No. S161385

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DAVID B. SCHACHTER,
Plaintiff-Appellant-Petitioner,

vs.

CITIGROUP, INC., et al.,
Defendant-Respondent.

BRIEF AMICI CURIAE OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-RESPONDENT CITIGROUP, INC.

On Review of a Decision of the Court of Appeal
Second Appellate District, Division Seven
Superior Court of Los Angeles, Case No. B193713
The Honorable Victoria Chaney

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BRIEF AMICI CURIAE OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-RESPONDENT CITIGROUP, INC.

I. PRELIMINARY STATEMENT

Petitioner David Schachter, a former employee of Citigroup, voluntarily elected to participate in Citigroup's Capital Accumulation Plan ("CAP"). Aware of the substantial benefits he stood to receive under the CAP, Mr. Schachter elected in writing to receive 5% of his compensation as restricted Citigroup stock.

Equity compensation plans, like the one at issue in this case, enjoy wide use in the financial services industry and have been expressly endorsed by a task force appointed by the Securities and Exchange Commission ("SEC"). These plans are often offered to sophisticated financial services industry employees, like Mr. Schachter, whose very job is to advise clients and make recommendations to them about investment options after evaluating market conditions, risk, tax consequences, financial objectives, and other factors. These employees choose to participate in plans like Citigroup's CAP because of the substantial benefits the plans offer.

Specifically, employees are able to purchase the stock at a price significantly discounted from the market price. Participation in the CAP also confers considerable tax benefits, as participating employees are given the option of either deferring income taxes on the portion of their compensation that they elect to receive as restricted stock or, alternatively, paying taxes on the fair market value of the stock at the time of its grant. Additionally, even

before the stock vests, participants have ownership interests in the restricted stock in the form of voting rights and receipt of dividends.

In addition to the benefits to employees, the plans also benefit the investing public because encouraging financial advisors to remain employed creates continuity of service for clients and fosters clean compliance records. Indeed, the task force appointed by the SEC has not only endorsed the use of these equity plans, but also has deemed the plans a "best practice" because the plans foster long-term relationships between financial advisors and their clients, thus "contribut[ing] to better customer service."

Courts across the country have examined the legality of Citigroup's CAP – the very plan at issue here – and similar plans used by a variety of other financial services companies. These courts, including the highest courts in New York, New Jersey, and Connecticut, and the First and Third Circuits, have consistently upheld the equity plans against challenges based on contractual and quasi-contractual theories as well as under various state labor laws.

Petitioner Schachter wants this Court to depart from the long line of precedent endorsing Citigroup's CAP (and similar plans). Mr. Schachter seeks not only to invalidate his own agreement, but also, by extension, to deprive thousands of California employees of the opportunity to participate in valuable tax-deferred equity plans like the one offered by Citigroup here. Were this Court to rule in Petitioner Schachter's favor, companies in California would no longer offer tax-deferred equity compensation plans, and California employees would suffer as a result. This disadvantage would be

immediate and significant. Given the discounted purchase price and tax benefit features of the plans, striking them down in California would mean that a financial services professional employed in California could net significantly less money than a similarly-compensated professional outside of California who elected to participate in a plan like Citigroup's CAP.

Nothing in California law or public policy supports the result sought by Petitioner Schachter and, in fact, Citigroup's CAP and plans like it are entirely consistent with this State's laws and public policy. Contorting the State's Labor Code – which expressly authorizes the type of written agreements reached by Petitioner and Citigroup here – to strike down Citigroup's CAP is directly contrary to a policy underlying the Labor Code, namely, to protect and benefit California employees.

For these reasons, we respectfully submit that the decision of the Court of Appeal should be affirmed.

II. INTEREST OF THE AMICI CURIAE

Amicus Securities Industry and Financial Markets Association ("SIFMA") is the product of the November 1, 2006 merger of the Securities Industry Association and the Bond Market Association. SIFMA brings together the shared interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to present its members' interests locally and globally. It has

offices in New York, as well as Washington D.C. and London, and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

Amicus Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, and the leading representative of large and small businesses nationwide. It has an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing amicus curiae briefs in cases involving issues of concern to American business.

