

ORAL ARGUMENT SCHEDULED FOR MARCH 23, 2015

No. 14-1194/No. 14-5242

**United States Court of Appeals
for the District of Columbia Circuit**

NEW YORK REPUBLICAN STATE COMMITTEE, and
TENNESSEE REPUBLICAN PARTY,

Appellants/Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee/Respondent.

Appeal from the U.S. District Court for the District of Columbia
and on petition for review of a final order of the
Securities and Exchange Commission

**BRIEF AMICUS CURIAE OF LETITIA JAMES,
NEW YORK CITY PUBLIC ADVOCATE AND
TRUSTEE OF THE NEW YORK CITY EMPLOYEES'
RETIREMENT SYSTEM IN SUPPORT OF
APPELLEE/RESPONDENT FOR AFFIRMANCE**

JENNIFER LEVY
General Counsel Litigation

LAWRENCE M. SCHIMMEL
General Counsel Investments

MUHAMMAD UMAIR KHAN
Deputy Counsel
New York City Public Advocate
1 Centre St., 15th Fl.
New York, NY 10007
(212) 669-4590
khan@pubadvocate.nyc.gov
Application Pending

Counsel for Amicus Curiae

January 28, 2015

CERTIFICATE PURSUANT TO CIRCUIT RULES 28(a)(1) and 29(d)

1. Circuit Rule 28(a)(1). All parties and *amici* appearing before the district court and this court are listed in the Briefs for Petitioners and Respondent. References to the rulings at issue appear in Briefs for Petitioners and Respondent. There are no related cases.
2. Circuit Rule 29(d). Counsel for the New York City Public Advocate hereby certifies that a separate brief is necessary. She is the duly elected Public Advocate for the City of New York, one of three city-wide elected officials, and serves as a Trustee of the New York City Employees' Retirement System. This \$53 billion public pension fund would be damaged by Petition to invalidate the Securities and Exchange Commission's Political Contributions for Certain Investment Advisers Rule.

TABLE OF CONTENTS

CERTIFICATE PURSUANT TO CIRCUIT RULES 28(a)(1) AND 29(d)	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
GLOSSARY.....	vii
INTEREST OF NEW YORK CITY PUBLIC ADVOCATE LETITIA JAMES, <i>AMICUS CURIAE</i>	1
ARGUMENT	3
I. The Troubling History of Pay-to-Play in New York and Other Jurisdictions Necessitates the Political Contribution Rule Promulgated by the Securities and Exchange Commission	3
A. The Sordid History of Pay-to-Play Corruption in New York.....	3
B. Protections Implemented in New York Following Pay-to-Play Scandal are Meaningful but Limited.....	6
C. Pay-to-Play Corruption in Other Jurisdictions.....	9
II. Responsibilities of Public Pension Trustees and Investment Advisers.....	10
A. New York Republican State Committee and Tennessee Republican Party Unable to Proffer Investment Adviser or Trustee of Public Pension, Public Advocate Endorses Political Contribution Rule	10
B. Existing Laws and Fiduciary Responsibilities of Public Pension Trustees and Investment Advisers are Unable to Adequately Secure Integrity of Public Pension.....	11
III. Importance of Public Pension Funds to U.S. Economy and Dangers of Cross-Jurisdictional Corruption.....	12

TABLE OF CONTENTS (Cont.)

IV. Constitutionality of Political Contribution Rule16

 A. Contribution Limits are Permitted if Closely Drawn to Prevent Actual or Perceived Corruption.....17

 B. SEC Did Not Operate Beyond Its Statutory Authority, Prophylactic Rules are Permissible and Must Be Accorded Deference.....18

 C. State and Local Officeholders Seeking Federal Office are not a Protected Class and Thus are not Disparately Treated21

 D. Investment Advisers Who Manage Public Pension Funds May Be Regulated Similar to the Political Activity Restrictions Upon High-Level Government Employees21

CONCLUSION22

CERTIFICATE OF COMPLIANCE23

CERTIFICATE OF SERVICE.....24

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Batterton v. Francis</i> , 432 U.S. 416 (1977)	19
<i>Blount v. SEC</i> , 61 F.3d 938 (D.C. Cir. 1995), <i>cert. denied</i> 517 U.S. 1119 (1996)	18
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	17
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010)	18
<i>COIB v. Chapin</i> , Case No. 1999-500 (2000)	21
<i>FEC v. Beaumont</i> , 539 U.S. 146 (2003)	16
<i>Kearny v. COIB</i> , Case No. 2009-600 (2010)	21
<i>McCutcheon v. FEC</i> , 134 S. Ct. 1434 (2014)	17,19
* <i>Nixon v. Shrink Mo. Gov't PAC</i> , 528 U.S. 377 (2000)	17
* <i>Ognibene v. Parkes</i> , 671 F.3d 174 (2d Cir. 2011), <i>cert. denied</i> 133 S. Ct. 28 (2012)	18,19
* <i>People v. Hevesi</i> , Allocution, 4632/2010 (Sup. Ct. N.Y. 2010)	4,5,6,13
<i>People v. Morris</i> , Plea Agreement, 0025/2009 (Sup. Ct. N.Y. 2011)	6
<i>Randall v. Sorrell</i> , 548 U.S. 230 (2006)	17
<i>Schreiber v. Burlington Northern Inc.</i> , 472 U.S. 1 (1985)	19
* <i>United States v. O'Hagan</i> , 521 U.S. 642 (1997)	19
<i>United States v. Kresler</i> , 392 Fed. Appx. 765 (11th Cir. 2010)	21

