No. 16-1330

IN THE
Supreme Court of the United States

CHARLES M. IVEY, III, TRUSTEE,
Petitioner,

v.

FIRST-CITIZENS BANK & TRUST COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the Bankruptcy Code, a trustee may "avoid" certain fraudulent "transfer[s]" by a debtor, 11 U.S.C. § 548(a)(1), and recover the transferred property, or its value, from certain "transferee[s]," 11 U.S.C. § 550(a)(1). Here, Respondent First-Citizens Bank & Trust Company ("First Citizens") merely maintained an ordinary, unrestricted checking account in which a bankrupt debtor received checks and wire transfers from third parties. The deposited funds remained "freely withdrawable," Pet. App. 10a, and the deposits did not "diminish[]" or have "the potential to diminish the estate." Pet. App. 30a-31a. The question presented is:

Whether these deposits into the debtor's unrestricted checking account were fraudulent "transfers" from the debtor to First Citizens, potentially rendering First Citizens liable as the transferee of those fraudulent transfers.

RULE 29.6 STATEMENT

Respondent First-Citizens Bank & Trust Company is a commercial bank chartered in North Carolina. It is a wholly owned subsidiary of First Citizens BancShares, Inc., which is a publicly held company incorporated in Delaware. No other publicly held company owns 10% or more of First-Citizens Bank & Trust Company's stock.

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INTRODUCTION

When debtors transfer property before entering bankruptcy, they can diminish the estate and harm creditors. The Bankruptcy Code therefore permits a trustee to "avoid" certain fraudulent transfers and recover the property, or its value, from third parties. Below, Petitioner, a bankruptcy trustee, brought a fraudulent transfer claim against Respondent First-Citizens Bank & Trust Company ("First Citizens"), which maintained an ordinary checking account for a now-bankrupt debtor. Petitioner's theory was that deposits *into* the debtor's own checking account were "fraudulent transfers" and that First Citizens owed damages because it provided the account. The bankruptcy court, district court, and Fourth Circuit each rejected that claim. The deposits did not diminish, or even potentially diminish, the estate because the "funds in the account were at all times part of" the estate. Pet. App. 10a. And the debtor "continued to possess, control, and have custody over those funds, which were freely withdrawable." *Id.* First Citizens' "mere maintenance" of the account thus did not give rise to a fraudulent transfer. *Id.*

Petitioner now claims "[t]his case presents a clear and intractable circuit conflict." Pet. 2. With that boast, one would expect Petitioner to cite cases reaching the opposite result on the same facts—holding banks liable based on maintenance of a checking account. That expectation would be disappointed. There is no such case. Every court to have considered similar claims on similar facts has rejected them.

With no *actual* conflict, Petitioner claims disagreement over the abstract question of whether "a debtor's deposits into his own bank account" constitute "transfers," fraudulent or not, under the Code. Pet. 2. Even if that disagreement existed, it would not justify certiorari absent a showing that it is leading different circuits to reach different results in similar cases. Regardless, even on this abstract question, there is no split.

Petitioner principally points to the Ninth Circuit's recent decision in *Schoenmann v. Bank of the West (In re Tenderloin Health)*, 849 F.3d 1231 (9th Cir. 2017). But *Tenderloin* did not concern "mere maintenance" of a checking account. Pet. App. 10a. The *Tenderloin* deposit harmed other creditors by triggering a security interest that changed the course of the bankruptcy proceeding. In this case, the Fourth Circuit left open the possibility that such a fact pattern could yield a "transfer." And for its part, *Tenderloin* stressed that the deposit there "deplete[d] the assets … available for distribution to creditors," and the court noted that absent such depletion it might have found no "transfer," just as the Fourth Circuit did here. 849 F.3d at 1244. That is not a split; if anything, these courts have expressly reserved the right to reach the same result if presented with similar facts.

There is, to be sure, dialogue about the precise bounds of a "transfer," particularly in district and bankruptcy courts. That has allowed Petitioner to fill his brief with broad language that, when lifted from context and juxtaposed, gives the flavor of conflict. This Court, however, does not grant certiorari to clear up general

"confusion." Pet. 2. Its conflict docket is for when circuits are deciding similar cases differently. While Petitioner may hypothesize that the Fourth and the Ninth Circuits would reach different results on the same facts—notwithstanding their express statements to the contrary—this Court can grant certiorari should that ever occur. Indeed, if Petitioner were right that a decision in his favor would be "outcome-determinative in a wide range of cases," Pet. 2, that would be all the more reason to deny the petition. This Court does not exercise its certiorari jurisdiction to decide broad questions in a technical area like bankruptcy without a genuine split.

STATEMENT OF THE CASE

A. Bankruptcy And Fraudulent Transfers.

The foundation for a bankruptcy case is the bankruptcy estate. "The commencement of a case under the Bankruptcy Code creates an estate which, with limited exceptions, consists of all of the debtor's property wherever located." *Ohio v. Kovacs*, 469 U.S. 274, 284 n.12 (1985). The estate then is subject to "equitable distribution" among creditors. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 667 (2006) (quotation marks omitted).

