No. 16-1048

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE STEPHEN SILBERSTEIN,

Petitioner,

OPPOSITION OF RESPONDENT U.S. SECURITIES AND EXCHANGE COMMISSION TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS

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GLOSSARY AND ABBREVIATION CONVENTIONS

APA	Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*
Commission	Securities and Exchange Commission
Man. Pet. __	Page citation to Silberstein's Mandamus Petition
Rulemaking Pet. __	Page citation to Silberstein's May 2015 Rulemaking Petition

INTRODUCTION

Stephen M. Silberstein's petition for a writ of mandamus should be rejected—either dismissed for lack of standing or denied on the merits—because it seeks to compel action that Congress has barred the Commission from taking. Silberstein requests an order "requir[ing] the SEC to act immediately" on his petition for rulemaking regarding the disclosure of political contributions and to "issue an explanation of its decision to grant or deny the petition . . . ." But Section 707 of the Consolidated Appropriations Act for the current fiscal year prohibits the Commission from, among other things, using appropriated funds to finalize or issue any "order regarding the disclosure of political contributions," which would include an order granting or denying Silberstein's rulemaking petition. By prohibiting the very agency action Silberstein is suing to compel, Section 707 makes the claim of harm underlying his mandamus petition not redressable by this Court and thereby deprives him of standing. And Section 707 likewise forecloses Silberstein's mandamus petition on the merits: Silberstein cannot demonstrate that the Commission is under a clear duty to immediately respond to his rulemaking petition—a threshold requirement for the mandamus relief he is seeking—because Congress has prevented the Commission from taking such action. For the same reason, to the extent they are applicable in this circumstance, the multi-factor guideposts this Court employs to assess whether

agency action has been unreasonably delayed, *see Telecomm. Research and Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (*TRAC*), weigh conclusively against the relief Silberstein seeks.

JURISDICTIONAL STATEMENT

For the reasons set forth below at pages 7-8, Silberstein's mandamus petition should be denied for lack of standing. If, however, the Court determines to reach the merits, this Court's authority to entertain the petition would rest on Section 25(a)(1) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78y(a)(1), and the All Writs Act, 28 U.S.C. § 1651(a). *See Silberstein v. SEC*, __ F. Supp. 3d __, __, 2016 WL 29253, at *3 (D.D.C. Jan. 4, 2016) (*Silberstein I*) ("When the discrete agency action sought—a final SEC order on a petition for rulemaking—is itself reviewable exclusively by a circuit court, then an APA unreasonable delay claim is also reviewable exclusively by a circuit [court].") (citing *TRAC*, 750 F.2d at 76)).[1]

COUNTERSTATEMENT OF THE ISSUE

Whether Silberstein's petition for a writ of mandamus to compel the Commission to immediately grant or deny his petition for the Commission to

[1] As Silberstein describes in his mandamus petition, he earlier brought a claim in the District Court for the District of Columbia seeking an order compelling the Commission to respond to his rulemaking petition, but that court dismissed the claim after finding that the courts of appeals have exclusive jurisdiction over such claims. *See* Man. Pet. 10-11 (citing *Silberstein I*, __ F. Supp. 3d at __, 2016 WL 29253, at 3-4). Silberstein did not appeal that decision.

undertake a discretionary rulemaking regarding the disclosure of political contributions must be rejected because Congress—through a provision in the current appropriations statute—has prevented the Commission from acting on the rulemaking petition.

STATUTE

Consolidated Appropriations Act, 2016, Pub. L. 114-113, Division E, Title VI, § 707:

> LIMITATION ON SEC FUNDS.
> None of the funds made available by any division of this Act shall be used by the Securities and Exchange Commission 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.

