

15-1150

United States Court of Appeals for the District of Columbia Circuit

WILLIAM GALVIN, SECRETARY OF THE COMMONWEALTH OF
MASSACHUSETTS,
Petitioner,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Respondent

**BRIEF FOR WILLIAM MICHAEL CUNNINGHAM AS AMICUS CURIAE
IN SUPPORT OF THE PUBLIC INTEREST
AND AGAINST APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

William Michael Cunningham is filing as an individual, has no parent company, nor has he issued any stock.

Table of Contents

INTEREST OF THE AMICUS CURIAE9

RELATIONSHIP TO OTHER AMICI10

BRIEF BY WILLIAM MICHAEL CUNNINGHAM AS (Pro Se) AMICUS
CURIAE IN PARTIAL OPPOSITION TO BOTH THE RESPONDENT AND
PETITIONER12

THE FACT THAT RESPONDENT US SECURITIES AND EXCHANGE
COMMISSION HAS HAD SIGNIFICANT DIFFICULTY ACTING IN THE
PUBLIC INTEREST JUSTIFIES A COURT REVIEW14

RESPONDENT US SECURITIES AND EXCHANGE COMMISSION HAS
DELAYED THE IMPLEMENTATION OF THE JOBS ACT TO FAVOR
THE INTERESTS OF LARGE FINANCIAL INSTITUTIONS, TO THE
DETRIMENT OF THE PUBLIC16

RESPONDENT US SECURITIES AND EXCHANGE COMMISSION’S
IMPLEMENTATION OF THE JOBS ACT IS FLAWED, AND SETS UP A
CONFLICT BETWEEN TITLE IV AND TITLE VII OF THE ACT.....16

PETITIONER GALVIN’S VISION IS LIMITED BY PAROCHIOL
INTERESTS17

CONCLUSION.....19

CERTIFICATE OF COMPLIANCE.....20

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<http://www.prlog.org/10746429-firm-releases-transaction-cost-theory-of-the-financial-crisis.html>

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“EVIL IS NOT DRIVEN OUT,
BUT CROWDED OUT BY THE
EXPLUSIVE POWER OF
SOMETHING GOOD” MLK

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<https://youtu.be/r3Z5KPDvKIU>



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November 23, 2014. <https://youtu.be/r3Z5KPDvKIU>



INTEREST OF THE AMICUS CURIAE

William Michael Cunningham registered with the U.S. Securities and Exchange Commission as an Investment Advisor on February 2, 1990. He registered with the D.C. Public Service Commission as an Investment Advisor on January 28, 1994. Mr. Cunningham manages an investment advisory and research firm, Creative Investment Research, Inc. Mr. Cunningham holds an MA in Economics and an MBA in Finance, both from the University of Chicago in Chicago, Illinois. Mr. Cunningham's understanding of capital markets is based on firsthand knowledge obtained in a number of positions at a diverse set of major financial institutions. He served as Senior Investment Analyst for an insurance company. Mr. Cunningham was an Institutional Sales Representative in the Fixed Income and Futures and Options Group for a leading Wall Street firm. Mr. Cunningham also served as Director of Investor Relations for a New York Stock Exchange-traded firm. On November 16, 1995, he launched one of the first investment advisor websites. In 2007, he invented and proposed the first investment crowdfunding initiative, the *Microcredit Stock Exchange*.

Mr. Cunningham has long been concerned with the integrity of the securities markets. He has worked to repair the damage caused by unethical institutions¹. From his testimony² on behalf of the public in Federal Court³, he understands that the widespread, generalized decline in ethical standards of business behavior over the past two decades requires consideration of the public interest.

¹ Property Flipping Remediation Yields Investment-grade Security.
<http://www.socialfunds.com/news/article.cgi?sfArticleId=682>

² See: Partial Revised Transcript from the Global Research Analyst Settlement Fairness Hearing. April 11, 2005. Before Judge William H. Pauley. In the U.S. District Court for the District of New York.
<http://www.creativeinvest.com/sri/fairness.html>

³ Supreme Court of the United States. No. 97-5066. William Michael Cunningham, Petitioner v. Board of Governors of the Federal Reserve System. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 97-1256 William Michael Cunningham, APPELLANT v. Board of Governors of the Federal Reserve System, Appellee. Decided April 30, 1997.

