No. 21-942

In the Supreme Court of the United States

CLARK COUNTY BANCORPORATION, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR BANK OF CLARK COUNTY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined, applying principles of issue preclusion, that the prior finding of the United States District Court for the District of Columbia that petitioner had not timely exhausted its administrative remedies was entitled to preclusive effect in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is available at 848 Fed. Appx. 321. The order of the district court (Pet. App. 4a-19a) is not published in the Federal Supplement but is available at 2019 WL 157942. Prior orders of the district court (Pet. App. 23a-27a, 28a-34a) are not published in the Federal Supplement but are available at 2015 WL 7458663 and 2015 WL 3752028. An additional order of the district court (Pet. App. 20a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2021. A petition for rehearing was denied on July 29, 2021 (Pet. App. 75a-76a). On October 20, 2021, Justice Kagan extended the time within which to file a

petition for a writ of certiorari to and including December 23, 2021, and the petition was filed on December 21, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Statutory And Regulatory Background

1. In response to the savings and loan crisis during the 1980s, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (12 U.S.C. 1811 *et seq.*). FIRREA created an administrative claims process for banks in receivership with the Federal Deposit Insurance Corporation (FDIC). 12 U.S.C. 1821(d)(3)-(13). That administrative process enables the FDIC to "ensure that the assets of a failed institution are distributed fairly and promptly among those with valid claims" and "to expeditiously wind up the affairs of failed banks, without unduly burdening the [d]istrict [c]ourts." *Rundgren* v. *Washington Mut. Bank, FA*, 760 F.3d 1056, 1060 (9th Cir. 2014) (citations omitted), cert. denied, 575 U.S. 914 (2015).

FIRREA provides that, when a failed bank is in receivership, the FDIC initiates the administrative claims process by publishing notice to the bank's creditors to present their claims to the receiver by a specified date (called the "claims bar date"), "which shall be not less than 90 days after the publication of such notice." 12 U.S.C. 1821(d)(3)(B)(i). Subject to one exception not applicable here, claims not filed by the claims bar date "shall be disallowed and such disallowance shall be final." 12 U.S.C. 1821(d)(5)(C)(i).[1] Within 60 days after

[1] A late-filed claim may be considered where a claimant did not receive notice of the appointment of the receiver in time to file a

the earliest of either (1) the disallowance of a claim or (2) the expiration of the 180-day period after a claim is filed, a claimant may file suit on the claim in the appropriate federal district court, "and such court shall have jurisdiction to hear such claim." 12 U.S.C. 1821(d)(6)(A).

To prevent claimants from bypassing FIRREA's administrative claims process and going directly to court, Congress included a jurisdiction-limiting provision. That provision, titled "Limitation on judicial review," states in relevant part:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> > (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been appointed receiver * * * ; or
> >
> > (ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

12 U.S.C. 1821(d)(13)(D). The "except as otherwise provided" clause in that provision refers to Section 1821(d)(6), which, as described above, permits a claimant to sue in court only after completing the administrative claims process. See, *e.g.*, *McCarthy* v. *FDIC*, 348 F.3d 1075, 1078 (9th Cir. 2003) (citation omitted).

Those provisions together "set[] forth 'a standard exhaustion requirement.'" *American Nat'l Ins. Co.* v. *FDIC*, 642 F.3d 1137, 1141 (D.C. Cir. 2011) (citation omitted). "Section 1821(d)(6)(A) 'routes claims through an administrative review process, and [Section

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claim by the claims bar date and the claim is filed in time to permit payment of the claim. 12 U.S.C. 1821(d)(5)(C)(ii).

1821(d)(13)(D)] withholds judicial review unless and until claims are so routed.'" *Ibid.* (citation omitted); see *McCarthy*, 348 F.3d at 1079-1081 (holding that unexhausted claims must be dismissed for lack of subject-matter jurisdiction).

