Nos. 16-3360, 16-3732

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE REPUBLICAN PARTY, GEORGIA REPUBLICAN PARTY, and NEW YORK REPUBLICAN STATE COMMITTEE,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION, and MUNICIPAL SECURITIES RULEMAKING BOARD,

Respondents.

On Petition for Review to the Securities and Exchange Commission

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, RESPONDENT

ANNE K. SMALL
General Counsel

SANKET J. BULSARA
Deputy General Counsel

MICHAEL A. CONLEY
Solicitor

JEFFREY A. BERGER
DANIEL STAROSELSKY
Senior Litigation Counsel

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-5774 (Staroselsky)

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STATEMENT REGARDING ORAL ARGUMENT

The Securities and Exchange Commission's brief addresses only whether this Court has jurisdiction over the petitions for review. Because the Commission did not issue any order regarding the Municipal Securities Rulemaking Board's proposed rule change that petitioners have challenged, there is no Commission reasoning regarding the merits that counsel can discuss or defend before the Court. In addition, an appropriations statute precludes counsel from using appropriated funds to address the merits issues raised by petitioners, which may be construed as implementing the MSRB's rule. Nevertheless, the jurisdictional question is independently significant, and the Commission respectfully submits that oral argument may assist the Court in its consideration of this important issue. Fed. R. App. P. 34(a)(2)(C); 6th Cir. R. 34(a).

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PRELIMINARY STATEMENT

A unique set of circumstances deprives this Court of jurisdiction to hear this case. The petitioners are three state political parties that seek to challenge a rule of the Municipal Securities Rulemaking Board (MSRB), which is a non-governmental self-regulatory organization (SRO) that the Securities and Exchange Commission oversees. Petitioners have named the Commission as a respondent, and have invoked this Court's jurisdiction under Section 25(a) of the Securities Exchange Act of 1934.

But Section 25, which provides for direct appellate review only for a "final order" of the Commission, and not an SRO like the MSRB, does not supply jurisdiction to hear petitioners' challenge because it is undisputed that the Commission did not issue *any* order regarding the MSRB's proposed rule change. There is no Commission order in the Federal Register, in petitioners' appendix, or anywhere else. Rather, the MSRB's proposed rule change went into effect solely as a result of an Exchange Act provision that makes SRO rules become effective in the absence of Commission action. That is, after the Commission did not act to approve or disapprove the rule change, it went into effect by operation of law—by congressional will.

The Commission did not act because it could not do so: two days after the MSRB filed the proposed rule change for the Commission's review, Congress enacted legislation prohibiting the Commission from using appropriated funds to "finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions." This appropriation provision applies to the MSRB's proposed rule change because it extended to newly regulated entities a pre-existing requirement that certain political contributions be publicly disclosed. Congress has continued that funding restriction through April 28, 2017.

Petitioners also invoked the Administrative Procedure Act (APA) as a basis for review, but the APA also requires, as a predicate for its application, the existence of "agency action." Although the APA in limited circumstances allows for review of an

agency's "failure to act," such circumstances are not present here because petitioners do not seek to compel the Commission to engage in any discrete action that the Commission was required—but failed—to take regarding the MSRB's proposed rule change. Nor could the Court order such agency action in any event because the continuing appropriations restriction precludes the Commission (through at least April 2017) from using appropriated funds to issue any order regarding the disclosure of political contributions, which the MSRB's rule requires.

While petitioners are currently pursuing a challenge (in the Eleventh Circuit) to another SRO's pay-to-play rule in which these precise jurisdictional obstacles are not present (because the Commission approved those rules by "order"), in this case, the combination of the statutory review scheme and the appropriations restriction imposed by Congress means that there is no Commission order regarding the MSRB's proposed rule change for this Court to review, no jurisdiction to hear the case, and no remedy for the Court to provide. Because Commission counsel cannot supply the justification for the Commission's (in)action *post-hoc* and because the appropriations language also precludes the Commission from "implement[ing]" the MSRB's rule change, which we interpret as barring us from addressing the merits, this brief addresses only this Court's jurisdiction to hear petitioners' challenge.

STATEMENT OF JURISDICTION

As discussed below, the Court lacks jurisdiction to hear this case.

STATEMENT OF THE ISSUE

As discussed, the Commission cannot address the merits. Therefore, this brief addresses only whether the Commission has entered an "order" subject to review under Exchange Act Section 25(a) or taken agency action subject to judicial review under the APA.

STATEMENT OF THE CASE

A. Statutory Background

1. The MSRB is a self-regulatory organization that regulates brokers, dealers, municipal securities dealers and municipal advisors.

Securities industry self-regulation by non-governmental entities commonly known as self-regulatory organizations, or SROs, "has a long tradition in the U.S. securities markets." *Concept Release Concerning Self-Regulation*, Exchange Act Release No. 50700, 2004 WL 2648179, at *3 (Nov. 18, 2004). With the establishment of the Securities and Exchange Commission in 1934, "the self-regulatory system was incorporated into the federal securities laws." *Id.*, 2004 WL 2648179, at *2.

Established as part of the Securities Acts Amendments of 1975, the MSRB is one such SRO. *See* Exchange Act Section 15B(b), 15 U.S.C. 78*o*-4(b); S. Rep. No. 94-75, 94th Cong. 1st Sess., 1975 WL 12347, at *46 (describing the newly created MSRB). Like other SROs, the MSRB is not a division of the Securities and Exchange Commission; it is an independent entity with its own staff and its own Board. Exchange Act Section 15B(b)(1), 15 U.S.C. 78*o*-4(b)(1); *see also* http://www.msrb.org.

The MSRB regulates brokers, dealers, municipal securities dealers, and, beginning in 2010, municipal advisors. Dodd-Frank Wall Street Reform and Consumer Protection Act, Title IX, Subtitle H, § 975, Pub. L. No. 111-203, 124 Stat. 1376, 1915–23 (2010) (amending Section 15B to add municipal advisors to the MSRB's jurisdiction).

The MSRB is authorized to propose for the Commission's review rules regarding, *inter alia*, transactions in municipal securities by brokers and dealers, advice provided to municipal entities and obligated persons by municipal advisors, and solicitation of municipal entities. Among other requirements, such rules "shall be designed" to "prevent fraudulent and manipulative acts and practices," to "promote just and equitable principles of trade," "to remove impediments to and perfect the mechanism of a free and open market in municipal securities," and "to protect investors, municipal entities, obligated persons, and the public interest." Exchange Act Section 15B(b)(2)(C), 15 U.S.C. 78*o*-4(b)(2)(C). The MSRB has proposed numerous rules for the Commission's review, and the Commission has issued numerous orders regarding them. *See* http://www.sec.gov/rules/sro/msrb.shtml# (listing SEC orders).

2. Congress has provided that proposed MSRB rules can become effective without the Commission taking action to approve them.

The process for Commission review of proposed MSRB rules is governed by Exchange Act Section 19(b). 15 U.S.C. 78s(b); *see* Exchange Act Section 3(a)(26), 15 U.S.C. 78c(a)(26) (defining "self-regulatory organization" to include the MSRB

"for purposes of" Section 19(b)). Before 2010, Section 19(b) did not address what would happen if the Commission did not act upon a proposed rule within a certain time period. 15 U.S.C. 78s(b)(2) (2006). Several SROs jointly wrote to Congress that the Commission's processing of proposed rule changes was a "point of frustration" for them. S. Rep. No. 111-176, at 106 (Apr. 30, 2010). In response to these concerns, Congress amended Section 19(b) in 2010. *See* Dodd-Frank Act, Title IX, Subtitle A, § 916, 124 Stat. at 1833–35. Congress sought to "streamline SRO rule filing procedures by requiring the SEC to complete the process of reviewing and taking action on proposed SRO rules within [a] specified time frame." H.R. CONF. REP. 111-517, at 727 (Jun. 29, 2010); *see also Rules of Practice*, Exchange Act Release No. 63723, 76 FED. REG. 4066 (Jan. 24, 2011) (discussing Dodd-Frank and amending the Commission's rules to implement the statutory changes).

Under the current version of Section 19(b), an SRO such as the MSRB commences the review process by filing a proposed rule change with the Commission, which triggers a requirement that the Commission "publish notice" of the proposal and give "interested persons an opportunity" to comment on the proposed rule change. 15 U.S.C. 78s(b)(1). Within 45 days "after the date of publication of a proposed rule change," the Commission "shall * * * by order, approve or disapprove the proposed rule change; or * * * institute proceedings under subparagraph (B) to determine whether the proposed rule change should be disapproved." Exchange Act Section 19(b)(2)(A)(i), 15 U.S.C. 78s(b)(2)(A)(i). Most significantly for this case, the

Dodd-Frank Act amendments imposed a default approval if the Commission does not act within the allotted time: "[a] proposed rule change shall be deemed to have been approved by the Commission, if * * * the Commission does not approve or disapprove the proposed rule change or begin proceedings under subparagraph (B) within the period described in subparagraph (A)." Exchange Act Section 19(b)(2)(D), 15 U.S.C. 78s(b)(2)(D).

