No. 13-304

In the Supreme Court of the United States

JOHN R. MCCARRON, 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

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QUESTION PRESENTED

Whether the doctrine of res judicata barred petitioner from seeking the same relief in the Court of Federal Claims that he had previously been denied in federal district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 710 F.3d 1336. The opinion of the Court of Federal Claims denying petitioner's motion to intervene (Pet. App. 33-42) is reported at 102 Fed. Cl. 27.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2013. A petition for rehearing was denied on June 7, 2013 (Pet. App. 56-58). The petition for a writ of certiorari was filed on September 5, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1933, Congress established the Federal Deposit Insurance Corporation (FDIC) "to insure bank

deposits" and to act as a receiver for failed banks. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 388 (1995); see Act of June 16, 1933, ch. 89, § 8, 48 Stat. 168, as amended, 12 U.S.C. 1811 *et seq.* In its insurer capacity, the FDIC charges premiums to member banks and insures their depository accounts up to a specified maximum amount. See 12 U.S.C. 1817, 1821. In its receiver capacity, the FDIC "hold[s] and liquidate[s] the assets" of collapsed financial institutions. *Lebron*, 513 U.S. at 388; see 12 U.S.C. 1822.

In 1982, an FDIC member bank in Pennsylvania was failing. Pet. App. 4. Acting in its capacity as insurer, the FDIC sought to avoid the bank failure by helping another bank (Meritor) to merge with the failing one. *Ibid.* In connection with the merger, the FDIC agreed to use certain lenient accounting procedures in determining whether Meritor met the capital requirements that the FDIC imposes on insured institutions. *Ibid.* In 1988, however, the FDIC breached that agreement by declining any longer to follow those lenient accounting procedures. *Id.* at 4-5. Meritor subsequently failed. *Id.* at 5. State officials seized Meritor, and the FDIC was appointed as its receiver. *Ibid.*

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 authorizes the FDIC, in its capacity as receiver, to "disaffirm or repudiate any contract or lease * * * the performance of which the * * * receiver, in the * * * receiver's discretion, determines to be burdensome." 12 U.S.C. 1821(e)(1)(B). Acting pursuant to that authority, the FDIC repudiated all severance agreements with Meritor employees, based upon its determination that "the payment of any and all severance claims would further burden a banking institution in financial ruin." *McCarron* v. *FDIC*, 111 F.3d 1089, 1094 (3d Cir. 1997), cert. denied, 522 U.S. 1046 (1998). Petitioner, a former officer of Meritor, was one of the employees whose severance agreements were repudiated. *Id.* at 1094-1095.

During the 1990s, petitioner pursued claims against the FDIC for the amounts he would have been owed under the repudiated severance agreements. Petitioner brought that litigation in the United States District Court for the Eastern District of Pennsylvania, and he appealed the district court's adverse judgment to the Third Circuit. See Pet. App. 8; *McCarron*, 111 F.3d at 1089. Both the district court and the Third Circuit concluded that the FDIC had made a "valid" repudiation of petitioner's severance package, and that petitioner was not entitled to recover any severance benefits. *McCarron*, 111 F.3d at 1095. This Court denied certiorari. 522 U.S. 1046.

2. Meanwhile, in this separate litigation, a shareholder filed a derivative class action against the United States in the Court of Federal Claims (CFC), challenging the FDIC's failure to adhere to the lenient accounting practices to which it had agreed in 1982. Pet. App. 5-6. The CFC found the government liable for breach of contract. *Id.* at 6. The court awarded, *inter alia*, $276 million in "'lost value' damages based on Meritor's market valuation immediately before the FDIC's breach, on the theory that the breach initiated a chain of events leading to the bank's seizure and the loss of all shareholder value." *Ibid.*

In 1996, while the appeal of his own suit against the FDIC was pending before the Third Circuit, petitioner moved to intervene in the CFC litigation. Pet. App.

9. Petitioner claimed an entitlement to a portion of the potential litigation proceeds, on the theory that his severance and employment agreements with Meritor had promised him a cash payment and stock options. *Id.* at 8. In 2006, the CFC denied petitioner's intervention motion, and petitioner did not appeal that ruling. *Id.* at 9.

