

**No. 10-1305**

Oral Argument Scheduled for April 7, 2011

IN THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

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BUSINESS ROUNDTABLE and CHAMBER OF COMMERCE OF  
THE UNITED STATES OF AMERICA,

*Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

**On Review of an Order of the  
United States Securities and Exchange Commission**

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MOTION FOR LEAVE TO FILE LAW PROFESSORS' BRIEF  
AS *AMICI CURIAE* IN SUPPORT OF  
THE SECURITIES AND EXCHANGE COMMISSION

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**LIST OF AMICI**  
(Alphabetically)

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William W. Bratton  
Professor of Law and Co-Director at the Institute for Law and Economics  
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Victor Brudney  
Robert B. and Candice J. Haas Professor in Corporate Finance Law, Emeritus  
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John C. Coates, IV  
John F. Cogan Professor of Law and Economics and  
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James D. Cox  
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Lawrence Cunningham  
Henry St. George Tucker III Research Professor of Law  
George Washington University Law School

Lisa Fairfax  
Professor of Law  
George Washington University Law School

James Fanto  
Professor of Law  
Brooklyn Law School

Tamar Frankel  
Professor of Law and Michaels Faculty Research Scholar  
Boston University School of Law

Jose Gabilondo  
Associate Professor of Law  
Florida International University College of Law

Frederick Mark Gedicks  
Guy Anderson Chair and Professor of Law  
J. Reuben Clark Law School  
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Professor of Law  
Hofstra University School of Law

Lee Harris  
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University of Memphis Law School

Thomas Lee Hazen  
Cary C. Boshamer Professor of Law  
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Joan MacLeod Heminway  
College of Law Distinguished Professor of Law  
University of Tennessee College of Law

Lyman Johnson  
Robert O. Bentley Professor of Law  
Washington and Lee University School of Law  
and  
LeJeune Distinguished Chair  
University of St. Thomas School of Law

Renee Jones  
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Donald C. Langevoort  
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Faith Stevelman  
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Adam Winkler  
Professor of Law  
UCLA School of Law

Thirty-six law professors, who teach constitutional, corporate and securities law at various law schools across the country (the “Law Professors”) move the Court pursuant to Fed. R. App. P. 29(b) (“Rule 29(b)”) to file the Law Professors’ Brief as *Amici Curiae* in Support of the Securities Exchange Commission (“Brief”). The proposed Brief, which is filed concurrently with this motion, supports the Commission’s<sup>1</sup> position that 17 CFR § 240.14a-11 (“Rule 14a-11”) does not violate the First Amendment,

Rule 29(b) requires *amici curiae* to file a motion that states “(1) the movant’s interest; and (2) the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” The Law Professors have extensive experience researching and teaching issues of constitutional law, securities law, and corporate law. They are, therefore, uniquely qualified to write on the application of the First Amendment to Rule 14a-11.<sup>2</sup> The Law Professors’ proposed Brief is desirable and appropriate because it addresses an important issue that was *not* addressed by other *amici* that support the Commission’s position, and

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<sup>1</sup> The Securities and Exchange Commission will be referred to as “Commission.”

<sup>2</sup> As set forth in the Law Professors’ Certificate of Counsel Pursuant to Circuit Rule 29(b), attached hereto as Exhibit A, filing a joint amicus brief with the Counsel of Institutional Investors is not practicable.

raises myriad important points *not* raised by the Commission in its opening brief or by any other *amici*.

## **I. THE INTERESTS OF AMICI**

*Amici* are 36 law professors from 31 law schools around the country. They file this brief in their individual, not institutional capacities; their institutional affiliations are listed in the Brief for identification purposes only. *Amici* have devoted significant parts of their professional careers to teaching and writing on issues related to the First Amendment, corporate governance, and securities law. The Law Professors do not hold the same views regarding the merits of or underlying policies behind the proposed Rule. The Law Professors also differ on many issues concerning corporate governance and corporate law policy. The Law Professors agree, however, that Rule 14a-11 as promulgated by the Commission does not violate the First Amendment.

