No. 10-1305
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.
SECURITIES AND EXCHANGE COMMISSION,
Respondent.

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

LAW PROFESSORS' REPLY TO PETITIONERS' OPPOSITION TO LAW PROFESSORS' MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

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On January 27, 2011, thirty-six law professors ("Law Professors") filed a Motion for Leave to File Law Professors' Brief as *Amici Curiae* in Support of the Securities And Exchange Commission[1] ("Law Professors' Motion").[2] On January, 28, 2010, Petitioners filed the Opposition to Motion of Law Professors to File an *Amicus Curiae* Brief ("Petitioners' Opp."). Petitioners' arguments are without merit and the Court should accept the Law Professors' Brief.

* * *

First, Petitioners argue that the Law Professors' Brief is not timely because the Law Professors failed to file a notice of intent to file a brief within 60 days of docketing pursuant to Circuit Rule 29(b). Petitioners' Opp. at 2. As Petitioners concede, however, Circuit Rule 29(b) was amended effective December 1, 2010, and no longer requires filing such a notice within 60 days of docketing.[3] *Id*. at 3 n.2. The Law Professors timely filed their brief on January 27, 2011, the date the Court ordered *amici* supporting Respondent to file. *See* October 14, 2010 Order.[4]

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[1] The Securities and Exchange Commission will be referred to as "Commission."

[2] The Law Professors' brief as *Amici Curiae* In Support of the Securities And Exchange Commission filed on January 27, 2011 will be referred to as the "Law Professors' Brief."

[3] Circuit Rule 29(e) now only "encourages" *amici* "to file a notice of intent to file an amicus brief, as promptly as practicable after the case is docketed in this court."

[4] The October 14, 2010 Order directed *amici* supporting Respondent to file a joint brief.

Petitioners also will suffer no prejudice if the Court determines to accept the Law Professors' Brief at this time. *See Haley v. F.A.A.*, 89 Fed. Appx. 274, 275 (D.C. Cir. 2004) (Court need not accept "conclusory assertion[s]" of litigant). Petitioners may respond to the points raised in the Law Professors' Brief when they file their reply brief on the merits on or before February 10, 2011.

Second, despite Petitioners' argument to the contrary (*see* Petitioners' Opp. at 3-4), it was not "practicable" for the Law Professors to file a single brief with the Institutional Investors.[5] The briefs address completely different issues. The Law Professors' brief focuses exclusively on Petitioners' challenge to Rule 14a-11 based on the First Amendment – an issue that was not addressed at all by the Institutional Investors. Moreover, the Law Professors do not all agree with the Institutional Investors' position that Rule 14a-11 "will significantly improve shareholders' ability to ensure that corporate stewards maximize shareholder wealth" (Institutional Investors' Brief at 1), and thus represent fundamentally

[5] The "Institutional Investors" are the Council of Institutional Investors, TIAA-CREF, California Public Employees' Retirement System, California State Teachers' Retirement System, State of Wisconsin Investment Board, 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.

different interests. The Law Professors therefore offer a unique perspective on Rule 14a-11, and it would not have been practicable to for them to file a joint brief with the Institutional Investors. .

Third, Petitioners' argument that the Law Professors' Brief exceeded the maximum number of words allowed is simply wrong. *See* Petitioners' Opp. at 4. At 3,198 words, the Law Professors' Brief is well within the required limit. Federal Rule of Appellate Procedure 29(d) states "an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief." The maximum length for a party's principal brief is 14,000 words. *See* Fed. R. App. 28.1. The Law Professors' Brief did not exceed the permitted word count as it was well under 7,000 words.

CONCLUSION

For the forgoing reasons, the Law Professors' motion to participate as *amici curiae* should be Granted.

January 31, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2011, I electronically filed the foregoing LAW PROFESSORS' REPLY TO PETITIONERS' OPPOSITION TO LAW PROFESSORS' MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF 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 this reply brief via overnight delivery with a commercial carrier service.

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

January 31, 2011

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