No. 14-485

In the Supreme Court of the United States

HILLSIDE METRO ASSOCIATES, LLC, PETITIONER

v.

JPMORGAN CHASE BANK, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

RICHARD J. OSTERMAN, JR.
Acting General Counsel
FLOYD I. ROBINSON
Acting Deputy General Counsel
COLLEEN J. BOLES
Assistant General Counsel
KATHRYN R. NORCROSS
Senior Counsel
JOSEPH BROOKS
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner lacks standing to enforce its interpretation of an agreement to which petitioner is not a party and that expressly disclaims any intention to confer rights on third-party beneficiaries.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 747 F.3d 44. The order of the district court denying cross-motions for summary judgment and denying the Federal Deposit Insurance Corporation's motion to dismiss (Pet. App. 15a-53a) is unreported but is available at 2011 WL 5008368. The order of the district court granting summary judgment to petitioner (Pet. App. 54a-70a) is unreported but is available at 2012 WL 1611830.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2014. A petition for rehearing was denied on July 28, 2014 (Pet. App. 71a-72a). The petition for a writ of certiorari was filed on October 27,

2014 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, in response to the savings and loan crisis of the 1980s. The statute provides a framework for resolving the assets and liabilities of failed banks. Under Section 212 of FIRREA, when a bank insured by respondent Federal Deposit Insurance Corporation (FDIC) becomes insolvent, the FDIC may be appointed the receiver for the bank and may take control of its assets and liabilities. See 12 U.S.C. 1813(c)(2), 1821(c)(1), (d)(2)(A) and (B).

As particularly relevant here, the statute authorizes the FDIC as receiver to repudiate a lease to which the bank is a party if the FDIC finds that performance of the lease would be burdensome and that repudiation "will promote the orderly administration of the institution's affairs." 12 U.S.C. 1821(e)(1)(B) and (C). A lessor on such a lease may sue the FDIC for damages arising out of the repudiation, but the relief is generally limited to "rent accruing before the later of the date * * * the notice of disaffirmance or repudiation is mailed; or * * * the disaffirmance or repudiation becomes effective." 12 U.S.C. 1821(e)(4)(A), (B)(i)(I) and (II).

FIRREA requires parties seeking damages for the repudiation of contracts to exhaust administrative remedies before suing the FDIC in court. It provides that the FDIC shall "determine [such] claims," 12 U.S.C. 1821(d)(3)(A), and that "no court shall have jurisdiction over * * * any claim or action for

payment from * * * the assets of [the bank]" "[e]xcept as otherwise provided in [Section 1821(d)]," 12 U.S.C. 1821(d)(13)(D)(i). Although the statute does not contain "an explicit mandate for exhaustion of administrative remedies[,] these provisions are accepted by the cases and by Congress as having that meaning." *FDIC* v. *Lacentra Trucking, Inc.*, 157 F.3d 1292, 1294 (11th Cir. 1998) (citing *Marquis* v. *FDIC*, 965 F.2d 1148, 1151-1152 (1st Cir. 1992)), cert. dismissed, 526 U.S. 1083 (1999). The FDIC must "promptly publish a notice to the [bank's] creditors to present their claims * * * by a date" that is at least 90 days after publication of the notice. 12 U.S.C. 1821(d)(3)(B)(i).

In April 2008, petitioner entered into an agreement with Washington Mutual Bank (WaMu) in which petitioner agreed to lease to WaMu for a term of ten years real property in Queens, New York, that was the site of a former video rental store (the Hillside Lease). Pet. App. 4a. Petitioner and WaMu intended that the premises would be used as a WaMu bank branch, and plans for renovating the building on the premises were attached to the Hillside Lease. *Ibid.* In September 2008, however, before the building was fully converted to a bank branch, WaMu suffered the largest bank failure in United States history and was declared insolvent by the Office of Thrift Supervision of the United States Department of the Treasury. *Ibid.*

After being appointed receiver for WaMu under FIRREA, the FDIC immediately assigned most of WaMu's assets and liabilities to respondent JPMorgan Chase Bank, N.A. (JPMorgan). Pet. App. 4a. That assignment was accomplished through a Purchase and

Assumption Agreement (Agreement) between the FDIC and JPMorgan. *Ibid.* The Agreement recites that it generally confers no enforceable rights on third parties. The Agreement states that, "[e]xcept as otherwise specifically provided in this Agreement, nothing expressed or referred to in this Agreement is intended or shall be construed to give any Person other than the [FDIC] and [JPMorgan] any legal or equitable right, remedy or claim under or with respect to this Agreement." *Id.* at 5a.

