

TO: Public Pension Boards of Trustees

FROM: NCPERS Executive Board of Directors

RE: NCPERS Code of Conduct and Content-Based Restrictions on Free Speech

DATE: January 2017

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Some of our members have asked about the impact of the U.S. Constitution's First Amendment free speech protections on NCPERS Code of Conduct for Public Pension Service Providers (Code). After discussions with outside counsel, we believe that the Code is consistent with the First Amendment. Our analysis is summarized below. Of course, NCPERS cannot provide legal advice and members are encouraged to seek advice from their own counsel on the First Amendment and whether their state constitution or other laws might affect adoption of the Code.

If a state pension system wants to impose a content-based regulation on speech, it must demonstrate that its "regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end." *Burson*, 504 U.S. at 198. To demonstrate that an interest is compelling, the state must show that it addresses an "actual problem." *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 799 (2011). If a less restrictive alternative would serve the government's purpose, the regulation is not narrowly tailored. See *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). Therefore, content-based regulations "rarely survive[]" this strict scrutiny analysis and very few content-based regulations have been upheld. *Burson v. Freeman*, 504 U.S. 191, 200 (1992). See, also *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2231-33 (2015) (invalidating state regulation that imposed different placement and time restrictions on outdoor signs based on the messages on the signs); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (invalidating regulation that banned news racks containing commercial bills but permitted news racks containing newspapers).

Two cases, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) and *Burson v. Freeman*, 504 U.S. 191 (1992), demonstrate the type of limited content-based regulations that can survive strict scrutiny.

In *Holder*, various human rights organizations claimed that a federal statute prohibiting the provision of "material support or resources" to foreign organizations that engage in terrorist activity infringed upon their First Amendment rights. 561 U.S. at 7. Conceding that this statute is a content-based regulation of speech, *id.* at 27, the Court nevertheless upheld it, finding that it is necessary to serve the compelling government interest of preventing terrorism, and that it is narrowly tailored because it only applies to "designated foreign terrorist organizations" and provides narrow definitions and exceptions that limit its scope. *Id.* at 36-39. However, the Court cautioned that its holding did not guarantee that "any future applications of the material-support statute to speech or advocacy" or "any other statute relating to speech and terrorism" would survive First Amendment strict scrutiny. *Id.* at 39. It is quite possible that it was only the special gravity of terrorism that brought the Court to its position.

In *Burson*, the Court upheld a Tennessee law that prohibited the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. 504 U.S. at 211. Noting that regulations are "content-based" not only when they restrict speech based on a particular

viewpoint, but also when they prohibit a public discussion of an entire topic, the Court considered the Tennessee law a “facially content-based restriction on political speech.” *Id.* at 197-98. Nonetheless, the Court upheld the law because it found that it is necessary to serve the compelling state interest of preventing voter intimidation and election fraud. *Id.* at 206. The Court further found—without much analysis—that the 100 foot restriction is narrowly tailored to prevent voter intimidation and election fraud. *Id.* at 210-11. The Court’s decision was based in large part on the fact that it was faced with reconciling two rights that are both fundamental—“the right to engage in political discourse with the right to vote.” *Id.* at 198, 211. Just as in *Holder*, the Court “reaffirm[ed] that it is the rare case in which [it has held] that a law survives strict scrutiny.” *Id.* at 211.

These two cases demonstrate that restrictions will be upheld in circumstances where the harm they are intended to prevent is significant and the means of the restriction is no broader than necessary. Thus, a state pension system should be able to justify its restriction on an investment manager, accounting, actuarial firm or other service provider’s right to advocate an “anti-public pension” policy position as a “conflict of interest” with the system and its goals, success and survival.

Where a contractor states a public policy position that conflicts with what it is currently relying upon in its work with the pension plan, the pension plan may terminate its contract with that contractor. Similarly, where a potential contractor states a public policy position, and that position conflicts with what the contractor will have to rely upon in working for a pension plan, then the pension plan may refuse to hire that contractor. For example, if an actuarial firm has previously stated that only a 4% rate of return assumption is reasonable, the pension plan could refuse to hire that firm on the grounds that it requires a firm that accepts 7% as a reasonable rate assumption.

This content-based restriction on the firm’s speech should pass strict scrutiny because it serves the compelling state interest of avoiding the use of accountants or actuaries whose beliefs are in conflict with the requirements of their work for the pension plans. The restriction is narrowly tailored because it only restricts speech related to the actual work—rate assumptions—utilized by the speaker.

Item 2 of the Code requires public pension service providers to act “for the benefit of public plan clients,” and Item 4 requires service providers to “[f]ully disclose to public plan clients conflicts of interest that arise that may impair the ability to act independently or objectively.” A vendor that states a public policy position that conflicts with what it is relying upon or would need to rely upon in working for a pension plan would not be acting for the benefit of the pension plan (in violation of Item 2) and would be in a conflict of interest (in violation of Item 4). These Items both directly further the content-based restrictions addressed above. In addition, Items 9 and 10 of the Code, stating that service providers should “[s]upport the sustainability of public defined benefit plans” and disclose all contributions to certain listed organizations which have advocated “for the diminishment of public defined benefit plans,” can be a justified impingement of a vendor’s free speech rights because these prohibitions are directly tied to the service provider’s work for the public plan.

To conclude, we believe that a state pension system may fire or refuse to hire a vendor that publicly states policy positions that are in conflict with their obligations (or potential obligations) to state pension plans.