B. The changes to the MSRB rule that petitioners challenge went into effect by operation of law after the Commission did not take any action regarding those changes.

1. In 1994, the MSRB proposed, and the Commission entered an order approving, Rule G-37 to address "pay to play" practices.

The MSRB sought to amend Rule G-37, which the MSRB originally proposed—and the Commission approved by final order—in 1994. *See* Exchange Act Release No. 33868, 1994 WL 117907 (Apr. 7, 1994) (order approving Rule G-37). Rule G-37 was a response to "[w]idespread reports" that the integrity of the municipal securities markets was being undermined by "pay to play" practices—instances in which municipal securities dealers made payments and political contributions to elected officials in order to obtain underwriting business from State and local governments for municipal securities offerings. *Id.*, 1994 WL 117907, at *1, *3. Rule G-37 sought to address these pay to play arrangements principally by prohibiting broker-dealers from engaging in municipal securities business with a State or local

governmental issuer for two years after making contributions above a *de minimis* level to elected officials who can influence their selection. *See id.*, 1994 WL 117907, at *4.

After a notice and comment period, the Commission issued an order approving Rule G-37. In that order, the Commission explained that the MSRB had statutory authority to adopt the rule, described how the rule would address pay to play, and discussed commenters' First Amendment objections to the rule. *See generally id.*, 1994 WL 117907. The chairman of a state political party who was also a registered broker and dealer of municipal securities challenged the "SEC's order approving Rule G-37" on First Amendment and other grounds. *Blount v. SEC*, 61 F.3d 938, 940 (D.C. Cir. 1995). In addressing the merits of the challenge, the D.C. Circuit repeatedly discussed the Commission's reasoning as articulated in the order approving the rule. *Id.* at 941–48; *see also Wagner v. FEC*, 793 F.3d 1, 16–17, 26 (D.C. Cir. 2015) (en banc), *cert. denied sub nom. Miller v. FEC*, 136 S. Ct. 895 (2016) (describing Rule G-37 and the *Blount* decision in upholding a statutory bar on contributions by federal contractors).

2. In appropriations legislation enacted in December 2015, Congress precluded the Commission from using appropriated funds to finalize, issue, or implement orders, rules, or regulations regarding the disclosure of political contributions.

In December 2015, Congress enacted appropriations legislation restricting the Commission's authority to take certain actions in relation to rules and orders regarding the disclosure of political contributions. In the 2016 Appropriations Act, Congress provided that "[n]one of the funds made available" by the Act could be

used by the 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." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. O, Title VII, § 707, 129 Stat. 2242, 3029–30 (signed into law on December 18, 2015). Congress has extended this limitation on the use of funds, without alteration, in subsequent legislation. *See* Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act, Div. C, § 106, Pub. L. No. 144-223, 130 Stat. 857, 909–10 (continuing the funding restriction through December 9, 2016); Further Continuing and Security Assistance Appropriations Act, 2017, § 101, Pub. L. No. 114-254, 130 Stat. 1005, 1005–06 (continuing the funding restriction through April 28, 2017).

This type of funding restriction has serious implications for the Commission. As a general matter, "an agency's decision to ignore congressional expectations [as reflected in appropriations provisions] may expose [the agency] to grave political consequences." *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

Moreover, if the Commission were to use appropriated funds in contravention of the restriction, it would run afoul of the Antideficiency Act, 31 U.S.C. 1341, *et seq.* That Act is "one of the major laws in the statutory scheme by which Congress exercises its constitutional control of the public purse"—it is "'the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on

expenditure of appropriated funds.'" U.S. Government Accountability Office, *Principles of Federal Appropriations Law* at 6-34 (3d ed. 2006), quoting *Hopkins & Nutt*, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 51, 56 (1978). The Act prohibits government employees from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. 1341(a)(1)(A). Federal employees who violate the Act are subject to administrative sanctions, such as suspension from duty without pay and removal from office, and even penal sanctions, such as fines, imprisonment, or both. 31 U.S.C. 1349–50; *see also* U.S. Government Accountability Office, *Antideficiency Act Reports—Fiscal Year 2015* (available at http://www.gao.gov/assets/680/673853.pdf) (cataloguing reports of potentially violative conduct and describing remedial actions taken).

3. The MSRB proposed amendments to Rule G-37, and the proposed rule change went into effect by operation of law after the Commission took no action upon it due to the funding restriction.

The MSRB submitted its proposed rule change to the Commission on December 16, 2015, two days before the Appropriations Act was signed into law. App-53. In the notice that was eventually published in the Federal Register, nearly all of which the MSRB prepared,[1] the MSRB described its proposed rule change as part of a congressionally mandated "process of developing a comprehensive regulatory

[1] The Secretary of the Commission prepared only the introductory paragraph, which provides notice of the MSRB's proposal, App-53, and the concluding paragraph, which informs the public how it can submit comments, App-79.

framework for municipal advisors and their associated persons." *Id.* Among other changes, the MSRB proposed to extend Rule G-37(e)'s disclosure requirements to municipal advisors. App-66. Under Rule G-37(e), certain covered entities must file with the MSRB quarterly reports tracking political contributions to certain government officials, and the MSRB makes those reports publicly available. *Id.*

After the MSRB submitted its proposed rule change, the Secretary of the Commission, pursuant to Section 19(b)(1), 15 U.S.C. 78s(b)(1), published notice of the filing on December 23, 2015. *See* http://www.sec.gov/rules/sro/msrb/2015/34-76763.pdf. The Commission received five comments regarding the MSRB filing. *See* http://www.sec.gov/comments/sr-msrb-2015-14/msrb201514.shtml.

The Commission did not approve or disapprove the proposed rule change, nor did it institute proceedings to determine whether to approve or disapprove it, within the relevant time frame. *See* Exchange Act Section 19(b)(2)(A)(i), 15 U.S.C. 78s(b)(2)(A)(i); Exchange Act Section 19(b)(2)(E), 15 U.S.C. 78s(b)(2)(E). Accordingly, the proposed rule change was "deemed to have been approved by the Commission" on February 13, 2016. Exchange Act Section 19(b)(2)(D)(i), 15 U.S.C. 78s(b)(2)(D)(i). The Commission did not issue an order regarding the rule change to Rule G-37 and it did not publish any further notice regarding the rule change. Nor did the Commission address any of the submitted comments. On February 17, 2016, the MSRB announced that the proposed rule change to Rule G-37 had been "deemed approved." App-1 (MSRB regulatory notice).

C. Prior Proceedings

On April 12, 2016, in this Court, the Tennessee Republican Party filed a petition for review of amended Rule G-37, naming the Commission and the MSRB as respondents. Dkt. 1-1. The following day, the Georgia Republican Party and the New York Republican State Committee filed a nearly identical petition for review (also naming the Commission and MSRB as respondents) in the Eleventh Circuit. *See Georgia Republican Party v. SEC*, No. 16-11656 (11th Cir. Apr. 13, 2016).[2] The Eleventh Circuit transferred its case to this Court pursuant to 28 U.S.C. 2112, where it was consolidated with the Tennessee Republican Party's petition. The Commission then moved to dismiss the petitions for lack of jurisdiction, and a motions panel of this Court referred that motion to the merits panel. Dkt. 36-1 (Oct. 4, 2016).

STANDARD OF REVIEW

This Court reviews questions of subject matter jurisdiction *de novo*. *Todd v. Weltman, Weinberg & Reis Co.*, 434 F.3d 432, 435 (6th Cir. 2006).

SUMMARY OF ARGUMENT

1. Petitioners have not satisfied their burden of establishing that this Court has jurisdiction to hear the merits of their challenge. Section 25(a) of the Exchange Act, which permits aggrieved parties to seek review of a "final order of the

[2] Under the venue provision of Section 25(a)(1), the New York Republican State Committee could not have sought relief in the Eleventh Circuit or this Court. Section 25(a)(1) states that a party aggrieved by a final order must choose between the D.C. Circuit or the place where it "resides or has [its] principal place of business."

Commission" in an appropriate court of appeals, does not confer jurisdiction because the Commission did not issue—and could not have used funds appropriated under the 2016 Appropriations Act to issue—any "order" regarding the MSRB's rule change. Rather, the rule change was "deemed approved" under Exchange Act Section 19(b), which Congress revised to allow proposed SRO rules to become effective notwithstanding the Commission's inaction.

