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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the opening brief for petitioner remains accurate.

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

This Court granted certiorari to review the validity of the "*Bob Richards* rule." Pet. i. But the FDIC refuses to defend that rule. And one can hardly blame it: That "rule of federal common law" (U.S. Br. 30 n.5) flunks every test this Court has established for the creation of federal common law, Pet. Br. 24-39, and contravenes the tax laws, to boot, *id.* at 39-51.

Rather than allow *Bob Richards* a dignified burial, however, the FDIC tries to preserve some semblance of the *Bob Richards* rule by relying on a conspicuous fallacy. From start to finish, the FDIC's brief is premised on the assertion that the parties have "allocated ultimate entitlement" to the tax refund to

the Bank, and that the only dispute is whether UWBI has "interim ownership" of the refund. U.S. Br. 23-27. That assertion serves as the basis for the FDIC's claim that the *Bob Richards* rule is not at issue here, *id.* at 28-30; that *Bob Richards* contained a second, heretofore-undiscovered holding, *id.* at 30-32; and that a *Bob Richards*-like presumption can be grounded in the tax laws, *id.* at 32-39.

The FDIC's premise, however, is simply wrong. The *entire* dispute between the parties is whether UWBI owns the refund, and merely owes the Bank a debt in the amount of the refund; or, alternatively, whether the Bank owns the refund, and UWBI holds the refund for the Bank in an agency capacity. The FDIC's newfound framing of the case, which it neither previewed in its brief in opposition nor advocated in any lower court, quite literally assumes the answer to that central question in dispute. It conflates the Bank's entitlement to receive *payment* in the amount of the refund—which the parties do not dispute—with *ownership* of the refund—which is the entirety of the parties' disagreement.

Once this fallacy is recognized, there is virtually nothing left of the FDIC's argument. The validity of the *Bob Richards* rule is squarely presented here, because that rule purports to answer the ownership question at issue; that is why the Tenth Circuit said 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. Likewise, the observation that the tax laws do not "alter[ ] ownership of the refund within the group" (U.S. Br. 32) is of no assistance to the FDIC, because—again—the question at issue is whether

state law gives the Bank ownership of the refund in the first place.

And without a federal-law presumption in its favor, the FDIC is sunk. The FDIC has no plausible argument that the tax allocation agreement here gives the Bank the sort of continuous control necessary to make UWBI the Bank's agent under Colorado law. Moreover, far from requiring UWBI to "forward" the refund to the Bank, *cf.* U.S. Br. 17, 19, 20, 25, the Agreement establishes a set of fungible payment obligations incompatible with a principal-agent relationship. The FDIC offers no viable response to these arguments. Instead, it urges the Court to ignore the "Colorado-law prerequisite[s] to the formation of an actual agency relationship" and find that the refund belongs to the Bank no matter what state law says. *Id.* at 48.

That is not how our federal system works. State law, not an invented federal presumption, determines property rights within an affiliated group. And here, Colorado law unambiguously assigns ownership of the refund to UWBI. The judgment should be reversed.

ARGUMENT

I. THERE IS NO BASIS FOR A FEDERAL-LAW PRESUMPTION CONCERNING OWNERSHIP OF CONSOLIDATED TAX REFUNDS.

A. The FDIC Misapprehends The Basic Question In Dispute.

The FDIC opens its argument by subtly reframing the issues presented in this case. U.S. Br. 23-27. That framing serves as the foundation for everything that follows. It is also grossly incorrect.

1. To resolve disputes over the ownership of tax refunds paid to an affiliated group, courts typically must answer two questions.

First, courts must determine whether the parent corporation is required to distribute the amount of the tax refund to any particular subsidiary. *See* Pet. Br. 10. This question simply concerns a matter of *payment*—that is, whether the parent owes the subsidiary a dollar amount equal to the value of the tax refund. *See, e.g.*, *In re First Cent. Fin. Corp.*, 269 B.R. 481, 491 (Bankr. E.D.N.Y. 2001).

Second, if a court finds that the parent is required to pay the subsidiary some amount of the tax refund, it must determine the capacity in which the parent holds the tax refund. Pet. Br. 10-11. There are generally two possibilities.

