No. 18-____

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**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

The Internal Revenue Code permits affiliated corporate groups—consisting of a parent corporation and its subsidiaries—to file a consolidated income tax return. 26 U.S.C. §§ 1501, 1504(a). When the Internal Revenue Service issues a tax refund to an affiliated group, that refund is made "directly to and in the name of" the parent corporation, even if the refund arises in whole or in part from the losses of a corporate subsidiary. 26 C.F.R. § 1.1502-77(c), (d)(5).

Three Circuits, including the court below, have adopted a federal common law rule known as the "*Bob Richards* rule," under which a tax refund paid to an affiliated group is presumed to belong to the corporate subsidiary whose losses gave rise to the refund unless the parties clearly agree otherwise. Four Circuits reject that rule, and instead determine ownership of a tax refund based on applicable state law.

The question presented is:

Whether courts should determine ownership of a tax refund paid to an affiliated group based on the federal common law "*Bob Richards* rule," as three Circuits hold, or based on the law of the relevant State, as four Circuits hold.

## RULE 29.6 DISCLOSURE STATEMENT

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

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Simon E. Rodriguez, in his capacity as Chapter 7 Trustee for the bankruptcy estate of United Western Bancorp, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit in this case.

## INTRODUCTION

Under the Internal Revenue Code, a parent corporation and its subsidiaries may file a single consolidated tax return with the Internal Revenue Service. *See* 26 U.S.C. §§ 1501, 1504(a). Filing a consolidated return has several advantages: It permits corporate groups to offset each other's tax losses, generate tax efficiencies, and benefit from economies of scale. It also simplifies interactions with the IRS. Only the corporate parent is required to make a filing with the

IRS, and all payments from the IRS to the corporate group are made "directly to and in the name of" the parent corporation. 26 C.F.R. § 1.1502-77(c), (d)(5).

This system comes with a catch, however. When the IRS pays a tax refund to the corporate group, it always issues that refund to the corporate parent—even if some or all of the losses are attributable to one of its subsidiaries. That raises an oft-litigated and highly significant question: Who owns the refund? Is it the parent who holds it, or the subsidiary that gave rise (in whole or in part) to the underlying tax losses?

Circuits are intractably divided on the answer to that question. Three Circuits and the Federal Deposit Insurance Corporation (FDIC) apply a federal common law rule known as the "*Bob Richards* rule"—named after the Ninth Circuit's decision in *In re Bob Richards Chrysler-Plymouth Corp., Inc.*, 473 F.2d 262 (9th Cir. 1973)—which presumes that a tax refund belongs to the subsidiary that caused the underlying loss unless the parties have entered into a tax agreement clearly assigning the refund to the parent. Four Circuits, in contrast, have rejected the *Bob Richards* rule: The Sixth and Eleventh Circuits hold that ownership of a tax refund should *always* be determined by consulting the applicable state's law, without recourse to any presumption. And the Third and Second Circuits have adopted the same approach, at least in the presence of a tax agreement. This split is deep, acknowledged by courts on both sides, and growing; in the last six years alone, four Circuits have newly joined the fray.

The stakes are considerable. Corporate tax refunds often run into the tens or hundreds of millions of dollars. Assigning those assets to the right owner matters greatly to the corporations and their shareholders. And when corporations enter bankruptcy, it matters to their creditors, too. If a refund is part of a parent corporation's estate, it can be used to repay the corporation's unsecured creditors. But if the refund is owned by the subsidiary, the parent must transfer it to the subsidiary in full.

In the decision below, the Tenth Circuit joined those circuits that follow the *Bob Richards* rule. United Western Bancorp, Inc. (UWBI) and its subsidiary United Western Bank ("the Bank") both entered bankruptcy and filed competing claims for a roughly $4 million tax return issued to UWBI. The Bankruptcy Court applied Colorado law and determined that UWBI rather than its subsidiary owns the refund. Pet. App. 127a. But the Tenth Circuit disagreed: Applying the federal common law *Bob Richards* rule, it held that the refund belongs to the Bank unless "unambiguous[ ]" language in "the written terms of the" parties' tax allocation agreement assigns it to UWBI. Pet. App. 18a. Finding that high threshold not met, the Tenth Circuit awarded the refund to the Bank. *Id.* at 27a.

In both reasoning and result, that decision split from the holdings of four other Circuits. And it is profoundly incorrect. No court has ever articulated a valid legal basis for the *Bob Richards* rule, which has no statutory foundation and satisfies none of the stringent prerequisites for federal common lawmaking. The Court should not permit the rights of corporations, shareholders, and creditors to vary dramatically circuit-by-circuit based on this invented presumption. The writ should be granted, and the Tenth Circuit's judgment should be reversed.

## OPINIONS BELOW

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

## JURISDICTION

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

## STATEMENT

### A. Legal Background

The Internal Revenue Code permits a parent corporation and its subsidiaries to file a single consolidated tax return. Section 1501 of the Code provides that "[a]n affiliated group of corporations" may "mak[e] a consolidated return with respect to * * * income tax." 26 U.S.C. § 1501. And section 1504 defines an "affiliated group" to mean a group of "corporations connected through stock ownership with a common parent corporation." *Id.* § 1504(a)(1)(A).

Filing a consolidated return carries several advantages for a corporate group. *See* Martin J. McMahon, Jr., *Understanding Consolidated Returns*, 12 Fla. Tax Rev. 125, 129-131 (2012). It enables subsidiaries to offset their losses against each other, thereby reducing the group's overall tax liability. *Id.* at 129 & n.8 (citing 26 C.F.R. § 1.1502-11(a)). It allows corporations to defer accounting for gains or losses attributable to sales of property within the corporate group. *Id.* at 130. Joint filing also comes with administrative efficiencies, and creates economies of scale for the corporate group as a whole.

