No. ________

In The
Supreme Court of the United States

JOHN M. MARSHALL, et al., TRANSFEREES,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Commissioner v. Stern*, 357 U.S. 39 (1958), this Court held that whether a transferee of property is liable for the transferor's federal taxes is predominantly a question of the state law applicable to private creditors. The question presented is:

Whether, when the true form of the transaction is at issue, the court must determine whether state law would permit a private creditor to collapse or recharacterize the transaction in analogous circumstances, or whether the court can instead look to federal law, state tax law, and/or the law of other states.

PARTIES TO THE PROCEEDING

The petitioners in this case are John M. Marshall, Transferee; Karen M. Marshall, Transferee; Marshall Associated, LLC, Transferee; Estate of Richard Marshall, Deceased, Patsy L. Marshall, Personal Representative, Transferee; and Patsy L. Marshall, Transferee. The respondent is the Commissioner of Internal Revenue.

RULE 29.6 STATEMENT

Marshall Associated, LLC does not have a parent corporation; it does not issue stock; nor does there exist a publicly held corporation that owns 10% or more of its stock.

LIST OF RELATED PROCEEDINGS

United States Tax Court:

Estate of Richard L. Marshall, Deceased, Patsy L. Marshall, Personal Representative, and Patsy L. Marshall, Transferees v. Commissioner of Internal Revenue, No. 27241-11 (Aug. 1, 2017)

Marshall Associated, LLC, Transferee v. Commissioner of Internal Revenue, No. 28661-11 (Aug. 1, 2017)

John M. Marshall and Karen M. Marshall, Transferees v. Commissioner of Internal Revenue, No. 28782-11 (Aug. 1, 2017)

LIST OF RELATED PROCEEDINGS—
Continued

United States Court of Appeals (9th Cir.):

Estate of Richard L. Marshall, Deceased, Patsy L. Marshall, Personal Representative; Patsy L. Marshall v. Commissioner of Internal Revenue, No. 17-72960 (July 23, 2019), *petition for reh'g denied*, Oct. 2, 2019

Marshall Associated, LLC, Transferee v. Commissioner of Internal Revenue, No. 17-72958 (July 23, 2019), *petition for reh'g denied*, Oct. 2, 2019

John M. Marshall; Karen M. Marshall, Transferees v. Commissioner of Internal Revenue, No. 17-72955 (July 23, 2019), *petition for reh'g denied*, Oct. 2, 2019

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Petitioners John M. Marshall; Karen M. Marshall; Marshall Associated, LLC; Estate of Richard Marshall, Deceased, Patsy L. Marshall, Personal Representative; and Patsy L. Marshall respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1–5) is unreported, but available at 782 F. App'x 565. The order of the court of appeals denying rehearing and rehearing en banc (App. 67–68) is unreported. The Tax Court's memorandum findings of fact and opinion (App. 26–66) is unofficially reported at 111 T.C.M. (CCH) 1579. The Tax Court's decisions on liability as to each petitioner (App. 6–13) and order (App. 14–25) are unreported.

JURISDICTION

The court of appeals entered judgment on July 23, 2019. App. 1–5. On October 2, 2019, the court of appeals denied a timely petition for rehearing and rehearing en banc. App. 67–68. On December 17, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including

January 30, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App. 69–89.

INTRODUCTION

Over a half century ago, in *Commissioner v. Stern*, 357 U.S. 39 (1958), this Court decided that the Commissioner of Internal Revenue should be treated the same as private creditors when assessing transferee liability under 26 U.S.C. § 6901. The Court rejected the Commissioner's plea for a uniform, federal rule, and instead adopted an approach that would give rise to different treatment of the same transaction depending on the applicable state law governing private creditors. Despite *Stern*'s clear holding, the Commissioner continues to argue that a uniform, federal rule should govern the predicate determination of how to characterize the transaction at issue. And a growing number of courts of appeals are looking outside state private creditor law to decide that critical, threshold question. The result is an expansion of substantive liability beyond what state courts have permitted, a special rule that favors the Commissioner vis-à-vis private

creditors, and a gravitational pull toward the precise uniformity this Court rejected in *Stern*. The decision below is the most recent example of this troubling trend, and this Court's review is needed to ensure that *Stern*'s dictates are followed in practice and not just in name.

STATEMENT OF THE CASE

1. Before 1926, "if the government was unable to collect taxes from a particular taxpayer and believed the taxpayer's assets had been transferred to someone else, the government could only proceed against the 'transferee' of those assets by bringing a bill in equity or an action at law." *Starnes v. Commissioner*, 680 F.3d 417, 425–26 (4th Cir. 2012). "[T]he rights of the Government as creditor" in those proceedings "depended upon state statutes or legal theories developed by the courts for the protection of private creditors, as in cases where the debtor had transferred his property to another." *Commissioner v. Stern*, 357 U.S. 39, 43 (1958). This process of enforcing liability through the court system proved to be "unduly cumbersome," compared to "the summary administrative remedy allowed against the taxpayer himself." *Id.*

So, in 1926, Congress enacted a statute to streamline the process for collecting taxes from "transferees." Revenue Act of 1926, ch. 27, § 280, 44 Stat. 9, 61. That provision, now codified at § 6901 of the Internal Revenue Code (without substantive change), allows the

Commissioner to assess and collect "[t]he liability, at law or in equity, of a transferee of property . . . of a taxpayer" "in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred." 26 U.S.C. § 6901(a). "[T]he term 'transferee' includes donee, heir, legatee, devisee, and distributee . . . ." *Id.* § 6901(h).

