Nos. 16-3360, 16-3732

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE REPUBLICAN PARTY, GEORGIA REPUBLICAN PARTY, and NEW YORK REPUBLICAN STATE COMMITTEE,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION and MUNICIPAL SECURITIES RULEMAKING BOARD,

Respondents.

On Petition for Review to the
Securities and Exchange Commission

BRIEF FOR RESPONDENT MUNICIPAL SECURITIES RULEMAKING BOARD

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December 19, 2016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-3360,16-3732 Case Name: Tenn. Republican Party v. SEC

Name of counsel: Joseph R. Guerra, Eric D. McArthur, Michael L. Post

Pursuant to 6th Cir. R. 26.1, Municipal Securities Rulemaking Board
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. The Municipal Securities Rulemaking Board is a self-regulatory organization created under the Securities Acts Amendments of 1975. It is incorporated as a Virginia non-stock corporation. It is not a subsidiary or affiliate of a publicly owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No publicly owned non-party corporation has a financial interest in the outcome of this appeal.

CERTIFICATE OF SERVICE

I certify that on December 19, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Joseph R. Guerra
Joseph R. Guerra
Sidley Austin LLP

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTRODUCTION

Petitioners challenge an amendment to a longstanding rule designed to prevent so-called "pay-to-play" practices (and the appearance of such practices) in the municipal securities market. Pay-to-play typically involves making a political contribution to help finance the election of an official who can steer government business to the contributor. Pay-to-play practices have a long and sordid history in our nation, and have been uniformly condemned as inimical to public confidence in government and to the proper administration of governmental programs.

Over 75 years ago, Congress banned campaign contributions by federal contractors in response to a pay-to-play scandal in which the Democratic National Committee coerced campaign contributions from contractors during the 1936 and 1938 elections. *See Wagner v. FEC*, 793 F.3d 1, 11-12 (D.C. Cir. 2015) (en banc). Just last year, the D.C. Circuit, sitting en banc, unanimously rejected a First Amendment challenge to this law, which is now part of the Federal Election Campaign Act (FECA). *See* 52 U.S.C. § 30119(a). The court concluded that the ban serves the government's important interests "in preventing corruption

and its appearance, and in protecting against interference with merit-based administration." *Wagner*, 793 F.3d at 26.

Nearly a quarter century ago, the Municipal Securities Rulemaking Board (MSRB or Board) proposed a rule designed to prevent pay-to-play practices in elections involving state and local officials who can influence the selection of municipal securities underwriters. The Securities and Exchange Commission (SEC or Commission) approved that regulation, known as MSRB Rule G-37, and the D.C. Circuit upheld it in the face of a constitutional challenge, holding that the rule is a legitimate response to the "self-evident[] . . . conflict of interest" that arises from such contributions by municipal securities brokers and dealers. *Blount v. SEC*, 61 F.3d 938, 944 (D.C. Cir. 1995).

Since then, in recognition of its effectiveness, Rule G-37 has served as the model for two other pay-to-play rules that the SEC has adopted for other sectors of the financial industry. *See* 75 Fed. Reg. 41018 (July 14, 2010); 81 Fed. Reg. 60051 (Aug. 31, 2016). And, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010), Congress authorized the SEC and MSRB to regulate municipal advi-

sors, in part because the MSRB already "ha[d] an existing, comprehensive set of rules on key issues, such as pay-to-play," S. Rep. No. 111-176, at 149 (2010).

Petitioners now challenge the amendments to Rule G-37 that, in accordance with the Dodd-Frank Act, extend the pay-to-play rule to municipal advisors. Remarkably, despite indisputable evidence that Congress intended to subject municipal advisors to the MSRB's pay-to-play rule, petitioners claim that amendments that effectuate Congress's intent somehow exceed the authority Congress gave the MSRB and SEC. Similarly, although FECA bars certain federal campaign contributions to prevent corruption or its appearance in the administration of federal contracts, petitioners claim that FECA prohibits regulation of federal contributions to incumbent state and local officials that raise the same type of harms at the state and local level. And, despite decisions affirming the constitutional validity of laws designed to prevent the evils of pay-to-play practices—including a decision upholding the original version of Rule G-37 itself—petitioners contend the amended rule violates the First Amendment.

As explained in detail below, petitioners lack standing to raise these challenges, and their challenges have no merit in any event.

JURISDICTIONAL STATEMENT

The Court lacks jurisdiction because petitioners lack standing, *see infra* § I, there is no reviewable order or agency action, *see* Doc. 30, and, insofar as petitioners rely on the Administrative Procedure Act (APA), such a claim "must be brought initially in a district court," *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 599 F.3d 662, 672-73 (D.C. Cir. 2010).

BACKGROUND

A. The MSRB's Role Under The Exchange Act

The MSRB is a self-regulatory organization authorized under the Securities Exchange Act of 1934 (Exchange Act) to regulate broker-dealers and banks that buy, sell, and underwrite municipal securities, as well as municipal advisors who advise municipal entities, including state and local governments, regarding municipal financial products and the issuance of municipal securities. Section 15B of the Exchange Act grants the MSRB broad authority to "propose and adopt rules to effect the purposes of [the Exchange Act]." 15 U.S.C. § 78*o*-4(b)(2). "The rules of the Board, as a minimum, shall," *inter alia*, "be designed to pre-

vent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, … to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest." *Id.* § 78*o*-4(b)(2)(C).

B. The MSRB's Rule G-37

In 1993, reports of pay-to-play misconduct prompted members of Congress to ask the SEC and MSRB to review the adequacy of regulations governing the municipal securities market. *See* 59 Fed. Reg. 17621, 17623 & n.32 (Apr. 13, 1994). The Board did so, and the "vast majority" of commenters on its proposed pay-to-play rule believed that "the payment of political contributions to issuer officials is a factor in the awarding of business." 59 Fed. Reg. 3389, 3394 (Jan. 21, 1994). Indeed, "'the vast majority of the *dealer community* wanted to see the end of political contributions … as a factor, actual or apparent, in the selection of underwriters.'" *Id.* at 3395 (emphasis added). Based on this and other evidence, the Board concluded that "political contributions create a potential conflict of interest for issuers, or at the very least the ap-

pearance of a conflict, when dealers make contributions to officials responsible for, or capable of influencing the outcome of, the awarding of municipal securities business and then are awarded business by issuers associated with these officials." *Id.* at 3390.

The Board found that such practices "undermine investor confidence in the municipal securities market" and create "artificial barriers to those dealers not willing or able to make such payments, thereby harming investors and the public interest by stifling competition and increasing market costs associated with doing municipal securities business." *Id.* "[T]o promote just and equitable principles of trade," the Board explained, "the awarding of business should be based on merit, and not on political contributions." *Id.* Thus, regulatory action was necessary "to protect investors and maintain the integrity of the market." *Id.*

The core of the proposed Rule G-37 was not a prohibition or limit on contributions to those who seek or hold state and local offices, but rather an ethics rule that prohibited dealers from engaging in municipal securities business with an issuer for two years after making a contri-

bution to certain officials of that issuer. *Id.* at 3391.[1] Contributions by municipal finance professionals associated with the dealer would likewise trigger the two-year "timeout," with the exception of contributions not exceeding $250 per election to each official for whom the professional was entitled to vote. *Id.* Covered "officials" would include any incumbent or candidate for an elective office who "is directly or indirectly responsible for, or can influence the outcome of, the hiring of a dealer for municipal securities business." *Id.*

Other provisions of the proposed rule were designed to reinforce and prevent circumvention of the two-year timeout. Dealers and professionals would be prohibited from doing, with the requisite intent, any act indirectly that would result in a violation of the rule if done directly, and from soliciting and coordinating contributions to officials of any issuer with which they were engaged or seeking to engage in municipal securities business. *Id.* at 3392. Dealers would also be subject to disclosure and recordkeeping requirements to facilitate compliance with and enforcement of the rule. *Id.* at 3392-93.

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[1] The provision applied to brokers, dealers, and municipal securities dealers. 59 Fed. Reg. at 3389. We refer to "dealers" for convenience.

The Commission approved Rule G-37 in April 1994. Citing "wide-spread reports" of pay-to-play abuses, the Commission concluded that such conduct amounts to "fraudulent, unethical, and manipulative dealer selection practices," *id.* at 17621, and that the rule was "an appropriate response to a compelling problem," *id.* at 17626. The Commission further concluded that the rule fell within the MSRB's "broad rulemaking authority" under Section 15B of the Exchange Act, *id.* at 17626-27, did not conflict with FECA, *id.* at 17629 n.75, and complied with the First Amendment, *id.* at 17627-28.

C. The D.C. Circuit's *Blount* Decision

William Blount, chairman of the Alabama Democratic Party and a registered dealer, challenged the Commission's order approving Rule G-37, arguing the rule violated the First Amendment. Assuming without deciding that strict scrutiny applied, the D.C. Circuit unanimously upheld the rule, holding it was narrowly tailored to serve the compelling governmental interest of protecting the municipal securities market from corrupt practices. *Blount*, 61 F.3d at 941-48.[2]

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[2] The court also rejected arguments that the rule was unconstitutionally vague and violated the Tenth Amendment. 61 F.3d at 948-49.

