

Supreme Court, U.S.  
FILED  
APR 17 2015  
OFFICE OF THE CLERK

No. 14-1142

IN THE  
**Supreme Court of the United States**

---

MICHAEL BOUDREAUX,  
*Petitioner,*

—v.—

SECURITIES AND EXCHANGE  
COMMISSION,  
*Respondent.*

---

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

---

**BRIEF OF AMICUS CURIAE THE  
INTERNATIONAL MUNICIPAL LAWYERS  
ASSOCIATION IN SUPPORT OF THE  
PETITIONER**

---

CHARLES W. THOMPSON, JR. <i>Counsel of Record</i>	SARAH M. SHALF
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION	EMORY LAW SCHOOL SUPREME COURT ADVOCACY PROGRAM
7910 Woodmont Ave., Suite 1440	1301 Clifton Road
Bethesda, MD 20814	Atlanta, Georgia 30322
cthompson@imla.org	sarah.shalf@emory.edu
(202) 466-5424	(404) 712-4652

---

**BLANK PAGE**

TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF CITED AUTHORITIES ..... iii

INTEREST OF THE AMICUS CURIAE ..... 1

SUMMARY OF THE ARGUMENT ..... 2

ARGUMENT ..... 3

    I. THE NEED FOR A RULING ON QUALIFIED IMMUNITY ARISES AS A RESULT OF RECENT ENFORCEMENT ACTIONS BY THE SEC, AND THE AGENCY’S PLANS TO INCREASE ENFORCEMENT, THAT EXCEED THE EXTENT OF THE AGENCY’S TRADITIONAL REGULATION OF MUNICIPAL FINANCE AND BUDGET OFFICIALS. .... 4

        A. The SEC Traditionally Did Not Impose Financial Disclosure Requirements On Municipal Officials Due To The Tower Amendment, And Retains Authority To Regulate Such Officials’ Financial Disclosures Only Via The Anti-Fraud Provisions Of The Securities Statutes. .... 5

        B. The SEC Has Indicated It Will Be Escalating Its Use Of Enforcement Actions Against Municipal Officials Across The Country As Part Of An Effort To Establish New Financial Disclosure Norms For Municipal Bond Offerings. .... 8

    II. THE 11TH CIRCUIT’S DENIAL OF QUALIFIED IMMUNITY TO BOUDREAUX

EXPOSES MUNICIPAL FINANCE OFFICIALS TO UNCERTAINTY THAT WILL MAKE THEIR JOBS HARDER TO PERFORM, AND TO RISKS OF INDIVIDUAL LIABILITY THAT WILL JEOPARDIZE MUNICIPALITIES' ABILITY TO HIRE TALENTED AND QUALIFIED PROFESSIONALS TO MANAGE THEIR FUNDS. .... 12

A. The Action Against Michael Boudreaux Thwarts The Fundamental Purpose Of Qualified Immunity As It Would Apply To Finance Officials Throughout The Country.. 12

B. Qualified Immunity Is Necessary To Protect Municipal Officials' Ability To Make Discretionary, Good-Faith Decisions As Part Of Their Jobs In The Face Of Vague And Shifting Financial Disclosure Standards Imposed By Recent SEC Enforcement Actions ..... 14

C. Without Qualified Immunity, Municipal Officials Face A Threat Of Personal Liability To Pay Civil Penalties That Will Cast A Cloud Over Municipal Officials' Decision-Making And Deter Talented Finance Managers From Working For Municipalities..... 23

CONCLUSION..... 28

## TABLE OF CITED AUTHORITIES

CASES	<i>Page</i>
 <b>Supreme Court</b>	
<i>Davis v. Sherer</i> , 468 U.S. 183 (1984) .....	13
<i>Filarsky v. Delia</i> , 132 S.Ct. 1657 (2012) .....	13
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	12
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009) .....	12, 13
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974) .....	12
 <b>United States Court of Appeals</b>	
<i>Berdin v. Duggan</i> , 701 F.2d 909 (11th Cir. 1983) .....	13
<i>Globus v. Law Research Serv., Inc.</i> , 418 F.2d 1276 (2d Cir. 1969).....	26
<i>Howell v. Evans</i> , 922 F.2d 712 (11th Cir. 1991) .....	13

**United States District Court**

*Envtl. Conservation Org. v. Bagwell*,  
No. 4:03CV-807-Y, 2005 WL 2465003 (N.D. Tex.  
Sept. 30, 2005) ..... 26

*SEC v. Conway*,  
697 F. Supp. 733 (E.D. Mich. 2010)..... 26

*SEC v. Kilpatrick*,  
No. 12-12109 (E.D. Mich. July 31, 2014) ..... 11

*SEC v. Moran*,  
944 F. Supp. 286 (S.D.N.Y. 1996) ..... 24

**Litigation Documents**

Compl. .... 19, 21

Def. City of Miami’s Reply in Supp. Mot.  
to Dismiss ..... 21

Def. Boudreaux’s Mot. to Dismiss ..... 21

**STATUTES AND REGULATIONS**

**Federal Statutes**

15 U.S.C.A. § 77c(a)(2) (West 2015) ..... 5

15 U.S.C.A. § 77l(a)(2) (West 2015)..... 5

15 U.S.C.A. § 78c(a)(12)(A) (West 2015) ..... 5

15 U.S.C.A. § 78c(a)(29) (West 2015) ..... 5

15 U.S.C.A. § 78o-4 (West 2015)..... 5

15 U.S.C.A. § 78o-4(a)(1) (West 2015).....	6
15 U.S.C.A. § 78o-4(b)(1) (West 2015).....	6
15 U.S.C.A. § 78o-4(d)(1) (West 2015).....	6
The Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203, § 976, 124 Stat. 1376 (2010).....	6

### **Federal Regulations**

17 C.F.R. § 229.512 (h)(3) (West 2015) .....	26
17 C.F.R. § 240.15c2-12 (West 2015).....	7
17 C.F.R. § 240.15Ba1-2 (West 2015).....	7
17 C.F.R. § 240.15Ba1-8 (West 2015).....	7

### **State Constitutions**

CAL. CONST. art. 13A, § 2(b) (West 2015).....	20
MICH. CONST. art. 9, § 3 (West 2015) .....	20

