Nos. 16-3360, 16-3732

IN THE 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

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BRIEF *AMICUS CURIAE* FOR THE CAMPAIGN LEGAL CENTER SUPPORTING RESPONDENTS

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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: Tara Malloy, Lawrence M. Noble, Megan P. McAllen

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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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GLOSSARY

Bipartisan Campaign Reform Act	BCRA
Federal Election Commission	FEC
Federal Election Campaign Act	FECA
Municipal Securities Rulemaking Board	MSRB
Securities and Exchange Commission	SEC

STATEMENT OF INTEREST[1]

Amicus curiae Campaign Legal Center is a nonprofit organization that works to strengthen the laws governing campaign finance, governmental ethics and political disclosure. *Amicus* has expertise in the legal issues raised here, and a demonstrated interest in the challenged amendments to Rule G-37 ("Amendments") of the Municipal Securities Rulemaking Board ("MSRB").

INTRODUCTION

The MSRB Amendments are based on a simple proposition. Substantial campaign contributions from a municipal advisor to officeholders with control over awards of municipal advisory business are likely to give rise to quid pro quo exchanges, or at a minimum, the appearance of such exchanges. That is the premise not only of the challenged Amendments, but also the underlying rule, which was upheld by the D.C. Circuit in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995). This anti-corruption interest also animates a multitude of federal, state and municipal laws regulating political activities by governmental contractors.

Despite widespread acceptance of the proposition that governmental contracting should be insulated from pay-to-play activities, petitioners Tennessee

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

All parties have consented to *amicus*'s participation.

Republican Party, Georgia Republican Party and New York Republican State Committee charge that the Amendments are beyond the SEC's statutory authority, precluded by the Federal Election Campaign Act ("FECA"), and facially unconstitutional under the First Amendment. None of these claims has merit, and their challenge should be rejected.

SUMMARY OF ARGUMENT

Amicus's primary experience lies in the area of campaign finance, so this memorandum will focus on petitioners' First Amendment claims, *see* Brief for Pet'rs ("Br.") 43-50, and on issues of standing. *Amicus* will not address the SEC's view that the petition should be dismissed for want of reviewable agency action, but generally defer to its understanding of the statutory scheme. *Amicus* further agrees with and incorporates by reference the MSRB's arguments that the Amendments are well within its authority to adopt regulations under 15 U.S.C. § 78o-4(b)(2)(C) and are not preempted by FECA. MSRB Br. 23-45.

As a threshold matter, petitioners have no standing to bring this case. They have suffered no direct injury, because the Amendments neither regulate their conduct nor subject them to any potential legal penalties. Nor can petitioners establish associational standing on behalf of the class of covered municipal advisors they claim as "members," because petitioners offer no evidence of any affiliation with these individuals, and have identified no specific "member" now

regulated by the Amendments who wishes to make a contribution to a covered official.

In terms of their First Amendment claims, the petitioners appear unable to decide whether they are bringing a facial or as-applied challenge to the Amendments. Petitioners' arguments focus almost exclusively on the specific application of the Amendments to covered officials running for *federal* office. *See* Br. 2 (arguing that "fully disclosed" federal "contributions of $2,700 and $10,000" do not "create a risk of quid pro quo corruption"); *see also id.* at 3, 43, 45, 46, 48 (discussing federal contributions). But they do not designate their case as an as-applied challenge, and appear to be seeking facial invalidation of the Amendments. They make not the slightest attempt, however, to show their facial unconstitutionality by demonstrating that "a substantial number of [the law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 n.6 (2008); *accord United States v. Stevens*, 559 U.S. 460, 473 (2010). This failure is particularly glaring because the Amendments will likely most frequently apply in municipal and state elections—given that covered officeholders in most cases will be running to retain their offices. Petitioners are trying to have it both ways: the standards of an as applied challenge with the relief of a facial one.

On the merits, petitioners' First Amendment case also suffers from at least three defects. First, petitioners downplay the D.C. Circuit's decision in *Blount* to uphold the original Rule G-37. They attempt to argue that *Blount* relied on outdated "strands of reasoning," Br. 47, but have no basis for their claim that the Supreme Court has changed its approach to reviewing contribution limits.