III. THE BENEFITS AND USE OF VOLUNTARY EQUITY PLANS.

A. Voluntary Equity Plans Are Widely Used In General, And In The Financial Services Industry In Particular.

Equity compensation plans are an important component of executive compensation throughout all sectors of the United States economy; they are in growing use among non-executive employees. David Walker, *Is Equity Compensation Tax Advantaged?* 84 B.U.L. Rev. 695, 697 (June 2004). By the end of the twentieth century, the percentage of large business firms granting stock options to a majority of their workers was up to 39%. John E. Core & Wayne R. Guay, *Stock Option Plans For Non-Executive Employees*, Journal of Fin. Economics, Aug. 2001, at 1. In the year 2000, eleven million U.S. employees participated in long-term incentive stock plans.

Compensation: U.S. Firms Lead in Use of Stock Options to Attract Key Employees, Study Finds, Daily Labor Report, Oct. 26, 2000.

Equity incentive plans are used even more pervasively in the financial services industry. In 2007, 44% of surveyed financial services companies reported offering equity compensation plans to their financial advisors, who are also known as registered representatives.[1] *See* Samantha Simone, *et al.*, Securities Industry and Financial Markets Association, Report on Production and Earnings of RRs – 2007, at 7 (October 2008).

Employers favor use of these equity plans as a way to cultivate employee loyalty and longevity of service. Well-known companies like Prudential, Merrill Lynch, and Morgan Stanley have used plans to reward employees while simultaneously encouraging them to remain employed with

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[1] As the United States Department of Labor has stated:

> To become "registered," employees must pass a qualification examination, the most common of which is the "Series 7." The Series 7 examination is administered by the NASD and covers topics such as federal securities laws, SEC and NASD rules, securities products, the operation and interrelation of financial markets, economic theory and kinds of risk, corporate financing, accounting and balance sheet analysis, portfolio theory and analysis, fair sales practices, types of customer accounts, and tax treatment of various investments. Depending on the types of other services they provide, the employees may be subject to additional registration requirements. Once an individual passes the relevant licensing tests, clears the background and employment screening, and becomes fully registered, the employee may provide investment advice to the employing firm's clients, which may include individual investors, sole proprietors, corporations, trusts, partnerships, estates, and other entities that invest in the securities markets.

DOL Wage and Hour Opinion Letter No. FLSA2006-43 (Nov. 27, 2006).

the company. *See* John Churchill, *Handcuffs Made of Gold*, Registered Rep., Sep. 1, 2004.

B. Equity Plans Represent A Valuable Benefits Option For Employees.

Equity plans offer employees an investment option that can produce several highly valuable worker benefits.

First, participating employees can invest in company stock at a price substantially discounted from the market. *See Marsh v. Prudential Securities Inc.* (N.Y. App. Ct. 2003) 802 N.E.2d 610, 611 (offering restricted stock at a 25% discount from the market value); *Milhollin v. Salomon Smith Barney, Inc.* (Ga. App. Ct. 2005) 612 S.E.2d 72, 75 (same); *Kim v. Citigroup Inc.* (Ill. App. Ct. 2006) 856 N.E.2d 639, 642 (same); *Serio v. Wachovia Securities, LLC* (D.N.J. 2007) 2007 U.S. Dist. LEXIS 63341 (same). Firms like Citigroup offer shares at 25% off the price at which Citigroup stock trades.