Creditors face the risk that a debtor, before the filing of a bankruptcy petition, may seek to move assets beyond the reach of the estate—reducing the property available for distribution. Hence, a core "purpose of the … Code[] … is to prevent a debtor from making transfers that diminish the … estate to the detriment of creditors." *Grayson Consulting, Inc. v. Wachovia Sec.*,

LLC (In re Derivium Capital LLC), 716 F.3d 355, 361 (4th Cir. 2013).

To effectuate this purpose, the Code permits a trustee to "avoid," and then recover, certain "fraudulent transfers" occurring in the two years before the filing of a bankruptcy petition. Under 11 U.S.C. § 548, the trustee "may avoid any transfer … of an interest of the debtor in property" if the debtor "made such transfer … with actual intent to hinder, delay, or defraud any" creditor. 11 U.S.C. § 548(a)(1)(A); *see BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994). The Code defines "transfer" to include "each mode … of disposing of or parting with … (i) property; or (ii) an interest in property." 11 U.S.C. § 101(54).

If a fraudulent transfer leaves property with a third party, the trustee's recourse is to § 550 of the Code. It provides that, "to the extent that a transfer is avoided under [§ 548]," or another such provision, "the trustee may recover … the property …, or, if the court so orders, the value of such property," from the "initial transferee" or certain others. 11 U.S.C. § 550(a).

B. Whitley's Checking Account At First Citizens And Ensuing Bankruptcy.

First Citizens is the nation's largest family-controlled bank, chartered and headquartered in North Carolina. Fourth Cir. Joint Appendix 575, ECF No. 23 (Feb. 8, 2016) ("JA"). Like many banks, First Citizens maintains deposits and checking accounts for customers. Pet. App. 3a, 35a. Funds deposited into a demand deposit account are "freely withdrawable." Pet. App. 10a, 30a. They are "available to [accountholders] at any

time [they] wish[] to write a check … or otherwise make a withdrawal from the account." Pet. App. 35a.

One accountholder was James Whitley. Pet. App. 2a. Like many accountholders, Whitley deposited checks in his account and received wire transfers there. Pet. App. 33a. Whitley, however, used his account while running a Ponzi scheme that unraveled in 2009. Pet. App. 2a.

In 2010, creditors filed an involuntary bankruptcy petition against Whitley. *Id.* The request was granted, and Petitioner was appointed trustee. Pet. App. 3a. While millions of dollars had been deposited into Whitley's account over the years, only a few dollars remained and became part of the bankruptcy estate.

C. Proceedings Below.

Two years later, Petitioner filed a complaint against First Citizens. He claimed that certain deposits *into* Whitley's account were avoidable as "fraudulent transfers" by Whitley under § 548(a)(1). Pet. App. 33a-34a. Petitioner sought to recover "the value of" these deposits under § 550(a), on the theory that First Citizens was the "transferee" of a fraudulent transfer. JA482. By targeting deposits into the account, Petitioner sought to make First Citizens a guarantor of the money Whitley obtained, for the benefit of creditors in bankruptcy. If, for example, Whitley received a $1,000 check, deposited it into his account, and then wired the same amount to an accomplice, Petitioner's theory would hold First Citizens liable based on the initial deposit.

Petitioner targeted a dozen deposits. Pet. App. 15a & n.5. Some were checks or wire transfers from "investors" in the Ponzi scheme. Pet. App. 33a. Others

were not—for example, a $300,000 wire of proceeds from a construction loan. Pet. App. 33a. As the district court observed, these deposits did "not cause any diminution of the estate." Pet. App. 18a. To the contrary, the non-investor deposits, if anything, *increased* the estate. JA978-79.

The bankruptcy court granted summary judgment to First Citizens. It observed that the purpose of fraudulent transfer law is to allow "creditors to avoid transfers which unfairly or improperly deplete a debtor's assets." Pet. App. 34a (quoting 5 *Collier on Bankruptcy* ¶ 548.01 (16th ed. 2014)). Here, the deposits went to "an ordinary checking account in which the funds in the account … remained subject to the control of the Debtor and were available to him at any time he wished." Pet. App. 35a. Hence, "the deposits … were not fraudulent transfers." Pet. App. 34a-35a. The court found that this conclusion was supported by *New York County National Bank v. Massey*, 192 U.S. 138 (1904), which held that "a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor," because there exists at all times "on the part of the bank, an obligation to pay the amount of the deposit." *Id.* at 147; *see* Pet. App. 35a.

The district court affirmed. The court noted that the issue on appeal—fraudulent transfer liability based on deposits into a checking account—"rarely arises" and was far afield from the normal fraudulent transfer case, where "there is usually no question that [an allegedly] fraudulent transfer depleted the estate." Pet. App. 23a.

The district court rejected Petitioner's novel claim. As that court observed, the Code limits liability to "a

fraudulently intended transfer 'of an interest of the debtor in property.'" Pet. App. 20a (quoting 11 U.S.C. § 548(a)). While the Code does not define this phrase, *Begier v. IRS*, 496 U.S. 53 (1990), defined it with reference to the property made part of the estate under § 541. Pet. App. 20a. *Begier* held that this phrase "is best understood as that property that would have been part of the estate had it not been transferred before the commencement of bankruptcy proceedings." Pet. App. 20a (quoting *Begier*, 496 U.S. at 58). Accordingly, the court concluded, if a transaction did not and could not affect "the scope of 'property of the estate,'" it was not a fraudulent conveyance. *Id.* (quoting *Begier*, 496 U.S. at 58). Other courts had likewise interpreted § 548's limit to mean that a transaction "is not subject to avoidance if it did not or could not diminish the estate, reflecting that the interest of the debtor in such property did not change." Pet. App. 22a; *see* Pet. App. 21a-25a (citing cases). Under that rule, the district court found, this was an easy case: "[N]othing in the record here indicates the estate was negatively impacted when these deposits were made into Debtor's own checking account," or even that the deposits had "the potential to diminish the estate." Pet. App. 30a-31a.

