No. 19-969

In the Supreme Court of the United States

JOHN M. MARSHALL, ET AL.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

BRIEF FOR PROFESSORS MARY ANDERSON AND W. BRIAN DOWIS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF PROFESSORS MARY ANDERSON AND W. BRIAN DOWIS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Mary Morgan Anderson, DBA, CPA, is an Associate Professor of Accountancy at the University of Southern Mississippi. W. Brian Dowis, DBA, CPA, is an Assistant Professor of Accountancy at Georgia Southern University. Both teach courses on federal tax law and accounting, and both frequently publish articles in academic journals and consult with tax practitioners on complex issues of federal tax law. *Amici* have written on the tax issue presented in this case. See Mary Anderson, W. Brian Dowis, & Ted D. Englebrecht, *The Two-Prong Test of Section 6901*, 123 J. Tax'n 252 (2015).[1]

This case involves an important question of federal tax law, which is what law applies to determine an alleged transferee's federal tax liability. Here, a company's shareholders sold all of their stock in a company, and the purchaser of that stock assumed the company's tax obligations. But the purchaser did not satisfy those tax obligations, and so the IRS attempted to collect the taxes from the earlier shareholders on a fraudulent-conveyance theory. The ques-

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel for all parties received notice of *amici*'s intention to file this brief at least 10 days before its due date and consented to the filing of this brief. Sup. Ct. R. 37.2(a).

tion is whether federal courts should look to individual States' private-creditor laws, or some other source of law, to determine the transferees' tax liability.

In *amici*'s view, federal courts should ground their analyses in the relevant State's private-creditor laws. The courts have not consistently done so. Instead, they have treated state private-creditor laws as one interchangeable mass. And they have developed what is in essence a body of federal common law that gives the Internal Revenue Service a "most favored creditor" status. That outcome conflicts with this Court's teachings in *Commissioner* v. *Stern*, 357 U.S. 39 (1958), that transferee liability depends on state private-creditor law, and that the IRS should be treated like any other private creditor on questions of transferee liability. *Amici* urge this Court to grant review to provide clarity on this important tax issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since the early 1990s, the IRS has increasingly sought to hold alleged transferees liable for transferors' tax debts. One particular set of facts occurs with great frequency: Individuals own stock in a corporation, they sell the stock, the corporation incurs tax debts but does not pay them, and then the IRS attempts to collect the debts from the former shareholders – even many years after they sold their stock. To make the shareholders liable, the IRS uses fraudulent-conveyance principles and collapses the corporations' transactions and the shareholders' stock sales into one transaction.

In some cases, this tax treatment is completely justified. In the 1990s, for example, there was a series of well-publicized cases in which buyers and sellers

would collude to have a shell corporation assume a company's tax obligations with the intent of defaulting on them. (These are known as "Midco" transactions, so named because of the middleman intermediary that would absorb the company's tax liability after a purchaser depleted the company of its assets with the seller's full knowledge. See, *e.g.*, Mary Anderson, W. Brian Dowis, & Ted D. Englebrecht, *The Two-Prong Test of Section 6901*, 123 J. Tax'n 253 (2015).)

But all too often, the IRS has sought to impose tax liability on former shareholders in much more routine circumstances. Here, petitioners sold their stock in a private corporation. The purchaser – without petitioners' involvement – depleted the corporation's assets and left behind a massive unpaid tax bill. The IRS pursued petitioners for payment of that tax debt, rather than the purchaser. On the IRS's theory, petitioners' otherwise perfectly legal stock sale can be combined with the purchaser's actions to render petitioners liable for the taxes. The IRS was able to succeed on this question because rather than rely only on Oregon's private-creditor law (which should be applied here), it convinced the Ninth Circuit to look to other sources of law.

Federal tax law permits the IRS to hold transferees liable for unpaid tax liability if a private creditor could do so under the relevant state law. In *Commissioner* v. *Stern*, 357 U.S. 39 (1958), the Court explained that a transferee can be on the hook for the transferor's unpaid taxes *only* if the transaction is considered a fraudulent conveyance under the alleged transferee's particular State's private-creditor laws. That is, the federal courts are supposed to treat the

Commissioner just like any other creditor. In practice, though, federal courts have not consistently applied state law to assess transferee liability.