The first possibility is that the *parent* owns the tax refund, and that its obligation to pay the subsidiary is merely a debt. *See, e.g.*, *In re Indymac Bancorp, Inc.*, 554 F. App'x 668, 670 (9th Cir. 2014). In this circumstance, the subsidiary has no property interest in the refund itself. Rather, the subsidiary is an unsecured creditor, entitled to payment from the parent's general assets in an amount corresponding to the value of the refund. *See Luis* v. *United States*, 136 S. Ct. 1083, 1092 (2016) (plurality op.) ("an unsecured creditor * * * might collect from a debtor's general assets, [but] cannot be said to have any present claim to, or interest in, the debtor's property"); *Grupo Mexicano de Desarrollo, S.A.* v. *All. Bond Fund, Inc.*, 527 U.S. 308, 330 (1999) ("before judgment * * * an unsecured creditor has no rights at law or in equity to the property of his debtor"). As a result, when the corporations enter bankruptcy, the

refund remains the property of the parent's bankruptcy estate, and the subsidiary has the same rights to recover its debt as the parent's other unsecured creditors. *See* 5 Collier on Bankruptcy ¶ 541.05[1][b] (16th ed. 2019).

A second possibility is that the *subsidiary* owns the tax refund, and the parent is holding the refund for the subsidiary in an agency or trust capacity. *See, e.g.*, *In re Netbank, Inc.*, 729 F.3d 1344, 1349-52 (11th Cir. 2013). In this circumstance, property rights to the refund vest immediately in the subsidiary, and the parent has no equitable interest in the refund. *See* Restatement (Third) of Agency § 8.12 cmt. c (2006) (Third Restatement) ("[i]f an agent acquires any asset on behalf of the principal * * * the principal owns the asset"); 5 Collier on Bankruptcy ¶ 541.05[1][a] ("title to * * * property remains in the * * * principal" when "the agent holds the property"). When the corporations enter bankruptcy, the refund thus remains the subsidiary's property, and does not enter the parent's bankruptcy estate. *See* 5 Collier on Bankruptcy ¶ 541.05[1][a].

2. The FDIC misapprehends these basic principles. It starts in the right place: Courts resolving disputes over ownership of tax refunds should begin by asking whether the parent is "obligated to distribute some or all of the refund to one or more affiliates." U.S. Br. 5-6. The FDIC then goes on to claim that, where the parties have agreed that the parent will pay the amount of the refund to a particular subsidiary, that means that "ultimate entitlement to [the] refund has been allocated to [the] subsidiary," *id.* at 6—or, as the FDIC elsewhere puts it, that "equitable title to the refund" ultimately "reside[s]" with the subsidi-

ary, *id.* at 38. The only remaining question, the FDIC then reasons, is whether the parent acquired "interim ownership" of the refund in the brief period before the parent "forward[s] the refund to the subsidiary." *Id.* at 6 (brackets and citation omitted).

Spot the fallacy? Without explanation, the FDIC has conflated a subsidiary's *right to receive payment* in the amount of a tax refund with *ultimate entitlement* to the refund itself. That characterization, however, assumes the answer to the very question at issue. If the parent's obligation to pay the subsidiary is merely a debt, then the subsidiary does *not* have "ultimate entitlement" to the refund. Rather, the *parent* is the owner of the refund, and the subsidiary is an unsecured creditor, holding nothing more than a claim to payment from the parent's "general assets." *Luis*, 136 S. Ct. at 1092. The subsidiary is "entitle[d]" to the refund itself only when the parent is holding the refund for the subsidiary in an agency or trust capacity. *See* Third Restatement § 8.12. To assume that the same holds true in every case is to collapse the central, critical distinction between debts and agency relationships.

It follows that the FDIC is also wrong that, once a court has found that the parties "allocated" a tax refund to the subsidiary, the only remaining issue is one of "interim ownership." U.S. Br. 6. If the parent's obligation to pay the subsidiary is a debt, then the parent is not merely "interim" owner of the refund. It is the owner, full stop. The issue of interim ownership arises only where a court has *already* determined that the refund is the subsidiary's property. And in that case, there is no real question to answer: A parent corporation that holds its subsidi-

ary's refund in an agency or trust capacity does not acquire interim ownership at all; equitable title resides with the subsidiary as soon as the refund is paid to the parent. *See* 5 Collier on Bankruptcy ¶ 541.05[1][a].

