No. 18-1269

IN THE

Supreme Court of the United States

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

Petitioner,

v.

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

Respondent.

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

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The American College of Tax Counsel (the "College") respectfully submits this brief as amicus curiae in support of Petitioner. The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession.

The College is composed of approximately 700 Fellows and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College. The purposes of the College are to foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law; to stimulate development of skills and knowledge through participation in continuing legal education programs and seminars; to provide additional mechanisms for input by tax professionals in the development of tax laws and policy; and to facilitate scholarly discussion and examination of tax policy issues. As part of its mission to improve the tax system, the College provides recommendations to Congress and the Internal Revenue Service for improving the nation's tax laws and the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

way that they are interpreted and administered, and it provides input to the Court by filing amicus briefs in selected tax cases. The College has recently filed briefs with the Court in *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 915 (2019), and *Marinello v. United States*, 138 S. Ct. 1101 (2018).[2]

SUMMARY OF ARGUMENT

This case raises a significant legal issue that implicates both tax and bankruptcy law and that has divided the Courts of Appeals. In Title 11 of the U.S. Code (the "Bankruptcy Code"), Congress defined property of the bankruptcy estate broadly to maximize the estate for the benefit of all creditors. Equality of distribution among creditors is a central policy of the Bankruptcy Code. In some circumstances, however, if a bona fide trust relationship is found to have been created, the claimant is entitled to the entirety of the claimed trust assets, rather than sharing pro rata in the overall bankruptcy estate.

For their part, the corporate consolidated tax reporting rules of the Internal Revenue Code of 1986, as amended (the "Tax Code"), provide that the common parent for a consolidated return year is the sole agent for each member (and any successor of a member) in a corporate consolidated group and is authorized to act in its own name with respect to all matters relating to the U.S. federal income tax liability for that

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[2] This amicus brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College.

consolidated return year for the group. It also provides that the common parent files claims for refund, and any refund is made directly to and in the name of the common parent and discharges any liability of the Government to any member with respect to such refund.

If a U.S. federal income tax refund is received by the common parent of a consolidated group when that common parent is in bankruptcy and such refund is attributable to a particular group member, the question arises whether the refund is held in trust by the common parent for such group member. If the refund is held in trust, then it belongs in its entirety to the group member. If not, then the group member stands with other unsecured creditors of the common parent in collecting its interest in that refund and other assets of the common parent.

Generally, the circuits agree that where there is an explicit agreement or where an agreement can clearly be implied as a matter of state law (a tax sharing agreement), the parties in a consolidated group are free to adjust any tax liability and tax attributes among themselves. However, the circuits are not uniform in determining the relationship between a common parent and group members where no explicit or implied agreement exists. Specifically, in the absence of an agreement, the circuits disagree how a tax refund that results from offsetting one affiliate's losses against the income of the consolidated group should be allocated as between the affiliate member and common parent.

Several circuits have found an implied trust (or equitable trust) to exist between the common parent and group member. This concept is embodied in the Ninth Circuit's so-called "*Bob Richards*" rule. As articulated by the Tenth Circuit here, that rule provides that, absent an agreement providing unambiguously to the contrary, 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. *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262, 265 (9th Cir. 1973) [hereinafter *Bob Richards*]; *In re United Western Bancorp, Inc.*, 914 F.3d 1262, 1270 (10th Cir. 2019).

Other circuits have rejected this rule, reasoning that the request by an unsecured creditor for a court to impose an equitable trust for that creditor's sole benefit after a bankruptcy petition is filed threatens to undermine the fundamental bankruptcy principle of equality of distribution and to delay administration of the estate.

Tens of thousands of taxpayers regularly file consolidated federal income tax returns or file combined or consolidated returns for state tax purposes. Sometimes they enter into tax sharing agreements, but often they do not. The consequences of bankruptcy are an important issue in evaluating both the filing of tax returns and the filing of tax refund claims.

In the case before the Court, a parent holding company entered into a bankruptcy proceeding. During the bankruptcy proceeding, it received a federal income tax refund that resulted from the carryback of losses incurred by its subsidiary. The parent and the subsidiary had a tax sharing agreement that was ambiguous with respect to the ownership of tax refunds within the consolidated group. While the Tenth Circuit ultimately held that the subsidiary was entitled to the refund based on the agreement, the court used the framework set forth in *Bob Richards* in conducting its analysis. *In re United Western Bancorp, Inc.*, 914 F.3d at 1269.

This case and other cases relying on the *Bob Richards* rule conflict with cases in other circuits that have rejected *Bob Richards*, thereby creating confusion and uncertainty regarding the treatment and consequences of tax refunds in similar situations. This Court's resolution of the conflict is needed and would aid advisers by creating a uniform rule that would inform the drafting of tax sharing agreements and the proper planning for bankruptcy.

