

**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.

SECURITIES AND EXCHANGE
COMMISSION,

Respondent.

OXFAM AMERICA, INC.,

Intervenor.

Case No. 12-1398

**OPPOSITION OF RESPONDENT
SECURITIES AND EXCHANGE COMMISSION TO
PETITIONERS' MOTION TO STAY THE MANDATE**

The Securities and Exchange Commission respectfully requests that the Court deny petitioners' motion to stay the issuance of the mandate.

First, this Court lacks jurisdiction to grant the relief sought by petitioners. Petitioners' request turns on the notion that this petition for review could eventually "be consolidated with" a hypothetical appeal from the pending, independent district court action in which the parties are currently litigating the validity of the challenged statute and rule. Mot. 4. But jurisdiction over an appeal

is a prerequisite to its consolidation with another appeal. *Cf. Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 677 (D.C. Cir. 1996) (declining to exercise pendent appellate jurisdiction in order to consolidate two appeals from the same action). Indeed, “[w]ithout jurisdiction, the court cannot proceed at all in any cause,” and once a court concludes that it has no jurisdiction, “the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) (internal quotation marks omitted).

This Court has already concluded that it lacks subject matter jurisdiction over this petition and ordered its dismissal. *Am. Petroleum Inst. v. Securities and Exchange Commission*, No. 12-1398, Docs. 1432736 & 1432739, 2013 WL 1776467 (D.C. Cir. Apr. 26, 2013). Moreover, as no party has sought rehearing or certiorari, the Court’s ruling ends this proceeding in its entirety, and no live controversy remains. This Court thus lacks the power to entertain this petition any further, much less to hold it in abeyance for the purpose of an improper consolidation with a potential appeal of another action at some point in the future.

Second, petitioners have failed to demonstrate the requisite “good cause” for staying the mandate. Circuit Rule 41. To begin with, there can be no “good cause” for using the mandate as a vehicle for affecting administrative matters (such as panel assignments) in other cases. The mandate is intended to formally mark

the end of the court of appeals' jurisdiction over the issues raised in the petition for review (*see Chamber of Commerce of the United States v. Securities and Exchange Commission*, 443 F.3d 890, 897-99 (D.C. Cir. 2006)), and a stay of the mandate is typically appropriate only where a party is seeking a writ of certiorari in the Supreme Court (*see, e.g., Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 2003 WL 22319584, at *1 (D.C. Cir. Sept. 30, 2003) (per curiam) (unpublished)).¹ There is no such basis for withholding the mandate here, as all issues properly before this Court have been resolved, and petitioners' substantive challenge to the statute and rule is already proceeding in a separate action at the district court level.

In any event, even if this Circuit's panel-assignment process constituted a proper consideration in determining whether to issue the mandate, there is no "good cause" for withholding the mandate here. In arguing that speed and efficiency would be served by staying the mandate, petitioners mistakenly assume that the parties' arguments "will be changed little if at all" in an appeal of the district court's ultimate decision. Mot. 4. Yet it is far from certain that there will even be an appeal. Should the district court decide to remand or vacate the rule, the Commission has the option of addressing the court's ruling through further

¹ While this Court has also stayed issuance of the mandate when necessary to avoid disruptions while an agency responds to a remand order (*see, e.g., Nat'l Coal. Against Misuse of Pesticides v. Thomas*, 809 F.2d 875, 884-85 (D.C. Cir. 1987)), that reason plainly has no application in this situation given that the Court did not reach the merits of the rule challenge.

rulemaking, during which time the district court would retain jurisdiction over the matter. *See Sierra Club v. U.S. Dep't of Agric.*, -- F.3d --, 2013 WL 2302321, at *3 (D.C. Cir. May, 28, 2013) (remand order typically appealable only by government agency, not private party). Even if an appeal ultimately arises, it may differ substantially from the petition for review before this panel. Given the uncertainties underlying petitioners' assumption, there is simply no good cause for delaying final resolution of this petition for review.

Accordingly, petitioners' motion to stay the mandate should be denied.

Respectfully Submitted,

MICHAEL A. CONLEY
Deputy General Counsel

WILLIAM K. SHIREY
Assistant General Counsel

THEODORE J. WEIMAN
Senior Counsel

/s/ Theodore J. Weiman
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549
(202) 551-5167 (Weiman)

June 2013

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system on June 10, 2013. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Theodore J. Weiman
THEODORE J. WEIMAN

June 10, 2013