3. The FDIC's confusion bleeds over into its discussion of the disputed issue in this case. Armed with its false equivalence between a right to payment and ownership, the FDIC asserts that "it is undisputed that the Agreement here allocated ultimate entitlement to the $4 million tax refund to the Bank rather than to UWBI." U.S. Br. 39; *see id.* at 23-26. Accordingly, the FDIC contends, the only remaining question is whether UWBI assumed "interim ownership" of that refund "during the brief period" before UWBI was required to forward the refund to the Bank. *Id.* at 26-27.

No. What the parties here agree on is that the Agreement gives the Bank a right to payment in "the dollar amount" equal to at least some portion of the refund. Pet. App. 126a-127a.[1] What the parties emphatically do not agree on—indeed, the entire substance of their disagreement—is whether that right to payment means that the Bank has "ultimate entitlement" to the refund itself. Since filing its adversary complaint, Petitioner has argued that the Agreement merely creates a debt to the Bank, and that UWBI is the sole owner of the refund. *See* J.A.

[1] Petitioner has consistently maintained that the Bank's losses were not the sole source of the refund, and the Tenth Circuit revised its original panel opinion to remove its suggestion to the contrary. Pet. App. 2a; *see* CA10 Pet. for Rehearing 2-3; U.S. Br. 25 n.4. That question accordingly remains open on remand.

30-31. The FDIC, in contrast, has argued that the Agreement vests ownership of the refund in the Bank, and that UWBI holds the refund in an agency capacity. *See* J.A. 45-46. The FDIC's assertion that it is "undisputed" that the latter characterization is correct is tantamount to claiming that it is undisputed that the FDIC should win the case.

The FDIC's suggestion (at 24-26) that "three courts below" made "findings" that the Bank has ultimate entitlement to the refund is also mistaken. All that the lower courts found is that, because most of the tax refund at issue arises from losses attributable to the Bank, the Agreement obligates UWBI to pay the Bank an amount equal to some or all of the refund. Pet. App. 7a, 36a, 127a. That uncontested finding, however, merely raises, rather than answers, the pertinent legal question: Is that payment obligation a debt or a property right?

B. The *Bob Richards* Rule Is Unlawful.

In the decision below, the Tenth Circuit employed the *Bob Richards* rule to answer that question. *See* Pet. App. 15a-18a. That rule holds that, absent an "unambiguous[ ]" agreement to the contrary, a tax refund "belongs to the company responsible for the losses that form the basis of the refund," and that a parent merely holds that refund for the subsidiary in an "agency" or "trust" capacity. *Id.* (citations omitted); *see Capital Bancshares, Inc.* v. *FDIC*, 957 F.2d 203, 208 (5th Cir. 1992); *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262, 264-265 (9th Cir. 1973). *Bob Richards* thus offers a readymade answer to the central ownership question at stake in disputes over affiliated tax refunds: Unless the parties "unambiguously" agree otherwise, *Bob Rich-*

ards instructs, a tax refund is a subsidiary's property, not the parent's. Pet. App. 18a.

The problem is that the *Bob Richards* rule has no valid legal basis. It does not satisfy the strict criteria for the creation of a rule of federal common law. Pet. Br. 24-39. And it positively contradicts the tax laws that Congress and the IRS enacted. *Id.* at 39-51.

The FDIC offers essentially no response. Apart from a single halfhearted footnote, *see* U.S. Br. 30 n.5, the FDIC makes no attempt to engage with or rebut any of the arguments against the *Bob Richards* rule.[2] It also does not offer an affirmative legal basis for the rule, aside from acknowledging that it "appears to be a default rule of federal common law." *Id.* The FDIC simply forfeits the sole question on which this Court granted certiorari.