The Fourth Circuit affirmed, finding that the deposits were not "transfers" under § 101(54) and hence "cannot be avoidable [fraudulent] transfers under § 548(a)." Pet. App. 10a-11a. The Fourth Circuit grounded this conclusion in the Code's text. A "transfer," the court explained, requires a "'disposing of' or 'parting with' property." Pet. App. 10a (quoting 11 U.S.C. § 101(54)). The court found that the deposits here

did not satisfy this requirement: "When Whitley made deposits and accepted wire transfers into his checking account …, he continued to possess, control, and have custody over those funds, which were freely withdrawable at his will." *Id.* "Indeed," the court noted, "any funds in the account were at all times part of the bankruptcy estate." *Id.* Hence, the "Bank's mere maintenance of Whitley's checking account does not suffice to make deposits and wire transfers in that account 'transfers' from Whitley to the Bank." *Id.* Although the Fourth Circuit believed that courts were "divided" on what constitutes a transfer, it noted that its conclusion accorded with this Court's decision in *Massey*, Pet. App. 8a, its own pre-Code precedent, Pet. App. 7a-8a (citing *Citizens' Nat'l Bank of Gastonia v. Lineberger*, 45 F.2d 522, 527-28 (4th Cir. 1930)), and "bankruptcy and circuit courts … before and after the … Code," Pet. App. 9a.

The Fourth Circuit emphasized that its conclusion was "limited to the narrow circumstances presented here." Pet. App. 10a. The court "express[ed] no opinion on whether other types of deposits … would constitute transfers under § 101(54)." *Id.* In particular, the court included two specific—and significant—caveats. First, Fourth Circuit precedent recognizes that, to escape definition as a "transfer," the deposit must be "in reality a deposit, made in good faith as such… and not made as a cloak for a payment or other forbidden transaction." Pet. App. 7a (quotation marks omitted). Second, the account must be wholly "unrestricted"; the court expressly reserved whether the result would be the

same if the deposit resulted in funds becoming "restricted" in any way. Pet. App. 10a.

REASONS FOR DENYING THE WRIT

Petitioner claims "circuit conflict" on what, in the abstract, counts as a "transfer." Pet. 2. This split is illusory. Petitioner cites no case imposing fraudulent transfer liability on a bank based on ordinary deposits into a debtor's unrestricted checking account. Indeed, courts have universally rejected such claims on multiple grounds. And even entertaining Petitioner's abstract Question Presented on its own terms, no split exists. Petitioner claims a conflict with two Ninth Circuit decisions, but the decision below expressly reserved judgment on whether it would reach the same result on the Ninth Circuit's facts. As for the three-decades-old Tenth Circuit decision Petitioner also cites, it did not consider the question presented here.

Absent a real split, Petitioner wrenches broad language from context and ignores caveats in an effort to claim general "confusion" in lower courts. Pet. 2. This Court, however, grants certiorari to resolve *genuine* splits—different circuits reaching different results on similar facts. No such conflict exists here. Especially in a complicated area like bankruptcy, the Court should not jump in to decide issues that, in Petitioner's words, could change outcomes "in a wide range of cases," Pet. 2, where there is no split.

I. THE ASSERTED SPLIT IS ILLUSORY.

A. Courts Uniformly Reject Fraudulent Transfer Liability For Banks Based On Mere Maintenance Of Demand Deposit Accounts.

The only alleged "fraudulent transfers" in this case were ordinary deposits into an unrestricted checking account. Pet. App. 10a. They were "freely withdrawable at … will," and "any funds … were at all times part of the" estate. *Id.* The deposits did not "diminish[]" or even have "the potential to diminish the estate." Pet. App. 30a-31a. And they did not render the funds "restricted" in any way. Pet. App. 10a. In such circumstances, courts have uniformly rejected attempts to impose liability on banks for "mere maintenance" of accounts. *Id.* Petitioner cites no contrary case.

Some courts have reached this result, as the Fourth Circuit did, by concluding that no "transfer" took place within the meaning of § 101(54). *See, e.g.*, Pet. App. 10a; *Kiester v. Handy (In re Handy)*, 164 B.R. 355, 358 (Bankr. M.D. Fla. 1994) (deposit into unrestricted bank account not a fraudulent transfer under § 548); *Pioneer Liquidating Corp. v. San Diego Trust & Sav. Bank (In re Consol. Pioneer Mortg. Entities)*, 211 B.R. 704, 714 - 15 (S.D. Cal. 1997) (same), *aff'd in part, rev'd in part on other grounds*, 166 F.3d 342 (9th Cir. 1999); *see also In re Prescott*, 805 F.2d 719, 728-29 (7th Cir. 1986) (same result as to preferential transfer under § 547); *Tonyan Constr. Co. v. Mchenry State Bank (In re Tonyan Constr. Co.)*, 28 B.R. 714, 729 (Bankr. N.D. Ill. 1983) (same); *Rosen v. Kore Holdings, Inc. (In re Rood)*, 459 B.R. 581, 606 (Bankr. D. Md. 2011), *aff'd*, 482 B.R. 132 (D. Md. 2012), *aff'd sub nom. S. Mgmt. Corp. Ret. Trust v.*

Rood, 532 F. App'x 370 (4th Cir. 2013), and *aff'd sub nom. S. Mgmt. Corp. Ret. Trust v. Jewell*, 533 F. App'x 228 (4th Cir. 2013) (same, as to alleged post-petition transfer under § 549).