A series of D.C. Circuit decisions explains that when rules or orders become effective pursuant to such "deemed approved" provisions, they are not reviewable as "final orders" or "agency action." As those cases indicate, it was Congress, not the Commission, that decided that proposed SRO rule changes like the MSRB's proposed rule change would be "deemed approved" even when the Commission does not take any action regarding such proposed rules.

The Commission's inaction should not be treated as a Commission order. Because the Commission did not act, there is no agency reasoning and no order for the Court to affirm, vacate, or modify. Moreover, a remand would be fruitless because the Commission is still hobbled by an appropriation restriction that precludes it from using appropriated funds to issue any order regarding a rule such as the one that petitioners challenge.

Petitioners' arguments that the Court could nonetheless exercise jurisdiction under Section 25(a) have no merit. There is no basis in the record for petitioners' assertion that the Commission made a "decision to approve" the MSRB's rule change.

Petitioners' argument that the rule change could not have become effective without the Commission's approval by "order" ignores the plain language of the Exchange Act. The D.C. Circuit's decisions explaining that "deemed approved" provisions do not yield reviewable agency action do not turn, as petitioners argue, on differences in the statutory language involved in those cases. And, contrary to petitioners' claim, if the Commission had used funds appropriated for Fiscal Year 2016 to disapprove the MSRB's rule change, it would have violated Congress's prohibition against the use of such funds to issue any order "regarding" the disclosure of political contributions.

Finally, the lack of jurisdiction in these unique circumstances is a consequence of the system that *Congress* mandated. In other instances (including in a nearly identical challenge to another SRO's pay to play rule currently being litigated by the same petitioners represented by the same counsel), the jurisdictional obstacles described in this brief do not exist and will not prevent judicial review. But in this case, there is no jurisdiction, and the petitions should be dismissed.

2. For many of the same reasons that there is no reviewable final order under Section 25 of the Exchange Act, there is no "agency action" as defined under the APA. The APA's inclusion of "failure to act" in the definition of "agency action" does not alter the result. The Supreme Court has held that review of an agency's failure to act is available under the APA only where, as in a mandamus action, the plaintiff can show "that an agency failed to take a *discrete* agency action that it is *required to take*." Petitioners have argued that the Commission's inaction is reviewable

because, they contend, the Commission was required to disapprove the MSRB's proposed rule change. But nothing in the Exchange Act required the Commission to take that discrete action, and, indeed, the Appropriations Act stated that the Commission could not use appropriated funds to issue any such order.

3. In these unique and particular circumstances, counsel cannot address the merits of petitioners' challenge. Because the Commission did not issue any order regarding the MSRB's proposed rule change, counsel cannot offer, *post hoc*, reasoning that the Commission did not itself supply in support of an order it did not issue. Addressing the challenge on the merits could also be viewed as violating Congress's continuing restriction against the use of appropriated funds to "implement" a rule "regarding the disclosure of political contributions," such as the one that petitioners challenge. Counsel's inability to brief the merits is not a concession, forfeiture, or waiver with respect to petitioners' substantive arguments.

ARGUMENT

I. There is no jurisdiction under Section 25(a)(1) of the Exchange Act because the Commission did not issue a "final order."

"As 'courts of limited jurisdiction,' federal courts 'possess only that power authorized by Constitution and statute.'" *United States v. Lucido*, 612 F.3d 871, 873 (6th Cir. 2010), quoting *Kokonnen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Public Citizen v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016) ("[A] federal court's subject-matter jurisdiction extends only so far as the Congress provides

by statute, and is strictly limited to the agency action(s) included therein.") (internal quotation marks, editing and citation omitted); 16 Wright & Miller, FED. PRAC. & PROC. § 3940 (3d ed. 2016 update) ("Jurisdiction in each case must be found in the specific provisions of a particular statute."). It is "to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokonnen*, 511 U.S. at 377 (internal citation omitted). Petitioners have not satisfied their burden of showing that this Court has jurisdiction over this case.

Petitioners invoke Section 25(a)(1) of the Exchange Act, which provides that a person aggrieved by "a final order" of the Commission may obtain review "of the order" by filing a petition for review in the appropriate court "within sixty days after the entry of the order." 15 U.S.C. 78y(a)(1). In the usual case, when the Commission affirmatively acts to approve or disapprove a proposed new SRO rule or a proposed change to an existing SRO rule, Section 25(a)(1) is the appropriate and exclusive vehicle for judicial review because, in that instance, there is a "final order." *See, e.g.*, *NetCoalition v. SEC*, 715 F.3d 342, 346–47 (D.C. Cir. 2013); *Domestic Secs., Inc. v. SEC*, 333 F.3d 239, 245–46 (D.C. Cir. 2003); *Blount*, 61 F.3d at 940.

This review mechanism is unavailable here because there is no "final order." The Commission took no action on the proposed rule change because it could not use appropriated funds to issue any order "regarding the disclosure of political contributions," and the MSRB's proposed rule change requires the disclosure of

political contributions. Because the Commission took no action on the proposed rule change, it was deemed approved by operation of law. In these circumstances, there is no jurisdiction to review under Section 25(a)(1). Because "'[w]ithout jurisdiction the court cannot proceed at all,'" the "'only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998), quoting *Ex Parte McCardle*, 7 Wall. 506, 514 (1868).

A. The approval by operation of law of the MSRB's proposed change to Rule G-37 does not give rise to a "final order" that this Court has jurisdiction to review.

1. There is no Commission order.

Petitioners point to no "final order" of the Commission because there is none. In nearly identical circumstances, a trilogy of D.C. Circuit cases explained why there is no reviewable agency order where, as here, the challenge is premised on the operation of a statutory "deemed granted" provision, such as Section 19(b)(2)(D) of the Exchange Act. *See Sprint Nextel v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007); *AT&T Corp. v. FCC*, 369 F.3d 554 (D.C. Cir. 2004) (per curiam); *Public Citizen v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016). This Court should adopt the reasoning of those decisions and dismiss the petitions for review.[3]

[3] While these cases are not binding in this Circuit, their holdings are directly on point and this Court frequently cites the D.C. Circuit's decisions for their persuasive value on administrative law issues. *E.g.*, *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281,

In *Sprint Nextel v. FCC*, the D.C. Circuit considered whether a petition that went into effect by operation of law constituted a "final orde[r]" for jurisdictional purposes. 508 F.3d at 1131, citing 28 U.S.C. 2342(1) and 47 U.S.C. 402(a).[4] Verizon requested that the FCC refrain (or "forbear") from applying certain regulations, and the FCC was required by statute to forbear if Verizon complied with various requirements. *Id.* at 1131, citing 47 U.S.C. 160(a). In the event that the FCC did not deny the request within a specified amount of time, the relevant statute commanded that the "'petition shall be deemed granted.'" *Id.*, quoting 47 U.S.C. 160(c). The FCC deadlocked in its vote on Verizon's forbearance petition, it did not act within the

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290–92 (6th Cir. 2015); *Howard v. Solis*, 570 F.3d 752, 756–57 (6th Cir. 2009); *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 779–80 (6th Cir. 2008).

[4] The FCC's direct-review statute, 28 U.S.C. 2342(1), provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.

The FCC's "deemed granted" provision, 47 U.S.C. 160(c), provides in relevant part:

> Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission.

statutory time period, and Verizon's petition "'was deemed granted by operation of law.'" *Id.*

Several other telecommunications providers sought judicial review of the FCC's disposition of Verizon's request for forbearance, but the court dismissed their appeal because there was no "order" to review, which was a prerequisite for the invocation of the statutory provisions granting exclusive appellate review. *See* 28 U.S.C. 2342(1); 47 U.S.C. 402(a). The court explained that "[i]n those instances in which the [FCC] does not deny a forbearance petition, Congress has spelled out the legal effect: the petition 'shall be deemed granted.'" *Id.* at 1132, quoting 47 U.S.C. 160(c). The grant did "not result in reviewable agency action" because "Congress, not the [FCC], 'granted'" the request to forebear. *Id.* at 1132. When the FCC "failed to deny Verizon's forbearance petition within the statutory period, Congress's decision—not the agency's—took effect." *Id.*

The D.C. Circuit stated (*id.*) that its holding in *Sprint Nextel* was "compelled" by its decision in *AT&T Corp. v. FCC*, 369 F.3d 554. In *AT&T*, Verizon was subject to congressionally imposed restrictions that would expire unless the FCC extended them "'by rule or order.'" *Id.* at 556, quoting 47 U.S.C. 272(f)(1).[5] The FCC did not extend

[5] 47 U.S.C. 272(f)(1) provides:

> The provisions of this section (other than subsection (e) of this section) shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating

them, and AT&T, a competitor, filed a petition for review of the FCC's "decision to permit the sunset to occur." *Id.* at 559. The court dismissed the petition, holding that AT&T had "incorrectly assume[d] that the decision whether to sunset the [relevant] safeguards lies with the FCC." *Id.* at 560. This assumption, the court explained, was "simply wrong" because it was "Congress"—not the FCC—that "made the decision to extinguish the protections of [the safeguards] *by operation of law*." *Id.* (emphasis in original).

