

THE STATE OF NEW HAMPSHIRE

GRAFTON, SS

SUPERIOR COURT

Docket No. 08-E-0294

B.V. BROOKS, KENNETH F. CLARK, JR., MARISA DEANGELIS KANE,  
JOHN H. PLUNKETT, DOUGLAS R. RAICHLE, ROBERT G. REED III, AND JOHN STEEL III

Petitioners

v.

TRUSTEES OF DARTMOUTH COLLEGE

Respondent

AMICUS CURIAE STATEMENT OF FORMER DARTMOUTH  
COLLEGE TRUSTEE PROFESSOR TODD J. ZYWICKI IN SUPPORT OF  
PLAINTIFFS' OBJECTION TO SUMMARY JUDGMENT

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*

Todd J. Zywicki is George Mason University Foundation Professor of Law at George Mason University School of Law and Trustee Emeritus and 1988 graduate of Dartmouth College.<sup>1</sup> He is Senior Scholar of the Mercatus Center at George Mason University, Senior Fellow of the James Buchanan Center for Political Economy Program on Philosophy, Politics, and Economics at George Mason, Senior Fellow of the Goldwater Institute, and Fellow of the International Centre for Economic Research in Turin, Italy. Professor Zywicki teaches bankruptcy, contracts, commercial law, business associations, law and economics, and public choice and the law. He has authored over 70 articles in leading law reviews and peer-reviewed economics journals. His work has been cited 724 times in legal treatises and law reviews and he is one of the top 50 most downloaded law authors at the Social Science Research Network. He was editor of the *Supreme Court Economic Review* (2001- 2002) and has served as co-editor since 2006. He has taught at Vanderbilt Law School, Georgetown Law Center, Boston College Law School, and Mississippi College School of Law. Professor Zywicki was a fall 2008 Searle Fellow at George Mason University School of Law and was a 2008-2009 National Fellow at Stanford's Hoover Institution. In 2009 he was elected a Trustee of Yorktown University.

Professor Zywicki has consulted with foreign governments, including Iceland, Italy, Japan, and Guatemala. In 2006 he served on the Department of Justice Study Group on "Identifying Fraud, Abuse and Errors in the United States Bankruptcy System." From 2003 to 2004, he was Director of the Office of Policy Planning, Federal Trade Commission. He has testified 13 times before the Congress and is a frequent print and broadcast commentator.<sup>2</sup> He

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<sup>1</sup>Professor Zywicki received an A.B. cum Laude with high honors in his major from Dartmouth. He holds an M.A. in Economics from Clemson University and a J.D. from the University of Virginia.

<sup>2</sup> Professor Zywicki has been a commentator in the *Wall Street Journal*, *New York Times*, *Washington Post*, *Washington Times*, *Forbes*, *Nightline*, *The Newshour with Jim Lehrer*, *Fox and Friends*, *Lou Dobbs Radio Show*,

has published law review articles, spoken at professional conferences, and testified before the Bankruptcy Rules Committee of the Federal Judicial Conference on fiduciary duties of lawyers and management in bankruptcy<sup>3</sup> and has published on university governance and administration.<sup>4</sup>

Dartmouth alumni elected Professor Zywicki to the Board of Trustees (“Board”) in 2005; he served until 2009, when a majority of the Board, for the first time ever, denied an alumni trustee a second term.<sup>5</sup> His Dartmouth service has given Professor Zywicki first-hand knowledge of the subject of this lawsuit: the actions of the Board in destroying parity, the 117-year-old balance between “alumni” and “charter” trustees.

The Association’s meeting notes regarding adoption of the 1891 Agreement expressed the hope that “Alumni should understand and feel that they were to have a constant, personal responsibility for the college, an annually recurring obligation to discharge for her which they could not throw off or leave to the Board of Trustees or any other persons.”<sup>6</sup> Professor Zywicki’s concern for Dartmouth motivates this *amicus* submission urging the Court to deny Defendant’s Motion for Summary Judgment and allow Plaintiffs’ suit to proceed to conclusion on the merits. Professor Zywicki’s intimate knowledge of the lawsuit’s background, his

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*Neil Cavuto Show*, and *The Laura Ingraham Show*. He contributes to the highly regarded legal weblog *The Volokh Conspiracy* and *The Atlantic* magazine’s *The Atlantic Business Channel*.

<sup>3</sup> Professor Zywicki is a member of the Governing Board and the Advisory Council for the Financial Services Research Program at George Washington University School of Business, the Board of Directors of the Bill of Rights Institute, the Executive Committee for the Federalist Society’s Financial Institutions and E-Commerce Practice Group, the Advisory Council of the Competitive Enterprise Institute, the Program Advisory Board of the Foundation for Research on Economics and the Environment and the Advisory Council of the Center para el Analisis de las Decisiones Publicas, Universidad de Francisco Marroquin, Guatemala City, Guatemala. He is currently the Chair of the Academic Advisory Council for the following organizations: The Bill of Rights Institute, the film “We the People in IMAX,” and the McCormick-Tribune Foundation “Freedom Museum” in Chicago, Illinois.

<sup>4</sup> Todd J. Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Academic and Experiential Analysis*, 101 NORTHWESTERN U. L. REV. 861 (2007).

<sup>5</sup> The College’s Board is made up of “alumni trustees” and “charter trustees,” groups that were equal in number from the time when the Association of Alumni of Dartmouth College (“Association”) and the Board entered into the 1891 Agreement until the Board’s violation of that agreement and destruction of that balance, known as parity, in September of 2007. The Board also includes the Governor of the State of New Hampshire and the President of Dartmouth College, *ex officio*.

<sup>6</sup> Meeting of the Dartmouth Association of Alumni, Minutes and Adopted Documents (June 24, 1891), at App. 7.

expertise in the law of contracts and business associations, his scholarly commentary on higher education governance, extensive board service with nonprofit, and experience as a former trustee at Dartmouth uniquely qualify him to assist the Court as to the duties of nonprofit boards.

