January 20, 2016

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Comment of the New York Republican State Committee and Tennessee Republican Party in Opposition to Proposed FINRA Rules 2030 and 4580 (File No. SR–FINRA–2015–056)

Dear Mr. Fields,

I write on behalf of the New York Republican State Committee and the Tennessee Republican Party (hereinafter, the "State Parties") in opposition to the above-captioned proposed rules. The Securities and Exchange Commission ("SEC" or "Commission") has published for comment proposed rules that the Financial Industry Regulatory Authority, Inc. ("FINRA") has filed for approval. 80 Fed. Reg. 81,650, 81,650 (Dec. 30, 2015) (hereinafter, the "FINRA Proposal"). FINRA believes its proposal is required by the Commission's own Political Contribution Rule, Rule 206(4)-5 ("Political Contribution Rule"). 80 Fed. Reg. at 81,651. Moreover, the FINRA Proposal mirrors the Political Contribution Rule, pointing to that rule's justification as the basis for the FINRA Proposal's lawfulness. The Political Contribution Rule, however, is both unlawful and unconstitutional.

The FINRA Proposal would restrict the ability of member firms and their employees to make otherwise lawful political contributions to certain candidates for state and federal office, thereby also restricting the fundraising capabilities of such candidates. Moreover, the FINRA Proposal would limit the fundraising capabilities of state political parties. The proposed rules would do this to "promote just and equitable principles of trade and, in general, to protect investors and the public interest." *Id.* at 81,656. FINRA suggests that its proposal will "allow member firms to continue to engage in distribution or solicitation activities with government entities on behalf of investment advisers." *Id.* at 81,657. Of course, that is only true if member firms do not exercise their First Amendment rights to make political contributions.

The FINRA Proposal directly harms the State Parties and their members. Under the Proposal, it would be unlawful for covered members or associates of member firms to coordinate or solicit any "payment to a political party of a state or locality of a government entity with which the covered member is engaging in, or

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seeking to engage in, distribution or solicitation activities on behalf of an investment adviser." *Id.* at 81,654. This would restrict the State Parties' ability to fundraise. Moreover, it would restrict the ability of its members who are employed at member firms to make political contributions. Finally, the FINRA Proposal would restrict the fundraising capabilities of the State Parties' members who are covered officials.

For the reasons discussed below, the FINRA Proposal is unlawful and unconstitutional. In effect, the FINRA Proposal forces member firms and their employees to choose between making otherwise-lawful campaign contributions or providing advisory services to public funds. That dooms the FINRA Proposal three times over. The Proposal fails, first, because FINRA does not have any authority to alter or supplement Congress' comprehensive contribution limits regime; second, because the Proposal vastly exceeds FINRA's authority to prevent fraudulent and manipulative acts or practices; and third, because the Proposal restricts constitutionally protected conduct in a manner that is not sufficiently tailored to serve a sufficiently important government interest. The Commission should exercise its authority to disapprove of the proposal.

I. The FINRA Proposal is Unlawful.

The FINRA Proposal is unlawful as it is *ultra vires*. Congress did not empower entities like FINRA—nor agencies like the SEC—to regulate federal political contributions when it granted generic authority to establish rules "designed to prevent fraudulent and manipulative acts and practices[.]" 15 U.S.C. §78o-3(b)(6). Instead, the FINRA Proposal is a direct effort to deter member firms and their employees from engaging in conduct that is protected by the First Amendment and permitted by federal statute.

1. 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 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 member firms, who provide their services to governmental entities and private investment advisers. Instead, employees of member firms remain subject to the standard statutory contribution limit, which currently is fixed at $2,700 per candidate per election *see* 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015), and $10,000 per calendar year per state party committee, 11 C.F.R. §110.1(c)(5).

2. Congress' comprehensive regime of political contribution limits forecloses FINRA's effort to regulate the same conduct. 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*, 322 U.S. 102, 107 (1944) (quotation marks omitted). 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 v. Valeo*, 424 U.S. 1, 12–13 (1976); *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 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 or self-regulatory organization 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 id.* §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).

Congress also has reserved for itself the power to establish exceptions to its statutorily fixed limits.[1] 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.[2] 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 member firms who are providing or seeking to provide their services to investment advisers.

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[1] The Proposal similarly conflicts with the authority of state legislatures and regulators. The States retain "substantial sovereign powers" with which "Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). "Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens." *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013). "'[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'" *Id.* (quoting *Gregory*, 501 U.S. at 461–62); *see also Carrington v. Rash*, 380 U.S. 89, 91 (1965) (States have "broad powers to determine the conditions under which the right of suffrage may be exercised"). In the absence of an "unmistakably clear" indication that Congress intended to legislate in a matter of State sovereignty, courts are to assume that Congress did not so intend. *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

[2] 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).

All of that would make the FINRA Proposal difficult enough to defend had it been proposed 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. That FINRA proposes to issue this rule makes this an even easier case, as Congress has not granted FINRA *any* authority to regulate campaign contributions or other campaign finance-related activities. FINRA's exceedingly expansive view of its 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 FINRA—an entity with no expertise whatsoever with the complex and delicate task of regulating federal elections—to be making decisions about whether or how much people may contribute to candidates or political parties under the guise of regulating the business practices of member firms.

That much is clear from *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 representation." 39 U.S.C. §3005. The *Galliano* 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 (quotation marks omitted). 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.*

To allow any 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 election law." *Common Cause v. Schmitt*, 512 F. Supp. 489, 502 (D.D.C. 1980); *cf. Hunter v. FERC*, 711 F.3d 155, 156 (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).

3. Even assuming Congress' comprehensive contribution limits regime does not preclude FINRA from enacting its own regulations on the matter, the FINRA Proposal vastly exceeds FINRA's authority to issue rules "designed to prevent fraudulent and manipulative acts and practices[.]" 15 U.S.C. §78o-3(b)(6). In explaining and justifying its proposal, FINRA relies almost exclusively on the justifications that the SEC offered in support of its Political Contribution Rule. That, however, is fatal to the lawfulness of the FINRA Proposal. As the State Parties have explained elsewhere, the Political Contribution Rule is both unlawful and unconstitutional. *See* Op. Br., *N.Y. Republican State Committee v. SEC*, No. 14-1194 (D.C. Cir. Dec. 22, 2014) (Exhibit A); Reply Br., *N.Y. Republican State Committee v. SEC*, NO. 14-1194 (D.C. Cir. Feb. 4, 2015) (Exhibit B). Indeed, the SEC itself conceded that few (if any) contributions within the limits set by FECA are likely to result in some sort of fraudulent or manipulative conduct. And FINRA, like the Commission, simply does not have the power to impose categorical prophylactic prohibitions on conduct that is exceedingly unlikely to implicate its statutory mandate—particularly when that conduct is protected by the Constitution.

At the outset, it is important to recognize that the FINRA Proposal, like the Political Contribution Rule, targets only those instances in which member firms or their employees make *fully disclosed* political contributions in amounts *less than $2,700* per candidate and $10,000 per year for political party committee federal accounts. 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 FINRA Proposal is necessarily premised on the notion that transparently contributing $2,700 or less to a covered official is likely to result in some sort of "fraudulent and manipulative" practice. 15 U.S.C. §78o-3(b)(6).

Unsurprisingly, when issuing the Political Contribution Rule, the Commission did not focus on instances where this has actually happened. In fact, most examples of "pay-to-play" activity on which it relied did not even involve a political contribution—let alone an investment adviser's publicly disclosed contribution of $2,700 or less to a candidate or $10,000 per year to a political party committee federal account. *See* 75 Fed. Reg. at 41,018, 41,019 nn.16–26 (July 14, 2010). Instead, these examples largely involved payments and gifts given directly to government officials. *Id.* The FINRA Proposal is only more troubling, as it does not even attempt to cite a single example of *any* pay-to-play activity. *See* 80 Fed. Reg. at 81,656.

When it issued the Political Contribution Rule, on which FINRA relies heavily, the SEC fell back on the notion that Congress has authorized it to "adopt prophylactic rules that may prohibit acts that are not themselves fraudulent." 75 Fed. Reg. at 41,022. That may be so, but Congress has authorized the SEC to enact prophylactic rules only when they are "reasonably designed to prevent" conduct by investment advisers that is fraudulent, deceptive, or manipulative. 15 U.S.C. §80b-6(4). 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. FINRA has identified no basis for assuming that most, many, or even more than a few publicly disclosed $2,700 contributions to candidates or $10,000 to political party committee federal accounts made by member firms or their employees to covered officials will involve the kind of *quid pro quo* arrangement that it claims it has authority to prevent. In other words, even FINRA must recognize that "[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).

II. The FINRA Proposal Violates the First Amendment.

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 or $10,000 per year to state party committee federal accounts. If FINRA wants to impose even more stringent restrictions on the First Amendment rights of member firms and their employees, then it must show that those restrictions are necessary to further a sufficiently important interest, and do so in a sufficient tailored manner. This, FINRA does not and cannot do.

At the outset, there can be no serious dispute that the FINRA Proposal severely burdens First Amendment rights. In effect, it forces member firms to choose between exercising their constitutional right to support candidates through political contributions and continuing to work with investment advisers who are seeking work from public pensions. Under the FINRA Proposal, the only way for a member firm employee to do the latter is to forgo the former. FINRA itself characterizes its exception to this rule as "*de minimis*"—and with good reason, as it allows member firms and their employees to contribute only $350 per election to candidates for whom they are entitled to vote, and only $150 to any other candidate. 80 Fed. Reg. at 81,655. Those limits are "substantially lower than … limits [that courts] have previously upheld," and are lower even than limits that courts have struck down. *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (plurality op.). FINRA therefore bears 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 FINRA Proposal does not target the spending of "large sums of money." Instead, it targets fully disclosed political contribution of $2,700 or less. But even setting that problem aside, FINRA faces an uphill battle at the outset—the Supreme Court has never recognized "prevent[ing] a potentially harmful disruption in the member firms' solicitation business" or "promot[ing] competition" as legitimate bases for imposing restrictions on the right to make political contributions.

When the SEC tried to justify its Political Contribution Rule, it implicitly recognized this same problem, attempting instead to squeeze the Political Contribution Rule into the Supreme Court's case law by portraying it as "a focused effort to combat *quid pro quo* payments by investment advisers seeking governmental business." 75 Fed. Reg. at 41,023 n.68. But that argument was doomed by its sheer implausibility where *disclosed* contributions *within* the limits established by FECA are concerned. As noted, the SEC did not identify a single instance in which an investment adviser has made a fully disclosed campaign contribution of $2,700 "in connection with an effort to control the exercise of an officeholder's official duties." *McCutcheon*, 134 S. Ct. at 1450. Indeed, the SEC, like FINRA, did not even attempt 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); *see also, e.g.*, *McCutcheon*, 134 S. Ct. at 1456 ("speculation … cannot justify … substantial intrusion on First Amendment rights").

In other words, FINRA openly acknowledges that its Proposal is a broad prophylactic measure that deters constitutionally protected conduct even when the government has no legitimate interest in doing so. But Congress has already enacted a broad prophylactic restriction on campaign contributions, limiting them to $2,700 per candidate per election and $10,000 per calendar year for political party committee federal accounts. That contribution limit "remain[s] the primary means of regulating campaign contributions[.]" *McCutcheon*, 134 S. Ct. at 1451. If FINRA wants to subject member firms to even more stringent restrictions "layered on top" of that statutory limit, *id.* at 1458, then it 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. But FINRA, like the SEC, has 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, FINRA only compounds the SEC's errors by suggesting that the constitutionality of the Proposal has already resolved in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995). *See* 80 Fed. Reg. at 81,659. *Blount*, however, 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. 187, 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, Inc.*, 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 is 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 FINRA Proposal 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 v. FEC*, 554 U.S. 724, 738 (2008). 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 FINRA Proposal would do, as it would prevent covered associates of member firms from making $2,700 contributions to candidates who are covered officials, but not from making the same contribution to those candidates' opponents.

Finally, *Blount* did not discuss the constitutionality of anything comparable to the FINRA Proposal's express prohibition on coordinating or soliciting contributions "to a political party of a State or locality where the investment adviser is providing or seeking to provide investment advisory services to a government entity." 80 Fed. Reg. at 81,654. That restriction is unconstitutional wholly apart from the Proposal's primary restriction, as it is so exceedingly attenuated from any conceivable "pay-to-

play" concerns that FINRA might advance that it cannot plausibly be understood to further those interests "in any meaningful way." *McCutcheon*, 134 S. Ct. at 1452.

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.[3] The D.C. Circuit Court of Appeals' recent citation to *Blount* in *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015), is of no moment. *See* 80 Fed. Reg. at 81,659. Not only does that reference do nothing to cure the constitutional infirmities of *Blount*'s analysis, the *Wagner* court addressed a statute that has little in common with the FINRA Proposal. Unlike the Proposal, the ban on contributions by federal contractors addressed in *Wagner* was an act of Congress supported by 139 years of history. *See* 52 U.S.C. §30119; *Wagner*, 793 F.3d at 10–14. The contractor contribution ban is also substantially less onerous than the FINRA Proposal, applying only "while they negotiate or perform federal contracts," *Wagner*, 793 F.3d at 3, rather than for two years after a contribution is made. Moreover, the contractor contribution ban does not include any provisions similar to the Proposal's broad prohibitions against contributions to state political parties.

III. Conclusion.

For the foregoing reasons, the FINRA Proposal is both unlawful and unconstitutional. The Commission should exercise its authority to disapprove of the Proposal.

Respectfully submitted,

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[3] *Blount* also did not involve any challenges to the statutory authority to promulgate the rule at issue.

EXHIBIT A

ORAL ARGUMENT NOT YET SCHEDULED

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW YORK REPUBLICAN STATE COMMITTEE; and
TENNESSEE REPUBLICAN PARTY,

Petitioners–Appellants,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent–Appellee.

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

On Petition for Review of a Final Rule of the United States Securities and Exchange Commission (SEC File No. S7-18-09)

OPENING BRIEF FOR PETITIONERS–APPELLANTS

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December 22, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners–Appellants New York Republican State Committee and Tennessee Republican Party hereby provide this certificate as to parties, rulings, and related cases, which includes the disclosure required by Circuit Rule 26.1.

A. Parties, Intervenors and *Amici*

Petitioners-Appellants in this matter are the New York Republican State Committee and the Tennessee Republican Party (collectively, the "State Parties"). Respondent–Appellee in this matter is the United States Securities and Exchange Commission ("Commission" or "SEC").

The following entities participated as *amici curiae* in the proceedings before the United States District Court for the District of Columbia: Free Speech for People; Campaign Legal Center; and Democracy 21.

B. Rulings Under Review

The State Parties appeal a decision of U.S. District Judge Beryl A. Howell, dismissing their challenge to a final rule promulgated by the SEC (the "Political Contribution Rule"). *See* Order, *New York Republican State Comm. v. SEC*, 2014 WL 4852030, No. 14-cv-01345-BAH (D.D.C. Sept. 30, 2014) (Dkt. 31). Consolidated with this action is the State Parties' petition for review of the Political Contribution Rule. *See Political Contributions by Certain Investment Advisers*, 75 Fed. Reg. 41,018 (July 14, 2010). This rule is codified at 17 C.F.R. §275.206(4)-5.

C. Related Cases

This matter has not previously been before this Court or any other federal court of appeals.

