No. 08-489

In the Supreme Court of the United States

MARVIN TAYLOR BARNHILL, ET AL., PETITIONERS

v.

ED SCHAFER, SECRETARY OF AGRICULTURE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' multi-peril crop insurance policy did not promise to indemnify peanut farmers at higher rates reserved for "quota" peanuts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 524 F.3d 458. The opinion and orders of the district court (Pet. App. 41a-88a, 89a-94a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2008. A petition for rehearing was denied on July 8, 2008 (Pet. App. 96a-97a). The petition for a writ of certiorari was filed on October 6, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal crop insurance program is administered by the United States Department of Agriculture's (USDA) Risk Management Agency through the Federal

Crop Insurance Corporation (FCIC). 7 U.S.C. 1503, 1508; see Pet. App. 6a. It is intended to protect crop producers from unavoidable risks associated with adverse weather, plant diseases, insect infestations, and other specified causes of loss. 7 U.S.C. 1508(b); see, *e.g.*, 7 C.F.R. 457.134, para. 11 (peanut crop insurance provisions). Basic coverage offers insurance against catastrophic risk and will indemnify the farmer for 55% of the estimated market price of the crop, on losses in excess of 50% of the normal yield. 7 U.S.C. 1508(b); 7 C.F.R. 402.1. Participating farmers may also purchase additional insurance that covers a higher percentage of the expected yield and price. 7 U.S.C. 1508(c).

The FCIC is authorized to offer these various insurance policies directly, or it may instead reinsure privately issued policies that it has reviewed and approved for sale to producers. 7 U.S.C. 1508(a), (h)(3) and (k). Since 1998, private insurance companies reinsured by the FCIC have sold and serviced all multiple peril crop insurance authorized under the statute.

2. Before 2002, federal statutes permitted the Secretary of Agriculture to set a national quota on the amount of peanuts that could be marketed for domestic consumption as food. 7 U.S.C. 1358-1 (2000). A second quota was then set by the Farm Service Agency, by allocating shares of the national quota to individual farms on the basis of past production history. Pet. App. 8a. Holders of the right to market peanuts under that quota authority received several substantial benefits. They could sell the crop in the domestic market for use as food, deriving the higher prices dictated by the high value of that end use of the product, and further profiting from regulatory limitations on total supply. Or they

could seek price support benefits by taking out non-recourse loans made available through USDA.

Non-quota or "additional" peanuts—*i.e.*, peanuts intended to be exported or crushed into peanut oil and meal, see 7 U.S.C. 1358-1(e)(1) (2000)—commanded far lower prices and federal support. The supply of peanuts for sale in foreign markets is not limited by United States law, and that use of peanuts for crushing into oil or meal has a lower end-use value than food uses. Moreover, while loan assistance was also available for non-quota peanuts, the federal price support levels on those loans were set far lower. Producers consequently received substantially lower prices for non-quota peanuts. Pet. App. 7a-8a.

3. Petitioners' crop insurance contract defined what insured production, if any, should be treated as production indemnified at quota price levels.

First, the contract required the farmer to identify the acreage that he wished to insure and the amount of such production, if any, that he could insure at quota rates. It thus required an insured producer to file an "acreage report." The acreage report detailed the acreage planted in peanuts and the "effective poundage marketing quota, *if any*, that [was] applicable" to the farm for the current crop year. C.A. App. 56, Peanut Provisions ¶ 6 (emphasis added).[1] The "effective poundage marketing quota" could not exceed the individual farm quota set by the Farm Service Agency. *Id.* at 55, Peanut Provisions ¶ 1; *id.* at 57, Peanut Provisions ¶ 14(b).

[1] The contract terms consist of basic provisions applicable to all crops, a set of provisions specific to the peanut crop, and certain other special provisions and endorsements. See C.A. App. 43, Basic Provisions ¶ 1 (definition of "Policy").

Second, the contract defined the amount of production that would be guaranteed by the peanut crop insurance policy. That figure, termed the "production guarantee," was based on two criteria: a measure of the farmer's average yield based upon actual production history, and the percentage of that anticipated yield the farmer opted to insure in the coming crop year. C.A. App. 43, Basic Provisions ¶ 1 (definition of "production guarantee"); *id.* at 55, Peanut Provisions ¶ 1 (definition of "Approved yield" and "Production guarantee"); see 7 U.S.C. 1508(g)(2); 7 C.F.R. 400.51-400.56.

