No. 16-1330

# In the Supreme Court of the United States

CHARLES M. IVEY, III, TRUSTEE, PETITIONER

*v.*

FIRST CITIZENS BANK & TRUST COMPANY

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

## REPLY BRIEF FOR THE PETITIONER


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## ARGUMENT

This petition presents a "significant threshold question" of bankruptcy law that has "divided" the circuits: whether a debtor's deposit into his own unrestricted bank account is a "transfer" under 11 U.S.C. 101(54). Pet. App. 5a-6a. The Fourth Circuit acknowledged the conflict below (*ibid.*), and the Ninth Circuit has confirmed the conflict is entrenched (*Schoenmann* v. *Bank of the West (In re Tenderloin Health)*, 849 F.3d 1231 (9th Cir. 2017)). Expert analysis from the American Bankruptcy Institute has flagged the "intractable split" and urged the Court to "grant review," stressing the issue's "importance" to "bankruptcy practice nationwide." Rochelle's Daily Wire, *'Cert' Petition Seeks to Resolve Circuit Split on What's a 'Transfer'*, Am. Bankr. Inst. (Aug. 4, 2017) (ABI) <http://tinyurl.com/iveycircuitsplit> (noting the issue's significance for multiple Code provisions and explaining how the decision leaves "the Fourth Circuit a haven for fraudsters"). The decision below was indefensible on the merits, and this "important" issue (*ibid.*) was the sole basis for the court's disposition.

Respondent's opposition trots out all the usual makeweights against review. It argues there is "no *actual* conflict" (Opp. 2), but everyone *except respondent* agrees there is a genuine split. The panels of two different circuits did not acknowledge a conflict out of sport, and expert commentary has confirmed what is so obvious that respondent alone denies it. Opp. 13-16 (misreading *Tenderloin* by focusing on just one of its *independent* holdings and ignoring, entirely, its rejection of the Fourth Circuit's position). Respondent says there is no split on the *ultimate* question of "fraudulent transfer liability" (Opp. 9), which is irrelevant here—and would only become relevant *after* this Court reverses the "significant threshold"

issue (read: the *actual* question presented). Pet. App. 5a-6a. Respondent may wish to litigate its *downstream* issues now, but its separate defenses will not be ripe until a remand after plenary review. And respondent makes the obligatory vehicle objections (Opp. 25-27), trumpeting immaterial facts that no court (including the court below) has considered relevant, and suggesting the issue has insufficiently percolated—despite a 2-1 circuit conflict in a bankruptcy context that demands "uniform[ity]." U.S. Const. Art. I, § 8, cl. 4.

In the end, the importance of further review is undeniable. Under the decision below, an ordinary deposit *never* leads to any consequences for wrongdoers, even where "its officers were willfully blind to the use of their institution to commit fraud." ABI, *supra*. This case is illustrative. Respondent was not "merely a conduit." Opp. 12 n.1. It originally closed Whitley's account because it "fear[ed]" he was "involved in some kind of Ponzi Scheme," but gave him another account after pressure from a "high-ranking bank official" with a "personal relationship" with Whitley. C.A. J.A. 476-478. Told this new account showed the same suspicious Ponzi activity, the official "recommend[ed]" "that Whitley needed to be coached on how he should be handling his accounts." *Id.* at 478. Contrary to respondent's strawman, this is not targeting banks for "'mere maintenance of [a] checking account.'" Opp. 12. It involves faithfully applying Congress's expansive definition of "transfer" to avoid short-circuiting the Code's protections against fraud. ABI, *supra*.[1]

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[1] Another example of the issue's importance: Under the decision below, but not in the Ninth and Tenth Circuits, a debtor under 11 U.S.C. 727(a)(2) "would receive a discharge despite his documented attempt at defrauding creditors" by secretly depositing funds into his accounts. ABI, *supra*; cf. *In re Schafer*, 294 B.R. 126, 132 (N.D. Cal. 2003).

While respondent has an understandable incentive to paper over the split, courts that actually apply the law perceive a square conflict. This issue was outcome-determinative below, and respondent does not even attempt to dispute its importance. The brief in opposition, though wrong, was unsolicited and extensive, far surpassing the arguments below and making clear that both sides will be well represented on plenary review. And this petition presents an ideal vehicle to resolve this significant split. Certiorari is warranted.

**A. Respondent Refuses To Grapple With The Obvious Circuit Conflict**

Although respondent deflects from the threshold "transfer" question, the circuits are intractably divided over the meaning of this important Code provision.

1. a. In direct conflict with the Fourth Circuit, the Ninth Circuit has squarely held that a deposit into an unrestricted bank account is a "transfer" under Section 101(54). See Pet. 8-11; *Tenderloin*, 849 F.3d at 1243-1244; *Bernard* v. *Schaeffer (In re Bernard)*, 96 F.3d 1279, 1282 (9th Cir. 1996). Respondent's attempts to minimize the split are baseless.

