
ORAL ARGUMENT NOT YET SCHEDULED

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,

Respondents,

and

OXFAM AMERICA,

Intervenor-Respondent.

**OXFAM AMERICA'S REPLY IN SUPPORT OF
MOTION TO MODIFY BRIEFING ORDER**

Petitioners American Petroleum Institute, *et al.* (“API”) object to Oxfam America’s (“Oxfam”) request to be relieved of the obligation to file a “Joint Brief” with any Amici on the grounds that the request is premature, and threatens prejudice to API in the form of additional briefing it will need to address in its Reply. For several reasons, these objections are misplaced.

First, far from making Oxfam’s request premature, the fact that Oxfam does not know which Amici may seek to participate is central to Oxfam’s concern that,

absent relief, and based on the Court's Briefing Order as written, Oxfam may be in the position of drafting a brief and then being compelled to negotiate with Amici at the eleventh hour concerning the contents of a Joint Brief, or the division of words between Oxfam and any Amicus. Oxfam is simply seeking certainty at this time that, assuming Amici do seek to participate, Oxfam will not be put in the position of sharing its brief with Amici.¹

Second, API's contention that the Court's Rules provide for the kind of joint brief the Court has ordered here is mistaken. API Resp. at 3-4. While the Rules certainly contemplate that multiple intervenors will file one joint brief where practicable, and that multiple amici will do the same, *see* Circuit Rule 28(d) and 29(c), they do not contemplate a joint brief of *both* intervenors and amici.²

¹ Oxfam opposes API's suggestion that the Court decide *now* that the combined total of Oxfam's brief and any separate Amici brief may not exceed 8,750 words. API Resp. at 2. By the Court's Rules, 8,750 is the number of words allocated to Intervenors alone, Circuit Rule 32(a)(2), and as explained below the Court should separately consider whether it will allow additional briefing.

² Oxfam recognizes that in certain particularly complex cases with many parties and amici the Court has required joint intervenor and amici briefs, API Resp. at 6, but the Rules contemplate that in the ordinary case, intervenors and amici are treated separately. Rather than being comparable to the cases cited in Petitioners' brief, this case is similar to the pending petition challenging the SEC's Conflicts Mineral Rule, which, like this case, also has one intervenor and no amici as of yet, and where the Court ordered a "Brief of Any Intervenor *Or* Amicus," rather than requiring a Joint Brief. *See* Oxfam Mot. at 7.

Third, API's concern that the relief Oxfam seeks will require API to respond to additional briefing is itself premature. If the Court grants Oxfam's request, any prospective Amici will have an opportunity to file a motion under Appellate and Circuit Rule 29 for leave to participate (unless API consents), at which time such Amici will have to explain why the Court should consider an additional brief. Fed. R. App. P. 29(b); Circuit Rule 29(b). If the Court is not satisfied that such additional briefing is appropriate, the motion will be denied and the brief will not be considered. Alternatively, if the Court determines the additional brief *is* appropriate, and if API maintains that it therefore requires a larger Reply brief, it may seek leave at that time. Circuit Rule 29(e). However, the fact that the Court might grant such a motion and permit an Amicus filing simply highlights why it is premature at this time to *foreclose* such a motion by requiring that any Amici file a Joint Brief with Oxfam.³

In sum, the Court should modify the Briefing Order as Oxfam has requested, and consider whether to allow one or more separate Amicus briefs to be filed when a motion for leave for such a brief is presented.

³ Consequently, contrary to API's claim, Oxfam is not at this time seeking additional briefing supporting Respondent. *See* API Resp. at 4 (claiming Oxfam should seek leave to file a brief with additional words). Rather, Oxfam simply seeks to ensure that any prospective Amici have the right to seek leave to file a separate brief. Indeed, Oxfam has already explained that it can and will join with Amici where practicable. However, by altering the Briefing Order in the manner Oxfam seeks, prospective Amici will be permitted to seek leave to file a separate brief should that prove necessary.

Respectfully submitted,

/s/ Howard M. Crystal

Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Conn. Ave., N.W. Suite 700
Washington, DC 20009-1056
Direct: 202-588-5206
hcrystal@meyerglitz.com
Fax: 202-588-5049

/s/ Marco Simons

Marco Simons
EARTHRIGHTS INTERNATIONAL
1612 K St. NW Suite 401
Washington, DC 20009
Phone: 202-466-5188 x103
Fax: 202-466-5189
marco@earthrights.org

Counsel for Oxfam America

Of counsel:

Richard Herz
Jonathan G. Kaufman
EARTHRIGHTS INTERNATIONAL
1612 K St. NW Suite 401
Washington, DC 20009
Phone: 202-466-5188 x103
Fax: 202-466-5189

Richard J. Rosensweig
Derek B. Domian
GOULSTON & STORRS, P.C.
400 Atlantic Avenue
Boston, MA 02110-3333
T: (617) 482-1776
F: (617) 574-4112

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2012, I electronically filed the foregoing Oxfam America's Reply In Support Of Motion to Modify Briefing Order, 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. I also certify that I have caused 4 copies to be hand delivered to the Clerk's office.

/s/ Howard M. Crystal