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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether courts should determine ownership of a tax refund paid to an affiliated group based on the federal common law "*Bob Richards* rule" or based on the law of the relevant state.

RULE 29.6 DISCLOSURE STATEMENT

United Western Bancorp, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF FOR PETITIONER

INTRODUCTION

The Internal Revenue Code permits a parent corporation and its subsidiaries to file a single consolidated tax return. 26 U.S.C. § 1501. When an affiliated group elects this option—as the vast majority do—that group is treated for tax purposes largely as a "single business enterprise." *Old Mission Portland Cement Co.* v. *Helvering*, 293 U.S. 289, 291 (1934). It must pool its income and losses, account for many transactions between its members as if they were "divisions of a single corporation," and compute and file its taxes jointly. 26 C.F.R. §§ 1.1502-2, -11, -12, and -13. When the group's taxes come due, each member of the group is "severally liable" for the entirety of the payment. *Id.* § 1.1502-6(a). And when

the IRS issues the group a tax refund, that refund is "made directly to and in the name of" the corporate parent, not any individual member. *Id.* § 1.1502-77(d)(5).

The tax laws do not dictate how affiliated groups distribute tax refunds among their members. As the Solicitor General acknowledges, both the Internal Revenue Code and its implementing regulations are "silent" on this question. Opp. 2 (quoting Pet. App. 15a). Accordingly, under our federal system, that is a question left to the affiliated group to decide for itself, subject to any applicable rules of state law—the body of law that almost always governs when federal law falls silent.

Some federal courts, however, have crafted a rule of "federal common law" commonly known as the "*Bob Richards* rule," under which courts presume that a tax refund belongs to the member of an affiliated group whose losses gave rise to the refund, unless an agreement "unambiguously" provides to the contrary. Pet. App. 15a-18a. No court has ever identified a valid legal basis for this judge-made rule; indeed, when the Ninth Circuit first announced this rule in 1973, it stated simply that it "fe[lt]" that this was the rule that "should" control. *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262, 265 (9th Cir. 1973). Nonetheless, three Circuits now apply the *Bob Richards* rule and rely on that invented presumption to reassign ownership of hundreds of millions of dollars and override the contrary laws of more than a dozen states.

The time has come to put the *Bob Richards* rule to rest. This rule does not come close to satisfying any of the stringent requirements for the creation of

federal common law: It does not fall in one of the "limited enclaves" in which judicial lawmaking is appropriate; it addresses a subject that Congress has expressly entrusted to the IRS; and it resolves no "significant conflict" (indeed, no conflict at all) between state law and federal policy. Moreover, far from furthering the policies of the tax laws, the *Bob Richards* rule subverts them at every turn—contradicting their text, undermining their structure, and resting on a concept this Court has held "simply does not exist." *United Dominion Indus., Inc.* v. *United States*, 532 U.S. 822, 830 (2001) (citation omitted).

In this case, the *Bob Richards* rule also resulted in the erroneous transfer of a $4 million tax refund from a parent corporation to its subsidiary. When United Western Bancorp, Inc. (UWBI) entered bankruptcy and its subsidiary United Western Bank ("the Bank") entered receivership, the trustee for the estate of UWBI and the Federal Deposit Insurance Corporation (FDIC) disagreed as to who owned a tax refund issued to UWBI. Interpreting the parties' tax allocation agreement in light of Colorado law, the Bankruptcy Court held that the refund was the property of UWBI. But the Tenth Circuit applied the *Bob Richards* rule—which it said outlined "the general framework that we must apply in resolving the parties' dispute," Pet. App. 18a—and assigned the refund to the Bank.

That decision was incorrect. State law, not a federal common law presumption, governs ownership of tax refunds paid to an affiliated group. And in this case, that law unambiguously assigns the refund at

issue to UWBI. The Tenth Circuit's judgment should be reversed.

OPINIONS BELOW

The Tenth Circuit's opinion (Pet. App. 1a-27a) is reported at 914 F.3d 1262. The District Court's opinion (Pet. App. 28a-66a) is reported at 574 B.R. 876. The Bankruptcy Court's opinion (Pet. App. 67a-128a) is reported at 558 B.R. 409.

JURISDICTION

The Tenth Circuit entered judgment on July 19, 2018. Petitioner filed a timely petition for rehearing, which was granted in part and denied in part on January 29, 2019. On April 1, 2019, Petitioner filed a petition for a writ of certiorari, which this Court granted on June 28, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the Addendum.

STATEMENT

A. Legal Background

1. Since 1919, the Internal Revenue Code has afforded "[a]n affiliated group of corporations * * * the privilege of making a consolidated return with respect to * * * income tax." 26 U.S.C. § 1501; *see* Revenue Act of 1918, Pub. L. No. 65-254, § 240(a), 40 Stat. 1057, 1081-82 (1919). An "affiliated group" is defined as a set of corporations "connected through stock ownership with a common parent corporation" that owns 80% or more of each member's stock. 26 U.S.C. § 1504(a)(1)-(2). Thus, the statute permits

entities "with substantially common ownership"—a corporate parent and its wholly- or nearly-wholly-owned subsidiaries—to file one tax return rather than several. *Old Mission Portland Cement*, 293 U.S. at 291.

That consolidation saves more than paper. As this Court has explained, "[t]he purpose of [this] section was to provide a method of computing the tax * * * of what is in practical effect a single business enterprise * * * as though it were a single taxpayer." *Id.*; *see* S. Rep. No. 65-617, at 9 (1918); Treas. Reg. 45, art. 631 (1919). Filing jointly enables an affiliated group to achieve largely the same beneficial tax treatment as if its members were "divisions of a single entity." 1 Jerred G. Blanchard, Jr. et al., Federal Income Taxation of Corporations Filing Consolidated Returns § 1.01 (2d ed. 2019) ("Taxation of Corporations Filing Consolidated Returns"). Further, it affords corporations "flexibility in the organization of business activities," by mitigating any negative tax consequences from a parent corporation's decision to conduct its affairs through several corporations rather than one. *Id.*; *see* H.R. Rep. No. 73-704, at 17 (1934).

Congress did not attempt to work out for itself the details of how consolidation would work. Instead, it entrusted the IRS with authority to "prescribe such regulations as [it] may deem necessary" to carry out the consolidated-return scheme. 26 U.S.C. § 1502. The IRS has exercised that authority by promulgating a comprehensive body of regulations governing consolidated tax returns. 26 C.F.R. §§ 1.1502-0 to -99a. Those regulations give effect to the "single entity" concept in a few principal ways. *See* Martin

J. McMahon, Jr., *Understanding Consolidated Returns*, 12 Fla. Tax Rev. 125, 128-133 (2012).

First, the regulations enable an affiliated group of corporations to pool its members' income and losses. 26 C.F.R. § 1.1502-11(a). Loss generated mainly by one member—say, the sale of a tractor by subsidiary A at a $10 loss—may be used to offset income generated mainly by another member—say, the sale of produce by subsidiary B at a $10 gain. *See* 1 Taxation of Corporations Filing Consolidated Returns § 1.01, ex. 1. Were the corporations filing separately, subsidiary B would need to pay tax on its $10 income, and subsidiary A could not deduct its $10 loss unless it could match that loss with its own income. But consolidated filing enables the group to net out the members' income and loss to a tax liability of zero.

Second, the IRS regulations treat transactions between members of an affiliated group—known in tax parlance as "intercompany transactions"—largely as if the corporations were "divisions of a single corporation." 26 C.F.R. § 1.1502-13(a)(2); *see* 1 Taxation of Corporations Filing Consolidated Returns § 1.01. In general, that means that an affiliated group need not recognize income or loss on the transfer of property between its members until that property leaves the group. 1 Taxation of Corporations Filing Consolidated Returns § 31.01[1]. So, if subsidiary A sells land to subsidiary B at a loss, the group is not required to recognize that loss until subsidiary B sells the land to a non-group member. *Id.* Further, the use to which subsidiary B puts the property may affect the character of the loss. For instance, if subsidiary A held the land as investment

real estate, but subsidiary B develops the land as residential real estate, the loss is converted from a capital loss to an ordinary loss, which may in turn be used to offset income taxed at a higher rate. 26 C.F.R. § 1.1502-13(c)(7)(ii), ex. 2; *see Understanding Consolidated Returns* at 130.

Third, the IRS provides for the calculation of several tax attributes solely at the level of the affiliated group as a whole, not at the level of its individual members. *See United Dominion*, 532 U.S. at 826. To calculate its "consolidated taxable income," an affiliated group starts by "taking into account" the "separate taxable income" (STI) of each member of the group, which is calculated "as though the member were a separate corporation (*i.e.* by netting income and expenses), but subject to several important 'modifications.'" *Id.* (quoting 26 C.F.R. § 1.1502-12); *see* 26 C.F.R. § 1.1502-11(a). In particular, the definition of STI excludes several items "that an individual taxpayer would normally account for in computing income or loss, but which an affiliated group may tally only at the consolidated level, such as capital gains and losses, charitable-contribution deductions, and dividends-received deductions." *United Dominion*, 532 U.S. at 832 (citing 26 C.F.R. § 1.1502-12(j) to (n)). Those items are then accounted for on a consolidated basis, without attribution to any individual taxpayer. *See* 26 C.F.R. § 1.1502-11(a)(2)-(8). The result is a measurement of "consolidated taxable income" that includes both individual and consolidated elements—and which, as a result, cannot easily be disaggregated among the individual members. *United Dominion*, 532 U.S. at 826.

Fourth, the IRS requires an affiliated group that elects consolidated status to file and pay its taxes jointly. Each member of an affiliated group is "severally liable" for the taxes of the group as a whole. 26 C.F.R. § 1.1502-6(a). Moreover, a single member of an affiliated group—almost always the corporate parent—is designated the group's "agent" for communications with the IRS. *Id.* § 1.1502-77(a), (c)(1). Among other "matters subject to [its] agency," the parent files the group's consolidated tax return, elects to take any deductions, and files any claims for refund. *Id.* § 1.1502-77(d)(1), (5). When a refund is due to the group, that refund is "made directly to and in the name of the agent and discharges any liability of the Government to any member with respect to such refund." *Id.* § 1.1502-77(d)(5).[1]

The long and short of it is that, through a variety of complex maneuvers, the Code and the regulations enable an affiliated group to calculate and pay its taxes largely (although not entirely) as if it were a "single entity." *Understanding Consolidated Returns* at 128. This enables considerable tax savings for the corporate group as a whole. And it has proven beneficial enough in practice that "[v]irtually all publicly owned United States corporations," and some privately owned corporations, as well, now

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[1] From 2002 to 2015, the identity and responsibilities of an agent were governed by 26 C.F.R. § 1.1502-77B. The relevant language of that provision is materially identical to the language of section 1.1502-77. *Compare* 26 C.F.R. § 1.1502-77B(a)(1)(i), (a)(2)(v), *with id.* § 1.1502-77(a)(1), (d)(5). For simplicity, we refer to section 1.1502-77 throughout this brief.

"elect to report their income for federal tax purposes as part of a consolidated group." *Id.* at 127.

2. One matter on which the tax laws are conspicuously silent is the manner in which an affiliated group assigns responsibility for tax payments and distributes tax refunds among its members. Nothing in the Code or the regulations dictates what portion of the group's tax liability any individual member must shoulder; the regulations simply make every member "severally liable" for the entirety of the group's taxes. 26 C.F.R. § 1.1502-6(a). Likewise, as the Solicitor General acknowledges, the Code and the regulations "do not determine which entity * * * is entitled to retain any refund." Opp. 2.

In the absence of controlling federal law, many affiliated groups have chosen to address this question by entering "tax allocation agreements" (TAAs). *See* Dale L. Ponikvar & Russell J. Kestenbaum, *Aspects of the Consolidated Group in Bankruptcy: Tax Sharing and Tax Sharing Agreements*, 58 Tax Law. 803, 826 (2005) ("*Tax Sharing Agreements*"). These agreements typically specify what share of a group's tax liability each member will pay, as well as what share of any tax refund it is entitled to receive. *Id.* at 827-828*; see, e.g.*, Pet. App. 129a-139a. In addition, TAAs usually specify the timing and manner in which tax payments will be made to and from the parent; for instance, they may provide (as the TAA in this case does) that a member's estimated share of tax payments must be made quarterly, and that a parent must distribute tax refunds among individual subsidiaries within 10 days of receipt. *See* Pet. App. 136a-137a.

These agreements rarely give rise to legal disputes when times are good. But the allocation of tax refunds becomes the subject of frequent and heated litigation when a parent corporation or its subsidiary enters bankruptcy. That is because a corporation's estate in bankruptcy includes any property, including tax refunds, in which the estate holds both "legal title" and "an equitable interest." 11 U.S.C. § 541(a)(1), (d); *see Segal* v. *Rochelle*, 382 U.S. 375, 381 (1966) (holding that a claim to a tax refund is "property" under the Bankruptcy Code). At the time of bankruptcy, a parent corporation sometimes holds legal title to a tax refund that was paid to it by the IRS "directly" and "in [its] name." 26 C.F.R. § 1.1502-77(d)(5). But a subsidiary may claim that it is the *equitable* owner of a refund, on the ground that the parent is merely holding the refund for that subsidiary in an agency or trust capacity. *See* 5 Collier on Bankruptcy ¶ 541.28 (16th ed. 2019).

To resolve disputes that arise out of these conflicting claims of ownership, many courts consult the terms of any TAA between the parties, subject to the law of the applicable state. Pet. 22-26. First, these courts use state contract and corporation law to determine whether, as an initial matter, the TAA or principles of fiduciary duty require a parent to distribute the refund to a particular subsidiary. *See, e.g.*, *In re First Cent. Fin. Corp.*, 269 B.R. 481, 490-495 (Bankr. E.D.N.Y. 2001). Second, if the answer to that question is yes, these courts consult state agency and trust law to determine the *capacity* in which the parent holds the refund: whether as an agent or trustee—in which case the subsidiary may be the equitable owner of the refund—or as a debtor—in which case the parent owns the refund, and the

subsidiary is merely an unsecured creditor. *See, e.g.*, *In re Downey Fin. Corp.*, 593 F. App'x 123 (3d Cir. 2015); *FDIC* v. *AmFin Fin. Corp.*, 757 F.3d 530 (6th Cir. 2014); *In re NetBank, Inc.*, 729 F.3d 1344 (11th Cir. 2013).[2]

3. Some courts, however, have not left it to private parties and state law to resolve this question. Instead, they have resolved disputes over the ownership of tax refunds in an affiliated group by crafting a rule of "federal common law" known as the *Bob Richards* rule.