#### BACKGROUND: GOVERNANCE AT DARTMOUTH<sup>7</sup>

At stake are fundamental principles: the independence of trustees, the proper object of fiduciary duty and loyalty, and freedom of speech (a vital component of academic freedom and fiduciary duty) at Dartmouth. The 1891 Agreement's goal was to ensure good governance and wise use of alumni contributions in an era when College administrators and life-appointed trustees recklessly managed the College's finances and neglected its academics.<sup>8</sup> As the Association's minutes of June 24, 1891 noted, the Association and the Board believed that allowing alumni to elect half the trustees would "create and preserve the live, constant, active interest of the alumni in the college and their cooperation in its affairs," ushering in "a new era of prosperity for the College," and "a warmer interest and closer relation between the Board of Government and the Alumni would strengthen the college, and promote its welfare and usefulness."<sup>9</sup> The Agreement unquestionably achieved these goals.

Alumni trustee candidates may be placed on the ballot by nomination by the Alumni Council, or by "petition" with 500 alumni signatures.<sup>10</sup> This second method is the only route to election not substantially controlled by the Dartmouth administration, the Board's Governance

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<sup>7</sup> Professor Zywicki assumes the Court's familiarity with the facts as laid out in the memoranda of the parties. Laid out herein is additional background that *amicus* hopes will assist the Court to place this dispute in its historical and legal context. A set of documents, including many written contemporaneously with the events described herein, is attached as an Appendix. See also HARVEY A. SILVERGLATE AND JOSEPH MALCHOW, DARTMOUTH COLLEGE, THE BATTLE OVER PARITY, AND THE LEGAL NOTION OF FIDUCIARY DUTY (2009), available at <http://www.dartblog.com/data/2009/09/008625.php>, for a step-by-step synopsis of the Board's multi-year effort to upend the 1891 Agreement and a broader discussion of fiduciary duty than is contained in this brief.

<sup>8</sup> Petition ¶ 7; LEON BURR RICHARDSON, HISTORY OF DARTMOUTH COLLEGE, 578-79 (1932).

<sup>9</sup> Meeting of the Dartmouth Association of Alumni, *supra* n. 6.

<sup>10</sup> The Alumni Council is an unelected body of class and regional College officers and heads of various "affinity groups," which was created by but is distinct from the Association. The Association is elected by and represents the entire alumni body. Since 1990, in the typical election for an open alumni trustee seat the Council nominates three candidates for whom alumni can vote, or four nominees if two seats are to be elected.

Committee, or the Council, which effectively operates as an arm of the Board and administration in making its nominations.<sup>11</sup> Because of high hurdles to qualify for the ballot and the alumni's measured use of the option, petition trustee candidacies are rare and successful efforts rarer still. Historically, the availability of petition trustee candidacies has served as a safety valve: alumni elect petition trustees to effect change when the College strays from its mission. In 1980, after a decade of turmoil, the alumni elected Dr. John Steel III as petition trustee, prompting the retirement of Dartmouth President John Kemeny.<sup>12</sup> In 2004 Dr. T. J. Rodgers, President and CEO of Cypress Semiconductor Corporation, was elected via petition. Professor Zywicki and Hoover Institution Fellow Peter Robinson, a researcher and former speechwriter for President Reagan, were elected in 2005. Professor Stephen Smith of the University of Virginia School of Law (and now at Notre Dame Law School) was elected in 2007.

Alumni trustees originally served five-year terms; charter trustees served for life. During the Twentieth Century, Alumni trustees began to stand for second term reelection.<sup>13</sup> From then until 1990, Dartmouth's alumni could reelect alumni trustees based on first-term performance, but in 1990 a small group of alumni insiders transferred that power from the alumni to the Board itself and changed election rules to make it more difficult for petition trustees to gain ballot access and election. The date is significant for two reasons. First, Dr. Steel's tenure expired that year. Second, Dr. Washburn's unsuccessful candidacy against an incumbent alumni trustee

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<sup>11</sup> For example, although the Alumni Council's authority to nominate candidates for alumni trustee positions derives from a delegation of authority from the Association of Alumni to the Alumni Council, the official slate is selected primarily through a collaborative process between the Board of Trustees' Nominating and Governance Committee and the Nominating Committee of the Alumni Council, rather than independently by alumni.

<sup>12</sup> Dr. Steel, the only petition trustee elected prior to Dr. Rodgers' successful 2004 campaign and a plaintiff in this lawsuit, served on the Board from 1980 until 1990. Notably, the Board initially refused to seat him following his election and allowed him to take his seat only after he began legal proceedings. Following President Kemeny's retirement, subsequent petition candidates were unsuccessful, but Dr. Steel was reelected by the alumni. In 1989 Dr. Wilcomb Washburn gained access to the ballot as a petition candidate but was not elected.

<sup>13</sup> Eventually the Board adopted terms for charter trustees as well, another way the innovation of alumni-elected trustees had a beneficial effect on governance.

seeking reelection had occurred just the previous year. The new regime—that the Board sits in judgment of itself—was adopted so that future petition trustees could be removed after a single term. Amendments to election procedures were adopted, including an increase in the required number of signatures for ballot access and multi-candidate elections with “approval” voting (as opposed to nomination of a single candidate), designed to make petition trustee candidacies less necessary and more difficult.<sup>14</sup> Since then, the prospect of arbitrary removal without input from the alumni electorate is held over the heads of alumni-elected trustees.