BACKGROUND

Silberstein (along with Citizens for Responsibility and Ethics in Washington (CREW)) filed with the Commission on May 8, 2014 a petition requesting the promulgation of "regulations that would require public companies to disclose to shareholders the use of corporate resources for political activities." Rulemaking Pet. ¶1.[2] The petition urged the Commission to initiate a rulemaking pursuant to

[2] The rulemaking petition is available at https://www.sec.gov/rules/petitions/2014/petn4-637-2.pdf). CREW, by itself, had previously filed a rulemaking petition on April 15, 2014 seeking identical relief; as a result, Silberstein and CREW styled their joint rulemaking petition as an amended petition. Rulemaking Pet. ¶1. Further, their joint rulemaking petition purports to "incorporate by reference" a similar rulemaking petition filed on August 3, 2011

the Commission's "broad discretionary powers" under Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a). Rulemaking Pet. ¶¶6-7, 44.[3]

While Silberstein's rulemaking petition remained pending,[4] the President on December 18, 2015, signed into law the Consolidated Appropriations Act, 2016, Pub. L. 114-113, which appropriates money to fund the Commission for the 2016 fiscal year (FY-2016). This statute includes a provision captioned "LIMITATION ON SEC FUNDS" ("Section 707") that, as set forth in full above, prohibits the

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by the Committee on Disclosure of Corporate Political Spending ("CDCPS"), a group of ten academics filing in their individual capacities. Rulemaking Pet. ¶¶2-3; *see also* https://www.sec.gov/rules/petitions/2011/petn4-637.pdf. Despite Silberstein's and CREW's attempt at incorporation by reference, there does not appear to be any link between the two sets of petitioners. Neither Silberstein nor CREW was an original signatory to CDCPS's 2011 petition, and it does not appear that Silberstein submitted a letter in support of that petition. *See* Comments on Rulemaking Petition No. 4-637 (at: http://www.sec.gov/comments/4-637/4-637.shtml). Similarly, none of the members of the CDCPS are original signatories to the amended petition here; nor does it appear that they have submitted letters in support of the amended petition. *See id.*

[3] Section 14(a) of the Exchange Act prohibits the solicitation of proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

[4] Silberstein notes in his mandamus petition (at 7) that in the agency's 2013 regulatory agenda, "the SEC's Division of Corporation Finance … announced [that] it was *considering* '*whether to recommend* that the Commission issue a proposed rule to require that public companies provide disclosure to shareholders regarding the use of corporate resources for political activities.'" (Emphasis added). Silberstein does not contend that this statement constitutes a final agency order disposing of his rulemaking petition, nor could he. Indeed, this statement regarding the potential 2013 regulatory agenda was issued over a year before Silberstein submitted his 2014 rulemaking petition to the Commission.

Commission from spending any appropriated funds "to finalize, issue, or implement any … order regarding the disclosure of political contributions …." Consolidated Appropriations Act, 2016, Pub. L. 114-113, Division E, Title VI, § 707.

ARGUMENT

I. Congress has adopted an appropriations provision that prohibits the Commission from making a final determination on Silberstein's rulemaking petition.

The Commission has two "potential responses to Mr. Silberstein's petition for rulemaking—a final order denying or granting the petition[.]" *Silberstein I*, __ F. Supp. 3d at __, 2016 WL 29253, at *3.[5] *See generally Watts v. SEC*, 482 F.3d 501, 505-06 (D.C. Cir. 2007) (explaining that an "SEC[] decision" qualifies as an "order" if it "constitutes 'the whole or a part of a final disposition' of the SEC 'in a matter other than a rule making'") (quoting 5 U.S.C. § 551(6)). But since

[5] Notably, only a final order denying the rulemaking petition could be subject to immediate judicial review. A final order granting the petition would not be ripe for judicial review, nor would it satisfy the final-agency-action requirement necessary for immediate review, because it would mark only the start of the rulemaking process. *See, e.g.*, *Atlantic States Legal Foundation, Inc. v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003) ("a 'claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all'") (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)); *Atlantic States Legal Foundation*, 325 F.3d at 285 ("The lack of final agency action depends on 'whether the agency's position … has a direct and immediate … effect on the parties.'") (quoting *Fourth Branch Assocs. (Mechanicville) v. FERC*, 253 F.3d 741, 746 (D.C. Cir. 2001)).