* Authorities on which this brief chiefly relies are marked with an asterisk.

Statutes

15 U.S.C. 80b-6(1)20

15 U.S.C. 80b-6(2)20

15 U.S.C. 80b-6(4)20

N.Y. Const. Art. V, § 616

N.Y. Elec. L. § 14-11412

*N.Y.C. Admin. Code § 3-701 et seq12,18

N.Y.C. Admin. Code § 13-10310

N.Y.C. Admin. Code § 13-12716

N.Y.C. Admin. Code § 13-12916

Regulations

17 C.F.R. 275.206(4)-5(a)(1)8

Other Authorities

U.S. Att’y N.D. Cal., Fmr CalPERS CEO Pleads Guilty Press Release10

U.S CENSUS BUREAU, 2012 Annual Survey of Public Pensions: State- and
Locally-Administered Defined Benefit Data13

*N.Y. Att’y Gen. Carlyle Group Assurance of Discontinuance4,5,6

N.Y. Att’y Gen. GKM Newport Assurance of Discontinuance4

*N.Y. Att’y Gen. Hevesi Sentencing Press Release5,6

*N.Y. Att’y Gen. Quadrangle Assurance of Discontinuance	4,5,6,13
N.Y. Att’y Gen. HVF/Odyssey Settlement Press Release.....	7
*N.Y. Att’y Gen. Public Pension Fund Code of Conduct	7,8
N.Y. Att’y Gen. Rattner Settlement.....	6
N.Y. Att’y Gen. Riverstone/Leuschen Settlement.....	4,6
*N.Y. Compt. Exec. Order “Political Contributions”	7,8
Rebecca Ballhaus, <i>Discord Brews Over SEC Campaign</i> , WALL ST. J.....	11
MARYLAND PUBLIC POLICY INSTITUTE, WALL STREET FEES AND THE MARYLAND PUBLIC PENSION FUND	14
Barry Massey, <i>Firm Settles with New Mexico over Investment Deals</i> , BLOOMBERG BUSINESS WEEK	9
PUBLIC FUND SURVEY, SURVEY OF FINDINGS FOR FY 2013	16
Nari Rhee, <i>Pensionomics 2014: Measuring the Economic Impact of DB Pension Expenditures</i> , National Institute on Retirement Security	14,15
RESTATEMENT, TRUSTS 2D. § 170	12

GLOSSARY

AoD	Assurance of Discontinuance
CalPERS	California Employees' Retirement System
COIB	New York City Conflict of Interest Board
CRF	New York Common Retirement Fund
FEC	Federal Election Commission
NYCERS	New York City Employees' Retirement System
PCR	Political Contributions by Certain Investment Advisers Rule
SEC	Securities and Exchange Commission

Interest of Letitia James, New York City Public Advocate and Trustee New York City Employees' Retirement System, Amicus Curiae

Letitia James is the duly elected Public Advocate for the City of New York and trustee of the New York City Employees' Retirement System (NYCERS). The potential nullification of Political Contributions by Certain Investment Advisers Rule (PCR) would adversely impact the integrity of the pension systems of states and localities by drastically easing the ability for investment managers to engage in pay-to-play activities and cause serious harm to the American economy.

As a trustee and fiduciary to the \$53 billion NYCERS public pension fund, the Public Advocate has an obligation to protect and grow the retirement savings that hundreds of thousands of pension members rely upon. The state of New York bears the recent stain of corruption in our state public pension fund where tens of millions in political contributions, sham fees, and gifts were given by investment fund managers to corrupt government officials. These contributions were made in exchange for the state pension system investing billions with these investment managers.

In addition, over \$10.2 million was spent in the race for Public Advocate in 2013. In the last election, all three city-wide candidates participated in the municipal public financing. Should the Court strike the Political Contribution Rule, it would weaken New York City's successful public finance system. The Office of Public Advocate has a proud history of protecting the residents from the

corrupting influence of big money in politics. In fact, the previous Public Advocate and now Mayor, Bill de Blasio challenged the efforts to invalidate state-law contribution limits for independent expenditure committees.