The court rejected the argument that the harms targeted by the rule were "merely conjectural" because "the record contain[ed] no evidence of specific instances of quid pro quos." *Id.* at 944. The court reasoned that the political contributions at issue "self-evidently create a conflict of interest," and that "[w]hile the risk of corruption is obvious and substantial," it is difficult to detect because "actors in this field are presumably shrewd enough to structure their relations" to avoid detection. *Id.* at 944-45. Accordingly, the allegations of abusive practices identified by the Commission were sufficient: "no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic." *Id.* at 945.

With regard to narrow tailoring, the court concluded that the rule was "closely drawn" to "avoi[d] unnecessary abridgment of First Amendment rights." *Id.* at 947. The court explained that the rule "constrains relations only between the two potential parties to a quid pro quo," "restricts a narrow range of their activities for a relatively short period of time," and allows professionals to contribute $250 per election to each official for whom they can vote without triggering the two-year timeout, and to "engag[e] in the vast majority of political activities, in-

cluding making direct expenditures for the expression of their views, giving speeches, soliciting votes, writing books, or appearing at fund-raising events." *Id.* at 947-48. And none of the proposed alternatives "would be even *almost* equally effective" in stamping out the harmful pay-to-play practices targeted by the rule. *Id.* at 947.

In 2015, the en banc D.C. Circuit reaffirmed *Blount*, citing it repeatedly in support of its unanimous decision upholding the federal ban on contributions from government contractors to candidates for federal office. *See Wagner*, 793 F.3d at 20, 26-27, 29-30, 32.

D. The 2005 Amendments To Rule G-37

Since promulgating Rule G-37, the MSRB has proposed, and the SEC has approved, a number of amendments to strengthen and prevent circumvention of the rule's protections. As relevant here, the MSRB in 2005 proposed to extend the rule's ban on soliciting and coordinating contributions to include payments to a political party of a state or locality where the dealer is engaging or seeking to engage in municipal securities business. 70 Fed. Reg. 48214, 48216 (Aug. 16, 2005).

The Board determined this was necessary to eliminate "the appearance of attempting to influence the awarding of municipal securi-

ties business through such payments," and that "without the proposed prohibition, it would be very difficult to detect such potential indirect violations because the parties solicited do not have to disclose the payments." *Id.* In addition, the Board noted that "the arguably stricter prohibition" on soliciting and coordinating payments can be justified because a violation "does not result in an automatic ban on business." *Id.*[3]

The Commission approved the amendment for the reasons stated by the Board, finding that the amendment would "help inhibit practices that attempt, or create the appearance of attempting, to influence the awarding of municipal securities business through an indirect violation of Rule G-37." SEC Rel. No. 34-52496, at 10-11 (Sept. 22, 2005).

E. The SEC's And FINRA's Pay-To-Play Rules

In 2010, the SEC adopted a pay-to-play rule for investment advisers. 75 Fed. Reg. 41018. Citing a wide body of evidence, the Commission found that "the selection of advisers … has been influenced by political

[3] Contrary to petitioners' contention, Br. at 14-15, a violation of the ban on soliciting and coordinating payments does not trigger the two-year timeout. *Compare* App. 28-29 (Rule G-37(c)), *with id.* at 25-28 (Rule G-37(b)). And the rule does not restrict contributions to political parties unless the contributions are used, with the requisite intent, as a means to indirectly violate the rule by using the party as a conduit for contributions to a covered official and doing business within two years with the relevant municipality. *See* App. 29 (Rule G-37(d)).

contributions and that, as a result, the quality of management service provided to public funds may be negatively affected." *Id.* at 41019-20. To combat these practices, the Commission adopted a rule "modeled" on MSRB Rule G-37, which the Commission concluded had "significantly curbed pay to play practices in the municipal securities market." *Id.* at 41020 & n.31, 41026 & n.101.[4]

In August 2016, the SEC approved a proposal by another self-regulatory organization, the Financial Industry Regulatory Authority (FINRA), to adopt a similar pay-to-play rule for placement agents who help investment advisers obtain business from state and local government entities. 81 Fed. Reg. 60051. The Commission found the rule was within FINRA's authority under Section 15A(b)(6) of the Exchange Act, 15 U.S.C. § 78*o*-3(b)(6), and consistent with the First Amendment. 81 Fed. Reg. at 60062-66.

[4] In 2014, petitioners New York Republican State Committee and Tennessee Republican Party challenged the SEC's pay-to-play rule as exceeding the Commission's statutory authority and violating the First Amendment. Without reaching the merits, the D.C. Circuit dismissed the challenge as having been improperly brought in district court and as untimely in the court of appeals. *N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126 (D.C. Cir. 2015).

F. The Dodd-Frank Act

In 2010, the Dodd-Frank Act amended the Exchange Act to provide for the regulation by the Commission and the MSRB of municipal advisors. Section 15B now prohibits municipal advisors from engaging in any fraudulent, deceptive, or manipulative act or practice, 15 U.S.C. § 78*o*-4(a)(5), and extends the MSRB's rulemaking authority to municipal advisors and municipal advisory activities, *id.* § 78*o*-4(b)(2). Notably, this extension of the Board's rulemaking authority was based in part on the fact that the Board already had "an existing, comprehensive set of rules on key issues such as pay-to-play and fair dealing." S. Rep. No. 111-176, at 149; *see also id.* ("the MSRB has an extensive understanding of the municipal securities market and has put in place a mature body of comprehensive regulation that," *inter alia*, "restricts real and perceived conflicts of interests, including prohibiting pay-to-play practices").

G. The 2016 Amendments To Rule G-37

In accordance with the Dodd-Frank Act, the MSRB filed with the SEC a proposed rule change that extended the core standards of Rule G-37 to municipal advisors. 80 Fed. Reg. 81710 (Dec. 30, 2015). The MSRB explained that the rule would "address[] an area of potential cor-

ruption, or appearance of corruption, in connection with the awarding of municipal advisory business, which impedes a free and open market in municipal securities and may harm investors, issuers, municipal entities and obligated persons." *Id.* at 81710. The Board cited "numerous developments in recent years [that] have led the MSRB to conclude that the selection of market participants that may now be defined as municipal advisors has been influenced by 'pay to play' practices." *Id.* at 81725.[5] Moreover, the Board concluded, even the mere "appearance of *quid pro quo* corruption in the selection of municipal securities professionals … diminishes investor confidence," "creates artificial impediments to a free and open market as professionals that believe that 'pay to play' practices are a prerequisite to the receipt of government business may be reluctant to enter the market," and "may breed actual *quid pro quo* corruption as municipal advisors, dealers, investment advisors and [municipal entity] officials alike may feel compelled to take part in 'pay to play' practices in order to avoid a competitive disadvantage as

[5] The record before the Board included a report (omitted from petitioners' appendix) setting forth evidence of pay-to-play practices from numerous states. *See* Supp. App. 329-53; *infra* pp. 31-32.

compared to similarly situated parties they believe do engage in such practices." *Id.* at 81726.

Due to a funding restriction, the Commission took no action on the proposed rule change. As a result, on February 13, 2016, the rule change was deemed approved by operation of law under 15 U.S.C. § 78s(b)(2)(D). It took effect on August 17, 2016.

SUMMARY OF ARGUMENT

I. Because they seek only prospective relief, petitioners must demonstrate a real and immediate threat of *future* injury. Petitioners identify by name only one would-be donor subject to Rule G-37, but their hearsay-based affidavits describe no concrete plans this individual has to contribute to any specific candidate or to engage in any specific solicitation efforts. Moreover, because this individual was subject to the rule before it was amended, petitioners cannot satisfy the jurisdictional requirements of Article III and Section 25(a) of the Exchange Act by relying on speculative injuries traceable only to those aspects of the rule that cannot provide the basis for a timely petition for review.

II. The amendments to Rule G-37 cannot be set aside as exceeding the MSRB's statutory authority unless they are arbitrary, capri-

cious, or manifestly contrary to Section 15B of the Exchange Act. *United States v. O'Hagan*, 521 U.S. 642, 673 (1997). No such showing is possible. As the D.C. Circuit recognized, the connection between the MSRB's mandate to protect and perfect the municipal securities market and Rule G-37's anticorruption goals is self-evident. *Blount*, 61 F.3d at 945. Petitioners' arguments to the contrary are wholly unavailing.

Their contention that almost everything covered by Rule G-37 is covered by FECA is wrong and irrelevant. Rule G-37 applies to contributions for state and local elections that fall outside FECA's scope. The only overlap between the two regimes that petitioners identify concerns contributions to incumbent state or local officials running for federal office. Moreover, petitioners do not explain why the rule's application to federal contributions in that circumstance renders it manifestly contrary to Section 15B.

Nor is evidence of "rampant" *quid pro quo* corruption needed to sustain Rule G-37. Agencies exercising express power to adopt prophylactic rules can rely on "fair assumptions." Rule G-37 is based on the Board's and Commission's judgments, borne out by numerous comments, reports, and other information, that restrictions on pay-to-play

practices prevent corruption and the appearance of corruption, which in turn furthers the goals set forth in Section 15B. The decision in *Blount* endorsed this justification for the original Rule G-37, and courts have consistently recognized the legitimacy of similar anti-corruption rationales underlying other federal and state pay-to-play rules.