Neither § 6901 nor its predecessors "define[d] or change[d] existing liability." *Stern*, 357 U.S. at 44 (internal quotation marks omitted). Rather, "for procedural purposes the transferee is treated as a taxpayer would be treated." *Phillips v. Commissioner*, 283 U.S. 589, 594 n.4 (1931) (internal quotation marks omitted). The Commissioner can therefore use the same administrative procedure to collect from defaulting taxpayers and their transferees—if the transferees are liable for the taxes.

2. After § 6901's predecessor was enacted, a circuit split arose about whether "the substantive liability enforced under [the statute] is to be determined by state or federal law." *Stern*, 357 U.S. at 42 (citing cases). In *Stern*, this Court granted certiorari and held that liability is to be determined under the state law that governs private creditors. *See id.* at 44–45.

The Court explained that (what is now) § 6901 is "purely a procedural statute," and does not itself create liability. *Id.* at 44. Since no federal statute defined a transferee's substantive liability, the Court was "left with a choice between federal decisional law and state

law for its definition." *Id.* The Commissioner argued that the Court should apply federal common law to "further 'uniformity of liability.'" *Id.* The dissent urged the same. *Id.* at 48 (Black, J., dissenting). The Court disagreed.

The Court explained that allowing federal common law to displace state law "would be a sharp break with the past." *Id.* at 44. "[I]n cases where the Government [sought] to collect unpaid taxes from persons other than the defaulting taxpayer," the courts had long applied state statutes to determine liability. *Id.* "[A]ware" of that history, Congress "disclaim[ed] any intention 'to define or change existing liability.'" *Id.* And Congress did so despite the fact that "the varying definitions of liability under state statutes resulted in an absence of uniformity of liability." *Id.* at 45. "Uniformity," the Court continued, "is not always the federal policy." *Id.* "What is a good transfer in one jurisdiction might not be so in another." *Id.*

The Court also recognized that, since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), "the federal courts no longer formulate a body of federal decisional law for the larger field of creditors' rights." *Stern*, 357 U.S. at 45. Instead, "in diversity actions brought by private creditors," federal courts must "apply state decisional law." *Id.* Because a "flexible body of pertinent state law [is] continuously being adapted to changing circumstances affecting all creditors," the Court thought that the "effort" to create a new body of federal law that applies only when "the Government" is the "creditor" was "plainly not justified." *Id.* Instead, "the

Government's substantive rights" should be "precisely those which other creditors would have under [state] law." *Id.* at 47. In sum, "until Congress speaks to the contrary, the existence and extent of liability should be determined by state law." *Id.* at 45.

The courts of appeals have interpreted *Stern* as creating a two-prong, conjunctive test to determine whether the Commissioner may collect taxes from an alleged transferee. Under this framework, a court must evaluate whether the alleged transferee is liable under state law, and whether that person or entity is a "transferee" for procedural purposes under federal law. *See*, *e.g.*, *Salus Mundi Found. v. Commissioner*, 776 F.3d 1010, 1012 (9th Cir. 2014); *Diebold Found., Inc. v. Commissioner*, 736 F.3d 172, 184 (2d Cir. 2013); *Starnes*, 680 F.3d at 427.

3. In 1965, Brothers John and Richard Marshall founded Marshall Associated Contractors, Inc. ("MAC"), a heavy construction company. *See* App. 27–28. John, Richard, and their wives, Karen Marshall and Patsy Marshall (collectively "the Marshalls"), each owned equal shares of MAC. *Id.* at 27.

In 1982 and 1983, MAC successfully bid on two projects with the United States Bureau of Reclamation, both of which resulted in protracted litigation. *Id.* at 28–29. While those disputes were pending, Richard suffered a serious stroke, and John took over Richard's duties and became MAC's sole officer and director. *See id.* at 29. MAC's primary activity then shifted to resolving the Bureau of Reclamation litigation. *Id.*

In 2002, MAC was awarded over $40 million in contract damages and interest on one of its claims, which was expected to result in significant taxable income. *See id.* at 29–30. John accordingly sought advice and services from the accounting firm PricewaterhouseCoopers LLP ("PwC") and the law firm Schwabe, Williamson & Wyatt PC ("Schwabe"), both of which had long advised MAC and the Marshalls. *See id.* at 30–31, 33.

Later that year, John received an unsolicited offer from Fortrend International and certain of its affiliates (collectively, "Fortrend") to purchase MAC's stock. *See id.* at 31–32. Fortrend represented that it wanted to use MAC's cash to buy credit card debt, operate a debt recovery business, and offset MAC's income with losses from that business. *See* C.A. Excerpts of Record ("ER") 909, 913–14, 1262, 1266–68. The Marshalls turned to and relied on PwC and Schwabe to investigate Fortrend and its proposal. *See* App. 33. Based on their investigation, PwC and Schwabe told the Marshalls that the proposed transaction was permissible. *See*, *e.g.*, ER 2558. As a result, the Marshalls decided to pursue Fortrend's proposal.

The Fortrend transaction proceeded in three parts: (1) MAC redeemed a portion of the Marshalls' stock in exchange for MAC's real estate, equipment, and other tangible assets (which Fortrend did not need for its debt recovery business), and MAC transferred those assets to Marshall Associated, LLC ("MA, LLC"); (2) MAC contracted with the Marshalls to continue prosecuting the Bureau of Reclamation litigation in

exchange for about 80 percent of the eventual proceeds; and (3) the Marshalls sold their stock to Fortrend and agreed to assume some of MAC's liabilities. *See* App. 45–46.

During the Marshalls' decades-long ownership of the Company, MAC was solvent, made estimated tax payments, and had enough cash to pay its tax liabilities. *See* ER 591, 850C. Fortrend represented that it would operate MAC as a solvent, going concern, and that MAC would continue to pay its taxes. *See*, *e.g.*, ER 1268.

