No. 24-1189

In the United States Court of Appeals for the Sixth Circuit

IN RE ERIC S. SMITH,

Petitioner.

PETITIONER'S REPLY IN FURTHER SUPPORT OF HIS PETITION FOR A WRIT OF MANDAMUS TO THE U.S. SECURITIES AND EXCHANGE COMMISSION

Russell G. Ryan
Kara M. Rollins
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Drive, Suite 300
Arlington, VA 22203
(202) 869-5210
russ.ryan@ncla.legal

Robert Knuts
SHER TREMONTE LLP
90 Broad Street
23rd Floor
New York, NY 20004
(212) 202-2600
rknuts@shertremonte.com

Counsel for Petitioner

On August 5, 2024, this Court directed respondent Securities and Exchange Commission ("SEC") to *respond* to the petition for a writ of mandamus filed by Eric Smith more than six months ago. *See* ECF No. 7-1. But instead of responding to the petition as the Court directed, SEC filed a three-sentence submission claiming the petition is now moot. *See* ECF No. 9. SEC's attempt to evade the Court's direction and oversight should not be countenanced.

The petition describes in detail SEC's willful and prolonged refusal to decide Smith's administrative appeal from a sanction imposed against him nearly four years ago by the Financial Industry Regulatory Authority ("FINRA"). Ignoring its own rule (which says SEC will "ordinarily" decide such appeals within less than a year after briefing) as well as the Administrative Procedure Act (which requires agencies to conclude administrative matters within a reasonable time), SEC granted itself *nine* consecutive 90-day extensions of time to decide Smith's appeal, unilaterally extending its decision deadline by more approximately 27 months. Even after Smith filed his mandamus petition, SEC granted itself two more 90-day extensions before the Court directed SEC to respond to the petition. *See* Smith's Rule 28(j) letters dated April 9, 2024 (ECF No. 5) and July 9, 2024 (ECF No. 6). The petition also described SEC's systemic failure to decide appeals by many others similarly situated, as well as the routine frequency with which SEC has repeatedly granted itself similar extensions in many of those other appeals.

SEC's submission addresses none of these concerns and failures; it ignores them entirely. After years of inexplicable dithering—and only after Smith was forced to seek mandamus relief, and even then only after this Court forced SEC's hand by ordering it to respond to Smith's petition, finding that SEC's ongoing delay "hinders Smith's ability to earn a living" and "there is no obvious explanation for the significant delay"—SEC suddenly rushed out a decision on Smith's appeal in a transparent effort to avoid having to explain itself to the Court.

SEC cites only one case in support of its claim of mootness, *In re Leonard Nyamusevya*, No. 23-3497, 2024 WL 1151692 (6th Cir. Feb. 8, 2024), but that case is easily distinguished. There, the only relief requested by an excessively litigious petitioner was an order directing the court below to decide several pending motions. The lower court decided those motions before this Court could rule on the mandamus petition, so this Court held the mandamus petition moot, quoting from earlier circuit precedent that held where "events that occur subsequent to the filing of a lawsuit or an appeal *deprive the court of the ability to give meaningful relief*, then the case is moot and must be dismissed." *Id*. (emphasis added).

Here, by contrast, the Court is *not* deprived of the ability to give meaningful relief to Smith, notwithstanding SEC's issuance of a decision denying his administrative appeal. The primary remedy Smith seeks in his mandamus petition is a declaration that the prolonged SEC delay that forced Smith to seek mandamus

relief was unconstitutional and unlawful, along with an order directing SEC to set aside the FINRA sanctions order Smith appealed to SEC. *See* Petition (ECF No. 1) at 18. While SEC's hurried decision may have deprived the Court of its ability to grant the alternative relief Smith sought—namely, forcing SEC to decide his appeal—the Court retains the power to grant Smith the primary relief he still seeks.

The Court should grant such relief for the reasons set forth in the petition and to deter SEC from persisting in its systemic adjudicative foot-dragging. SEC's three sentences do not meet its "heavy burden" of demonstrating mootness. *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019). The Court should assess costs against SEC in all events.

September 4, 2024

Respectfully submitted,

/s/Russell G. Ryan
Russell G. Ryan
Kara M. Rollins
NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Drive, Suite 300
Arlington, VA 22203
(202) 869-5210
russ.ryan@ncla.legal

Robert A. Knuts
SHER TREMONTE LLP
90 Broad Street, 23rd Floor
New York, NY 20004
(212) 202-2600
rknuts@shertremonte.com

Counsel for Petitioner Eric S. Smith

CERTIFICATE OF COMPLIANCE

This petition complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 21(d) because it contains 632 words, excluding the parts of the petition exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word (the same program used to calculate the word count).

/s/Russell G. Ryan
Russell G. Ryan

CERTIFICATE OF SERVICE

I certify that upon filing this document via ECF on September 4, 2024, a copy will be contemporaneously served on all counsel of record in this proceeding.

s/*Russell G. Ryan*
Russell G. Ryan