

No. 23-60230

**In the United States Court of Appeals
for the Fifth Circuit**

NATIONAL CENTER FOR PUBLIC POLICY RESEARCH;

NATHANIEL FISCHER; PHILLIP ARONOFF,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

Petition for Review from an Order
of the Securities and Exchange Commission

**INTERVENOR THE NATIONAL ASSOCIATION OF
MANUFACTURERS' RESPONSE IN SUPPORT OF PETITIONERS'
PETITION FOR REHEARING EN BANC**

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CERTIFICATE OF INTERESTED PERSONS

No. 23-60230

National Center for Public Policy Research; Nathaniel Fischer;

Phillip Aronoff,

Petitioners,

v.

Securities and Exchange Commission,

Respondent.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. Intervenor the National Association of Manufacturers has no parent corporations and no publicly held corporation owns 10% or more of its respective stock. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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National Center for Public Policy Research; Nathaniel Fischer;
Phillip Aronoff

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RESPONSE IN SUPPORT OF PETITION FOR REHEARING EN BANC

Pursuant to Federal Rule of Appellate Procedure 40(d)(4), Intervenor the National Association of Manufacturers (“NAM”) submits this Response in support of Petitioners’ Petition for Rehearing En Banc.

The NAM intervened in this proceeding to raise a fundamental threshold issue that neither party addressed but that affects nearly every publicly traded company in the country. The First Amendment and federal securities statutes do not allow the SEC, through its Rule 14a-8, to compel a corporation to use its proxy statement to disseminate shareholders’ speech about abortion, climate change, diversity, gun control, immigration, or other contentious issues unrelated to its core business or the creation of shareholder value. *See* NAM Opening Br. at 23-54; NAM Reply Br. at 13-27; *see also* Br. of Amicus Curiae Professor Sean J. Griffith in Support of Intervenor at 3 (“Rule 14a-8 violates the First Amendment”).

The divided panel decision, however, erroneously concluded that SEC no-action letters under Rule 14a-8 are not final reviewable agency actions and that this case is moot. The NAM has argued throughout this case that SEC no-action letters under Rule 14a-8 are final reviewable agency actions. *See* NAM Opp. to SEC’s Mot. to Dismiss at 10-15; NAM Reply Br. at 4-6; NAM May 13, 2024 Response to Rule 28(j) Letter at 1-2. And the NAM has asserted that this case is not moot. *See* NAM Opp. to SEC’s Mot. to Dismiss at 3-10; NAM Reply Br. at 3-4; NAM May 13, 2024 Response to Rule 28(j) Letter at 1-2.

The NAM agrees with Petitioners that the panel's contrary decision conflicts with *Clarke v. CFTC*, 74 F.4th 627 (5th Cir. 2023). *See* Pet. for Rehearing En Banc at 4-17. Accordingly, the NAM respectfully requests that the Court grant Petitioners' Petition for Rehearing En Banc.

Respectfully submitted.

/s/ Scott A. Keller

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CERTIFICATE OF SERVICE

On February 10, 2025, this response was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Scott A. Keller

Scott A. Keller

CERTIFICATE OF COMPLIANCE

This response complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 40(d)(2)-(3) because it contains 300 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

/s/ Scott A. Keller

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