In *Public Citizen v. FERC*, the D.C. Circuit recently adhered to, and elaborated upon, the holdings in *Sprint Nextel* and *AT&T*. The petitioners in *Public Citizen* sought review of notices issued by the Federal Energy Regulatory Commission (FERC), which explained that, as a result of a deadlock by FERC's Commissioners, certain electric rates would become effective. 839 F.3d at 1167–69. To obtain review, the petitioners invoked 16 U.S.C. 825*l*(b), which permits any party "aggrieved by an order issued by [FERC]" to seek review "of such order" in the appropriate court of appeals. Following *Sprint Nextel* and *AT&T*, the court dismissed the petitions for lack of jurisdiction, reasoning that the "nature of a deadlock confirms" that FERC did not "engage[] in an 'action' of any kind." *Id.* at 1170.

The court observed that Congress knows how to authorize judicial review of an agency's failure to act, but did not create such a review mechanism for FERC. As an

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company affiliate is authorized to provide interLATA telecommunications services under section 271(d) of this title, unless the Commission extends such 3-year period by rule or order.

example, the court pointed to the Federal Election Campaign Act (FECA). There, the treatment of deadlocks as reviewable agency action "is baked into the very text of the statute," which authorizes review when a party is aggrieved "*by a failure of the* [Federal Election Commission] *to act*" in certain circumstances. *Public Citizen*, 839 F.3d at 1170 (emphasis in original).[6] The court also noted that because the FEC "includes six Commissioners, distinguishing it from the vast majority of agencies with an odd number of members," "Congress uniquely structured the FEC toward maintaining the status quo, increasing the appropriateness of recognizing deadlocks as agency action in that specific context." 839 F.3d at 1171. Because FERC's enabling statute lacked these unusual characteristics, *Public Citizen* declined to treat FERC's deadlock as reviewable agency action. *Id.*

The decisions in *Sprint Nextel*, *AT&T*, and *Public Citizen* should guide this Court to dismiss the petitions in this case. Like the judicial review provisions in those cases, the Exchange Act grants jurisdiction only when the Commission issues an "order," and there is no order in this case. Petitioners nevertheless ask the Court to treat the "deemed" approval mechanism that Congress created in amended Section 19(b)(2)(D) as producing a constructive Commission order. But the *Sprint Nextel* line of cases teaches that when Congress enacts such "deemed approved" provisions, it is not the

[6] Specifically, FECA authorizes "[a]ny party aggrieved by an order of the Commission *dismissing a complaint* filed by such party * * * *or by a failure of the Commission to act* on such complaint" to seek judicial review." 52 U.S.C. 30109(a)(8)(A) (emphases added).

relevant agency that acts. This is true regardless of whether the inaction—or, as here, an inability to act—arises as the result of a deadlock or a funding restriction. In either circumstance, it is Congress that dictates the outcome, and that outcome cannot be challenged under provisions allowing for review of an agency's "order."

As *Public Citizen* explains, Congress could have provided for review of agency inaction, just as it did with the FEC when it structured that agency such that its inaction is "part of its *modus operandi*." 839 F.3d at 1171. But the unique structural design features and statutory language that justify treating FEC deadlocks as "an exception to the rule" that agency inaction does not result in a reviewable order, *id.*, are not present in the Exchange Act or in the structure of the Commission. *See* Exchange Act Section 4(a), 15 U.S.C. 78d(a) (the SEC is "composed of five commissioners").

In short, the MSRB's rule change went into effect by operation of law, not because the Commission took any action. *Sprint Nextel*, 508 F.3d at 1132; *AT&T*, 369 F.3d at 560. Petitioners seek review of the Commission's supposed "approval" of the MSRB's amendments to Rule G-37, Br. 3, but, as the D.C. Circuit rhetorically asked in *Sprint Nextel*, "where is the Commission 'order'?" 508 F.3d at 1131. There is none, which is why these petitions should be dismissed for lack of jurisdiction.

2. The Commission's inaction should not be treated as a Commission order.

Petitioners would have the Court treat the Commission's silence as the equivalent of an order. But "[t]hat the Commission took no action in this case is clearer still in light of the implications of a contrary ruling." *Sprint Nextel*, 508 F.3d at 1132. Under the APA, which "instructs courts to set aside agency action 'found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" reviewing courts "require more than a result"—they also "need the agency's reasoning for that result." *Sprint Nextel*, 508 F.3d at 1132, quoting 5 U.S.C. 706(2)(A); *see also Gibson v. SEC*, 561 F.3d 548, 552–53 (6th Cir. 2009) (standard of review of Commission orders). But if this Court "found reviewable action in this case, where would [it] find the Commission's reasoning?" *Id.* at 1133. Nowhere; it does not exist because Congress stated that the Commission could not use appropriated funds to issue any order "regarding the disclosure of political contributions," and the MSRB's proposed amendments to Rule G-37(e) concern the disclosure of political contributions.

Moreover, the "ground[s] upon which an administrative order must be judged are those upon which the record discloses that its action was based.'" *Atrium Med. Ctr. v. United States HHS*, 766 F.3d 560, 568 (6th Cir. 2014), quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *accord SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an

administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency."). As a corollary, courts "may not accept appellate counsel's *post hoc* rationalizations for agency action because *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168–69 (1962). Here, because there is no order and no basis articulated, anything said by Commission's counsel about the merits would be considered *post hoc* rationalizations. *See NetCoalition*, 715 F.3d at 346 (noting that the Commission's "refusal to join the merits issue is well-taken" because the Commission "conducted no proceeding and created no administrative record documenting its decision-making process or explaining its reasoning").[7]

In their opposition to the Commission's motion to dismiss, petitioners argued that *Chenery* is no obstacle here because, in their view, "[e]ither the [MSRB's] rule meets the requirements of the Exchange Act and Constitution, in which case we must reject the challenge, or it does not." Petitioners' Opposition to the Securities and Exchange Commission's Motion to Dismiss at 19, Dkt. 34 (July 27, 2016) (MTD Opp.) (internal quotation marks and alterations omitted). But because the Commission did not act, it did not explain the governmental interest underlying the amendments to the MSRB's rule or how those proposed changes further that interest

[7] The MSRB, which is not bound by the Appropriations Act, has explained its reasons for its proposed amendments to Rule G-37.

(and could not have used appropriated funds to do so), as it has in the past. *See*, *e.g.*, *Blount v. SEC*, 61 F.3d 938, 944–48 (D.C. Cir. 1995) (citing and analyzing the Commission's reasoning in reviewing and upholding the MSRB's rule); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (agency's interpretation of the scope of its regulatory authority is entitled to *Chevron* deference). Consistent with *Chenery*, agency counsel cannot now offer a response that the Commission itself did not provide to petitioners' contention, Br. 44–46, that there is no legitimate governmental interest supporting the MSRB's rule change.

There is also the matter of a judicial remedy. Petitioners ask the Court to "vacate the Commission's approval of the MSRB's proposed rule," Br. 53, but there *is no* such "Commission[] approval." In cases where an agency acts but fails to explain itself, the usual relief is a remand. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("[If the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."). But even that option is unavailable, because Congress has continued to preclude the Commission from using appropriated funds to issue an order regarding rules such as amended Rule G-37(e).

Petitioners' request that the Court "order the SEC to disapprove of the [MSRB's] rule," Br. 52, should also be rejected. Where an agency's "failure to act" is based on its failure to adhere to statutory "timing requirements," courts are not free

to "impose their own coercive sanction." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993). Instead, Congress—not a court—"specif[ies] a *consequence* for noncompliance with statutory time provisions." *Id.* (emphasis added). Here, Congress specified that default approval of the proposed SRO rule change is the "Result" of the Commission's inaction. Section 19(b)(2)(D). Petitioners cite no authority that would authorize the Commission, on remand, to override this congressionally mandated result. Plus, even if the Commission could act in such a manner, in this case, the Commission may not use appropriated funds to issue the order petitioners seek.

B. Petitioners' efforts to identify a reviewable order are unavailing.

In arguing that a reviewable order exists, petitioners: (1) assert without any basis in the record that the Commission in fact approved the rule change; (2) erroneously argue that the MSRB's rule change could not have gone into effect unless the Commission approved it by order; (3) fail to distinguish the D.C. Circuit's on-point decisions explaining that deemed-approved provisions do not yield reviewable agency action; (4) misread the Appropriations Act as requiring the Commission to disapprove the rule change; and (5) make unavailing policy arguments.