Third, the contract defined the price per pound that would be used to compute the insurance premium and any indemnities for covered crop losses. That measure was termed the "Price election" and was generally based on the FCIC's projection of market prices for the commodity. See C.A. App. 43, Basic Provisions ¶ 1; 7 U.S.C. 1508(c)(5)-(6). Price elections differed for quota and non-quota peanuts and reflected the substantially higher price quota peanuts could command in the marketplace. Each respective price election was typically announced just before the commencement of the coming crop year and then incorporated into the insurance contract by a price addendum. See Pet. App. 14a.

Fourth, the contract defined what lost production, if any, should be indemnified at the quota price.[2] Petitioners' contract limited the production indemnified at quota price to the "effective poundage marketing quota." C.A. App. 55, Peanut Provisions ¶ 3(b). Because the "Effec-

[2] This provision, like the other contract provisions described above, was common to all peanut insurance contracts and was thus included in agreements with both producers who had previously been entitled to quota allocations and producers who had no current or prior right to a quota allocation. 7 C.F.R. 457.2(b), 457.7.

tive poundage marketing quota" could not exceed the individual farm quota set by the Farm Service Agency, C.A. App. 55, Peanut Provisions ¶ 1, indemnification at quota rates was limited by the individual farm quota. Consequently, if an individual farm quota was never set, that quota would be zero and none of that farm's peanut production would be insured at quota rates. See Pet. App. 25a.

Finally, the contract set a "Contract change date." C.A. App. 42, Basic Provisions ¶ 1. All changes to the policy's coverage provisions, price elections, coverage limits, premium rates, and program dates had to be made by the contract change date. For the 2002 crop year at issue here, the contract change date was November 30, 2001. Pet. App. 9a.

4. On the contract change date (November 30, 2001), the price elections for the 2002 crop year were incorporated into the contract. They established a price election of 31 cents per pound for quota peanuts and 16 cents per pound for non-quota peanuts. Pet. App. 14a.

On December 14, 2001, USDA issued a release that set the 2002 national peanut quota based on each state's share of the 2001 quota. C.A. App. 75. That announcement alerted petitioners to the possibility that the peanut quota program could be changed or eliminated by pending legislation:

> The Farm Bill currently being considered by Congress would dramatically change the peanut program. Poundage quotas would be replaced with a target price and deficiency payment plan. If pending legislation is enacted as law, the 2002 poundage

> quota and price support announced by this release may be altered or rescinded.

Ibid. On January 15, 2002, USDA issued another announcement, also warning that if the pending "Farm Bill" were "enacted as Law for 2002, the 2002 poundage quota announced according to this notice will be altered or rescinded." C.A. App. 78.

Because the pending farm bill would have eliminated the peanut quota system, the Farm Service Agency did not set the 2002 peanut quotas for individual farms. On May 3, 2002, the Farm Service Agency directed its county officers not to allocate individual farm quotas. Pet. App. 15a.

Ten days later, on May 13, 2002, the President signed the 2002 farm bill, which repealed the peanut quota system and substantially revamped federal assistance for peanut producers. See Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 1309(a), 116 Stat. 179. In lieu of the quota system, this statute provided for a mandated increase—from 16 cents to 17.75 cents per pound—in the "price election" for non-quota peanuts used to compute premiums and indemnity payments under crop insurance policies applicable to the 2002 crop year. § 1310(c), 116 Stat. 182-183. It also continued price supports through non-recourse loans, but at the non-quota rate of 17.75 cents per pound instead of the quota rate of 31 cents per pound.[3] § 1307(a), 116 Stat. 175-176.