### **State Statutes**

MASS. GEN. LAWS ANN. 59, § 21C (West 2015) .....	20
--	----

### **OTHER AUTHORITIES**

<i>109<sup>th</sup> Annual Conference Innovation and Resilience</i> , GOVERNMENT FINANCE OFFICERS ASSOCIATION, <a href="http://www.gfoa.org/sites/default/files/Con15Brochure2.pdf">http://www.gfoa.org/sites/default/files/Con15Brochure2.pdf</a> (last visited Mar. 29, 2015) .....	16
<i>Average Salaries of Municipal Officers</i> , NATIONAL LEAGUE OF CITIES, <a href="http://www.nlc.org/build-skills-">http://www.nlc.org/build-skills-</a>	

- and-networks/resources/cities-101/city-officials/average-salaries-of-municipal-officials (last visited Apr. 11, 2015) ..... 27
- Awards Program*, Harvard Kennedy School, Ash Center for Democratic Governance and Innovation (last visited Mar. 29, 2015), available at <http://www.innovations.harvard.edu/awards-programs/award-model> ..... 22
- Bernard Black et al., *Legal Liability of Company Officials Part 2: Court Procedures, Indemnification and Insurance, and Administrative and Criminal Liability (Report to the Russian Securities Agency)*, 2008 Colum. Bus. L. Rev. 1 (2008) ..... 23
- Byron Lutz, Raven Molloy and Hui Shan, *The Housing Crisis and State and Local Government Tax Revenue: Five Channels*, FEDERAL RESERVE BOARD (August 2010), <http://www.federalreserve.gov/pubs/feds/2010/201049/201049pap.pdf>..... 20
- Daniel Gallagher, *Remarks at Municipal Securities Rulemaking Board's First Annual Municipal Securities Regulator Summit*, SEC (May 29, 2014), available at [http://www.sec.gov/News/Speech/Detail/Speech/1370541936387#\\_edn36](http://www.sec.gov/News/Speech/Detail/Speech/1370541936387#_edn36) ..... 16, 17
- Facts About GASB*, GOVERNMENTAL ACCOUNTING STANDARDS BOARD, [http://www.gasb.org/jsp/GASB/Document\\_C/GAS](http://www.gasb.org/jsp/GASB/Document_C/GAS)



- BDocumentPage&cid=1176164672329 (last visited Apr. 10, 2015)..... 15
- GFOA Alert: The SEC MCDC Initiative and Issuers*,  
GOVERNMENT FINANCE OFFICERS ASSOCIATION,  
[http://gfoa.org/sites/default/files/GFOA%20MCDC%20Alert\\_0.pdf](http://gfoa.org/sites/default/files/GFOA%20MCDC%20Alert_0.pdf)  
(last visited Apr. 11, 2015) ..... 18, 19
- GFOA Alert – Deadline Extended for SEC MCDC Initiative*, GOVERNMENT FINANCE OFFICERS ASSOCIATION,  
<http://gfoa.org/sites/default/files/MCDC%20Alert%20II%20-%20Final.pdf> (last visited Apr. 11, 2015) ..... 18
- Helen K. Michael and Virginia R. Duke, *Directors and Officers Liability Insurance Policies*, Kilpatrick Townsend & Stockton LLP, Practical Law Practice Note 2-504-6515 (West 2015) ..... 24
- Jon N. Eisenberg, *How Much Protection Do Indemnification and D&O Insurance Provide?*, HARV. L. SCHOOL FORUM ON CORPORATE GOVERNANCE & FIN. REGULATION (May 28, 2014), <http://blogs.law.harvard.edu/corpgov/2014/05/28/how-much-protection-do-indemnification-and-do-insurance-provide> ..... 24, 25
- Kimberly Nelson, *Municipal Choices During a Recession: Bounded Rationality and Innovation*, 44 STATE AND LOCAL GOVERNMENT REVIEW 44S, (August 2012)..... 20, 22

- Kyle Glazier, *Expect a Lot of Enforcement in 2014, Experts Say*, THE BOND BUYER (Dec. 20, 2013, 11:33 AM),  
[http://www.bondbuyer.com/issues/122\\_249/expect-a-lot-of-enforcement-in-2014-experts-say-1058577-1.html](http://www.bondbuyer.com/issues/122_249/expect-a-lot-of-enforcement-in-2014-experts-say-1058577-1.html) ..... 8
- Kyle Glazier, *Gaunt: MCDC Enforcement Actions Will Make Clear SEC's View*, THE BOND BUYER (Dec. 11, 2014, 3:52 PM),  
<http://www.bondbuyer.com/news/washington-enforcement/gaunt-mcdc-enforcement-actions-will-make-clear-secs-views-1068700-1.html>..... 10, 17
- Kyle Glazier, *More Individual, Secondary Market Enforcement in 2015*, THE BOND BUYER (Jan. 5, 2015, 10:03 AM),  
<http://www.bondbuyer.com/news/washington-enforcement/more-individual-secondary-market-enforcement-in-2015-1069232-1.html> ..... 8, 9
- Kyle Glazier, *SEC's Top Cop: More Muni Enforcement, Not Less*, THE BOND BUYER (Nov. 10, 2014, 3:57 PM),  
<http://www.bondbuyer.com/news/washington-enforcement/secs-top-cop-more-muni-enforcement-not-less-1067831-1.html> ..... 8, 15
- Lawrence Martin, Richard Levey, and Jenna Cawley, *The 'New Normal' for Local Government*, 44 STATE AND LOCAL GOVERNMENT REVIEW 17S (2012)..... 22

- Mary Jo White, Speech to the Council of Institutional Investors Fall Conference: Deploying the Full Enforcement Arsenal, (Sept. 26, 2013), (*available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370539841202#.VSc8vBPF9-o>) ..... 24
- May 2014 National Occupational Employment and Wage Estimates by ownership: Cross-industry, private ownership only*, Dep't of Labor, <http://www.bls.gov/oes/current/000001.htm#11-0000> (last modified March 25, 2015) ..... 26, 27
- May 2014 National Occupational Employment and Wage Estimates by ownership: Local government, including schools and hospitals*, Dep't of Labor, <http://www.bls.gov/oes/current/999301.htm#11-0000> (last modified Mar. 25, 2015) ..... 27
- Michael Pagano and Christiana McFarland, *City Fiscal Conditions in 2013*, NATIONAL LEAGUE OF CITIES (October 2013), [http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/Final\\_CFC2013.pdf](http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/Final_CFC2013.pdf) ..... 19
- Michael Pagano and Christiana McFarland, *City Fiscal Conditions 2014*, NATIONAL LEAGUE OF CITIES, <http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/CSAR%20City%20Fiscal%20Conditions%202014.pdf> (last visited Apr. 11, 2015)..... 20

