No. 06-231

# In the Supreme Court of the United States

CITIZENS FINANCIAL SERVICES, FSB, FKA CITIZENS FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
PETER D. KEISLER
*Assistant Attorney General*
DAVID M. COHEN
JEANNE E. DAVIDSON
RICHARD B. EVANS
JOHN H. ROBERSON
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the trial court's factual findings that petitioner had failed to prove two essential elements of its claim for damages—causation and reasonable certainty—were clearly erroneous.

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## OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a) is not published in the Federal Reporter, but it is reprinted in 170 Fed. Appx. 129. The opinion of the Court of Federal Claims on lost profits damages (Pet. App. 4a-47a) is reported at 64 Fed. Cl. 498. The opinion of the Court of Federal Claims on petitioner's other damages theories (Pet. App. 48a-71a) is reported at 59 Fed. Cl. 27.

## JURISDICTION

The judgment of the court of appeals was entered on March 9, 2006. A petition for rehearing was denied on May 17, 2006 (Pet. App. 2a-3a). The petition for a writ

of certiorari was filed on August 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

**STATEMENT**

This is one of approximately 29 remaining *Winstar*-related cases. See *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996).

1. In 1983, petitioner Citizens Financial Services, FSB (formerly known as Citizens Federal Savings and Loan Association), acquired two troubled thrifts in northern Indiana pursuant to an agreement with government regulators under which Citizens received $12.75 million in cash assistance and other benefits. As a result of the transaction, Citizens recorded $52.9 million in goodwill, which it was able to apply toward satisfaction of regulatory capital requirements under the rules then in effect. Pet. App. 49a.

On August 9, 1989, Congress enacted the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. Among other things, FIRREA required the phase-out of goodwill from regulatory capital over a six-year period and established the Office of Thrift Supervision, which was given responsibility for the regulation of all federally-insured savings associations. See *Winstar*, 518 U.S. at 856-858. Additionally, FIRREA established three new capital standards, and the Office of Thrift Supervision issued regulations governing minimum capital standards for thrifts. 12 C.F.R. Pt. 567 (1990).

It was "not disputed" in this case that "Citizens' loss of supervisory goodwill [due to FIRREA] did not interfere with its ability to meet its regulatory capital requirements." Pet. App. 50a; see *id.* at 6a ("[A]t all times following the implementation of FIRREA, Citizens ex-

ceeded all regulatory capital requirements."); *id.* at 42a n.6. For example, one regulatory standard required a minimum "core capital" of 3%, while Citizens' core capital at the end of the first quarter of 1990 stood at 5.36% and increased steadily to 9.12% by the end of 1992. *Id.* at 69a n.1; see *id.* at 18a (other capital requirements). As the trial court found, "Citizens did not receive a lot of attention from regulators post-FIRREA," *id.* at 28a-29a, and regulators considered Citizens to be a "well-run shop with good capital, conservative . . . Low risk. . . . The institution was well managed," *id.* at 29a (quoting trial testimony).

2. a. In 1993, Citizens filed a complaint in the Court of Federal Claims, alleging that the government had entered into and breached a contract permitting Citizens to include goodwill in calculating its regulatory capital. The government conceded a breach of contract. See Pet. App. 5a. The government, however, contested Citizens' claim that it suffered harm that was caused by the phase-out of goodwill.

b. The trial court granted the government's motion for summary judgment on Citizens' claims for the hypothetical cost of replacing the goodwill and for restitution. Pet. App. 57a-60a, 63a-65a. The court denied the government's motion for summary judgment on Citizens' claim for reliance damages, *id.* at 60a-62a, but Citizens voluntarily abandoned that claim before trial, *id.* at 42a n.4. The court also denied the government's motion for summary judgment on Citizens' claim for lost profits, which thus went to trial. *Id.* at 65a-69a.

c. After a four-week trial, at which more than 500 exhibits were introduced and numerous witnesses testified, Pet. App. 9a, the trial court denied Citizens' claim for lost profits in its entirety. *Id.* at 4a-47a. The trial

court found that, although the possibility of lost profits was within the contemplation of the parties at the time the contract was formed (foreseeability), *id.* at 12a-17a, Citizens had failed to prove that the breach actually caused it to lose any profits that it otherwise would have realized, *id.* at 17a-31a. The court also found that there would be an independent bar to recovery, because "even if the court were to find that Citizens established causation, * * * [Citizens] failed to prove lost profits with reasonable certainty." *Id.* at 31a; see *id.* at 31a-40a.