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 98-1459 William Michael Cunningham, APPELLANT v. Board of Governors of the Federal Reserve System, Appellee. October, 1998. US v. McGraw-Hill Companies Inc., et. al. Case No. CV 13-0779-DOC (JCGx).

Mr. Cunningham is independent and objective. He comes to the Court with hands clean. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), William Michael Cunningham states that *no one* contributed money to fund preparing or submitting this brief.

Relationship to other Amici

Several organizations have filed “Friend of the Court” briefs in this matter. Each are self interested and ethically compromised. We consider two of these below.

As noted in their Amicus brief, which neglected to list Mr. Cunningham as an Amici, “The North American Securities Administrators Association, Inc. (‘NASAA’) is..the oldest international organization devoted to protecting investors from fraud and abuse in connection with the offer and sale of securities.” As noted below, large financial institutions, aided by regulators like NASAA, caused a global financial crisis that cost US households \$17 trillion dollars.⁴ A loss of this magnitude proves that NASAA, charged with “protecting investors from fraud and abuse in connection with the offer and sale of securities,” is incapable of protecting the public. Their lack of competence raises grave questions about the value of their advice.

NASAA claims Respondent Securities and Exchange Commission failed “to adequately consider..benefits, increases in efficiency, and cost reductions and failed “to fully consider the adverse impact to investors associated with preempting state review of many Regulation A offerings” but NASAA’s history of protecting investors is mediocre at best and bigoted at worst: NASAA played no effective role in protecting black neighborhood and churches.⁵

Of more relevance is the Amicus brief filed by Representative Maxine Waters, Representative Stephen Lynch, Representative Keith Ellison, Representative Michael Capuano, Representative Carolyn Maloney, Representative Niki Tsongas,

⁴ Statement for the Treasury Borrowing Advisory Committee of the Securities Industry and Financial Markets Association Alan B. Krueger Assistant Secretary for Economic Policy & Chief Economist. 5/3/2010. At <http://www.treasury.gov/press-center/press-releases/Pages/tg683.aspx>

⁵ “Bank accused of predatory practices. Lawsuit alleges black neighborhood, churches targeted.” Gazette.net. Online at: http://www.gazette.net/stories/06182009/collnew182411_32521.shtml

Senator Ed Markey, and former Representative Barney Frank, all current and former members of the United States Congress.

While these individuals speak for some in the Congress, they do not speak for the entire body. They also fail to understand that *the nature of the technology requires state-level preemption*, in the same way that Facebook or Google require state-level preemption.

The Court will find little help in the Amicus briefs filed by the entities above (and perhaps none here, but at least this brief is submitted by a party with clean hands and a long history of correctly predicting the public interest impacts of financial market policy decisions⁶).

⁶ See Supreme Court of the United States. No. 97–5066. William Michael Cunningham, Petitioner v. Board of Governors of the Federal Reserve System. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, See United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 97-1256 William Michael Cunningham, APPELLANT v. Board of Governors of the Federal Reserve System, Appellee. Decided April 30, 1997. Also, see United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT. No. 98-1459 William Michael Cunningham, APPELLANT v. Board of Governors of the Federal Reserve System, Appellee. October 1998. Also, see: This Week in Socially Responsible Investing, October 3, 2011. (Published October 2, 2011) <http://cepurl.com/gage9>

BRIEF BY WILLIAM MICHAEL CUNNINGHAM AS (Pro Se) AMICUS
CURIAE IN PARTIAL OPPOSITION TO BOTH THE RESPONDENT AND
PETITIONER

On June 7, 2007, Mr., Cunningham proposed the creation of the Microcredit Stock Exchange to the Government of the District of Columbia in a meeting with Mr. William Liggins (Director, DC Revenue Bond & Enterprise Zone Program, Office of the Deputy Mayor for Planning and Economic Development) and Robin Jasper (an aide to then City Council Chairman Vincent Gray. See documentation below:)

Information on the Micro..., NMTCPProject1.pdf

This Week in Socially Responsible Investing (SRI)
to: John Simmons

William Michael Cunningham
6/11/2007

Attached is a discussion document and a budget for initial research on the concept.

Pls let me know what you think....

Information on the Micro...

Information on the Microcredit Stock Exchange
to: Liggins, William (EOM), robin.jasper@dc.gov

William Michael Cunningham
6/9/2007

As promised, I have attached an outline on the Microcredit Stock Exchange we discussed on Thursday.