As it turned out, Fortrend had borrowed the money necessary to buy the Marshalls' MAC stock and, unbeknownst to the Marshalls, repaid the loan with MAC's cash after these transactions closed. App. 39, 43–44; *see*, *e.g.*, ER 565, 806. Fortrend ultimately caused MAC to claim tax losses that the IRS eventually disallowed. *See* App. 49. MAC never paid the resulting tax bill. *Id.* at 49–50.

4. Nearly a decade later, the Commissioner sent petitioners notices asserting that they were liable as transferees for MAC's unpaid taxes, plus interest and penalties. *Id.* at 50.

On June 20, 2016, the Tax Court agreed. *See id.* at 26–66. To get to that result, the court first had to collapse the three separate transfers and treat them "as if MAC had sold its assets and then made liquidating distributions to the shareholders." *Id.* at 53. The court acknowledged that no Oregon court had addressed (or permitted) such collapsing. *Id.* at 54. The court instead

turned to § 6901 decisions from the Tax Court and courts of appeals interpreting other states' fraudulent transfer laws. *Id.* at 54–58. Applying that out-of-state law, the Tax Court concluded that collapsing would be appropriate if the "ultimate transferee had constructive knowledge that the debtor's debts would not be paid." *Id.* at 54.

The Tax Court ultimately found that the Marshalls had constructive knowledge, and collapsed the transactions. *Id.* at 56–58. The court also held that the transactions (as collapsed) rendered petitioners liable for a constructively fraudulent transfer under the Oregon Uniform Fraudulent Transfer Act ("OUFTA"), *see* Or. Rev. Stat. § 95.240(1), and as "transferees" under § 6901(h). App. 59–64. Accordingly, the court found petitioners liable for MAC's unpaid taxes. *Id.* at 66.

5. The Ninth Circuit affirmed in an unpublished decision. *Id.* at 1–5.

On appeal, petitioners argued that Oregon law did not permit collapsing under the OUFTA. Pet. C.A. Br. 35. Petitioners also argued that even if Oregon would permit collapsing in some circumstances, it would do so only in cases of actual—not constructive—fraud, and only if the Marshalls had actual knowledge that Fortrend intended to default on MAC's taxes. *Id.* at 36–41. The Commissioner, for his part, asserted that the transactions could be collapsed without any "consideration of the Marshalls' knowledge or intent." Resp. C.A. Br. 37.

In a single paragraph, the Ninth Circuit agreed with the Tax Court. The court of appeals held that collapsing was appropriate under a constructive knowledge standard. For support, the court included a string cite to three sources: (1) general language from the OUFTA; (2) a prior Ninth Circuit decision interpreting Arizona's Uniform Fraudulent Transfer Act ("AUFTA") (*see Slone v. Commissioner*, 896 F.3d 1083, 1085–88 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1348 (2019)); and (3) an Oregon state court decision in a contract case that did not adopt a constructive knowledge standard. App. 3.

The court of appeals went on to affirm the Tax Court's other rulings, and held that petitioners were liable for MAC's unpaid taxes. *See id.* at 4–5.

6. Petitioners timely petitioned for rehearing and rehearing en banc. On October 2, 2019, the Ninth Circuit denied rehearing. *Id.* at 67–68.

REASONS FOR GRANTING THE PETITION

In *Commissioner v. Stern*, this Court held that the state law applicable to private creditors determines whether an alleged transferee is liable for the transferor's unpaid federal taxes. *See* 357 U.S. 39, 45, 47 (1958). Notwithstanding *Stern*, the Commissioner continues to insist that federal law should control the predicate question of whether and when a series of transactions may be collapsed for purposes of determining substantive liability. And while the Tax Court

and multiple courts of appeals have rejected that argument, substantial confusion persists. Although some of those courts correctly apply state private creditor law as *Stern* requires, many do not. A growing number of courts of appeals have been turning to federal law, state tax law, and/or other federal court decisions applying the law of a different state. The result—expanding liability under state law, elevating the Commissioner to "most favored creditor" status, and creating a uniform body of federal decisional law—cannot be squared with *Stern* or basic *Erie* principles. The decision below is part of that troubling trend. This Court's review is warranted.

A. THERE IS SUBSTANTIAL CONFUSION AMONG THE COURTS OF APPEALS

A predicate question that often arises in the context of transferee liability is the nature of the transaction. When there have been multiple transfers, a court must first decide whether the transaction should be evaluated as structured by the parties, or whether separate pieces of the transaction should instead be collapsed. This question may arise in the context of determining whether the party is a "transferee" under federal tax law, and in the context of determining substantive liability under state law.

Under federal tax law, "substance-over-form" and other related doctrines drive that analysis. The states, by contrast, take varying approaches. The answer is not uniform even within states—different rules may

govern state tax liability, as compared to private creditor liability, for example. The spectrum ranges from not allowing collapsing at all, to allowing it but only when the party had actual knowledge, to allowing it upon a showing of constructive knowledge, to allowing collapsing regardless of knowledge. In short, what law governs this threshold inquiry—whether and when a transaction should be collapsed—matters. Yet, more than half a century after this Court's decision in *Stern*, substantial confusion on that question remains.

1. The Commissioner takes the position that federal law should control. In *Starnes v. Commissioner*, for example, the Commissioner argued that § 6901 "require[s] a two-step analysis with the second step wholly dependent on the first step." 680 F.3d 417, 428 (4th Cir. 2012). According to the Commissioner, at the first step, a court should "determine whether a person or entity is a 'transferee' under federal law, that is, whether a particular set of transactions should be recast under the 'substance-over-form' doctrine derived from federal tax cases." *Id.* Only after the transactions have been "recast under federal law" should courts proceed to the second step and "apply state law to the" already "recast transactions." *Id.* at 428, 429 (emphasis omitted).

