No. 14-576

In the Supreme Court of the United States

AMFIN FINANCIAL CORPORATION, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF AMTRUST BANK

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RICHARD J. OSTERMAN, JR.
Acting General Counsel
FLOYD I. ROBINSON
Acting Deputy General Counsel
COLLEEN J. BOLES
Assistant General Counsel
KATHRYN R. NORCROSS
Senior Counsel
JOSEPH BROOKS
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether the court of appeals correctly held that a tax-sharing agreement between a debtor holding company and its subsidiary was ambiguous as to whether the holding company owned a federal income tax refund generated by the subsidiary, or whether the holding company instead held the refund either as agent for the subsidiary or in a resulting trust for the subsidiary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 757 F.3d 530. The opinion of the district court granting petitioner's motion for judgment on the pleadings (Pet. App. 22a-34a) is reported at 490 B.R. 548.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2014. A petition for rehearing was denied on August 19, 2014 (Pet. App. 21a). The petition for a writ of certiorari was filed on November 17, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Internal Revenue Code authorizes affiliated companies to file income tax returns on a consolidated basis. 26 U.S.C. 1501. While consolidated filing is optional, many groups choose to file consolidated returns because it may result in tax savings by allowing the group to offset one member's losses against another's income.[1] Under applicable regulations, a common parent is authorized to file a consolidated return as "sole agent * * * for the group." 26 C.F.R. 1.1502-77(a)(1)(i). The Internal Revenue Service (IRS), through the United States Treasury, pays tax refunds owed to a consolidated group to the parent company as the group's agent. 26 C.F.R. 1.1502-77(a)(2)(v).

AmFin Financial Corporation (Parent) was the parent corporation of several subsidiaries, including AmTrust Bank (AmTrust). Pet. App. 2a. The Parent and its subsidiaries (collectively, Affiliated Group) have chosen to file income tax returns on a consolidated basis. In 2006, they entered into a tax-sharing agreement (TSA) governed by Ohio law, the stated purpose of which was to "specify the manner in which the Affiliated Group w[ould] share the Consolidated Tax Liability and the manner in which certain Tax Attributes [were] to be treated among the members of

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[1] See *Wolter Constr. Co.* v. *Commissioner*, 634 F.2d 1029, 1032 n.1 (6th Cir. 1980). Other benefits typically associated with consolidated filing include the deferral of gain on intercompany transactions; tax-free intercompany dividends; greater use of loss carryovers, investment credits, and excess charitable deductions; reduction in the gain on sale of a subsidiary; and reduction of the minimum tax. *Ibid.*

the Affiliated Group." *Id.* at 5a, 27a (ellipses and brackets omitted).

The TSA also set the parameters for calculating each member's share of the consolidated tax liability and the amount a member was entitled to receive if it incurred a loss. Pet. App. 27a-30a. The TSA required each member's tax liability to be "computed on a Separate Return Basis," meaning that its liability would be calculated as if each member had filed an individual return. *Id.* at 27a. With respect to loss carrybacks, the TSA provided that "the respective liabilities of [the] Parent and each Affiliate shall be redetermined hereunder after fully giving effect to any such adjustment, as if such adjustment had been part of the original computation." *Id.* at 6a.

The protective, separate-return treatment afforded to the members of the Affiliated Group by the TSA is consistent with an interagency policy statement issued by federal banking regulators to provide uniform guidance on the structure of tax-sharing agreements. See *Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure*, 63 Fed. Reg. 64,757 (Nov. 23, 1998). Most relevant for present purposes, the *Interagency Policy Statement* provides:

> Regardless of the treatment of an institution's tax loss for regulatory reporting and supervisory purposes, *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*. Accordingly, an organization's tax allocation agreement or other corporate policies 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. at 64,759 (emphasis added).