That rule takes its name from a 1973 decision of the Ninth Circuit. There, a parent corporation and its bankrupt subsidiary contested the ownership of a roughly $10,000 tax refund. *Bob Richards*, 473 F.2d at 263. The Ninth Circuit acknowledged that "there is nothing in the [Internal Revenue] Code or Regulations that compels the conclusion that a tax saving must or should inure to the benefit of the parent company or of the company which has sustained the loss that makes possible the tax saving." *Id.* at 264 (citation omitted). Further, it stated that "where there is an explicit agreement, or where an agreement can fairly be implied,[3] as a matter of state

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[2] Some states also have laws specifically governing ownership of tax refunds issued to persons filing jointly. *See FDIC* v. *FBOP Corp.*, 252 F. Supp. 3d 664, 682 (N.D. Ill. 2017) (citing examples of such laws in Illinois and Oregon). Where applicable, those laws provide the backdrop against which any TAA is interpreted and may be used to fill gaps in those agreements. *See id.* at 688-707.

[3] As an example of an "implied agreement," the court cited a case in which "the parties had been filing consolidated returns

corporation law the parties are free to adjust among themselves the ultimate tax liability." *Id.* But, it continued,

> [a]bsent any differing agreement we feel that a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member.

Id. at 265. Finding no such "express or implied agreement" in the case before it, the Ninth Circuit held that the corporate parent "was acting as a trustee of a specific trust and was under a duty to return the tax refund to the estate of the bankrupt [subsidiary]" whose losses allegedly gave rise to the refund. *Id.*

The Ninth Circuit identified no positive legal basis for its rule. But in subsequent years, courts have rationalized this rule as a creature of "[f]ederal common law." Pet. App. 15a; *see AmFin*, 757 F.3d at 535; *In re NetBank*, 729 F.3d at 1347 n.3. So has the FDIC. That agency is a frequent litigant in this area, in its capacity as the receiver for insolvent depository institutions that are subsidiaries of banking corporations, and it too has consistently understood and defended *Bob Richards* as a rule of federal common law. *See, e.g.*, Br. of Appellant FDIC at 33, *AmFin*, 757 F.3d 530 (No. 13-3669); *see also* Opp. 16

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for 35 years" and "[i]t ha[d] always * * * been the practice to assess tax liability" in a particular manner. *Bob Richards*, 473 F.2d at 264 n.4; *cf. Capital Bancshares, Inc.* v. *FDIC*, 957 F.2d 203, 208 (5th Cir. 1992) (holding that "an inconsistent practice" could not support "the existence of an implied agreement").

(stating that the *Bob Richards* rule is "probably" a rule "of federal common law.").

B. Factual Background

1. This case arises from a dispute between two Colorado corporations over ownership of a tax refund. One of those corporations, UWBI, is a holding company that owns several banking corporations. J.A. 26. The other, the Bank, is one of UWBI's wholly-owned subsidiaries and a federally insured depository institution. *Id.*

Since 2008, UWBI and its subsidiaries have elected to file their federal income taxes as an affiliated group. J.A. 27. To govern each member's rights and responsibilities, the group entered a tax allocation agreement ("the Agreement"), which addresses both the manner in which the group pays tax liabilities and the manner in which it distributes any tax refunds it receives. Pet. App. 129a-142a.

On the payment side of the ledger, the Agreement provides that each subsidiary (referred to in the Agreement as an "Affiliate") "shall pay UWBI an amount equal to the federal income tax liability such Affiliate would have incurred were it to file a separate return." *Id.* at 130a. Because this methodology frequently overshoots the tax liability of the group as a whole, *see Tax Sharing Agreements* at 828 & n.110, the Agreement vests UWBI with authority to "refund" estimated tax payments to Affiliates whom it determines have overpaid their share of the group's taxes. Pet. App. 130a, 135a. It also grants UWBI discretion to apportion responsibility for consolidated tax attributes among Affiliates, subject to several "policies." *Id.* at 132a-134a, 138a. As required by the consolidated-return regulations, the Agreement

appoints UWBI the "agent" of each Affiliate "for the purpose of filing * * * consolidated Federal income tax returns * * * and making any election, application or taking any action in connection therewith on behalf of the Affiliates." *Id.* at 137a; *see* 26 C.F.R. § 1.1502-77(a), (d). It also states that UWBI acts as "an intermediary between an Affiliate and the [IRS]." Pet. App. 131a.

Section H of the Agreement addresses the distribution of tax refunds that UWBI receives from the IRS. It provides that "[i]n the event of any adjustment to the tax returns of the Group as filed * * * by reason of [a] * * * claim for refund, * * * the liability of the parties to this Agreement shall be re-determined to give effect to any such adjustment." *Id.* at 137a. It further specifies that any resulting "payments between the appropriate parties" must be made "within 10 business days after any such * * * refunds are received." *Id.* Thus, UWBI is required to distribute tax refunds to "appropriate parties" in the course of settling each Affiliate's share of the group's total tax liability.

The Agreement provides that it shall be governed by Colorado law. *Id.* at 138a. It also includes a general statement of purpose: "The intent of this Agreement is to provide an equitable allocation of the tax liability of the Group among UWBI and the Affiliates. Any ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent, in favor of any insured depository institution." *Id.*

2. In 2011, UWBI invoked its authority under the tax laws and the Agreement to claim a tax refund on behalf of the affiliated group. It carried back a $35.4

million tax loss the group incurred in 2010 to offset $34.4 million in taxable income the group reported in 2008, thereby yielding tax savings in excess of $4 million. *Id.* at 7a. UWBI requested that the IRS issue the group a tax refund in that amount. *Id.*

While UWBI's refund request was pending before the IRS, the Office of Thrift Supervision closed the Bank and appointed the FDIC as receiver. J.A. 26. UWBI soon became insolvent as well, and Simon E. Rodriguez was appointed as Trustee of UWBI's bankruptcy estate. *Id.* at 25-26. The IRS subsequently completed its audit of UWBI's refund request, and issued a refund in the amount of $4,081,334.67. Pet. App. 10a.

C. Procedural History

1. In 2012, the FDIC filed a proof of claim in UWBI's bankruptcy case for the amount of the tax refund UWBI had requested from the IRS. *Id.* at 8a. The FDIC claimed that the refund stemmed solely from the Bank's income and losses, and thus the Bank held equitable title to the refund. *Id.* The Trustee responded by initiating an adversary proceeding in Bankruptcy Court, seeking declaratory and other relief stating that UWBI was the equitable owner of the refund. *Id.* at 9a. The parties cross-moved for summary judgment. *Id.*

The Bankruptcy Court granted summary judgment to the Trustee. *Id.* at 127a-128a. It determined that because the refund was paid "directly to and in the name of" the parent corporation, UWBI holds "at least bare legal title to the Tax Refund." *Id.* at 95a (emphasis omitted). And it found that, under Colorado law, UWBI holds equitable title to that refund, as well. *Id.* 96a-97a. As the court explained, the

Agreement does not make UWBI the "agent" of the Bank under Colorado law, because it does not subject UWBI to the Bank's control. *Id.* at 110a-113a; *see id.* at 113a ("In Colorado, there can be no agency relationship where the alleged agent is not subject to the control of the alleged principal."). The court also found that the Agreement does not satisfy any of the state-law requirements for creation of a trust on behalf of the Bank. *Id.* at 113a-116a. Thus, the court concluded, the tax refund is part of UWBI's bankruptcy estate. *Id.* at 127a. But the court noted that "this does not leave the FDIC without a remedy": "FDIC still is a general unsecured creditor" of the estate, and so may seek to recover a portion of the refund "with any other allowed general unsecured claims." *Id.*

2. The District Court reversed. *Id.* at 29a; *see* 28 U.S.C. § 158(a) (granting district courts "jurisdiction to hear appeals" from bankruptcy court decisions). Unlike the Bankruptcy Court, the District Court determined that its analysis was governed by the *Bob Richards* rule. Pet. App. 41a. The District Court acknowledged that the Ninth Circuit had "cited no authority" for this rule, and that the Sixth Circuit had recently "rejected" it as "an unnecessary exercise of federal common law authority." *Id.* at 42a-43a (citing *AmFin*, 757 F.3d at 535-536). "If writing on a clean slate," the District Court added, it "would be inclined to agree with the Sixth Circuit." *Id.* at 43a. But the court concluded that the Tenth Circuit had adopted the *Bob Richards* rule in *Barnes* v. *Harris*, 783 F.3d 1185 (10th Cir. 2015), and that the District Court was therefore bound to follow it. Pet. App. 44a-45a.

Applying that rule, the District Court found that there are "at least two reasonable interpretations * * * regarding the scope of [UWBI's] agency on behalf of the Bank." *Id.* at 64a. The court did not consult Colorado agency law to determine which interpretation was correct. Instead, it simply invoked the Agreement's statement of purpose to resolve that perceived ambiguity in the Bank's favor. *Id.* at 64a-65a.

3. The Tenth Circuit affirmed. *Id.* at 3a. It began its analysis, much as the District Court had, by asserting that "[f]ederal common law * * * provides a framework for resolving this issue." *Id.* at 15a. Under the *Bob Richards* rule, it stated, "a tax refund due from a joint return generally belongs to the company responsible for the losses that form the basis of the refund." *Id.* (quoting *Barnes*, 783 F.3d at 1195). Furthermore, the court held, the *Bob Richards* rule applies even where there is "a written agreement in place." *Id.* at 18a. The Tenth Circuit thus determined that it was required 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 and, if so, whether it purports to deviate from the general rule outlined in * * * *Bob Richards*." *Id.*

The Tenth Circuit found that "the written terms of the Agreement are, at best, ambiguous regarding the nature of the relationship" between UWBI and the Bank. *Id.* On one hand, it admitted, several provisions of the Agreement suggest "a debtor-creditor relationship," including the fact that the Agreement permits UWBI to "retain tax refunds and then later take them into account during the annual settlement

process," that it grants UWBI "discretion regarding the amount to refund" subsidiaries, and that it "contains no language requiring UWBI to utilize a trust or escrow for tax refunds." *Id.* at 26a. On the other hand, the court believed that the Agreement's reference to UWBI as an "intermediary" and as "agent for purposes of filing the consolidated tax return" suggested that UWBI received tax refunds in an agency capacity. *Id.* at 25a-26a.

The Tenth Circuit did not consult Colorado agency law to determine whether these provisions, taken together, established an agency relationship. *Cf. id.* at 110a-116a (Bankruptcy Court's analysis). Rather, the Tenth Circuit simply invoked the Agreement's general statement of purpose. *Id.* at 26a. Relying on this provision, the panel concluded that "the Agreement's intended treatment of tax refunds does not differ from the general rule outlined in *Barnes* and *Bob Richards*." *Id.* at 27a. It followed that "the tax refund at issue belongs to the Bank." *Id.*

UWBI filed a petition for rehearing, which the Tenth Circuit largely denied. *Id.* at 2a.[4] This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The *Bob Richards* rule is an unwarranted act of judicial lawmaking. The rule satisfies none of the stringent prerequisites for the creation of federal

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[4] The panel amended its decision by removing a footnote erroneously stating that UWBI had waived the argument that a portion of the tax refund is attributable to UWBI's losses. Pet. App. 2a. That argument accordingly remains open to UWBI on remand.

common law. And even if the requirements for common lawmaking were present, the *Bob Richards* rule would not be a permissible exercise of that authority.

A. This Court famously declared in *Erie Railroad Co.* v. *Tompkins* that "[t]here is no federal general common law." 304 U.S. 64, 78 (1938). In a few "limited enclaves," courts retain residual authority to create what is sometimes referred to as "federal common law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729-730 (2004). But the circumstances in which "judicial creation of a special federal rule would be justified are 'few and restricted.'" *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997) (alterations and citation omitted). At least three requirements must be satisfied to permit that unusual act of judicial law-making. First, the rule must involve a "uniquely federal interest[ ]." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988). Second, Congress must not have "displace[d] * * * federal common law" by enacting a comprehensive regulatory scheme or vesting authority in a federal agency. *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 423-424 (2011) ("*AEP*"). And, third, there must be a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994). The *Bob Richards* rule satisfies none of these requirements.

The ownership of tax refunds within an affiliated group is not a question of "uniquely federal interest." It does not fall within any of the narrow enclaves in which this Court has previously recognized that federal common lawmaking is permissible, such as foreign affairs or admiralty. Nor do the tax laws or

the Bankruptcy Code delegate to courts the authority to engage in common lawmaking. On the contrary, this Court has repeatedly recognized that the way in which private parties allocate assets issued by the Federal Government is a matter on which the creation of federal common law is *not* appropriate. *See Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 70-71 (1966); *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *Parnell*, 352 U.S. 29, 33-34 (1956).

Further, Congress has displaced any authority courts may have to devise federal common law in this area. Congress has delegated to the IRS broad authority to prescribe rules governing consolidated tax returns. 26 U.S.C. § 1502. And it has specifically delegated to the IRS authority to "by regulation provide" that a tax refund may be paid directly to the fiduciary of an insolvent corporation that is the subsidiary of an affiliated group. *Id.* § 6402(k). The IRS has established some federal rules on these questions, *see, e.g.*, 26 C.F.R. § 301.6402-7, but has otherwise left state law undisturbed. Federal courts have no warrant to seize for themselves the authority Congress vested in a federal agency. *AEP*, 564 U.S. at 425-426.

There is also no "significant conflict" between state law and any defined federal policy or interest—let alone a conflict sufficient to upset the primacy accorded state law in matters of contract, corporate, and commercial law. *See Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). There is no special need for national uniformity in this area. *O'Melveny*, 512 U.S. at 88. There is no reason why state-law rules are incapable of fairly allocating tax refunds. *Wallis*, 384 U.S. at 70-71. And the dubious

possibility that *some* TAAs involving banks *might* create legal questions under federal banking laws does not justify the creation of prophylactic federal common law.