The court of appeals subsequently affirmed the CFC's finding of liability and award of $276 million against the United States. Pet. App. 6. The proceedings were then remanded to the CFC to determine whether the award would be distributed to current Meritor shareholders, or instead to the persons who had been shareholders when the bank failed in 1992. *Id.* at 7. During those proceedings on remand, petitioner filed a second motion to intervene. *Id.* at 9. This second motion asserted a claim to a portion of the award, based on the same theories that petitioner had asserted in the earlier intervention motion. *Ibid.*

The CFC denied the motion on multiple independent grounds. Pet. App. 39-41; see *id.* at 21. First, the CFC concluded that it lacked jurisdiction over petitioner's claim. The CFC reasoned that the Tucker Act, 28 U.S.C. 1491(a)(1), authorizes the CFC to hear certain claims against "the United States," and that petitioner's claim was "directed against Meritor" and the FDIC as receiver "rather than the Government." Pet. App. 39-40. Second, the CFC concluded that res judicata barred petitioner's claim. *Id.* at 40-41. The CFC observed that petitioner had "previously asserted the same claim in district court * * * and received final judgment[]." *Ibid.* Third, the CFC concluded that, by failing to appeal the denial of his original intervention motion, petitioner had failed to "preserve the issue and cannot raise it again now." *Id.* at 41.

3. The court of appeals affirmed the denial of the intervention motion. Pet. App. 1-23. The court reasoned that it "need only address the issue of res judicata to affirm." *Id.* at 21. It observed that, "[u]nder the doctrine of res judicata or claim preclusion, 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *Ibid.* (quoting *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) (internal brackets omitted)). The court of appeals rejected petitioner's argument that the final judgment in the earlier litigation should have no preclusive effect because the receivership has "since been found to be improper." *Ibid.* The court explained that, although "the FDIC has been found liable for breaching its capital agreement with Meritor, and * * * the FDIC's breach led to Meritor being put into receivership," it "is not true * * * that the receivership itself has been adjudicated as improper." *Id.* at 22. The court added that petitioner "cites no support for the proposition that the FDIC's breach of contract renders invalid all of the subsequent actions of the FDIC, acting in its capacity as Meritor's receiver," and it found "no reason to conclude that the [FDIC as receiver's] repudiation of [petitioner's] employment contract was improper." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 17) that this Court should grant certiorari to "provide clarification to the lower courts on how to distribute a surplus [from a failed thrift institution] as among creditors and shareholders." Neither of the courts below addressed that issue because neither court found it to be properly presented. Those courts instead concluded, as a threshold matter, that petitioner was barred from arguing that he was a creditor of Meritor. See Pet. App. 20-22, 39-41. The resolution of that fact-bound threshold issue was correct and does not conflict with any decision of this Court or any court of appeals. Petitioner also fails to address several additional potential obstacles to obtaining relief on his current claim. Further review is not warranted.

1. The courts below correctly held that res judicata bars petitioner's contention that he is a creditor of Meritor. Under the res judicata doctrine, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *San Remo Hotel, L.P.* v. *City & Cnty. of San Francisco*, 545 U.S. 323, 336 n.16 (2005) (quoting *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980)). Nearly 20 years ago, petitioner brought suit against the FDIC as receiver in the Eastern District of Pennsylvania, seeking compensation on the basis of the severance agreements he had made with Meritor. *McCarron* v. *FDIC*, 111 F.3d 1089, 1094 (3d Cir. 1997), cert. denied, 522 U.S. 1046 (1998). The district court entered summary judgment against petitioner on the relevant claims, and the Third Circuit affirmed. *Id.* at 1091, 1093. The Third Circuit held that the FDIC had validly repudiated the severance provisions at issue and that petitioner was not entitled to damages for the repudiation. *Id.* at 1094-1095.

Petitioner does not dispute that, if the Third Circuit's holding was correct, res judicata would preclude petitioner from arguing in this case that he is a creditor of Meritor. Petitioner instead asserts (Pet. 26-30) that the Third Circuit's ruling was incorrect, on the theory that all of the FDIC's actions as receiver (including the repudiation of Meritor's contractual obligations to petitioner) were invalid because the FDIC itself, through its actions as an insurer, had triggered the events leading to the receivership. The correctness of the Third Circuit's decision, however, is irrelevant to its res judicata effect.