Professor Zywicki’s April 2009 removal made that threat, previously hypothetical,<sup>15</sup> real.<sup>16</sup> The threat of removal by the trustees encourages an unhealthy groupthink, a “go along to get along” mentality, and chills exercise of independent judgment and performance of fiduciary duty properly defined. Culminating in the board-packing plan two years ago that destroyed parity and relegated alumni-elected trustees to permanent minority status, the Board’s mounting disdain for student and alumni input has finally realized its end-point: a token minority of alumni-elected Board members serve at the pleasure of the Board majority. The majority consolidated its extraordinary illegitimate power in still other ways. It rewrote the Trustee Charge as a veritable loyalty oath designed, in part, to limit trustees’ ability to use their own best

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<sup>14</sup> Ironically, but predictably, one dictate of the 2007 Board-packing plan demanded that the Association of Alumni replace the system of multi-candidate elections with approval voting, adopted in 1990, with a system that promotes “head-to-head” election contests—reinstating a system virtually identical to that abandoned in 1990. An amendment to the alumni constitution ratified the Board’s mandated changes. The Board offered no justification for its asserted belief that approval voting was unfair or that the mandated alternative was superior. In fact, substantial expert commentary concludes the opposite. See Robert Z. Norman, *A Look at the Trustee Voting System*, THE DARTMOUTH (March 27, 2007), available at <http://thedartmouth.com/2007/03/27/opinion/look>; Robert J. Weber, *Approval Voting*, 9 J. ECON. PERSPECTIVES 39 (1995); MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW, Chapter 3, Appendix A (Forthcoming 2009) (analyzing and comparing efficiency of alternative voting regimes). These facts strongly suggest that the Board’s motivation was to frustrate petition trustee candidacies, not to improve the actual fairness of the voting system.

<sup>15</sup> Reelection of trustees was a routine matter before the election of the petition trustees and the Board had never previously denied a trustee reelection, although it had attempted to deny Dr. Steel his seat, as described *supra* n. 12.

<sup>16</sup> See Letter from Todd Zywicki to The Men and Women of Dartmouth (Apr. 13, 2009), at App. 13.

judgment in executing their duties and to silence public expression of dissenting viewpoints.<sup>17</sup>

The version adopted by the Board on June 7, 2007 judges trustee behavior by standardless criteria. For instance, it requires trustees to “act in the best overall interest of Dartmouth” and to “[r]epresent Dartmouth positively in words and deeds, particularly and proactively to Dartmouth constituents”—requirements defined *ad hoc* by arbitrary Board discretion.<sup>18</sup> This second requirement is a striking attempt to avoid the competition of a free marketplace of ideas.<sup>19</sup>

Presumably relying on these vague, unexplained guidelines, the majority forced Professor Zywicki off the Board. Under rules adopted by the majority, the reelection of trustees initially elected by Alumni in democratic elections is decided behind closed doors. Professor Zywicki has been given no explanation, no tally of the secret vote, and no opportunity to learn the charges against him. Dr. Rodgers has written publicly that during the trustees’ deliberations on Professor Zywicki’s reelection—a process he characterized as a “kangaroo court”—many factually incorrect statements were made, which Professor Zywicki had no opportunity to rebut.<sup>20</sup>

The danger in the vague Trustee’s Charge is manifest in its application to Professor Zywicki in contrast to non-petition trustees. One likely factor in Professor Zywicki’s expulsion was a speech he made at an academic conference two years earlier in which he criticized the

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<sup>17</sup> Following the 2007 changes the Charge is now titled the “Statement on Governance and Trustee Responsibilities.”

<sup>18</sup> A February 2007 draft would have added that trustees must “[e]xercise substantial self-restraint from taking a public position on issues prior to Board opportunity for deliberation or action,” “[r]efrain from engaging in any activity that causes, or may be reasonably foreseen to cause, damage to Dartmouth,” and “[p]ublicly support Board decisions.” In addition to mandating public “support” even from trustees who conscientiously disagree, the Charge included a prior restraint on speech, a notion at war with the performance of fiduciary duty properly understood. Dr. Rodgers secured a confidential legal opinion regarding the illegality of the proposed Charge, and the Board, after criticizing and threatening disciplinary action against Dr. Rodgers for discussing confidential Board matters with his own attorney, backed down from the worst of these proposed changes, avoiding a public fiasco.

<sup>19</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Holmes wrote that “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.”

<sup>20</sup> T.J. Rodgers, Op-Ed, *Hang One, Warn a Thousand*, THE DARTMOUTH, Apr. 22, 2009, available at <http://thedartmouth.com/2009/04/22/opinion/rodgers>, at App. 16-17.

board-packing plan and opined on the declining state of higher education and growing threat of mal-administration. By contrast, trustees who asserted that Dartmouth was harmed by alumni elections were not disciplined.<sup>21</sup> Even more telling, the Board's crackdown on independent trustees has brought adverse publicity, criticism from commentators on governance, two alumni lawsuits, and the alienation of thousands of alumni and donors. Yet a majority of trustees have persuaded themselves that such actions were consistent with the Board's mandate to "represent Dartmouth positively in words and deeds" and were taken "in the overall best interests of Dartmouth." The majority conflated fealty to itself with the interests of the College.

By any honest measure of fiduciary duty properly defined, the performance of the four recently elected petition alumni trustees has benefited Dartmouth. They share a commitment to renewing an emphasis on undergraduate education, making Dartmouth affordable, guaranteeing freedom of speech, and reducing the size and improving the effectiveness of the bureaucracy. They share a willingness to criticize the administration in Dartmouth's interest. Their message resonated with alumni. The alumni in 2004 shared Dr. Rodgers' anger that the Board had eliminated the College's swimming and diving teams instead of cutting burgeoning, unnecessary administrative costs. Dr. Rodgers advocated eliminating a speech code imposed by President James Wright and Dean James Larimore.<sup>22</sup> After election, Dr. Rodgers concluded that Dartmouth's teaching was underfunded: the College heavily relied on temporary teachers, there were many oversubscribed classes, and hence education plans of certain majors were disrupted.

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<sup>21</sup> The Board also took no action against trustees who criticized the petition trustees at Dartmouth events, but disciplined Zywicki for his remarks about the Board at an academic conference before a non-Dartmouth audience.

<sup>22</sup> The statements at issue are available at [http://www.thefire.org/public/pdfs/5622\\_3832.pdf](http://www.thefire.org/public/pdfs/5622_3832.pdf).