## **II. THE PROFESSORS ARGUE THAT RULE 14a-11 DOES NOT VIOLATE THE FIRST AMENDMENT**

The Law Professors make arguments *not* contained in the Initial Brief of the Securities and Exchange Commission filed on January 19, 2010 (“SEC Brief”) or in brief filed by the Council of Institutional Investors, TIAA-CREF, and 14 Other Funds as *Amici Curiae* in Support of Respondent (filed January 27, 2010) (1) state and federal laws that define the rights of individual shareholders in a company and (2) the importance of the state and federal government’s ability to compel

disclosures in their regulation of securities, corporations and other areas of the economy. Furthermore, there is no other *amicus curiae* brief filed in support of the Commission that addresses First Amendment issues.

Specifically, in Section I of the Brief, the Law Professors argue that Rule 14a-11 does not violate the First Amendment because it is similar to other laws that give individual shareholders rights in a company. *See* Brief at 2-7. For example, state law gives individual shareholders the right to bring derivative suits and requires companies to hold annual meetings that give individual shareholders a platform to communicate with management and other shareholders. *See* Brief at 4-5 (citing 8 Del. C. § 211; *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991)). As set forth in the Brief, state and federal laws may allocate certain corporate powers to individual shareholders, such as the power to nominate directors on the company's proxy statement, without violating the First Amendment. *See* Brief at 2-7.

In Section II of the Brief, the Law Professors argue that state and federal law have traditionally regulated broad areas of the economy, including the purchase and sale of securities and the internal affairs of corporations, through comprehensive disclosure regimes. *See* Brief at 7-11. A finding that Rule 14a-11 violates the First Amendment would cast significant doubt on these regulations and represent a significant departure from prior precedent. *See e.g., SEC v. Wall Street*



*Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988) (“If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible-and that result has long since been rejected.”). The Law Professors conclude that adopting Petitioners’ construction of the First Amendment would amount to an “unprecedented court intrusion in Congress’s ability to regulate broad areas of economic activity.” Brief at 10.

These arguments are not contained in the SEC Brief, and will assist the Court in determining whether Rule 14a-11 violates the First Amendment.

**CONCLUSION**

For the forgoing reasons, the Law Professors respectfully request the Court grant the Motion to Seek Leave to File the Law Professors' Brief as *Amici Curiae* in Support of the Securities Exchange Commission.

January 27, 2011

Respectfully Submitted,

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## Exhibit A

Law Professors' Certificate of Counsel Pursuant to Circuit Rule 29(b)

No. 10-1305

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Respondent.

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LAW PROFESSORS' CERTIFICATE OF COUNSEL  
PURSUANT TO CIRCUIT RULE 29(b)

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Law professors submit this Certificate of Counsel pursuant to Circuit Rule 29(d) because they have moved the Court to file a separate *amici brief* in support of Respondent, Securities and Exchange Commission. On November 26, 2010, the Council of Institutional Investors (“CII”) and a group of institutional investors and representatives of public pension funds (“Institutional Investors”) notified the Court that they would participate *amici curiae* in favor of the Respondent.<sup>3</sup> Counsel for the Law Professors learned that the Institutional Investors would discuss the benefits that Rule 14a-11 will provide to investors and did not intend to make arguments concerning the First Amendment.

The Law Professors have a variety of opinions on the wisdom of adopting Rule 14a-11 and not all concur that Rule 14a-11 will provide significant benefits to shareholders. However, each agree that Rule 14a-11 does not violate the First Amendment. Consequently, because the Institutional Investors and Law

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<sup>3</sup> These Institutional Investors are California Public Employees’ Retirement System, California State Teachers’ Retirement System, State of Wisconsin Investment Board, Trustee of the New York State Common Retirement Fund, Oregon State Treasurer Ted Wheeler, New York City Employees’ Retirement System, Board of Education Retirement System of the City of New York, Teachers’ Retirement System of the City of New York, New York Fire Department Pension Fund, New York City Police Pension Fund, New Jersey Division of Investment, Washington State Investment Board, North Carolina Retirement System, and Colorado Public Employees’ Retirement Association.

Professors have differing opinions on Rule 14a-11 and their interests with respect to this litigation concern different aspects of the case, filing a joint *amicus* brief is not practicable.

January 27, 2011

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 27, 2011, I electronically filed the foregoing MOTION FOR LEAVE TO FILE LAW PROFESSORS' BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE SECURITIES AND EXCHANGE COMMISSION with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I also hereby certify that within the allowed time period, I will serve the Clerk's Office with four (4) copies of the motion and eight (8) copies of the related brief via overnight delivery with a commercial carrier service.

Service was accomplished on all counsel via the Court's CM/ECF system

January 27, 2011

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