B. Even if federal courts somehow had authority to create federal law in this area, the *Bob Richards* rule would still be unwarranted. Far from furthering federal policy, this rule conflicts with the text, policy, and structure of the consolidated-return rules that it is purportedly designed to supplement.

First, the consolidated-return rules already specify the circumstances in which the IRS intended that tax refunds be paid to a subsidiary rather than a parent corporation. *See* 26 C.F.R. §§ 301.6402-7; 1.1502-78(a), (b)(1). The *Bob Richards* rule conflicts with that scheme.

Second, the central premise of the *Bob Richards* rule—that certain tax refunds are attributable "solely" to the income and losses of a particular member of an affiliated group—is incorrect. 462 F.2d at 265. Tax refunds are issued on the basis of consolidated taxable income and consolidated net operating loss, not the income and losses of an individual member. Indeed, this Court has held that the concept of separate net operating loss "does not exist" for members of an affiliated group filing jointly, and that there is no "plausible analogy" to such a concept, either. *United Dominion*, 532 U.S. at 829-831.

Third, the *Bob Richards* rule is inconsistent with the structure of the tax laws. The Code and regulations leave affiliated groups free to assign responsibility for tax *liability* among their members however they see fit. It follows that the group should have the same freedom to distribute tax *refunds,* which

are merely compensation for the earlier overpayment of tax liability. Decoupling these two measures results in a significant anomaly whereby a member that did not pay an underlying tax may nonetheless be deemed entitled to a refund for that tax as a matter of federal law. Courts following the *Bob Richards* rule have felt compelled to correct that anomaly by inventing yet another atextual rule, only further unmooring *Bob Richards* from the Code and regulations.

Finally, the *Bob Richards* rule lacks a sound policy justification. The rule cuts against the central purpose of the consolidated-return laws: to treat the members of an affiliated group as a single entity. And in light of the integrated nature of an affiliated group, the close connection between a parent corporation and its subsidiaries, and the backstop provided by state law, it is highly simplistic to assume that a parent corporation would be "unjustly enriche[d]" absent the *Bob Richards* rule. 435 F.2d at 265. At minimum, the function of "weighing and appraising" these complex and competing policy considerations is for Congress and the IRS, not federal courts. *O'Melveny*, 512 U.S. at 89.

II. Once the *Bob Richards* rule is abandoned, this case is easily resolved. The Bank would have an equitable interest in the tax refund paid to UWBI only if UWBI received that refund in the capacity of a trustee or an agent for the Bank. Whether a trustee or agency relationship exists is a question of state law, determined (pursuant to the parties' agreement) by the law of Colorado.

Here, Colorado law makes clear that neither a trustee nor an agency relationship is present. The FDIC

forfeited below any argument that UWBI is a trustee of the Bank, which it plainly is not. Pet. App. 58a. And to be an "agent" in Colorado (as in most states), an entity must be subject to the continuous control of its purported principal; the label the parties use to describe their relationship is immaterial. *See City of Aurora ex rel. Util. Enter.* v. *Colo. State Eng'r*, 105 P.3d 595, 622 (Colo. 2005); *Stortroen* v. *Beneficial Fin. Co. of Colo.*, 736 P.2d 391, 395 (Colo. 1987). UWBI is not subject to *any* control by the Bank—its wholly-owned subsidiary—let alone the continuous control necessary to deem it the Bank's agent. It therefore holds equitable as well as legal title to the refund.

The Tenth Circuit reached a contrary conclusion only because its analysis was distorted by the *Bob Richards* rule. The court demanded "unambiguous[ ]" evidence in "the written terms of the agreement" that the parties "deviate[d] from the general rule outlined in * * * *Bob Richards*." Pet. App. 18a. In searching for such evidence, the court analyzed the bare text of the Agreement, without recourse to the Colorado law of agency. And, having ignored the relevant body of law, it placed dispositive weight on a factor—the label used by the parties—that Colorado law deems irrelevant. All of these analytic errors flowed from the same false premise: that federal common law governs this case. Once that mistake is corrected, the "ambiguity" the court perceived falls away, and the tax refund is plainly part of UWBI's bankruptcy estate.

ARGUMENT

I. THE *BOB RICHARDS* RULE IS UNLAWFUL.

It is undisputed that the *Bob Richards* rule cannot be found in any law enacted by the political branches. When it first propounded this rule, the Ninth Circuit acknowledged that "there is nothing in the [Internal Revenue] Code or Regulations that compels the conclusion that a tax saving must or should inure to the benefit of the parent company or of the company which has sustained the loss that makes possible the tax saving." *Bob Richards*, 473 F.2d at 264 (citation omitted). Similarly, the Solicitor General has conceded that both the Code and the consolidated-return regulations are "silent with respect to the legal and equitable ownership of such a tax refund." Opp. 2 (quoting Pet. App. 15a).

The only conceivable legal basis for the *Bob Richards* rule, then, is the one the Tenth Circuit invoked in the decision below: "[f]ederal common law." Pet. App. 15a. But that narrow source of law is equally unavailing. This is not "one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." *O'Melveny*, 512 U.S. at 89. And even if federal courts had some common lawmaking authority in this area, the *Bob Richards* rule would be an impermissible exercise of that authority.

A. The *Bob Richards* Rule Is Not A Valid Rule Of Federal Common Law.

This Court declared in *Erie* that "[t]here is no federal general common law." 304 U.S. at 78. "'Whether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts." *Atherton*, 519 U.S.

at 218 (quoting *Wallis*, 384 U.S. at 68). And "Congress acts * * * against the background of the total *corpus juris* of the states." *Wallis*, 384 U.S. at 68 (quoting H. Hart & H. Wechsler, The Federal Courts and the Federal System 435 (1953)). Hence, in all but the rarest of cases, a finding that neither federal statutes nor federal regulations (nor the Constitution) displace state law is dispositive: State law continues to govern. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 498 (1954) ("[F]ederal law" is "interstitial law, assuming the existence of, and depending for its impact upon, the underlying bodies of state law.").

Federal courts do retain residual power, restricted to a few "limited enclaves," in which they may create what is commonly referred to as "federal common law." *Sosa*, 542 U.S. at 729; *see* Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964). But the "free-wheeling days" of judicial lawmaking "antedating *Erie*" are long past. *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963). This Court has repeatedly emphasized that the circumstances in which "judicial creation of a special federal rule would be justified are 'few and restricted.'" *Atherton*, 519 U.S. at 218-219 (alterations omitted). They are confined to certain "narrow areas" in which the structure of our constitutional system or an affirmative source of federal law gives courts authority to "formulate substantive rules of decision." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *see City of Milwaukee* v. *Illinois & Michigan*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not pos-

sess a general power to develop and apply their own rules of decision.").

In particular, this Court has identified three conditions that must be present before federal courts may engage in "the judicial 'creation' of a special federal rule of decision." *Atherton*, 519 U.S. at 218. First, the case must involve a "uniquely federal interest[ ]," such as foreign affairs, admiralty, or the rights and obligations of the Federal Government. *Boyle*, 487 U.S. at 504 (internal citation omitted). Second, Congress must not have "displace[d] * * * federal common law" by enacting a comprehensive regulatory scheme on the subject or vesting authority in a federal agency. *AEP*, 564 U.S. at 423-424 (citing *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)). And, third, there must be a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87 (quoting *Wallis*, 384 U.S. at 68).

The *Bob Richards* rule clears none of these high bars. It does not even come close.

1. The Bob Richards *rule does not involve any "uniquely federal interest."*

First, the *Bob Richards* rule does not "involv[e]" a "uniquely federal interest[ ]," that is "so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced." *Boyle*, 487 U.S. at 504. This Court has found such an interest present only in "few and restricted" circumstances, *Atherton*, 519 U.S. at 218, and this case is far afield from all of them.

The *Bob Richards* rule does not fall within any of the limited enclaves of judicial lawmaking that this Court has recognized to date. *See Atherton*, 519 U.S.

at 225-226 (collecting prior cases). The issue here does not concern foreign affairs. *E.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427-428 (1964). It does not concern a dispute between states. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). It does not involve admiralty, *e.g.*, *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 23 (2004), the rights and obligations of the Federal Government or its agents, *e.g.*, *Boyle*, 487 U.S. 504-506, or the legal effect of a federal judgment, *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Nor does the *Bob Richards* rule plausibly fall within any other recognized enclave.

The *Bob Richards* rule also does not arise out of a statutory scheme in which Congress delegated to the federal courts the power to evolve rules through a common-law process. As this Court has noted, "[f]ederal common law * * * may come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law." *Texas Indus., Inc.*, 451 U.S. at 642-643. So, for instance, this Court has read the Labor Management Relations Act to "vest[ ] in the courts the power to develop a common law of labor-management relations." *Id*. (citing *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957)). Similarly, this Court has interpreted the "sweeping language" of the Sherman Act to implicitly delegate power to "the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *Id*. at 643 (citation omitted); *see also Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987) (explaining that Congress "expect[ed] that a federal common law of rights and obligations under ERISA-regulated plans would develop").

But there is nothing comparable in the tax laws or the bankruptcy laws that would allow federal courts to supplant state laws of property and corporations. On the contrary, "[f]ederal tax law" and "federal bankruptcy law" are quintessential examples of federal statutes in which Congress has incorporated and relied on preexisting rules of state law. *The Relations Between State and Federal Law* at 535. The Tax Code "creates no property rights but merely attaches consequences * * * to rights created under state law." *United States* v. *Nat'l Bank of Commerce*, 472 U.S. 713, 722 (1985) (citation omitted). Likewise, the Bankruptcy Code "generally l[eaves] 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); *see Stern* v. *Marshall*, 564 U.S. 462, 495 (2011) ("[P]roperty interests [in bankruptcy] are created and defined by state law" (citation omitted)). That ensures both that a party does not receive "a windfall merely by reason of the happenstance of bankruptcy," *Butner*, 440 U.S. at 55 (citation omitted), and that state authority in an area of "traditional state regulation" is preserved, *BFP* v. *Resolution Tr. Corp.*, 511 U.S. 531, 544 (1994).

Further, the federal connections that the *Bob Richards* rule *does* have are plainly insufficient to justify the creation of a new enclave of judicial lawmaking. The fact that a tax refund is paid out of the public fisc does not somehow render the subsequent use or transfer of those funds a uniquely federal interest. The Federal Government's duty to pay a tax refund is "discharge[d]" the moment it distributes the refund to a parent corporation. 26 C.F.R. § 1.1502-77(d)(5). And any subsequent disposition of that

refund is a matter "between private parties and does not touch the rights and duties of the United States." *Parnell*, 352 U.S. at 33. Indeed, this Court has repeatedly held that the manner in which private parties dispose of assets issued by the Federal Government does not present an issue of sufficient federal interest to justify the creation of federal common law. *See id.* at 33-34 (refusing to create federal common law rule regarding post-transfer ownership of "[s]ecurities issued by the Government"); *Wallis*, 384 U.S. at 67-68 (refusing to create common-law rule governing "the dealings of private parties in an oil and gas lease" issued by the Secretary of the Interior); *Miree* v. *DeKalb County*, 433 U.S. 25, 28-31 (1977) (refusing to create common-law rule regarding rights of "third-party beneficiaries of * * * contracts" with the Federal Government). As Justice Holmes explained in the similar context of land transferred from the Government to a settler: "[W]hen the title has passed, then the land like all other property in the state is subject to state legislation." *Buchser* v. *Buchser*, 231 U.S. 157, 161 (1913) (Holmes, J.) (internal quotation marks omitted).

Likewise, the fact that the FDIC happens to be a party to this dispute does not itself warrant the application of federal common law. For one thing, the *Bob Richards* rule is much broader than this dispute—in those courts that apply the rule, it governs the disposition of tax refunds paid to corporate parents whether or not the Federal Government is involved. Indeed, the *Bob Richards* case itself did not involve the FDIC. *See* 473 F.2d at 263. For another, when the FDIC steps into the shoes of an insured depository institution, it is not "asserting its *own* rights" as an instrumentality of the Federal

Government but "the rights of" the now-defunct bank "under state law." *O'Melveny*, 512 U.S. at 85-87; *see* 12 U.S.C. § 1821(d)(2)(A)(i); *Atherton*, 519 U.S. at 225. Consequently, "[t]he rules of decision at issue * * * do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred." *O'Melveny*, 512 U.S. at 88. If every rule that touched on the FDIC's rights and liabilities in this incidental manner involved a uniquely federal interest, "we would be awash in 'federal common-law' rules." *Id.*

2. Congress has foreclosed adoption of a federal common law rule.

In addition to falling outside one of the "limited enclaves" in which federal common lawmaking is appropriate, the *Bob Richards* rule falls within a field that Congress has comprehensively addressed—and in which it has delegated lawmaking authority to another entity: the IRS.

"Federal common law is a 'necessary expedient'" that is "resorted to '[i]n absence of an applicable Act of Congress.'" *Milwaukee*, 451 U.S. at 314 (citations omitted). The "need for such an unusual exercise of lawmaking by federal courts disappears" when "Congress addresses [the] question." *Id.* Accordingly, "congressional legislation excludes the declaration of federal common law" when it "speak[s] directly to [the] question at issue." *AEP*, 564 U.S. at 424 (quoting *Mobil Oil Corp.*, 436 U.S. at 625); *see Milwaukee*, 451 U.S. at 314; *County of Oneida* v. *Oneida Indian Nation of N.Y.*, 470 U.S. 226, 236-237 (1985).