December 2015, the Commission has been precluded by the clear terms of Section 707 of the Consolidated Appropriations Act from taking either action.[6] *See, e.g.*, *McHugh v. Rubin*, 220 F.3d 53, 58 (2d Cir. 2000) (explaining that where an "annual appropriations statute[]" bars an agency from spending appropriated funds, the "effect on the agency is obvious"—the agency may not take any actions "falling within the scope of the funding restriction"). Thus, because the Commission can neither issue an order denying or granting Silberstein's rulemaking petition, any final Commission action on the rulemaking petition must await the expiration of the spending prohibition or congressional action to repeal it.[7]

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[6] *See also* Section 608, Division E, Title VI, Consolidated Appropriations Act, 2016 (providing that "none of the funds provided in this Act, provided by previous appropriations Acts to the agencies or entities funded in this Act that remain available for obligation or expenditure in fiscal year 2016, or provided from any accounts in the Treasury derived by the collection of fees and available to the agencies funded by this Act, shall be available for obligation or expenditure through a reprogramming of funds that … increases funds or personnel for any program, project, or activity for which funds have been denied or restricted by the Congress").

[7] Silberstein states in his mandamus petition that Section 707 "does not strip the SEC of its statutory authority to prepare for a corporate disclosure rulemaking procedure, including discussing, investigating, planning, and developing a draft proposal." Man. Pet. 12. But regardless of whether the Commission *could* take any such preliminary steps, Silberstein's mandamus petition does not seek this relief—nor could it conceivably do so, as Silberstein has no right to such relief under the Administrative Procedure Act or any other federal statute.

II. In light of the appropriations provision, this Court should dismiss Silberstein's mandamus petition as non-justiciable because his unreasonable delay claim is not redressable by this Court.

As the Supreme Court has explained, a critical aspect of the "'irreducible constitutional minimum'" of standing is a likelihood that the petitioner's claimed injury will be redressed by a decision in the petitioner's favor. *U.S. Ecology, Inc. v. U.S. Dept. of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). And "'the party invoking federal jurisdiction bears the burden of establishing its existence.'" *Id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998)). Silberstein lacks standing under this precedent—and his petition accordingly should be dismissed—because even if this Court were to determine that the Commission had unreasonably delayed in issuing a final order resolving Silberstein's rulemaking petition, there is no relief that this Court could currently afford Silberstein that would redress the injury.

As discussed above, Section 707 prohibits the Commission from expending any appropriated funds to finalize, issue, or implement *any* order regarding the disclosure of political contributions, which includes the order granting or denying his rulemaking petition that Silberstein's mandamus petition seeks to compel. *Cf. Indian Path Medical Ctr. v. Leavitt*, 2006 WL 1663453, at *5 (D.D.C. June 9, 2006) (finding that plaintiffs' claims for relief were not redressable because of

restrictions imposed by Congress, including a limited appropriation of federal funds). Because Silberstein cannot show that his purported injury is redressable by this Court, he lacks standing to pursue his claim of unreasonable delay.

III. If the Court does reach the merits, Silberstein's mandamus petition should be denied.

A. Silberstein cannot demonstrate an entitlement to the drastic remedy of mandamus given that an appropriations statute prohibits the Commission from responding to his rulemaking petition.

As this Court has often explained, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002) (internal quotation marks omitted) (citing cases). To show an entitlement to mandamus, a petitioner must demonstrate as a threshold matter that the government agency is violating a clear duty to act; a petitioner's failure to make that showing requires a denial of the petition. *See Am. Hosp. Assoc. v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Because Silberstein has not made—and cannot make—that showing here, his mandamus petition should be denied.

Contrary to Silberstein's contention (at 4), the Commission does not have a clear duty "to respond immediately" by either granting or denying his rulemaking petition. To the contrary, Section 707 prohibits the Commission from expending appropriated funds to finalize or issue an order granting or denying the rulemaking

petition. As such, the Commission has a duty *not* to act on Silberstein's rulemaking petition and Silberstein is not entitled to a writ of mandamus.

