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.

Petition for Review of Final Rule of the Municipal Securities Rulemaking Board Approved by the United States Securities and Exchange Commission

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BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the Georgia Republican Party, New York Republican State Committee, and Tennessee Republican Party certify that they do not have parent corporations and that no publicly held corporation owns more than ten percent of their stock.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This petition presents several important issues about the legality of the Securities and Exchange Commission's attempt to regulate political speech. Petitioners respectfully submit that the oral argument would assist the Court in resolving these issues.

INTRODUCTION

This case involves a challenge to an SEC-approved rule that restricts the ability of municipal advisors to make political contributions that are within the limits that Congress has imposed by statute through its comprehensive regime of campaign finance regulations. According to the Municipal Securities Rulemaking Board ("MSRB") and the Securities and Exchange Commission ("Commission" or "SEC"), the SEC may supplant Congress' limits with a broad, prophylactic rule of its own in an effort to deter so-called "pay-to-play" activities in the provision of advisory services for public assets, including public pension funds. As Petitioners (the "State Parties") explained to the Commission, that contention is flatly foreclosed by federal campaign finance law, the statute under which the SEC purports to be acting, the Administrative Procedure Act, and, ultimately, the First Amendment.

To begin, the SEC's decision to approve and finalize the MSRB's rule should be rejected because the comprehensive nature of Congress' regime for regulating and limiting campaign contributions demonstrates that Congress never intended to grant an agency like the SEC—much less the MSRB—the authority to tinker with contributions to political parties and candidates for federal office. Rather, Congress has determined that this limit should be $2,700 per federal

candidate per election and $10,000 per year for political party federal accounts, and Congress has left no room for the SEC to second-guess its judgment.

The SEC and MSRB not only impermissibly intruded on Congress' comprehensive contribution limits regime, they did so by vastly exceeding their authority to regulate municipal advisors. While the MSRB has authority to propose, and the SEC authority to approve, rules "to prevent fraudulent and manipulative acts and practices," to promote "a free and open market in municipal securities," and to protect participants in that market, 15 U.S.C. §78o-4(b)(2)(C), that general authority does not allow the MSRB and SEC to stifle First Amendment activity. Instead, Congress expressly forbids the MSRB from trying "to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter …." 15 U.S.C. §78o-4(b)(2)(C), and requires the SEC to disapprove any such proposed rule as inconsistent with the requirements of the Exchange Act, §78s(b)(2)(C).

The Political Contribution Rule should be set aside for the independent reason that its severe limits on the political activities of municipal securities dealers and advisors violate the First Amendment. The MSRB and SEC have failed to show that fully disclosed political contributions of $2,700 and $10,000 per year contributions to the federal accounts of political party or less create a risk of *quid pro quo* corruption sufficient to enact severe prophylactic rules restricting

municipal advisors' constitutional rights. The Supreme Court has made clear that such a prophylaxis-upon-prophylaxis approach deserves First Amendment close scrutiny. And the MSRB's reliance on mere conjecture and speculation that $2,700 per election is too high and that contributions to political party committees can be banned is insufficient to sustain the Rule under the First Amendment.

Finally, the SEC's decision to approve and finalize the MSRB's rule should be rejected because it is a clear-cut violation of the Constitution's Appropriations Clause. The Appropriations Act for FY 2016 prohibited the SEC from using any funds "to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions." Yet when the MSRB proposed a rule that would require municipal advisors to disclose their political contributions, the SEC ignored this clear directive by approving and thus finalizing the Rule. The SEC's action, therefore, is a plain violation of the Constitution's Appropriations Clause, which ensures "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990).

JURISDICTIONAL STATEMENT

The State Parties petition for review of the SEC's approval of a rule proposed by MSRB. This Court has jurisdiction to review the SEC's action under

Section 25(a) of the Exchange Act, 15 U.S.C. §78y(a), and Sections 702 and 706 of the Administrative Procedure Act, 5 U.S.C. §§702, 706.

The MSRB is a self-regulatory organization ("SRO") created under the Securities Acts Amendments of 1975 that proposes rules to the SEC regarding the regulation of municipal securities brokers and dealers (collectively "dealers") and municipal advisors. *See generally* 15 U.S.C. §78o-4. The MSRB's proposed rules, however, cannot "take effect unless approved by the Commission." 15 U.S.C. §78s(b)(1).[1] Thus, the SEC is required to, "*by order*, approve or disapprove the proposed rule change" or institute further proceedings to review the rule before issuing its "order." §78s(b)(2)(A)(i) (emphasis added). Statutory "[s]tandards for approval and disapproval" of proposed rules dictate that the SEC must "approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization." §78s(b)(2)(C)(i). Conversely, if the SEC "does not make [such] a finding," it must "disapprove a proposed rule change." §78s(b)(2)(C)(ii).

The SEC must determine whether to, "by order, approve or disapprove" a proposed rule change "not later than 45 days after the date of publication of a

[1] Section 78s(b)(3) provides that certain types of rules—e.g., those "concerned solely with the administration of the" MSRB, §78s(b)(3)(A)—can take effect without Commission approval, but those types of rules are not implicated here.

proposed rule change ….” 15 U.S.C. §78s(b)(2)(A)(i)(I). After that time, if the SEC does not institute proceedings “to determine whether the proposed rule change should be disapproved,” §78s(b)(2)(A)(i)(II), the “proposed rule change shall be deemed to have been approved by the Commission,” §78s(b)(2)(D). And as the structure of section 78s demonstrates, the only way the SEC can approve a proposed rule is “by order.” §78s(b)(2)(A)(i)(I). Any “person aggrieved by” such “a final order of the Commission … may obtain review of the order” by filing a petition for review “in the United States Court of Appeals for the circuit in which he resides or has his principal place of business … within sixty days after the entry of the order ….” §78y(a)(1). In this way, the Exchange Act guarantees that any rule proposed by an SRO becomes law only after obtaining the SEC’s approval by order and thus being made subject to the judicial review.

This case involves the MSRB’s proposed expansion of its Political Contribution Rule, Rule G-37. On August 18, 2014, the MSRB published its draft changes. App. 93.[2] The MSRB received 13 comment letters in response to its proposal, several of which noted that the proposed rule violated First Amendment protections on political speech. *See* App. 72 n.113, 153-55, 157, 160-61, 164-72. The MSRB responded to these comments, maintaining that its proposed cap on political donations by municipal advisors would be constitutional and consistent

[2] “App.” refers to the appendix Petitioners have filed with this brief.

with the Exchange Act. *See*, *e.g.*, 80 Fed. Reg. at 81725-27, 81729-30 [App. 68-70, 72-73].

On December 16, 2015, the MSRB proposed the rule to the SEC, and on December 30, the SEC posted notice of the proposed rule in the Federal Register. *See* 80 Fed. Reg. 81,710 [App. 53]. Petitioners the Tennessee Republican Party and New York Republican State Committee urged the SEC to disapprove the proposal, noting that the regulation was inconsistent with the Exchange Act because campaign finance regulation is the exclusive province of Congress and the Federal Election Commission, not the SEC or MSRB, App. 174, and that the proposed cap on contributions to elected officials violated the First Amendment, App. 179. The SEC did not respond to these comments or "institute proceedings … to determine whether the proposed rule change should be disapproved." 15 U.S.C. §78s(b)(2)(A)(i)(II). Instead, by waiting 45 days, the SEC guaranteed the proposed rule would be "deemed to have been approved by the Commission." §78s(b)(2)(D). Thus, the proposed rule was "approved by the Commission" on February 13, 2016. *See* Mun. Sec. Rulemaking Bd., *Amendments to MSRB Rule G-37 on Political Contributions and Prohibitions on Municipal Securities Business and Related Amendments are Deemed Approved Under the Securities Exchange Act of 1934* (Feb. 17, 2016) [App. 1].