Pursuant to the Fed. R. App. P. 29(a), Circuit Rule 29(b) all parties consent to the filing of this *amicus curiae* brief. In accordance with Fed. R. App. P. 29(c)(5) the New York City Public Advocate's attorneys authored this brief without assistance, and no person other than the City of New York paid the expenses of its preparation.

ARGUMENT

I. The Troubling History of Pay-to-Play in New York and Other Jurisdictions Necessitates the Political Contribution Rule Promulgated by the Securities and Exchange Commission

Petitioners, the New York Republican State Committee and Tennessee State Republican Party, fail to acknowledge the recent corruption scandals involving one of the largest pension systems in the nation, the New York State Common Retirement Fund (CRF). Indeed, in their papers, they make only a passing reference to the possibility of corruption. Petitioners' brief asserts that the pay-to-play "activity...did not even involve a political contribution." Pet. Br. 45. Furthermore, Petitioners' claim that the graft consisted largely of "payments and gifts given directly to government officials." *Id.* They also contend that the harm the Securities and Exchange Commission seeks to mitigate is ill-conceived and infringes upon the contribution limit established by Congress. *Id.* 45-46. Petitioners are mistaken in their understanding of the facts and the law.

A. The Sordid History of Pay-to-Play Corruption in New York

Despite Petitioners' efforts to obfuscate the facts, New York State's recent history is replete with pay-to-play scandals. Protecting the pensions of hardworking New Yorkers from the schemes of investment managers, placement agents, and elected officials is not merely an academic exercise or a "prophylaxis-upon-prophylaxis" measure against a fictitious harm as Petitioners contend. Pet.

Br. 10. Indeed, pension systems in New York State recently fell victim to such pay-to-play schemes that included campaign contributions from investment firms including: Markstone Capital for \$500,000,² from the Carlyle Group for \$78,000,³ Quadrangle for \$50,000,⁴ GKM for \$50,000,⁵ and by Riverstone of \$40,000⁶ to support the re-election campaign of then-New York State Comptroller Alan Hevesi, who was first elected 2002 and re-elected in 2006.

The New York State Common Retirement Fund, for which Hevesi was sole trustee, invested vast sums of retirement savings of pension members in funds managed by these firms. Carlyle Group alone received investments totaling \$730 million over the course of two years across five of its funds.⁷ In his allocation,

² Pet. Br. at 56.

³ Allocation of Alan Hevesi at 1, *People v. Hevesi*, 4632/2010, Oct. 7, 2010, http://www.ag.ny.gov/sites/default/files/press-releases/archived/Hevesi_Allocation.pdf.

⁴ Att’y Gen. of N.Y., Assurance of Discontinuance (AoD) at 20, *In re: Quadrangle Group, LLC*, Investigation No. 10-044, April 15, 2010, <http://www.ag.ny.gov/sites/default/files/press-releases/archived/QUADRANGLE%20AOD.pdf>.

⁵ Att’y Gen. of N.Y., Assurance of Discontinuance (AoD) at 13, *In re: GKM Newport Generation Capital Services, LLC*, Investigation No. 2010-017, April 14, 2010, <http://www.ag.ny.gov/sites/default/files/press-releases/archived/GKM%20AOD.pdf>.

⁶ Att’y Gen. of N.Y., Cuomo Secures Agreement with Riverstone Founder David Leuschen to Pay \$20 Million in Restitution to Resolve Role in Continuing State Pension Fund Investigation, Dec. 9, 2009, <http://www.ag.ny.gov/press-release/cuomo-secures-agreement-riverstone-founder-david-leuschen-pay-20-million-restitution>.

⁷ Att’y Gen. of N.Y., Assurance of Discontinuance (AoD) at 14, *In re: The Carlyle Group*, Investigation No. 2009-071, May 14, 2009,

Comptroller Hevesi admitted to approving at least \$250 million in pension investments to private equity fund Markstone Capital Partners, L.P.⁸ In exchange for the campaign contributions, Quadrangle obtained \$150 million in pension assets.⁹

Then-Attorney General Andrew Cuomo conducted a robust five-year investigation into pay-to-play activities that yielded convictions of eight individuals including New York State Comptroller Alan Hevesi.¹⁰ This investigation revealed an intricate operation wherein the New York State Common Retirement Fund invested at least \$5 billion in more than twenty investment vehicles.¹¹ Over the course of the investigation, the web of pay-to-play kickback corruption led to the guilty pleas of Hevesi's political adviser and Searle & Co. member Henry "Hank" Morris; former New York Chief Investment Officer David Loglisci; former Liberal Party Chair Raymond Harding; investment adviser Saul

<http://www.ag.ny.gov/sites/default/files/press-releases/archived/Carlyle%20AOD.pdf>.

⁸ Hevesi Allocution, *supra* note 2, at 1.

