No. 18-1269

In the Supreme Court of the United States

SIMON E. RODRIGUEZ, AS
CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF
UNITED WESTERN BANCORP, INC., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS
RECEIVER FOR UNITED WESTERN BANK

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly applied principles of Colorado contract law in interpreting a tax allocation agreement.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
Conclusion 17

TABLE OF AUTHORITIES

Cases:

BankUnited Fin. Corp., In re, 727 F.3d 1100 (11th Cir. 2013), cert. denied, 571 U.S. 1244 (2014) 14

Barnes v. *Harris*, 783 F.3d 1185 (10th Cir. 2015) 2, 7, 14

Barnhill v. *Johnson*, 503 U.S. 393 (1992) 7, 12

Bob Richards Chrysler-Plymouth Corp., In re, 473 F.2d 262 (9th Cir.), cert. denied, 412 U.S. 919 (1973) 2, 5, 9, 13, 14, 15

Butner v. *United States*, 440 U.S. 48 (1979) 15

Capital Bancshares, Inc. v. *FDIC*, 957 F.2d 203 (5th Cir. 1992) 14, 16

Downey Fin. Corp., In re, 593 Fed. Appx. 123 (3d Cir. 2015) 14

Expressions Hair Design v. *Schneiderman*, 137 S. Ct. 1144 (2017) 12

FDIC v. *AmFin Fin. Corp.*, 757 F.3d 530 (6th Cir. 2014), cert. denied, 135 S. Ct. 1402 (2015) 2, 14, 16

First Reg'l Bancorp, In re, 703 Fed. Appx. 565 (9th Cir. 2017) 15

Indymac Bancorp, Inc., In re, 554 Fed. Appx. 668 (9th Cir. 2014) 15

Jump v. *Manchester Life & Cas. Mgmt. Corp.*, 579 F.2d 449 (8th Cir. 1978) 14

Cases—Continued: Page

NetBank, Inc., In re, 729 F.3d 1344 (11th Cir. 2013), cert. denied, 135 S. Ct. 476 (2014) 16

Pinnacol Assurance v. *Hoff*, 375 P.3d 1214 (Colo. 2016) 10

Posadas v. *National City Bank of New York*, 296 U.S. 497 (1936)... 13

Prudential Lines Inc., In re, 928 F.2d 565 (2d Cir.), cert. denied, 502 U.S. 821 (1991) 14, 15, 16

School Dist. No. 1 in Cnty. of Denver v. *Denver Classroom Teachers Ass'n*, 433 P.3d 38 (Colo. 2019) 9, 10, 11, 13

US Airways, Inc. v. *McCutchen*, 569 U.S. 88 (2013) 16

USI Props. E., Inc. v. *Simpson*, 938 P.2d 168 (Colo. 1997) 10, 13

Statutes, regulations, and rule:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:

Ch. 5, 11 U.S.C. 501 *et seq.*:

11 U.S.C. 541(d) 4

Ch. 7, 11 U.S.C. 701 *et seq.* 4

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 4

12 U.S.C. 1813.. 4

12 U.S.C. 1821.. 4

12 U.S.C. 1821(d)(2)(A)(i) 4

Internal Revenue Code (26 U.S.C.):

§ 172 4

§§ 1501-1504 2

26 C.F.R.:

Section 1.1502-77(a)(1) 2

Section 1.1502-77(c)(1) 2

Regulation and rule—Continued: Page

Section 1.1502-77(d)(5) 2

Sup. Ct. R. 10 11

Miscellaneous:

Stephen M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 914 F.3d 1262. The opinion and order of the district court (Pet. App. 28a-66a) is reported at 574 B.R. 876. The opinion and order of the bankruptcy court (Pet. App. 67a-128a) is reported at 558 B.R. 409.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2018. A petition for rehearing was granted in part and denied in part on January 29, 2019 (Pet. App. 2a). The petition for a writ of certiorari was filed on April 1, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Affiliated corporations that share a common parent may file a consolidated income tax return in lieu of separate returns. 26 U.S.C. 1501-1504. To facilitate its handling of consolidated returns, the IRS generally prohibits individual affiliates from contacting the agency concerning the returns. Instead, the common parent "is the sole agent that is authorized to act" for the group. 26 C.F.R. 1.1502-77(a)(1); see 26 C.F.R. 1.1502-77(c)(1). Accordingly, only the common parent "files claims for refund, and any refund is made directly to and in the name of the [common parent]." 26 C.F.R. 1.1502-77(d)(5).