"[T]he res judicata consequences of a final, unappealed judgment on the merits" are not "altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); see *ibid.* (citing cases); see also, *e.g.*, *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1869 (2013) ("[E]ven an erroneous judgment is entitled to res judicata effect."). "[T]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert." *Federated Dep't Stores*, 452 U.S. at 398-399 (quoting *Reed* v. *Allen*, 286 U.S. 191, 201 (1932)) (brackets omitted).

Petitioner asserts (Pet. 29) that "[t]here was no authority to challenge the receivership" in the Third Circuit ligitation, "as it was presumed" in that case that "the Government acted according to its statutory power in seizing Meritor, not that the Government through its own breach of contract had caused the receivership and that Meritor would later be ordered restored to its pre-receivership status." Petitioner provides no reason, however, why he could not have challenged that "presum[ption]" in those proceedings. Because res judicata bars relitigation of all "issues that were *or could have been* raised" in the earlier litigation, *San Remo Hotel*, 545 U.S. at 336 n.16 (emphasis added), petitioner's failure to raise some of his current arguments in the earlier case does not alter the preclusive effect of the prior judgment.

In any event, petitioner's challenge to the Third Circuit's prior decision lacks merit. As the court below observed, petitioner's argument "rests on the flawed premise that Meritor's receivership has been adjudicated as improper." Pet. App. 22. Although the FDIC acting as insurer was found to have breached its contract with Meritor (and the government was ordered to pay damages for that breach), that holding does not cast doubt on the propriety of the FDIC's subsequent conduct as receiver after Meritor failed. See *ibid*. In particular, the FDIC's breach of its agreement to apply lenient accounting standards in its capacity as insurer provides "no reason to conclude that the [FDIC as receiver's] repudiation of [petitioner's] employment contract was improper." *Ibid*.

2. Petitioner also fails to address several other potential obstacles that could prevent him from obtaining relief in this case. Those additional barriers render this case an unsuitable vehicle for resolution of the question presented and provide further reasons to deny certiorari.

First, the CFC concluded (Pet. App. 40) that it lacked jurisdiction over petitioner's claim. The Tucker Act, 28 U.S.C. 1491(a)(1), provides jurisdiction only for certain suits against "the United States." The CFC concluded that petitioner's claim was "directed against Meritor and the [FDIC as] Receiver rather than the Government." Pet. App. 40. Meritor is not "the United States," and the FDIC's actions as a receiver can be challenged only in district court, see 12 U.S.C. 1821(d)(6) and (13)(D), as occurred in petitioner's prior suit against the FDIC in the 1990s.

Second, the CFC determined (Pet. App. 40-41) that petitioner's intervention motion was precluded not only by the prior Third Circuit decision, but also by the CFC's own earlier denial (which petitioner did not appeal) of an effectively identical motion. See *id.* at 21 (discussing alternate grounds for the CFC's holding). The CFC cited, *inter alia*, a prior Federal Circuit decision holding that where a party had "failed to raise" a particular issue on appeal that had been "clearly implicated in the initial decision of" the trial court, the court of appeals' mandate "acted to prevent" that party "from raising th[e] issue on remand or in any future proceedings in th[e] litigation." *Tronzo* v. *Biomet, Inc.*, 236 F.3d 1342, 1349, cert. denied, 534 U.S. 1035 (2001) (cited at Pet. App. 41).

Third, the funds in this case have already been distributed by the CFC to the shareholder plaintiffs. Petitioner did not seek a stay of that distribution pending appeal. He does not propose how, as a practical matter, the CFC could effectively grant him relief even if he were to overcome all of the potential procedural obstacles and prevail on the merits. Cf., *e.g.*, *In re Agent Orange Prod. Liab. Litig.*, 804 F.2d 19, 20 (2d Cir. 1986) (per curiam) (recognizing that appellate review of challenge to settlement and distribution scheme would be ineffectual in the absence of a stay).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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