

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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SIMON E. RODRIGUEZ, AS CHAPTER 7)
TRUSTEE FOR THE BANKRUPTCY ESTATE)
OF UNITED WESTERN BANCORP, INC.,)
) Petitioner,)
) v.) No. 18-1269
FEDERAL DEPOSIT INSURANCE)
CORPORATION, AS RECEIVER FOR)
UNITED WESTERN BANK,)
) Respondent.)
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Pages: 1 through 71
Place: Washington, D.C.
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8 FEDERAL DEPOSIT INSURANCE)

9 CORPORATION, AS RECEIVER FOR)

10 UNITED WESTERN BANK,)

11 Respondent.)

12 - - - - -

13 Washington, D.C.

14 Tuesday, December 3, 2019

15

16 The above-entitled matter came on
17 for oral argument before the Supreme Court of the
18 United States at 10:05 a.m.

19

20 APPEARANCES:

21 MITCHELL P. REICH, ESQ., Washington, D.C.;

22 on behalf of the Petitioner.

23 MICHAEL R. HUSTON, Assistant to the Solicitor General,

24 Department of Justice, Washington, D.C.;

25 on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-1269,
5 Rodriguez versus the Federal Deposit Insurance
6 Corporation.

7 Mr. Reich.

8 ORAL ARGUMENT OF MITCHELL P. REICH

9 ON BEHALF OF THE PETITIONER

10 MR. REICH: Mr. Chief Justice, and may
11 it please the Court:

12 The question presented in this case is
13 what body of law courts should apply to
14 determine ownership of consolidated tax refunds.
15 In our view, the answer to that question is
16 straightforward.

17 Courts should apply state law. That's
18 the body of law that virtually always governs
19 property rights disputes in our federal system,
20 and, here, the political branches have not
21 displaced that traditional area of state power
22 either by statute or by federal regulation.

23 The FDIC takes a different approach,
24 although exactly what that approach is has
25 changed somewhat over the course of this

1 litigation. In the lower courts, the FDIC
2 advocated a rule of federal common law known as
3 the Bob Richards rule, which holds that
4 ownership of a tax refund presumptively resides
5 with the subsidiary whose losses gave rise to
6 that refund. That's the rule the FDIC has
7 advocated for decades, and that's the rule the
8 Tenth Circuit applied below.

9 But, in this Court, the government has
10 abandoned any defense of the Bob Richards rule,
11 and as our opening brief explains, that rule
12 fails every test this Court has established for
13 the creation of federal common law and
14 contravenes the tax laws themselves.

15 Instead, the government advocates a
16 brand-new rule, one that it's never pressed in
17 the lower courts and that, to our knowledge, no
18 court has ever adopted. But this rule suffers
19 from an even more basic flaw than Bob Richards
20 itself. It simply assumes the answer to the
21 very ownership question at issue.

22 The government's argument starts from
23 the premise that where a parent has agreed to
24 pay its subsidiary the amount of a tax refund,
25 the subsidiary has been vested with "ultimate

1 entitlement to the refund itself."

2 That assumption serves as the
3 load-bearing pillar of the government's entire
4 argument. Yet, it has no basis in state law.
5 The government disclaims any argument it's
6 grounded in federal law, and it can't even find
7 footing in the -- in the Ninth Circuit's 1973
8 Bob Richards decision.

9 Starting with state law, it's simply
10 not the case that where a parent agrees to pay
11 its subsidiary the amount of a refund, the
12 subsidiary necessarily has any property rights
13 in the refund itself. Rather, there are two
14 possible ways of characterizing that payment
15 obligation which have substantially different
16 legal consequences.

17 JUSTICE GINSBURG: Before you proceed
18 with that argument, you now said your question
19 presented was about Bob Richards. You say that
20 the government has abandoned that position.

21 The Tenth Circuit, on the other hand,
22 the opinion is shot through with quotes from the
23 contract and what the Tenth Circuit said, it --
24 it was examining the parties' agreement to
25 determine whether the parent or sub gets this.

1 So it seems that the Tenth Circuit, while it
2 might have cited Bob Richards, was relying on
3 contract interpretation.

4 Why should we take up Bob Richards at
5 all in this case? Because both sides agree that
6 that's not what should be dispositive, and the
7 Tenth Circuit said here we have a contract,
8 calls for contract interpretation. State law,
9 contract interpretation. The question
10 presented, it seems, has now vanished from the
11 case.

12 MR. REICH: I think the Bob Richards
13 rule was critical to the Tenth Circuit's
14 decision, and you can tell that both from what
15 the Tenth Circuit said and what the Tenth
16 Circuit did. What the Tenth Circuit said on
17 page 18a of the petition appendix is that Bob
18 Richards "clearly applies to this case and
19 provides the general framework we must apply in
20 resolving the parties' dispute."

21 It then went to say that what Bob
22 Richards requires is that the -- the written
23 terms of the contract unambiguously deviate from
24 the Bob Richards rule. So it -- it understood
25 Bob Richards as establishing a clear statements

1 rule, which is the understanding that the lower
2 courts generally have of Bob Richards and that
3 the FDIC itself has advocated for decades.

4 And then, when the court went on to
5 analyze the agreement, it didn't apply the
6 ordinary rules of state agency law to determine
7 whether an agency relationship had been created
8 here. It did what it said it was going to do,
9 which is just look at the bare words of the
10 agreement and see if they unambiguously departed
11 from the Bob Richards rule.

12 JUSTICE SOTOMAYOR: Excuse me. May I
13 -- because you're going to have to point to
14 something in -- some words in the opinion that
15 do that. I -- I -- I read the opinion. You're
16 right, it said Bob Richards sets out the rule.

17 But the first step of Bob Richards is:
18 Does the contract tell us who has interim
19 ownership? That's how I read the opinion. Does
20 state law trump a contract allocation of
21 ownership?

22 MR. REICH: No. State law sets the
23 inquiry to determine whether the parties have
24 vested equitable title in an entity --

25 JUSTICE SOTOMAYOR: No, no, no, no --

1 MR. REICH: -- that does not --

2 JUSTICE SOTOMAYOR: -- answer my
3 question. If the contract said you're my agent,
4 as clearly as that, would state law go any
5 further? Would it change that statement?

6 MR. REICH: State law would not deem
7 that sufficient to create an agency
8 relationship.

9 JUSTICE SOTOMAYOR: Ahh, that's what
10 the fight's about, whether state law requires
11 something in addition to that?

12 MR. REICH: Well, the -- the
13 overarching fight is as to whether courts should
14 apply the ordinary --

15 JUSTICE SOTOMAYOR: No, I don't want
16 -- I don't an overarching fight. I -- I want to
17 know what state -- does state law say that state
18 law trumps contract agreement?

19 MR. REICH: It doesn't say that it
20 trumps the contract agreement, but I think --

21 JUSTICE SOTOMAYOR: All right. So it
22 doesn't say that. Does it say we don't look to
23 the contract to see who -- to establish if it
24 does so unambiguously?

25 MR. REICH: It says you look to the

1 contract to determine whether the parties have
2 consented to enter an agency relationship.

3 But --

4 JUSTICE SOTOMAYOR: All right. So
5 that's what state law says. So in which ways
6 did the Tenth Circuit err in looking at the
7 contract to determine whether the parties
8 consented to an agency relationship?

9 MR. REICH: The Tenth Circuit erred
10 because it -- under state agency law, under the
11 ordinary rules of state agency law, which the
12 Tenth Circuit didn't cite or even purport to
13 apply, the prerequisites for establishing the
14 agency relationship are to -- are that the
15 agents must be vested with both loyalty and
16 control to the principal -- by the principal.
17 The principal must have interim control over the
18 agent. That's the defining feature of an agency
19 relationship.

20 And the common law is equally clear
21 that simply labeling someone an agent is not
22 sufficient to establish a common law agency
23 relationship. That is in Section 1.02 of the
24 Third Restatement, Section 1 of the Second
25 Restatement --

1 JUSTICE SOTOMAYOR: Was this argued
2 below?

3 MR. REICH: Yes, this was argued in
4 exactly those terms below at every stage of the
5 proceedings.

6 JUSTICE SOTOMAYOR: So am I to assume
7 you -- are you arguing that somehow, because of
8 the Bob Richards rule, the court was not paying
9 attention to what the contract did or didn't do?