The issue of what body of law governs in transferee-liability cases is an important, recurring question that warrants this Court's review. The issue recurs with some frequency, and the number of federal cases involving this issue has steadily increased in recent years. See, *e.g.*, Anderson et al., 123 J. Tax'n at 261-262. And the issue is important. Paying taxes is a common fiscal responsibility, but "being forced to pay taxes for *someone else* is reprehensible in the absence of a fraudulent conveyance." *Id.* at 252. Further, many federal courts have given short shrift to state law, despite the States' equal role in our federalist system.

Federal courts must apply individual state private-creditor laws to determine transferee liability. Despite the proliferation of so-called "uniform" fraudulent-conveyance laws, state private-creditor laws contain many substantive and procedural differences. And even when States' laws use the same or similar phrasing, state courts often interpret the language differently. So it is important to use the correct state law to answer the transferee-liability question. State private-creditor laws should not be considered interchangeable.

And in applying state law, federal courts must answer two independent questions in order to impose liability on a transferee. First, the court must determine whether state law allows the IRS to equitably combine separate transactions – the transferee's stock sale transaction and the transferor's asset depletion and tax avoidance. Second, the court must determine whether the transferee has the requisite knowledge to

justify holding the transferee liable for the transferor's actions. As with many other aspects of state private-creditor law, the answers to those questions are anything but uniform. Here, the court of appeals treated several States' laws as interchangeable and merged together the two different questions that bear on liability. This Court should grant certiorari to ensure that the federal courts follow *Stern* and give taxpayers the protections guaranteed by state law.

ARGUMENT

I. The Petition Presents An Important, Recurring Issue Of Federal Tax Law

The issue about what law applies to decide transferee liability for tax debts has arisen with increasing frequency since this Court's decision in *Commissioner* v. *Stern*, 357 U.S. 39 (1958). In *Stern*, this Court held that whether an alleged transferee is liable for a transferor's tax liability on a fraudulent-conveyance theory depends on state law, rather than on federal law. *Id.* at 42-44 (1958) (construing the predecessor to 26 U.S.C. 6901).[2] The Commissioner had urged the Court (and continues to urge courts) to hold that federal common law governs that analysis. *Id.* at 44.

But this Court flatly rejected that approach, holding that the "existence and extent of liability should be determined by state law," specifically, the state law applicable to private creditors. *Stern*, 357 U.S. at 45 (referencing the "flexible body of pertinent state law continuously being adapted to changing circumstances affecting all creditors"). The Court noted that

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[2] We refer to an "alleged" transferee because a person liable for another's taxes under state private-creditor law must also be a "transferee" as defined in 26 U.S.C. 6901(h). See *Stern*, 357 U.S. at 42-44.

federal law governs the *procedural* mechanism by which the IRS can assess and collect taxes from transferees. *Id.* at 44 (citing 26 U.S.C. 311, now codified at 26 U.S.C. 6901). But *substantive* liability depends on the state law about when a private creditor can require one person to satisfy another person's debt. *Id.* at 42-44. Because "Congress has not manifested a desire for uniformity of liability" in this context, the Commissioner must be treated like any other private creditor seeking a state-law remedy for a fraudulent transfer. *Id.* at 45.

In the years since *Stern*, federal courts have not carefully followed state private-creditor law. Instead, they have treated different States' laws as interchangeable and have relied on a growing body of federal precedents. The state law to apply is the law of the place of the transaction for which the IRS seeks to impose liability. See *Stern*, 357 U.S. at 45. As explained below, state fraudulent-conveyance laws differ substantially. But federal courts often have treated those separate state bodies of law as interchangeable. See Pet. 16-18. Over time, the federal courts of appeals have developed a body of federal case law interpreting state private-creditor laws that has become a sort of federal common law of transferee liability. See *ibid.* The effect is that instead of scrupulously applying state law to transferee-liability questions, the federal courts of appeals now apply a mixture of federal and state precedents that do not actually reflect the relevant State's private-creditor law.