Upon election, Dr. Rodgers worked with trustees and administrators and achieved repeal of the speech code in part by publicizing the issue.<sup>23</sup> The petition trustees met with professors in the College's most over-subscribed departments to discuss how to reduce the problem: Faculty hiring was accelerated. Professor Zywicki made undergraduate education a major plank in his electoral platform, and as a trustee he advocated for, and achieved, the creation of a Standing Committee on Academic Excellence and Mission. The petition trustees attempted to exercise financial oversight, working to stem runaway growth of expenses so as to avoid layoffs. (Unfortunately, many of their warnings were disregarded.<sup>24</sup>) The petition trustees have not been mere oppositionists; they have pointed out problems and proposed solutions. Alumni responded to this active role by their elected representatives with a remarkable 38-percent turnout in an alumni constitutional referendum, and the decade-plus downward trend in the percentage of alumni giving to the Dartmouth Fund reversed in 2004, when Dr. Rodgers was elected.

The petition trustees' attempts to address the College's problems resulted in the Board majority seeing them as the enemy. Peter Fahey, the trustee whom Dr. Rodgers replaced, called them a "radical cabal" trying to "hijack" the College. One reason for this hostile treatment is the growing belief that Board seats should be awarded to financial largesse rather than to skill and a commitment to governance. On August 7, 2007, charter trustee Brad Evans told student leaders that positions on the Board should be reserved for alumni who can donate large amounts, arguing

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<sup>23</sup> Letter from Robert B. Donin, General Counsel, Dartmouth College, to David French, President, Foundation for Individual Rights in Education (FIRE) (May 2, 2005), at [http://www.thefire.org/public/pdfs/5619\\_3830.pdf](http://www.thefire.org/public/pdfs/5619_3830.pdf). As a result of the change, Dartmouth received FIRE's "green light" ranking regarding free speech and academic freedom.

<sup>24</sup> Dartmouth is in dire need of financial oversight, as illustrated by the fact that its bond rating has recently been downgraded due to "operating deficits, a decline in the college's endowment, and its debt load." Scott Carlson, *Dartmouth College, Its Bond Rating Downgraded, Takes On More Debt*, THE CHRONICLE OF HIGHER EDUCATION, May 26, 2009, available online at <http://chronicle.com/news/article/6531/dartmouth-college-its-bond-rating-downgraded-takes-on-more-debt>. According to one calculation, the deterioration in its rating will cost Dartmouth \$400,000 to \$800,000 in increased interest expenses. See <http://www.dartblog.com/data/2009/05/008602.php>.

that a major problem of petition candidate success was that it took seats from large donors.<sup>25</sup> At the September 7, 2007 meeting at which the Board-packing plan was instituted, the Board was informed that that overall alumni giving had been rising since the election of petition trustees and that the College's capital campaign was "over performing" in smaller gifts, though "under performing" with regard to "principal" gifts of five million dollars and larger over five years. Despite a large body of evidence to the contrary, it was speculated that governance issues were discouraging a few large donors.<sup>26</sup> The Board's solution to this imagined problem was to abolish parity and aim to fill charter trustee Board seats with large donors. The Board was aware that the decision would be unpopular with alumni, as indeed it was: A 2007 poll by the Association found that 92 percent of alumni supported parity.<sup>27</sup> It cynically hoped that the resulting anticipated decrease in alumni contributions could be offset by rich new Board members.

Commentators on governance have widely criticized the actions of the Board majority. As THE WALL STREET JOURNAL wrote in an editorial on September 11, 2007, the Board's choice to destroy parity was motivated by a desire to suppress genuine oversight: "the independent trustees were willing to dissent from the insular uniformity of modern higher education, so they had to be neutered before they might actually make a difference."<sup>28</sup> Similarly, discussing the Board's dismissal of Zywicki, Anne Neal, President of the American Council of Trustees and Alumni, wrote: "The academy's runaway costs, diffuse curricula, and disconnect from the

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<sup>25</sup> David Nachman, *Student Leaders Meet Trustee*, SUPER DARTMOUTH (Aug. 7, 2007), available at <http://superdartmouth.blogspot.com/2007/08/student-leaders-meet-trustee.html>. Charter trustee Pamela Joyner stated more brazenly that a seat on the Board "should be a reward for your largesse."

<sup>26</sup> Letter from Dr. Rodgers (May 11, 2007) at App. 18 effectively rebuts the view that the petition trustees harm Dartmouth. *Amicus* notes that the Trustee Charge requires that trustees "[s]erve Dartmouth as a whole, rather than the interests of any constituency," presumably including the large donor constituency. The Board's willingness to conflate, and even subordinate, governance issues (as opposed to programmatic decisions) to the appeasement of a particular constituency demonstrates the Board majority's inconsistent application of stated principles.

<sup>27</sup> Letter from Frank Gado, Bert Boles, Tim Dreisbach, David Gale, Alex Mooney, and Marji Grant Ross, Dartmouth Association of Alumni Executive Committee, to Dartmouth Alumni (Mar. 12, 2008), at App. 24.

<sup>28</sup> Editorial, *Dartmouth Diminished*, The Wall Street Journal (Sept. 11, 2007), available at <http://online.wsj.com/article/SB118947940651923528.html>, at App. 26.

public's concerns have everything to do with the go-along-get-along mindset that prevails on governing boards. That mindset must change."<sup>29</sup> Shortly after institution of the board-packing plan, distinguished Dartmouth economics professor Meir Kohn wrote that the elimination of parity had to be understood in the context of the peculiar problems of nonprofit governance:

It is not that administrative misbehavior is unusually bad at Dartmouth. What is unusual is the ability of Dartmouth alumni to elect to the board some trustees not hand-picked by the administration. This peculiarity offered a potential mechanism of governance, and a number of alumni were sufficiently public-spirited to try to turn this potential into reality. . . . With remarkable brutality, the administration and its friends on the board have acted to neutralize it. Contrary to the pronouncements of the Ministry of Truth, the board did not vote to strengthen governance at Dartmouth: it voted to prevent it. With this avenue cut off, we remain without any effective mechanism of governance. There is therefore no constraint on the potential misbehavior of this or any future administration.<sup>30</sup>

Dartmouth alumni are legendary for commitment, and their ability to elect half the Board has fed this loyalty—as the framers of the 1891 Agreement predicted. That governance structure worked for more than a century, enabling Dartmouth to become the nation's finest college.<sup>31</sup> The Board has sought to excuse dismantling this structure with a claim that recent trustee elections have become “divisive,” as if public debate of big issues, like the balance between research and teaching, is harmful. In fact, publicly available figures show that the petition trustees have not decreased alumni support.<sup>32</sup> The Board's transfer of oversight power, once vested in 69,000 intelligent alumni, to a hand-picked Governance Committee of five at the expense of the College's contractual promise—that Dartmouth would be led by those who love it—is bad governance and against public policy.

