ORAL ARGUMENT SCHEDULED FOR MARCH 23, 2015

No. 14-1194 (consolidated with No. 14-5242)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW YORK REPUBLICAN STATE COMMITTEE; and
TENNESSEE REPUBLICAN PARTY,

Petitioners-Appellants,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent-Appellee.

On Appeal from the United States District Court for the District of Columbia,
No. 1:14-cv-01345-BAH

On Petition for Review of a Final Rule of the U.S. Securities and Exchange Commission, SEC File No. S7-18-09

BRIEF *AMICI CURIAE* FOR THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 SUPPORTING RESPONDENT-APPELLEE AND URGING AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the Campaign Legal Center and Democracy 21 provide this certificate as to parties, rulings, and related cases, which includes the disclosure required by Fed. R. App. P. 26.1.

A. Parties, Intervenors and *Amici*

Petitioners-Appellants in this matter are the New York Republican State Committee and the Tennessee Republican Party. Respondent-Appellee is the United States Securities and Exchange Commission.

The Campaign Legal Center and Democracy 21, and Free Speech for People, participated as *amici curiae* in the proceedings before the United States District Court for the District of Columbia. The Campaign Legal Center and Democracy 21, Free Speech for People and the Financial Services Institute, Inc. have or will file *amici curiae* briefs in this Court.

B. Rulings Under Review

Petitioners-Appellants appeal a decision of U.S. District Judge Beryl A. Howell, dismissing their challenge to a final rule promulgated by the SEC (the "Rule"), *Political Contributions by Certain Investment Advisers*, File No. S7-18-09, 75 Fed. Reg. 41018 (Jul. 14, 2010), *codified in part at* 17 C.F.R. 275.206(4)-5. *See* Order, *New York Republican State Comm. v. SEC*, 2014 WL 4852030, No. 14-

cv-01345-BAH (D.D.C. Sept. 30, 2014). Consolidated with this action is Petitioners-Appellants' petition for review of the Rule.

C. Related Cases

Amici are not aware of any related cases currently pending in this or any other court.

D. Corporate Disclosure Statement

The CLC is a nonprofit, nonpartisan corporation. The CLC has no parent corporation and no publicly held corporation has any form of ownership interest in the CLC.

Democracy 21 is a nonprofit, nonpartisan corporation. Democracy 21 has no parent corporation and no publicly held corporation has any form of ownership interest in Democracy 21.

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Municipal Securities Rulemaking Board	MSRB
Securities and Exchange Commission	SEC

STATEMENT OF INTEREST[1]

Amici curiae Campaign Legal Center and Democracy 21 are nonprofit organizations that work to strengthen the laws governing campaign finance, governmental ethics and political disclosure. *Amici* have participated in several of the Supreme Court cases cited by petitioners as forming the basis of their First Amendment challenge, including *Citizens United v. FEC*, 558 U.S. 310 (2010) and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). *Amici* thus have expertise in the legal issues raised here, and a demonstrated interest in the challenged SEC regulations.

INTRODUCTION & SUMMARY OF ARGUMENT

The SEC regulations challenged here are based on a simple proposition. Substantial campaign contributions from an investment advisor to state officeholders from whom the advisor seeks business are likely to give rise to quid pro quo exchanges, or at a minimum, the appearance of such exchanges. *See Political Contributions by Certain Investment Advisers*; Final Rule, 75 Fed. Reg. 41,018 (July 14, 2010), *codified in part at* 17 C.F.R. 275.206(4)-5. That is the premise not only of the challenged Rule, but also of MSRB Rule G-37, which was upheld by this Court in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), as well as of

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* affirm that no party's counsel authored the brief in whole or in part, and no person—other than the *amici*—contributed money to fund the brief.

numerous federal, state and municipal laws regulating political activities by governmental contractors.

Despite the broad acceptance of the proposition that governmental contracting should be insulated from pay-to-play activities, petitioners New York Republican State Committee and Tennessee Republican Party challenge the Rule as both beyond the SEC's statutory authority and contrary to the First Amendment. Neither claim has merit, and their challenge should be rejected.

Amici's primary experience lies in the area of campaign finance, so this memorandum will focus on petitioners' First Amendment claims, *see* Compl. ¶¶ 88-98, and on issues of standing. However, *amici* agree that the adoption of the challenged Rule falls well within the SEC's authority to promulgate regulations "that define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 80b-6(4). *See also* Brief of the SEC, 35-45. Further, *amici* believe that the challenged Rule should be analyzed as a regulation of conflicts of interest and pay-to-play abuses in the market for state investment advisory services, not as a contribution limit, because the Rule regulates registered investment advisors' eligibility for state business if they make contributions to government officials who have some role in deciding which advisors receive that business.[2] That said, petitioners' First Amendment claims rely upon Supreme Court precedents that analyze campaign finance laws, and in that context, contribution limits—as opposed to expenditure restrictions—are the Rule's closest analogue for the purposes of constitutional review. For this limited purpose only, *amici* treat the Rule as a regulation of contributions.