Second, petitioners question the constitutionality of the Amendments on grounds that they were not adopted to combat quid pro quo corruption, but turn a blind eye to broad swaths of the record that confirm that this was precisely the MSRB's objective.

Third, petitioners argue that the Amendments represent an impermissible "prophylaxis-upon-prophylaxis" approach that relies on "speculation and conjecture." Br. 47-48. This statement ignores both the extensive record of fraud in the award of municipal and state advisory business, and the ubiquity of scandals in contracting at all levels of government—all of which occurred *despite* the existence of the federal contribution limits that petitioners contend entirely eliminate any possibility of corruption. *See* Br. 46-48. Further, even if the evidence of pay-to-play were 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.

Petitioners invoke this Court's jurisdiction under Section 25(a) of the Securities Exchange Act of 1934 and the Administrative Procedures Act, but as the respondents' briefs make clear, those provisions do not supply a statutory basis for this Court's jurisdiction. But petitioners have also failed to establish their standing to sue, whether in their own capacity or as representatives of their members, under Article III of the U.S. Constitution.

To have standing, petitioners' injury must be "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). Each petitioner "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). In limited circumstances, however, 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 if it can 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." *United Food & Commer. Workers Union*

Local 751 v. Brown Grp., 517 U.S. 544, 546 (1996) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

Petitioners assert standing on their own and as representatives of their members, whom they allege include unidentified covered municipal advisors and would-be contributors to party candidates. It is clear, however, that petitioners cannot establish standing under either theory. At a minimum, they have not described the nature of the prospective harm that they believe will be caused by amended Rule G-37 with the detail necessary to establish standing. And their failure to demonstrate that they represent the interests of any municipal advisors who are newly regulated under the Rule is fatal to their standing claim.

The Amendments extended Rule G-37's coverage to municipal advisors, consistent with the MSRB's broadened statutory charge under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. According to petitioners, the expanded scope of Rule G-37 injures them directly by limiting the ability of covered municipal advisors to make, coordinate or solicit contributions "under certain circumstances." Br. 25. But they rest this claim on vague and unsupported allegations about the supposed effects of the Amendments on their fundraising activities, and conclusory assertions about the members they claim to represent. However they frame it, the amended Rule applies only to certain municipal advisors, and not to the petitioners. Petitioners cite no case where direct

injury has been found based on a law's effect on third parties who have not been identified and where no evidence has been presented that third parties actually modified their activities relative to the organization in direct response to the challenged law.

Indeed, petitioners acknowledge that the "injuries are attributable to the actions of the State Parties' would-be contributors, rather than the State Parties themselves." Br. 26. Petitioners claim standing based on *Taxation with Representation of Wash. v. Regan*, 676 F.2d 715, 723 (D.C. Cir. 1982), *rev'd on other grounds*, 461 U.S. 540 (1997), where the D.C. Circuit 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. Rather, it challenged a denial of tax-exempt status that directly affected the organization.

Petitioners' assertion of representational standing fares no better. They are really asking the Court to find that the Amendments are unconstitutional because they prevent potential contributors from making or soliciting political contributions they allegedly would otherwise make or solicit. Having no examples of such contributors, however, 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." Br. 27. Saying this does not make it so.

The factual basis for the petitioners' claimed associational standing, beyond it being "self-evident," rests on affidavits from the executive directors of the three state party petitioners, each of whom merely asserts that he "suspect[s] there are" or "ha[s] encountered donors and potential donors … who have either limited their contributions or declined to contribute because of the MSRB's Political Contribution Rule." App-306; App-313; App-318. However, although petitioners intimated that they provided "at least one Republican securities dealer, municipal advisor, or covered official in Georgia, Tennessee, or New York" injured by the amended Rule, *see* Br. 28, the record is utterly devoid of anything that would substantiate that claim.[2]