Petitioners cannot overcome these conclusions based on their unsubstantiated assumption that legal contributions cannot cause pay-to-play dangers. Limits and disclosure requirements do not prevent *quid pro quo* practices or the appearance of such corruption. Indeed, FECA's complete ban on federal contributions by federal contractors reflects this same judgment. Disclosure can actually increase the pressure on government contractors to make contributions. And evidence in the record in this case and others confirms that pay-to-play harms persist despite federal and state contribution limits.

Thus, the restrictions of amended Rule G-37 are not arbitrary. And the canon of constitutional avoidance cannot excuse petitioners' inability to demonstrate that those restrictions are manifestly contrary to Section 15B.

III. Petitioners have likewise failed to show that, in enacting FECA, Congress clearly intended to prohibit regulation of pay-to-play practices in the municipal securities market under the Exchange Act. The two statutes have different scopes and purposes, and both can be enforced without conflict in the limited area of overlap petitioners identify.

FECA does not regulate contributions in state and local elections, and thus does not prohibit Rule G-37's application to such contributions. Moreover, Petitioners identify nothing in FECA or the Exchange Act that expressly forbids Rule G-37's application to contributions to incumbent state and local officials running for federal office. And FECA's preemption provision, which reaches only state regulation, is strong evidence that FECA does not bar other federal regulation. *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014). Indeed, because FECA bars federal campaign contributions by federal contractors to prevent corruption or its appearance in the administration of federal programs, it is implausible to conclude that Congress clearly intended to *allow* federal campaign contributions that can cause those same harms at the state and local level. Under *POM Wonderful*, FECA's supposed "greater

specificity" and grant of exclusive enforcement to the Federal Election Commission (FEC) are insufficient to sustain a contrary conclusion.

To the extent the D.C. Circuit's decision in *Galliano v. U.S. Postal Service*, 836 F.2d 1362 (D.C. Cir. 1988), remains good law after *POM Wonderful*, it is readily distinguishable. *Galliano* relied on an implied-repeal-by-later-enactment theory that is inapplicable here. Moreover, unlike this case, the FECA disclosure provision at issue in *Galliano* expressly addressed the area of statutory overlap, and it was reasonable to believe that Congress intended those disclosure requirements to foreclose additional federal regulation.

IV. In all events, in the Dodd-Frank Act, Congress ratified Rule G-37 and its application to federal contributions to incumbent state and local officials. Indeed, the MSRB's pay-to-play regulation was one of the explicit reasons for extending the Board's authority to municipal advisors.

V. Petitioners have provided no valid reason for creating a split with the D.C. Circuit over the constitutional validity of pay-to-play rules. The Supreme Court has in recent years applied a less rigorous standard of scrutiny than the standard applied in *Blount*, and it has

consistently recognized that preventing corruption or its appearance is an important governmental interest that justifies contribution restrictions. Four other circuit decisions sustaining federal and state pay-to-play contribution regulations, as well as common sense and evidence in the record of this and other cases, refute petitioners' claim that the amendments to Rule G-37 rest on improper conjecture and speculation. Petitioners' reliance on out-of-context quotations from Supreme Court decisions provides no basis for concluding otherwise.

VI. The MSRB should be re-designated as an intervenor. Although amended Rule G-37 is binding federal law, the Board is neither part of the Commission nor a federal agency. Accordingly, it is not a proper respondent under the Exchange Act's judicial review provision and cannot be sued under the APA.

ARGUMENT

I. PETITIONERS HAVE NOT DEMONSTRATED STANDING.

In addition to the absence of a reviewable Commission order, *see* Doc. 30, this Court lacks jurisdiction because petitioners have failed to demonstrate standing, either in their own capacity or in a representative capacity. A party seeking only prospective relief must demonstrate a "real and immediate threat" of *future* injury, and may not rely on

"past wrongs." *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). Petitioners must also demonstrate standing for each aspect of the rule they challenge. *Davis v. FEC*, 554 U.S. 724, 733-34 (2008); *Wagner*, 793 F.3d at 4-5. Petitioners' affidavits do not satisfy these requirements.

The few statements about future injury, all one or more levels of hearsay, are mostly about unspecified "donors" and "some … people." App. 307, 318. The exception is their claim that "Steve McManus … a covered associate of a register investment advisor … has stated that he would contribute more than $250 to a covered official in a future election" and "would be willing to solicit contributions for the Tennessee Republican Party" but for the MSRB's rule. App. 307-08.[6] But the affidavit does not identify any specific candidate for any specific office in any specific election whom Mr. McManus wishes to support, nor any specific solicitation efforts he wishes to undertake. "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of

[6] Petitioners did not provide an affidavit from Mr. McManus, nor specify whether Mr. McManus is a member of the Tennessee Republican Party.

the 'actual or imminent' injury that our cases require." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

Moreover, the affidavit states that Mr. McManus works for an MSRB-registered *dealer*, but does not state that the firm is also a municipal advisor (and it is not).[7] Because the amendments made no substantive change to the ability of a dealer's employees to make or solicit contributions, *see, e.g.*, App. 6, Mr. McManus's speculative future injury is traceable to the pre-amendment version of the rule, which is no longer subject to challenge through direct review. *See* 15 U.S.C. § 78y(a)(1) (requiring review within 60-day period). Petitioners cannot satisfy the jurisdictional requirements of both Article III and Section 25(a) by relying on speculative injuries traceable only to those aspects of the rule that cannot provide the basis for a timely petition for review.

In addition, petitioners' speculative claims concerning Mr. McManus provide no basis for concluding that they have standing to challenge the disparate impact that the two-year timeout can have when a covered official runs for federal office against a candidate who is

[7] FTB Advisors is listed only as a dealer in the MSRB's public record, available at http://www.msrb.org/BDRegistrants.aspx (last visited Dec. 19, 2016).

not covered by the rule. Petitioners have not identified any party members who will imminently face this situation, and thus lack standing to bring this challenge. *See* App. 313 (alleging only a *past* disparate impact).

II. THE AMENDMENTS TO RULE G-37 ARE NOT *ULTRA VIRES*.

A. The Board's Pay-To-Play Rules Fall Within Section 15B's Sweeping Grant Of Authority To Prescribe Prophylactic Rules.

Section 15B of the Exchange Act grants the MSRB, subject to SEC oversight, broad authority to "propose and adopt rules" that "shall," at a minimum: (1) "prevent fraudulent and manipulative acts and practices," (2) "promote just and equitable principles of trade," and (3) "perfect the mechanism of a free and open market in municipal securities." 15 U.S.C. § 78*o*-4(b)(2)(C). Section 15B is thus an express delegation of discretionary authority to choose the means of effectuating several broad statutory goals. Any claim that the MSRB has acted outside this sweepingly broad grant of authority is therefore governed by a very stringent standard of judicial review—one petitioners cannot satisfy.

The Supreme Court has held that, when Congress grants authority "to prescribe legislative rules" that are "designed to prevent" particu-

lar harms, an agency's judgment that a measure is an appropriate prophylactic is entitled not just to deference, but to "'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.'" *O'Hagan*, 521 U.S. at 673 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). Section 15B indisputably confers power to prescribe legislative rules, *i.e.*, the power to make binding federal law. *See Blount*, 61 F.3d at 941 ("Rule G-37 operates … as federal law"). And petitioners cannot show that Rule G-37 is arbitrary, capricious, or manifestly contrary to Section 15B.

Indeed, the D.C. Circuit held over two decades ago that "the link between eliminating pay-to-play practices and the Commission's goals of 'perfecting the mechanism of a free and open market' and promoting 'just and equitable principles of trade' *is self-evident*." *Blount*, 61 F.3d at 945 (emphasis added). That conclusion forecloses any claim that the rule is arbitrary, capricious, or manifestly contrary to that statute.

B. Petitioners' Arguments Provide No Basis For Concluding That The MSRB Lacked The Authority To Adopt The Amendments To Rule G-37.

Ignoring both *O'Hagan*'s test and *Blount*'s dispositive conclusion, petitioners mistakenly assert "that [Rule G-37] targets *only* those in-

stances in which municipal advisors make fully disclosed *federal* political contributions in amounts less than $2,700 or make fully disclosed donations to political party committees subject to a $10,000 limit." Br. at 39 (emphases altered). From this mistaken premise they contend that the "purported prevalence" of pay-to-play practices does not show that otherwise-lawful contributions are a frequent source of 'fraudulent and manipulative' conduct," and they fault the MSRB for failing to offer "firm evidence of legal political contributions leading to *quid pro quo* corruption." *Id.* at 40. These arguments are flawed from start to finish.

1. Rule G-37 does not target federal contributions.

Rule G-37 does not target federal campaign contributions, much less target *only* those contributions. Petitioners note that it can apply to contributions in a federal election where a covered incumbent state or local official runs for federal office. But the rule targets contributions to persons who occupy or seek *state and local* office and thus typically applies to non-federal contributions. And the rule does not prohibit municipal advisors from contributing to political parties except where contributions are made with the intent to evade the rule's restrictions. *See supra* p. 11 n.3.

