No. 19-343

# In the Supreme Court of the United States

NEW YORK REPUBLICAN STATE COMMITTEE,
PETITIONER

*v.*

SECURITIES AND EXCHANGE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTIONS PRESENTED

In response to a series of pay-to-play scandals involving placement agents—broker-dealers that solicit state and local governments for contracts on behalf of investment advisers—the Securities and Exchange Commission (SEC or Commission) approved a rule proposed by the Financial Industry Regulatory Authority. That rule imposed a two-year ban on compensation for placement agents that make political contributions in excess of a certain amount to the campaigns of officials who have authority to award investment-advisory contracts. The questions presented are as follows:

1. Whether the rule is consistent with the First Amendment.

2. Whether the Commission's approval of the rule was a valid exercise of the SEC's authority under the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq*.

3. Whether the Commission's approval of the rule was arbitrary and capricious.

**ADDITIONAL RELATED PROCEEDINGS**

United States Court of Appeals (D.C. Cir.):

*New York Republican State Comm.* v. *SEC*, No. 18-1111 (June 18, 2019)

United States Court of Appeals (11th Cir.):

*Georgia Republican Party* v. *SEC*, No. 16-16623 (Apr. 26, 2018) (transferring this case to the D.C. Circuit)

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 4a-32a) is reported at 927 F.3d 499. The final order of the Securities and Exchange Commission (Pet. App. 138a-224a) is reported at 114 SEC Docket 5455 and is available at 2016 WL 4474780.

**JURISDICTION**

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on June 18, 2019. The petition for a writ of certiorari was filed on September 16, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

### A. Statutory And Regulatory Background

1. State and local governments often manage pension funds and other investment plans for current and former employees. "In many instances," the elected officials "responsible for holding and managing" such funds "are also responsible for choosing investment advisers to manage plan assets." Pet. App. 6a. That arrangement can create a risk of "'pay-to-play'" corruption when "elected officials [select] investment advisers based upon whether the would-be adviser ha[s] given them money or donated to their campaign." *Ibid.* In 2009, the Securities and Exchange Commission (SEC or Commission) observed that a "growing number" of enforcement actions and reports revealed that campaign contributions had influenced state and local governments' awards of investment advisory contracts. 74 Fed. Reg. 39,840, 39,843 (Aug. 7, 2009).

In 2010, the SEC exercised its authority under the Investment Advisers Act of 1940 (Advisers Act), 15 U.S.C. 80b-1 *et seq.*, to adopt a rule (Advisers Act Rule), 17 C.F.R. 275.206(4)-5, that regulates the conduct of investment advisers who seek business from government entities. The Advisers Act Rule makes it unlawful to provide 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." 17 C.F.R. 275.206(4)-5(a)(1). The Commission modeled the Advisers Act Rule—including its two-year timeout mechanism—on an earlier rule (Rule G-37) adopted by the Municipal Securities Rulemaking Board (MSRB), which had successfully helped to reduce pay-to-play in the municipal securities industry. 75 Fed.

Reg. 41,018, 41,020 & n.30 (July 14, 2010). In 1995, the D.C. Circuit upheld Rule G-37 against constitutional challenge. *Blount* v. *SEC*, 61 F.3d 938, 941-949, cert. denied, 517 U.S. 1119 (1996).

In addition to regulating investment advisers, the Advisers Act Rule addressed the role of the "'placement agents' that [investment] advisers engage (or believe they must engage) in order to secure a client relationship with a public pension plan." 75 Fed. Reg. at 41,019. The Commission described several relevant instances of misconduct, including one in which a placement agent had directed legal contributions to the New York State Comptroller to secure $250 million in pension fund investments for investment-adviser clients. Pet. App. 204a-205a; see 75 Fed. Reg. at 41,019-41,020. The SEC initially proposed to ban the use of placement agents by investment advisers altogether, but it ultimately allowed advisers to retain placement agents that are "regulated persons." Pet. App. 195a; see 75 Fed. Reg. at 41,041; see also 17 C.F.R. 275.206(4)-5(a)(2)(i).

The Advisers Act Rule defines the term "[r]egulated person" to include a broker-dealer that "is registered with the Commission, and is a member of a national securities association"—such as the Financial Industry Regulatory Authority (FINRA)—provided that the association's rules (which must be approved by the SEC) prohibit members from "engaging in distribution or solicitation activities if certain political contributions have been made," and that the association's rules are "substantially equivalent or more stringent" than the Advisers Act Rule. 17 C.F.R. 275.206(4)-5(f)(9)(ii) (emphasis omitted); see 75 Fed. Reg. at 41,041-41,042. Thus, rather than banning placement agents, the Commission

subjected them to rules that FINRA would develop. Pet. App. 195a n.241.