⁹ Quadrangle AoD, *supra* note 3, at 20.

¹⁰ Att'y Gen. of N.Y., Former Comptroller Alan Hevesi Sentenced to up to Four Years in Prison for Role in Pay-to-Play Pension Fund Kickback Scheme, April 15, 2011, <http://www.ag.ny.gov/press-release/former-comptroller-alan-hevesi-sentenced-four-years-prison-role-pay-play-pension-fund>.

¹¹ Quadrangle AoD, *supra* note 3, at 11.

Meyer; hedge fund manager Barrett Wissman; unlicensed placement agent Julio Ramirez; and venture fund manager Elliott Broidy.¹²

Attorney General Cuomo secured over \$170 million for the state through settlements with twenty-one firms and five individuals.¹³ Quadrangle Capital founder Steven Rattner reached a settlement with the Attorney General for \$10 million and a five-year ban from appearing in any capacity before any public pension fund in the New York.¹⁴ His firm Quadrangle also reached a separate settlement with New York for \$7 million.¹⁵ The Carlyle Group ultimately paid \$20 million¹⁶ in penalties and their fund partner Riverstone paid \$30 million¹⁷ to the state of New York. “Hank” Morris, in his plea agreement, agreed to a forfeiture of \$19 million and a lifetime ban from the securities industry in New York.¹⁸

B. Protections Implemented in New York Following Pay-to-Play Scandal Are Meaningful But Limited.

¹² Hevesi Sentenced, *supra* note 9.

¹³ Att’y Gen. of N.Y., Attorney General Cuomo Announces Agreement with Steven Rattner Former Founding Principal of Quadrangle in Public Pension Fund Investigation, Dec. 30, 2010, <http://www.ag.ny.gov/press-release/attorney-general-cuomo-announces-agreement-steven-rattner-former-founding-principal>.

¹⁴ *Id.*

¹⁵ Quadrangle AoD, *supra* note 3, at 11.

¹⁶ Carlyle AoD, *supra* note 6, at 18.

¹⁷ Att’y Gen. of N.Y., Riverstone/Leuschen Settlement, *supra* note 5.

¹⁸ Plea Agreement of Henry “Hank” Morris at 1, *People v. Morris*, 0025/2009, Nov. 22, 2010, http://www.ag.ny.gov/sites/default/files/press-releases/archived/MORRIS_PLEA_AGMT_EXECUTED_11-22.pdf.

Numerous efforts were made to help protect public pensions in New York following the revelations of corruption at the New York Common Retirement Fund. Attorney General Cuomo and the new State Comptroller, Thomas DiNapoli, implemented several measures by executive action and sought legislative reforms.

The Attorney General obtained commitments from twenty-one firms and five individuals to the Public Pension Fund Code of Conduct (Code).¹⁹ The Code prohibits investment advisers from receiving *any* fees for a *two-year* period following any political contribution to a trustee, candidate for trustee, political parties, and political action committees.²⁰ Entities however are permitted to contribute *up to \$300* to the campaign for an elected trustee of a public pension for whom they can vote.²¹ The Code also precludes investment firms from compensating intermediaries for so-called introductions to public pension systems.²² In addition, there are provisions that increase transparency through regular disclosure of campaign contributions, investment fund personnel, and

¹⁹ Att’y Gen. of N.Y., Attorney General Cuomo Announces Agreements with Two Investment Firms (HVF Mgmt. and Odyssey Partners) in State Pension Fund Investigation, Dec. 15, 2010, <http://www.ag.ny.gov/press-release/attorney-general-cuomo-announces-agreements-two-investment-firms-state-pension-fund>.

²⁰ Att’y Gen. of N.Y., Andrew Cuomo, Public Pension Code of Conduct, § 3, No Campaign Contributions or Solicitations, http://riverstonellc.com/documents/Public_Pension_Fund_Reform_Code_of_Conduct.pdf.

²¹ *Id.* at § 3(c).

²² *Id.* at § 9.

payments to third parties.²³ Lastly, the Code also creates a higher fiduciary standard regarding public pension fund officials and fund advisers.²⁴

Similarly Comptroller DiNapoli issued an Executive Order that implemented rigorous reforms in the New York State Common Retirement Fund.²⁵ The Order banned the use of placement agents, and prevented the CRF from doing business with any “investment adviser” who made a political contribution to the State Comptroller or any candidates for State Comptroller.²⁶ The Executive Order also prohibited the CRF from investing with any investment adviser who coordinates or solicits with any person or political action committee.²⁷ However, these provisions served as interim policy until the implementation of the SEC’s Political Contributions by Certain Investment Advisers Rule (PCR). 17 C.F.R. 275.206(4)-5(a)(1).