1. There is no basis in the record for petitioners' assertion that the Commission decided to approve the MSRB's rule change.

Faced with the undisputed fact that there is no Commission order taking *any* view on the MSRB's rule change, petitioners nevertheless repeatedly refer to the

"SEC's approval" of, or "decision to approve and finalize," the rule change. E.*g.*, Br. 1, 3, 7, 19, 29. But nowhere in their brief or 320-page appendix do petitioners identify any Commission order approving or instituting proceedings regarding the proposed rule change. No such order exists.

In fact, petitioners concede the point when they contend that the Appropriations Act required the Commission to disapprove the MSRB proposed rule change by order, but the Commission failed to do so. Br. 50–53. While this argument rests upon a misreading of the appropriations statute, *infra* pp. 30–32, it acknowledges the absence of a "final order," which is the requirement for jurisdiction under Section 25(a)(1).

2. Petitioners erroneously argue that, under the Exchange Act, the MSRB's rule change could not have gone into effect unless the Commission approved it by order.

Unable to identify any Commission "order" approving the MSRB's rule amendment, petitioners have contended that because Exchange Act Section 19(b)(2)(A) provides that the Commission must either "approve or disapprove" a proposed SRO rule, and the Commission can only act "'by order,'" the Commission must have issued an order in this instance. MTD Opp. 4–5, citing 15 U.S.C. 78s(b)(2)(A). But Section 19(b)(2)(A) must be read in conjunction with Section 19(b)(2)(D), which cross-references sub-paragraph (A) and provides that a proposed rule may go into effect if "the Commission does not issue an order approving or disapproving the proposed rule." 15 U.S.C. 78s(b)(2)(D). The Section 19(b)(2)(D)

default was triggered here after Congress passed the funding restriction prohibiting the Commission from using appropriated funds to issue an order "regarding" the disclosure of political contributions, which was part of the MSRB's proposed rule change.

Similarly, in their opening brief, petitioners partially quote Section 19(b)(1)—focusing on the phrase "'[n]o proposed rule change shall take effect unless approved by the Commission'"—and erroneously conclude that the "Exchange Act guarantees that any rule proposed by an SRO becomes law only after obtaining the SEC's approval by order and thus being subject to judicial review." Br. 4–5, quoting 15 U.S.C. 78s(b)(1). But petitioners omit a crucial part of Section 19(b)(1); the full sentence also provides that a proposed rule change will take effect as "otherwise permitted in accordance with the provisions of this subsection." *Id.* One of those provisions is Section 19(b)(2)(D), under which an SRO rule goes into effect by operation of law and in the absence of a Commission order. Contrary to petitioners' argument that this provision mandates Commission action, Congress added the "deemed to have been approved" language in the Dodd-Frank Act precisely because it wanted SRO rules to go into effect even when the Commission does not affirmatively act upon them. 15 U.S.C. 78s(b)(2)(D); *see* S. Rep. No. 111-176, at 106; H.R. CONF. REP. 111-517, at 727.

3. Petitioners fail to distinguish the D.C. Circuit's on-point decisions explaining that "deemed approved" provisions do not result in reviewable agency action.

In their opposition to the Commission's motion to dismiss, petitioners sought to distinguish *Sprint Nextel* and *AT&T*, *see* MTD Opp. at 10–12, but the distinctions they offered are meritless.

Petitioners first argued that *Sprint Nextel* is distinguishable because Section 19(b)(2)(D) uses the phrase "by the Commission" (*i.e.*, "shall be deemed to have been approved by the Commission"), but that phrase does not appear in the statute in *Sprint* (*i.e.*, "shall be deemed granted if the Commission does not deny the petition"). MTD Opp. 11; *compare* 15 U.S.C. 78s(b)(2)(D) *with* 47 U.S.C. 160(c). But this does not alter the crucial similarity between *Sprint Nextel* and this case: that Section 19(b)(2)(D) says "deemed to have been approved by the Commission" does not mean the Commission has issued an order or taken action. Rather, Section 19(b)(2)(D) is a congressional choice to put a proposed SRO rule change into effect—precisely because the Commission has not acted. The relevant question for judicial review purposes is who has acted—Congress or the agency—and, just as in *Sprint*, the automatic, default nature of Section 19(b)(2)(D), combined with the absence of an order, deprives this Court of jurisdiction. *Sprint*, 508 F.3d at 1132.

Petitioners made a similar error in discussing *AT&T*. They claimed that whereas the statute in *AT&T* reflected Congress's intent that a regulation expire in the absence of affirmative FCC action, the Exchange Act "makes clear that '[n]o proposed

rule change shall take effect unless approved by the Commission.'" MTD Opp. 12, quoting 15 U.S.C. 78s(b)(1). Once more, petitioners misdescribed Section 19(b)(1) because they truncated their quotation of the statute, excising the part that states "unless approved by the Commission *or otherwise permitted in accordance with the provisions of this subsection*." One of those provisions is Section 19(b)(2)(D), which, similar to the statute at issue in *AT&T*, demonstrates that Congress—not the Commission—"made the decision" to have a proposed rule change become effective "by operation of law" when the Commission does not act. *AT&T*, 369 F.3d at 560.

4. Petitioners erroneously argue that the Appropriations Act required the Commission to disapprove the MSRB's rule change.

Despite insisting that the Commission made a "decision to approve" the MSRB's rule amendment, Br. 1, petitioners subsequently switch gears and assert that the Commission violated the 2016 Appropriations Act (and the Constitution's Appropriations Clause) by *not* taking action to disapprove the amendment. Br. 50–52. This argument cannot be reconciled with the language of the statute.

The 2016 Appropriations Act provided that "[n]one of the funds made available" by the Act could be used by the Commission to "finalize, issue, or implement any rule, regulation, or order *regarding* the disclosure of political contributions," Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. O, Title VII, § 707, 129 Stat. 2242, 3029–30 (emphasis added), and Congress has continued that funding restriction through at least April 28, 2017. As petitioners

appear to recognize, *see* Br. 52, if Congress sought to preclude the Commission from using appropriated funds to *approve* the MSRB rule amendment, it would have used the word "approving" instead of the broader word "regarding." But it opted for language that has a more comprehensive reach. *See* Merriam-Webster Dictionary Online, *Regarding* (defined as "with respect to: concerning") (available at http://bit.ly/2gTHmIe).

Petitioners miss the mark when they assert that "[h]ad the SEC disapproved the MSRB's rule, it would not have 'finalized, issued, or implemented' the rule." Br. 52. Absent the Appropriations Act, the Commission would not finalize or issue an MSRB rule; it would finalize or issue *an order* approving the MSRB rule change, provided that it found that the change was consistent with the Exchange Act. *See* 15 U.S.C. 78s(b)(2)(A)(i)(I), (b)(2)(B)(ii), (b)(2)(C)(i)–(ii). Likewise, to disapprove the rule change, the Commission would have had to use funds to finalize or issue an "*order regarding*" the disclosure of political contributions. The use of appropriated funds to engage in either action would have run afoul of that Act, subjected the agency to "grave political consequences," *Vigil*, 508 U.S. at 193, and exposed its staff to severe sanctions, *see supra* 9–10.

The elimination of jurisdiction that occurs when an appropriations provision effectively disables a path of judicial review is not novel, as demonstrated by the Supreme Court's decision in *United States v. Bean*, 537 U.S. 71 (2002). In *Bean*, the Court held that in the absence of a dispositive decision by an agency, which Congress

precluded when it denied the agency funds to make that decision, there could be no judicial review. 537 U.S. at 74–76. Petitioners have claimed that the appropriations language in *Bean* "extended far more broadly" than the provision here, MTD Opp. 16, but they again disregard Congress's use of the word "regarding," which creates a restriction that is no less broad than the one in *Bean*. 537 U.S. at 73; Appropriations Act § 707.[8]

5. Petitioners' policy arguments are unavailing.

There is no basis for petitioners' contention that, by pointing out the jurisdictional defect in their challenge, the Commission has engaged in "hands-off lawmaking" or has sought a "loophole that allows the SEC to turn proposed rules by SROs into unreviewable law." MTD Opp. at 9. There is "no indication that the Commission or individual Commissioners have abused [the statutory requirements] or have acted in bad faith," and "[a]bsent such evidence, it is appropriate to assume that their behavior is regular and proper." *Sprint Nextel*, 508 F.3d at 1133.