As a threshold matter, petitioners have no standing to bring this case. They have suffered no direct injury, because the Rule neither regulates their conduct, nor subjects them to any potential legal penalties or burdens. Petitioners also cannot claim associational standing on behalf of the class of covered investment advisors they claim are "members" because petitioners offer no evidence of any affiliation with these individuals, nor have they identified any specific "member" covered by the Rule who wishes to make a prohibited contribution. The petitioners' failure to find a single covered advisor to support their claim of injury underscores that the interests of investment advisors and petitioners likely differ, as the former must consider the fiduciary duties they owe their current and prospective governmental

[2] In other words, the Rule does not address investment advisors' right to make campaign contributions, but instead regulates the potentially corrupt transactions that may result—the "quos" that may result from "quids" offered by advisors. At a minimum, regulating the non-speech consequences of contributions in order to prevent the corrupt or apparently corrupt receipt of favoritism is less restrictive of First Amendment-protected activity than direct regulation of contributions.

clients. *See*, *e.g.*, 75 Fed. Reg. at 41,019. Petitioners cannot represent this perspective.

Petitioners' First Amendment case also suffers from at least three defects. First, petitioners downplay this Court's decision in *Blount* to uphold a materially-identical regulation. They attempt to argue that *Blount* is "inconsistent with more recent Supreme Court decisions," but can offer no support for their claim that the Supreme Court has changed its approach to reviewing contribution limits. Opening Br. for Pet'rs.-Appellants. ("Parties Br.") at 55.

Second, petitioners question the constitutionality of the Rule on grounds that it was not adopted to combat quid pro quo corruption, but turn a blind eye to broad swaths of the record that confirm that this is precisely the Rule's objective: it takes aim at quid pro quo corruption in the market for state investments. As this Court in *Blount* noted, "one of the primary reasons people object to bought elections is that a bought politician tends to make distorted choices, and the public's concern about a particular type of distorted choice (the choice of bond underwriter) does not logically stand on a lower plane than its concern about bought politicians generally." 61 F.3d at 944.

Third, petitioners argue that the Rule represents an impermissible "prophylaxis-upon-prophylaxis" approach that relies purely on "speculation and conjecture." Parties Br. 53-54. This statement ignores both the extensive record of fraud in the award of state investments compiled by the SEC, and the ubiquity of scandals in contracting at all levels of government—all of which occurred despite the existence of the federal base contribution limits and oftentimes, state base contribution limits. *See* Parties Br. 47-48, 52-53. Further, even if the evidence of play-to-pay was less plentiful, the Supreme Court has allowed the enactment of prophylactic measures when quid pro quo corruption is "neither easily detected nor practical to criminalize." *McConnell v. FEC*, 540 U.S. 93, 153 (2003).

ARGUMENT

I. Petitioners Lack Standing to Bring This Action.

The Rule was promulgated under the Investment Advisers Act of 1940, which recognizes the special fiduciary relationship between an investment advisor and a client and is intended, *inter alia*, to protect against conflicts of interest that corrupt that fiduciary relationship. *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963). The Rule seeks to prevent long-recognized corrupt practices that can arise in the grant of government contracts for advisory services and to protect the fiduciary relationship between the investment advisor and the government client from conflicts of interest. *See, e.g.*, 75 Fed. Reg. at 41021-41022; 41027 n.110. It does so, however, without imposing any obligations or liability upon the candidates or committees who receive political contributions. In fact, while a covered investment advisor cannot receive compensation for services provided if the advisor makes a covered contribution, the making of the contribution itself is not illegal, nor is its solicitation or receipt.[3]

Nevertheless, the petitioners argue that the Rule unconstitutionally infringes the First Amendment rights of investment advisors who allegedly wish to make political contributions to covered officials and of the covered officials who wish to solicit and receive those contributions. However, petitioners' failure to demonstrate that they represent the interests of any investment advisors who are regulated by the Rule, and who owe the fiduciary duty to their government clients that the Rule seeks to protect, is fatal to their effort to establish standing to bring this action.

To have standing, plaintiffs "must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. FEC*, 554 U.S. 724, 733 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). But in limited circumstances, the courts have recognized that an association that has not suffered a direct injury itself may have standing to represent the interests of its members who have been

[3] In contrast, under FECA, both making and soliciting an illegal contribution, and the knowing acceptance of such a contribution by a candidate or political party, are prohibited and carry possible civil and criminal penalties. *See, e.g.*, 52 U.S.C. § 30109(d).

directly injured. *Id.* at 511. To assert representational standing, however, an association must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977), *superseded in part by statute*, Worker Adjustment and Retraining Notification Act, Pub. L. 100-379, 102 Stat. 890 (1988), *as recognized in United Food & Commer. Workers Union Local 751 v. Brown Grp.*, 517 U.S. 544, 546 (1996).