Although both the Attorney General and Comptroller included an absolute prohibition from earning fees for two years if an investment adviser gives contribution for any amount, both policies have their limitations. The Attorney General’s Code of Conduct is only applicable to the firms and individuals who reached a settlement with that office. The pay-to-play provisions of the

²³ *Id.* at §§ 3, 9, 10.

²⁴ *Id.* at §§ 12-18.

²⁵ N.Y. Compt. Thomas DiNapoli, Executive Order, “Political Contribution,” Sept. 13, 2010 <https://www.osc.state.ny.us/pension/reform.htm>.

²⁶ *Id.* at § 2(A).

²⁷ *Id.* at § 2(B).

Comptroller's Executive Order sunsetted with the implementation of the PCR. Despite the value of these reforms, ultimately they are executive actions that a subsequent officeholder may choose not to support. In addition, they have a limited bearing on New York City's municipal pension funds. Efforts to codify the reforms by the Attorney General and Comptroller were not successful. Thus the Political Contributions by Certain Investment Advisers Rule is still needed to protect the integrity of New York's state and municipal public pensions.

C. Pay-to-Play Corruption in Other Jurisdictions

The threat of pay-to-play in the financial services sector with public pension funds is not limited to New York but tarnishes pension systems across the country. Like New York State, other jurisdictions have had serious allegations of improper influences impacting pension fund investment decisions. Dallas-based Aldus Principal Saul Meyer, who made payments to manage \$450 million in CRF assets, also reached a settlement with New Mexico to pay \$620,000.²⁸ The State of New Mexico has collected \$26 million in pay-to-play settlements. *Id.* In California, former California Public Employees Retirement System (CalPERS) CEO Fred Buenrostro admitted before a federal judge in the Northern District of California

²⁸ Barry Massey, *Firm Settles with New Mexico over Investment Deals*, BLOOMBERG BUSINESS WEEK, June 19, 2014, <http://www.businessweek.com/ap/2014-06-19/firm-settles-with-new-mexico-over-investment-deals>.

on July 11, 2014, to taking bribes to influence CalPERS Investments and obstructing civil and criminal investigations.²⁹ These allegations involved former CalPERS Trustee, and recently deceased Alfred J. Villalobos, founder and operator of ARVCO Capital Research LLC, a major placement agent firm.³⁰

II. Responsibilities of Public Pension Trustees and Investment Advisers

A. New York Republican State Committee and Tennessee Republican Party Unable to Proffer Investment Adviser or Trustee of Public Pension, Public Advocate Endorses Political Contribution Rule

As a trustee of the New York City Employees Retirement System (NYCERS) and as the Public Advocate for the New York, this Office wholeheartedly welcomes the Securities and Exchange Commission's promulgation of the PCR. N.Y.C. Admin. Code § 13-103. The commonsense provisions set forth in the PCR bolster the integrity of NYCERS and of pension systems across the country. Petitioners, the New York Republican State Committee and Tennessee Republican Party's attack a rule designed to prevent the real concrete harms of pay-to-play behavior by investment advisers under the guise

²⁹ U.S. Att'y N.D. Cal., Former CalPERS CEO Pleads Guilty to Corruption Conspiracy, July 11, 2014, <http://www.fbi.gov/sanfrancisco/press-releases/2014/former-calpers-ceo-pleads-guilty-to-corruption-conspiracy>.

³⁰ *Id.*

of the First Amendment. However, the real motives seem primarily to benefit certain governors who seek higher office.³¹

Even on appeal, Petitioners are unable to produce a single plaintiff directly regulated by the SEC. Nor is an elected official who serves as a fiduciary on a public pension system willing to lend their name. This is consequential. The Petitioners have no fiduciary duties or obligations to a public pension, nor are they subject to the regulatory authority of the SEC. Yet Petitioners claim the First Amendment rights of parties are being violated, none of who are willing to state they are aggrieved.

B. Existing Laws and Fiduciary Responsibilities of Public Pension Trustees and Investment Advisers Are Unable to Adequately Secure Integrity of Public Pensions

It is evident from examining the state of corruption in the nation's pension systems that pre-existing laws were insufficient to guard against abuse. Neither fiduciary obligations nor existing limits on contributions have prevented the scandals from occurring in New York and elsewhere.

We know that both trustees and the investment advisers who manage pension funds bear responsibilities enshrined in common law, including the duty of loyalty and duty of care. The duty of loyalty, specifically, the prohibition against

³¹ Rebecca Ballhaus, *Discord Brews Over SEC Campaign*, WALL ST. JOURNAL, Dec. 28, 2014, <http://www.wsj.com/articles/discord-brews-over-sec-campaign-finance-rule-1419814379>.

self-dealing is a prophylactic rule meant to insulate from harm should a trustee's interest conflict with a beneficiary. RESTATEMENT, TRUSTS 2D. § 170. Trustees must discharge their duties solely in the interest of the plan's participants and beneficiaries.

