

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

AMERICAN PETROLEUM INSTITUTE,
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
INDEPENDENT PETROLEUM
ASSOCIATION OF AMERICA, and
NATIONAL FOREIGN TRADE COUNCIL,

Petitioners,

v.

UNITED STATES
SECURITIES AND EXCHANGE
COMMISSION,

Respondent.

OXFAM AMERICA, INC.

Intervenor.

Case No. 12-1398

**REPLY
IN SUPPORT OF
PETITIONERS' MOTION TO STAY THE MANDATE**

In their oppositions to Petitioners' Motion to Stay the Mandate, neither the Commission nor Oxfam disputes that this litigation would be more expeditious if the panel that has already familiarized itself with the parties' arguments in these cases were to resolve any future appeal. Nor could they, as this case was briefed and argued in the District Court on the same briefs that the parties submitted to this Court. *See*

Scheduling Order, *API et al. v. SEC*, No. 12-1668 (D.D.C. May 3, 2013) (Dkt. No. 23). Nor do the parties dispute that this case warrants expedited treatment; indeed, both this Court and the District Court recognized the need for expedition. *See id.*; No. 12-1398 (D.C. Cir. Nov. 1, 2012) (Doc. 1402612). Rather, the Commission and Oxfam advocate a result that would undeniably require more time and effort to reach a final resolution of this rulemaking challenge, with potentially significant costs for U.S. companies, investors, and the general public.

First, the Commission (at 1-2) argues that the Court's decision that it lacked jurisdiction over the petition for review should foreclose the panel from staying the mandate in this case, regardless of the efficiencies of eventual consolidation upon any appeal. But the Commission cites nothing to support its argument that an appellate panel has no *discretion* to stay the mandate for its own decision that it lacks jurisdiction. Indeed, the Commission's own authority belies that claim: This Court *may* exercise "pendent" appellate jurisdiction over two appeals when they are "closely related, or turn on . . . similar issues," in order to "spar[e] . . . this [C]ourt . . . from further proceedings and giv[e] the parties a speedy resolution," or "streamlin[e] the judicial process." *Gilda Marx, Inc. v. Wildwood Exercise*, 85 F.3d 675, 679 (D.C. Cir. 1996) (cited in SEC Opp. at 2). Here, the two cases present more than related claims; it is effectively the *same case* returning to this Court with the jurisdictional question resolved. This Court should not hesitate to advance the twin goals of judicial

economy and expedition, which provide ample good cause for staying the mandate to allow for consolidation.

Second, Oxfam argues (at 2) that the second appeal may look different because the Commission may rewrite its rule as a result of vacatur or remand by the District Court. But Oxfam misunderstands the relief that Petitioners seek. Petitioners ask the Court to stay issuance of the mandate only until the time to appeal the District Court's decision has expired. If the rule is vacated and remanded to the Commission for further proceedings and there is no appeal, Petitioners would not expect the mandate to continue to be withheld. But that is no argument against a *temporary* stay of the mandate until it is known whether an appeal will be taken directly from the District Court's decision. (At the June 7 hearing, the District Court expressed its intention to issue a decision in the case promptly.)

Third, Oxfam argues (at 3) that the Commission might not "be in a position to respond promptly if the District Court were to remand with instructions, unless this Court had already issued the mandate." That too is incorrect. The mandate in this case has no effect on the Commission's ability to respond to any remand order by the District Court, for multiple reasons: They are two separate cases, and the Commission's obligations in the District Court case would be determined by *that Court's* remand order. Moreover, "the Commission ha[s] authority to consider whether to alter the conditions [of its rule] in response to [a judicial decision] prior to

the issuance of the mandate.” *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006). And, as noted above, Petitioners would not expect this Court to continue to withhold its mandate once the time to appeal from the District Court had passed.

Fourth, Oxfam argues (at 3) against staying the mandate because if the District Court vacates the rule and the Commission appeals the remedy, the question of vacatur would be considered more deferentially than when this Court decides to vacate in the first instance. But the parties already briefed the question of whether vacatur or remand is appropriate. It hardly amounts to a “radically different posture” (Oxfam Opp. 3) for this Court to consider the matter more deferentially, but on the basis of the same legal and factual considerations as were before this Court previously.

For all these reasons, Petitioners’ motion to stay the mandate should be granted.

Dated: June 17, 2013

Of Counsel
Harry M. Ng
Peter C. Tolsdorf
American Petroleum
Institute
1220 L Street, N.W.
Washington, D.C. 20005
Telephone: (202) 682-
8500
Counsel for Petitioner
American Petroleum
Institute

Of Counsel
Rachel Brand
Steve Lehotsky
National Chamber
Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-
5337
Counsel for Petitioner
Chamber of Commerce
of the United States of
America

Respectfully submitted,

/s/ Eugene Scalia
Eugene Scalia
Counsel of Record
Thomas M. Johnson, Jr.
Ashley S. Boizelle
GIBSON, DUNN &
CRUTCHER LLP
1050 Connecticut Ave.,
N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2013, I electronically filed the foregoing Reply in Support of Petitioners' Motion to Stay the Mandate with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system.

Service was accomplished on the following by the CM/ECF system:

Mark Pennington
penningtonm@sec.gov
Michael A. Conley
conleym@sec.gov
William K. Shirey
shireyw@sec.gov
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

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

/s/ Eugene Scalia
Eugene Scalia
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
EScalia@gibsondunn.com