STATEMENT OF INTEREST OF THE AMICI

This *amicus* brief is filed on behalf of individuals who are representative of two distinct categories of CBOE members, collectively identified as CBOT exercisers and CBOE treasury seatholders, pursuant to Rule 37.2 of this Court.[1] The individuals *amici* are a diverse group of commentators in the underlying SEC rulemaking proceedings who were Vice-Chairmen and members of CBOE's Board of Governors, are **currently** CBOT exercisers and CBOE members and treasury seatholders who are committed to the principals of fair and effective governance for all members of CBOE.

The *amici* have quite divergent positions on a wide range of issues relating to CBOE governance, the SEC rulemaking process and that the Court of Appeals for the D.C. Circuit erroneously dismissed an issue that will *be capable of repetition yet evading review*. However, they share one common view, which prompts their involvement in this brief: the *amici* believe that the SEC and D.C. Circuit decisions in these matters failed to give appropriate consideration to the fundamental right of a parties to be fully heard by the agency in the rulemaking process under the *Administrative Procedure Act* (APA) and Petitioner's right to be heard pursuant to this Court's rulings that he is entitled to prosecute his appeal not only because he has a stake in the outcome but under his right as a commentator under the a *public interest exception to the mootness doctrine.*

Amici believe that their perspective will complement that of the Petitioner and will

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1 Pursuant to Supreme Court Rule 37.6, pro se authors for *Amicus Curiae,* Thomas Bond and Donald Cleven state with the assistance of counsel, that they have authored this brief in whole, and that no person or entity has made a monetary contribution to the preparation and submission of this brief.

provide assistance to this Court in deciding the issues.[2]

STATEMENT

Amici and Petitioner were commentators in the underlying rulemaking proceedings that resulted in Petitioner filing petitions for review of the SEC orders dated February 25, 2005 in SR-CBOE-2004-16, SEC Release No. 34-5152 (70 FR 10442) and May 24, 2005 in SR-CBOE-2005-19, SEC Release No. 34-51733 (70 FR 30981) in the United States Court of Appeal for the D.C. Circuit Case Nos. 05-1211 consolidated with 05-1279, respectively. The Court of Appeals for the D.C. Circuit dismissed those appeals on the judicial doctrines of standing and mootness because Petitioner sold his CBOE treasury membership on concerns that it would not sustain value after the underlying SEC proceedings had concluded.

ARGUMENT

SEC had failed to adhere to its procedures in deciding Petitioner's Petition for Review before the Commission without properly hearing his evidence. It failed to deal with Petitioner's points as to whether the SEC or a State Court Chancellor decides issues of Corporate Governance.

The Court of Appeals for the D.C. Circuit had not addressed whether Section 25(a)(1) of the Exchange Act confers the right of an "aggrieved party" to show economic harm as the only exclusive element to have standing to appeal. When congress said in the statute that only an "aggrieved party" had standing to appeal *economic harm* was not prescribed even though Petitioner claimed such harm in his case.

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2 Respondent while they have been informed has neither consented or disapproved the filing of this brief. Petitioner has provided his consent.

With regard to the statutory component of standing, the Administrative Procedure Act (APA) entitles a party who is "adversely affected or aggrieved by agency action within the meaning of a relevant statute" to obtain judicial review.[3] Section 25 of the Securities Act of 1934 entitles a person who is "aggrieved by a final order of the Commission [SEC]. . . [to] obtain review of the order.[4]

Petitioner should be entitled to review by a Court as it goes to the SEC's dealings with Corporate State Law.

There is an exception to the *mootness doctrine* if (1) the question must be of a public nature; (2) an authoritative determination of the question must be desirable for the purpose of guiding public officers; and (3) the question must likely to recur; as these elements were demonstrated in *Dyer v. Securities and Exchange Commission* 266 F.2d 33, at 47 (1959)

Petitioner's circumstances that support a finding of standing sufficient to meet Constitutional concerns over justiciablility on the basis, for example, that the harm involved is not unique to Petitioner as he asserts interests that others, including the *Amici* share (*i.e.*, other CBOE members and CBOT exercise members also opposed the CBOE rule change before the SEC on the same grounds as Petitioner), Petitioner has unrelentingly challenged the CBOE rule from the outset, and has repeatedly stated in the underlying proceedings his interest in potentially acquiring an interest in another CBOE treasury membership.

This Court has viewed mootness as the '"the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence

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35 U.S.C. Sec. 702 (2005).
415 U.S.C. Sec 78 (2005).

(mootness)'"[5] However, even though some issues may become moot during the pendency of a case, the case will survive as to any issues that are not moot. Thus, "[o]ften a claim for damages will keep a case from becoming moot where equitable relief no longer forms a basis of a live controversy.[6]

Exceptions to mootness have been applied where (1) an issues is recurring one, which nonetheless evades ordinary review; (2) a plaintiff whose claim is moot may continue a suit as representative of a broad class of individuals with a continuing interest; (3) a plaintiff's claim has been mooted only because defendant has voluntarily, but not necessarily permanently, acquiesced, (4) a case appears to be moot only because collateral consequences of challenged action have been ignored.[7]

It is important for this Court to remember, even though the underlying controversy between CBOE and CBOT on the exercise right issue will arise again. The issue of the SEC validating the *ultra vires* action of CBOE's Board to revise its Articles of Incorporation will have a binding and precedent effect on future Board decisions to revise its Articles of Incorporation. Thus, even CBOT exercisers will find themselves disenfranchised when CBOE strips away their rights to trade a CBOE with its upcoming demutualization (conversion from a membership organization to a publicly traded and held shareholder corporation).

5*United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Monaghan, "Constitutional Adjudication: The Who and When" 82 Yale L.J. 1363, 1384 (1973)).

6Tribe, *id.*, at p.347, *citing Powell v. McCormack*, 395 U.S. 486, 497 (1969) (Congressman's injunctive demand to be seated as a member of the 90th Congress became moot with termination of that Congress and his seating in the 91st Congress; he was allowed to continue his suit, on his claim for back salary).

7Tribe, *id.*

Amici believe that Petitioner's statutory right to judicial review pursuant to Section 25(a)(1) of the Exchange Act should not be conditioned exclusively on demonstrating financial harm as another element for why he has standing to appeal. Members of the public have the right to comment and participate in hearings pursuant to the APA; at a time when Petitioner's and *amici* shared that right.

Amici believe as part of their ability to participate in commenting on issues that affect the *public interest* and free speech rights, Petitioner should have standing to continue with his appeal at the D.C. Circuit. This should be part of Petitioner's right to raise issues concerning the public interest and free speech rights afforded all members of the public pursuant to APA.

Beyond the private action brought by Petitioner, during whose tenure at CBOE saw them expend approximately $4,000,000 on purchase of CBOT exercise rights as a result of SEC rule approvals and saw the value of his seat stymied because CBOE's board insured 1,300 additional CBOT members will be participating in a demutualization plan that Petitioner was trying to limit to 935 of his fellow CBOE treasury seatholders, a claim that he and his fellow **current** members may be barred from asserting as a result of the D.C. Circuit's erroneous findings, this case has a significant impact on the public interest. It raises issues of corporate governance in a publicly regulated corporation that is a key component to the global equity markets consistent with Delaware Law.

As more corporations demutualize like CBOE, in a global market place, maintaining corporate democracy is one of the key functions SEC is charged with in maintaining the integrity of the U.S. Markets and publicly traded

corporations.

CONCLUSION

For the foregoing reasons the Petitioner's petition for writ of certiorari should be granted.

Respectfully submitted,
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