Those requirements are solely for the convenience of the IRS and do not determine which entity—parent or subsidiary—is entitled to retain any refund. "[T]he [Internal Revenue] Code is silent with respect to the legal and equitable ownership of such a tax refund." Pet. App. 15a; see Pet. 5-6. Courts uniformly agree that affiliated companies may form contracts that allocate such refunds in whatever manner the companies choose. See, *e.g.*, *Barnes* v. *Harris*, 783 F.3d 1185, 1196 (10th Cir. 2015); *FDIC* v. *AmFin Fin. Corp.*, 757 F.3d 530, 533 (6th Cir. 2014), cert. denied, 135 S. Ct. 1402 (2015) (No. 14-576); *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262, 264 (9th Cir.), cert. denied, 412 U.S. 919 (1973).

2. a. United Western Bancorp, Inc. was a Colorado holding company. Pet. App. 3a. One of its subsidiaries was United Western Bank, a federally chartered savings and loan association also based in Colorado. *Id.* at 7a, 30a. The holding company and all of its subsidiaries, including the bank, were members of an affiliated group

that filed consolidated tax returns. *Id.* at 3a. They entered into a tax allocation agreement "to establish a method for (i) allocating the consolidated tax liability of the Group among its members, (ii) reimbursing [the holding company] for the payment of such tax liability, and (iii) compensating each member of the Group for the use of its losses by any other member of the Group." *Id.* at 129a-130a.

The agreement generally required each affiliate to pay the holding company "an amount equal to the federal income tax liability such Affiliate would have incurred were it to file a separate return." Pet. App. 130a. Conversely, if a "regulated" affiliate—such as the bank —"incurs a net operating loss or excess tax credits, the regulated Affiliate is entitled to a refund equal to the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return." *Ibid.* "In essence, this Agreement requires that each first-tier subsidiary be treated as a separate taxpayer with [the holding company] merely being an intermediary between an Affiliate and the Internal Revenue Service." *Id.* at 131a. To that end, "[e]ach affiliate hereby appoints [the holding company] as its agent * * * for the purpose of filing such consolidated Federal income tax returns." *Id.* at 137a.

The agreement also stated that its "intent" was "to provide an equitable allocation of the tax liability" among the member companies. Pet. App. 138a. The agreement further provided that "[a]ny ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent, in favor of any insured depository institution." *Ibid.*

b. The dispute in this case concerns ownership of a federal tax refund related to tax years 2008 and 2010.

In 2008, the bank generated and paid taxes on approximately $34 million in taxable income. Pet. App. 7a. In 2010, however, the bank lost more than $35 million, a portion of which it could "carryback" to 2008 to reduce the taxable income (and thus the taxes owed) for that year. See 26 U.S.C. 172; Pet. App. 7a. Accordingly, the holding company filed a request on behalf of the consolidated group for a refund of more than $4 million. Pet. App. 7a.

Around that time, the bank failed and respondent Federal Deposit Insurance Corporation (FDIC) was appointed as receiver under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183. See 12 U.S.C. 1813, 1821; Pet. App. 7a-8a. As receiver, the FDIC succeeded to "all rights, titles, powers, and privileges of the insured depository institution." 12 U.S.C. 1821(d)(2)(A)(i). Shortly thereafter, the holding company also declared bankruptcy, and petitioner eventually was appointed as the Chapter 7 trustee. Pet. App. 7a-8a. The FDIC filed a proof of claim for the anticipated tax refund, asserting that the refund belonged to the bank rather than to the holding company's estate. *Id.* at 8a; see 11 U.S.C. 541(d) (estate excludes property "to the extent of any equitable interest in such property that the debtor does not hold").