William Michael Cunningham...

Information on the Micro...

The Microcredit Stock Exchange represents one of the earliest versions of crowdfunding. This solution was created by Mr. Cunningham in direct response to the decline in business ethics that limited capital access in low income, minority and women business communities. As noted in the proposal,

“Equity capital, or shares in micro businesses would be traded on a Micro Business Stock Exchange created and managed by a third party entity. The Exchange would provide the framework for the provision of small amounts of equity capital

(\$1,000 to \$250,000) to micro businesses in Washington. To make things easier and to enhance the probability of success, we suggest the initiative focus specifically on disadvantaged businesses operating in far Northeast and in Southeast.⁷”

The equity crowdfunding concept Mr. Cunningham pioneered soon became the JOBS Act. As Mr. Cunningham noted in an article in the Washington Post,

“Crowdfunding works this way: An entrepreneur with an idea for a company or product posts the details of the idea or product on a Web site such as Kickstarter. The posting includes information on the amount of money needed, benefits to those who contribute to the project and information on the developers. The (Title III) crowdfunding provisions of the JOBS Act allow start-up and other companies to sell up to \$1 million in equity, or ownership shares, in their business.⁸”

The two largest crowdfunding platforms, Indiegogo and Kickstarter are donations-based platforms (not equity); they are currently active and operational and have served as the model for many of the proposed rules and regulations, including certain aspects of Title IV of the JOBS Act. Title IV, the subject of this matter, allows firms to raise up to \$50 million.

So that the Court can view the crowdfunding technique at work⁹, the chart below, from Mr. Cunningham’s book, *Top 50 Crowdfunding Campaigns*¹⁰, shows activity for the Pebble Watch donation (or reward based) crowdfunding campaign on Kickstarter:

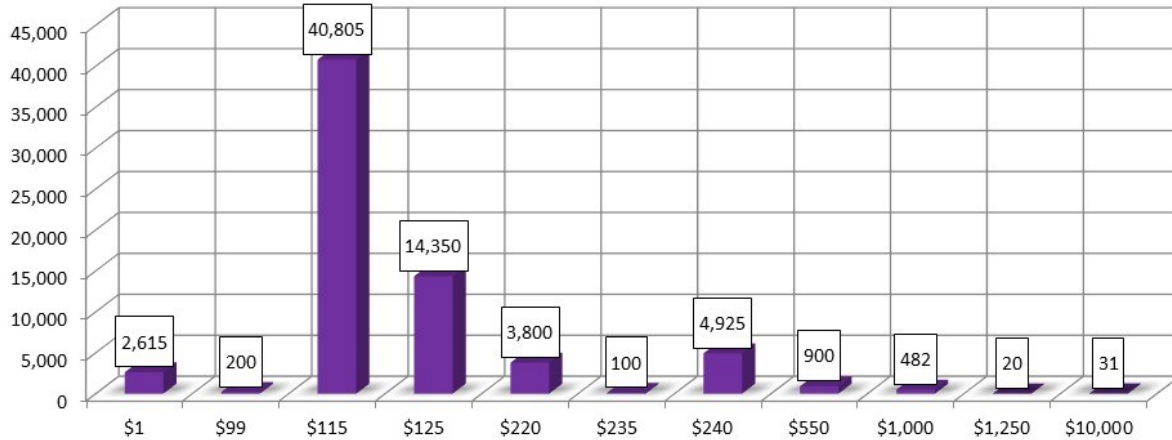
⁷ *The Microcredit Stock Exchange*. Proposal to William Liggins (Director, DC Revenue Bond & Enterprise Zone Program, Office of the Deputy Mayor for Planning and Economic Development) and Robin Jasper (aide to City Council Chairman Vincent Gray) representing the Government of the District of Columbia. June 7, 2007.

