No. 18-1269

IN THE

Supreme Court of the United States

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

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CAPACITY AS RECEIVER FOR UNITED WESTERN BANK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

MARK E. HAYNES
IRELAND STAPLETON PRYOR
& PASCOE, P.C.
717 Seventeenth St.
Suite 2800
Denver, CO 80202

NEAL KUMAR KATYAL
Counsel of Record
MITCHELL P. REICH
COLLEEN E. ROH SINZDAK
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

The Federal Deposit Insurance Corporation (FDIC) does not dispute that the circuits are split on the validity of the *Bob Richards* rule. *See* Opp. 16 (acknowledging multiple circuits' "disagreement with *Bob Richards*"). Nor does it attempt to defend the *Bob Richards* rule on the merits. Indeed, FDIC conspicuously declines to offer any legal basis for the rule at all. The most it is willing to say is that *Bob Richards*—a rule adopted by three circuits to govern the disposition of hundreds of millions of dollars—is "probably" a rule "of federal common law." *Id.*

Faced with a clear circuit split over a legal rule that even it will not defend, FDIC stakes its case against certiorari on a single gambit: It tries to minimize the rule just enough to make this case appear an unattractive vehicle for reviewing it. In stark contrast with the position it has taken in the lower courts, FDIC now claims that circuits follow the *Bob Richards* rule only "when the parties do not have a tax allocation agreement" (TAA). Opp. 9. It asserts that the Tenth Circuit therefore found "the *Bob Richards* default rule * * * inapplicable here 'because there was a written agreement in place.' " Opp. 12 (quoting Pet. App. 18a).

These claims cannot withstand scrutiny. Circuits that follow the *Bob Richards* rule do not hold that it ceases to apply whenever the parties have a TAA. Rather, as FDIC itself has repeatedly recognized, these circuits hold that the *Bob Richards* rule governs unless a TAA "unambiguously" or "clearly" provides to the contrary. Other circuits construe TAAs using ordinary principles of state agency and trust law, without any presumption or demand for unambiguous text. *Bob Richards* thus alters the standard by which courts assess TAAs, the body of law they apply in interpreting them, and, frequently, the outcomes they reach.

This case offers a perfect illustration of how these approaches diverge in practice. The Bankruptcy Court declined to follow the *Bob Richards* rule, and thus read the parties' TAA in light of Colorado agency and trust law and concluded that the tax refund at issue belonged to UWBI. The Tenth Circuit, in contrast, held that the *Bob Richards* rule "clearly applies to this case," demanded "unambiguous[ ]" evidence that "the written terms" of the TAA "deviate[d] from * * * *Bob Richards*," and, finding none, assigned the tax refund to the Bank. Pet. App. 18a, 27a. Far from being deemed "inapplicable here," Opp. 12, the *Bob Richards* rule thus furnished "the general framework" the Tenth Circuit "appl[ied] in resolving the parties' dispute," Pet. App. 18a, dictated the court's method of analysis, and altered its bottom-line result.

This case therefore presents a long-overdue opportunity to review the *Bob Richards* rule, which has "frustrated" tax planning and stripped corporations and creditors of highly valuable assets to which they are entitled. *See* American College of Tax Counsel (ACTA) Amicus Br. 12-15. Neither FDIC nor any circuit has offered a reason why this invented presumption should stand. There is none. The writ should be granted, and the *Bob Richards* rule should be overturned.

ARGUMENT

I. FDIC'S EFFORTS TO MINIMIZE THE CIRCUIT SPLIT ARE UNAVAILING.

FDIC does not seriously dispute that the circuits are split over the validity of the *Bob Richards* rule. Nor could it. Three circuits have expressly adopted *Bob Richards*'s "federal common law" rule in determining ownership of tax refunds. Pet. 14-21. Four circuits, in contrast, have refused to apply the *Bob Richards* rule—with two of them expressly stating that this presumption is wrong. Pet. 22-26. Numerous courts, commentators, and the American College of Tax Counsel have all recognized this disagreement. ACTA Amicus Br. 5-12; Pet. 26, 32-33. So has FDIC: Although the agency initially claims that these cases merely reflect "tension among the courts of appeals," it ultimately acknowledges that "tension" is a euphemism for "disagreement with *Bob Richards*." Opp. 15-16.