The combination of this acquisition price discount and possible market appreciation give participating employees the chance to profit significantly. For example, a share of Citigroup restricted stock with a market value of $7.90 at the end of July 1995 (when Petitioner Schachter received his first installment of restricted stock) could have been purchased by a Citigroup CAP participant for $5.95. *See* http://www.morningstar.com for a complete history of Citigroup stock value. Two years later, when that stock would have ceased to have been restricted (July 1997), its market value had increased to $23.98 per share. Thus, a plan participant would have gained $18.03 per share. If a hypothetical Citigroup employee earning $200,000 per year had used 25% of her compensation to acquire restricted Citigroup stock, her resulting financial

gain would have been $151,512. This figure represents an increase of nearly double the financial gain of the S&P 500 Index during the same time period. Even if the market turned downward during this period, the initial 25% discount on the purchase price would have given the participant a significant 25% cushion against downward stock market movement.[2]

Second, equity plans are an attractive option because participating employees can realize significant tax advantages. *See* Walker, *supra*, at 706-07 (explaining the many and significant tax advantages of investing in restricted company stocks). Essentially, plan participants can elect from different, financially beneficial tax treatment options that can save them money.

One option is to defer taxes on the portion of the money used to acquire the restricted stock. *See* 26 U.S.C. § 83. In other words, instead of paying regular income taxes on that money in the year it was available to the employee, the employee could defer and avoid paying taxes on that percentage of his or her income until the restricted stock vests. In doing so, the employee would effectively lower his or her earned income for the year in which the restricted stock was acquired, and choose to invest or otherwise use these tax savings.[3]

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[2] Stocks such as Citigroup are traded at a true market price – the price at which a buyer is willing to buy and a seller is willing to sell on an open international market. Imagine having the option to purchase any stock at 25% below the true market price, much less the stock of a company you believed in and with which you were very familiar.

[3] The benefits of deferring taxes and the tax-free buildup of appreciation alone are what has made 401(k) plans so popular, and widely used, by employees in the United States.

Alternatively, a participant may opt to pay income taxes on the fair market value of the restricted stock at the time the stock is acquired. Jane Kim, *Getting Personal: Tax Law Alters Stock-Based Compensation*, Dow Jones Newswires, June 11, 2003. This can be beneficial in two respects. The acquisition price starts, of course, at a discounted market price, here the 25% discount Citigroup offers. This necessarily results in a lesser tax amount. In addition, if the stock price increases, "[t]he advantages...[are] that any appreciation after the date of transfer [*viz.*, acquisition by the participating employee] will be taxed at capital gains rates and the recipient controls the timing and disposition and income inclusion." Walker, *supra*, at 707.

Petitioner's central grievance in this case is that a participant's interests in the acquired stock do not become unrestricted for two years. If the participant leaves Citigroup's employ during this two-year period, the participant is unable to retain his or her interest in the restricted stock. But the tax benefits of equity plans would not be available if, as Petitioner would like, there was no risk that he might not vest into full ownership of the stock. Under 26 U.S.C. § 83, tax benefits may only be realized if the restricted stock grant is subject to a substantial risk of forfeiture. As the governing statute states: "The rights of a person in property are subject to a substantial risk of forfeiture if such person's rights to full enjoyment of such property are conditioned upon the future performance of substantial services by any individual." 26 U.S.C. § 83.

Another benefit of equity plans is that, while shares remain restricted for a time (in Citigroup's case, two years), participating employees get many

of the benefits of unconditional stock ownership during this restricted period: the right to receive dividends and the right to vote the shares in matters of corporate governance. *See Schachter v. Citigroup, Inc.* (2008) 70 Cal. Rptr. 3d 776, 779 (right to vote and collect dividends under Citigroup's CAP); *see also Marsh*, 802 N.E.2d at 615 (same under Prudential's MasterShare Plan).

Courts have recognized that employees garner substantial benefits from each of these features of equity compensation plans. *Marsh*, 802 N.E.2d at 615 ("[T]he disclosed risks do not negate the multiple benefits that these knowledgeable employees receive from their voluntary participation in the program, such as the opportunity to invest in securities, the ability to purchase shares at a substantial discount, the deferral of income taxes on compensation and the beneficial rights of stock ownership."); *Schachter*, 70 Cal.Rptr. 3d at 785 (holding Schachter's present right to receive dividends and vote the shares "had a real value"); *Kim*, 856 N.E.2d at 646-47 (concluding that plaintiff benefited from the CAP in part because he "received benefits ... and had voting privileges related to the stock"); *In re Citigroup, Inc.* (1st Cir. 2008) 535 F.3d 45, 57-58 (holding Citigroup's CAP provided "substantial consideration" to the plaintiff by granting, among other things, the right to vote the restricted shares and receive dividends).