2. In December 2015, FINRA proposed a pay-to-play rule, Rule 2030, for approval by the SEC. Pet. App. 33a-97a, 237a-244a; see 15 U.S.C. 78s(b). Rule 2030 adopts the same timeout mechanism that appears in the Advisers Act Rule and Rule G-37. Pet. App. 142a-146a, 192a-198a. Specifically, covered member firms may not "engage in distribution or solicitation activities for compensation with a government entity on behalf of an investment adviser that provides or is seeking to provide investment advisory services to such government entity within two years after a contribution to an official of the government entity is made by the covered member or a covered associate." *Id.* at 237a. The timeout discourages "pay-to-play practices by requiring a cooling-off period during which the effects of a *quid pro quo* political contribution on the selection process can be expected to dissipate." *Id.* at 191a. A violation of Rule 2030 thus occurs not because of a contribution, but because a firm receives compensation within two years after a covered contribution. If a firm makes a covered contribution but receives no compensation for placement-agent services during the next two years, there is no violation of Rule 2030.

Not every contribution to every candidate for every office triggers the Rule 2030 timeout. The timeout applies to contributions made by a member firm or certain employees known as "'[c]overed associate[s],'" which includes "[a]ny general partner, managing member or executive officer," and those that engage "in distribution or solicitation activities with a government entity." Pet. App. 241a-242a. These are employees "who, by vir-

tue of their position or responsibilities, are best positioned to engage in pay-to-play activities as placement agents." *Id.* at 215a-216a. Rule 2030 covers only contributions to "'[o]fficial[s],'" a term the rule defines to mean incumbents or candidates for an office that is "directly or indirectly responsible for, or can influence the outcome of, the hiring of an investment adviser by a government entity" or that has the "authority to appoint" such a person. *Id.* at 243a-244a. Donations to candidates who do not have such authority, and "direct contributions to political parties," do not trigger the timeout. *Id.* at 217a. With respect to political-party fundraising, Rule 2030 "only precludes a covered member from soliciting or coordinating payments to a political party of a State or locality of a government entity with which the covered member is engaging in distribution or solicitation activities on behalf of an investment adviser." *Id.* at 218a.

Rule 2030 does not implicate other forms of political speech, such as advocating for candidates, volunteering personally for campaigns, or making independent expenditures. Pet. App. 206a-207a. And Rule 2030 contains several exceptions. Firms and covered associates may contribute $350 to "officials" for whom they can vote—and $150 to others—without triggering the timeout. *Id.* at 238a. The rule also contains an exception for returned contributions and a process for seeking exemptions from the timeout. *Id.* at 238a-241a.

3. After a public comment process, the SEC approved Rule 2030 in August 2016. Pet. App. 138a-140a, 191a. In approving the rule, the Commission emphasized the "central role" that placement agents had "played in actions that the Commission and other authorities have brought involving pay-to-play schemes." *Id.* at 192a-

207a. The Commission also reiterated its concern that hiring "placement agents who have made political contributions to key officials is viewed by investment advisers as a necessary step to securing a contract with a public pension plan." *Id.* at 194a-195a. The SEC concluded that Rule 2030 would allow firms to serve as placement agents "without political contributions distorting the process," thereby "promot[ing] fair competition in the market and protect[ing] public pension funds and investors." *Id.* at 199a; see 17 C.F.R. 275.206(4)-5(a)(2)(i)(A).

The SEC found that Rule 2030 was "consistent" with the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, as required for approval, 15 U.S.C. 78s(b)(2)(C)(i). The Commission discussed how pay-to-play distorts "the investment adviser selection process from one that is based on merit, performance and cost, to one that is influenced by a placement agent's contributions to the campaigns of government officials" who select advisers. Pet. App. 196a. The Commission also described how pension funds can be harmed if they receive inferior services or pay higher fees, and how the ultimate victims are taxpayers and beneficiaries, who cannot easily move their assets or remove compromised officials from their posts. *Ibid.*

The SEC further emphasized that pay-to-play distorts markets. When actual or apparent pay-to-play arrangements infect the contracting process, placement agents cannot compete or obtain a contract for their clients unless they contribute. Pet. App. 196a-197a. Investment advisers are also disadvantaged "unless they are willing to engage in pay-to-play practices" by "hiring placement agents that make certain political contributions." *Ibid.* The Commission added that regulation

is needed because pay-to-play occurs in stealth, and neither officials nor firms have an incentive to stop for fear of losing out to rivals who continue. *Id.* at 194a-201a.

