No. 16-107

In the Supreme Court of the United States

OXY USA INC., PETITIONER

v.

DAVID SCHELL, ET AL.

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

SUPPLEMENTAL BRIEF FOR PETITIONER REGARDING INTERVENING DECISION

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

RULE 29.6 STATEMENT

The disclosures in the petition remain accurate.

SUPPLEMENTAL BRIEF FOR PETITIONER REGARDING INTERVENING DECISION

Pursuant to this Court's Rule 15.8, petitioner submits this supplemental brief to address the relevance of an intervening lower-court decision that adopted the rule petitioner advocates, vacating the district court's decision after the appellants' voluntary conduct rendered their appeal moot.

As petitioner has explained, the courts of appeals frequently face the issue of whether to vacate a district court's decision after an appellant's voluntary conduct has mooted the appeal. Pet. 31-32; Reply Br. 11-12. Just since petitioner filed its reply brief in this case, a court of appeals has issued *another* decision applying the majority-side rule of the split outlined in the petition.

On October 4, 2016, the United States Court of Appeals for the First Circuit held that vacatur of the district court's decision was proper although the appellants had mooted their appeal through voluntary conduct. *Pollack* v. *Reg'l Sch. Unit 75*, ___ F. App'x ___, No. 16-1414, 2016 WL 5746263. In *Pollack*, a school district refused to allow an autistic student to use an electronic recording device in class, and his parents filed suit against the district. *Id.* at *1. The district court granted the school district summary judgment on some of the parents' claims because they had not been exhausted through the state administrative process. *Id.* at *1-2. But shortly before that decision issued, the parents filed an administrative complaint raising those claims. *Id.* at *2.

The First Circuit held that the parents had mooted their own appeal by "satisfy[ing] the exhaustion requirement as articulated by the district court," and that the proper course was to "vacate the portion of the district court's order granting summary judgment for the District on" the previously unexhausted claims. *Id.* at *2. In addition to confirming that this case presents a frequently recurring issue, see Pet. 31-32; Reply Br. 11-12, the decision underscores four important points the petition made.

First, *Pollack* confirms that, in determining whether vacatur is warranted when a decision becomes moot on appeal, most federal courts of appeals give *controlling weight* to whether the pending appeal played a role in the appellant's voluntary conduct. See Pet. 14-18. In *Pollack*, the First Circuit explicitly stated that "[a] primary concern is whether the appellant *deliberately* mooted the appeal." *Pollack*, 2016 WL 5746263, at *2 (emphasis added) (quoting *Kerkhof* v. *MCI WorldCom*, 282 F.3d 44, 53 (1st Cir. 2002)). After determining that the parents had not deliberately mooted the appeal, the First Circuit decided on that basis alone that vacatur was appropriate. *Pollack* thus underscores the primacy of that consideration among courts that employ the majority rule. The Tenth Circuit, however, *explicitly rejected* the idea that courts should "pa[y] particular attention * * * to whether a party's voluntary act effecting mootness" was undertaken to moot the appeal. Pet. App. 51a n.5. And utterly absent from the First Circuit's

reasoning was any suggestion that the appellants—a schoolchild's parents—were "governmental agencies." Opp. 7 n.3.

Second, *Pollack* reinforces the fact that when following the "normal[]" practice of vacating a decision that becomes moot on appeal, *Alvarez* v. *Smith*, 558 U.S. 87, 94 (2009), the majority-rule circuits give a narrow reading to the exception established in *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994), "[w]here mootness results from settlement," *id*. at 25. *Pollack* emphasized the narrowness of the *Bancorp* exception by noting that the exception applies where "an appellant settles an *entire* case"—as opposed to a portion of the case—and "thereby surrender[s] his claim to the equitable remedy of vacatur." 2016 WL 5746263, at *2 (emphasis added) (quoting *Bancorp*, 513 U.S. at 25). That is in sharp contrast to the Tenth Circuit's reading of *Bancorp*, which automatically imposes a strict presumption against vacatur based on the mere fact that the appellant's case-mooting conduct was voluntary. See Pet. App. 14a-15a (noting blanket "presumption * * * in favor of retaining the judgment" whenever mootness results from "voluntary action" by the appellant (quoting *Bancorp*, 513 U.S. at 24)). There is clearly a fundamental difference in the way the courts on each side of the split construe the *Bancorp* exception. See Pet. 19-20; Reply Br. 3.

Third, *Pollack* confirms that the majority-rule circuits do not, like the Tenth Circuit below, require proof of "compelling equitable reason[s]" for vacatur. See Pet. App. 25a. The First Circuit considered it

sufficient that the appellants "took the actions necessary to clear the procedural hurdle of exhaustion in accordance with the district court's order" and thus had not deliberately sought to moot the case. *Pollack*, 2016 WL 5746263, at *2. That is in sharp contrast with the Tenth Circuit, which demands that an appellant's conduct—even if unrelated to the litigation and not motivated by a desire to moot the appeal—also be "commendable." Pet. App. 25a. And far from spawning "satellite litigation," as respondents contend, Opp. 19, the First Circuit dispatched the issue in a brief *per curiam* opinion.

Finally, *Pollack* undermines respondents' criticism that cases that predate *Alvarez* v. *Smith*, 558 U.S. 87 (2009), are not entitled to weight in considering the split among the circuits. See Opp. 14. *Pollack* confirms petitioner's contention that pre-*Alvarez* decisions continue to be relevant because *Alvarez* "*embraced* the majority rule." Reply Br. 4. In vacating the decision below, *Pollack* relied exclusively on two pre-*Alvarez* majority-rule decisions—including one petitioner cited that respondents sought to distinguish. See *Kerkhof* v. *MCI WorldCom, Inc.*, 282 F.3d 44, 53-54 (1st Cir. 2002) (cited at Pet. 15, Opp. 14, Reply Br. 4-5). See *Pollack*, 2016 WL 5746263, at *2 (quoting *Kerkhof*); *ibid*. (citing with approval *S.S.* v. *E. Kentucky Univ.*, 125 F. App'x 644, 646 (6th Cir. 2005)).

The fact that this Court has now removed *Ivy* v. *Morath*, No. 15-486, from its oral argument calendar (presumably because the case has become moot)

underscores the need for plenary review in this case. To begin with, this case involves a distinct factual scenario that is, standing alone, a "not-uncommon situation" in federal court—"a litigant selling assets that are at issue in a lawsuit during the pendency of the litigation." 2015 ABA Env't, Energy & Resources L.: Year in Rev. 121, 132; see also Reply Br. 1, 4 (noting circuit split on that issue). The fact that the Tenth Circuit below went so far wrong interpreting *Alvarez*—a factually similar case involving the return of seized property—demonstrates that further guidance from this Court is needed on the distinct issue of the sale of property at issue in litigation. And unlike most cases this Court addresses involving a case that becomes moot while on appeal, *this* case has the benefit of full factual development and a thorough discussion of the issues by the court of appeals. Further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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

OCTOBER 2016