

In The
Supreme Court of the United States

—◆—
OXY USA INC.,

Petitioner,

v.

DAVID SCHELL, ET AL, on behalf of
himself and all others similarly situated,

Respondents.

—◆—
*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

—◆—
**RESPONSE TO SUPPLEMENTAL BRIEF
FOR PETITIONER REGARDING
INTERVENING DECISION**

—◆—
REX A. SHARP
Counsel of Record
BARBARA C. FRANKLAND
REX A. SHARP, P.A.
5301 West 75th Street
Prairie Village, KS 66208
(913) 901-0505
rsharp@midwest-law.com
bfrankland@midwest-law.com

Counsel for Respondents

OXY submits a five-page supplemental brief covering a two-page unpublished opinion issued about three weeks ago by the First Circuit Court of Appeals. *Pollack v. Regional School Unit 75*, ___ Fed.Appx. ___, 2016 WL 5746263 (1st Cir. Oct. 4, 2016) (unpub.).¹ *Pollack* vacates the district court’s summary judgment for failure to exhaust administrative remedies after the parents of a non-verbal autistic child exhausted their administrative remedies during the pendency of the appeal so that the case would be decided on the merits rather than procedural grounds.²

Legally, *Pollack* breaks no new legal ground and essentially adopts the test Respondent puts forth. Compare *Pollack*, 2016 WL 5746263, at *2 with *Opp.* at 5-10, 13-19; see also, App. 50a-63a.

When an appeal becomes moot, the decision of whether to vacate a trial court order “rests in the equitable discretion of this court.” *Kerkhof v. MCI WorldCom, Inc.*, 282 F.3d 44, 53 (1st Cir. 2002) (citing *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 25, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994)). “A primary concern is whether the appellant deliberately

¹ The case was not selected for publication. Under 1st Cir. Rule 36.0, unpublished opinions “are not likely to break new legal ground or contribute otherwise to legal development.”

² *Pollack*, 2016 WL 5746263, at *2 (“[I]t would be inequitable to leave the summary judgment order standing and have these claims dismissed without ever reaching their merits.”).

mooted the appeal,” such as through settlement or withdrawal of the appeal. *Id.* at 53-54.

The essential inquiry is whether the party seeking vacatur knowingly mooted the appeal through voluntary conduct. Opp. at i, 5-10. In *Pollack*, the parents were simply trying to clear a procedural hurdle that the district court had ordered so they could reach the merits of their claims. *Pollack*, 2016 WL 5746263, at *2 (“Parents merely took the actions necessary to clear the procedural hurdle of exhaustion in accordance with the district court’s order.”). By contrast, in this case, OXY deliberately mooted the appeal. Unlike the parents in *Pollack*, OXY was not merely complying with a district court order. Rather, OXY took voluntary action, knowing its conduct would moot the appeal, proceeded anyway, collected \$1.4 billion, initially hid the transaction from the Tenth Circuit, and then argued that its selling all of its Kansas assets (including the leases in question) did not moot the appeal. Opp. at 10-13. Having lost this gambit, OXY hopes to pull victory from the jaws of defeat by creating a new subjective vacatur standard so it can erase the district court’s judgment on the merits in favor of the class.

Nothing about *Pollack* supports vacating the fully litigated merits judgment against OXY in this case. The Tenth Circuit properly found the equities in this

case weighed against vacatur. App. 58a (“After weighing the equities of this case, however, we determine that vacating the district court’s judgment would not be appropriate.”).

◆

CONCLUSION

OXY’s petition for a writ of certiorari should be denied; or, if granted, the cross-petition for a writ of certiorari on the award of attorneys’ fees and expenses as “further necessary or proper relief” under the Declaratory Judgment Act, 28 U.S.C. § 2202, should be granted as well.

Respectfully submitted,

REX A. SHARP

Counsel of Record

BARBARA C. FRANKLAND

REX A. SHARP, P.A.

5301 West 75th Street

Prairie Village, KS 66208

(913) 901-0505

rsharp@midwest-law.com

bfrankland@midwest-law.com

OCTOBER 2016