The SEC also addressed First Amendment concerns raised by commenters. Pet. App. 201a-207a. The Commission explained that Rule 2030 advances important government interests, including halting *quid pro quo* corruption, and that Rule 2030 is closely drawn to serve those interests because it affects only a small segment of the electorate and a limited number of officials. *Id.* at 206a-207a. The Commission also emphasized that Rule 2030 imposes a limited burden on speech because it contains exceptions that permit some contributions without triggering the timeout, and it does not affect other forms of political speech. *Id.* at 207a.

**B. Proceedings Below**

Petitioner New York Republican State Committee (NYGOP), along with the Tennessee Republican Party and the Georgia Republican Party, filed in the Eleventh Circuit a joint petition for review of the SEC order approving Rule 2030. See *Georgia Republican Party* v. *SEC*, 888 F.3d 1198, 1200 (2018). The Eleventh Circuit determined that the Georgia Republican Party lacked standing, see *id.* at 1201-1205, and that venue was improper for petitioner and the Tennessee Republican Party, see *id.* at 1205. The court accordingly transferred the case with respect to petitioner and the Tennessee Republican Party to the D.C. Circuit. *Ibid.* The D.C. Circuit upheld the Commission's approval of Rule 2030. Pet. App. 4a-28a.[1]

1. The court of appeals first addressed whether petitioner had Article III standing. Pet. App. 10a-13a.

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[1] Only the NYGOP seeks review in this Court.

The panel majority cited an affidavit from Francis Calcagno, a New Jersey resident, stating that "'if Rule 2030 were no longer in effect,' then he 'would solicit contributions for the NYGOP from [his] friends, family, and other contacts.'" *Id.* at 11a (quoting *id.* at 236a) (brackets in original); see *id.* at 235a. Based on this affidavit, the majority concluded that petitioner's "reduced ability to raise funds due to Rule 2030 constitutes a concrete and particularized injury for purposes of Article III standing," and that petitioner had "shown it faces a 'substantial risk' of this harm materializing." *Id.* at 11a-12a.

Judge Sentelle dissented from that holding, explaining that he would have dismissed the petition for lack of standing. Pet. App. 29a-32a. Judge Sentelle stated that, because the Calcagno affidavit does not "attest with certainty that any of his contacts would contribute to petitioners in the absence of the rule," the assertion of any injury-in-fact was "at most speculation." *Id.* at 30a-31a. He further concluded that petitioner had not established that any injury it may have suffered was caused by the Commission, because the existence of any such injury "depends on the volitional act of a third party" not before the court. *Id.* at 31a.

2. On the merits, the court of appeals rejected petitioner's contention that Rule 2030 exceeded the Commission's authority under the Exchange Act, holding that Rule 2030 "is within the authority of the SEC to reduce distortion in financial markets." Pet. App. 14a-15a. The court noted the "'self-evident' connection 'between eliminating pay-to-play practices and the Commission's [twin] goals of perfecting the mechanism of a free and open market and promoting just and equitable principles of trade.'" *Id.* at 16a (quoting *Blount*, 61 F.3d

at 945) (internal quotation marks omitted; brackets in original). The court explained that pay-to-play subverts these objectives by "transform[ing] the process by which government officials select investment advisers into one in which political contributions, rather than the competence and cost of investment advisers, drive the award of contracts." *Id.* at 14a.

The court of appeals also held that the Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. 30101 *et seq.* (Supp. V 2017), did not displace the Commission's authority because there existed no "clear congressional intention to preclude the SEC from limiting campaign contributions that distort financial markets." Pet. App. 17a (internal quotation marks omitted). The court concluded that "FECA and the Exchange Act, as instantiated by the SEC's pay-to-play rules, can peacefully coexist." *Id.* at 20a. It explained that, "[a]lthough both regimes touch upon political contributions, the FECA is meant to protect elections from the perceived untoward effects of over-limit campaign contributions by whomever made, whilst the Exchange Act, as implemented by Rule 2030, is meant to protect the financial markets from the perceived untoward effects of over-limit contributions made by placement agents." *Ibid.*

Petitioner also contended that the SEC had failed to show the existence of corruption beyond what was already prohibited by bribery laws or FECA. Pet. App. 21a-23a. In rejecting that argument, the court of appeals explained that bribery laws "deal with only the most blatant and specific attempts of those with money to influence governmental action," while "corruption and its appearance are no doubt more widespread in the contracting process than our criminal dockets reflect." *Id.* at 21a-22a (quoting *Wagner* v. *FEC*, 793 F.3d 1, 15

(D.C. Cir. 2015) (en banc), cert. denied, 136 S. Ct. 895 (2016)) (citation omitted). The court also noted that "[t]he SEC adopted Rule 2030 precisely because it was aware of several instances in which a placement agent's contribution to a government official—lawful under the FECA—influenced that official's decision to award an advisory services contract." *Id.* at 22a. As with Rule G-37, the court explained, contributions by placement agents seeking business for investment-adviser clients "'self-evidently create[d] a conflict of interest' and, although actual corruption is difficult to detect, the 'risk of corruption is obvious and substantial.'" *Id.* at 23a (quoting *Blount*, 61 F.3d at 944-945) (brackets in original).