C. The Sophisticated Employees Of Financial Services Companies Participate In Employer Equity Plans In High Percentages.

The fact that these equity plans confer substantial benefits and that employees recognize such benefits is demonstrated by the high levels of plan participation among workers in the financial services industry. *See, e.g.*, Chad

Bray, *Bear Stearns Extends Stock Options to Retain Top Managers, Producers*, Dow Jones Business News, Dec. 12, 2000 (financial services industry employees participate in plans at high percentages). Most of the equity plans offered by securities firms are (like Citigroup's) entirely voluntary. *See* Churchill, *Handcuffs Made of Gold, supra*. Thus, employees may elect to receive all of their compensation in cash or they may decide to use some of their compensation to acquire restricted shares of their employer's stock. *See, e.g., Schachter*, 70 Cal. Rptr. 3d at 779 n.5.[4] Financial advisors evaluate and recommend investments for a living; they bring those same skills to their own financial affairs, and their election to participate in plans like Citigroup's CAP further confirms the substantial benefits of the plans. *See Marsh*, 802 N.E.2d at 615 (describing the financial advisors involved in the plans as having "significant knowledge and expertise in assessing investment risks"); *Kim*, 856 N.E.2d at 641 (financial consultant plaintiff testified he participated in the equity plan because he believed it "was an innovative and attractive savings vehicle").

D. Voluntary Equity Plans Benefit The Investing Public And Other Participants In The Investment Markets.

Voluntary equity plans, like Citigroup's CAP, have been endorsed by a task force appointed by the Securities and Exchange Commission as a "best practice" for use in compensating employees in the securities industry. In fact,

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[4] As the Court of Appeal here noted, in words that could equally be used with respect to many other plans: "[Schachter] had a choice: He could be paid and actually receive his wages entirely in cash or he could use a portion of his cash compensation to participate in an investment program that allowed him to purchase at a substantial discount shares of restricted stock." *Schachter*, 70 Cal. Rptr. 3d at 783.

the SEC task force specifically recommends that brokerage firms develop and implement programs that defer financial advisors' compensation beyond the year in which work is performed. *See* Securities & Exchange Commission, Report of the Committee on Compensation Practices, (April 10, 1995), available at http://www.sec.gov/news/studies/bkrcomp.txt, hereinafter "SEC, Report on Compensation Practices."

In the view of the Commission's task force, equity compensation plans tend to align the interests of financial advisors and their employers by reducing employee turnover and fostering continuity of service. *Id.* at 2. These voluntary plans also benefit employers by creating incentives for their skilled financial employees to remain with the company, contributing to a more stable workforce in a volatile industry. By opting to remain with their current employer, financial advisors have the opportunity to learn more about the goals, investment experience, and risk capacities of their clients. *Id.* at 11. Among other things, financial services industry employees will be less swayed by the allure of new jobs, the temptation of new employer signing bonuses, or the ability to earn higher commission percentages during a "honeymoon" period with a new employer, if they know that they will leave behind potentially valuable assets in the form of stock of their current employer. *See* Mark H. Edwards, *The Equity Economy: The Future Is Now*, WorldatWork Journal, Apr. 1, 2001.