Petitioner then initiated this adversary proceeding against the FDIC, objecting to its proof of claim and asserting that the disputed tax refund belonged to the holding company, not the bank. Pet. App. 9a, 70a. The FDIC counterclaimed, asserting the opposite. *Ibid.* Both parties moved for summary judgment. *Id.* at 37a. The IRS deposited the $4 million refund in the bankruptcy court's registry, where it remains pending resolution of this dispute. *Id.* at 37a-38a, 69a.

3. a. The bankruptcy court granted petitioner's motion for summary judgment and denied the FDIC's motion. Pet. App. 67a-128a.

The bankruptcy court observed that, "in the absence of any agreement amongst the members of a consolidated group," it would have applied a "default rule for distribution of loss carryback tax refunds based upon consolidated income tax returns," such as the default rule set forth by the Ninth Circuit in *Bob Richards*. Pet. App. 116a. Under that default rule, "a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member * * * should inure to the benefit of that member." *Bob Richards*, 473 F.2d at 265. That default rule applies, however, only "[a]bsent any differing agreement" between the parties concerning the proper allocation of taxes. *Ibid.* The court in *Bob Richards* stated that the rule does not apply "where there is an explicit agreement, or where an agreement can fairly be implied, as a matter of state corporation law." *Id.* at 264 (footnotes omitted). In this case, the bankruptcy court observed that "such an agreement is present" here, and so "the *Bob Richards* default rule is facially inapplicable." Pet. App. 118a.

The bankruptcy court further explained that ownership of the tax refund at issue in this case therefore depended solely on the "unambiguous terms of the" parties' tax allocation agreement "as construed under Colorado law." Pet. App. 97a (footnote omitted). Reviewing those terms, the court concluded that the agreement unambiguously created a creditor-debtor relationship —and not an agency relationship—between the bank and the holding company. *Id.* at 105a, 112a-113a. Accordingly, the court found that the refund belonged to

the holding company's estate, and that the bank was merely a general unsecured creditor with a non-priority claim for the $4 million refund. *Id.* at 126a-127a.

b. The district court reversed. Pet. App. 28a-66a.

The district court first observed that "[t]he Bankruptcy Court's judgment rested on a contract interpretation made as a matter of law." Pet. App. 29a. The district court further observed that "the parties here agree (as do the various cases they cite) that the question of refund allocation is ultimately a matter of contractual intent." *Id.* at 39a. Like the bankruptcy court, the district court acknowledged the *Bob Richards* default rule but found it inapplicable here, explaining that "analysis of the property interest created by the [tax allocation agreement] ultimately favors the FDIC," without the need to apply any default rules or presumptions. *Id.* at 49a-50a.

After analyzing (Pet. App. 50a-64a) the parties' tax allocation agreement "as construed under Colorado law," *id.* at 50a (capitalization and emphasis omitted), the district court concluded that the agreement "could be reasonably interpreted both to create an agency relationship (in which case the Holding Company was required to act toward the Refund as a fiduciary for the Bank) or a standard commercial relationship (in which case the Holding Company has no greater obligation to the Bank than it does to any other creditor)," *id.* at 64a. But the court also found that the agreement itself, "by its express terms, breaks the tie in favor of the Bank" by stating that "'[a]ny ambiguity in the interpretation hereof shall be resolved * * * in favor of any insured depository institution.'" *Ibid.* (citation omitted). The court accordingly concluded that the bank held equitable title to the refund, and that "[t]he Refund is not part

of the Holding Company's bankruptcy estate." *Id.* at 66a.