Petitioners are thus wrong in claiming that almost "[e]verything" covered by Rule G-37 is "already … prohibited" by federal law and "squarely within the enforcement jurisdiction of the [Federal Election Commission (FEC)] and the Department of Justice." Br. at 39. Their argument provides no basis for concluding that Rule G-37 exceeds the MSRB's authority when it applies to contributions by municipal advisors for *state and local elections*. Nor have petitioners explained why the rule's limited application to federal contributions renders it manifestly contrary to Section 15B.

2. The Board and Commission reasonably found that contributions subject to the rule create risks of corruption and its appearance.

The Commission, in approving the original Rule G-37, and the Board, in proposing the recent amendments, reasonably found that the rule's restrictions are designed to achieve the objectives set forth in Section 15B. This prophylactic legislative rule did not have to be based on any evidence, much less "evidence of rampant *quid pro quo* conduct," Br. at 41. In *O'Hagan*, the Supreme Court upheld an SEC prophylactic rule that "encompasse[d] more than the core activity prohibited" by the statute, 521 U.S. at 673, because it was "a fair assumption" that the

type of trading the rule prohibited would "often involve a breach of a" substantive duty, and that proving actual violations of that duty would be difficult, *id.* at 674-76.

Rule G-37 was adopted based on the Commission's conclusion, borne out by numerous comments, that pay-to-play practices create the risk and appearance of corruption, which distort merit-based competition in the municipal securities markets, and that Rule G-37 would prevent such fraudulent and manipulative practices, help "perfect the mechanism of a free and open market," and "promote just and equitable principles of trade" by eliminating the "artificial barriers to competition" that such practices create, 59 Fed. Reg. at 17621-22, 17626-27. The MSRB relied on these same rationales in extending the rule. *See* App. 69.

Courts have repeatedly recognized the validity of these concerns. *See Blount*, 61 F.3d at 944-45 ("underwriters' … contributions self-evidently create a conflict of interest in state and local officials who have power over municipal securities contracts," and thus create a "risk of corruption [that] is obvious and substantial"); *Wagner*, 793 F.3d at 21 (there is nothing "implausible about the idea that contractors may be

coerced to make contributions … or that more qualified contractors may decline to play at all if the game is rigged"); *Yamada v. Snipes*, 786 F.3d 1182, 1206 (9th Cir. 2015) ("contributions from contractors to officeholders and candidates" are "linked to actual and perceived quid pro quo corruption"); *Ognibene v. Parkes*, 671 F.3d 174, 186 n.12 (2d Cir. 2012) ("that money and governmental favors are connected [is] far from implausible"); *Preston v. Leake*, 660 F.3d 726, 736 (4th Cir. 2011) (it was a "rational judgment" that a ban on contributions from lobbyists "was necessary as a prophylactic to prevent not only actual corruption but also the appearance of corruption").[8]

Accordingly, it is entirely reasonable to conclude that eliminating pay-to-play practices serves the goals of Section 15B. *See*, *e.g.*, *Blount*, 61 F.3d at 945.

3. Petitioners' assumption that otherwise-lawful contributions cannot create risks of corruption or its appearance is baseless.

At bottom, petitioners argue that judgments long deemed reasonable by courts and agencies cannot apply to "otherwise-lawful," "mod-

[8] Contrary to petitioners' suggestion, Br. at 39, anti-bribery laws do not undermine these concerns, as they '"deal with only the most blatant and specific attempts of those with money to influence governmental action."' *Wagner*, 793 F.3d at 15.

est," and "publicly disclosed contributions." Br. at 40. But petitioners' unsubstantiated—and indeed, unexplained—assumption that such contributions by municipal advisors for state and local elections cannot cause corruption or its appearance is not a basis for deeming amended Rule G-37 arbitrary, capricious, or manifestly contrary to Section 15B.

First, many otherwise-legal contributions are not "modest" at all. According to the National Conference of State Legislatures (NCSL), 11 states have no contribution limits, and 16 others allow contributions of $5,000 or more to at least some statewide candidates.[9] In some states, some contributions can be considerably higher still.[10]

More fundamentally, petitioners' speculation that otherwise legal contributions from those doing business with the government will cause harm only in "'the most exceptional of cases,'" Br. at 41, is contrary to common sense, a congressional judgment embodied in FECA, and evi-

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[9] *See* www.ncsl.org/research/elections-and-campaigns/state-limits-on-contributions-to-candidates.aspx (updated May 2016) (last visited Dec. 19, 2016). (NCSL identified Missouri as having no limit, but voters recently adopted one, *see* http://fox2now.com/2016/11/08/missouri-voters-pass-measure-limiting-campaign-contributions/.)

[10] In Ohio, an individual can contribute up to $12,532.34 to a statewide candidate. Ohio Rev. Code § 3517.104. In New York, the general election limit for statewide candidates is $44,000. N.Y. Election L. § 14-114.

dence in the record. Limits and disclosure requirements do not alter the facts that contributions by those who do business with the government can constitute "a quid pro quo for government [business], that officials may steer government [business] in return for such contributions, and that the making of contributions and the awarding of [government business] to contributors fosters the appearance of such quid pro quo corruption." *Wagner*, 793 F.3d at 21. In the absence of Rule G-37, an advisory firm could not only contribute itself without triggering the two-year timeout, but also solicit and coordinate numerous *legal* contributions from employees and their spouses, thereby amassing large contributions on an aggregate basis. Nor do limits and disclosure prevent coerced contributions. Indeed, disclosure may *increase* this harm of pay-to-play practices: revealing which advisors have contributed can increase the pressure on other advisors to do the same "in order to avoid a competitive disadvantage." App. 69.

Congress itself recognized these dangers, *Wagner*, 793 F.3d at 21, which is why it banned *any* contributions made "directly or indirectly" by anyone "who enters into any contract with the United States" or commences "negotiations" for such a contract. 52 U.S.C. § 30119(a)(1).

Thus, Congress concluded that federal contributions by those doing or negotiating for business with the federal government create a risk of corruption and its appearance so great that federal contractors should not be allowed to make "fully disclosed $2,700 federal contributions," Br. at 41—or fully disclosed federal contributions of even $1. It thus cannot be arbitrary for the MSRB to conclude, in the exercise of its expertise and powers under Section 15B, that fully disclosed contributions by municipal advisors to those seeking or holding offices that control the award of municipal advisory business likewise create risks of corruption and its appearance.

Indeed, evidence in the administrative record confirms these dangers. A report explains, for example, that between 1997 and 2000, entities related to a company that mismanaged a $392 million contract for New Jersey contributed over $500,000 to candidates and state committees. Supp. App. 337-38. A later investigation concluded that the contractor's actions had "'remained within the boundaries of the law.'" *Id.* at 338. In 2009, federal investigators alleged that "New Mexico lost $90 million while investing with firms whose employees contributed at least

$15,100 to [Governor] Richardson's presidential campaign"—contributions subject to FECA's requirements. *Id.* at 343.

The report also notes that law firms that received contracts with Virginia had contributed to both candidates for governor in the 1998 race, with one firm contributing over $40,000 to both and receiving $56.8 million in contracts from 1996 to 1997. *Id.* at 348. Similarly, in *Wagner*, the D.C. Circuit cited a report that identified millions in political contributions from firms that contracted with the District of Columbia. *See* 793 F.3d at 17-18 n.21. The contributions, often made months or weeks before contracts were awarded, were apparently within legal limits, but created the appearance of pay-to-play practices. Patrick Madden, *The Cost of D.C. Council's Power Over Contracts*, WAMU (Oct. 14, 2014), http://wamu.org/projects/paytoplay/#/story. Petitioners simply ignore this evidence.

4. The canon of constitutional avoidance is irrelevant.

Petitioners' reliance on the canon of constitutional avoidance, Br. at 42, is unavailing. That canon is used to "decid[e] which of two plausible statutory constructions to adopt." *Clark v. Martinez*, 542 U.S. 371, 380 (2005). To meet *O'Hagan*'s test, however, petitioners must do more

than offer a "plausible" alternative interpretation of Section 15B—they must show that Rule G-37 is irrational or categorically prohibited by Section 15B. 521 U.S. at 673. They cannot make that showing.[11]

III. THE AMENDMENTS TO RULE G-37 DO NOT CONFLICT WITH FECA.

Petitioners are also mistaken in claiming that FECA forecloses adoption of the Rule G-37 amendments. Br. at 30. When overlapping statutes "are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.,* 534 U.S. 124, 143-44 (2001). Petitioners have failed to identify evidence of a clear congressional intent to preclude application of Rule G-37 in the limited area of overlap with FECA they identify, much less when there is no overlap.

A. FECA Does Not Foreclose Regulation Of Contributions That Fall Outside Its Scope.

Petitioners nowhere limit the relief sought under their FECA-based arguments, and thus appear to claim that FECA renders Rule G-37 invalid in its entirety. Any such claim is baseless.

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[11] The canon is also inapplicable because there is no serious question about the rule's constitutionality. *Infra* pp. 47-63.