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<sup>29</sup> Anne D. Neal, OpEd, *Fired for Doing His Job*, THE WASHINGTON EXAMINER (May 27, 2009), available at [www.washingtonexaminer.com/opinion/columns/OpEd-Contributor/Fired-for-doing-his-job-46270992](http://www.washingtonexaminer.com/opinion/columns/OpEd-Contributor/Fired-for-doing-his-job-46270992).

<sup>30</sup> Meir Kohn, OpEd, *ExtraCurricular*, THE DARTMOUTH (Oct. 3, 2007), available at <http://thedartmouth.com/2007/10/03/opinion/kohn/>.

<sup>31</sup> In the latest *U.S. News & World Report* rankings, Dartmouth is No. 1 in the category, “Best Colleges: Undergraduate Teaching at National Universities.” See <http://colleges.usnews.rankingsandreviews.com/best-colleges/national-ut-rank>.

<sup>32</sup> See Rodgers' letter, *supra* n. 26.

## ARGUMENT

### Recognition of the Plaintiffs as Third-Party Beneficiaries of the 1891 Agreement is Legally Required, Appropriate, and in the Public Interest

University governance is beset by an inherent structural problem that results in the systematic promotion of the interests of permanent constituencies—faculty and administration—at the expense of the interests of transient students. In for-profit corporations, accountability to shareholders restricts management and employees from pursuing self-interest at the corporation's expense. In the university setting, by contrast, the attenuated ownership of the organization creates potential for faculty and administration to effectively operate the institution for their rather than the students' benefit. As a result, faculty have become the *de facto* owners of the academic enterprise, resulting in a tendency for professors to offload teaching responsibilities onto poorly-paid inexperienced graduate students and to force curriculum and teaching requirements to conform to their parochial intellectual interests, even at America's leading institutions.<sup>33</sup> Burgeoned by the past decade's roaring endowment returns, administrators have obtained near- absolute control over budgetary and operational decisions, leading to a dramatic increase in the size and expense of university administrations—by one estimate administrative spending grew two to three times as rapidly as educational expenditures from 1995-2004.<sup>34</sup>

Given the systemic biases of university operations, trustees bear substantial responsibility to oversee self-dealing by these entrenched permanent constituencies. They often fail abysmally at this task. Neglecting energetic oversight, trustees defer to presidents and administrators. As Jose A. Cabranes, a judge on the Second Circuit Court of Appeals, former General Counsel of

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<sup>33</sup> See HARRY LEWIS, *EXCELLENCE WITHOUT A SOUL: HOW A GREAT UNIVERSITY FORGOT HIGHER EDUCATION* (2006); ANTHONY KRONMAN, *EDUCATION'S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE* (2008); MARTIN ANDERSON, *IMPOSTERS IN THE TEMPLE* (1992).

<sup>34</sup> See Daniel L. Bennet, *Bureaucrat U*, FORBES (July 13, 2009) (citing study by the Delta Cost Project using U.S. Department of Education data), available at <http://www.forbes.com/forbes/2009/0713/opinions-college-tuition-teachers-on-my-mind.html>; Zywicki, *supra* n. 4 (comparing "empire building" tendencies of university administrations to government bureaucracies).

Yale University, and a veteran of four prominent university boards has noted, trustees, who are often business executives, “prefer to be the sort of trustees that they would hope to have on their own boards”—that is, “‘team players’ who do not disturb the peace of the executive.”<sup>35</sup> Trustees are often chosen on the basis of friendship and promises of financial support to the current president, a process that tends to self-select regime loyalists. Presidents of private universities, for example, frequently serve on boards’ nominating and governance committees, a practice condemned in public corporations and at public universities because of its potential for abuse but which prevailed at Dartmouth until the petition trustees objected.<sup>36</sup> Board members frequently are not only major donors, but count their alma maters as major clients. Such conflict-of-interest transactions may chill oversight and add to overinvestment in risky assets such as those that led to Dartmouth’s liquidity crisis, a shortfall recently requiring \$560 million in bond financing.<sup>37</sup>

The unique governance structure erected by the 1891 Agreement created checks and balances that have helped insulate Dartmouth from these baleful trends. Vigorous alumni involvement provides an unbiased, long-term, educated approach that counterbalances the self-interest of faculty and administrators, and the tendency toward lax oversight by. Alumni are thus the stakeholders who are most analogous to shareholders in public corporations.<sup>38</sup> Alumni have the experience and knowledge to be vigorous, intelligent advocates for undergraduate education

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<sup>35</sup> Jose Cabranes, *Myth and Reality of University Trusteeship in the Post-Enron Era*, FORDHAM LAW REVIEW Vol. 76, 966 (2007).

<sup>36</sup> See Letter from Anne Neal, President, American Council of Trustees and Alumni (ACTA), to Executive Committee, Dartmouth Association of Alumni 2 (July 30, 2007), at App. 28. Ms. Neal notes that Dartmouth’s President even participated in the germination of the Board-packing plan, which would determine how future trustees would be selected.

<sup>37</sup> See Carlson, *supra* n. 24.