Under very similar facts, the Second Circuit reached the same conclusion in *McHugh v. Rubin*, 220 F.3d 53 (2000). Through a provision included in several consecutive annual appropriations statutes, Congress barred the Bureau of Alcohol, Tobacco and Firearms (ATF) from using appropriated funds to act upon applications by individuals for the restoration of their federal firearms privileges. *Id.* at 55. After the ATF declined to act on his application for restoration of his firearms privileges, plaintiff McHugh sought a writ of mandamus to compel the AFT to do so. *Id.* at 56. The Second Circuit denied the mandamus petition, reasoning that the ATF had no clear duty to act because "[t]he ATF has been placed in a virtual straightjacket by the plain language of Congress's appropriations statutes precluding [the ATF] from acting[.]" *Id.* at 57; *see also id.* ("Here, the ATF is under a statutory duty *not* to do the act in question.") (emphasis in original). In reaching this conclusion, the Court explained that "while the annual appropriations statutes speak in terms of the ATF's ability to spend appropriated funds, their effect on the agency is obvious: It may neither grant nor deny applications falling within the scope of the funding restriction." *Id.* at 58.

For the same reasons, this Court should conclude that the Commission is not violating a clear duty to immediately grant or deny Silberstein's rulemaking

petition. And because the threshold requirement of a clear duty to act is absent, the mandamus petition should be denied.

B. Application of the *TRAC* factors here further confirms that Silberstein's mandamus petition should be denied.

In assessing whether a writ of mandamus is justified in the context of claims of unreasonable agency delay, this Court typically considers the six so-called "*TRAC* factors." *Burwell*, 812 F.3d at 189-90. As this Court has explained, those factors are designed to provide "useful guidance" as to whether the agency's delay is "'so egregious as to warrant mandamus.'" *Id.* at 189-90 (quoting *TRAC*, 750 F.2d at 79). Because the threshold showing for mandamus—the violation of a clear duty to act—cannot be established here given Congress's enactment of the Section 707 appropriations limitation, it is likely unnecessary for this Court to look to the *TRAC* factors in resolving Silberstein's mandamus petition. But if this Court were to consider those factors, they confirm that mandamus is not warranted here.

The *TRAC* analysis involves consideration of the following:

(1) the time that agencies take to make decisions must be governed by a "rule of reason";

(2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed, that legislative direction may supply content for this rule of reason;

(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;

(4) the effect of expediting delayed action on agency activities of a higher or competing priority;

(5) the nature and extent of the interests prejudiced by delay; and

(6) impropriety causing the agency delay.

See TRAC, 750 F.2d at 80. The *TRAC* analysis is highly deferential to government agencies. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 12.3, at 1069 (5th ed. 2010). ("It is hard for a petitioner to prevail under this deferential standard, and most do not."). *See, e.g.*, *Independence Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997) (denying an order to compel agency action after assessing a six-year delay in acting on mineral patent claims under the *TRAC* test).[8] And whether an unreasonable delay has occurred under the *TRAC* factors is heavily dependent on statutory context. *See The Fund for Animals v. Norton*, 294

[8] The substantial deference afforded the government is due to the fact that, as a leading treatise has explained,

> [w]hen a court is called upon to order an agency to take action in a given matter by a certain date, the court is being asked, in effect, to reorder the agency's priorities and reallocate its resources. An agency cannot expedite its decisionmaking in one matter without diverting resources from other matters, thereby slowing the process of decisionmaking in those matters. Thus, in deciding whether to grant relief under APA § 706(1), a court must focus not on the detail of the agency's method of proceeding with respect to the particular matter, but rather on a broad assessment of the temporal urgency of that matter in comparison with the temporal urgency of the scores, hundreds, or even thousands of other matters for which the agency has decisionmaking responsibility.

PIERCE, *supra*, § 12.3, at 1068.

F.Supp.2d 92, 113 (D.D.C. 2003) ("The [*TRAC*] factors make clear that an analysis of whether unreasonable delay has occurred is heavily dependent on the statutory context"). Finally, a finding of unreasonable delay under the *TRAC* factors is appropriate only when "the delay is egregious." *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001).

Turning to the first two *TRAC* factors (rule of reason and statutory timeline), by enacting Section 707 Congress conclusively determined the reasonableness of the Commission not acting on Silberstein's rulemaking petition while the appropriations prohibition is in force. Contrary to Silberstein's contention in his mandamus petition (at 14) that the Commission's "[o]ngoing [f]ailure to [a]ct" is inconsistent with "[a]ny" rule of reason, the Commission is adhering to federal law by not acting and this, by definition, cannot violate any potential rule of reason.