2. Under the Internal Revenue Code, "[a]n affiliated group of corporations" may file a "consolidated" income-tax return for the members of the group "in lieu of separate returns" for each affiliate. 26 U.S.C. 1501; see 26 U.S.C. 1502-1503. Corporations are "'affiliated'" for this purpose when they are connected by "stock ownership with a common parent" that owns (directly or indirectly) 80% or more of each member's stock. 26 U.S.C. 1504(a)(1) and (2). Congress directed the Secretary of the Treasury to "prescribe such regulations as he may deem necessary in order that the tax liability of any affiliated group of corporations making a consolidated return and of each corporation in the group" is properly determined. 26 U.S.C. 1502.

To facilitate the handling of consolidated returns by the Internal Revenue Service (IRS), the IRS's regulations generally designate the group's common parent entity as "the sole agent that is authorized to act" for the group. 26 C.F.R. 1.1502-77(a)(1); see 26 C.F.R. 1.1502-77(c)(1). The parent is charged with filing one consolidated tax return on behalf of the members of the group. See 26 C.F.R. 1.1502-75(h)(1). Accordingly, only the common parent files any "claims for refund, and any refund is made directly to and in the name of the [common parent]." 26 C.F.R. 1.1502-77(d)(5).

Those regulatory requirements are solely for the convenience of the IRS and do not determine which entity, as between a corporate parent and its subsidiary, is entitled to retain any tax refund. Instead, as every

court of appeals to consider the issue has agreed, affiliated companies may form contracts, known as tax allocation agreements, to allocate such refunds as they choose. See, *e.g.*, *Rodriguez* v. *FDIC (In re United Western Bancorp, Inc.)*, 959 F.3d 1269, 1273-1277 (10th Cir. 2020); *FDIC* v. *AmFin Fin. Corp.*, 757 F.3d 530, 533 (6th Cir. 2014), cert. denied, 574 U.S. 1153 (2015); *Zucker* v. *FDIC (In re BankUnited Fin. Corp.)*, 727 F.3d 1100, 1102-1103 (11th Cir. 2013), cert. denied, 571 U.S. 1244 (2014).

The general regulatory requirement that an affiliated group's common parent must act as the sole agent for the group is subject to an exception that applies when the group includes an insolvent financial institution. In that situation, the FDIC as receiver "may, in addition to the common parent, act as agent for the group in certain matters relating to the tax liability of the group," 26 C.F.R. 301.6402-7(a)(2)(i) and (b)(3)(i), and "[t]he [IRS] may deal directly with the common parent or the [FDIC] (or both) as agent for the group," 26 C.F.R. 301.6402-7(a)(2)(ii). In particular, the FDIC as receiver "may claim a refund * * * by filing its own claim for refund," and the IRS "may, in its sole discretion, pay to the [FDIC] all or any portion of the refund * * * that the [IRS] determines * * * to be attributable to the net operating losses of the institution." 26 C.F.R. 301.6402-7(e)(1) and (g)(1).

B. The Present Controversy

1. Petitioner Clark County Bancorporation is a bank holding company and the corporate parent of the Bank of Clark County (the Bank). Pet. App. 5a. In August 2001, petitioner and the Bank entered into a tax allocation agreement (Agreement) to file consolidated income-tax returns beginning with the 2001 tax year.

Ibid. The Agreement provided that all tax settlements between petitioner and the Bank would be "conducted in a manner that is no less favorable to [the Bank] than if it were a separate taxpayer." *Ibid.* (brackets in original; citation omitted). The Agreement thus required the Bank to compute its income taxes as if it were a separate entity, and to pay that amount to petitioner regardless of the total amount of taxes owed by the consolidated group. *Ibid.* Conversely, if the Bank incurred a loss for tax purposes, the Agreement required petitioner to pay the Bank a tax refund in an amount no less than the refund that the Bank would have been entitled to receive if it had filed a tax return as a separate entity. *Id.* at 5a-6a.

