
No. 12-1398

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

AMERICAN PETROLEUM INSTITUTE, et al.,

Petitioners,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondent,

and

OXFAM AMERICA, INC.

Intervenor-Respondent.

**OXFAM AMERICA'S OPPOSITION TO PETITIONERS' MOTION TO
STAY THE MANDATE**

Intervenor Oxfam America, Inc., submits this memorandum opposing Petitioners' Motion to Stay the Mandate, providing additional arguments to those raised by Respondent in its Opposition.

Petitioners' Motion is a transparent attempt to pre-determine the composition of the panel that will hear any eventual appeal of the District Court's disposition in *American Petroleum Institute v. SEC*, No. 12-cv-1668 (D.D.C.).

Petitioners have not explained why this Court's ordinary procedures for expediting consideration of an appeal, *see* Circuit Rule 27(f), will be inadequate should the case be appealed. Indeed, those procedures sufficed the first time this Court heard the case. *American Petroleum Inst. v. SEC*, No. 12-1398, ___ F.3d ___, 2013 U.S. App. LEXIS 8477 (D.C. Cir. Apr. 26, 2013). Moreover, in the event that an appeal is filed by Petitioners, they would be free to file a motion requesting the same panel that considered their case and dismissed it on jurisdictional grounds, *id.* Regardless, they have provided no authority that absent a petition for rehearing or a petition for certiorari, this Court has the power to grant extraordinary relief and withhold the mandate after having determined that it lacks jurisdiction even to consider the case.

Faced with lack of authority for their position, Petitioners instead make the conclusory and unsupported assertion that any eventual appeal will raise nearly the same issues as were considered in their original Petition for Review. Mot. at 4. However, Respondent correctly points out that the District Court may remand the rules at issue in this case to the SEC, which may alter the regulatory scheme in response to the court's directions. Opp. at 4. If that happens, the rules (and, consequently, the legal issues) that would be presented to this Court on appeal could be quite different than those in the original Petition for Review. Moreover, while the District Court's review of the constitutional and administrative issues in

this case would be subject to *de novo* review by this Court, *Petit v. U.S. Dept. of Education*, 675 F.3d 769, 778-78 (D.C. Cir. 2012), its choice of remedy is subject to considerable deference. *See Neb. HHS v. HHS*, 435 F.3d 326, 330 (D.C. Cir. 2006) (“We review the district court's decision to vacate, as we do any decision to grant or withhold equitable relief, for abuse of discretion.”). Thus, if the District Court does vacate the rule, and if that order is appealed on the grounds that remand would have been the appropriate remedy, the case will return to this Court in a radically different posture, presenting substantially different issues.

Finally, it is not at all clear that the SEC would be in a position to respond promptly if the District Court were to remand with instructions, unless this Court had already issued the mandate. In both *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890 (D.C. Cir. 2006), and *Alabama Power Co. v. FPC.*, 511 F.2d 383 (D.C. Cir. 1974), this Court noted that statutory provisions functionally equivalent to Section 25 of the Exchange Act, 15 U.S.C. § 78y(b)(3), sharply limit the power of an agency to modify its rules and orders during the pendency of an appeal. In both of those cases, the Court noted that if the agency were to modify its previous order on remand, it might be forced to seek release of the mandate before such changes could go into effect. *See Chamber of Commerce*, 443 F.3d at 899; *Alabama Power*, 511 F.2d at 388. Such a cumbersome process, if required, would be an unwarranted intrusion on the flexibility of the SEC absent an

actual pending appeal, and an infringement on the authority of the District Court to fashion an appropriate remedy that could be implemented in a timely manner.

CONCLUSION

For all of the foregoing reasons, Petitioners' Motion to Stay the Mandate should be denied.

Respectfully submitted,

/s/ Jonathan Kaufman

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2013, I electronically filed the foregoing Opposition to Petitioners' Motion to Stay the Mandate, with the clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I certify that all participants in the case are CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jonathan Kaufman