Indeed, when there is no funding restriction in play, the Commission has initiated proceedings, reviewed a proposed rule change regarding pay-to-play, and explained its rationale for approving or disapproving the SRO rule. This is how Rule G-37 was originally approved: the MSRB proposed the rule, the Commission

[8] The funding restriction in *Bean* prohibited the use of appropriated funds "'to investigate or act upon applications for relief from Federal firearms disabilities.'" *Bean*, 537 U.S. at 74–75, quoting Treasury, Postal Service, and General Government Appropriations Act, 1993, Pub. L. No. 102-393, 106 Stat. 1732.

reviewed it, and the D.C. Circuit reviewed the "SEC's order approving" the rule. *Blount*, 61 F.3d at 940; Exchange Act Release No. 33868, 1994 WL 117907.

Even more recently, the Commission issued a final order approving a pay-to-play rule promulgated by the Financial Industry Regulatory Authority (FINRA), another self-regulatory organization supervised by the Commission. Because FINRA's rule differs from the MSRB's rule and does not regulate the disclosure of political contributions, the Appropriations Act did not preclude the Commission from using appropriated funds to issue an order "regarding" that proposed rule, and the Commission issued an order explaining why it approved the rule and responding to constitutional concerns raised by commenters. *See* Securities and Exchange Commission, *Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Adopt FINRA Rule 2030 and FINRA Rule 4580 To Establish "Pay-To-Play" and Related Rules*, 81 FED. REG. 60051 (Aug. 31, 2016). The Commission's order approving the FINRA rule was challenged on nearly identical grounds by the same petitioners as in this case, represented by the same counsel, and absent any other jurisdictional defects, such as standing, the challenge will be heard on the merits by the Eleventh Circuit. Petition for Review, *Georgia Republican Party, New York Republican States Committee, and Tennessee Republican Party v. SEC*, 16-16623 (11th Cir. Oct. 20, 2016).

But in this case, as a result of the confluence of (1) Congress's decision to amend Section 19(b) to allow proposed SRO rules to become effective without the

Commission taking action; and (2) Congress's decision in 2015 to impose funding restrictions that prevented the Commission from using appropriated funds to issue an order regarding the MSRB's proposed rule amendments, the Court cannot exercise jurisdiction under Section 25. The obstacles to this Court's review are "the consequence of the system Congress mandated." *Sprint Nextel*, 508 F.3d at 1133. That petitioners seek to litigate statutory and constitutional objections to the MSRB's rule change is not a basis for the Court to ignore the statutory language. As the D.C. Circuit recognized in an analogous context, where a statutory scheme premises the exercise of jurisdiction on the existence of agency action and there is none, the congressionally dictated consequence is that courts "lack jurisdiction in what may be the hardest cases.'" *Id.*; *see also Public Citizen*, 839 F.3d at 1174 (same).

Similarly erroneous is the false premise, woven into petitioners' prior discussion of *Sprint* and *AT&T*, that if this Court does not accept the fiction that a "final order" exists, the MSRB's rule change will never be subject to judicial review. MTD Opp. 2, 7, 9. Adhering to the language of Section 25(a)(1) does not mean that the MSRB's rule change is unreviewable; for instance, a party defending an action brought by the Commission to enforce the MSRB rule can challenge its constitutionality in that proceeding. *See NetCoalition*, 715 F.3d at 344, 351–52 (interpreting Dodd-Frank's changes to the Section 19(b)(3) process for Commission review of the rules of securities exchanges, concluding that application of an automatic approval provision does not result in a "final order," and noting that such a result does not cut off review

because of the "availability of judicial review down the road," including "at the enforcement stage"). Just because the MSRB rule change cannot be reviewed in this Court at this time does not mean that it can never be reviewed.

In resisting dismissal, petitioners have also invoked the presumption that Congress intends judicial review of agency action. MTD Opp. at 7, citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). But "this presumption applies *only* to 'final agency action,'" and in this case the Commission "did not engage in agency action at all, let alone final agency action." *Public Citizen*, 839 F.3d at 1171, quoting *Bowen*, 476 U.S. at 670. In any event, "practical and prudential considerations, however compelling, cannot provide the basis for [this Court's] jurisdiction absent demonstrated final agency action and clear congressional authority." *Id.* at 1171, n.4. Because the Court lacks jurisdiction, it "simply lack[s] the power to assess [the] validity" of the MSRB's rule amendment, and given the text of the Exchange Act and the Appropriations Act, "it lies with Congress, not this Court, to provide the remedy." *Id.* at 1174.[9]

[9] In their opposition to the Commission's motion to dismiss, petitioners invoked the non-delegation doctrine, MTD Opp. 13, but the Supreme Court has not used this doctrine to strike down a law in more than 80 years. *United States v. Cooper*, 750 F.3d 263, 270 (3d Cir. 2014); *see also Whitman v. Am. Trucking Assocs., Inc.*, 531 U.S. 457, 474–75 (2001), *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (describing the modern view of the doctrine). During the same period, SROs have "enjoyed congressionally delegated quasi-governmental powers" without a hint of a constitutional issue. *NASD v. SEC*, 431 F.3d 803, 807 (D.C. Cir. 2005). Moreover, petitioners have never argued, and therefore have forfeited, any claim that, the Exchange Act's jurisdictional requirements should be relaxed on the ground that this

II. The Commission has not taken any "agency action" under the APA.

Petitioners also cite the APA as a basis for review of the MSRB rule amendment, but the APA turns on the existence of "agency action" and there was none here. Section 702 states that a person "adversely affected or aggrieved by agency action * * * is entitled to judicial review," and Section 706(2)(A) authorizes reviewing courts to "hold unlawful and set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 702, 706(2)(A). The APA defines "agency action" to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13). Except for a "failure to act," which is addressed below, each "agency action" requires an affirmative and discrete act "of an agency." *See* 5 U.S.C. 551(4), (6), (8), (10), (11); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (*SUWA*).

The reasoning of *Bean*, *Sprint Nextel*, *AT&T*, and *Public Citizen* demonstrate that the Commission has not engaged in "agency action" by entering an order or the "equivalent * * * thereof" (Br. 8), under the APA, just as those cases demonstrate why the Commission did not issue a reviewable "final order" under Exchange Act Section

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case arises in the First Amendment context. *See Kuhn v. Washtenaw Cty.*, 709 F.3d 612, 624 (6th Cir. 2013). In any event, as the D.C. Circuit recognized in another case brought by two of the petitioners, the mere fact that an agency's action is challenged on First Amendment grounds does not justify overriding statutory jurisdictional requirements. *See New York Republican State Committee v. SEC*, 799 F.3d 1126, 1135–37 (D.C. Cir. 2015).

25. Congress, not the Commission, "spelled out the legal effect" of the Commission's inaction regarding the MSRB's proposed rule change. *Sprint Nextel*, 508 F.3d at 1132–33; *see also Public Citizen*, 839 F.3d at 1172–74 (holding that FERC did not engage in agency action where, as here, the statute did "not mandatorily obligate FERC to engage in either of Petitioners' desired actions"); *DTCC Data Repository LLC v. CFTC*, 25 F. Supp. 3d 9, 16–18 (D.D.C. 2014) (applying *Sprint Nextel* and holding that there was no reviewable agency action under the APA when a rule proposed by a derivative clearing organization went into effect by operation of law).[10]

The Commission's commencement of the Section 19(b) process does not mean that the eventual approval of the MSRB rule change by operation of law is a reviewable agency action. Upon receiving the MSRB's proposed rule change (before the appropriations provision was signed into law), the Commission, as required by Section 19(b)(1), published notice of the proposal, which primarily consists of material prepared by the MSRB, in the Federal Register. The Commission also posted the proposal on its website and invited submission of comments. These acts, which Congress commanded and which were not an attempt to finalize, issue, or implement a rule, regulation, or order, do not constitute the type of agency action that is suitable for review under the APA. Courts have held that neither a press release announcing that a petition is "deemed granted by operation of law" nor a public notice that a

[10] The lack of "agency action" would also negate an APA claim brought in district court. The problem with petitioners' attempt to sue the Commission is not the forum but the absence of any reviewable agency action.

statute had expired constitute reviewable agency action. *Sprint Nextel*, 508 F.3d at 1131–32; *AT&T Corp.*, 369 F.3d at 561; *see also Public Citizen*, 839 F.3d at 1172–74. Likewise, a notice of the receipt of a proposed SRO rule is not an agency action, let alone the type of "final agency action" that is a prerequisite for APA review. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (a "'final'" agency action "must mark the 'consummation' of the agency's decisionmaking process").