In the district court, petitioners asserted associational standing as representatives of investment advisors who, they alleged, were both their members and wanted to contribute to candidates. On appeal, the state parties have put greater weight on a claim of direct injury, which they conflate with the assertion they have a right to represent the interests of others. Parties Br. 30. It is clear, however, that because the Rule neither regulates the petitioners' conduct, nor subjects petitioners to any potential sanctions or burdens, petitioners lack any direct claim of standing to bring this action. Nor do petitioners satisfy the test for associational standing.

Petitioners allege that the Rule "injures the State Parties directly" by making it unlawful for investment advisers who are providing or seeking to provide investment services to a government entity to coordinate or solicit contributions to a political party of a State or locality. *Id*. According to petitioners, "these provisions cause the State Parties precisely the kinds of associational and economic injuries that courts repeatedly have held sufficient to give organizations standing in their own right." *Id*. at 30-31. However they frame it, the Rule still applies only to certain investment advisors and not to the petitioners. Petitioners cite no case where direct injury has been found solely based on the effect of a law on third parties who have not been identified and where no evidence has been presented that their activities in relation to an organization was a direct result of the law being challenged.

Indeed, petitioners acknowledge that the "injuries are attributable to 'the independent actions' of their would-be contributors, rather than the States Parties themselves." *Id.* at 31. They claim this fact not only "makes no difference," but also supports their right to proceed on behalf of those would be contributors. *Id*. In support of this proposition, petitioners rely on *Taxation with Representation of Washington v. Regan*, 676 F.2d 715, 723 (D.C. Cir. 1982), *rev'd*, 461 U.S. 540 (1983), where this Court found that an organization had standing to challenge the IRS's denial of its application for status as a 501(c)(3) tax-exempt organization, one result of which was that contributions to the organization were not tax-deductible. Critically, however, the organization was not challenging the constitutionality of the IRS rule that prohibited taxpayers from deducting contributions to non-501(c)(3) organizations, but rather the regulations that directly affected the tax-exempt status of the organization.

Petitioners are really asking the Court to find that the Rule is unconstitutional because it prevents potential contributors from making political contributions they allegedly would otherwise make. Having no valid examples of such contributors, petitioners argue that their standing is "self-evident" because "there can be no serious dispute that, but for the Political Contribution Rule, at least one of those individuals would make, solicit, coordinate or receive a contribution that the Rule prohibits." Parties Br. 33. But saying this does not make it so.

The factual basis for the petitioners' "self-evident" assertion of associational standing includes declarations filed in the district court in support of their Motion for Preliminary Injunction from the executive directors of the New York Republican State Committee and the Tennessee Republican Party, both of which merely assert that they "have encountered donors and potential donors . . . who have either limited their contributions or declined to contribute because of the political contribution Rule." Decl. of Jason Weingartner ¶ 9 (Oct. 8, 2014) (Dkt. 7-2); Decl. of Frederick Brent Leatherwood ¶ 9 (Oct. 8, 2014) (Dkt. 7-3).

Petitioners' only other "evidence" is their identification of two party officials who had been candidates and who claim that they were covered officials and were aware of individuals who did not contribute to their campaigns because of the Rule. Decl. of Jim Tracy (Sept. 17, 2014) (Dkt. 27). But according to the SEC, neither of the two candidates was a covered official within the meaning of the Rule and thus none of the would-be contributors they identify were actually barred by the Rule from contributing. SEC Br. 32-33. Therefore, even if these two candidates were parties to this action, they would still not have standing to challenge the Rule. It follows, of course, that the state parties cannot derive third-party standing from members who would not have standing on their own.

Petitioners further argue that the "SEC has produced not a shred of evidence" to support the "proposition that the Political Contribution Rule has not adversely impacted a single Republican in all of New York or Tennessee" and, therefore, "there is no need for the State Parties to go through the artificial exercise of forcing additional members to reaffirm what their executive directors and candidates have already said. …" Parties Br. 34-35.

This sleight-of-hand stands the required Article III analysis on its head. Petitioners are not entitled to a presumption of Article III standing that the SEC must disprove. It is the responsibility of petitioners to prove Article III standing. In the face of this immutable obligation, petitioners have failed to make the required showing that the Rule causes direct injury to them or even to their candidates and instead rely on speculation. In reality, petitioners' theory of standing would recognize a constitutionally cognizable injury any time a regulation applicable to a third party might hypothetically deter that person or entity from making a contribution to the petitioners or their candidates.

Moreover, in asserting representational standing, it is of apparently little import to petitioners that the targets of their fundraising efforts that are subject to the Rule may not wish to make contributions to the petitioners, or may not believe themselves to be injured by the Rule. In fact, petitioners claim to represent the interests of "members" who they define as people who have decided *not* to contribute to the party. Parties Br. 31. "Membership" in an organization must mean more than simply the possibility that a person might contribute to it but has not done so. If representational standing is to serve any of the interests protected by Article III, there must be some basis upon which the Court can be assured that a party claiming such standing will, in fact, represent the interests of those it purports to represent. *Pharm. Research & Mfrs. of America v. Thompson*, 259 F. Supp. 2d 39, 52 (D.D.C. 2003), *aff'd sub nom. Pharm. Research & Mfrs. America v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004).