Finally, the court of appeals held that Rule 2030 does not violate the First Amendment. Pet. App. 23a-28a. Applying the "standard of review prescribed by the Supreme Court," the court of appeals concluded that Rule 2030 was "closely drawn to serve a sufficiently important governmental interest." *Id.* at 23a-24a (citations and internal quotation marks omitted). Relying on its previous decision in *Blount*, which had upheld an MSRB rule that was "identical in every constitutionally relevant way to FINRA Rule 2030," the court explained that, "[t]hen, as now, the Supreme Court has said that 'preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'" *Id.* at 24a (quoting *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985)). The court of appeals noted its prior determination in *Blount* that "Rule G-37 survives even strict scrutiny because the rule restricts only a 'narrow range of . . . activities for a relatively short period of time.'" *Ibid.* (citation omit-

ted). The court explained that, because "Rule 2030 contains identical safeguards," it was constitutional for the same reason: "its restrictions are closely drawn to further a compelling governmental interest, as can be seen in the specific instances of quid pro quo conduct identified by the SEC." *Ibid.*

The court of appeals rejected petitioner's argument that two decisions of this Court issued after *Blount*—*McCutcheon* v. *FEC*, 572 U.S. 185 (2014), and *Davis* v. *FEC*, 554 U.S. 724 (2008)—undermined its holding. The court of appeals explained that *Blount* was consistent with *McCutcheon*'s admonition "that the court must be 'particularly diligent in scrutinizing the law's fit' with the governmental interest it is supposed to serve." Pet. App. 25a (quoting *McCutcheon*, 572 U.S. at 221) (plurality opinion). Relying on *Davis*, petitioner contended that the "'disparate impact that a restriction like Rule 2030 will have on candidates running for the same seat' where one candidate is a covered official and the incumbent (or another candidate) is not" rendered Rule 2030 unconstitutional. *Ibid.* (citation omitted); see *id.* at 25a-26a. The court rejected that argument, explaining that the question in *Davis* "was not simply whether the challenged rule had a disparate effect, but whether the difference was 'justified by the primary governmental interest proffered in its defense.'" *Id.* at 26a (quoting *Davis*, 554 U.S. at 738). Here, by contrast, "any disparate effect from Rule 2030 is a feature, not a flaw, of the narrow tailoring of the Rule." *Id.* at 27a. The court accordingly concluded that "the Rule is indeed closely drawn to fit the important governmental interest behind it." *Ibid.*

**ARGUMENT**

The court of appeals correctly held that Rule 2030 is consistent with the First Amendment because it is closely drawn to further important governmental interests in, among other things, halting *quid pro quo* corruption and its appearance. The court also correctly held that the Commission had the power to approve Rule 2030's response to pay-to-play abuses under its statutory authority to prevent fraud, remove impediments to a free and open market, and protect investors and the public. Finally, the court correctly rejected petitioner's assertion that the Commission's action was arbitrary and capricious. The decision below does not conflict with any decision of this Court or any other court of appeals, and the serious doubts about petitioner's standing further counsel against this Court's review. The petition for a writ of certiorari should be denied.

1. a. Applying this Court's precedent, the court of appeals correctly held that Rule 2030 is consistent with the First Amendment because it is "closely drawn" to serve "'sufficiently important'" governmental interests. Pet. App. 24a (quoting *McCutcheon* v. *FEC*, 572 U.S. 185, 197 (2014)) (plurality opinion).

Petitioner acknowledges the sufficiency of the Commission's interest in halting *quid pro quo* corruption. Pet. 22 (citing *McCutcheon*, 572 U.S. at 191, 206-208) (plurality opinion). Rule 2030 discourages member firms from spending money "in connection with an effort to control the exercise of an officeholder's official duties," namely awarding investment advisory contracts. *McCutcheon*, 572 U.S. at 208 (plurality opinion). As the unanimous en banc D.C. Circuit has explained, "if there is an area that can be described as the 'heartland' of"

concerns about *quid pro quo* corruption, "the contracting process is it." *Wagner* v. *FEC*, 793 F.3d 1, 22 (2015), cert. denied, 136 S. Ct. 895 (2016).

The Commission also has an interest in avoiding the appearance of corruption. Pet. App. 24a (citing *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985)); see also *McCutcheon*, 572 U.S. at 206-207 (plurality opinion). "[A] contribution made while negotiating or performing a contract looks like a quid pro quo, whether or not it truly is." *Wagner*, 793 F.3d at 22. If it appears to FINRA members and investment advisers that the contracting process is rigged, they "may be coerced to make contributions to play in that game," or "more qualified contractors may decline to play at all." *Id*. at 21.