Scholars also agree that restricted stock grants are beneficial in the financial services industry. *See* Book Note: *Stakeholders as Shareholders (Review of BLAIR: Ownership and Control: Rethinking Corporate*

Governance in the Twenty-First Century), 109 Harv. L. Rev. 1150, 1151 (March 1996). Indeed, one commentator has emphasized that "granting restricted stock to employees would align their interests with those of shareholders..., protect their firm-specific investments..., encourage them to invest more firm-specific human capital..., and provide greater flexibility to the firm than the traditional compensation alternatives of lifetime employment or high wages." *Id.*

The investing public also benefits from equity compensation plans. Customers seek and desire stable attention to their investment portfolios. *See* SEC, Report on Compensation Practices at 11; T. Lembrich, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 Colum. L. Rev. 2291, 2296 (Dec. 2002). The SEC task force observed that deleterious "undue trading" practices in the accounts of investors are more prevalent when financial advisors assume new employment, at which time they typically receive higher shares of the commissions on the transactions they arrange. SEC, Report on Compensation Practices at 11.

Voluntary equity plans also tend to have a policing effect on financial advisors' behavior, given that employees who are terminated for cause lose their investment in restricted stock. *See* SEC, Report on Compensation Practices at 2. The SEC task force thinks employees will be more likely to "play by the rules" and maintain clean compliance records if they have the incentive of still-to-vest restricted stock before them. *Id.* at 11.

IV. COURTS AROUND THE COUNTRY HAVE UNIFORMLY REJECTED CHALLENGES TO VOLUNTARY EQUITY COMPENSATION PLANS.

Courts around the country have upheld either Citigroup's CAP or similar plans, rejecting an array of contract, quasi-contract, and state labor law challenges. These well-reasoned decisions counsel a similar disposition of this case by this Court.

In one of the earliest cases to address such plans, the Court of Appeals of New York held that Prudential Securities' MasterShare Plan did not violate New York's Labor Laws. *Marsh*, 802 N.E.2d at 611. The MasterShare Plan was structured like Citigroup's CAP. Employees could elect to have their employers purchase for them shares of the Prudential Stock Index Fund. *Id.* The employee was the beneficial owner of the shares for three years, during which time he or she received dividends and cast shareholder votes. *Id.* After three years, the employee could cash in the shares or renew the account. *Id.* If the employee terminated voluntarily or was fired for cause within the three-year period, the balance of the MasterShare account was forfeited. *Id.*

Plaintiff in *Marsh* alleged that the MasterShare Plan violated New York Labor Law § 193, which prohibits unlawful deductions from an employee's wages. The Court held that "whether a wage deduction for investment is 'for the benefit of the employee' can be determined only by examining the investment plan in its entirety, giving due weight to the existence of a forfeiture provision." *Id.* at 615. The Court determined that the MasterShare Plan was "for the benefit of the employee," and that the plaintiff's participation in the plan was "expressly authorized in writing." *Id.* at 612. The Court relied in part on the fact that the plaintiff was a "[s]ophisticated financial

advisor[ ] [who] could reasonably believe that the benefits and potential rewards of the Plan participation outweighed the likelihood of loss." *Id.* at 615.

The Court also recognized the substantiality of the benefits conferred by the MasterShare Plan: tax deferral; beneficial ownership even before full vesting; voting rights; and the right to receive dividends. *Id.* The Court ruled that because these benefits are received by the employee even before the shares vested, the MasterShare Plan was "distinguishable from wage deductions and forfeitures designed to benefit the employer alone." *Id.*[5]

In *Kim v. Citigroup*, the Court upheld the Citigroup CAP, rejected plaintiff's quasi-contractual claims, and found that the CAP did not violate the Illinois Wage Act. 856 N.E.2d at 642. The Court in *Kim* held that the "trial court was correct in finding that the CAP stock was compensation and, therefore, governed by the Wage Act based upon the plain language of the election agreement." *Id.* at 646. The Court favorably cited other cases upholding the validity of the CAP, and concluded that an employee's choice to

