No. 13-1480

In the Supreme Court of the United States

CLIFFORD ZUCKER, IN HIS CAPACITY AS LIQUIDATING SUPERVISOR FOR NETBANK, INC., PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS CAPACITY AS RECEIVER OF NETBANK, FSB

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a federal income-tax refund received by the debtor holding company was not property of the bankruptcy estate because the debtor had no equitable interest in the refund, which was generated by its subsidiary and received by the holding company in its role as agent for the subsidiary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-18a) is reported at 729 F.3d 1344. The order of the district court (Pet. App. 19a-21a) is not published in the *Federal Supplement* but is available at 2012 WL 2383297. The judgment and order of the bankruptcy court (Pet. App. 25a-71a) is reported at 459 B.R. 801.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2013. A petition for rehearing was denied on January 15, 2014 (Pet. App. 1a-2a). On March 27, 2014, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 9, 2014, and the petition was filed

on that date. 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 that practice 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).

NetBank, Inc. (Parent) is the parent corporation of several subsidiaries, including NetBank f.s.b. (Bank). Pet. App. 4a. The Parent and its subsidiaries have chosen to file income-tax returns on a consolidated basis. *Id.* at 5a. To allocate tax liability within the consolidated group, the group members entered into a tax sharing agreement (TSA). *Ibid.* Section 10(c) of the TSA "specifies that Georgia law governs the agreement." *Id.* at 13a; see *id.* at 7a n.3. Under the TSA, each group member authorizes the Parent to

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[1] See *Wolter Constr. Co.* v. *Commissioner*, 634 F.2d 1029, 1031 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, unused investment credits, and excess charitable deductions; reduction in gain on sale of a subsidiary; and reduction of the minimum tax. *Ibid.*

represent the member "as its agent and attorney-in-fact" for matters related to consolidated filings. *Id.* at 9a-10a.

The TSA also sets the parameters for calculating each member's share of the consolidated tax liability and the amount a member is entitled to receive if it incurs a loss. With respect to loss carrybacks, the TSA provides that refunds for the Bank and its subsidiaries (collectively, the Bank Affiliated Group) are to be calculated on a separate-entity basis, putting the Bank Affiliated Group in the position that it would have occupied if it had filed a separate return. Pet. App. 8a. The TSA further provides that any payment by the Parent to a group member entitled to a refund for the carryback of its losses shall be made "not later than thirty (30) days after the date on which a credit is allowed or refund is received" with respect to the taxable year to which such payment relates. *Ibid.*

The protective, separate-entity treatment afforded to the Bank Affiliated Group is reinforced by another provision of the TSA, which expresses the parties' intent to allocate their tax liability "in accordance with the Interagency Statement on Income Tax Allocation in a Holding Company Structure." Pet. App. 10a. The Interagency Statement referred to is a joint policy issued by federal banking regulators to provide uniform guidance on the structure of tax-sharing agreements. 63 Fed. Reg. 64,757 (Nov. 23, 1998). Most relevant for present purposes, the Interagency 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.

In 2007, the Parent sought a refund of taxes based on the carryback of the Bank Affiliated Group's 2006 net operating loss to offset income earned by the Bank Affiliated Group in the 2005 tax year. The carryback produced a refund of approximately $5.7 million (Refund). Pet. App. 5a, 30a.

2. On September 28, 2007, the Office of Thrift Supervision closed the Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as its receiver. Pet. App. 5a. On the same day, the Parent petitioned for bankruptcy. *Ibid.*

Petitioner Clifford Zucker, as liquidating supervisor for the Parent, initiated an adversary proceeding in the bankruptcy court seeking a declaration that the Refund belongs to the Parent's bankruptcy estate under Section 541(a) of the Bankruptcy Code.[2] Pet. App. 5a. Section 541(a) defines the scope of the bankruptcy estate to include "all legal and equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." 11 U.S.C. 541(a)(1). Property that a debtor holds only in trust or as agent,

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[2] The complaint initially named both the FDIC and the United States as defendants because the IRS had not yet paid the Refund. After the parties agreed that the IRS would pay the Refund to the FDIC to hold in escrow pending a determination of ownership, the United States was dismissed from the suit. Pet. App. 32a-33a.

however, is not owned by the debtor and is not part of the bankruptcy estate. See *Begier* v. *IRS*, 496 U.S. 53, 59 (1990) ("Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'") (citing 11 U.S.C. 541(d)); 5 *Collier on Bankruptcy* ¶ 541.05[1][a] at 541-24, ¶ 541.28 at 541-110 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).