FECA reaches only contributions to candidates "for *Federal* office." 52 U.S.C. § 30101(8)(A)(i) (emphasis added). "[D]onations made solely for the purpose of influencing state or local elections are therefore unaffected by FECA's requirements and prohibitions." *Emily's List v. FEC*, 581 F.3d 1, 20 (D.C. Cir. 2009). Because FECA does not regulate contributions to state and local elections, much less do so "comprehensively," it does not foreclose other federal regulation of such contributions. *See J.E.M. Ag Supply,* 534 U.S. at 144 (Court "has not hesitated to give effect to two statutes that overlap, so long as each reaches some distinct cases"); *Galliano*, 836 F.2d at 1371 (even where irreconcilable conflict effects partial repeal by implication, earlier-enacted law remains operative outside area of overlap).

B. FECA Does Not Preclude Rule G-37's Limited Application To Contributions For Federal Elections.

FECA likewise does not render Rule G-37 invalid when it applies to contributions to incumbent state or local officials running for federal office. *POM Wonderful* makes this clear.

There, the Court held that the Lanham Act's prohibition of false or misleading product descriptions can coexist with the Food, Drug, and Cosmetic Act's (FDCA's) prohibition of false or misleading beverage la-

bels, even when liability under the Lanham Act is based on a label that satisfies the FDCA. In concluding that this apparent conflict was permissible, the Court stressed that "neither the Lanham Act nor the FDCA, in express terms, forbids or limits Lanham Act claims challenging labels that are regulated by the FDCA." *Id.* at 2237. The absence of such a provision was "of special significance," because the two statutes had coexisted for decades and, if Congress believed Lanham Act suits interfered with the FDCA, "it might well have enacted a provision addressing the issue." *Id.*

The same is true here. Nothing in FECA or the Exchange Act expressly forbids application of Rule G-37 to federal campaign contributions to incumbent state and local officials. Rule G-37 has applied to such contributions since 1994. Yet, in amending both the Exchange Act and FECA since then,[12] Congress has not expressed concern that Rule G-37 is interfering with FECA, much less precluded its application to federal campaign contributions. Instead, Congress affirmatively ex-

[12] *E.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014) (FECA); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Exchange Act); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (FECA).

tended the Board's regulatory authority to include municipal advisors, invoking the MSRB's pay-to-play rule in doing so.[13] *See infra* pp. 45-57.

Similarly, the Court found that Congress's decision to preempt state laws addressing food and beverage misbranding but not to preclude "other federal laws that might bear on" such labeling was "powerful evidence" that Congress did not intend to preclude all other federal regulation. *POM Wonderful*, 134 S. Ct. at 2237-38. Similarly here, FECA preempts "any provision of State law with respect to election to Federal office," 52 U.S.C. § 30143, but "does not refer to requirements imposed by other sources of law, such as federal statutes," *POM Wonderful*, 134 S. Ct. at 2238.

Finally, despite the apparent conflict in that case, the Court concluded that the laws were complementary in light of their respective scopes and purposes. *Id.* at 2238-39. The FDCA seeks to protect public health and safety, while the Lanham Act protects competitors. *Id.* Precluding Lanham Act claims would result in "less effective protection in

[13] Because petitioners must show that Congress clearly intended FECA to *foreclose* adoption of Rule G-37, it is irrelevant that Congress "has not given the MSRB [or the] SEC … explicit authority to impose additional restrictions on" federal campaign contributions, or that Congress itself "could easily have" adopted additional restrictions. Br. at 36-37.

the food and beverage labeling realm," a result "Congress likely did not intend." *Id.* at 2239.

Here, FECA and Rule G-37 complement each other by protecting against comparable harms in different contexts. In FECA, Congress set campaign contribution limits at the level it deemed generally sufficient to prevent corruption and the appearance thereof, but banned federal contributions by those contracting with the federal government. FECA's focus on preventing corruption or its appearance in the administration of *federal* programs, however, left a gap: the danger that some federal contributions can corrupt (or appear to corrupt) the administration of state and local programs, by officials who can influence the awarding of state or local business while running (or preparing to run) for federal office (or afterwards, if their federal candidacies fail). Rule G-37 thus complements FECA's goal of ensuring that federal campaign contributions do not distort awards of governmental business. Indeed, it is highly unlikely that Congress intended to shield from federal regulation federal campaign contributions that could cause, at the state and local level, the very same distortion of merit-based public administration that Congress sought to prevent at the federal level.

The foregoing evidence compels the conclusion that Congress did not clearly intend FECA to foreclose Rule G-37's application to contributions made to state and local officials who happen to be seeking federal office. Nor does it matter that FECA grants the FEC "exclusive jurisdiction with respect to the civil enforcement of" FECA's provisions, 52 U.S.C. § 30106(b)(1). *See* Br. at 31, 33, 35-36. Just as the plaintiff in *POM Wonderful* sought "to enforce the Lanham Act, not the FDCA or its regulations," 134 S. Ct. at 2239, Rule G-37 enforces standards under the Exchange Act, not FECA. The "centralization of" authority to enforce one statute does "not indicate that Congress intended to foreclose … enforcement of other federal statutes." *Id.*[14]

Petitioners also claim that FECA must prevail over Rule G-37 because FECA is the more specific statute. Br. at 30. This argument begs the question. FECA addresses federal campaign contributions general-

[14] *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013), is inapposite. The statute there conferred exclusive jurisdiction over *primary conduct*, *i.e.*, "transactions conducted on futures markets." *See id.* at 157-58. Here, the primary conduct is contributing to federal campaigns. As petitioners themselves stress, however, "Congress has not granted the FEC discretion to increase or decrease [FECA's] limits." Br. at 31. Thus, the additional and limited restriction Rule G-37 imposes on such conduct cannot "eviscerate," *id.* at 36, the FEC's enforcement authority.

ly, but says nothing about the integrity of municipal securities markets or federal contributions to officials who occupy state and local offices that control awards of municipal advisory business. On this topic, the Exchange Act is more specific.

In all events, "greater specificity would matter only if [the relevant statutes] cannot be implemented in full at the same time." *Id.* at 2240; *see also Trepel v. Roadway Express, Inc.*, 266 F.3d 418, 424 (6th Cir. 2001) (declining to apply the more specific provision where there was "no inherent conflict between provisions"), *superseded by statute on other grounds*, Pub. L. No. 109-59, 119 Stat. 1144 (2005). That condition is not met here. FECA prohibits contributions that "exceed" its limits. 52 U.S.C. § 30116(a)(1). Rule G-37 does not require conduct that violates that prohibition, nor does it prohibit conduct that FECA requires.

Petitioners try to manufacture a conflict by claiming that Congress alone can "establish *exceptions* to its statutorily fixed limits." Br. at 32 (emphasis added). To be an exception to a prohibitory *limit*, however, Rule G-37 would have to require or permit contributions *above* those limits—which it does not do. For this same reason, FECA's provisions barring federal campaign contributions by federal contractors, na-

tional banks, corporations, labor organizations, and their officers and directors, 52 U.S.C. § 30118, are not *exceptions* to the contribution limits; they are *additional prohibitions*.

In essence, petitioners contend that FECA's prohibitions are necessarily exclusive. But while an enumeration of exceptions to a general prohibition can create an inference of exclusivity, *see United States v. Smith,* 499 U.S. 160, 167 (1991), a series of prohibitions does not, *see Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) ("a congressional decision to prohibit certain activities does *not* imply an intent to disable the relevant administrative body from taking similar action with respect to activities that pose a similar danger"); *Pathfinder Mines Corp. v. Hodel*, 811 F.2d 1288, 1292 (9th Cir. 1987) (no negative inference should be drawn "[u]nless Congress states that [a] list of prohibited activities is exclusive"). Congress's desire to ensure that federal campaign contributions do not distort awards of federal contracts makes it utterly implausible to believe that Congress deliberately chose to allow federal contributions that can distort awards of municipal securities business. *See Sidney Coal Co. v. Soc. Sec. Admin.*, 427 F.3d 336, 348 (6th Cir. 2005) ("statute's explicit refer-

ence" to two things "need not preclude adding another to the list," where the plaintiffs "have not demonstrated that Congress 'considered the unnamed possibility and meant to say no to it'"); *Texas Rural Legal Aid,* 940 F.2d at 694 (a prohibition "may actually *support* the view that the administrative entity can … eliminate a similar danger"). In all events, *expressio unius* is a "maxim … not a rule of substantive law," *Kentucky Resources Council, Inc. v. EPA*, 467 F.3d 986, 994 (6th Cir. 2006), and thus is not a basis for concluding that FECA and Rule G-37 "*cannot* be implemented in full at the same time." *POM Wonderful*, 134 S. Ct. at 2240 (emphasis added).

Petitioners also claim that setting contribution limits "is an inherently *legislative* function." Br. at 32 n.10. They cite no authority, however, establishing that Congress cannot delegate such authority to an agency.[15] The relevant inquiry, therefore, is what Congress intended. And, for all the reasons discussed above, petitioners cannot show that Congress clearly prohibited the MSRB from regulating campaign con-

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[15] Petitioners cite *Randall v. Sorrell*, 548 U.S. 230, 248 (2006), *see* Br. at 32 n.10, but the Court's observation that legislatures are "better equipped" than *courts* to set contribution limits does not bar delegation of such judgments to *agencies*. Nor do the other cases petitioners cite, *see id*. nn.10 & 11, identify such a bar.

tributions by municipal advisors to state and local officials seeking federal office.