C. The FDIC's New Rule Is Both Non-Responsive To The Question Presented And Meritless.

Rather than engage with the (admittedly straightforward) question presented, the FDIC throws a Hail Mary. It argues that the validity of the *Bob Rich-*

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[2] The FDIC does quibble with Petitioner's discussion of *United Dominion Industries, Inc.* v. *United States*, 532 U.S. 822 (2001). Given the many other, independently sufficient reasons why the *Bob Richards* rule is unlawful, *see* Pet. Br. 24-42, 46-51, the Court need not address the issue. But the FDIC misses the point: Although *United Dominion* "did not concern the distribution * * * of a tax refund," U.S. Br. 30 n.5, it made clear that both of the attributes that give rise to a consolidated tax refund—consolidated taxable income and consolidated net operating loss—cannot generally be attributed to a single affiliate, as the *Bob Richards* rule requires. *See* Pet. Br. 42-46.

ards rule is not actually presented here, because the *Bob Richards* rule ostensibly governs only the "allocation" of tax refunds, and the parties agree that the tax refund at issue should be paid to the Bank. U.S. Br. 28-30. Instead, the FDIC claims, this case concerns a previously undiscovered *second* holding of *Bob Richards*—supposedly grounded in the IRS regulations—which holds that a parent does not obtain "interim ownership" of a tax refund that "is ultimately payable to a subsidiary." *Id.* at 30-39. Everything about that is wrong.

1. To start, this argument rests on the same false premise that pervades the FDIC's brief. The dispute between the parties concerns *ownership* of a tax refund, not *interim* ownership. And the *Bob Richards* rule addresses precisely that question: It is used principally (indeed, almost exclusively) to resolve questions of ownership, even where the parties agree that the subsidiary is entitled to payment in the amount of the refund. *See, e.g.*, *Lubin* v. *FDIC*, No. 1:10-CV-00874, 2011 WL 825751, at *5-6 (N.D. Ga. Mar. 2, 2011); *In re TMCI Elecs.*, 279 B.R. 552, 556-558 (Bankr. N.D. Cal. 1999) (giving examples); Pet. 14-22 (same). That is why the Tenth Circuit invoked the *Bob Richards* rule to resolve the "ownership" dispute in this very case. Pet. App. 2a, 15a-18a.

Indeed, the FDIC itself has repeatedly relied on the *Bob Richards* rule to resolve ownership questions. In case after case, it has argued that the *Bob Richards* rule establishes a presumption that "a subsidiary *owns* any share of a consolidated tax refund attributable to its earnings history," and that "the parent receives refunds only as agent." Br. of Appel-

lant FDIC at 15-16, *In re Downey Fin. Corp.*, 593 F. App'x 123 (3d Cir. 2015) (No. 14-1586), 2014 WL 4275800 (emphasis added). The FDIC repeated that understanding in its briefs below in this case. *See* CA10 Br. of Appellee FDIC at 22 (the *Bob Richards* rule gives the Bank "default ownership of the Refund"); D. Ct. Br. of Appellant FDIC at 19 (the *Bob Richards* rule presumes that the Bank "own[s] any resulting refund"). And the FDIC repeated it again in its brief in opposition, where it acknowledged that the *Bob Richards* rule establishes a presumption concerning "ownership of tax refunds." Opp. 16. Only now, when pressed to defend the rule's insurmountable legal defects, does the FDIC claim that the *Bob Richards* rule never had anything to do with ownership in the first place.

2. The FDIC's contention that *Bob Richards* contained a second holding governing "interim ownership" of tax refunds is, accordingly, both irrelevant and incorrect. This Court granted certiorari to determine whether "the federal common law '*Bob Richards* rule' " employed by "three Circuits" is valid. Pet. i. The FDIC identifies no court, ever, that has understood there to be two *Bob Richards* rules. And, as far as we can tell, the FDIC itself has never previously taken this position—including in its brief in opposition, where it bore an "obligation" to identify "any perceived misstatement of fact or law in the petition." S. Ct. R. 15.2. It is thus beside the point what the Ninth Circuit may have meant in 1973. The only "*Bob Richards* rule" that exists in the lower courts is the rule holding that "a tax refund due from a joint return generally belongs to the company responsible for the losses that form the basis of the refund." Pet. App. 15a (citation omitted).