2. In November 2009, the Parent filed for Chapter 11 bankruptcy protection. Pet. App. 3a. Shortly thereafter, the federal Office of Thrift Supervision closed AmTrust and appointed the Federal Deposit Insurance Corporation (FDIC) as its receiver. *Ibid.* The Parent subsequently filed a consolidated 2008 tax return on behalf of the Affiliated Group, including AmTrust, showing a total net operating loss of $805 million. *Ibid.* Of that amount, AmTrust's losses accounted for $767 million. *Ibid.* The IRS determined that the Affiliated Group was owed a total of approximately $195 million (the Refund). *Ibid.*

The FDIC asserted that approximately $170 million of the Refund plus interest belonged to AmTrust, because that portion resulted solely from the offsetting of AmTrust's 2008 net operating losses against its income in prior tax years. Pet. App. 3a. The Parent contended that the entire amount of the Refund belonged instead to its bankruptcy estate. *Ibid.* The parties agreed to deposit the Refund into a segregated account pending final adjudication of their respective rights. *Ibid.* Consistent with its regulations, the IRS issued the Refund to the Parent, which deposited it as agreed. *Ibid.*

a. The FDIC filed a complaint seeking a declaratory judgment that AmTrust owned the portion of the Refund generated by its own operating losses. Pet. App. 3a. The Parent moved for judgment on the pleadings, arguing that the TSA unambiguously created a debtor-creditor relationship between the Parent and its affiliates with respect to tax refunds. *Id.* at

22a, 30a. Consequently, the Parent argued, the TSA mandated that the entire Refund—including the portion generated by AmTrust's net operating losses—belonged to the Parent's bankruptcy estate, such that AmTrust was merely a creditor of the estate. *Id.* at 2a.

The FDIC subsequently moved to amend its complaint after uncovering new evidence about the parties' intent regarding ownership of refunds received by the Parent from the IRS. Pet. App. 3a. Specifically, the FDIC proffered extrinsic evidence showing that, with respect to tax refunds, the parties to the TSA had intended to create either an agency relationship or a resulting trust under Ohio law. *Id.* at 4a. The district court denied the FDIC's motion to amend, declined to consider any extrinsic evidence, and granted the Parent's motion for judgment on the pleadings, holding that the TSA unambiguously allocated the entire Refund to the Parent. *Id.* at 2a-4a.

b. The FDIC appealed, and the court of appeals reversed and remanded. Pet. App. 1a-20a. The court determined that the TSA was ambiguous regarding the ownership of the Refund:

> [T]he TSA[] speaks only to the allocation of liability in the event of an adjustment such as a loss carryback refund. It says nothing about the ownership of such a refund, much less [does it] unambiguously establish [the Parent's] ownership of the Refund. We thus reject [the Parent's] argument that the text of the TSA supports its right to the Refund and agree with the FDIC that the TSA fails to address the ownership or disposition of refunds.

Id. at 6a. In light of this ambiguity, the court concluded that, under Ohio law, "the district court must look to the evidence of the parties' intent unearthed during discovery." *Id.* at 11a. Such evidence would illuminate whether the TSA had created "a trust or agency relationship with respect to tax refunds" (as the FDIC contended), or instead merely a creditor-debtor relationship (as the Parent contended). *Ibid.*

The court of appeals also rejected the Parent's argument that the TSA could not support the existence of a trust as a matter of law. The court held that the TSA's lack of express "language evincing a trust relationship" was nevertheless compatible with the existence of "an *implied* resulting trust." Pet. App. 12a. The court also rejected the Parent's argument "that the Sixth Circuit recognizes no implied trusts in bankruptcy." *Ibid.* The court explained that, although the Sixth Circuit had "held that a *constructive* trust could not exclude property from a bankruptcy estate," the court had not addressed the permissibility of "resulting trusts, [which] unlike constructive trusts, do not subvert the policy of ratable distribution." *Ibid.* (citing *In re Omegas Grp., Inc.*, 16 F.3d 1443 (6th Cir. 1994)). Finally, the court noted that "Ohio courts frequently recognize resulting trusts" in a variety of scenarios, based on a "key" inquiry: "whether the parties intended the recipient of the property to also hold the beneficial interest." *Id.* at 14a. The court of appeals accordingly remanded the case "with instructions that the district court consider extrinsic evidence concerning the parties' intent in light of Ohio agency and trust law." *Id.* at 3a.

Judge Gilman filed a separate concurring opinion. Pet. App. 16a-19a. In his view, cases from different circuits "can be reconciled with the following protocol: First look to the tax-sharing agreement (TSA) to settle the refund issue. But if the TSA is ambiguous, then determine whether an agreement between the parties can be implied under state law." *Id.* at 19a.

