Three, even if it's a taking, we've established
9 that zero compensation is due.
10 Four, even if you think some compensation might
11 be due, they've never gone to the State -- not a single
12 client -- and tried to prove up the amount of
13 compensation, which is very much in dispute if you look at
14 their earnings credit analysis, unlike Eastern Enterprises
15 where we knew the exact amount, it's very much in dispute
16 whether some or all of those costs would have been borne
17 down.
18 And finally, even if you reject all our other
19 positions, you then reach an argument that we don't need
20 to make because we believe in our other arguments, and
21 that is, why not treat this as a valid revenue measure?
22 Unlike the bad revenue measures of Eastern Enterprises,
23 where the State, or the Government was imposing a
24 retroactive onerous burden on a few identifiable, known
25 people, here it's prospective, reasonably broadly based,

1 and raises -- and modest in the exaction. That looks even
2 as a financial transaction.
3 QUESTION: Courts have the power to tax?
4 MR. DELLINGER: I'm sorry?
5 QUESTION: Courts have the power to tax?
6 MR. DELLINGER: Courts have the power -- and
7 other agencies often -- to impose fees. That's a State
8 law issue, but whether it's an IOLTA assessment, or a user
9 fee, or however you want to characterize it, if you look
10 at it like that, I'm not sure why it doesn't stand up
11 quite well.
12 Whenever you're talking about money, you have to
13 decide why isn't this just a valid way for the government
14 to raise money? And part of the Takings Clause shares an
15 overlap with the bill of attainder and`the ex post facto.
16 Are you singling out a few individuals retroactively, as
17 Justice Kennedy focused on in Eastern Enterprises. Here
18 you're not. Anybody who chooses to engage in X will
19 pay Y. When X is a lot of people -- 40,000 in Texas --
20 and potentially all of us who do transactions, and Y is a
21 perfectly reasonable amount of money, nonexistent in our
22 view, but minimal at worst under their characterization.
23 Thank you.
24 QUESTION: Thank you, Mr. Dellinger.
25 Mr. Fried, you have about 5 minutes left.

1 REBUTTAL ARGUMENT OF CHARLES FRIED

2 ON BEHALF OF THE PETITIONERS

3 MR. FRIED: Thank you, Justice Stevens.

4 Just a few points. First, this is not a revenue

5 measure. It is not a tax. It has never been argued to be

6 a tax. Indeed, if it were a tax, we would have no

7 complaint. Indeed, it is our answer to the arguments

8 made, the dog-in-the-manger argument that was made in the

9 court below, and the argument made by AARP, that if the

10 government wants our money, they should get it the

11 old-fashioned way. They should tax.

12 Now, the court said, and AARP said, it's

13 inconvenient to tax because that comes with strings.

14 That's called democracy. They don't like the strings.

15 And so the bar association and the justices wish to

16 acquire the money.

17 QUESTION: May I -- I shouldn't be taking your

18 rebuttal time, Mr. Fried, but are you saying that if they

19 did this by a statute, it would be perfectly okay?

20 MR. FRIED: No, I'm not saying that. I'm saying

21 that if they did it as a --

22 QUESTION: -- as part of the revenue code.

23 MR. FRIED: -- as a tax -- if they did it as a

24 tax because it --

25 QUESTION: Well, it seems to me the program was

1 exactly the same, it was adopted by a legislature, and had
2 the title tax on it.
3 MR. FRIED: Because in every jurisdiction and
4 certainly in the Federal Government, taxes have to jump
5 over certain hoops. There are institutional constraints,
6 and it's exactly those constraints that the justices and
7 the bar associations want to escape. They have told us
8 so. It's all --
9 QUESTION: I'm not sure I know the answer to my
10 question. If they did exactly what I said, would it be
11 permissible?
12 MR. FRIED: It would be an entirely different
13 question. I wouldn't want to concede it, but it would be
14 a different question, and a harder one because this Court
15 has granted greater leeway to tax, and`the reason it has
16 is because taxation is a recognized institutional form
17 with lots of institutional hurdles that the respondents do
18 not wish to endure. They wish to do -- do an end run
19 around them.
20 Now, as to the regulatory purpose here, I think
21 it's sufficient to note that prior to IOLTA, there were
22 plenty of regulations -- both of escrow agents and
23 lawyers -- to prevent them from self-dealing, and lawyers
24 were disbarred if they violated them. This IOLTA measure
25 was passed, and it was passed only as a way to raise funds

1 for legal services. So I think that the regulatory
2 purpose is an after-the-fact invention.
3 Now, also we do not say that it is impossible to
4 value the taken here -- the amounts taken. It's perfectly
5 possible. It's $5 and $2. It's simply impracticable to
6 force Brown and Hayes to sue for it. That's the
7 impracticability. It's not impossible. We do not say
8 that. And that's why cases like Kimball Laundry are
9 completely beside the point.
10 QUESTION: Mr. Fried, may I ask you another
11 question that is troubling me about this, in addition to
12 the question of is it really the bank whose -- whose
13 economic gain has been taken? But this is a question
14 about the -- the class sets involved. Now, I know this
15 isn't a class action, but the injunction is going to be to
16 cover everyone in this group. And some of them may be
17 outraged by this and others may say, we'd much rather that
18 IOLTA get it than the bank. So there's something
19 troubling about an injunction that's going to cover all of
20 these people who may have very diverse views about what
21 they would like to see happen.
22 MR. FRIED: Yes, and the solution for that is
23 the political process rather than the process of judges
24 and bar associations raising revenue. And under the
25 political process, the result you describe happens all the

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1 time. It should not happen here.

2 QUESTION: I'm not sure I understand that

3 answer. If the choice is between the banks and IOLTA, and

4 some of the people say we don't want to prefer the bank,

5 we want to prefer IOLTA. You're -- you're making the

6 choice for them in saying, you have to prefer the bank

7 because we're enjoining it.

8 MR. FRIED: Well, we're enjoining it -- we are

9 asking you to enjoin it because it is an illegal program.

10 The result of the injunction, or a -- a declaration would

11 be what you described.

12 QUESTION: Mr. Fried, you may have another

13 minute if you didn't get your rebuttal through.

14 MR. FRIED: No. I -- I think that's --

15 JUSTICE STEVENS: Thank you.`

16 MR. FRIED: -- sufficient. I thank the Court

17 for its attention.

18 (Whereupon, at 12:03 p.m., the case in the

19 above-entitled matter was submitted.)

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