Among the liabilities to which the FDIC succeeded were real-property leases in which WaMu was the lessee. See Pet. App. 4a. The Agreement divides those leases into two categories: "Bank Premises" and "Other Real Estate." *Id.* at 4a-5a & n.1.[1] Leases for Other Real Estate were assigned outright to JPMorgan, but the Agreement gave JPMorgan a 90-day option to accept or decline assignments of leases for Bank Premises. *Ibid.*

Because the parties to the Agreement understood the Hillside Lease to fall within the Bank Premises category, JPMorgan received a 90-day option to accept or decline it. Pet. App. 6a; Pet. 5. Within that period, JPMorgan notified the FDIC that it would not assume the Hillside Lease. See Pet. App. 6a. JPMorgan also sent a letter to petitioner stating that it would not assume the Hillside Lease. *Id.* at 6a, 19a-

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[1] The Agreement defines "Bank Premises" as "the banking houses, drive-in banking facilities, and teller facilities (staffed or automated) together with appurtenant parking, storage and service facilities and structures connecting remote facilities to banking houses, and land on which the foregoing are located, that are owned or leased by [WaMu] and that are occupied by [WaMu] as of Bank Closing." Pet. App. 4a (brackets in original).

20a. Accordingly, the FDIC never executed a document assigning the Hillside Lease to JPMorgan, and it continued to treat the Hillside Lease as a retained liability. See *id.* at 6a.

In April 2009, the FDIC notified petitioner that it had elected to exercise its authority under FIRREA to repudiate the Hillside Lease. Pet. App. 6a, 20a; see 12 U.S.C. 1821(e)(1). Although the FDIC paid all pre-repudiation rent to petitioner, it did not pay petitioner any rent for the period after repudiation, in accordance with FIRREA's limitation on damages, 12 U.S.C. 1821(e)(4)(A) and (B)(i). See Pet. App. 6a. Petitioner did not file an administrative claim with the FDIC after learning that the Hillside Lease had been repudiated. See *ibid.*

2. Petitioner sued JPMorgan in the United States District Court for the Eastern District of New York, alleging a claim for breach, repudiation, or abandonment of the Hillside Lease. Pet. App. 6a, 20a. Contrary to the notifications it had received from JPMorgan and the FDIC, petitioner contended that JPMorgan "had assumed the [Hillside Lease] under the [Agreement] and was in default." *Id.* at 6a. JPMorgan, on the other hand, took the position that it was not liable for any unpaid rent because it had not assumed the Hillside Lease. *Ibid.* The FDIC intervened in support of JPMorgan. *Id.* at 6a-7a.

a. In an initial order, the district court denied cross-motions for summary judgment and the FDIC's motion to dismiss. Pet. App. 15a-53a. JPMorgan and the FDIC had argued, as relevant here, that petitioner could not prevail on its claim because, given that petitioner was neither a party to nor a third-party beneficiary of the Agreement, it lacked standing to

argue that the Agreement had effected an assignment of the Hillside Lease to JPMorgan. See *id.* at 21a-22a.[2] The district court recognized that, "[w]here a non-party plaintiff claims to have suffered an injury due to a defendant's breach of a contractual duty owed to someone else, the plaintiff lacks standing to complain of the breach because his injury did not result from 'an invasion of a legally protected interest' belonging to the plaintiff himself." *Id.* at 34a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The court believed, however, that "where the law arguably grants a plaintiff an interest in seeing another's contractual obligations performed, that plaintiff has standing to argue that he had such an interest and that the interest was violated, even though he is not a party to the contract." *Id.* at 34a-35a.