The IRS has provided by regulation that, where an affiliated group files a consolidated return, all interactions with the IRS must occur through the corporate parent. 26 C.F.R. § 1.1502-77(a), (c)(1). The subsidiaries must appoint the parent corporation as their agent for the purpose of filing the consolidated return. *Id.* § 1.1502-77(d)(5). Any tax refunds due to members of the group are in turn required to be paid "directly to and in the name of" the corporate parent, not to individual subsidiaries. *Id.*

The Code is silent as to how members of an affiliated group may organize themselves internally for the purpose of making tax payments and distributing tax refunds. To address these questions, affiliated groups often enter into tax allocation agreements (TAAs). *See* Dale L. Ponikvar & Russell J. Kestenbaum, *Aspects of the Consolidated Group in Bankruptcy: Tax Sharing and Tax Sharing Agreements*, 58 Tax Law. 803, 826 (2005). TAAs typically specify a schedule under which subsidiaries make estimated tax payments to the parent corporation, and under which parents distribute tax refunds to subsidiaries. *Id.* at 827-828. In addition, the agreements often grant a parent discretion as to when and how to distribute tax refunds to subsidiaries. *See, e.g.*, *In re Indymac Bancorp, Inc.*, 554 F. App'x 668, 670 (9th Cir. 2014).

This statutory scheme has often led to litigation over the following multimillion-dollar question: Who owns a tax refund that is paid to an affiliated group? Does the *parent* own the refund, with a subsidiary merely having a claim to that refund as a creditor? Or does the *subsidiary* own the tax refund, with the parent holding it for the subsidiary in an agency or trust capacity?

Although this question rarely leads to litigation when times are good, it becomes of tremendous import when some or all of a corporate group enters bankruptcy. A corporation's estate in bankruptcy consists of property, including tax refunds, in which the estate holds both "legal title" and "an equitable interest." 11 U.S.C. § 541(d); *see Segal* v. *Rochelle*, 382 U.S. 375, 381 (1966) (holding that tax refunds are "property" under the Bankruptcy Code). If a parent corporation owns a tax refund, then the refund is part of its bankruptcy estate, and a subsidiary claiming a right to the refund merely stands in the same position as the corporation's other "unsecured creditor[s]." Pet. App. 127a. In contrast, if a parent holds the tax refund as agent or trustee for its subsidiary, then equitable title to the refund belongs to the subsidiary, and the parent corporation may not use the refund to pay any of its other debts. *Id.* at 66a. Because corporate tax refunds sometimes reach into the nine figures, *see, e.g.*, *FDIC* v. *AmFin Fin. Corp.*, 757 F.3d 530, 532 (6th Cir. 2014) (dispute over ownership of $170 million tax refund), correctly allocating ownership of a tax refund may lead to dramatically different consequences for the parent, its subsidiaries, and the corporations' creditors.

**B. Factual Background**

1. UWBI is a bank holding company based in Colorado. Pet. App. 3a. The Bank, one of UWBI's subsid-

iaries, is a federally chartered savings and loan association also based in Colorado. *Id.* at 3a, 7a.

In 2008, UWBI and its subsidiaries entered into a Tax Allocation Agreement ("the Agreement"). *Id.* at 129a. The Agreement deems UWBI and its subsidiaries an "affiliated group" within the meaning of Section 1504(a) of the Internal Revenue Code. *Id.* It also establishes procedures by which subsidiaries (referred to in the Agreement as "Affiliates") pay taxes to UWBI, and UWBI repays the subsidiaries for tax refunds its receives.

On the payment side of the ledger, the Agreement states that "each Affiliate shall pay UWBI an amount equal to the federal income tax liability such Affiliate would have incurred were it to file a separate return." *Id.* at 130a. Each Affiliate must make estimated tax payments to UWBI quarterly. *Id.* at 136a. If an entity overpays its estimated taxes, those overpayments generally "are not refunded" by UWBI "until final tax settlement is done" at the end of the tax year. *Id.* at 135a. As required by IRS regulations, the Agreement "appoints UWBI as [the] agent" of each Affiliate "for the purpose of *filing* such consolidated Federal income tax returns for the UWBI group as UWBI may elect to file." *Id.* at 137a (emphasis added); *see* 26 C.F.R. § 1.1502-77(c)(1), (d)(5). The Agreement states that "[i]n essence," UWBI is "merely * * * an intermediary between an Affiliate and the [IRS]." Pet. App. 131a.

With regard to tax refunds, the Agreement provides that "[i]n the event of any adjustment to the tax returns of the Group as filed * * * by reason of [a] * * * claim for refund, * * * the liability of the parties to this Agreement shall be re-determined to give effect to any such adjustment." *Id.* at 137a. UWBI generally must make such "payments" to "the appropriate parties" within 10 business days "after any such * * * refunds are received." *Id.* In some circumstances, UWBI may make a refund payment "over the amount received or claimed * * * if in its sole discretion it believes such payment is in its best interest." *Id.* at 130a.

The Agreement provides that it "shall be governed by and construed in accordance with the laws of the State of Colorado and the applicable laws of the United States of America." *Id.* at 138a (capitalization omitted). It also states that its intent is "to provide an equitable allocation of the tax liability of the Group among UWBI and the Affiliates," and that "[a]ny ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent, in favor of any insured depository institution." *Id.*

2. This case arose after UWBI sought a tax refund pursuant to this Agreement. In 2008, UWBI filed a return indicating that the Bank generated over $34 million in taxable income. *Id.* at 7a. In 2010, the Bank suffered a loss of more than $35 million. *Id.* In 2011, UWBI "carr[ied] back" the 2010 losses and filed a request for a refund of over $4 million to recover a portion of the taxes paid in 2008. *Id.* at 7a & n.2.

While UWBI's refund request was pending before the IRS, the Office of Thrift Supervision closed the Bank and appointed the FDIC as receiver. *Id.* at 7a-8a. UWBI soon became insolvent as well, and filed a petition for bankruptcy. *Id.* Simon E. Rodriguez was appointed as Trustee of UWBI's estate. *Id.* The IRS subsequently completed its audit of UWBI's refund request, and issued a refund in the amount of $4,081,334.67. *Id.* at 10a.

**C. Procedural History**

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

The Bankruptcy Court granted summary judgment to the Trustee. *Id.* at 127a-128a. The court concluded that UWBI has "at least bare legal title" to the refund, given that the refund was made " 'directly to and in the name of' " UWBI. *Id.* at 95a (emphasis omitted) (quoting 26 C.F.R. § 1.1502-77(d)(5)). The court therefore analyzed the parties' Agreement, "as construed under Colorado law," to determine whether UWBI has a "beneficial interest" in the refund, as well. *Id.* at 96a-97a. In conducting that analysis, the court noted that this issue "has caused quite a stir nationally," and that there is an extensive body of precedent on the subject. *Id.* at 97a-98a (citing cases). Applying those precedents and the terms of the parties' Agreement under Colorado law, the court found that UWBI has equitable title to the refund.