The underlying dispute in this case concerns the ownership of more than $9.6 million in federal tax refunds arising from losses incurred by the Bank. Pet. App. 29a. In January 2009, the Bank failed and the FDIC was appointed as its receiver. See *id.* at 6a. Petitioner knew of the FDIC's appointment as receiver on that date. *Ibid.* The FDIC later published notice to the Bank's creditors that the administrative claims bar date was April 23, 2009. *Id.* at 71a.

Consistent with the applicable IRS regulations for insolvent financial institutions in consolidated-filing groups, see p. 5, *supra*, the FDIC, as receiver for the Bank, filed tax returns seeking refunds on behalf of the Bank for the tax years 2003 to 2009. Pet. App. 36a. Those returns were based exclusively on the Bank's financial information, and losses incurred by the Bank, as opposed to other members of the consolidated-filing group. *Id.* at 6a, 25a. Later, petitioner also filed tax returns with the IRS for those same tax years, seeking the same refunds based on the same losses incurred by

the Bank. *Id.* at 25a, 37a-38a. The IRS processed and accepted only the FDIC's tax forms and sent checks for refunds only to the FDIC. *Id*. at 6a-7a.

2. Petitioner thereafter filed a series of lawsuits seeking to obtain the tax refunds.

In May 2013, petitioner filed an action in the United States District Court for the District of Columbia against the Department of the Treasury, the IRS, and the FDIC in its corporate capacity, seeking to obtain the Bank's tax refunds. See Compl., *Clark County Bancorporation* v. *United States Dep't of Treasury*, No. 13-cv-632 (May 2, 2013); Pet. App. 8a.[2] Petitioner later amended its complaint to add several additional defendants, including the FDIC in its capacity as receiver for the Bank, and to "meander[] through various and sundry legal theories and claims for relief." Pet. App. 39a-40a. All defendants moved to dismiss. See *id.* at 8a.

On December 6, 2013—more than seven months after petitioner had filed suit and more than four years after the FIRREA claims bar date—petitioner sent the FDIC a letter demanding delivery of the tax refunds that the FDIC (as receiver for the Bank) had received from the IRS when it filed tax returns for the Bank for the years 2003 to 2009. See Pet. App. 8a. The FDIC responded in January 2014, stating that petitioner might have an administrative claim against the Bank and informing petitioner that a claim needed to be submitted by April 16, 2014. See *ibid.* Petitioner instead

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[2] The FDIC as receiver acts in a capacity distinct from that of the corporation, and the two capacities give rise to separate legal rights and obligations. See, *e.g.*, *FDIC* v. *Bank of Boulder,* 911 F.2d 1466, 1473 (10th Cir. 1990), cert. denied, 499 U.S. 904 (1991); *FDIC* v. *Nichols*, 885 F.2d 633, 636 (9th Cir. 1989); *FDIC* v. *Cuvrell (In re F & T Contractors, Inc.)*, 718 F.2d 171, 173, 180-181 (6th Cir. 1983).

waited until July 29, 2014—more than five years after the claims bar date—to submit a claim to the FDIC requesting the tax refunds. See *ibid.*

In July 2014, while the defendants' motions to dismiss in No. 13-cv-632 were still pending in the D.C. district court, petitioner filed a second action in the same court against the FDIC, in both its corporate capacity and its capacity as receiver for the Bank, seeking a declaration that petitioner was entitled to the same tax refunds. See Compl., *Clark County Bancorporation* v. *FDIC*, No. 14-cv-1304 (July 30, 2014); Pet. App. 9a. In August 2014, the FDIC (as receiver) sent petitioner a notice of disallowance of its July 29 administrative claim. Pet. App. 82a-84a. The notice explained that petitioner's claim had been "filed after [the] established Bar date" and therefore was "untimely." *Id.* at 82a (emphasis omitted).[3]