⁸ *Commentary: The quest for crowdfunding enters a complicated, but critical phase. December 23, 2012. Capital Business The Washington Post*. Online at: http://www.washingtonpost.com/business/capitalbusiness/commentary-the-quest-for-crowdfunding-enters-a-complicated-but-critical-phase/2012/12/23/d15ef280-4939-11e2-ad54-580638ede391_story.html

⁹ Also see: Cunningham, William Michael, Four DC businesses use crowdfunding in support of innovative projects! November 23, 2014. and Cunningham, William Michael, Wanda’s on 7th: How one small women owned firm seeks to use crowdfunding. November 18, 2014

¹⁰ Cunningham, William Michael, *Top 50 Crowdfunding Campaigns: Fifty Most Successful Crowdfunding Campaigns [Kindle Edition]* <http://www.amazon.com/Top-50-Crowdfunding-Campaigns-Successful-ebook/dp/B00RKK4NL0>

Pebble: E-Paper Watch for iPhone and Android - \$10,266,845



Packages	\$1 or more	\$99 or more	\$115 or more	\$125 or more	\$220 or more	\$235 or more	\$240 or more	\$550 or more	\$1000 or more	\$1250 or more	\$10,000 or more
	Keep up-to-date on all things Pebble	Early bird: Black watch	One Black Pebble	One Color Pebble	Two Black Pebbles	Prototype Pebble for early app dev + one Color Pebble	Two Color Pebbles	Five Color Pebbles	Ten Color Pebbles	Custom face + five Color Pebbles	One Hundred Pebbles in any color

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The horizontal axis shows the number of rewards. The vertical axis shows the various rewards and the dollar amount required for each. The boxes at the top of each bar represents the number of rewards taken. The Court can imagine the Pebble Watch company granting equity ownership stakes in addition to, or instead of, selling crowdfunding campaign participants a watch.

THE FACT THAT RESPONDENT US SECURITIES AND EXCHANGE COMMISSION HAS HAD SIGNIFICANT DIFFICULTY ACTING IN THE PUBLIC INTEREST JUSTIFIES A COURT REVIEW

The Micro Credit Stock Exchange was invented by Mr. Cunningham and the resulting crowdfunding platforms emerged due to the ability of entrepreneurs to use technology to address the lack of small business financing from large financial institutions. Large financial institutions, aided by regulators, caused the recent

global financial crisis that cost US households \$17 trillion dollars.¹¹ A loss of this magnitude suggests that Respondent US Securities and Exchange Commission, charged with protecting the public, is incapable of doing so. Under these circumstances, with the US Securities and Exchange Commission captured by the financial service industry, this review is warranted: only a Court is in a position to care for the public interest.

Repeatedly over the past thirty years, signal market participants, operating in the most materially advantaged country ever to exist, abandoned ethical principles in the pursuit of material wellbeing.¹² By 2015, marketplace ethics reached a new.

Fully identifiable entities engaged in illegal activities.¹³ They have, for the most part, evaded prosecution of any consequence.¹⁴ We note that Goldman Sachs, fined \$659.3 million by the Respondent for various efforts to defraud investors, subsequently received \$75 million in Federal Government tax credits.¹⁵

As I noted in testimony to the Department of Labor in August, 2015, markets cannot survive continuously elevated levels of fraud, since fraudulent practices mask an entity's true value and misallocates capital by moving investment dollars from deserving entities and companies to unworthy ones.¹⁶

¹¹ “The housing downturn, financial market crisis, and job losses were major setbacks for U.S. households. On net, household wealth fell by about \$17 trillion, or 26 percent...” Statement for the Treasury Borrowing Advisory Committee of the Securities Industry and Financial Markets Association Alan B. Krueger Assistant Secretary for Economic Policy & Chief Economist. 5/3/2010. At <http://www.treasury.gov/press-center/press-releases/Pages/tg683.aspx>

¹² The relationship between investment banks and the economy <http://twisri.blogspot.com/2009/03/why-market-failed.html>

¹³ See: Racial Bias in Securitization and Community Lending <http://twisri.blogspot.com/2009/08/wells-fargo-sued-for-racially-biased.html>, Mortgage GSE's, Predatory Lending and Minority Banks (2007 Prediction: Bear Stearns Will Fail.) <http://twisri.blogspot.com/2007/08/morgage-gses-predatory-lending-and.html>

¹⁴ See: Transaction Cost Theory of the Crisis <http://www.prlog.org/10746429-firm-releases-transaction-cost-theory-of-the-financial-crisis.html>

¹⁵ The tax credits were awarded under the U.S. Department of the Treasury New Markets Tax Credit (NMTC) Program. (See: <http://www.cdfifund.gov/programs/nmtc/>).

¹⁶ [Hearing on the Department of Labor's Fiduciary Rule](#), August 13, 2105.