First, respondent insists the issue remains open in the Ninth Circuit (Opp. 15-16), which would surely come as a surprise to that court. The Ninth Circuit was not confused when it said it was bound by *preexisting* circuit law: "'Under the holding in *Bernard*, there is no ambiguity around the definition of a transfer; withdrawals *and deposits* into bank accounts clearly qualify.'" *Tenderloin*, 849 F.3d at 1243-1244 (emphasis added); *id.* at 1244 ("'a deposit 'exchange[s] money for debt * * * result[ing] in a 'parting with' property under the holding in *Bernard* as a matter of law'"); *id.* at 1246 (Korman, D.J., concurring) ("The majority is correct that *Bernard*[] binds us to begin with the

premise that a bank deposit is a 'transfer' under the modern Bankruptcy Code."). *Bernard*'s "holding"—as *Tenderloin* confirmed—controls as law of the circuit. Contra Opp. 15. Respondent cannot wish away this square disposition of the question presented.[2]

Second, respondent argues that *Tenderloin* is distinguishable because the deposits at issue were subject to the bank's security interest. Opp. 13-15 (maintaining, without support, that the court "reserved judgment on whether [it] would reach the same result" with "unrestricted" deposits). But the Ninth Circuit was unequivocal that deposits *of any kind* were "transfers" under the Code. Respondent simply skips over the extended discussion of *Bernard* (which involved no security interests), Congress's 1978 enactment of the Code, the Code's sweeping new language, the Code's stated legislative purpose, and the Ninth Circuit's reasons for setting aside *N.Y. Cty. Nat'l Bank* v. *Massey*, 192 U.S. 138 (1904)—in other words, the court's complete repudiation of every jot of the Fourth Circuit's rationale. 849 F.3d at 1243-1244 & n.12. While it is assuredly true that the panel *also* noted that the bank's security interest *alternatively* supported the same result, that was, at most, an alternative holding. And it is "well-established that 'where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.'" *United States* v. *Vidal-Mendoza*, 705 F.3d 1012, 1016 n.5 (9th Cir. 2013) (quoting *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949)).

Respondent notes that *Tenderloin* found *Massey* "factually distinguishable." Opp. 15. What respondent does

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[2] *Tenderloin*'s discussion of *Massey* and *Bernard* also forecloses respondent's related attempts to distinguish *Bernard*. Opp. 16-18. The court correctly recognized that *Bernard* compelled the conclusion that unrestricted deposits are "transfers." See 849 F.3d at 1243-1244, 1246.

not note is that *Tenderloin first and foremost* rejected *Massey*'s legal conclusion. The court made clear that the factual distinction was an *additional* ground for decision: "*Massey* is *also* factually distinguishable." 849 F.3d at 1244 n.13 (emphasis added). The conflict is undeniable.

b. As the Fourth Circuit acknowledged, its decision also departs from *Redmond* v. *Tuttle*, 698 F.2d 414 (10th Cir. 1983), which held that "'[t]ransfer' is broadly defined in 11 U.S.C. 101[(54)] to include every means of parting with property or an interest in property, even by deposits in a bank account." 698 F.2d at 417 & n.8 (citing S. Rep. No. 989, 95th Cong., 2d Sess. 27 (1978)). Respondent says this was merely a "passing" conclusion. Opp. 19. But this reasoning was essential to the outcome, as the "exemption" issue required finding a "transfer." This precedent does not become any less binding because the panel did not struggle at length with the conclusion.

Respondent still declares the decision non-precedential because the issue was "'not raised by the appellant.'" Opp. 19 (quoting *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1288-1289 (10th Cir. 2017)). But *Belnap* is limited to issues that were not raised *or decided*. See 844 F.3d at 1289 (addressing issues not "considered and resolved," "suggested or decided," "brought to the attention of the court []or ruled upon"). The court below did not doubt *Redmond*'s "finding that deposits" satisfied Section 101(54) (Pet. App. 7a), and respondent has no basis for suggesting otherwise. That the Tenth Circuit has not since reiterated this conclusion (Opp. 19) reflects only that bankruptcy issues rarely percolate up to the court of appeals, and litigants seldom waste resources briefing issues foreclosed by circuit precedent.