Petitioners' only other evidence is their identification of three New York Republican officeholders who were federal congressional candidates in 2016 and who claim to have been "hindered by the MSRB's Political Contribution Rule." App-317–App-18. Because they fail to identify any "covered-official candidates"

[2] The single named would-be donor, Steve McManus, was evidently subject to the Rule's requirements before the challenged amendments took effect. *See* MSRB Br. 22 & n.7. Petitioners cannot rest their standing on the purported injury of "one Republican securities dealer" if that injury is traceable to the pre-amendment rule, challenges to which are now time-barred under 15 U.S.C. § 78y(a)(1).

with "concrete plans to run for office in the future," *Nader v. FEC*, 725 F.3d 226, 229 (D.C. Cir. 2013), Petitioners' attempt to invoke competitor standing on behalf of their candidates is unavailing. "'[S]ome day' intentions" cannot establish the requisite "'actual or imminent' injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Furthermore, petitioners did not submit affidavits from any of those officeholders, nor did they specify whether they were covered officials under Rule G-37(g)(xvi). Even if the three candidates were parties to this action, therefore, they would still lack standing to challenge the amended Rule. The parties cannot derive third-party standing from members who would not have standing in their own right.

Finally, Petitioners contend that if the respondents are "unwilling to concede" the state parties' standing solely on the basis of assumed or "suspect[ed]" injuries to unidentified covered members, they must concede that there was no possible justification for expanding the scope of Rule G-37. *See* Br. 28-29. This sleight-of-hand turns the Article III analysis on its head. It is the petitioners' burden to establish standing; they are not entitled to a presumption of Article III injury that the respondents must disprove. Petitioners' theory of standing would recognize a constitutionally cognizable injury any time a regulation applicable to a hypothesized third party might deter that person from making a contribution to the petitioners or their candidates.

More fundamentally, petitioners overlook the possibility that those advisors covered by the amended Rule—and whose interests they claim to represent—may *not* wish to make prohibited contributions, or may *not* believe themselves to be injured by the Amendments. Petitioners claim to represent the interests of a vaguely defined "membership" that apparently includes covered advisors who have decided *not* to contribute to a state party or its candidates. *See* Br. 27. To satisfy the minimum jurisdictional requirements of Article III, however, there must be some basis upon which the Court can be assured that a party claiming representational standing will actually 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). Petitioners' failure to provide any information about the noncontributing advisors with whom they claim to have a "membership" relationship—or indeed, to identify a single member covered specifically by the Amendments under challenge—does not meet the test for representational standing set forth in *Warth* and *United Food*.

Unlike the general contribution limits and prohibitions found in FECA, the MSRB's rule is aimed at the practices of those involved in a highly-regulated industry defined by complicated fiduciary relationships among public and private actors. As the MSRB explained, extending the Rule's core standards to municipal

advisors not only protects the integrity of the contracting process but also ensures that similarly situated market participants are subject to the same rules:

> [C]ontinued "pay to play" practices by professionals seeking or engaging in municipal advisory business … and the awarding of business by conflicted officials erodes public trust and confidence in the fairness of the municipal securities market, impedes a free and open market in municipal securities, may damage the integrity of the market, and may increase costs borne by municipal entities, issuers, obligated persons and investors. The MSRB believes that extending the policies embodied in Rule G-37 to municipal advisors … will help ensure common standards for dealers and municipal advisors, who operate in the same market, and frequently with the same clients.

App-54. Plainly, the petitioners' interests in maximizing their ability to collect political contributions from any source likely diverge from the interests of regulated individuals and firms. This Court should not decide what interests are at stake without the participation of those directly affected by the amended Rule.

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

A. The D.C. Circuit Rejected a Constitutional Challenge to Rule G-37 in *Blount*.

In *Blount*, the D.C. Circuit rejected a First Amendment challenge to the original Rule G-37—which regulated municipal dealers in a manner nearly identical to how the Amendments now regulate municipal advisors—concluding that it served multiple "compelling" governmental interests. 61 F.3d at 944-49.

Rule G-37 originally prohibited 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). The Amendments extend this regulation to contributions from municipal advisors to officials with "selection influence" over the award of municipal advisory business.