Rule 2030 is closely drawn to further these important interests by restricting a "narrow range" of activities "for a relatively short period of time," Pet. App. 24a (citation omitted), during "which the effects of a *quid pro quo* political contribution on the selection process are expected to dissipate," *id.* at 199a. The two-year timeout applies only when broker-dealers (and a subset of their employees) make contributions to a state or local "official," a term the rule defines by reference to an individual's legal responsibility for awarding contracts to investment advisers. *Id*. at 237a; see *id.* at 215a-219a, 243a-244a. With respect to political-party fundraising, "the time-out is *not* triggered by direct contributions to political parties." *Id*. at 217a. Rule 2030 provides only that a covered person may not "solicit[] or coordinat[e] payments to a political party of a State or locality of a government entity with which the covered member is engaging in distribution or solicitation activities on behalf of an investment adviser." *Id*. at 218a.

Thus, Rule 2030 "constrains relations only between the two potential parties to a quid pro quo." *Blount* v. *SEC*, 61 F.3d 938, 947 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996). Some contributions can be made without triggering the timeout, and the rule provides an automatic exception and a process for seeking additional exemptions. Pet. App. 238a-241a. Member firms and covered associates may make independent expenditures, volunteer personally for candidates, speak on their behalf, and solicit votes without triggering the timeout. See *McCutcheon*, 572 U.S. at 205 (plurality opinion) ("[A] supporter could vindicate his associational interests by personally volunteering his time and energy on behalf of a candidate.").

b. Petitioner does not seriously challenge the court of appeals' conclusion that Rule 2030 is closely drawn to serve important governmental interests. Instead, petitioner principally contends (Pet. 18-27) that the decision below is in tension with this Court's decisions in *McCutcheon* and in *Davis* v. *FEC*, 554 U.S. 724 (2008). That argument lacks merit.

Petitioner asserts (Pet. 18) that Rule 2030 is unconstitutional under *Davis* because Rule 2030 may sometimes have the effect of imposing "different contribution limits for different candidates campaigning for the same office." In the court of appeals, petitioner identified as an example a U.S. congressional election in which one candidate was a county legislator who could "influence the outcome of the hiring of an investment adviser by" the county, and who therefore was an "official" under the rule, even though his opponent (the incumbent Congressman) was not. Pet. App. 230a. As the court explained, petitioner's argument based on this disparity

"quote[s] dicta" from *Davis* while "disregard[ing its] reasoning." *Id.* at 25a.

In *Davis*, this Court struck down "a law that impose[d] different contribution limits" for self-financing candidates by raising "the limits only for the non-self-financing candidate," and only when that candidate expended a certain amount of personal funds. 554 U.S. at 738. The Court held that the law impermissibly burdened the self-financing candidate's right to use "personal funds for campaign speech." *Id.* at 740; see, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 52-53 (1976) (per curiam) (rejecting limits on expenditures of personal funds). In that context, the *Davis* Court stated it had never upheld "a law that imposes different contribution limits for candidates who are competing against each other." 554 U.S. at 738; see, *e.g.*, *Arizona Free Enter. Club's Freedom Club Pac* v. *Bennett*, 564 U.S. 721, 751-752 (2011) (describing *Davis* as rejecting burdens on "a candidate's expenditure of his own funds").

Rule 2030, by contrast, does not affect self-financing candidates—it does not regulate candidates at all—but rather regulates placement agents' receipt of compensation from investment advisers seeking business from governmental entities. In the distinctive situation that petitioner identifies, where only one candidate for a non-covered office qualifies as a Rule 2030 "official" by virtue of his current office's power, the rule's disparate treatment reflects the fact that the one candidate is susceptible to corruption in a way his opponent is not. As the court below correctly recognized, see Pet. App. 27a, any disparate burden here is justified by the important "governmental interest in eliminating corruption," as well as the other interests described above. *Davis*, 554 U.S.

at 740. Indeed, any disparity is a function of the tailoring of the rule to its purpose of halting a specific type of pay-to-play involving public pension funds, placement agents, and their investment adviser clients.[2]

Even if petitioner's analogy to *Davis* had merit, it would at most support an argument that Rule 2030 is invalid as applied to the particular circumstance in which one candidate in an election is an "official" under the rule but his opponent is not. Petitioner has not advanced such an as-applied challenge, however, but has argued that the rule is invalid on its face. And because petitioner is a political party, rather than a candidate or a potential placement agent, it is unclear how petitioner could establish injury from the rule's disparate application in the circumstance described above. Cf. pp. 23-24, *infra*.