<sup>38</sup> Harvard Dean Harry Lewis has similarly argued that Harvard’s alumni-elected Board of Overseers should engage in more vigorous oversight and cease “functioning as the University’s honorees and cheerleaders rather than governors.” See LEWIS, *supra* n. 33 at 263.

and to bring a broader perspective to governance.<sup>39</sup> At Dartmouth, parity has created a unique institution: an Ivy League college where undergraduate education remains the central mission. Parity serves the interests of Dartmouth as well as those of higher education generally by preserving this alternate, salutary governance model. This Court should consider these facts when deciding whether to recognize Plaintiffs as third-party beneficiaries of the 1891 Agreement with the right to enforcement *unless* the alumni vote specifically to give up these rights.<sup>40</sup>

A beneficiary of a promise is an intended beneficiary “if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” Restatement (Second) of Contracts § 302(1)(b).<sup>41</sup> An intended beneficiary has standing to bring an action to enforce the promise. *Id.* § 304 (“A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.”) To take the second part of the Restatement’s test first, history makes it clear that the Association of Alumni, to which Dartmouth made a promise in the 1891 Agreement, intended to give the benefit of that promise to *individual* alumni. Dartmouth promised that “the graduates of the College” could “nominate a suitable person for election” to trusteeship.<sup>42</sup> The Association’s role was to provide a vehicle for

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<sup>39</sup> For instance, when Zywicki was elected to the Board, he became the *only* full-time academic serving on the Board, offering a perspective that alumni quite reasonably thought relevant to the Board’s responsibilities. Since then, the alumni have elected Stephen Smith, another full-time academic.

<sup>40</sup> This question is one of the most central at this stage in the litigation because, if the Plaintiffs are third-party beneficiaries, their suit cannot be barred by the doctrine of *res judicata*. See Restatement (Second) of Judgments § 56(1) (providing that a judgment for or against the promisee in an action between him and the promisor does not preclude an action by the beneficiary unless certain circumstances are present).

<sup>41</sup> New Hampshire follows the Restatement (Second) of Contracts. See, e.g., *Grossman v. Murray*, 144 N.H. 345, 348 (1999). The test that it outlines is therefore the applicable test for purposes of New Hampshire law.

<sup>42</sup> The Association’s notes, contemporaneously adopting the Agreement, state that the Board’s “resolves,” including the guarantee that alumni could “nominate a suitable person for election,” “were adopted on the part of the Board with the clear understanding and assurance . . . that the persons so nominated by the Alumni will be elected by the Board to such Trusteeships.” Meeting of the Dartmouth Association of Alumni, *supra* n. 6. Thus, while the

election, but the Association itself was never given the power to elect trustees without the participation of the alumni themselves. The power to vote—to elect trustees and have a voice in governance—was intended to be held and exercised by the alumni. The benefit of Dartmouth’s promised performance was intended for alumni, not for the Association of Alumni. It is because the alumni gained a personal stake in Dartmouth’s governance in the 1891 Agreement that they have reacted with such loyalty and generosity. Dartmouth graduates have provided almost all of the \$2.6 billion endowment and provide, extraordinarily, over 40 percent of Dartmouth’s expenses yearly.

The first part of the test for whether the alumni are intended beneficiaries of the 1891 Agreement asks if “recognition of a right to performance in the beneficiary is *appropriate* to effectuate the intention of the parties.” Restatement (Second) of Contracts § 302(1)(b) (emphasis added). The Agreement is clear that the intention of the parties was to give alumni a voice in Dartmouth’s future in exchange for their support. The fact that both the benefit of a vote for trustees and the obligation to support the College are held by individual alumni establishes that recognition of an alumni right to enforce the Agreement is appropriate.<sup>43</sup>

The test for appropriateness also invites a broader inquiry. The use of the term “appropriate” signals the influence of Professor Corbin in preparation of the Second Restatement. JOHN E. MURRAY, JR., CORBIN ON CONTRACTS, Vol. 9 § 44.4 n. 5 (Rev. ed. 2007):

A study of thousands of these cases in which an enforcing remedy has been given to the third party shows no injustice to the defendants; instead it demonstrates that refusal of remedy would have been out of harmony with generally prevailing ideas of justice and convenience and that cases in which a remedy was refused have often come to be regarded later as in shocking conflict with existing mores.

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language of the resolution speaks of nomination, the alumni are the actual electors of alumni trustees and the Board does not have the choice under the contract’s terms to refuse to “elect” the trustees chosen by alumni.

<sup>43</sup> The Association not only does not vote for or select trustees, it also does not make contributions to the College and does not serve as a vehicle for, or exercise any control over, contributions by alumni.

*See id.*; *see also* 13 WILLISTON ON CONTRACTS § 37:8 (4th ed.) (noting that “the intent to benefit a third party can be shown not only by the contract’s express language but by the surrounding circumstances”). The test requires a court to look not only to the narrow language of a contract, but to “justice and convenience” in view of the surrounding circumstances and “existing mores.” Applying that test requires the Court to consider the Board’s attempt to violate the Agreement and the significant public policy questions that follow. The Board’s attempt to destroy parity is part of its broader plan to centralize power in a self-perpetuating coterie of insiders and to muzzle the petition trustees and, indirectly, the alumni, in favor of a philanthropic but pliant Board. The test requires the Court to consider that these actions are serious violations of public policies governing university boards and deeply harmful to Dartmouth itself.

The Board’s attempt to silence alumni by censoring or eliminating their Board representatives is a particularly glaring violation of the public policy of New Hampshire because it results in a suppression of the stewardship exercised by all trustees, but especially independently-elected petition trustees. As elucidated below, the New Hampshire Attorney General has noted that boards have a duty to engage in the sort of information-gathering and critical oversight that the Dartmouth Board has punished the petition trustees for undertaking.

Members of nonprofit boards, including university boards, owe their fiduciary duties to the nonprofit itself, not to a particular administration.<sup>44</sup> In exercising those duties, each director must act in good faith, with the care that an ordinarily prudent person would exercise under similar circumstances, and in a manner that he reasonably believes to be in the best interests of the corporation.<sup>45</sup> In New Hampshire, according to its Attorney General, boards and their members are further required to “be well-informed,” to “encourage open discussion,” to “pursue

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<sup>44</sup> 3 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 844.10 (2008).