10 MR. REICH: Yes. What the -- the
11 court expressly said the Bob Richards rule
12 required was that the contract must
13 unambiguously deviate from--

14 JUSTICE SOTOMAYOR: Tell me where the
15 words -- where that -- where in the opinion you
16 see those words.

17 MR. REICH: On page 18a of the
18 petition appendix in the -- at -- at the end of
19 the paragraph, it says that -- after it says Bob
20 Richards outlines the general framework we must
21 apply, it says that, therefore, as directed by
22 Barnes and Bob Richards, we must look to the
23 terms of the agreement and -- and see whether
24 they unambiguously --

25 JUSTICE KAGAN: Well, it does say

1 that.

2 JUSTICE BREYER: No, it doesn't. It
3 says taking into account Colorado case law. You
4 happened to leave those words out.

5 MR. REICH: Yes. It looked to
6 Colorado case law --

7 JUSTICE BREYER: Well, that -- that's
8 what it says.

9 MR. REICH: Only as to the question of
10 how does one read a contract. But it didn't --

11 JUSTICE BREYER: No. Ah. How does
12 one read a contract. Okay. They say here's
13 what we'll do. We'll look at the agreement,
14 taking into account Colorado case law, and
15 decide whether it unambiguously says how tax
16 refunds are to be handled. Then the next few
17 pages, they do that.

18 Then, at the end, they say, you know,
19 it's ambiguous, but there's a rule, right,
20 written down here that says in the case of
21 ambiguity, you decide it in favor of the bank,
22 the subsidiary. And so we decide it in favor of
23 the bank, and we conclude, since it must be
24 construed in favor of the bank and the FDIC, the
25 agreement must be read as creating only an

1 agency relation between the parent and the bank.

2 Okay. I read that. I thought, unless
3 there's some Colorado law that says that that
4 doesn't create an agency, they've said under
5 Colorado law it creates an agency.

6 MR. REICH: And there is Colorado law
7 that says that doesn't create an agency.

8 JUSTICE BREYER: Good. Where is that
9 in the briefs?

10 MR. REICH: That's in our -- that's in
11 our brief --

12 JUSTICE BREYER: Where? What page is
13 it? I want to read it.

14 MR. REICH: In Part II of our brief,
15 we go --

16 JUSTICE BREYER: And what pages should
17 I read?

18 MR. REICH: I -- I believe beginning
19 on page 15 of our reply brief, we discuss the
20 requirements --

21 JUSTICE BREYER: Ah.

22 MR. REICH: -- of Colorado law.
23 Starting on page 16 --

24 JUSTICE BREYER: And do you say and,
25 in fact, even though they said, taking into

1 account Colorado law, we think this creates an
2 agency relation; even though they said that,
3 that was wrong as a matter of Colorado law?

4 MR. REICH: Yes. That's -- that's
5 precisely what we say --

6 JUSTICE BREYER: Okay.

7 MR. REICH: -- that they don't look
8 to --

9 JUSTICE BREYER: Now, if they've made
10 a mistake of Colorado law, I guess there is a
11 group that could answer that question. And
12 they're not sitting in front of you.

13 MR. REICH: But the --

14 JUSTICE BREYER: They're sitting in
15 Denver.

16 (Laughter.)

17 MR. REICH: Yes, Your Honor, but the
18 issue here is not simply that it made a mistake
19 of Colorado law. It's that it didn't even
20 purport to be applying the right body of
21 Colorado law. It said that it needed
22 unambiguous evidence in the written terms of the
23 agreement. It doesn't cite to any Colorado
24 cases as to agency. And the word "control,"
25 which is the clear prerequisite for agency in

1 Colorado, doesn't appear once in its opinion.

2 So its entire mode of analysis was
3 dictated by what it understood to be the federal
4 common law rule, which was a clear statements
5 rule.

6 JUSTICE KAVANAUGH: Is it enough then
7 for us to say in your view that the Bob Richards
8 rule is not good law and then to send it back?

9 MR. REICH: I think that --

10 JUSTICE KAVANAUGH: That's all we
11 would say: Bob Richards. Federal common law.
12 We don't do that. That's not a good rule.
13 That's all we're going to say about this. Send
14 it back, as Justice Breyer says, and you can
15 look at state law without any thumb on the scale
16 provided by the Bob Richards rule?

17 MR. REICH: I think that's essentially
18 correct, Your Honor. The one amendment I'd make
19 to that is I think the Court should clarify that
20 in conducting, determining whether an agency or
21 trust relationship exists, courts should apply
22 the ordinary rules of state agency or trust law,
23 not varied in any way because of the fact that a
24 consolidated tax refund is available here.

25 And I think that guidance is quite

1 important because, if one looks at the lower
2 court cases, even that's declined to apply the
3 Bob Richards rule, there appears to be some
4 confusion in the lower courts as to whether they
5 should conduct a different analysis.

6 For example, the Eleventh Circuit's
7 Net Bank decision, although it rejects Bob
8 Richards, it still doesn't purport to apply
9 normal Georgia agency law. It does -- it -- it
10 just looked at the plain words of the agreement
11 according to some undefined federal law
12 standard.

13 JUSTICE KAVANAUGH: I guess the other
14 thing we'd have to say as well is that the IRS
15 regs don't speak to this question.

16 MR. REICH: Yes, Your Honor.

17 JUSTICE KAVANAUGH: The SG's -- the
18 SG's new argument.

19 MR. REICH: And I think the SG's new
20 argument, it all hinges on the -- on the notion
21 that when a payment -- there's a payment
22 obligation from parent to sub, entitlement to
23 the refund has been vested in the sub, because
24 what they say repeatedly throughout their brief
25 is that the -- the sole office of the

1 regulations in this context is not to alter the
2 parties' underlying ownership rights under state
3 law. They say that at pages 18 to 19, 20 to 32
4 and 38.

5 And -- and we agree with that. That's
6 -- that's correct. And that has to be right
7 because there's nothing in the federal tax
8 regulations, let alone the Internal Revenue
9 Code, that expresses any interest or concern
10 with how ownership rights are allocated within
11 an affiliated group. They're simply silent on
12 that question.

13 And the government makes much of the
14 word "agent" in the tax regulations, but that
15 doesn't get them where they need to go for at
16 least two reasons.

17 One is that that word has universally
18 been understood by the government itself and by
19 every lower court as just a procedural
20 designation that identifies the parent as the
21 sole member of the group authorized to
22 communicate with the IRS, not as vesting it with
23 the obligations of a common law agent.

24 And, in any event, second, even if it
25 did carry some of its common law baggage, all

1 the regulations say is that the parent is agent
2 for the group as a whole, the affiliated group
3 of which the parent itself is a member.

4 So it doesn't tell you who within the
5 group actually gets the refund. You need to
6 look to the parties' agreement as interpreted
7 under state law to answer that question.

8 And so that just brings you back to
9 the underlying state law question: Do the
10 parties agree the parent gets the refund and
11 just those debts to the subsidiaries, or do the
12 parties actually vest equitable title to the
13 refund in -- in the subsidiaries?

14 JUSTICE SOTOMAYOR: How do we write
15 this? Justice Kavanaugh says we say no common
16 law, Bob Richards rule. But, if we read this
17 opinion and don't think that they apply the Bob
18 Richards rule to the interim ownership question,
19 which is what's at issue here, you're just
20 claiming a misapplication of Colorado law.

21 MR. REICH: Yeah.

22 JUSTICE SOTOMAYOR: I don't -- I -- I
23 will ask the Solicitor General whether they
24 stand by -- they seem even under their test to
25 create a common law rule under the two prongs.

1 So I'll ask them whether creating any kind of
2 federal common law is right or not and they can
3 answer that question.

4 But I don't know how I get to it when
5 they haven't briefed that question, and I don't
6 know how I get to it if I assume that what the
7 -- the Circuit did was what I said, which was to
8 look to the contract to see if it created an
9 agency or debtor/creditor situation.

10 Do I write an opinion that says when
11 you look to the contract, that's what you do,
12 and you apply just general state agency
13 debtor/creditor law?

14 MR. REICH: I think that's exactly
15 what the opinion should say, Your Honor. And I
16 just want to make a few points.

17 JUSTICE SOTOMAYOR: So we don't need
18 to reach Bob Richards, is what I keep saying.

19 MR. REICH: But the -- a -- a few
20 points, Your Honor. First, I think the
21 government's failure to defend Bob Richards
22 can't be a reason not to reach that question.
23 That's --

24 JUSTICE SOTOMAYOR: Why?

25 MR. REICH: -- literally the question

1 presented in this case.

2 JUSTICE SOTOMAYOR: Usually, we need
3 adversarial testing before we reach questions
4 that are not implicated by the issues before us.

5 MR. REICH: Well, I do think the issue
6 is implicated. I would just take the Tenth
7 Circuit at its word that it said Bob Richards
8 clearly applies to this case and, for the
9 reasons I mentioned, it understood that as
10 establishing a clear statement rule.

