No. 14-845

In the Supreme Court of the United States

FIRST AMERICAN TITLE INSURANCE COMPANY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner lacks prudential standing to enforce its understanding of an agreement between the Federal Deposit Insurance Corporation and a private bank, where petitioner is neither a party to nor a third-party beneficiary of the agreement, and its understanding of the agreement is contrary to the understanding of the contracting parties.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 5a-28a) is reported at 750 F.3d 573. The order of the district court granting summary judgment as to liability (Pet. App. 63a-81a) is reported at 795 F. Supp. 2d 624.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2014. A petition for rehearing was denied on August 13, 2014 (Pet. App. 3a). On October 23, 2014, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 12, 2015, and the petition was filed on that date. 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 relevant here, the FDIC, as receiver, is authorized to enter into a purchase-and-assumption agreement with an assuming institution under which certain assets and liabilities of the failed bank are transferred to the assuming institution. 12 U.S.C. 1821(d)(2)(G)(i)(II).

In September 2008, Washington Mutual Bank (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. See Pet. App. 8a. After being appointed receiver for WaMu under FIRREA, the FDIC immediately assigned most of WaMu's assets and liabilities to JPMorgan Chase Bank, N.A. (JPMorgan). *Id.* at 9a. That assignment was accomplished through a purchase-and-assumption agreement (Agreement) between the FDIC and JPMorgan. *Ibid.* The Agreement provides that the FDIC would retain assets listed on Schedule 3.5 of the Agreement. *Ibid.* Those assets include "any interest, right, action, claim, or judgment against * * * any * * * Person

whose action or inaction may be related to any loss * * * incurred by the Failed Bank." *Ibid.*

The Agreement also recites that it generally confers no enforceable rights on third parties. Section 13.5 states that, except as otherwise specifically provided, the Agreement should not 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 [the] Agreement." Pet. App. 19a.

2. In 2007, before it was declared insolvent, WaMu had approved a loan of $4.5 million to a man named Ha Truong. Pet. App. 7a. The loan was secured by a Michigan residence known as Bellerive. *Ibid.* Patriot Title Agency, LLC (Patriot), a local agent of petitioner, "issued a commitment to provide title insurance, underwritten by [petitioner], in connection with the transaction." *Ibid.* Title insurance is "a contract to indemnify the insured for any losses incurred as a result of later found defects in title," such as "unknown liens, easements, and the like which might affect the property's value." *First Fed. Sav. & Loan Ass'n of Fargo* v. *Transamerica Title Ins. Co.*, 19 F.3d 528, 530 (10th Cir. 1994) (citing 57 George J. Couch & Ronald A. Anderson, *Couch on Insurance* § 189 (2d ed. 1983 & Supp. 1993); 9 John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 5201 (1981 & Supp. 1993)).

In addition to the commitment to provide title insurance, petitioner issued WaMu a separate document called a "closing protection letter" (CPL). See Pet. App. 7a. In the CPL, petitioner agreed to indemnify WaMu for any losses that might arise from the fraud or dishonesty of Patriot, which was responsible for

closing the loan according to WaMu's instructions. *Id.* at 8a.

After closing, petitioner discovered that the sale of Bellerive had been a fraud perpetrated by Patriot's owner. Pet. App. 8a. The seller had been fictitious and Truong's income fabricated; Patriot's owner had absconded with the $4.5 million from the loan. *Id.* at 8a, 53a-54a. As a result of the fraud, WaMu did not obtain a mortgage lien on Bellerive, Truong did not obtain title, and a prior mortgage had not been discharged. *Id.* at 54a.

Petitioner obtained title to Bellerive and began negotiating with WaMu to sell the property to cover WaMu's losses. Pet. App. 8a. Those negotiations were still ongoing in September 2008, when the FDIC was appointed as WaMu's receiver and assigned most of WaMu's assets and liabilities to JPMorgan. *Ibid.* Petitioner then tendered to JPMorgan a quitclaim deed for the Bellerive property—*i.e.*, a deed conveying all of petitioner's interest, whatever its scope, in the Bellerive property. *Id.* at 9a-10a. JPMorgan refused to accept the quitclaim deed. *Id.* at 10a.