ARGUMENT

I. THE CIRCUITS DISAGREE ON HOW TO ASSESS THE OWNERSHIP OF INCOME TAX REFUNDS IN THE CONTEXT OF CONSOLIDATED TAX REPORTING GROUPS

The question presented pertains to the proper tax and bankruptcy treatment of federal income tax refunds in the context of consolidated tax reporting groups, a question on which the Courts of Appeals are in disarray.

The Tax Code authorizes an "affiliated group" of corporations to make a consolidated return with respect to income tax. 26 U.S.C. § 1501. The Tax Code defines the term "affiliated group" to mean, in pertinent part, one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation. 26 U.S.C. § 1504(a)(1)(A). 26 C.F.R. § 1.1502-77(a) provides that the common parent for a consolidated return year is the sole agent (the agent for the group) that is authorized to act in its own name with respect to all matters relating to the U.S. federal income tax liability for that consolidated return year, for each member in the group, and any successor of a member. It also provides that the common parent files claims for refund, and any refund is made directly to and in the name of the common parent and discharges any liability of the Government to any member with respect to such refund. However, the Tax Code and Treasury Regulations do not specify the legal and equitable ownership of such a tax refund. *See* T.D. 8446 ("The regulations do not determine ownership of the refund and therefore the equities are unaffected. The common parent may seek to recover all or part of the refund under principles of state law.").

In the Bankruptcy Code, Congress defined property of the bankruptcy estate broadly to maximize the estate for the benefit of all creditors. *See* 11 U.S.C. § 541(a); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983). Under the Bankruptcy Code, similarly situated creditors generally are treated equally with respect to the distribution of a bankruptcy estate. In some circumstances, however, a claimant argues that some of the property of the estate is held in trust for that claimant. If a bona fide trust relationship is found to have been created, the claimant is entitled to the entirety of the claimed trust assets, rather than sharing pro rata in the overall bankruptcy estate. *See* 11 U.S.C. § 541(b), (c)(2).

The circuits generally are in agreement that the members of a consolidated tax group are free to enter into a tax sharing agreement to allocate income tax attributes and the ultimate income tax liability among themselves. *See, e.g.*, *In re Prudential Lines, Inc.*, 928 F.2d 565, 570 (2d Cir. 1991); *Cantor v. FDIC (In re Downey Fin. Corp.)*, 593 F. App'x 123, 126 (3d Cir. 2015); *Capital Bancshares, Inc. v. FDIC*, 957 F.2d 203, 207 (5th Cir. 1992); *Bob Richards*, 473 F.2d at 264; *In re United Western Bancorp, Inc.*, 914 F.3d at 1270; *Zucker v. FDIC (In re BankUnited Fin. Corp.)*, 727 F.3d 1100, 1107 (11th Cir. 2013). The circuits diverge, however, in how they address the issue of allocating tax liabilities among consolidated group members where there is no tax sharing agreement or the agreement does not unambiguously address the ownership of tax attributes that generate a tax refund or the ownership of the tax refund itself.

In *Bob Richards*, the Ninth Circuit ruled that, in the absence of an agreement to the contrary, 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. *Bob Richards*, 473 F.2d at 265. The court reasoned that to allow the common parent in such case to keep a refund arising solely from a subsidiary's losses simply because the parent and subsidiary chose a procedural device to facilitate their income tax reporting unjustly enriches the common parent. *Id.* The Ninth Circuit expressed its agreement with the conclusions of the bankruptcy referee and the district court in that case that the common parent was acting as a trustee of a specific trust and was under a duty to return the tax refund to the subsidiary group member. *Id.* The Ninth Circuit did not elaborate on the precise basis for these conclusions, most notably whether the result was based on state law. *See Bob Richards*, 473 F.2d at 265; *FDIC v. Siegel (In re IndyMac Bancorp, Inc.)*, 554 F. App'x 668, 669 (9th Cir. 2014).

As reflected in this case, the Tenth Circuit too has adopted, as a default rule, the *Bob Richards* rule. As the Tenth Circuit explained, a tax refund due from a joint return generally belongs to the company responsible for the losses that form the basis of the refund unless the parties have unambiguously agreed otherwise. *In re United Western Bancorp, Inc.*, 914 F.3d at 1269-70; *see Barnes v. Harris*, No. 2:12-cv-1010 TS, 2013 WL 6732122, at *5 (D. Utah Dec. 19, 2013), *aff'd* 783 F.3d 1185 (10th Cir. 2015).