Based on that understanding, the district court held that petitioner had "plausibly alleged an invasion by [JPMorgan] of [its] own legally protected interest." Pet. App. 35a. The court found that petitioner had not alleged a "simple breach of contract claim," but rather had asserted a claim "based primarily in property law": to "enforce * * * the lease it entered into with WaMu, which it plausibly alleges [JPMorgan] assumed." *Id.* at 35a-36a. The court determined that, under the "longstanding property law" of New York, a

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[2] In the district court, the FDIC also argued that, "even if the lease was assigned to [JPMorgan] by the [Agreement], the assignment would be void and unenforceable against [JPMorgan] under federal banking regulations that limit the purposes for which national banks may purchase or hold real property." Pet. App. 22a. The court rejected that argument, see *id.* at 48a-53a, and the FDIC did not renew it on appeal.

landlord may "rely upon a contract to which he is not a party to establish an assignment" of a lease. *Id.* at 36a. The court concluded on that basis that petitioner "has standing to pursue its claim." *Id.* at 37a; see *id.* at 31a n.9 (explaining that "New York assignment law" governed the court's analysis).

The district court then considered the merits of petitioner's argument that the Hillside Lease did not constitute "Bank Premises" within the meaning of the Agreement (and therefore had been assigned to JPMorgan). See Pet. App. 37a-47a. The court concluded that neither party was entitled to summary judgment on that question. See *id.* at 47a.

b. After further discovery, the parties again filed cross-motions for summary judgment. Pet. App. 55a. The district court granted summary judgment to petitioner, holding that the Hillside Lease was automatically assumed by JPMorgan in the Agreement because it does not constitute "Bank Premises." See *id.* at 56a, 62a-68a. The court found that WaMu's intent to build a bank branch on the premises of the Hillside Lease was insufficient for the property to qualify as "Bank Premises" when the plans to convert the existing building into a bank branch had not yet been completed at the time the parties executed the Agreement. See *id.* at 66a-68a.[3]

3. The court of appeals reversed. See Pet. App. 1a-14a. The court explained that "[t]he sole issue on appeal is whether [petitioner] has standing to sue

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[3] The district court also rejected the argument that the lease constitutes a liability rather than an asset under the Agreement and therefore is not encompassed by the provision under which JPMorgan assumed real-estate assets other than leased Bank Premises. See Pet. App. 69a.

[JPMorgan] for breach of the lease based on [petitioner's] own interpretation of the [Agreement] when it was neither a party to nor an intended third-party beneficiary of the [Agreement]." *Id.* at 8a. The court held that petitioner "does not have prudential standing in this case because it cannot enforce the terms of the [Agreement], as to which it is neither a party nor a third-party beneficiary, but the enforcement of which is a necessary component of its claim." *Id.* at 9a.

The court of appeals began by explaining that the parties did not "seriously dispute on appeal that federal common law governs our interpretation of the [Agreement], a federal government contract." Pet. App. 9a. Relying on the provision of the Agreement that expressly disclaims any intent to confer rights on persons other than the FDIC and JPMorgan (see p. 4, *supra*), the court held that petitioner is not an intended third-party beneficiary of the Agreement. Pet. App. 10a-11a.

The court of appeals further held that, "in the absence of a contractual relationship under the [Agreement], [petitioner] cannot prevail because its claim to damages under the lease necessarily requires that the provisions of the [Agreement] relating to assignments be interpreted and enforced in a way that contradicts [the] disclaimer of any third-party benefits"—*i.e.*, because it would require the court to credit the interpretation of a stranger to the Agreement over the understanding of both parties. Pet. App. 11a. The court found its holding to be "consistent with that of most other sister Circuits to have addressed the issue involving the same [Agreement]." *Ibid.* (citing *Deutsche Bank Nat'l Trust Co.* v. *FDIC*, 717 F.3d 189, 194 (D.C. Cir. 2013); *Interface Kanner, LLC* v.

JPMorgan Chase Bank, N.A., 704 F.3d 927, 933 (11th Cir.), cert. denied, 134 S. Ct. 175 (2013); *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship* v. *JPMorgan Chase Bank, Nat'l Ass'n*, 671 F.3d 1027, 1032-1033 (9th Cir. 2012)).