As explained below, the Commissioner has not had much success when making this argument. But at least one court of appeals judge has agreed. *See id.* at 441–43 (Wynn, J., dissenting). And the Commissioner has continued to press this argument in the Tax Court and other courts of appeals. *See*, *e.g.*, *Buckrey v.*

Commissioner, 114 T.C.M. (CCH) 45, 2017 WL 2964716, at *7 (2017); *Feldman v. Commissioner*, 779 F.3d 448, 457–58 (7th Cir. 2015); *Salus Mundi Found. v. Commissioner*, 776 F.3d 1010, 1018–19 (9th Cir. 2014); *Diebold Found., Inc. v. Commissioner*, 736 F.3d 172, 184 (2d Cir. 2013); *Frank Sawyer Tr. of May 1992 v. Commissioner*, 712 F.3d 597, 599 (1st Cir. 2013). Indeed, the Commissioner has gone so far as to forum shop to avoid unfavorable circuit precedent to the contrary. *See Julia R. Swords Tr. v. Commissioner*, No. 14-2279, 2014 WL 7929830, at *1 (6th Cir. Dec. 18, 2014) (noting that "[t]he Commissioner seeks to file the appeal here because [the Sixth Circuit has] not yet decided the issue at hand adversely to the Commissioner's position," but transferring the appeal because "the Commissioner stated below that venue lies in the Fourth Circuit"); Appellant's Opposition to Appellees' Motion to Transfer Venue, *Swords*, No. 14-2279, at 7 (Oct. 20, 2014), ECF No. 10 (conceding the Commissioner sought to avoid the Fourth Circuit's holding in *Starnes*).

2. The Tax Court and every court of appeals to consider the issue has rejected the Commissioner's position and held that the predicate question of collapsing should be decided under state private creditor law. *See*, *e.g.*, *Buckrey*, 2017 WL 2964716, at *8; *Feldman*, 779 F.3d at 457–58; *Salus Mundi*, 776 F.3d at 1018–19; *Diebold Found.*, 736 F.3d at 185; *Frank Sawyer Tr.*, 712 F.3d at 604–05; *Starnes*, 680 F.3d at 428–31.

This seeming uniformity, however, devolves upon further inspection. Beneath the veneer of agreement,

there is division and confusion. Some courts hold that state private creditor law controls—and then actually apply that law to determine whether to collapse a series of transactions. Others hold that state private creditor law controls, but then engage in an analysis that piggybacks on federal law, looks to state *tax* law, relies on decisions of other federal courts applying the law of a *different* state, or some combination of the above.

3. In some cases, courts actually do apply state private creditor law when considering whether to collapse the transaction.

In *Buckrey*, for example, the Tax Court applied state private creditor law to conclude that Minnesota did not permit collapsing at all. The Commissioner sought to collapse a series of transactions and thereby impose transferee liability on a corporation's former shareholders for the corporation's unpaid taxes. 2017 WL 2964716, at *5, *9. The court started with the question whether "the transactions [could] be combined under" Minnesota fraudulent transfer law. *Id.* at *9–10. The Tax Court recognized that "there are Minnesota cases that apply substance-over-form principles"—like those in federal tax law—to collapse a transaction. *Id.* at *9. But the court disregarded them because "they are Minnesota *tax* cases," and "this particular issue isn't a question of tax law but a question of Minnesota fraudulent-transfer law." *Id.* at *10.

The court then examined a recent Minnesota Supreme Court decision interpreting the Minnesota Uniform Fraudulent Transfer Act ("MUFTA"), *Finn v.*

Alliance Bank, 860 N.W.2d 638 (Minn. 2015). In *Finn*, the court had held that the MUFTA requires an "asset-by-asset and transfer-by-transfer" inquiry, such that a creditor must "prove the elements of a fraudulent transfer with respect to *each transfer*, rather than relying on a presumption related to the form or structure of the entity making the transfer." *Buckrey*, 2017 WL 2964716, at *10 (emphasis added) (quoting *Finn*, 860 N.W.2d at 647). Based on *Finn*, the Tax Court concluded that the MUFTA did not permit any collapsing. *See id.* at *11.

Similarly, in *Diebold Foundation*, the Second Circuit applied state private creditor law to conclude that New York did permit collapsing, but only when the party had actual or constructive knowledge. *See* 736 F.3d at 185–86. At issue there was New York's Uniform Fraudulent Conveyance Act ("NYUFCA"). The court concluded that the NYUFCA permitted collapsing, based on case law holding that "multilateral transactions may under appropriate circumstances be 'collapsed' and treated as phases of a single transaction for analysis under the UFCA." *Id.* at 186 (quoting *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635 (2d Cir. 1995)). Under that same case law, the court continued, the party must have "actual or constructive knowledge of the entire scheme that renders her exchange with the debtor fraudulent." *Id.* (quoting *HBE Leasing*, 48 F.3d at 635).[1]

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[1] Although the immediate sources cited were federal decisions, they (in turn) traced the rule back to New York private

4. In other cases, courts nominally recognize their obligation to look to state private creditor law to determine whether and when they may collapse transactions—but then look elsewhere.

Take, for example, the Seventh Circuit's analysis in *Feldman*. There, the court of appeals first applied federal substance-over-form principles to collapse the transactions at issue and conclude that the former shareholders of a tax-delinquent corporation were "transferees" under § 6901. *See Feldman*, 779 F.3d at 454–57. The court determined that it should adopt the same conclusion for liability under Wisconsin law unless "there is a conflict between" it and "the applicable federal tax doctrine." *Id.* at 458. The court found no such conflict, based primarily on the fact that Wisconsin's Uniform Fraudulent Transfer Act ("WIUFTA") "incorporates equitable principles," including "the general rule that '[e]quity looks to substance and not to form,'" which Wisconsin courts have applied, "most notably in[ ] tax cases." *Id.* at 459.