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

A. Parties, Intervenors and *Amici* i

B. Rulings Under Review i

C. Related Cases ii

TABLE OF AUTHORITIES v

GLOSSARY OF ABBREVIATIONS xii

INTRODUCTION 1

JURISDICTIONAL STATEMENT 2

STATUTES AND REGULATIONS 3

STATEMENT OF THE ISSUES 3

STATEMENT OF THE CASE 3

A. Statutory and Regulatory Background 3

B. The Proceedings Below 11

SUMMARY OF ARGUMENT 14

STANDARD OF REVIEW 18

ARGUMENT 19

I. There Is No Jurisdictional Or Standing Bar To The State Parties' Challenge To The Political Contribution Rule. 19

A. The District Court Had Jurisdiction Over the State Parties' Challenge. 19

B. This Court, in the Alternative, Has Jurisdiction to Hear the State Parties' Challenge to the Political Contribution Rule. 25

C. The State Parties Have Standing to Challenge the Political Contribution Rule. 29

II. The Political Contribution Rule Is Unlawful And Unconstitutional. 37

A. Congress' Comprehensive Regime of Political Contribution Limits Forecloses the SEC's Effort to Regulate the Same Conduct. 37

B. The Political Contribution Rule Exceeds the SEC's Authority. 44

C. The Political Contribution Rule Violates the First Amendment. 49

CONCLUSION 56

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

ADDENDUM

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES[*]

Cases

Aid Ass'n for Lutherans v. U.S. Postal Serv.,
321 F.3d 1166 (D.C. Cir. 2003)....................27

Ala. Power Co. v. FERC,
160 F.3d 7 (D.C. Cir. 1988)....................20

Am. Coal. for Competitive Trade v. Clinton,
128 F.3d 761 (D.C. Cir. 1997).................... 27, 28

**Am. Petroleum Inst. v. SEC*,
714 F.3d 1329 (D.C. Cir. 2013).................... 19, 23

Ams. for Safe Access v. DEA,
706 F.3d 438 (D.C. Cir. 2013)....................36

Belmont v. MB Inv. Partners, Inc.,
708 F.3d 470 (3d Cir. 2013)....................46

Blount v. SEC,
61 F.3d 938 (D.C. Cir. 1995).................... 53, 54

Bouie v. City of Columbia,
378 U.S. 347 (1964)....................26

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988)....................20

Bowen v. Michigan Acad. of Family Physicians,
476 U.S. 667 (1986)....................27

Buckley v. Valeo,
424 U.S. 1 (1976).................... 32, 38

Carter v. Wash. Metro. Area Transit Auth.,
503 F.3d 143 (D.C. Cir. 2007)....................18

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Catholic Health Initiatives v. Sebelius,
617 F.3d 490 (D.C. Cir. 2010) 49

Chamber of Commerce of U.S. v. FEC,
69 F.3d 600 (D.C. Cir. 1995) 28

Citizens United v. FEC,
558 U.S. 310 (2010)... 4, 51

Clifford F. MacEvoy Co. v. United States,
322 U.S. 102 (1944)...37

Common Cause v. Schmitt,
512 F. Supp. 489 (D.D.C. 1980) 42

Crawford v. Marion Cnty. Election Bd.,
472 F.3d 949 (7th Cir. 2007)..31

Dart v. United States,
848 F.2d 217 (D.C. Cir. 1988) 27

Davis v. FEC,
554 U.S. 724 (2008)... 34, 54

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council,
485 U.S. 568 (1988)...29

Envtl. Defense v. Duke Energy Corp.,
549 U.S. 561 (2007)...24

FCC v. Fox Television Stations, Inc.,
132 S. Ct. 2307 (2012)...25

FEC v. Colo. Republican Fed. Campaign Comm.,
533 U.S. 431 (2001)...36

FEC v. Nat'l Right to Work Comm.,
459 U.S. 187 (1982)...53

FEC v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007)... 34, 53

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 30

**Galliano v. U.S. Postal Serv.*,
836 F.2d 1362 (D.C. Cir. 1988) 4, 38, 40, 41, 42

General Majority PAC v. Aichele, No. 14-cv-332,
2014 WL 3955079 (M.D. Pa. Aug. 13, 2014) 39

Haitian Refugee Ctr. v. Gracey,
809 F.2d 794 (D.C. Cir. 1987) 31

Hunter v. FERC, 711 F.3d 155 (D.C. Cir. 2013) 42

Inv. Co. Inst. v. Bd. of Governors of the Fed. Reserve Sys.,
551 F.2d 1270 (D.C. Cir. 1977) 13, 21, 23, 24

Janko v. Gates,
741 F.3d 136 (D.C. Cir. 2014) 24

Kusner v. First Pennsylvania Corp.,
531 F.2d 1234 (3d Cir. 1976) 46

LaRoque v. Holder,
650 F.3d 777 (D.C. Cir. 2011) 35

Littlewolf v. Lujan,
877 F.2d 1058 (D.C. Cir. 1989) 26

McConnell v. FEC,
540 U.S. 93 (2003) 50

**McCutcheon v. FEC*,
134 S. Ct. 1434 (2014) 38, 43, 48, 49, 50, 51, 52, 53, 54, 55, 56

Nat'l Auto. Dealers Ass'n v. FTC,
670 F.3d 268 (D.C. Cir. 2012) 19

**Nat'l Mining Ass'n v. Dep't. of Labor*,
292 F.3d 849 (D.C. Cir. 2002) 20, 22, 25

Nat'l Mining Ass'n v. Kempthorne,
512 F.3d 702 (D.C. Cir. 2008) 49

NetCoalition v. SEC,
715 F.3d 342 (D.C. Cir. 2013) 19

Nixon v. Shrink Mo. Gov't PAC,
528 U.S. 377 (2000)... 52, 54

Pickett v. Brown,
462 U.S. 1 (1983)..28

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976)...37

**Ragsdale v. Wolverine World Wide, Inc.*,
535 U.S. 81 (2002).. 47, 48

Randall v. Sorrell,
548 U.S. 230 (2006).. 32, 50, 53

Renal Physician Ass'n v. HHS,
489 F.3d 1267 (D.C. Cir. 2007) 35, 36

Republican Party of N.M. v. King,
741 F.3d 1089 (10th Cir. 2013)..40

Rural Cellular Ass'n v. FCC,
685 F.3d 1083 (D.C. Cir. 2012) 48

Sierra Club v. Jewell,
764 F.3d 1 (D.C. Cir. 2014) 30

SpeechNow.org. v. FEC,
599 F.3d 686 (D.C. Cir. 2010) 39

Summers v. Earth Island Inst.,
555 U.S. 488 (2009)...36

**Taxation with Representation of Wash. v. Regan*,
676 F.2d 715 (D.C. Cir. 1982) 31, 32

Teper v. Miller,
82 F.3d 989 (11th Cir. 1996)..38

Tex. Dem. Party v. Benkiser,
459 F.3d 582 (5th Cir. 2006) 31, 34

Transamerica Mortgage Advisors, Inc. v. Lewis,
444 U.S. 11 (1979) 46

United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,
517 U.S. 544 (1996) 36

United States v. O'Hagan,
521 U.S. 642 (1997) 47, 48

Unity08 v. FEC,
596 F.3d 861 (D.C. Cir. 2010) 27

**Watts v. SEC*,
482 F.3d 501 (D.C. Cir. 2007) 19, 20

Wilson v. Iseminger,
185 U.S. 55 (1902) 26, 28

Statutes

2 U.S.C. §434 (52 U.S.C. §30104) 45

2 U.S.C. §437 (52 U.S.C. §30105) 45

2 U.S.C. §437c (52 U.S.C. §30106) 4, 40

2 U.S.C. §437g (52 U.S.C. §30109) 39

2 U.S.C. §441a (52 U.S.C. §30116) 4, 5, 39, 45

2 U.S.C. §441b (52 U.S.C. §30118) 5, 39

2 U.S.C. §441c (52 U.S.C. §30119) 5, 40, 41, 43

2 U.S.C. §441e (52 U.S.C. §30121) 5, 40

5 U.S.C. §551 20

5 U.S.C. §706 18

15 U.S.C. §80b-11 21

15 U.S.C. §80b-13 ..... 2, 3, 13, 20

15 U.S.C. §80b-6 ..... 3, 5, 11, 41, 44, 45, 47

18 U.S.C. §201 45

18 U.S.C. §608(b) (1975) 39

26 U.S.C. §6096 42

28 U.S.C. §1291 2

28 U.S.C. §1331 2

28 U.S.C. §2401(a) 27

33 U.S.C. §921 22

39 U.S.C. §3005 42

47 U.S.C. §315 42

N.Y. Penal Law §200.04 45

Tenn. Code §39-16-102 45

Rules

Fed. R. App. P. 4 29

Regulations

17 C.F.R. §275.206(4)-5 ..... 3, 7, 8, 9, 10, 30, 50, 55

Political Contributions by Certain Investment Advisers,
64 Fed. Reg. 43,556 (Aug. 10, 1999) 6

Political Contributions by Certain Investment Advisers,
74 Fed. Reg. 39,840 (Aug. 7, 2009) 6

Political Contributions by Certain Investment Advisers,
75 Fed. Reg. 41,018
(July 14, 2010) 7, 8, 9, 10, 11, 21, 27, 30, 36, 45, 46, 47, 48, 51, 52

Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530-02 (Feb. 6, 2013). 5

GLOSSARY OF ABBREVIATIONS

Advisers Act	Investment Advisers Act of 1940
APA	Administrative Procedure Act
BCRA	Bipartisan Campaign Reform Act of 2002
Commission or SEC	United States Securities and Exchange Commission
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971
IRS	Internal Revenue Service
Political Contribution Rule or Rule	*Political Contributions by Certain Investment Advisers*, 75 Fed. Reg. 41,018 (July 14, 2010)
State Parties	New York Republican State Committee and Tennessee Republican Party

INTRODUCTION

This case involves a challenge to an SEC rule that restricts the ability of investment advisers 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 SEC, it may supplant Congress' limits with a broad, concededly 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-Appellants (the "State Parties") explained below, 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.

Rather than address the State Parties' arguments on the merits, however, the District Court dismissed this case for lack of subject matter jurisdiction, concluding that a statute granting original appellate jurisdiction over challenges to SEC "orders" must be interpreted to govern challenges to "rules" as well. The court did so because it mistakenly believed that result was compelled by a nearly 40-year-old decision of this Court addressing an entirely distinct statutory scheme. But as more recent precedents confirm, absent some clear indication otherwise, "orders" should be interpreted to mean "orders," not "rules." Accordingly, the Court should remand for the District Court to consider the State Parties' challenge in the first instance.

If the Court disagrees, then it should exercise jurisdiction itself and hold the SEC's Political Contribution Rule unlawful and unconstitutional. Under the circumstances, the 60-day statute of limitations on challenges to Commission "orders" cannot constitutionally be applied, as the State Parties lacked fair notice that this limitation would govern their challenge. And it would be particularly problematic to apply that limitation here, where the State Parties have raised both *ultra vires* and constitutional claims. Instead, those claims should be considered on the merits, and on the merits, they plainly should prevail. Indeed, the SEC's rule can survive neither statutory nor constitutional scrutiny, as it impermissibly intrudes on Congress' carefully crafted contribution limits regime, vastly exceeds the SEC's statutory authority, and is irreconcilable with the First Amendment.

JURISDICTIONAL STATEMENT

The State Parties appeal a final decision of the District Court dismissing their complaint for lack of subject matter jurisdiction. The District Court had jurisdiction pursuant to 28 U.S.C. §1331. *See* Part I.A *infra*. The State Parties timely noticed their appeal on October 1, 2014. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291. Alternatively, this Court has jurisdiction over the State Parties' petition for review pursuant to 15 U.S.C. §80b-13. *See* Part I.B *infra*. The State Parties have standing, as the Political Contribution Rule directly injures the State Parties and their members. *See* Part I.C *infra*.

STATUTES AND REGULATIONS

The relevant provisions of the Investment Advisers Act of 1940, 15 U.S.C. §§80b-6, 80b-13, along with the relevant provision of the SEC's Political Contribution Rule, 17 C.F.R. §275.206(4)-5, are reproduced in the Addendum to this brief.

STATEMENT OF THE ISSUES

1. Whether a statute granting original appellate jurisdiction over challenges to "orders" issued under the Advisers Act requires challenges to "rules" to be brought in the Courts of Appeals as well.

2. Whether the State Parties have direct and associational standing to challenge a rule that directly impedes the ability of the parties and their members to make, receive, solicit, and coordinate political contributions.

3. Whether the SEC has the authority to impose restrictions on the First Amendment rights of investment advisers to make political contributions that are within the $2,600 limit Congress has imposed and that the SEC itself has conceded will rarely, if ever, involve fraudulent, deceptive, or manipulative business practices.

4. Whether the Political Contribution Rule violates the First Amendment.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. 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. 2 U.S.C. §437c(b)(1) (52 U.S.C. §30106(b)(1));[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 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* 2 U.S.C. §441a(a) (52 U.S.C. §30116(a)). Likewise, Congress has reserved for itself the decision whether, when, and how

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[1] As of September 1, 2014, FECA provisions formerly codified in Title 2 of the United States Code have been transferred to Title 52. For convenience, the State Parties provide citations to both the former and current locations throughout this brief.

those statutorily prescribed limits may be altered. *Id.* §441a(c) (52 U.S.C. §30116(c)). And when Congress has seen fit to make exceptions to the standard limits, it has done so itself. *See, e.g.*, *id.* §§ 441b, 441c, 441e (52 U.S.C. §§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.* §441c (52 U.S.C. §30119). But Congress has never enacted a comparable restriction for investment advisers who provide their services to public pension funds or other governmental clients. Instead, investment advisers remain subject to the standard statutory contribution limit, which currently is fixed at $2,600 per candidate per election. *See Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530-02, 8532 (Feb. 6, 2013).

2. Under the Investment Advisers Act of 1940 (the "Advisers Act"), 15 U.S.C. §80b *et seq*., "[i]t shall be unlawful for any investment adviser, … directly or indirectly … to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." *Id.* §80b-6(4). The Advisers Act authorizes the Securities and Exchange Commission ("Commission" or "SEC") to "define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative." *Id.*

In 1999, purporting to act under §80b-6(4), the Commission proposed a rule that would have prohibited investment advisers 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 Investment Advisers*, 64 Fed. Reg. 43,556 (Aug. 10, 1999) (the "1999 Proposal"). In other words, the 1999 Proposal would have forced investment advisers 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. Letter from Darryl R. Wold, Vice Chairman, FEC, *et al*., to Jonathan G. Katz, Secretary, SEC, 1999 WL 33949875, at *1–2 (Nov. 1, 1999). The SEC did not issue a final rule based on the 1999 Proposal.

3. In 2009—several years after Congress enacted BCRA and, in doing so, declined to adopt the SEC's proposal or provide the SEC with any authority to do so itself—the SEC proposed for comment another rule seeking to deter investment advisers from making certain political contributions that otherwise would be lawful under FECA. *See Political Contributions by Certain Investment Advisers*, 74 Fed. Reg. 39,840 (Aug. 7, 2009) [JA-1]. On July 14, 2010, the SEC approved a final rule

"prohibit[ing] an investment adviser from providing advisory services for compensation to a government client for two years after the adviser or certain of its executives or employees make a contribution to certain elected officials or candidates." *Political Contributions by Certain Investment Advisers*, 75 Fed. Reg. 41,018, 41,018 (July 14, 2010) [JA-33]. The portion of this Rule relevant to this dispute is codified at 17 C.F.R. §275.206(4)-5.

