No. 16-244

In the Supreme Court of the United States

DAVID SCHELL, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, CROSS-PETITIONERS

v.

OXY USA INC.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

MARIE R. YEATES
GREGORY F. MILLER
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002
(713) 758-2222

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

QUESTION PRESENTED

Whether the court of appeals erred in holding that the district court did not abuse its discretion by denying cross-petitioners' motion for attorney fees, which they sought based solely on the common-benefit doctrine and 28 U.S.C. § 2202.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Tenth Circuit:

1) OXY USA Inc. was the defendant-appellant-cross-appellee below.

2) David Schell, Donna Schell, and Ron Oliver were the plaintiffs, on behalf of themselves and "all surface owners of Kansas land burdened by oil and gas leases held or operated by OXY USA, Inc., which contain a free gas clause," Pet. App. 4a, as well as appellees-cross-appellants below.

RULE 29.6 STATEMENT

The parent companies of OXY USA Inc. are Occidental Oil and Gas Holding Corporation, Occidental Petroleum Investment Co., and Occidental Petroleum Corporation. Occidental Petroleum Corporation is traded on the New York Stock Exchange under the symbol OXY. No other publicly traded company owns 10% or more of OXY USA Inc.'s or Occidental Petroleum Corporation's stock.

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JURISDICTION

Petitioner OXY USA Inc.'s timely petition for a writ of certiorari was filed on July 20, 2016, and docketed on July 22, 2106. The conditional cross-petition was timely filed on August 19, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. a. After obtaining declaratory relief on a Kansas state-law contractual claim, cross-petitioners moved for attorney fees, invoking only three potential bases for relief: (1) the "common-benefit exception" to the so-called "American Rule" that parties bear their own costs; (2) the "bad faith" exception to that Rule; and (3) a freestanding right to fees under the Declaratory Judgment Act, which authorizes courts to award "[f]urther necessary or proper relief." 28 U.S.C. § 2202. Cross-petitioners did not cite Kansas law as a basis for relief. See Mem. in Supp. Mot. for Att'y's Fees, Nontaxable Expenses and Incentive Award 4, 8-32 *Schell* v. *OXY USA Inc.*, No. 6:07-cv-01258-JTM-KMH (D. Kan. Apr. 9, 2013), ECF No. 161.

b. The district court denied cross-petitioners' motion. Cross-Pet. App. 2-9. Because cross-petitioners' obtained only declaratory relief and no monetary recovery from which an attorney fee could be drawn, the court concluded that "the common-benefit exception is inappropriate under these circumstances." *Id.* at 7. The court found "no

evidence supporting a finding that OXY litigated this issue in bad faith." *Id.* at 5. Finally, the court concluded that § 2202 provided "no independent statutory or contractual basis for attorneys' fees." *Ibid.*

2. a. On appeal, cross-petitioners "argue[d] that they qualified for attorneys' fees under the common-benefit exception to the American Rule; in the alternative, they argue[d] for such fees under 28 U.S.C. § 2202." Pet. App. 31a; see also Appellee's Principal & Response Br. 41-52, C.A. Doc. 01019242524; Appellees' Reply Br. 2-12, C.A. Doc. 01019264810.

b. The court of appeals affirmed in relevant part. Pet. App. 26a-37a. The court of appeals agreed with the district court that the common-benefit exception was inapplicable because, absent a monetary recovery, the fees could not "be spread across the plaintiff class." *Id.* at 32a. The court also concluded that "the district court did not abuse its discretion in concluding that § 2202 does not authorize an independent grant of attorneys' fees that is not otherwise authorized by statute, contract, or state law." Pet. App. 35a. The court observed that "our sister circuits" uniformly "have concluded that § 2202 does not give an independent power to award attorneys' fees," and cross-petitioners had offered "no persuasive reason" to "follow a different path here." *Id.* at 35a-36a.[1]

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[1] The court declined to address cross-petitioners' argument, first raised "briefly * * * in their reply brief," that OXY had litigated in bad faith. Pet. App. 37a n.14.

REASONS FOR DENYING THE CROSS-PETITION

Cross-petitioners assert that they are entitled to attorney fees based on the general language of the Declaratory Judgment Act and—for the first time in any court—under Kansas state law. Both courts below correctly rejected an award of attorney fees on the sole theory cross-petitioners have preserved, and cross-petitioners do not even assert that the courts of appeals are divided on the issue. The cross-petition should be denied.

1. Under the American Rule, "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252-253 (2010). Aside from "a limited number" of well-established "equitable exceptions to the American Rule" (Pet. App. 30a) that are not implicated here,[2] courts "will not deviate from the American rule absent explicit statutory authority." *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (internal quotation marks omitted). Such statutes must speak in unmistakable terms; although these "[s]tatutory changes to [the American Rule] take various forms, they tend to authorize the award of 'a reasonable attorney's fee,' 'fees,' or 'litigation costs,' and usually refer to a 'prevailing party' in the context of an adversarial 'action.'" *Ibid.* (some internal quotation marks omitted; citations omitted).