Other courts have reached this result, as the bankruptcy and district courts did, by finding that such deposits have "no actual or potential diminutive effect on the bankruptcy estate," Pet. App. 22a, and hence are not a "transfer of an interest of the debtor in property" under § 548. *See In re Consol. Pioneer*, 211 B.R. at 716-17; Pet. App. 30a-31a; Pet. App. 35a.

Still other courts have reached this result under § 550. As explained above, that section allows a trustee to recover avoided fraudulent transfers from third parties—but it permits actions only against a "transferee." 11 U.S.C. § 550(a)(1); *see supra* at 4. Courts have held that banks are not "transferees" of funds in unrestricted checking accounts and instead act merely as conduits. *See, e.g.*, *Meoli v. Huntington Nat'l Bank*, 848 F.3d 716, 725 (6th Cir. 2017) (to be "transferee" of § 548 fraudulent transfer, bank must have "dominion and control" over funds, which was absent given "the account-holder's right to withdraw the deposits" at will); *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 893-94 (7th Cir. 1988) (when debtor deposited a check, bank "received nothing … that it could call its own" and hence was not "transferee" of § 548 fraudulent transfer); *Pioneer Liquidating Corp. v. San Diego Trust & Sav. Bank (In re Consol. Pioneer Mortg. Entities)*, 166 F.3d 342, 1999 WL 23156, at *1 (9th Cir. 1999) (unpublished table decision) (ordinary "checking transactions" did not render bank "a

'transferee'" of a § 548 fraudulent transfer because bank "never had dominion or control over deposited funds such that it could use them for its own purposes").[1]

In uniformly rejecting the liability that Petitioner urges, courts have reached the logical and sensible result. Checking accounts are a financial staple. Given their ubiquity, virtually every fraud—certainly, every *major* fraud—passes funds through such accounts at some point. Yet on Petitioner's theory, *every* bank would be subject to fraudulent transfer liability based on "mere maintenance of [a] checking account." Pet. App. 10a. Any bank unfortunate enough to have a fraudster customer would be forced to litigate fact-intensive defenses. *Compare* 11 U.S.C. § 548(c) (affirmative

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[1] On a motion to dismiss, the bankruptcy court rejected First Citizens' argument based on § 550, believing that a bank can only avoid "transferee" status if it "can demonstrate it acted in good faith," which the court found could not be resolved at the pleading stage. *Ivey v. First–Citizens Bank & Trust Co. (In re Whitley)*, Bankr. No. 10-10426, 2013 WL 486782, at *5 (Bankr. M.D.N.C. Feb. 7, 2013). The court was wrong on that point. Under § 550(a)(1)'s plain text, "good faith" is simply irrelevant to whether someone is a "transferee." A bank that is *not* a transferee, but merely a conduit, does not somehow become a transferee based on claims that it did not act in good faith. That accords with *Meoli* and *Bonded*. Those cases did not ask, as to funds that were merely deposited into checking accounts, whether the banks acted in good faith. *Meoli*, 848 F.3d at 724-29; *Bonded*, 838 F.2d at 892-95; *cf. Meoli*, 848 F.3d at 729-35; *Bonded*, 838 F.2d at 896-98 (analyzing good faith only as to separate loan repayments that the banks received, pursuant to "good faith" defenses that the banks had invoked under § 548(c) and § 550(b)). Regardless, the bankruptcy court's mistake is immaterial. The point is that, via one route or another, courts reject the liability Petitioner urges.

defense for certain transferees that "take[] for value and in good faith"), *with, e.g.*, *Grede v. Bank of N.Y. Mellon Corp. (In re Sentinel Mgmt. Grp., Inc.)*, 809 F.3d 958, 961 (7th Cir. 2016) (defense unavailable if transferee had "inquiry notice" of "wrongdoing" based on "awareness of suspicious facts"). Petitioner's theory is a recipe for enmeshing banks in years of litigation after every fraud, and one that courts and the Code have wisely avoided.

B. There Is No Conflict Between The Decision Below And Any Circuit Court.

Although Petitioner claims a "2-1 split" between the decision below and the Ninth and Tenth Circuits, Pet. 3, Petitioner is wrong. None of the cases that Petitioner cites even addresses the type of claim at issue here—fraudulent transfer liability for a bank based on deposits into a debtor's unrestricted checking account that the bank merely maintained. Petitioner's cases concern different claims and materially different facts. Indeed, the Fourth Circuit expressly reserved judgment on whether it would reach the same result if presented with those different facts.

