

**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.

No. 10-1305

**RESPONSE OF COUNCIL OF INSTITUTIONAL INVESTORS *ET AL.*
TO MOTION OF TIAA-CREF FOR LEAVE TO FILE A
SEPARATE *AMICUS CURIAE* BRIEF**

Pursuant to Federal Rule of Appellate Procedure 27(a)(3), the undersigned 15 *amici* submit this Response to TIAA-CREF's Motion for Leave to File a Separate *Amicus Curiae* Brief (Doc. 1286660, filed Jan. 6, 2011).¹

¹ *Amici* include: Council of Institutional Investors, 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

The undersigned 15 *amici* have coordinated their efforts and plan to file one consolidated brief. In response to TIAA-CREF's motion for leave to file a separate brief, petitioners Business Roundtable and Chamber of Commerce urge that, while they "do not oppose" TIAA-CREF's motion, they would oppose "allowing more than 7,000 words combined" for all *amicus* briefs supporting respondent. *See* Petitioners' Response to Motion of TIAA-CREF to File a Separate *Amicus Curiae* Brief at 1-2 (Doc. 1288459, filed Jan. 18, 2011).

To the extent petitioners' response is proposing that the joint brief of the undersigned 15 *amici* be limited to fewer than 7,000 words, that counter-proposal should be rejected. It is now just 9 days before *amicus* briefs are due. That looming deadline makes reducing word limits at this hour impracticable. Many of the *amici* joining the brief, moreover, are public funds that require significant lead-time to review the brief and obtain approval to join, a process that has already begun. The sheer number of signatories also imposes significant coordination requirements. Revising the word limits so as to require dramatic surgery to the draft at this point would be unfair; potentially impede consensus; and likely would render the resulting brief

Police Pension Fund, New Jersey Division of Investment, Washington State Investment Board, North Carolina Retirement System, and Colorado Public Employees' Retirement Association.

less helpful to this Court. Two separate *amicus* briefs with a combined word count exceeding 7,000 words were filed in support of petitioners. No prejudice would befall petitioners from according similar treatment to *amici* supporting respondent.² By contrast, revising the word limits for the joint brief of the 15 undersigned *amici* at this late hour would prejudice them enormously.

² While this Court's October 14, 2010 Order (Doc. 1271590) provided that a "Joint Brief of any Intervenors or Amici Curiae in Support of Petitioners" was due on December 9, 2010, both the State of Delaware and the Investment Company Institute and Independent Directors Council filed separate *amicus* briefs supporting petitioners without seeking leave of the Court. And while petitioners contend that Delaware "is not bound by the joint brief requirement" of this Court's Rule 29(d), Pet. Response at 8 n.*, the Court's October 14, 2010 *Order* requires "a . . . Joint Brief"—not "Joint Briefs." That order is controlling. In any event, petitioners cannot claim to be prejudiced by the filing of two *amicus* briefs totaling more than 7,000 words after having been supported by two *amicus* briefs together totaling more than 7,000 words. That Delaware's brief was shorter than might otherwise have been permitted, Pet. Response at 9 n.*, does not alter the fact that petitioners are seeking to impose stricter limits on opposing *amici* than were applied (with their consent) to their own *amici*.

Dated: January 18, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Consistent with this Court's May 15, 2009 Administrative Order ECF-6(D), I also certify that I will cause 4 copies to be hand delivered to the Clerk's Office no later than January 19, 2011. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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