The tax issue here arises frequently. In the last three decades, there has been a "proliferation of cases" where the Commissioner has invoked Section 6901 to collect on a transferor's tax liability. Mary Anderson, W. Brian Dowis, & Ted D. Englebrecht, *The Two-*

Prong Test of Section 6901, 123 J. Tax'n 252, 262 (2015). In the last decade alone, nearly every court of appeals was called upon to decide a transferee-liability question.[3] And many Tax Court cases never make it that far.[4]

The transferee-liability issue implicates important individual rights. It is "well recognized that a person (or corporation) can be held legally responsible only for his own actions, absent extraordinary circumstances." *Shell Offshore, Inc.* v. *Greenpeace, Inc.*, 709 F.3d 1281, 1293 (9th Cir. 2013) (Smith, J., concurring)

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[3] See, *e.g.*, *Billy F. Hawk, Jr., GST Non-Exempt Marital Tr.* v. *Commissioner*, 924 F.3d 821 (6th Cir. 2019); *Diebold Found., Inc.* v. *Commissioner*, 753 F. Appx. 57 (2d Cir. 2018) (unpublished); *Slone* v. *Commissioner*, 896 F.3d 1083 (9th Cir. 2018); *Shockley* v. *Commissioner*, 872 F.3d 1235 (11th Cir. 2017); *Kardash* v. *Commissioner*, 866 F.3d 1249 (11th Cir. 2017); *Stuart* v. *Commissioner*, 841 F.3d 777 (8th Cir. 2016); *Cullifer* v. *Commissioner*, 651 F. Appx. 847 (11th Cir. 2016) (unpublished); *McMullen* v. *Wakulla Cty. Bd. of Cty. Comm'rs*, 650 F. Appx. 703 (11th Cir. 2016) (unpublished); *United States* v. *Marshall*, 798 F.3d 296 (5th Cir. 2015); *Feldman* v. *Commissioner*, 779 F.3d 448 (7th Cir. 2015); *Salus Mundi Found.* v. *Commissioner*, 776 F.3d 1010 (9th Cir. 2014); *Schussel* v. *Werfel*, 758 F.3d 82 (1st Cir. 2014); *Diebold Found., Inc.* v. *Commissioner*, 736 F.3d 172 (2d Cir. 2013); *Frank Sawyer Tr. of May 1992* v. *Commissioner*, 712 F.3d 597 (1st Cir. 2013); *Starnes* v. *Commissioner*, 680 F.3d 417 (4th Cir. 2012); *Bosamia* v. *Commissioner*, 661 F.3d 250 (5th Cir. 2011).

[4] See, *e.g.*, *Julia R. Swords Tr.* v. *Commissioner*, 142 T.C. 317 (2014); *Griffin* v. *Commissioner*, 101 T.C.M. (CCH) 1274, 2011 WL 894702 (2011); *CHC Indus., Inc.* v. *Commissioner*, 101 T.C.M. (CCH) 1148, 2011 WL 320887 (2011); *Diebold* v. *Commissioner*, 100 T.C.M. (CCH) 370, 2010 WL 4340535 (2010); *LR Dev. Co. LLC* v. *Commissioner*, 100 T.C.M. (CCH) 231, 2010 WL 3604164 (2010); *Jeffries* v. *Commissioner*, 100 T.C.M. (CCH) 97, 2010 WL 3035998 (2010); *Upchurch* v. *Commissioner*, 100 T.C.M. (CCH) 85, 2010 WL 3001748 (2010); *Rubenstein* v. *Commissioner*, 134 T.C. 266 (2010).

(collecting cases). That certainly is true in federal tax law; one person can be held liable for another person's tax debts only when state law specifically allows that outcome. *Stern*, 357 U.S. at 45. There are situations that justify that extraordinary result, but courts must take care to stay within the scope of the applicable state law. That is especially true because States are "independent sovereigns with plenary authority to make and enforce their own laws." *Danforth* v. *Minnesota*, 552 U.S. 264, 280 (2008). It is the "fundamental interest in federalism" that allows individual States to tailor their laws – including their private-creditor laws – to their citizens. *Ibid.*

The federal taxing power, like "'all power,' may be abused." *United States* v. *Clark*, 573 U.S. 248, 253 (2014). By failing to consistently apply state law, federal courts have allowed the IRS to create a one-way ratchet in favor of imposing liability on transferees. As one court of appeals remarked, so far as it knew, "the Commissioner has never used this power to reclassify the form of a taxpayer's Code-compliant transaction to *reduce* his tax liabilities." *Summa Holdings, Inc.* v. *Commissioner*, 848 F.3d 779, 788 (6th Cir. 2017). When courts give short shrift to the nuances of individual State's private-creditor laws, they not only ignore *Stern* but deny taxpayers their rightful protection from the federal government's taxing power.