ARGUMENT

Petitioners contend that the circuits are divided regarding how to reconcile state law governing implied trusts with the federal bankruptcy policy of ratable distribution. In support of that contention, however, petitioners rely exclusively on decisions addressing *constructive* trusts. The court of appeals in this case, by contrast, remanded for consideration of whether the parties to the TSA had established a *resulting* trust. The difference is significant, as the court below explained, because resulting trusts (unlike constructive trusts) give effect to the intent of the parties as of the date of their agreement. Petitioners identify no appellate court decision—and we are aware of none—holding that recognition of a resulting trust would conflict with the federal bankruptcy policy of ratable distribution. The current interlocutory posture of this case provides an additional reason to deny certiorari. Further review is not warranted.

1. Under the Bankruptcy Code, the bankruptcy estate is defined to include "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." 11 U.S.C. 541(a)(1). Where a debtor holds "only legal title and not an equitable interest" in property, however, the property "becomes property of the estate * * * only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. 541(d). Consequently, because a debtor "does not own an equitable interest in property he holds in trust for another, that

interest is not 'property of the estate.'" *Begier* v. *IRS*, 496 U.S. 53, 59 (1990) (citation omitted).

Although disposition of the estate is determined by federal law, "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). The dispute in *Butner* concerned whether rents collected after a mortgagor's bankruptcy, but before the foreclosure sale of the mortgaged property, were property of the bankruptcy estate. *Id.* at 49. Although it ultimately declined to resolve that state-law dispute, the Court affirmed "the basic federal rule * * * that state law governs" the ownership status of the disputed property. *Id.* at 57. The relevant question, therefore, was "how local courts would dispose of comparable issues" under the applicable state law. *Id.* at 58. Following *Butner*, the courts of appeals routinely apply state law to determine ownership of disputed property in bankruptcy cases—including in disputes over the status of property under state agency or trust law. See, *e.g.*, *City of Farrell* v. *Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994) ("[W]e look to state law to determine whether the claimant has shown a trust relationship.").

In this case, the court of appeals properly evaluated the TSA to give effect to the parties' intentions, as required by Ohio law. The court determined that the TSA was silent as to whether the parties intended to vest ownership of tax refunds in the Parent, or instead to create either an agency relationship or a resulting trust with respect to those refunds. Pet. App. 11a-12a. In accordance with state law, the court therefore remanded "with instructions that the district court consider extrinsic evidence concerning the parties' intent in light of Ohio agency and trust law." *Id.* at 3a. That analysis is fully consistent with the treatment of tax-sharing agreements under state law by other courts of appeals.

Petitioners briefly argue that the recognition of resulting trusts in bankruptcy "undermines ratable distribution and impedes effective reorganization." Pet. 22; see Pet. 1 ("[P]aramount federal bankruptcy interests * * * should not be undermined by nebulous state law implied trust theories."). But the principle of equal distribution of assets in bankruptcy is not at issue here. That policy speaks to the proper distribution of estate assets; it therefore "is not implicated" unless the property at issue is actually owned by the debtor. *Begier*, 496 U.S. at 58; see *In re LAN Tamers, Inc.*, 329 F.3d 204, 215 (1st Cir.) ("[T]he trustee emphasizes the importance in bankruptcy law of equal footing for similarly placed creditors. * * * This bankruptcy policy is not implicated, however, when the property in question is not legitimately available to creditors in the first place."), cert denied, 540 U.S. 1047 (2003). The rule that property held by the debtor as agent or trustee is *not* estate property itself reflects—and thus does not conflict with—fundamental federal bankruptcy policy.

2. Petitioners' primary contention is that the circuits are divided as to whether a state-law implied trust may be recognized in order to exclude property from a bankruptcy estate under 11 U.S.C. 541(d). Pet. 7-8. All of the decisions petitioners cite, however, address *constructive* trusts. Pet. 9-18; see, *e.g.*, *In re Mississippi Valley Livestock, Inc.*, 745 F.3d 299, 306 (7th Cir. 2014) ("[W]e need to choose sides on the question whether property subject to a constructive

trust can be excluded from a bankruptcy estate."); *In re Omegas Grp., Inc.*, 16 F.3d 1443, 1449 (6th Cir. 1994) (disagreeing "with the analyses of the vast majority of courts which have addressed bankruptcy claims based on constructive trust"). Other than the decision below, petitioners do not cite any decision addressing whether recognition of a *resulting* trust under state law would implicate the federal bankruptcy policy of ratable distribution.[2]

The distinction between constructive and resulting trusts is significant. As the court below explained:

> Enforcement of a resulting trust differs from post-petition imposition of a constructive trust in two important respects. First, a resulting trust gives effect to the intent of the parties. As such, the circumstances in which it is effective are governed by the usual standards for establishing intent, and not by the relatively undefined equitable considerations that govern constructive trusts. Second, because a resulting trust merely gives effect to the original will of the parties, it is effective from the date of the original transfer, and does not undermine ratable distribution among creditors who possess similar legal rights as of the petition date.