In September 2014, the D.C. district court in No. 13-cv-632 dismissed petitioners' claims against all defendants. Pet. App. 35a-74a. As relevant here, the court determined that all of petitioner's claims seeking injunctive, declaratory, and mandamus relief against the FDIC as receiver for the Bank should be dismissed for lack of subject-matter jurisdiction, because petitioner had not timely exhausted FIRREA's administrative claims process. *Id.* at 66a-72a. The court found it "undisputed" that petitioner "did not" file an administrative claim "by the applicable [claims] bar date, April 23, 2009." *Id.* at 71a. The court also rejected petitioner's

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[3] The notice of disallowance misstated the claims bar date as December 20, 2008. Pet. App. 9a & n.2. That error is not relevant here because petitioner's claim was submitted more than five years after the actual claims bar date of April 23, 2009.

request for equitable tolling of the claims bar date, explaining that "[e]ven if the exhaustion requirement were equitably tolled," petitioner "still would not have filed a timely claim." *Id.* at 71a-72a. The court observed that petitioner acknowledged having learned about the FDIC's receipt of the Bank's tax refunds "as early as October 2010" and then again in August 2011, but that petitioner had not submitted any communication that could "possibly be construed as an adequate [administrative] claim" until "December 2013." *Id.* at 72a.

Petitioner did not appeal the district court's judgment of dismissal in No. 13-cv-632.

In October 2014, petitioner moved to transfer No. 14-cv-1304 to the Western District of Washington. See Pet. App. 10a. That same week, petitioner filed in that same district two additional actions seeking to obtain the same tax refunds. See *ibid.* One of those named as defendants the Department of the Treasury, the IRS, and the United States. See Compl., *Clark County Bancorporation* v. *United States Dep't of Treasury*, No. 14-cv-5811 (W.D. Wash. Oct. 14, 2014). The other named the FDIC, both in its corporate capacity and in its capacity as receiver. See Compl., *Clark County Bancorporation* v. *FDIC*, No. 14-cv-5816 (W.D. Wash. Oct. 15, 2014). The D.C. district court granted petitioner's motion to transfer No. 14-cv-1304, and that case was assigned docket No. 14-cv-5852 in the Western District of Washington. See Pet. App. 10a. That gave petitioner "three actions pending in" the Western District of Washington "over the same tax refunds." *Ibid.*

In June 2015, the district court in No. 14-cv-5811 granted summary judgment to the defendants, finding

that petitioner was not permitted to sue the Department of Treasury, the IRS, or the United States after a tax refund had issued. See Pet. App. 10a.

3. In February 2016, the district court consolidated petitioner's two remaining actions against the FDIC. See Pet. App. 11a. In January 2019, the court granted the FDIC's motion to dismiss or, in the alternative, for summary judgment. *Id.* at 4a-19a.

While the district court observed that "[petitioner's] claims are unclear," Pet. App. 12a, the court found that, "to the extent" petitioner's action was "based on claims against a failed institution under FIRREA," petitioner had "failed to timely file [an administrative] claim" and the court accordingly "lack[ed] jurisdiction." *Id.* at 13a. The court explained that the claims bar date "is a jurisdictional requirement," and that petitioner "would not be entitled to extensions in equity" in any event because petitioner sought "to unfairly gain assets that it failed to properly secure itself." *Id.* at 13a-14a.

The district court also considered and rejected petitioner's contention that it was entitled to the Bank's tax refunds under the tax allocation agreement. Pet. App. 15a-18a. The court found that the Agreement unambiguously established that petitioner's "claim of entitlement to the refunds is without merit." *Id.* at 16a. The court pointed to the Agreement's requirement that, "when the Bank incurred substantial losses, it was entitled to a refund from [petitioner] in an amount no less than the amount [the Bank] would have been entitled to as a separate entity." *Ibid.* Thus, even if petitioner had been the one to file the Bank's tax returns and had "obtain[ed] the contested refunds," petitioner would be "contractually bound to refund the amount to the Bank." *Ibid.* Petitioner had therefore failed to "show

that the Bank, or the [FDIC as receiver] on behalf of the Bank, breached the [Agreement] by obtaining the refund." *Id.* at 18a.