II. Individual State Private-Creditor Laws Are Far From Uniform

The federal courts are not scrupulously applying state private-creditor law to decide transferee law. That error matters because there are actually significant variations in the various States' laws – even for

States that have adopted some version of the Uniform Fraudulent Transfer Act.

A. The Federal Courts Are Not Applying The Relevant State Private-Creditor Law

In this case, the court of appeals should have looked to Oregon private-creditor law to determine petitioners' federal tax liability, because that is where the allegedly fraudulent transfer occurred. See Pet. App. 27a. Doing so meant determining whether Oregon private-creditor law allows the Commissioner to equitably combine petitioners' stock sale with the purchasers' tax default and, if so, what degree of knowledge (if any) petitioners had to have that the purchaser would default on those taxes. See Part III, *infra*. The court of appeals considered Oregon law, but only perfunctorily. See Pet. App. 3a. And it also relied on other sources of law, including an earlier court of appeals decision that discussed *Arizona* law. *Ibid.* The court seemed to view federal and state precedents as interchangeable on the transferee-liability question.

Like the court of appeals here, courts routinely short-circuit the task of construing the relevant State's private-creditor laws by turning to the law of other States and to federal case law. The petition documents the confusion in the courts of appeals. Pet. 16-18. We discuss an additional representative example, to show why the variations in state law actually matter.

Consider the Tax Court's analysis in *Tricarichi* v. *Commissioner*, 110 T.C.M. (CCH) 370, 2015 WL 5973214 (2015). The petitioner in *Tricarichi* sold his company stock to a buyer, and that buyer depleted the company of its remaining cash assets and failed to pay

corporate taxes. See *id.* at *8-10. The Commissioner sought to combine those separate transactions to treat the stock sale as a de facto corporate liquidation. *Id.* at *18. Ohio law should apply to those questions because that is where the allegedly fraudulent transfer occurred. *Id.* at *6-8.

To determine whether and in what circumstances Ohio private-creditor law allows that combination, the Tax Court relied exclusively on *other* States' substantive law. As a justification to do so, and at the Commissioner's urging,[5] the court cited an Ohio case remarking that "Ohio courts have regularly consulted and followed the decisions of sister courts." *Tricarichi*, 2015 WL 5973214, at *18. The court then cited Second and Ninth Circuit decisions that applied New York law to a "transaction resembling" the one at issue, and a Fourth Circuit decision construing North Carolina law. *Ibid.*

But the state private-creditor laws discussed in *Tricarichi* are not fungible. The court should not have used New York law, because it is fundamentally different from Ohio law. At the time, New York followed the Uniform Fraudulent Conveyance Act (UFCA). Anderson et al., 123 J. Tax'n at 263. Ohio, in contrast, modeled its law on the Uniform Fraudulent Transfer Act (UFTA). *Ibid.* The UFCA differs in many respects from the UFTA. 2 Baxter Dunaway, *Law of Distressed Real Est.* § 23:10 (Dec. 2019).

The Tax Court should not have used North Carolina law, either. North Carolina, like Ohio, uses a form of the UFTA. But those States' laws are not iden-

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[5] See Opening Br. for Respondent at 81, *Tricarichi* (Sept. 26, 2014) (No. 23630-12).

tical, and anyway, the Tax Court did not actually construe the relevant parts of North Carolina law. The Fourth Circuit opinion on which the Tax Court relied never addressed the issue in *Tricarichi* – whether the Commissioner's equitable combination of separate transactions was allowed and, if so, what mental state was required to do so under state private-creditor law. See *Starnes* v. *Commissioner*, 680 F.3d 417, 434 (4th Cir. 2012). Rather, the Fourth Circuit had merely assumed that the required mental state was constructive knowledge and then discussed how North Carolina courts determine what constitutes constructive knowledge. See *ibid.*; see also *Tricarichi*, 2015 WL 5973214, at *18 (citing *Starnes*). That analysis had no bearing on the transferee-liability issues in *Tricarichi* even if North Carolina law were relevant – and in any event it could not substitute for a fulsome analysis of Ohio private-creditor law.