The Bankruptcy Court observed, first, that the Agreement "creates a debtor-creditor relationship between [UWBI] and the Bank." *Id.* at 98a. The Agreement establishes "fungible payment obligations," including by providing that UWBI may compensate subsidiaries for tax refunds by "redetermin[ing]" their "*liability*," not by transferring the refunds themselves. *Id.* at 98a-103a (emphasis added). The Agreement also lacks "any express, or even implied, requirement for [UWBI] to escrow or segregate any funds that it might receive as a tax refund from the IRS." *Id.* at 104a. And it "[d]elegates [d]ecision-[m]aking" authority to UWBI, a further hallmark of a debtor-creditor rather than agency relationship. *Id.* at 104a-105a.

The Bankruptcy Court further found that the Agreement does not establish a trust or agency relationship under Colorado law. "In Colorado, there can be no agency relationship where the alleged agent is not subject to the control of the alleged principal," and under the Agreement the subsidiaries "do not control their parent[ ]." *Id.* at 113a (citing *Montano* v. *Land Title Guar. Co.*, 778 P.2d 328, 331 (Colo. App. 1989)). Furthermore, the Agreement does not establish any trust recognized under Colorado law: It does not exhibit the characteristics of an "express trust," a "constructive trust," or a "resulting trust." *Id.* at 114a-116a.

Last, the Bankruptcy Court declined to apply "the *Bob Richards* default rule." *Id.* at 117a. That rule, the Bankruptcy Court noted, applies only where there is "no agreement concerning ultimate disposition of the tax refund." *Id.* (citation omitted). But here, the court reasoned, such an agreement existed, and so the *Bob Richards* rule is "facially inapplicable." *Id.* at 118a.

2. The District Court reversed. *Id.* at 29a.[1] It began where the Bankruptcy Court left off: with the federal common law *Bob Richards* rule. *Id.* at 41a. The District Court noted that the Ninth Circuit in *Bob Richards* had "cited no authority" for this rule, and that the Sixth Circuit had recently "rejected" it as "an unnecessary exercise of federal common law authority." *Id.* at 43a (citing *AmFin*, 757 F.3d at 535-536). "If writing on a clean slate," the District Court added, it "would be inclined to agree with the Sixth Circuit." *Id.* But the District Court concluded that the Tenth Circuit had adopted the *Bob Richards* rule in *Barnes* v. *Harris*, 783 F.3d 1185 (10th Cir. 2015), and that it was therefore bound to follow it. Pet. App. 44a-46a.

Applying that rule, the District Court concluded that the Agreement was ambiguous on its face as to whether it established an agency relationship. *Id.* at 64a. Moreover, the court read the Agreement's statement of "intent" to require the court to resolve any ambiguity in favor of the Bank. *Id.* at 64a-6a. It thus concluded that equitable title of the refund resided with the subsidiary. *Id.* at 66a.

3. The Tenth Circuit affirmed. *Id.* at 3a. It began its analysis, much as the District Court did, by asserting that "[f]ederal common law * * * provides a framework for resolving this issue." *Id.* at 15a. Under the *Bob Richards* rule, it stated, "a tax refund due from a joint return generally belongs to the company responsible for the losses that form the

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[1] In bankruptcy adversary proceedings, the district court acts as an appellate court. 28 U.S.C. § 158(a).

basis of the refund." *Id.* (quoting *Barnes*, 783 F.3d at 1195). The Tenth Circuit acknowledged that the Sixth Circuit had recently "decline[d] to adopt the *Bob Richards* rule," but it said it was "bound by" its decision in *Barnes*, which "effectively adopted" the rule. *Id.* at 15a & n.3. Furthermore, the court held, the *Bob Richards* rule applies even where there is "a written agreement in place." *Id.* at 18a. Thus, the Tenth Circuit concluded that it was required to "look to the terms of the Agreement and, taking into account Colorado case law, decide whether it *unambiguously* addresses how tax refunds are to be handled and, if so, whether it purports to deviate from the general rule outlined in *Barnes* and *Bob Richards*." *Id.* (emphasis added).

The panel found that "the written terms of the Agreement are, at best, ambiguous regarding the nature of the relationship" between UWBI and the Bank. *Id.* On one hand, it admitted, several provisions of the Agreement suggest "a debtor-creditor relationship," including the fact that the Agreement permits UWBI to "retain tax refunds and then later take them into account during the annual settlement process," that it grants UWBI "discretion regarding the amount to refund" subsidiaries, and that it "contains no language requiring UWBI to utilize a trust or escrow for tax refunds." *Id.* at 21a, 26a. On the other hand, the court believed that the one reference to UWBI as an "intermediary," and the fact that UWBI was appointed "agent for purposes of *filing* the consolidated *tax return*," suggested that UWBI also *received* tax *refunds* in an agency capacity. *Id.* at 25a-26a (emphases added).

The Tenth Circuit did not consult Colorado trust or agency law to determine whether these terms, taken together, established an agency or trust relationship. *Cf. id.* at 113a-116 (Bankruptcy Court's analysis). Rather, the Tenth Circuit simply cited the provision in the Agreement requiring that it be construed "equitabl[y]" and in a manner favorable, where possible, to insured depository institutions. *Id.* at 26a. Relying on this provision, the panel concluded that "the Agreement's intended treatment of tax refunds does not differ from the general rule outlined in *Barnes* and *Bob Richards*." *Id.* at 27a. It followed that "the tax refund at issue belongs to the Bank." *Id.*

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

## REASONS FOR GRANTING THE PETITION

This Court's intervention is needed to resolve an intractable division between the Circuits on a question of significant economic consequence. As both the District Court and the Tenth Circuit indicated, the Circuits are deeply split—at 3-4 by last count—on the validity of the so-called *Bob Richards* rule. That federal common law rule is enormously significant: Where it applies, it establishes a strong presumption that tax refunds, which often stretch into nine figures, are owned by a subsidiary rather than its parent. But courts cannot agree on whether that

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[2] The panel altered its decision by removing a footnote that erroneously stated that UWBI had waived an argument. Pet. App. 2a.

rule should apply in the first place, and no court has ever attempted to offer a valid legal basis for it.