Rather than meaningfully dispute the split, FDIC tries to diminish it. It claims that the *Bob Richards* rule has bite only "when the parties do not have a tax allocation agreement." Opp. 9. Otherwise, it asserts, "[a]ll courts" agree that "allocation of any tax refund is governed *solely* by the parties' agreement when such an agreement exists." *Id.* (emphasis added).

That is incorrect. To be sure, all courts agree that a TAA plays *some* role in determining who owns a tax refund. But they disagree fundamentally on *what* that role is.

On one hand, courts that apply the *Bob Richards* rule hold that a TAA governs allocation of a tax refund only if the agreement "unambiguously" assigns the refund to the parent. Pet. App. 18a. These courts thus begin with a default presumption (drawn from the Ninth Circuit's "feel[ing]" about what federal law "should" provide) that any refund belongs to the subsidiary. *In re Bob Richards Chrysler-Plymouth Corp., Inc.*, 473 F.2d 262, 264-265 (9th Cir. 1973). They then hold that an agreement overcomes that presumption only if it "clearly" or "unambiguous[ly]" provides otherwise. *In re Indymac Bancorp, Inc.*, 554 F. App'x 668, 670 & n.1 (9th Cir. 2014); *see* Pet. App. 18a (agreement must "unambiguously" depart from *Bob Richards*); *Capital Bancshares, Inc.* v. *FDIC*, 957 F.2d 203, 207 (5th Cir. 1992) (differing agreement must be "express" or "clearly implied").

Because of their insistence on "unambiguous" language, these circuits do not apply the ordinary rules of state trust or agency law or consider extrinsic evidence in determining whether a TAA overrides *Bob Richards*. Rather, they require that "the written terms" of the agreement address allocation of the refund. Pet. App. 18a; *see Indymac*, 554 F. App'x at 670. Bankruptcy courts that follow *Bob Richards* understand this rule the same way: They hold that *Bob Richards*'s presumption governs "absent a clear and explicit agreement" to the contrary. *In re Nelco, Ltd.*, 264 B.R. 790, 809 (Bankr. E.D. Va. 1999); *see, e.g.*, *In re Vineyard Nat'l Bancorp*, 2013 WL 1867987, at *7 (Bankr. C.D. Cal. May 3, 2013).

FDIC claims that it is error to read these cases as holding that "an agreement must 'unambiguously' diverge from" the *Bob Richards* rule to "overcome that presumption." Opp. 13. But in addition to being what those cases quite literally say, that is precisely how FDIC itself characterized the *Bob Richards* rule back when it was trying to convince courts to join its side of the split rather than defeat certiorari. *See, e.g.*, Br. of Appellant FDIC at 39, *FDIC* v. *AmFin Fin. Corp.*, 757 F.3d 530 (6th Cir. 2014) (No. 13-3669), 2013 WL 4776406 (arguing that a TAA must contain "*specific* language that *conclusively* disavows the [*Bob Richards*] rule" (emphases added)). Indeed, three pages after bristling at petitioner's characterization, FDIC abruptly reverses course and admits that, in those circuits that follow *Bob Richards*, the rule applies unless a TAA "*clearly* addresses ownership of tax refunds." Opp. 16 (emphasis added).

The four circuits that reject *Bob Richards* take a markedly different approach to TAAs. They do not start from any presumption that the refund belongs to the subsidiary, or require "clear" language in the

TAA to overcome such a presumption. *In re NetBank, Inc.*, 729 F.3d 1344, 1347 n.3 (11th Cir. 2013). Instead, they ask whether the TAA establishes an agency or trust relationship under state law—for instance, by considering whether a TAA subjects the parent to the control of the subsidiary or requires the parent to hold any refund in escrow. *See In re Downey Fin. Corp.*, 593 F. App'x 123, 125-128 (3d Cir. 2015); *In re First Cent. Fin. Corp.*, 377 F.3d 209, 211-213, 218 (2d Cir. 2004); *AmFin*, 757 F.3d at 533-538. Furthermore, in conducting that analysis, these courts do not limit themselves to the terms of the agreement, but consider extrinsic evidence where state law permits. *See AmFin*, 757 F.3d at 536-538; *Netbank*, 729 F.3d at 1350.