Tenderloin. Principally, Petitioner claims conflict between the decision below and *Schoenmann v. Bank of the West (In re Tenderloin Health)*, 849 F.3d 1231 (9th Cir. 2017). Pet. 8. The issue in *Tenderloin* was whether a $526,402.05 deposit was avoidable as preferential transfer under § 547. *See* 849 F.3d at 1234. But *Tenderloin* differs from the decision below in a critical way. It did not concern "mere maintenance," Pet. App. 10a, of a normal unrestricted account. The bank had a "security interest" in the account's funds by virtue of a loan from the bank to the debtor that was "secured by …

its deposit accounts." 849 F.3d at 1234, 1243, 1244 n.13. Hence, deposited funds became "subject … to [the bank]'s security interest." *Id.* at 1243. And by "increas[ing] the size of [the bank's] secured claim," the deposit altered the results of the proceeding—allowing the bank to obtain more, and other creditors, less. *Id.* at 1242-43.[2] Here, by contrast, there is no claim that the deposits subjected the funds to a security interest of First Citizens. The Fourth Circuit thus addressed a situation in which First Citizens "mere[ly] maintain[ed]" a checking account for Whitley solely as an accountholder. Pet. App. 10a.

This critical difference is not a distinction that lurks, unmentioned, in *Tenderloin*'s facts. It is why the Ninth Circuit reached the result it did. As the court explained:

> The deposit would also constitute a "transfer" under the … Code. It would subject the funds to BOTW's security interest, give BOTW title to the funds, and deplete the assets available for distribution to Tenderloin's creditors. Tenderloin therefore would be "disposing of or parting with … an interest in property."

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[2] The *Tenderloin* debtor directed two payments to the bank: It first designated $190,595.50 to satisfy its loan and then designated $526,402.05 for deposit. 849 F.3d at 1234. The Ninth Circuit, however, deemed it irrelevant under the Code that the debtor "transferred the $526,402.05 … having already satisfied its preexisting debt," *id.* at 1242, and it decided the case on the assumption that the bank's "security interest" continued to exist at the time of the $526,402.05 deposit, *id.* at 1242-43.

Id. at 1243. Indeed, the Ninth Circuit also relied on those same facts to deem this Court's decision in *Massey* "factually distinguishable," noting that "[h]ere, unlike in *Massey*, the accounts were pledged as security on an antecedent loan, and the deposit itself would render [the bank] fully secure." *Id.* at 1244 n.13.

Even more telling, both the Fourth Circuit below and the Ninth Circuit in *Tenderloin* reserved judgment on whether each would reach the same result if presented with the other's facts. For the Fourth Circuit, it was critical that Whitley's deposits were not "a cloak for a payment or other forbidden transaction," and the court "express[ed] no opinion" on the result if a deposit caused the funds to be "restricted" in any way. Pet. App. 7a, 10a (quotation marks omitted). If, in a future case, a trustee argues that a deposit subjects funds to the bank's "security interest" on a loan, *Tenderloin*, 849 F.3d at 1243, the Fourth Circuit could decide that the decision below does not control and instead follow *Tenderloin*.

As for the Ninth Circuit, it acknowledged the cases holding that a bank deposit is not a fraudulent transfer if it does not "deplete[] the assets of the estate available for … creditors," including the district court's decision below. *Id.* at 1244-45. The Ninth Circuit expressed "doubt" that "such an inquiry is warranted when deciding whether a transaction *constitutes* a transfer"—but it did not resolve that question, instead finding that "[o]n the specific facts of this case …, the deposit would have th[e] effect" of depleting the estate. *Id.* at 1244. Hence, if a future Ninth Circuit panel considered this case's facts, it likewise could deem itself free to reach the same result as the Fourth Circuit. That is especially

clear because the Ninth Circuit found the bank to have "waived" the theory on which the bankruptcy court and the district court decided this case—that there was no transfer "of an interest of the debtor in property" under § 548(a)(1). *Id.* at 1244 n.14 (quotation marks omitted). In either of these ways, then, the Ninth Circuit could decide this case the same way as the Fourth Circuit.

Bernard. Even weaker is Petitioner's claimed conflict with the Ninth Circuit's decision in *Bernard v. Sheaffer (In re Bernard)*, 96 F.3d 1279, 1282 (9th Cir. 1996). To begin, there could not possibly be a cert-worthy conflict with the 1996 *Bernard* opinion given that *Tenderloin* in 2017 has left open the possibility that no avoidable transfer occurs when a deposit does not "deplete[] the assets of the estate." 849 F.3d at 1244. In fact, *Bernard* is farther afield still. Petitioner's Question Presented asks whether the word "transfer" includes a "debtor's deposit into his own bank account." Pet. i. But *Bernard* was not about a bank's liability for maintaining an unrestricted checking account into which a debtor deposited funds. It was about *withdrawals* and addressed whether a debtor's withdrawal of $64,000 from his bank account with the "admitted intent to hinder the [creditors'] attempts to attach the … accounts" rendered *the debtor* ineligible for a Chapter 7 discharge under 11 U.S.C. § 727(a)(2)(A). 96 F.3d at 1280. That section prohibits discharge when "the debtor, with intent to hinder, delay, or defraud a creditor ... has transferred … property" in the year preceding the petition. *Id.* (quoting § 727(a)(2)(A)). The Ninth Circuit held that this withdrawal indeed rendered the debtor ineligible for discharge. *Id.* at 1283.