The third *TRAC* factor (human health and welfare) would weigh against an order compelling agency action even if the Commission were not precluded from taking the action Silberstein is seeking, because any delay in issuing an order responding to Silberstein's rulemaking petition will not result in the kind of direct threat to human health and welfare that might weigh in favor of a court issuing a writ of mandamus compelling agency action. *TRAC*, 750 F.2d at 80 ("[D]elays that might be reasonable in the sphere of economic regulation are less tolerable

when human health and welfare are at stake.").[9] As Silberstein concedes in his mandamus petition (at 19), the requested rulemaking is a public-company disclosure rule aimed at investors to provide them with information that the rulemaking petitioners contend may assist investors' decisions; such a rule, were it eventually adopted, would be an economic regulation that would have no direct bearing on public health or welfare. It thus follows that any delay in issuing a final order granting (or denying) Silberstein's rulemaking petition requesting such a rule would not cause direct harm to the public health or welfare.

The fourth *TRAC* factor (competing agency priorities) also counsels against this Court issuing a writ of mandamus. By directing that the Commission not expend appropriated funds "to finalize, issue, or implement any … order regarding disclosure of political contribution," Congress has effectively removed consideration of Silberstein's rulemaking petition from the list of regulatory activities that the Commission has discretion to undertake. Section 707 is thus a clear signal from Congress that the Commission's cannot make disclosure of political contributions a regulatory priority. By contrast, Congress itself has

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[9] *Cf. In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 551 (D.C. Cir. 1999) (directing Mine Safety and Health Administration to promulgate new standards to protect miners from harmful gaseous emissions); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (explaining that the serious health risks associated with cadmium exposure warranted setting a deadline for finalizing new requirements for handling cadmium).

determined many of the Commission's regulatory priorities in recent years by affirmatively mandating in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) and the Jumpstart Our Business Startups Act of 2012 (JOBS Act) that the Commission undertake nearly 100 new extensive rulemakings.[10]

The fifth *TRAC* factor provides that the Court may take into account the nature and extent of the interests prejudiced by delay. The only potential harm from agency inaction that Silberstein's mandamus petition identifies (at 18-19) is that investors may not be receiving information about the campaign-related expenditures of the public companies in which they invest. But any such potential harm results from Section 707's prohibition on expending funds to finalize, issue, or implement a rule or regulation regarding the disclosure of political

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[10] *See* Spotlight on Implementing the Dodd-Frank Act, (at: http://www.sec.gov/spotlight/dodd-frank.shtml) (last visited on May 9, 2016) (detailing the current status of the Commission's mandatory rulemakings under the Dodd-Frank Act, as well as the status of other Dodd-Frank mandates); Spotlight on JOBS Act (at: http://www.sec.gov/spotlight/jobs-act.shtml (last visited on May 9, 2016) (discussing the regulatory actions mandated by the JOBS Act). These Congressionally mandated rulemakings have involved novel and complex matters, including, for example, rules that: govern the previously unregulated derivatives market; impose proprietary trading restrictions on many financial institutions; increase transparency for hedge funds and private equity funds; give investors a say on executive compensation; establish a new whistleblower program; lift the ban on general solicitation for certain private securities offerings; reform and more intensely oversee credit rating agencies; and require the disclosure of payments from resource extraction issuers to governments for the extraction of oil and certain other natural resources.

contributions—a circumstance that neither the Commission nor this Court is empowered to alter.

Finally, Silberstein has offered no proof to support the last *TRAC* factor (impropriety causing the agency delay). Although Silberstein suggests (at 20) that "the delay likely is due to hostility some congressional overseers have expressed toward a corporate disclosure rule," the fact is that Congress through Section 707 has now prohibited the Commission from expending funds to issue a corporate political disclosure rule. It cannot be claimed that, by adhering to that statutory prohibition, the Commission is somehow acting improperly.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court reject Silberstein's petition for a writ of mandamus.

Respectfully Submitted,

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May 2016

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3,748 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14-Point Times New Roman.

/s/ William K. Shirey
WILLIAM K. SHIREY

May 9, 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Court's CM/ECF system on May 9, 2016, which will electronically serve all counsel of record.

/s/ *William K. Shirey*
WILLIAM K. SHIREY

May 9, 2016