C. Petitioners' Reliance On The *Galliano* Decision Is Misplaced.

The D.C. Circuit's *Galliano* decision does not dictate a contrary conclusion. *Galliano* found an irreconcilable conflict between a postal fraud statute barring efforts to "obtai[n] money … through the mail by means of false representations," 836 F.2d at 1366, and FECA's "specific disclosure requirements" for solicitations from non-authorized political committees, *id.* at 1364 n.1. The court held that these FECA provisions "were meant to provide a safe haven" to compliant solicitations and thus "represent[ed] more than a minimal requirement that the Postal Service is free to supplement." *Id.* at 1370. In so ruling, the court stressed two factors that *POM Wonderful* has since deemed non-dispositive—*i.e.*, the "precisely drawn, detailed" specificity of FECA's disclosure requirements and the FEC's enforcement authority. *See id.* at 1370-71.

But even if *Galliano* remains good law, it is readily distinguishable. First, it relies on the theory that FECA's later-enacted disclosure provisions impliedly repealed the earlier postal fraud statute with re-

spect to activities falling within the scope of both laws. *See id.* at 1370 (Postal Service's "no-repeal-by-implication argument … is properly turned around"); *FTC v. Ken Roberts Co.*, 276 F.3d 583, 592 (D.C. Cir. 2001) (characterizing *Galliano* as repeal-by-implication decision). Here, petitioners' FECA-based preclusion argument is premised on the FEC's enforcement authority and the existence (not the precise levels) of FECA's campaign contribution limits, both of which predate the creation of the MSRB.[16] These provisions, therefore, did not impliedly repeal a later statute.

Second, *Galliano*'s basis for deeming FECA's disclosure requirements exclusive (and thus a safe harbor) does not apply to its contribution limits. FECA's disclosure requirements expressly contemplated the very type of solicitation that could fall within the ambit of the postal fraud statute, *i.e.*, "direct mailing," *see Galliano*, 836 F.2d at 1364 n.2, and there was no reason to believe that FECA's disclosure requirements might, in certain circumstances, fail to achieve Congress's goal of pre-

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[16] *Compare* Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (establishing the FEC and setting contribution and expenditure limits), *with* Securities Act Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975) (creating the MSRB and empowering it to propose rules).

venting fraudulent representations concerning a candidate's sponsorship. Here, by contrast, the fact that FECA prohibits contributions by federal contractors and other entities refutes any notion that FECA's general contribution limits are "a safe haven" for any and all contributions below those limits. *See supra* p. 17. There is no evidence that Congress expressly contemplated the distorting effects that contributions to state and local incumbents running for federal office could have on awards of municipal securities business, much less evidence that Congress believed that, as long as such contributions were fully disclosed and within federal limits, they could create no cognizable risk of corruption or the appearance thereof. To the contrary, the prohibition on contributions by federal contractors makes it implausible that Congress intended to prohibit rules issued under other federal statutes to eliminate comparable distorting effects. *Cf. Ken Roberts*, 276 F.3d at 592-93 (distinguishing *Galliano* because "nothing in the background or history of the [the Investment Advisers Act] … demonstrates (or even hints at) a congressional intent to preempt the antifraud jurisdiction of the FTC").

In sum, FECA sets forth no "clearly expressed congressional intention to" preclude regulation of municipal advisors' campaign contri-

butions to state or local officials seeking federal office. *J.E.M. Ag Supply,* 534 U.S. at 143-44.

IV. CONGRESS RATIFIED THE BOARD'S AUTHORITY TO ADOPT PAY-TO-PLAY RULES THAT CAN APPLY TO FEDERAL ELECTIONS.

Even if there were any doubt about the MSRB's authority to adopt pay-to-play rules for the municipal securities market under the Exchange Act or in light of FECA—and there is none—Congress has plainly ratified the exercise of such regulatory authority.

Sixteen years after Rule G-37 was approved, Congress decided in the Dodd-Frank Act to extend the MSRB's authority to municipal advisors based, in part, on the MSRB's "existing, comprehensive set of rules on key issues *such as pay-to-play*." S. Rep. No. 111-176, at 149 (emphasis added). The Senate Report explained that the MSRB's "mature body of comprehensive regulation that … restricts real and perceived conflicts of interests, *including prohibiting pay-to-play practices*," would serve "[a]s a baseline for rulemaking with respect to municipal advisors." *Id.* (emphasis added).

This is a textbook example of congressional ratification. "When a Congress that re-enacts a statute voices its approval of an administra-

tive or other interpretation thereof, Congress is treated as having adopted that interpretation, and th[e] Court is bound thereby." *United States v. Bd. of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 134 (1978); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) ("Congress plainly ratified" the courts of appeals' unanimous construction of a statute when it reenacted the relevant provision after the Senate committee "cited with approval" several of those cases). Congress's explicit decision to extend the MSRB's regulatory authority with full knowledge of the Board's pay-to-play rules forecloses any claim that Rule G-37 exceeds the authority conferred by Section 15B of the Exchange Act.

It likewise forecloses petitioners' FECA-based preclusion argument. Rule G-37's application to contributions to incumbent state and local officials who run for federal office was well-understood—and vigorously debated—from the very outset. *See* 59 Fed. Reg. at 17629 & nn.75-76 (summarizing comments on the issue). Squarely confronting the issue, the Commission explicitly approved the rule's application to such federally regulated contributions. *Id.* at 17629.

Congress is "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation" when it re-

enacts or revises the statute without disturbing the interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)); *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974) (where "Congress has re-enacted [a] statute without pertinent change .... congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress"). That presumption is triggered here by the Dodd-Frank Act, as well as by amendments to FECA since 1994, *see supra* p. 35 n.12, and dictates that Congress ratified the rule's limited application to contributions for federal elections.

V. RULE G-37 COMPLIES WITH THE FIRST AMENDMENT.

As discussed above, the D.C. Circuit unanimously upheld original Rule G-37, finding that it was narrowly tailored to serve the compelling governmental interest of protecting the municipal securities market from corrupt practices. *Blount*, 61 F.3d at 941-48. The political contributions at issue "self-evidently create a conflict of interest," and a correspondingly "obvious and substantial" "risk of corruption" that was difficult to detect. *Id.* at 944-45. The rule was a "closely drawn" response to this problem, because it "constrains relations only between the two potential parties to a quid pro quo," "restricts a narrow range of their ac-

tivities for a relatively short period of time," and allows professionals to contribute $250 per election to each official for whom they can vote, and to "engag[e] in the vast majority of political activities, including making direct expenditures for the expression of their views, giving speeches, soliciting votes, writing books, or appearing at fundraising events." *Id.* at 947-48. And none of the proposed alternatives "would be even *almost* equally effective" in stamping out the harmful pay-to-play practices targeted by the rule. *Id.* at 947.

Petitioners offer a scattershot array of arguments for why this Court should not follow *Blount*. Many are based on out-of-context quotations that have no bearing on the continuing strength of *Blount* or the proper disposition of this case. None has any merit.[17]

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[17] *Amicus* Financial Services Institute (FSI) seeks to raise issues beyond those raised in the petitions for review. *See* App. 80-91 (no claim of unconstitutional vagueness or claim that the rule is overbroad as applied to independent broker-dealers). These additional issues are thus forfeited. *See Self-Ins. Inst. of Am., Inc. v. Snyder*, 827 F.3d 549, 560 (6th Cir. 2016) ("[W]hile an amicus may offer assistance in resolving issues properly before a court, it may not raise additional issues or arguments not raised by the parties."), *cert. pet. docketed*, No. 16-593 (Nov. 2, 2016); *Hill v. Curtin*, 792 F.3d 670, 680 n.2 (6th Cir. 2015) (en banc) (an "entirely new challenge" that was "raised only in an amicus brief" is "forfeited").

A. The Level Of Scrutiny.

Citing the plurality decision in *Randall v. Sorrell*, 548 U.S. 230 (2006), and dicta in *McConnell v. FEC*, 540 U.S. 93 (2003), petitioners claim that Rule G-37 is subject to "an exceedingly high burden," because it imposes limits substantially lower than those previously upheld, and even lower than limits that courts have struck down. Br. at 44. But *Blount* assumed that original Rule G-37 was subject to strict scrutiny. 61 F.3d at 941-43. There is no more stringent standard of review, and thus no reason to disregard *Blount*'s holding on the theory that subsequent cases require a stricter level of review.

Moreover, the three-Justice plurality in *Randall* did not apply "strict scrutiny." It recognized that contribution limits are permissible under the First Amendment if closely drawn to serve a sufficiently important interest, *see* 548 U.S. at 247, but concluded that Vermont's law was not "closely drawn." Eight years later, the plurality in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), re-affirmed the sufficiently-important/closely-drawn standard, explaining that contribution restrictions "impose a lesser restraint on political speech because they 'permit[] the symbolic expression of support evidenced by a contribution

but do[] not in any way infringe the contributor's freedom to discuss candidates and issues.'" *Id.* at 1444 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). Since *McCutcheon*, both this Court and the D.C. Circuit have applied this test to contribution bans. *See Lavin v. Husted*, 689 F.3d 543, 547 (6th Cir. 2012); *Wagner*, 793 F.3d at 7-8. That standard applies here, and under it, *Blount* remains good law.