Pet. App. 13a (quoting *In re Sale Guar. Corp.*, 220 B.R. 660, 667-668 (B.A.P. 9th Cir. 1998)) (quotation marks omitted).[3]

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[2] Petitioners cite other appellate decisions involving tax-sharing agreements between parent companies and their subsidiary banks. Pet. 23-24. None of those decisions addresses the treatment of resulting trusts.

[3] As shown in the text above, the court of appeals in this case endorsed, and quoted at length from, the analysis of the Bankrupt-

In an attempt to minimize this distinction, petitioners argue that, although a resulting trust "is a separate doctrine in theory, in practice courts often confuse it with a constructive trust and/or describe them interchangeably." Pet. 21. But any lack of precision by other courts in other contexts is no reason to grant review here, given the explicit attention paid by the court below to the distinction's significance. Petitioners also argue that it is "circular" to state, as the court below did, that property held in a resulting trust "never belonged to the transferee 'in the first place.'" *Ibid.* (quoting Pet. App. 14a). In support of that contention, however, petitioners cite only *Omegas Group*—a decision about *constructive* trusts. Pet. 21-22. In any event, there is nothing circular about suggesting that the parties to the TSA intended for AmTrust to hold the beneficial interest in tax refunds generated by its own operating losses.

Finally, petitioners state that "[a] resulting trust, like a constructive trust, is an equitable remedy imposed after the fact by courts." Pet. 22. But a resulting trust is a trust relationship "founded upon the intention, implied in law, of the parties to the transaction." *Phillips* v. *Althoff*, No. 1-90-91, 1991 WL 217562, at *1 (Ohio Ct. App. Aug. 9, 1991). Although judicial recognition of the trust may occur at a later date, such recognition therefore "merely gives effect

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cy Appellate Panel in *In re Sale Guaranty Corporation*. In that case, the Ninth Circuit ultimately "affirm[ed] the judgments of the bankruptcy court for the reasons set forth in the opinion of the Bankruptcy Appellate Panel." *In re Sale Guar. Corp.*, 199 F.3d 1375, 1375 (2000). Thus, the only other court of appeals that appears to have considered the status of resulting trusts under federal bankruptcy law reached the same conclusion as did the court below.

to the original will of the parties." Pet. App. 13a (citation omitted).

A constructive trust, by contrast, "is not really a trust." *Omegas Grp.*, 16 F.3d at 1449. Rather, it "is an equitable remedy imposed to prevent fraud or unjust enrichment." *Brate* v. *Hurt*, 880 N.E.2d 980, 985 (Ohio Ct. App. 2007) (citation omitted). As the court below recognized, the difference means that "resulting trusts, unlike constructive trusts, do not subvert the policy of ratable distribution." Pet. App. 12a. Petitioners' contrary view is not reflected in the decision of any court of appeals.

3. Two additional considerations further counsel against review here.

First, petitioners seek this Court's intervention while the case is still in an interlocutory posture. Petitioners may yet prevail on remand, thereby mooting the question presented. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (No. 92-1213) (Scalia, J., respecting the denial of the petition for a writ of certiorari); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

Second, although petitioners focus solely on the Sixth Circuit's ruling as to resulting trusts, the court also held that "[t]he FDIC's evidence might * * * establish an agency relationship" with respect to the tax refund generated by AmTrust's operating losses. Pet. App. 14a. That holding could provide a separate basis for the district court, on remand, to determine that AmTrust owns the portion of the Refund generated by its own losses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

RICHARD J. OSTERMAN, JR.
Acting General Counsel
FLOYD I. ROBINSON
Acting Deputy General Counsel
COLLEEN J. BOLES
Assistant General Counsel
KATHRYN R. NORCROSS
Senior Counsel
JOSEPH BROOKS
Counsel
Federal Deposit Insurance Corporation

JANUARY 2015