4. The court of appeals affirmed in an unpublished memorandum disposition, Pet. App. 1a-3a, "albeit on different grounds," *id.* at 2a (citation omitted). The court found that the D.C. district court's determination in No. 13-cv-632 (pp. 8-9, *supra*) that petitioner "had failed to exhaust its administrative remedies" under FIRREA—a determination that petitioner had not appealed—"is entitled to preclusive effect here." Pet. App. 2a-3a. The court explained that "waiver and estoppel doctrines do not apply to subject matter jurisdiction." *Id.* at 3a (citing *Intercontinental Travel Mktg., Inc.* v. *FDIC*, 45 F.3d 1278, 1286 (9th Cir. 1994)). Thus, the court reasoned, once the D.C. district court "determined that it lacked subject matter jurisdiction because [petitioner] failed to timely file a claim with the FDIC, neither [petitioner's] nor the FDIC's subsequent actions recreated subject matter jurisdiction over the same tax-refund claims." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 3-19) that the court of appeals erred in giving preclusive effect to the D.C. district court's finding that petitioner did not timely exhaust its administrative remedies. Petitioner asserts that issue preclusion does not apply here because this Court's intervening decisions in *Rodriguez* v. *FDIC*, 140 S. Ct. 713 (2020), and *United States* v. *Kwai Fun Wong*, 575 U.S. 402 (2015), have undermined the D.C. district court's 2014 ruling. Pet. 9 (citing *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1697 (2019), and *Bobby* v. *Bies*, 556 U.S. 825, 836 (2009)). Petitioner is incorrect. Neither of those decisions casts doubt on the D.C. district court's

finding that petitioner's claims seeking the Bank's tax refunds were barred by FIRREA for failure to exhaust administrative remedies. The court of appeals' unpublished summary disposition is correct and does not conflict with any decision of this Court or another federal court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the D.C. district court's 2014 finding that petitioner had "failed to timely exhaust its administrative remedies is entitled to preclusive effect here." Pet. App. 3a.

"[T]he general rule" of issue preclusion provides that, "'when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *B&B Hardware, Inc.* v. *Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (brackets omitted) (quoting Restatement (Second) of Judgments § 27, at 250 (1982)). Here, the parties in the D.C. district court fully litigated the issue of petitioner's failure to comply with FIRREA's administrative exhaustion requirement, including the subsidiary factual questions of when petitioner knew of the FDIC's appointment as receiver for the Bank and when it submitted an administrative claim. See pp. 8-9, *supra*. The D.C. court's determination that petitioner had not timely exhausted its administrative remedies was essential to its judgment—indeed, that was the basis for the court's judgment dismissing petitioner's claims against the FDIC. See Pet. App. 72a. That determination was therefore conclusive in petitioner's current action against the FDIC.

2. Petitioner acknowledges (Pet. 10) that the court of appeals' case-specific application of issue-preclusion

principles is "not relevant to this petition for certiorari." Petitioner asserts (Pet. 10-11), however, that "preclusion did not exist" here because "[t]he instant" action concerns petitioner's claim for the Bank's tax refunds, whereas the D.C. district court's decision arose from petitioner's "constitutional challenge" to "statutes and regulations allowing the IRS to issue" tax refunds for insolvent financial institutions to the FDIC as receiver.

That fact-bound argument would not warrant this Court's review even if petitioner were correct. But petitioner is mistaken twice over. First, even if the D.C. action and this one did not involve "the 'same tax refund claims,'" as petitioner asserts, Pet. 11 (quoting Pet. App. 3a), issue preclusion prevents relitigation of decided factual and legal questions between the same parties "whether on the same or a different claim." *B&B Hardware*, 575 U.S. at 148 (citation omitted). Second, petitioner's claims in this action are in substance the same as petitioner's claims against the FDIC in the D.C. district court: in both proceedings, petitioner sought to challenge the FDIC's receipt of the Bank's tax refunds in its capacity as receiver. See Pet. App. 67a.[4]