4. The court of appeals affirmed. Pet. App. 2a-27a.

a. Like the bankruptcy court and the district court, the court of appeals acknowledged the *Bob Richards* default rule. Pet. App. 15a. The court also recognized that in *Barnes*, *supra*, it had "effectively adopted" the *Bob Richards* rule, *ibid.*, and that *Barnes* "outlines the general framework that [the court] must apply" here, *id.* at 18a. The court agreed with petitioner, however, that "this case differs from *Barnes* and *Bob Richards* because there was a written agreement in place," namely, the parties' tax allocation agreement. *Ibid.* The court also explained that in this context, "'property' and 'interests in property' are creatures of state law." *Ibid.* (quoting *Barnhill* v. *Johnson*, 503 U.S. 393, 398 (1992)). Accordingly, the court stated that its task was to "look to the terms of the Agreement and, taking into account Colorado case law, decide whether it unambiguously addresses how tax refunds are to be handled." *Ibid.*

After analyzing (Pet. App. 18a-26a) various provisions of the tax allocation agreement, the court of appeals determined that the agreement "is, on its face, ambiguous with respect to the type of relationship it intends to create between [the holding company] and regulated, first-tier affiliates, such as the Bank, regarding the ownership of refunds from the IRS." *Id.* at 25a. "On the one hand," the court explained, some provisions "quite clearly indicate the intent to create an agency relationship," such as the provision stating that "'each first-tier subsidiary is to be treated as a separate taxpayer with [the holding company] merely being an in-

termediary,'" and the one stating that the holding company "is being appointed by each affiliate to act as its agent." *Ibid.* (brackets and citation omitted). "On the other hand," the court observed, some provisions "arguably suggest the intent for [the holding company] to retain tax refunds before forwarding them on," such as the one "imply[ing] that [the holding company] will retain tax refunds and then later take them into account during the annual settlement process." *Id.* at 25a-26a.

Like the district court, the court of appeals recognized that "the Agreement itself provides a method for resolving the ambiguity." Pet. App. 26a. Quoting the ambiguity-resolving provision set forth above, the court observed that "[q]uite clearly, construing the Agreement to create an agency relationship * * * and thereby affording ownership of the tax refund to the Bank" would be "more favorable to the Bank than construing the Agreement to create a debtor/creditor relationship and thus affording ownership of federal tax refunds to" the holding company. *Id.* at 26a-27a. The court held that the Agreement therefore "must be read as creating only an agency relationship between [the holding company] and the Bank." *Id.* at 27a. In the "Conclusion" section of its opinion, the court stated that "the Agreement's intended treatment of tax refunds does not differ from the general rule outlined in *Barnes* and *Bob Richards*." *Ibid.*

b. Petitioner filed a petition for rehearing, challenging the court of appeals' finding that the entire $4 million refund was attributable to the bank's losses. See Pet. C.A. Pet. for Panel Reh'g and Mot. for Clarification 4-11 (Aug. 3, 2018). Granting in part and denying in part the petition, the court deleted a footnote in its opin-

ion suggesting that petitioner had forfeited the argument, but declined to modify its ultimate finding that the refund was attributable solely to the bank's losses. See Pet. App. 2a; cf. 893 F.3d 716, 722 n.3.

ARGUMENT

Petitioner asserts (Pet. 14-28) that a circuit conflict exists concerning the applicability of the Ninth Circuit's decision in *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262, cert. denied, 412 U.S. 919 (1973), to the allocation of a refund among members of a consolidated tax filing group. Petitioner further asserts (Pet. 28-31) that *Bob Richards* was wrongly decided. Although there is tension among the courts of appeals on the applicability of the *Bob Richards* default rule when the parties do not have a tax allocation agreement, this case does not implicate that issue because the parties here had such an agreement. All courts, including the court in *Bob Richards*, have recognized that allocation of any tax refund is governed solely by the parties' agreement when such an agreement exists. In accordance with that principle, the court below correctly applied Colorado law and held that, under the parties' tax allocation agreement, the disputed tax refund belongs to the FDIC in its capacity as the bank's receiver. Petitioner's disagreement with that factbound application of state law does not warrant this Court's review.