There is none. The *Bob Richards* rule has no statutory foundation, and satisfies none of the stringent requirements for federal common lawmaking. Courts should determine ownership of tax refunds the same way they determine other property-rights questions in bankruptcy: by applying the substantive laws of the relevant state, not by placing a heavy federal thumb on one side of the scale. Had the Tenth Circuit applied that approach here, it would have concluded—as the Bankruptcy Court did—that Colorado law assigns the $4 million tax refund at issue to UWBI, not to the Bank.

Certiorari should be granted.

## I. THERE IS A CLEAR CIRCUIT SPLIT ON THE VALIDITY OF THE *BOB RICHARDS* RULE.

The Circuits are sharply divided on how to determine who owns a tax refund paid to an affiliated corporate group. Whereas three Circuits and the FDIC apply the *Bob Richards* rule, four Circuits largely or entirely reject that common law presumption. This split is widely acknowledged, deepening, and frequently outcome-determinative, and has no prospect of resolving itself without this Court's intervention.

### A. Three Circuits And The FDIC Hold That The *Bob Richards* Rule Governs Absent A Clear Agreement To The Contrary.

Three Circuits—the Ninth, the Fifth, and the Tenth—apply the *Bob Richards* rule, which holds that a tax refund paid to an affiliated group belongs to a subsidiary in the absence of an agreement clearly providing to the contrary. The FDIC, the principal regulator and litigant in this area, has consistently advocated the same position.

1. The Ninth Circuit first articulated this rule in *Bob Richards*. That case arose when Bob Richards Chrysler-Plymouth, the wholly owned subsidiary of Western Dealer Management, Inc., went bankrupt. 473 F.2d at 263. Western Dealer filed a consolidated return on behalf of both corporations and received a tax refund. *Id.* The trustee for Bob Richards' estate argued that it was entitled to the refund, on the ground that the refund was attributable solely to Bob Richards' losses. *Id.*

The Ninth Circuit awarded the refund to the trustee. *Id.* at 264. It stated that "where there is an explicit agreement, or where an agreement can fairly be implied, as a matter of state corporation law the parties are free to adjust among themselves the ultimate tax liability." *Id.* (footnotes omitted). But the parties had "made no agreement concerning the *ultimate disposition* of the tax refund." *Id.* at 265 (emphasis added). And the Ninth Circuit thought that "[a]llowing the parent to keep any refunds arising solely from a subsidiary's losses" in the absence of such an agreement would "unjustly enrich[] the parent." *Id.* The court thus made the following pronouncement, which has since become known as the *Bob Richards* rule:

> Absent any differing agreement we feel that a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member in a prior or sub-

sequent year should inure to the benefit of that member.

*Id.*

The court then applied that rule to the case before it. "Since there is no express or implied agreement *that [Western Dealer] had any right to keep the refund*," the court reasoned, Western Dealer "was acting as a trustee" for Bob Richards. *Id.* at 265 (emphasis added). It was thus "under a duty to return the tax refund to the estate of [Bob Richards]." *Id.*

The Ninth Circuit reiterated and reapplied this rule in *In re First Regional Bancorp*, 703 F. App'x 565 (9th Cir. 2017). Like *Bob Richards*, that case involved a dispute between a parent and a subsidiary over ownership of a tax refund. The court's analysis was simple. It repeated *Bob Richards*' assertion that "[a]llowing a parent corporation to keep any refunds arising solely from a subsidiary's losses * * * unjustly enriches the parent." *Id.* (brackets omitted) (quoting *Bob Richards*, 473 F.2d at 265). It found no "tax sharing agreement—express or implied—between" the parties. *Id.* Thus, it concluded, the parent "failed to plausibly alleged any relationship * * * that would diverge from the rule of *Bob Richards*." *Id.*

The Ninth Circuit once again reiterated this rule in *Indymac*. "[T]he parent holds the tax refunds in trust for the subsidiary," it repeated, unless "the parties have made [an] agreement concerning the ultimate disposition of the tax refund." 554 F. App'x at 670 (brackets omitted) (quoting *Bob Richards*, 473 F.2d at 265). In that case, the court found such an agreement because the parties' tax sharing agreement "clearly" and "unambiguous[ly]" "adjust[ed] the parties' ultimate tax liability" and "describe[d] the process by which [the parent] will allocate the tax refunds, if any, attributable to any of the [subsidiary's] current losses." *Id.* at 670 & n.1. Thus, it stated, "*Bob Richards* dictates we follow California state law in determining whether the tax refunds are proper of Bancorp's estate." *Id.* at 670. And because the agreement did not "establish a principal-agent relationship under California law," nor "create a trust relationship," the tax refunds were "property of [the parent's] estate." *Id.*

Together, these opinions make the Ninth Circuit's position clear. Under the *Bob Richards* rule, the Ninth Circuit presumes that a parent merely holds a tax refund "as a trustee" for a subsidiary. *Bob Richards*, 473 F.2d at 265; *see Indymac*, 554 F. App'x at 670. A parent may overcome that presumption by identifying an agreement that "clearly," "unambiguous[ly]," or "express[ly]" provides for a different "ultimate disposition of the tax refund." *Indymac*, 554 F. App'x at 670; *Bob Richards*, 473 F.2d at 264-265; *see First Reg'l Bancorp*, 703 F. App'x at 565. Only if such an agreement is identified does the *Bob Richards* rule fall away, and the Ninth Circuit applies the applicable state law of trust and agency to determine whether the parent owns the refund. *See Indymac*, 554 F. App'x at 670.

2. The Fifth Circuit follows the same approach. In *Capital Bancshares, Inc.* v. *FDIC*, 957 F.2d 203 (5th Cir. 1992), it announced that it was "[f]ollowing * * * the reasoning" of "the seminal case of *In re Bob Richards*." *Id.* at 207-208. Under that rule, courts "will not question an allocation which results from an *express* agreement, or an agreement which is

*clearly* implied." *Id.* at 207 (emphases added). But "in the absence of an agreement to the contrary," the Fifth Circuit held, "the parent corporation '[i]s acting as trustee of a specific trust,'" and "allowing [the] parent to keep refunds arising solely from a subsidiary's losses would constitute unjust enrichment." *Id.* (quoting *Bob Richards*, 473 F.2d at 265).