The Political Contribution Rule is triggered when an investment adviser or any of its "covered associates" makes a political contribution to an "official of a government entity," *id.* §275.206(4)-5(a)(1), which includes "an incumbent, candidate, or successful candidate for elective office of a government entity if the office: (i) [i]s directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity; or (ii) [h]as authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity." *Id.* §275.206(4)-5(f)(6). "Government entity" means "any State or political subdivision of a State[.]" *Id.* §275.206(4)-5(f)(5).

The Rule's prohibitions apply to "any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act." *Id.* §275.206(4)-5(a)(1). These prohibitions also extend to "covered associates" of investment

advisers, which include "(i) [a]ny general partner, managing member or executive officer, or other individual with a similar status or function; (ii) [a]ny employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee; and (iii) [a]ny political action committee controlled by the investment adviser or by any [of its covered associates]." *Id.* §275.206(4)-5(f)(2).

When the Rule is triggered, an investment adviser is barred for two years from receiving compensation for advisory services provided to the particular government entity whose public official received the political contribution. *Id.* §275.206(4)-5(a)(1). The Commission also cautioned that the two-year ban may be triggered by contributions to a political party when the party solicits "funds for the purpose of supporting a limited number of government officials[.]" 75 Fed. Reg. at 41,031 n.163 [JA-46]. In such instances, contributions "might well result in the same prohibition … as would a contribution made directly to the official." *Id.*

In addition to prohibiting direct contributions, the Political Contribution Rule makes it "unlawful" for an investment adviser or covered associate "[t]o coordinate, or to solicit any person or political action committee to make, any (A) [c]ontribution to an official of a government entity to which the investment adviser is providing or seeking to provide investment advisory services; or (B) [p]ayment to a political party of a State or locality where the investment adviser is providing or seeking to provide

investment advisory services to a government entity." 17 C.F.R. §275.206(4)-5(a)(2)(ii). These restrictions are purportedly "intended to prevent advisers from circumventing the rule's prohibition on direct contributions to certain elected officials such as by 'bundling' a large number of small employee contributions to influence an election, or making contributions (or payments) indirectly through a State or local political party." 75 Fed. Reg. at 41,043 [JA-58]. A political action committee that is "controlled" by an investment adviser is completely banned from making a contribution to a covered public official of a government entity who is also a candidate for elected office. 17 C.F.R. §275.206(4)-5(f)(2)(iii).

Finally, the Rule's broad catch-all provision makes it unlawful "for any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b-3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates to do anything indirectly which, if done directly, would result in a violation of this section." *Id.* §275.206(4)-5(d).

There are only limited exceptions to the Political Contribution Rule's two-year ban. First, the Commission provided what it characterizes as a "*de minimis* exception" under which an individual may contribute "to officials for whom the covered associate was entitled to vote at the time of the contributions and which in the aggregate do not exceed $350 to any one official, per election, or to officials for

whom the covered associate was not entitled to vote at the time of the contributions and which in the aggregate do not exceed $150 to any one official, per election." *Id.* §275.206(4)-5(b)(1). This exception is limited to "natural person[s]," and thus is unavailable to a political action committee controlled by an investment adviser. *Id.* Second, the "new covered associates" exemption provides that the Rule "shall not apply to an investment adviser as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the investment adviser unless such person, after becoming a covered associate, solicits clients on behalf of the investment adviser." *Id.* §275.206(4)-5(b)(2). And finally, the SEC may exempt an investment adviser who has made a political contribution in violation of the SEC's rule from the two-year ban. *See id.* §275.206(4)-5(e).

4. According to the SEC, the Political Contribution Rule is designed to prevent so-called "pay-to-play" practices in the management of public pension plans, where investment advisers allegedly "seek to influence government officials' awards of advisory contracts" and elected officials "allow political contributions to play a role in the management of [public pension plan] assets." 75 Fed. Reg. at 41,019 [JA-34]. In promulgating the Rule, however, the Commission identified almost no instances in which this has actually happened. Instead, the bulk of the "pay-to-play" activities it invoked involved direct gifts or payments to government officials, not political contributions, and these bribes and kickbacks typically were in amounts far larger

than the $2,600 limit on political contributions. *See* 75 Fed. Reg. at 41,019 nn.16–26 [JA-34–35]. The SEC therefore acknowledged that the Rule prohibits conduct that is rarely (if ever) actually fraudulent or manipulative, but nonetheless claimed that the Rule is a permissible exercise of its authority "to adopt rules 'reasonably designed to prevent, [*sic*] such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.'" *Id.* at 41,022 (quoting 15 U.S.C. §80b-6(4)) [JA-37].

B. The Proceedings Below.

1. On August 7, 2014, the New York Republican State Committee and the Tennessee Republican Party (collectively, the "State Parties") filed a complaint against the SEC in the District Court challenging the Political Contribution Rule. JA-94–120. The State Parties sought an order declaring that the Rule, as applied to federal campaign contributions, exceeds the SEC's statutory authority, violates the Administrative Procedure Act, and violates the First Amendment. JA-118. The State Parties also sought an order enjoining the SEC from enforcing the Rule's requirements with respect to federal campaign contributions. *Id.*

On August 8, 2014, the State Parties asked the District Court to preliminarily enjoin the Political Contribution Rule as applied to federal campaign contributions in light of the ongoing and irreparable harm the Rule was causing them and their membership. Pls.' Mot. for Prelim. Inj. (Aug. 8, 2014) (Dkt. 7). Through supporting

declarations, the State Parties demonstrated how the Rule is causing irreparable injury to the parties themselves, on account of its prohibition on coordinating or soliciting contributions to state political parties; to their investment adviser or covered associate members who would like to make contributions that are permitted by FECA but prohibited by the Rule; and to their covered official candidates who would like to receive such contributions.

Specifically the State Parties submitted declarations from their executive directors, each of who attested to having encountered potential contributors who either declined to make a contribution or limited their contribution to the State Parties or their candidates because of the Rule, and also explained how members who, as state officeholders running for federal office, had their fundraising ability curtailed by the Political Contribution Rule. JA-122, 125. The State Parties also submitted a declaration from Tennessee State Senator Jim Tracy who, as a covered public official, explained how the Rule hindered his fundraising efforts in his campaign for the U.S. House of Representatives. JA-131–33. Specifically, this declaration identified one covered associate who informed Senator Tracy that the Political Contribution Rule restricted his ability to contribute more than $150 and another covered associate to whom Senator Tracy was required to return a campaign contribution because of the Rule. JA-132–33.

2. The SEC moved to dismiss the complaint for lack of subject matter jurisdiction, contending that 15 U.S.C. §80b-13 deprives District Courts of original jurisdiction over challenges to SEC rules. Def.'s Mem. in Supp. of Mot. to Dismiss 1 (Aug. 13, 2014) (Dkt. 10-1). Although §80b-13 provides that "[a]ny person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such *order*" in the Courts of Appeals, 15 U.S.C. §80b-13(a) (emphasis added), the SEC contended that this Court's decision in *Investment Company Institute v. Board of Governors of the Federal Reserve System*, 551 F.2d 1270 (D.C. Cir. 1977), compels the conclusion that "order" must be interpreted to include "rules." The SEC also challenged the State Parties' standing, contending that the Political Contribution Rule "does not govern [the State Parties]" and that they may not "advance the claims of unnamed party 'members' who are purportedly 'unable to make' political contributions because of the rule." Def.'s Opp. to Mot. for Prelim. Inj. 12–13 (Aug. 29, 2014) (Dkt. 18).

After hearing oral argument, the District Court dismissed the State Parties' complaint for lack of subject matter jurisdiction, concluding that §80b-13 vests Courts of Appeals with exclusive jurisdiction over challenges to rules promulgated under the Advisers Act. JA-146. The District Court acknowledged that its holding created "multiple difficulties"—including "grave constitutional concerns"—but it reluctantly deemed itself bound by *Investment Company* to reach that troubling

conclusion. JA-146, 149. Although the court did not reach the standing issue, it suggested that "whether the plaintiffs have standing to bring this case remains in doubt." JA-143.

3. In addition to filing a notice of appeal of the District Court's dismissal order, the State Parties also filed a petition for review asking this Court to resolve their challenge to the Political Contribution Rule in the first instance. This Court has consolidated these two matters.

SUMMARY OF ARGUMENT

I. The District Court erred in concluding that it lacked jurisdiction to consider the State Parties' challenge to the Political Contribution Rule. The Advisers Act grants Courts of Appeals original jurisdiction only over challenges to SEC "orders." Absent some clear indication that Congress intended otherwise, that term must be given its ordinary APA meaning. And the APA could not be clearer that a "rule" is not an "order." Indeed, the distinction between orders and rules is the very foundation on which much of the APA is built. To the extent the District Court believed that this Court's decision in *Investment Company* compels a different result, it was mistaken. As more recent decisions confirm, *Investment Company* does not establish a blanket rule regarding the interpretation of the term "order" in jurisdictional statutes. Instead, it represents only a limited exception to the general rule that, unless Congress directs otherwise, challenges to agency rules belong in the

District Courts in the first instance. Because Congress has not done so in the Advisers Act, this case should be remanded to the District Court to resolve the State Parties' claims on the merits.

If this Court disagrees, it should exercise jurisdiction over the State Parties' challenge itself. Although the Advisers Act requires challenges to "orders" to be brought within 60 days, that limitation cannot constitutionally be applied to foreclose the State Parties' claims, as they lacked fair notice that the Political Contribution Rule would be considered an "order." Indeed, a 60-day restriction on bringing *ultra vires* and constitutional challenges to rules would be constitutionally suspect in many circumstances, which is all the more reason to require some clear evidence before concluding that Congress actually intended such a harsh result.

But in all events, whether this Court remands or exercises jurisdiction itself, it should confirm that the State Parties' standing to challenge the Political Contribution Rule is clear. Indeed, their standing to challenge the Rule both in their own right and on behalf of their members is self-evident. The Rule not only prohibits affected individuals from soliciting or coordinating contributions to the State Parties themselves, but also precludes their investment adviser members from making contributions and their covered official members from receiving them. The State Parties have submitted affidavits from their executive directors and one of their members detailing the many ways in which these restrictions have injured and

continue to injure the parties, their candidates, and their members. This Court's precedents require nothing more—particularly where First Amendment rights are at stake.

II. The Political Contribution Rule is both unlawful and unconstitutional. The Rule forces investment advisers to choose between limiting their political contributions to amounts that the SEC itself characterizes as "*de minimis*" or foregoing the opportunity to provide advisory services to public pension funds. It similarly requires investment advisers to limit their association with state political parties. The SEC attempts 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 $2,600, not $350 or $150. Congress has not given the SEC—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 also fails for the independent reason that it vastly exceeds the SEC's statutory authority. Congress has given the SEC authority to prohibit fraudulent, deceptive, or manipulative practices in the investment adviser services market, and to make rules that are reasonably designed to deter such practices. The SEC does not and cannot offer any evidence that fully disclosed political contributions of $2,600 or less or coordinated contributions to state political parties are likely to result in fraudulent, deceptive, or manipulative practices in most, many, or even a few instances. Indeed, the SEC ultimately concedes that they are not. It nonetheless attempts 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 conduct that a rule restricts is protected by the Constitution. Because that condition is manifestly not satisfied here, the SEC simply does not have the authority to prevent investment advisers from exercising their constitutional right to make modest contributions within the limits that Congress has imposed.

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 SEC's 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 investment advisers make fully disclosed political contributions of $2,600 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 SEC has any legitimate justification for its Rule, the Rule is far too overbroad to survive the kind of scrutiny that the Constitution demands.

STANDARD OF REVIEW

This Court "review[s] the district court's order granting the motion to dismiss *de novo*." *Carter v. Wash. Metro. Area Transit Auth.*, 503 F.3d 143, 145 (D.C. Cir. 2007). As to the State Parties' petition for review, a 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).

ARGUMENT

I. There Is No Jurisdictional Or Standing Bar To The State Parties' Challenge To The Political Contribution Rule.

A. The District Court Had Jurisdiction Over the State Parties' Challenge.

1. "'In this circuit, the normal default rule is that persons seeking review of agency action go first to district court rather than to a court of appeals.'" *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1332 (D.C. Cir. 2013) (quoting *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 270 (D.C. Cir. 2012)). "Initial review occurs at the appellate level only when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action." *Watts v. SEC*, 482 F.3d 501, 505 (D.C. Cir. 2007); *see also NetCoalition v. SEC*, 715 F.3d 342, 347 (D.C. Cir. 2013) ("[U]nless the Congress has … expressly supplied the courts of appeals with jurisdiction to review agency action directly, an APA challenge falls within the general federal question jurisdiction of the district court and must be brought there ab initio."). Thus, "absent a grant of original appellate jurisdiction …, a party must first proceed by filing suit in district court pursuant to 28 U.S.C. §1331 and the Administrative Procedure Act, 5 U.S.C. §§551 et seq." *Am. Petroleum Inst.*, 714 F.3d at 1333.

The Advisers Act is devoid of any "grant of original appellate jurisdiction" for challenges to Commission rules. Instead, the Act grants original appellate jurisdiction only over a challenge to "an *order* issued by the Commission under this

subchapter." 15 U.S.C. §80b-13(a) (emphasis added). Although the Advisers Act does not define "order," the APA does, and the APA could not be clearer that "the term 'order' is essentially and necessarily defined to exclude rules." *Ala. Power Co. v. FERC*, 160 F.3d 7, 11 n.5 (D.C. Cir. 1988); *see* 5 U.S.C. §551(6) (defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter *other than rule making* but including licensing" (emphasis added)); *compare id.* §551(5) (defining "rule making" as the "agency process for formulating, amending, or repealing a rule"), *with id.* §551(7) (defining "adjudication" as the "agency process for the formulation of an order"). Indeed, there are few things better settled in administrative law than the distinction between rules and orders, which is "the entire dichotomy upon which the most significant portions of the APA are based." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring).

As this Court has made clear repeatedly, when "an agency's direct-review statute d[oes] not define 'order[,]'" courts must "look to the Administrative Procedure Act" and the bright line between orders and rules that it draws. *Watts*, 482 F.3d at 505; *see also, e.g.*, *Nat'l Mining Ass'n v. Dep't. of Labor*, 292 F.3d 849, 856 (D.C. Cir. 2002). That is particularly so with a statutory scheme that, like the Advisers Act, draws the same clear distinction as the APA, thus confirming that "Congress was using order in the same sense it used the term in the APA." *Id.*; *see,*

e.g., 15 U.S.C. §80b-11(a) (authorizing SEC to issue "rules and regulations," on the one hand, and "orders" on the other); *compare id.* §80b-11(b) (addressing effective dates of "rules and regulations"), *with id.* §80b-11(c) ("Orders of the Commission under this subchapter shall be issued only after appropriate notice and opportunity for hearing."). Section 80b-13(a) of the Advisers Act therefore confines this Court's original jurisdiction to orders; everything else—including this challenge to a rule that the Commission itself acknowledged was promulgated pursuant to its authority to issue "rules and regulations," not orders, 75 Fed. Reg. at 41,068 [JA-83]—belongs in the District Courts in the first instance.