The court of appeals rejected petitioner's argument that it has standing to enforce its interpretation of the Agreement under "New York property law" as "a landlord seek[ing] to collect rent from an assignee of a lease." Pet. App. 12a. The court explained that, "[u]nder New York law, '[w]here a lessee assigns his whole estate, without reserving any reversion therein in himself, a privity of estate is at once created between his assignee and the original lessor, and the latter has a right of action directly against the assignee, on the covenant to pay rent.'" *Ibid.* (quoting *Stewart* v. *Long Island R.R.*, 8 N.E. 200, 201 (N.Y. 1886) (second brackets in original)). The court further held that, "[e]ven assuming that principles of privity of estate obtain" in this case, "[t]he privity of estate argument rests on an interpretation of the [Agreement] and assumes that an assignment has occurred." *Id.* at 13a. That "argument fails," the court continued, "'because it is dependent on [petitioner's] ability to enforce its interpretation of the [Agreement], which * * * [petitioner] lacks standing to do.'" *Ibid.* (quoting *Interface Kanner*, 704 F.3d at 933) (second brackets in original).

The court of appeals explained that its conclusion was consistent with the structure and purposes of FIRREA, which make "clear that [petitioner's] recourse to sue for unpaid rent or other damages as a result of the alleged breach of its lease was against the FDIC, not [JPMorgan]." Pet. App. 14a. "Permit-

ting [petitioner] to proceed against [JPMorgan]," the court explained, "would risk significantly curtailing the FDIC's 'extensive [statutory] power and discretion to manage the affairs of the failed bank,' as well as its authority to repudiate leases with respect to which the failed bank was the lessee." *Ibid.* (quoting *GECCMC*, 671 F.3d at 1030) (internal citation omitted).

ARGUMENT

The court of appeals correctly held that, because petitioner is not an intended third-party beneficiary of the Agreement, it lacks prudential standing to enforce its own interpretation of the Agreement against JPMorgan in order to collect rent on a lease that both parties to the Agreement understood to have remained with the FDIC. Petitioner's challenges to that holding lack merit. The court below correctly applied settled principles of prudential standing and contract interpretation, and this Court has recently denied petitions raising the same question. See *Winkal Holdings, LLC* v. *JPMorgan Chase Bank, N.A.*, 134 S. Ct. 638 (2013) (No. 13-79); *Interface Kanner, LLC* v. *JPMorgan Chase Bank, N.A.*, 134 S. Ct. 175 (2013) (No. 12-1465). Although the Fifth Circuit has reached a different conclusion on substantially similar facts, see *Excel Willowbrook, L.L.C.* v. *JPMorgan Chase Bank, Nat'l Ass'n*, 758 F.3d 592 (2014), that holding was based on Texas law, and it is therefore unclear how the Fifth Circuit would have resolved the present case. Moreover, because the FDIC's standard purchase-and-assumption agreement has recently been revised to clarify the intended meaning of the term "Bank Premises," and because the standing issue here has not arisen with any frequency in other contexts,

the question presented lacks prospective importance. Further review therefore is not warranted.

1. a. The court of appeals correctly held that petitioner lacks prudential standing to enforce its own interpretation of the Agreement. The doctrine of prudential standing includes a "general prohibition on a litigant's raising another person's legal rights." *Devlin* v. *Scardelletti*, 536 U.S. 1, 7 (2002) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). Thus, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). For that reason, a plaintiff who is neither a party to a contract nor an intended third-party beneficiary lacks standing to enforce the contract, at least absent some other source of law independently conferring an enforceable right upon him. See, *e.g.*, *Deutsche Bank Nat'l Trust Co.* v. *FDIC*, 717 F.3d 189, 194 (D.C. Cir. 2013).[4]

Because petitioner is not a party to the Agreement, it could have standing to enforce the Agreement only if it were an intended third-party beneficiary. As the court of appeals explained, however, the Agreement

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[4] In *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), this Court noted that, although the general bar on third-party standing has often been characterized as an aspect of prudential standing, it is also "closely related to the question whether a person in the litigant's position will have a right of action on the claim." *Id.* at 1387 n.3 (quoting *Department of Labor* v. *Triplett*, 494 U.S. 715, 721 n.** (1990)). Because *Lexmark* did not present a question about third-party standing, the Court concluded that "consideration of that doctrine's proper place in the standing firmament can await another day." *Ibid.* Regardless of how the doctrine is classified, however, petitioner's claim here would be barred.