*Occupational Employment and Wages, May 2014: Chief Executives*, DEP'T OF LABOR, <http://www.bls.gov/oes/current/oes111011.htm#nat> (last modified Mar. 25, 2015)..... 27

Paul Glick and Sabrina Wiley Cape, *Understanding City Finance*, in HANDBOOK FOR GEORGIA MAYORS AND COUNCILMEMBERS (5th ed. 2012), *available at* <http://www.gmanet.com/GMASite/media/PDF/handbook/finance.pdf>..... 14, 15, 21

Press Release, SEC, Former San Diego Officials Agree to Pay Financial Penalties in Municipal Bond Fraud Case, (Oct. 27, 2010), (*available at* <http://www.sec.gov/news/press/2010/2010-204.htm>) ..... 10

Press Release, SEC, SEC Charges Allen Park, Mich. and Two Former City Leaders in Fraudulent Muni Bond Offering for Movie Studio Project, (Nov. 6, 2014), (*available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543373355#.VSfhms5SWF4>) ..... 11

Press Release, SEC, SEC Launches Enforcement Cooperation Initiative for Municipal Issuers and Underwriters, (Mar. 10, 2014), (*available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541090828#.VPyDm2TF9fz>) ..... 18

*Reference Library*, GOVERNMENTAL ACCOUNTING STANDARDS BOARD, <http://www.gasb.org/jsp/GASB/Page/GASBLandingPage&cid=1175804799014> (last visited Mar. 29, 2015) ..... 16

SEC. EXCH. COMM’N, <i>Municipalities Continuing Disclosure Cooperation Initiative</i> , (Nov. 13, 2014), available at <a href="http://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml">http://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml</a> .....	9, 10
SEC. EXCH. COMM’N, REPORT ON THE MUNICIPAL SECURITIES MARKET (2012) .....	5, 7, 15, 16
SEC. EXCH. COMM’N, STAFF REPORT ON THE MUNICIPAL SECURITIES MARKET (1993) .....	5, 6
SEC Charges City of Victorville, Underwriter, and Others with Defrauding Municipal Bond Investors, SEC Release No. 22690, 2013 WL 1792152 (Apr. 29, 2013) .....	11
SEC Obtains Final Judgments Against Gary Burtka and Eric Waidelich, SEC Release No. 23229, 2015 WL 1519701 (Apr. 6, 2015) .....	11
Urska Velikonja, <i>Public Compensation for Private Harm: Evidence from the SEC’s Fair Fund Distributions</i> , 67 STAN. L. REV. 331 (2015) .....	25
U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-698, MUNICIPAL SECURITIES OPTIONS FOR IMPROVING CONTINUING DISCLOSURE (2012) .....	6

**BLANK PAGE**

## INTEREST OF THE AMICUS CURIAE<sup>1</sup>

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties and subdivision thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

---

<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than *amicus curiae*, its members, or its counsels made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2, each party has been given 10-day notice and consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

## SUMMARY OF THE ARGUMENT

Unlike their private counterparts, municipal government finance officials do not profit from their employers' bond or stock issues. They do not benefit from stock bonuses or multi-million dollar incentive plans. Rather, they are public servants without incentives to defraud investors or to profit from non-disclosures of financial information.

Facing confusing and constantly shifting enforcement guidance from the Securities and Exchange Commission ("SEC"), municipal officials responsible for financial disclosures now risk being personally liable for stiff penalties for running afoul of the agency's regulation of municipal bond offerings. The defense of qualified immunity should be available to provide essential protection for municipal officials who comply with the accounting and disclosure standards set forth by the Government Accounting Standards Board ("GASB") and make a good faith attempt to comply with the law, particularly given the SEC's lack of clear guidance in this area. Yet the Eleventh Circuit's ruling, that the defense of qualified immunity is categorically unavailable to municipal financial officials subject to lawsuits seeking civil penalties, disintegrated this protection.

The SEC's new emphasis in seeking individual liability in civil enforcement actions against municipal finance officials, as a way to regulate the municipal bond market, has created an urgent need for municipal officials to be protected by qualified immunity. This Court should grant certiorari to



clarify that qualified immunity is indeed available to municipal officials who adhere to GASB and make a good faith attempt to comply with the law.

### ARGUMENT

Although *amicus* cannot attest to the relative merits of either party's factual claims, the central issue of this case turns on a claim by petitioner Michael Boudreaux that he followed every standard applicable to the performance of his duties in preparing and passing along to City of Miami decision-makers certain information for the decision-makers to adopt in the city's annual financial reports; while respondent, the SEC, claims that despite Boudreaux not being a decision-maker, he should nevertheless be assessed a civil penalty based upon standards not clearly understood to apply to a person in Boudreaux's position.

No one argues that the SEC should not be able to use its enforcement power to protect the municipal bond market from fraud. Rather, *amicus* believes that a government official should be entitled to qualified immunity from lawsuits seeking civil penalties, when the official acted in reasonable reliance on existing accounting standards governing the performance of the official's duties.

This Court should grant certiorari in this case due to the compelling need to decide the scope of qualified immunity against these officials. The SEC plans to substantially increase its use of enforcement actions, as in the instant case, against municipal officials involved in the issuance of municipal bonds.

This has sown fear and confusion among city officials nationwide, who worry that they may now face individual liability for taking actions that satisfy traditional and widely adopted accounting and disclosure standards.

A decision on the scope and availability of this immunity would restore valuable certainty to municipal officials as to the boundary between standards-compliant actions that cannot be the basis for individual liability, and intentional wrongs that can. Such clarity will support creative and effective city management while protecting cities' ability to hire the most qualified and talented officials available to manage their funds.

**I. THE NEED FOR A RULING ON QUALIFIED IMMUNITY ARISES AS A RESULT OF RECENT ENFORCEMENT ACTIONS BY THE SEC, AND THE AGENCY'S PLANS TO INCREASE ENFORCEMENT, THAT EXCEED THE EXTENT OF THE AGENCY'S TRADITIONAL REGULATION OF MUNICIPAL FINANCE AND BUDGET OFFICIALS.**

Historically, the SEC's regulatory powers over issuers of municipal debt have been limited by the Securities and Exchange Act and the Tower Amendment. The agency rarely took enforcement actions against municipal officials. Recently, however, the SEC has begun using its anti-fraud authority to initiate enforcement actions against individual municipal officials as part of a scheme to

regulate the types of disclosures such officials may or must make in connection with bond offerings. This Court must thus decide if these actions, which result in the imposition of civil penalties against municipal officials, are subject to a defense of qualified immunity.