The Eleventh Circuit adopted the Seventh Circuit's understanding of Wisconsin law in *Shockley v. Commissioner*, 872 F.3d 1235, 1253–54 (11th Cir. 2017). The court first acknowledged that "no Wisconsin court has addressed this issue in the context of WIUFTA." *Id.* (internal quotation marks omitted). The court of appeals then turned to *Feldman* and the

creditor cases. *See HBE Leasing*, 48 F.3d at 635 (relying on *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35–36 (2d Cir. 1993), in turn relying on *Gruenebaum v. Lissauer*, 57 N.Y.S.2d 137, 145 (Sup. Ct., N.Y. County 1945), *aff'd*, 61 N.Y.S.2d 372 (N.Y. App. Div. 1946)).

Wisconsin cases the Seventh Circuit relied on, which, "most notably," were "tax cases." *Id.* (quoting *Feldman*, 779 F.3d at 459). And it agreed (presumably based on those cases) that Wisconsin law "is substantially the same as the substance-over-form analysis under federal tax law." *Id.* (internal quotation marks omitted). The court found it unnecessary to determine whether the WIUFTA contained "any knowledge requirement," but noted that courts had reached different conclusions when interpreting different states' versions of the Uniform Fraudulent Transfer Act ("UFTA"). *Id.* at 1254 n.17.

The Sixth Circuit's decision in *Billy F. Hawk, Jr., GST Non-Exempt Marital Trust v. Commissioner*, 924 F.3d 821 (6th Cir.), *cert. denied*, 140 S. Ct. 38 (2019), proceeded in similar fashion. The court of appeals first considered the federal prong of the *Stern* analysis, and "look[ed] to 'the economic realities of the business deal' to determine whether a transaction occurred as the taxpayer labeled it." *Id.* at 825. Applying this principle, the court collapsed a series of transactions and concluded that the former shareholders of a tax-delinquent corporation were "transferees" under § 6901. *See id.* at 825–27.

The Sixth Circuit then went on to analyze liability under the Tennessee UFTA ("TUFTA"). But its first step was to incorporate the prior federal law analysis. *See id.* at 827 ("[F]or many of the same reasons the . . . transaction amounts to a *transfer* to the Hawks under federal law, it counts as a transfer . . . under Tennessee law."). The court cited no provision of the TUFTA—or

case law interpreting it—that explicitly permits private creditors to collapse a transaction. The only affirmative support for collapsing came from Tennessee tax cases and cases decided by "other courts" under "other States' Uniform Fraudulent Transfer Acts." *Id.* at 827 (citing *CAO Holdings, Inc. v. Trost*, 333 S.W.3d 73, 88 (Tenn. 2010) (resale tax exemption); *M. & M. Stamp Co. v. Harris*, 368 S.W.2d 752, 755 (Tenn. 1963) (privilege tax)). And one of the two out-of-state cases the court relied on was the Seventh Circuit's decision in *Feldman*. *See id.* (citing *Feldman*, 779 F.3d at 459 (applying Wisconsin law); *Barclay v. Mackenzie (In re AFI Holding, Inc.)*, 525 F.3d 700, 708 (9th Cir. 2008) (applying California law)).

Relying exclusively on decisions from other courts, interpreting other states' UFTAs, the Sixth Circuit additionally held that collapsing was not only permissible—but that the party's knowledge was irrelevant. *Id.* at 828–29. The court of appeals distinguished cases—like *Diebold Foundation*, *Starnes*, and others—which required some showing of at least constructive knowledge. *Id.* at 828. But the court made no mention of the Tax Court's decision in *Buckrey*, which had interpreted Minnesota's version of the UFTA to prohibit collapsing entirely.[2]

[2] This Court declined to review the Sixth Circuit's decision in *Hawk*, but the petition for a writ of certiorari presented four distinct questions and was based largely on the premise that different states' fraudulent transfer statutes must be interpreted the same way. This petition is more targeted and does not make that

5. The confusion among the courts of appeals (and the Commissioner's divergence on the correct approach) warrants this Court's review. Rather than turn to the relevant state law applicable to private creditors, courts are increasingly turning to the § 6901 decisions of other federal courts to decide whether collapsing is appropriate and, if so, what standard of knowledge is required. But that makes sense only when the prior § 6901 decision is (a) interpreting the same state's law, and (b) adopting the correct means of analysis to do so. Without this Court's intervention, an incorrect analysis in one case, under one state's law, will continue to have an outsized impact.

B. THE DECISION BELOW CONFLICTS WITH *STERN* AND IS WRONG

The decision below is part of this troubling trend. Rather than rely on Oregon private creditor law, the court of appeals relied primarily on another Ninth Circuit decision applying Arizona law and a state court contract case that says nothing about the applicable knowledge standard. That approach conflicts with *Stern* and misapplies the principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). It elevates the Commissioner to "most favored creditor" status and results in federal courts expanding liability under state law. This Court's review is warranted.

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argument. If anything, the *Hawk* decision and petition only further highlight the recurring nature of the question presented.

1. The decision below followed the same approach as the Sixth, Seventh, and Eleventh Circuits. The Ninth Circuit recognized that the question whether "the multiple steps in the transaction through which the Marshalls sold their MAC stock could be 'collapsed' and deemed a 'transfer' from MAC to the Marshalls" had to be answered under state private creditor law. App. 3. But in a single conclusory paragraph that adopted the reasoning of the Tax Court, the court did something quite different.

The court of appeals started with the OUFTA. But nothing in the OUFTA or Oregon case law interpreting it expressly addresses whether a court may collapse a series of transactions and, if so, under what circumstances.[3] So the court also cited two additional sources.