expressly recites that there are no third-party beneficiaries other than as "specifically provided in this Agreement." Pet. App. 5a, 10a-11a. Because no other provision of the Agreement identifies petitioner as an intended third-party beneficiary, petitioner has no contract-law rights under the Agreement and therefore lacks standing to enforce it. Every court of appeals to consider the question has reached that conclusion. See pp. 15-17, *infra*.[5]

b. Petitioner contends (Pet. 19) that it has a right under "the property law of New York" to enforce the Hillside Lease, and that as part of its enforcement of that right, it may establish an interpretation of the Agreement (*i.e.*, that the Agreement assigned the Hillside Lease to JPMorgan) that contradicts the interpretation adopted by the parties to the Agreement. Apart from recent decisions interpreting the same Agreement that is at issue in this case, however, petitioner cites no decision endorsing a rule that a lessor may enforce its interpretation of an assignment agreement when the agreement specifically denies the lessor third-party-beneficiary status.

Such a rule is wrong as a matter of the common law. Lessors may enforce their interpretations of

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[5] Petitioner does not make any substantial argument in its certiorari petition that it is a third-party beneficiary of the Agreement. That argument is therefore forfeited. Petitioner briefly states in a footnote (Pet. 18 n.5) that the "flaws" in the court of appeals' no-third-party-beneficiary holding were discussed in the Fifth Circuit's decision in *Excel Willowbrook*. That oblique reference is insufficient to preserve the argument, see *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 729 n.11 (2010), particularly given the Fifth Circuit's ultimate holding that lessors in petitioner's position are not third-party beneficiaries of the Agreement. See pp. 16-17, *infra*.

assignment agreements to which they are not parties only if they are intended third-party beneficiaries of the agreements. See Robert S. Schoshinski, *American Law of Landlord and Tenant* § 8.12, at 567 (1980) ("Where an assignee assumes by contract the obligations of the lease, the lessor, *as third party beneficiary of that contract* * * * may enforce all of the terms of the lease contract against him.") (emphasis added). And it is an established principle of contract law that, "where a provision exists in an agreement expressly negating an intent to permit enforcement by third parties, . . . that provision is decisive." *India.com, Inc.* v. *Dalal*, 412 F.3d 315, 321 (2d Cir. 2005) (citation omitted) (applying New York law). Consequently, even when a particular third party would otherwise be "a classic creditor beneficiary" with respect to a contract—such as a lessor with respect to a contract under which its tenant assigned its lease to another—the third party lacks standing to enforce the contract if the contract has "a clause forbidding a third-party to claim under it." *Talman Home Fed. Savs. & Loan Ass'n* v. *American Bankers Ins.*, 924 F.2d 1347, 1352-1353 (5th Cir. 1991).

Petitioner relies on its asserted privity of estate with JPMorgan to give it the authority to enforce an interpretation of the Agreement. As the court of appeals explained, however, petitioner's argument is question-begging. See Pet. App. 13a; see also *Interface Kanner, LLC* v. *JPMorgan Chase Bank, N.A.*, 704 F.3d 927, 933 (11th Cir. 2013), cert. denied, 134 S. Ct. 175 (2013). Whether petitioner is, in fact, in privity of estate with JPMorgan turns entirely on the meaning of a contract between the FDIC and JPMorgan. The only parties with rights under that contract

have both concluded that it did not require the FDIC to assign the Hillside Lease to JPMorgan (and the FDIC executed no such assignment in any event). Petitioner's putative privity of estate with JPMorgan could not give petitioner the right to enforce its own interpretation of the Agreement—the predicate to establishing privity of estate in the first place.