2. Respondent discounts the split because conflicting decisions arise under different Code sections. This overlooks the *relevant* commonality: each case addressed *the*

*Code's identical "threshold" definition*. It is *that* threshold question (under the *same* Section 101(54)) that has produced an acknowledged conflict, and respondent never identifies any reason that threshold definition might vary across the Code. Rather, Section 101 defines "transfer" identically throughout Title 11, see 11 U.S.C. 101, and a consistent meaning is appropriate. See Pet. 3-5. Respondent's contrary position conflicts with the entire body of relevant authority, which treats the threshold definition as uniform and independent of other issues. *E.g.*, *Tenderloin*, 849 F.3d at 1243-1244 (treating *Bernard*—a discharge-denial case under Section 727—as precedent for a "preference" issue under Section 547). And the Fourth Circuit below cited decisions from multiple contexts without hinting the underlying context made any difference.

Respondent thus is wrong that every *subsequent* issue must be identical for the threshold decision to produce a certworthy conflict. Opp. 3. Indeed, the Court has a case this Term with a discrete, predicate legal issue arising in a variety of bankruptcy settings. See *U.S. Bank Nat'l Ass'n, Trustee* v. *The Vill. at Lakeridge, LLC*, No. 15-1509 (considering the standard of review for "insider" determinations, even though the conflict canvassed a variety of contexts (cramdowns, equitable subordination, avoidable transfers)).

3. According to respondent, the "threshold" conflict is irrelevant because petitioner will ultimately lose—the deposits did not diminish the estate and respondent was not a "transferee." Opp. 9-12. But whether a "transfer" *ultimately leads to liability* is a subsequent issue. What matters here is the Fourth Circuit chose to sidestep the merits and instead waded into a circuit conflict on the "threshold" question. Its disposition was outcome-determinative. This Court often grants review even if a party might eventually prevail on remand on alternative grounds. See, *e.g.*,

*Abbott* v. *Abbott*, 560 U.S. 1, 22 (2010) (deciding question presented before remanding for decision on alternative defenses).[3]

**B. Respondent's Merits Argument Misquotes The Statutory Text And Dodges The Relevant Issue**

As previously explained (Pet. 13-17), the Fourth Circuit's interpretation of "transfer" flouts the Code's plain text and statutory purpose. Respondent's firm disagreement underscores the need for this Court's intervention, and assures the issue will be fully ventilated on both sides on plenary review. We make three brief points.

*First*, according to respondent, nothing in the text or history of Congress's 1978 amendment suggests an intent to "depart" from *Massey*'s "'construction'" of "transfer"; indeed, both the old Act and the new Code "define[] 'transfer'" the same way—"as a 'disposing of or parting with' property." Opp. 21. Not so.

The Act's old language had two critical differences. Pet. 5, 16. First, it addressed only property, not property *or "an interest in property."* Second, a transfer was limited to "disposing of or parting with" property "*as a payment, pledge, mortgage, gift, or security*"—any transfer that did not qualify as one of those specific things fell outside the definition. *Ibid.* The new language *removed* that limiting language, covering *any* dispositions of property (however disposed) *and* mere interests in property. *Tenderloin*, 849 F.3d at 1243 n.12.

Respondent ignores each of these differences. It wrongly focuses on language that remained constant *while hiding the language that materially (and obviously) changed*. And respondent says that Congress left

[3] Respondent, besides, is wrong on the merits and brushes aside sharply contested issues below.

no hints what it was doing. But the Senate Report *expressly disclosed* that it was (i) changing the language, (ii) to make it "as broad as possible," (iii) by "delet[ing]" "potentially limiting words," and (iv) thus covering "deposit[s]" as "transfer[s]" (contrary to *Massey*). S. Rep. No. 95-989, at 27. Congress rarely gets much clearer than this.

*Second*, respondent misrepresents the holding of *Barnhill* v. *Johnson*, 503 U.S. 393 (1992). Respondent argues that *Barnhill* rejected "Petitioner's same arguments" because they "'would accomplish a near-limitless expansion of' the 'transfer' definition." Opp. 22-23. This is false. *Barnhill* actually held that merely receiving a check does not give the recipient "a conditional right" to "the account maintained with the drawee bank" because that "would accomplish a near-limitless expansion of the term '*conditional.*'" 503 U.S. at 400-401 (emphasis added). *Barnhill* thus rejected a *different* argument on a *different* issue to reach a *different* conclusion. Respondent again swaps out words and truncates text to convey the wrong message.