The failure to provide any information about the noncontributing investment advisors with whom they claim to have a "membership" relationship does not meet the test for representational standing set forth in *Warth* and *Hunt*. This is a classic case where the nature of the Rule and the claims asserted require the participation of those directly covered by the Rule.

Unlike the general contribution limits and prohibitions found in FECA, the SEC's Rule is aimed at the practices of individuals and firms involved in a business highly regulated by the SEC and involving complicated fiduciary relationships. As the SEC has explained:

> [I]nvestment advisers that seek to influence government officials' awards of advisory contracts by making or soliciting political contributions to those officials compromise their fiduciary duties to the pension plans they advise and defraud prospective clients. . . . Ultimately, these violations of trust can harm the millions of retirees that rely on the plan or the taxpayers of the State and municipal governments that must honor those obligations.

75 Fed. Reg. at 41,019 (footnotes omitted).

Thus, the interests of the petitioners in obtaining political contributions from any source possible likely differ from the interests of individuals and firms regulated by the Rule. This Court should not decide what interests are at stake without the participation of those directly affected by the Rule.

II. The Political Contribution Rule Is Consistent with the First Amendment.

A. This Court Rejected a Constitutional Challenge to a Materially Similar Rule in *Blount v. FEC*.

In *Blount*, this Court rejected a First Amendment challenge to MSRB Rule G-37, a rule that is almost identical to the Rule challenged here, concluding that it served multiple "compelling" governmental interests. 61 F.3d at 944-49.

Rule G-37 prohibits municipal securities professionals who have made more than *de minimis* contributions to the campaigns of officials of a municipal securities "issuer" from obtaining business from that "issuer" for two years after the contribution. MSRB Rule G-37(b). Municipal securities professionals are also barred from soliciting or coordinating contributions for officials of any issuer with whom they are "engaging or . . . seeking to engage in municipal securities business" or for the political parties of the state of the issuer. *Id.* at (c).

In reviewing Rule G-37, the Court declined to decide the applicable level of scrutiny because it found that Rule G-37 could survive strict scrutiny and thus "there [was] no need to decide the issue."[4] 61 F.3d at 943. The agency asserted that Rule G-37 served at least two state interests: "prevent[ing] fraudulent and manipulative acts and practices, as well as the appearance of fraud and

[4] The Supreme Court has since made clear that laws regulating political contributions—even complete bans on contributions—are subject only to "closely drawn" scrutiny. *McConnell*, 540 U.S. at 136; *FEC v. Beaumont*, 539 U.S. 146, 162 (2003).

manipulation," and "perfect[ing] the mechanism of a free and open market for municipal securities" in order to "promote just and equitable principles of trade." *Id.* at 942 (quoting SEC Release No. 34-33868 at 26, 29 (Apr. 7, 1994) (order approving proposed rule change)). Applying strict scrutiny, the Court found that both of these interests were compelling and that the Rule was narrowly tailored to serve these interests. In so holding, it noted the pay-to-play activities that Rule G-37 would prevent:

> [U]nderwriters' campaign contributions self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity. Petitioner himself remarked on national radio that "most likely [state and local officials] are gonna call somebody who has been a political contributor" and, at least in close cases, award contracts to "friends" who have contributed.

Id. at 944-45.

This analysis applies with equal force to the Rule here. Its structure is identical to Rule G-37; the only material difference is that it regulates the grant of state investment advisory contracts, instead of the municipal securities business. And the SEC invoked the same governmental interests in adopting the challenged Rule as it did in connection to Rule G-37 in *Blount*.

In an attempt to blunt the application of *Blount*, petitioners argue that it "relied heavily on several strands of reasoning that the Supreme Court has since rejected." Parties Br. 53. Petitioners rely principally on *McCutcheon* and *Davis*, but neither case addresses laws regulating the consequences of contributions from government contractors, and so even insofar as the Rule is understood to indirectly impact political contributions, the cited cases have no direct application here.

First, petitioners argue that *Blount* was improperly deferential in its review of Rule G-37, arguing that *McCutcheon* made clear that a "'prophylaxis-upon-prophylaxis' approach requires [courts to] be particularly diligent in scrutinizing the law's fit." Parties Br. 53 (quoting *McCutcheon*, 134 S. Ct. at 1458). But *McCutcheon* did not strike down the aggregate contribution limits at issue there because they were "prophylactic" in nature, nor did the Supreme Court change the standard of review typically applied to campaign contribution restrictions. Instead, the *McCutcheon* Court invalidated the aggregate limits because it concluded that they did not further the anti-circumvention goal that they were enacted to achieve. *McCutcheon* thus in no way undercuts *Blount*'s approval of G-37 as a prophylactic measure to stamp out quid pro quo corruption in government investing.