**A. The SEC Traditionally Did Not Impose Financial Disclosure Requirements On Municipal Officials Due To The Tower Amendment, And Retains Authority To Regulate Such Officials' Financial Disclosures Only Via The Anti-Fraud Provisions Of The Securities Statutes.**

The original New Deal-era securities legislation, the Securities Act of 1933 (“Securities Act”) and the Securities Exchange Act of 1934 (“Exchange Act”), exempted municipal securities from almost all of their provisions; the only exceptions were the anti-fraud provisions of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5. SEC. EXCH. COMM’N, REPORT ON THE MUNICIPAL SECURITIES MARKET ii (2012); *see also* 15 U.S.C.A. §§ 77c(a)(2), 77l(a)(2), 78c(a)(12)(A), 78c(a)(29) (West 2015). Congress did not regulate municipal securities until 1975, and even then, only did so via a limited regulatory scheme that affected firms and individuals who traded, sold and underwrote municipal securities, including brokers and dealers, but not the actual municipalities issuing the bonds. SEC. EXCH. COMM’N, STAFF REPORT ON THE MUNICIPAL SECURITIES MARKET 6 (1993); *see also* 15 U.S.C.A. § 78o-4 (West 2015); Christine S. Chung, *Municipal Securities: The Crisis of State and Local Government Indebtedness*,

*Systemic Costs of Low Default Rates, and Opportunities for Reform*, 34 *Cardozo L. Rev.* 1455, 1503 (2013). These 1975 reforms required firms who wished to transact in municipal securities to register with the SEC. 15 U.S.C.A. § 78o-4(a)(1) (West 2015). They also established the Municipal Securities Rulemaking Board (“MSRB”), granting the MSRB rulemaking authority over “brokers, dealers, municipal securities dealers, and municipal advisors” who effected municipal securities transactions. *Id.* at § 78o-4(b)(1).

With respect to the municipal issuers, the reforms, expressly provided that neither the SEC nor the MSRB could require any issuer to file “any application, report, or document” with the SEC or MSRB prior to the issuance, sale, or distribution of municipal securities. *Id.* at 78o-4(d)(1); *see also* STAFF REPORT ON THE MUNICIPAL SECURITIES MARKET, *supra*, at 7-8. Known as the “Tower Amendment,” this provision sought to preserve the traditional exemption from regulation enjoyed by municipal issuers, in part out of respect to principles of comity. *See Chung, supra*, at 1505 n. 233; *see also* S. Rep. No. 94-75 (1975); 15 U.S.C.A § 78o-4(d)(1).

Passed in 2010, the Dodd–Frank Act required the U.S. Comptroller General to study municipal securities regulation and review the policy implications of repealing or retaining the Tower Amendment. The Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203, § 976, 124 Stat. 1376 (2010) (“Dodd-Frank Act”); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-698, MUNICIPAL SECURITIES OPTIONS FOR IMPROVING CONTINUING DISCLOSURE (2012). To compile this

report, the Government Accountability Office surveyed experts, market participants, and regulators about various policy alternatives. While many experts suggested repealing the Tower Amendment, regulators said it would have “no effect” on what the SEC could require issuers to disclose. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra*, at 23. Merely repealing the Tower Amendment would not authorize the agency to issue regulations for municipal debt issuers. *Id.* at 24. SEC staff admitted that the agency would need additional statutory authority in order to directly regulate municipal issuers. *Id.*

Absent affirmative statutory authority over issuers, the SEC, in order to regulate municipal securities, has relied instead on its ability to regulate those transacting in municipal securities, and the prohibition of the underwriting and subsequent recommendation of securities for which adequate information is not available. REPORT ON THE MUNICIPAL SECURITIES MARKET, *supra*, at 28; *see also* 17 C.F.R. §§ 240.15c2-12, 240.15Ba1-2, 240.15Ba1-8. Finally, because the Tower Amendment did not exempt municipal issuers from anti-fraud provisions such as rule 10b-5, the SEC has also relied on its anti-fraud enforcement authority. *Id.*

The instant case concerns the scope of the anti-fraud authority when it is used, via civil enforcement actions, to regulate municipal officials’ disclosures in connection with bond offerings.

**B. The SEC Has Indicated It Will Be Escalating Its Use Of Enforcement Actions Against Municipal Officials Across The Country As Part Of An Effort To Establish New Financial Disclosure Norms For Municipal Bond Offerings.**

In recent years, the SEC has actively sought and explored ideas for increasing regulation of the municipal securities market. The agency issued a report in 2012 examining current regulatory regimes of that market and assessing ideas for increased regulatory power. *See* REPORT ON THE MUNICIPAL SECURITIES MARKET, *supra*. SEC officials have also recently made repeated public announcements that they will continue to investigate municipal bond issuers and officials.

Articles in *The Bond Buyer* predicting SEC enforcement trends in 2014 and 2015 quoted the chief of the SEC enforcement division's municipal securities and public pensions unit, LeeAnn Gaunt, as indicating that the unit intends to increase its focus on individual liability. Kyle Glazier, *Expect a Lot of Enforcement in 2014, Experts Say*, THE BOND BUYER (Dec. 20, 2013, 11:33 AM), [http://www.bondbuyer.com/issues/122\\_249/expect-a-lot-of-enforcement-in-2014-experts-say-1058577-1.html](http://www.bondbuyer.com/issues/122_249/expect-a-lot-of-enforcement-in-2014-experts-say-1058577-1.html) ("You will see our increased focus on municipal issuers and issuer officials."); Kyle Glazier, *More Individual, Secondary Market Enforcement in 2015*, THE BOND BUYER (Jan. 5, 2015, 10:03 AM), <http://www.bondbuyer.com/news/washington->

enforcement/more-individual-secondary-market-enforcement-in-2015-1069232-1.html (“We’re putting a continued focus on [personal liability], which people should expect to see in 2015.”). In 2014, SEC enforcement division director Andrew Ceresney described his view on individual liability at a panel about municipalities at the Securities Industry and Financial Markets Association’s annual meeting by stating, “From my perspective, the most effective deterrent [to breaking federal securities laws] is individual liability.”<sup>2</sup> Kyle Glazier, *SEC’s Top Cop: More Muni Enforcement, Not Less*, THE BOND BUYER (Nov. 10, 2014, 3:57 PM), <http://www.bondbuyer.com/news/washington-enforcement/secs-top-cop-more-muni-enforcement-not-less-1067831-1.html>.