3. a. Petitioner sued JPMorgan in Michigan state court, seeking a declaratory judgment that petitioner had fulfilled its obligations under the title insurance policy by tendering the quitclaim deed to JPMorgan. Pet. App. 10a. JPMorgan then filed suit against petitioner in the United States District Court for the Eastern District of Michigan, arguing that the deed was void and seeking money damages instead. *Ibid.* JPMorgan also removed the state-court case to the Eastern District of Michigan, and the two cases were consolidated. *Ibid.* As particularly relevant here, in an amended complaint, JPMorgan stated that it did

not own any claim arising out of the CPL issued to WaMu in connection with the Bellerive transaction because the FDIC had retained that asset under the terms of the Agreement. *Id.* at 133a n.1.

The FDIC intervened in the consolidated cases. Pet. App. 67a, 122a-124a. It alleged one breach-of-contract claim against petitioner arising out of the CPL. See *id.* at 10a. The FDIC argued that WaMu, the FDIC's predecessor in interest, had suffered actual losses of $4.5 million on the sham loan (although the FDIC reduced its damages claim by the book value of the loan carried on WaMu's books and records at the time the loan was transferred to JPMorgan under the Agreement). See *id.* at 76a. The FDIC explained that it sought to recover the difference between the book value of the loan and the $4.5 million disbursement, and that the CPL was designed to cover that loss. See *ibid.*; see also FDIC C.A. Br. 28-31. The FDIC and JPMorgan filed a joint stipulation in the proceedings, which reaffirmed the statement in JPMorgan's amended complaint that JPMorgan "did not acquire the CPL claim" and that JPMorgan "claims no interest in that CPL claim." Pet. App. 90a.

Shortly thereafter, a court-appointed receiver sold Bellerive for approximately $2 million, and the proceeds from the sale were transferred to JPMorgan. JPMorgan and petitioner then stipulated to an order of dismissal of their claims against each other. Pet. App. 10a-11a.

b. The FDIC and petitioner cross-moved for summary judgment on the FDIC's CPL claim. Pet. App. 11a. The district court granted summary judgment to the FDIC on petitioner's liability, but not on damages. *Id.* at 11a, 64a.

Petitioner argued that the FDIC had assigned the CPL claim to JPMorgan in the Agreement, and that the FDIC therefore lacked standing to recover under the CPL. See Pet. App. 77a. The district court rejected that contention. Noting the joint stipulation filed by JPMorgan and the FDIC, which reflected those entities' agreement that the CPL claim had not been transferred to JPMorgan, the court explained that petitioner had "not shown how it escapes the well-established rule that a stranger to a contract has no standing to challenge the parties' mutual understanding of their own contract." *Ibid.* (citing *City of Grosse Pointe Park* v. *Michigan Mun. Liab. & Prop. Pool*, 702 N.W.2d 106, 114 (Mich. 2005)).

c. The district court held a jury trial on damages. Pet. App. 11a. The jury awarded the FDIC $2.3 million. *Ibid.*

d. Petitioner moved under Federal Rule of Civil Procedure 60(b)(2) for relief from the final judgment on the ground of newly discovered evidence. Petitioner alleged that JPMorgan had contended in other proceedings that it had acquired CPL rights with respect to other WaMu loans. Pet. App. 82a-87a. The district court denied the motion, explaining that the evidence was insufficient to change its conclusion that the FDIC had retained the CPL claim at issue here. *Id.* at 56a-60a. The court cited the FDIC's "evidence of its consistent position that it retained CPLs in the [Agreement]"; JPMorgan's position in its amended complaint in this case; and "evidence indicating that it is standard practice for the FDIC to retain ownership of this type of CPL when negotiating a [purchase-and-assumption] [a]greement." *Id.* at 57a-58a.