That conclusion does not, as petitioner contends (Pet. 24), permit a "tenant and [an] assignee [to] * * * contract away their landlord's rights under property law while rendering their interpretation of the assignment agreement immune from review by the courts." A lessor may still (absent other barriers to suit) enforce the lease against the original lessee (here, the FDIC, which stands in the shoes of WaMu). Thus, as the Ninth Circuit has explained in the specific context of the Agreement, "[t]o the extent [a party whose contract has been repudiated] seeks recovery for its losses, that remedy is best sought in [a] claim against the FDIC." *GECCMC 2005-C1 Plummer St. Office Ltd. P'ship* v. *JPMorgan Chase Bank, Nat'l Ass'n*, 671 F.3d 1027, 1036 (2012). If there exists uncertainty about whether the FDIC and JPMorgan interpret the Agreement to require the assignment of a particular lease to JPMorgan, a plaintiff may sue both parties, because one of them will be liable for any damages to which the plaintiff is legally entitled. If the FDIC and JPMorgan then disagree over whether the Agreement required an assignment of the lease to JPMorgan, the court would have jurisdiction to resolve that dispute because each of those parties has standing to enforce its own interpretation.

In this case, by contrast, there is no dispute between the FDIC and JPMorgan concerning the proper

interpretation of the Agreement. Both those parties concur that the Hillside Lease was not required by the Agreement to be assigned (and was not in fact assigned) to JPMorgan, and that petitioner therefore should have sought relief from the FDIC for any damages to which it believes it is entitled. It is true that petitioner may no longer sue the FDIC because it did not file a timely administrative claim. See Pet. App. 6a. But petitioner received the statutorily-required notice of repudiation from the FDIC, *ibid.*, which clearly alerted petitioner to the FDIC's view that the lease had not been assigned to JPMorgan. Petitioner's subsequent failure to satisfy the statutory preconditions to suit against the FDIC does not permit it to circumvent settled rules of prudential standing and contract interpretation.

2. Petitioner contends (Pet. 12-16) that the decision below conflicts with the decision of the Fifth Circuit in *Excel Willowbrook*. Although the Fifth Circuit reached a different outcome in a case involving the same Agreement and a materially identical claim by a lessor against JPMorgan, its decision ultimately turned on its interpretation of Texas property law. *Excel Willowbrook* therefore does not squarely conflict with the decision below on any question of federal law.

a. Every court of appeals to consider the question, including the Fifth Circuit, has held that entities in petitioner's position are not third-party beneficiaries of the Agreement and therefore lack standing under the federal common law of contracts to enforce their own interpretation of what assets the Agreement transferred to JPMorgan. For example, like petitioner, the plaintiff lessor in *Interface Kanner* "argue[d]

that JPMorgan assumed the Lease automatically under the * * * Agreement as 'Other Real Estate,' while JPMorgan and the FDIC argue[d] that JPMorgan had 90 days to accept or reject the Lease as a 'Bank Premises.'" 704 F.3d at 930. The Eleventh Circuit held that the landlord "lack[ed] standing to enforce its interpretation of that agreement" because it was "not an intended third-party beneficiary of the * * * Agreement." *Id.* at 934. The Sixth, Ninth, and D.C. Circuits have reached similar conclusions in cases involving both leasehold and non-leasehold interests. See *JPMorgan Chase Bank, N.A.* v. *First Am. Title Ins. Co.*, 750 F.3d 573, 581-582 (6th Cir. 2014); *GECCMC*, 671 F.3d at 1033-1035 (9th Cir.); *Deutsche Bank*, 717 F.3d at 194 & n.4 (D.C. Cir.); see also *Security Serv. FCU* v. *First Am. Mortg. Funding, LLC*, 771 F.3d 1242, 1245-1246 (10th Cir. 2014) (reaching same conclusion under different purchase-and-assumption agreement).

In *Excel Willowbrook*, the Fifth Circuit adopted the same holding, for the express purpose of avoiding a circuit conflict on the interpretation of the Agreement under federal law. See 758 F.3d at 596-598. The court stated that, "[w]ere we writing on a blank slate, we would conclude that the Landlords are creditor beneficiaries to the * * * Agreement and therefore have a contractual right to enforce [JPMorgan's] promise to assume the Leases." *Id.* at 598. "In the interest of maintaining uniformity [among the circuits] in the construction and enforcement of federal contracts," however, the court held that "the Landlords do not qualify as third-party beneficiaries." *Id.* at 598-599. The Fifth Circuit therefore concluded that, under the federal common law of contracts, the

lessors lacked "a contractual right to enforce [JPMorgan's] promise to assume WaMu's obligations under the [l]eases" at issue. *Id.* at 596; see *id.* at 597 & n.6; cf. Pet. App. 9a-12a. Accordingly, on the question whether lessors in petitioner's position may enforce their interpretation of the Agreement under federal common law, no conflict of authority exists.

