No. 10-1221

In the Supreme Court of the United States

HOMER J. HOLLAND, ET AL., PETITIONERS

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

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QUESTIONS PRESENTED

1. Whether petitioners' unqualified release of a federal agency sharing joint and several contractual liability with a second federal agency effected a release of the second agency, when neither the contract nor the surrounding circumstances demonstrated an intent to reserve petitioners' claims premised on alleged breaches of contract by the second agency.

2. Whether the court of appeals correctly applied state law as the federal rule of decision in determining the effect of a settlement agreement, when there was no controlling federal precedent and the parties' contract called for the application of state law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 621 F.3d 1366. The opinion of the Court of Federal Claims (Pet. App. 35a-49a) is reported at 75 Fed. Cl. 492. An earlier opinion of the Court of Federal Claims is reported at 74 Fed. Cl. 225.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2010. A petition for rehearing was denied on January 5, 2011 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on April 5, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner First Bank is the successor in interest to two Illinois thrifts. In 1988, the predecessor thrifts

acquired several other Illinois thrifts and entered into two Assistance Agreements with the Federal Savings and Loan Insurance Corporation (FSLIC). The Assistance Agreements promised the thrifts "regulatory forbearances"—favorable accounting treatment that made it easier for them to satisfy their regulatory capital requirements. Pet. App. 2a-6a. The FSLIC was the sole government signatory to the agreements, which incorporated documents created by the Federal Home Loan Bank Board (FHLBB). *Id.* at 10a, 15a. Each agreement contained a choice-of-law clause providing that, "[t]o the extent that Federal law does not control," the "[a]greement and the parties' rights and obligations under it shall be governed by the law of the State of Illinois." C.A. App. A200199.

In 1989, in response to widespread problems in the savings-and-loan industry, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. FIRREA abolished FSLIC and the FHLBB, and it transferred FSLIC's Assistance Agreement obligations to the FSLIC Resolution Fund (FRF), which is managed by the Federal Deposit Insurance Corporation (FDIC). FIRREA § 215, 103 Stat. 253; see Pet. App. 17a.

In 1991, petitioners (or their predecessors in interest) entered into a Settlement Agreement with the FDIC, as manager of the FRF. Pet. App. 57a-74a. Citing FIRREA, the parties to the Settlement Agreement recognized that the FRF was the successor in interest to the FSLIC Assistance Agreements. *Id.* at 58a. Under the settlement agreement, the FDIC made cash payments to petitioners. *Id.* at 59a. In exchange, the parties agreed that the settlement would

> effect a complete accord and satisfaction of any and all obligations and liabilities of such party under the Assistance Agreements and, thenceforth, such party shall be fully discharged from any obligation or liability of any kind in connection therewith, including, without limitation, any and all actions, causes of action, suits, debts, sums of money, bonds, covenants, agreements, promises, damages, judgments, claims, and demands whatsoever, known or unknown, suspected or unsuspected, at law or in equity.

Id. at 63a-64a.

The Settlement Agreement also contained a choice-of-law clause similar to those found in the Assistance Agreements: "This Settlement Agreement shall be governed by and construed in accordance with the federal law of the United States of America and, in the absence of controlling federal law, in accordance with the laws of the State of Illinois." Pet. App. 71a.

2. Petitioner Homer J. Holland is a former shareholder of First Bank's predecessors; petitioner Steven J. Bangert is the co-executor of the estate of Howard Ross, another shareholder. In 1995, Holland and Ross filed suit in the Court of Federal Claims (CFC), alleging that the government's enforcement of FIRREA, which tightened thrifts' capital-reserve requirements, breached its contractual obligations under the Assistance Agreements. Cf. *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996). First Bank also joined as a plaintiff, naming the Office of Thrift Supervision (OTS) and the FDIC as defendants. C.A. App. A400332-A400335.

The United States moved to dismiss the suit on the ground that the Settlement Agreement with the FDIC and FRF released all claims connected with the Assistance Agreements. The CFC denied the motion to dis-

miss. The court held that, although the Settlement Agreement fully released the FDIC, it did not release the Assistance Agreement obligations inherited by the OTS. Pet. App. 36a-37a.