The APA's inclusion of "failure to act" in the definition of "agency action" does not mean that the Commission's inaction, which triggers a statutory approval, is reviewable under the APA as if it were affirmative agency action. The Supreme Court has held that "'failure to act'" must be read in conjunction with Section 706(1), which authorizes courts to "'compel agency action unlawfully withheld.'" *SUWA*, 542 U.S. at 62–63, quoting 5 U.S.C. 551(13) and 5 U.S.C. 706(1). A claim under Section 706(1) "to compel agency action" can proceed only "where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 63 (emphases in original). This standard reflects the extraordinary writ of mandamus, which the APA "carried forward" in Section 706(1). *Id.* at 63; *see also United States v. Gomez-Gomez*, 643 F.3d 463, 471 (6th Cir. 2011) (writ of mandamus is an "extraordinary" and "drastic" remedy) (internal quotation marks omitted); *Public Citizen*, 839 F.3d at 1172 ("reviewable inactions" under Section 706(1) are subject to "strict limits") (internal quotation marks omitted).

The "failure to act" language is not relevant here because petitioners do not seek to compel the Commission to engage in any discrete action that it was "*required to take*" regarding the MSRB's rule amendment. *SUWA*, 542 U.S. at 63. Indeed, the Commission may not use appropriated funds to issue any order regarding a rule such as the MSRB's. *See Mullis v. United States*, 230 F.3d 215, 219 (6th Cir. 2000) ("Because Congress clearly has the power to prevent the ATF from acting on applications made pursuant to § 925(c) if it chooses, there is no agency action for a federal court to compel or review."); *McHugh v. Rubin*, 220 F.3d 53, 57 (2d Cir. 2000) ("The ATF has been placed in a virtual straightjacket by the plain language of Congress's appropriations statutes.").

In arguing the contrary, petitioners have relied on the D.C. Circuit's decision in *Amador County v. Salazar*, but their arguments are misplaced because of the dispositive difference between the statute in that case and the Exchange Act. MTD Opp. 17–19, citing 640 F.3d 373, 375 (D.C. Cir. 2011). *Amador County* interpreted the Indian Gaming Regulatory Act (IGRA), which provides that if the Secretary of the Interior does not act upon a tribal gaming compact, it is deemed approved after 45 days "but only to the extent the compact is consistent with" the IGRA, including the requirement that gaming take place on "Indian lands." 25 U.S.C. 2710(d)(1), (8)(C). The Secretary did not act upon a compact submitted by a tribe, the compact was deemed approved, and Amador County—where the tribe's land was located—alleged that the tribe failed to satisfy the "Indian lands" requirement. 640 F.3d at 377.

The *Amador County* panel, composed of the same judges that decided *AT&T*, held that there was an "agency action." *Id.* at 382–83. The court distinguished *Sprint* because of an "essential difference" between the Telecommunications Act and the IGRA: the latter contained the "caveat that compacts deemed approved through secretarial inaction become effective" only if the compact is consistent with the IGRA, including the "Indian lands" requirement. *Id.* at 382. As the court explained, the statute in *Sprint* contained "no parallel provision" imposing a restriction on the "deemed approved" clause; if the FCC failed to act, "a forbearance request would be granted by operation of law *without limitation*." *Id.* (emphasis added). By contrast, the IGRA "limited the extent to which a compact could be approved by operation of law," thus requiring the Secretary to "affirmatively disapprove any compact exceeding that limit." *Id.* Because Amador County challenged the compact "on the grounds that it conflicts with another provision of IGRA"—the same provision that cabined the "deemed approved" process—the court found "a discrete agency inaction to review," namely "the Secretary's failure to disapprove the compact despite its inconsistency with the Act." *Id.*

The D.C. Circuit's decision in *Public Citizen* interpreting the Federal Power Act (FPA) confirms that *Sprint Nextel*, not *Amador County*, is the more apt precedent here. At issue in *Public Citizen* was Section 205(a) of the FPA, which provides that any "'rate or charge that is not just and reasonable is hereby declared to be unlawful.'" *Public Citizen*, 839 F.3d at 1172, quoting 16 U.S.C. 824d(a). Relying on *Amador County*, the

petitioners argued that this provision imposed an affirmative obligation on FERC "to disapprove any unjust or unreasonable rate." *Id.* The court rejected this argument, explaining that Section 205(a)'s "statement concerning the unlawfulness of unjust and unreasonable rates does not rise to an inexorable command like that found in IGRA" because it "does not compel FERC to engage in nondiscretionary activity either by commanding FERC to set disputed rates for a hearing or by mandating FERC disapprove any unjust or unreasonable rates." *Id.* Because the requested action was "not legally required," *Sprint Nextel*, not *Amador County*, "control[led] the dispute." *Id.* at 1173, 1174.

Amador County is also inapposite here because the Exchange Act lacks the "essential difference" in statutory language that the court emphasized in distinguishing *Sprint*. *Amador County*, 640 F.3d at 382. Like the statutes in *Public Citizen* and in *Sprint*, the "deemed to have been approved" language in Section 19(b)(2)(D) is "without limitation"; it does not contain language equivalent to the IGRA's "consistent with" caveat. While petitioners have cited Section 19(b)(2)(C), 15 U.S.C. 78s(b)(2)(C), MTD Opp. 19, which requires the Commission to find consistency with the Exchange Act *when it acts to affirmatively approve* a proposed SRO rule, no such language appears in the "deemed to have been approved" provision. Because Section 19(b) "does not mandatorily obligate [the Commission] to engage in either of Petitioners' desired actions," *Public Citizen*, 839 F.3d at 1173, it is functionally indistinguishable from the statute in *Sprint*, and thus *Sprint*—not *Amador County*—is the more pertinent

precedent. *See also DTCC Data Repository LLC*, 25 F. Supp. 3d at 17–18 (reconciling *Sprint* with *Amador County* and holding that there was no "agency action" when the CFTC did not act on a proposed SRO rule—which went into effect under a "deemed approved" provision that Dodd-Frank added and that resembles Section 19(b)(2)(D)—because the provision did not contain any limitation akin to the language in the IGRA and thus more closely resembled the statute in *Sprint*).

Contrary to petitioners' suggestion (MTD Opp. at 19–20), neither *Amador County* nor this Court's decision in *Denko v. INS* resolves the *Chenery* problem identified by the Commission. In *Amador County*, the court held that due to the "nature of this particular challenge"—the claim that the tribe failed to satisfy the same IGRA requirement that served as a limitation on the approval-by-inaction—the court needed "no agency reasoning." 640 F.3d at 382. In contrast, in this case, because the Commission's decision whether to approve or disapprove the proposed rule change "was not legally required" by the Exchange Act—and, in fact, the Commission could not use appropriated funds to issue an order "regarding," that is, approving *or* disapproving, the proposed rule change—the Court lacks standards "to meaningfully review" the Commission's inaction. *Public Citizen*, 839 F.3d at 1174. *Denko* is even further afield; in that case, the BIA *acted*—it issued an order—and the court held that since applicable regulations permitted the BIA to affirm an immigration judge's opinion without decision only if it *determined* that the IJ was correct, the BIA effectively made a determination and the IJ's opinion became "the reasoned

explanation needed for review." 351 F.3d 717, 729–30 (6th Cir. 2003). Here, by contrast, the Commission did not act, the MSRB's relationship to the Commission is not that of an ALJ to an agency, and Section 19(b)(2)(D) does not provide that inaction results in a determination of anything.

III. Given the posture of this case, the Commission's counsel cannot brief the merits of petitioners' challenge.

In their opening brief, petitioners largely ignore the question of jurisdiction and devote their argument to the merits of their challenge to the MSRB's rule change. As discussed above, because the Commission did not—and could not—address these issues, counsel cannot discuss them here without running afoul of *Chenery* and its progeny. Any discussion of the merits by Commission counsel would be a *post hoc* rationalization that this Court could not accept.

There is another significant barrier to counsel addressing the merits. The same appropriations provision that prevented the Commission and its staff from issuing or finalizing an order regarding the proposed MSRB rule change continues to apply, and it precludes the Commission from using appropriated funds to "finalize, issue, *or implement* any rule" regarding the disclosure of political contributions. Defending the MSRB rule on the merits may constitute "implementing" that rule, and the Commission may not expend appropriated funds in doing so. *See* Merriam-Webster Online Dictionary, *Implement* (1. "to give practical effect to and ensure of actual fulfillment by concrete measures"; 2. "to provide instruments or means of expression

for") (available at http://bit.ly/2gZxDPg). Because Congress chose an appropriations provision as the vehicle to control the Commission's actions, the Antideficiency Act is implicated. Since that statute exposes Commission staff to severe consequences for its violation, including potential administrative sanctions and criminal penalties, it is prudent for counsel not to address the merits of petitioners' challenge.