b. The Fifth Circuit did reach a different conclusion than did the court below on the separate question whether "[l]andlords have a right to enforce the [l]eases against [JPMorgan] by virtue of their 'privity of estate' with [JPMorgan]." *Excel Willowbrook*, 758 F.3d at 599-603. The Fifth Circuit's conclusion that the lessors had such a right, however, expressly rested on its interpretation of Texas property law.

The Fifth Circuit believed that, under the property-law "concept of 'real covenants,'" which "carried over into American law and the laws of Texas" from English common law, a lessor need not be in contractual privity with a lessee to enforce the covenant to pay rent, because that type of covenant "'runs with the land.'" *Excel Willowbrook*, 758 F.3d at 599, 601-602. The Fifth Circuit held that, because a "subsequent tenant only comes into 'privity of estate' with the landlord if the landlord can prove that the original tenant assigned away his entire interest in the lease," the landlord has "'standing' to prove the content and effect of the conveyance between the tenants." *Id.* at 599-600 (emphasis omitted). In other words, the court concluded that Texas property law gives a lessor the right to enforce an interpretation of an assignment agreement between a tenant and a third party—even an agreement that excludes the lessor from third-party-beneficiary status—that would establish that

the agreement effected a complete assignment such that the lessor came into privity of estate with the third party. See *id.* at 600 n.16 (citing *Twelve Oaks Tower I, Ltd.* v. *Premier Allergy, Inc.*, 938 S.W.2d 102, 114 (Tex. App. 1996); *Fabrique, Inc.* v. *Corman*, 796 S.W.2d 790, 793 (Tex. App. 1990), writ denied, 806 S.W.2d 801 (Tex. 1991) (per curiam); *Moore* v. *Kirgan*, 250 S.W.2d 759, 764 (Tex. App. 1952); *Cauble* v. *Hanson*, 224 S.W. 922, 923 (Tex. App. 1920), aff'd, 249 S.W. 175 (Tex. Comm'n App. 1923)). While acknowledging that the result would be different under "some non-Texas cases," under which privity of estate is not created until the third party takes possession of the property, the Fifth Circuit applied what it believed to be the Texas rule. *Id.* at 601.

Having identified that principle of Texas property law, the Fifth Circuit then concluded that "the Agreement, properly construed, is a complete 'assignment' sufficient to create privity of estate under Texas law" because, in the court's view, "the plain language of the Agreement indicates that the FDIC assigned away its entire interest in the [l]eases" at issue to JPMorgan. *Excel Willowbrook*, 758 F.3d at 600. The Fifth Circuit acknowledged that its conclusion departed from the decision below and the Eleventh Circuit's decision in *Interface Kanner*, but it believed that those decisions had "fail[ed] to accommodate the concept of privity of estate and real covenants." *Id.* at 602-603.

The Fifth Circuit's analysis in *Excel Willowbrook* rested on the view that, even if a plaintiff has no right under contract law to obtain a judicial declaration as to the proper interpretation of a contract between other parties, the plaintiff may have a right to such a

declaration under some other source of law. See p. 11, *supra*. The court was correct that, in some circumstances, a plaintiff may proceed with a cause of action that requires the court to construe a contract between other parties, even though the plaintiff is not a third-party beneficiary of the contract. Cf. FDIC Br. at 8-9, *Interface Kanner*, *supra* (No. 12-1465) ("[A] plaintiff who is neither a party to a contract nor an intended third-party beneficiary lacks standing to enforce the contract, at least absent some other source of law conferring an enforceable right upon him."). For example, Section 1 of the Sherman Act, 15 U.S.C. 1, bars any "contract * * * in restraint of trade." If the plaintiff in a Section 1 case alleged that a contract between third parties violated that prohibition, the court in deciding the case would not be required to accept the interpretation of the contract that was proffered by the parties to the agreement. Allowing the Section 1 plaintiff to assert its own interpretation of the agreement would not violate the third-party standing doctrine because the plaintiff would seek to enforce its own rights under the Sherman Act.