<sup>45</sup> REVISED MODEL NONPROFIT CORPORATION ACT § 8.30(a).

the charity's mission and best interests with determination," and to "make certain that the charity operates in a fiscally sound manner and has mechanisms in place to keep it fiscally sound."<sup>46</sup> These are precisely the attributes that the petition trustees have displayed by speaking freely about the College's governance (for which Zywicki was expelled from the Board) and raising concerns about the College's fiscal management. The petition trustees have thus illustrated the importance of what the New Hampshire Attorney General has described as "[a] nominating process that invites openness, variety and change," which is important for a board to "avoid becoming a closed club with a narrow range of insiders."<sup>47</sup> The Board's choice to inhibit free speech and enforce conformity to prevent the four petition trustees elected in recent years from doing their duty; to chastise them (even expel them) for speaking their minds; and to suppress alumni participation in electing trustees specifically with the goal of remaining a closed club of insiders, is explicitly contrary to this guidance.

New Hampshire's public policy in favor of genuine oversight by a diverse group of trustees is supported by legal and scholarly commentators. One of the earliest writers on the governance of organizations, 19th Century professor Leonard Bacon, posed the question whether the executive administration of charitable organizations ought "to be, formally and really, responsible to some constituency."<sup>48</sup> He answered this question in the affirmative, and considered various governance options, concluding that the "executive of any such institution may be made responsible to a board of managers," an arrangement which, "properly carried into effect, would leave nothing to be desired."<sup>49</sup> In discussing how to properly carry the arrangement into effect, he noted that a board "must be the representative body of the society,

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<sup>46</sup> OFFICE OF THE NH ATTORNEY GENERAL, CHARITABLE TRUST UNIT, GUIDEBOOK FOR NEW HAMPSHIRE CHARITABLE NONPROFIT ORGANIZATIONS 5 (2d ed. 2003).

<sup>47</sup> *Id.* at 6.

<sup>48</sup> Leonard Bacon, *Responsibility in the Management of Societies*, THE NEW ENGLANDER, Vol. V, 32 (1847).

<sup>49</sup> *Id.* at 36.

and must be constituted for that end. . . . We say, then, that the proper function of a board is that of trustees for the contributors, the living and the dead.”<sup>50</sup> It is precisely this function that the alumni of Dartmouth secured in the 1891 Agreement. The Board’s attempt to destroy the safeguards that ensure its accountability is contrary to foundational notions of good governance.

Regarding the conduct of such a board, Bacon further wrote that it “should be a deliberative body,” which “should be so constituted, and its meetings should be so arranged, as to facilitate deliberation and discussion.”<sup>51</sup> Bacon hoped that a trustee would “exercise his own free judgment” and “bend his powers earnestly to the business in hand.”<sup>52</sup> The Board’s use of the Trustee Charge and its power over trustee reelection to stifle alumni trustees and prevent them from voicing independent views are blows to Bacon’s vision of accountability. Instead of the robust oversight that Bacon contemplated, boards such as Dartmouth’s are hamstrung by a pernicious elevation of coerced congeniality and fundraising ability over effective oversight.<sup>53</sup> Commentators voice concern over this trend. Judge Cabranes has described this trivial role:

The widespread practice of trustee passivity in the absence of truly incompetent presidential performance has been described as ‘back ‘em or sack ‘em.’ This pithy and useful aphorism (which I first heard from fellow trustees) describes, as best I can tell, the view of most trustees of the scope of their fiduciary responsibilities.<sup>54</sup>

Judge Cabranes noted that “[w]hen it comes to academic matters, trustees generally acquiesce passively, and routinely ratify the decisions of other stakeholders of the university.”<sup>55</sup> Other

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Richard Chait has noted that trustees are “understandably chastened” by scandals that have marred both corporate and nonprofit governance in recent years, and has expressed concern that as a result “boards will be lawfully mediocre and that trustees will misconstrue due diligence as evidence of effectiveness rather than its prerequisite.” Richard Chait, *The Gremlins of Governance: A Trusteeship Q&A with Richard Chait, Research Professor at the Harvard Graduate School of Education*, TRUSTEESHIP 10 (July/Aug. 2009).

<sup>54</sup> Cabranes, *supra* n. 35, at 966.

<sup>55</sup> *Id.* at 963. Judge Cabranes has urged trustees to assert their authority to oversee finances in particular, writing, “even university trustees who are discharging only the limited duty to either ‘back’ or ‘sack’ a president can perform

leading scholars writing in the *Harvard Business Review* have stated, with equal pith, that “[e]ffective governance by the board of a nonprofit organization is a rare and unnatural act.”<sup>56</sup>

Studies have found that a board’s culture is critically important to its effectiveness.<sup>57</sup>

Richard Chait, a Research Professor at Harvard’s Graduate School of Education, recently noted that boards should consider changes in culture and dynamics to facilitate exceptional governance, promoting “openness, inclusiveness, lively participation, respectful dissent, and mutual trust.”<sup>58</sup> Instead, “many colleges and universities, especially private institutions pressed to amass larger endowments . . . have increasingly monetized trusteeship.”<sup>59</sup> This focus has resulted in making financial capacity the primary criterion in recruiting trustees, which causes the decline of intimacy and personal accountability and leads to trustees becoming “disengaged and disaffected.”<sup>60</sup> Chait writes that “[t]here’s always important governance to do, and yet boards often fasten on philanthropy to the neglect of trusteeship.”<sup>61</sup> The Dartmouth Board’s belief that board seats should be assigned based on financial largesse, a major motivating force behind the destruction of parity, is ironic given that it actually hired Chait as a consultant for matters unrelated to the board-packing plan.

A more troubling trend is that trustees are expected to support university administrators instead of focusing on the “overall goal” of “improv[ing] the university [they] serve[] for the public benefit.”<sup>62</sup> Trustees are frequently discouraged from determining important issues:

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this function effectively only if they have a full picture of how efficiently the university’s finances are being managed, and how well it is performing.” *Id.* at 973.

<sup>56</sup> Barbara E. Taylor, Richard P. Chait, and Thomas P. Holland, *The New Work of the Nonprofit Board*, HARVARD BUSINESS REVIEW 4 (Sep.-Oct. 1996).