The Fifth Circuit has also followed the reasoning of *Bob Richards* in holding that, in the absence of an agreement to the contrary, a tax refund belongs to a group member, rather than the common parent, where the refund was generated by a loss that was entirely attributable to the group member and such member could have generated the refund on its own had it filed income taxes separately from the group. *Capital Bancshares, Inc.*, 957 F.2d at 208. The Fifth Circuit in *Capital Bancshares* noted that the common parent there could not have generated the tax refund at issue on its own, and thus, in its view, to allow the common parent to keep the refund generated by the subsidiary group member would unjustly enrich the common parent. *Id.* Although the court observed that the Ninth Circuit deemed the common parent in *Bob Richards* to be acting as trustee of a specific trust, the Fifth Circuit's analysis in *Capital Bancshares* did not include a trust discussion. *Id.* at 207.

In contrast, the Sixth Circuit has explicitly rejected the *Bob Richards* rule in determining the ownership of a tax refund in the consolidated group context, referring to the rule as "a creature of federal common law." *FDIC v. AmFin Fin. Corp.*, 757 F.3d 530, 535 (6th Cir. 2014). Instead, the Sixth Circuit noted that Congress generally left the determination of property rights in the assets of a bankrupt's estate to state law, and the court explained that, in its view, this was not an instance where federal common law should be invoked. *Id.* at 536 (citing *Butner v. United States*, 440 U.S. 48, 54 (1979); *Cent. States, Se. & Sw. Areas Pension Fund v. Mahoning Nat'l Bank*, 112 F.3d 252, 256 (6th Cir. 1997); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979)). The Sixth Circuit also noted that prior cases employing the *Bob Richards* rule did not address the threshold question of whether federal common law should govern. *Id.* (citing *In re Prudential Lines Inc.*, 928 F.2d at 570-71; *Capital Bancshares, Inc.*, 957 F.2d at 208; *In re Revco D.S., Inc.*, 111 B.R. 631, 637 (Bankr. N.D. Ohio 1990)).

The Eleventh Circuit too has rejected the premise of the *Bob Richards* rule, stating that "Federal law does not govern the allocation of the [consolidated]

Group's tax refunds; hence a parent and its subsidiaries are free to provide for the allocation of tax refunds by contract." *Zucker v. FDIC (In re BankUnited Fin. Corp.)*, 727 F.3d at 1102-03; *FDIC v. Zucker (In re Net-Bank, Inc.)*, 729 F.3d 1344, 1347 n.3 (11th Cir. 2013).

The Eighth Circuit, while not explicitly rejecting the *Bob Richards* rule, has declined to consider it. *See Jump v. Manchester Life & Cas. Mgmt. Corp.*, 579 F.2d 449 (8th Cir. 1978). Instead, the Eighth Circuit has taken the view that, in the absence of controlling federal law, state law governs the rights and responsibilities as between a parent corporation and its subsidiaries. *Id.* at 452.

Similarly, the Second Circuit has signaled that it does not follow the *Bob Richards* rule. In an early case, the Second Circuit did not explicitly adopt the trust analysis underlying the *Bob Richards* rule, but held that corporations in a consolidated group retain their separate identities and property interests and, therefore, a subsidiary member does not lose any interest in its tax attributes solely because of its status in a group of affiliated corporations that file a consolidated tax return. *In re Prudential Lines, Inc.*, 928 F.2d at 571 (quoting *Bob Richards* for the proposition that "allowing the parent to keep any refunds arising solely from a subsidiary's losses simply because the parent and subsidiary chose a procedural device to facilitate their income tax reporting unjustly enriches the parent."). In a more recent case, however, the Second Circuit analyzed whether to impose a constructive trust on a tax refund received by the common parent of a consolidated group and did so under state law, without referencing *Bob Richards*. *Superintendent of Ins. v. Ochs (In re First Cent. Fin. Corp.)*, 377 F.3d 209 (2d Cir. 2004).

Other circuits, such as the Third Circuit, have cited to *Bob Richards* but have not dealt specifically with the ownership of a tax refund in the consolidated tax group context where there was no governing tax sharing agreement. *See, e.g.*, *Cantor*, 593 F. App'x at 126 (referring to the *Bob Richards* rule as the "so-called '*Bob Richards* default rule'"). However, the Third Circuit does not appear to have adopted the *Bob Richards* rule as the framework for its analysis. For example, in analyzing a tax sharing agreement to determine the intent of the parties with respect to ownership of a tax refund, the Third Circuit has not adopted the Tenth Circuit's premise that the agreement should be analyzed to determine whether it purported to deviate from the default *Bob Richards* rule that a trust exists; rather, the Third Circuit looks to state law to determine whether a tax sharing agreement creates a trust. *Compare Cantor*, 593 F. App'x at 127 *with In re United Western Bancorp, Inc.*, 914 F.3d at 1270.