11 And I think --

12 JUSTICE KAGAN: Well, but, Mr. Reich,
13 it didn't -- it said, you're exactly right,
14 unambiguously, so it says there's a clear
15 statement rule.

16 But then, in its contract analysis, it
17 obviously doesn't apply a clear statement
18 because, in 10 pages of contract analysis, it
19 says some provisions do this, and then, on the
20 other hand, some provisions do that.

21 And then, in the end, we're relying on
22 a default provision in the contract itself. So
23 that's nobody's idea of a clear statement.

24 So it doesn't seem as though that's
25 what they were doing when they actually sat down

1 to do the work of the opinion.

2 MR. REICH: I -- I -- I do think it
3 was, Justice Kagan, in two ways. One, I think
4 that the fact that they invoked the -- the rule
5 of construction in the contract was their way of
6 determining that the contract did unambiguously
7 address the question as a whole, that they
8 thought the provisions were cut in both ways,
9 but then the contract itself resolved that
10 ambiguity clearly.

11 And, moreover, the -- the -- the --
12 the way that Bob Richards was doing the work was
13 in what question the court was looking at the
14 contract to answer. It was just looking at what
15 the written terms of the agreement said, not
16 what Colorado law actually requires for the
17 creation of an agency relationship, an analysis
18 that even the government doesn't really defend,
19 because, in their brief, they themselves
20 acknowledge that to create an agency
21 relationship under Colorado law, you need
22 control.

23 They think a minimal level of control
24 is sufficient, but -- which we don't think is
25 correct, but even they think the court would

1 have needed to do more under an actual normal
2 agency analysis.

3 So I think the mode of analysis was
4 distorted by this notion that the -- only the
5 words of the contract mattered.

6 JUSTICE KAVANAUGH: I suppose --

7 JUSTICE BREYER: Why is it just in
8 case we reach the question of federal common
9 law, a matter which, when, I guess, I tried to
10 study it, seems to have evaporated, what is --
11 why -- why isn't it common sense to say, look,
12 we're talking here about three bank subs and a
13 parent, and they get a tax refund, and the
14 reason they get the tax refund is because of the
15 bank. They're the ones that lost the money.

16 So mail them the money, IRS. And in
17 case there's something odd about it, there is an
18 IRS rule. And the IRS rule says, you know, it
19 says that that parent, it says, is an agent, an
20 agent for each member of the group. And they
21 describe it's the agent's, i.e., the parent's
22 obligation, to collect the refund for the group.

23 And that's one of the matters subject
24 to the agency. So that's what the IRS says. So
25 I am a naive judge who forgets his federal law

1 course, and I look at that and I say: The IRS
2 wants the money to go back to the -- to the
3 bank. The bank's the one responsible for the
4 refund. They are the ones that lost the money.
5 And why shouldn't it go back to the bank, unless
6 the parties want something different? And if
7 they want something different, all they have to
8 do is tell us in the contract.

9 Now I -- I -- I know there must be a
10 lot of law here that says don't do what seems to
11 make sense.

12 (Laughter.)

13 JUSTICE BREYER: But I'd like to know,
14 in case we reach that issue, what is it?

15 MR. REICH: Yes, Your Honor. I think
16 that that intuition is undoubtedly what underlay
17 the Ninth Circuit's decision. And it wasn't
18 much more than its feeling as to fairness that
19 -- that guided it. And I think there are two
20 categories of flaws there.

21 One is just the absence of any
22 positive legal basis for codifying that
23 intuition into law. There's nothing in the
24 statute or the regs that says that it's the
25 subsidiaries, however sensible that could seem

1 to a judge. And -- and that, as you said, is
2 Federal Law 101. That means the courts can't
3 create the rule themselves.

4 But the second point is that even as
5 to the sense of what's fair, I think the
6 analysis that the Ninth Circuit conducted was
7 overly simplistic on a number of levels.

8 One is that the entire structure of
9 the consolidated return regulations is to treat
10 the affiliated group essentially as if it were a
11 single entity and to merge its income and losses
12 in ways that make it difficult and often
13 contrary to the regulations to try to separate
14 them out as attributable to one member or
15 another. For example, intercompany
16 transactions, losses that are technically listed
17 as one subsidiary's losses could really be due
18 to conduct of other members of the group.

19 And, more broadly, the regulations
20 don't -- are quite clear that payments of tax
21 liability are entirely within this group's
22 discretion to allocate. So allocating refunds
23 to a particular member decouples who -- who pays
24 the tax liability from who gets the refund,
25 which is itself quite unfair.

1 And, finally, I think that the notion
2 that federal law is necessary to achieve what
3 seems like a fair result is itself flawed in
4 that state law contains all the protections that
5 the Bob Richards rule is purportedly designed to
6 achieve. State law contains numerous doctrines
7 to prevent unjust enrichment. There's
8 constructive trust. There's fiduciary duty.
9 And many states have essentially the Bob
10 Richards rule as rules of their own common law.
11 In the FDIC v. FBOP decision that both parties
12 cite, an Illinois court applied Illinois law
13 which essentially has Bob Richards' rule at the
14 state level. And so does Oregon.

15 So I think that there was no
16 unfairness created by the application of that
17 normal body of law, and states or the political
18 branches are the ones entrusted with the
19 authority to make these judgments as to
20 fairness.

21 I do want to go back to this point as
22 to what the Tenth Circuit below said because I
23 also think it's important to note that the
24 government's principal reason for opposing cert
25 in this case was that purportedly Bob Richards

1 didn't play a role in the decision below. We
2 responded to the cert reply, and the Court
3 granted the case nonetheless.

4 And I think the government's refusal
5 to defend the Bob Richards rule isn't a reason
6 to not reach the question. I -- I think that
7 it's a sophisticated litigant; it certainly
8 shouldn't be encouraged for declining to answer
9 what's clearly the question presented.

10 And -- and, in addition, there's many
11 examples in this Court in which a difficult, if
12 not impossible to defend, legal rule comes up to
13 the Court. The Respondent just doesn't defend
14 it. I think Justice Alito's opinion in
15 Travelers Casualty and Surety Co. is a good
16 example of this, actually quite a similar rule
17 to this. And the Court's practice in many of
18 these cases is simply to deem the rule invalid,
19 a rule that is manifestly indefensible, and --
20 and either not address or reject the
21 government's other --

22 JUSTICE GINSBURG: The problem is --

23 MR. REICH: -- grounds for defending.

24 JUSTICE GINSBURG: -- we -- we have
25 had no adversarial confrontation on -- on this

1 issue, and we usually don't decide an abstract
2 -- or a question disembodied from the case, that
3 it has to be an actual controversy between the
4 parties.

5 And so you're -- you're -- you present
6 a question; the other side says that's
7 irrelevant to this case. We have no one on the
8 other side defending the rule.

9 MR. REICH: I think the government had
10 every opportunity to defend this rule. That was
11 -- that was the question presented. That's the
12 question on which the Court granted cert.

13 JUSTICE KAGAN: Just to put it another
14 way, though, Mr. Reich, had the government come
15 to us and said we no longer intend to defend the
16 Bob Richards rule, I think we probably wouldn't
17 have thought twice about just -- we would have
18 said, well, then we need to appoint an amicus.

19 MR. REICH: I think it's a question as
20 to why the government didn't do that in this
21 case if it had no intention of defending the
22 rule on which the Court granted cert.

23 I also think it's notable that the
24 government's brief attempts to cram its new rule
25 into the Bob Richards decision, perhaps in

1 recognition of the fact that that is the
2 question on which the Court granted cert and it
3 needed some basis for grounding its argument in
4 that decision. Of course, for the reasons we
5 give, the rule it's advocating here has only
6 passing resemblance to the actual Bob Richards
7 rule applied by the lower courts or by the Tenth
8 Circuit in this case.

9 And so -- and so I don't think that
10 the government's refusal to address the question
11 can be a reason for the Court to allow a rule
12 that is -- I think for the reasons we give in
13 our opening brief, just fails every possible
14 test for the creation of federal common law,
15 something that is permitted only in the
16 narrowest of circumstances.

17 JUSTICE KAVANAUGH: And there's the
18 circuit split.

19 MR. REICH: And there is a circuit
20 split, a 4-3 --

21 JUSTICE KAVANAUGH: And the government
22 benefits from this rule throughout the country.

23 MR. REICH: Absolutely. It -- and --
24 and this is --

25 JUSTICE KAVANAUGH: And it's

1 manifestly indefensible.