3. The court of appeals reversed. Pet. App. 1a-32a. The court explained that "release and accord and satisfaction are separate contractual defenses." *Id.* at 17a. While release involves the abandonment or relinquishment of a claim that one party has against another, accord and satisfaction involves the discharge of a claim "because some performance other than that which was claimed to be due is accepted as full satisfaction of the claim." *Id.* at 18a. The court of appeals concluded that petitioners' claims were independently barred by both defenses. *Ibid.*

In considering release, the court of appeals began by "determin[ing] the law to be applied." Pet. App. 22a. The choice-of-law provision in the Settlement Agreement provided that Illinois law was to apply "in the absence of controlling federal law." *Ibid*. Petitioners argued that *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), supplied "controlling federal law" regarding the effect of the release of petitioners' contractual claims. The court rejected that contention, observing that *Zenith* "did not involve the release of co-obligors on a contract." Pet. App. 22a-23a. The court therefore looked to Illinois law to determine the legal effect of the release. It held that, under Illinois law, a party executing a full release must specify whether it intends to reserve its claims against other co-obligors; simply failing to name the co-obligors in the settling document is insufficient to indicate or effect a party's intent to reserve rights against those potential defendants. *Id.* at 24a-25a.

The court of appeals concluded that the circumstances surrounding the Settlement Agreement did not suggest that petitioners intended to reserve potential claims premised on alleged breaches of contract by the OTS. "The letters and documents prepared in the course of finalizing the Settlement Agreement," the court observed, "include broad references to the resolution of the Assistance Agreements and never suggest that Plaintiffs sought to reserve their rights against the OTS." Pet. App. 27a. The court also noted that, before the FDIC executed the Settlement Agreement, the OTS had approved terminating the Assistance Agreements. *Ibid.* The court explained that "the OTS's role in the approval of the Settlement Agreement, at least to some extent, goes against a showing that [petitioners] reserved their rights against the OTS." *Ibid.* Finding that petitioners had not expressed an intent to reserve claims against the OTS, the court concluded that the Settlement Agreement's "complete and unconditional release of all claims against the FDIC as a manager of the FRF" released all claims connected with the Assistance Agreements. *Ibid.*

As an alternative ground for its holding, the court of appeals held that the FDIC's cash payment to petitioners' predecessors constituted an accord and satisfaction of all claims arising out of the Assistance Agreements, simultaneously "releasing and discharging [the FDIC's] co-obligor, the OTS." Pet. App. 18a, 28a-29a. Because "[n]either party * * * pointed to any 'controlling federal law' on the effect of an accord and satisfaction with one co-obligor on other co-obligors," the court relied on Illinois law. *Id.* at 30a-31a. Under Illinois law, "[p]laintiffs are only entitled to one complete satisfaction of their claims," and "an accord and satisfaction 'generally

extinguishes or discharges the cause of action' and is 'considered a bar to further action.'" *Id.* at 30a (quoting *McCullough* v. *Orcutt*, 145 N.E.2d 109, 116 (Ill. App. Ct. 1957)). Because the accord and satisfaction extinguished petitioners' claims, the court held that petitioners were not entitled to any further recovery from the OTS. *Id.* at 31a.

ARGUMENT

Petitioners argue (Pet. 8-23) that their Settlement Agreement with the FDIC did not release their current claims alleging breaches of contract by the OTS. They further contend that the court of appeals' decision conflicts with *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971), as well as with decisions of other courts of appeals concerning the circumstances in which a federal court may apply state law as a rule of decision. Those arguments lack merit. The court of appeals' application of contract-law principles to the "unusual factual situation" (Pet. App. 10a) presented in this case is consistent with the decisions of this Court and other courts of appeals. In any event, the judgment is independently supported by the court's alternative holding based on the doctrine of accord and satisfaction, and petitioners raise no serious objection to that ruling. Further review is not warranted.

1. Applying Illinois law, the court of appeals held that the unconditional release of petitioners' contractual claims against the FDIC also released their claims alleging breaches of contract by its co-obligor, the OTS. Petitioners do not suggest that the court of appeals misapplied or misconstrued Illinois law. Instead, they contend that its decision was inconsistent with *Zenith*, which they read as establishing a general federal rule that a plaintiff who releases a federal claim "releases only

those other parties whom he intends to release." Pet. 2 (quoting *Zenith*, 401 U.S. at 347).