Thus, when two parties seek to effect a particular allocation of rights and obligations vis-à-vis each other, they may sometimes be barred from disavowing that allocation in litigation against third parties. That principle, however, has no application here. Since WaMu's failure in 2008, the course of dealings between the FDIC and JPMorgan has reflected those parties' consistent understanding that leases like the one at issue in this case do *not* pass to JPMorgan unless JPMorgan expressly chooses to assume them. Petitioner does not seek to hold the parties to the Agreement to any choice they ever believed them-

selves to have made. Rather, petitioner seeks to exploit a possible drafting error to achieve a result that neither party to the contract intended.

The Fifth Circuit erred in concluding that common-law property principles give a lessor a right to enforce an interpretation of an agreement to which it is neither a party nor a third-party beneficiary in order to establish privity of estate with a putative assignee. See pp. 12-13, *supra*. But because that property-law question (unlike the interpretation of a federal contract) is ultimately a matter of state law, and the Fifth Circuit in *Excel Willowbrook* expressly rested its decision on Texas property-law principles, it is unclear how the Fifth Circuit would have resolved the present case. See Pet. App. 31a n.9, 36a (district court refers to assignment and property law of New York).

To be sure, the court below did disagree with the Fifth Circuit's view that state-law property rules were relevant to the determination whether petitioner could sue JPMorgan for unpaid rent. See Pet. App. 11a-14a & n.5. Unlike the Fifth Circuit in *Excel Willowbrook*, the Second Circuit correctly recognized that, because petitioner is neither a party to nor a third-party beneficiary of the Agreement that purportedly assigned the lease to JPMorgan, a court cannot appropriately invoke state property law as a basis for rejecting the parties' own understanding of the Agreement. See *ibid*. But even if petitioner's challenge to that holding had merit, the Agreement's application to leases like the one at issue here could vary from State to State, depending on the nuances of a particular State's property law.

3. The question presented lacks prospective importance. Other than in the particular context of the

Agreement between the FDIC and JPMorgan, we are not aware of any body of federal judicial precedent addressing the standing of a lessor to enforce an interpretation of an assignment agreement between the lessee and a third party. Because the default view under the common law is that a lessor is a third-party beneficiary of a lease assignment agreement between a tenant and a third party (see p. 13, *supra*), the standing issue in this case arises only when a particular assignment agreement includes a no-third-party-beneficiaries provision. Other than the cases involving the particular Agreement here, however, we are not aware of any other cases involving such an agreement, and petitioner has not cited one.

As the Fifth Circuit explained in *Excel Willowbrook*, moreover, the FDIC has recently revised its standard purchase-and-assumption agreement to resolve the interpretive issue that gave rise to many of those decisions: whether a particular property that had been designated for use as a bank branch, but that had not yet been used for that purpose at the time of WaMu's failure, qualifies as "Bank Premises" under the Agreement (see p. 7, *supra*). See *Excel Willowbrook*, 758 F.3d at 603 n.37. The standard agreement now defines "Bank Premises" to include properties intended to be used for bank branches.[6] Petitioner observes that "claims seeking to hold [JPMorgan] liable on WaMu's leases have been filed in more than a dozen actions in federal courts." Pet. 24. That is true, but it appears that most of those cases (aside from this one) have been finally resolved. This case therefore does not present an issue of ongo-

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[6] See, *e.g.*, *Purchase and Assumption Agreement*, § 1.3 https://www.fdic.gov/bank/individual/failed/nrbc_p_and_a.pdf.

ing importance even in the specific context of FDIC purchase-and-assumption agreements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

RICHARD J. OSTERMAN, JR.
Acting General Counsel
FLOYD I. ROBINSON
Acting Deputy General Counsel
COLLEEN J. BOLES
Assistant General Counsel
KATHRYN R. NORCROSS
Senior Counsel
JOSEPH BROOKS
Counsel
Federal Deposit Insurance Corporation

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