Counsel's inability to brief the merits should not be taken as a concession, forfeiture, or waiver with respect to petitioners' substantive arguments. When the Commission and its staff have not been affected by a funding restriction, the Commission has articulated its position on the issues raised by petitioners' challenge. The Commission defended on the merits the agency's pay-to-play rule for investment advisers (which also does not regulate the *disclosure* of political contributions). *See* Brief of the Securities and Exchange Commission, *New York Republican State Committee v. SEC* at 39-54, Nos. 14-1194, 14-5242 (D.C. Cir.) (available at 2015 WL 271072) (defending the Commission's pay-to-play rule on the merits); *New York Republican State Committee v. SEC*, 799 F.3d 1126, 1128 (D.C. Cir. 2015) (dismissing the challenge as untimely without reaching the merits). And the Commission will brief the merits of petitioners' challenge to the Commission order approving the FINRA pay-to-play rule, which was not implicated by the Appropriations Act. In the unique circumstances of this case, however, the Commission's hands are tied and its inability

to speak does not reflect any views the agency may have, nor should it restrict the Commission's ability to evaluate the merits issues in the future.

CONCLUSION

For the foregoing reasons, the petitions should be dismissed for lack of jurisdiction.

Respectfully submitted,

ANNE K. SMALL
General Counsel

SANKET J. BULSARA
Deputy General Counsel

MICHAEL A. CONLEY
Solicitor

JEFFREY A. BERGER
DANIEL STAROSELSKY
Senior Litigation Counsel

/s/ Daniel Staroselsky

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(202) 551-5774 (Staroselsky)

December 2016

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 11,189 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface—Garamond, at least 14 point—using Microsoft Word.

/s/ Daniel Staroselsky
Daniel Staroselsky

STATUTORY ADDENDUM

STATUTORY ADDENDUM TABLE OF CONTENTS

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APPROPRIATIONS ACT RESTRICTION

Consolidated Appropriations Act, 2016, PUB. L. NO. 114-113, DIV. O, TITLE VII, § 707, 129 STAT. 2242, 3029–30

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.

Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act, § 106, Pub. L. No. 144-223, 130 Stat. 857, 909–10

Unless otherwise provided for in this Act or in the applicable appropriations Act for fiscal year 2017, appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation for any project or activity provided for in this Act; (2) the enactment into law of the applicable appropriations Act for fiscal year 2017 without any provision for such project or activity; or (3) December 9, 2016.

Further Continuing and Security Assistance Appropriations Act, 2017, § 101, Pub. L. No. 114-254, 130 Stat. 1005, 1005–06

SEC. 101. The Continuing Appropriations Act, 2017 (division C of Public Law 114–223) is amended by—

(1) striking the date specified in section 106(3) and inserting "April 28, 2017";

(2) striking "0.496 percent" in section 101(b) and inserting "0.1901 percent"; * * *

ANTI-DEFICIENCY ACT PROVISIONS

31 U.S.C. 1341. Limitations on expending and obligating amounts

31 U.S.C. 1341(a)(1)(A)

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not--

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;

…

31 U.S.C. 1349. Adverse personnel actions

(a) An officer or employee of the United States Government or of the District of Columbia government violating section 1341(a) or 1342 of this title shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office.

…

31 U.S.C. 1350. Criminal penalty

An officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both.

SECURITIES AND EXCHANGE ACT PROVISIONS

EXCHANGE ACT SECTION 19, 15 U.S.C. 78S. Registration, Responsibilities, and Oversight of Self-Regulatory Organizations

* * *

(b) Proposed rule changes; notice; proceedings

(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, as soon as practicable after the date of the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) Approval process

(A) Approval process established

(i) In general

Except as provided in clause (ii), not later than 45 days after the date of publication of a proposed rule change under paragraph (1), the Commission shall--

(I) by order, approve or disapprove the proposed rule change; or

(II) institute proceedings under subparagraph (B) to determine whether the proposed rule change should be disapproved.

(ii) Extension of time period

The Commission may extend the period established under clause (i) by not more than an additional 45 days, if--

(I) the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

(II) the self-regulatory organization that filed the proposed rule change consents to the longer period.

(B) Proceedings

(i) Notice and hearing

If the Commission does not approve or disapprove a proposed rule change under subparagraph (A), the Commission shall provide to the self-regulatory organization that filed the proposed rule change--

(I) notice of the grounds for disapproval under consideration; and

(II) opportunity for hearing, to be concluded not later than 180 days after the date of publication of notice of the filing of the proposed rule change.

(ii) Order of approval or disapproval

(I) In general

Except as provided in subclause (II), not later than 180 days after the date of publication under paragraph (1), the Commission shall issue an order approving or disapproving the proposed rule change.

(II) Extension of time period

The Commission may extend the period for issuance under clause (I) by not more than 60 days, if--

(aa) the Commission determines that a longer period is appropriate and publishes the reasons for such determination; or

(bb) the self-regulatory organization that filed the proposed rule change consents to the longer period.

(C) Standards for approval and disapproval

(i) Approval

The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this chapter and the rules and regulations issued under this chapter that are applicable to such organization.

(ii) Disapproval

The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make a finding described in clause (i).

(iii) Time for approval

The Commission may not approve a proposed rule change earlier than 30 days after the date of publication under paragraph (1), unless the Commission finds good cause for so doing and publishes the reason for the finding.

(D) Result of failure to institute or conclude proceedings

A proposed rule change shall be deemed to have been approved by the Commission, if--

(i) the Commission does not approve or disapprove the proposed rule change or begin proceedings under subparagraph (B) within the period described in subparagraph (A); or

(ii) the Commission does not issue an order approving or disapproving the proposed rule change under subparagraph (B) within the period described in subparagraph (B)(ii).

(E) Publication date based on Federal Register publishing

For purposes of this paragraph, if, after filing a proposed rule change with the Commission pursuant to paragraph (1), a self-regulatory organization publishes a notice of the filing of such proposed rule change, together with the substantive terms of such proposed rule change, on a publicly accessible website, the Commission shall thereafter send the notice to the Federal Register for publication thereof under paragraph (1) within 15 days of the date on which such website publication is made. If

the Commission fails to send the notice for publication thereof within such 15 day period, then the date of publication shall be deemed to be the date on which such website publication was made.

* * *

(3)(A) Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change shall take effect upon filing with the Commission if designated by the self-regulatory organization as (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2).

(B) Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(C) Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this chapter, the rules and regulations thereunder, and applicable Federal and State law. At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1), the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) to determine whether the proposed rule should be approved or disapproved. Commission action pursuant to this subparagraph shall not affect the validity or force

of the rule change during the period it was in effect and shall not be reviewable under section 78y of this title nor deemed to be "final agency action" for purposes of section 704 of Title 5.

* * *

EXCHANGE ACT SECTION 25, 15 U.S.C. 78Y. Court Review of Orders and Rules.

(a) Final Commission orders; persons aggrieved; petition; record; findings; affirmance, modification, enforcement, or setting aside of orders; remand to adduce additional evidence

(1) A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.

* * *

ADMINISTRATIVE PROCEDURE ACT PROVISIONS

5 U.S.C. 551. Definitions

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing; * * *

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing; * * *

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission; * * *

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action; * * *

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person; * * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; * * *

5 U.S.C. 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. * * *

5 U.S.C. 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

FEDERAL COMMUNICATIONS COMMISSION PROVISIONS

28 U.S.C. 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

* * *

47 U.S.C. 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

* * *

47 U.S.C. 160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

* * *

47 U.S.C. 272. Separate affiliate; safeguards

* * *

(f) Sunset

(1) Manufacturing and long distance

The provisions of this section (other than subsection (e) of this section) shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such

Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d) of this title, unless the Commission extends such 3-year period by rule or order.

* * *

FEDERAL ELECTION CAMPAIGN ACT PROVISION

52 U.S.C. 30109. Enforcement

(a) Administrative and judicial practice and procedure

* * *

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

* * *

FEDERAL POWER ACT PROVISIONS

16 U.S.C. 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * *

16 U.S.C. 825*l*. Review of Orders

* * *

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *

INDIAN GAMING REGULATORY ACT PROVISIONS

25 U.S.C. 2710. Tribal gaming ordinances

* * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * *

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter. * * *

TREASURY, POSTAL SERVICE, AND GENERAL GOVERNMENT APPROPRIATIONS ACT, 1993, PL 102-393, 106 STAT. 1729

* * *

Bureau of Alcohol, Tobacco and Firearms Salaries and Expenses

* * *

[N]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. 925(c).

CERTIFICATE OF SERVICE

I, Daniel Staroselsky, hereby certify that on December 19, 2016, I caused to be served by CM/ECF the Brief of the Securities and Exchange Commission, Respondent, in *Tennessee Republican Party et al. v. SEC et al.*, Nos. 16-3360, 16-3732, on all CM/ECF participants.

/s/ Daniel Staroselsky
Daniel Staroselsky