The standard for finding such "[l]egislative displacement of federal common law" is not especially demanding. *AEP*, 564 U.S. at 423.[5] First, this Court has held that Congress speaks directly to a question by enacting a "comprehensive and detailed" statute on the subject. *O'Melveny*, 512 U.S. at 85. "[M]atters left unaddressed in such a scheme," the Court has explained, "are presumably left subject to the disposition provided by state law." *Id.*; *see also Nw. Airlines, Inc.* v. *Transp. Workers Union*, 451 U.S. 77, 97 (1981); *Mobil Oil Corp.*, 436 U.S. at 625. Second, the Court has held that legislative displacement occurs where Congress delegates authority over a matter to a federal agency, irrespective of whether the agency "actually exercises its regulatory authority." *AEP*, 564 U.S. at 425-426. "[T]he delegation is what displaces federal common law." *Id.* at 426; *see Milwaukee*, 451 U.S. at 319-323.

Here, Congress has displaced federal common law concerning the ownership of tax refunds in both ways. First, Congress has enacted the paradigmatic "comprehensive and detailed" statute: the Tax Code. In thousands of sections spanning multiple volumes of the U.S. Code, Congress specified in exceptional

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[5] The Court has explained that this standard is significantly less exacting than the standard "for preemption of state law." *AEP*, 564 U.S. at 423-424. Whereas the Court "start[s] with the assumption that the historic police powers of the States [a]re not to be superseded * * * unless that was the clear and manifest purpose of Congress," the Court applies the inverse "assumption" with regard to federal common law: "that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Milwaukee*, 451 U.S. at 316-317 (citation omitted).

detail how federal income taxes should be paid, assessed, filed, adjusted, and returned. *See Bob Jones Univ.* v. *United States*, 461 U.S. 574, 596 (1983) (noting the "complex[ity]" of "the tax system"). The Code includes a chapter specifically governing consolidated returns, 26 U.S.C. §§ 1501-1563, and another chapter detailing the manner in which tax refunds should be calculated, paid, and distributed, *id.* §§ 6401-6430. That Congress nowhere in this statute included a rule governing how consolidated tax refunds should be distributed within an affiliated group is reason enough to conclude that courts may not "supplement" the statute by adding one of their own. *O'Melveny*, 512 U.S. at 86-87 ("To create additional 'federal common-law' exceptions is not to 'supplement' th[e] scheme, but to alter it.").

Second, to the extent Congress *did* address this issue, it delegated authority over the matter to the IRS. In 26 U.S.C. § 1502, Congress vested the IRS with broad authority to "prescribe such regulations as [it] may deem necessary" to carry out the consolidated-return provisions, including regulations governing how the tax liability of an affiliated group and its members "may be * * * adjusted," *i.e.*, enlarged or refunded. Then, in 26 U.S.C. § 6402(k), Congress gave the IRS authority to provide for the payment of refunds directly to a subsidiary in circumstances closely resembling this case: It stated that where a member of an affiliated group is "insolvent" and "subject to a statutory or court-appointed fiduciary," the IRS "may by regulation provide that any refund for such taxable year may be paid on behalf of such insolvent corporation to such fiduciary to the extent that the * * * refund is attributable to losses or

credits of such insolvent corporation." 26 U.S.C. § 6402(k).

The IRS has invoked its authority under both of these provisions. It has used its general rulemaking authority to establish a default rule that tax refunds are paid "directly to and in the name of the" corporate parent. 26 C.F.R. § 1.1502-77(d)(5); *see also id.* § 1.1502-78(b)(1). It has also established exceptions to that rule, by specifying certain circumstances in which a refund is paid directly to "the corporation to which [a] loss or credit is attributable." *Id.* § 1.1502-78(a), (b)(1). And, pursuant to section 6402(k), it has promulgated a detailed regulation establishing "rules for the payment of refunds * * * to the fiduciary of an insolvent financial institution that was a subsidiary in a consolidated group." 26 C.F.R. § 301.6402-7(a)(1).[6]

This is, accordingly, an even clearer case of legislative displacement than *AEP*. There, the Court found legislative displacement of "any federal common law right to seek abatement of carbon-dioxide emissions" because the Clean Air Act "delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants." 564 U.S. at 424-426. And that conclusion held firm even though EPA had

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[6] The FDIC did not invoke this provision as a basis for seeking the tax refund in this case, and has not complied with the numerous prerequisites it imposes. *See, e.g.*, 26 C.F.R. § 301.6402-7(c), (d), (e) (imposing notice and filing requirements a fiduciary must follow in order to seek a tax refund). This case does not present the question whether the FDIC could invoke this provision to receive any subsequent tax refund paid to UWBI and its subsidiaries.

not "actually exercise[d] its regulatory authority." *Id.* Here, Congress has delegated to the IRS authority to prescribe rules governing the distribution of tax refunds, *and* the IRS has specifically exercised that authority. Even more so than in *AEP*, this statutory and regulatory scheme leave "no room for a parallel track." *Id.*

3. There is no "significant conflict" between state law and an identifiable federal policy.

The *Bob Richards* rule also founders on the third requirement for federal common lawmaking: the existence of "significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87. This Court has "uniformly" held that "such a conflict is a precondition for recognition of a federal rule of decision." *Id.*; *see Atherton*, 519 U.S. at 218; *Boyle*, 487 U.S. at 507; *Kamen*, 500 U.S. at 98; *Wallis*, 384 U.S. at 68. And it has stated that "[t]he presumption that state law" controls is "particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98.[7] The *Bob Richards* rule upsets state

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[7] The Court has sometimes said that, in those enclaves where federal common lawmaking is appropriate, state law continues to govern of its own force absent a need for a differing federal rule, while other times it has said that federal law is presumed to "refer to state law for the rule of decision." *Boyle*, 487 U.S. at 507 n.3. As this Court has explained, this difference in terminology is "of only theoretical interest," since under either formulation "[t]he issue * * * is whether the [state] rule of decision is to be applied * * * or displaced." *O'Melveny*, 512 U.S. at 85; *see Boyle*, 487 U.S. at 507 n.3 (doubting that the formula-

law in three such areas: "[c]orporation law," "property law," and "commercial law." *Id.*; *see supra* pp. 10-11. Courts would need an especially compelling reason to so substantially "disrupt commercial relationships predicated on state law." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728-729 (1979).

No such reason exists. Indeed, "[w]hat is fatal" to the *Bob Richards* rule is that its proponents have "identified *no* significant conflict with an identifiable federal policy or interest." *O'Melveny*, 512 U.S. at 88. In *Bob Richards* itself, the Ninth Circuit justified its rule on the ground that it "*fe[lt]* that a tax refund * * * *should* inure to the benefit of" the group member whose income and losses allegedly gave rise to the refund. 473 F.2d at 265 (emphases added). The court did not identify any federal interest in allocating refunds that way. Nor did it offer a reason why the well-established body of state law concerning corporations, property ownership, and commercial transactions is not up to the task of fairly adjudicating the ownership of tax refunds.

Those Circuits that have followed *Bob Richards* have similarly "bypassed th[is] threshold question." *AmFin*, 757 F.3d at 536. When the Fifth Circuit adopted the *Bob Richards* rule, it did little more than summarize "the *In re Bob Richards* reasoning" and pronounce it "sound." *Capital Bancshares, Inc.* v. *FDIC*, 957 F.2d 203, 208 (5th Cir. 1992). The Tenth Circuit's rationale for adopting the rule was even more terse: It identified *Bob Richards* as the "de-

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tion "ever makes a practical difference," and "adopt[ing] the more modest terminology").

fault allocation rule" and left it at that. *Barnes*, 783 F.3d at 1195-96.

Nor does any heretofore-unrecognized conflict exist. The *Bob Richards* rule cannot be justified by an "interest in uniformity." *O'Melveny*, 512 U.S. at 88. Private corporations in affiliated groups do not require a uniform federal rule to govern their commercial transactions; the normal (and expected) rule in our federal system is that corporate transactions and property rights are "governed by state-law standards." *Kamen*, 500 U.S. at 98. And even if a federal interest in uniformity were present, the *Bob Richards* rule would not meaningfully serve that interest, given that it is defeasible by private agreements and leaves unaffected the vast majority of state-law property questions that arise in bankruptcy and tax proceedings. *Bob Richards*, 482 F.3d at 264-265; *see Kimbell Foods*, 440 U.S. at 729-732 (continued existence of state-law issues "belies the[] assertion" that a uniform federal rule is necessary (citing *United States* v. *Yazell*, 382 U.S. 341, 353, 357 (1966))).

The Ninth Circuit's concern with preventing "unjust enrichment" also does not establish a significant conflict. *Bob Richards*, 473 F.2d at 265 & n.7. The general goal of avoiding unjust enrichment is far too "abstract" an interest to support creation of a federal common law rule. *Wallis*, 384 U.S. at 71; *see O'Melveny*, 512 U.S. at 89 (rejecting a claimed interest in preventing "malpractice" as "untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy"). And, in any event, *Bob Richards* and its progeny have made "no showing that state law," which includes well-established

common-law protections against unjust enrichment, "is not adequate" to vindicate such a policy. *Wallis*, 384 U.S. at 71.

Indeed, this Court rejected a closely comparable justification for the creation of federal common law in *Wallis*. There, the defendant leased the mineral rights to federal land from the Government, and was sued by a plaintiff claiming it owned a portion of the lease due to a joint venture agreement between it and the defendant. *Id.* at 64-66. The plaintiff argued that "because the leases are issued by the United States and concern federal lands, there is a federal interest in having private disputes over them justly resolved." *Id*. at 70-71. The Court disagreed: "Apart from the highly abstract nature of this interest," it observed, "there has been no showing that state law is not adequate to achieve it." *Id*. at 71. Accordingly, the court found that the application of state law posed "no significant threat to any identifiable federal policy or interest." *Id.* at 68. So too here.

Finally, the *Bob Richards* rule draws no meaningful support from the banking laws. Several banking regulators, including the FDIC, have issued a nonbinding policy statement advising regulated entities that, in their view, tax-allocation agreements between banks "should not purport to characterize refunds attributable to a subsidiary depository institution that the parent receives from a taxing authority as the property of the parent." Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 63 Fed. Reg. 64,757, 64,759 (Nov. 23, 1998). The policy statement claims that if such a refund is not paid to the subsidiary

"within a reasonable period following the date the [subsidiary] would have filed its own return * * * the institution's primary federal regulator may consider the receivable as either an extension of credit or a dividend from the subsidiary to the parent," in violation of certain banking laws. *Id.*; *see* 12 U.S.C. § 371c(c)(1) (requiring that extensions of credit between affiliated banks be secured by collateral); *id.* § 371c-1(a)(1)(A) (requiring that loans between affiliated banks be made on terms "substantially the same" as those prevailing for other entities).[8]

This policy statement provides no support for the *Bob Richards* rule. For one thing, it simply assumes the validity of the rule—that is, that a refund "attributable to a subsidiary" is properly viewed as the subsidiary's property. 63 Fed. Reg. at 64,759. But for that undefended premise, retention of a refund by the parent would plainly not be an "extension of credit" from the subsidiary to the parent. *Id.* at 64,758; *cf. Atherton*, 519 U.S. at 225 (rejecting relevance of non-binding statement that applied a "judge-made federal common-law standard" without providing "any convincing evidence of a relevant, significant conflict or threat to a federal interest").

For another, even on its own terms, this statement does not get the Government far. It is a non-binding policy statement. It applies only to banks, not to all

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[8] The banking regulators have issued an addendum to this policy statement providing guidance on how tax-allocation agreements should be drafted to conform to the statement. *See* Addendum to the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 79 Fed. Reg. 35,228 (June 19, 2014).

affiliated groups. And even if it were true that a parent's retention of a tax refund owed to a subsidiary constitutes a "loan" from the subsidiary—which it does not, *see In re Indymac Bancorp, Inc.*, 554 F. App'x 668, 670 (9th Cir. 2014)—the relevant banking laws prohibit such loans only where certain conditions are not satisfied. 63 Fed. Reg. at 64,759; *see* 12 U.S.C. §§ 371c(c)(1)(a), 371c-1(a)(1). The hypothetical possibility of a legal violation in some subset of cases does not make for "one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted." *O'Melveny*, 512 U.S. at 89.

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In sum, the *Bob Richards* rule flunks not one but three of the requirements for the creation of federal common law. That is sufficient, three times over, to declare the rule extinct. The *Bob Richards* rule simply lacks any positive legal basis, and so federal courts may not apply it as a federal rule of decision.

B. The *Bob Richards* Rule Is Inconsistent With The Tax Laws.

Even if the *Bob Richards* rule somehow fell within the scope of federal courts' lawmaking authority, it would be invalid due to a second, equally fatal set of problems: It is inconsistent with the tax laws.

Federal common law is a supplemental power designed to "fill the interstices of federal remedial schemes." *Kamen*, 500 U.S. at 98. Even where it is authorized, federal common law therefore may not be used to "contradict an explicit federal statutory provision." *O'Melveny*, 512 U.S. at 85. And "[i]f there is a federal statute dealing with the general subject," that statute "is a prime repository of federal policy and a starting point for federal common law."

Wallis, 384 U.S. at 59. Federal common law rules, in other words, must be "solicitous of * * * federal interests"; they cannot contravene the very statutes they are supposed to supplement. *See Kimbell Foods*, 440 U.S. at 728.

The *Bob Richards* rule falls badly short on that score. It contravenes the text, policy, and structure of the consolidated-return laws. And it raises significant tax policy questions that only Congress and the IRS may resolve.

1. To start, the *Bob Richards* rule is irreconcilable with the scheme that the IRS designed for assigning tax refunds.

As noted above, those regulations set a default rule that tax refunds are paid to the corporate parent. The IRS set forth this allocation with fivefold emphasis, providing that "*any* refund" is made "*directly*" to the parent and "*in the name of*" the parent, and discharges "*any* liability" of the Government to "*any* member" of the group. 26 C.F.R. § 1.1502-77(d)(5) (emphases added); *see also id.* § 1.1502-78(b)(1) (same, with respect to carryback adjustments). The IRS could hardly have said more clearly, or more times over, that a tax refund is issued to the parent, and, at least as far as the IRS is concerned, that is the end of it.

In contrast, when Congress and the IRS wished that refunds be issued to a subsidiary, they said so. Congress authorized the IRS to establish regulations providing that a tax refund "attributable to losses or credits" of an insolvent subsidiary may be paid directly to the fiduciary of that subsidiary. 26 U.S.C. § 6402(k). And the IRS has promulgated multiple regulations directing when consolidated tax refunds

arising from a subsidiary's losses should be paid to a subsidiary rather than the parent. *See* 26 C.F.R. §§ 1.1502-78(a), (b)(1), 301.6402-7(a)(1); *see also id.* § 1.1502-6(b).