(i). *Causation.* At trial, Citizens' theory of lost-profits damages was that FIRREA had caused it to lose some of its regulatory capital and thereby had caused it to forgo profitable business opportunities while it attempted to rebuild its capital. Citizens contended that it had an internal goal of achieving and maintaining a 10% regulatory capital level—far higher than the minimum capital standards imposed by regulatory authorities either before or after FIRREA. Citizens argued that, as a result of the diminution of regulatory capital resulting from FIRREA, it could not grow (and could not take advantage of profitable business opportunities) until it accumulated enough additional capital to reach its own 10% capital goal. Pet. App. 17a. The trial court based its finding that Citizens failed to establish that the breach caused it to forgo any growth opportunities, and thus any lost profits, upon two key findings.

First, the court found that Citizens failed to prove the existence of the purported 10 percent regulatory capital goal, which was the "heart of Citizens' lost profit claim." Pet. App. 17a. After an extensive review and discussion of the evidence, the court noted that "neither * * * the President and Chief Operating Officer of Citizens[] nor * * * the Chairman of the Board of Citizens[]

were aware of the alleged 10% goal." *Id.* at 22a. The court also noted that, although "all the * * * internal documents of the thrift were very detailed and thorough," Citizens failed to "point to any document prepared by Citizens either prior to or following FIRREA that indicated that there was a 10% regulatory capital goal." *Ibid.* The court found "it difficult to believe that a capital goal, if any existed, would not appear in at least one of Citizens' internal documents over the years." *Ibid.* Because Citizens thus "did not have a 10% regulatory capital goal," the court found that "FIRREA did not cause Citizens to forgo growth and potential profits because Citizens wanted to rebuild its capital ratio to 10% of assets." *Id.* at 23a. To the contrary, "Citizens was free to grow after FIRREA," and its "decision not to grow after FIRREA was based on Citizens' 'independent business decision.'" *Ibid.*

Second, the trial court considered "Citizens' additional evidence that FIRREA directly interfered with Citizens' ability to pursue specific business opportunities," Pet. App. 23a, finding that "Citizens failed to prove that FIRREA caused it to forgo any specific business opportunities because of capital concerns," *id.* at 30a. For example, although Citizens' officers testified that Citizens had forgone opportunities to acquire other thrifts because of concern about its capital levels, there was no "contemporaneous evidence tending to show that Citizens actually engaged in calculations to determine whether acquiring a particular institution would have, in fact, caused Citizens to fall below acceptable capital levels," and Citizens "never approached the [Resolution Trust Corporation] regarding any specific acquisition." *Id.* at 25a. Citizens also "did not present any evidence to prove that acquiring any of the institutions on the

RTC list would have been profitable." *Ibid.* The court found, based on an analysis of the testimony of witnesses and on contemporaneous documents produced by Citizens, that "Citizens also failed to establish how FIRREA caused Citizens to lose profitable opportunities outside the arena of RTC acquisitions." *Id.* at 26a. The court concluded that, "[a]lthough there is no doubt that Citizens' regulatory capital was reduced following FIRREA, [Citizens] * * * failed to prove that Citizens failed to make investments because of the reduction in its regulatory capital following FIRREA." *Id.* at 29a.

In sum, the court was "persuaded that Citizens did not grow or pursue various business opportunities immediately following FIRREA because Citizens did not believe that those opportunities would be profitable or worth the risk," independent of the breach of contract. Pet. App. 31a. Accordingly, Citizens "failed to prove causation." *Ibid.*

(ii). *Reasonable certainty*. The trial court based its conclusion that Citizens in any event "failed to prove lost profits with reasonable certainty," Pet. App. 31a, on four key findings.

First, the court found that, because Citizens' expert's damages model relied upon a purported 10% capital goal that did not exist, the damages computations were "without value." Pet. App. 32a.

Second, the trial court found that Citizens' expert's "growth assumptions [were] wholly speculative." Pet. App. 33a. The court found that there "was absolutely no contemporaneous evidence in any of Citizens' business plans either prior to or following FIRREA that suggests that Citizens would have or could have expanded its asset base" by the rate set forth by its expert, who predicted a 20% annual growth rate in the year after

FIRREA, when Citizens growth rate in the three years before FIRREA had been 1.5% to 4.4%. *Ibid.*

Third, the court found that Citizens' expert had specifically failed to "present any evidence to support the asset and yield assumptions in his model," Pet. App. 34a, and the court was "persuaded by the testimony" of the government's experts that the model presented by Citizens "ignored basic economic principles," *id.* at 35a. Indeed, as the court explained, Citizens' model yielded a total of $48 million in lost profits if Citizens had a capital goal of 8%, $257 million in lost profits if Citizens had a capital goal of 4%, and "if Citizens had leveraged all of its assets * * *, its lost profits for an eight-year period would be infinite" under the model presented. *Id.* at 37a. The court found that "[a]ny model that could yield such an absurd result cannot be reliable." *Ibid.*

The trial court also concluded that Citizens did not provide any other means, aside from its expert's model, of "mak[ing] a fair and reasonable approximation" of lost profits. Pet. App. 45a n.17. Thus, even if Citizens had proved causation, the fact that "Citizens failed to prove an injury" would nonetheless make a "jury verdict" award of damages inappropriate. *Id.* at 46a n.17.