Moreover, due to a new agency initiative, municipal officials may find themselves individually liable for failing to make disclosures even when the city they serve is not financially liable. Between March 10, 2014 and December 1, 2014, the SEC implemented the Municipalities Continuing Disclosure Cooperation (“MCDC”) initiative, through which the agency “recommend[s] favorable settlement terms” to issuers and underwriters of municipal securities who self-report possible violations of the continuing disclosure requirements of Exchange Act Rule 15c2-12. See SEC. EXCH. COMM’N, *Municipalities Continuing Disclosure*

---

<sup>2</sup> The SEC’s civil and criminal enforcement powers sufficiently protect against fraud. The concern is not whether civil enforcement can be used as a tool, but whether the person being assessed should have the opportunity to assert the

*Cooperation Initiative*, (Nov. 13, 2014) available at <http://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml>.

Under the terms of the MCDC, if a municipal bond issuer reported that it had violated these requirements, the SEC would settle with the municipality without civil penalties. *Id.* However, the MCDC did not limit individual liability for municipal officials. *Id.* The SEC has not announced how many reports it received through the MCDC, Kyle Glazier, *Gaunt: MCDC Enforcement Actions Will Make Clear SEC's View*, THE BOND BUYER (Dec 11, 2014, 3:52 PM), <http://www.bondbuyer.com/news/washington-enforcement/gaunt-mcdc-enforcement-actions-will-make-clear-secs-views-1068700-1.html>. If

municipalities report non-disclosures that implicate individual officials, however, the terms of the MCDC suggest that the agency could use that information to pursue civil enforcement actions against individual officials notwithstanding its settlement with the municipality.

Indeed, over the last several years, the agency has increased its enforcement efforts against municipal issuers. In October 2010, the agency for the first time secured civil penalties against city officials charged with municipal bond fraud when four San Diego officials agreed in a settlement to pay fines without admitting guilt. Press Release, SEC, Former San Diego Officials Agree to Pay Financial Penalties in Municipal Bond Fraud Case, (Oct. 27, 2010), (available at <http://www.sec.gov/news/press/2010/2010-204.htm>).

In a second series of disclosure cases, the SEC sued



the former mayor and city administrator along with the city of Allen Park, Michigan. Press Release, SEC, SEC Charges Allen Park, Mich. and Two Former City Leaders in Fraudulent Muni Bond Offering for Movie Studio Project, (Nov. 6, 2014), (*available at* <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543373355#.VSfhms5SWF4>); SEC Obtains Final Judgments Against Gary Burtka and Eric Waidelich, SEC Release No. 23229, 2015 WL 1519701 (Apr. 6, 2015). The agency recently concluded litigation against officials from Detroit, *see SEC v. Kilpatrick*, No. 12-12109, (E.D. Mich. July 31, 2014); and a suit against officials in Victorville, California is now pending, *see SEC Charges City of Victorville, Underwriter, and Others with Defrauding Municipal Bond Investors*, SEC Release No. 22690, 2013 WL 1792152 (Apr. 29, 2013). Boudreaux's case, then, comes as part of a rash of enforcement actions pursuant to a new agency emphasis on the municipal market despite the Tower Amendment.

In light of the SEC's increased focus on a wide range of municipal bond issuers; its announcements about future agency actions to sue municipal officials; its MCDC initiative; and the recent actions it has taken to back up its promises of enforcement, many municipal officials across the country are eager for this Court to define the qualified-immunity limits to the SEC's power to regulate disclosures using its anti-fraud powers.

II. THE 11TH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY TO BOUDREAUX EXPOSES MUNICIPAL FINANCE OFFICIALS TO UNCERTAINTY THAT WILL MAKE THEIR JOBS HARDER TO PERFORM, AND TO RISKS OF INDIVIDUAL LIABILITY THAT WILL JEOPARDIZE MUNICIPALITIES' ABILITY TO HIRE TALENTED AND QUALIFIED PROFESSIONALS TO MANAGE THEIR FUNDS.

A. The Action Against Michael Boudreaux Thwarts The Fundamental Purpose Of Qualified Immunity As It Would Apply To Finance Officials Throughout The Country.

Public officials receive immunity from suits for damages in order to “shield them from undue interference with their duties and from potentially disabling threats of liability.” *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). The doctrine protects government officials’ use of discretion in reasonable ways under the scope of their employment while also ensuring that they can be held accountable when they break the law. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity prevents government officials from being paralyzed by the threat of suit as they make decisions in the public interest. *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Other key goals of the immunity are avoiding “unwarranted timidity” on the part of public officials,

and being able to attract talented individuals to public service. *Filarsky v. Delia*, 132 S.Ct. 1657, 1665 (2012).

Public officials routinely make discretionary decisions in the course of their employment to serve the public interest. A police officer faced with the quandary of determining whether to arrest a suspect, for example, must decide whether the law allows the seizure. *See Pearson*, 555 U.S. at 244. An administrator firing an employee must determine whether doing so affects a protected right. *Davis v. Sherer*, 468 U.S. 183, 196 (1984). Similarly, a budget officer preparing disclosure documents must consider Government Accounting Standards Board (“GASB”) standards and other requirements that direct these actions. Under the 11th Circuit’s reasoning, unfortunately, only the budget officer cannot find comfort in qualified immunity.

Qualified immunity does not guarantee that a public official will be protected from liability; rather, it allows a court to consider if the public official acted reasonably. *See e.g. Howell v. Evans*, 922 F.2d 712, 723 (11th Cir. 1991) (prison superintendent whose behavior satisfied deliberate indifference was not protected by qualified immunity), *vacated*, 931 F.2d 711 (11th Cir. 1991); *Berdin v. Duggan*, 701 F.2d 909, 913 (11th Cir. 1983) (mayor not protected by qualified immunity because his actions clearly violated an employee’s First Amendment rights). Yet the 11th Circuit precludes only a finance officer from even this preliminary determination.

Municipal financial officials need qualified immunity from SEC civil penalties for the same reasons as police officers, and administrators: to protect their ability to make discretionary, good-faith decisions as part of their jobs without worrying about a lawsuit if the decision, with hindsight, turns out to have been incorrect. These officials' decisions are immensely more difficult when made under threat of an SEC individual enforcement action using fluid standards that vary from the widely reported standards of GASB. Knowledge of this danger, in turn, disincentivizes talented individuals from taking positions in municipal government.<sup>3</sup>

**B. Qualified Immunity Is Necessary To Protect Municipal Officials' Ability To Make Discretionary, Good-Faith Decisions As Part Of Their Jobs In The Face Of Vague And Shifting Financial Disclosure Standards Imposed By Recent SEC Enforcement Actions.**

Among the central duties of municipal financial officials is the preparation of financial statements monthly and yearly. Paul Glick and Sabrina Wiley Cape, *Understanding City Finance*, in HANDBOOK FOR GEORGIA MAYORS AND COUNCILMEMBERS, pt. 5, at 1 (5th ed. 2012), available at <http://www.gmanet.com/GMASite/media/PDF/handb>

---

<sup>3</sup> To some extent the disincentives exacerbate the problem. As less competent people perform the duties their lack of competence tends to insure increased failures to meet standards.

ook/finance.pdf. Oftentimes, annual financial reports are relied upon by “buyers of local government debt securities... as a basis for investment.” *Id.* at 5.