The *Bob Richards* rule cannot be squared with these provisions. It entitles a subsidiary to receive a tax refund not just in the narrow circumstances Congress and the IRS specified, but in *any* case in which the subsidiary's losses gave rise to the refund. *See Bob Richards*, 473 F.2d at 265. Further, it purports to assign the subsidiary *ownership* of that refund, rather than just making it the initial recipient. *Cf.* 26 C.F.R. § 301.6402-7(j) ("This section determines the party to whom a refund * * * will be paid but is not determinative of ownership"). In so doing, the *Bob Richards* rule almost entirely swallows both 26 U.S.C. § 6402(k) and its implementing regulation, since any beneficiary of those provisions would be entitled to not merely receipt but ownership of a refund under the *Bob Richards* rule. "[T]he courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Mobil Oil Corp.*, 436 U.S. at 625.

Some litigants have sought support for the *Bob Richards* rule in the fact that Section 1.1502-77 designates the parent corporation as "agent" for the affiliated group. *See* Pet. App. 60a. "[N]ot surprisingly," courts have uniformly rejected this argument. *Id.* (citing cases). As the Government itself has long maintained, the word "agent" in the regulations is a procedural designation made "solely for the convenience of the IRS," so that the IRS can communicate with the affiliated group through a single intermediary; it does not purport to alter the group's internal

affairs or the property rights of its members. Opp. 2; *see, e.g.*, *Interlake Corp.* v. *Comm'r*, 112 T.C. 103, 113 (1999) (stating that the regulations make the parent "the exclusive agent for the consolidated group with respect to all procedural matters."); *S. Pac. Co.* v. *Comm'r*, 84 T.C. 395, 401 (1985) (same); Pet. App. 60a-61a. Furthermore, the parent is designated agent for "the group" as a whole, not for any individual subsidiary. 26 C.F.R. § 1.1502-77(a)(1). That designation thus furnishes no support for *Bob Richards*'s presumption that a *particular* member of the group—"the company responsible for the losses that form the basis of the refund," Pet. App. 15a (citation omitted)—is entitled to receive the refund.

2. In addition to contradicting the regulatory text, the *Bob Richards* rule also rests on a concept inconsistent with the consolidated-return rules. *Bob Richards* reasoned that a member of an affiliated group is entitled to a tax refund that "result[s] solely from offsetting the losses of [that] member * * * against the income of that same member in a prior or subsequent year." 463 F.2d at 265. But, with narrow exceptions, the premise that income or losses giving rise to a consolidated tax refund are attributable to a particular member of an affiliated group is mistaken.

Under the Tax Code, a taxpayer is entitled to a refund when its net operating loss (NOL) in one year—that is, its excess of deductions over income—is used to offset its income from a prior year. 26 U.S.C. §§ 172(b)(1)(A), (c), 6611(f). When a taxpayer 'carries back' its NOL in this way, the prior year's taxable income is recalculated in light of the NOL deduction, and any resulting "overpayment of tax" is

refunded to the taxpayer. *Id.* § 6611.[9] For an affiliated group filing jointly, however, both ingredients in this refund calculation—NOL and taxable income—are attributable to the affiliated group as a whole, not any individual member.

This Court expressly held as much with respect to NOL in *United Dominion*. In that case, a member of an affiliated group argued that a particular type of NOL known as product liability loss should be attributed separately to each member of the group, rather than calculated on a "single-entity" basis for the consolidated group as a whole. 532 U.S. at 827-828. The Court rejected that position. It explained that "the Code and regulations governing affiliated groups of corporations filing consolidated returns provide only one definition of NOL: 'consolidated' NOL" (CNOL). *Id.* at 829 (quoting 26 C.F.R. § 1.1502-21(f) (1982)).[10] "There is no definition of separate NOL for a member of an affiliated group." *Id.* "[I]t is fair to say," the Court concluded, "that the concept of separate NOL 'simply does not exist.'" *Id.* at 830 (citation omitted).

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[9] Congress recently limited the availability of carryback deductions for losses arising after December 31, 2017. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13302, 131 Stat. 2054, 2121 (2017). That amendment does not affect the availability of a refund in this case, which arose in 2011, or in many other pending disputes. *See* Cert. Amicus Br. of Am. Coll. of Tax Counsel 14.

[10] The definitions of consolidated taxable income and CNOL are now set forth in 26 C.F.R. §§ 1502-21(e) and 1.1502-11(a). The substance of these provisions is materially unchanged.

The Court further held that the consolidated-return rules lack any "plausible *analogy* to NOL" for individual members of an affiliated group filing a consolidated return. *Id.* at 831 (emphasis added). An entity's "separate taxable income" (STI) is not a "proxy for a group member's 'separate' NOL" because it "by definition excludes several items that an individual taxpayer would normally account for in computing income or loss, but which an affiliated group may tally only at the consolidated level." *Id.* at 832; *see* 26 C.F.R. § 1.1502-12. Likewise, although certain provisions of the consolidated-return regulations "provide a way to allocate CNOL to an affiliate member," those provisions permit that allocation "for only one reason": to enable a member "to carry back a loss * * * to a year in which the member was not part of the consolidated group." *United Dominion*, 352 U.S. at 833 (citing 26 C.F.R. § 1.1502-79(a)(3) (1982)). Courts lack "any statutory or regulatory basis" to repurpose that methodology to generate a measurement of separate NOL for "consolidated return year[s]," given "the facial inapplicability" of the provisions to that circumstance. *Id.* at 833-834.[11]

Although *United Dominion* did not have reason to decide whether the taxable income of an affiliated group filing a consolidated return may be calculated

[11] The Court also distinguished 26 C.F.R. § 1502-21(b), which similarly apportions NOL to individual members for the purpose of carrying back losses to separate return years. *See United Dominion*, 532 U.S. at 830 n.7. The Court indicated that this provision was "inapplicable" to consolidated-return years both "substantively" and "temporally," and that its "references to separate NOLs 'ste[m] more from careless drafting than meaningful design.'" *Id.* (citation omitted).

on a "separate member" basis, the opinion's logic makes clear that it too generally cannot. Like NOL, the taxable income of an affiliated group filing a consolidated return is measured solely at the consolidated level, as "consolidated taxable income" (CTI). 26 C.F.R. § 1.1502-11. Although one component of CTI is the STI of each group member, "STI is merely an accounting construct devised as an interim step in computing a group's CTI or CNOL; it 'has no other purpose,'" and "is not in and of itself the basis for any tax event." *United Dominion*, 532 U.S. at 834-835 (citation omitted). And "STI by definition excludes several items that an individual taxpayer would normally account for in computing income or loss." *Id.* at 832.

United Dominion thus makes clear that the central premise of the *Bob Richards* rule is incorrect. A consolidated tax refund does not "result[] solely from" the losses and income of a single member. *Bob Richards*, 473 F.2d at 265. It results from two tax attributes—consolidated taxable income and consolidated NOL—that are assessed "only" at the level of the affiliated group. *United Dominion*, 532 U.S. at 829; *see also* 26 C.F.R. § 1.1502-78(a) (carryback adjustments for an affiliated group are calculated on the basis of "consolidated net operating loss"). Attempting to disaggregate those tax attributes and assign them to individual members of the group, as *Bob Richards* requires, entails application of a concept that, under the tax laws, "simply does not exist." *United Dominion*, 532 U.S. at 830 (citation omitted).

Of course, the IRS retains authority to create that concept if it wishes. *See id.* at 838 ("To the extent

the Government disagrees, it may amend its regulations to provide for a different [approach].”). And, in narrow circumstances, the IRS has chosen to do so. As *United Dominion* noted, the IRS has established a methodology for attributing NOL to an individual member so that it can carry back losses to a year in which it filed a separate return. *See* 26 C.F.R. §§ 1.1502-21(b)(2)(iv)(B), 1.1502-78(a). The IRS has also established a slightly different methodology for attributing losses to an insolvent subsidiary whose fiduciary is seeking a tax refund pursuant to 26 U.S.C. § 6402(k). *See* 26 C.F.R. § 301.6402-7(g)(2)(iii). Not incidentally, both of those regulations also carve out exceptions to the general rule that refunds are paid exclusively to the parent. *See supra* pp. 40-41. But far from repudiating *United Dominion* more generally, the IRS has reaffirmed “the principle enunciated by the Supreme Court in [*United Dominion*] that, in general, the only net operating loss of a consolidated group or its members for a consolidated return year is the consolidated net operating loss.” Guidance Under Section 1502; Application of Section 108 to Members of a Consolidated Group, 68 Fed. Reg. 52,487, 52,488 (Sept. 4, 2003). Courts cannot ignore that considered regulatory judgment and employ a measurement of separate income and NOL that the tax laws do not.

3. The *Bob Richards* rule also conflicts with the structure of the consolidated-return regulations, by creating an illogical asymmetry between the imposition of *liability* for a consolidated tax and the entitlement to *refunds* for those taxes.

On one hand, it is undisputed that the tax laws do not mandate or presume any particular system for

assigning responsibility for the payment of tax liability among members of an affiliated group. Instead, the regulations impose "tax liability" on the "group" as a whole, 26 C.F.R. § 1.1502-2, and make each member of the group "severally liable for the tax," *id.* § 1.1502-6(a). This system leaves affiliated groups free to assign responsibility for the payment of taxes among members as they see fit, subject only to restrictions imposed by state law and "the boundaries of the tax advisor's imagination." 3 Taxation of Corporations Filing Consolidated Returns § 71.02[4][a]. Affiliated groups often choose to apportion liability based on an estimate of each member's proportional contribution to the group's net income or tax liability. *See Tax Sharing Agreements* at 828. But nothing in the tax laws requires groups to follow that scheme. TAAs may, for instance, require the parent corporation to shoulder a disproportionate share of taxes, or authorize some more complex assignment of tax liability. Federal law expresses no preference for one distribution of tax liability over another; that is a matter left for the group to work out for itself.[12]

[12] The Code and the regulations establish rules for "allocating * * * tax liability," 26 U.S.C. § 1552(a); 26 C.F.R. §§ 1.1552-1, 1.1502-33(d), but these rules do not establish actual liability for payment of taxes to the IRS; rather, they exist solely for the purpose of determining an individual member's "earnings and profits," an attribute used in determining whether distributions from a corporation are dividends or a return of capital. *See* 3 Taxation of Corporations Filing Consolidated Returns § 71.02[4][a] ("It is important to distinguish between the allocation methods in the regulations, which apply solely for stock basis and earnings and profits purposes, from tax sharing agreements, which assign actual financial responsibility.").

It would be highly anomalous if, despite imposing no restrictions on the assignment of responsibility for payment of tax *liability*, the tax laws established a default rule for the entitlement to tax *refunds*. Tax refunds, after all, simply compensate entities for the "overpayment" of taxes. 26 U.S.C. §§ 6402(a), 6611(f). They are designed to undo a prior payment of tax liability that is found, when considered against a longer time horizon, to have been overstated. But if federal law takes no interest in how a group assigns responsibility for tax payments among its members, it is difficult to see why it would take an interest in how the group determines the entitlement of members to receive tax *re*payments. What is true on the front end should presumably hold true on the back end as well: the regulations deal with the group as a whole, and leave the assignment of taxes within that group to its members and state law.

Indeed, establishing a presumption with respect to tax refunds that does not exist for tax liability results in an obvious discrepancy: Sometimes, the entity that *Bob Richards* pronounces entitled to a refund may not be the entity that actually paid the tax being refunded. For instance, losses and income "attributable" to corporation S may give rise to a tax refund, but corporation P may have paid the taxes on that income in a prior year. Having embarked on the project of ensuring a purportedly just allocation of tax refunds, some courts have attempted to address the issue by announcing a further rule: an entity is only entitled to the portion of a refund that equals the share it paid in underlying tax. *See, e.g.*, *In re Nelco, Ltd.*, 264 B.R. 790, 809 (Bankr. E.D. Va. 1999) (collecting cases). But the need to pile yet another rule upon the already shaky foundation of *Bob*

Richards to avoid a significant structural anomaly it generates is only further confirmation that *Bob Richards* itself is at odds with the tax laws.

4. Finally, the *Bob Richards* rule cannot be justified on policy grounds—the sole basis the Ninth Circuit offered for adopting this rule in the first place. The *Bob Richards* court forthrightly appealed to its "feel[ing]" that deeming a parent the owner of a tax refund attributable solely to a subsidiary's income and losses would "unjustly enrich[ ] the parent." 473 F.2d at 265. An unadorned judicial policy judgment of this kind cannot serve as a basis for federal law, let alone override contrary provisions of the tax laws. *See Comm'r* v. *Lundy*, 516 U.S. 235, 252 (1996). But even taken on its own terms, the Ninth Circuit's intuition about good policy was flawed on multiple levels.

First, the Ninth Circuit's judgment that fairness generally favors assigning a refund to the subsidiary whose income and losses ostensibly gave rise to a refund is, at minimum, highly questionable. As already noted, the tax laws ordinarily preclude allocation of taxable income and NOL to an individual subsidiary. *See supra* pp. 43-45. And even where the tax laws attribute an individual item of income or loss to a particular member, the consolidated nature of an affiliated group often means that multiple members of the group bear responsibility for that item. Take, for instance, intercompany transactions. A sale of property by subsidiary S to subsidiary B will be reported as income or loss under subsidiary S's "separate taxable income." *See* 26 C.F.R. §§ 1.1502-12(a), 1.1502-13. But "the activities of both S and B might affect the attributes" of the income or

loss; for instance, by converting it from a capital loss into an ordinary loss. *Id.* § 1.1502-13(c)(1). The tax laws accordingly must "distort the separate income of each member in order to clearly reflect the income of the group as a whole." Taxation of Corporations Filing Consolidated Returns § 31.01[1]. Entitling subsidiary S alone to benefit from any resulting refund discounts the contributions of other members, and allows it to claim an asset that was made possible, at least in part, because of its membership in the affiliated group. Arguably it is subsidiary S that is "unjustly enriched" by such an arrangement.