2 MR. REICH: And this is a rule of no
3 small --

4 JUSTICE KAVANAUGH: So -- so their
5 argument suggests, because they're not defending
6 it. Maybe they're going to tell me it is
7 defensible, but --

8 MR. REICH: Well, that'll be a
9 surprise to us. But I think the problem is that
10 this rule is of massive economic significance.
11 This refund is \$4 million. There's cases where
12 these tax refunds go into 100 -- in the Downey
13 case, 170 -- \$370 million. And these issues
14 arise all the time in the bankruptcy courts.

15 And it's often difficult for
16 bankruptcy cases to even reach this Court
17 because they moot out frequently because the
18 bankruptcy proceeding concludes. So I think, in
19 this case, where the Tenth Circuit said
20 literally this rule clearly applies to this
21 dispute and then said it -- set forth the
22 analysis it applied, this is an opportunity for
23 the Court to at last address a rule that has
24 essentially abrogated state property rights for
25 decades, with massive implications for creditors

1 and for parties drafting these agreements, which
2 should -- should know with clarity which law
3 their agreements are going to be interpreted in
4 light of.

5 And if there are no further questions.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Huston.

9 ORAL ARGUMENT OF MICHAEL R. HUSTON
10 ON BEHALF OF THE RESPONDENT

11 MR. HUSTON: Mr. Chief Justice, and
12 may it please the Court:

13 The question in this case is whether
14 the parties who made this contract intended the
15 bank to be the equitable owner of the tax
16 refund. That question turns on the parties'
17 contractual intent.

18 To determine that intent, start with
19 the facts that are undisputed. First, the bank
20 was the taxpayer in this consolidated group who
21 paid the taxes and then generated the losses
22 that earned this refund in the first place.
23 UWBI is just a holding company. It had zero
24 taxable income in the relevant year. It did
25 nothing to earn this refund.

1 Second, the parties here agree that,
2 under the express terms of their contract, when
3 the IRS paid the \$4 million tax refund at issue
4 in this case, the bank was entitled to receive
5 that amount within 10 business days.

6 So given those two undisputed facts,
7 the refund is headed within 10 days to the bank
8 and the bank is the taxpayer that generated the
9 refund in the first place, ask yourself: Why
10 would these parties have intended to make UWBI
11 the equitable owner of the tax refund and left
12 the bank as nothing more than an unsecured
13 creditor? Especially when, if the parties had
14 made that type of arrangement, they would very
15 likely have violated the Federal Reserve Act.

16 The answer is they didn't. Every
17 relevant provision of the contract shows that
18 the parties intended to make the bank the owner
19 of the refund and to make UWBI an agent. First,
20 as Justice Sotomayor pointed out, the parties
21 specified that UWBI would act as an agent on
22 behalf of the subsidiaries. That's the language
23 of their contract.

24 Second, they said further that the
25 essence of their agreement, the core logic of

1 the agreement, was that the bank ought to be
2 treated as a separate taxpayer and UWBI should
3 be "merely an intermediary with the IRS." That
4 type of language, "agent," "mere intermediary,"
5 that is exactly what you would expect to find in
6 a contract if what the parties really wanted to
7 get across was that when UWBI collects a tax
8 refund like this one from the IRS, it does not
9 acquire equitable title to it.

10 The parties then went on to specify
11 the duties that UWB had -- UWBI has as an agent.
12 They said that if the bank incurs a loss, it --

13 CHIEF JUSTICE ROBERTS: Mr. Huston,
14 two words you haven't used yet are Bob Richards.
15 What -- what is your position on the extent to
16 which that is implicated in this case? And what
17 is your position on its viability?

18 MR. HUSTON: Your Honor, we think that
19 Bob Richards supply -- as the case describes on
20 its facts and as the courts have understood it,
21 it provides a rule for determining who ends up
22 with a tax refund where parties have not made a
23 contract.

24 I would urge the Court to look at page
25 17a of the Tenth Circuit's opinion. This is

1 where the court describes the Bob Richards rule.
2 It's true, as my friend suggests, that the Tenth
3 Circuit understood that Bob Richards applied to
4 this case. But, on the immediately preceding
5 page of the opinion, the Tenth Circuit explained
6 what the Bob Richards rule is. What the Bob
7 Richards rule is, is a rule where there is not
8 an explicit agreement.

9 The court went on to say, absent any
10 differing agreement, it would apply Bob
11 Richards.

12 JUSTICE SOTOMAYOR: I'm sorry, now
13 let's stop. Assume this was that case. Assume
14 this agreement doesn't specify anything, all
15 right? Can the Bob Richards rule stand? And
16 why should it stand?

17 MR. HUSTON: Well, appreciating --
18 submitting respectfully that the court -- that
19 would be a pure advisory opinion in the context
20 of this case, Your Honor, I'm happy to answer
21 the question. I think the answer to the
22 question is that where parties do not have a
23 contract, the right way to determine who owns a
24 tax refund is to look to state law.

25 I think, as my friend suggests, the

1 FBOP case is a --

2 JUSTICE SOTOMAYOR: So you are
3 rejecting the Bob Richards rule?

4 MR. HUSTON: I -- there is -- we -- we
5 certainly think --

6 JUSTICE SOTOMAYOR: Assuming --

7 MR. HUSTON: Yes.

8 JUSTICE SOTOMAYOR: -- you're right
9 that it applies only when the parties don't have
10 an agreement, you don't think it's right?

11 MR. HUSTON: I do not think that it is
12 correct as a rule of federal common law. And I
13 think the -- the court in Bob Richards itself
14 didn't say it was applying a rule of federal
15 common law. It said it was looking to unjust
16 enrichment.

17 Now, certainly, the Bob Richards
18 opinion could have been more clear, and it's
19 undoubtedly true that some courts --

20 JUSTICE GORSUCH: All right, all
21 right. Let's just --

22 MR. HUSTON: -- have subsequently
23 understood Bob Richards as a rule of federal --

24 JUSTICE GORSUCH: -- let's just stop
25 there because I think this is what the Chief

1 Justice was trying to get at, and -- and Justice
2 Sotomayor, too.

3 If Bob Richards, as understood by the
4 lower courts, as creating a federal common law
5 rule, to require a clear statement in a contract
6 before a contract will be enforced, contrary to
7 existing state law, do we all agree, can we all
8 agree on one thing, that's wrong?

9 MR. HUSTON: I agree that that rule of
10 -- you would not put a thumb on the scale where
11 the parties have a contract --

12 JUSTICE GORSUCH: Okay.

13 MR. HUSTON: -- as we have always --

14 JUSTICE KAVANAUGH: Is that a yes?

15 JUSTICE GORSUCH: All right. That's a
16 lot of words.

17 JUSTICE KAVANAUGH: Is that a yes?
18 It's wrong?

19 JUSTICE GORSUCH: It's wrong. We got
20 that. Okay.

21 JUSTICE KAVANAUGH: Did you say -- you
22 said yes, though?

23 JUSTICE GORSUCH: He said it's wrong.
24 So -- so, if that's the case, counsel --

25 (Laughter.)

1 JUSTICE GORSUCH: He said it's wrong.
2 I'm not -- I'm not letting him off the hook so
3 fast.

4 JUSTICE KAVANAUGH: No, I'm trying to
5 keep him on.

6 CHIEF JUSTICE ROBERTS: I'm -- I'm
7 getting wheezy with this back and forth.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: To be clear --

10 JUSTICE GORSUCH: Let me just --

11 CHIEF JUSTICE ROBERTS: -- is -- is
12 your answer to Justice Gorsuch's question yes or
13 no?

14 MR. HUSTON: The answer to the
15 question is that, where parties have made a
16 contract, ownership of a tax refund is
17 determined pursuant to the terms of the
18 contract. That's --

19 JUSTICE GORSUCH: Pursuant to state
20 law without any thumb on the scale by federal
21 common law?

22 MR. HUSTON: Yes, with -- with --

23 JUSTICE GORSUCH: Okay. Okay. All
24 right. Now, if that's the case, why shouldn't
25 this Court say so? It seems like it would be of

1 material benefit to the lower courts across the
2 country that have operated under a different
3 understanding for this Court to say so. That's
4 why we took cert in this case after all.

5 MR. HUSTON: I'm perfectly comfortable
6 to the Court to write that opinion, Your Honor,
7 but the last line of it has got to be that the
8 judgment is affirmed --

9 (Laughter.)

10 JUSTICE GORSUCH: Well, no, what --

11 MR. HUSTON: -- because this Court
12 reviews judgments --

13 (Laughter.)