Petitioner also invokes the *McCutcheon* plurality opinion's statement that a "'prophylaxis-upon-prophylaxis approach' requires that we be particularly diligent in scrutinizing the law's fit." 572 U.S. at 221 (citation omitted). But *McCutcheon* involved an aggregate limit on political contributions that was "layered on top" of the base limits prescribed by FECA, "ostensibly to prevent

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[2] Petitioner's citation (Pet. 18) of *Riddle* v. *Hickenlooper*, 742 F.3d 922 (10th Cir. 2014), only highlights the distinction between *Davis* and this case. The court in *Riddle* struck down (on Fifth Amendment grounds) a statute that allowed supporters of major-party candidates to give more than supporters of other candidates. *Id.* at 926. The Tenth Circuit emphasized the absence of any suggestion that write-in or minor-party candidates "were more corruptible (or appeared more corruptible) than their Republican or Democratic opponents." *Id.* at 928. By contrast, state and local officials who are responsible for or can influence the award of pension fund contracts are susceptible to potential corruption in a way that their opponents who lack such power are not. *Id.* at 928-929.

circumvention of the base limits." Pet. App. 25a (quoting *McCutcheon*, 572 U.S. at 221) (plurality opinion). Thus, "the holding of *McCutcheon* is not that a belt and braces approach is necessarily unconstitutional, but that the court must be 'particularly diligent in scrutinizing the law's fit' with the governmental interest it is supposed to serve." *Ibid.* (quoting *McCutcheon*, 572 U.S. at 221) (plurality opinion). The D.C. Circuit had exercised such diligence "in *Blount* by applying strict scrutiny, a standard even more exacting than the 'closely drawn' standard * * * , to evaluate the [F]irst [A]mendment claim against MSRB G-37." *Ibid.* The court correctly applied the proper standard to Rule 2030, which is "identical in every constitutionally relevant way." *Id.* at 24a.

*McCutcheon*'s statement about a "prophylaxis-upon-prophylaxis approach" is also tied to the particular issues posed by aggregate limits and their relationship to base limits. Such aggregate limits have little in common with Rule 2030's targeted attempt to halt *quid pro quo* corruption and its appearance, in the specific context of placement agents, investment advisers, and the subset of officials with contracting authority for pension funds and other governmental entities that hire investment advisers. Layering a compensation restriction atop the general base limits is not fatally overinclusive "in the case of contracting" because, "[u]nlike the corruption risk when a contribution is made by a member of the general public," there "is a very specific quo for which the contribution may serve as the quid: the grant or retention of the contract." *Wagner*, 793 F.3d at 22.

2. a. The court of appeals also correctly held that approving Rule 2030 was within the SEC's statutory authority. Pet. App. 13a-21a. Rule 2030 reflects the system of "cooperative regulation" established by Section

15A of the Exchange Act, under which self-regulatory organizations create business-conduct rules for industry participants. H.R. Rep. No. 2307, 75th Cong., 3d Sess. 2, 4-5 (1938); see Act of June 25, 1938, ch. 677, 52 Stat. 1070; see also 15 U.S.C. 78*o*-3. To be approved by the Commission under Section 15A, FINRA's rules must be "designed to," *inter alia*, "prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade," "to remove impediments to and perfect the mechanism of a free and open market," and "to protect investors and the public interests." 15 U.S.C. 78*o*-3(b)(6).

Pay-to-play corruption harms the investing public, particularly public pension funds and their beneficiaries. Pet. App. 193a-201a. Pay-to-play also harms FINRA members by pressuring placement agents to make contributions to candidates with contracting authority in order to compete for contracts for their clients, thereby distorting the market for placement-agent services. See *id.* at 169a-171a, 193a-201a. The two-year timeout mechanism in Rule 2030 addresses these harms by imposing a "cooling-off" period during which the effects of a *quid* will dissipate, making the *quo* less likely. *Id.* at 199a.

b. The court of appeals' recognition of the SEC's authority to approve Rule 2030 accords with the Exchange Act's text and this Court's precedent. Petitioner observes (Pet. 29) that "[n]ot a single line of the Exchange Act mentions the regulation of campaign finance." But the court of appeals correctly viewed that absence as inconsequential, because Rule 2030 is not an attempt to regulate campaign finance or enforce campaign-finance laws at the federal, state, or local level. Rather, it reflects FINRA's effort to police its members—and only

its members—to prevent their use of unfair business practices. See Pet. App. 203a ("We do not understand FINRA to be engaging in broad electoral reform or trying to clean up the electoral process."). For that reason, enforcing Rule 2030—*i.e.*, pursuing an action against a member firm for accepting compensation during the timeout—would not interfere with the FEC's enforcement responsibilities. Petitioner's focus (Pet. 28) on the FEC's "exclusive jurisdiction" to enforce FECA is accordingly beside the point.

