No. 16-1048

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE STEPHEN M. SILBERSTEIN,

Petitioner.

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS MITCH MCCONNELL, THAD COCHRAN, JOHN BOOZMAN, AND RICHARD SHELBY IN SUPPORT OF RESPONDENT U.S. SECURITIES AND EXCHANGE COMMISSION AND IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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May 16, 2016

No. 16-1048

CERTIFICATE AS TO PARTIES AND RULINGS

(A) Parties & *Amici*:

Stephen M. Silberstein

Securities and Exchange Commission

Senator Mitch McConnell

Senator Thad Cochran

Senator John Boozman

Senator Richard Shelby

(B) Rulings Under Review: The Petition challenges the SEC's actions with respect to a May 8, 2014 petition for rulemaking filed by Petitioner.

(C) Related Cases: *Amici* are unaware of any related case.

GLOSSARY

FEC	Federal Election Commission
SEC	Securities and Exchange Commission
Pet.	Page citation to Silberstein's Mandamus Petition
Opp.	Page citation to the SEC's Opposition Brief

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of the United States Senate. Senator Mitch McConnell is the U.S. Senate Majority Leader and a member of the Committee on Appropriations. Senator Thad Cochran is Chairman of the Committee on Appropriations. Senator John Boozman is a member of the Committee on Appropriations and Chairman of its Subcommittee on Financial Services and General Government. Senator Richard Shelby is Chairman of the Committee on Banking, Housing, and Urban Affairs, and as such sits *ex officio* on the Subcommittee on Securities, Insurance, and Investment and the Subcommittee on Financial Institutions and Consumer Protection. He is also a member of the Committee on Appropriations.

As such, they have both governance and oversight responsibilities concerning this matter and an interest in the correct application of administrative law principles to the federal agencies generally. Moreover, to the extent that the Petition raises a question of Congressional policy, namely the application of a provision of the Consolidated Appropriations Act, 2016, Pub. L. 114-113, *Amici* have both expertise concerning the interpretation of that enactment and an interest in this Court's enforcement thereof.

[1] No person contributed money intended to fund the preparation or submission of this brief, which was authored solely by counsel for *amici*. Pursuant to Rule 29(a) of this Court, all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Stephen M. Silberstein, an individual investor, has asked this Court to issue a writ of mandamus "compel[ling] the SEC to take all steps necessary to propose a corporate disclosure rule, including discussing, investigating, planning, and developing a draft proposal, within 30 days of the Court's decision." Pet. at 20. This extraordinary remedy is couched in terms of the Commission's "unreasonable delay," but goes far beyond "requiring the SEC to act on petitioner's rulemaking request" by, for instance, "deny[ing] the [rulemaking] petition." Pet. at 3-4.

Nevertheless, both this Court and the SEC have interpreted the Petition as requesting relief based upon the Commission's purportedly unreasonable delay. In evaluating that claim, this Court looks to the factors set forth in *Telecommunications Research and Action Center v. Federal Communications Commission*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*). Of those six factors, two—whether "Congress has provided a timetable or other indication" of expected speed, and "the effect of expediting delayed action on agency activities of a higher or competing priority"—directly involve the acts and intent of Congress. *TRAC*, 750 F.2d at 80. In addition, the sixth factor, "the nature and extent of the interests prejudiced by delay," implicates "our campaign finance system," a subject concerning which Congress "enjoys particular expertise." *Id.*; Pet. at 18; *McConnell v. FEC*, 540 U.S. 93, 137 (2003).

Fundamentally, by means of this year's Consolidated Appropriations Act, Congress and the President have precluded the Commission from acting upon Mr. Silberstein's request. This fact is sufficient to deny the Petition, on the merits or otherwise. Moreover, the Act explicitly demonstrates Congress's position that this policy question is not a priority for the Securities and Exchange Commission, especially where mandatory rulemaking stemming from previous legislation remains unfinished.

But even without this binding statutory language, the Petition vastly overstates both the merits of the underlying rulemaking petition and the public interest implicated therein. While the Petition bears every indication that Mr. Silberstein is motivated by his passionate views on campaign finance law, and his civic engagement is commendable, the Petition nonetheless fails to establish how such rulemaking would further the SEC's core mission, and it does not support the issuance of a writ of mandamus.

STATUTES AND REGULATIONS

All application statutes and regulations are contained in the Brief for Respondent.