2. The District Court based its contrary conclusion primarily on *Investment Company*, a decades-old decision in which this Court interpreted a statutory scheme that provided for original appellate jurisdiction of "orders" as granting original appellate jurisdiction over "any agency action capable of review on the basis of the administrative record." 551 F.2d at 1278. But *Investment Company* does not establish a blanket rule that *every* original appellate jurisdiction provision that uses the term "order" necessarily sweeps so broadly. That much is clear from this Court's decisions in *National Mining* and *American Petroleum*, both of which interpreted statutory schemes providing original appellate jurisdiction over "orders" as leaving the District Courts with jurisdiction over challenges to rules.

National Mining involved a provision of the Black Lung Benefits Act stating that any person "adversely affected or aggrieved by a final order of the Board may obtain review of that order in the United States court of appeals for the circuit in which the injury occurred[.]" 33 U.S.C. §921(c). In rejecting the government's argument that this provision deprived the District Court of jurisdiction over a challenge to an agency rule, the Court explained that "[t]he obvious difficulty with the government's position is that this provision putting exclusive review jurisdiction in the Court of Appeals speaks of orders, but Congress in passing the APA drew a distinction between orders, which typically follow adjudications, and regulations." *National Mining*, 292 F.3d at 856. That same distinction was reflected, moreover, in the Black Lung Benefits Act itself, which "used the term 'order' to refer to an adjudicatory compensation order, not the promulgation of a regulation." *Id.* That being the case, the Court saw no reason to give "order" anything other than its settled APA meaning.

American Petroleum likewise confirms that a rule should not be considered an "order" when the relevant statutory scheme does not define "order," but rather just incorporates the same distinction between orders and rules as the APA. There, the petitioners advanced much the same argument that the SEC advances here, insisting that the Court "must interpret the word 'order' … to mean 'orders' *and* 'rules'" because challenges to rules "can be resolved 'on the basis of the

administrative record.'" *Am. Petroleum Inst.*, 714 F.3d at 1333 (quoting *Investment Co.*, 551 F.2d at 1278). In rejecting that argument, the Court emphasized that *Investment Company* "involved a very different jurisdictional statute" and thus cannot be applied reflexively to every such statute that speaks of "orders." *Id.* The Court also specifically rejected the notion that Congress should be assumed to have legislated with *Investment Company* in mind when, as with the Advisers Act, the relevant jurisdictional provision pre-dates *Investment Company*, and no court has ever extended *Investment Company* to reach it. *See id.* at 1335–36.

3. As these decisions make clear, *Investment Company* does not control the interpretation of very different statutory schemes in which Congress has given zero indication that it intended to send challenges to rules straight to the Courts of Appeals. And there is certainly no reason to extend *Investment Company* to contexts in which it is not strictly controlling, as the result it reached is difficult to defend even as to the statutory scheme it considered. Not only did *Investment Company* fail to identify anything in the Bank Holding Company Act evincing Congress' intent that the term "order" encompass "rules," but the Court also openly acknowledged that "the legislative history … [wa]s completely silent with respect to the forum in which Board regulations would be reviewable." 551 F.2d at 1278. Yet rather than accept those clear signals that Congress intended the APA's settled distinction and the default rule of original District Court jurisdiction to govern, the Court made its

own judgment that "the purposes underlying section 9 will be best served if 'order' is interpreted to mean any agency action capable of review on the basis of the administrative record." *Id.*

That interpretive approach is flatly inconsistent with the bedrock rule that courts must "presume that the legislature says in a statute what it means and means in a statute what it says there." *Janko v. Gates*, 741 F.3d 136, 139–40 (D.C. Cir. 2014) (quotation marks omitted); *see also id.* ("our inquiry begins with the statutory text, and ends there as well if the text is unambiguous") (quotation marks omitted). Moreover, in statutes that, like this one, elsewhere use the same distinction between rules and orders as the APA, *Investment Company*'s approach is at odds with the "usual presumption that the same words repeated in different parts of the same statute have the same meaning." *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 584 (2007). Worse still, as the District Court noted in reluctantly deeming itself bound to apply that atextual approach, *Investment Company* violated these core interpretive canons in service of reaching a result that blatantly conflicts with black-letter administrative law. JA-147–48.

It is little surprise, then, that *Investment Company* is in serious tension—to say the least—with more recent cases such as *National Mining*, *American Petroleum*, and *Watts*, each of which directs courts to apply the settled definitions of the APA to jurisdictional provisions absent some strong sign (*i.e.*, a contrary definition) that

Congress intended otherwise. Indeed, the District Court readily acknowledged that those decisions "would seem to *require* [it] to exercise jurisdiction over the present case," where there is no indication whatsoever that Congress intended any other result. JA-150 (emphasis added). And so they do. In short, *Investment Company* is the exception, not the rule, and the rule governs here. Because the Advisers Act is "silent on how review of regulations is to be accomplished, … persons seeking such review [are] directed by the APA to go to district court." *Nat'l Mining Ass'n*, 292 F.3d at 856.

B. This Court, in the Alternative, Has Jurisdiction to Hear the State Parties' Challenge to the Political Contribution Rule.

Because §80b-13 governs challenges to orders, not rules, this case should be remanded to the District Court to consider the State Parties' challenge in the first instance. But if this Court disagrees, it should exercise jurisdiction itself. If the Political Contribution Rule really is an "order" within the meaning of §80b-13, then challenges to the Rule fall squarely within this Court's original jurisdiction. And although §80b-13 requires such challenges to be brought within 60 days, under the circumstances, that restriction should not foreclose the State Parties' challenge.

It is "[a] fundamental principle in our legal system … that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). That is just as true of statutes of limitations requirements, which "proceed on the idea that the party

has full opportunity afforded him to try his right in the courts." *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902); *see also Littlewolf v. Lujan*, 877 F.2d 1058, 1062–63 (D.C. Cir. 1989). While fair notice concerns arise most frequently when statutes are insufficiently specific about what they prohibit or require, "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). Indeed, the due process "violation is that much greater" when "a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction," as a precise statute "lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." *Id.*

That is exactly the kind of due process violation that would result should this Court determine now, long after the 60-day limitations period has passed, that §80b-13 governs this challenge to a rule even though its plain language speaks only of orders, which both the APA and the Advisers Act sharply distinguish from rules. Not a single court had considered—let alone adopted—the SEC's strained reading of §80b-13 before this lawsuit was commenced; nor was there any suggestion in the 53 pages that the Political Contribution Rule spanned in the *Federal Register* that

challenges to the Rule were subject to §80b-13. *See* 75 Fed. Reg. at 41,018 [JA-33] (stating explicitly that the SEC was "adopting a new rule"). It is therefore implausible to charge affected individuals and entities with fair notice that they had only 60 days to challenge the Rule, rather than the six years for bringing challenges under the APA. *See* 28 U.S.C. §2401(a).

That fair notice concern is especially acute in this case, where the State Parties are pressing claims that the Rule is both *ultra vires* and unconstitutional. There is a "strong presumption that Congress intends judicial review of administrative action[,]" *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), and that already-strong presumption "is particularly strong where an agency is alleged to have acted beyond its authority." *Dart v. United States*, 848 F.2d 217, 223 (D.C. Cir. 1988); *see also, e.g.*, *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172 (D.C. Cir. 2003). And, of course, any statute that operated to "preclude[] judicial review for constitutional claims would clearly raise serious due process concerns," *Am. Coal. for Competitive Trade v. Clinton*, 128 F.3d 761, 765 (D.C. Cir. 1997)—particularly where, as here, First Amendment rights are at stake, and "subsequent Supreme Court jurisprudence calls into question the constitutionality of the challenged rule." JA-148–49; *see also Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) ("Our reluctance to require parties to subject themselves to enforcement proceedings to challenge agency positions is of course at

its peak where, as here, First Amendment rights are implicated and arguably chilled by a 'credible threat of prosecution.'") (quoting *Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995)).

Indeed, as the District Court acknowledged below, interpreting §80b-13 "to strip jurisdiction from *any court* to hear pre-enforcement constitutional challenges to SEC rules filed after sixty days" would "raise[] grave constitutional concerns" even if parties *did* have fair notice. JA-148–49. As this Court has noted, "there may well be limits as to how severely Congress can restrict the route to judicial review of constitutional challenges when it keeps that route partially open." *Am. Coal. for Competitive Trade*, 128 F.3d at 765–66; *see also Wilson*, 185 U.S. at 63 (noting that a limitations period can be "manifestly so insufficient that the statute becomes a denial of justice"). Allowing affected parties a mere 60 days to challenge a rule as vague yet potentially sweeping as the Political Contribution Rule exceeds those limits, as that is simply not "long enough to provide a reasonable opportunity for those with an interest" to determine whether and to what extent they are injured by the Rule and "bring suit" if they are. *Pickett v. Brown*, 462 U.S. 1, 9 (1983).

Of course, those concerns are not atypical where preenforcement challenges are concerned. But that is all the more reason to demand some clear showing from Congress before determining that a very tight limitations period applies to challenges to rules, not just orders. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. &*

Constr. Trade Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). After all, it is one thing to require a party to an adjudication to challenge the result of that proceeding within 60 days. *Cf.* Fed. R. App. P. 4 (providing 30 days to file notice of appeal in civil cases and 14 in criminal cases). It is another thing entirely to expect every single person or entity potentially affected by an agency rule to figure out within 60 days whether bringing a preenforcement suit makes sense. Perhaps there are some statutes in which Congress clearly intended such a harsh result, but §80b-13 is certainly not one of them. But in all events, under the circumstances, the State Parties' *ultra vires* and constitutional claims must be allowed to proceed in some forum.

C. The State Parties Have Standing to Challenge the Political Contribution Rule.

Whether this Court remands or retains jurisdiction, it should confirm that there can be no serious dispute that 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.

At the outset, the Political Contribution Rule injures the State Parties directly by making it unlawful for investment advisers or covered persons "[t]o coordinate, or to solicit any person or political action committee to make, any [p]ayment to a political party of a State or locality where the investment adviser is providing or seeking to provide investment advisory services to a government entity." 17 C.F.R. §275.206(4)-5(a)(2)(ii)(B). And the Commission has further warned that if a "political party is soliciting funds for the purpose of supporting a limited number of government officials, then, depending on the facts and circumstances, contributions to the … political party might well result in the same prohibition … as would a contribution made directly to the official." 75 Fed. Reg. at 41,031 n.163 [JA-46].

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 (1997); *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987) ("drain on [an] organization's resources" is "concrete and demonstrable" injury) (quotation marks omitted); *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (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. Dem. 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 on which to base standing") (quotation marks omitted).

That these injuries are attributable to "the independent actions" of their would-be contributors, rather than the States Parties themselves, makes no difference. JA-142. Indeed, if anything, that just 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. This Court'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"). And the Court certainly never suggested that an organization's ability to vindicate those interests turns on how many affidavits from would-be contributors it produces—presumably because the Court found the proposition that an organization's members would actually like to contribute to the organization self-evident.

The State Parties' standing is equally self-evident here. There is no dispute that each State Party counts among its members numerous investment advisers 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, the executive director of each party attested below that "donors and potential donors" have "declined to contribute or limited their contributions" to the party or its members "because of the Political Contribution Rule." JA-122–23, 125–26; *see also* JA-104. This "has significantly hindered" the associational and fundraising activities not only of the parties themselves, but also of their investment adviser members who would like to make, solicit, or coordinate contributions and their covered official members "who are seeking or are considering seeking federal office." JA-122–23, 125–26.

For instance, Senator Tracy, a covered official and member of the Tennessee Republican Party, identified specific instances in which individuals would have contributed more to his campaign but for the Political Contribution Rule. JA-132–33. He ended up losing his election to a candidate who was not a covered official "by a scant 38 votes out of 77,504 votes cast." JA-143. Likewise, the Political Contribution Rule restricted the ability of Lee Zeldin, a covered official and member of the New York Republican Party, to obtain contributions from would-be donors who were investment advisers or covered associates. *See* JA-105, 122, 127.

As these affidavits reflect, 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).[2]

The SEC has produced not a shred of evidence calling into question the veracity of the State Parties' affidavits. Nor has it produced anything supporting the

[2] That some of the injuries identified by the State Parties occurred in the past does not undermine their standing. As the Supreme Court has made clear, election-related injuries are prime candidates for the "capable of repetition, yet evading review" exception to mootness. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). Nor does it matter that the SEC now claims that its rule should be interpreted to render every individual that the State Parties have identified outside its scope. *See* JA-143. Senator Tracy and his potential contributors quite reasonably believed that they were precluded by the Rule from making or accepting certain contributions. *See* JA-132–33. Moreover, even accepting the SEC's convenient litigating position, that its rule is so vague as to deter First Amendment activity even where it purportedly is not intended to do so only makes the injury that it causes the State Parties and their members all the more obvious.

highly dubious proposition that the Political Contribution Rule has not adversely impacted a single Republican in all of New York or Tennessee. That being so, there is no need for the State Parties to go through the artificial exercise of forcing additional members to reaffirm what their executive directors and candidates have already said—particularly at this motion to dismiss stage, when the Court "must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor, and presum[ing] that general allegations embrace those specific facts that are necessary to support the claim." *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011) (citations and quotation marks omitted).

Indeed, even at the merits stage, this Court has asked for a "heightened showing" of associational standing only when the injury is attributable to the actions of someone *other than* the association's own members. *See, e.g.*, *Renal Physician Ass'n v. HHS*, 489 F.3d 1267, 1273 (D.C. Cir. 2007) (requiring "heightened showing" where "the alleged impact of the [challenged provision] *on* [*the association's*] *members* is indirect, the result of actions of third parties" (emphasis added)). By contrast, where, as here, "the record present[s] substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress," associational

standing is clear. *Id.* at 1275 (quotation marks omitted); *see also Ams. for Safe Access v. DEA*, 706 F.3d 438, 448–49 (D.C. Cir. 2013).[3]

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. JA-142 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). Instead, the Court need accept nothing more than the uncontroverted evidence that the Political Contribution Rule has in fact had its intended effect on at least one Republican investment adviser or covered official in Tennessee or New York—the very State that the SEC repeatedly highlighted as a prime target of its Rule. *See, e.g.*, 75 Fed. Reg. at 41,019–20, 41,037–38 [JA-34–35, 52–53]. If the SEC is unwilling to concede even that much, then it is difficult to fathom what possible business it has enacting such a sweeping prophylactic measure in the first place.

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[3] The SEC does not appear to dispute that the State Parties satisfy the germaneness prong of the associational standing inquiry—and with good reason, as supporting candidates and ensuring that members may do the same are core purposes of a political party. *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 450–52 (2001). There is also no need for individual members to participate in this case, as the State Parties are seeking only declaratory and injunctive relief. *See United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553–54 (1996).

II. The Political Contribution Rule Is Unlawful And Unconstitutional.

The Political Contribution Rule is a direct effort to deter investment advisers from engaging in conduct that is protected by the First Amendment and permitted by federal statute. In effect, the Rule forces investment advisers to choose between making otherwise-lawful campaign contributions or providing advisory services to public funds. That dooms the Political Contribution Rule three times over. The Rule fails, first, because the SEC does not have any authority to alter or supplement Congress' comprehensive contribution limits regime; second, because the Rule vastly exceeds the SEC's authority to prevent fraudulent, deceptive, or manipulative practices in the investment adviser industry; and third, because the Rule restricts constitutionally protected conduct in a manner that is not sufficiently tailored to serve a sufficiently important government interest.