With regards to political contribution scheme, the Petitioners repeatedly cite to the \$2,600 maximum contribution established by Congress as a pre-existing protection against corruption. Pet. Br. 44, 46, 49. However, that rule is not absolute; it permits donors to give trustees up to the maximum limit permitted under state and local laws. In some instances, these sums are far greater. In New York for example, an individual may give up to \$41,100 for the general election to a candidate for Governor, Comptroller, and Attorney General. N.Y Elec. L. 14-114. Similarly, municipal candidates in New York City for the three city-wide offices, the Mayor, Public Advocate, and City Comptroller are subject to higher contribution limits. N.Y.C. Admin. Code § 3-701, *et seq.*

III. Importance of Public Pension Funds to U.S. Economy and Dangers of Cross-Jurisdictional Corruption

1. The insidious nature of the corruption is not limited to one jurisdiction but indeed without oversight it may envelope public pension systems across the country. Hedge funds and private equity firms such as Quadrangle used the ill-

gotten prestige of New York’s CRF systems to enlist other systems.³² In some instances the tentacles of corruption reached even further because public officials who were beneficiaries of the political contributions of private equity firms including the Comptroller went so far as to persuade trustees from other systems to invest with these corrupt firms.³³ For example, we know that Comptroller Hevesi flew to California at the behest of Markstone Capital to persuade public pension systems there to invest their assets with Markstone.³⁴ The corrupt actions of firms such as Markstone and Quadrangle demonstrate the dangers beyond the members of a single public pension system. While balancing any perceived rights to campaign contributions by those who financially and politically benefit from those contributions, weighed against the need to protect pension funds, this Court must consider the clear enormity of the stakes and support proper regulation.

The assets of the United States’ state and local pension funds are too valuable and vulnerable to allow the malfeasance of targeted campaign contributions for influence. With over \$3.05 trillion in assets (in 2012) state and local pension funds and the fees associated with managing those assets, are an attractive target for managers to seek business.³⁵ In 2011, the 50 State pension

³² Quadrangle AoD, *supra* note 3, at 5.

³³ Hevesi Allocation, *supra* note 7, at 7.

³⁴ *Id.*

³⁵ U.S CENSUS BUREAU, 2012 Annual Survey of Public Pensions: State- and Locally-Administered Defined Benefit Data,

funds with assets of over \$2 trillion, excluding local pension funds, expended \$7.8 billion dollars on investment fees.³⁶ This rich financial opportunity has created an atmosphere that attracts marketers, third party placement agents, influence peddlers and other actors seeking to gain favorable treatment by the staff and trustees of our state and local pension funds.

The public pension funds of the United States are too important to allow any increased pressures that interfere with their proper administration and influence on investment decisions. The assets are not only individually important to workers and retirees, i.e. plan beneficiaries, but collectively impact the local, state and federal economies of the United States. This mandates protecting these assets and a need for increased responsibility on the part of SEC regulators in protecting the corpus and management of pension funds.

According to the National Institute on Retirement Security, the economic gains attributable to defined benefit pension expenditures are enormous.³⁷ In their most recent study, they determined that in 2012 nearly \$477 billion in pension benefits were paid to 24 million retired Americans, including \$228.5 billion paid to

<http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

³⁶ MARYLAND PUBLIC POLICY INSTITUTE, WALL STREET FEES AND THE MARYLAND PUBLIC PENSION FUND, July 25, 2012, <http://www.mdpolicy.org>.

³⁷ Nari Rhee, Pensionomics 2014: Measuring the Economic Impact of DB Pension Expenditures, National Institute on Retirement Security, July 2014, p. 1, http://www.nirsonline.org/storage/nirs/documents/Pensionomics%202014/pensionomics2014_final.pdf.

some 9 million retired employees of state and local government and their beneficiaries.³⁸ Pension payments supported: \$6.2 million American jobs that resulted in nearly \$307 billion in labor income; \$943 billion in total economic output nationwide; \$555 billion in value added (GDP) and added \$135 billion in federal, state, and local tax revenue.³⁹

These pensions, according to the study have significant multiplier effects. They cite that for each dollar paid out in pension benefits, it supports \$1.98 in total economic output nationally.⁴⁰ Each taxpayer dollar contributed to state and local pensions supported \$8.06 in total output on a national level.⁴¹ Further according to the National Institute on Retirement Security “reliable pension income can be especially important not only in providing retirees with peace of mind, but in stabilizing local economies during economic downturns. Retirees with [defined benefit] pensions know they are receiving a steady check despite economic conditions.”⁴² To the extent that defined benefit pensions provide retirees with steady income available for spending regardless of fluctuations in the stock market,

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Rhee, Pensionomics 2014 1.