ARGUMENT

I. Congress has expressed its affirmative disapproval of SEC rulemaking in the area requested by Petitioner.

Congress has given the Securities and Exchange Commission broad authority to determine what information must be disclosed by public companies. *See* 15 U.S.C. § 78n(a). But that authority is not unlimited. First, like all agency discretion, it is subject to such restrictions as Congress may impose. *See Michigan v. Envtl. Protection Agency*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (a federal agency "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress") (internal citation and quotation marks omitted). Second, the Commission may not impose arbitrary or capricious disclosure requirements, including rules that provide opportunities for partisan or special-interest gamesmanship. *Business Roundtable v. SEC*, 647 F.3d 1144, 1152 (D.C. Cir. 2011) (striking down proxy disclosure rule because, in part, it failed to consider "that investors with a special interest… can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value").

As the Commission correctly notes, less than two months before Mr. Silberstein filed his Petition, Congress passed, and the President signed into law, the Consolidated Appropriations Act for the 2016 fiscal year. *See* Opp. at 4. That bipartisan enactment limits the use to which the SEC may put public funds. *See*

Opp. at 4; U.S. Const. art. I, § 9 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). In particular, it has prohibited the use of funds "to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations." Consolidated Appropriations Act, 2016, Pub. L. 114-113, Division E, Title VI, § 707.

The SEC suggests that this language prohibits it from either "granting or denying the rulemaking petition." Opp. at 8. There is certainly no possible reading of the Act that would permit the Commission to act favorably upon Mr. Silberstein's petition. But the clear implication of the Act's broad language is a statement of Congressional policy opposing the SEC's involvement in the regulation of political activity, and in particular to the issuance of any rule requiring disclosure of contributions to a range of non-profit entities. This "express opposition" binds the Commission, and it should be applauded for rejecting the Petition's lawless suggestion that an agency may plan, draft—and even "propose"—a rule that it has no authority to issue. *See Nat'l Treasury Emps. Union v. Devine*, 733 F.2d 114, 117 (D.C. Cir. 1994); Pet. at 12.

Moreover, the Act is best read as permitting a rejection, but not an acceptance, of Petitioner's proposed rulemaking. While this Court applies a "'very strong presumption' that appropriation acts do not amend substantive law," the

relevant inquiry is whether Congress has "unambiguously expressed" its intention. *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000). Here, the Act describes not only "orders"—the category of acts to which the Commission points—but also "rules" and "regulations." *See* Opp. at 5. This Congress, then, while not ousting the general authority of the SEC to require disclosure needed for healthy markets and the protection of investors, has determined that rules tending toward the regulation of political speech and association, and not of markets, are disallowed. That statement of policy resolves this matter on the merits.

II. Congress has expressly indicated that other rulemaking priorities should take precedence over political disclosure regulations.

The Petition claims that the SEC "has addressed all of the mandatory rulemaking provisions imposed by the Dodd-Frank Act, leaving it free to address the issue of a corporate disclosure rule." Pet. at 19-20. This view is factually incorrect. The SEC has identified 23 pending matters under the Dodd-Frank Act, including 5 for which no rule has yet been proposed.[2] These mandatory projects reflect the policy choices of Congress with regard to the SEC's regulatory priorities, and the Commission acts comfortably within its statutory discretion when it follows that guidance.

[2] *See* SEC, "Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act," https://www.sec.gov/spotlight/dodd-frank.shtml ("The Commission has *taken action* to address *virtually* all of the mandatory rulemaking provisions of the Dodd-Frank Act") (emphasis supplied).

III. Petitioner overstates the "nature and extent of the interests" allegedly affected here.

The *TRAC* decision explicitly calls upon this court to "take into account the nature and extent of the interests prejudiced by delay." *TRAC*, 750 F.2d at 80. The Petition suggests, in scant two pages, that the impact of Mr. Silberstein's petition upon both "our campaign finance system" and investors interests "cannot be overstated." Pet. at 18-19.

The Petition's clear emphasis is on the campaign finance portion of that statement. It makes little serious effort to demonstrate how mandated disclosure of political spending, contributions to nonprofit organizations, or dues to trade associations is material to shareholders or investors. There is no discussion of how any such proposed rule would further the SEC's core mission, positively impact shareholder value, or protect capital markets. Nor does the Petition address any of the concerns raised by this Court in *Business Roundtable*. Instead, it asserts amorphous "investor concern with corporate political spending," based upon the fact that "shareholders ha[ve] voted on 33 corporate disclosure proposals, reflecting an average shareholder support of 35 percent." Pet. at 6. Even if such statements were to be taken as persuasive, 35 percent is a decided minority and proves, if anything, that nearly two-thirds of shareholders—when explicitly asked

if they prefer Petitioner's approach to corporate disclosure—decided that this information is not material to them as investors and voted "no."