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[3] Before a creditor is entitled to relief under the OUFTA, the creditor must show that there is (1) a "transfer," (2) by the debtor, of (3) the debtor's "asset or an interest in an asset." Or. Rev. Stat. §§ 95.230, 95.240, 95.200(2), 95.200(12); *see Fadel v. El-Tobgy*, 264 P.3d 150, 157 (Or. Ct. App. 2011); *Kellstrom Bros. Painting v. Carriage Works, Inc.*, 844 P.2d 221, 222 (Or. Ct. App. 1992). Oregon law does not allow courts to add to this statutory language. *See* Or. Rev. Stat. § 174.010. The OUFTA does not permit transfers to be collapsed—and authority interpreting identical statutory provisions requires that each of the listed elements be evaluated and satisfied for each transfer, not in gross. *See Finn*, 860 N.W.2d at 647 ("The asset-by-asset and transfer-by-transfer nature of the inquiry under MUFTA requires a creditor to prove the elements of a fraudulent transfer with respect to *each transfer* . . . ." (emphasis added)); *cf. Crystallex Int'l Corp. v. Petróleos de Venezuela, S.A.*, 879 F.3d 79, 88–89 (3d Cir. 2018) (explaining under Delaware's UFTA ("DUFTA") that "(1) a transfer (2) made by the debtor" are "two *separate* elements of a DUFTA claim" and that while "DUFTA may cover an indirect transfer . . . that

The first was the Ninth Circuit's § 6901 decision in *Slone v. Commissioner*, 896 F.3d 1083 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1348 (2019). *Slone*, however, involved the *Arizona* UFTA. And even in the context of Arizona law, *Slone* did not decide the relevant question. The Ninth Circuit considered only the factual question whether the alleged transferees had constructive knowledge of the tax avoidance purpose of the transactions. *See id.* at 1085, 1088. The parties did not dispute that Arizona law permitted collapsing *if* they had such knowledge, so the Ninth Circuit had no occasion to interpret Arizona law. *See*, *e.g.*, Br. for the Appellant, *Slone*, No. 16-73349, at 57–58 (Mar. 7, 2017), ECF No. 18.

The second source was the Oregon Supreme Court's decision in *Diamond Fruit Growers, Inc. v. Goe Co.*, 409 P.2d 909 (Or. 1966). But *Diamond Fruit Growers* was not a private creditor case and did not interpret the OUFTA. And that decision provides no support for the constructive knowledge standard the Ninth Circuit adopted and applied here. There, the relevant parties had *actual intent to defraud*. *Id.* at 910. The decision said nothing about constructive fraud.

Petitioners had identified cases directly relevant to whether and when Oregon might permit collapsing in the context of private creditors. For example, petitioners cited *Kellstrom Bros. Painting v. Carriage Works, Inc.*, 844 P.2d 221, 222 (Or. Ct. App. 1992) and

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transfer must nonetheless be made 'by a debtor' in order to be cognizable under the statute" (emphasis added)).

Cadle Co. II v. Schellman, 868 P.2d 773, 777 (Or. Ct. App. 1994), which made clear that liability under the OUFTA requires identifying a specific "debtor" who "transfers" an "asset"—all statutorily defined terms—which is incompatible with the broad authority to collapse transactions the Ninth Circuit read into Oregon law. Petitioners also relied on *Finn* (which considered statutory language identical to the OUFTA's) and *Buckrey* (which applied that statute and refused to collapse in analogous circumstances). If the court of appeals thought it relevant how *other* states were applying their versions of the UFTA, one might have expected it to look beyond a federal court decision that did not even engage in the relevant analysis and to a state supreme court decision that did. The Ninth Circuit did just the opposite.

The point is not that the Ninth Circuit got Oregon law wrong (though it did). The point is that neither the court of appeals' decision, nor the Tax Court decision on which it relied, were based on an analysis of Oregon private creditor law at all.

2. The approach taken by the Ninth Circuit in the decision below, and by other courts of appeals in the decisions discussed above, is contrary to *Stern*.

a. As an initial matter, the courts of appeals have correctly rejected the Commissioner's extreme position that federal law should control whether a transaction should be collapsed for purposes of assessing substantive liability. In *Stern*, this Court held that § 6901 is "purely a procedural statute," and that Congress had

eschewed a uniform, federal standard of transferee liability in favor of state law. 357 U.S. at 44; *see id.* at 44–45. The Court also held that the Commissioner should be treated no different than private creditors. *Id.* at 47. Collapsing transactions under federal law, and applying substantive state law to that collapsed transaction, injects federal law into what is supposed to be a purely state law inquiry. And doing so would place the Commissioner in a different position than private creditors. As the courts of appeals have uniformly held, this directly conflicts with the "twin holdings" of *Stern*. *Feldman*, 779 F.3d at 458.[4]

b. Just as important, though, the only relevant state law is the law applicable to *private creditors*. That is the body of law that courts had turned to before Congress enacted § 6901's predecessor. *See Stern*, 357 U.S. at 43. And, in *Stern*, this Court instructed the lower courts to continue applying that body of law going forward, keeping in mind that the Commissioner should have no greater rights than "other creditors

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[4] *See*, *e.g.*, *Feldman*, 779 F.3d at 458 (explaining that "[t]his conclusion flows from *Stern*'s twin holdings that (1) § 6901 is a procedural statute only; and (2) state law defines both the existence and the extent of substantive liability, placing the federal government in no better position than any other creditor"); *Diebold Found.*, 736 F.3d at 185 ("[T]he position urged by the IRS imports federal law into the substantive determination of liability, in contravention of long settled law that § 6901 is only a procedural statute, creating no new liability."); *Starnes*, 680 F.3d at 429 ("*Stern* forecloses the Commissioner's efforts to recast transactions under federal law before applying state law" because "*Stern* places the IRS in precisely the same position as that of ordinary creditors under state law.").

would have under [state] law." *Id.* at 47; *see id.* at 45.[5] In so holding, this Court understood that the resulting regime would not be uniform—because state law was not uniform. *See id.* at 45 (explaining that Congress "refrained from disturbing the prevailing practice" of relying on "varying definitions of liability under state statutes" that "resulted in an absence of uniformity of liability"); *see also id.* at 49 (Black, J., dissenting) (suggesting that the complexity of "apply[ing] differing laws of 48 States to transferee liability ought to be avoided").

