

In The
Supreme Court of the United States

—◆—
DAVID SCHELL, ET AL.,
On behalf of himself and all others similarly situated,

Cross-Petitioners,

v.

OXY USA INC.,

Cross-Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

—◆—
**REPLY BRIEF TO
CONDITIONAL CROSS PETITION
FOR WRIT OF CERTIORARI**

—◆—
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To OXY, Section 2202’s “further necessary or proper relief” clause apparently means anything that the district court deems necessary or proper, except attorneys’ fees – a common form of relief and essentially the only relief that opens the courthouse door to contingent fee clients, especially those pursuing class actions.

Defendant relies on the easily distinguishable *Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158 (June 15, 2015), where two large powerhouse companies – both paying their counsel hourly fees – could make the other side pay under the Bankruptcy Code. Class actions and declaratory judgments are at the other end of the spectrum. They open the courthouse door to people with legal claims that are too small to warrant individual litigation and to remedy potential harms before the harm is inflicted. They are emblematic of the types of cases that necessitated exceptions to the American rule (such as the common fund doctrine, the common benefit doctrine, and numerous statutory exceptions). Although the law in this area is relatively sparse, the need is great for judicial discretion to award attorneys’ fees where substantial harm is averted by a declaratory judgment action. Without the prospect of payment upon winning, attorneys who represent clients on a contingent fee basis will avoid seeking declaratory judgments, opting instead to wait for the infliction of actual harm so that legal claims with money damages allow them to be paid if they win the case for their clients. With that background, the “necessary or proper relief” language in Section 2202

should be interpreted to authorize the district court to exercise its discretion to award attorneys' fees when appropriate.

At least one district court has analyzed the interplay between *Baker Botts* and the American Rule in depth. In doing so, it dismantled the broad reading of *Baker Botts* asserted by OXY here, which conflates *dicta* about the American Rule with the actual, narrow holding of the case:

To put the matter very succinctly, *Baker Botts* says a lot, but holds very little. Specifically, *Baker Botts* is binding only for the proposition that § 330(a)(1) of the Bankruptcy Code does not permit a bankruptcy court to award attorney's fees for work performed in defending a fee application in court.

Shammas v. Lee, ___ F. Supp. 3d ___, 2016 WL 2726639, at *4 (E.D. Va. May 9, 2016), appeal filed June 9, 2016; *see also id.* (rejecting the assertion that the broad reading of *Baker Botts* overrules the Fourth Circuit's interpretation of the American Rule).

Further, *Baker Botts* held that no fees were allowed because "[l]itigating against one's own client did not fall within the Court's view of what constitutes 'actual, necessary services rendered' under § 330(a)." *In re 29 Brooklyn Avenue, LLC*, 548 B.R. 642, 647 (E.D.N.Y. April 27, 2016). Here, of course, the opposite is true. Class counsel clearly labored for the class and prevailed for the Class. The district court so found. Cross-Pet. App. 7-9.

Nor does Plaintiff suggest that simply prevailing automatically requires an attorneys' fee award, as some statutes require. Under Section 2202, the award of fees is discretionary. The district court below, in its discretion, would have awarded fees, if it believed it had the legal authority to do so. Cross-Pet. App. 7-9. Section 2202 provides that statutory legal authority when the district court finds such relief "necessary or proper," whether based on the express language of Section 2202 alone, or based on state law as other courts have done.

To whitewash the circuit split about whether federal or state law controls the issue under Section 2202 (and that Kansas state law would allow attorneys' fees in a declaratory judgment action – an issue which OXY does not contest), OXY argues that the issue was not raised below. But OXY is wrong. The issue was raised below. *See* Appellee's Petition for Rehearing or Rehearing En Banc (C.A. 01019575655) at 9, n.3.¹

¹ The entirety of the footnote states:

Kansas law would not bar attorneys' fees for a declaratory judgment. K.S.A. 60-1703 provides: "Further relief based on a declaratory judgment may be granted whenever necessary or proper." And the procedure to determine the award shifts the burden to defendant. A prevailing declaratory judgment plaintiff can apply to the court for fees, and the defendant must "show cause why further relief should not be granted." As the district court found, OXY cannot show any reason why fees should not be awarded under Section 2202.

The conditional cross-petition should be granted if the Court also grants OXY's petition for a writ of certiorari.

Respectfully submitted,

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