On April 12, 2016, the Tennessee Republican Party filed a petition for review in this Court seeking review of the SEC's approval of the MSRB's proposed rule. The Tennessee Republican Party averred that it was adversely affected by the MSRB Political Contribution Rule on the same statutory and constitutional grounds that it raised before the Commission. *See* Pet. for Review, *Tenn. Republican Party v. SEC*, No. 16-3360 (6th Cir.) [App. 80]. On that same day, the Georgia Republican Party and New York Republican State Committee filed a similar petition for review of the SEC's action in the Eleventh Circuit, also arguing that they were aggrieved by the Commission's final order. Pet. for Review, *Ga. Republican Party v. SEC*, No. 16-11656 (11th Cir. docketed Apr. 13, 2016), [App. 87]. The Eleventh Circuit transferred that petition to this Court, where it was consolidated with the Tennessee Republican Party's challenge. Order Transferring Case, *Ga. Republican Party v. SEC*, No. 16-11656 (11th Cir. June 24, 2016). Because the Commission's decision to allow the MSRB's Rule to take effect constitutes a final order, the Petitioners were aggrieved by that order, their objections were urged before the Commission, and their petitions were filed within sixty days of the Commission's approval, this Court has jurisdiction over these petitions for review under 15 U.S.C. §78y(a).

If the SEC's decision to allow the MSRB's Rule to be "deemed approved by the Commission" is not an "order" under section 78y(a), it is certainly final agency

action reviewable under the APA. *See* 5 U.S.C. §§551, 702, 706. Congress gave the term "agency action" a capacious definition that "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." §551(13). And only "two conditions … generally must be satisfied for agency action to be 'final' under the APA. First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). "And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id*. The Commission's decision to allow the Political Contribution Rule to take effect, or its "failure to act" to prevent that result, is final, and the petitioners have already felt the legal consequences of the Commission's actions. App. 304-20. Thus, if the SEC did not issue an order, it either (1) issued "the equivalent … thereof" when the proposed rule was deemed approved or (2) "fail[ed] to act" to disapprove the proposed rule. 5 U.S.C. §551(13). In either instance, the Court has jurisdiction to review this "final agency action."

STATEMENT OF THE ISSUES

1. The Appropriations Act for FY 2016 forbade the SEC from using any funds "to finalize, issue, or implement any rule … regarding the disclosure of political contributions." The MSRB's proposed Political Contribution Rule

requires municipal advisors to disclose political contributions. Did the SEC violate the Appropriations Act for FY 2016 and the Appropriations Clause of the Constitution when it allowed the MSRB's proposed Rule to be approved and finalized?

2. Does the SEC have the authority to impose restrictions on the First Amendment rights of municipal advisors and securities dealers to make federal political contributions that are fully disclosed and within the $2,700 federal limit and contributions to political party committee federal accounts under the $10,000 annual limit Congress has imposed?

3. Does the Political Contribution Rule violate the First Amendment?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Federal campaign finance regulation has long been the exclusive province of Congress and the Federal Election Commission ("FEC"), the agency that Congress has given sole jurisdiction to "administer, seek to obtain compliance with, and formulate policy with respect to," federal campaign finance laws. 52 U.S.C. §30106(b)(1); *see also Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1368 (D.C. Cir. 1988). The Supreme Court has succinctly described the comprehensive nature of this regulatory scheme:

> Campaign finance regulations now impose unique and complex rules on 71 distinct entities. These entities are subject to separate rules for

> 33 different types of political speech. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975.

Citizens United v. FEC, 558 U.S. 310, 334-35 (2010) (citations and quotation marks omitted).

Although Congress has left many aspects of campaign finance regulation to the discretion of the FEC, setting contribution limits for federal candidates and to the federal accounts of political party committees is a power that Congress has consistently reserved for itself. Since Congress first enacted the Federal Election Campaign Act of 1971 ("FECA"), all the way through its extensive revisions in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), contribution limits have been set by statute, not regulation. *See* 52 U.S.C. §30116(a). Likewise, Congress has reserved for itself the decision whether, when, and how those statutorily prescribed limits may be altered. *Id.* §30116(c). And when Congress has seen fit to make exceptions to the standard limits, it has done so itself. *See, e.g.*, *id.* §§30118, 30119, 30121. Congress has crafted one such exception for federal government contractors, who may not make political contributions to federal candidates, political parties, or political action committees while they are in the process of negotiating or performing a federal contract. *See id.* §30119. But Congress has never enacted a comparable restriction for securities dealers or investment advisors who provide their services to public pension funds or other

governmental clients. Instead, these individuals remain subject to the standard statutory contribution limit, which currently is fixed at $2,700 per candidate per election. *See* Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 80 Fed. Reg. 5750, 5751 (Feb. 3, 2015).

2. The Securities Exchange Act of 1934 grants the SEC authority to regulate municipal securities dealers and municipal advisors. 15 U.S.C. §78o-4. The SEC has the authority to, "censure, place limitations on the activities, functions, or operations, suspend for a period not exceeding twelve months, or revoke the registration of any municipal securities dealer or municipal advisor" who violates certain provisions the Exchange Act or related rules. §78o-4(c)(2). And those who violate SEC regulations risk not just their livelihoods, but also their liberty, as any willful violation of an SEC rule is punishable by a fine of up to $5,000,000 and a prison term of up to 20 years. §78ff(a).

The SEC is assisted in its work by the MSRB. The MSRB is an SRO composed of 15 members of the public, most of whom have experience in the municipal securities or municipal advising industries. §78o-4(b)(1). Created under the Securities Acts Amendments of 1975, Congress has granted the MSRB authority to propose rules to the SEC regarding the regulation of municipal securities dealers and municipal advisors. *See generally* 15 U.S.C. §78o-4(b).

Relevant here, the MSRB's rules "shall … be designed to prevent 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 generally "protect investors, municipal entities, obligated persons, and the public interest." §78o-4(b)(2)(B)-(C). The proposed rules, however, must "not be designed … to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter …." §78o-4(b)(2)(C).

The MSRB's proposed rules cannot "take effect unless approved by the Commission." 15 U.S.C. §78s(b)(1). Thus, the SEC is required to, "by order, approve or disapprove the proposed rule change" or institute further proceedings to review the rule before issuing its order. §78s(b)(2)(A)(i). Once the rule has been approved by the SEC, it becomes binding law.

B. SEC-Approved Expansions of the MSRB's Political Contribution Rule Severely Curtail Political Contributions by Municipal Advisors

In 1994, the MSRB proposed and the SEC approved what would become MSRB Rule G-37, which prohibits municipal securities dealers, any "municipal finance professional" of the dealer,[3] and any political action committee ("PAC")

[3] A municipal finance professional is a person who is associated with a dealer and who is involved with the underwriting, trade, sale of municipal securities; provides financial advisory or consulting services, in connection with the issuance of municipal securities; research and investment advice in relation to municipal

operated by these persons from making political contributions to certain elected officials of a municipal issuer or candidates for an office of a municipal issuer. *See* Rule G-37(b); *see also* 80 Fed. Reg. at 81712 [App. 55]. Rule G-37 also prohibits dealers and finance professionals from soliciting or coordinating contributions for these officials or political candidates. *See* Rule G-37(c)(i); *see also* 80 Fed. Reg. at 81712 [App. 55]. Further, in states and municipalities where dealers and their finance professionals are attempting to obtain municipal securities business, they are prohibited from raising funds for the state or municipal political party. *See* Rule G-37(c)(ii); *see also* 80 Fed. Reg. at 81712 [App. 55]. If a a dealer, associated finance professional, or associated PAC makes a prohibited political contribution, both the dealer and the finance professional are barred from the municipal securities business for two years. Rule G-37(b). The Rule provides a narrow *de minimis* exception, allowing a dealer or the finance professional to make a contribution of no greater than $250 per election to an official or candidate, but even this exception applies only if the contributor can vote for the official or candidate. Rule G-37(b); *see also* 80 Fed. Reg. at 81712 [App. 55]. The Rule, however, provides no *de minimis* exception to allow a covered person to raise

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securities; activities that require communication with public investors in municipal securities; those who solicits municipal security business; a municipal securities principal, the chief executive officer, a bank's board of directors' designee to handle the bank's municipal securities activities, and supervisor of the solicitor. *See* Rule G-37(g)(ii).

funds for a political party committee.