On cross-motions for summary judgment, the bankruptcy court held that the Refund belonged to the Parent's bankruptcy estate. In the court's view, under the TSA, the Parent "did not function as a collection agent" on behalf of other members of the consolidated group. Pet. App. 69a. Although the TSA created an "obligation" in the Parent to pay the Bank any tax benefits to which the Bank Affiliated Group would have been entitled, the court viewed the agreement as merely establishing a "debtor-creditor" relationship between the Parent and the Bank. *Id.* at 69a-70a. In reaching that conclusion, the court relied on certain provisions in the TSA that gave the Parent discretion with respect to tax filings; on the fact that the TSA required the Parent to pay the Bank regardless of whether the consolidated group received a refund; and on the absence of any language in the TSA requiring the Parent to segregate refunds or otherwise restricting the Parent's use of refunds it received from the IRS. *Id.* at 69a-70a. The FDIC appealed the bankruptcy court's decision to the district court, which affirmed. *Id.* at 20a-21a.

3. The court of appeals reversed. Pet. App. 3a-18a. The FDIC argued that, absent express agreement to the contrary, a subsidiary should not be assumed to relinquish its entitlement to a tax refund—a principle

sometimes called the "*Bob Richards*" rule. See Gov't C.A. Reply Br. 16-20 (citing *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262 (9th Cir.), cert. denied, 412 U.S. 919 (1973)). The court of appeals held that Georgia law governed the interpretation of the TSA, and it accordingly applied Georgia principles of contract interpretation. See Pet. App. 7a n.3, 13a-14a. The court's conclusion that state law applied was based in part on circuit precedent and in part on Section 10(c) of the TSA itself, which specified that Georgia law governed. See *id.* at 7a n.3, 13a. The court stated, however, that "the outcome of the instant case would not be different if the '*Bob Richards* rule' were applied" because "the intent of the parties expressed in the TSA—the controlling factor under either Georgia contract law or the federal common law as articulated in the '*Bob Richards* rule'—created an agency relationship." *Id.* at 7a n.3.

After "careful examination of all of the provisions in the TSA," the court found the TSA to be "ambiguous with respect to whether [the Parent] 'owns' the refunds received from the IRS before forwarding them to the Bank." Pet. App. 12a. In resolving that ambiguity, the court of appeals considered the background against which the agreement was adopted. *Id.* at 13a-14a. The court noted the "clear expression in the TSA" that the parties intended to comply with the Interagency Statement. *Id.* at 14a. The Interagency Statement, in turn, "specifically state[s] that a parent receives refunds from a taxing authority as 'agent' on behalf of the group members," and it "expressly counsels against entering into a tax allocation agreement that would grant ownership to the parent of refunds attributable to the Bank." *Id.* at 15a. The court also

noted that the TSA's separate-entity treatment of tax refunds reflects a "principle * * * at the core of" the Interagency Statement. *Ibid.* "Based on the language of the TSA and the Policy Statement," the court therefore found that the parties had intended the Parent to act only as an agent when receiving tax refunds solely attributable to the Bank Affiliated Group. *Id.* at 16a. It accordingly held that the Refund was not property of the Parent's bankruptcy estate, but instead was property of the failed Bank. *Id.* at 18a.

ARGUMENT

The court of appeals applied well-established principles of contract interpretation to determine the nature of the parties' property interests in the Refund. The court correctly held that the parties to the TSA intended for the Parent to act as an agent for purposes of receiving tax refunds attributable to the Bank Affiliated Group. Other courts of appeals have engaged in similar analyses to determine the nature of property rights in bankruptcy proceedings.

Petitioner's reliance on the general policy favoring equitable distribution of the bankruptcy estate is misplaced. That policy requires a debtor's property to be divided equally among creditors of equal priority. The policy has no logical bearing, however, on the threshold determination whether particular assets belong to the debtor in the first place.