A. Congress' Comprehensive Regime of Political Contribution Limits Forecloses the SEC's Effort 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*, 322 U.S. 102, 107 (1944) (quotation marks omitted); *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.") (quotation marks omitted). 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 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* 2 U.S.C. §441a(a) (52 U.S.C. §30116(a)). Although Congress has given the FEC broad and exclusive jurisdiction to enforce the statutorily prescribed contribution limits, *see id.* §437g (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.* §441a(c) (52 U.S.C. §30116(c)).

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.* §441b (52 U.S.C. §30118).[4] Congress also has prohibited foreign nationals from making any

[4] 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) ("the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.") *Republican Party of N.M. v. King*,

contributions in connection with any election. *Id.* §441e (52 U.S.C. §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.* §441c (52 U.S.C. §30119). Congress has not imposed any comparable restriction on investment advisers who are providing or seeking to provide their services to public pension funds.

2. All of that would make the 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* 2 U.S.C. §437c(b)(1) (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 investment advisers to choose between receiving compensation for their services to public pension funds or making political contributions at the amounts permitted by FECA,

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741 F.3d 1089, 1095–96 (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").

the rule has the same practical effect as the restriction that Congress chose to impose only on government contractors. *See* 2 U.S.C. §441c (52 U.S.C. §30119).

That the Political Contribution Rule was promulgated by the *SEC* makes this an even easier case, as Congress has not granted the SEC *any* authority to regulate campaign contributions or other campaign finance-related activities. Instead, the SEC claims this power only under its general grant of authority to promulgate rules designed to prevent investment advisers from engaging in "fraudulent, deceptive, or manipulative" business practices. 15 U.S.C. §80b-6(4). The SEC's exceedingly expansive view of its 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 SEC—an agency with no expertise whatsoever with the complex and delicate task of regulating federal elections—to be making decisions about whether or how much people may contribute to candidates or political parties under the guise of regulating the business practices of investment advisers.

That much is clear from this Court'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 representation." 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 (quotation marks omitted). 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 election law." *Common Cause v. Schmitt*, 512 F. Supp. 489, 502 (D.D.C. 1980); *cf. Hunter v. FERC*, 711 F.3d 155, 156 (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 SEC—or anyone else, for that matter—any such explicit authority to impose additional restrictions on the constitutional rights of investment advisers to make campaign contributions. That Congress has not done so is particularly notable given that the SEC had already tried (unsuccessfully, and over the FEC's objection) to do so *before* Congress overhauled FECA through BCRA. Had Congress agreed with the SEC that the standard limits are insufficient to prevent corruption or the appearance of corruption where investment advisers 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* 2 U.S.C. §441c (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*, the SEC has no 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 SEC to do so through a general grant of authority to prevent investment advisers from engaging in "fraudulent, deceptive, or manipulative" business practices. 15 U.S.C. §80b-6(4).

B. The Political Contribution Rule Exceeds the 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 SEC's authority to "define, and prescribe means reasonably designed to prevent such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative." 15 U.S.C. §80b-6(4). The Commission itself has conceded that few (if any) contributions within the limits set by FECA are likely to result in some sort of fraudulent, deceptive, or manipulative conduct. And the Commission simply does not have the power to impose categorical prophylactic prohibitions on conduct that is exceedingly unlikely to implicate 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 investment advisers make *fully disclosed* political contributions in amounts *less than $2,600*. 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* 2 U.S.C. §§441a, 434, 437 (52 U.S.C. §§30116, 30104, 30105). In other words, the SEC's rule is necessarily premised on the notion that transparently contributing $2,600 or less to a covered official is likely to result in some sort of "fraudulent, deceptive, or manipulative" practice. 15 U.S.C. §80b-6(4).

Unsurprisingly, the Commission does not focus on instances where this has actually happened. In fact, most examples of "pay-to-play" activity on which it relied in promulgating the Political Contribution Rule did not even involve a political contribution—let alone an investment adviser's publicly disclosed contribution of $2,600 or less. *See* 75 Fed. Reg. at 41,019 nn.16–26 [JA-34–35]. Instead, these examples largely involved payments and gifts given directly to government officials. *Id.*

Setting aside the fact that such 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); N.Y. Penal Law §200.04 (prohibiting payments of bribes to state officials); Tenn. Code §39-16-102 (same), its purported prevalence does nothing to further the notion that otherwise-lawful political contributions are a frequent source of "fraudulent, deceptive, or manipulative" practices in the investment adviser community. 15 U.S.C. §80b-6(4). Indeed, the Commission cannot even identify with any specificity what "fraud" might result from the modest publicly disclosed

contributions its rule precludes. The Commission suggests that political contributions have the "potential" to "defraud prospective clients" because "[t]he most qualified adviser may not be selected," "[t]he pension fund may pay higher fees," or the advisers may "obtain greater ancillary benefits." 75 Fed. Reg. at 41,022 [JA-37]. Even accepting the dubious notion that those broad generalizations hold true with respect to publicly disclosed contributions of $2,600 or less, the SEC does not explain how any of these perceived ills actually "defrauds" a prospective client.

The SEC also vaguely alludes to its authority to enforce the "Federal fiduciary standard" that it insists §80b-6(4) creates. *See id.* But courts have recognized the possibility of violations of this implied fiduciary duty only when investment advisers have breached established standards or obligations, such as by misappropriating investment opportunities, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 13–14 (1979); acting as an investment adviser without registering, *id.*; purchasing inferior securities on behalf of a client, *id.*; receiving an undisclosed personal benefit from a transaction recommendation, *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 503 (3d Cir. 2013); or engaging in self-dealing, *Kusner v. First Pennsylvania Corp.*, 531 F.2d 1234, 1236 (3d Cir. 1976). The Commission does not and cannot explain how making a fully disclosed $2,600 political contribution to a covered official is likely to result in anything comparable to these clear ethical violations.

Instead, the SEC falls back on the notion that Congress has authorized it to "adopt prophylactic rules that may prohibit acts that are not themselves fraudulent." 75 Fed. Reg. at 41,022 [JA-37]. That may be so, but Congress has authorized the SEC to enact prophylactic rules only when they are "reasonably designed to prevent" conduct by investment advisers that is fraudulent, deceptive, or manipulative. 15 U.S.C. §80b-6(4). 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 Commission has identified absolutely no basis for assuming that most, many, or even more than a few publicly disclosed $2,600 contributions made by investment advisers to covered officials will involve the kind of *quid pro quo* arrangement that it claims it has authority to prevent. To the contrary, the SEC itself has admitted that "few if any contributions to candidates will involve *quid pro quo* arrangements." Def.'s Opp. to Mot. for Prelim. Inj. 35 (Aug. 29, 2014) (Dkt. 18). In other words, even the SEC seems to recognize that

"[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's 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. Although the SEC makes a half-hearted attempt to suggest otherwise, *see* 75 Fed. Reg. at 41,026 [JA-41], it ultimately acknowledges (with considerable understatement) "that the two-year time out provision may affect the propensity of investment advisers to make political contributions." *Id.* at 41,023 [JA-38]. The SEC likewise acknowledges that "the rule impacts contributions regardless of whether they are being made for the purposes of engaging in pay to play." *Id.* at 41,058 [JA-73].

Whatever deference the SEC may receive when interpreting its statutory mandate under the Advisers Act, 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 SEC's attempt to impose broad prophylactic restrictions *on top of* Congress' 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* Part II.C *infra*. Because the SEC exceeded its 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 $2,600 per candidate per election. If the SEC wants to impose even more stringent restrictions on the First Amendment rights of investment advisers, then it must prove that those restrictions are necessary to further a sufficiently important interest, and do so in a sufficient tailored manner. This, the SEC does 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 investment advisers to choose between exercising their constitutional right to support candidates through political contributions and continuing to work as advisers to public pensions. Under the Rule, the only way for an investment adviser to do the latter is to forgo the former. The SEC itself characterizes its exception to this rule as "*de minimis*"—and with good reason, as it allows investment advisers to contribute only $350 per election to candidates for whom they are entitled to vote, and only $150 to any other candidate. 17 C.F.R. §275.206(4)-5(b)(1). 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 SEC therefore bears 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 reiterated just last Term, 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 political contribution of $2,600 or less. But even setting aside that massive problem, the SEC faces an uphill battle at the outset, as the Supreme Court has never recognized "address[ing] practices that undermine the integrity of the market for advisory services," 75 Fed. Reg. at 41,053 [JA-68], as a legitimate basis for imposing restrictions on the right to make political contributions. Nor has the Court deemed the government's interest in promoting "fairness" or "leveling the playing field among advisers competing for State and local government business," *id.* at 41,019, 41,053 [JA-34, 68], sufficiently important to override an individual's First Amendment rights.

Implicitly recognizing as much, the SEC attempts to squeeze its Rule into the Supreme Court's case law by portraying it as "a focused effort to combat *quid pro quo* payments by investment advisers seeking governmental business." *Id.* at 41,023

n.68 [JA-38–39]. But that argument is doomed by its sheer implausibility where *disclosed* contributions *within* the limits established by FECA are concerned. As noted, the SEC has yet to identify a single instance in which an investment adviser has made a fully disclosed campaign contribution of $2,600 "in connection with an effort to control the exercise of an officeholder's official duties." *McCutcheon*, 134 S. Ct. at 1450. Indeed, the SEC does not even attempt 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); *see also, e.g.*, *McCutcheon*, 134 S. Ct. at 1456 ("speculation … cannot justify … substantial intrusion on First Amendment rights"). Instead, it simply accepts that "few if any contributions to candidates will involve quid pro quo arrangements." Def.'s Opp. to Mot. for Prelim. Inj. 35 (Aug. 29, 2014) (Dkt. 18).

In other words, the SEC 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* 75 Fed. Reg. at 41,022 [JA-37] (resting rule on authority "to adopt prophylactic rules that may prohibit acts that are not themselves fraudulent"). But Congress has already enacted a broad prophylactic restriction on campaign contributions, limiting them to $2,600 per candidate per election. That contribution limit "remain[s] the primary means of regulating campaign contributions[.]" *McCutcheon*, 134 S. Ct. at 1451. If the SEC

wants to subject investment advisers to even more stringent restrictions "layered on top" of that statutory limit, *id.* at 1458, then it 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 investment advisers. But the SEC has 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 SEC has insisted that this Court has already resolved the question in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), which rejected a First Amendment challenge to a similar rule governing 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. 187, 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 *Wis. Right to Life*, 551 U.S. at 479). *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 is 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 investment advisers from making $2,600 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 supra* pp. 33–36, 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. Yet *Blount* did not even acknowledge this significant First Amendment injury.

Finally, *Blount* 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 investment adviser is providing or seeking to provide investment advisory services to a government entity." 17 C.F.R. §275.206(4)-5(a)(2)(ii)(B). 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 SEC might advance that it cannot plausibly be understood to further those interests "in any meaningful way." *McCutcheon*, 134 S. Ct. at 1452.

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.[5] To the extent its reasoning supports the result the SEC urges, it is inconsistent with more recent Supreme Court decisions and therefore does not control here. Those decisions instead compel the result that

[5] *Blount* also did not involve any challenges to the SEC's 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*.

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.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand to the District Court to consider the State Parties' claims in the first instance. In the alternative, the Court should resolve those claims itself and hold the Political Contribution Rule unlawful and unconstitutional. In either case, the Court should confirm that the State Parties have standing to challenge the Rule.

Respectfully submitted,

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December 22, 2014

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(N) and the briefing order issued on November 12, 2014, because it contains 13,310 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font.

Dated: December 22, 2014

s/Brian J. Field
Brian J. Field

Addendum

TABLE OF CONTENTS

15 U.S.C. §80b-6..1a

15 U.S.C. §80b-13..2a

17 C.F.R. §275.206(4)-5..3a

15 U.S.C. § 80b–6
Prohibited transactions by investment advisers

It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction; or

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

15 U.S.C. § 80b–13
Court review of orders

(a) Petition; jurisdiction; findings of Commission; additional evidence; finality

Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal office or place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(b) Stay of Commission's order

The commencement of proceedings under subsection (a) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

17 C.F.R. § 275.206(4)-5
Political contributions by certain investment advisers.

(a) *Prohibitions*. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts, practices, or courses of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b–6(4)), it shall be unlawful:

(1) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b–3(b)(3)), or that is an exempt reporting adviser, as defined in section 275.204–4(a), to provide investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or any covered associate of the investment adviser (including a person who becomes a covered associate within two years after the contribution is made); and

(2) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b–3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates:

(i) To provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is:

(A) A regulated person; or

(B) An executive officer, general partner, managing member (or, in each case, a person with a similar status or function), or employee of the investment adviser; and

(ii) To coordinate, or to solicit any person or political action committee to make, any:

(A) Contribution to an official of a government entity to which the investment adviser is providing or seeking to provide investment advisory services; or

(B) Payment to a political party of a State or locality where the investment adviser is providing or seeking to provide investment advisory services to a government entity.

(b) *Exceptions*—

(1) *De minimis exception*. Paragraph (a)(1) of this section does not apply to contributions made by a covered associate, if a natural person, to officials for whom the covered associate was entitled to vote at the time of the contributions and which in the aggregate do not exceed $350 to any one official, per election, or to officials for whom the covered associate was not entitled to vote at the time of the contributions and which in the aggregate do not exceed $150 to any one official, per election.

(2) *Exception for certain new covered associates*. The prohibitions of paragraph (a)(1) of this section shall not apply to an investment adviser as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the investment adviser unless such person, after becoming a covered associate, solicits clients on behalf of the investment adviser.

(3) *Exception for certain returned contributions.*

(i) An investment adviser that is prohibited from providing investment advisory services for compensation pursuant to paragraph (a)(1) of this section as a result of a contribution made by a covered associate of the investment adviser is excepted from such prohibition, subject to paragraphs (b)(3)(ii) and (b)(3)(iii) of this section, upon satisfaction of the following requirements:

(A) The investment adviser must have discovered the contribution which resulted in the prohibition within four months of the date of such contribution;

(B) Such contribution must not have exceeded $350; and

(C) The contributor must obtain a return of the contribution within 60 calendar days of the date of discovery of such contribution by the investment adviser.

(ii) In any calendar year, an investment adviser that has reported on its annual updating amendment to Form ADV (17 CFR 279.1) that it has more than 50 employees is entitled to no more than three exceptions pursuant to paragraph (b)(3)(i) of this section, and an investment adviser that has reported on its annual updating amendment to Form ADV that it has 50 or fewer employees is entitled to no more than two exceptions pursuant to paragraph (b)(3)(i) of this section.

(iii) An investment adviser may not rely on the exception provided in paragraph (b)(3)(i) of this section more than once with respect to contributions by the same covered associate of the investment adviser regardless of the time period.

(c) *Prohibitions as applied to covered investment pools*. For purposes of this section, an investment adviser to a covered investment pool in which a government entity invests or is solicited to invest shall be treated as though that investment adviser were providing or seeking to provide investment advisory services directly to the government entity.

(d) *Further prohibition*. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts, practices, or courses of business within the meaning of section 206(4) of Advisers Act (15 U.S.C. 80b–6(4)), it shall be unlawful for any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b–3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates to do anything indirectly which, if done directly, would result in a violation of this section.