For similar reasons, FECA does not displace the Commission's authority under the Exchange Act. See Pet. App. 17a-21a. When "two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J. E. M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-144 (2001) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)); see *POM Wonderful LLC* v. *Coca-Cola Co.*, 573 U.S. 102, 113-115 (2014). "The rarity with which [courts] have discovered implied repeals is due to the relatively stringent standard for such findings." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 381 (1996).

In *POM Wonderful*, the Court found that a claim under the Lanham Act, 15 U.S.C. 1051 *et seq.*, for misleading labeling did not conflict with the labeling provisions of the Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, because (1) the FDCA did not expressly preclude other federal laws, 573 U.S. at 113-114; (2) the two statutes, each with "its own scope and purpose," complemented each other, *id.* at 115; and (3) the greater specificity of one statute was not dispositive when both statutes could be implemented together, *id.* at 116-118. All three aspects of the Court's reasoning demonstrate why

FECA does not displace the Exchange Act in the context of Rule 2030. FECA does not contain any "provision addressing the preclusion of other federal laws." *Id.* at 114. And, as in *POM Wonderful*, the absence of a preclusion provision is particularly significant because FECA includes an express preemption provision regarding state law. See 52 U.S.C. 30143(a) (Supp. V 2017). "By taking care to mandate express pre-emption of some state laws, Congress if anything indicated it did not intend" FECA "to preclude requirements arising from other sources" of federal law. *POM Wonderful*, 573 U.S. at 114.

The absence of a preclusion clause in FECA also "is of special significance" because FECA and pay-to-play rules "have coexisted" for decades. *POM Wonderful*, 573 U.S. at 113. Although petitioner (Pet. 29) asserts that the SEC lacks "expertise" in this area, the Commission approved MSRB Rule G-37 nearly 25 years ago, and it has been clear since 2010 that FINRA would propose a pay-to-play rule for placement agents, see Pet. App. 7a, 195a & n.241. Yet Congress has not amended FECA to mandate "the preclusion of other federal laws," *POM Wonderful*, 573 U.S. at 114, despite having amended the election and securities laws numerous times since the Commission first addressed pay-to-play in the securities industry. *E.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376; Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; see *POM Wonderful*, 573 U.S. at 113-114 (listing statutes in which Congress could have added a preclusion clause).

FECA and the Exchange Act "complement each other" and feature "'different requirements and protections.'" *POM Wonderful*, 573 U.S. at 115 (quoting

*J. E. M.*, 534 U.S. at 144). To halt *quid pro quo* corruption and its appearance generally, FECA creates contribution limits that apply to the general public. *Wagner*, 793 F.3d at 8. To halt a specific form of *quid pro quo* corruption that produces unique harms to public pension funds, their beneficiaries, and the market for placement agents, Rule 2030 temporarily bars a small segment of the public—FINRA members serving as placement agents for investment advisers—from being compensated if they, or their covered associates, have recently made contributions above a de minimis amount to officials with the authority to award advisory contracts. See Pet. App. 193a-201a. And while FECA is designed to protect the integrity of *federal* elections, Rule 2030 reflects a recognition that corruption of the state and local officials who make investment decisions on behalf of their governmental bodies would subvert the distinct federal interest in the proper functioning of the investment-adviser market. Striking down Rule 2030's solution to the collective-action problem posed by pay-to-play in the pension-fund context "would lead to a result that Congress likely did not intend," namely "less policing" of corruption, which in this instance affects the business practices of broker-dealers, investment advisers, and public pension funds. *POM Wonderful*, 573 U.S. at 116.

Petitioner asserts (Pet. 28) that Rule 2030 conflicts with FECA because FECA authorizes contributions below the $2700 base limit. That argument raises "practical concerns about drawing a distinction between regulations that 'specifically . . . authorize' a course of conduct and those that merely tolerate that course." *POM Wonderful*, 573 U.S. at 119 (citation omitted). FECA does not require or encourage political contributions,

but rather limits them. See *McCutcheon*, 572 U.S. at 197-198 (plurality opinion). And Rule 2030 does not contravene that limitation, since it neither requires nor authorizes contributions above FECA's limits. Petitioner is similarly wrong to assert (Pet. 27) that Congress viewed the $2700-per-election contribution limit as the "tipping point between the lawful exercise of First Amendment rights and *large* campaign contributions that are corrupting." In *the contracting context*, Congress evidently decided that the "tipping point" is zero, since it barred all contributions by federal contractors to federal candidates. See 52 U.S.C. 30119 (Supp. V 2017) (federal contractor ban).