Applying that rule, the Fifth Circuit held that a subsidiary Bank was entitled to a tax refund that arose from losses "entirely attributable to the Bank." *Id.* at 208. The Fifth Circuit rejected the parent's claim that its course of dealing with the subsidiary established an "implied agreement as to the allocation of tax refunds." *Id.* The court reasoned simply that "the refund is the property of the Bank in the absence of a contrary agreement," and "[t]o allow [the parent] to keep the refund generated by the Bank would unjustly enrich the parent." *Id.*

The Fifth Circuit's rule is thus the same as the Ninth Circuit's. It presumes that a refund is the subsidiary's, and that the parent is merely holding the refund as "trustee." *Id.* at 207. The parties can overcome that presumption by identifying an allocation agreement that "express[ly]" or "clear[ly]" provides "to the contrary"; an ambiguous "implied agreement" is not good enough. *Id.* at 208. Otherwise, the refund belongs to the subsidiary, and the court does not consult state law to determine whether the parties stand in an agency or trust relationship. *Id.*

3. In the decision below, the Tenth Circuit likewise adopted the *Bob Richards* rule—and made it if anything more stringent. The panel began by asserting that the "[f]ederal common law" rule articulated

in *Bob Richards* "provides a framework for resolving th[e] issue" whether a parent or a subsidiary owns a tax refund. Pet. App. 15a. Under that "common law * * * framework," a "tax refund due from a joint return generally belongs to the company responsible for the losses that form the basis of the refund." *Id.* (quoting *Barnes*, 783 F.3d at 1195). Moreover, that rule applies even where "there [is] a written agreement in place." *Id.* at 18a. The Tenth Circuit explained that courts "must look to *the terms of the Agreement* and, taking into account [state] case law, decide whether it *unambiguously* addresses how tax refunds are to be handled and, if so, whether it purports to deviate from the general rule outlined in *Barnes* and *Bob Richards*." *Id.* (emphases added).

The Tenth Circuit thus conducted a review solely of the "written terms of the Agreement"—and nothing more—to decide whether the parties here departed from the *Bob Richards* rule. *Id.* The court found that, "on its face," the agreement was "ambiguous"; some provisions suggested an agency relationship, many others did not. *Id.* at 18a-26a. The court did not consult Colorado trust or agency law to decide which reading was better, as the Bankruptcy Court did. Rather, the Tenth Circuit simply turned to a contractual provision requiring the agreement to be construed "equitabl[y]" in a manner that favors the subsidiary, if possible. *Id.* at 26a-27a. Relying on that provision, the court concluded that "the Agreement's intended treatment of tax refunds does not differ from the general rule outlined in *Barnes* and *Bob Richards*," and awarded the tax refund to the subsidiary. *Id.* at 27a.

The Tenth Circuit thus adopted and extended the *Bob Richards* rule. Like the Ninth and Fifth Circuits, it applied a strong presumption that a refund belongs to a subsidiary. *Id.* at 15a-17a. And it made clear that a "written agreement" is not enough to overcome that presumption. *Id.* at 18a. In its view, an agreement must "unambiguous[ly]" diverge from the rule, based solely on its "written terms," without recourse to state agency or trust law. *Id.*[3]

4. The FDIC has taken a comparable view in its capacities both as regulator of federally insured banks, and as a frequent litigant in disputes between bank holding companies and their subsidiaries.

As a regulator, the FDIC has issued two nonbinding policy statements announcing a categorical presumption that tax refunds paid to affiliated groups belong to the subsidiary that generated the losses. In 1998, the FDIC and several other entities issued a statement asserting that "a parent company that receives a tax refund from a taxing authority obtains these funds as agent for the consolidated group on behalf of the group members." Interagency Policy Statement on Income Tax Allocation in a

[3] The Eighth Circuit has taken a similar view. In *Jump* v. *Manchester Life & Casualty Management Corp.*, 579 F.2d 449 (8th Cir. 1978), a subsidiary sought to recover a tax refund that was based on its liabilities but exceeded the amount of its tax payments. The court stated that it did not need to apply a "state's substantive law" in determining ownership of a tax refund. *Id.* at 452. Rather, it held that "absent an express agreement," it did not "see any * * * reason * * * to divert a refund * * * paid by other members of the affiliated group to reward [an entity] for the fortuitous effect" of its losses. *Id.* at 454.

Holding Company Structure, 63 Fed. Reg. 64,757, 64,759 (Nov. 23, 1998). It therefore advised that "an organization's tax allocation agreement * * * should not purport to characterize refunds attributable to a subsidiary depository institution that the parent receives from a taxing authority as the property of the parent." *Id.* In 2014, after finding that courts had "reached varying conclusions" on the question, the FDIC issued a second policy statement doubling down on this position. Addendum to the Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure, 79 Fed. Reg. 35,228, 35,229-30 (June 19, 2014). It urged corporations to revise their tax sharing agreements to "ensure the[ir] agreements * * * [c]learly acknowledge that an agency relationship exists between [a] holding company and its subsidiar[ies] * * * with respect to tax refunds." *Id.*

As a litigant, the FDIC has consistently urged courts to take this approach, by adopting the *Bob Richards* rule and applying it strictly. In the Third Circuit, for instance, the FDIC argued that the *Bob Richards* rule was correct and that "a subsidiary's mere agreement" to a TAA is not sufficient to overcome it; rather, it said that an agreement must "*clearly* override the default rule" in order to assign a tax refund to the parent. Br. of Appellant FDIC at 16-17, *In re Downey Fin. Corp.*, 593 F. App'x 123 (3d Cir. 2015) (No. 14-1586), 2014 WL 4275800 (emphasis added). The FDIC similarly argued in the Sixth Circuit that, to overcome *Bob Richards*, a contract must have "*specific* language that *conclusively* disavows" the rule. Br. of Appellant FDIC at 39, *AmFin*, 757 F.3d 530 (No. 13-3669), 2013 WL 4776406 (emphases added). The FDIC has tried, sometimes successfully, to convince district courts to take the same position. *See, e.g.*, *In re Venture Fin. Grp., Inc.*, 587 B.R. 542, 545 (W.D. Wash. 2018), *appeal docketed*, No. 18-35375 (9th Cir. May 4, 2018). The FDIC agency is thus actively working, in multiple capacities, to convince courts to adopt the same strict *Bob Richards* rule that the Ninth, Fifth, and Tenth Circuits already have.

### B. Four Circuits Have Largely Or Entirely Rejected The *Bob Richards* Rule.

In contrast, four Circuits—the Sixth, Eleventh, Third, and Second—have largely or entirely rejected the *Bob Richards* rule. Two courts have rejected the *Bob Richards* rule completely, while two have held that it does not apply where (as here) the parties have entered a TAA. Instead, those courts apply the applicable State's law of agency and trust to determine whether the parent or its subsidiary owns a tax refund.