⁴² *Id.*

DB [defined benefit] pensions may play a stabilizing role in the economy like Social Security.”⁴³

2. But at the same time, pension funds in the United States, both state and local, have had serious funding challenges. According to the Public Fund Survey in 2015, the actuarial funding levels among plans in their Survey, declined in FY13 to 71.8 percent.⁴⁴ The actuarial liabilities grew from \$3.60 trillion to \$3.81 trillion, or 5.9 percent.⁴⁵ When investment returns are insufficient to meet liabilities, cities and state generally must increase contributions, through their tax levy on their residents. N.Y.C. Admin. Code §§13-127 and 13-129. In many jurisdictions, any reduction of investment assets may result in loss of benefits to individuals who may result in poverty and increased reliance on other governmental subsidies for those beneficiaries. Where diminishment or impairment of benefits is not permitted, its impact is on the entire state or locality to increase its employer contributions. N.Y. Const. Art. V, § VII. Moreover, the need for increased employer contributions resulting from poor funding status or loss of returns from poor investment decisions, causes an increased strain to the state and local budgets, and may negatively impact credit ratings, which may have further negative fiscal implications.

⁴³ *Id.*

⁴⁴ PUBLIC FUND SURVEY, SURVEY OF FINDINGS FOR FY 2013, Jan. 2015, *available at* <http://www.publicfundsurvey.org/publicfundsurvey/summaryoffindings.html>.

⁴⁵ *Id.*

Improper investment decisions, which have been and may once again be influenced by campaign contributions, while not an exclusive basis are a major contributing factor in those funding valuations and have a consequential impact to beneficiaries, as well as state and local economies. Therefore, striking down the PCR would likely have a deleterious impact upon pension members, taxpayers, and the economy.

IV. Constitutionality of the Political Contribution Rule

A. Contribution Limits Are Permitted If Closely Drawn to Prevent Actual or Perceived Corruption

The Supreme Court consistently applies the less stringent closely drawn analysis as opposed to strict scrutiny when evaluating the constitutionality of contribution limits. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1449 (2014); *FEC v. Beaumont*, 539 US. 146, 162 (2003); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). The Court has long recognized that preventing actual or even perceived corruption is an important state interest. *Nixon v. Shrink*, 528 U.S. 377, 388 (2000) (quoting *Buckley* 424 U.S at 25-26). Contribution limits are permissible if they are “closely drawn to match a sufficiently important interest.” *Randall v. Sorrell*, 548 U.S. 230, 247 (2006). Although the SEC’s rule is not a contribution limit in the strictest sense in that it creates a “cooling-off” period. Even in circumstances where strict scrutiny was applied to a similar rule meant to protect investors in municipal bonds

from fraudulent and corrupt practices, those measures were upheld by this Court. *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), *cert. denied* 517 U.S. 1119 (1996).

B. SEC Did Not Operate Beyond Its Statutory Authority, Prophylactic Rules are Permissible and Must be Accorded Deference

The corruption of the play-to-play scandals that rocked pension systems across the country lead the objective observer to the conclusion that the existing legal framework is not adequate for protecting the system. Assuming *in arguendo* that Petitioners' assertions are accurate that there is no evidence of pay-to-play corruption, the SEC may still issue a prophylactic rule.

Petitioners' argument is that the SEC should permit those who seek to subvert the public pensions that millions of Americans rely on for their personal benefit to continue such practices. This strains credulity. A similar specious argument was before the Second Circuit in *Ognibene v. Parks*, 671 F.3d. 174 (2d. Cir. 2011), *cert. denied* 133 S. Ct. 28 (2012). Petitioners in that case sought to nullify New York City's "Doing Business Law." N.Y.C. Admin. Code § 3-701. The law prohibits individuals with who have contract(s) with the City from contributing more than \$400 for to any candidate seeking municipal office. In upholding the Doing Business Law, the Second Circuit citing *Citizens United* held that that "there is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures." *Ognibene*, 671

F.3d. at 188, (citing *Citizens United v. FEC* 558 U.S. 310 (2010)). Highlighting imprudence of the petitioners contention, the Court stated, “[a]ppellants essentially propose giving every corruptor at least one chance to corrupt before anything can be done, but this dog is *not* entitled to bite.” *Id.*

The Supreme Court has repeatedly upheld “definitional and prophylactic” rules developed by the Securities and Exchange Commission. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985). The SEC’s ability to create prophylactic rules is predicated upon a specific delegation of Congressional authority. The Agency’s determination must be given more than mere deference or weight. *Batterton v. Francis*, 432 U.S. 416, 424-426 (1977). However, the Agency is not permitted to promulgate a rule that is “arbitrary, capricious, or manifestly contrary to the statute. *U.S. v. O’Hagan*, 521 U.S. 642, 676 (1997).