Nothing in the decision below would stop the Fourth Circuit from reaching the same result if presented with *Bernard*'s facts and legal question. The Fourth Circuit, again, cautioned that a deposit must be "in reality a deposit" and not "a cloak for a … forbidden transaction." Pet. App. 7a (quotation marks omitted). The *Bernard* withdrawals, however, were just such a "cloak." *Id.* Indeed, the Ninth Circuit emphasized the obvious point: cash "was more difficult for the [creditors] to acquire" than the bank accounts the cash replaced. 96 F.3d at 1283. That is in stark contrast to here, where the deposits did not even "potentially diminish the estate." Pet. App. 25a. If anything, it was *easier* for the estate to obtain checks deposited in Whitley's account rather than sitting in his desk.

Just as critical is the different question *Bernard* confronted. Section 727 operates "to deny the dishonest debtor a discharge," *Law v. Siegel*, 134 S. Ct. 1188, 1198 (2014), and hence in *Bernard*, intent was the central issue: The court denied its fraudulent debtor's discharge even though "[a]t least in theory, the … withdrawals did not reduce the assets available to the [creditors]." 96 F.3d at 1282. This case, however, concerns an attempt to avoid transactions and impose liability on a third party—First Citizens. It would be bizarre to impose such liability when the transactions did not even "potentially diminish the estate."[3] Pet. App. 25a. In

[3] Indeed, the Ninth Circuit's two decisions recognize this point. *Bernard* squarely held that "depletion of assets is not a prerequisite to denial of discharge under § 727(a)(2)(A)." 96 F.3d at 1282. But

properly rejecting that liability, the Fourth Circuit was not compelled to disagree with the Ninth Circuit's result on *Bernard*'s facts.[4]

Redmond. Petitioner is also wrong that the decision below conflicts with *Redmond v. Tuttle*, 698 F.2d 414 (10th Cir. 1983). Pet. 11. Like *Bernard*, *Redmond* did not involve an avoidance issue, but exemptions under 11 U.S.C. § 522. And in addressing that different issue, the Tenth Circuit did not decide the "transfer" question Petitioner poses.

In *Redmond*, the debtors failed to disclose $4,563.80 deposited in a bank account, which the trustee subsequently recovered. 698 F.2d at 415. Under § 522(g)(1), the debtors could exempt these recovered funds from the bankruptcy estate only if the "transfer was not a voluntary transfer … by the debtor." 11 U.S.C. § 522(g)(1). The Tenth Circuit stressed that the "only question on appeal is whether the deposits that ended up in the … account were voluntary," finding they were. *Redmond*, 698 F.2d at 417. To be sure, the Tenth Circuit observed in a footnote that "'[t]ransfer' is

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when *Tenderloin* addressed avoidance issues, it left open that question. 849 F.3d at 1244.

[4] Petitioner claims (at 11) *Bernard* was followed in *A&H Insurance, Inc. v. Huff (In re Huff)*, BAP No. NV-13-1263, 2014 WL 904537 (B.A.P. 9th Cir. Mar. 10, 2014). Like *Bernard*, *Huff* concerned denial of discharge under § 727(a). *Id.* at *4. And its *entire* discussion of the "transfer" issue was dicta because the court had already found the "§ 727 claim … barred as a matter of law." *Id.* The deposit, too, changed the interests in the funds in a way absent here: The debtors withdrew money from their own account and deposited it in a joint account held with their son. *Id.* at *1, *6.

broadly defined" and includes "even … deposits in a bank account." *Id.* at 417 n.8. But this type of passing assumption, regarding "'issues not raised by the appellant,'" does not "constitute [binding] precedent[]." *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1288-89 (10th Cir. 2017) (quoting *Cone v. Bell*, 556 U.S. 449, 482 (2009)) (some internal quotation marks omitted)). It certainly does not create cert-worthy conflict that merits this Court's review. The Tenth Circuit has never, in the 35 years since *Redmond*, said that deposits in ordinary checking accounts are fraudulent transfers under the Code.[5]

* * *

Petitioner's alleged split is an illusion built on broad dicta snatched from context. No other circuit has reached different results from the Fourth Circuit on similar facts. Rather, courts have reached different

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[5] Petitioner also asserts that the "division … extends to … district and bankruptcy courts." Pet. 12. But in fact, Petitioner cites only two bankruptcy court decisions allegedly in conflict with the decision below. *Id.* (citing *Clark v. Wilbur (In re Wilbur)*, 211 B.R. 98 (Bankr. M.D. Fla. 1997); *Locke v. Schafer (In re Schafer)*, 294 B.R. 126 (N.D. Cal. 2003)). Neither is genuinely in conflict; rather, they are of a piece with *Bernard*, and so off-point for the same reasons. Like *Bernard*, both concerned denial of discharge under § 727(a)(2), not avoidance of an allegedly fraudulent transfer. And in both, as in *Bernard*, the debtor made withdrawals or deposits "as a cloak for a … forbidden transaction." Pet. App. 7a (quotation marks omitted); *see Wilbur*, 211 B.R. at 102, 104 (debtor "cash[ed] traveler's checks" resulting in "loss of over $30,000" that debtor "failed to explain"); *Schafer*, 294 B.R. at 128, 131 (debtor opened new account, and made deposits in it, because creditor "previously attached his old account").

results because they addressed different facts and different legal issues. Indeed, they have expressly reserved the possibility that, were the facts reversed, so too would be the results.