14 MR. HUSTON: -- this Court --

15 JUSTICE GORSUCH: How about -- how
16 about -- how about vacate and remand to decide
17 under state law what the rule in this particular
18 -- who cares about the refund in this case? All
19 right. I know you guys care terribly about it.
20 I know your colleagues on the other side care
21 terribly about it.

22 But the Supreme Court of the United
23 States is here to resolve circuit splits on
24 questions of law. We took this to decide the
25 Bob Richards rule, whether it's a thing.

1 And both sides seem to agree that it
2 is not a thing, as understood by so many courts
3 of appeals across the country. Why shouldn't we
4 put a period at the end saying, both sides agree
5 this is not a thing, go back and do it properly?

6 MR. HUSTON: Because the Court reviews
7 judgments and not opinions, Your Honor. And
8 there's no error in the judgment. The judge --

9 JUSTICE GORSUCH: We vacate and remand
10 for reconsideration under different -- new tests
11 all the time, don't we?

12 MR. HUSTON: Not where the judgment --

13 JUSTICE GORSUCH: We do that all the
14 time.

15 MR. HUSTON: Yes, but not where the
16 judgment has no error in it. And you know that
17 the judgment has no error in it because, as
18 Justice Kagan explained, the operative part of
19 the opinion, pages 18a to 27a, that's the
20 portion of the Tenth Circuit's opinion where it
21 gives the rule that supports its judgment.

22 And it doesn't say one word about --

23 JUSTICE KAVANAUGH: But it'll be easy
24 --

25 MR. HUSTON: -- federal common law or

1 Bob Richards or anything.

2 JUSTICE KAVANAUGH: -- it'll be --
3 it'll be easy enough for the Tenth Circuit to
4 say that on remand, to follow up on Justice
5 Gorsuch's question, if Bob Richards did not put
6 a thumb on the scale in its analysis.

7 So you will end up getting the result
8 you want from the Tenth Circuit if they truly
9 did what you think they did.

10 MR. HUSTON: Well, I think, Your
11 Honor, that --

12 JUSTICE KAVANAUGH: But we don't know
13 because they start out with this whole Bob
14 Richards framework, and I don't think you can be
15 sure. And what's the problem with doing, as
16 Justice Gorsuch said, vacating, remanding, and
17 they can do it without Bob Richards?

18 MR. HUSTON: I think you do know, Your
19 Honor, and I think it would be --

20 JUSTICE KAVANAUGH: Well, if we do
21 know, it'll be simple then, won't it?

22 MR. HUSTON: It -- it would be strange
23 for the Court, I think, to vacate a decision and
24 remand so that the Tenth Circuit can simply
25 reinstate pages 18a to 27a --

1 JUSTICE KAVANAUGH: Well, that --

2 MR. HUSTON: -- of its opinion.

3 JUSTICE KAVANAUGH: -- they may or may
4 not do that, though, knowing that Bob Richards
5 does not, contrary to what they said in their
6 opinion, provide the framework for the analysis.

7 MR. HUSTON: It -- but you have to
8 understand, Your Honor, what the court meant by
9 the framework of the analysis. The framework
10 includes the qualification that it applies only
11 where the parties don't have a contract.

12 Remember the judgment that the Tenth
13 Circuit was reviewing. The district court's
14 judgment, the district court had said -- this is
15 on page 49a to 50a of the petition appendix --
16 the court says: Thankfully, I don't have to
17 wade into this messiness about the Bob Richards
18 rule because these parties have a contract, the
19 contract is ambiguous, and the contract itself
20 supplies the way of resolving that ambiguity.

21 JUSTICE KAGAN: Mr. Huston, may I ask
22 you a question about another aspect of your
23 answer to Justice Gorsuch? I think you said
24 that the Bob Richards rule is wrong in the sense
25 that it -- it puts a thumb on the scales when

1 interpreting a contract. Correct?

2 MR. HUSTON: A court should not apply
3 a federal common law rule to -- to put a thumb
4 on -- on the scale in the contract.

5 JUSTICE KAGAN: Yeah. How about if
6 there is no contract at all? Do you think that
7 there is a federal rule that decides the
8 question then?

9 MR. HUSTON: Again, I think that
10 question is not presented by this case. But I
11 -- no, generally not. State law determines the
12 rights and ownership of property, but the Tenth
13 Circuit said that.

14 JUSTICE KAGAN: So, in fact, the Bob
15 Richards rule, whether it's a matter of contract
16 interpretation or whether it's a default rule
17 where no contract exists, as to both aspects of
18 the Bob Richards rule, you're saying there's no
19 place for such a rule in our law?

20 MR. HUSTON: Well, there's not a --
21 there's not a place for a rule of federal common
22 law. But, importantly, I think the Court should
23 also recognize that Bob Richards then went on in
24 an important part of its opinion to say don't
25 make any -- don't have any misunderstanding

1 about how the IRS tax regulations work in this
2 case.

3 And the suggestion that this is a new
4 argument that we've sort of sprung on the Court
5 for the first time is completely incorrect. We
6 cited Bob Richards for this proposition on page
7 13 of our brief to the Tenth Circuit.

8 But the point here is the only reason
9 why we're even entertaining the idea that UWBI
10 would be the equitable owner of a tax refund
11 that the group has allocated to the bank and
12 that the bank earned is because the IRS
13 regulations, for reasons of the IRS's own
14 convenience, pay that refund to the parent.

15 But what the regulations very much
16 want to make clear, and what I hope this Court
17 will use this case as an opportunity to make
18 clear in its opinion, is that when the IRS makes
19 that tax payment to the parent, it does not
20 confer any equitable title.

21 And the reason you know that's true is
22 because the regulations use the term "agent,"
23 which has a well-established common law meaning,
24 and thereby draw on the general common law of
25 agency.

1 And I don't even take --

2 JUSTICE KAVANAUGH: So does the
3 regulate --

4 JUSTICE KAGAN: Well, now I --

5 MR. HUSTON: -- my friend on the other
6 side to dispute that.

7 JUSTICE KAVANAUGH: Go ahead.

8 JUSTICE KAGAN: I guess I'm a little
9 bit confused by this because that suggests that
10 there is a federal rule that comes from the IRS
11 regs that allocates this money in the absence of
12 an agreement.

13 I think, if you would ask Mr. Reich,
14 Mr. Reich would say, no, that's state law that
15 does that. So that does -- does seem as though
16 you're essentially saying that, in the absence
17 of a contract, federal law controls.

18 MR. HUSTON: Your Honor, the
19 regulations rebut the suggestion that corporate
20 parents like UWBI have made all the time, that
21 they ought to be viewed as the owner of a tax
22 refund like this because they're in possession
23 of it.

24 And you can see this argument all over
25 the Blue Brief. Petitioner repeatedly says we

1 are the party who is in possession of the
2 refund. That ought to count when you're
3 figuring this out.

4 The IRS regulations say, no, no, they
5 -- we do not mean to confer any equitable title.
6 We are for reasons of purely our own convenience
7 giving you this refund.

8 And so what I think it means is that
9 you can't -- you can't put a thumb on the scale
10 the other way in favor of corporate parents,
11 which is what some corporate parents have
12 repeatedly tried to ask for, by citing the IRS
13 regulations.

14 Bob Richards correctly interpreted the
15 regulations not to do that. And so federal law
16 --

17 JUSTICE BREYER: Can I before -- I
18 just don't want you to stop. I like where
19 you're going. It's interesting and helpful.
20 But I have two related questions.

21 You're assuming throughout that
22 Colorado law does give the money to the bank.
23 Okay. On pages 16 and 17 of their reply brief,
24 they say no, Colorado law does not because
25 Colorado law requires control by -- of the agent

1 by the principal. And that hasn't happened
2 here. Okay? So just writing the word
3 "affirmed" is going to overlook what seems like
4 a significant dispute.

5 And the other thing that is bothering
6 me, and I'll mention it once, is I tend to think
7 words like "federal common law" are labels which
8 have an uncertain meaning in some instances.

9 And I guess, if I had a cousin who was
10 running the IRS, that cousin might think a very
11 good tax principle is, when the IRS owes an
12 entity money, you should pay it to the entity.

13 And if, for example, the postman got
14 ahold of the check and then went bankrupt, I
15 don't think you'd say, if you were running the
16 IRS -- but there may be no state law to the
17 contrary -- the postman's bubble gum creditor
18 gets some of that \$4 million.

19 All right? So I'm worried about the
20 term. I'm worried about the implications of
21 what we write. But maybe there is an argument
22 about Colorado law here. Although you're
23 certain there isn't, they're certain there is.
24 And so what do we do?

25 MR. HUSTON: Your Honor, let me

1 address all the questions in one -- in one
2 answer.