3. "[E]ven where the core requirements of issue preclusion are met, an exception to the general rule may apply when a 'change in [the] applicable legal context'

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[4] Petitioner asserts that the D.C. district court "acknowledged" that the action before it "was not a tax refund claim." Pet. 10. In context, however, the court simply observed that petitioner had "[f]or some reason * * * never" attempted to avail itself of the option provided by "26 U.S.C. § 7422 and 28 U.S.C. § 1346(a)([1])" to bring a tax-refund suit against the United States. Pet. App. 44a. The D.C. district court did not dispute that petitioner's claim in No. 13-cv-632 was an attempt to obtain the Bank's tax refunds.

intervenes,'" including where an intervening decision of this Court casts doubt on the earlier ruling that is alleged to have preclusive effect. *Bobby*, 556 U.S. at 834 (brackets in original; citation omitted). But the intervening-legal-change exception to issue preclusion does not apply here, because neither of the decisions that petitioner invokes changed the law governing petitioner's failure to exhaust administrative remedies under FIRREA.

a. Petitioner argues (Pet. 7-14) that the court of appeals' decision "conflicts with" (Pet. 3) this Court's holding in *Rodriguez*, *supra*, that "state law" rather than federal common law governs the determination whether a tax refund for an insolvent financial institution in FDIC receivership is part of the bankruptcy estate of that financial institution's corporate parent. 140 S. Ct. at 718; see *id.* at 716-718.

i. Petitioner principally asserts (Pet. 8-9) that *Rodriguez* "confirm[s] that FIRREA is not germane to tax refund determination lawsuits" because, "if jurisdiction did not exist"—as the D.C. district court held in this case regarding petitioner's FIRREA-barred claim—then "it would be expected" that this Court would not have granted "certiorari" or issued a "decision" in *Rodriguez*. Petitioner further asserts (Pet. 8 & n.8) that "numerous other" courts of appeals have held "that FIRREA is not applicable in tax refund determination declaratory judgment lawsuits."

Petitioner's argument is flawed in multiple respects. This Court in *Rodriguez* never mentioned FIRREA or the consequences of missing its claims bar date. And even if petitioner were correct that this Court's decision rested on an unnoticed failure of jurisdiction, the Court has "often said that drive-by jurisdictional rulings of

th[at] sort * * * have no precedential effect." *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 91 (1998).

In any event, petitioner misunderstands *Rodriguez*. That case did not involve an administrative claim under FIRREA because the FDIC had not applied for or received tax refunds for the bank that was in receivership in that case. Rather, the failed bank's parent had applied for and received the disputed refunds, and it therefore had no claim to recover refunds in the possession of the FDIC. See *Rodriguez* v. *FDIC (In re United Western Bancorp, Inc.)*, 959 F.3d 1269, 1271 (10th Cir. 2020) (observing that litigation over ownership of the failed bank's refunds had arisen in the corporate parent's bankruptcy proceeding). Because *Rodriguez* did not involve FIRREA or its claims bar date, this Court's resolution of the question presented there had no explicit or implicit bearing on the exhaustion issue that the D.C. district court resolved in petitioner's case.

The other court of appeals decisions cited by petitioner (Pet. 8 & n.8), one of which was issued on remand in *Rodriguez*, see 959 F.3d at 1271, are similarly inapposite. None involved the situation here, where the FDIC as receiver filed a tax return and received a refund directly from the IRS. See *Zucker* v. *FDIC (In re BankUnited Fin. Corp.)*, 727 F.3d 1100, 1103, 1104 n.5 (11th Cir. 2013) (corporate parent had received subsidiary's tax refund), cert. denied. 571 U.S. 1244 (2014); *FDIC* v. *Zucker (In re NetBank, Inc.)*, 729 F.3d 1344, 1346 (11th Cir. 2013) (same), cert. denied, 574 U.S. 990 (2014); *Cantor* v. *FDIC (In re Downey Fin. Corp.)*, 593 Fed. Appx. 123, 125 (3d Cir. 2015) (same). Those courts therefore had no occasion to consider whether a corporate parent in petitioner's position must comply with FIRREA's claims bar date before suing the FDIC to

seek a subsidiary's tax refunds. The only court of appeals to decide that question has agreed with the D.C. district court here that FIRREA requires proper exhaustion. See *Waldron* v. *FDIC*, 935 F.3d 844, 851 (9th Cir. 2019) (per curiam).