On August 18, 2014, the MSRB proposed to expand its restrictions on political contributions to also cover persons engaged in the municipal advisory business, 80 Fed. Reg. at 81712 [App. 55], and the SEC approved the rule change on February 13, 2016. The amendments extend the Political Contribution Rule's restrictions to "municipal advisors," which includes "financial advisors, guaranteed investment contract brokers, third-party marketers, placement agents, solicitors, finders, and swap advisors" who provide advice to or solicit municipal entities. 15 U.S.C. §78o-4(e)(4)(B). The Rule thus now restricts these persons and their associated municipal advisor professionals from making or soliciting political contributions for certain public officials by prohibiting advisors who engage in such activities from working for the public official's government entity for the following two years. App.96. The Rule also requires these advisors to disclose information about their political contributions. 80 Fed. Reg. at 81712, 81721 [App. 55, 64].

As under the prior Rule G-37, there is a narrow exception to the two-year ban for political contributions. Municipal advisors and professionals can still contribute $250 or less to politicians for whom they are allowed to vote, but they cannot donate a dollar to any other politician who may have influence over selecting municipal advisors because the donor's "non–*quid pro quo* interest in that

election is less likely to be immediately apparent to the public." 80 Fed. Reg. at 81730 [App. 73]. Nor is there any exception to the two-year ban for any municipal advisor who contributes any sum of money to or solicits contributions for a state or local political party that corresponds to the state or local government where the advisor is seeking to engage in municipal advising. *See* Rule G-37(c)(ii); *see also* 80 Fed. Reg. at 81722 [App. 65].

The recent changes to Rule G-37 affect municipal dealers as well as advisors. The amended Rule treats any company that performs both dealer and advisor services "as a single economic unit." *See id*. at 81719 [App. 62]. Rather than limit the ban to the scope of business with which the contributor is associated, the Rule subjects a contributor to a complete ban on municipal securities business and municipal advisory businesses if the official who receives the contribution has selection influence over both dealers and municipal advisors. *See id*. Thus, if an employee associated only with a company's municipal advisory business contributes to an official with both dealer and advisor selection influence, a cross ban is applied on both lines of the company's business. *See id*. This provision thus also prohibits municipal advisors and dealers from soliciting contributions or coordinating contributions to an official with dealer or advisor selection influence. *See id*. at 81722 [App. 65].

The recent action by the MSRB and SEC also expands the scope of Rule G-37 by applying it to a broader swath of elected officials. For a contribution to trigger the two-year ban, the contribution must be made to a municipal entity's covered officials, which, under the prior version of Rule G-37, included anyone who, at the time of the contribution, was an incumbent or candidate for (1) a municipal elected office that "is directly or indirectly responsible for, or can influence the outcome of, the hiring of a dealer for municipal securities business by the issuer;" or (2) "any elective office of a state or of any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for or can influence the outcome of, the hiring of a dealer for municipal securities business by an issuer." 80 Fed. Reg. at 81717 [App. 60]. The new Rule G-37 expands this definition to now include three categories of municipal entity officials: those with (1) "dealer selection influence;" (2) "municipal advisor selection influence;" or (3) "investment adviser selection influence." *See id.* (citing G-37(g)(xvi)). An official has "selection influence" if he or she is directly or indirectly responsible for or can influence the outcome of, the hiring of a dealer, municipal advisor, or investment advisor, or has the authority to appoint any person who is directly or indirectly responsible or can influence the outcome of the hiring of a dealer, municipal advisor, or investment advisor.

The term "selection influence" is broad in scope. Indeed, in its interpretive guidance, the MSRB has stated that contributions to a gubernatorial candidate are covered under Rule G-37 if the governor has the power to appoint members of a board that hires municipal securities dealers. *See Questions and Answers Concerning Political Contributions and Prohibition on Municipal Securities Business: Rule G-37* ("MSRB Rule G-37 Q&A"), MSRB, Question II.5 (last visited Nov. 15, 2016).[4] The MSRB has also cautioned that "contributions to certain state-wide … legislative officials would be included within the prohibition on engaging in municipal securities business." *See* MSRB Rule G-37 Q&A, Question IV.21.

And the scope of Rule G-37 stretches further still, as it can also apply to state or local office holders who are candidates in federal elections. The Rule applies to contributions to candidates for federal office who, while campaigning for federal office, are simultaneously serving as state officials with selection influence. *See* Rule G-37(g)(vi)(A)(1). Troublingly, this facet of Rule G-37 subjects the candidate for federal office to a different contribution limit than is applied to his or her competitors through FECA. This tilting of the playing field has already had major implications in federal elections, including presidential campaigns. During the 2012 campaign, the MSRB issued a notice to "remind[] municipal securities

[4] *available at http://bit.ly/2geCOy*.

dealers about its rule on political contributions and its application to issuer officials running for federal office, including President and Vice President."[5] The rule affected certain candidates like Rick Perry, who was reportedly "hamstrung by new Securities and Exchange Commission rules that inhibit donations from financial services company employees to sitting governors."[6] And the effects of the MSRB's and SEC's limitations on otherwise lawful political contributions had the potential to affect the country's most recent presidential election, as Rule 37 stacked the general election deck against one political party. Because Mike Pence was Governor of Indiana during the campaign, his selection as Donald Trump's running mate "create[d] a significant hurdle to raising money" for the Republican ticket—a hurdle that did not exist for Hillary Clinton and Tim Kaine.[7] The MSRB guidance even suggests that, as long as Governor Pence remains incumbent governor while working on his federal transition and inauguration activities, these restrictions will apply to persons covered by the Rule who wish to make donations to the transition or even purchase tickets to the inauguration (since FECA requires

[5] MSRB Notice, *MSRB Reminds Dealers That Political Contributions Rule Applies to Issuer Officials Running for Federal Office*, Sept. 28, 2011, http://bit.ly/2fVUZJ1.

[6] Tom Hamburger, et al., *SEC Rules Could Hurt Rick Perry's Fundraising*, Los Angeles Times (Aug. 25, 2011), http://lat.ms/2feP1PI.

[7] Peter Overby, *How Picking Mike Pence As VP Might Cost The Trump Campaign Donations*, NPR (July 16, 2016), http://n.pr/29Q9ACf.

disclosure of ticket purchases as if they were contributions to a political committee). MSRB Rule G-37 Q&A, Question II.6.[8]

C. The Proceedings Below

In August 2014, the MSRB proposed to expand the scope of Rule G-37. App. 93; 80 Fed. Reg. at 81,712 [App. 55]. The MSRB received 13 comment letters in response to its proposal. App. 72 n.113. Multiple commenters argued that this proposed rule would violate First Amendment protections on political speech. *See* App. 72 n.113, 153-55, 157, 160-61, 164-72. The MSRB responded to these comments, maintaining that its proposed cap on political donations by municipal advisors would be constitutional and consistent with the Exchange Act. *See, e.g.*, *id*. at 44-54, 57-60.

On December 16, 2015, the MSRB proposed the rule to the SEC, and on December 30, the SEC posted notice of the proposed rule in the Federal Register. *See* 80 Fed. Reg. 81,710 [App. 53]. Petitioners urged the SEC to disapprove the proposed rule as inconsistent with the Exchange Act and First Amendment. App. 174, 179. The SEC decided not to reject the proposed rule, and instead waited the 45 days necessary to have the rule "deemed … approved by the Commission." §78s(b)(2)(D)(i). The Tennessee Republican Party filed a petition for review in this Court seeking review of the SEC's approval of the MSRB's proposed rule.

[8] *available at http://bit.ly/2geCOy*.

The Eleventh Circuit transferred a similar petition filed by the Georgia Republican Party and New York Republican State Committee to this Court, where the petitions were consolidated.