3 Petitioner has not identified a single
4 case under Colorado law in which parties said we
5 want the nature of our relationship to be an
6 agency, and then a court came back in and said,
7 oh, no, you -- you have not created an agency
8 because you haven't provided the specific forms
9 of interim control that that agency relationship
10 requires. It's supposed to be easy to create an
11 agency relationship.

12 Think about an example where my
13 coworkers appoint me as their agent to go to the
14 deli and pick up lunch. They say, Michael, you
15 will be our agent. The order at the deli will
16 be placed in your name. Bring us back the
17 sandwiches and bring us back the change, too.

18 When I'm on my way back to the office,
19 if I suddenly declare bankruptcy, everyone
20 understands that the sandwiches and the change
21 are the property of my coworkers. They don't
22 become part of my bankruptcy estate.

23 And it doesn't matter that my
24 colleagues didn't specify here is the specific
25 route you have to take from the deli back to the

1 office. And it doesn't matter that they didn't
2 specifically say that I was required to keep
3 each of my six colleagues' change in a separate
4 envelope.

5 In fact, the Restatement at Section
6 8.12, the comment C in the Third Restatement is
7 clear that parties are free to waive the normal
8 segregation obligation if they don't
9 particularly care about it. And you can
10 understand why closely affiliated parties like
11 these would have wanted to say: You know, for
12 10 days, which is the only interim period that
13 we're talking about, we're just not that
14 especially concerned about what UWBI does.

15 JUSTICE ALITO: But what you're
16 talking about, you're talking about general
17 agency law, which is to say you're talking about
18 state law.

19 MR. HUSTON: Absolutely, Your Honor.
20 That's right. And that's -- that's -- but it's
21 also a --

22 JUSTICE ALITO: You want us to take a
23 decision of state law?

24 MR. HUSTON: We want to -- we want you
25 to -- the judgment rests on the contract. We

1 think that judgment is absolutely correct,
2 there's no error in it, and that judgment should
3 be affirmed.

4 And another reason that you know that
5 this judgment is correct is that when this
6 particular group, which contains an insured
7 depository institution, sat down to write their
8 contract, their federal regulator had told them
9 that, pursuant to the Federal Reserve Act, they
10 would not be permitted to engage in a contract
11 like the one that Petitioner advocates.

12 JUSTICE KAVANAUGH: So --

13 JUSTICE ALITO: Well, one of the
14 things I -- I took from what you said a few
15 minutes ago, but maybe this isn't what you
16 meant, was that you want federal law to be
17 involved in this to the extent of not having the
18 actions taken by the IRS in mailing the check
19 figure at all in the determination of ownership
20 under state law.

21 You want the federal government's
22 participation to be completely neutral. Did I
23 misinterpret that?

24 MR. HUSTON: That's basically correct,
25 Your Honor. I -- I just -- I would phrase it

1 slightly differently. The federal regulations
2 bar a corporate parent like UWI -- UWBI from
3 claiming any equitable entitlement to this
4 refund by virtue of the mere fact that it has
5 possession.

6 JUSTICE BREYER: Do we know, by the
7 way --

8 MR. HUSTON: It has that possession as
9 an agent.

10 JUSTICE BREYER: -- on this -- it has
11 put the question in my mind. It may have an
12 obvious answer. But how do we know there is a
13 Bob Richards rule?

14 Now how do we know it isn't like
15 phlogiston? How do we know it really exists?
16 Because it could be every time a court has
17 mentioned Bob Richards' rule, what they're doing
18 is going to exactly where they would go if they
19 simply looked to state law, unless, of course,
20 it's in the contract.

21 Now do we know there is a problem? I
22 mean, which is the case that would be most
23 obvious that a court invoked the Bob Richards
24 rule but went to a result that was different
25 than what you'd reach -- reach if you just read

1 the contract under state law?

2 MR. HUSTON: Your Honor, I think,
3 generally speaking, there aren't very many of
4 them. And that's why when these contracts --
5 when parties --

6 JUSTICE BREYER: Name me one.

7 MR. HUSTON: I -- I -- I'm not sure
8 that there is one. I think -- in fairness, I
9 think the question would be better directed to
10 -- to my friend, but I think that what these
11 courts -- the courts that have looked at these
12 things have said where there's a contract, we
13 should generally speaking apply -- we, in fact,
14 always were going to apply the contract. Every
15 court of appeals recognizes that where the
16 parties have a contract, you apply the contract.

17 And then the question is -- but -- and
18 this is the important part, and, again, I think
19 this goes to one of your other -- Your Honor's
20 other questions. I really hope that the Court's
21 opinion will make clear in this case that when
22 parties set out to determine equitable ownership
23 of a tax refund, using words like "agent" and
24 "mere intermediary" in your contract is a
25 perfectly sensible way, indeed, I think it's the

1 best way, to make clear that the party who holds
2 bare title, who collects the refund from the
3 IRS, does not acquire equitable ownership of it.

4 Petitioner has no sensible explanation
5 for what that language is doing in this contract
6 if not to --

7 JUSTICE KAVANAUGH: In your --

8 MR. HUSTON: -- make clear --

9 JUSTICE KAVANAUGH: -- in your answer
10 to Justice Alito where you said it should be
11 affirmed, should it be affirmed on the basis of
12 the IRS reg or affirmed on the basis of state
13 law?

14 MR. HUSTON: It should be affirmed on
15 the basis of the contract, Your Honor, the
16 judgment of --

17 JUSTICE KAVANAUGH: Contract as
18 interpreted?

19 MR. HUSTON: Under state law. With
20 the caveat that --

21 JUSTICE KAVANAUGH: Does the IRS reg
22 play any role therefore?

23 MR. HUSTON: It -- it plays a role in
24 this limited sense. It --

25 JUSTICE KAVANAUGH: Let me -- let me

1 --

2 MR. HUSTON: Yes.

3 JUSTICE KAVANAUGH: -- ask you this
4 way: If the IRS reg leads you to a different
5 answer, as you described it, than state law
6 does, what happens?

7 MR. HUSTON: It -- it would not. That
8 would not -- the IRS reg does not override state
9 law. That's not how it works.

10 JUSTICE KAVANAUGH: Okay. So it all
11 --

12 MR. HUSTON: It precludes --

13 JUSTICE KAGAN: Well, when you said --
14 you said in your brief federal law provides
15 relevant background for construing the contract
16 --

17 MR. HUSTON: Yes.

18 JUSTICE KAGAN: -- what did you mean?

19 MR. HUSTON: We mean that a
20 Petitioner, a party like Petitioner, UWI --
21 UWBI, cannot come into court and say we -- we
22 have a good claim to being the equitable owner
23 of this refund because we're in possession.
24 After all, the IRS regulations, they paid us.
25 That's how you know we're the owner of it.

1 The IRS regulations do not allow a
2 corporate parent to make that type of argument.
3 And that's what --

4 JUSTICE KAVANAUGH: So --

5 MR. HUSTON: So they do play a role.
6 They don't override state law, but --

7 JUSTICE KAGAN: But maybe -- you know,
8 maybe state law would say if you are in
9 possession, then you are the owner.

10 MR. HUSTON: Well, state law certainly
11 does not say that, Your Honor. I mean, it's
12 emphatically the case that the Restatement does
13 not say that mere possession coupled with
14 something like, you know, the absence of a
15 specific description of interim control leads to
16 equitable ownership.

17 Indeed, as I said, it's supposed to be
18 easy to create --

19 JUSTICE KAGAN: Well, then it just
20 seems --

21 JUSTICE KAVANAUGH: That's --

22 JUSTICE KAGAN: -- as though it's a
23 matter of state law. What does --

24 MR. HUSTON: It is --

25 JUSTICE KAGAN: -- what does federal

1 law have to do with it?

2 MR. HUSTON: -- it is ultimately, at
3 the end of the day, a matter of state law. And,
4 more specifically here, it's a part -- it's a
5 matter of state contract law.

6 JUSTICE KAVANAUGH: And on that
7 question of state law, Justice Breyer was
8 pointing out that there's disagreement about --
9 on page 16 and 17, about what the state law is,
10 and the bankruptcy court had a different view,
11 correct?

12 MR. HUSTON: That's right. It had a
13 different view, an incorrect view.

14 JUSTICE KAVANAUGH: So it had a
15 different view on state law.

16 MR. HUSTON: Yes.

17 JUSTICE KAVANAUGH: So, if it is
18 purely a question of state law and there's been
19 disagreement here and there's disagreement
20 between the bankruptcy court, which is expert in
21 these matters, and the district court and the
22 Tenth Circuit, shouldn't we remand for the state
23 law question to be sorted out?