1. The Sixth Circuit squarely rejected the *Bob Richards* rule in *FDIC* v. *AmFin Financial Corp.*, 757 F.3d 530 (6th Cir. 2014). That case arose when a parent and its subsidiary disagreed over who owned a $170 million tax refund. The FDIC, as receiver for the subsidiary, urged the court to "apply the principle first enunciated in *In re Bob Richards*" to resolve any tie in favor of the subsidiary. *Id.* at 535.

The Sixth Circuit refused. "[T]his court-created 'rule,'" it explained, "is a creature of federal common law." *Id.* But "federal common law constitutes an unusual exercise of lawmaking which should be indulged * * * only when 'there is a significant conflict between some federal policy or interest and the use of state law.'" *Id.* (internal quotation mark omitted) (quoting *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994)). The court found no such justification for the *Bob Richards* rule. On the contrary, it explained, "Congress generally *allows* state law to determine the property interests subject to bankruptcy." *Id.* at 536 (emphasis added). Those courts "employing the *Bob Richards* analysis," the Sixth Circuit concluded, had simply "bypassed the threshold question of whether federal common law should govern this issue." *Id.*

Thus, the Sixth Circuit "decline[d] to apply federal common law." *Id.* Rather, it held that "Ohio law * * * determine[d] who own[ed] the Refund," and remanded the case to the district court to analyze the parties' agreement under state law. *Id.* The Sixth Circuit made clear, moreover, that in applying Ohio law, the lower court should not limit itself to the text of the agreement. *Id.* Instead, it directed the district court to determine whether the agreement established an "implied resulting trust" under Ohio law, or gave the subsidiary sufficient control over the parent to create a "agency-principal relationship * * * in Ohio." *Id.* at 536-538.

2. The Eleventh Circuit has also rejected the *Bob Richards* rule, and instead looks to state substantive law to determine whether a parent and subsidiary are in an agency or trust relationship. In *In re BankUnited Financial Corp.*, 727 F.3d 1100 (11th Cir. 2013), the Eleventh Circuit held that "[f]ederal law does *not* govern the allocation of * * * tax refunds" within an affiliated group. *Id.* at 1102 (emphasis added). Rather, the court resolved a dispute over ownership of a refund by examining the parties' TAA in light of "Delaware law." *Id.* at 1104-05. It

observed that the TAA contained none of the characteristics Delaware courts had found indicative of a debtor-creditor relationship, such as a means of "guarantee[ing] the debtor's obligation." *Id.* at 1108 (citing *Lasker* v. *Mcdonnell & Co.*, 1975 WL 1950, at *10 (Del. Ch. July 9, 1975)). Rather, the court concluded, the TAA required the parent to hold the funds "as if in escrow" for the subsidiary, and so made them the property of the subsidiary under state law. *Id.* at 1108-09.

The Eleventh Circuit made its rejection of the *Bob Richards* rule even more explicit in In *In re Netbank, Inc.*, 729 F.3d 1344 (11th Cir. 2013). There, the FDIC argued that the court "should invoke federal common law, specifically the '*Bob Richards* Rule,'" and hold that a parent is the agent of its subsidiary "absent clear agreement to the contrary." *Id.* at 1347 n.3. The Eleventh Circuit declined. "Following the *BankUnited* decision," it said, "we apply state contract law"—in that case, "Georgia contract law"—to determine the nature of the parties' relationship. *Id.* Applying that law, it concluded that the TAA contained a "clear expression" of intent to assign the refund to the subsidiary, given that the parties had explicitly chosen to incorporate the FDIC's nonbinding policy statement into their agreement by reference. *Id.* at 1350.

3. The Third Circuit has also rejected *Bob Richards*, at least where, as here, the parties entered a TAA. In *In re Downey Financial Corp.*, 593 F. App'x 123 (3d Cir. 2015), the Third Circuit considered whether a parent or a subsidiary owned a tax refund where the parties had entered a TAA. The FDIC urged the court to apply the *Bob Richards* rule. *Id.*

at 126. But the Third Circuit held that "the so-called *Bob Richards* default rule * * * is not applicable" where "the parties have agreed to" a TAA. *Id.* (internal quotation marks omitted). Moreover—in direct contrast to the Tenth Circuit panel here—the Third Circuit held that the TAA did not need to "unambiguous[ly]" assign ownership to the parent in order to overcome the *Bob Richards* rule. *Id.* at 126 n.4. Rather, the Third Circuit simply examined whether the TAA established a trust or agency relationship "[u]nder California law." *Id.* at 125-126. It looked at whether the agreement gave the subsidiary sufficient control over the parent to establish a principal-agent relationship, or required the parent to segregate funds or otherwise act as a trustee under California law. *Id.* at 125-128. Finding that it did neither, the court found that the agreement "created a debtor/creditor relationship" and assigned the tax refund to the parent. *Id.* at 128.

4. The Second Circuit has likewise declined to apply the *Bob Richards* rule, and instead applies state trust and agency law. In *In re First Central Financial Corp.*, 377 F.3d 209 (2d Cir. 2004), the subsidiary argued that its parent held a tax refund in "constructive trust," and that the parent would be "unjustly enriched" if permitted to retain the refund. *Id.* at 212-213. The Second Circuit held that "New York law control[led]" this question. *Id.* at 212. Despite the subsidiary's heavy reliance on *Bob Richards* in its briefing, the Second Circuit did not cite or rely on the decision. *See* Br. for Plaintiff-Appellant at 23-26, *In re First Cent. Fin. Corp.*, 377 F.3d 209 (No. 02-5605), 2003 WL 23356658. The Second Circuit instead found that, under New York law, it is inappropriate to impose a trust where "a

written agreement exists between [parent] and [subsidiary] covering how taxes were to be allocated." 377 F.3d at 211. Accordingly, it found that the tax refund belonged to the parent. *Id.*

* * *

In sum, the circuits are deeply divided as to what rule to apply—and even what source of law to invoke—in determining whether a parent or a subsidiary owns a tax refund. On one hand, three Circuits and the FDIC apply the *Bob Richards* rule, a rule of *federal common law* that *presumes* that a tax refund belongs to the subsidiary except where there is clear or unambiguous contractual language to the contrary. On the other hand, four Circuits apply *state law*, *without any presumption* in favor of the parent, to determine whether a parent stands in the position of an agent or trustee or, instead, a debtor.