Thus, the circuits have split on how courts should address rights and responsibilities with respect to taxes as between a common parent and its group members in bankruptcy. Specifically, the Ninth and Tenth circuits have adopted a default rule that, in the absence of an agreement clearly to the contrary, the common parent of a consolidated tax reporting group is acting as a trustee of a specific trust for each subsidiary group member and is under a duty to return a tax refund to the subsidiary group member whose tax attributes generated the refund. Although this rule may have originally reflected a state law analysis of the relationship between the parties in the context of a consolidated tax reporting group, it appears to have become a default federal common law rule in several circuits. The Fifth Circuit too has followed the reasoning of *Bob Richards*.

On the other hand, as noted above, other circuits have rejected and have declined to follow the *Bob Richards* framework.

While the College does not at this time recommend any particular approach that should necessarily govern with respect to this issue, it does believe that the differing positions of the circuits should be resolved in order to provide taxpayers with greater certainty in structuring their relationships in the consolidated group context. The lack of uniformity on this question of law with significant and recurring tax and bankruptcy implications warrants this Court's attention.

II. THE ISSUE IS SIGNIFICANT AND THIS CASE IS A PROPER VEHICLE FOR RESOLVING IT

The uncertainty in the law governing the relationship between the common parent and group members of a consolidated tax reporting group should not be allowed to persist. According to IRS Statistics of Income Program data, 35,185 corporate (IRS Form 1120 filers) U.S. federal income tax returns filed for the 2013 tax year (the latest year for which information is publicly available), were consolidated returns. I.R.S., *2013 Corporation Income Tax Returns Complete Report* 131, 156 (Rev. 4-2016), https://www.irs.gov/pub/irs-soi/13coccr.pdf. During 2013, 71 public corporations representing over $42.6 billion in pre-petition assets filed for bankruptcy under the Bankruptcy Code. Bankruptcy Data, *2017 Corporate Bankruptcy Review* (Jan. 10, 2018), https://www.bankruptcydata.com/public/assets/filemanager/userfiles/BankruptcyData_2017_Corporate_Bankruptcy_Review.pdf. Against this backdrop, the question of properly assessing the ownership of income tax attributes and income tax refunds in the consolidated reporting context is and remains of continuing importance and is highly likely to recur.

The uncertainty in the law governing the relationship between the common parent and group members of a consolidated tax reporting group also hinders proper tax planning. The members of consolidated corporate groups are frequently located in different states, frustrating the efforts of tax professionals in structuring transactions and drafting tax sharing agreements where the basic rules governing the ownership of tax refunds in the bankruptcy context may vary by circuit. In practice, many of the corporations that file consolidated or combined returns do not have tax sharing agreements. Depending on geography, a refund in these circumstances could be governed by the *Bob Richards* rule, which may not be the result shareholders or creditors of the parent company would have intended. A number of consolidated groups also involve FDIC-insured institutions. The terms of their tax sharing agreements are governed by applicable interagency policy guidelines, which were updated in 2014 to reflect the ongoing litigation in this area. *See* Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 63 Fed. Reg. 64,757 (Nov. 23, 1998); Addendum to Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 79 Fed. Reg. 35,228, 35,229 (June 19, 2014).

In this case, the subsidiary group member was able to carry back losses to a profitable year, thereby generating a tax refund. While the carryback of losses is no longer permitted following the recent enactment of the Tax Cuts and Jobs Act, the ability to carryback or carryforward losses will likely be driven by the economic environment at a particular time. Pub. L. No. 115-97, § 13302, 131 Stat. 2054, 2121 (2017). For instance, for tax years ending in 2008, the year in which the last recession commenced, Congress amended the Tax Code to give taxpayers the opportunity to carryback losses six years, rather than the two years permitted under prior law in effect before the amendment. Even after the amendment made by the Tax Cuts and Jobs Act, farming losses and insurance losses may still be carried back. 26 U.S.C. §§ 172(b)(1)(B)-(C).

Moreover, state laws vary regarding the treatment of net operating losses. While most states follow the federal rules, and thus preclude the carryback of losses, some states still permit the carryback of losses. California, for example, currently allows losses to be carried back for two years. Cal. Rev. & Tax. Code § 24416.22.

Additionally, taxpayers are permitted to carryback foreign tax credits one year. 26 U.S.C. § 904(c).

If a refund were to arise as a result of the carryback of a foreign tax credit, the same issue presented by this case would arise. Similarly, a corporation with alternative minimum tax credits is able to obtain a cash refund of credit carryovers. 26 U.S.C. § 53(e).

The need to resolve the question presented thus remains pressing, and, in fact, has intensified of late. The issue continues to arise in the lower courts, and, indeed, the Tenth Circuit in two cases, including this one, has now weighed in on the split for the first time. *See Barnes*, 783 F.3d at 1195; *In re United Western Bancorp, Inc.*, 914 F.3d at 1270.

This case thus presents an excellent and timely vehicle to resolve the divide in the circuits.

CONCLUSION

For the foregoing reasons, the College respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 3, 2019