(e) *Exemptions*. The Commission, upon application, may conditionally or unconditionally exempt an investment adviser from the prohibition under paragraph (a)(1) of this section. In determining whether to grant an exemption, the Commission will consider, among other factors:

- (1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Advisers Act (15 U.S.C. 80b);
- (2) Whether the investment adviser:
  - (i) Before the contribution resulting in the prohibition was made, adopted and implemented policies and procedures reasonably designed to prevent violations of this section; and
  - (ii) Prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and
  - (iii) After learning of the contribution:
    - (A) Has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and
    - (B) Has taken such other remedial or preventive measures as may be appropriate under the circumstances;
- (3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the investment adviser, or was seeking such employment;
- (4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (e.g, Federal, State or local); and
(6) The contributor's apparent intent or motive in making the contribution which resulted in the prohibition, as evidenced by the facts and circumstances surrounding such contribution.

(f) *Definitions*. For purposes of this section:

(1) *Contribution* means any gift, subscription, loan, advance, or deposit of money or anything of value made for:
(i) The purpose of influencing any election for Federal, State or local office;
(ii) Payment of debt incurred in connection with any such election; or
(iii) Transition or inaugural expenses of the successful candidate for State or local office.
(2) *Covered associate* of an investment adviser means:
(i) Any general partner, managing member or executive officer, or other person with a similar status or function;
(ii) Any employee who solicits a government entity for the investment adviser and any person who supervises, directly or indirectly, such employee; and
(iii) Any political action committee controlled by the investment adviser or by any person described in paragraphs (f)(2)(i) and (f)(2)(ii) of this section.
(3) *Covered investment pool means*:
(i) An investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) that is an investment option of a plan or program of a government entity; or
(ii) Any company that would be an investment company under section 3(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–3(a)), but for the exclusion provided from that definition by either section 3(c)(1), section 3(c)(7) or section 3(c)(11) of that Act (15 U.S.C. 80a–3(c)(1), (c)(7) or (c)(11)).
(4) *Executive officer* of an investment adviser means:
(i) The president;
(ii) Any vice president in charge of a principal business unit, division or function (such as sales, administration or finance);
(iii) Any other officer of the investment adviser who performs a policymaking function; or
(iv) Any other person who performs similar policy-making functions for the investment adviser.

(5) *Government entity* means any State or political subdivision of a State, including:

(i) Any agency, authority, or instrumentality of the State or political subdivision;

(ii) A pool of assets sponsored or established by the State or political subdivision or any agency, authority or instrumentality thereof, including, but not limited to a ‘‘defined benefit plan’’ as defined in section 414(j) of the Internal Revenue Code (26 U.S.C. 414(j)), or a State general fund;

(iii) A plan or program of a government entity; and

(iv) Officers, agents, or employees of the State or political subdivision or any agency, authority or instrumentality thereof, acting in their official capacity.

(6) *Official* means any person (including any election committee for the person) who was, at the time of the contribution, an incumbent, candidate or successful candidate for elective office of a government entity, if the office:

(i) Is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity; or

(ii) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity.

(7) *Payment* means any gift, subscription, loan, advance, or deposit of money or anything of value.

(8) *Plan or program of a government entity* means any participant-directed investment program or plan sponsored or established by a State or political subdivision or any agency, authority or instrumentality thereof, including, but not limited to, a ‘‘qualified tuition plan’’ authorized by section 529 of the Internal Revenue Code (26 U.S.C. 529), a retirement plan authorized by section 403(b) or 457 of the Internal Revenue Code (26 U.S.C. 403(b) or 457), or any similar program or plan.

(9) *Regulated person* means:

(i) An investment adviser registered with the Commission that has not, and whose covered associates have not, within two years of soliciting a government entity:

(A) Made a contribution to an official of that government entity, other than as described in paragraph (b)(1) of this section; and

(B) Coordinated or solicited any person or political action committee to make any contribution or payment described in paragraphs (a)(2)(ii)(A) and (B) of this section;

(ii) A ''broker,'' as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)) or a ''dealer,'' as defined in section 3(a)(5) of that Act (15 U.S.C. 78c(a)(5)), that is registered with the Commission, and is a member of a national securities association registered under 15A of that Act (15 U.S.C. 78o–3), provided that:

(A) The rules of the association prohibit members from engaging in distribution or solicitation activities if certain political contributions have been made; and

(B) The Commission, by order, finds that such rules impose substantially equivalent or more stringent restrictions on broker-dealers than this section imposes on investment advisers and that such rules are consistent with the objectives of this section; and

(iii) A ''municipal advisor'' registered with the Commission under section 15B of the Exchange Act and subject to rules of the Municipal Securities Rulemaking Board, provided that:

(A) Such rules prohibit municipal advisors from engaging in distribution or solicitation activities if certain political contributions have been made; and

(B) The Commission, by order, finds that such rules impose substantially equivalent or more stringent restrictions on municipal advisors than this section imposes on investment advisers and that such rules are consistent with the objectives of this section.

(10) *Solicit* means:

(i) With respect to investment advisory services, to communicate, directly or indirectly, for the purpose of obtaining or retaining a client for, or referring a client to, an investment adviser; and

(ii) With respect to a contribution or payment, to communicate, directly or indirectly, for the purpose of obtaining or arranging a contribution or payment.

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2014, I electronically filed the foregoing Opening Brief for Petitioners-Appellants with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

s/H. Christopher Bartolomucci
H. Christopher Bartolomucci

<u>EXHIBIT B</u>

ORAL ARGUMENT SCHEDULED FOR MARCH 23, 2015

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEW YORK REPUBLICAN STATE COMMITTEE; and
TENNESSEE REPUBLICAN PARTY,

Petitioners–Appellants,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent–Appellee.

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

On Petition for Review of a Final Rule of the United States Securities and Exchange Commission (SEC File No. S7-18-09)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

GLOSSARY OF ABBREVIATIONS vi

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. There Are No Jurisdictional Or Standing Barriers To The State Parties' Challenge To The Political Contribution Rule. 2

A. The District Court Has Jurisdiction to Hear the State Parties' Challenge. 2

B. This Court, in the Alternative, Has Jurisdiction. 8

C. The State Parties Have Standing. 12

II. The Political Contribution Rule Is Unlawful And Unconstitutional. 19

A. Congress Has Not Given the SEC the Power to Regulate Political Contributions. 19

B. The Political Contribution Rule Exceeds the SEC's Authority. 22

C. The Political Contribution Rule Violates the First Amendment. 25

CONCLUSION 29

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES*

Cases

Am. Coal. for Competitive Trade v. Clinton,
128 F.3d 761 (D.C. Cir. 1997) 9

**Am. Petroleum Inst. v. SEC*,
714 F.3d 1329 (D.C. Cir. 2013) 2, 3

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006)....................7

Blount v. SEC,
61 F.3d 938 (D.C. Cir. 1995) 27, 28

Bob Jones Univ. v. Simon,
416 U.S. 725 (1974)....................13

Bouie v. City of Columbia,
378 U.S. 347 (1964)....................8

Chevron Natural Gas v. FERC,
199 F. App'x 2 (D.C. Cir. 2006) 14

Clapper v. Amnesty Int'l USA,
133 S. Ct. 1138 (2013)....................14

Colo. Republican Fed. Campaign Comm. v. FEC,
518 U.S. 604 (1996)....................12

Conservation Force, Inc. v. Jewell,
733 F.3d 1200 (D.C. Cir. 2013) 16

Davis v. FEC,
554 U.S. 724 (2008)....................28

Eagle-Picher Indus. Inc. v. EPA,
759 F.2d 905 (D.C. Cir. 1985) 9

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Elrod v. Burns,
427 U.S. 347 (1976) 11

FCC v. Fox Television Stations, Inc.,
132 S. Ct. 2307 (2012) 8

FCC v. ITT World Commc'ns, Inc.,
466 U.S. 463 (1984) 6

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 21

FEC v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007) 11

Fla. Power & Light Co. v. Lorion,
470 U.S. 729 (1984) 5, 6

**Galliano v. U.S. Postal Service*,
836 F.2d 1362 (D.C. Cir. 1988) 20, 21

Haitian Refugee Ctr. v. Gracey,
809 F.2d 794 (D.C. Cir. 1987) 13

Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.,
551 F.2d 1270 (D.C. Cir. 1977) 3

Janko v. Gates,
741 F.3d 136 (D.C. Cir. 2014) 8

La Botz v. FEC,
__ F. Supp. 2d __,
2014 WL 3686764 (D.D.C. July 25, 2014) 18

LaRoque v. Holder,
650 F.3d 777 (D.C. Cir. 2011) 16

Lujan v. Defendants of Wildlife,
504 U.S. 555 (1992) 14, 15, 18

**McCutcheon v. FEC*,
134 S. Ct. 1434 (2014) 13, 19, 20, 25, 26, 27, 28

**Nat’l Mining Ass’n v. Dep’t of Labor*,
292 F.3d 849 (D.C. Cir. 2002) 3, 4

Nat’l Mining Ass’n v. Kempthorne,
512 F.3d 702 (D.C. Cir. 2008) 24

Nixon v. Shrink Mo. Gov’t PAC,
528 U.S. 377 (2000)... 25, 26

POM Wonderful LLC v. Coca-Cola Co.,
134 S. Ct. 2228 (2014)..21

**Ragsdale v. Wolverine World Wide, Inc.*,
535 U.S. 81 (2002)..23

Renal Physician Ass’n v. HHS,
489 F.3d 1267 (D.C. Cir. 2007) 18

Republican Nat’l Comm. v. FEC,
698 F. Supp. 2d 150 (D.D.C. 2010) 13

Storer v. Brown,
415 U.S. 724 (1974)..18

Sweezy v. New Hampshire,
354 U.S. 243 (1957)..12

**Taxation with Representation of Wash. v. Regan*,
676 F.2d 715 (D.C. Cir. 1982) 13

United States v. O’Hagan,
521 U.S. 642 (1997)... 23, 24

**Watts v. SEC*,
482 F.3d 501 (D.C. Cir. 2007) 5, 9

Weaver v. FMCSA,
744 F.3d 142 (D.C. Cir. 2014) 7

Statutes

5 U.S.C. §551(6) 3, 5

15 U.S.C. §80b-6(4).. 19, 22, 23, 24

15 U.S.C. §80b-11(c) 4

15 U.S.C. §80b-13.. 3, 4, 8

33 U.S.C. §921(c) 4

Regulations

17 C.F.R. §201.192(a)..10

17 C.F.R. §275.206(4)-5 .... 12, 17

Political Contributions by Certain Investment Advisors,
75 Fed. Reg. 41,018 (July 14, 2010).. 12, 14

Other Authorities

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David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action*, 75 COLUM. L. REV. 1 (1975)..7

GLOSSARY OF ABBREVIATIONS

Advisers Act	Investment Advisers Act of 1940
APA	Administrative Procedure Act
Commission or SEC	United States Securities and Exchange Commission
FEC	Federal Election Commission
FECA	Federal Election Campaign Act of 1971
NYCPA	New York City Public Advocate
Political Contribution Rule or Rule	*Political Contributions by Certain Investment Advisers*, 75 Fed. Reg. 41,018 (July 14, 2010)
State Parties	New York Republican State Committee and Tennessee Republican Party

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commission's transparent efforts to insulate its Political Contribution Rule from judicial review are unavailing. Contrary to the Commission's contentions, there is no watershed moment at which this Court or the Supreme Court declared that, henceforth, all statutes providing for direct appellate review of orders would also govern review of rules. In fact, cases much more recent than those on which the Commission relies confirm that this Court does indeed continue to apply ordinary principles of statutory construction to direct-review statutes. And here, those principles compel the conclusion that the Investment Advisers Act's direct-review provision governs review of challenges only to orders, not rules. Even were that not the case, moreover, that provision could not constitutionally be applied to foreclose judicial review under the circumstances at hand, as the State Parties cannot fairly be charged with notice that they had only 60 days in which to challenge a sweeping rule that deters core First Amendment activity.

Of course, the Commission's fight to insulate its Rule from review should come as little surprise, as the Rule is both ultra vires and unconstitutional. It is ultra vires because Congress did not empower the Commission to regulate federal political contributions when it granted it generic authority to prevent fraudulent, deceptive, or manipulative practices in the market for investment adviser services. In fact, Congress has carefully preserved for itself the sensitive power to impose

limits on the extent to which people may exercise their constitutional right to make political contributions. Even if the Commission had any such power, that would not save its prophylactic rule, which by the Commission's own telling deters conduct that rarely, if ever, is actually fraudulent, deceptive, or manipulative. Indeed, the Commission still fails to identify a single instance where a fully disclosed contribution within the base limits of $2,600 or less to a federal candidate or $10,000 or less to a state political party has resulted in "pay-to-play activities."

That dooms the Rule not only as a statutory matter, but also as a constitutional one, as the First Amendment simply cannot tolerate this kind of prophylaxis-on-prophylaxis approach to restricting political contributions. Accordingly, if this Court concludes that it is the proper court to consider the State Parties' challenge in the first instance, then it should invalidate the Rule as both unlawful and unconstitutional. But in all events, the Court should reject the Commission's efforts to evade judicial review of its rule entirely.

ARGUMENT

I. There Are No Jurisdictional Or Standing Barriers To The State Parties' Challenge To The Political Contribution Rule.

A. The District Court Has Jurisdiction to Hear the State Parties' Challenge.

"In this circuit, the normal default rule is that persons seeking review of agency action go first to district court rather than to a court of appeals." *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1332 (D.C. Cir. 2013). Barring the presence

of a direct-review provision granting this Court jurisdiction over challenges to Commission rules, this "normal default rule" governs. *Id.* at 1332–33. The Advisers Act is devoid of any such provision. That conclusion follows from straightforward principles of statutory interpretation, as the plain text of the direct-review provision grants appellate courts jurisdiction over challenges only to "orders," not "rules." 15 U.S.C. §80b-13. And not a word in the Act suggests that Congress intended the term "order" to have anything other than its ordinary administrative law meaning. *See* 5 U.S.C. §551(6) (defining "order" as "the whole or part of a final disposition … other than rulemaking").

Indeed, the Commission does not really dispute the soundness of this reading. Instead, it insists that this Court must ignore that plain text because this Court has adopted, and the Supreme Court has approved, a blanket rule that the term "order" in direct-review provisions *must* be interpreted to encompass "rules." The Commission is wrong on both counts.

First, any suggestion that *Investment Company Institute v. Board of Governors of Federal Reserve System*, 551 F.2d 1270 (D.C. Cir. 1977), established this blanket rule is defeated by the Court's more recent decision in *National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002), which held that a statute providing for exclusive appellate jurisdiction over challenges to "orders" was indeed confined to challenges to "orders." In doing so, the Court relied on a rule

diametrically opposed to the one the Commission advances here: "Since Congress was silent on how review of regulations was to be accomplished, … persons seeking such review [are] directed by the APA to go to district court." *Id.* at 856; *see also id.* ("the obvious difficulty with the government's position is that this provision … speaks of orders" not regulations).