Petitioner argues that the court of appeals' reliance on state law, and its recognition of an agency relationship in these circumstances, is inconsistent with decisions of the First, Second, and Fifth Circuits. Contrary to petitioner's assertion, however, each of those courts similarly looks in part to state law when deter-

mining the nature of property interests in bankruptcy, as do other courts of appeals. And while petitioner identifies cases from other circuits in which various payments were found to be property of a bankruptcy estate, rather than property held in trust for another, those cases involved agreements quite different from the TSA. Any variation in outcomes merely reflects the differing facts and circumstances under which courts have been asked to determine the existence of fiduciary relationships. Further review is not warranted.[3]

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). 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. Although it ultimately declined to resolve that state-law dispute, the Court affirmed "the basic federal rule * * *

[3] This Court has rejected a previous attempt by petitioner to seek review of a similar question in another dispute with the FDIC over tax refunds. See Pet. at i, *Zucker* v. *FDIC*, 134 S. Ct. 1505 (2014) (No. 13-909) ("May a federal court ignore fundamental presumptions of federal bankruptcy and state law and impose a 'resulting trust' on a federal tax refund payable to a debtor's estate in bankruptcy, thereby diverting the refund to a single unsecured creditor at the expense of other unsecured creditors?").

that state law governs" the ownership status of the disputed property. *Id.* at 57.

Following *Butner*, the courts of appeals routinely apply state law to determine ownership of disputed property. See, *e.g.*, *In re The Ground Round, Inc.*, 482 F.3d 15, 19 (1st Cir. 2007) (analyzing competing claims to disputed property under Pennsylvania law); *In re NTA, LLC*, 380 F.3d 523, 529-530 (1st Cir. 2004) (Illinois law); *In re First Cent. Fin. Corp.*, 377 F.3d 209, 212 (2d Cir. 2004) (New York law); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 96-99 (3d Cir. 1994) (Pennsylvania law); *In re Pinetree, Ltd.*, 876 F.2d 34, 36-37 (5th Cir. 1989) (Mississippi law). Indeed, several such decisions have been rendered in contexts similar to this one—namely, disputes over the status of property under state agency or trust law. See *FDIC v. AmFin Fin. Corp.*, 757 F.3d 530, 532 (6th Cir. 2014) ("[W]e reverse and remand with instructions that the district court consider extrinsic evidence concerning the parties' intent in light of Ohio agency and trust law."); *First Cent. Fin. Corp.*, 377 F.3d at 212 ("In making the determination as to whether a constructive trust applies, New York law controls."); *City of Farrell*, 41 F.3d at 95 ("[W]e look to state law to determine whether the claimant has shown a trust relationship."). The decision below is fully consistent with these cases.

To be sure, the ultimate determination whether particular assets are property of a bankruptcy estate is one of federal law. In this case, for example, the court of appeals' determination that the Refund was not estate property depended (though the court below did not state the point explicitly) on the established rule that, "[b]ecause the debtor does not own an equi-

table 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). That rule is one of federal law derived from the Bankruptcy Code, see *ibid.* (citing 11 U.S.C. 541(d)), not one of Georgia contract or property law. In applying the federal rules that define the parameters of the bankruptcy estate, however, courts routinely and appropriately decide subsidiary property- and contract-law questions under state law "[u]nless some federal interest requires a different result." *Butner*, 440 U.S. at 55.

2. Petitioner asserts that the First, Second, and Fifth Circuits apply federal rather than state law to determine whether a debtor holds property in trust. That is incorrect. In one of the Fifth Circuit cases on which petitioner relies, *In re Oxford Mgmt., Inc.*, 4 F.3d 1329 (5th Cir. 1993), the court explicitly recognized that "the substantive nature of property rights is defined by reference to state law." *Id.* at 1334 (citing *Butner*); see *ibid.* ("The bankruptcy court properly looked to Louisiana law to determine whether Oxford's estate owned the commissions under the terms of the contracts between the parties."). The other decisions cited by petitioner do not address the issue directly. And more-recent decisions from each circuit have expressly applied state law. See *The Ground Round, Inc.*, 482 F.3d at 19; *First Cent. Fin. Corp.*, 377 F.3d at 212; *Oxford Mgmt., Inc.*, 4 F.3d at 1334.

3. This case would be an especially poor vehicle for this Court to consider the precise respective roles of federal and state law in the "property of the estate" inquiry. As petitioner acknowledges (Pet. 12 n.1), he argued in the court of appeals that Georgia law governed the interpretation of the TSA. The court of

appeals stated, moreover, that its decision would be the same regardless of whether Georgia law or federal common law controlled. See Pet. App. 7a n.3. And in discerning the likely intent of the contracting parties, the court emphasized the parties' stated intent to conform to the Interagency Statement, see *id.* at 14a, which is a statement of federal policy issued by federal banking regulators.