II. THE DECISION BELOW IS CORRECT.

The lack of conflict constitutes reason enough to deny, but the decision below is also correct. The "deposits and wire transfers at issue here are not §101(54) 'transfers' from Whitley to First Citizens." Pet. App. 10a.

The Fourth Circuit's decision comports with the Code's plain text, which reaches only transactions in which the debtor has "dispos[ed] of" or "part[ed] with" property or an interest in property. 11 U.S.C. § 101(54). When an accountholder parks funds in an unrestricted checking account, however, the funds are "freely withdrawable at his will." Pet. App. 10a. These funds "remain[] subject to [his] control," and are "available to him at any time he wished to write a check on his checking account or otherwise make a withdrawal." Pet. App. 35a. Thus, the account holder has not disposed of, or parted with, anything any more than if had he exchanged five $20 bills for ten $10 bills.

The leading bankruptcy treatise agrees: A "debtor's deposit of a nonexempt check into a nonexempt bank account … is not a transfer … —so classifying such transactions would be akin to holding that a debtor's moving of money from one pocket to another is a transfer." 2 *Collier on Bankruptcy* ¶ 101.54 (Alan N. Resnick & Henry J. Sommer eds., 16th rev. ed. 2017). There is no disposing of, or parting with, property

because the "debtor's interest in the property has not substantively changed, and at all times the debtor's interest was exposed to creditors." *Id.*

The Fourth Circuit's conclusion follows multiple decisions of this Court. The first is *Massey*. *Massey* explained that a "deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor," and so "is not a transfer of property." 192 U.S. at 147. Petitioner observes that Congress subsequently amended the definition of "transfer." Pet. 16. But the Bankruptcy Act of 1898 at issue in *Massey* likewise defines "transfer" as a "disposing of or parting with" property. Bankruptcy Act of 1898, ch. 541, § 1, 30 Stat. 544, 545; *see Massey*, 192 U.S. at 146. As just explained, that limitation is dispositive. Where this Court has set forth a "settled construction," an amendment must provide a "relatively clear indication of its intent" to depart. *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017) (internal quotation marks omitted). No such indication is present here.

Petitioner invokes snippets of 1978 legislative history—in particular, a statement that a "deposit in a bank account or similar account" can be a transfer. S. Rep. No. 95-989, at 27 (1978), *as reprinted in* 1979 U.S.C.C.A.N. 5787, 5813; *see* Pet. 3, 5, 10, 12, 14, 15, 16, 17. But even leaving aside the normal caveats about legislative history, the Fourth Circuit did not hold that deposits *cannot* be transfers. It reserved decision on "other types of deposits"—including, as explained above, deposits into accounts encumbered by security interests, like those considered in *Tenderloin*. Pet. App.

10a. Meanwhile, this single sentence does not state that *every* deposit is a transfer—and could not, without contradicting § 101(54)'s plain text.

Barnhill v. Johnson, 503 U.S. 393 (1992), confirms that the 1978 amendments did not displace *Massey* on the facts here. Petitioner asserts that, "[b]y depositing funds, Whitley turned his property over to the bank." Pet. 14. But before the transactions, Whitley did not *have* "funds." *Id.* The transactions Petitioner seeks to avoid are "checks and wire transfers" from third parties *to Whitley*. Pet. App. 3a. The deposits gave him money he did not have before—and thus, if anything, only *increased* Whitley's property, and so the estate's. Whitley cannot have disposed of, or parted with, anything via these transactions when he did not have funds until the transactions were complete.

Barnhill is express on this point. It addressed *when* a check "transfer" occurs—when the check is delivered to the recipient, or when the drawee bank honors it? 503 U.S. at 394-95. The *Barnhill* petitioner advocated for delivery, based on Petitioner's same arguments. He observed that § 101(54) adopts "an expansive definition of transfer," bolstered his position with "legislative history," and contended that the recipient "gain[s] something when he receive[s] the check"—*i.e.*, possession of a negotiable instrument. *Id.* at 400-01. The Court "acknowledge[d]" the argument as having "some force," but rejected it. *Id.* at 400. Per *Barnhill*, until the drawee bank honors the check, the funds remain "subject to a variety of actions by third parties"—for example, the maker can cancel. *Id.* at 401. Hence, the "something" the recipient gets from mere delivery is

only a "chose in action against" the maker, and "no interest in property [is] thereby … transferred" under § 101(54). *Id.* at 400-01. Rather, the recipient does not obtain § 101(54) property "until the moment of honor." *Id.* at 401. Any other interpretation, the Court stressed, "would accomplish a near-limitless expansion of" the "transfer" definition. *Id.*[6] This holding is dispositive: Before the check deposits, Whitley likewise did not have § 101(54) property that he could fraudulently transfer. The wire transfers are easier still, as Whitley did not even have physical possession of a piece of paper until the transaction was complete.

The conclusion dictated by *Massey* and *Barnhill* accords with the Code's purposes. The Code voids fraudulent transfers "to prevent a debtor from making transfers that diminish the bankruptcy estate to the detriment of creditors." *Derivium*, 716 F.3d at 361. A deposit into a debtor's unrestricted checking account does not diminish, or even "potentially diminish," the estate. Pet. App. 25a. If anything, such deposits benefit the estate. A mere check—a mere "chose in action," *Barnhill*, 503 U.S. at 400-01—becomes accessible funds. There is no reason to deem such transactions "transfers" subject to avoidance.