FDIC claims that these courts' approach is indistinguishable from the *Bob Richards* rule because all agree that "an unambiguous agreement would govern ownership of the tax refund." Opp. 14. That is doubly inaccurate. First, whereas the *Bob Richards* courts deem an unambiguous agreement *necessary* to allocate a tax refund to a parent, other circuits hold that an ambiguous agreement as well as an unambiguous one is *sufficient* to achieve that allocation. *See, e.g.*, *AmFin*, 757 F.3d at 535-536; *Netbank*; 729 F.3d at 1350. Second, the different circuits disagree on how one analyzes the agreement in the first place. Under the *Bob Richards rule*, a court looks to the text alone to decide whether it "unambiguously" displaces the presumption in favor of subsidiary ownership. *E.g.* Pet. App. 18a. If it does not, the subsidiary gets the refund. In the absence of the *Bob Richards* rule, however, courts analyze the agreement using principles of agency and trust law to decide whether the parties' relationship is best described as principal-agent, creditor-debtor, or something else. *E.g.*, *Downey Fin. Corp.*, 593 F. App'x at 125-128. An agreement that does not "unambiguously" displace the *Bob Richards* rule may nonetheless unambiguously create a particular type of relationship under the state's law of agency and trust, leading to an entirely different outcome to a case. *Compare, e.g.*, Pet. App. 97a (Bankruptcy Court's decision), *with id.* at 27a (Tenth Circuit's decision); *see also* Pet. 26-28.

Until now, affected entities—including, again, the FDIC—widely recognized the significance of this divergence of approach to construing TAAs. The circuit cases rejecting the *Bob Richards* rule all arose where the parties had agreed to a TAA. *See* Pet. 27. FDIC has issued two policy statements attempting (unsuccessfully) to clear up the "varying conclusions" courts have reached as to how to construe TAAs. Pet. 20-21 (citation omitted). The American College of Tax Counsel likewise explains that the circuit split over *Bob Richards* has "frustrated * * * the drafting of tax sharing agreements." ACTA Amicus Br. 13; *see also* Pet. 32-34. If the split over *Bob Richards* does not matter where a TAA is involved, neither the courts, the responsible federal agency, nor the parties concerned have yet realized it.

II. FDIC DOES NOT ATTEMPT TO DEFEND THE *BOB RICHARDS* RULE.

When it turns from the circuit split to the merits, FDIC comes up all but empty-handed. FDIC's defense of the *Bob Richards* rule consists, in full, of the following tepid remark: "The Sixth Circuit probably is correct to characterize the *Bob Richards* default rule as one of federal common law." Opp. 16.

The brevity of that defense speaks volumes. For decades, the *Bob Richards* rule has served as the basis for FDIC to claim hundreds of millions of dollars in assets from private entities. Yet even it cannot muster a defense of that rule on the merits. And that is all the more notable given the Solicitor General's ordinary practice of providing some defense for the rule of decision on which a favorable lower-court judgment rests. That the government itself is unwilling to defend this rule or try to explain where it comes from provides ample indication that it is long past time for the Court to step in and overturn this baseless precedent.

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE CIRCUIT SPLIT.

Lacking much of an argument on the split or the merits, FDIC devotes the lion's share of its brief to critiquing the vehicle. It asserts that "this case does not implicate" the validity of the *Bob Richards* rule because the court below supposedly "*agreed* with petitioner that the *Bob Richards* default rule was inapplicable here." Opp. 9, 12. That claim is, to say the least, perplexing. From start to finish, the *Bob Richards* rule controlled the decision below.

The Court need only take the Tenth Circuit at its word on this question. The panel below opened its analysis by stating that "*Bob Richards* * * * *clearly applies* to this case and outlines the general framework that we *must apply* in resolving the parties' dispute." *Id.* at 18a (emphases added). That was so, it continued, even though "there was a written agreement in place * * * that discussed the filing of a consolidated federal tax return." *Id.* "[A]s directed by *Barnes* and *Bob Richards*," the panel explained, "we must 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 and, if so, whether it purports to deviate from the general rule outlined in *Barnes* and *Bob Richards*." *Id.*

The Tenth Circuit thus made clear that *Bob Richards* controlled each aspect of its analysis. It dictated the source the panel consulted ("the terms of the Agreement"), the standard the panel applied (whether the TAA "unambiguously addresses how tax refunds are to be handled") and the ultimate question the panel sought to answer (whether the TAA "purports to deviate from the general rule outlined in * * * *Bob Richards*"). *Id.* FDIC is plainly incorrect that the panel deemed the *Bob Richards* rule "inapplicable here 'because there was a written agreement in place.'" Opp. 12. Quite the contrary, the panel held that the *Bob Richards* rule "*clearly* applie[d]" notwithstanding the presence of a written agreement because it dictated the standard by which that agreement should be reviewed.