D. The 2016 Appropriations Act Forbids the SEC From Finalizing, Issuing, or Implementing Rules Requiring the Disclosure of Political Contributions.

The Appropriations Act that Congress passed for FY 2016 expressly forbids the SEC from using any funds "to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. O, Title VII, §707, 129 Stat. 2242, 3029–30. The SEC has admitted in these proceedings that the Act applies to the MSRB's Political Contribution Rule. SEC Mot. to Dismiss 1, 11-12.

SUMMARY OF ARGUMENT

The Political Contribution Rule is both unlawful and unconstitutional several times over. First, the Rule is an impermissible intrusion into Congress' comprehensive regime for regulating federal political contributions. The Rule forces municipal advisors to choose between limiting their political contributions to amounts that the MSRB and SEC characterize as "*de minimis*" or foregoing the opportunity to provide advisory services to public pension funds. It similarly

requires municipal advisors to limit their association with state and local political parties. The MSRB and SEC attempt to justify this role on a *quid pro quo* corruption theory, but Congress has already determined the tipping point at which political contributions create a cognizable risk of *quid pro quo* corruption or the appearance thereof. That point is $2,700, not $250, and certainly not low enough to justify the effective ban the Rule imposes on many other contributions. Congress has not given the SEC, the MSRB, or anyone else, for that matter, discretion to second-guess or countermand that judgment. Instead, Congress has carefully and consistently reserved for itself the constitutionally delicate task of determining how much individuals and entities may contribute to federal candidates and whether there are circumstances that warrant exceptions to the standard limit. That comprehensive and First-Amendment-sensitive statutory contribution limits regime forecloses the SEC's amateur foray into campaign finance regulation.

The Political Contribution Rule, as applied to federal, state and local political contributions, also fails for the independent reason that it vastly exceeds the MSRB's and SEC's statutory authority. Congress has given the MSRB authority to propose rules that prohibit fraudulent or manipulative practices in the municipal advisor services market and generally promote the health of that market. But Congress also expressly stated that the MSRB could not use that authority to

regulate "matters not related to the purposes of" the Exchange Act. The MSRB cannot offer any evidence that fully disclosed political contributions of $2,700 or less or coordinated contributions to state political parties are likely to result in fraudulent or manipulative practices in most, many, or even a few instances, and the MSRB only speculated on how its rule could otherwise protect the municipal advisor services market. It nonetheless attempted to justify its rule as a permissible "prophylactic" one. But prophylactic rules are appropriate only when the conduct they prohibit is likely to be unlawful in the typical instance. That admonition applies with all the more force where, as here, the more conduct that a rule restricts is protected by the Constitution. Because that condition is manifestly not satisfied here, the MSRB plainly lacked authority to propose this restriction on protected political activity, and the SEC exceeded its authority by approving the Rule.

For largely the same reasons, the Political Contribution Rule cannot survive First Amendment scrutiny, as it does not further a sufficiently important interest in a sufficiently tailored manner. The only recognized government interest substantial enough to justify restrictions on the right to make political contributions is preventing corruption or the appearance thereof, and the only corruption that counts is *quid pro quo* corruption. The Political Contribution Rule does not further that interest in any meaningful way because there is absolutely no support for the notion that any cognizable risk of corruption is created when municipal advisors

make fully disclosed political contributions of $2,700 or less to covered officials or coordinate contributions to state political parties. To the contrary, the vast majority (if not all) of such acts are nothing more than an attempt to exercise a constitutionally protected right. Accordingly, even assuming the MSRB or SEC have any legitimate justification for their Rule, the Rule is far too overbroad to survive the kind of scrutiny that the Constitution demands.

Finally, in addition to violating the First Amendment, the SEC's actions disregard the Constitution's Appropriations Clause. In the Appropriations Act for FY 2016, Congress expressly prohibited the SEC from spending any funds "to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions …." Even so, when the MSRB proposed to the SEC a rule that would require municipal advisors to disclose their political contributions, the SEC allowed the Political Contribution Rule to be finalized and implemented. The SEC's defiance of Congress' command is a clear violation of the 2016 Appropriations Act as well as the Constitution's Appropriations Clause and merits vacatur of the SEC's action.

STANDARD OF REVIEW

The Political Contribution Rule must be set aside if it violates the Constitution, exceeds the agency's statutory authority, or is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C.

§706(2)(A)-(C); *see also Oakland Cty. Bd. of Comm'rs v. U.S. Dep't of Labor*, 853 F.2d 439, 442 (6th Cir. 1988) (agency's action is arbitrary and capricious if based on "an improper understanding of the law").

ARGUMENT

I. The State Parties Have Standing To Challenge The Political Contribution Rule.

The State Parties have standing to challenge the Political Contribution Rule. To establish standing, a party must show "(1) 'an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Sierra Club v. Jewell*, 764 F.3d 1, 5 (D.C. Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). To establish associational standing, an association must demonstrate that "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181. The State Parties readily satisfy these requirements, both on their own and in their capacity as representatives of their members.

As an initial matter, the expanded Political Contribution Rule injures the State Parties directly by making it unlawful for municipal advisors to coordinate with or to solicit any person or political action committee to make any contribution to a political party of a state or locality where the municipal advisor either provides or is seeking to provide advisory services to a government entity. 80 Fed. Reg. at 81722 [App. 65]. And the MSRB has warned that if a dealer makes contributions to a political party that "is soliciting funds for the purpose of supporting a limited number of issuer officials, then, depending upon the facts and circumstances, …payments to the political party might well result in the same prohibition on municipal securities business as would a contribution made directly to the issuer official." MSRB Rule G-37 Q&A, Question III.5.[9]

By prohibiting individuals from contributing, soliciting, or even making contributions to political parties under certain circumstances, these provisions cause the State Parties precisely the kinds of associational and economic injuries that courts repeatedly have held sufficient to give organizations standing in their own right. *See, e.g.*, *Taxation with Representation of Wash. v. Regan*, 676 F.2d 715, 723 (D.C. Cir. 1982) (organization had standing to challenge IRS rule that hindered its ability to fundraise), *rev'd on other grounds*, 461 U.S. 540 (1983); *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987) ("drain on [an]

[9] *available at http://bit.ly/2geCOy*.

organization's resources" is "concrete and demonstrable" injury); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (state political party had standing to challenge law that required it "to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote"); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (law that had effect of requiring state party to "raise and expend additional funds" caused party "quintessential injury upon which to base standing").

Whether these injuries are attributable to the actions of the State Parties' would-be contributors, rather than the State Parties themselves, makes no difference. Indeed, if anything, that fact makes this an even easier standing case, as it confirms that the State Parties can proceed on behalf of their members as well as on their own. The D.C. Circuit's decision in *Taxation with Representation* is illustrative. There, a nonprofit organization sought to challenge an IRS determination denying it section 501(c)(3) status. The court soundly rejected the IRS's argument that the organization lacked standing to do so, finding it "clearly evident" that the organization had standing to sue both in its own right, on account of the injury it would suffer if it could not receive tax-deductible contributions, and "on behalf of its members and supporters," who were precluded by the rule from making contributions on a tax-deductible basis. 676 F.2d at 723.

In doing so, the court drew expressly on campaign finance jurisprudence, quoting *Buckley v. Valeo*, 424 U.S. 1 (1976), for the proposition that organizations are particularly appropriate parties to challenge laws that interfere with their members' ability to make contributions, as such laws "preclude[] … associations from effectively amplifying the voice of their adherents" and are "simultaneously an interference with the freedom of (their) adherents." *Taxation with Representation*, 676 F.2d at 723 n.14 (quoting *Buckley*, 424 U.S. at 22); *see also Randall v. Sorrell*, 548 U.S. 230, 256 (2006) (contribution limits affecting state political parties "threaten[] harm to a particularly important political right, the right to associate in a political party").