In reviewing Rule G-37, the *Blount* court declined to decide the applicable level of scrutiny because it found that Rule G-37 could survive strict scrutiny so "there [was] no need to decide the issue." 61 F.3d at 943.[3] The SEC 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 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. 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.

Id. at 944-45.

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[3] The Supreme Court has since confirmed 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).

This analysis applies with equal force to the Amendments here. Structurally, the Amendments track previous versions of Rule G-37; they simply extend its core standards to municipal advisory services, as Congress intended. And the interests invoked here to justify the Amendments are similar to those used in *Blount* to defend the Rule.

In an attempt to undermine *Blount*'s application, petitioners argue that it "relied heavily on several strands of reasoning that the Supreme Court has since rejected," citing principally the Supreme Court's decisions in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) and *Davis*. Br. 47. But neither case addresses laws regulating contributions from government contractors, so even if the Rule is understood to indirectly impact political contributions, those cases have no direct application here.

First, petitioners suggest that the D.C. Circuit was overly deferential in its review of Rule G-37, arguing that *McCutcheon* found that a "'prophylaxis-upon-prophylaxis' approach requires [courts to] be particularly diligent in scrutinizing the law's fit." Br. 47-48 (quoting *McCutcheon*, 134 S. Ct. at 1458) (alteration in original). But the Supreme Court did not strike down the aggregate contribution limits at issue in *McCutcheon* because they were "prophylactic" in nature. Nor did it change the standard of review typically applied to campaign contribution restrictions. Instead, the Court invalidated the aggregate limits because it

concluded that they did not further the anti-circumvention goal that they were enacted to achieve. *McCutcheon* in no way undercuts *Blount*'s approval of G-37 as a prophylactic measure to stamp out quid pro quo corruption in the municipal securities business.

McCutcheon considered a particular type of limit—the federal aggregate limits on total contributions that an individual could make to candidates, parties and PACs. 2 U.S.C. § 441a(a)(3) (2013), *invalidated by McCutcheon*, 134 S. Ct. 1434. Unlike Rule G-37 and the Amendments at issue here, the aggregate limits had not been designed to directly prevent quid pro quo exchanges, 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) (per curiam). The *McCutcheon* plurality invalidated these aggregate limits because it believed that 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 "highly implausible," even in the absence of the aggregate limits. 134 S. Ct. at 1453. Therefore, the problem with the aggregate limits was not that they were "prophylactic," but that they were simply unnecessary. Rule G-37 and the Amendments here, by contrast, were not "layered" on base limits to thwart

circumvention; instead, they aim to directly prevent a particular type of quid pro quo corruption, namely, "cash or in-kind political contributions … as a quid pro quo for the receipt of government contracts." App-53; *see* Section I.B. *infra*. The *McCutcheon* plurality's concern that the federal aggregate limits did not prevent circumvention does not undercut—or even speak to—*Blount*'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 (alteration in original).

Furthermore, far from changing the degree of deference due in the review of a contribution restriction, the *McCutcheon* plurality 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. If anything, *McCutcheon* suggests that *Blount* may have reviewed Rule G-37 too stringently, not too leniently, and that the MSRB may have *more* discretion in the design of Rule G-37 and the challenged Amendments than *Blount* recognized.

Second, petitioners argue that *Blount* failed to consider whether Rule G-37 might have a disparate impact on *federal* 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." Br. 48 (citing *Davis*, 554 U.S. at 738).

Davis is not applicable here. In *Davis*, the Supreme Court reviewed the "Millionaire's Amendment," a federal provision that tripled the contribution limit for any congressional candidate facing an opponent who spent over $350,000 of his personal funds to support his campaign. *See* 554 U.S. at 739; Bipartisan Campaign Reform Act § 319(a). 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). Otherwise put, the Court was concerned that the Millionaire's Amendment manipulated the contribution limits in order to discourage "any candidate who robustly exercises [the] First Amendment right" to spend personal money. *Id*. at 738-39. *Davis* is properly understood as a challenge to burdens 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 739-40.