Second, by focusing exclusively on abstract considerations of fairness, the Ninth Circuit ignored the central policy aim that Congress actually enacted the consolidated-return laws to achieve: treating an affiliated group as if it were a "single business enterprise." *Old Mission Portland Cement*, 293 U.S. at 291. The *Bob Richards* rule cuts against that policy. It disaggregates an affiliated group and entitles certain of its members (rather than the group as a whole) to a valuable tax benefit. In so doing, it also reduces the parent corporation's flexibility to manage the group's affairs and deprives the parent of assets that it would have controlled were its subsidiaries "divisions of a single entity." 1 Taxation of Corporations Filing Consolidated Returns § 1.01. These core policy concerns should have been the "starting point" for the Ninth Circuit's analysis. *Wallis*, 384 U.S. at 69. Instead, it ignored them entirely.

Third, the Ninth Circuit incorrectly assumed that, in the absence of the *Bob Richards* rule, a tax refund would "enrich[ ] the parent." 473 F.2d at 265. Regardless of any legal constraints, however, the com-

mon parent of an affiliated group has strong incentives to distribute tax refunds equitably among its members. It is, by definition, the supermajority owner of each member, and so is invested (quite literally) in their success. *See* 26 U.S.C. § 1504(a). Moreover, a parent corporation is subject to state-law fiduciary duties towards its corporate subsidiaries, as well as any other limits that state law imposes. *See supra* p. 10. Those laws may require a parent to share a tax refund with a subsidiary even where federal law does not.

In short, the *Bob Richards* rule is, at best, debatable as a policy proposition. The soundness of the rule "involves a host of considerations that must be weighed and appraised." *O'Melveny*, 512 U.S. at 89 (citation omitted). "Within the federal system, at least, we have decided that that function of weighing and appraising 'is more appropriately for those who write the laws, rather than for those who interpret them." *Id.* Because the *Bob Richards* rule lacks any basis in the handiwork of Congress and the IRS, and positively conflicts with the laws they have enacted, it cannot stand.

II. THE TENTH CIRCUIT'S DECISION SHOULD BE REVERSED.

Once the *Bob Richards* rule is cast aside, this becomes a straightforward case.

1. The parties dispute whether a roughly $4 million tax refund is the property of the estate of UWBI, a parent corporation, or the Bank, its subsidiary. It is undisputed that UWBI has legal title to the tax refund at issue: That refund was paid "directly to" UWBI and "in [its] name." Pet. App. 95a. The only question, then, is whether the Bank rather than

UWBI is the *equitable* owner of the refund. *See* 11 U.S.C. § 541(d). Without the federal-law presumption created by the *Bob Richards* rule, that question is answered simply by consulting the law of the applicable state. In this case, that is Colorado—the state where both companies are incorporated and whose law the parties selected to govern their tax allocation agreement. Pet. App. 138a.

There is no longer any dispute, moreover, that UWBI is not holding the tax refund for the Bank in trust. In the lower courts, the FDIC "forfeited any argument sounding in trust law." Pet. App. 58a. And the strict requisites for creation of a trust under Colorado law plainly are not satisfied here. *See* Pet. App. 114a-116a.

The only way the Bank could be the equitable owner of the refund, then, is if UWBI is holding the refund as an agent for the Bank. In Colorado—as in most states—an agency relationship exists where two criteria are satisfied: (1) the agent agrees to act on behalf of the principal, and (2) the agent is "subject to [the principal's] control." *Aurora*, 105 P.3d at 622; *see Montano* v. *Land Title Guarantee Co.*, 778 P.2d 328, 331 (Colo. App. 1989); Restatement (Third) of Agency § 1.01 (2006). The "label" the parties use in describing their relationship is immaterial. Restatement (Third) of Agency § 1.02. "What is critical is that the parties materially agree to enter into a particular relation to which the law attaches the legal consequences of agency," regardless of whether the parties "call it an agency." *Stortroen*, 736 P.2d at 395 (citing Restatement (Second) of Agency § 1 cmt. b (1957)).

Here, one of the essential requirements for an agency relationship—control—is entirely absent. Under the Agreement, the Bank does not exercise anything resembling control over UWBI. On the contrary, the Agreement gives UWBI broad discretion to handle nearly every aspect of the group's tax return, including making elections on behalf of the group, reducing excess payments, allocating consolidated tax attributes, and requesting tax refunds. *See* Pet. App. 130a-134a, 137a. The Agreement does not give the Bank authority to direct the way UWBI fulfills these responsibilities. Nor can the Bank revoke the Agreement. Indeed, far from the Bank controlling UWBI, UWBI is the Bank's parent corporation, and, when the two entities were in operation, it could have replaced the Bank's directors and exercised pervasive control over its operations. *See Downey*, 593 F. App'x at 126; *Indymac*, 554 F. App'x 670. It is impossible to say in these circumstances that the Bank exercised the type of control necessary to make its own parent corporation its agent under Colorado law.

2. The Tenth Circuit reached a contrary conclusion only because is analysis was distorted, from start to finish, by the *Bob Richards* rule. The panel opened its analysis by announcing that the *Bob Richards* rule "*clearly* applies to this case and outlines the general framework that we *must* apply in resolving the parties' dispute." Pet. App. 18a (emphases added). Following that rule, the panel stated that it was required to find "unambiguous[ ]" evidence in the Agreement that the parties "deviate[d] from the general rule outlined in * * * *Bob Richards*." *Id.* It then proceeded to conduct a survey of the "written terms of the Agreement" for evidence of an "agency"

relationship, without once citing or even acknowledging the requirements for an agency relationship under Colorado law. *Id.* at 18a-26a. Finding this analysis indeterminate, the panel pronounced the Agreement ambiguous, and relied on the Agreement's general statement of purpose to rule in favor of the Bank. *Id.* at 26a-27a.

This analysis was thoroughly misguided. First, the Tenth Circuit applied the wrong body of law. It expressly stated that the *Bob Richards* rule—which it described as a rule of "[f]ederal common law"—governed its analysis, and demanded "unambiguous[ ]" evidence that the parties had deviated from it. *Id.* at 15a, 18a. But the *Bob Richards* rule is unlawful. An agreement therefore need not "unambiguously" depart from that rule to assign equitable ownership of a tax refund to a parent corporation. *Id.* at 18a.

Second, because it thought itself bound by *Bob Richards*, the Tenth Circuit failed to examine whether the requirements for an agency relationship under Colorado law were satisfied. Rather, the panel consulted only the "written terms" of the Agreement to assess whether they appeared to designate UWBI as agent according to some undefined federal-law standard. *Id.*; *see id.* at 18a-26a. That inquiry perhaps made sense in a world where a contract needed to "unambiguously" depart from the *Bob Richards* rule. *Id.* at 18a. But absent that presumption, the court needed to identify the substantive standard for agency in Colorado in order to determine whether the Agreement satisfied it.

Third, the only features that the court found suggestive of an agency relationship are ones that

Colorado law expressly deems insufficient. The court observed that the Agreement refers to UWBI as an "agent" and an "intermediary" for the purpose of filing returns. Pet. App. 25a. But these are bare labels that Colorado law makes clear are not sufficient to establish an agency relationship. *See Stortroen*, 736 P.2d at 395; Restatement (Third) of Agency § 1.02; *see also Indymac*, 554 F. App'x at 670.[13] The panel also suggested that the nature of the parties' relationship is ambiguous because the TAA does not "contain provisions for interest and collateral—which would be indicative of a debtor-creditor relationship." Pet. App. 26a. But, in Colorado, the absence of interest and collateral obligations have no bearing on the existence of an agency relationship; the requirements for such a relationship are loyalty and control, and here at least one of those requirements is absent.

Finally, because the requirements for an agency relationship under Colorado law are plainly not satisfied, the Tenth Circuit wrongly found the Agreement ambiguous on this question. *See* Pet. App. 26a-27a. Had the panel applied the correct body of law—rather than an invented federal law presumption—there would have been no doubt that UWBI is not an agent for its subsidiary, and accordingly no basis to appeal to the Agreement's statement of purpose to break a perceived tie in favor of the Bank. UWBI is unambiguously both legal and

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[13] Further, Section G of the Agreement plainly uses the term "agent" in the same limited, procedural sense as the consolidated-return regulation on which it is modeled. *Compare* Pet. App. 137a, *with* 26 C.F.R. § 1.1502-77(a), (d)(1).

equitable owner of the tax refund, and so the refund is the property of UWBI's bankruptcy estate.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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ADDENDUM

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STATUTORY PROVISIONS INVOLVED

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1. **11 U.S.C. § 541 provides in pertinent part:**

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

> **(1)** Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * * * *

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

* * * * *

2. **26 U.S.C. § 1501 provides:**

Privilege to file consolidated returns

An affiliated group of corporations shall, subject to the provisions of this chapter, have the privilege of making a consolidated return with respect to the

income tax imposed by chapter 1 for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under section 1502 prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

3. **26 U.S.C. § 1502 provides:**

Regulations

The Secretary shall prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability. In carrying out the preceding sentence, the Secretary may prescribe rules that are different from the provisions of chapter 1 that would apply if such corporations filed separate returns.

4. **26 U.S.C. § 1504 provides in pertinent part:**

Definitions

(a) Affiliated group defined.--For purposes of this subtitle--

(1) In general.--The term “affiliated group” means--

(A) 1 or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation, but only if--

(B)(i) the common parent owns directly stock meeting the requirements of paragraph (2) in at least 1 of the other includible corporations, and

(ii) stock meeting the requirements of paragraph (2) in each of the includible corporations (except the common parent) is owned directly by 1 or more of the other includible corporations.

(2) 80-percent voting and value test.--The ownership of stock of any corporation meets the requirements of this paragraph if it--

(A) possesses at least 80 percent of the total voting power of the stock of such corporation, and

(B) has a value equal to at least 80 percent of the total value of the stock of such corporation.

* * * * *

5. **26 U.S.C. § 6402 provides in pertinent part:**

Authority to make credits or refunds

(a) General rule.--In the case of any overpayment, the Secretary, within the applicable

period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), (e), and (f), refund any balance to such person.

* * * * *

(k) Refunds to certain fiduciaries of insolvent members of affiliated groups.--Notwithstanding any other provision of law, in the case of an insolvent corporation which is a member of an affiliated group of corporations filing a consolidated return for any taxable year and which is subject to a statutory or court-appointed fiduciary, the Secretary may by regulation provide that any refund for such taxable year may be paid on behalf of such insolvent corporation to such fiduciary to the extent that the Secretary determines that the refund is attributable to losses or credits of such insolvent corporation.

* * * * *

REGULATORY PROVISIONS INVOLVED

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1. **26 C.F.R. § 1.1502-6 provides:**

Liability for tax.

(a) Several liability of members of group. Except as provided in paragraph (b) of this section, the common parent corporation and each subsidiary which was a member of the group during any part of the consolidated return year shall be severally liable for the tax for such year computed in accordance with the regulations under section 1502 prescribed

on or before the due date (not including extensions of time) for the filing of the consolidated return for such year.

(b) Liability of subsidiary after withdrawal. If a subsidiary has ceased to be a member of the group and in such cessation resulted from a bona fide sale or exchange of its stock for fair value and occurred prior to the date upon which any deficiency is assessed, the Commissioner may, if he believes that the assessment or collection of the balance of the deficiency will not be jeopardized, make assessment and collection of such deficiency from such former subsidiary in an amount not exceeding the portion of such deficiency which the Commissioner may determine to be allocable to it. If the Commissioner makes assessment and collection of any part of a deficiency from such former subsidiary, then for purposes of any credit or refund of the amount collected from such former subsidiary the agency of the common parent under the provisions of § 1.1502–77 shall not apply.

(c) Effect of intercompany agreements. No agreement entered into by one or more members of the group with any other member of such group or with any other person shall in any case have the effect of reducing the liability prescribed under this section.

2. **26 C.F.R. § 1.1502-11(a) provides:**

Consolidated taxable income.

(a) In general. The consolidated taxable income for a consolidated return year shall be determined by taking into account:

(1) The separate taxable income of each member of the group (see § 1.1502–12 for the computation of separate taxable income);

(2) Any consolidated net operating loss deduction (see §§ 1.1502–21 (or 1.1502–21A, as appropriate) for the computation of the consolidated net operating loss deduction);

(3) Any consolidated capital gain net income (net capital gain for taxable years beginning before January 1, 1977) (see §§ 1.1502–22 (or 1.1502–22A, as appropriate) for the computation of the consolidated capital gain net income (net capital gain for taxable years beginning before January 1, 1977));

(4) Any consolidated section 1231 net loss (see §§ 1.1502–23 (or 1.1502–23A, as appropriate) for the computation of the consolidated section 1231 net loss);

(5) Any consolidated charitable contributions deduction (see § 1.1502–24 for the computation of the consolidated charitable contributions deduction);

(6) Any consolidated section 922 deduction (see § 1.1502–25 for the computation of the consolidated section 922 deduction);

(7) Any consolidated dividends received deduction (see § 1.1502–26 for the computation of the consolidated dividends received deduction); and

(8) Any consolidated section 247 deduction (see § 1.1502–27 for the computation of the consolidated section 247 deduction).

3. **26 C.F.R. § 1.1502-12 provides:**

Separate taxable income.