McCutcheon considered a particular type of contribution limit—the federal aggregate limits on total contributions that an individual could make to candidates, parties and PACs—that had been adopted as an anti-circumvention measure. 2 U.S.C. § 441a(a)(3) (2013), *invalidated by McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). Thus, unlike Rule G-37 and the Rule at issue here, the aggregate limits had not been designed to prevent quid pro quo exchanges directly, but rather to stop donors from circumventing the base limits on contributions to candidates by making "unearmarked contributions to political committees likely to contribute to [their preferred] candidate, or huge contributions to the candidate's political party." *Buckley v. Valeo*, 424 U.S. 1, 38 (1976). The *McCutcheon* Court invalidated these aggregate limits because it believed numerous other provisions of federal law—such as limits on contributions to parties and PACs, as well as affiliation rules—made circumvention of the base limits even in the absence of the aggregate limits "highly implausible." 134 S. Ct. at 1453. Rule G-37 and the Rule here, by contrast, were not "layered" on the base limits as a means to thwart circumvention; instead they aim to directly prevent a different type of quid pro quo corruption, namely "quid pro quo payments by investment advisers seeking governmental business." *See* 75 Fed. Reg. at 41,023 n.68; Section I.B. *infra*. The *McCutcheon* Court's concern that the federal aggregate limits did not prevent circumvention does not undercut—or even speak to—the *Blount* Court's recognition that Rule G-37 serves to "prevent fraudulent and manipulative acts and practices, as well as the appearance of fraud and manipulation." 61 F.3d at 942.

Furthermore, far from changing the degree of deference due in the review of a contribution restriction, *McCutcheon* reaffirmed that "closely drawn" scrutiny remains the appropriate standard. 134 S. Ct. at 1451 & n.6; *see also id.* at 1445 ("[W]e see no need in this case to revisit *Buckley*'s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review.”). By contrast, *Blount* applied strict scrutiny in reviewing Rule G-37, although the Court declined to rule on whether such a standard was required. 61 F.3d at 943. Thus, if anything, *McCutcheon* suggests that *Blount* may have reviewed Rule G-37 too *stringently*, not too leniently, and that the SEC had *more* discretion in the design of Rule G-37 than *Blount* recognized.

Second, petitioners argue that *Blount* failed to consider that the Rule has a disparate impact on candidates, and suggest that the Supreme Court in *Davis* categorically prohibited any “law that imposes different contribution limits for candidates who are competing against each other.” Parties Br. 54 (citing *Davis*, 554 U.S. at 738).

Davis also is not applicable to the Rule here. *Davis* reviewed the “Millionaire’s Amendment,” a federal provision that tripled the contribution limit for any congressional candidate who faced an opponent who spent over $350,000 of his personal funds to support his campaign. *See* 554 U.S. at 739. However, the defect of the Millionaire’s Amendment was not that it placed limits on contributions, but that it did so in a way that “impose[d] a substantial burden on the exercise of the First Amendment right to use *personal funds* for campaign speech.” 554 U.S. at 740 (emphasis added). The Court was concerned that the Millionaire’s Amendment manipulated the contribution limits to discourage candidates from "robustly exercis[ing]" their "First Amendment right" to spend personal money. *Id*. at 738-39. *Davis* is properly understood as a challenge to restrictions on personal expenditures, not an attack on contribution limits; accordingly, the law was subject to strict scrutiny, not the "closely drawn" scrutiny applied to contribution limits. *Id*. at 739.

By contrast, the Rule here does not burden personal expenditures. It does not establish "asymmetric" contribution limits. Indeed, it is not a contribution limit in the first place, as it does not bar political giving, but rather only limits the grant of state investment business after an advisor has made a substantial contribution to a covered candidate. The Rule is more akin to a state or federal ethics law that aims to prevent conflicts of interests and self-dealing by officeholders—in this case, by regulating pay-to-play practices in the award of state and municipal investments. Thus, insofar as the Rule has a "disparate impact" on a state official running for federal office and an outside candidate in the same race, this is due to the former candidate's status as an officeholder and the ethical obligations that follow. But such differences are inevitable where one candidate holds office and is consequently subject to ethics rules that are not applicable to his opponents. For example, gift and travel restrictions, financial disclosure obligations and regulations governing conflicts of interest, outside employment and honoraria all could create "disparate" burdens on candidates in such a context. *See, e.g.*, U.S.

House Rules XXIII, cl. 3 (conflicts of interest), cl. 4 (gift ban); cl. 15 (travel restrictions). There is no constitutional right for a state officeholder to abandon his ethical duties simply because he has chosen to run for federal office and would like to do so unencumbered by rules intended to protect the public trust in his office.

In short, *Blount* directly governs the consideration of petitioners' First Amendment claims here, and no case since its issuance has undercut its reasoning or altered the Supreme Court's longstanding approach to the review of laws impacting political contributions.