By contrast, Petitioner's position yields bizarre results. Imagine, for example, that with his balance at $0, Whitley deposited a $1,000 payroll check from a bona fide job. Imagine, too, that as soon as the check cleared,

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[6] While the meaning of "property" and "interest in property" under § 101(54) "are creatures of state law," *Barnhill* was "aware of no material differences" across states. 503 U.S. at 398 & n.5.

Whitley made a wire transfer to an accomplice. The strange result of Petitioner's view is that Whitley has transferred *the same* $1,000 twice—first when he deposited the check, and again when he conveyed the same funds to his accomplice. More than that: Petitioner's rule would allow a trustee to target *the first* deposit, which only increased the estate, as a fraudulent transfer. And if the trustee recovered from the bank, he could not thereafter bring a fraudulent transfer claim based on the transaction in which Whitley *actually* "dispos[ed] of" these funds, 11 U.S.C. § 101(54)(D), by conveying them to his accomplice—because under § 550, the "trustee is entitled to only a single satisfaction." *Id.* § 550(d).

Indeed, under Petitioner's theory, the entire concept of avoided transfers becomes incoherent. Avoidance "is the setting aside or nullification of a transaction," making "the transfer … retroactively ineffective." 5 *Collier on Bankruptcy* ¶ 548.10. But nullifying the transactions here—checks and wire transfers from third parties—would not put funds back in the hands of Whitley or the estate. If the checks and wire transfers were never deposited, the *third parties* would still have the funds. This strange result follows because Petitioner departs from the statute by treating deposits into Petitioner's account as fraudulent transfers by Petitioner.

Moreover, Petitioner's position would unleash a tidal wave of litigation, which reinforces why the Fourth Circuit was correct to reject it. Below, Petitioner admitted as much—that his "theory of the case" is that "every cent from whatever source that goes into [a]

fraudster's account at [a] bank" is a fraudulent transfer. Fourth Cir. Oral Arg. Recording 13:21-13:53. Banks will only be able to avoid liability by proving, on the facts, an affirmative "good faith" defense that, per Petitioner, will be unavailable if anything lurking in the bank's files gave it so much as "inquiry notice" of potential misconduct. Fourth Cir. Br. of Appellant at 19-20 & n.9 (quotation marks omitted); *see supra* at 13. Banks are attractive targets because of perceived deep pockets, and soon, every fraud would yield a claim against every bank that housed a checking account. It is thus no wonder that every court to consider claims like Petitioner's has rejected them on one or more of several grounds—under § 101(54), under § 548(a)(1), and under § 550(a)(1). That solid wall of decisions reinforces why the Fourth Circuit was right.

III. THIS COURT'S INTERVENTION IS NOT WARRANTED.

Petitioner asserts that "[t]his Court's intervention is urgently needed," Pet. 13, but his own brief shows that this claim is untrue. There is no genuine split and, even to create his illusory split, Petitioner can only cobble together three decisions on what he calls a "[s]ignificant [a]nd [r]ecurring [q]uestion," Pet. 17. Two of them are more than 20 years old. This Court's scarce resources are not well spent on an issue that the Circuits confront, at most, once a decade.

Indeed, if Petitioner were right that the definition of "transfer" under § 101(54) is potentially "outcome-determinative in a wide range of cases" across the Code, Pet. 2, that would be even more reason for the Court to stay its hand. This issue has received barely any

treatment in the Circuits, and no other Circuit has considered the issue in the context of a § 548 fraudulent transfer claim on similar facts. The Court should not reach out to decide an issue that could yield such broad effects with such limited ventilation and such little visibility into the effects.

This case is also a poor vehicle for addressing Petitioner's broad Question Presented. Petitioner pitches his Question as categorical—whether "a debtor's deposit into his own bank account" is a § 101(54) transfer. Pet. i. But this case potentially concerns four different types of transactions: personal checks from third parties, cashier's checks, cash, and wire transfers. Pet. App. 3a, 15a n.5, 33a. And as Petitioner acknowledged below, whether there was a "transfer" of property from Whitley to First Citizens potentially implicates each of the four different legal regimes governing these different transactions, which may require separate analysis. *See* Fourth Cir. Oral Arg. Recording 5:23-5:43 (proceeding to discuss each of the "four different types of transfers"). Yet none of the decisions below analyzed those differences. If this Court granted certiorari, it could find itself having to wade into all these issues—which often implicate nuances of state law—writing on a blank slate without assistance from the courts below. Indeed, the district court observed that there is a "discrepancy" over whether a cash deposit is even in the case. Pet. App. 15a n.5. That compounds the vehicle problems, as the decisions below do not even settle *what type* of transactions are at issue.

This case is also a poor vehicle because of the unanimity over the right result. The only variation

among lower courts is over the precise provision they rely upon. The point is not just that there are alternative *grounds* for the decision below. It is that courts, differing only in the labels they use, are reaching the same result for the *same reasons*. A proper vehicle would be one in which § 101(54)'s "transfer" definition was actually "outcome-determinative." Pet. 2.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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