State and local government officials today primarily follow procedures and guidelines for accounting and financial reporting set by GASB. While GASB standards themselves are not binding federal or state law, many municipal codes require that government officers follow accounting principles and requirements promulgated by GASB. *Facts About GASB, GOVERNMENTAL ACCOUNTING STANDARDS BOARD* 1, [http://www.gasb.org/jsp/GASB/Document\\_C/GASBDocumentPage&cid=1176164672329](http://www.gasb.org/jsp/GASB/Document_C/GASBDocumentPage&cid=1176164672329) (last visited Apr. 10, 2015). Thirty-eight states, as of December 2010, required their political subdivisions to follow GASB standards. *REPORT ON THE MUNICIPAL SECURITIES MARKET, supra*, at 72. Indeed, even if state and local laws do not require following GASB standards, municipalities often follow them anyway. *Facts About GASB, supra*, at 1. Ninety-four percent of 350 larger governments and 81 percent of 193 smaller governments surveyed by GASB in 2011 prepared their annual financial reports using GASB standards. *REPORT ON THE MUNICIPAL SECURITIES MARKET, supra*, at 72.

Financial officers work hard to stay up-to-date on what GASB requires. Its standards are published and distributed through subscription plans and on the GASB website, and are easily accessible so as to encourage wide participation. *Facts About GASB, supra*, at 2. GASB hosts educational webcasts and posts videos and podcasts online to assist its

members in staying current with accounting and financial reporting issues in government. *Reference Library*, GOVERNMENTAL ACCOUNTING STANDARDS BOARD, <http://www.gasb.org/jsp/GASB/Page/GASBLandingPage&cid=1175804799014> (last visited Mar. 29, 2015). The Government Finance Officers Association, an organization that represents public financial officials, also hosts an annual conference in which its members can earn continuing professional education credits by attending seminars on changes in accounting and financial reporting. *See 109th Annual Conference Innovation and Resilience*, GOVERNMENT FINANCE OFFICERS ASSOCIATION, <http://www.gfoa.org/sites/default/files/Con15Brochure2.pdf> (last visited Mar. 29, 2015). The SEC, for its part, has recognized that GASB standards promote “consistency and comparability of financial information between and among municipal issuers and differing types of municipal securities.” REPORT ON THE MUNICIPAL SECURITIES MARKET, *supra*, at 137.

Despite this, it is becoming increasingly clear that the SEC intends its enforcement actions against municipal budget officials to supplant GASB with undefined, aspirational goals. SEC Commissioner Daniel Gallagher asserted in remarks on May 29, 2014 at the MSRB’s first annual Municipal Securities Regulator Summit that “GASB standards are a disclosure floor, not a ceiling.” Daniel Gallagher, *Remarks at Municipal Securities Rulemaking Board’s First Annual Municipal Securities Regulator Summit*, SEC (May 29, 2014), *available at*

[http://www.sec.gov/News/Speech/Detail/Speech/1370541936387#\\_edn36](http://www.sec.gov/News/Speech/Detail/Speech/1370541936387#_edn36). Ceresney, the SEC enforcement division director, openly stated in November 2014 that the enforcement actions against individuals would take an “outsized role” because the regulatory system for municipal securities is not as robust as in other markets, in part due to the Tower Amendment’s provisions that prevent the agency from requiring disclosures by municipal bond issuers. Glazier, *SEC’s Top Cop*, *supra*. Finally, in December 2014, Gaunt, the chief of the enforcement division’s municipal securities and public persons unit, announced that the SEC would use its enforcement proceedings arising from the MCDC Initiative to clarify the SEC’s desired disclosure requirements. Glazier, *Gaunt: MCDC Enforcement Actions*, *supra*. The SEC thus will use its fraud-prevention authorities to establish disclosure requirements by penalizing officials whose disclosures may meet the GASB floor but fall short of the SEC’s amorphous ceiling. Indeed, by labeling an official’s disclosure decision an act of “fraud,” notwithstanding the fact that the government official may have been complying with GASB standards, the agency elides the traditional meaning of fraud as an intentional tort and risks punishing good-faith behavior.

“Alerts” issued by the GFOA in 2014, warning its members about potential problems they may encounter with the SEC’s MCDC Initiative, demonstrate the alarm with which municipal officials have greeted the SEC’s new focus on using enforcement actions to impose disclosure requirements. *See e.g. GFOA Alert: The SEC MCDC*

*Initiative and Issuers*, GOVERNMENT FINANCE OFFICERS ASSOCIATION, [http://gfoa.org/sites/default/files/GFOA%20MCDC%20Alert\\_0.pdf](http://gfoa.org/sites/default/files/GFOA%20MCDC%20Alert_0.pdf) (last visited Apr. 11, 2015). While the SEC has marketed the program as completely voluntary, it also indicated that non-participants would be subject to increased sanctions for violations. Press Release, SEC, SEC Launches Enforcement Cooperation Initiative for Municipal Issuers and Underwriters, (Mar. 10, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541090828#.VPyDm2TF9fz>. The increased sanctions on violations for non-participants provide a strong compulsion for government finance officers to participate.

The GFOA alerts warn its members to carefully evaluate their decision to participate in the MCDC Initiative. One concern the GFOA raises is that although issuers and underwriters are invited to disclose material misstatements through the new initiative, the SEC has not defined “materiality,” indicating instead that the materiality of statements will be determined on an individual-case basis. *GFOA Alert – Deadline Extended for SEC MCDC Initiative*, GOVERNMENT FINANCE OFFICERS ASSOCIATION, <http://gfoa.org/sites/default/files/MCDC%20Alert%20II%20-%20Final.pdf> (last visited Apr. 11, 2015). Another concern of the GFOA is that while the SEC agrees to refrain from individually fining participating issuers, the SEC can still “pursue separate enforcements against individuals within a government who[m] it deems to be culpable of the misstatements.” *GFOA Alert: The SEC MCDC*



*Initiative and Issuers, supra.* In particular, the GFOA advises its members to consult legal counsel in order to learn more about the legal consequences of participating in the Initiative. *Id.*

The 11th Circuit ruling thus creates confusion because, by refusing to grant municipal officials the protection of qualified immunity, it permits the SEC, under the auspices of anti-fraud rules, to impose *de facto* requirements on municipal officials for accounting and financial disclosures that do not comport with already established and understood state and local government accounting and financial standards. Officials are worried that the SEC will, after the fact and without warning, assert that additional or altogether different disclosures should have been made and seek penalties for not having made them.