This split is both clear and growing. Circuits on both sides of the divide, as well as the FDIC, have acknowledged the disagreement. *See AmFin*, 757 F.3d at 536 (expressly disagreeing with the Fifth and Ninth Circuits and joining the Eleventh Circuit in rejecting the *Bob Richards* rule); Pet. App 15a & n.3 (joining the Ninth Circuit and expressly disagreeing with the Sixth Circuit); 79 Fed. Reg. at 35,229-30 & n.5 (acknowledging that "courts have reached varying conclusions" on this question). And this split has dramatically deepened in recent years. The Sixth, Eleventh, and Third Circuits all adopted their positions in the last six years, while the Ninth Circuit reaffirmed its contrary position as recently as 2017, and the Tenth Circuit joined the *Bob Richards* camp just a few months ago. Particularly given that the FDIC—the most frequent litigant in these cases—is vigorously urging courts to join the short side of the split, there is no prospect that the split will resolve itself.

Moreover, this disagreement is often outcome-determinative. The parent corporations in *AmFin*, *Downey*, and *First Central Financial* would plainly have lost had their cases been brought in the Ninth, Fifth, or (especially) Tenth Circuits. Their TAAs were virtually indistinguishable from the one at issue here, and did not contain anything resembling the "unambiguous[ ]" language that the *Bob Richards* Circuits require. Pet. App. 18a. Indeed, the FDIC and the subsidiaries in each case argued that they necessarily would prevail were the *Bob Richards* rule applied. *See supra* pp. 21-25. Yet the Sixth, Third, and Second Circuits refused to rule in favor of the subsidiaries because they rejected *Bob Richards* and instead applied state agency and trust law.

Conversely, the parent corporations in *Bob Richards*, *First Regional Bancorp*, *Capital Bancshares*, and (especially) here might well have won had their cases proceeded in the Sixth, Eleventh, Third, or Second Circuits. In none of these cases was there evidence that the parent was subject to the control of the subsidiary, or that the parent was required to hold funds in escrow for the subsidiary—the hallmarks of common-law agency and trust relationships. Nevertheless, each litigant lost because their circuits applied *Bob Richards* to hold that the refunds belonged to the subsidiary absent an explicit agreement to the contrary.

The Court should not permit the rights of corporations and their creditors to turn on these stark regional variations in approach. Certiorari should be granted, and the division among the circuits should be resolved once and for all.

## II. THE *BOB RICHARDS* RULE IS PLAINLY INCORRECT.

Certiorari is also warranted because the position taken by the Tenth Circuit is wrong. Neither the Tenth Circuit nor any other court has identified a valid legal basis for the *Bob Richards* rule, and none exists. Rather than applying *Bob Richards*' invented rule, courts should determine ownership of tax refunds the way they determine other property interests in bankruptcy: by applying the applicable state's law. Had the Tenth Circuit applied that approach here, as the Bankruptcy Court did, UWBI would have prevailed.

1. *Bob Richards* identified no positive legal basis for the rule it adopted. It candidly acknowledged that "there is nothing in the Internal Revenue Code" that supports it. 473 F.2d at 264 (internal quotation marks and brackets omitted). Instead, it stated simply that "we feel" that tax refunds generally "should inure to the benefit of" the subsidiary that caused the underlying tax loss. 473 F.2d at 265. But a "feel[ing]" is not a source of legal rights and obligations. The Ninth Circuit briefly suggested that its rule sounded in principles of "trust" and "unjust enrichment," *id.* at 265 & n.7, but it cited no state-law authorities establishing that the requisites for a trust were established. And subsequent cases have applied this rule without regard to which state's law governs. *See First Reg'l Bancorp*, 703 F. App'x 565 (California); *Capital Bancshares*, 957 F.2d 203 (Louisiana); Pet. App. 18a (Colorado).

Later cases have attempted to rationalize *Bob Richards* as a rule of "[f]ederal common law." Pet. App. 15a; *see AmFin*, 757 F.3d at 536. But the prerequisites for federal common lawmaking are stringent. This Court has "uniformly require[d] the existence of" a "*significant conflict* between some federal policy or interest and the use of state law" as "a precondition for recognition of a federal rule of decision." *O'Melveny*, 512 U.S. at 87 (emphasis added). The mere "existence of related federal statutes" or an asserted "need for 'uniformity'" are not sufficient. *Atherton* v. *FDIC*, 519 U.S. 213, 218-219 (1997). The circumstances in which the Court has found federal common lawmaking proper are thus "few and restricted." *Id.* at 218 (quoting *O'Melveny*, 512 U.S. at 87); *see id.* at 225-226.

Rather than attempting to show that the requisites for making federal common law are satisfied, *Bob Richards* and its progeny have simply "bypassed th[is] threshold question." *AmFin*, 757 F.3d at 536. And this Court's precedents make clear that there is no "conflict" with federal policy—let alone a "significant" one—posed by the application of state law to determine whether a bankruptcy estate owns a tax refund. On the contrary, "Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner* v. *United States*, 440 U.S. 48, 54 (1979). If state law is ordinarily the *preferred* means of determining property rights in bankruptcy, it is passing unlikely that it is *incompatible* with Congress's policies solely when determining ownership of tax refunds paid to affiliated corporate groups. *See Segal*, 382 U.S. at 380-381 (deeming a tax refund "property" within the meaning of the Bankruptcy Code); *see also Atherton*, 519 U.S. at 218-221 (rejecting FDIC's claim that federal common law rules are necessary merely because federally insured banks are involved).

Because there is no basis to create federal common law in this area, the "general[ ]" rule applies: Courts should determine who owns a tax refund by applying "state law." *Butner*, 440 U.S. at 54. The question whether a parent is holding tax refunds as an agent or trustee of the subsidiary should not turn on free-floating notions of fairness or the bare words of a TAA, but on the applicable State's substantive law of agency and trust. *See First Cent. Fin. Corp.*, 377 F.3d at 213-219; *Downey*, 593 F. App'x at 126-128; *AmFin*, 757 F.3d at 536-538.