Envy, hatred,¹⁷ and greed¹⁸ have flourished in capital market institutions, propelling ethical standards of behavior downward. Without meaningful reform there remains a significant and growing risk that our economic system will simply cease functioning.¹⁹

The Microcredit Stock Exchange and, by extension, crowdfunding, was designed to counter capital misallocation by helping insure that more capital goes, at the margin, to deserving small companies.

RESPONDENT US SECURITIES AND EXCHANGE COMMISSION HAS
DELAYED THE IMPLEMENTATION OF THE JOBS ACT TO FAVOR THE
INTERESTS OF LARGE FINANCIAL INSTITUTIONS, TO THE DETRIMENT
OF THE PUBLIC

Under Title IV of the JOBS Act, the US Securities and Exchange Commission proposed rules to allow companies to raise up to \$50 million.

The proposed rule implements Title IV of the JOBS Act before the implementation of Title III. Title III, small scale (up to \$1 million) equity crowdfunding, should have come first, as was the clear intent of Congress. Congress placed Title III before Title IV in the JOBS Act for a reason: this sequencing allowed the Respondent to use experience gained in small scale offerings to set the stage for and improve the larger scale offerings generated out of Title IV.

RESPONDENT US SECURITIES AND EXCHANGE COMMISSION'S
IMPLEMENTATION OF THE JOBS ACT IS FLAWED, AND SETS UP A
CONFLICT BETWEEN TITLE IV AND TITLE VII OF THE ACT.

The Respondent's regulatory approach allowing larger offerings first can only be attributed to a desire on the part of the Agency to protect the interests of large

¹⁷ "Bank accused of predatory practices. Lawsuit alleges black neighborhood, churches targeted." Gazette.net. Online at: http://www.gazette.net/stories/06182009/collnew182411_32521.shtml

¹⁸ The relationship between investment banks and the economy. <http://twisri.blogspot.com/2009/03/why-market-failed.html>

¹⁹ Proportional hazard models created by Mr. Cunningham and reflecting the probability of system wide market failure first spiked in September, 1998. The models spiked again in January and August, 2001. On December 22, 2005, we met with Ms. Elaine M. Hartmann and others from the Division of Market Regulation, U.S. Securities and Exchange Commission and specifically noted our model findings.

financial institutions: legal and investment banking fees are far greater in a \$50 million dollar offering than in a \$1 million dollar offering. This is contrary to the public interest, since our research shows that the bulk of the social return (benefit to society) from equity crowdfunding will come, over time, from small, less than \$1 million dollar offerings.

The Respondent and the market institutions it ostensibly regulates have been shown to allocate regulatory penalties and capital in a racially and gender biased manner²⁰ so “Title VII, tells the (respondent) to conduct outreach regarding the (JOBS Act) to SMEs and businesses owned by women, veterans, and minorities.” Congress intended, in creating Title VII of the Act, to help insure that startup capital is distributed in a fair and equitable manner to all segments of the population and our research indicates that the JOBS Act and crowdfunding has the potential to allocate capital in a marginally more objective manner.²¹

Women, veteran and minority businesses tend to be small.²² They will, therefore, benefit relatively more from Title III than from Title IV crowdfunding. The Respondents’ regulatory approach favors larger, non-minority firms. This is in conflict with Congressional intent as expressed by Title VII of the Act.

PETITIONER GALVIN’S VISION IS LIMITED BY PAROCHIOL INTERESTS

While regulatory capture²³ has rendered the US Securities and Exchange Commission incompetent, Mr. Galvin is also compromised in several important ways. His state is home to many of the largest mutual funds in the world. These institutions stand to be damaged by the self-directed nature of investment crowdfunding.

Mr. Galvin professes concern about investors, but Title IV crowdfunding cannot impose a \$17 trillion dollar loss on the economy: there have been no wide scale,

²⁰ “Bank accused of predatory practices. Lawsuit alleges black neighborhood, churches targeted.” Gazette.net. Online at: http://www.gazette.net/stories/06182009/collnew182411_32521.shtml

²¹ *Commentary: Crowdfunding can provide new financing option for minority firms.* June 3, 2012. Capital Business The Washington Post. Online at: http://www.washingtonpost.com/business/capitalbusiness/commentary-crowdfunding-can-provide-new-financing-option-for-minority-firms/2012/06/01/gJQAThq7BV_story.html

²² Ibid.