The State Parties' standing is equally self-evident here. There is no dispute that each State Party counts among its members numerous municipal securities dealers, municipal advisors, and covered officials. And 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. Indeed, senior officials from the parties have attested that "donors and potential donors" have "limited their contributions or declined to contribute" to the party or its members "because of the Political Contribution Rule." App. 306, 318; *see also* App. 313. This "has significantly hindered" the associational and fundraising activities not only of the parties themselves, but also of their municipal

advisor members who would like to make, solicit, or coordinate contributions and their covered official members "who are seeking or are considering seeking federal office." App. 309, 319; *see also* App. 313.

The Political Contribution Rule injures covered-official candidates in at least three distinct ways, diminishing their ability to associate with would-be supporters; impeding their ability to fundraise effectively; and putting them at a competitive disadvantage as compared to candidates for the same office who are not covered officials. *Cf. Davis v. FEC*, 554 U.S. 724, 738 (2008) ("We have never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other[.]"). And those injuries to the candidates of the State Parties are, in turn, injuries to the State Parties as well. *See Benkiser*, 459 F.3d at 587 & n.4 (collecting cases holding that injury to "a political party's interest in a candidate's success" is sufficient to confer standing on the party).

In sum, this is not a case that requires the Court to engage in "an ingenious academic exercise in the conceivable" to arrive at the conclusion that the State Parties have standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Instead, the Court need accept nothing more than the evidence that the Political Contribution Rule has in fact had its intended effect on at least one Republican securities dealer, municipal advisor, or covered official in Georgia, Tennessee, or New York If the MSRB and SEC are unwilling to concede even that much, then it

is difficult to fathom what possible business they have in proposing and enacting such a sweeping prophylactic measure in the first place.

II. The Political Contribution Rule Is Unlawful And Unconstitutional.

The Political Contribution Rule is a direct effort to deter municipal advisors from engaging in conduct that is protected by the First Amendment and permitted by federal statute. In effect, the Rule forces municipal advisors to choose between making otherwise-lawful campaign contributions or providing advisory services to public funds. And because the Rule requires municipal advisors to disclose political contributions, the 2016 Appropriations Act prohibited the SEC from implementing it in the first place. Thus, the Political Contribution Rule is doomed four times over. The Rule fails, first, because neither the MSRB nor SEC has any authority to alter or supplement Congress' comprehensive contribution limits regime. Second, the Rule vastly exceeds the MSRB's and SEC's authority to prevent fraudulent or manipulative practices or generally promote free and open municipal securities markets. Third, the Rule restricts constitutionally protected conduct in a manner that is not sufficiently tailored to serve a sufficiently important government interest. And, finally, the SEC's approval of the Rule is a clear violation of the 2016 Appropriations Act and the Constitution's Appropriations Clause.

A. Congress' Comprehensive Regime of Political Contribution Limits Forecloses Efforts by the MSRB and SEC to Regulate the Same Conduct.

1. It is a long-settled principle that "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling." *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107 (1944); *see also, e.g.*, *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."). Congress' "comprehensive regime of limitations on campaign contributions" is "precisely the kind of detailed statute whose specific provisions control matters that might otherwise fall under the total governance of a more broadly conceived and crafted statute." *Galliano*, 836 F.2d at 1368. The "intricate statutory scheme" Congress has crafted "includes restrictions on political contributions and expenditures that apply broadly to all phases of and all participants in the election process." *Buckley*, 424 U.S. at 12-13; *see also, e.g.*, *Teper v. Miller*, 82 F.3d 989 (11th Cir. 1996). That detailed regulatory regime simply does not leave room for agencies—much less SROs—to use wholly unrelated delegations to impose campaign finance regulations of their own.

That is particularly so when it comes to the delicate task of deciding whether and how much people may contribute to candidates, parties, or political

committees. As the Supreme Court recently reiterated, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders," and that includes the right, "protected by the First Amendment," "to participate in democracy through political contributions." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014). Accordingly, although "Congress may regulate campaign contributions to protect against corruption or the appearance of corruption," *id.* at 1441, it treads on very constitutionally sensitive ground when it does so.

In keeping with that understanding, Congress has not delegated to *any* agency the sensitive undertaking of determining the point at which campaign contributions pose a risk of corruption or the appearance thereof. Instead, Congress consistently has reserved this role for itself, fixing by statute all limits on campaign contributions. This was so back when Congress first enacted FECA, and it remains so today, after Congress extensively revised FECA through BCRA. *Compare* 18 U.S.C. §608(b) (1975), *with* 52 U.S.C. §30116(a). Although Congress has given the FEC broad and exclusive jurisdiction to enforce the statutorily prescribed contribution limits, *see* 52 U.S.C. §30109, Congress has not granted the FEC discretion to increase or decrease those limits on its own initiative. Instead, that, too, is a judgment that Congress itself has made, dictating

by statute the precise circumstances and manner in which its contribution limits may be adjusted. *See id.* §30116(c).[10]

Congress also has reserved for itself the power to establish exceptions to its statutorily fixed limits. For instance, Congress has prohibited national banks, corporations, labor organizations, and their officers or directors from making any contributions in connection with elections for federal offices. *Id.* §30118.[11]

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[10] Indeed, we are unaware of any case other than *Blount* in which a court has upheld a restriction on political contributions imposed *by a regulatory agency* that is more stringent than the restrictions imposed by the legislature. While courts have upheld certain state law restrictions on contributions, these cases have involved *legislative* enactments. *See, e.g.*, *In re Earle Asphalt Co.*, 950 A.2d 918, 927 (N.J. Super. Ct. App. Div. 2008) (rejecting constitutional challenge to legislative amendment of New Jersey's Campaign Contributions and Expenditure Reporting Act); *Casino Ass'n v. State*, 820 So. 2d 494, 510 (La. 2002) (rejecting constitutional challenge against Louisiana statute prohibiting campaign contributions from both riverboat and land based casinos); *Ognibene v. Parkes*, 671 F.3d 174, 196 (2d Cir. 2011) (rejecting constitutional challenge to New York City Council statute restricting contributions from those who have business dealings before the City); *Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1063 (D. Haw. 2012) (rejecting constitutional challenge to Hawaii's statute prohibiting campaign contributions from government contractors). These decisions thus demonstrate that setting contribution limits is an inherently *legislative* function. *See Randall*, 548 U.S. at 248 ("the legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office.").

[11] Attempts to extend these prohibitions have been rejected as unconstitutional. *See, e.g.*, *General Majority PAC v. Aichele*, No. 14-cv-332, 2014 WL 3955079, at *6 (M.D. Pa. Aug. 13, 2014) (finding unconstitutional a state law prohibiting corporations "from contributing to political groups that make only independent expenditures"); *SpeechNow.org. v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) ("[T]he government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations."); *Republican Party of N.M. v.*

Congress also has prohibited foreign nationals from making any contributions in connection with any election. *Id.* §30121. And Congress has imposed restrictions on the circumstances under which people who contract their services to the government may make contributions, prohibiting them from doing so while they are negotiating or performing under a government contract. *Id.* §30119. Congress has not imposed any comparable restriction on municipal advisors.

2. All of that would make the expanded Political Contribution Rule difficult enough to defend had it been promulgated by the FEC. After all, Congress may have granted the FEC "exclusive[]" "responsibility for the civil enforcement of matters specifically covered by" FECA and BCRA, *Galliano*, 836 F.2d at 1368; *see* 52 U.S.C. §30106(b)(1), but Congress has not granted the FEC discretion to displace its own judgment regarding the appropriate limits on the right to make political contributions with the agency's own views on the matter. Yet that is precisely what the Political Contribution Rule does: By forcing municipal advisors and dealers to choose between providing advisory or dealer services or making political contributions at the amounts permitted by FECA, the rule has the same practical effect as the restriction that Congress chose to impose only on government contractors. *See* 52 U.S.C. §30119.

King, 741 F.3d 1089, 1103 (10th Cir. 2013) (holding that "political committees that are not formally affiliated with a political party or candidate may receive unlimited contributions for independent expenditures").

