

ORAL ARGUMENT SCHEDULED FOR APRIL 7, 2011

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

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

Petitioners,

v.

UNITED STATES
SECURITIES AND
EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR REVIEW

Case No. 10-1305

**PETITIONERS' OPPOSITION TO MOTION OF LAW PROFESSORS
TO FILE AN *AMICUS CURIAE* BRIEF**

Petitioners hereby oppose the motion of thirty-six law professors (“Law Professors”) to file an *amicus curiae* brief supporting Respondent Securities and Exchange Commission. Law Professors’ motion should be rejected because it is filed out of time and they have not demonstrated that filing a joint brief with the other *amici* was not practicable. Moreover, the Law Professors seek to exceed the Court’s word limit for *amici*, but have neither moved for leave to do so nor provided a justification for doing so. *See* Fed. Rule App. P. 29(d); Circuit Rules

28(e), 29(d). Allowing the Law Professors to file would prejudice Petitioners; their motion should be denied.

ARGUMENT

This case concerns the “proxy access” rules adopted by Respondent Securities and Exchange Commission. Petitioners challenge Rule 14a-11, which would require a publicly-traded company to include in its proxy materials a candidate nominated by shareholders that have held shares representing at least 3 percent of the voting power of the company’s stock for the past 3 years.

The Court’s October 14, 2010 Scheduling Order requires a “Joint Brief of any Intervenors or Amici Curiae in Support of Respondent.” *Amici* that are non-governmental entities were required to file a notice of intent to file a brief within 60 days of docketing, specifically November 29, 2010. Circuit Rule 29(b) (2010).¹ The Court’s Rules require *amici* to file a joint brief “to the extent practicable.” Circuit Rule 29(d). TIAA-CREF, another *amicus* in support of the SEC, sought to file a brief separate from the other *amici*. On January 20, this Court denied that motion. This Court also strongly disfavors motions to exceed page limits, and

¹ The rule was amended effective December 1, 2010, to encourage filing a notice of intent “as promptly as practicable after the case is docketed in this court.” Circuit Rule 29(b).

grants such motions “only for extraordinarily compelling reasons.” Circuit Rule 28(e)(1).

Law Professors’ motion must be denied for three independent reasons. *First*, the motion is out of time. This Court’s rules in place in November 2010 required a non-governmental *amicus* to file a motion to participate within 60 days of docketing. All the other non-governmental *amici* complied with this rule and Law Professors do not offer any reason for not having done so. A 12-page brief requiring coordination among 36 individuals does not occur overnight and the Law Professors—who followed the proxy access matter closely—should have made their intent known to the Court long before yesterday.²

Second, Law Professors have not demonstrated that filing a brief with the other *amici* would not have been practicable. Circuit Rule 29(d). Law Professors state that they agree that Rule 14a-11 does not violate the First Amendment, but disagree on whether Rule 14a-11 would benefit shareholders. Law Professors’ Certificate of Counsel Pursuant to Circuit Rule 29(b) at 2. That does not justify filing a separate brief and exceeding this Court’s word limits. Law Professors could have simply participated in a joint brief in which they indicated their concur-

² The Law Professors also have not complied with the amended wording of Circuit Rule 29(b), which encourages the filing of a notice of intent to participate “as promptly as practicable after the case is docketed in this court.”

rence with the First Amendment arguments only. There can be no doubt that the other *amici* supporting the Rule wish it to be found constitutional. Accordingly, to allow this separate brief is to allow the *amici* additional words in violation of this Court's rules and Scheduling Order.

Third, as has been noted, Law Professors seek to exceed the Court's total word limits for *amici* but provide no justification for doing so. Indeed, they do not even move for such relief. *See* Fed. Rule App. P. 27(a)(2)(A) ("A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.").

CONCLUSION

For the foregoing reasons, the Court should deny the Law Professors' motion to participate as *amicus curiae*.

Dated: January 28, 2011

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2011, I electronically filed the foregoing Petitioners' Opposition to Motion of Law Professors to File an *Amicus Curiae* Brief with the Clerk of Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. I also hereby certify that I caused 4 copies to be hand delivered to the Clerk's Office.

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