Similarly, Petitioner points to "an unprecedented level of public support – at least…1.2 million comments" submitted in connection with a separately-filed petition.[3] Pet. at 7. But those comments are, overwhelmingly, form letters discussing campaign finance and the purportedly deleterious effects of *Citizens United v. Federal Election Commission*.[4] For instance, over 350,000 comments are of Letter Type A, which states the authors' "concern[] about the influence of corporate money on our electoral process" and that they are "appalled that, because of the Supreme Court's ruling in Citizens United v. Federal Election Commission, publicly traded corporations can spend investor's money on political activity in secret."[5] Similarly, Letter Type B, filed by 11,000 individuals, begins with the (incorrect)[6] assertion that "Super PACs don't have to disclose their unlimited

[3] The Commission correctly states that "there does not appear to be any link between" that earlier petition and Mr. Silberstein's later effort. Opp. at 3-4, n. 2.

[4] Comments are available online at: https://www.sec.gov/comments/4-637/4-637.shtml.

[5] In fact, all corporate independent expenditures over $250 are already disclosed to the Federal Election Commission. *See* 52 U.S.C. 30104(c). The same is true for all corporate contributions to Super PACs aggregating over $200, 52 U.S.C. §30104(b), and for contributions to and spending by corporate PACs. 52 U.S.C. § 30104(a)(4).

[6] Independent Expenditure Committees, colloquially known as Super PACs, have, since their inception, been required to report all of their donors over $200. *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc) (requiring

corporate donations." Letter Type X, with over 100,000 examples, states, almost in its entirety, that "[c]orporations are flooding our elections with unregulated, secret money. Shareholders and voters should know exactly who is attempting to influence our democracy."[7] There are also substantive comments, to be sure, but agency rulemaking is not a plebiscite, and the sheer number of polemical form letters making up Petitioner's "1.2 million comments" undermines their utility as support for Commission action.[8]

The SEC "has a unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation.'" *Business Roundtable*, 647 F.3d at 1148. These factors have not been addressed by Mr. Silberstein's petition. Nor is disclosure necessarily harmless. Economically immaterial disclosure "simply…bur[ies] the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision making." *TSC Indus. v. Northway*, 426 U.S. 438, 448-49 (1976) (Marshall, J., for a unanimous court). As the SEC's sitting Chair has correctly noted, this danger is especially acute when proposed disclosure rules stray from the Commission's "core mission" and instead "seem

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first Independent-Expenditure-Only Committee to register and report as a political committee). *See also* 52 U.S.C. §§30104(a)(4) and 30104(b)(3).

[7] *See supra*, n. 5.

[8] The same is true for the December 22, 2015 letter from certain members of the minority party in the Congress that is cited by the Petition. *See* Pet. at 16, 18. That letter, unlike the Act, does not represent an official act of Congress signed into law by the President.

more directed at exerting societal pressure on companies to change behavior, rather than to disclose financial information that primarily informs investment decisions."[9] Such is the case here.

Finally, as a private citizen, Mr. Silberstein may petition the SEC but lacks authority to expand its core mission. Moreover, his effort to expand the SEC's authority conflicts with Congress's duties and its decision to create a separate body for interpretation and civil enforcement of the campaign finance laws. The Federal Election Commission, not the SEC, has been given that mandate. 52 U.S.C. § 30106(b)(1).

CONCLUSION

The Petition requests an extraordinary remedy that would violate the statutory language of the Consolidated Appropriations Act, 2016—an official act of Congress. Moreover, it does so by engaging in a heated discussion of political issues that are clearly outside the mission of the SEC. For the foregoing reasons, and those already given by the Commission's counsel, the Petition should be denied.

[9] Mary Jo White, Chair, Securities and Exchange Comm'n, 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture, Fordham Law School: The Importance of Independence (Oct. 3, 2013) (available online at: http://www.sec.gov/News/Speech/Detail/Speech/1370539864016).

Respectfully submitted,

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Dated: May 16, 2016

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Certificate of Compliance

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 2,267 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

Dated: May 16, 2016

/s/ Allen Dickerson
Allen Dickerson

Certificate of Service

I hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief in Support of Respondents using the court's CM/ECF system which will automatically generate and send by email a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys. D.C. Cir. R. 25(d).

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