That the Political Contribution Rule was proposed by the *MSRB* and promulgated by the *SEC* makes this an even easier case, as Congress has not granted either body *any* authority to regulate campaign contributions or other campaign finance-related activities. Instead, the MSRB claimed this power only under its general grant of authority to propose rules "designed to prevent 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 generally "protect investors, municipal entities, obligated persons, and the public interest." 80 Fed. Reg. at 81725 [App. 68] (quoting 15 U.S.C. §78o-4(b)(2)(C)). Giving this provision an exceedingly expansive view, the SEC necessarily found that the "proposed rule change [wa]s consistent with the requirements" of the Exchange Act when the SEC allowed the proposal to take on the force of law. *See* 15 U.S.C. §78s(b)(2)(C)(i); §78s(b)(2)(C)(ii) (requiring the SEC to "disapprove a proposed rule change of a self-regulatory organization if it does not" find that the proposed rule change is consistent with the Exchange Act). This boundless view of SEC authority would strain credulity even without the constitutional sensitivities or Congress' "comprehensive" and "first-amendment-sensitive" contribution limits regime, *Galliano*, 836 F.2d at 1368, 1370. But those factors readily defeat any suggestion that Congress intended the MSRB or SEC—

two bodies with no expertise whatsoever managing the complex and delicate task of regulating federal elections—to decide whether or how much people may contribute to candidates or political parties under the guise of regulating the business practices of municipal advisors and dealers.

That much is clear from the D.C. Circuit's decision in *Galliano*. *Galliano* concerned an attempt by the Postal Service to impose additional disclosure requirements on political mailings pursuant to its authority to prevent "scheme[s] or device[s] for obtaining money … through the mail by means of false representations." 39 U.S.C. §3005. This Court readily rejected the Postal Service's argument that it could use this general grant of authority to "countermand the precisely drawn, detailed prescriptions of FECA." *Galliano*, 836 F.2d at 1371. In doing so, the Court reiterated that FECA's carefully crafted provisions are not "minimal requirement[s] that the Postal Service is free to supplement," but rather are the product of "[a] fine balance of interests [that] was deliberately struck by Congress." *Id.* at 1370. To allow an agency to prohibit conduct that is "consistent with FECA requirements would defeat the substantive objective of that Act's first-amendment-sensitive provisions." *Id.*

3. To allow an agency other than the FEC to interfere with Congress' statutory scheme would be doubly problematic, as "Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." *Common*

Cause v. Schmitt, 512 F. Supp. 489, 502 (D.D.C. 1980); *cf. Hunter v. FERC*, 711 F.3d 155, 158 (D.C. Cir. 2013) (rejecting interpretation of one agency's authority that "would eviscerate the … exclusive jurisdiction" of another agency). And in the rare instance when Congress wants agencies other than the FEC to participate in the enforcement or administration of campaign finance laws, it says so directly. *See, e.g.*, 47 U.S.C. §315(b) (delegating to Federal Communications Commission authority to enforce proper sponsorship identification in political advertising); 26 U.S.C. §6096 (delegating authority to Internal Revenue Service to administer "check off program" that funds Presidential Election Campaign Fund).

Congress has not given the MSRB, SEC, or anyone else, for that matter, any such explicit authority to impose additional restrictions on the constitutional rights of citizens to make campaign contributions. That Congress has not done so is particularly notable given that the SEC already tried (unsuccessfully, and over the objections of several FEC commissioners) to do so *before* Congress overhauled FECA through BCRA. In 1999, the Commission proposed a rule that would have prohibited investment advisors from receiving compensation for advisory services provided to a government client for two years if the adviser or certain of its employees contributed to certain elected officials or candidates for elected office. *Political Contributions by Certain Inv. Advisers*, 64 Fed. Reg. 43,556 (Aug. 10, 1999) (the "1999 Proposal"). In other words, the 1999 Proposal would have forced

investment advisors to choose between making contributions up to the levels permitted by statute, or providing their services to public pension funds. This proposal was met with the objection of three FEC commissioners, who stated that it "encroach[ed] upon the exclusive domain of the FECA" and conflicted with Congress' intent to vest "sole jurisdiction to enforce the provisions contained within FECA's covered area" in the FEC. Darryl R. Wold, Vice Chairman, FEC, *et al.*, 1999 Proposal, Comments on Proposed Rule, 1999 WL 33949875, at *1–2 (Nov. 1, 1999). The SEC did not issue a final rule based on the 1999 Proposal.

Had Congress agreed with the SEC that FECA's standard limits are insufficient to prevent corruption or the appearance of corruption where investment advisors are concerned, it could easily have addressed the matter itself. Instead, Congress chose to retain a specialized limit on the circumstances under which campaign contributions may be made only with respect to federal government contractors. *See* 52 U.S.C. §30119. And it granted neither the FEC nor the SEC any discretion to extend that restriction to other actors or contexts.

In short, the contribution limits that Congress has already imposed reflect "its belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 134 S. Ct. at 1452. Just like the Postal Service in *Galliano*, neither the MSRB nor the SEC have any business second-guessing that determination or imposing restrictions more stringent than those Congress has

chosen. Indeed, the exhaustive manner in which Congress has legislated on whether and how much people may contribute ought to foreclose any suggestion that Congress has entrusted *any* agency with making these exceedingly sensitive judgments. But in all events, it certainly forecloses any suggestion that Congress implicitly empowered the MSRB or SEC to do so through a general grant of authority to prevent municipal advisors and dealers from engaging in "fraudulent and manipulative" business practices or a general mandate to promote "a free and open market in municipal securities and municipal financial products." 15 U.S.C. §78o-4(b)(2)(C).

B. The Political Contribution Rule Exceeds the MSRB's and SEC's Authority.

Even assuming Congress' comprehensive contribution limits regime does not preclude the SEC from enacting its own regulations on the matter, the Political Contribution Rule vastly exceeds the MSRB's authority to propose and the SEC's authority to approve rules that "prevent fraudulent and manipulative acts and practices;" "promote just and equitable principles of trade" and "a free and open market in municipal securities and municipal financial products;" or "protect investors, municipal entities, obligated persons, and the public interest." *Id.* Rather, Congress expressly forbids the MSRB from trying "to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter …" 15 U.S.C. §78o-4(b)(2)(C), and requires the SEC to disapprove any

such proposed rule as inconsistent with the requirements of the Exchange Act, §78s(b)(2)(C). The MSRB's and SEC's ill-fated foray into campaign finance regulation plainly fits this bill. The Commission simply does not have the power to impose categorical prophylactic prohibitions on conduct so far outside its statutory mandate—particularly when that conduct is protected by the Constitution.

At the outset, it is important to recognize that the Political Contribution Rule targets only those instances in which municipal advisers 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.* Everything else already is prohibited directly by the campaign finance statutes, and therefore squarely within the enforcement jurisdiction of the FEC and the Department of Justice. *See* 52 U.S.C. §§30116, 30104, 30105. In other words, the SEC's rule is necessarily premised on the notion that transparently contributing $2,700 or less to a covered official who is a federal candidate or $10,000 to a political party is likely to result in some sort of "fraudulent and manipulative" act or will otherwise harm markets or the "public interest." 15 U.S.C. §78o-4(b)(2)(C).

Setting aside the fact that "pay-to-play" conduct is already prohibited by both state and federal law, *see, e.g.*, 18 U.S.C. §201 (prohibiting payment of bribes to federal officials); Ga. Code Ann. §16-10-2 (West 2016) (prohibiting payments of bribes to state officials); N.Y. Penal Law §200.04 (McKinney 2016) (same); Tenn.