Davis's analysis therefore has no relevance to the review of pay-to-play restrictions like Rule G-37. Pay-to-play restrictions do not burden personal expenditures. They do not establish "asymmetric" contribution limits. Indeed, they are not contribution limits in the first place, as they do not bar political giving, but only limit the receipt of business after one has made a contribution that creates the appearance of pay-to-play. In this way, they are more akin to a state 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 municipal advisory business.

Insofar as the Amendments have a "disparate impact" on a covered official vis-à-vis his competitors in a race for federal office, it is due to the former's status as an officeholder and the ethical obligations that follow. But this will always be the case where one candidate holds office and is consequently subject to ethics rules that are not applicable to his opponents. For example, ethical rules such as 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.*, 5 U.S.C. app. 4 §§ 101, 102 (federal financial disclosure); 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 municipal official 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* speaks to petitioners' First Amendment claims directly, and no subsequent case 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 there is only one interest recognized by the Supreme Court that can justify the regulation of political contributions—the prevention of "quid pro quo corruption"—and suggest that the Amendments were not sufficiently premised on this objective.

But the administrative record makes clear that the Amendments were meant to address "'pay to play' practices and the appearance thereof," i.e., practices that "typically involve a person or an entity making cash or in-kind political contributions (or soliciting or coordinating others to make such contributions) … as a quid pro quo for the receipt of government contracts." App-53. As the MSRB further expounded, such practices "distort and undermine the fairness of the process by which government business is awarded," "creat[e] artificial impediments to a free and open market in municipal securities and municipal financial products," and "harm obligated persons, municipal entities and their citizens by resulting in inferior services and higher fees." App-68.

Although the Amendments were intended to prevent a broad range of harms, the interest in preventing quid pro quo exchanges was paramount. For instance, the MSRB "conclude[d] that the selection of … municipal advisors has been influenced by 'pay to play' practices and … political contributions as the quid pro quo for the award of valuable financial services contracts have been funneled through third parties." App-68. *See also* App-53 (noting that pay-to-play practices "create conflicts of interest and give rise to circumstances suggesting quid pro quo corruption"). It is hard to imagine how the Amendments could have been more clearly premised on the interest in preventing quid pro quos.

Furthermore, the anti-corruption purpose of pay-to-play restrictions in governmental contracting has been recognized so often by the courts as to be wholly uncontroversial. *See* Section C.1 *infra*. The D.C. Circuit recently upheld the federal restriction on federal contractor contributions, a law that swept far more broadly than the challenged Amendments here and banned all contributions from contractors or prospective contractors of any size to all federal candidates, parties and political committees. *Wagner v. FEC*, 793 F.3d 1, 21 (2015) (en banc); *id*. at 21 ("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."). *See also FEC v. Weinstein*, 462 F. Supp. 243, 247-48 (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 suggest, however, that the Amendments were actually motivated by less compelling reasons, arguing that the articulated interests in "perfect[ing] the mechanism of a free and open market in municipal securities" and "protect[ing] investors, municipal entities, obligated persons, and the public interest" were not "legitimate bases" for their enactment. Br. 45 (alterations in original). This turns a blind eye to the fact that these interests were cited *alongside* more traditional concerns about quid pro quo corruption.

But even if these interests were more central to the motivation behind the Amendments, the D.C. Circuit confronted this precise argument in *Blount*, and rejected it. The plaintiffs there 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. The court flatly rejected the 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 other words, the exchange of political contributions for the award of municipal advisory business is simply a subset of a broader range of political quid pro quos. But it is a "type of distorted choice" in which the MSRB has a particular interest given its statutory area of responsibility.