In light of these statutory changes, USDA sent a bulletin to crop insurance companies on May 28, 2002. This bulletin stated that all peanuts were to be treated as non-quota peanuts for purposes of policies covering the 2002 crop year. Pet. App. 16a. Accordingly, all indemnities for 2002 peanut crops were made at the non-quota rate of 17.75 cents per pound. *Ibid.*

5. Petitioners allege (Pet. 16-17) that they are entitled to insurance indemnification for 2002 peanut crop losses at the higher rates previously reserved for quota peanuts. They brought a breach of contract action against the Secretary of Agriculture and other federal officials in the Eastern District of North Carolina. The court certified a class comprised of insured producers whose farms were located within its judicial district and

[3] The 2002 farm bill also established: (1) a new program of direct payments of $36 per ton (1.8 cents per pound) paid to farmers who had produced peanuts in the previous years (Pub. L. No. 107-171, § 1303(b), 116 Stat. 170); (2) a new price support program of "counter-cyclical" payments, triggered when market prices, in combination with certain other assistance, fall below a target price of $495 per ton (§ 1304(c), 116 Stat. 171); and (3) a quota buy-out program, providing for prior holders of quota authority to receive compensation for the value lost by repeal of the quota system (§ 1309(b), 116 Stat. 180). This latter compensation program authorized owners of farms to which a quota had been allocated to receive five annual payments, computed at the rate of 11 cents per pound of their 2001 peanut quota allotment. § 1309(c) and (d), 116 Stat. 180.

who had been allotted an individual farm peanut quota for the preceding, 2001 crop year.[4]

Ruling on cross-motions for summary judgment, the court held that the government had breached a contractual obligation to insure production previously eligible for the quota rate of 31 cents per pound. Pet. App. 80a-81a. The court principally reasoned that the government, by repealing authority to allocate peanut quotas to insured producers, had prevented the occurrence of a condition that would give rise to that insurance coverage, and that general principles of contract law (as summarized in the 1 Restatement (First) of Contracts § 295 (1932)), bar a party from denying liability if it has itself frustrated the occurrence of a condition that would give rise to liability. Pet. App. 69a-72a. The court further held that neither the "sovereign acts" nor "unmistakability" doctrine afforded a valid defense to liability. *Id.* at 72a-80a.

6. The court of appeals vacated the district court's order granting summary judgment to petitioners and remanded. Pet. App. 1a-40a. The court, applying federal common law to the interpretation of the insurance agreement, concluded that the multi-peril crop insurance policy did not create any contractual obligation to reimburse lost peanut production at quota rates. *Id.* at 23a-24a. Noting that contract terms expressly contemplated the possibility that no quota allotment would be

[4] The Judicial Panel on Multidistrict Litigation subsequently transferred a group of related cases to the same district court for coordinated or consolidated pre-trial proceedings. Pet. App. 19a; see 28 U.S.C. 1407.

made, it concluded that the contractual obligation to indemnify crop losses at quota rates was contingent on the allocation of individual farm quotas for the 2002 crop year—an allocation that was never made. *Id.* at 23a-29a.

The court recognized that quotas had not been allotted because statutory authority to make a quota allotment had been repealed by Congress, and that common law contract principles hold that a party may be liable for breach of contract if that party hinders the occurrence of a condition on contract performance. Pet. App. 30a. The court held, however, that those contract principles were inapplicable here because the quota allotment was not a true "condition" on the government's obligation to indemnify covered farmers for crop losses (*id.* at 31a-32a), and because the government had never promised to make a quota allotment (*id.* at 31a, 40a n.20). It further concluded that, because the government had not breached the insurance contract, it was unnecessary to address whether the "sovereign acts" or "unmistakability" doctrine afforded the government a defense to liability. *Id.* at 40a n.21.

Finally, the court rejected petitioners' claim that they were entitled to damages because they had detrimentally relied on the expectation that indemnity at quota rates would continue for the 2002 crop year. The court reasoned that significant legislative changes in the quota program had occurred in recent years, and that the Secretary had given farmers timely and specific warning that pending legislation might alter or rescind the peanut quota system. Pet. App. 35a. The court concluded that petitioners' assertions of reliance on continued quota allocations were therefore misplaced. *Id.* at 36a.

ARGUMENT

The court of appeals correctly applied well-settled principles of contract construction to the specific facts of this case. Its holding does not conflict with decisions of this Court or of any other court of appeals. The court of appeals' decision turns only on a narrow question of contract interpretation that does not warrant further review.