1. a. The court of appeals correctly held that, under the parties' tax allocation agreement construed in accordance with Colorado law, the disputed tax refund here belongs to the FDIC as receiver. Pet. App. 18a-27a. Under Colorado law, the "primary goal" of contract interpretation "is to discern and effectuate the parties' intent." *School Dist. No. 1 in Cnty. of Denver* v. *Denver Classroom Teachers Ass'n*, 433 P.3d 38, 41

(Colo. 2019) (en banc). Courts "ascertain the parties' intent 'primarily from the language of the instrument itself.'" *Ibid.* (citations omitted). "If the contract is complete and free from ambiguity," Colorado courts "deem it to represent the parties' intent and enforce it based on the plain and generally accepted meaning of the words used." *Ibid.* But if the contract is ambiguous, "the meaning of its terms is generally an issue of fact to be determined in the same manner as other disputed factual issues." *Ibid.* (citation omitted).

Accordingly, determining whether a contract is ambiguous is a threshold inquiry under Colorado law. See *School Dist. No. 1*, 433 P.3d at 41; *USI Props. E., Inc.* v. *Simpson*, 938 P.2d 168, 173 (Colo. 1997) (en banc). That inquiry "is a question of law." *Pinnacol Assurance* v. *Hoff*, 375 P.3d 1214, 1229 (Colo. 2016) (en banc). As the court of appeals here recognized, "a contract is ambiguous if it is reasonably susceptible of more than one meaning." Pet. App. 25a (citing *Pinnacol Assurance*, 375 P.3d at 1229).

The court of appeals correctly applied those principles of Colorado law to the parties' tax allocation agreement. The court carefully analyzed (Pet. App. 18a-25a) "the language of the instrument itself" to determine whether it established an agency relationship or a debtor-creditor relationship. *School Dist. No. 1*, 433 P.3d at 41 (citation omitted). The language of some provisions, the court found, suggested an agency relationship, such as the ones stating that the holding company was "merely * * * an intermediary" for federal tax purposes, Pet. App. 131a, and that each affiliate "hereby appoints [the holding company] as its agent * * * for the purpose of filing such consolidated Federal income tax returns," *id.* at 137a. See *id.* at 25a. The language

of others, the court recognized, pointed the other way, such as the provisions allowing the holding company to retain refunds until an annual settlement process. See *id.* at 26a. The court therefore concluded that the tax allocation agreement was ambiguous because it was "reasonably susceptible of more than one meaning." *Id.* at 25a.

To resolve that ambiguity, the court of appeals correctly applied Colorado law by looking to the "the language of the instrument itself." *School Dist. No. 1*, 433 P.3d at 41 (citation omitted). The court focused on the agreement's statement that "any ambiguity in the interpretation hereof shall be resolved * * * in favor of any insured depository institution." Pet. App. 26a (brackets and citation omitted); see *id.* at 138a. Applying that provision, the court correctly held that the ambiguity the court had identified must be resolved by "construing the Agreement to create an agency relationship," which would "afford[] ownership of the tax refund to the Bank." *Id.* at 26a.

That holding reflects a correct application of Colorado law to the particular agreement at issue here. Even if it does not, it would not warrant further review, for this Court ordinarily does not engage in error correction. See Sup. Ct. R. 10; Stephen M. Shapiro et al., *Supreme Court Practice* § 4.2, at 239-240 (10th ed. 2013). To the extent petitioner contends (Pet. 19) that the court of appeals erred in its interpretation or application of Colorado law by failing to "consult Colorado trust or agency law to decide which reading [of the tax allocation agreement] was better," that argument also would not warrant this Court's review, as this Court or-

dinarily defers to the regional courts of appeals on issues of state law. See, *e.g.*, *Expressions Hair Design* v. *Schneiderman*, 137 S. Ct. 1144, 1149-1150 (2017).