3. On appeal, the Federal Circuit affirmed the trial court's judgment in a brief order and without issuing an opinion. Pet. App. 1a.

## ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this court or any other court of appeals. Further review is unwarranted.

1. Petitioner contends that further review is warranted because the court of appeals adopted a "special rule protective of the government" regarding the calcu-

lation of lost-profits damages, Pet. 17, that is "contrary to long-standing decisions of this and other courts," Pet. 16. The court of appeals, however, did not adopt any legal rule whatever in this case. Instead, it merely issued a one-sentence order that affirmed without opinion the fact-based judgment of the trial court. Pet. App. 1a.

That summary disposition of petitioner's appeal has no precedential effect. See Fed. Cir. R. 36 ("The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that [specified] conditions exist and an opinion would have no precedential value."). Non-precedential orders of the Federal Circuit "are not citable to [the Federal Circuit], they do not represent the considered view of the Federal Circuit regarding aspects of a particular case beyond the decision itself, and they are not intended to convey [the Federal Circuit's] view of law applicable in other cases." *Hamilton* v. *Brown*, 39 F.3d 1574, 1581 (Fed. Cir. 1994).[1] Moreover, while an order of summary affirmance approves the judgment of the lower court, it does not necessarily adopt the lower court's reasoning. *Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 224 n.2 (1992) ("Summary disposition affirm[s] only the judgment below, and cannot be taken as adopting the reasoning of the lower court.").

In short, the order of the court of appeals does not adopt any rule of law, much less the purported "special rule" that is the subject of the petition for certiorari.

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[1] Under the new Federal Rule of Appellate Procedure 32.1, a court "may not prohibit the citation of federal judicial opinions, orders, judgments, or other written disposition that have been * * * designated as 'unpublished' * * * or the like * * * and * * * issued on or after January 1, 2007." The order of the court of appeals in this case was entered on March 9, 2006.

For that reason alone, review of the court's one-sentence order is not warranted.

2. Petitioner contends (Pet. 29) that the proper disposition of this particular case presents a question of exceptional importance to other "government contractors—especially those who may be called on to assist the government in a time of crisis." Even had the court of appeals affirmed the trial court's decision and all of its findings in a published opinion, however, no question of general importance would have been presented.

This case arises in the *Winstar* context, in which petitioner had to prove the damages that were caused by the government's failure to honor a particular kind of promise—the promise to permit a thrift to count goodwill as regulatory capital over some period of time.[2] There is, however, a progressively smaller and steadily shrinking number of *Winstar*-related cases. Of the approximately 122 *Winstar*-related cases that were originally filed, only 29 remain pending, and most of those

[2] Petitioner criticizes (Pet. 18) the trial court's statement that "[t]he Federal Circuit has stressed that plaintiffs face a heavy burden in proving lost profits in *Winstar* cases." Pet. App. 11a. That statement, however, summarizes the Federal Circuit's experience with attempts to prove the elements of a lost-profits damage claim in *Winstar* cases. The court's statement does not adopt any particular legal rule precluding lost-profits awards in *Winstar* cases, and it does not alter the normal showings—foreseeability, causation, and reasonable certainty—that any plaintiff in a contract case must make in order to obtain a damages award. Indeed, while the Federal Circuit has noted that lost-profits claims have "proven * * * impractical for these [*Winstar*] cases, and generally not susceptible to reasonable proof," *Glendale Fed. Bank, FSB* v. *United States*, 378 F.3d 1308, 1313 ( 2004), cert. denied, 544 U.S. 904 (2005), the Federal Circuit has also explained that lost-profits awards are available if the plaintiff can make the necessary showings. See *California Fed. Bank* v. *United States*, 395 F.3d 1263, 1267 (Fed. Cir.), cert. denied, 126 S. Ct. 344 (2005).

cases are nearly through the trial and appellate process. Accordingly, even a broad disagreement about the proper method of calculating damages in *Winstar* cases would not present an issue of general importance that would warrant further review at this time.