B. Pay-to-Play Laws Are Widely Recognized as Advancing Important Governmental Interests.

Petitioners maintain that the Supreme Court has made clear that a legislature or agency may justify the regulation of political contributions based on only one interest—the prevention of "quid pro quo corruption"—but suggest that this was not an objective of the SEC in adopting the Rule. This position is willfully blind.

The SEC articulated the interests served by the Rule as the "prevent[ion of] direct quid pro quo arrangements, fraudulent and manipulative acts and practices"; and the "improve[ment] of the mechanism of a free and open market for investment advisory services for government entity clients." 75 Fed. Reg. at 41,024 n.79. The SEC further explained that "pay to play" arrangements for investment advisory services "are inconsistent with an adviser's fiduciary obligations, distort the process by which investment advisers are selected, can harm advisers' public pension plan clients and the beneficiaries of those plans, and can have detrimental effects on the market for investment advisory services." *Id*. at 41,023.

Although the SEC thus perceives the Rule as preventing a broad range of harms, all of these harms arise from the pay-to-play quid pro quo exchanges the Rule was intended to bar. For instance, the SEC states that the Rule is "a focused effort to combat quid pro quo payments by investment advisers seeking governmental business." *Id*. at 41,023 n.68; *see also id.* at 41,023 (noting that "payments to State officials as a quid pro quo for obtaining advisory business as well as other forms of 'pay to play'" are a form of fraud targeted by the Rule); *id*. at 41,024 ("The rule is targeted at those employees of an adviser whose contributions raise the greatest danger of quid pro quo exchanges."). It is hard to imagine how the SEC could have more clearly expressed an interest in preventing quid pro quos.

The SEC's justifications for its Rule were found to be sufficiently important by this Court in *Blount* in its review of Rule G-37. There, the SEC asserted that Rule G-37 both "protect[ed] investors in municipal bonds from fraud" and "protect[ed] underwriters of municipal bonds from unfair, corrupt market practices." 61 F.3d at 944. The Court affirmed that both interests were "compelling." *Id.*; *see also FEC v. Weinstein*, 462 F. Supp. 243, 248 (S.D.N.Y. 1978) (approving federal contractor contribution ban and noting that "the importance of the governmental interest" in preventing corruption "through the creation of political debts" had "never been doubted").

Petitioners also suggest that "address[ing] practices that undermine the integrity of the *market for advisory services*" is not a "legitimate basis" for enacting the Rule. *See* Parties Br. at 51 (alteration in original) (emphasis added) (quoting 75 Fed. Reg. at 41,053). But this Court confronted this precise argument in *Blount*, and rejected it. The plaintiffs in *Blount* had argued that in campaign finance cases, "the legislature was interested in clean elections," whereas the SEC "is interested in clean bond markets," and that "the latter interest is less compelling than the former." 61 F.3d at 944. This Court rejected this attempt to differentiate between types of "corruption," finding that "one of the primary reasons people object to bought elections is that a bought politician tends to make distorted choices, and the public's concern about a particular type of distorted choice (the choice of bond underwriter) does not logically stand on a lower plane than its concern about bought politicians generally." *Id*. In short, preventing quid pro quos in the award of state investments is as compelling as preventing corruption in officeholders generally.

Tacitly acknowledging that the Rule was indeed intended to combat a form of quid pro quo corruption, petitioners argue that Congress has already enacted a "broad prophylactic restriction on campaign contributions" to avert quid pro quo corruption, i.e., the base limits of $2,600 per election ($5,200 per cycle) on contributions to federal candidates. 52 U.S.C. § 30116(1)(a). The Rule, in petitioners' estimation, is consequently redundant. But this position requires petitioners to turn a blind eye to the limited nature of the federal base limits. Congress was concerned with the integrity of *federal elections*; it is unreasonable to suggest that Congress believed FECA's contribution limit would prevent quid pro quo arrangements in *state contracting* for investment services even in the narrow circumstances that petitioner target, i.e., when state officials run for federal office.

Absent the SEC Rule, a state investment advisor—or PACs controlled by the advisor—would still be permitted to buy admission to the advisor-selection process of potential state customers by making "limited" individual or PAC contributions to state decision-makers who were also federal candidates. Similarly, the application of the base contribution limits in FECA would not prevent an even more powerful means to buy influence: namely an advisor encouraging and steering a huge number of additional "limited" contributions to such officials through its associates. Similarly, the base limits do not forbid investment advisors and their associates from soliciting or "bundling" contributions from outside contributors to a campaign, leaving open a clear channel for the exchange of quid pro quos. In short, even a cursory comparison of the Rule and the federal base limits confirms that they have different purposes and regulate different activities.

C. A Prophylactic Rule Is Not Only Permissible, But Is Often Deemed Necessary to Prevent Pay-to-Play Activities.

1. There Is Ample Evidence of Quid Pro Quo Corruption in the Selection of Investment Advisors and Government Contracting in General.