B. State Private-Creditor Laws Vary Significantly

The vast majority of States have adopted a version of the Uniform Fraudulent Transfer Act. See Anderson, *supra*, at 263 (table).[6] But those States' laws are

[6] Currently, 45 States plus the District of Columbia use some version of the UFTA; one State uses a version of the UFCA; and four States use entirely state-specific statutes. See Uniform Law Commission, *Fraudulent Transfer Act*, https://perma.cc/9LGF-YKZB (last visited Feb. 24, 2020). Since the Commissioner instituted this suit against petitioners, 22 States have further adopted some version of model amendments to the UFTA, called the Uniform Voidable Transactions Act (UVTA). See Uniform Law Commission, *Voidable Transaction Act Amendments – Formerly Fraudulent Transfer Act*, https://perma.cc/2VM5-F42L (last visited Feb. 24, 2020); see also Michael L. Cook, *Bankruptcy Litig. Manual* § 11.01 (2020) ("The UVTA is the UFTA with a new name and minor amendments.").

not identical. Those States started with the model UFTA and then adopted some provisions, omitted others, and modified some of the provisions to suit their individual state needs. As a result, provisions in the UFTA "vary widely from state to state" and even some identical provisions "are often applied differently." Edward T. Wahl, *Fraudulent Transfers and the Uniform Fraudulent Transfer Act: An Overview*, Aspatore, 2009 WL 2510912, at *13 (Aug. 2009); see, *e.g.*, *In re Exide Techs., Inc.*, 299 B.R. 732, 749 (Bankr. D. Del. 2003) ("While the UFCA and its successor, the UFTA, are similar, they are not identical and vary from state to state.").

For example, the model UFTA provides for a four-year statute of limitations to void a fraudulent transfer.[7] But States have taken a variety of approaches to it. Minnesota never adopted that provision; instead, Minnesota requires claims to be brought within six years of discovery of the fraud. Minn. Stat. § 541.05, subd. 1(6). New Jersey adopted the model four-year statute-of-limitations provision, see Wahl, 2009 WL 2510912 at *13, but it nonetheless applies its general ten-year statute of limitations in some instances, such as when the State brings fraudulent-conveyance claims. *State Dep't of Envt'l Protection* v. *Caldeira*, 794 A.2d 156, 163-64 (N.J. 2002).

There are also significant variations in the substance of the laws. Pennsylvania, for example, adopted the UFTA but declined to incorporate its model provision treating insider preferences (such as

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[7] See Nat'l Conf. of Comm'rs of Uniform State Laws, Uniform Fraudulent Transfer Act § 9(a) (Oct. 2013), https://perma.cc/94ZW-YY6K (last visited Feb. 24, 2020).

payments a company might give its officers) as fraudulent transfers. See, *e.g.*, Kenneth C. Kettering, *The Pennsylvania Uniform Fraudulent Transfer Act*, 65 Pa. Bar Ass'n Quarterly 67, 77 (1994) (discussing "significant substantive differences between the PaUFTA and the UFTA"). It was not the only State to make that change. Of the other States "that have adopted the UFTA, at least two, Arizona and California, have done likewise, while two others, Hawaii and Oregon, have adopted nonuniform amendments that blunt the force of the insider preference provision." *Ibid.* In sum, States that have adopted the "uniform" UFTA "have been liberal with nonuniform amendments" to it. Kenneth C. Kettering, *Codifying a Choice of Law Rule for Fraudulent Transfers*, 19 Am. Bankr. Inst. L. Rev. 319, 330 (2011).

And even when States adopt the exact same provisions from the UFTA, their courts sometimes interpret those provisions differently in decisional law. For instance, Minnesota has interpreted the exact same definition of "transfer" differently than Arizona. Compare, *e.g.*, *Finn* v. *Alliance Bank*, 860 N.W. 2d 638, 647 (Minn. 2015), with Pet. App. 3 (discussing Arizona law); see also pp. 15-17, *infra*. This is not a new phenomenon. It has long been the "established rule of federal decision" that "if a precisely similar statute was enacted in two adjoining states, and yet, notwithstanding such similarity, the settled course of decision in those states resulted in a different interpretation of the same language, the federal courts would accept the construction given by the courts of each state, respectively, as the true meaning of the statute in such state." *Chicago, R.I. & P. Ry.* v. *Stahley*, 62 F. 363, 365 (1894). Under *Stern*, States are free to adopt constructions that best suit their particular needs. See