Indeed, the existence of multiple governmental interests supporting a pay-to-play measure tends to strengthen the law's constitutional foundation, not undermine it. In *Wagner*, the D.C. Circuit noted that the federal contractor contribution ban was founded on both the traditional interest in "protection against quid pro quo corruption and its appearance," and the more specific interest in avoiding "interference with merit-based public administration" of governmental contracting. 793 F.3d at 8. The second goal of merit-based contracting did not detract from the law's legitimacy. On the contrary, the court found that this second interest, "in combination with the first," made the FEC's case "even stronger," and noted that the Supreme Court had approved of targeted campaign finance restrictions such as the Hatch Act based on a secondary "interest in allowing governmental entities to perform their functions." *Id.* (citing *Citizens United v. FEC*, 558 U.S. 310, 341 (2010)). The MSRB relied on analogous secondary interests to justify the Amendments—"protect[ing] investors, municipal entities,

obligated persons"—which also serve to reinforce, not undercut, the constitutionality of the Amendments.

Finally, petitioners argue that Congress' anti-corruption goal has already been achieved in its enactment of a "broad prophylactic restriction on campaign contributions," namely, the federal base limits of $2,700 per election ($5,400 per cycle) on contributions to candidates. 52 U.S.C. § 30116(1)(a). The Amendments, in petitioners' estimation, are consequently redundant. Br. 45-46. But this position requires petitioners to ignore the limited nature of the federal base limits. Congress was concerned with the integrity of *federal elections*; it is ludicrous to suggest that Congress believed FECA's contribution limit would prevent quid pro quo arrangements in *municipal contracting* for advisory services. The vast majority of Rule G-37's applications will be to covered officials running for municipal or state office—i.e., running to retain the offices in which they already serve or to win election to similar offices.

Even in the scenario where a covered official runs for federal office, it is clear that the FECA limits do not foreclose all of the abuses targeted by amended Rule G-37. Absent the Amendments, a municipal investment advisor would still be permitted to curry favor with potential municipal customers by making "limited" federal contributions totaling $5,400 in an election cycle. Indeed, these limited contributions would likely be the "price of admission" to secure even the

opportunity to compete for municipal business. And the application of FECA's base contribution limits would not prevent an even more powerful method of buying influence: namely, an advisor steering a huge number of additional "limited" federal contributions through its associates to covered officials. Similarly, the base limits do not forbid municipal advisors and their associates from soliciting or "bundling" contributions from outside contributors to a candidate or his party, leaving open a clear channel for the exchange of quid pro quos.

C. A Prophylactic Rule Is Permissible Even Without an Extensive Record, But Here There Is Ample Evidence of Quid Pro Quo Corruption.

In addition to questioning the MSRB's anti-corruption objectives, petitioners also suggest that it has offered no "actual evidence" that contributions complying with FECA's limits create the possibility of quid pro quos in the selection of municipal advisors. Br. 45-46.

Petitioners ignore the record compiled in the rulemaking and are apparently unaware of the extensive evidence of pay-to-play activity at both the federal and state levels. But even if the evidence were less overwhelming, the Supreme Court made clear in *Nixon v. Shrink Missouri Government PAC* that "[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." 528 U.S. 377, 391 (2000). And "there is nothing novel or implausible about the notion" that those seeking governmental contracts might "pay to play." *Wagner*, 793 F.3d at 21. Therefore, even if the evidence of quid pro quo exchanges were less abundant, a prophylactic approach would still be permissible. *See also Blount*, 61 F.3d at 945 (noting that "[a]lthough 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").

Moreover, as important as preventing actual corruption in contracting is avoiding the appearance of corruption. *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). Although petitioners insinuate that *McCutcheon* cast doubt on the constitutionality of prophylactic laws, they fail to mention that the plurality 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. Recognizing the importance of this interest, the Second Circuit, for instance, 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 v. Parkes*, 671 F.3d 174, 189 n.15 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 28 (2012). 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).

In any event, the record of quid pro quo corruption and its appearance compiled here is more than sufficient, and any argument to the contrary requires willful blindness. The record contains numerous public reports of pay-to-play involving municipal advisors—from New Mexico to Pittsburgh. App-68. It also lists multiple actions brought by the SEC and other regulators to prosecute quid pro quo deals to secure investment contracts. App-69. For instance, the record discusses the SEC's enforcement action against the former treasurer of the State of Connecticut for awarding State investments to private equity fund managers in exchange for payments. App-69. Another state prosecution referenced concerned a "complex" pay-to-play scheme between the former Philadelphia treasurer, municipal securities professionals and a third-party intermediary seeking business on behalf of the municipal securities professionals. *Id*.