24 You -- you've implied -- just to
25 follow up on this, you've implied that the state

1 law question is so obvious. But we have the
2 bankruptcy court going the other way on it.

3 MR. HUSTON: Well, it's particular --
4 it's overwhelmingly obvious here because these
5 parties have a contract that resolves any
6 ambiguity in favor of the bank.

7 So to whatever extent there is a fight
8 about what you would do where there's not a
9 contract or if a contract -- you know, in a
10 different case, if the contract were ambiguous,
11 again, I -- I think you can just read the
12 Restatement and understand that it's supposed to
13 be easy for parties to create an agency
14 relationship, but to whatever extent you have
15 doubts about how -- you know, how -- what these
16 parties wanted for their contract, you know that
17 they wanted an agency relationship because they
18 went out of their way to write an
19 ambiguity-resolving provision in favor of the
20 bank. And they did that, again, because their
21 federal regulator had told them to do that. And
22 this is important to the FDIC.

23 It would be very troubling if the
24 Court made a rule that said, you know, it's
25 actually really quite difficult for parties to

1 create an agency relationship to specify that
2 the party that generated the refund has
3 equitable title to it. You have to engage in
4 this onerous analysis and you have to write down
5 a lot of provisions about control --

6 JUSTICE KAVANAUGH: Would it be a
7 problem for the FDIC if we just said it's a
8 matter of state law?

9 MR. HUSTON: Well, Your Honor, I would
10 -- I think the Court should make clear that
11 parties are entitled to rely on the statement
12 that their federal regulator has given them
13 about how they're supposed to handle contracts
14 exactly like this one.

15 And what the federal banking
16 regulators have instructed is write your
17 contract to make clear that you are entering an
18 agency relationship. And, again, parties who
19 have made these contracts have relied on that
20 instruction.

21 So, if this Court goes back and says,
22 you know, it's all just a question of state law,
23 I don't think that that gives adequate weight to
24 what the regulators are instructing insured
25 depository institutions.

1 JUSTICE KAVANAUGH: But I thought you
2 just said to Justice Kagan it is a matter of
3 state law.

4 MR. HUSTON: Well, it's a matter of
5 state -- it is, it is, in the sense that, at the
6 end of the day, you know, these parties have to
7 write a contract.

8 What I am saying is that the federal
9 regulators in this area have told groups that
10 have insured depository institutions that they
11 should enter an agency relationship. They're
12 required to by Section 23A and 23B of the
13 Federal Reserve Act. Those are the affiliate
14 transaction rules.

15 And it would be -- I think so the
16 Court should -- should say that it is easy for
17 parties to enter that type of agency
18 relationship. And, in particular, it suffices
19 to say, in this group, for our purposes, what we
20 want to do is have UWBI collect a tax refund as
21 our agent.

22 Remember that the -- the parties said
23 that when the bank incurs a loss, it is entitled
24 to receive a refund equal to what it would have
25 received if it had filed as a separate taxpayer.

1 If the bank had been a separate taxpayer, it
2 would have been the owner of this tax refund,
3 not merely an unsecured creditor.

4 And, again, there's just no reason,
5 there's no one who benefits from the arrangement
6 that Petitioner suggests, this debtor/creditor
7 relationship, in addition to the fact that it
8 would very likely violate federal law.

9 Think about the parties when they're
10 designing this agreement. They know that the
11 bank is the taxpayer that generated it. They
12 know that they want the refund to go within 10
13 days to the bank.

14 Who benefits from structuring the
15 relationship as a debtor/creditor relationship
16 for those 10 days? The only conceivable entity
17 is the parent company's creditors in a
18 hypothetical future bankruptcy. And there's no
19 way that this group was seeking to protect them
20 and thereby endanger the bank's refund.

21 So, at the end of the day, it is a
22 question of state law, we agree, but we think
23 that the judgment that is under review in this
24 Court rested entirely on state law, the
25 operative part of the opinion is, again, pages

1 18a to 27a.

2 The entirety of that section has
3 nothing to do with federal common law or federal
4 law at all. And that's, again, because the
5 judgment that the Tenth Circuit was reviewing
6 was the one from the district court, which
7 itself had focused on resolving the case based
8 on the parties' agreement.

9 So I hope that, again, the Court will
10 use the case as an opportunity to make clear
11 that the tax regulations don't give a corporate
12 parent any claim to equitable title, first; and,
13 second, that parties are free to allocate
14 questions of tax refunds --

15 JUSTICE SOTOMAYOR: You seem to be
16 saying --

17 MR. HUSTON: -- and they can do it
18 with words like "agent."

19 JUSTICE SOTOMAYOR: But you seem --
20 I'm -- I'm not quite sure what you're arguing,
21 because you seem to be saying the opposite.
22 You're saying the IRS payment should be seen as
23 an agency payment only. That goes back to
24 Justice Kagan's point, which is you're not
25 taking a position either way.

1 MR. HUSTON: The IRS regulations do
2 not override state law, Your Honor. They bar a
3 corporate parent like --

4 JUSTICE SOTOMAYOR: But they don't
5 create a state law agency relationship?

6 MR. HUSTON: Well, they -- no, they --
7 I don't -- that's -- I think they don't, that's
8 right, but what they do do is they bar a
9 corporate parent like UWBI from attempting to
10 invoke its possession as a basis for its
11 equitable ownership.

12 JUSTICE SOTOMAYOR: That -- that --
13 that --

14 MR. HUSTON: They can't make that
15 argument.

16 JUSTICE SOTOMAYOR: I'm sorry,
17 counsel. It makes no sense. Possession is
18 nine-tenths of the law, I was taught as a child,
19 even before I was a lawyer. So possession has
20 some state law consequences.

21 MR. HUSTON: This -- but this is --

22 JUSTICE SOTOMAYOR: Whether you want
23 to bar them or not, you can't do that unless you
24 explicitly state that.

25 MR. HUSTON: Your Honor, they do

1 explicitly state it, and the way that they do it
2 is they use the general common law term like
3 "agent."

4 And that is exactly the term that you
5 would use to make clear that, when UWBI collects
6 a tax refund from the IRS, it doesn't acquire
7 equitable title to it. And you can understand
8 why the parties to this group and the parties to
9 a lot of groups that have these consolidated
10 filing agreements said, you know, we want to
11 make clear that when UWBI goes to the IRS and it
12 just receives the refund for reasons of the
13 IRS's own convenience, that mere fact, that mere
14 possession does not in this case give UWBI any
15 claim to equitable title.

16 And the way that the regulations do
17 that is by saying, agent, we, in this group,
18 know that our federal banking regulators have
19 instructed us to describe our relationship as
20 agency in order to fulfill our legal
21 obligations. And for all those reasons, we are
22 going to say that UWBI in this group is an
23 agent. It's a mere intermediary.

24 Again, if you wanted to design the
25 debtor/creditor relationship that Petitioner

1 suggests, and you went to a lawyer and said draw
2 that up for me, I think what that lawyer would
3 say is the one thing you should not say in your
4 agreement is that the corporate parent is going
5 to be the agent or the mere intermediary of the
6 bank.

7 JUSTICE KAGAN: May --

8 MR. HUSTON: That makes no sense.

9 JUSTICE KAGAN: May I ask, Mr. -- or
10 maybe this isn't a question. Maybe this is more
11 in the realm of making a comment.

12 (Laughter.)

13 JUSTICE KAGAN: And this is not on
14 you, Mr. Huston. You have lots of bosses in the
15 Solicitor General's Office. But, if you had
16 said to the Court that you did not intend to
17 defend Bob Richards, as everybody understands
18 that rule, and if you had said to the Court that
19 you did not intend to state a position on the
20 only question presented in the case, I don't
21 exactly know what we would have done, but I will
22 tell you that there's a pretty good probability
23 that we would have thought that that was an
24 appropriate place to appoint an amicus.

25 So I guess I -- I -- to the extent

1 that this is a question, I want to know how you
2 think we should deal with this issue.

3 MR. HUSTON: Your Honor, I think we
4 told the Court in our brief in opposition that,
5 contrary to Petitioner's representation, the Bob
6 Richards rule actually wasn't doing the work in
7 this case that Petitioner would like it to.

8 There is some disagreement about what
9 the Bob Richards rule does. But everybody
10 agrees that that only happens in a case where
11 the parties don't have a contract. And we said
12 this --

13 JUSTICE GINSBURG: But you did --

14 MR. HUSTON: -- on page 16 of --

15 JUSTICE GINSBURG: -- But you did say
16 --

17 MR. HUSTON: -- our brief in
18 opposition.

19 JUSTICE GINSBURG: You did say in your
20 brief, and this is in pages 31 to 32, "Bob
21 Richards supports the distinct proposition that
22 the parent's role in interacting with the IRS on
23 behalf of the affiliated group does not give the
24 parent temporary equitable title to the refund."