357 U.S. at 45 ("What is a good transfer in one jurisdiction might not be so in another.").

All of this is to say that, if *Stern*'s admonition that transferee liability should turn on state private-creditor law is to be given effect, federal courts must carefully ground their analyses in the relevant State's private-creditor law. Just as "a practitioner should examine state statutes and case law to determine whether the relevant jurisdiction has set forth particular standards under *its version* of the UFTA," the federal courts must do so as well. William R. Culp, Jr. & Christian L. Perrin, *The Case for Caution: Fraudulent Conveyance Risks in Estate Planning*, 24 Prob. & Prop. 41, 43 (2010) (emphasis added). Applying state private-creditor law as one uniform mass imposes by the backdoor the Commissioner's desired "uniformity" (*Stern*, 357 U.S. at 44) in a system that is anything but uniform.

III. Federal Cases On Transferee Liability Generally Turn On Two Independent Questions Of State Law

The transferee-liability cases generally require federal courts to answer two discrete questions of state law. First, the federal court must determine whether separate transactions can be equitably combined to recast the overall transaction as a taxable event for the transferee, as opposed to a taxable event for the transferor. Second, the court must assess whether the transferee should be held liable for the transferor's tax debt based on the transferee's awareness of the transferor's activities. Like other areas of private-creditor law, those two questions turn on the nuances of state law. We describe these two critical

state-law questions in order to underscore the importance of using state law (as opposed to federal law, or some multi-state hybrid) to answer them.

A. State Law Determines Whether Separate Transactions Should Be Equitably Combined

To impose tax liability on a transferee, a court typically combines separate transactions to form one single transaction. This is called "collapsing," "recasting," or "recharacterizing" the transactions. It is through this mechanism that an alleged transferee's perfectly legal act of selling his or her stock is combined with the transferor's fraudulent act of depleting the sold corporation's assets and reneging on its tax obligations, to make the transferee liable for the resulting tax arrears.

Despite the clear teaching of *Stern*, the Commissioner often argues that courts should look to federal law to recast the transactions before turning to other state-law issues of liability. See, *e.g.*, *Buckrey* v. *Commissioner*, 114 T.C.M. (CCH) 45, 2017 WL 2964716, at *7 (2017); see also Anderson et al., 123 J. Tax'n at 253-254. Courts have resisted the Commissioner's attempts to impose federal law directly. See, *e.g.*, *Starnes*, 680 F.3d at 429; see also Anderson et al., 123 J. Tax'n at 254. But in practice, courts have been all too willing to import federal equitable principles without first conducting a meaningful analysis of what state private-creditor law says about equitable recasting. See Pet. 16-18.

The UFTA does not directly address collapsing transactions. As a result, States have taken different approaches on this question. For instance, Minnesota has interpreted the UFTA language "transfer made or

obligation incurred by a debtor" (Minn. Stat. §§ 513.44(a), 513.45(a)) to foreclose equitably collapsing transactions in favor of an "asset-by-asset and transfer-by-transfer" approach. *Finn*, 860 N.W.2d at 647. In Ohio, meanwhile, courts allow creditors to combine separate transactions and view those transactions "as a whole" as an exercise of equity. *Premier Therapy, LLC* v. *Childs*, 75 N.E.3d 692, 724 (Ohio Ct. App. 2016). The same is true in Nebraska. See, *e.g.*, *Dillon Tire, Inc.* v. *Fifer*, 589 N.W.2d 137, 152 (Neb. 1999) ("We have previously stated that an action seeking to declare a transfer fraudulent as to a creditor invokes equity jurisdiction of a court * * * [and] [e]quity looks through forms to substance.").