The separate taxable income of a member (including a case in which deductions exceed gross income) is computed in accordance with the provisions of the Code covering the determination of taxable income of separate corporations, subject to the following modifications:

(a) Transactions between members and transactions with respect to stock, bonds, or other obligations of members shall be reflected according to the provisions of § 1.1502–13;

(b) Any deduction which is disallowed under §§ 1.1502–15A or 1.1502–15 shall be taken into account as provided in those sections;

(c) The limitation on deductions provided in section 615(c) or section 617(h) shall be taken into account as provided in § 1.1502–16;

(d) The method of accounting under which such computation is made and the adjustments to be made because of any change in method of accounting shall be determined under § 1.1502–17;

(e) Inventory adjustments shall be made as provided in § 1.1502–18;

(f) Any amount included in income under § 1.1502–19 shall be taken into account;

(g) In the computation of the deduction under section 167, property shall not lose its character as new property as a result of a transfer from one member to another member during a consolidated return year if:

(1) The transfer occurs on or before January 4, 1973, or

(2) The transfer occurs after January 4, 1973, and the transfer is an intercompany transaction as defined in § 1.1502–13 or the basis of the property in the hands of the transferee is determined (in whole or in part) by reference to its basis in the hands of the transferor;

(h) No net operating loss deduction shall be taken into account;

(i) [Reserved]

(j) No capital gains or losses shall be taken into account;

(k) No gains and losses subject to section 1231 shall be taken into account;

(l) No deduction under section 170 with respect to charitable contributions shall be taken into account;

(m) No deduction under section 922 (relating to the deduction for Western Hemisphere trade corporations) shall be taken into account;

(n) No deductions under section 243(a)(1), 244(a), 245, or 247 (relating to deductions with respect to dividends received and dividends paid) shall be taken into account;

(o) Basis shall be determined under §§ 1.1502–31 and 1.1502–32, and earnings and profits shall be determined under § 1.1502–33; and

(p) The limitation on deductions provided in section 613A shall be taken into account for each member's oil and gas properties as provided in § 1.1502–44.

(q) A thrift institution's deduction under section 593(b)(2) (relating to the addition to the reserve for

bad debts of a thrift institution under the percentage of taxable income method) shall be determined under § 1.1502–42.

(r) See §§ 1.337(d)–2, 1.1502–35, and 1.1502–36 for rules relating to basis adjustments and allowance of stock loss on dispositions or transfers of subsidiary stock.

(s) See § 1.1502–51 for rules relating to the computation of a member's GILTI inclusion amount under section 951A and related basis adjustments.

4. **26 C.F.R. § 1.1502-13 provides in pertinent part:**

Intercompany transactions.

(a) In general—(1) Purpose. This section provides rules for taking into account items of income, gain, deduction, and loss of members from intercompany transactions. The purpose of this section is to provide rules to clearly reflect the taxable income (and tax liability) of the group as a whole by preventing intercompany transactions from creating, accelerating, avoiding, or deferring consolidated taxable income (or consolidated tax liability).

(2) Separate entity and single entity treatment. Under this section, the selling member (S) and the buying member (B) are treated as separate entities for some purposes but as divisions of a single corporation for other purposes. The amount and location of S's intercompany items and B's corresponding items are determined on a separate entity basis (separate entity treatment). For example, S determines its gain or loss from a sale of property to B on a separate entity basis, and

B has a cost basis in the property. The timing, and the character, source, and other attributes of the intercompany items and corresponding items, although initially determined on a separate entity basis, are redetermined under this section to produce the effect of transactions between divisions of a single corporation (single entity treatment). For example, if S sells land to B at a gain and B sells the land to a nonmember, S does not take its gain into account until B's sale to the nonmember.

* * * * *

(c) Matching rule. For each consolidated return year, B's corresponding items and S's intercompany items are taken into account under the following rules:

(1) Attributes and holding periods—(i) Attributes. The separate entity attributes of S's intercompany items and B's corresponding items are redetermined to the extent necessary to produce the same effect on consolidated taxable income (and consolidated tax liability) as if S and B were divisions of a single corporation, and the intercompany transaction were a transaction between divisions. Thus, the activities of both S and B might affect the attributes of both intercompany items and corresponding items. For example, if S holds property for sale to unrelated customers in the ordinary course of its trade or business, S sells the property to B at a gain and B sells the property to an unrelated person at a further gain, S's intercompany gain and B's corresponding gain might be ordinary because of S's activities with respect to the property. Similar principles apply if S performs services, rents

property, or engages in any other intercompany transaction.

* * * * *

(7) Examples—(i) In general. For purposes of the examples in this section, unless otherwise stated, P is the common parent of the P consolidated group, P owns all of the only class of stock of subsidiaries S and B, X is a person unrelated to any member of the P group, the taxable year of all persons is the calendar year, all persons use the accrual method of accounting, tax liabilities are disregarded, the facts set forth the only corporate activity, no member has any special status, and the transaction is not otherwise subject to recharacterization. If a member acts as both a selling member and a buying member (e.g., with respect to different aspects of a single transaction, or with respect to related transactions), the member is referred to as M, M1, or M2 (rather than as S or B).

(ii) Matching rule. The matching rule of this paragraph (c) is illustrated by the following examples.

* * * * *

Example 2. Dealer activities. (a) Facts. S holds land for investment with a basis of $70. On January 1 of Year 1, S sells the land to B for $100. B develops the land as residential real estate, and sells developed lots to customers during Year 3 for an aggregate amount of $110.

(b) Attributes. S and B are treated under the matching rule as divisions of a single corporation for purposes of determining the attributes of S's intercompany item and B's corresponding item.

Thus, although S held the land for investment, whether the gain is treated as from the sale of property described in section 1221(1) is based on the activities of both S and B. If, based on both S's and B's activities, the land is described in section 1221(1), both S's gain and B's gain are ordinary income.

* * * * *

5. **26 C.F.R. § 1.1502-21 provides in pertinent part:**

Net operating losses.

(a) Consolidated net operating loss deduction. The consolidated net operating loss deduction (or CNOL deduction) for any consolidated return year is the aggregate of the net operating loss carryovers and carrybacks to the year. The net operating loss carryovers and carrybacks consist of—

(1) Any CNOLs (as defined in paragraph (e) of this section) of the consolidated group; and

(2) Any net operating losses of the members arising in separate return years.

(b) Net operating loss carryovers and carrybacks to consolidated return and separate return years. Net operating losses of members arising during a consolidated return year are taken into account in determining the group's CNOL under paragraph (e) of this section for that year. Losses taken into account in determining the CNOL may be carried to other taxable years (whether consolidated or separate) only under this paragraph (b).

(1) Carryovers and carrybacks generally. The net operating loss carryovers and carrybacks to a

taxable year are determined under the principles of section 172 and this section. Thus, losses permitted to be absorbed in a consolidated return year generally are absorbed in the order of the taxable years in which they arose, and losses carried from taxable years ending on the same date, and which are available to offset consolidated taxable income for the year, generally are absorbed on a pro rata basis. In addition, the amount of any CNOL absorbed by the group in any year is apportioned among members based on the percentage of the CNOL attributable to each member as of the beginning of the year. The percentage of the CNOL attributable to a member is determined pursuant to paragraph (b)(2)(iv)(B) of this section. Additional rules provided under the Internal Revenue Code or regulations also apply. See, e.g., section 382(l)(2)(B) (if losses are carried from the same taxable year, losses subject to limitation under section 382 are absorbed before losses that are not subject to limitation under section 382). See paragraph (c)(1)(iii) of this section, Example 2, for an illustration of pro rata absorption of losses subject to a SRLY limitation.

(2) Carryovers and carrybacks of CNOLs to separate return years—(i) In general. If any CNOL that is attributable to a member may be carried to a separate return year of the member, the amount of the CNOL that is attributable to the member is apportioned to the member (apportioned loss) and carried to the separate return year. If carried back to a separate return year, the apportioned loss may not be carried back to an equivalent, or earlier, consolidated return year of the group; if carried over to a separate return year,

the apportioned loss may not be carried over to an equivalent, or later, consolidated return year of the group.

(ii) Special rules—(A) Year of departure from group. If a corporation ceases to be a member during a consolidated return year, net operating loss carryovers attributable to the corporation are first carried to the consolidated return year, then are subject to reduction under section 108 and § 1.1502–28 (regarding discharge of indebtedness income that is excluded from gross income under section 108(a)), and then are subject to reduction under § 1.1502–36 (regarding transfers of loss shares of subsidiary stock). Only the amount that is neither absorbed by the group in that year nor reduced under section 108 and § 1.1502–28 or under § 1.1502–36 may be carried to the corporation's first separate return year. For rules concerning a member departing a subgroup, see paragraph (c)(2)(vii) of this section.

(B) Offspring rule. In the case of a member that has been a member continuously since its organization (determined without regard to whether the member is a successor to any other corporation), the CNOL attributable to the member is included in the carrybacks to consolidated return years before the member's existence. If the group did not file a consolidated return for a carryback year, the loss may be carried back to a separate return year of the common parent under paragraph (b)(2)(i) of this section, but only if the common parent was not a member of a different consolidated group or of an affiliated group filing separate returns for the year to which the loss is carried or any

subsequent year in the carryback period. Following an acquisition described in § 1.1502–75(d)(2) or (3), references to the common parent are to the corporation that was the common parent immediately before the acquisition.

(iii) Equivalent years. Taxable years are equivalent if they bear the same numerical relationship to the consolidated return year in which a CNOL arises, counting forward or backward from the year of the loss. For example, in the case of a member's third taxable year (which was a separate return year) that preceded the consolidated return year in which the loss arose, the equivalent year is the third consolidated return year preceding the consolidated return year in which the loss arose. See paragraph (b)(3)(iii) of this section for certain short taxable years that are disregarded in making this determination.

(iv) Operating rules—(A) Amount of CNOL attributable to a member. The amount of a CNOL that is attributable to a member shall equal the product of the CNOL and the percentage of the CNOL attributable to such member.

(B) Percentage of CNOL attributable to a member—(1) In general. Except as provided in paragraph (b)(2)(iv)(B)(2) of this section, the percentage of the CNOL attributable to a member shall equal the separate net operating loss of the member for the year of the loss divided by the sum of the separate net operating losses for that year of all members having such losses. For this purpose, the separate net operating loss of a member is determined by computing the CNOL by reference to only the member's items of

income, gain, deduction, and loss, including the member's losses and deductions actually absorbed by the group in the taxable year (whether or not absorbed by the member).

(2) Special rules—(i) Carryback to a separate return year. If a portion of the CNOL attributable to a member for a taxable year is carried back to a separate return year, the percentage of the CNOL attributable to each member as of immediately after such portion of the CNOL is carried back shall be recomputed pursuant to paragraph (b)(2)(iv)(B)(2)(v) of this section.

(ii) Excluded discharge of indebtedness income. If during a taxable year a member realizes discharge of indebtedness income that is excluded from gross income under section 108(a) and such amount reduces any portion of the CNOL attributable to any member pursuant to section 108 and § 1.1502–28, the percentage of the CNOL attributable to each member as of immediately after the reduction of attributes pursuant to sections 108 and 1017 and § 1.1502–28 shall be recomputed pursuant to paragraph (b)(2)(iv)(B)(2)(v) of this section.

(iii) Departing member. If during a taxable year a member that had a separate net operating loss for the year of the CNOL ceases to be a member, the percentage of the CNOL attributable to each member as of the first day of the following consolidated return year shall be recomputed pursuant to paragraph (b)(2)(iv)(B)(2)(v) of this section.

(iv) Reduction of attributes for stock loss. If during a taxable year a member does not cease to

be a member of the group and any portion of the CNOL attributable to any member is reduced under § 1.1502–36, the percentage of the CNOL attributable to each member as of immediately after the reduction of attributes under § 1.1502–36 shall be recomputed pursuant to paragraph (b)(2)(iv)(B)(2)(v) of this section.

(v) Recomputed percentage. The recomputed percentage of the CNOL attributable to each member shall equal the unabsorbed CNOL attributable to the member at the time of the recomputation divided by the sum of the unabsorbed CNOL attributable to all of the members at the time of the recomputation. For purposes of the preceding sentence, a CNOL that is reduced under section 108 and § 1.1502–28, or under § 1.1502–36, or that is otherwise permanently disallowed or eliminated, shall be treated as absorbed.

* * * * *

6. **26 C.F.R. § 1.1502-77 provides in pertinent part:**

Agent for the group.

(a) Agent for the group—(1) Sole agent. Except as provided in paragraphs (e) and (f)(2) of this section, one entity (the agent) is the sole agent that is authorized to act in its own name regarding all matters relating to the federal income tax liability for the consolidated return year for each member of the group and any successor or transferee of a member (and any subsequent successors and transferees thereof). The identity of that agent is determined under the rules of paragraph (c) of this section.

*   *   *   *   *

(c) Identity of the agent—(1) In general. Except as otherwise provided in this section, the agent for a current year is the common parent and the agent for a completed year is the common parent at the close of the completed year or its default successor, if any. Except as specifically provided otherwise in this paragraph (c), any entity that is an agent pursuant to paragraph (c)(3) of this section (agent following group structure change), paragraph (c)(5) of this section (agent designated by agent terminating without default successor), paragraph (c)(6) of this section (agent designated by Commissioner), or paragraph (c)(7) of this section (agent designated by resigning agent), or any entity subsequently serving as agent following such agent, acts as an agent for and under the same terms and conditions that apply to a common parent. For example, such an agent would generally be able to designate an agent if it terminates without a default successor; however, an entity that became agent pursuant to a designation by the Commissioner under paragraphs (c)(6)(i)(A)(2), (3), or (4) of this section is not permitted to designate an agent if it terminates without a default successor. Other special rules described in this paragraph (c) apply.

*   *   *   *   *

(d) Examples of matters subject to agency. With respect to any consolidated return year for which it is the agent—

(1) The agent makes any election (or similar choice of a permissible option) that is available to a subsidiary in the computation of its separate taxable income, and any change in an election (or

similar choice of a permissible option) previously made by or for a subsidiary, including, for example, a request to change a subsidiary's method or period of accounting;

(2) All correspondence concerning the income tax liability for the consolidated return year is carried on directly with the agent;

(3) The agent files for all extensions of time, including extensions of time for payment of tax under section 6164, and any extension so filed is considered as having been filed by each member;

(4) The agent gives waivers, gives bonds, and executes closing agreements, offers in compromise, and all other documents, and any waiver or bond so given, or agreement, offer in compromise, or any other document so executed, is considered as having also been given or executed by each member;

(5) The agent files claims for refund, and any refund is made directly to and in the name of the agent and discharges any liability of the Government to any member with respect to such refund;

(6) The agent takes any action on behalf of a member of the group with respect to a foreign corporation including, for example, elections by, and changes to the method of accounting of, a controlled foreign corporation in accordance with § 1.964–1(c)(3);

(7) Notices of claim disallowance are mailed only to the agent, and the mailing to the agent is considered as a mailing to each member;

(8) Notices of deficiencies are mailed only to the agent (except as provided in paragraph (f)(3) of this section), and the mailing to the agent is considered as a mailing to each member;

(9) Notices of final partnership administrative adjustment under section 6223 with respect to any partnership in which a member of the group is a partner may be mailed to the agent, and, if so, the mailing to the agent is considered as a mailing to each member that is a partner entitled to receive such notice (for other rules regarding partnership proceedings, see paragraph (f)(2)(iii) of this section);

(10) The agent files petitions and conducts proceedings before the United States Tax Court, and any such petition is considered as also having been filed by each member;

(11) Any assessment of tax may be made in the name of the agent, and an assessment naming the agent is considered as an assessment with respect to each member; and

(12) Notice and demand for payment of taxes is given only to the agent, and such notice and demand is considered as a notice and demand to each member.