That is sufficient to render this case a suitable vehicle to review *Bob Richards*. A decision that draws its legal standard from *Bob Richards* would, at minimum, need to be vacated and reconsidered if *Bob Richards* were overturned. *See, e.g.*, *Tibble* v. *Edison Int'l*, 135 S. Ct. 1823, 1827-29 (2015) (vacating decision that applied improper standard even though "it is possible" the court would reach the same result on remand); *Conkwright* v. *Frommert*, 559 U.S. 506, 521 (2010) (similar).

But *Bob Richards* did not simply provide the framework for the Tenth Circuit's decision; it also governed the substance of its analysis. "[A]s directed" by *Bob Richards*, the panel analyzed "the written terms of the agreement" to determine whether the TAA "unambiguously" departed from the *Bob Richards* rule. Pet. App. 18a. The panel observed that some provisions of the agreement were phrased in a manner that "point[ed] toward" an agency relationship, while others were written to "suggest" a debtor-creditor relationship, without ever considering the criteria necessary to establish an agency or a debtor-creditor relationship under Colorado law. *Id.* at 19a-26a. Finding this linguistic analysis inconclusive, the court looked to the contract's rule of construction to resolve the question presented in favor of the Bank. *Id.* at 26a-27a.

That analysis would have been entirely different if the court had not been hamstrung by *Bob Richards*. Instead of considering whether the text "unambiguously" established an agency relationship pursuant to some nebulous federal-common-law standard of agency, the court would have analyzed whether the agreement met the specific requirements for an agency as defined by Colorado law—for instance, whether it subjected UWBI to sufficient control to qualify as an implied agent of the Bank. *See* Pet. App. 96a-116a (performing such an analysis). That analysis still would have considered the terms of the TAA. But it would have considered them under the standard dictated by Colorado law.

FDIC contends that the *Bob Richards* rule did not circumscribe the panel's analysis because the court stated that it was "taking into account Colorado case law." Opp. 12 (quoting Pet. App. 18a). But the panel took Colorado case law into account for the single narrow purpose permitted by the *Bob Richards* rule: to determine whether the contract's written terms were "unambiguous." *See* Pet. App. 25a (citing one Colorado case for the proposition that contracts are ambiguous if they are "susceptible of more than one meaning"). It did not analyze those terms according to any state-law standard, or even cite a single Colorado case on trust or agency. The problem is not, then, that the panel "erred in its interpretation or application of Colorado law," Opp. 11, but that it did not think it was required to consider the applicable body of Colorado law at all. *Cf. O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 83 (1994).

Unsurprisingly, application of the wrong legal framework and the wrong mode of analysis led the Tenth Circuit to the wrong result. When the Bankruptcy Court applied Colorado trust and agency law, it determined that the tax refund belonged to UWBI. Pet. App. 127a; *see id.* at 96a-116a. The Tenth Circuit did not dispute any part of that state-law analysis. Yet, applying the *Bob Richards* rule, it reached the opposite conclusion and awarded the tax refund to the Bank. *Id.* at 27a.

FDIC speculates that the *Bob Richards* rule made no difference to the outcome because the TAA requires that ambiguities be resolved in favor of the Bank. Opp. 13. But the Tenth Circuit only found the contract "ambiguous" as to whether it established an agency relationship because the court did not apply the Colorado law of trust and agency. When the Bankruptcy Court consulted the correct body of law, it found that the "terms of the TAA as construed under Colorado law" were "unambiguous" in dictating that the tax refund belonged to UWBI.

Pet. App. 97a; *see* 110a-113a (applying Colorado agency law). It was the *Bob Richards* rule—and the artificial analysis it dictated—that led the panel to find ambiguity in the first place.

In the end, FDIC asks the Court to swallow a remarkable proposition: that the *Bob Richards* rule played no role in a decision that the panel expressly stated was governed by *Bob Richards*; that applied a method of analysis dictated by *Bob Richards*; and that reached a conclusion contrary to a lower court that refused to apply *Bob Richards*. The Court should accept the obvious: the *Bob Richards* rule "clearly applies to this case." Pet. App. 18a. This case therefore presents an opportunity to overturn that misguided and judicially invented presumption once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK E. HAYNES
IRELAND STAPLETON PRYOR
& PASCOE, P.C.
717 Seventeenth St.
Suite 2800
Denver, CO 80202

NEAL KUMAR KATYAL
Counsel of Record
MITCHELL P. REICH
COLLEEN E. ROH SINZDAK
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

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