Given the States' differing approaches, federal courts cannot simply assume that different States' laws are similar on the equitable-recasting issue. This case is particularly instructive. To justify collapsing the two separate transactions, the court of appeals pointed to its earlier decision in a case involving the Arizona UFTA. Pet. App. 3a. But that decision did not actually decide that the Arizona UFTA allows equitable recasting at all. See *Slone* v. *Commissioner*, 896 F.3d 1083, 1085-1088 (9th Cir. 2018), cert. denied, 139 S. Ct. 1348 (2019); see also Pet. 21. And the court of appeals could just as well have pointed to the Minnesota Supreme Court's decision in *Finn*, which held that the Minnesota UFTA does not.[8] Had the court of

[8] Compare Pet. App. 3a (discussing Or. Rev. Stat. § 95.200(12), which defines "transfer" as "'every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset'"), with *Finn*, 860 N.W. 2d at 647 (addressing Minn. Stat. § 513.41(12), which defines "[t]ransfer" as "every mode, direct or indirect, absolute or

appeals looked to Minnesota's UFTA law instead of Arizona's UFTA law, it would have reached precisely the opposite result, because *Finn* determined that the quoted language forecloses collapsing.

The court of appeals therefore should not have indiscriminately relied on Arizona law. The issue is how *Oregon*'s courts treat collapsing for purposes of transferee liability. There is no acceptable shortcut to considering the correct State's private-creditor law.

B. State Law Determines Whether Transferees Should Be Held Responsible For Transferors' Actions

Once a court determines if state law allows separate transactions to be collapsed at all, it then must determine what (if any) mental state on the part of the transferee is required to justify holding the transferee liable for the transferor's tax debts.

States are far from uniform in their approaches on that issue. Some require essentially no proof of an alleged transferee's mental state. See, *e.g.*, *Badger State Bank* v. *Taylor*, 688 N.W.2d 439, 447 (Wisc. 2004) ("Proof of 'constructive fraud' simply entails proof of the requirements of the statute.") (discussing Wisc. Stat. 242.05, which requires proof that the debtor "made the transfer * * * without receiving a reasonably equivalent value in exchange for the transfer").

Others require proof of constructive knowledge. Although the exact requirements depend on state law, constructive knowledge generally requires that the al-

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conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset").

leged transferee should have known from the circumstances that the transferor would deplete the transferred company of its assets and default on tax. Several States take this approach. See, *e.g.*, *Janvey* v. *GMAG, LLC*, No. 19-0452, 2019 WL 6972237, at *4 (Tex. Dec. 20, 2019) ("[A] transferee on inquiry notice of the debtor's fraudulent intent cannot prove good faith without conducting a diligent investigation."); *Mantle* v. *North Star Energy & Constr., LLC*, 437 P.3d 758, 790 (Wyo. 2019) (holding that the Wyoming version of the UFCA requires a showing of "constructive knowledge").

And still other States – like Oregon here – require a showing of actual knowledge on the part of the transferee. Although again the exact requirements turn on the particular State's law, actual knowledge generally requires that the transferee actually knew that the transferor would deplete the transferred company of its assets and default on tax. States with this requirement allow alleged transferees to show that they acted in good faith to avoid liability. See, *e.g.*, *Cushman* v. *Wilkinson*, 879 P.2d 873, 876 (Or. Ct. App. 1994) ("[W]e conclude that the legislature intended the good faith standard in [Or. Rev. Stat. §] 95.270(1) to be a subjective test."); *First Nationwide Savings* v. *Perry*, 15 Cal. Rptr. 2d 173, 179 (Cal. Ct. App. 1992) (discussing "good faith" language); see also *Asset Protection: Legal Planning, Strategies, and Forms* ¶ 3.04, at *86 (2020) ("Under California's version of the UFTA, an inquiry notice does not negate good faith, only actual knowledge does.") (discussing *Perry*).

Like so many other courts in recent transferee-liability cases, the court of appeals here did not deter-

mine what the relevant State's (Oregon) private-creditor cases have said about the transferee's knowledge of the transferor's transaction. Instead, it looked to Arizona law on that question. Pet. App. 3a. It did not even directly construe Arizona law, but instead relied on a federal court of appeals opinion that purported to construe Arizona law. *Ibid.* And, in fact, that earlier court of appeals decision never addressed whether Arizona private-creditor law requires only constructive knowledge. See *Slone*, 896 F.3d at 1085-1088; see also Pet. 21. These are serious mistakes to make in the context of holding one taxpayer liable for another taxpayer's tax debts.

* * *

Under *Stern*, transferee liability is supposed to be governed solely by state private-creditor law. That requires courts to identify and carefully apply the applicable State's private-creditor law. The court of appeals here – following the lead of other federal courts – did not do that. This Court's review is necessary to protect taxpayers from being unfairly held responsible for other people's tax debts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2020