(e) Matters reserved to subsidiaries. Except as provided in this paragraph (e) and paragraph (f)(2) of this section, no subsidiary (unless it is or becomes an agent pursuant to paragraph (c) of this section) has authority to act for or to represent itself in any matter related to the tax liability for the consolidated return year. The following matters, however, are reserved exclusively to each subsidiary—

(1) The making of the consent required by § 1.1502–75(a)(1);

(2) Any action with respect to the subsidiary's liability for a federal tax other than the income tax imposed by chapter 1 of the Code (including, for example, employment taxes under chapters 21 through 25 of the Code, and miscellaneous excise taxes under chapters 31 through 47 of the Code); and

(3) The making of an election to be treated as a Domestic International Sales Corporation under § 1.992–2.

* * * * *

7. **26 C.F.R. § 1.1502-78 provides in pertinent part:**

Tentative carryback adjustments.

(a) General rule. If a group has a consolidated net operating loss, a consolidated net capital loss, or a consolidated unused business credit for any taxable year, then any application under section 6411 for a tentative carryback adjustment of the taxes for a consolidated return year or years preceding such year shall be made by the common parent corporation for the carryback year (or the agent determined under § 1.1502–77(c) or § 1.1502–77B(d) for the carryback year) to the extent such loss or unused business credit is not apportioned to a corporation for a separate return year pursuant to § 1.1502–21(b), 1.1502–22(b), or 1.1502–79(c). In the case of the portion of a consolidated net operating loss or consolidated net capital loss or consolidated unused business credit to which the preceding sentence does not apply and that is to be carried

back to a corporation that was not a member of a consolidated group in the carryback year, the corporation to which such loss or credit is attributable shall make any application under section 6411. In the case of a net capital loss or net operating loss or unused business credit arising in a separate return year that may be carried back to a consolidated return year, after taking into account the application of § 1.1502–21(b)(3)(ii)(B) with respect to any net operating loss arising in another consolidated group, the common parent for the carryback year (or the agent determined under § 1.1502–77(c) or § 1.1502–77B(d) for the carryback year) shall make any application under section 6411.

(b) Special rules—(1) Payment of refund. Any refund allowable under an application referred to in paragraph (a) of this section shall be made directly to and in the name of the corporation filing the application, except that in all cases where a loss is deducted from the consolidated taxable income or a credit is allowed in computing the consolidated tax liability for a consolidated return year, any refund shall be made directly to and in the name of the common parent corporation for the carryback year (or the agent determined under § 1.1502–77(c) or § 1.1502–77B(d) for the carryback year). The payment of any such refund shall discharge any liability of the Government with respect to such refund.

(2) Several liability. If a group filed a consolidated return for a taxable year for which there was an adjustment by reason of an application under section 6411, and if a deficiency is assessed against such group under section 6213(b)(3), then each member of such group shall

be severally liable for such deficiency including any interest or penalty assessed in connection with such deficiency.

(3) Groups that include insolvent financial institutions. For further rules applicable to groups that include insolvent financial institutions, see § 301.6402–7 of this chapter.

* * * * *

8. **26 C.F.R. § 301.6402-7 provides in pertinent part:**

Claims for refund and applications for tentative carryback adjustments involving consolidated groups that include insolvent financial institutions.

(a) In general—(1) Overview. Section 6402(i) authorizes the Secretary to issue regulations providing for the payment of a refund directly to the statutory or court-appointed fiduciary of an insolvent corporation that was a subsidiary in a consolidated group, to the extent the Secretary determines that the refund is attributable to losses or credits of the insolvent corporation. This section provides rules for the payment of refunds and tentative carryback adjustments to the fiduciary of an insolvent financial institution that was a subsidiary in a consolidated group.

* * * * *

(c) Deemed agency status of fiduciary—(1) In general. Notwithstanding the general treatment of a common parent as the agent of a group under §§ 1.1502–77 and 1.1502–78 of this chapter, if the fiduciary satisfies the notice requirements of paragraph (d)(1) of this section, the fiduciary may

also be deemed to be an agent under §§ 1.1502–77 and 1.1502–78 of this chapter—

(i) Of the loss year group (if any) for purposes of filing a consolidated return for the loss year;

(ii) Of the carryback year group for purposes of filing a claim for refund or an application for a tentative carryback adjustment for the consolidated carryback year under paragraph (e) of this section and receiving payments of any refund or tentative carryback adjustment under paragraph (g) of this section; and

(iii) Of the carryback year group, the loss year group or any other group of which the institution is a member for any matter pertaining to the determination of the refund or tentative carryback adjustment, but only to the extent provided in paragraph (c)(2) of this section.

(2) Limitation. The fiduciary may act as an agent for matters described in paragraph (c)(1)(iii) of this section only to the extent—

(i) Authorized by the district director, in his/her sole discretion, after receiving a written request from the fiduciary; or

(ii) Requested by the Internal Revenue Service under paragraph (f)(3) of this section.

(d) Notice requirements—(1) Notice to the Internal Revenue Service. To satisfy the notice requirement of this paragraph (d)(1), the fiduciary must file Form 56–F, Notice Concerning Fiduciary Relationship of Financial Institution, with the Internal Revenue Service Center indicated on the form. However, in its sole discretion, the Internal Revenue Service may treat notice to it in any other

manner as satisfying the notice requirement under this paragraph (d)(1).

(2) Notice to the common parent—

(i) Form 56–F. The fiduciary must send a copy of the form 56–F filed with the Internal Revenue Service Center or any other notice provided to the Service under paragraph (d)(1) of this section to the common parent of the loss year group (if any) and the common parent of all carryback year groups (if different from the loss year group).

(ii) Claim for refund and loss year return. If a claim for refund is filed by the fiduciary in accordance with paragraph (e)(1) of this section, the fiduciary must provide a copy of the claim for refund to the common parent of the carryback year group. If a loss year return is filed by the fiduciary in accordance with paragraph (e)(3) of this section, the fiduciary must provide a copy of the loss year return to the common parent of the loss year group (if any).

(iii) Additional information. The fiduciary must provide to the affected common parent a copy of the request for agency status referred to in paragraphs (c)(2)(i) and (ii) of this section, and a copy of any additional information submitted to the Internal Revenue Service as agent under paragraph (c)(1)(iii) of this section.

(e) Filing requirements of the fiduciary—

(1) Claim for refund by the fiduciary. If the fiduciary accepts a claim for refund filed by the common parent, the fiduciary may claim a refund under this section by filing a copy of the common parent's claim for refund. If no claim for refund is

filed by the common parent for the consolidated carryback year or the fiduciary does not accept a claim for refund filed by the common parent, the fiduciary may claim a refund under this section by filing its own claim for refund under section 6402, based on all information pertaining to the institution and all information pertaining to other members of the carryback year group and the loss year group to which the fiduciary has reasonable access. Any claim for refund filed by the fiduciary under this paragraph (e)(1) must contain the title "Claim for refund under section 6402(i) of the Code" at the top of the first page of the claim, and the following must be attached to the claim:

(i) The name and employer identification number of the institution that was a member of the carryback year group;

(ii) The name of the fiduciary;

(iii) A schedule demonstrating that the amount of the refund claimed by the fiduciary is determined in accordance with paragraph (g) of this section;

(iv) A representation that the institution is an insolvent financial institution as defined in paragraph (b)(4) of this section;

(v) A representation that the fiduciary has satisfied the requirements set forth in paragraphs (d)(2)(i) and (ii) of this section; and

(vi) A statement executed by an authorized representative of the fiduciary and any paid preparer utilized by the fiduciary that provides "Under penalties of perjury, I declare that I have examined the items listed in § 301.6402–7T(e)(1)(i) through (v), including accompanying schedules and

statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than fiduciary) is based on all information of which the preparer has any knowledge."

(2) Application for tentative carryback adjustment pursuant to section 6411. Notwithstanding section 6411 and § 1.1502–78 of this chapter, an application for a tentative carryback adjustment must be signed by both the common parent of the carryback year group and the fiduciary if the payment with respect to the tentative carryback adjustment is not made before the procedure effective date (whether or not the application was filed before the procedure effective date). Any application for a tentative carryback adjustment filed under this paragraph (e)(2) must contain the title "Application for tentative carryback adjustment under section 6402(i) of the Code" at the top of the first page of the application. In addition, the following must be attached to the application:

(i) The name and employer identification number of the institution that was a member of the carryback year group;

(ii) The name of the fiduciary;

(iii) A schedule demonstrating that the amount claimed by the fiduciary is determined in accordance with paragraph (g) of this section;

(iv) A representation that the institution is an insolvent financial institution as defined in paragraph (b)(4) of this section; and

(v) A representation that the fiduciary has satisfied the requirements set forth in paragraph (d)(2)(i) of this section.

(3) Loss year return by the fiduciary. If the institution is a member of a loss year group, and either the common parent does not file a loss year return or the fiduciary does not accept the loss year return filed by the common parent, the fiduciary may file a loss year return with respect to the loss year group. A loss year return can only be filed by the fiduciary in conjunction with the filing of a claim for refund under paragraph (e)(1). The return must be based on all information pertaining to the institution and all information pertaining to other members to which the fiduciary has reasonable access. Any return filed by the fiduciary under this paragraph (e)(3) must contain the title "Loss year return under section 6402(i) of the Code" at the top of the first page of the return, and the following must be attached to the return:

(i) The name and employer identification number of the institution that is a member of the loss year group;

(ii) The name of the fiduciary;

(iii) A representation that the institution is an insolvent financial institution as defined in paragraph (b)(4) of this section; and

(iv) A representation that the fiduciary has satisfied the requirements set forth in paragraphs (d)(2)(i) and (ii) of this section.

(4) Additional information. If the fiduciary files additional information under paragraph (c)(1)(iii) of this section, the fiduciary must attach a

representation that it has satisfied the requirements set forth in paragraph (d)(2)(iii) of this section.

(5) Election to waiver carryback. Any election filed after December 30, 1991, by the common parent of a loss year group under section 172(b)(3) to relinquish the entire carryback period with respect to a consolidated net operating loss arising in a loss year is not effective with respect to the portion of the consolidated net operating loss attributable to a subsidiary that is an institution. Instead, the fiduciary may make the election under section 172(b)(3) with respect to the portion attributable to the institution after the notice described in paragraph (d)(1) of this section is filed. For purposes of this paragraph (e)(5), the portion attributable to an institution is determined under the principles of paragraph (g)(2)(ii) of this section.

* * * * *

(g) Payment of a refund or a tentative carryback adjustment to fiduciary—(1) In general. If a claim for refund or an application for a tentative carryback adjustment is filed for the consolidated carryback year in accordance with paragraph (e) of this section, the Internal Revenue Service may, in its sole discretion, pay to the fiduciary all or any portion of the refund or tentative carryback adjustment that the Internal Revenue Service determines under this section to be attributable to the net operating losses of the institution. Nothing in this section obligates the Internal Revenue Service to pay to the fiduciary all or any portion of a claim for refund or application for tentative carryback adjustment.

(2) Portion of refund or tentative carryback adjustment attributable to the net operating loss of an insolvent financial institution—(i) In general. The portion of a refund or tentative carryback adjustment attributable to a net operating loss of an institution that is carried to a consolidated carryback year is determined based on the absorption, as described in paragraph (g)(2)(iii) of this section, of the institution's net operating loss carried to the consolidated carryback year.

(ii) Member's net operating loss. If the loss year is a consolidated return year, references in this section to the net operating loss of a member of the loss year group is a reference to the portion of the loss year group's consolidated net operating loss attributable to the member. The consolidated net operating loss for a taxable year that is attributable to a member is determined by a fraction, the numerator of which is the separate net operating loss of the member for the year of the loss and the denominator of which is the sum of the separate net operating losses for that year of all members having such losses. For this purpose, the separate net operating loss of a member is determined by computing the consolidated net operating loss by taking into account only the member's items of income, gain, deduction, and loss, including the member's losses and deductions actually absorbed by the group in the taxable year (whether or not absorbed by the member).

(iii) Absorption of net operating losses. The absorption of net operating losses generally is determined under applicable principles of the Code and regulations, including the principles of section

172 and §§ 1.1502–21(b) or 1.1502–21A(b) (as appropriate) of this chapter. Notwithstanding any contrary rule or principle of the Code or regulations, if an institution and another member of the carryback year group have net operating losses that arise in taxable years ending on the same date and are carried to the same consolidated carryback year, the carryback year group's consolidated taxable income for that year is treated as offset first by the loss attributable to the institution to the extent thereof.

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(j) Determination of ownership. This section determines the party to whom a refund or tentative carryback adjustment will be paid but is not determinative of ownership of any such amount among current or former members of a consolidated group (including the institution).

(k) Liability of the Government. Any refund or tentative carryback adjustment paid to the fiduciary discharges any liability of the Government to the same extent as payment to the common parent under § 1.1502–77 or § 1.1502–78 of this chapter. Furthermore, any refund or tentative carryback adjustment paid to the fiduciary is considered a payment to all members of the carryback year group. Any determination made by the Internal Revenue Service under this section to pay a refund or tentative carryback adjustment to a fiduciary or the common parent may not be challenged by the common parent, any member of the group, or the fiduciary.

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