1. The court of appeals correctly held that petitioners had no contractual entitlement to indemnification of lost peanut production at quota rates. As the court reasoned (Pet. App. 24a), the contract provided that indemnity at quota rates was contingent on the allocation of individual farm quotas. That is because the contract limited the production indemnified at quota rates to the "effective poundage marketing quota." C.A. App. 55, Peanut Provisions ¶ 3(b). The "Effective poundage marketing quota," in turn, could not exceed the individual farm quota set by the Farm Service Agency. *Id.* at 55, Peanut Provisions ¶ 1. Thus, whenever the Farm Service Agency did not set an individual farm quota, the "Effective poundage marketing quota" for that farm would be zero, so none of that farm's peanuts could be indemnified at quota price. In fact, the contract explicitly contemplated such a scenario, by referring to the "effective poundage marketing quota, *if any*." *Id.* at 56, Peanut Provisions ¶ 6 (emphasis added); *id.* at 57, Peanut Provisions ¶ 14(b) (emphasis added). Consequently, because the Farm Service Agency did not set individual farm quotas for petitioners in 2002, petitioners had no contractual entitlement to indemnity at quota rates for their 2002 crop.

Petitioners argue (Pet. 30-31) that the Farm Service Agency's failure to set individual farm quotas was irrelevant and that they had a contractual entitlement to indemnity at quota rates even though they had no quotas. Petitioners assert that the government's performance was conditioned on the allocation of individual farm quotas, and that the government hindered the occurrence of that condition by enacting new legislation repealing the peanut quota system. Pet. 28-29.

The court of appeals correctly rejected that argument, holding that the allocation of individual farm quotas was not a "condition" on the government's obligation to indemnify insured peanut losses. Pet. App. 31a. Only the "occurrence of a natural cause of covered loss" was a condition that triggered the government's duty to indemnify petitioners' 2002 peanut crop loss. *Ibid.* Thus, the repeal of the peanut quota system did not frustrate any "condition" on the government's contractual obligation to reimburse farmers for covered losses. *Ibid.* Indeed, petitioners were reimbursed by the government for their 2002 covered losses, albeit at the lower rate of 17.75 cents per pound. *Id.* at 16a.

Even if the setting of individual farm quotas were a "condition," however, the court rightly noted that the non-occurrence of a condition is not a breach of contract unless the party is under a duty to make that condition occur. Pet. App. 40a n.20 (citing 2 Restatement (Second) of Contracts § 225 (1981)).[5] Here, the government nei-

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[5] The First Restatement of Contracts stated the rule as follows:

> Failure of a condition to exist or to occur even though the condition is some performance by a party to the contract, is not a breach of contractual duty by him unless he has made an enforceable promise that the condition exists or shall occur. Whether he has done so is a question of interpretation.
>
> * * * * *

ther promised to indemnify peanut farmers at quota rates nor promised to maintain statutory authority to make a quota allocation. See p. 10, *supra*; C.A. App. 55-56, Peanut Provisions ¶¶ 1, 6. Thus, even if the allocation of quota authority is assumed to have been a "condition" on the government's liability, the government could not be held liable for the failure of that condition to occur unless it had made an enforceable promise to allocate individual farm peanut quotas, which it had not done.

The court of appeals' construction of petitioners' insurance contract is therefore correct and that fact-bound decision does not present any issue warranting this Court's review.

2. The court of appeals' holding is consistent with the principles of *United States* v. *Winstar Corp.,* 518 U.S. 839, 898 (1996), *Perry* v. *United States*, 294 U.S. 330, 352 (1935), and *Lynch* v. *United States*, 292 U.S. 571, 580 (1934). Petitioner cites those cases for the propositions (1) that the government is bound to its contracts to the same extent as private parties, and (2) that, unless the contract provides otherwise, the government may be held liable for breach of contract where Congress enacts legislation that impairs or renders impossible the government's promised contract performance. Pet. 28-29. Petitioners read these cases too broadly.

Illustrations:

1. A promises B to paint a landscape. B promises A to pay $1000 for the painting if B builds a house which he is then planning. B later decides not to build the house and declines to buy the painting. A has no right of action.

1 Restatement (First) of Contracts § 257; accord 2 Restatement (Second) of Contracts § 225(3) (1981) ("Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.").

They merely make "clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights," and "[t]he extent of that capacity * * * remains somewhat obscure." *Winstar*, 518 U.S. at 876 (plurality opinion) (citing *Perry* and *Lynch*).

Moreover, the conclusion petitioners seek to draw in the second clause quoted above—that one of the parties to a contract, the government, is presumptively liable upon a change in the law—does not follow from the premise that government contracts are generally to be treated in the same manner as private contracts. Which party should be liable turns on which party, if either, should be held to have assumed the risk of a change in the law. Here, unlike in *Winstar* (see *id.* at 881), the government did not assume the risk of a change in the law, and indeed it warned farmers that a change might be imminent which could result in no quotas.