The court of appeals correctly held that *Zenith* does not apply to breach-of-contract cases. Pet. App. 22a-23a. Instead, the Court in *Zenith* considered the settlement of actions brought against joint antitrust tortfeasors. In holding that a release of one tortfeasor releases other tortfeasors only if the party granting the release so intends, the Court in *Zenith* repeatedly invoked relevant tort authorities, including the First Restatement of Torts, the then-tentative draft of the Second Restatement of Torts, and the Uniform Contribution Among Tortfeasors Act. See 401 U.S. at 344-345, 347. The Court also emphasized the statutory nature of the cause of action, and it observed that its rule was "most consistent with the aims and purposes of the treble-damage remedy under the antitrust laws." *Id.* at 346; see *id.* at 344 (noting that the case involved "a statutory cause of action created under federal law"). The Court noted that much antitrust litigation has a "multistate and multiparty character," where "often, defendants who have conspired together must be sued in a number of different States if all are to be reached." *Id.* at 346.

None of those considerations is applicable to breach-of-contract claims, especially those involving the United States as a defendant. Nothing in *Zenith* supports the proposition that the federal common law of contracts should be governed by tort-law principles. Nor does *Zenith* suggest that the release rule the Court set forth should be applicable to two agencies of the United States, which are part of a single, unified federal government.

In determining the rights and obligations of two federal agencies to a third party, "the federal government

is considered to be a single-entity." *United States* v. *Maxwell*, 157 F.3d 1099, 1102 (7th Cir. 1998). Indeed, although petitioners' current claims are premised on alleged breaches of contract by the OTS, the named defendant in this case is the United States rather than the OTS itself. And while the United States was not specifically identified as a party to the Settlement Agreement (the named federal parties were the Resolution Trust Corporation and the FDIC, see Pet. App. 74a), the settlement surely would have barred petitioners from seeking relief against the United States based on the FDIC's alleged breaches of contract. Absent an express reservation of rights in the Settlement Agreement, petitioners should not be allowed to avoid the natural effect of the settlement by suing the United States and alleging that a different federal agency breached the Assistance Agreements. That conclusion is consistent with this Court's longstanding rule that broadly worded stipulations like the one at issue here (see p. 3, *supra*) indicate "a purpose to make an ending of every matter arising under or by virtue of the contract," and "are not to be shorn of their efficiency by any narrow, technical and close construction." *United States* v. *William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907).

Petitioners identify no decision in which *Zenith*'s rule concerning the release of joint tortfeasors has been applied to a case involving the federal common law of contracts. The decisions cited by petitioners as relying on *Zenith*'s rule all involved tort-related or statutory causes of action. None involved the settlement of a contract claim, and none involved a settlement in which multiple federal agencies were parties to a single contract.

2. Petitioners also argue that the court of appeals erred by giving effect to the Settlement Agreement's choice-of-law clause. They contend that, because the Settlement Agreement involves the release of a federal agency from claims arising under a federal contract, "[u]nder no circumstances * * * could 'the controversy . . . be resolved under state law.'" Pet. 17 (quoting *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)).

Petitioners' argument rests on the mistaken premise that the court of appeals viewed state law as applying of its own force. In fact, the issue before the court of appeals was not whether state law could be applied directly, but whether state law could be incorporated as the federal rule of decision in the absence of any controlling federal precedent or any conflict between state law and federal statutes or other federal interests. In that context, this Court has recognized that it is appropriate "to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979). And in cases involving federal contracts, the Federal Circuit has long recognized the incorporation of state law as the federal rule of decision. *Ginsberg* v. *Austin*, 968 F.2d 1198, 1199-1201 (1992).

In this case, the court of appeals first determined that no controlling federal precedent established the federal rule of decision as to the effect of a release and an accord and satisfaction upon contractual co-obligors. Pet. App. 22a-23a, 28a-29a. The court then incorporated state law as the federal rule of decision, as the CFC had done. *Id.* at 22a-23a; see *id.* at 39a-42a. That approach created no conflict with federal law.