In addition to questioning the importance of the SEC's anti-fraud objectives, petitioners also suggest that the SEC has offered no "actual evidence" that "limited" contributions create the possibility of quid pro quos in the selection of investment advisors or public pension fund managers. Parties Br. 52-53. Again petitioners' position is willfully blind.

Even a quick perusal of the record establishes that the SEC amassed extensive evidence of fraud in the award of state investment contracts. It detailed its concerns about the prevalence of schemes in which investment advisors funneled contributions through third-party "placement agents" in order to secure business with public pension plans. 75 Fed. Reg. at 41,019. It listed multiple actions brought by the SEC and state authorities to prosecute quid pro quo deals to influence the award of contracts in connection to the New York State Common Retirement Fund. One of the officials ensnared in these investigations, former New York State Comptroller Alan Hevesi, admitted he steered *$250 million* of state business to an investment firm in exchange for gifts and more than $500,000 in contributions.[5] The SEC also referenced its enforcement action against the former treasurer of the State of Connecticut for awarding State investments to private equity fund managers in exchange for payments, including political contributions, and discussed similar cases that had been prosecuted by state authorities in New York, New Mexico, Illinois, Ohio, Connecticut and Florida. 75 Fed. Reg. at 41,020; *see also id.* at 41,020 nn.19-25.

Petitioners object that nevertheless "the SEC has yet to identify a single instance" where a federally-limited "contribution of $2,600" has been part of a quid pro quo scheme in the grant of government investments." Parties Br. 52. But this ignores the key aspect of many of the pay-to-play scandals cited by the SEC as grounds for adopting the Rule: these scandals had occurred in states that *did have base limits* on contributions, such as New York or Connecticut. N.Y. Elec. Law § 14-114(1); Conn. Gen. Stat. § 9-611(a). Such laws were not sufficient to prevent the type of quid pro quo corruption in state investing that the Rule aims to eliminate. And there is no reason to believe that the federal $2,600 monetary threshold is so low that it obviates any possibility of pay-to-play: In Connecticut, the contribution limit applicable to the state-wide treasurer race—the locus of the

5 *See* Office of New York Attorney General Eric T. Schneiderman, *Former Comptroller Alan Hevesi Sentenced To Up To Four Years In Prison For Role In Pay-To-Play Pension Fund Kickback Scheme* (Apr. 15, 2011), http://www.ag.ny.gov/press-release/former-comptroller-alan-hevesi-sentenced-four-years-prison-role-pay-play-pension-fund.

pay-to-play scandal—is currently *lower*, at $2,000. Conn. Gen. Stat. Ann. § 9-611(a).

Furthermore, corrupt practices are hardly limited to the granting of investment advisory contracts. Pay-to-play activities are endemic in many areas of government contracting, as evidenced by numerous pay-to-play laws at the federal, state and municipal levels, and the SEC is entitled to consider the prevalence of such practices generally in determining the likelihood of similar corruption with respect to investment advisory services. At least seventeen states have enacted limits or prohibitions on campaign contributions from prospective and/or current government contractors or licensees.[6] A number of municipalities, including New York City and Los Angeles, have followed suit.[7]

The pervasiveness of pay-to-play practices in contracting has also been frequently recognized by the courts, which have generally approved of state limits and even bans on contributions by prospective and current state contractors. *See,*

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[6] Cal. Gov't Code § 84308(d); Conn. Gen. Stat. § 9-612(f)(1)-(2); Haw. Rev. Stat. § 11-355; 30 Ill. Comp. Stat. 500/50-37; Ind. Code §§ 4-30-3-19.5 to -19.7; Ky. Rev. Stat. Ann. § 121.330; La. Rev. Stat. Ann. §§ 18:1505.2(L), 27:261(D); Mich. Comp. Laws § 432.207b; Neb. Rev. Stat. §§ 9-803, 49-1476.01; N.J. Stat. Ann. § 19:44A-20.13 to -20.14; N.M. Stat. Ann. § 13-1-191.1(E)-(F); Ohio Rev. Code § 3517.13(I) to (Z); 53 Pa. Cons. Stat. § 895.704-A(a); S.C. Code Ann. § 8-13-1342; Vt. Stat. Ann. tit. 32, § 109(B); Va. Code Ann. § 2.2-3104.01 (amended by Va. Acts 2013, Ch. 583 (eff. July 1, 2014)); W. Va. Code § 3-8-12(d).