The Commission attempts to explain away *National Mining* as involving a "very different review provision" that made "'rather clear'" that Congress meant what it said when it confined direct appellate review to "orders." SEC Br. 20–21 (quoting 292 F.3d at 856). But there was nothing "very different" about the review provision at issue there; in fact, other than swapping out "Commission" for "Board," its language is virtually identical to the Advisers Act. *Compare* 15 U.S.C. §80b-13, *with* 33 U.S.C. §921(c). Moreover, what made it "rather clear" to the Court that Congress intended to confine direct appellate review to orders was the fact that Congress elsewhere in the statute used the term "order in the same sense it used the term in the APA[,]" 292 F.3d at 856—something that Congress also did in the Advisers Act. *See* 15 U.S.C. §80b-11(c) ("Orders of the Commission under this subchapter shall be issued only after appropriate notice and opportunity for hearing"); *id.* §80b-11(a), (b) (treating "rules and regulations" as distinct from "orders").

The Commission fares no better with its attempt to distinguish *Watts v. SEC*, 482 F.3d 501 (D.C. Cir. 2007), which reiterated that "when an agency's direct-review statute d[oes] not define 'order,'" the Court "looks to the Administrative Procedure Act" and its definition of an "order" as "'the whole or part of a final disposition … other than rule making ….'" *Id.* at 505–06 (quoting 5 U.S.C. §551(6)). The Commission dismisses *Watts* as a challenge to a subpoena not a rule. *See* SEC Br. 20. But it would hardly make sense to interpret a direct-review provision as sometimes adopting the APA's definition of "order" and other times rejecting it, depending on the agency action challenged. It is bad enough that the Commission's position would give "order" two different meanings in a single statutory scheme. *See* SEC Br. 16. The Commission cannot plausibly suggest that the term must be given two different meanings at once.

The Commission alternatively suggests that the Supreme Court has "expressly endorsed" the rule that the Commission attempts to attribute to *Investment Company*. SEC Br. 14. But it has done no such thing. Indeed, the principal decision on which the Commission relies had nothing to do with whether "order" should be read to encompass "rule" in a direct-review provision. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1984). The question there was whether an agency's denial of a request to institute a licensing proceeding "should be considered a final order" for purposes of a statute providing for direct appellate review of "orders." *Id.* at 734.

Concluding that it should, the Court neither adopted nor sanctioned *Investment Company*'s holding with respect to "rules," but instead cited the decision only for the unremarkable proposition that "jurisdictional provisions that place initial review in the courts of appeals … avoid the waste attendant upon th[e] duplication of effort" that results when, as is the norm, the process begins in the district courts. *Id.* at 744.

The Commission's repeated reliance on *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), is even more inexplicable. Contrary to the Commission's contention, the challengers there were *not* "challenging a rulemaking," SEC Br. 14; they were challenging what was undisputedly an *order* denying their rulemaking *petition*. *See* 466 U.S. at 468. The only question before the Court was whether they could evade the provision for direct appellate review of "orders" "by requesting the District Court to enjoin action that is the *outcome* of the agency's order." *Id.* (emphasis added). In concluding that they could not, the Court said nothing about whether a statute providing for direct review of "orders" must be interpreted as also applying to "rules."

Beyond that, the Commission just details the tortuous path through which courts resolved various questions not at issue here, such as whether rules are subject to judicial review *at all*, and whether it matters if they were the product of formal versus informal rulemaking. *See* SEC Br. 12–13; *cf.* David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action*, 75 COLUM. L. REV. 1,

39 (1975) (explaining that the cases the Commission cites "focused solely on questions of standing or ripeness for review, not discussing whether review should have been sought in a regular district court"). But this extended detour is rather beside the point, as no one is asking the Court "to turn back the clock" and reopen these long-settled debates. SEC Br. 12. Instead, the question here is how to interpret a particular direct-review provision that this Court has never before interpreted—more to the point, whether the Court should follow or ignore the statute's plain text.[1]

Although *Investment Company* may provide at least a modicum of support for doing the latter, neither that decision nor any other *compels* this Court to abandon traditional tools of statutory interpretation when confronting a direct-review provision.[2] And absent that kind of unmistakably clear mandate, this Court is bound by the settled rule that courts must "presume that the legislature says in a statute what it means and means in a statute what it says there." *Janko v. Gates*, 741 F.3d

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[1] To the extent the Commission suggests that this Court has already extended *Investment Company* to the Advisers Act, it is mistaken. *See* SEC Br. 19 n.4. In fact, the cases it cites did not address the question. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (admonishing that "'drive-by jurisdictional rulings' … should be accorded 'no precedential effect'").

[2] The Commission's reliance on *Weaver v. FMCSA*, 744 F.3d 142 (D.C. Cir. 2014), is unavailing. *See* SEC Br. 19. In *Weaver*, the Court concluded that it lacked jurisdiction under a statute providing for direct appellate review of "rule[s], regulations or final order[s]" because the agency action before it was none of those things. 744 F.3d at 147. That the Court cited *Investment Company* hardly suggests that it was "reiterating" a purportedly blanket rule that, even if it did exist, would have had zero application to the case before it.

136, 139 (D.C. Cir. 2014). Here, Congress could not have been clearer: Direct appellate review under the Advisers Act is confined to "orders." 15 U.S.C. §80b-13(a).

B. This Court, in the Alternative, Has Jurisdiction.

If this Court determines that §80b-13 gives it jurisdiction over challenges to Commission rules issued under the Advisers Act, then it should exercise jurisdiction over this matter itself. Because the State Parties had no notice that the courts would disregard the plain text of the statute and funnel their challenge into §80b-13, the 60-day clock cannot constitutionally be applied to preclude them from obtaining judicial review of the Political Contribution Rule. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964). That conclusion is underscored by the nature of the State Parties' challenges, as they contend that the Rule is both ultra vires and unconstitutional.

In seeking to insulate its Rule from review in any forum, the Commission relies in the main on the notion that the applicability of §80b-13's limitations period was clear when the Rule issued. *See* SEC Br. 24. Surely that claim would come as a surprise to the panels in *National Mining*, *Watts*, and *American Petroleum*, each of which dealt with similar questions but none of which referenced any binding rule stemming out of *Investment Company*. Instead, these cases reaffirmed that "when an agency's direct-review statute d[oes] not define 'order,'" this Court "look[s] to

the Administrative Procedure Act." *Watts*, 482 F.3d at 505. And, here, looking to the APA told the State Parties that the Political Contribution Rule was a rule, not an order, and therefore was subject to the general six-year statute of limitations, not §80b-13's truncated 60-day period.

The Commission's contention that the State Parties' should have filed a "protective petition" in this Court fails for the same reason. *See* SEC Br. 24. As the very case on which the Commission relies explains, that course of action is encouraged when there is "confusion in the law as the proper forum for review." *Eagle-Picher Indus. Inc. v. EPA*, 759 F.2d 905, 911 (D.C. Cir. 1985). But no such "confusion" existed here, as no court has *ever* held that rules issued under the Advisers Act must be treated as "orders" governed by §80b-13. Accordingly, determining now, for the first time and after the expiration of the 60-day clock, that the Advisers Act should not be interpreted to mean what it says would raise serious due process concerns.

Those concerns are all the more acute given that the Rule is, on its face, an effort to deter activity protected by the First Amendment. *See Am. Coal. for Competitive Trade v. Clinton*, 128 F.3d 761, 765 (D.C. Cir. 1997). The Commission attempts to dismiss that concern by noting that "the rule may be challenged in an enforcement action." SEC Br. 27. But that ignores the nature of the injury the State Parties and their members are suffering. To be sure, some of those members are

individuals who would like to make a contribution but are effectively precluded by the Rule from doing so. But others, including the State Parties themselves, are injured by the chilling effect the Rule has on those who would contribute, solicit, or coordinate but will not do so because of the Rule. Since the State Parties certainly cannot force these individuals to violate the Rule, the Commission's enforcement argument is cold comfort to them and their covered official candidates. *See* Hr'g Tr. 40:9–14 (Sept. 12, 2014) (describing Commission's argument as "very troubling" in light of the "chilling going on of exercise of important First Amendment rights").

The Commission alternatively suggests that the State Parties or their members could obtain judicial review by petitioning for reconsideration of the Rule. *See* SEC Br. 27. But the Commission is careful to add the caveat that it believes they may do so only if they "identif[y] new information about 'the regulation's concrete effects.'" SEC Br. 27. In other words, the Commission is not really willing to concede that this is a viable means of obtaining judicial review of the Rule; instead, it concedes only that this path could get someone into court, at which point the Commission would once again attempt to insulate its Rule from review by maintaining that any "supposedly new information" was not new at all. *Id.* Moreover, given the lack of any statutory or regulatory timeline by which the Commission must act on a petition for reconsideration, *see* 17 C.F.R. §201.192(a), the Commission's reconsideration argument is at odds with the principle that "[t]he loss of First Amendment freedoms,

for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (courts must "allow parties to resolve [First Amendment] disputes quickly without chilling speech through the threat of burdensome litigation.").

Finally, the Commission's attempt to convert the State Parties' arguments into a facial challenge to the Advisers Act's 60-day limitations period is unavailing. *See* SEC Br. 25. The State Parties are not arguing that the limitations period is unconstitutional in every application—even if it does apply to rules, not just orders. They are simply arguing that the limitations period cannot permissibly be applied in the narrow circumstances at hand—*i.e.*, when the State Parties are challenging a sweeping rule that deters core First Amendment activity and had no notice that their challenges to that rule must be brought under a statutory provision that on its face governs only challenges to "orders." Even if they had such notice, moreover, the Commission can hardly claim that they should have understood in a mere 60 days the full extent to which the Rule would injure them, particularly where the Rule was not even effective until well after the 60th day. In short, as the District Court correctly recognized, to wholly preclude the State Parties from obtaining judicial review under these circumstances would "raise[] grave constitutional concerns." JA-149.

C. The State Parties Have Standing.

1. There can be no serious dispute that the Rule directly affects the ability of the State Parties to obtain contributions. Not only does the Rule make it unlawful for investment advisers or covered persons "[t]o coordinate, or to solicit any person or political action committee to make, any [p]ayment to a political party of a State or locality where the investment adviser is providing or seeking to provide investment advisory services to a government entity[,]" 17 C.F.R. §275.206(4)-5(a)(2)(ii)(B),[3] the Commission also warned that the Rule may prohibit contributions to state political parties in various as-yet-undefined circumstances. *See* 75 Fed. Reg. 41,018, 41,031 n.163 [JA-46]. Unsurprisingly, as the declarations from the executive directors of each State Party confirm, these restrictions and warnings have *in fact* deterred people from making contributions to the State Parties. JA-122–23; 125–26.

The State Parties thus have standing to challenge the Rule for the same reason that political parties always have standing to challenge constraints on their ability to obtain contributions: because the injury that such constraints cause is self-evident. *See Sweezy v. New Hampshire*, 354 U.S. 243, 250–51 (1957) ("interference with the

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[3] This causes the State Parties real harm, as coordinated contributions are the primary method of party fundraising. *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) ("[P]ooling resources from many small contributors is … an integral part of party politics").

freedom of a party is simultaneously an interference with the freedom of its adherents."). Indeed, the injury here is no different from the injury that gave political parties standing to challenge the "soft money" ban in *Republican National Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010), and the aggregate contributions limits in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). Or that gives nonprofits standing to challenge regulations that inhibit their fundraising ability. *See Taxation with Representation of Wash. v. Regan*, 676 F.2d 715 (D.C. Cir. 1982); *Bob Jones Univ. v. Simon*, 416 U.S. 725 (1974); *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987).

In fact, the Commission cites not a single case in which an organization has been held to lack standing to challenge a law or regulation that limits its ability to raise money. Instead, it just attempts to distinguish *Taxation with Representation* on the ground that the association there "was the direct object of the regulation" denying tax-exempt status. SEC Br. 30. But that is not why this Court found standing. The Court found standing because, *inter alia*, it was "clearly evident that Taxation will be harmed if its contributors cease giving it money." *Taxation with Representation*, 676 F.2d at 725. The Commission alternatively suggests that the case was different because "the loss of tax-exempt status affected [the] entire donor base[.]" SEC Br. 30. But the executive directors' declarations confirm that the Rule has deterred at least *some* people from making contributions to their parties, JA-122–23; 125–26,

which is more than enough to supply the "identifiable trifle" of injury that Article III requires. *Chevron Natural Gas v. FERC*, 199 F. App'x 2, 4 (D.C. Cir. 2006).

The Commission attempts to dismiss those declarations as "mere 'speculation as to what third parties will do.'" SEC Br. 29. But there is nothing "speculative" about the executive directors' declarations under oath that *actual* individuals informed them that they refrained from making contributions because of the Rule, and that these past experiences have led them to the perfectly reasonable conclusion that they are likely to suffer the same injury in the future. There is certainly no reason to question the credibility or veracity of the executive directors; nor is there anything so inherently implausible about their declarations that they may dismissed out of hand. *Cf. Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013).

To the contrary, it is only natural that a rule designed to deter contributions to and coordination or solicitation on behalf of political parties has done and will continue to do just that. Indeed, the Commission itself has "acknowledge[d]" that its Rule "may affect the propensity of investment advisers to make political contributions." 75 Fed. Reg. at 41,023 [JA-38]. It should come as little surprise, then, the State Parties have been able to "adduce facts showing that," as a direct result of the Rule, covered associates' and officials' "choices have been or will be made in such manner as to" cause the State Parties concrete injury. *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 562 (1992). Article III requires nothing more.

2. The State Parties' declarations establish that they have associational standing as well because their members have been and continue to be injured by the Rule. *See* JA-121–22, 124, 127, 129, 131–33. Once again, that is hardly a remarkable proposition. The Commission does not and cannot dispute that the State Parties count among their members numerous covered associates and officials—*i.e.*, numerous individuals who are the direct "object of the government action … challenge[d]." *Lujan*, 504 U.S. at 562. The Commission instead just refuses to take at face value the State Parties' declarations that at least one of these covered associates and officials would like to make or receive a contribution covered by the Rule. In other words, the Commission astonishingly refuses to accept that there are any circumstances in which the Rule would affect a single Republican in all of New York or Tennessee.[4]

That much is clear from the purportedly "attenuated" "sequence of events" through which the Commission attempts to illustrate "the standing problem." SEC Br. 34. That sequence of events is nothing more than a description of the Rule's mine run operation: A covered associate refrains from making a contribution over the *de minimis* level to a covered official in order to preserve the ability to receive

[4] Nearly 20% of the 10,000 entities registered as investment advisers are headquartered in New York State. *2014 Evolution Revolution*: *A Profile of the Investment Adviser Profession*, Investment Adviser Ass'n & Nat'l Regulatory Servs., 26 (2014), http://perma.cc/gt57-bprs.

compensation for providing investment advisor services to a government entity. *See* SEC Br. 34. If that scenario is so inherently "speculative" that the Commission is not even willing to accept sworn declarations that it has occurred, then it cannot plausibly claim authority to enact its broad prophylactic rule in the first place.

Implicitly recognizing as much, the Commission maintains that the problem is not that the State Parties have no members affected by the rule, but that they have failed to identify who those members are. *See* SEC Br. 31–32. In fact, the State Parties have identified both covered associates and covered officials who are injured by the Rule. *See* JA-105, 121–22, 127, 131–33. That alone distinguishes this case from the ones on which the Commission relies, in which the associations submitted "*no* record evidence to support" their injury. *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1207 (D.C. Cir. 2013) (emphasis added); *see also Chamber of Commerce v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) ("the Chamber has not identified a single member who was or would be injured").