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[2] Cross-petitioners "accept[] the Tenth Circuit's finding that the common-benefit exception to the American Rule does not apply." Cross-Pet. 3 n.2.

Section 2202's general language authorizing courts to award "[f]urther necessary or proper relief," 28 U.S.C. § 2202, falls far short of "the clarity [this Court] ha[s] required to deviate from the American Rule." *Baker Botts*, 135 S. Ct. at 2164; *id.* at 2168 (holding "[t]he open-ended phrase 'reasonable compensation'" insufficient to depart from American Rule). It is therefore unsurprising that, as the Tenth Circuit noted, all circuits that "have considered the question" have uniformly "concluded that § 2202 does not give an independent power to award attorneys' fees." Pet. App. 35a-36a (citing *Utica Lloyd's of Tex.* v. *Mitchell,* 138 F.3d 208, 210 (5th Cir. 1998); *Titan Holdings Syndicate, Inc.* v. *City of Keene,* 898 F.2d 265, 273 (1st Cir. 1990); *Am. Family Ins. Co.* v. *Dewald,* 597 F.2d 1148, 1151 (8th Cir. 1979)).

The decisions cross-petitioners cite (Cross-Pet. 8-9) are not to the contrary. Some involve statutes that—as cross-petitioners acknowledge—"*specifically authorize* fee shifting" (*id.* at 9 (emphasis added));[3]

[3] See, *e.g.*, *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1746, 1748 (2014) (statute provided district courts "may award reasonable attorney fees to the prevailing party" (quoting 35 U.S.C. § 285)); *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755-1756 (2014) (same); *Rohm & Haas Co.* v. *Crystal Chem. Co.*, 736 F.2d 688, 689 (Fed. Cir. 1984) (same). To the extent cross-petitioners seek to invoke *Rohm*'s discussion authorizing attorney fees where a party litigated in "bad faith," 736 F.3d at 691, the Tenth Circuit explicitly held that they failed to preserve that claim, Pet. App. 37a n.14, and this Court ordinarily does not decide issues not resolved below. *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

Cross-petitioners also cite an unpublished Tenth Circuit decision. See Cross-Pet. 10-11 (citing *Kornfeld* v. *Kornfeld*, 341 F. App'x 394 (10th Cir. 2009)). But as the decision below noted,

others involve explicit contract provisions;[4] still others involve state statutes that explicitly provide a right to recover attorney fees.[5] Because those decisions involved express statutory and contractual provisions authorizing "attorney fees," they lend no support to cross-petitioners' unprecedented claim that § 2202's general authorization of "[f]urther necessary or proper relief" created another exception to the American Rule.

2. Cross-petitioners also assert that the Tenth Circuit "creat[ed] a circuit split in not considering Kansas law on the subject." Cross-Pet. 18. There is no such split. The Tenth Circuit correctly observed that "§ 2202 does not authorize an independent grant of attorneys' fees that is not otherwise authorized by statute, contract, or *state law*." Pet. App. 35a (emphasis added). Both courts below declined to address whether Kansas law authorized attorney fees here for the simple reason that cross-petitioners *never invoked* Kansas law below as a basis for awarding fees.

In apparent recognition of their failure to invoke Kansas law, cross-appellants argue that other

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that decision did not reach any holding regarding § 2202. See Pet. App. 35a n.13.

[4] *E.g.*, *Horn & Hardart Co.* v. *Nat'l Rail Passenger Corp.*, 843 F.2d 546, 550 (D.C. Cir. 1988) (lease gave contractual right to recover "attorneys' fees and three times its average monthly rent"); *GNB Inc.* v. *Gould, Inc.*, No. 90-cv-2413, 1996 WL 18898, at *1 (N.D. Ill. Jan. 18, 1996) (defendant "seeks its fees under * * * the [insurance] Agreement").

[5] *E.g.*, *Nat'l Indem. Co. v. Harper*, 295 F. Supp. 749, 757-758 (W.D. Mo. 1969) (Missouri statute entitled defendant-policyholder to attorney fees).

circuits have held that "§ 2202 require[s] the courts to look to state law." Cross-Pet. 18. Not so: In each of the cases cross-petitioners' cite, *the parties* invoked state law. See *Utica Lloyd's*, 138 F.3d at 210 ("[D]efendants rely on the § 37.009 of the Texas DJA to authorize recovery of attorney's fees."); *Titan Holdings*, 898 F.2d at 267 n.1, 273 (parties agreed that state law controlled the legal issues, including attorney fees); *Am. Family Ins.*, 597 F.2d at 1151 (noting party had cited authority permitting attorney fees "where such an award is authorized by applicable state law"). Where cross-petitioners made no such argument, the courts below were not obliged to make it for them. Because the question whether Kansas law authorized a § 2202 fee award "was not pressed or passed upon below," this Court's "traditional rule * * * precludes a grant of certiorari." *Williams*, 504 U.S. at 41.

CONCLUSION

The conditional cross-petition should be denied.

Respectfully submitted.

MARIE R. YEATES
GREGORY F. MILLER
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002
(713) 758-2222

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

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