Code Ann. §39-16-102 (West 2016) (same), and that contributions in many states are limited by state law, *see supra* n.10, its purported prevalence does nothing to further the notion that otherwise-lawful political contributions are a frequent source of "fraudulent and manipulative" conduct that inhibits "a free and open market in municipal securities" or harms the "public interest." 15 U.S.C. §78o-4(b)(2)(C). Indeed, the MSRB cannot even identify with any specificity what "fraud" might result from the modest publicly disclosed contributions its rule precludes. And the MSRB offers only speculation about the health of the market for municipal advice, suggesting that more qualified advisors might refrain from offering their services because of perceived corruption in the market, 80 Fed. Reg. at 81726 [App. 69], and municipal entities may receive better advice if their advisors cannot make political contributions, *id*. at 81728 [App. 71]. And the MSRB recognizes that compliance costs associated with the Rule are likely to drive many advisors out of the market altogether, potentially hurting competition. *Id*.

Instead of offering firm evidence of legal political contributions leading to *quid pro quo* corruption, the MSRB admits that pay-to-play practices are difficult to detect and contends that "prophylactic" measures therefore are justified. 80 Fed. Reg. at 81711 n.10 [App. 54 n.10]. But as the Supreme Court has explained, categorical prohibitions satisfy such grants of prophylactic authority only when

they "reflect broad generalizations holding true in so many cases that inquiry into whether they apply to the case at hand would be needless and wasteful." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93 (2002); *see also United States v. O'Hagan*, 521 U.S. 642 (1997). "When the generalizations fail to hold in the run of cases," however, "the justification for the categorical rule disappears." *Ragsdale*, 535 U.S. at 93.

That is precisely the situation here. The MSRB has identified absolutely no basis for assuming that most, many, or even more than a few publicly disclosed $2,700 federal contributions or similar contributions made to state and local officials by investment advisers will involve the kind of *quid pro quo* arrangement that it claims it has authority to prevent. Indeed, the MSRB has recognized that municipal advisors have a clear "non-*quid pro quo* interest" in exercising their right to donate to political candidates and parties. 80 Fed. Reg. at 81730 [App. 73]. Without evidence of rampant *quid pro quo* conduct, "[i]t is not a 'fair assumption' … that this fact pattern will occur in any but the most exceptional of cases." *Ragsdale*, 535 U.S. at 93 (quoting *O'Hagan*, 521 U.S. at 676).

That would be troubling enough if the SEC-approved rule did not deter conduct that the Constitution protects—and conduct that Congress has elsewhere expressly permitted. But there is no denying the reality that the Political Contribution Rule prevents individuals from exercising their First Amendment

"right to participate in democracy through political contributions." *McCutcheon*, 134 S. Ct. at 1441. Indeed, the MSRB acknowledged that its amendments to the Political Contribution Rule "relate to an area of First Amendment protection," 80 Fed. Reg. at 81732, and restrict contributions given "in the absence of actual *quid pro quo* corruption," *id*. at 81730 [App. 73].

Thus, whatever deference the SEC may receive when interpreting its statutory mandate to approve or disapprove proposed rules, that deference does not extend to interpretations that would empower it to impose broad prophylactic restrictions on constitutional rights. *See Rural Cellular Ass'n v. FCC*, 685 F.3d 1083, 1090 (D.C. Cir. 2012) (no deference to agency's "interpretation of an ambiguous statutory phrase if that interpretation raises a serious constitutional difficulty"); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) ("canon of constitutional avoidance trumps *Chevron* deference"). And it certainly does not extend to the MSRB's and SEC's attempt to impose broad prophylactic restrictions *on top of* Congress' and the states' own broad prophylactic restrictions on the very same constitutionally protected conduct. *See McCutcheon*, 134 S. Ct. at 1458 (rejecting "prophylaxis-upon-prophylaxis" approach to campaign finance regulation).

In short, the Political Contribution Rule is unauthorized, unjustified, and massively overbroad in a way that raises grave First Amendment concerns. *See*

infra Part II.C. Because the MSRB and SEC exceeded their statutory authority and acted arbitrarily and capriciously in promulgating it, the Rule "cannot be sustained." *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 496 (D.C. Cir. 2010).

C. The Political Contribution Rule Violates the First Amendment.

In all events, even if it could survive statutory or APA scrutiny, the Political Contribution Rule certainly cannot survive constitutional scrutiny. Congress has already significantly curtailed the constitutional right to support candidates through campaign contributions by limiting such contributions to $2,700 per candidate per election. If the MSRB and SEC want to impose even more stringent restrictions on the First Amendment rights of municipal securities dealers and advisors, then they must prove that those restrictions are necessary to further a sufficiently important interest, and do so in a sufficient tailored manner. This, the MSRB and SEC do not and cannot do.

At the outset, there can be no serious dispute that the Political Contribution Rule severely burdens First Amendment rights. In effect, it forces municipal advisors to choose between exercising their constitutional right to support candidates through political contributions and continuing to work as advisors to public pensions. Under the Rule, the only way for a municipal advisor to do the latter is to forgo the former. The MSRB itself characterizes its exception to this

rule as "*de minimis*"—and with good reason, as it allows municipal advisors to contribute only $250 per election to candidates for whom they are entitled to vote, and nothing to any other candidate. 80 Fed. Reg. at 81721 [App. 64]. Those limits are "substantially lower than … limits [that courts] have previously upheld," and are lower even than limits that courts have struck down. *Randall*, 548 U.S. at 253 (plurality op.). The MSRB and SEC therefore bear an exceedingly high burden in establishing the constitutionality of the Political Contribution Rule. *Cf. McConnell v. FEC*, 540 U.S. 93, 141 n.43 (2003) ("the associational burdens imposed by a particular piece of campaign-finance regulation may at times be so severe as to warrant strict scrutiny").

As the Supreme Court recently reiterated, there is "only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *McCutcheon*, 134 S. Ct. at 1450. And there is only one type of corruption that campaign finance restrictions may target: *quid pro quo* corruption. *Id.* at 1441. "Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such *quid pro quo* corruption." *Id.* at 1450. "Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties." *Id.* at 1451 (quoting *Citizens United*, 558 U.S. at 359). In short, "[i]ngratiation and

access … are not corruption," and thus are not things that campaign finance restrictions may target. *Citizens United*, 558 U.S. at 360.

Of course, the Political Contribution Rule does not target the spending of "large sums of money." Instead, it targets fully disclosed federal political contribution of $2,700 or less and similar amounts at the state and local levels. But even setting aside that massive problem, the MSRB and SEC face an uphill battle at the outset, as the Supreme Court has never recognized "promot[ing] just and equitable principles of trade;" "perfect[ing] the mechanism of a free and open market in municipal securities;" or "protect[ing] investors, municipal entities, obligated persons, and the public interest," 80 Fed. Reg. at 81725 (quoting 15 U.S.C. §78s(b)(2)(C)) [App. 68], as legitimate bases for imposing restrictions on the right to make political contributions.

Implicitly recognizing as much, the MSRB attempts to squeeze its Rule into the Supreme Court's case law by portraying it as an effort to combat *quid pro quo* payments by municipal advisors seeking business. *See* 80 Fed. Reg. at 81711 [App. 54]. But that argument is doomed by its sheer implausibility where *disclosed* contributions *within* the limits established by FECA are concerned. The MSRB does not point to instances in which an investment adviser has made a fully disclosed federal campaign contribution of $2,700 or comparable state political contribution "in connection with an effort to control the exercise of an

officeholder's official duties." *McCutcheon*, 134 S. Ct. at 1450. Instead, the MSRB attempts to justify its rule through the kind of "mere conjecture" that courts "have never accepted … as adequate to carry a First Amendment burden," *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000), asserting that, "at least in some instances, the awarding of municipal advisory business (or municipal securities business or engagements to provide investment advisory services when a municipal advisor solicits on behalf of dealers or investment advisers) has been influenced, or has appeared to have been influenced, by 'pay to play' practices." 80 Fed. Reg. at 81711 [App. 54]. But such "speculation … cannot justify … substantial intrusion on First Amendment rights." *McCutcheon*, 134 S. Ct. at 1456.