The specific state-law principles that the court of appeals discussed, moreover, are scarcely idiosyncratic to Georgia. The court explained that, under Georgia contract law, the clear language of an unambiguous contract controls; rules of construction must be applied if the contract is ambiguous; and one such rule of construction is "to consider the background of the contract and the circumstances under which it was entered into." Pet. App. 13a-14a (citations omitted). It is hard to imagine a contract-law regime that does not recognize those principles.

4. The "federal bankruptcy policy of equality of distribution among similarly situated creditors" (Pet. 25) does not call for a different result. Because that policy speaks to the proper distribution of estate assets, it "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 governs the disposition of the present case—*i.e.*, that property held by the debtor as trustee or agent of

another is *not* estate property—likewise reflects federal bankruptcy policy, and there is no sound reason that it should be disregarded.[4]

5. For similar reasons, there is no merit to petitioner's related suggestion that the burden to establish the existence of a fiduciary relationship should be placed on the beneficiary as a matter of federal common law. The "federal interest in promoting equality of distribution among similarly situated creditors" (Pet. 22) does not require such a rule. Petitioner's proposed burden-allocation rule would not necessarily favor creditors, moreover, because the debtor is as likely to be a fiduciary as to be a beneficiary.

No circuit conflict exists on this issue. Of the cases cited by petitioner, only *In re Morales Travel Agency*, 667 F.2d 1069, 1071 (1st Cir. 1981), directly addressed who bears the burden to establish a fiduciary relationship. Without citing *Morales*, more-recent First Circuit cases have evaluated the status of disputed property under state law. See *The Ground Round*, 482 F.3d at 19; *NTA*, 380 F.3d at 529-531. In *Oxford Management*, the Fifth Circuit applied something akin to a clear-statement rule, but it did so as a matter of state law. 4 F.3d at 1336 ("Under Louisiana law, an agency relationship cannot be presumed, it must be clearly established."). The other two decisions cited by petitioner say nothing about the burden of estab-

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[4] Creating a special federal rule to maximize debtor property would be particularly inappropriate in the present case because the FDIC, in its capacity as receiver for the insolvent Bank, has obligations similar to petitioner's to marshal assets and pay creditors. See 12 U.S.C. 1821(d)(11)(A). Petitioner offers no reason that Congress would intend to favor the creditors of one insolvent institution (the Parent) over those of another (the Bank).

lishing a fiduciary relationship, other than to admonish that "'substance [should] not give way to form.'" *In re Sakowitz*, 949 F.2d 178, 183 (5th Cir. 1991) (quoting *In re Shulman Transp. Enters., Inc.*, 744 F.2d 293, 295 (2d Cir. 1984)).

In any event, the TSA contains explicit indications that the parties to the agreement intended to create an agency relationship. Section 9(c) states that "[e]ach Affiliate hereby irrevocably appoints [the Parent] as its agent and attorney-in-fact" for purposes that include the claiming of tax refunds. Pet. App. 9a-10a. Section 10(a) states the parties' intent "to allocate the tax liability in accordance with the Interagency Statement," which in turn provides that "a parent receives refunds from a taxing authority as 'agent' on behalf of the group members." *Id.* at 10a, 15a. And while the court of appeals found the TSA as a whole to be ambiguous, see *id.* at 13a, it did not suggest that petitioner bore the burden of *dis*proving the existence of an agency relationship. Rather, the court considered all relevant evidence of the parties' intent, without placing a thumb on the scale in either direction, and concluded that the TSA was best read to establish an agency relationship.

6. Finally, the different outcomes in the cases cited by petitioner simply reflect the fact that those cases involved different facts and circumstances. In each case cited, the court followed the same general approach that was applied below, looking to the terms of the parties' agreement to determine the nature of the parties' relationship. See *Oxford Mgmt.*, 4 F.3d at 1336-1337; *Sakowitz*, 949 F.2d at 181-183; *Shulman Transp.*, 744 F.2d at 295-296; *Morales*, 667 F.2d at 1071-1072. Similarly here, the Eleventh Circuit found

an agency relationship based on its review of the TSA, along with other indicators of the parties' intent. See pp. 5-7, *supra*. It is unsurprising that courts facing differing circumstances will sometimes reach different outcomes, especially since none of the decisions cited by petitioner addresses the treatment of consolidated tax refunds. There is no division of authority warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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