Even setting aside the rule that the plaintiffs' well-pleaded and factually substantiated allegations must be taken as true at this stage, *see LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011), the Commission's attempts to find fault with the State Parties' declarations are wholly unfounded. For instance, the Commission suggests that maybe the individuals identified are not really covered associates. *See* SEC Br. 31–32. But the State Parties conclusively refuted that same speculation

below. *See* Pls.' Reply in Supp. of Mot. for Leave to File Tracy Decl. 4, Exs. B, C. (Dkt. 29) ("Tracy Reply"). The Commission also questions whether their firms "received compensation for services provided to a Tennessee government." SEC Br. 32. But as the State Parties explained, *see* Tracy Reply 4, that is beside the point as the Rule impacts not just firms that have *received* such compensation, but firms that would like to preserve the ability to do so in the future. *See* Pls.' Reply in Supp. of Mot. for Prelim. Inj. 7 (Dkt. 25).

The Commission alternatively contends that the covered officials identified are mistaken in their belief that they are covered officials. *See* SEC Br. 33. But the Commission fails to explain how these individuals, each of whom casts a vote in electing members of boards that hire investment advisers for the state, are not covered by the Rule's sweeping application to anyone who is "directly or indirectly responsible for, or can influence the outcome of," or "[h]as the authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity[.]" 17 C.F.R. §275.206(4)-5(f)(6). After all, the Rule does not contain an exception for officials who share their "influence" or "indirect responsibility" with others. SEC Br. 33–34. At any rate, the Commission cannot evade judicial review by adopting convenient litigating positions that make its Rule a moving target. And to the extent the Rule is

so vague as to deter contributions to which the Commission does not object, that only exacerbates the First Amendment injury.[5]

At bottom, the Commission simply refuses to recognize that there is nothing inherently suspect about associational standing when the association's own members are the "object of the government action … challenge[d]." *Lujan*, 504 U.S. at 562. Third-party standing concerns arise in the associational standing context only when the association's injury is attributable to independent actors *who are not its own members*. *See Renal Physician Ass'n v. HHS*, 489 F.3d 1267, 1273 (D.C. Cir. 2007). To accept that Commission's contrary view would gut the concept of associational standing entirely. Here, the State Parties' members are front and center, as they are the very individuals whose political contributions the Rule is designed to deter. The Commission cannot evade judicial review of that First Amendment injury by refusing to accept that its Rule actually has its intended effect.

[5] The Commission also errs in suggesting that the "capable of repetition yet evading review" doctrine applies *only* when the exact "same complaining party will be subject to the same action again." SEC Br. 33. In fact, "[i]n the electoral context," "the capable of repetition, yet evading review doctrine is appropriately applied where the state statute or policy in question will be applied in future elections and thus cause a comparable harm to candidates in the future." *La Botz v. FEC*, __ F. Supp. 2d __, 2014 WL 3686764, at *6 (D.D.C. July 25, 2014) (citing *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974)).

II. The Political Contribution Rule Is Unlawful And Unconstitutional.

A. Congress Has Not Given the SEC the Power to Regulate Political Contributions.

Congress has long reserved for itself the exclusive authority to set federal contribution limits, refusing to delegate that power even to the Federal Election Commission ("FEC"). And Congress' precisely drawn contribution limits reflect "its belief that contributions of that amount or less do not create a cognizable risk of corruption." *McCutcheon*, 134 S. Ct. at 1452. The Advisers Act does not empower the SEC to second-guess that determination. Indeed, nothing in its generic grant of authority to prevent "fraudulent, deceptive, or manipulative" practices, 15 U.S.C. §80b-6(4), even hints at the notion that Congress meant to delegate away that extraordinarily First Amendment-sensitive power.

The Commission's contrary argument rests on the mistaken premise that this case is about whether "two statutory regimes 'are capable of co-existence ….'" SEC Br. 40. But the question here is not whether the Advisers Act and Congress' contribution limits "irreconcilably conflict." SEC Br. 39. It is whether the Advisers Act grants the SEC the power it seeks to exercise. The Commission's attempt to shift the focus to whether its Rule can "co-exist" with Congress' contribution limits thus puts the cart before the horse, as the Commission just assumes the answer to the question that matters, which is whether the SEC has the power to enact such a rule in the first place.

It does not. As this Court already has recognized, Congress' "comprehensive regime of limitations on campaign contributions" forecloses efforts by agencies to invoke "more broadly conceived and crafted statute[s]" to enact their own campaign finance regulations. *Galliano v. U.S. Postal Service*, 836 F.2d 1362, 1368 (D.C. Cir. 1988). That is nowhere more true than in the realm of contributions limits, where Congress has fixed by *statute* the limits it is willing to accept. Moreover, when Congress wants other agencies to participate in the regulation of campaign finance, it says so expressly, *see* Opening Br. 42–43—something it has not done with *any* agency, let alone the SEC, with respect to contribution limits. Accordingly, as in *Galliano*, to allow the SEC to treat as fraudulent conduct that is "consistent with FECA requirements would defeat the substantive objective of that Act's first-amendment-sensitive provisions." 836 F.2d at 1370.

The Commission attempts to dismiss *Galliano* as a case where complying with one agency's rules would have violated another's. *See* SEC Br. 43. In fact, what *Galliano* rejected was the notion that FECA's disclosure requirements were merely "a minimal requirement that the Postal Service [wa]s free to supplement." 836 F.2d at 1370. Likewise, Congress' carefully crafted contribution limits are not a baseline that agencies may lower at will. They are Congress' final word on the delicate question of the extent to which the core right "to participate in democracy through political contributions," *McCutcheon*, 134 S. Ct. at 1441, may be

constrained. That conclusion is compelled just as much by bedrock principles of constitutional avoidance as it is by the statute itself. *Cf. Galliano*, 836 F.2d at 1369 ("Our resolution reconciles two statutes in a manner that reduces constitutional doubt.").

The Commission suggests that *Galliano* has been overruled by *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228 (2014). *See* SEC Br. 43. But *POM Wonderful* expressly declined to abandon the long-settled principle that, in interpreting a statute, a court must remain cognizant that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). *See POM Wonderful*, 134 S. Ct. at 2236 (invoking *Brown & Williamson*). Indeed, the Court made clear that it was not announcing any revolution in statutory interpretation, but rather was simply determining "the best way to harmonize" two statutes. *Id.* at 2237.

In any event, *POM Wonderful* is readily distinguishable on several grounds. First, it involved a question of whether one statute precluded the operation of the other, not, as here, whether an agency overstepped its bounds. Moreover, it involved two statutes that both regulated the same topic—"misleading food and beverage label," *id.* at 2233—not an agency's attempt to invoke a generic grant of authority to regulate a topic expressly and comprehensively regulated by another statutory

scheme. Finally, because both statutes explicitly addressed labeling requirements, the Court had no occasion to address whether constitutional avoidance principles warranted in favor of either result. Here, those principles reinforce the conclusion that is compelled by the statutes themselves: The Advisors Act does not empower the SEC to regulate political contributions.

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

Even if it did, however, that still would not save the Rule. The SEC's authority is limited to "defin[ing], and prescrib[ing] means *reasonably designed* to prevent … fraudulent, deceptive, or manipulative" practices. 15 U.S.C. §80b-6(4) (emphasis added). The Commission has conceded that few, if any, political contributions subject to the Rule are likely to result in such practices. In fact, notwithstanding the State Parties' repeated invitations, the Commission has yet to identify a *single* example of an investment adviser's fully disclosed contribution within the base limits resulting in identifiable pay-to-play activity.[6] Whatever authority the Commission may have to enact "prophylactic" rules, it does not have the power to

[6] The New York City Public Advocate ("NYCPA") does not help the Commission in this regard, as its brief focuses on *state* elections, even though the State Parties challenge the Rule only as applied to contributions in *federal* elections. Moreover, the NYCPA fails to provide any evidence that the contributions on which it mistakenly relies actually resulted in *quid pro quo*. Instead, it simply speculates that this must be so whenever an investment firm receives an investment around the same time as it (or its employees) made large contributions. *See* NYCPA Br. 5 n.9.

enact rules designed to prevent conduct that the Commission itself concedes is rarely, if ever, actually fraudulent.

The Commission insists that it "need not show a certain quantum of past wrongdoing before it can enact a 'prophylactic' rule." SEC Br. 38. But the problem here is that the Commission has produced no evidence *at all* to support the dubious proposition that its Rule is "reasonably designed to prevent" fraud. 15 U.S.C. §80b-6(4). And as the Supreme Court has made clear, this type of categorical prohibition is appropriate only when the "broad generalizations" on which it is based "hold[] 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, … the justification for the categorical rule disappears." *Ragsdale*, 535 U.S. at 93.

Obviously that standard is not satisfied by a rule designed to prevent conduct that the Commission itself concedes is rarely, if ever, fraudulent, deceptive, or manipulative. Indeed, if any "'fair assumption'" can be made here, *see* SEC Br. 38 (quoting *O'Hagan*, 521 U.S. at 676), it is that fully disclosed federal contributions of $2,600 or less are unobjectionable efforts to exercise constitutionally protected rights. The Commission's attempts to suggest otherwise conflate the question of whether "pay-to-play" activities *in general* are fraudulent with the entirely distinct

question of whether the contributions the Rule covers even result in "pay-to-play" activities in the first place.

The Commission fails to explain what "fraudulent, deceptive, or manipulative" conduct it purports to be deterring. The Commission, again, falls back on a vague "Federal fiduciary standard," SEC Br. 36–37, but this standard has been applied only when investment advisers have breached established standards or obligations. *See* Opening Br. 46 (citing cases). While the Commission protests that these examples are only "illustrat[ive]," SEC Br. 37, it tellingly fails to cite any authority applying "fiduciary standards" to circumstances anything like these.

Nor can the Commission's last-ditch appeals to *Chevron* deference save its Rule, as there is simply no evidence that deterring fully disclosed contributions within the base limits is at all likely—let alone "reasonably" so—"to prevent … fraudulent, deceptive, or manipulative" conduct. 15 U.S.C. §80b-6(4). The Commission's attempt to deter constitutionally protected activity in the name of preventing nonexistent fraud is therefore arbitrary, capricious, and contrary to law and receives no deference. *See O'Hagan*, 521 U.S. at 673; *cf. Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) ("constitutional avoidance trumps *Chevron* deference").

C. The Political Contribution Rule Violates the First Amendment.

The Rule imposes yet another prophylactic restriction on the core First Amendment right "to participate in democracy through political contributions." *McCutcheon*, 134 S. Ct. at 1441. The Commission therefore bears the burden of proving that its prophylaxis-upon-prophylaxis approach is sufficiently tailored to further a sufficiently important end not already addressed by the base contribution limits that Congress itself has imposed. *Id.* at 1452.

Remarkably, the Commission does not even attempt to satisfy that burden. In fact, as noted, the Commission never even bothers to identify a *single* instance in which a contribution *within* the modest base limits Congress already has imposed has been the source of some sort of pay-to-play or *quid pro quo* activity. Instead, the Commission contends—contrary to decades of Supreme Court precedent—that it need not satisfy this burden at all. Indeed, the Commission even goes so far as to fight the premise that "'‘mere conjecture'" is not "'‘adequate to carry a First Amendment burden." *Id.* (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000)). *See* SEC Br. 50.

The Commission rests its extraordinary contention that "speculation" and "conjecture" *do* suffice on the premise that the Supreme Court has upheld base limits without demanding any evidence to support them. *See* SEC Br. 48–49. But the very case on which the Commission relies expressly refutes that notion, reiterating that

"*Buckley's* evidentiary showing exemplifies a sufficient justification for contribution limits …." *Shrink Mo.*, 528 U.S. at 391. And the Commission's observation "that the *base limits* themselves are a prophylactic measure," *McCutcheon*, 134 S. Ct. at 1458, *see* SEC Br. 48–49, only undermines its argument that it may impose yet another layer of prophylaxis without even attempting to justify its actions. Indeed, that very fact led *McCutcheon* to admonish that a "'prophylaxis-upon-prophylaxis approach' requires that we be particularly diligent in scrutinizing the law's fit." 134 S. Ct. at 1458.

The Commission suggests that it has satisfied its burden because "the record here shows that pay-to-play schemes involving contributions" do exist. *See* SEC Br. 50. But the Commission tellingly declines to identify a single one of those purported schemes that involved contributions *within* the statutory base limits. In fact, the Commission all but concedes that no such evidence exists when it drops a footnote suggesting that the real goal of its Rule is to prevent "multiple 'covered associates' employed by [the same] investment adviser" from aggregating their contributions to a single covered official in an attempt to "distort the selection process." SEC Br. 50 n.10. But the Commission again does not bother to allege that this has ever happened, and its footnote only underscores the complete lack of fit between the conduct the Commission purports be targeting and the means it has selected to do so.

The Commission attempts to rescue its Rule by suggesting that even if there is no *quid pro quo* corruption left to target, the Rule still advances other "important" interests, like "regulating commercial relationships to ensure against 'conflicts of interest'" and "eliminating restraints on fair competition." SEC Br. 46. However "substantial" these interests may be, *id*., the Supreme Court has never suggested that they suffice where campaign finance restrictions are concerned. To the contrary, the Court has reiterated that there is one and "only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption." *McCutcheon*, 134 S. Ct. at 1450. Accordingly, if the Commission wants to justify its Rule, it must actually prove that there is some meaningful *quid pro quo* corruption concern that attaches to contributions within the base limits. That, the Commission does not and cannot do.

The Commission insists that this Court already resolved the question in its favor in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995). But as the Commission itself emphasizes, *see* SEC Br. 45, *Blount* relied on the deeply flawed premise that the government need not prove that a restriction actually furthers a sufficiently substantial interest when "the legislative purpose [is] prophylactic." *Id.* at 945; *see also id.* (courts should not "second-guess a legislative determination as to the need for prophylactic measures"). In fact, as *McCutcheon* reiterates, that is when the government's burden is most acute.

Moreover, *Blount* mistakenly viewed the constitutional burden as 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. But *McCutcheon* explicitly rejected the argument that it is enough that an individual still has *some* means of making "'the symbolic expression of support evidenced by a contribution[.]'" SEC Br. 53. *See McCutcheon*, 134 S. Ct. at 1444. The Commission's attempt to confine that reasoning to the context of aggregate limits misses the Court's point—*i.e.*, that constraining the right to make political contributions is *always* a significant burden on First Amendment activity, and is an even more significant burden the lower the limits get.

Beyond that, the Commission just resorts to pointing out the obvious—*i.e.*, *McCutcheon* involved aggregate limits not base limits, and *Davis* involved self-financing not pay-to-play. *See* SEC Br. 50–51. But the more relevant point is the *principles* those cases announced—namely, that the government may not employ a "prophylaxis-upon-prophylaxis approach" without demonstrating an actual, not conjectural, need to do so, *McCutcheon*, 134 S. Ct. at 1458, and may not "impose different contribution limits" on candidates for the same office, *Davis v. FEC*, 554 U.S. 724, 728 (2008). Under those principles, the Rule is unconstitutional.

CONCLUSION

The Court should reverse and remand to the District Court to consider the State Parties' claims. Alternatively, this Court should resolve those claims and invalidate the Political Contribution Rule. Either way, the Court should confirm the State Parties' standing.

Respectfully submitted,

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February 4, 2015

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I hereby certify that:

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Dated: February 4, 2015

s/Brian J. Field
Brian J. Field

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2015, I electronically filed the foregoing Reply Brief of Petitioners-Appellants with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

s/H. Christopher Bartolomucci
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