In any event, the FDIC's attempt to wring a second rule out of *Bob Richards* is entirely unconvincing. The *Bob Richards* court held, as a matter of federal common law, that a subsidiary in an affiliated group is "entitled to [a] refund" that "result[s] solely from" the subsidiary's losses. 473 F.2d at 264-265. It then held that, because a tax refund arising from the subsidiary's losses belongs to the subsidiary, a parent corporation does not obtain ownership of the refund when it receives it from the IRS, but rather holds it as the subsidiary's "agent" or "trustee." *Id.* at 265.

The FDIC attempts to decouple this second step of the Ninth Circuit's reasoning from the first, and elevate it to a standalone rule that a parent corporation holds a tax refund as "agent" *whenever* that refund has been "allocated to a subsidiary," by contract or otherwise. U.S. Br. 31-32. But the second step of the Ninth Circuit's reasoning was predicated on its immediately preceding holding that the refund "belong[ed] to" the subsidiary and was its "asset." *Bob Richards*, 473 F.2d at 264 & n.1. The Ninth Circuit did not suggest that it would assume that a parent holds a refund as the subsidiary's agent in the *absence* of a federal common-law rule vesting ownership of the refund in the subsidiary. *See* U.S. Br. 29 (admitting that the Ninth Circuit "did not clearly distinguish between the two" issues). To the contrary, the Ninth Circuit has since held that where an affiliated group agrees to an allocation arrangement that differs from the rule set forth in *Bob Richards*, the *Bob Richards* rule falls away entirely—not, as the FDIC's reading would have it, that the agreement is presumed to establish an agency relationship. *See Indymac*, 554 F. App'x at 669-670.

3. Regardless, the second rule the FDIC purports to extract from *Bob Richards* makes very little sense. As we understand it, the FDIC's argument goes like this: When an affiliated group agrees that a refund is "ultimately payable to a subsidiary," that means that the subsidiary is "ultimately entitled" to the refund itself. U.S. Br. 31. Under the tax laws, payment of a refund to the parent does not "alter[ ] ownership of the refund within the group." *Id.* at 32-37. Accordingly, absent "affirmative contractual language" to the contrary, "equitable title to the refund *continues to reside* * * * with the affiliate to which the refund has been allocated." *Id.* at 38-39 (emphasis added).

The fatal flaw in this argument is, once again, its question-begging premise. Agreeing that a subsidiary will receive "pay[ment]" in the amount of a refund does *not* necessarily vest the subsidiary with "ultimate entitlement" to the refund itself. *Id.* at 38-39. That payment obligation may be a debt, in which case title to the refund resides exclusively with the parent. *See, e.g.*, *Luis*, 136 S. Ct. at 1092. In other words, the FDIC's argument simply assumes, again, the answer to the very ownership question in dispute.

Once the hollow core of the FDIC's argument is exposed, the rest collapses. We have no quarrel with the proposition that the tax laws do not "*alter*[ ] ownership of the refund within the group." U.S. Br. 32 (emphasis added). But if a refund is the property of the parent, it follows that ownership of the refund "continues to reside" with *the parent*, not the subsidiary, once the refund is paid by the IRS. *Id.* at 38. Assuming otherwise, and creating a federal-law

presumption that the refund is the subsidiary's property, would contravene the FDIC's own principle that payment of the refund by the IRS should not give an affiliate "any ownership interest that it would not otherwise possess under a contract or other state law." *Id.*

The FDIC's extensive discussion of the meaning of the term "agent" in 26 C.F.R. § 1.1502-77 is thus a red herring. *See* U.S. Br. 32-37. As an initial matter, it is highly doubtful that this term was intended to impose on a parent the obligations of a common-law agent. The Solicitor General conceded in his brief in opposition that this designation is "solely for the convenience of the IRS and do[es] not determine which entity—parent or subsidiary—is entitled to retain any refund." Opp. 2; *see* Pet. Br. 41-42.[3] The IRS regulations themselves disavow any concern with how a refund is distributed after it is paid "directly to and in the name of" the parent. 26 C.F.R. § 1.1502-77(d)(5). Further, rendering a parent the common-law agent of its own subsidiaries would work an inversion of the normal rules of corporate law, something the Court should not presume the IRS intended without some clearer indication. *See* *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544-545 (1994).