²³ George Stigler, "The Theory of Economic Regulation," Bell Journal of Economics, 2, 1971:3-21

significant, fraudulent equity crowdfunding campaigns. Even if there were, Mr. Cunningham has developed a financial instrument to address these concerns.²⁴ Racial prejudice on the part of the Petitioners and the Respondent prevent them from recognizing this, however.

The Petitioner's action here is akin to locking the barn door after the horses have escaped. Our economic forecasting models show greater social and economic returns from having the financial institutions that actually caused the last crisis face meaningful non-monetary penalties.²⁵ In other words, Petitioner's time would be better spent tracking down escaped horses.

Mr. Galvin's action serves to delay capital access, as forecast in my comments to the SEC on Title IV:

"State Regulators who have been bypassed are sure to object to the diminution of their authority. This means they will examine each offering issued under these new rules with a microscope. This means further delays in the ability to actually use the law."²⁶

Mr. Galvin has chosen a hammer rather than a microscope. The effect remains the same.

While the creation of new federal agencies (such as the Consumer Financial Protection Bureau) and the expansion of federal law (such as the Dodd-Frank Wall Street Reform and Consumer Protection Act) testifies to the ineffectiveness of the Respondent, a Court review is warranted, but not of the Respondent's Title IV

²⁴ Cunningham, William Michael, Commentary: The quest for crowdfunding enters a complicated, but critical phase. December 23, 2012. Capital Business – The Washington Post. Online at:

http://www.washingtonpost.com/business/capitalbusiness/commentary-the-quest-for-crowdfunding-enters-a-complicated-but-critical-phase/2012/12/23/d15ef280-4939-11e2-ad54-580638ede391_story.html

²⁵ We stated in Testimony to the Norwegian Finance Ministry on February 5, 2015 that "As the market value of environmental, social and governance factors continues to grow, companies and investment managers will engage in fraudulent practices related to these factors." We note that in September 2015 automaker Volkswagen admitted that "defeat devices' used to cheat emissions testing were installed in 11 million vehicles worldwide."

²⁶ Cunningham, William Michael, *Comments to the SEC on Title IV*. March 27, 2015. Online at: <http://www.sec.gov/comments/jobs-title-iv/jobstitleiv-38.pdf> Also note that our Fully Adjusted Return® model predicted on August 2nd that Black Unemployment would fall from 9.5% in June to 9.1% in July. The forecast was confirmed by the US Department of Labor - Bureau of Labor Statistics on August 7th. See: <http://eepurl.com/bu-IT9>

effort. Rather, we suggest the Court review the Respondent's delay in implementing Title III of the JOBS Act.

The internet is a powerful tool. We understand both the potential benefits and the potentially disruptive nature of this technology better than most.²⁷ Capital market regulators in other regions of the world have begun to enhance their ability to access capital using internet-based tools.²⁸ Thus, competitive advantage with respect to capital access is now available to any country with significant economic potential and a modest communications infrastructure.

We do not know which countries will be winners over the long term. We know with certainty, however, that without the full set of internet-based capital access tools outlined in Titles III, IV and VII of the JOBS Act, it is unlikely that the United States will long maintain its current advantage.²⁹

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's request to vacate the rule, *subject to the Respondent immediately implementing Title III of the JOBS Act* but should not issue a permanent injunction prohibiting the Respondent from implementing and enforcing the rule.

Dated: October 5, 2015

²⁷ Mr. Cunningham launched his first website on November 16, 1995.

²⁸ See: [Current Trends in Crowdfunding](#), Lecture at the Embassy of Italy, Washington, DC. September 16, 2015. We have designed an Italian "Food and Fashion" equity crowdfunding facility that focuses on equity investing in those two industries specifically for Italian companies while collecting small scale investments from investors all over the world. Note that "Food and Fashion" allows us to focus on two industries in which Italy has a relative competitive advantage. Also see: State Council of China, Measures to support entrepreneurship and innovation. http://english.gov.cn/policies/latest_releases/2015/09/26/content_281475198633538.htm

²⁹ Cunningham, William Michael, Comments to the SEC on Title IV. March 27, 2015. Online at: <http://www.sec.gov/comments/jobs-title-iv/jobstitleiv-38.pdf>

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), the typeface requirement of Fed. R. App. P. 32(a)(5), and the typestyle requirements of Fed. R. App. P. 32(a)(6). This brief contains 3,321 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and is prepared in a proportionally spaced typeface (14- point Times New Roman).

/s/ William Michael Cunningham