Petitioners object that, nevertheless, the MSRB has pointed to no "instances in which an investment adviser has made a fully disclosed federal campaign contribution of $2,700 or comparable state political contribution" as part of a

political quid pro quo. Br. 45-46. But this charge ignores the key aspect of many of the pay-to-play scandals cited as grounds for adopting the Amendments: namely, that the scandals occurred in states that *did have base limits* on contributions in their elections, like Connecticut. Conn. Gen. Stat. Ann. § 9-611(a). Clearly, these laws were not "prophylactic" enough to prevent the type of quid pro quo corruption in the advisory market that the Amendments aim to eliminate. And there is no magic to the federal $2,700 monetary threshold: indeed, in Connecticut, the contribution limit applicable to the state-wide treasurer race—the locus of the pay-to-play scandal—is currently *lower* than the federal limits, at $2,000. *Id*.

On the flip side, many state contribution limits are significantly higher than the federal limit: for instance, the state contribution limits in New York, home of one of the petitioners, range as high as $44,000. *See*, *e.g.*, N.Y. Elec. Law § 14-114(1); N.Y. Bd. of Elections, *Contribution Limits: Candidate Contribution Receipt Limits*, https://www.elections.ny.gov/CFContributionLimits.html. Petitioners conveniently disregard the possibility that, absent the challenged Rule, would-be municipal advisors in many jurisdictions could be doling out not merely $2,700, but tens of thousands of dollars to the campaigns of officials with oversight over their advisory contracts. Indeed many, if not most, municipalities have no political contribution limits whatsoever.

Furthermore, corrupt practices are hardly limited to the grant of municipal advisory contracts, and this Court can look beyond that narrow scenario. Pay-to-play activities are endemic in most areas of government contracting, as evidenced by numerous pay-to-play laws at the federal, state and municipal levels. At least seventeen states have enacted limits or prohibitions on campaign contributions from prospective and/or current government contractors or licensees. *Wagner*, 793 F.3d at 16 & n.18. A number of municipalities, including New York City and Los Angeles, have followed suit.[4] As the *Wagner* court noted ruefully, the FEC there "assembled an impressive, if dismaying, account of pay-to-play contracting scandals, not only in [New Jersey, New York and Connecticut], but also in New Mexico, Hawaii, Ohio, California, and elsewhere." *Id*. at 17.

Courts have frequently recognized the pervasiveness of pay-to-play practices in contracting, and have generally approved of state regulation of contributions and other political activities by prospective and current state contractors. *See, e.g*., *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir.) (upholding Hawaii contractor contribution ban), *cert. denied*, 136 S. Ct. 569 (2015); *Ognibene*, 671 F.3d at 191 (upholding New York City contractor contribution restrictions); *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010) (upholding Connecticut contractor contribution ban), *cert. denied*, 564 U.S. 1052 (2011).

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

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 state 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 (citing *Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298, 306-08 (D. Conn. 2009)); *see also Ognibene*, 671 F.3d at 179 (noting the series of pay-to-play scandals in New York City preceding enactment of the contractor contribution restriction).

As the D.C. Circuit noted in *Blount*, "campaign contributions self-evidently create a conflict of interest in state and local officials." 61 F.3d at 944. This intuition is solidly supported by the record here, as well as the "impressive, if dismaying," volume of evidence showing pay-to-play corruption at all levels of government contracting. Accordingly, the MSRB and SEC are authorized to adopt prophylactic measures that combat not only actual quid pro quos in municipal advisory services, but also the appearance of quid pro quo corruption created by unchecked contributions by covered municipal advisors.

CONCLUSION

For the foregoing reasons, this Court should dismiss or deny the petitions.

RESPECTFULLY SUBMITTED this 23th day of December 2016.

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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 6425 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 23th day of December, 2016, I caused the foregoing BRIEF *AMICUS 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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