Respondent's suggestion that, under *Barnhill*, petitioner's argument "yields bizarre results" is more smoke and mirrors. Opp. 23. The issue in *Barnhill*—determining the date a transfer by check occurs—is irrelevant to the question here. All that matters is Whitley deposited funds in his account with respondent; the precise date is immaterial. Respondent expresses disbelief that a (hypothetical) Whitley could "transfer[] *the same* $1,000 twice—first when he deposited the check, and again when he conveyed the same funds to his accomplice." Opp. 24. This hypothetical is easily untangled: Whitley makes one transfer by exchanging cash for "a claim against the bank for funds in an [equal] amount" (*Barnhill*, 503 U.S. at 398); he makes a second transfer by parting with that claim via the

"wire transfer to an accomplice" (Opp. 24). Likewise, that "a trustee [may] target *the first* deposit" (Opp. 24) is understandable when, unlike respondent, one accepts petitioner's allegations that respondent was complicit in the fraud.[4]

*Third*, respondent is simply wrong that, "on Petitioner's theory, *every* bank would be subject to fraudulent transfer liability based on 'mere maintenance of [a] checking account." Opp. 12. Whereas Whitley's deposits themselves—the only facts relevant for certiorari—were 100% typical, respondent's conduct was not. Only banks that facilitate fraud need fear litigation.

Nor will this lead to respondent's (unsubstantiated) "tidal wave of litigation." Opp. 24. Chapter 7 trustees are not typical plaintiffs. They are "disinterested" parties (11 U.S.C. 701, 703) "guided by th[e] fundamental principle" to not act for their "primar[y] benefit" (U.S.D.O.J., *Handbook for Chapter 7 Trustees* 4-1 (Oct. 1, 2012)). Trustees do not waste their time with frivolous litigation.

The decision below cuts off legitimate claims where, as here, banks engaged in wrongdoing. And it likewise cuts off the check on discharge for dishonest debtors, who deposit funds into secret accounts for improper reasons. As the ABI explained, these costs are real, and the Court

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[4] Respondent's confusion that "nullifying the transactions" will not "put funds back in" the estate (Opp. 24) results from its neglect of Section 550(a), which allows the trustee to "recover, for the benefit of the estate," "the *value* of such property." Moreover, respondent misunderstands that each transaction involves *two* steps, not one. The first is the cashing of the check or instrument, which would leave Whitley with money. The second is Whitley's decision to transfer the proceeds to the bank via deposit. The fact that he directs the deposit *in advance* of the fund's arrival (or otherwise completes both steps simultaneously) does not change the nature of the transaction or eliminate the ultimate transfer.

"should grant review to ensure fraudsters don't escape consequences."[5]

### C. Plenary Review Is Warranted On This Important And Recurring Threshold Question

1. For its many quibbles, respondent does not dispute the obvious "importance of th[is] issue in bankruptcy practice nationwide." ABI, *supra*; cf. Pet. App. 5a (labeling the question "significant"). Instead, respondent argues that the issue does not arise with sufficient frequency to warrant review. Opp. 25-26. Not so. The Court routinely grants review even with shallow conflicts in the bankruptcy context. Pet. 18-19; see, *e.g.*, Opp. 14, *Baker Botts L.L.P.* v. *ASARCO LLC*, No. 14-103 (U.S.) ("few decisions" by any court and "a nascent split of just two" appellate decisions "more than a decade apart"); Opp. 13, *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, No. 11-166 (U.S.) ("two-court conflict" with "few decisions addressing the issue").

And respondent understates the issue's incidence: two circuits have weighed in this year alone (*Tenderloin* and the decision below), and another lower-court decision issued after the petition's filing (*Shamrock Jewelers, Inc.* v. *TD Bank, N.A. (In re Rollaguard Security, LLC)*, No. 14-38071-EPK, 2017 WL 3207123 (S.D. Fla. July 27, 2017)). This is on par with the typical level of attention in the bankruptcy setting.

Respondent's argument that the issue has received "limited ventilation" is puzzling. Opp. 26. Both the court below and the Ninth Circuit treated the issue in depth. This issue is important, but discrete; its resolution does

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[5] To the point: Although Whitley used multiple banks—each "maintaining" an account—petitioner sued only respondent. C.A. J.A. 474; Oral. Arg. Recording 16:19-16:32.

not require volumes of analysis. Given the question's undisputed importance and clear division in the lower courts, this Court's guidance is urgently needed.

2. Respondent's half-hearted "vehicle" concern is another futile effort to muddy the waters. According to respondent, "this case potentially concerns four different types of transaction: personal checks from third parties, cashier's checks, cash, and wire transfers." Opp. 26. But respondent never identifies any conceivable reason these differences would matter. Indeed, the court below was aware of those differences, yet found them irrelevant. And respondent cannot name a single decision putting weight on the mechanism used to deposit funds. The only material fact here is Whitley deposited funds into his account; the precise instrument used to get them there is irrelevant.[6]

Ultimately, respondent cannot escape the fact that this petition provides the perfect opportunity to resolve an entrenched conflict on an important question under the Code.

[6] Respondent below treated the deposits together. Oral Arg. Recording 18:45-19:50, 21:37-21:51.

## CONCLUSION

The petition should be granted.

Respectfully submitted.

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