But even if the word "agent" in the IRS regulations somehow carried its common-law meaning, that would get the FDIC nowhere. An agent is obligated

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[3] The FDIC denies it made this concession, but it simply ignores the quoted sentence and focuses solely on the one that follows. *See* U.S. Br. 36.

to turn over to its principal only those assets that "the principal owns"; an agent is not, of course, obligated to give the principal "the agent's property." Third Restatement § 8.12 cmt. c. At most, then, when a parent corporation receives a tax refund as "[a]gent for the group"—of which the parent itself is a member—it is obligated to turn over to a particular subsidiary refunds *that the subsidiary owns*. 26 C.F.R. § 1.1502-77(a). The FDIC's rule thus begs, rather than answers, the critical ownership question. And once the indefensible—and undefended—*Bob Richards* rule is cast aside, only state law can supply the answer.

II. UNDER COLORADO LAW, UWBI IS THE OWNER OF THE TAX REFUND.

Here, Colorado law makes clear that the tax refund at issue belongs to the estate of UWBI. Both parties agree that the Court should resolve this ownership question. *See* U.S. Br. 39-48; Pet. Br. 51-56; *see also, e.g.*, *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 756-766 (2005) (holding that state law governs, then applying state law); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-64 (1995) (same). Doing so would provide much-needed guidance to lower courts and contracting parties, and prevent litigants from attempting—as the FDIC does here—to inject federal-law presumptions into a state-law inquiry. *See infra* pp. 19-23. Further, the state-law question in this case is uncommonly straightforward: Under no plausible application of Colorado law does

UWBI hold the tax refund at issue as agent for the Bank.[4]

1. As the FDIC ultimately admits, Colorado law, like the law of most states, holds that an entity is an agent only if it is "subject to [the] control" of its alleged principal. *City of Aurora ex rel. Util. Enter.* v. *Colo. State Eng'r*, 105 P.3d 595, 622 (Colo. 2005) (quoting Restatement (Second) of Agency § 1(1) (1958) (Second Restatement)); *see* U.S. Br. 45 (acknowledging "the 'control' needed for an agency relationship"). And Colorado—also like most states—provides that the control required to form an agency relationship is "interim control"; that is, "the right to give interim instructions or directions to the agent once their relationship is established." Third Restatement § 1.01 cmt. f(1); *see, e.g.*, *Moses* v. *Diocese of Colo.*, 863 P.2d 310, 324 (Colo. 1993) (a principal has the right to "control * * * the manner of work performed"); *id.* at 332 (Rovira, C.J., concurring in part and dissenting in part) ("agree[ing]" that "the *sine qua non* of the agency relationship is the right of continuous control by the principal over the acts of the agent"). Indeed, "[t]he power to give interim instructions is an integral part of a principal's control over an agent and a defining element in a relationship of common-law agency." Third Restatement § 8.09 cmt. c.

The FDIC does not dispute that, in general, UWBI is not subject to the control of the Bank, its own subsidiary. *See* U.S. Br. 46-47. The FDIC cites one

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[4] The FDIC does not dispute that it "forfeited any argument sounding in trust law." Pet. App. 58a.

provision of the Agreement that it claims gives the Bank some degree of control: Section H.1, which requires UWBI to adjust "the liability of the parties" to "give effect" to a tax refund within 10 days of receipt. Pet. App. 137a. But that provision does not vest the Bank with *any* authority to "give interim instructions" to UWBI. Third Restatement § 1.01 cmt. f(1). It does not, for instance, empower the Bank to instruct UWBI how to handle a refund or to require UWBI to hold a refund in escrow. It simply imposes a standard contractual obligation to make a payment by time certain. If that were sufficient to establish an agency relationship, then every debtor would be an agent of its creditor. That plainly is not the case.

To support its improbable claim to the contrary, the FDIC distorts the relevant authorities beyond recognition. It claims that the Third Restatement says that "it suffices that 'the principal initially states what the agent shall and shall not do, in specific or general terms.'" U.S. Br. 45 (quoting Third Restatement § 1.01 cmt. f(1)). That is a curious assertion, given that the very next sentence of the Third Restatement says: "*Additionally*, a principal has the right to give interim instructions or directions to the agent once their relationship is established," and then goes on to describe interim control as an "integral" and "distinguish[ing]" feature of an agency relationship. Third Restatement § 1.01 cmt. f(1) (emphasis added).