[7] N.Y.C. Admin. Code §§ 3-702(18), 3-703(1-a) to (1-b); L.A., Cal., City Charter § 470(c)(12).

e.g., *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010) (upholding ban on contributions from state contractors,); *Ognibene v. Parkes*, 671 F.3d 174 (2d Cir. 2011) (upholding law limiting campaign contributions by entities "doing business" with New York City); *Yamada v. Weaver*, 872 F. Supp. 2d 1023 (D. Haw. 2012), (upholding law prohibiting all contractors from making contributions), *appeal docketed*, No. 12-15913 (9th Cir. Apr. 20, 2012).[8]

The courts have also highlighted that many state and municipal laws were passed in direct response to scandals involving quid pro quo exchanges of campaign contributions for state contracts. For instance, in upholding Connecticut's sweeping governmental contractor contribution ban, the Second Circuit noted that the law was passed after numerous pay-to-play corruption scandals in Connecticut, one involving the former governor, John Rowland, who accepted over $100,000 worth of gifts and services from state contractors in exchange for the grant of lucrative state contracts. *Green Party*, 616 F.3d at 193; *see also Ognibene*, 671 F.3d at 179 (noting the series of pay-to-play scandals in

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8 State courts have likewise sustained strict contractor contribution limits. *See In Re Earle Asphalt Co.*, 950 A.2d 918, 325 (N.J. Super. App. Div. 2008), *aff'd*, 966 A.2d 460 (N.J. 2009) (per curiam). Relatedly, state courts have also upheld a range of contribution restrictions applicable to certain highly regulated industries deemed to pose a heightened threat of political corruption. *See, e.g.*, *Casino Ass'n of La. v. State ex rel. Foster*, 820 So.2d 494 (La. 2002) (upholding law prohibition on political contributions from individuals connected to casino industry); *Soto v. New Jersey*, 565 A.2d 1088 (N.J. 1989) (upholding prohibition on casino-industry contributions).

New York City preceding enactment of the contractor contribution restriction); *Yamada*, 872 F. Supp. 2d at 1049 n.27 (recounting corruption scandals that preceded law).

Petitioners ignore the record compiled by the SEC of the extensive pay-to-play activity at both the federal and state levels. But even if the evidence were less overwhelming, this Court has already found that given the clear conflict of interest inherent in the political activities of financial professionals seeking state business, an extensive record is not necessary to support a pay-to-play restriction. In *Blount*, the plaintiff claimed that the SEC had failed to provide any evidence of specific instances of quid pro quos in the negotiated municipal bond business. This Court rejected this attack, noting: "Although the record contains only allegations, no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic." 61 F.3d at 945.

2. The First Amendment Does Not Bar Prophylactic Rules.

As demonstrated by the record and recent experience in states and municipalities, evidence of pay-to-play corruption in contracting is still plentiful and concerns about pay-to-play corruption are widespread. But even if quid pro quos were to occur only occasionally in contracting, the Supreme Court has allowed legislatures to take a prophylactic approach when such exchanges are "neither easily detected nor practical to criminalize." *McConnell*, 540 U.S. at 153 ("The best means of prevention is to identify and to remove the temptation."). As the Supreme Court stated in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391. In light of the record compiled by the SEC here, and the enactment of pay-to-play statutes in at least 20 states and municipalities, the suggestion that those seeking state contracts might "pay to play" is hardly novel or implausible. Therefore, even if the evidence of quid pro quo exchanges were less abundant, a prophylactic approach would still be permissible.

Lastly, at least as important as the need to prevent instances of actual fraud in contracting is the need to avoid the appearance of fraud. *See Buckley*, 424 U.S. at 27 ("Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'") (citation omitted). Recognizing the importance of this interest, the Second Circuit observed in upholding New York City's "doing business" law that recurrent pay-to-play scandals had "created a climate of distrust that feeds the already-established public perception of corruption." *Ognibene*, 671 F.3d at 191 n.15. It was therefore "not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the *appearance of corruption*." *Id.* at 183 (emphasis added). Similarly, as the Second Circuit emphasized in *Green Party*, "widespread media coverage of Connecticut's recent corruption scandals" created a "manifest need to curtail the *appearance of corruption* created by contractor contributions." 616 F.3d at 200 (emphasis added). Thus, as multiple courts have found, limiting contractor contributions is a key measure to combat the public perception that public business is for sale to private interests.

Although petitioners insinuate that *McCutcheon* cast doubt on the constitutionality of prophylactic laws, they fail to mention that the Court there explicitly acknowledged that Congress could pass laws not only to directly combat actual quid pro quo corruption, but also to limit "the appearance of quid pro quo corruption." 134 S. Ct. at 1451. As this Court noted in *Blount*, "campaign contributions self-evidently create a conflict of interest in state and local officials." 61 F.3d at 944. The SEC is statutorily authorized to adopt prophylactic measures that combat not only actual quid pro quos in the grant of state investments, but also the appearance of quid pro quo corruption created by generous contributions by state investment advisors.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision, dismiss the petition and uphold the Rule.

RESPECTFULLY SUBMITTED this 28th day of January 2015.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6927 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 8day of January 26, 2015, I caused the foregoing BRIEF *AMICI CURIAE* to be filed electronically using this Court's CM/ECF System and sent via the ECF electronic notification system to all CM/ECF registered counsel of record.

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