b. Petitioner suggests (Pet. 18-20, 30-31) that the court of appeals did not actually apply Colorado law, but instead "reli[ed], from start to finish, on the federal common law *Bob Richards* rule." Pet. 31. That is incorrect. The court *agreed* with petitioner that the *Bob Richards* default rule was inapplicable here "because there was a written agreement in place—the Agreement —that discussed the filing of a consolidated federal tax return." Pet. App. 18a. Accordingly, the court correctly understood that its task was to "look to the terms of the Agreement" while "taking into account Colorado case law." *Ibid.* Indeed, citing this Court's decision in *Barnhill* v. *Johnson*, 503 U.S. 393 (1992), the court noted that "'property' and 'interests in property' are creatures of state law." Pet. App. 18a (citation omitted). And even after finding the tax allocation agreement ambiguous, the court relied not on the default rule from *Bob Richards*, but on the ambiguity-resolving provision in the agreement itself. *Id.* at 26a-27a.

As petitioner repeatedly emphasizes (Pet. 19, 20, 30), the court of appeals at one point described the task before it as "decid[ing] whether [the tax allocation agreement] *unambiguously* addresses how tax refunds are to be handled and, if so, whether it purports to deviate from the general rule outlined in *Barnes* and *Bob Richards*." Pet. App. 18a (emphasis added). In theory, that articulation of the governing standard could have led the court to uphold the bank's claim of ownership even if the court had believed that the agreement was better read to vest ownership of the refund in petitioner, so long as the agreement was not unambiguous. But the

court did not decide the case on that rationale. Rather, it concluded that, in light of the agreement's own directive that ambiguities should be resolved in the bank's favor, the bank was entitled to the refund under the better reading of the contract. See *id.* at 26a-27a.

Petitioner's contention that the court of appeals applied the *Bob Richards* default rule also reflects a misunderstanding of the *Bob Richards* rule itself. Petitioner asserts that the *Bob Richards* rule "applie[s] a strong presumption that a refund belongs to a subsidiary" and requires that, "to overcome that presumption," "an agreement must 'unambiguously' diverge from the rule." Pet. 20 (brackets and citation omitted); see Pet. 26. That is incorrect. The court in *Bob Richards* stated that it would defer to the parties' agreement "as a matter of state corporation law" even when that agreement is merely "implied." 473 F.2d at 264. Deferring to an *implied* agreement allocating a refund to the parent would be inconsistent with the application of a "strong presumption" to the contrary. Cf. *Posadas* v. *National City Bank of New York*, 296 U.S. 497, 504 (1936).

As described above, the court of appeals in this case simply applied Colorado contract law, which requires courts to determine whether a written agreement is ambiguous as a threshold question of law in every contract case. See *School Dist. No. 1*, 433 P.3d at 41; *USI Props. E.*, 938 P.2d at 173. After finding the tax allocation agreement ambiguous, the court relied on the agreement's own provisions to resolve the ambiguity. The court concluded that the ambiguity as to ownership of the tax refund must be resolved in the bank's favor because the agreement itself specifically dictated that result, not because of any default presumption under federal common law.

2. a. Petitioner contends (Pet. 26) that the courts of appeals are "deeply divided as to what rule to apply—and even what source of law to invoke—in determining whether a parent or a subsidiary owns a tax refund." In fact, every court of appeals that has faced the issue has agreed that when (as here) the parties have a tax allocation agreement, that agreement interpreted under applicable state law governs the allocation of any tax refund between a parent and subsidiary. *In re Prudential Lines Inc.*, 928 F.2d 565, 570 (2d Cir.), cert. denied, 502 U.S. 821 (1991); *In re Downey Fin. Corp.*, 593 Fed. Appx. 123, 125 (3d Cir. 2015); *Capital Bancshares, Inc.* v. *FDIC*, 957 F.2d 203, 207 (5th Cir. 1992); *FDIC* v. *AmFin Fin. Corp.*, 757 F.3d 530, 533 (6th Cir. 2014), cert. denied, 135 S. Ct. 1402 (2015) (No. 14-576); *Jump* v. *Manchester Life & Cas. Mgmt. Corp.*, 579 F.2d 449, 452 (8th Cir. 1978); *Bob Richards*, 473 F.2d at 264; *Barnes* v. *Harris*, 783 F.3d 1185, 1196 (10th Cir. 2015); *In re BankUnited Fin. Corp.*, 727 F.3d 1100, 1102-1103 (11th Cir. 2013), cert. denied, 571 U.S. 1244 (2014) (No. 13-909).