Moreover, this case does not present any disagreement about the method of calculating damages in *Winstar* cases, but rather presents only the question whether the trial court clearly erred in finding that petitioner did not prove the facts necessary to obtain a damages award under settled principles of contract law. Contract damages are not awardable merely upon a finding that there was a breach; plaintiffs in *Winstar* cases, as in any other contract case, are entitled to an award of injury only if they prove both that the breach caused them damages and that the damages can be calculated with reasonable (though not absolute) certainty. *California Fed. Bank* v. *United States*, 395 F.3d 1263, 1267 (Fed. Cir.), cert. denied, 126 S. Ct. 344 (2005).[3] The trial court found that petitioner had failed to prove those facts here. Further review is not warranted to determine whether the trial court's factual findings were clearly erroneous.

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[3] The trial court was "cognizant of the fact that when a 'reasonable probability of damage can be clearly established, uncertainty as to amount will not preclude recovery.'" Pet. App. 37a (quoting *California Fed.*, 395 F.3d at 1267); see *Palmer* v. *Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 561 (1941) ("Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion."). Contrary to petitioner's contention, the trial court found here that petitioner had been unable to prove any damages at all. Compare Pet. 8 ("[T]he trial court never made any findings that the breach caused Citizens *no* damages.), with Pet. App. 46a n.17 (noting that "Citizens failed to prove an injury").

3. Petitioner argues repeatedly that the trial court erred "in denying a proper claim for lost profits damages because Citizens did not show 'specific' lost opportunities." Pet. 3; see Pet. 8-9, 10, 13-16, 26-27. That is incorrect. Petitioner attempted to prove lost profits in part by showing that it lost specific profitable business opportunities as a result of the breach. The trial court found that petitioner's proof on that point was inadequate, and petitioner does not contest that finding. But the trial court did not deny petitioner damages on that basis alone. Rather, the trial court also found that petitioner had failed in several other respects in its efforts to prove lost profits.

In addition to the loss of specific business opportunities, petitioner attempted to prove that it lost profits by showing that it had a goal of maintaining a 10% regulatory capital level, and that it had limited its growth (and, correspondingly, its opportunity for profits) in order to achieve that goal after FIRREA. The trial court found, however, that petitioner's theory that it had set itself an internal goal of maintaining a 10% regulatory capital level was without foundation. See Pet. App. 17a-23a. The court also found that "Citizens was free to grow after FIRREA," and that any "decision not to grow * * * was based on Citizens' 'independent business decision.'" *Id.* at 23a. Moreover, the trial court found that, even aside from petitioner's failure to prove causation, damages would have been unavailable because petitioner's damages model did "not provide the court with a reasonably certain measure of lost profits" or "with

any other means of determining lost profits with reasonable certainty." *Id.* at 40a.[4]

Accordingly, the trial court did not rest its decision solely upon petitioner's failure to show the loss of specific business opportunities. Instead, the court rested its decision on petitioner's general failure to prove causation or reasonable certainty, and therefore to obtain a damages award in a contract case.[5]

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[4] Petitioner argues (Pet. 7 & n.1) that, even if the trial court rejected its claim of $20.9 million in damages, see Pet. App. 7a, the court should have awarded $10.3 million based on an alternative method of proof that rested on the theory that Citizens would have had an alleged 5% growth rate. That claim, which was not in petitioner's expert's report and was advanced for the first time by petitioner's expert at trial, was rejected by the trial court on the ground that such theories "should have been done in advance of * * * this trial," C.A. App. A102728, and on the ground that the theory in any event had been conceded by Citizens' own expert to lead to an "unreasonable result," *id.* at A102397.

[5] Petitioner argues (Pet. 9) that the trial court erred by failing to "allow lost profits upon proof of pre-breach performance, or post-breach performance, or peer or industry performance." Any of those theories could provide a basis for a damages award based on an adequate factual foundation in a given case that the pre-breach, post-breach, or peer performance fairly proves the profits that the plaintiff would have made absent the breach. Petitioner, however, failed to lay that foundation here. Indeed, the trial court expressly considered Citizens' pre-breach and post-breach history, which the court found was inconsistent with petitioner's damages claims. See Pet. App. 33a ("Given Citizens' history, the growth assumptions in [Citizens' expert's] model strain credulity.").

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*
PETER D. KEISLER
*Assistant Attorney General*
DAVID M. COHEN
JEANNE E. DAVIDSON
RICHARD B. EVANS
JOHN H. ROBERSON
*Attorneys*

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