Contrary to Petitioners’ assertions, the PCR as promulgated by the SEC does not exceed the Agency’s authority. The SEC has considerable latitude in rulemaking. *O’Hagan*, 521 U.S. at 678. Indeed, the Political Contribution Rule promulgated by the SEC falls squarely within the ambit of the SEC’s authority of protecting investors and preventing fraud.

The PCR does not “prevent[s] individuals from exercising their First Amendment right to participate in democracy through political contributions.” Pet. Br. 48, quoting *McCutcheon*, 134 S.Ct. at 1441. Rather, the rule seeks to prevent

individuals and entities employed in the financial services sector who solicit pension funds to not corrupt a critical component of the U.S. economy. The rule regulates a narrow subset of individuals in the financial services industry. According to the Advisers Act, the law may only be applicable to larger advisers with \$25 million or more in assets under management who solicit or manage public pension funds. This is an important distinction.

Here the SEC's regulatory authority rests upon the Investment Advisers Act of 1940. Section 206 of the Advisers Act, the Prohibited Transactions by Registered Investment Advisers explicitly proscribes investment advisers either directly or indirectly from "employ[ing] any device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. §80b-6(1). The law further prohibits advisers from "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. §80b-6(2). Lastly and most relevant to this case, the statute prohibits investment advisers from "engag[ing] in any act, practice, or course of business which is fraudulent, deceptive, or manipulative." 15 U.S.C. §80b-6(4). Congress further, commands, "[t]he 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." *Id.* Here, it is manifestly clear that Congress intended to authorize

the SEC to promulgate rules and regulations to address the malignancy that has affected the management of public pension funds.

C. State and Local Officeholders Seeking Federal Office are not a Protected Class and Thus are not Disparately Treated

Petitioners contend that the SEC treats state officeholders, such as governors who seek the presidency, differently from other candidates as if governors are a protected class. Pet. Br. 54. This is the very definition of *chutzpah*. The 11th Circuit defines in *United States v. Kresler*, 392 Fed. Appx. 765, 770 (11th Cir. 2010). Petitioners' efforts to use the language of Civil Rights by referring to their restrictions as "disparate impact" is an affront to those who struggled, suffered, and died for equal justice. Republican officials seeking the Presidency or other offices are not a protected class. Should state or local officeholders who are trustees seek federal office, they may simply resign and run for office un-encumbered. Though the reality of such politics is that such officeholders have additional innumerable benefits when seeking higher office than those without such power and resources.

D. Investment Advisers Who Manage Public Pension Funds May Be Regulated Similar to the Political Activity Restrictions Upon High-Level Government Employees

Furthermore, Petitioners err in their belief to asserting a fundamental right in serving as an investment adviser. There is no such right. In New York City, municipal government employees with "substantial policy discretion" are restricted

from soliciting contributions for candidates seeking municipal office. N.Y.C. Charter §2604(b)(12). This commonsense prohibition in New York’s conflict of interest laws prevents even the appearance corruption by those who set policies or award contracts impacting the lives of the nine million residents of New York City and carries penalties for those who violate it.⁴⁶ This restriction is not only permissible but prudent public policy. The privilege of serving as a substantial policy-maker in government is not a right—nor is there a right to be an investment adviser.

CONCLUSION

The district court’s final judgment should be affirmed, and the petition for review should be dismissed. If the Court reaches the merits, it should uphold the pay-to-play rule.

Respectfully submitted,

JENNIFER LEVY
General Counsel Litigation

LAWRENCE M. SCHIMMEL
General Counsel Investments

/s/ Muhammad Umair Khan
MUHAMMAD UMAIR KHAN
Deputy Counsel
Office of New York City Public
Advocate Letitia James
1 Centre St., 15th Fl.
New York, NY 10007

January 28, 2015

Counsel for Amicus Curiae

⁴⁶ See e.g. *Kearny v. COIB*, Case No. 2009-600 (2010); *COIB v. Chapin*, Case No. 1999-500 (2000), http://www.nyc.gov/html/conflicts/downloads/pdf3/topics_docs/topics_enf_sum_political.pdf.

CERTIFICATE OF COMPLIANCE

1. Fed. R. App. P. 32(a)(7)(B); Circuit Rule 32(a)(2)(C). This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,537 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. Fed. R. App. P. 32(a). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman Type.

Dated: January 28, 2015

/s/ Muhammad Umair Khan
MUHAMMAD UMAIR KHAN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief Amicus Curiae of New York City Public Advocate Letitia James in support Respondents/Appellants was served on January 28, 2015 upon the following individuals via this Court's CM/ECF:

H. Christopher Bartolomucci
Bancroft PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036

Jason Brett Torchinsky
Holtzman Vogel Josefiak, PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186

Jeffrey Alan Berger
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9040

Jacob H. Stillman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9040

By: /s/ Muhammad Umair Khan
MUHAMMAD UMAIR KHAN

*Attorney for Amicus Curiae New York City Public
Advocate*