3. Petitioner briefly contends (Pet. 32-33) that Rule 2030 is an arbitrary and capricious exercise of the SEC's authority because the Commission failed to show that Rule 2030 targets corruption beyond that already prohibited by FECA or by federal and state laws against bribery. But it was neither arbitrary nor capricious for the Commission to determine that the federal and state laws prohibiting bribery are inadequate to address pay-to-play activity where such laws "deal with only the most blatant and specific attempts of those with money to influence governmental action." *Wagner*, 793 F.3d at 15 (quoting *Buckley*, 424 U.S. at 28); see Pet. App. 21a-22a. "[C]orruption and its appearance are no doubt more widespread in the contracting process than our criminal dockets reflect." *Wagner*, 793 F.3d at 15; see *id.* at 25. FECA likewise does not render the rule arbitrary and capricious, since the Commission "adopted Rule 2030 precisely because it was aware of several instances in which a placement agent's contribution to a government

official—lawful under the FECA—influenced that official's decision to award an advisory services contract." Pet. App. 22a.

4. Petitioner does not argue that the court of appeals' decision conflicts with any decision of another court. Federal and state appellate courts have consistently upheld pay-to-play laws against constitutional challenges, and this Court has repeatedly declined to review these decisions.[3] Rule 2030 is more narrowly tailored than many of the laws upheld in those cases, because Rule 2030 (like its model MSRB Rule G-37) is not an absolute ban or even a direct limitation on contributions, is triggered only by contributions to a small subset of candidates, and allows some amount to be contributed to any candidate without triggering the timeout. Cf., *e.g.*, *Wagner*, 793 F.3d at 3, 33-34 (upholding federal prohibition

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[3] See, *e.g.*, *Wagner*, 793 F.3d at 3, 33-34 (upholding federal-contractor contribution ban); *Yamada* v. *Snipes*, 786 F.3d 1182, 1204-1207 (9th Cir.) (upholding contractor ban, even when applied to candidates with no control over contracting), cert. denied, 136 S. Ct. 569 (2015); *Ognibene* v. *Parkes*, 671 F.3d 174, 179-180, 197 (2d Cir.) (upholding bans on contributions by contractors and lobbyists), cert. denied, 567 U.S. 935 (2012); *Preston* v. *Leake*, 660 F.3d 726, 729-730, 741 (4th Cir. 2011) (upholding ban on lobbyists contributing to legislative candidates); *Blount*, 61 F.3d at 944-949 (upholding MSRB Rule G-37 pay-to-play rule in municipal securities industry); *State* v. *Alaska Civil Liberties Union*, 978 P.2d 597, 617-620 (Alaska 1999) (upholding law barring contributions by lobbyists), cert. denied, 528 U.S. 1153 (2000); *Casino Ass'n* v. *State ex rel. Foster*, 820 So. 2d 494, 501-504, 509 (La. 2002) (upholding bar on contributions by casino industry), cert. denied, 537 U.S. 1226 (2003); *In re Earle Asphalt Co.*, 966 A.2d 460, 461 (N.J. 2009) (per curiam) (upholding ban on award of state contracts following contributions greater than a de minimis amount).

on contributions by government contractors to *all* candidates for federal office, regardless of their ability to influence the award of federal contracts).

5. Finally, this case is a poor vehicle to address the questions presented because serious doubts remain about petitioner's Article III standing. As Judge Sentelle explained in dissenting on jurisdictional grounds (without addressing the merits), petitioner did not establish either that it had suffered an injury-in-fact or that any injury was caused by the Commission. See Pet. App. 29a-32a. The majority below relied on the Calcagno affidavit's assertion that, but for Rule 2030, Calcagno would have solicited contributions for the NYGOP. See *id.* at 12a-13a. But Calcagno did not state in his affidavit (see *id.* at 234a-236a) that his firm ever has served or will serve as a placement agent for investment advisers seeking contracts from the New York State pension fund, such that Rule 2030 could dissuade him from soliciting contributions to the NYGOP. That omission is significant, because Rule 2030 is triggered by the solicitation of contributions "to a political party of a state or locality of a government entity with which the covered member is engaging in, or seeking to engage in, distribution or solicitation activities on behalf of an investment adviser." *Id.* at 237a-238a.

Petitioner attempts to buttress its standing argument by advancing theories that the court below did not address. See Pet. 15 (asserting that petitioner was injured because it had to divert resources to educate candidates about Rule 2030); Pet. 15-16 (arguing that petitioner has associational standing on behalf of its candidates). Petitioner's request that this Court address these fact-intensive standing arguments in the first instance

further demonstrates the case's unsuitability as a vehicle for resolution of the questions presented. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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