Petitioners argue (Pet. 17-18) that, even if state law can generally be incorporated as the federal rule of decision, the court of appeals improperly incorporated state law here. In support of that argument, they equate this federal contract case with cases involving federal statutory rights. See Pet. 16-18 (citing *Texas Indus.*, 451 U.S. at 641 (antitrust); *Dice* v. *Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952) (Federal Employers' Liability Act); *Prudential Ins. Co.* v. *Doe*, 140 F.3d 785, 791 (8th Cir. 1998) (ERISA); *Petro-Ventures, Inc.* v. *Takessian*, 967 F.2d 1337 (9th Cir. 1992) (securities); *Locafrance U.S. Corp.* v. *Intermodal Sys. Leasing, Inc.*, 558 F.2d 1113 (2d Cir. 1977) (securities)). That comparison is misconceived.

Unlike the settlements involved in those statutory cases, the Settlement Agreement's release of petitioners' claims under the Assistance Agreements does not affect unique federal interests. There is consequently no need to devise a uniform federal rule governing the interpretation of the Settlement Agreement. See *Atchison, Topeka & Santa Fe Ry.* v. *Brown & Bryant, Inc.*, 159 F.3d 358, 363 (9th Cir. 1998) (permitting the application of the state law of release where it does not "frustrate or conflict with specific objectives of federal programs"). Nor does the release conflict with a federal statutory scheme. Rather, as this Court recognized in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), "[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." *Id.* at 895 (brackets in original). Courts of appeals have accordingly recognized that, although the United States' rights and duties under government contracts are determined under federal law, if the United States

agrees that state law controls, then "it is appropriate to look there for our decision." *United States* v. *Burgreen*, 591 F.2d 291, 296 n.4 (5th Cir. 1979); accord *FDIC* v. *Bank of Am. Nat'l Trust & Sav. Ass'n,* 701 F.2d 831, 834-835 (9th Cir.), cert. denied, 464 U.S. 935 (1983). The ruling below is fully consistent with those decisions.

3. Even if the questions presented otherwise warranted review, this case would be an inappropriate vehicle for considering them. The judgment below is supported by the court of appeals' alternative holding that the Settlement Agreement effected an accord and satisfaction of petitioners' contractual claims, barring an additional recovery premised on alleged contract breaches by the OTS. Pet. App. 28a-31a. The court based that holding on the Illinois law of accord and satisfaction, emphasizing that "[n]either party [had] pointed to any 'controlling federal law' on the effect of an accord and satisfaction with one co-obligor on other co-obligors." *Id.* at 30a.

Petitioners largely ignore that alternative ground for the decision below. Petitioners do not dispute the Federal Circuit's observation that they had failed to identify any "controlling federal law" governing the principles of accord and satisfaction that apply in this context. Nor do they make any serious effort to identify a governing federal rule. Petitioners obliquely suggest that the Federal Circuit should have looked to *Zenith* for guidance (Pet. 19), but *Zenith* does not address the doctrine of accord and satisfaction. Accordingly, the petition offers no basis for questioning the Federal Circuit's reliance on Illinois law to resolve the accord-and-satisfaction issue.

Under Illinois law, "[p]laintiffs are only entitled to one complete satisfaction of their claims." Pet. App. 30a-31a. "[A]n accord and satisfaction 'generally extin-

guishes or discharges the cause of action,' and is 'considered a bar to further action.'" *Id.* at 30a (quoting *McCullough* v. *Orcutt*, 145 N.E.2d 109, 116 (Ill. App. Ct. 1957)); see also *id*. at 31a (citing Restatement (Second) of Contracts §§ 278, 281, and 293, at 373, 381-382, 421 (1981)). The proposition that a party is entitled to only one satisfaction of its claims is unremarkable, and it is not unique to Illinois. See 12 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 36:19, at 696 (4th ed. 1999) ("[A]nything which legally destroys the claim against one joint debtor will operate as a bar against the others. This has been so held in regard to an accord and satisfaction."). Indeed, petitioners cite no authority suggesting that a party is entitled to more than one complete accord and satisfaction if that party contracts with multiple obligors sharing joint and several liability.

Petitioners suggest in passing that an accord and satisfaction cannot "operate to discharge" another party to the contract. Pet. 8; see Pet. 11-12, 19. As explained above, that is incorrect. In any event, because petitioners cite no decision from this Court or any other court of appeals conflicting with the decision below, petitioners' contention does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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