In other words, the MSRB openly acknowledges that the Political Contribution Rule is a broad prophylactic measure that deters constitutionally protected conduct even when the government has no legitimate interest in doing so. *See* 80 Fed. Reg. at 81711 n.10 [App. 54 n.10] (recognizing the "prophylactic" purpose of the Rule). And the SEC, nevertheless, approved the expansion of the Rule. But Congress has already enacted a broad prophylactic restriction on campaign contributions, limiting them to $2,700 per federal candidate per election, and states have enacted analogous legislation modeled on FECA. FECA's contribution limit "remain[s] the primary means of regulating campaign contributions[.]" *McCutcheon*, 134 S. Ct. at 1451. If the MSRB or SEC want to

subject municipal advisors to even more stringent restrictions "layered on top" of that statutory limit, *id.* at 1458, then they must produce actual evidence that the existing limit—along with the myriad other restrictions imposed to enforce that limit or otherwise prevent *quid pro quo* corruption—is somehow insufficient to address *quid pro quo* corruption or the appearance thereof when it comes to municipal advisors. But the MSRB and SEC have utterly failed to offer "any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems" that its rule creates. *Randall*, 548 U.S. at 261.

Instead, to date, the MSRB has insisted that the D.C. Circuit already resolved the question in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), which rejected a First Amendment challenge to Rule G-37's application to municipal securities dealers. But *Blount* relied heavily on several strands of reasoning that the Supreme Court has since rejected. For instance, *Blount* insisted that courts should not "'second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.'" *Id.* at 945 (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982)). But the Supreme Court has since confirmed precisely the opposite, instructing that a "'prophylaxis-upon-prophylaxis' approach requires [courts to] be particularly diligent in scrutinizing the law's fit." *McCutcheon*, 134 S. Ct. at 1458 (quoting *FEC v.Wis.*

Right to Life, 551 U.S. 449, 479 (2007)). *Blount* also just assumed that the problem the SEC purported to target existed, *see* 61 F.3d at 945, in direct contradiction to the Supreme Court's more recent admonitions that speculation and conjecture do not suffice where First Amendment rights are concerned. *See McCutcheon*, 134 S. Ct. at 1452; *Shrink Mo.*, 528 U.S. at 392. And *Blount* impermissibly deemed the constitutional burden only minimal because affected individuals could still "contribute up to $250 per election to each official for whom he or she is entitled to vote," 61 F.3d at 947–48—an argument nearly identical to one rejected in *McCutcheon*. *See* 134 S. Ct. at 1449 ("It is no answer to say that the individual can simply contribute less money").

Moreover, *Blount* completely overlooked the disparate impact that a restriction like the Political Contribution Rule has on candidates. The Supreme Court has "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Davis*, 554 U.S. at 738. Nor has it upheld a law that prevents some, but not all, candidates for the same office from receiving contributions from certain individuals. Yet that is precisely what the Political Contribution Rule does, as it prevents municipal advisors from making $2,700 contributions to candidates who are covered officials, but not from making the same contribution to those candidates' opponents. As the State Parties demonstrated through their affidavits, *see* App. 304-20, that disparate

regulatory regime has had a concrete impact on both the willingness of candidates to run and the ability of individuals to contribute to their candidates of choice. And in the recent presidential campaign that just concluded, meddling by the MSRB and SEC tilted the playing field against the Republican ticket, as many municipal advisors could contribute up to $2,700 to Clinton-Kaine, but far less if any money to Trump-Pence because of Pence's service as Indiana's governor.[12] Yet *Blount* did not even acknowledge this significant First Amendment injury.

Blount similarly did not discuss the constitutionality of anything comparable to the Political Contribution Rule's express prohibition on coordinating or soliciting contributions to a political party of a State or locality where the municipal advisor is providing or is seeking to provide municipal advisory services. Rule G-37(c)(ii); *see also* 80 Fed. Reg. at 81712 [App. 55]. That restriction is unconstitutional wholly apart from the Rule's primary restriction, as it is so exceedingly attenuated from any conceivable "pay-to-play" concerns that the MSRB and SEC might advance that it cannot plausibly be understood to further those interests "in any meaningful way." *McCutcheon*, 134 S. Ct. at 1452.

Finally, the *Blount* court never considered how Congress' decision to occupy the field when it comes to limits on federal political contributions precludes

[12] Peter Overby, *How Picking Mike Pence As VP Might Cost The Trump Campaign Donations*, NPR (July 16, 2016), http://n.pr/29Q9ACf.

regulatory intrusions like those perpetrated by the SEC and MSRB. *See supra* 30-37; *Galliano*, 836 F.2d at 1368.

In short, *Blount* involved a different rule, "a different statute and different legal arguments, at a different point in the development of campaign finance" jurisprudence. *McCutcheon*, 134 S. Ct. at 1447.[13] To the extent its reasoning supports the result the MSRB urges, it is inconsistent with more recent Supreme Court decisions and therefore is not persuasive here. Those decisions instead compel the result that the SEC's "prophylaxis-upon-prophylaxis approach" to restricting the rights of investment advisers to make political contributions cannot be reconciled with the First Amendment. *McCutcheon*, 134 S. Ct. at 1458.

D. The SEC Violated the 2016 Appropriations Act and Appropriations Clause When It Approved the MSRB's Proposed Rule Requiring the Disclosure of Political Contributions.

The Appropriations Clause of the Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." art. I, §9, cl. 7. "It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). Under the Appropriations Clause, "[a]ny

[13] *Blount* also did not involve any challenges to the SEC's statutory authority to promulgate the rule at issue. Accordingly, it has no bearing on the arguments on the State Parties' distinct statutory challenges. *See* Part II.A–B *supra*.

exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Id.* at 425. Thus, an agency "cannot make expenditures, and therefore cannot act, other than by appropriation." *Envtl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 872 (9th Cir. 1995) (citing 31 U.S.C. §§1341, 1342). In this way, the Clause furthers the "fundamental and comprehensive purpose" of ensuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Richmond*, 496 U.S. at 427-28.

The Appropriations Act for FY 2016 prohibited the SEC from using any funds "to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions …." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. O, Title VII, §707, 129 Stat. 2242, 3029-30 (2005). As the SEC concedes, the MSRB's rule requires the "disclosure of political contributions." *Id.*; *see* Mot. to Dismiss 1, 11-12. Thus, when faced with the binary choice of either disapproving the MSRB's proposed rule or approving and thus finalizing it, *see* 15 U.S.C. §78s(b)(2)(A)(i)(1) ("the Commission shall[,] by order, approve or disapprove the proposed rule change"), the SEC was required to disapprove the proposed rule. Instead, in clear violation of the Appropriations Act and Appropriations Clause of the Constitution, art. I, §9, cl. 7, the SEC approved

and implemented the proposed rule. The Court should reverse this unlawful and unconstitutional action.

In arguing otherwise, the SEC turns the Appropriations Act language on its head, asserting that the Act required the SEC to do precisely what it was barred from doing. Ignoring the statutory language, the SEC contends that the Act prohibited it from "issu[ing] an order regarding the disclosure of political contributions," Mot. to Dismiss at 11, or otherwise "acting on the MSRB's rule," *id*. at 12. But the language in the Act is far more precise. The SEC is prohibited only from using funds to "finalize, issue, or implement" the MSRB's proposed rule, terms that demonstrate a clear intention to prevent proposed rules like the one at issue here from taking effect. Had the SEC disapproved the MSRB's rule, it would not have "finalized, issued, or implemented" the rule; it would have prevented those very outcomes. Thus, both the language and purpose of the Act refute the SEC's perverse contention that, because it could not act to finalize or issue the MSRB's Rule, it had to allow the Rule to be approved and finalized. The Court should vacate the SEC's approval of the MSRB's Rule and should order the SEC to disapprove of the Rule.

CONCLUSION

For the reasons set forth above, this Court should vacate the Commission's approval of the MSRB's proposed rule.

Respectfully submitted,

s/H. Christopher Bartolomucci

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WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,226 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: November 16, 2016

s/Edmund G. LaCour Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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