4. The court of appeals affirmed. Pet. App. 3a-28a.

As relevant here, the court of appeals upheld the district court's determination that petitioner could not challenge the mutual understanding of the FDIC and JPMorgan that the FDIC had retained the CPL claim. See Pet. App. 17a-21a.[1] The court of appeals explained that the Agreement expressly disclaims any intent to create third-party beneficiaries, and that "our sister circuits uniformly have held that parties attempting to rely on the [Agreement] to invoke a court's jurisdiction lack prudential standing to do so because they are neither parties to nor third-party beneficiaries of the [A]greement." *Id.* at 19a-20a (citing decisions from the Second, Fifth, Ninth, and Eleventh Circuits). The court found the D.C. Circuit's decision in *Deutsche Bank National Trust Co.* v. *FDIC*, 717 F.3d 189, 194 (2013), which held that proposed intervenors who were not parties to the Agreement lacked standing to assert an interpretation of the Agreement that contradicted the mutual understanding of the FDIC and JPMorgan, to be particularly "analogous to the present case." Pet. App. 20a.

Although the court in *Deutsche Bank* "addressed the prudential standing of a proposed intervenor," the court of appeals in this case found the D.C. Circuit's "reasoning persuasive and equally applicable to a defendant who attempts to defend against a claim by asserting a legal right belonging to a third party." Pet. App. 20a. The court explained that this Court

[1] The court of appeals held that, in light of the Agreement's choice-of-law provision, the district court had erred in relying on Michigan law rather than federal common law. Pet. App. 41a. The court concluded, however, that the error was "not a reversible one * * * because applying federal law yields the same result." *Id.* at 42a.

"repeatedly has recognized that 'a litigant must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Id.* at 20a-21a (citing *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720 (1990)). The court concluded that, "[b]ecause [petitioner] is neither a party to nor a third-party beneficiary of the [Agreement], it lacks prudential standing to challenge the FDIC's and [JPMorgan's] understanding of their own contract." *Id.* at 21a.

ARGUMENT

Petitioner argues (Pet. 10-30) that it is entitled to defend against the FDIC's CPL claim by arguing that the Agreement transferred that claim to JPMorgan. Petitioner seeks to assert that defense notwithstanding the shared view of the FDIC and JPMorgan—the only parties to the Agreement—that the contract did *not* have that effect. The court of appeals correctly applied settled principles of contract interpretation and prudential standing in concluding that petitioner's defense is improper. Petitioner acknowledges that the courts of appeals have unanimously rejected similar arguments in other cases arising under the Agreement. See Pet. 16, 24, 26. This Court has recently denied certiorari petitions seeking review of those holdings,[2] and there is no reason for a different result here.

1. Petitioner does not dispute that, if WaMu had remained solvent, WaMu could have recovered from

[2] See *Hillside Metro Assocs., LLC* v. *JPMorgan Chase Bank*, 135 S. Ct. 1399 (2015) (No. 14-485); *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).

petitioner under the CPL for the loss that it sustained as a result of Patriot's fraud. Petitioner also does not dispute that, when the FDIC became WaMu's receiver, it acquired the CPL claim that WaMu had previously possessed. Petitioner contends, however, that the FDIC's current suit on the CPL claim is barred because the FDIC transferred that claim to JPMorgan when those two parties executed the Agreement. The court of appeals correctly held that, as a stranger to the Agreement, petitioner may not assert a defense to liability premised on an interpretation of the Agreement that contradicts the mutual understanding of the contracting parties.

a. 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 person "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 person 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 that independently confers 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).[3]

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[3] 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 *United States*

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 specifically disclaims any intent to create third-party beneficiaries except as the Agreement expressly so provides. See Pet. App. 19a. 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 its provisions. The court of appeals' holding to that effect comports with the decisions of all other circuits that have interpreted the Agreement. See pp. 14-15, *infra*.