25 So you're bringing up Bob Richards as

1 in support of your position that there's -- that
2 the temporary possession doesn't create any
3 equitable title.

4 MR. HUSTON: That's correct, Your
5 Honor, but that -- that aspect of Bob Richards
6 is an interpretation of the federal tax
7 regulations. It's not a rule of federal common
8 law. And it's a correct interpretation of the
9 federal tax regulations.

10 Justice Kagan, just to return to my
11 answer to your question, again, I think on page
12 16 of our brief in opposition, we made clear the
13 very limited work that we think Bob Richards
14 does in the lower courts and in this case. And
15 we said that where the parties have a contract,
16 you resolve ownership under the contract. And
17 that is our core submission here.

18 So I -- I think, again, it's important
19 to understand what the regulations do and do not
20 do and the fact that the regulations prevent
21 Petitioner from making some of the arguments
22 it's tried to make in this case, but at the end
23 of the day, it would be very, very difficult, I
24 think, for this Court to look at this contract
25 and say that, where the parties wrote an

1 ambiguity-resolving provision in favor of the
2 bank, where they specified that UWBI should be a
3 mere intermediary, the parties, nevertheless,
4 unambiguously intended to make UWBI the
5 equitable owner of this refund.

6 Petitioner agrees that he cannot
7 prevail in this case unless he is unambiguously
8 correct. And the reason for that is not because
9 of a rule of federal common law. It's because
10 that's the clause that the parties wrote into
11 their agreement.

12 That was the basis of the judgment
13 below. There's no error in that judgment. And
14 so that's why at the end of the day this Court
15 should affirm.

16 I also think, as I stated, that I hope
17 the Court will clarify what the regulations do
18 and make clear that it's easy for parties to
19 specify that a party like the bank who earned
20 the refund is the owner of it.

21 A perfectly sensible way to do that is
22 to say we want to make UWBI an agent. We want
23 to make them a mere intermediary.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Five minutes, Mr. Reich.

3 REBUTTAL ARGUMENT OF MITCHELL P.

4 REICH ON BEHALF OF PETITIONER

5 MR. REICH: I think I'll start by what
6 my friends conceded at the podium, which is that
7 on the sole question on which this Court granted
8 certiorari, is the Bob Richards rule valid, the
9 answer is no, that that rule is not a valid rule
10 of federal common law and that courts should not
11 apply it.

12 Therefore, the Tenth Circuit erred in
13 saying that Bob Richards clearly applies to this
14 case and sets forth the framework that must
15 govern the parties' disputes.

16 And, Justice Kavanaugh, you're exactly
17 right. This is a -- the -- the lower courts
18 need clarity on this question. It's a subject
19 of a significant circuit split of great economic
20 significance every day.

21 The -- the -- my friend argued that
22 this decision didn't play a role, that Bob
23 Richards didn't play a role in the decision
24 below, despite what it said, because everyone
25 ostensibly agrees that where there's an

1 agreement Bob Richards has no effect.

2 That's not the FDIC's position in the
3 lower courts and that's not what the Tenth
4 Circuit said. Indeed, in its brief in
5 opposition in this case, on page 16, it said
6 that Bob Richards governs unless an agreement
7 clearly addresses the ownership of tax liability
8 and departs from that rule.

9 And in its brief in the AmFin case,
10 which we cite in our cert reply, the
11 government's position, which has been consistent
12 for decades, is that an agreement must contain
13 specific language that conclusively disavows the
14 Bob Richards rule in order to depart from this
15 presumption.

16 So it -- it's not a rule that vanishes
17 whenever there's an agreement. It's a rule that
18 all the lower courts understand as a clear
19 statement rule which puts a very heavy federal
20 thumb on the scale in favor of particular
21 allocation of liability. And that's the role it
22 played in the decision below.

23 My friend says that the sole role that
24 the regulations ostensibly play in this area is
25 clarifying that a party can't claim a federal

1 law entitlement to a refund just because it's
2 been paid to them. That -- that is a response
3 to a straw man. That's nobody's argument.

4 Our argument is states' law governs
5 without any federal law preference one way or
6 the other. And --

7 JUSTICE ALITO: Well, I don't want to
8 interrupt your rebuttal, but I didn't quite
9 understand his point to be that, that -- that --
10 I thought his point was that the fact that the
11 IRS for convenience purposes chooses to pay it
12 to the parent is not -- cannot be taken as a
13 factor under state law.

14 MR. REICH: I -- I --

15 JUSTICE ALITO: Do you disagree with
16 that?

17 MR. REICH: We do disagree with that.
18 And we don't think that the regulations say
19 anything to that effect. The regulations say
20 the refund is paid directly to and in the name
21 of the parent. And at that point, the
22 government's liability is discharged.

23 The regulations express no interest or
24 concern with how state law allocates the refund
25 after that.

1 I will note in their brief they make
2 this point many times, that parties can't claim
3 a federal law entitlement by virtue of that.
4 But the critical point is that others --

5 JUSTICE ALITO: Do you think that the
6 -- that the federal government could not make
7 that -- could not take that position?

8 MR. REICH: I think it's entirely
9 within the federal government's power to at
10 least dictate a default rule. And if the IRS
11 enacted a regulation to that effect, we would
12 not argue that's outside of its power. And,
13 indeed, to some extent, they have done so in
14 cases where they've said that refunds should be
15 directed to subsidiaries, in Section 16642-7 and
16 78 of the IRS regulations.

17 JUSTICE GORSUCH: I --

18 MR. REICH: But the --

19 JUSTICE GORSUCH: -- I apologize for
20 interrupting your rebuttal as well, but just to
21 follow up on Justice Alito's question, do we
22 even need to resolve this? I mean, we took this
23 case to decide the Bob Richards rule.

24 Now we're being asked to address a
25 subsidiary question about the effect of an IRS

1 regulation or the non-effect of it. Do we need
2 to -- do we need to do that?

3 MR. REICH: No, Your Honor. And I
4 think my friend's suggestion that this argument
5 was raised on page 13 of the Tenth Circuit brief
6 is just not correct. That -- that -- that page
7 of that brief just quotes the ordinary Bob
8 Richards rule without any suggestion of this new
9 argument about what the regulations mean.

10 And -- and my friend also made this
11 argument that it would seem absurd under state
12 law to not allow the term "agents" to do all the
13 work of establishing an agency relationship.
14 This is Black Letter common law represented in
15 the Third Restatement, the Second Restatement.

16 It's Illustration 2 in the entire
17 Second Restatement, is making the point that
18 calling something an agency agree -- agree -- an
19 agency does not establish an agency
20 relationship. And Colorado's Supreme Court has
21 said many times that words are not enough, in
22 the City of Aurora case and in the Moses case.
23 And this doesn't mean it's hard in any way to
24 assign a refund to the subsidiary.

25 The easiest way to do so is in the

1 government's -- in the banking regulators
2 guidance, their 2014 addendum to their policy
3 statement, which is cited on page 9 of the
4 government's brief, it provides model language
5 that parties can use to achieve the result it's
6 advocating here, which establishes a trust
7 relationship, which is very easy to establish
8 under state law, requires nothing more than
9 designating someone a trustee and requiring
10 funds to be held to -- to -- to be clearly set
11 aside for the subsidiary.

12 And we think that model language is
13 perfectly sufficient to achieve this result.

14 An agency relationship is harder to
15 create. It requires interim control. And --
16 and that's been the law in almost every state
17 and in Colorado for a long time.

18 I -- I -- I'd like to end --

19 JUSTICE SOTOMAYOR: Maybe I don't hate
20 interrupting as much, but --

21 (Laughter.)

22 JUSTICE SOTOMAYOR: -- it seems I
23 don't know exactly what you're seeking. If I
24 say you're my agent, you get this money, pay it
25 over to me in 10 days, do I have to tell them

1 how to pay it over to me? Do I have to tell
2 them that I have the ability to redirect payment
3 to someone else? I have to do all those things
4 under Colorado law?

5 MR. REICH: May I finish?

6 CHIEF JUSTICE ROBERTS: Briefly.

7 MR. REICH: To establish an agency
8 under the common law, the -- the subsidiary
9 would at least need to reserve the right to
10 direct how the subsidiary fills out -- how the
11 parent fills out -- fulfills that task either by
12 having authority to direct it to seek the refund
13 in the first place or direct how it handles the
14 refund once it's received.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 11:05 a.m., the case
18 was submitted.)

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