No. 04-1709

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CALIFORNIA FEDERAL BANK, FSB

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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As explained in the government's brief in opposition in No. 04-1557, the Court should deny CalFed's petition for a writ of certiorari in this case. If the Court were to grant CalFed's petition, however, it should also grant the government's cross-petition. The cross-petition challenges the court of appeals' antecedent holding that, despite the absence of any assistance agreement or other document of a contractual nature in connection with CalFed's acquisition of the Brentwood and Family thrifts, FSLIC must be held to have undertaken a contractual commitment to guarantee CalFed against loss resulting from a statutory change in regulatory policy.

The court of appeals seriously erred in failing to recognize that, in a regulatory context in which government approval is necessary before a private transaction can go forward, the application for and grant of such

approval does not result in a contractual relationship—at least in the absence of concrete and independent documentation, entirely lacking here, that the parties intended to form such a relationship. That issue is of substantially greater significance than the question presented in CalFed's petition for certiorari. Unlike the question presented in that petition, which appears to be limited in its significance to some of the remaining 39 *Winstar*-related cases, the question presented in the cross-petition could be of more general significance not only to a number of the remaining *Winstar*-related cases, but also to other cases in which regulated entities seek to convert grants of regulatory approval for transactions between private parties into contractual commitments by the regulatory agency, resulting in the potential for substantial and wholly unwarranted monetary liability on the part of the United States.

1. CalFed's primary contention (Br. in Opp. 11) is that the court of appeals and trial court "conducted a careful and thorough review of the evidentiary record in concluding that the government and CalFed manifested a mutual intent to contract," and that review by this Court is therefore unnecessary.

It is true that the courts below found all of the elements of contract formation—indeed, the court of appeals (although not the trial court) found all of the elements of an *express* contract—in the transactions at issue here. But the courts made those findings because they felt free to construe an application for regulatory approval as an "offer," a discussion between regulator and regulated entity of the terms of the private transaction and its impact on the public interest as "negotiations," and an ultimate grant of regulatory approval as an "acceptance." Under the same rationale, courts

could, contrary to settled principles of sovereign authority and administrative law, find the facts of a great many regulatory approvals to result in contracts between the regulated entity and the regulatory agency.

The cross-petition does not seek further review of any factual determination by the courts below. Indeed, although CalFed argues that all that is at issue here is a factual dispute, CalFed does not cite or quote any document or any other piece of contemporaneous evidence in which either CalFed or the federal regulatory agency characterized their relationship as contractual in nature or manifested a mutual intent to form a contract.[*]

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[*] The only item CalFed cites as evidence that the parties had an intent to form a contract is the declaration of D. James Croft, a former Bank Board employee. See Br. in Opp. 15. That declaration however, is not a document of FSLIC itself, and it was submitted by Dr. Croft in a personal capacity more than 14 years after the transaction at issue. Moreover, although CalFed quotes Dr. Croft's declaration for the proposition that CalFed had a certain level of "assurance" regarding the treatment of goodwill, Dr. Croft's declaration does not state—and it cites no document or other evidence supporting the quite different proposition—that FSLIC actually entered into a *contract* guaranteeing to make CalFed whole for any monetary losses resulting from a change in regulatory policy.

In any event, as the cross-petition notes (at 17-18 n.3), Dr. Croft's testimony was disputed by a declaration of former General Counsel Lawrence Hayes of the Bank Board, and it therefore could not have supported the grant of summary judgment on liability to petitioner. Although CalFed argues that this is merely a "belated attempt to disavow the sworn statement" of Dr. Croft and "revisionism" by the government, Br. in Opp. 15 n.6, the government has argued from the beginning of this case that no contract was formed. Moreover, CalFed does not take issue with the government's contention that Dr. Croft's statement was in fact contravened by Mr. Hayes's declaration. It is not "revisionism," but black-letter law, that disputed statements—even sworn statements— cannot support a grant of summary judgment. Dr. Croft's statement is at most a years-after-the-fact revisiting of events

Rather, the cross-petition seeks review of the court of appeals' underlying *legal* determination that, even in a situation in which regulatory approval is needed for a private transaction, and even when official documents and other factual circumstances of a case show nothing beyond such regulatory approval, and even when the parties themselves never manifested any intent in any document to enter into a contractual (as opposed to regulatory) relationship, a court is nonetheless free to recharacterize the facts in contractual terms

As the cross-petition notes (Cross-Pet. 24-25), such recharacterization is inconsistent with longstanding principles of sovereign authority and administrative law, which necessarily reserve to the government the authority to modify regulatory regimes in light of the need to serve the public interest in the face of changing circumstances and governmental policies.

2. CalFed asserts (Br. in Opp. 14) that "the government's sole basis for distinguishing [*United States* v. *Winstar*, 518 U.S. 839 (1996)] is that the transactions at issue in *Winstar* involved Assistance Agreements that included integration clauses, whereas the Brentwood and Family transactions did not." That, however, is no mere technical distinction, as CalFed would have it. That difference goes to the very heart of this case. The Assistance Agreement, with its attendant formalities, was the recognized vehicle employed by FSLIC when it chose to make a *contractual* commitment to the acquiring thrift. For example, as pointed out in the cross-petition (at 21-22) and as required by statute (see 12

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at the time of the regulatory approval. It does not suggest that the parties manifested any contemporaneous intent to form a contract, rather than merely to seek and grant, respectively, the necessary regulatory approval for a private transaction.

U.S.C. 1729(f) (1982)), no guarantee against losses or other financial assistance could be extended as part of such an assistance agreement unless FSLIC specifically found that the amount of the assistance was reasonably necessary to save the cost of liquidating the failing insured institution. FSLIC in fact made that determination in connection with its formal assistance agreements for the acquisitions in *Winstar* and the Southeast acquisition in this case, but it did not make any such determination with respect to the Brentwood and Family acquisitions in this case. See Cross-Pet. 21-22. The absence of any such determination, which is a statutorily prescribed precondition to the extending of guarantees or other contractual assistance by FSLIC, powerfully confirms what is in any event evident from the absence of assistance agreements covering the Brentwood and Family acquisitions: there was simply no contract between FSLIC and CalFed as to those acquisitions.

We may assume for present purposes, however, that, although the *presence* of an assistance agreement may make manifest the intent of the parties to enter into a contractual—as opposed to a regulatory—transaction, the *absence* of a formal assistance agreement is not decisive. For even on that assumption, what is decisive in this case is the absence of *any* indication, in the form of *any* contemporaneous document or statement, that the parties intended anything in addition to seeking, and granting, the legally necessary, see Cross-Pet. 3-4, regulatory approval of a private transaction.

CalFed contends (Br. in Opp. 19) that our cross-petition is a "plea for special treatment" that conflicts with the principle that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts

between private individuals." *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604, 607 (2000) (quoting *Winstar*, 518 U.S. at 895 (plurality opinion)). The question in this case, however, is precisely whether the government *has* "enter[ed] into contract relations" with a private party. Private parties do not find themselves in a posture analogous to that of regulated entity and regulatory agency. For that reason, the legal "rights and duties" that attach to such a regulatory—as opposed to contractual—relationship are indeed inapplicable to dealings between private parties. That is merely a recognition of well-settled principles of sovereign authority and administrative law, and it does not conflict in any way with the recognition that, when the government does enter into a contract, its rights and duties are generally the same as those of private parties.

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For the foregoing reasons, and those stated in the cross-petition, the petition for a writ of certiorari should be denied. If the Court decides to grant the petition, however, the government's cross-petition for a writ of certiorari should also be granted.

Respectfully submitted.

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