Petitioner does not contend that it qualifies as a third-party beneficiary under the terms of the Agreement. Petitioner argues (Pet. 15-19), however, that established restrictions on third-party standing are inapplicable here because petitioner did not file suit against the FDIC or JPMorgan, but instead raised its interpretation of the Agreement as a defense to potential liability on the CPL claim. That distinction is unfounded. This Court has recognized that prudential-standing limitations also "arise[] when the litigant asserts the rights of third parties defensively, as a bar to judgment against him." *Warth*, 422 U.S. at 500 n.12; see *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715, 720-721 & n.** (1990) (applying third-

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Dep't 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 argument here would fail.

party standing principles to attorney's "defense to [a] disciplinary proceeding" in state court). Although "there is no Art. III standing problem" when a defendant attempts to avoid liability by asserting the rights of a third party, the "prudential question is governed by considerations closely related to the question whether a person in the litigant's position would have a right of action on the claim." *Warth*, 422 U.S. at 500 n.12.

Here, petitioner lacks authority to enforce a particular interpretation of the Agreement—namely, that the FDIC assigned the CPL claim to JPMorgan—that contradicts the views of both parties to the Agreement. It can no more assert that interpretation as a defense to liability on the CPL claim than it could if it were the plaintiff in this case.

b. Petitioner contends (Pet. 10-26) that the decision below effectively prohibited petitioner from challenging the FDIC's Article III standing. According to petitioner, the decision below reflects the view that a defendant lacks standing to "contest[] whether the plaintiff owns the claim it seeks to assert, and is thus the proper plaintiff in the case," because the court of appeals "blindly accepted the FDIC's representation that it retained the [CPL] claim." Pet. 10, 15.

Petitioner's argument rests on a misunderstanding of the decision below. The court of appeals did not hold that a court lacks authority to determine whether a plaintiff owns the claim it asserts. Rather, the court held that a defendant may not challenge a plaintiff's right of action based on the defendant's own interpretation of an assignment contract that contradicts the interpretation of the only parties with rights under that contract. See Pet. App. 21a ("Because [petition-

er] is neither a party to nor a third-party beneficiary of the * * * Agreement, it lacks prudential standing to challenge the FDIC's and [JPMorgan's] understanding of their own contract.").

The FDIC succeeded to WaMu's assets, including the CPL claim, by virtue of its appointment as receiver under FIRREA. The FDIC did not (and had no need to) invoke the Agreement as an affirmative source of authority to sue on that claim. It was instead petitioner that invoked the Agreement, by arguing that the FDIC lacked standing because it had contracted away a right of action that it indisputably possessed before the Agreement was formed.

In rejecting that contention, the court of appeals did not "blindly accept[]" (Pet. 15) the FDIC's assertion that it retained the CPL claim. Rather, the courts below appropriately declined to second-guess the shared understanding of *both* the FDIC *and* JPMorgan, the only two parties with rights under the Agreement, that the CPL claim had not been transferred. It would be disruptive to contract stability if strangers could challenge the parties' interpretation of assignment agreements in prosecuting or defending against claims related to the assigned assets, potentially years after the agreements went into force. That is particularly so where (i) the contracting parties have specifically disclaimed any intent to create third-party beneficiaries, and (ii) a stranger to the contract seeks to invoke the agreement to avoid obligations imposed by other provisions of law.

c. Petitioner contends (Pet. 18) that the decision below "threatens obligors such as [petitioner] with having to pay twice on the same claim." That is incorrect. Before JPMorgan settled its dispute with peti-

tioner, JPMorgan executed a binding stipulation in court disavowing any interest in the CPL claim. See p. 5, *supra*. Because of that stipulation, JPMorgan is judicially estopped from denying the FDIC's ownership of the CPL claim in a future case. See *New Hampshire* v. *Maine*, 532 U.S. 742, 749-751 (2001); see also *Mirando* v. *United States Dep't of Treasury*, 766 F.3d 540, 545 (6th Cir. 2014).