Nor do the amendments to Rule G-37 impose the kind of contribution limits that concerned the *Randall* plurality. Vermont imposed a series of restrictions on all contributors that, "*[t]aken together,*" "prevent[ed] candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" 548 U.S. at 253, 248 (first and second brackets added). Because it applies only to a small portion of the public, Rule G-37 does not prevent candidates from amassing resources necessary for an effective campaign, and petitioners cite no evidence to the contrary.

B. The Relevant Important Governmental Interests.

Petitioners also claim that "there is 'only one legitimate government interest for restricting campaign finances: preventing corruption or the appearance of corruption,'" Br. at 44, and that such restrictions cannot be justified by the government's interests in "'promot[ing] just

and equitable principles of trade,'" or "'perfect[ing] the mechanism of a free and open'" securities market, *id.* at 45. This claim also fails.

First, it is based on a false dichotomy. Rule G-37 does not serve the government's interests in clean municipal securities markets *instead of* preventing corruption or the appearance thereof. Rather, the rule advances the statutory purposes set forth in Section 15B of the Exchange Act *because* it prevents a particular type of corruption (or its appearance) that arises from the municipal securities market. The "risk" that "state and local officials who have power over municipal securities contracts … will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity" is a "*risk of corruption* [that] is obvious and substantial." *Blount*, 61 F.3d at 944-45 (emphasis added); *see also Ognibene*, 671 F.3d at 188 ("Contributions to candidates for City office from persons with a particularly direct financial interest in these officials' policy decisions pose a heightened risk of actual and apparent corruption"). Because it is designed to promote clean securities markets by preventing this particular form of corruption (or its appearance), Rule G-37 serves precisely the interest that justifies campaign contribution restrictions.

Second, as the D.C. Circuit recently explained in a unanimous en banc decision:

> Although the Supreme Court has identified no congressional objective beyond protection against quid pro quo corruption and its appearance that warrants imposing campaign finance restrictions *on the citizenry at large*, it has "upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, ... based on an interest in allowing governmental entities to perform their functions."

Wagner, 793 F.3d at 8 (omission in original) (emphasis added) (quoting *Citizens United v. FEC*, 558 U.S. 310, 341 (2010)) (citations omitted). This "interest in protecting merit-based public administration" promotes "efficiency" and "fair[ness]," protects "confidence in the system of representative Government," and protects those who provide services to the government from "'unjust exactions.'" *Id.* at 9. These interests are "obviously important." *Id.* And just as "there is no reason why they should not be heard in support of [contribution] restrictions on [federal] contractors," *id.*, they provide additional justification for a restriction on contributions to state and local officials who are in a position to steer municipal advisory business to municipal advisor-contributors.

C. The Showing Necessary To Support The Governmental Interest.

Petitioners claim that, in extending Rule G-37 to municipal advisors, the MSRB relied on nothing more than "conjecture" and "speculation." Br. at 46. This is so, they contend, because "Congress has already enacted a broad prophylactic restriction on campaign contributions," as have the states. *Id.* In light of these restrictions, petitioners argue that the MSRB and SEC "must produce actual evidence that … existing" federal and state regulation "is somehow insufficient to address *quid pro quo* corruption or the appearance thereof." *Id.* at 47. These arguments suffer from myriad flaws.

First, FECA's requirements apply to state and local officials only in limited and fairly uncommon situations. *Supra* pp. 33-34. Those requirements, therefore, cannot prevent pay-to-play practices with respect to the vast majority of officials or candidates at the state and local level. Moreover, while petitioners claim that "states have enacted analogous legislation modeled on FECA," Br. at 46, nearly a dozen states have no limits at all, and another 16 permit contributions of $5,000 or more to some candidates. *See supra* p. 29 & nn.9-10.

More fundamentally, petitioners' assumption that contribution limits and disclosure requirements prevent pay-to-play practices is baseless. As the Supreme Court has explained, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty or plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). And, as the D.C. Circuit recently explained:

> There is nothing novel or implausible about the notion that contractors may make political contributions as a quid pro quo for government contracts, that officials may steer government contracts in return for such contributions, and that the making of contributions and the awarding of contracts to contributors fosters the appearance of such quid pro quo corruption. Nor is there anything novel or implausible about the idea that contractors may be coerced to make contributions to play in that game, or that more qualified contractors may decline to play at all if the game is rigged.

Wagner, 793 F.3d at 21.

As discussed in detail above, common sense alone confirms that these harms remain plausible even when contributions are subject to limits and disclosure requirements. *Supra* pp. 28-32. And evidence in the administrative record and from other cases confirms that limits and

disclosure requirements do not prevent pay-to-play practices, much less the appearance of such practices. *Id.*[18] Indeed, this undoubtedly explains why Congress has retained the federal contractor ban, notwithstanding the other aspects of FECA that petitioners tout. It likewise explains why at least 15 states found it necessary to "limit or prohibit campaign contributions from some or all state contractors or licensees," *Wagner*, 793 F.3d at 16 & n.18, in addition to the contribution limits that exist in these states.[19]

There might "be need for a more extensive evidentiary documentation if [petitioners] had made any showing of their own to cast doubt" on the common-sense observations set forth in *Wagner* and the evidence before the MSRB. *Shrink Mo.*, 528 U.S. at 394; *see also Lavin*, 689 F.3d at 547-48 (noting evidence showing that contributions would not influ-

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[18] By contrast, in *Lavin*, this Court noted that there was "no evidence at all" that prosecutors who accepted contributions from Medicaid providers might choose not to prosecute contributors that commit fraud. 689 F.3d at 547. That theory, moreover, is novel and implausible. It assumes contributions will immunize otherwise illegal conduct, rather than simply influence how the government selects service providers.

[19] Of the 17 states *Wagner* identified as having pay-to-play laws, only two, Nebraska and Pennsylvania, are identified by the NCSL as having no contribution limits. *See* www.ncsl.org/research/elections-and-campaigns/state-limits-on-contributions-to-candidates.aspx.

ence fraud prosecutions). But simply offering a wholly unexplained and speculative assumption that limits and disclosures are a panacea for pay-to-play practices is not a "showing" of any kind.

D. *Blount*'s Continuing Vitality.

Petitioners are also wrong that *Blount* "relied heavily on strands of reasoning that the Supreme Court has since rejected." Br. at 47.

1. Petitioners claim that *Blount* "just assumed that" pay-to-play practices existed, "in direct contradiction to the Supreme Court's admonitions that speculation and conjecture do not suffice." Br. at 48. Contrary to this revisionist claim, however, in proposing and adopting Rule G-37, the MSRB and SEC relied on numerous reports of pay-to-play conduct, 59 Fed. Reg. at 17622-23 & nn. 23-32, as well as comments in the record reflecting a widespread belief among the actual participants in the municipal securities markets that "the payment of political contributions to issuer officials is a factor in the awarding of business," *id.* at 3394-95. This is not "speculation" and "conjecture" and, as discussed above, given the highly plausible concerns about pay-to-play practices, it is more than sufficient "to satisfy heightened judicial scru-

tiny of" the judgments underlying adoption of Rule G-37 and its amendments. *Shrink Mo.*, 528 U.S. at 391.

2. Petitioners also argue that *Blount* erred in deferring to a judgment concerning the need for prophylactic measures when the Supreme Court has since instructed that "a prophylaxis-upon-prophylaxis approach requires [courts to] be particularly diligent in scrutinizing the law's fit." Br. at 47 (internal quotation marks and citations omitted). Petitioners' reliance on this quote is misplaced.

The *McCutcheon* plurality rejected a restriction on the number of "candidates or committees the donor may support, to the extent permitted by [FECA's] base limits." 134 S. Ct. at 1443. This "aggregate" limit was "layered on top [of the base limits], ostensibly to prevent circumvention of the base limits." *Id.* at 1458. After explaining at length why it was implausible to believe that contributions within the base limits to additional candidates or committees could result in evasion of the base limits, *id.* at 1452-58, the plurality stated that FECA's "'prophylaxis-upon-prophylaxis approach' requires that we be particularly diligent in scrutinizing the law's fit," *id.* at 1458.

Unlike aggregate limits, however, pay-to-play contribution rules are not designed to prevent circumvention of general contribution limits. Pay-to-play rules prevent a harm arising from contributions from specific donors whose business dealings with the government give rise to a special risk of corruption or its appearance. Thus, Rule G-37 operates (like FECA's federal contractor ban) as a distinct prophylaxis for a particular harm, not as prophylaxis designed to prevent circumvention of a different prophylaxis.

