

SEPARATE STATEMENT OF NON-CONCURRENCE
OF
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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 ballot 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. Scope of the Committee

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.”).

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 IOLTA 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 non-

union 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 legerdemain⁴. 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 zealotry 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

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.