In any event, the court of appeals' decision does not conflict with the broader proposition petitioners assert. The court of appeals simply held that the government had not promised to indemnify petitioners' 2002 peanut crop at quota rates, given the specific language of petitioners' insurance contract. Likewise, petitioners' argument that the government prevented the condition of allocating individual farm quotas from occurring presents no conflict with *Winstar*, *Perry*, and *Lynch*. That argument, too, turns on what the government actually promised in petitioners' insurance contract, which, in turn, depends on the specific language of that contract. As just explained, that contract contained no promise that petitioner would receive farm quotas or be indemnified at the quota rate. In fact, the contract specifically contemplated that there might not be a quota. See p. 10, *supra*.

In sum, under the court of appeals interpretation of the contract, the principles established in *Winstar* and related cases cited by petitioner have no bearing on the government's contractual liability. Rather, this case presents only a narrow question of contract interpretation pertaining to a unique indemnity scheme that was repealed six years ago.

3. The court of appeals' rejection of petitioners' "promissory estoppel" claim is consistent with settled law and does not present any issue warranting further review. Petitioners argue that they invested in agricultural resources and made financial commitments for the 2002 crop year in the expectation that indemnity at quota rates would continue. Pet. 33. They conclude that their reliance on indemnity at quota rates was reasonable and warrants forcing the government to indemnify lost production at quota rates. Pet. 34. The court of appeals rejected petitioners' estoppel argument, finding that petitioners' reliance on indemnity at quota rates was not reasonable in light of recent modifications in the quota program and clear warnings that repeal of the quota system might be imminent. Pet. App. 34a-36a.

No aspect of that holding warrants further review. Even amongst private parties, the estoppel theory on which petitioners rely requires that the aggrieved party demonstrate that it has changed its position in *reasonable* reliance on representations of the other party. See *Heckler* v. *Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984) (*Community Health Servs.*). The court of appeals was thus correct in concluding that no estoppel would lie absent *reasonable*, detrimental reliance. Pet. App. 33a-34a. And its holding that petitioners could not have reasonably relied on indemnity at quota rates in the circumstances presented here is a fact-bound determination that does not warrant further review.

Even if petitioners could establish reasonable, detrimental reliance on some expectation that a peanut quota allocation would have been made, "it is well settled that the Government may not be estopped on the same terms as any other litigant"—if the government can even be estopped at all. *Community Health Servs.*, 467 U.S. at 60. Moreover, "this Court has never upheld an assertion of estoppel against the Government by a claimant seeking public funds." *OPM* v. *Richmond*, 496 U.S. 414, 434 (1990). And while the Court has left open the possibility that the government might be estopped in some, extraordinary circumstances, it has made plain that a party's mere reliance on a government agent's misstatements of the law is not sufficient. See *Community Health Servs.*, 467 U.S. at 60-61; *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947). Petitioners' assertion that the court of appeals nonetheless erred in failing to estop the government is inconsistent with that line of precedent and does not present a substantial issue for the Court's review.[6]

4. Petitioners' passing due process and statutory arguments are meritless and do not afford any basis for further review of the court of appeals decision. Petitioners argue in passing that the asserted destruction of their contract rights is a violation of due process. Pet.

[6] In addition, the estoppel issue, like petitioner's remaining due process and statutory claims, is not identified as a "question presented." See Pet. I. It has therefore not been preserved for the Court's review. See Sup. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

35. The court of appeals correctly found, however, that petitioners had no contract right to indemnification at quota rates. That holding is correct and does not implicate the due process principles petitioners advance here.

Petitioners' contention that the court of appeals holding undermines the congressional policies underlying the crop insurance program (Pet. 35) similarly fails to present any substantial issue for the Court's review. Congress repealed the peanut quota program and replaced it with new statutory programs involving direct cash payments to farmers, new price supports, a quota buy-out program, and a statutory increase in the indemnification rates paid for non-quota peanuts. Pet. App. 15a. Nothing in the court of appeals holding is inconsistent with the provisions of those statutes or their underlying congressional policy. There is thus no error in statutory construction warranting further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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