2. The Tenth Circuit failed to follow that approach here. It held that UWBI could prevail only if it established that "the terms of the Agreement * * * *unambiguously* address[ ] how tax refunds are to be handled" and "deviate from the general rule outlined in * * * *Bob Richards*." Pet. App. 18a. It then limited its analysis to "the written terms of the agreement," seeking to infer from the "face" of the contract—without any recourse to the Colorado law of trust and agency—whether UWBI was best characterized as an "agent" of the Bank. *Id.* at 18a, 25a.

That analysis had no basis in the substantive law of Colorado—the law that should have governed this case. Rather, Colorado law (like the law of most states) requires courts to determine whether a person is acting as agent or trustee in a particular transaction by examining the *nature of the relationship* between the parties and the *types of obligations* any agreement imposes. *See* Pet. App. 113a-116a; *see also AmFin*, 757 F.3d at 535 (applying similar analysis under Ohio law); *Downey*, 593 F. App'x at 126 (likewise under California law). Colorado courts emphatically do not determine whether a contract establishes an agency relationship by limiting themselves to the "face" of the agreement. *See* Pet. App. 113a-116a.

Had the Tenth Circuit applied an ordinary state-law analysis here, it would have reached a different result. The TAA gives UWBI a degree of control incompatible with any finding that it is a common-law agent. *Id.* at 113a. And the Agreement does not contain the characteristics of any kind of trust under Colorado law (and indeed the FDIC forfeited any argument that a trust exists here). *Id.* at 114a-116a; *see id.* at 58a. As the Bankruptcy Court concluded, both the language of the Agreement and the system of payments it establishes are consistent with a debtor-creditor relationship under Colorado law. *Id.* at 98a-106a.

In short, the Tenth Circuit's decision was reliant, from start to finish, on the federal common law *Bob Richards* rule. Because of *Bob Richards*, the Tenth Circuit required "unambiguous[]" evidence of an agency relationship in "the written terms" of the agreement. Pet. App. 18a. And it found "ambiguity" in the contract only because the agreement, "on its face," did not expressly state that it established a debtor-creditor relationship. *Id.* at 25a-26a. Were *Bob Richards* overturned, the flawed premise underlying the court's decision would collapse, and the court would be bound to conclude—as the Bankruptcy Court did—that Colorado law assigns the tax refund to UWBI.

## III. THE QUESTION PRESENTED IS OF CONSIDERABLE IMPORTANCE.

This question is profoundly important. Disputes between parents and subsidiaries over the ownership of tax refunds arise with great frequency. *See* Pet. App. 97a; *see* Risa Lynn Wolf-Smith, *Squeezing Juice from a Turnip: Tax Assets and Tax Allocation Agreements*, Am. Bankr. Inst. J. 14, 14 (May 2013) (explaining that these disputes "have produced a robust body of case law."). Dozens of bankruptcy court opinions have addressed the issue. *See, e.g.*, Pet. App. 105a-106a (citing examples); *In re IndyMac Bancorp, Inc.*, 2012 WL 1037481, at *13 n.7 (Bankr. C.D. Cal. Mar. 29, 2012) (same). And numerous appellate decisions have grappled with this question over the course of decades. *See supra* Part I.

The stakes of these disputes are high. Tax refunds for affiliated groups filing jointly can extend into the tens or hundreds of millions of dollars. *See, e.g.*, *Downey*, 593 F. App'x at 125 ($370 million tax refunds); *AmFin*, 757 F.3d at 530 ($170 million tax refund); *Indymac*, 554 F. App'x at 669 ($55 million tax refund); *BankUnited*, 727 F.3d at 1103 ($48 million tax refunds). By assigning a tax refund incorrectly, a court not only deprives the refund's rightful owner of valuable property, but also prevents the owner's creditors from relying on that asset to collect on their debts in bankruptcy.

The circuit split on this issue also prevents entities from engaging in appropriate tax planning. Until recently, tax and bankruptcy practitioners advised that "the majority of cases" involving TAAs have found that *a parent* rather than a subsidiary owns a refund, and that "a tax-sharing agreement must be clearly drafted to provide that any refund received by the parent is to be segregated and held in trust for the benefit of the subsidiary." Wolf-Smith, *supra*, at 15; *see also* Lisa A. Bothwell, *Aberration or Seminal Decision?: Examining the Impact of* Zucker *v.* FDIC (In re BankUnited Financial Corp.) *on Bankruptcy Law*, 34 Rev. Banking & Fin. L. 369, 378 (2014) ("Historically, bankruptcy and district courts have found that a debtor-creditor relationship is formed between a parent holding company and a subsidiary when there is a [TAA]."). That advice, however, now runs headlong into the positions of the FDIC and the Ninth and Tenth Circuits, which have recently made clear that an agreement must be drafted "unambiguously" to avoid making *the subsidiary* the owner. Pet. App. 18a; *see Indymac*, 554 F. App'x at 670. Banks and other organizations cannot structure transactions or draft TAA's appropriately if the most basic rules governing ownership are contested circuit-by-circuit in this manner. And this problem is particularly acute for bank holding companies and other national entities, which often have subsidiaries in multiple states, and so cannot predict what rule they will be subject to if one of their subsidiaries enters bankruptcy.

This case presents an excellent vehicle to resolve the circuit split. As described above, the question presented is outcome-determinative. *See supra* Part II.2. The Tenth Circuit expressly relied on the *Bob Richards* rule in reaching its holding, and did not attempt to apply Colorado agency or trust law. Pet. App. 15a-27a. The Bankruptcy Court took the opposite approach—it rejected *Bob Richards* and rested on state-law agency and trust rules—and reached the opposite conclusion. Pet. App. 97a-119a.

Accordingly, reversal would likely compel a different outcome. At minimum, it would mean that the Tenth Circuit must scrap its decision and start again.

The issues are well-presented. UWBI preserved and thoroughly pressed its arguments at every stage of the case, resulting in three reasoned opinions airing every side of this dispute. And the respondent is the FDIC, the most frequent litigant in this area, and an experienced advocate on behalf of its views.

Finally, bankruptcy cases only infrequently reach the Court; often, they are mooted out before certiorari because of the entry of a plan of adjustment settling all claims in bankruptcy. *See* Jonathan P. Friedland et al., Commercial Bankruptcy Lit. § 12:10 (Jan. 2019 update) (explaining that "[i]n bankruptcy litigation, the risk is particularly acute that an appeal will be dismissed as moot," and giving examples). This is thus the rare opportunity in which the Court can weigh in on this important issue that has divided lower courts for years.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


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