An indirect application of federal law to the predicate collapsing question cannot be squared with *Stern* any more than a direct application. Although *Stern* does not require courts to decide state law substantive liability before deciding "transferee" status under § 6901, it does make clear that the two inquiries need to be separate and independent. And as a practical matter, the order of operations has caused some courts to distort and conflate the appropriate inquiry. For example, when deciding the "transferee" question first, the federal law analysis often finds its way into the state law analysis, leading to the inexorable conclusion that federal tax law and state private creditor law apply the same rule. *See Hawk*, 924 F.3d at 827 ("[F]or many of the same reasons the Holiday Bowl transaction amounts to a *transfer* to the Hawks under federal law, it counts as a transfer . . . under Tennessee law.");

[5] Congress knows how to prioritize tax debts over other debts when it wants to. *See*, *e.g.*, 11 U.S.C. § 507(a)(8). But Congress has never seen fit to change the rule adopted in *Stern*.

Feldman, 779 F.3d at 458 ("[T]he independent state-law inquiry will make a difference in the outcome only when there is a conflict between the applicable federal tax doctrine and the state law that determines substantive liability. We have no such conflict here." (internal citation omitted)). An ordinary creditor proceeding in state court would not derive the same benefit from the robust body of federal tax law as the Commissioner now has in several circuits.

A similar problem arises when courts turn to the wrong body of state law. When the Commissioner starts arguing about "economic substance," courts (not surprisingly) find comparable doctrines in state *tax* cases. But tax doctrine does not become more relevant just because it is state and not federal. Relying on tax law still treats the Commissioner different (and oftentimes better) than private creditors. Like Congress, states can decide to prioritize tax debts over other debts when they want to. But *Stern* makes clear that this priority cannot be imported into a determination of transferee liability under § 6901. The Commissioner is to be treated the same as private creditors, not state taxing authorities. *Compare Frank Sawyer Tr.*, 712 F.3d at 605, n.1 ("[T]he 'state law' that applies is the state law regarding creditors' rights, not state tax law."), *and Buckrey*, 2017 WL 2964716, at *10 (similar), *with Hawk*, 924 F.3d at 828 (relying on state tax cases), *and Feldman*, 779 F.3d at 459 (same).

Both of these problems are exacerbated when courts turn to other § 6901 decisions as a reason to collapse, or as a reason to adopt a particular knowledge

standard when doing so. If the other § 6901 decisions are interpreting the same state law and doing so correctly (*i.e.*, actually looking to state private creditor law), then this approach might have some merit. But if the other § 6901 decisions are interpreting *another* state's law, applying the wrong approach, or both, then the original error will just be multiplied and *Stern*'s dictates will become illusory. *See*, *e.g.*, *Shockley*, 872 F.3d at 1253–54 (adopting analysis from *Feldman*, including its reliance on federal principles and state tax cases); *Hawk*, 924 F.3d at 828–29 (also relying on *Feldman*).

This case is a prime example of that problem. No court has interpreted the OUFTA to allow collapsing or otherwise determined that collapsing is appropriate for private creditors under Oregon law. No Oregon court has held that collapsing would be permitted (if at all) based on a showing of constructive knowledge. To the contrary, Oregon has rejected constructive knowledge as a basis for liability under the OUFTA. *See Cushman v. Wilkinson*, 879 P.2d 873, 876–77 (Or. Ct. App. 1994) (concluding that whether a person took in good faith to avoid disregarding a transfer is a subjective test). Yet the Ninth Circuit disposed of this important issue in one paragraph of an unpublished decision that adopted the Tax Court's reasoning and that suffered from all of the flaws set forth above.

3. The approach taken by the Ninth Circuit in the decision below, and by other courts of appeals in the decisions discussed above, also runs afoul of basic *Erie* principles.

When a federal court is faced with a question of state law, its job is to predict, as accurately as possible, how the state's highest court would decide that question based primarily on other state decisional law, state statutes, and the state constitution. *See Commissioner v. Bosch's Estate*, 387 U.S. 456, 465 (1967); *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*, 736 F.3d 213, 219 (2d Cir. 2013). If necessary, a court may also consult less authoritative sources, such as Restatements of Law, treatises, law review articles, and decisions from courts of other states that approach legal matters in a similar way. *See McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 662–63 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980); Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4507 & nn.91–97 (Westlaw 3d ed. Aug. 2019 update) (collecting cases).

What a federal court may not do is choose the rule of law that it prefers or fashion a uniform rule of decision that the state's highest court would not adopt for itself. *See*, *e.g.*, *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 253–54 (3d Cir. 2010) (federal court should not act as a "judicial pioneer" (internal quotation marks omitted)). Nor, for that matter, may a federal court seek to innovate or expand liability under state law. On the contrary, "[w]hen given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, [courts] should choose the narrower and more reasonable path." *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 937 (6th Cir. 2014) (first and second alterations in original) (internal quotation marks omitted); *accord Pisciotta v. Old Nat'l Bancorp*,

499 F.3d 629, 640 (7th Cir. 2007); *see*, *e.g.*, *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002) ("[I]t is not the role of a federal court to expand state law . . . ."); Wright & Miller, *supra*, § 4507 & nn.101–02 (collecting additional authorities).

The decision below shows none of this restraint. The Ninth Circuit reached a novel result under the OUFTA that expands state law liability, yet it barely sketched out its reasoning and relied on sparse authority. The court's cursory analysis does not, and cannot, substitute for the careful analysis that *Erie* requires.