Indeed, the Sixth Circuit's decision in *AmFin*, on which petitioner principally relies, followed the same path that the court of appeals took here. *AmFin* first analyzed whether the parties' agreement was ambiguous under applicable state law, and it made clear that an unambiguous agreement would govern ownership of the tax refund regardless of what allocation it dictated. 757 F.3d at 533-535. The Third and Eleventh Circuit decisions on which petitioner relies are to the same effect. See *Downey*, 593 Fed. Appx. at 126 & n.4; *BankUnited*, 727 F.3d at 1108-1109. (Contrary to petitioner's infer-

ence (Pet. 25), the Second Circuit has expressly endorsed and applied *Bob Richards*, including its default rule. See *Prudential Lines*, 928 F.2d at 570-571.)

The courts of appeals' agreement on this threshold point is unsurprising. "Property interests are created and defined by state law," and "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner* v. *United States*, 440 U.S. 48, 54-55 (1979). Consistent with that principle, the *Bob Richards* court observed that, "where there is an explicit agreement, or where an agreement can fairly be implied, as a matter of state corporation law the parties are free to adjust among themselves the ultimate tax liability." 473 F.2d at 264 (footnotes omitted). And the Ninth Circuit has since confirmed that when parties have an agreement that "adjusts the parties' ultimate tax liability, * * * *Bob Richards* dictates that we follow [applicable] state law in determining whether the tax refunds are property of [the parent company's] estate." *In re Indymac Bancorp, Inc.*, 554 Fed. Appx. 668, 670 (2014).

b. There is some tension among the courts of appeals on the distinct question (not presented here) of what rule applies in this context if the parties do *not* have a tax allocation agreement. This case is not a suitable vehicle to address that tension, however, since the parties here had such an agreement and the court of appeals based its decision on it.

The court in *Bob Richards* held that, if the parties have neither an express nor an implied tax allocation agreement, the refund should go to the member whose losses gave rise to the refund. 473 F.2d at 265; see *In re First Reg'l Bancorp*, 703 Fed. Appx. 565, 565 (9th Cir.

2017) (applying the default rule in the absence of an express or implied agreement between the parties); *Prudential Lines*, 928 F.2d at 571 (same); *Capital Bancshares*, 957 F.2d at 207 (same). The Sixth Circuit probably is correct to characterize the *Bob Richards* default rule as one of federal common law. *AmFin*, 757 F.3d at 535; see *In re NetBank, Inc.*, 729 F.3d 1344, 1347 n.3 (11th Cir. 2013), cert. denied, 135 S. Ct. 476 (2014) (No. 13-1480). As explained above, however, that default rule performs only a gap-filling role in the rare circumstance where the parent and subsidiary have neither an express nor an implied tax allocation agreement that clearly addresses ownership of tax refunds. Cf. *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 102 (2013) ("Contracts are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' contrary intent.") (brackets, citation, and ellipsis omitted).

The Sixth and Eleventh Circuits' disagreement with *Bob Richards* is limited to their view that state rather than federal law should supply the default gap-filling rule in that rare circumstance. This case does not implicate that disagreement, however, because the parties here had an express tax allocation agreement that by its own terms resolved any ambiguity concerning ownership of tax refunds. Pet. App. 18a. Accordingly, this is an unsuitable vehicle to address any tension among the courts of appeals about the proper analysis in cases where no such agreement exists.

The courts of appeals agree that an express agreement, interpreted under applicable state law, governs disputes like the one here. See p. 14, *supra*. Consistent

with that uniform understanding, the court below held that the parties' tax allocation agreement, interpreted under Colorado law, gave ownership of the disputed refund to the bank, not the holding company. Pet. App. 18a-27a. Petitioner's factbound challenge to that state-law determination does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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