The FDIC next cites the Second Restatement for the proposition that "'P sends A to get goods from B' is a classic example of an agency relationship." U.S. Br. 45 (quoting Second Restatement § 349 cmt. d,

illus. 7). But that example, plucked seemingly at random out of the Second Restatement, does not purport to describe the type of control that suffices to create an agency relationship; it just delineates a particular task that an agent might undertake for its principal. When the Second Restatement does describe the requisite control, it is unequivocal that "[i]t is the element of *continuous subjection to the will of the principal* which distinguishes the agent from other fiduciaries and the agency agreement from other agreements." Second Restatement § 1 cmt. b (emphasis added).

The FDIC also finds no support for its view in Colorado case law. The sole case it cites (U.S. Br. 45), is not about the requirements for establishing an agency relationship at all; it is applying the test for "privity of estate" under "the doctrine of res judicata." *Argus Real Estate, Inc.* v. *E-470 Pub. Highway Auth.*, 97 P.3d 215, 217-218 (Colo. App. 2003). Colorado cases that actually address the prerequisites for agency make clear that a bare contractual obligation, unaccompanied by a right of interim control, does not establish an agency relationship. *See, e.g.*, *Montano* v. *Land Title Guarantee Co.*, 778 P.2d 328, 331 (Colo. App. 1989) (A's directive to B to "record the deed" did not render B the agent of A, because B was "not subject to control by [A]"); *Corrales* v. *Days Inn Worldwide, Inc.*, No. 04-CV-149, 2005 WL 4655135, at *2 (Colo. D. Ct. Dec. 5, 2005) (franchise agreement gave "insufficient control" to establish an agency, because it did not give the purported principal "a role in managing day-to-day operations"); *see also Moses*, 863 P.2d at 324-327.

2. The Agreement also departs from the fundamental characteristics of an agency relationship in a second respect. As the FDIC acknowledges, an agent is subject to certain obligations when "handling its principal's property." U.S. Br. 21. Among other requirements, an agent must "segregate the principal's property from that of the agent" and may not use the principal's property to pay "liens or setoffs" due to the agent or a third party. Third Restatement § 8.12 & cmts. a-d.

The Agreement's payment scheme is incompatible with those requirements. Contrary to the FDIC's portrayal, the Agreement does not require UWBI to "forward" refunds to its subsidiaries. *Cf.* U.S. Br. 17, 19, 20, 25. Rather, it requires UWBI to maintain a running ledger of the "liabilit[ies]" between itself and each subsidiary, and to "adjust[ ]" those liabilities to "give effect to" a refund. Pet. App. 135a-137a (§§ E, F, H.1). The Agreement thus treats a tax refund as a "fungible" asset, which can be incorporated into UWBI's general assets and used to offset the Bank's debts to UWBI. *Id.* at 100a-103a. That flexible arrangement is antithetical to the managerial duties of an agent—but fully consistent with the rights and duties of a debtor.

3. The FDIC makes several arguments to support its contention that the Agreement establishes an agency relationship. None suffices under Colorado law.

First, the FDIC (like the Tenth Circuit) relies heavily on the fact that the "Agreement describes the * * * relationship between the Bank and UWBI" using the words "agent" and "intermediary." U.S. Br. 40-41. But the law could not be clearer that "[a]n agency

relationship arises *only* when the elements" of loyalty and control are present, and that "[w]hether a relationship is characterized as agency in an agreement between parties * * * is not controlling." Third Restatement § 1.02 & cmt. b (emphasis added); *see Moses*, 863 P.2d at 324 ("Agency is * * * evidenced by [the parties'] acts and not on what the relationship is called."). Courts applying this established common-law principle have repeatedly rejected parties' characterization of their relationship as an agency where the functional prerequisites of agency are absent. *See, e.g.*, *Indymac*, 554 F. App'x at 670 (designation of entity as "agent and attorney-in-fact" insufficient to establish agency because of absence of "control"); Second Restatement § 1, cmt. b, illus. 2 ("[A] signs a document which states that A is B's agent"; because A has not agreed to act in B's interests, "A is not B's agent").