Nor is it any answer to say that the Ninth Circuit appropriately relied on *Slone* because the Arizona law at issue there was the UFTA too. As explained above, the UFTA does not expressly permit collapsing—let alone explain the circumstances under which collapsing might be permissible. The only state high court decision construing the UFTA has held that collapsing is never permissible. *See Finn*, 860 N.W.2d at 647 (requiring "asset-by-asset and transfer-by-transfer" inquiry); *Buckrey*, 2017 WL 2964716, at *10–11 (holding that the MUFTA does not permit collapsing at all).

True, some intermediate state appellate courts and federal courts have allowed collapsing under the UFTA in some circumstances. *See*, *e.g.*, *Premier Therapy, LLC v. Childs*, 75 N.E.3d 692, 724 (Ohio Ct. App. 2016) (holding that, under Ohio's UFTA, "[m]ultiple transactions *designed to perpetuate a fraud* can be considered a single transaction" (emphasis added)); *Hawk*, 924 F.3d at 828–29 (holding the TUFTA permits collapsing even without actual or constructive

knowledge). But that just highlights the problem. Courts cannot cherry-pick one (non-authoritative) out-of-state interpretation of the UFTA, ignore other (authoritative) interpretations of the same language, and call it a day. If anything, the most authoritative decision should control. But even if a faithful *Erie* inquiry could have ended in a draw, a federal court should err on the side of caution. No Oregon court had previously adopted the expansive rule of liability urged by the Commissioner in this case. The Ninth Circuit should not have been the first.

C. THIS IS AN IMPORTANT AND RECURRING QUESTION

The scope of transferee liability under § 6901 is an important and recurring issue, and this case is an appropriate vehicle to decide the question presented.

1. The sheer number of court of appeals decisions addressing whether or when transactions should be collapsed is a testament to how often the issue arises. And while most of the recent decisions have involved similar entities (like Fortrend), transferee liability under § 6901 has a considerably broader reach. Without this Court's intervention, the trend away from the relevant state's private creditor law—and the corresponding departure from *Stern*—will only continue to grow.

2. The potential impact of decisions like the one below is not limited to transferee liability under § 6901.

Federal decisions can have a lasting impact on the development of state law. Although a federal court's interpretation of state law is not binding on state courts, it may well control other federal courts and has far broader persuasive force. "[U]ntil corrected by the state supreme court," a federal court's erroneous "prediction[ ]" will "inevitably skew the decisions of [those] who rely on them," and "may even mislead lower state courts that may be inclined to accept federal predictions as applicable precedent." *Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1093 (7th Cir. 1999) (first and third alterations in original) (quoting Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1681 (1992)). In short, there is a reason why courts have counseled caution about "relying on the practice of other jurisdictions, even in analogous cases[ ]" to "make predictions about how the highest state court would decide a case." *Id.*

Under *Stern*, the state substantive law that governs liability to the Commissioner as creditor is the same state substantive law that governs liability to a private party as creditor. So when a federal court purports to decide the meaning of that law, its decision will apply to the Commissioner and private creditors alike. Here, for example, the Ninth Circuit was interpreting the meaning of Oregon's version of the UFTA. But the UFTA, of course, is applicable to more than just § 6901 cases; it is implicated whenever there is a transfer of property. The Ninth Circuit's determination that the OUFTA not only permits the collapsing of multiple transactions—but permits such collapsing based on a

showing of constructive knowledge—will now be relied on (as at least persuasive authority) when state and federal courts are deciding how to apply the OUFTA to private creditors. It may also be relied on when state and federal courts are deciding how to interpret other states' versions of the UFTA for purposes other than § 6901.

Moreover, the fraudulent transfer provisions in the UFTA are similar to the fraudulent transfer provision in the Bankruptcy Code, 11 U.S.C. § 548, and bankruptcy courts regularly find UFTA cases instructive and vice versa.[6] How federal courts interpret the UFTA in § 6901 cases may directly impact how courts assess alleged fraudulent transfers in bankruptcy proceedings as well. In short, an erroneous § 6901 decision can drastically change the scope of which transactions can be avoided in a variety of other settings.

3. This case is an appropriate vehicle to resolve the question presented. If the Ninth Circuit had actually applied the Oregon law applicable to private creditors, it would not have collapsed the three distinct transactions. The OUFTA itself does not expressly

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[6] *See*, *e.g.*, *Crystallex Int'l Corp.*, 879 F.3d at 85–86 ("Although Crystallex's claim arises under [Delaware's] UFTA, not the Bankruptcy Code, these decisions are instructive."); *Dahar v. Jackson (In re Jackson)*, 459 F.3d 117, 122 (1st Cir. 2006) ("While there is no case law interpreting the standard of proof under the New Hampshire UFTA's constructive fraud provision, we note that bankruptcy courts have applied the preponderance of the evidence standard to a similar constructive fraud provision in the Bankruptcy Code, 11 U.S.C. § 548(a)(2)."); *Taylor v. Rupp (In re Taylor)*, 133 F.3d 1336, 1339 (10th Cir. 1998) (recognizing that under 11 U.S.C. § 548, bankruptcy courts consider similar badges of fraud as those outlined in the UFTA).

permit collapsing. No Oregon case has interpreted the OUFTA to permit collapsing. The only authoritative state court decision interpreting a comparable statutory provision (in Minnesota) has held that collapsing is impermissible. And the sole Oregon decision relied on by the Ninth Circuit considered substance-over-form principles only in the context of actual fraud, not constructive fraud. *See supra* at 21. If any doubt remained, a proper *Erie* analysis would have counseled in favor of restraint.

CONCLUSION

The petition for a writ of certiorari should be granted.

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