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[5] The next year, the Third Circuit rejected a similar challenge to Prudential's MasterShare Plan under the New York Labor Law. *Schunkewitz v. Prudential Securities Inc.* (3d Cir. 2004) 99 Fed.Appx. 353, 2004 WL 896660 (affirming summary judgment in favor of Prudential and holding that Prudential MasterShare's forfeiture provision was lawful because "forfeiture provisions are valid as long as the employee entered into the agreement willingly" and that the plan did not violate New York Labor Law § 193 because an "employer may divert part of an employee's wages into a mutual fund ... where the employee has consented to the diversion"); *see also Milhollin*, 612 S.E.2d at 75 (rejecting challenge to CAP and holding that "[w]here a contract in unmistakable terms provides for a forfeiture and is otherwise free from legal infirmity, neither a court of law nor a court of equity will relieve against the forfeiture." (quoting *Fernandes v. Manugistics Atlanta* (Ga. App. Ct. 2003) 582 S.E.2d 499)).

voluntarily forego "earned compensation by an employee does not violate the public policy of the state." *Id.* at 648. The Court also relied on the fact that the plaintiff was fully aware of the forfeiture clause and chose to participate in the CAP because he "felt it was a smart investment vehicle." *Id.*

In *Guiry v. Goldman, Sachs & Co.* (N.Y. App. Div. 2006) 31 A.D.3d 70, New York's Appellate Division upheld a mandatory Restricted Stock Unit plan used by Goldman Sachs. *Id.* at 71. Plaintiff was paid in cash alone from the time of his hire in 1993 through December 18, 1999, after which time his compensation was divided into three components: a cash commission, a subjective bonus, and an equity-based right to restricted stock. *Id.* at 72. This restricted stock was contingent on plaintiff's continued employment until the vesting date. *Id.* Plaintiff alleged that the Restricted Stock Unit plan violated the New York Labor Laws. Following the decision in *Marsh*, the Court in *Guiry* held that "deferred equity-based compensation of this kind constitutes, as a matter of law, 'incentive compensation' ... not included in the definition of 'wages' under *Labor Law § 190(1)*.... Deferred awards of stock and stock options, like those at issue here, constitute incentive compensation, since they plainly serve the function of giving employees an incentive to stay with the firm and to maximize the value of the firm's business." *Id.* at 71, 73. Because the Restricted Stocks fell outside the Labor Law's definition of "wages," the plan's forfeiture provisions did not violate the statute, and Plaintiff's claim was dismissed.

Last year, the Supreme Court of New Jersey also upheld Citigroup's CAP. *Rosen v. Smith Barney, Inc.* (N.J. 2008) 950 A.2d 205. In *Rosen v.*

Smith-Barney, Inc. (N.J. App. Ct. 2007) 925 A.2d 32, the Appellate Division of the Superior Court of New Jersey analyzed the other judicial decisions we have canvassed and ruled that the CAP adhered to New Jersey public policy: the "enforceability of a forfeiture provision is judged against the standard of reasonableness, with due regard for the consideration that the court's equitable jurisdiction to permit relief from a forfeiture clause must not ignore the parties' legal rights to bind themselves to specific contract terms." *Id.* at 41.

The *Rosen* case then went to the Supreme Court of New Jersey, where the judgment was upheld. *See Rosen*, 950 A.2d at 206. The New Jersey Supreme Court rejected the argument that the CAP's forfeiture provision violated New Jersey's wage and hour law, holding that "incentive compensation plans in general, and the CAP in particular, find their authorization within the terms and provisions of the Wage and Hour law itself," which provides an exception to the rule against withholding funds "when the amounts ... are devoted to specifically authorized purposes." *Id.* The Court also recognized the substantial tax benefits granted to employees who enroll in the plan, noting that those tax benefits would disappear unless the "compensation is retained by the employer for a period of time and remains at a 'substantial risk of forfeiture' until payable to the employee." *Id.* (quoting U.S.C.A. § 409(a)(1)(A)(i)).