In all events, Rule G-37 would survive even "particularly diligent" scrutiny of its "fit." The connection between the rule's two-year timeout and the government's interests in preventing corruption and its appearance and protecting merit-based public administration is self-evident, as the decisions in *Blount*, 61 F.3d at 945, and *Wagner*, 793 F.3d at 21-26, confirm. Nor is it true that the rule's prohibitions on soliciting or coordinating contributions to a political party of a State or locality where the municipal advisor is providing or seeking to provide services are "so exceedingly attenuated from any conceivable 'pay-to-play' concerns … that [they] cannot plausibly be understood to further those interests 'in any meaningful way.'" Br. at 49. Once again, peti-

tioners offer no logical or empirical basis for questioning the conclusion of the MSRB and SEC, when they first introduced and adopted these restrictions, that they were necessary to eliminate "the appearance of attempting to influence the awarding of municipal securities business through such payments," and that "without the proposed prohibition, it would be very difficult to detect such potential indirect violations because the parties solicited do not have to disclose the payments." 70 Fed. Reg. at 48216. And, once again, petitioners ignore evidence in the record confirming these concerns. *See, e.g.*, Supp. App. 337-38, 345 (recounting New Jersey pay-to-play case where successful contractor "gave $507,950 to political candidates *and state committees*" and Ohio "Coingate" scandal in which firms "contributed to the Republican *party* and statewide candidates" (emphases added)).

3. Seizing on *Blount*'s observation that the rule's *de minimis* exception allows contributions of $250 to each official for whom a covered person can vote, petitioners claim that *McCutcheon* rejected "nearly identical" reasoning when it stated that "'[i]t is no answer to say that the individual can simply contribute less money.'" Br. at 48 (quoting

McCutcheon, 134 S. Ct. at 1449). This argument mixes apples and oranges.

The *McCutcheon* plurality rejected the idea that an "aggregate limit" on the number of candidates and committees an individual can support is a "'modest restraint'" on protected speech. 134 S. Ct. at 1448 (quoting *Buckley v. Valeo*, 424 U.S. at 38). Congress "may no more restrict how many candidates or causes a donor supports," the plurality reasoned, "than it may tell a newspaper how many candidates it may endorse," and "[i]t is no answer to say that the individual can simply contribute less money to more people." *Id.* at 1448-49. The plurality then went on, as noted above, to conclude that this burden was not justified by the aggregate limit's attenuated anti-circumvention rationale. *Id.* at 1452-58.

In *Blount*, the D.C. Circuit did not rely on the *de minimis* exception to conclude that Rule G-37 imposed only a "modest restriction" on protected speech. To the contrary, the court recognized that the Rule "infringe[d] speech," and that its solicitation restriction "is close to the core of protected speech" under the First Amendment. 61 F.3d at 941. Indeed, the *Blount* court assumed that the rule's burdens subjected it to

strict scrutiny. *Id.* at 941-43. Thus, the court viewed the *de minimis* speech exception not as evidence that Rule G-37 imposed a "modest restriction," *see id.* at 947-48, but rather as evidence that the rule was closely drawn to avoid "'*unnecessary* abridgement' of First Amendment rights," *id.* (quoting *Buckley*, 424 U.S. at 25) (emphasis added). The *McCutcheon* plurality's observations about the burdens imposed by aggregate limits, therefore, have no bearing on *Blount*'s assessment of Rule G-37's narrow tailoring.

4. Finally, petitioners fault *Blount* for not addressing the rule's disparate impact on state and local incumbents who seek federal office, noting that the Supreme Court has "'never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other.'" Br. at 48 (quoting *Davis*, 554 U.S. at 738). But the concerns underlying *Davis* are far afield from this case. The law at issue there lifted contribution limits on candidates when their opponent spent a certain amount of his or her own money on his or her competing campaign. 554 U.S. at 729-30. Thus, the law was explicitly designed to impose different contribution limits on competing candidates in certain circumstances. It did so, moreover, not to serve anti-

corruption purposes, but to "level the playing field" by mitigating the financial advantages that certain candidates would otherwise possess. *Id.* at 740-41.

Rule G-37's purpose, by stark contrast, is not to impose disparate fundraising limits on candidates competing for the same office. To the extent its restrictions can cause a disparity, this occurs in relatively limited circumstances; with respect to a discrete segment of the contributing public; and, most importantly, when the rule's anticorruption goals are triggered by one candidate (because of his or her current office) but not the other. Any such effect is thus a *function* of the close fit between the rule's scope and its purpose; it is not evidence that the rule is not closely drawn.

Petitioners identify no more narrowly tailored alternative that would achieve the rule's anticorruption objective while avoiding the disparate effect. The only alternative would be to permit contributions with the potential to corrupt (or to appear to corrupt) awards of municipal advisory business whenever an incumbent runs for federal office

against someone who cannot influence awards of such business.[20] Petitioners cite no authority, nor any cogent reason, for why the government's powerful anticorruption interest must yield if an anticorruption prophylactic incidentally causes an imbalance in relative fundraising advantages.

VI. THE BOARD SHOULD BE RE-DESIGNATED AS AN INTERVENOR.[21]

Finally, the MSRB should be re-designated as an intervenor rather than a respondent. The MSRB is not part of the Commission or a federal agency. It cannot be haled into court involuntarily under the Exchange Act's judicial review provision. However, the MSRB has a direct and substantial interest in this proceeding entitling it to participate as an intervenor to defend the amendments to its rule.

Petitioners seek review under Section 25(a) of the Exchange Act. That provision contemplates proceedings against only the Commission

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[20] Extending Rule G-37 in these circumstances to cover the other candidate (and thereby eliminate the disparity) is not an option. Despite the breadth of its authority, the MSRB likely cannot regulate contributions to those who neither occupy nor seek positions that can influence awards of municipal advisory business.

[21] The MSRB previously filed a motion to be re-designated as an intervenor rather than a respondent. Doc. 18. That motion was referred to the merits panel. Docs. 22-1.

itself. It requires that the person seeking review be "aggrieved by a final order *of the Commission*," and refers repeatedly to the Commission in describing the rights and duties of a respondent. *See* 15 U.S.C. § 78y(a)(1), (a)(2)-(5) (emphasis added). Moreover, Section 25(a) incorporates a definition of the "Commission" that includes, for specified purposes, particular entities other than the Commission—but *not* the MSRB. *See id.* § 78y(d).

Congress thus retained the usual structure in which a court of appeals "review[s] the SEC's order, not the order of" a self-regulatory organization. *Yoshikawa v. SEC*, 192 F.3d 1209, 1212 n.4 (9th Cir. 1999). That is true even though the MSRB proposes rules to the Commission that, if approved by order or operation of law, have the force of law. *Cf. Nat'l Mining Ass'n*, 599 F.3d at 672 ("Statutes … authorizing rulemaking contributions by other agencies do not thereby make the other agencies parties in a subsequent judicial challenge"). Consequently, the Commission, and not the MSRB, could be the only proper respondent here.

Petitioners have argued that the MSRB is a proper respondent because it is a "subpart" of the SEC. That is wrong. Self-regulatory organ-

izations like the MSRB are not government entities.[22] *See, e.g.*, *Mathis v. SEC*, 671 F.3d 210, 217 (2d Cir. 2012); *Shultz v. SEC*, 614 F.2d 561, 569 (7th Cir. 1980). Rather, they are "private entities," *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005), to which the Exchange Act "delegate[s] governmental power," S. Rep. No. 94-75 at 46 (1975). Thus, the MSRB is not a "subpart" of the SEC or, indeed, of the federal government. *Compare* 15 U.S.C. § 78*o*-4a(a)(2) (creating a separate Office of Municipal Securities "in the Commission"), *with* § 78*o*-4(b) (creating the MSRB without such language).[23]

Petitioners have also invoked the constitutional state action doctrine. But the fact that a rule is state *action* does not mean that the entity that proposed the rule—but could not have independently given it legal effect—was a state *actor*. And, in any event, a finding that an entity is a "state actor" for constitutional purposes does not mean that entity is *part of* the government. Indeed, even when a government-created

[22] MSRB, *The Role and Jurisdiction of the MSRB*, http://www.msrb.org/msrb1/pdfs/Role-and-Jurisdiction-of-MSRB.pdf (last visited Dec. 19, 2016).

[23] For the same reasons, the MSRB is "not an authority of the Government" under 5 U.S.C. § 551(1), and thus is not subject to the APA's review provisions. *See Shultz*, 614 F.2d at 568-69 & n.14; *In re Venezia*, SEC Rel. No. 36427 (Oct. 26, 1995).

entity *is* a state actor, Congress's designation of the entity as private is "dispositive" as to all issues "within Congress's control," including whether it "is subject to statutes that impose obligations or confer powers upon Government entities, such as the [APA]." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995). Because Congress designated the MSRB as a private entity, separate from the Commission, it is not a proper respondent under Section 25(a).

The MSRB should, however, be allowed to participate as an intervenor. The MSRB has a "defined role in the statutory scheme," *Texas v. Dep't of Energy*, 754 F.2d 550, 551 (5th Cir. 1985), and a direct and substantial interest in the case, as a successful challenge would substantially impact the means by which the MSRB fulfills its statutory mandate. Further, "the MSRB has an extensive understanding of the municipal securities market." S. Rep. No. 111-176, at 149. And no other party adequately represents its interest in defending its rule.

Accordingly, the MSRB should be re-designated an intervenor. *See NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) (granting self-regulatory organizations leave to intervene in actions against the Commission involving their rules).

CONCLUSION

The Court should dismiss the petitions for review or deny them. The MSRB should be re-designated as an intervenor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Federal Rule of Appellate Procedure 32(g) and Sixth Circuit Rule 32(a), I certify that:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1), this brief contains 12,984 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using the 2007 version of Microsoft Word in 14-point Century Schoolbook font.

Dated: December 19, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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