In this case, the SEC claims that the former director of the Office of Management and Budget of the City of Miami, Boudreaux, transferred funds from various of the city's capital projects to its general fund without properly disclosing this activity to investors. Compl. at ¶ 112.

During the course of the "Great Recession" of 2008, municipal budgets were decimated. Total revenue fell each year from 2008 to 2012, as a percentage of the previous year. Michael Pagano and Christiana McFarland, *City Fiscal Conditions in 2013*, NATIONAL LEAGUE OF CITIES 3 (October 2013), [http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/Final\\_CFC2013.pdf](http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/Final_CFC2013.pdf). This marked the first time since the Great

Depression that state and local tax revenues declined in nominal terms. Byron Lutz, Raven Molloy and Hui Shan, *The Housing Crisis and State and Local Government Tax Revenue: Five Channels*, FEDERAL RESERVE BOARD 5 (August 2010), <http://www.federalreserve.gov/pubs/feds/2010/201049/201049pap.pdf>. Sales tax revenue fell by 7.5 percent and income tax revenue by 17 percent. *Id.* Property taxes fell four years in a row from 2010 to 2013, only managing to rise again as a percentage of the previous year's revenue in 2014. Michael Pagano and Christiana McFarland, *City Fiscal Conditions 2014*, NATIONAL LEAGUE OF CITIES 4, <http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/CSAR%20City%20Fiscal%20Conditions%202014.pdf> (last visited Apr. 11, 2015). Many municipalities faced limitations on the ability to increase taxes based on either already established caps limiting yearly increases, as in California, see CAL. CONST. art. 13A, § 2(b), and Michigan, see MICH. CONST. art. 9, § 3; still others faced requirements for difficult to overcome supermajorities of votes to raise property taxes, as in Massachusetts, see MASS. GEN. LAWS ANN. 59, § 21C (West 2015). The result was that many municipalities initially responded to fiscal crisis by, among other things, shifting funds from capital projects and enterprise funds to general funds. See Kimberly Nelson, *Municipal Choices During a Recession: Bounded Rationality and Innovation*, 44 STATE AND LOCAL GOVERNMENT REVIEW 44S, 60S (August 2012).

Miami and Boudreaux contend that in the course of this dynamic situation, Boudreaux disclosed some

such transfers to the general fund in the City's Comprehensive Annual Financial Reports ("CAFR") in compliance with GASB standards. Def. City of Miami's Reply in Supp. Mot. to Dismiss 5. Like other public officials against whom civil penalties and damages are sought, he only seeks the umbrella of protection provided by qualified immunity for having complied with all requirements clearly established by law at the time of his action. Def. Boudreaux's Mot. to Dismiss 12. GASB Statement 34 requires municipalities to "provide information about funds." Glick, *supra*, at 10. Most of a typical municipality's financial transactions are reported in the general fund. *Id.* at 8. The SEC admitted that the transfers were disclosed in footnotes to Miami's CAFR's, Compl., *supra*, at ¶¶ 91-101, but found fault with the way Boudreaux characterized the transfers, *id.* at ¶¶ 84-101, alleging that he had "omitted material facts[.]" *Id.* at ¶¶ 87, 89, 95. The SEC seeks to hold Boudreaux accountable for disclosures in the CAFR's which the SEC found deficient, but which Boudreaux and the City believed to contain all material disclosures required by law. Def. City of Miami's Reply, *supra*, at 5.

This goalpost-shifting of the materiality standard necessarily will have the effect of slowing down procedures, creating unnecessary hesitancy among budget officials, and discouraging governmental finance officials from innovative financial management. Sometimes, government financial officers need to make decisions quickly. If these officers must first seek legal counsel to ensure that they do not run afoul of potential future SEC regulations, purely because they do not understand

the precise nature of the SEC's disclosure requirements, it would prevent the officers from operating in a time-sensitive manner and from being creative in their decision-making.

Hard and uncertain economic times require governmental finance officials to act creatively in generating new approaches, while working under already established financial frameworks, including GASB. Indeed, the 'new normal' of low revenues and restrictions on tax increases may require municipal leaders to be more innovative in their fiscal management. Nelson, *supra*, at 60S; *see generally* Lawrence Martin, Richard Levey, and Jenna Cawley, *The 'New Normal' for Local Government*, 44 STATE AND LOCAL GOVERNMENT REVIEW 17S (2012). The Ash Center for Democratic Governance and Innovation at Harvard University's John F. Kennedy School of Government recognizes the importance of such creativity in government by awarding Innovations in American Government Awards. *See Awards Program*, Harvard Kennedy School, Ash Center for Democratic Governance and Innovation (last visited Mar. 29, 2015), *available at* <http://www.innovations.harvard.edu/awards-programs/award-model>. These Awards have inspired other national and worldwide organizations to develop their own programs under a similar framework, to recognize innovation and creativity in governance. *Id.*

Under the 11th Circuit's reasoning, these governmental finance officials would not be protected from liability. The reasoning would have the effect of inserting legal counsel into the financial

workings of a municipality. Doing so would add to expense without adding any significant umbrella of protection. Municipal finance officials know how to properly comply with GASB standards, but imposing an additional layer of standards that are more suited to private industry with little advance notice will only confuse government budgeting.

**C. Without Qualified Immunity,  
Municipal Officials Face A Threat Of  
Personal Liability To Pay Civil  
Penalties That Will Cast A Cloud Over  
Municipal Officials' Decision-Making  
And Deter Talented Finance Managers  
From Working For Municipalities.**

Qualified immunity remains an essential protection for municipal officials such as Boudreaux because gaps in municipalities' ability to insure their officials threaten to leave those officials exposed to substantial personal liability. Existing commercial insurance policies may not cover the types of disclosures alleged in the instant case, and public policy may prevent indemnification for civil penalties. The salary differential between local government officials and private-sector officials already serves as a disincentive for talented finance and budget managers to work in the public sector; a failure to find qualified immunity for municipal officials, during a time of increasing SEC's enforcement focus on individual municipal officials, will only compound municipalities' difficult task of recruiting, hiring and retaining the most qualified personnel.