Last year, the First Circuit similarly found no basis for contractual or quasi-contractual challenges to a CAP contract, concluding that the CAP was unambiguous, and the defendants merely enforced against the plaintiff the express terms of their agreement. *In re Citigroup, Inc.*, 535 F.3d at 45. A

plaintiff from Texas also unsuccessfully challenged Citigroup's CAP last year. *See In re Citigroup Inc. Capital Accumulation Plan Litigation* (D. Mass. 2008) 2008 WL 3982065. The Court rejected plaintiff's breach of contract claim, finding no ambiguity in the contracts between the plaintiff and Citigroup, and determining that the plaintiff was not entitled to have his "earned compensation" returned because he received "precisely what he contracted for: restricted stock." *Id.* at *14. Rejecting plaintiff's public policy challenges to Citigroup's CAP, the court also held that Citigroup's plan was consistent with Texas public policy, even though the compensation took the form of an instrument whose value is contingent on continued employment: "Texas public policy strongly favors freedom of contract." *Id.* at 17-18.

Finally, in the most recent reported case, the Connecticut Supreme Court ruled that Citigroup's CAP did not violate Connecticut's wage law. *Weems v. Citigroup, Inc.* (Dec. 30, 2008) 289 Conn. 769; 2008 Conn.LEXIS 564, *2. Specifically finding that the written authorization signed by the employees to participate in Citigroup's CAP was "a model of clarity," the Court held that the authorization was "informed and voluntary" and complied with Connecticut's wage payment statutes. *Id.* at *31.

In summary, courts have consistently held that plans like the CAP confer substantial benefits on employees and are consistent with both public policy and state labor laws around the country.

V. NOTHING IN CALIFORNIA LAW, AND NO CALIFORNIA PUBLIC POLICY, JUSTIFIES DEPARTURE FROM THE PRECEDENT AROUND THE COUNTRY UPHOLDING EQUITY PLANS SUCH AS CITIGROUP'S CAP.

California law and public policy strongly favor a decision by this Court upholding Citigroup's CAP. Declaring Citigroup's CAP unlawful would necessarily result in California employers not offering such beneficial tax-deferred equity plans to their employees located in California – even when those same employers are offering such plans to their employees in other states. In fact, because of the deferred tax status and the significantly discounted stock purchase price, an employee in California who was not permitted to participate in an equity plan like Citigroup's CAP could make significantly less money than an otherwise similarly-compensated employee in another state who could and did participate in such a plan. Nothing in California law favors a rule that would so disadvantage employees in this State.

Generally, California favors freedom of contract. *Jensen v. Traders Ins. Co.* (1959) 52 Cal.2d 786, 795 ("It is to the interest of the public generally that the right to make contracts should not be unduly restricted ...."). California courts will not declare a contract illegal unless it expressly contravenes the law or an established public policy of the State. *Spangenberg v. Spangenberg* (1912) 19 Cal.App. 439, 446-47.

Equity plans like Citigroup's CAP do not contravene either law or public policy. It is not the office of an amicus curiae brief to comprehensively address all issues in a case; that is something Citigroup has done well as a

party litigant. Several points merit special emphasis, however, as the Court evaluates this case.

First, it is well-settled that an employer may offer payments to a California employee that are contingent upon the employee remaining employed until a date certain in the future, and are forfeited if the employee voluntarily leaves earlier or is terminated. *Neisendorf v. Levi Strauss* (2006) 143 Cal.App.4th 509, 522 ("Numerous cases have upheld the bonus formula in this case, holding that an employee discharged for good cause is not entitled to participate in the distribution of the proceeds of a bonus plan."); *Lucian v. All States Trucking Co.* (1981) 116 Cal.App.3d 972, 975 (granting summary judgment in the employer's favor because "an employee who voluntarily leaves his employment before the bonus calculation date is not entitled to receive it"). If, as in these reported cases, employers are permitted to provide employees with payments that can be forfeited, pursuant to bonus plans that are not elective with employees, then surely an employee's voluntary decision to participate in an equity plan with a tax-law mandated forfeiture provision is acceptable under California law.