Petitioner posits (Pet. 18) a hypothetical situation in which JPMorgan and the FDIC each sue a defendant separately on the same CPL. The court below did not address that hypothetical. But if that situation did arise, a defendant would have at its disposal legal mechanisms to prevent the risk of double recovery.

For example, Federal Rule of Civil Procedure 19(a), which governs mandatory joinder of parties, generally requires joinder of a person if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may * * * leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B)(ii). If a defendant were sued only by the FDIC, but believed that the Agreement had transferred the CPL claim to JPMorgan, it could move for mandatory joinder of JPMorgan under Rule 19. Cf. Charles Alan Wright et al., *Federal Practice and Procedure* § 1613 (3d ed. 2001) (explaining that, although "[a]n assignor of rights and liabilities under a contract generally is not needed for a just adjudication of a suit brought by the assignee[,] * * * when the validity of the assignment itself is at issue, the assignor's joinder may be required"). If JPMorgan responded to the joinder mo-

tion by disavowing any interest in the CPL claim, that representation would estop JPMorgan from asserting a claim under the CPL against the defendant in the future. If instead JPMorgan represented (contrary to the position of the FDIC) that it *did* own the CPL claim, the district court could adjudicate each party's rights. Either way, no risk of double recovery would arise.

2. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals.

a. As petitioner acknowledges (Pet. 16, 24, 26), the holding below is consistent with the holdings of all other circuits that have considered similar questions under the Agreement. The Second, Fifth, Ninth, Eleventh, and D.C. Circuits have all held that, at least absent some other source of law granting an enforceable right, strangers to the Agreement lack standing to enforce an interpretation of the Agreement that contradicts the interpretation of the contracting parties. See *Hillside Metro Assocs., LLC* v. *JPMorgan Chase Bank, N.A.*, 747 F.3d 44, 48-51 (2d Cir. 2014), cert. denied, 135 S. Ct. 1399 (2015); *Excel Willowbrook, L.L.C.* v. *JP Morgan Chase Bank, N.A.*, 740 F.3d 972, 979 (5th Cir. 2014)[4]; *Interface Kanner, LLC* v. *JPMorgan Chase Bank, N.A.*, 704 F.3d 927, 931-933

[4] In *Excel Willowbrook*, the Fifth Circuit relied on Texas principles of real-property law in holding that landlords on WaMu leases could advance their own interpretation of the Agreement. See 740 F.3d at 979-980. This case does not involve real property or Texas law, and petitioner does not contend that *Excel Willowbrook*'s property-law holding supports its position. Petitioner does rely (Pet. 24) on Judge Clement's concurrence in *Excel Willowbrook*. But that opinion does not reflect any holding of the Fifth Circuit and thus would not support this Court's review.

(11th Cir.), cert. denied, 134 S. Ct. 175 (2013); *GECCMC 2005—C1 Plummer St. Office Ltd. P'ship* v. *JPMorgan Chase Bank, N.A.*, 671 F.3d 1027, 1033-1036 (9th Cir. 2012); *Deutsche Bank*, 717 F.3d at 194 & n.5 (D.C. Cir.); see also *Winkal Holdings, LLC* v. *JPMorgan Chase Bank, N.A.*, 505 Fed. Appx. 674, 674 (9th Cir.), cert. denied, 134 S. Ct. 638 (2013).

The decision below is also consistent with the Tenth Circuit's recent decision in *Security Service FCU* v. *First American Mortgage Funding*, *LLC*, 771 F.3d 1242 (2014), which rejected a similar third-party challenge to the parties' interpretation of a purchase-and-assumption agreement between the National Credit Union Administration and the assuming credit union. *Id.* at 1245; see *ibid.* (concluding that the case was "easily resolved" because the defendants were "neither parties to nor third-party beneficiaries of the [agreement]" and therefore "lack[ed] standing to impose their interpretation of it on the parties who are in agreement as to its meaning"). Petitioner cites no appellate decision reaching the opposite conclusion in analogous circumstances.