<sup>57</sup> Chait, *supra* n. 53, at 10.

<sup>58</sup> *Id.* at 11.

<sup>59</sup> *Id.* at 12.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 13.

<sup>62</sup> Drew Miller, *Serving as a Responsible Trustee*, Essays in Perspective, Institute for Effective Governance in Higher Education Vol. 4, 1 (Fall 2005).

Board members are sometimes made to feel that asking a thorny question or advancing an alternative opinion is disloyal to the administration. A vote on an issue is a vote on the CEO. But how can a reactive, uninformed board know what opportunities the organization is missing? And how much damage must the organization sustain before the board realizes something is amiss?<sup>63</sup>

As Dr. Drew Miller, a Regent at the University of Nebraska, wrote, “the essence of responsible trusteeship requires that one put the public good first, not university administrators or your personal popularity.”<sup>64</sup> Dr. Miller found that these principles of trusteeship “are, in fact, frequently contrary to the norms promoted by university administrators,” and sadly “the #1 duty of a board member is to support the top administrator—period.”<sup>65</sup> Refusal to engage critically with the administration may violate rather than fulfill a trustee’s fiduciary duty, where he fails to act in the way he believes is in the best interest of the organization. Nonetheless, disengagement is encouraged by policies that penalize trustees for criticizing boards or administrations. “In the nonprofit context, nondisclosure agreements or the use of ‘executive session’ rules to curtail debates about policy and procedure depart from established norms. They shut down opportunities for public dialogue and for communication with other concerned and influential parties, including reporters.”<sup>66</sup> Such rules are increasingly used by majorities on nonprofit boards.<sup>67</sup> At Dartmouth, they are a hovering threat of dismissal of independent-minded trustees.

This brief is submitted in the spirit of trusteeship, properly understood. The prevailing trends on the Dartmouth Board and at many similar institutions are potentially ruinous and contrary to the principles that must guide institutions of higher education. At stake are the interests of Dartmouth itself, not of any small group of malcontents.<sup>68</sup> Under the present system,

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<sup>63</sup> Taylor, et. al., *supra* n. 56, at 5.

<sup>64</sup> Miller, *supra* n. 62, at 1.

<sup>65</sup> *Id.*

<sup>66</sup> Norman I. Silber, Anticonsultative Trends in Nonprofit Governance, OREGON LAW REVIEW, 76.

<sup>67</sup> *Id.* at 75.

<sup>68</sup> Dartmouth is a centrally important institution to the State of New Hampshire—so important that the Governor of New Hampshire sits on Dartmouth’s Board—which adds to this litigation’s public significance.

charter trustees will appoint more charter trustees to a super-majority of the Board, and this mechanism will be used – as has already commenced – to eliminate trustees that do not kowtow. As hundreds of then-current Dartmouth students wrote, the transfer of oversight “from the whole body of 69,000 alumni, who know and love our College, to a ‘Governance Committee’ made up of five self-appointed people” is simply “not right for the Dartmouth Community.”<sup>69</sup>

## CONCLUSION

Recognition of the plaintiffs as third-party beneficiaries of the 1891 Agreement is “appropriate to effectuate the intention of the parties” here, where New Hampshire law and the policies that underlie university and nonprofit governance establish a strong public policy interest in ensuring that Dartmouth’s governance is open and robust. Restatement (Second) of Contracts § 302(1). The circumstances indicate that the promisee—the Association—intended to give the alumni the benefit of the promised performance, in the form of a vote and a voice in the future of their College. *See id.* at § 302(1)(b). A finding that the plaintiffs are third-party beneficiaries of the 1891 Agreement will prevent harm to Dartmouth, advance good governance, and is appropriate to effectuate the intentions of the parties that entered into the Agreement.

This Honorable Court is not being asked to take sides in the dispute over governance at Dartmouth, but, rather, to restore the mechanism that wise men created by contract more than a century ago to effectuate good governance – unless and until a vote of alumni directly and specifically indicates they are prepared to give up this salutary innovation in good governance.

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<sup>69</sup> Letter from Diane E. Ellis and Joseph G. Braunreuther III, Dartmouth Class of 2008, to Dartmouth alumni, and attached article, *Today’s Dartmouth Students Speak Out for Parity*, and petition, at App. 33-36.

Dated: September 4, 2009

Respectfully submitted,

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By his attorneys,



Harvey Silverglate, Esq.\*

Of Counsel

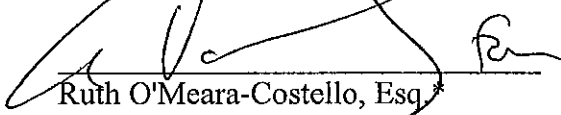
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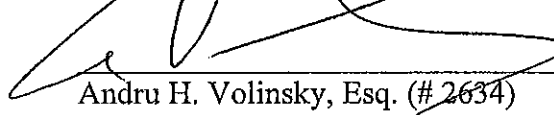
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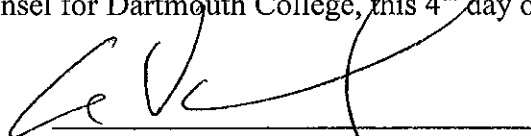
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### Certificate

I hereby certify that a true and exact copy of the foregoing brief and attached appendix has been forwarded to Eugene Van Loan, Wadleigh, Starr & Peters, LLP, 95 Market Street, Manchester, New Hampshire 03101, counsel for the petitioners, and Richard C. Pepperman, II, Sullivan & Cromwell LLP, 125 Broad Street, New York, New York 10004 and Bruce Felmley, McLane, Graf, Raulerson & Middleton, City Hall Plaza, 900 Elm Street, P.O. Box 326, Manchester, New Hampshire 03105, counsel for Dartmouth College, this 4<sup>th</sup> day of September, 2009 via U.S. Mail, postage prepaid.



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\* Attorneys Silverglate and O'Meara-Costello are not members of the New Hampshire Bar. They contemporaneously seek admission, *pro hac vice*, by application filed pursuant to Rule 19, Super.Ct. Rules.