Second, any question as to the propriety of Citigroup's CAP under the California Labor Code is foreclosed by the Labor Code's express authorization of precisely the type of written agreement made by Petitioner Schachter. A California employer may "withhold or divert any portion of an employee's wages" whenever the employee gives express written authorization. Labor Code § 224. California courts construe § 224 broadly when necessary to facilitate beneficial workplace agreements. *See, e.g., Prudential Ins. Co. v.*

Fomberg (1966) 240 Cal.App.2d 185, 192 (upholding agreement whereby employee can receive loans from an employer against future salary expectations). As the Court of Appeal aptly observed here, "if Schachter was not paid directly the money used to purchase the restricted stock, those funds were deducted for that purpose pursuant to Schachter's request and at his explicit authorization. That deduction is lawful under [Labor Code] section 224." *Schachter*, 70 Cal. Rptr. 3d at 784.

Third, more generally, California's Labor Code is "to be liberally construed with an eye to promoting [worker] protection." *Indus. Welfare Comm'n v. Superior Court* (1980) 27 Cal.3d 690, 702. The laws of this State should not become an unnecessary barrier to California employees' access to the valuable, voluntary benefits these equity plans provide – benefits that counterpart employees can enjoy when working in other states.

Petitioner Schachter did not have to participate in Citigroup's CAP. He deemed it advantageous to his interests to do so. "While participating in CAP undoubtedly carried risks, a rational employee could decide that the benefits outweighed the costs." *In re Citigroup Inc. Capital Accumulation Plan Litig.*, 2008 WL 3982065, at *18. Schachter's personal regret about his earlier investment decision should not have the effect of drying up opportunities for other Californians to gain the benefits these plans offer, some of which (like the tax benefits) depend on retaining the requirement that employees must bear a risk of forfeiting their stock.

Fourth, California workers are not the only ones who will be hurt if the laws of this State prove hostile to equity compensation plans of a kind in wide

use elsewhere. Such a result will make California a less attractive employment venue at a time when the elected branches of State government are focused on enhancing employment opportunities in this State. For example, Governor Schwarzenegger has recently proposed legislation that would make it easier, not more difficult, for both employers and employees to remain in or return to California. The Governor's "prescription [announced on November 6, 2008] is full of specific action to generate jobs, keep jobs and businesses that are tempted to leave in California and lure those that have left back to the Golden State." "Governor Schwarzenegger Announces Plan to Address Budge Emergency, Stimulate California's Economy," available at, http://gov.ca.gov/press-release/10966.

Fifth, the interests of the investing public deserve careful consideration as this Court evaluates this case. California has a strong public policy in favor of investor protection and preserving the integrity of financial markets. *See Hall v. Superior Court* (1983) 150 Cal.App.3d 411, 416 (noting the public policy of the "protection of securities investors"); *accord, CTS Corp. v. Dynamics Corp. of America* (1987) 481 U.S. 69, 83 (parallel "federal policy of investor protection"). Citigroup's CAP benefits California investors who utilize the services of California financial advisors, as CAP-type plans encourage financial advisors to maintain clean compliance records; any financial advisor who is terminated (before his or her interest in the restricted stock vests) for failure to comply with the applicable regulatory requirements in place to protect investors, for example, would lose their ownership interest in the stock. Given the SEC task force's endorsement of equity plans as a way

to improve the quality of service provided to the investing public, this Court should be extremely reluctant to find in California law impediments to the use of equity plans like Citigroup's CAP in this State.

VI. CONCLUSION

California law should follow the lead set by other courts. Employees, employers, and investors in this State should have access to the same plans available elsewhere, with the employment and securities trading benefits they confer. The decision of the Court of Appeal should be affirmed.

Dated: January 15, 2009

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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached brief is proportionately spaced, uses TimesRoman 13-point type, and is 5709 words.

I declare under penalty of perjury that this Certificate of compliance is true and correct and that this declaration was executed on 15 January 2009.

Dated: January 15, 2009

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PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is One Market, Spear Street Tower, San Francisco, California 94105-1126.

On January 15, 2009, I served the within document(s):

BRIEF AMICI CURIAE OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-RESPONDENT CITIGROUP, INC.

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

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Executed on January 15, 2009, at San Francisco, California.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct.

Jasmine Powers