The terms "agent" and "intermediary" are especially uninformative in this context. The parties were most likely borrowing the word "agent" from the relevant federal regulation, where it had long been understood—including by the Government—as a purely procedural designation. *See* Opp. 2; Pet. Br. 41-42; *see also Bob Richards*, 473 F.2d at 265. And the Third Restatement expressly distinguishes "intermediaries" from "agents," and states that many "actors [who] perform an intermediary role" are not "agents in any sense." Third Restatement § 1.01 cmt. h.

Second, the FDIC speculates that when the parties drafted the Agreement, they had in mind a non-binding interagency policy statement issued by several banking regulators. *See* U.S. Br. 41-43. That

policy statement "encourage[s]" banking groups not to characterize a refund attributable to the "loss[es]" of a subsidiary as the property of the parent, on the theory that giving a parent ownership of such a refund might be deemed an "extension of credit or a dividend from the subsidiary to the parent." 63 Fed. Reg. 64,757, 64,758-59 (Nov. 23, 1998).

This policy statement is irrelevant several times over. For one thing, the FDIC identifies no respect in which this policy statement pertains to the criteria for establishing an agency relationship under Colorado law, and none is apparent. For another, the policy statement is parol evidence, which Colorado forbids courts from consulting except in narrow circumstances, none of which the FDIC has claimed is present here. *See Boyer* v. *Karakehian*, 915 P.2d 1295, 1299 (Colo. 1996).[5] In addition, the express premise of the policy statement is that a refund is the property of the subsidiary that "incurr[ed]" the "loss" underlying the refund. 63 Fed. Reg. at 64,758; *accord* U.S. Br. 8-9. That is nothing more than the *Bob Richards* rule, which even the FDIC refuses to defend. *See* Pet. Br. 38.

Third, the FDIC claims that Section H.4 of the Agreement favors treating UWBI as the Bank's agent. U.S. Br. 41. That provision states that the

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[5] The FDIC cites one out-of-state case that consulted this policy statement in determining the parties' intent. U.S. Br. 42-43. There, however, the agreement itself contained a "clear expression * * * that the intent of the parties was to comply with the Policy Statement." *Netbank*, 729 F.3d at 1350; *see* U.S. Br. 43 n.8 (acknowledging as much). The Agreement here contains nothing similar.

Agreement should be construed to achieve "equitable *allocation* of the tax liability * * * in favor of any insured depository institution" where there is "ambiguity in the *interpretation*" of the Agreement. Pet. App. 138a (emphases added). As the FDIC observes more than a few times, however, the parties do not disagree on a question of "allocation"; they disagree on the question of *ownership*. Further, the parties' dispute centers not on the "interpretation" of the Agreement, but on whether the Agreement satisfies the substantive prerequisites for an agency relationship under Colorado law. And on that question, there is no meaningful ambiguity in any event, because the Agreement gives the Bank nothing resembling the continuous control over UWBI that Colorado law requires.

Fourth, the FDIC contends that there is "no cogent reason" why the parties would have assigned ownership of the refund to the parent. U.S. Br. 43. Nonsense. When parties enter contracts agreeing that one party will pay money to the other, the *norm* is that the payment obligation is a debt. Among other reasons, debt obligations are fungible; they give parties flexibility to manage their assets freely; and they avoid the need to establish separate accounts and burdensome escrow arrangements. *Cf.* Third Restatement § 8.12 & cmts. a-d. It is hardly surprising that corporations united by common ownership would prefer that flexible arrangement to one that imposed on UWBI the onerous "managerial duties" and control incident to a principal-agent relationship. *Id.* § 8.12 cmt. a.

Fifth, the FDIC abandons any pretense to applying Colorado law, and urges the Court to hold that

UWBI is the Bank's agent "*even if* * * * some Colorado-law prerequisite to the formation of an actual agency relationship ha[s] not been satisfied." U.S. Br. 48 (emphasis added).

Points for candor, at least. But the FDIC has offered no plausible basis—not in federal common law, the IRS regulations, or even its own "feel[ing]" as to what federal law "should" provide, *Bob Richards*, 473 F.2d at 265—for the preemptive rule it advocates. In our federal system, that means that state law governs ownership of the tax refund. And that law makes clear that the payment obligation in the Agreement is a debt, and that ownership of the tax refund resides with UWBI.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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