Petitioner argues (Pet. 24-26) that the decisions of the courts of appeals are "hedged and confused" because they are "divided on the relevant doctrinal analysis"—*i.e.*, on whether the strangers to the Agreement lacked Article III standing or lacked only prudential standing. As an initial matter, it is not clear that any of the decisions cited above has been premised on Article III standing principles. Neither decision that petitioner characterizes as having rested on "constitutional standing" expressly identified which standing doctrine it was invoking (although one decision ordered the district court to dismiss the third

party's suit for lack of subject matter jurisdiction). See *Interface Kanner*, 704 F.3d at 931-933; see also *GECCMC*, 671 F.3d at 1032-1036 (affirming district court's Rule 12(b)(6) dismissal on other grounds). But in any event, petitioner concedes that no circuit has held that a party in petitioner's position has standing to enforce its own interpretation of the Agreement. Any inconsistency or uncertainty about the precise rationale for rejecting third-party efforts to invoke the Agreement as a source of rights provides no basis for this Court's review.

Petitioner also contends (Pet. 24-26) that a number of unpublished district-court orders support its argument. This Court does not ordinarily grant review to resolve conflicts between unanimous circuit-court decisions and unreviewed holdings of district courts.

b. Petitioner cites a handful of circuit-court decisions (Pet. 12-13) for the more general proposition that a third party is entitled to advance an interpretation of an assignment agreement that differs from the understanding of the contracting parties. Those decisions do not support petitioner's view that it may enforce its own interpretation of the Agreement here.

For example, in *Culhane* v. *Aurora Loan Services of Nebraska*, 708 F.3d 282 (2013), the First Circuit held only that where a plaintiff-mortgagor has rights under a separate source of law—there, a state statute, Mass. Gen. Laws ch. 183, § 21 (2014)— "to challenge a foreclosing entity's status qua mortgagee," it may argue that the assignment of the mortgage to the foreclosing party was legally void. 708 F.3d at 289-291. The court did not hold that the plaintiff-mortgagor could challenge the parties' mutual interpretation of the agreement. To the contrary, it recog-

nized that, absent such a separately conferred right, "a nonparty who does not benefit from a contract generally lacks standing to assert rights under the contract." *Id.* at 290. In *Reinagel* v. *Deutsche Bank National Trust Co.*, 735 F.3d 220, 225, 228 (2013), the Fifth Circuit reached the same conclusion, applying Texas law. See *id.* at 224-225. Those decisions do not conflict with the holding below that petitioner may not raise, as a defense to the FDIC's CPL claim, an interpretation of the Agreement that contradicts the mutual understanding of the contracting parties.[5]

3. Petitioner contends (Pet. 26-29) that the issue presented in this case recurs with such frequency that this Court's review is necessary. If repeated litigation on this issue causes a circuit conflict to develop, the Court can decide whether its intervention is warranted at that time. Absent any disagreement among the circuits, however, the fact that numerous litigants have unsuccessfully attempted to invoke the Agreement as a source of rights provides no basis for this Court's review.

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[5] Petitioner also cites (Pet. 12-13) a number of decisions (all in contexts very different from this case) that do not address standing at all, much less set out holdings that conflict with the decision below. See *Lemke* v. *Sears, Roebuck & Co.*, 853 F.2d 253 (4th Cir. 1988); *J.R. Fulton* v. *L & N Consultants, Inc.*, 715 F.2d 1413 (10th Cir. 1982); *United States* v. *Ivey*, 414 F.2d 199 (5th Cir. 1969); *Clark* v. *United States*, 341 F.2d 691 (9th Cir. 1965); *Pugh* v. *Commissioner*, 49 F.2d 76 (5th Cir.), cert. denied, 284 U.S. 642 (1931). In addition, petitioner cites (Pet. 12) a recent decision of the Sixth Circuit. Even if that decision supported petitioner's argument, however, any intra-circuit tension could be resolved by the Sixth Circuit itself. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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