The SEC's focus on enforcement actions against individuals, as discussed, centers on the goal of deterrence. *See SEC v. Moran*, 944 F. Supp. 286, 296 (S.D.N.Y. 1996) (noting that the remedy of civil penalties serves to deter future violations). SEC Chairwoman Mary Jo White echoed this message in a 2013 speech, saying, "A core principle of any strong enforcement program is to pursue responsible individuals wherever possible.... When people fear for their own reputations, careers or pocketbooks, they tend to stay in line." Mary Jo White, Speech to the Council of Institutional Investors Fall Conference: Deploying the Full Enforcement Arsenal, (Sept. 26, 2013) (*available at* <http://www.sec.gov/News/Speech/Detail/Speech/1370539841202#.VSc8vBPF9-o>).

Unfortunately for municipal officials or cities who might wish to insure themselves against payments to the SEC, however, commercial Director and Officers ("D&O") or Errors and Omissions ("E&O") insurance policies are often subject to exclusions for suits implicating the very sorts of remedies that suits from the SEC would seek against them. *See* Helen K. Michael and Virginia R. Duke, *Directors and Officers Liability Insurance Policies*, Kilpatrick Townsend & Stockton LLP, Practical Law Practice Note 2-504-6515 (West 2015) (identifying "conduct exclusion" for fraud or intentionally dishonest acts or omissions, and "fines, penalties and ill-gotten gains exclusion," as exclusions commonly included in D&O policies); Jon N. Eisenberg, *How Much Protection Do Indemnification and D&O Insurance Provide?*, HARV. L. SCHOOL FORUM ON CORPORATE GOVERNANCE & FIN. REGULATION 9 (May 28, 2014),

<http://blogs.law.harvard.edu/corpgov/2014/05/28/how-much-protection-do-indemnification-and-do-insurance-provide> (identifying fines, penalties, and payments covering conduct arising out of deliberate, dishonest, fraudulent or criminal acts or omissions, as common exclusions for coverage.) To the extent the SEC uses its anti-fraud authority as the basis for its enforcement of disclosure standards, any action brought against an individual municipal official will necessarily accuse the official of intentional misconduct – and will seek civil penalties as a remedy – thus setting a high likelihood that such insurance would not apply. See Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 384 (2015) (noting that in the corporate context, civil fines paid to the SEC generally are not covered by D&O policies).

Even if D&O or E&O insurance were to apply, or if the municipality were self-insured, indemnification of the municipal official might be thwarted by settlement terms, a state's public policy, or by an activist court. The SEC has often insisted in settlement negotiations that the corporate officer found liable agree to personally pay the civil penalty assessed against him or her. See Bernard Black et al., *Legal Liability of Company Officials Part 2: Court Procedures, Indemnification and Insurance, and Administrative and Criminal Liability (Report to the Russian Securities Agency)*, 2008 Colum. Bus. L. Rev. 1, 121 (2008). It has succeeded at least once in forcing a promise by an individual to pay out of his own pocket as part of a settlement with the agency. Velikonja, *supra*, at 385 n. 272. Similarly,

though a court's power to order individuals not to pay penalties with insurance is unclear, judges may seek to make out-of-pocket payment by the individual defendant inevitable by raising the dollar amount of the civil penalty assessed against a liable officer. *See SEC v. Conway*, 697 F. Supp. 733, 772 (E.D. Mich. 2010).

A final and serious obstacle to the availability of insurance protection for municipal officials is that payment of civil penalties by insurance may be against public policy. The SEC has stated unilaterally that from its perspective such indemnification is unenforceable. 17 C.F.R. § 229.512 (h)(3) (2015). The Second Circuit has refused to enforce a claim for indemnification by a corporate underwriter against the company on public policy grounds. *See Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969). Courts have also held that indemnification for civil penalties for violations of environmental statutes cannot be enforced on public policy grounds. *See e.g. Env'tl. Conservation Org. v. Bagwell*, No. 4:03CV-807-Y, 2005 WL 2465003, \*3-4 (N.D. Tex. Sept. 30, 2005).

This threat of hefty fines comes in a context in which municipal officials are already ill-compensated relative to similar private-sector officers. Local governments pay their financial officials markedly less, on average, than private companies pay. Nationwide, the mean annual salary of private-sector financial managers is \$133,140, *May 2014 National Occupational Employment and Wage Estimates by ownership: Cross-industry, private ownership only*, DEPT OF LABOR,



<http://www.bls.gov/oes/current/000001.htm#11-0000>  
 (last modified March 25, 2015), while financial managers who work for local government earn a mean of just \$97,640. *May 2014 National Occupational Employment and Wage Estimates by ownership: Local government, including schools and hospitals*, DEP'T OF LABOR, <http://www.bls.gov/oes/current/999301.htm#11-0000> (last modified Mar. 25, 2015). A similar pay gap exists among budget analysts: private-sector wages average \$77,410, while local government wages stall at \$68,210. DEP'T OF LABOR, *Cross-industry, supra*; DEP'T OF LABOR, *Local government, supra*. In 2009, the average chief elected officer in a local municipality only earned about \$51,918 a year, and the average chief financial officer only \$87,173. *Average Salaries of Municipal Officers*, NATIONAL LEAGUE OF CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/average-salaries-of-municipal-officials> (last visited Apr. 11, 2015). Private-sector pay for chief executives, by contrast, averages \$180,700 per year. *Occupational Employment and Wages, May 2014: Chief Executives*, DEP'T OF LABOR, <http://www.bls.gov/oes/current/oes111011.htm#nat> (last modified Mar. 25, 2015).

The threat of civil penalties being assessed against individual officials would thus discourage potentially qualified and talented applicants from signing up to manage city funds – especially in those municipalities that need creative, competent management the most.

CONCLUSION

For all the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

CHARLES W. THOMPSON, JR.  
*Counsel of Record*  
INTERNATIONAL  
MUNICIPAL LAWYERS  
ASSOCIATION  
7910 Woodmont Ave.,  
Suite 1440  
Bethesda, MD 20814  
cthompson@imla.org  
(202) 466-5424

SARAH M. SHALF  
EMORY LAW SCHOOL  
SUPREME COURT  
ADVOCACY PROGRAM  
1301 Clifton Road  
Atlanta, Georgia 30322  
sarah.shalf@emory.edu  
(404) 712-4652

April 17, 2015