ii. Petitioner also asserts (Pet. 12-14) that the court of appeals engaged in "federal common lawmaking, in direct conflict with *Rodriguez*," Pet. 12, because the court did not accept petitioner's argument that the Western District of Washington had jurisdiction over this case under 12 U.S.C. 1821(d)(6)(A).

That argument has nothing to do with *Rodriguez*, federal common law, or the application of issue preclusion. Petitioner simply attacks the Washington district court's holding that petitioner's claim for the refunds was untimely and barred—which the court of appeals neither approved nor disapproved because it resolved the case on issue-preclusion grounds. A writ of certiorari is not warranted to address an argument that the court of appeals did not consider. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

In any event, petitioner is wrong about FIRREA. Section 1821(d)(6)(A) provides that, "[b]efore the end of the 60-day period beginning on the * * * date of any notice of disallowance of [a] claim[,] * * * the claimant may * * * file suit on such claim" in the appropriate federal district court, which "shall have jurisdiction to hear such claim." 12 U.S.C. 1821(d)(6)(A)(ii). Petitioner observes (Pet. 13) that it filed suit against the FDIC (as receiver) in the D.C. district court "within 60 days of the FDIC Notice of Disallowance." But petitioner had previously failed to comply with FIRREA's claims bar date, and the statute provides that any claim not filed

by the deadline "shall be disallowed and such disallowance shall be final." 12 U.S.C. 1821(d)(5)(C)(i). The statutory grant of jurisdiction for lawsuits brought within 60 days after the conclusion of the administrative process requires proper exhaustion of that process. See p. 3, *supra* (citing cases). Because petitioner did not properly exhaust that process, the D.C. district court correctly held that petitioner's claim seeking the Bank's tax refunds was barred.

b. Petitioner also argues (Pet. 14-18) that the decision below conflicts with this Court's decision in *Kwai Fun Wong*, *supra*. The Court there held that two filing deadlines in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), were not jurisdictional restrictions but instead claims-processing rules that were subject to equitable tolling. See *Kwai Fun Wong*, 575 U.S. at 405. Relying on this Court's statement that it will not construe a timing requirement to be jurisdictional unless the statute "speak[s] in jurisdictional terms or refer[s] in [some] way to the jurisdiction of the district courts," *id.* at 411 (quoting *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515 (2006)), petitioner asserts that, under *Kwai Fun Wong*, FIRREA's claims bar is similarly "not jurisdictional, but rather, [an] administrative claims processing rule[]." Pet. 15.

Nothing in *Kwai Fun Wong* casts doubt on the D.C. district court's 2014 failure-of-exhaustion holding. For one thing, the jurisdictional character of FIRREA's claims bar date was not the only basis for the court's decision. See pp. 8-9, *supra*. Rather, the court explained in addition that, "[e]ven if the exhaustion requirement were equitably tolled, * * * [petitioner] still would not have filed a timely claim." Pet. App. 71a-72a.

Moreover, *Kwai Fun Wong* did not establish that FIRREA's claims bar date is a claims-processing rule subject to equitable tolling. Unlike the FTCA timing requirements at issue in that case, FIRREA includes express jurisdiction-limiting language: "Except as otherwise provided in this subsection, no court shall have jurisdiction over" "(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution" under FDIC receivership; or "(ii) any claim relating to any act or omission of * * * the [FDIC] as receiver." 12 U.S.C. 1821(d)(13)(D). Within that same subsection, the statute "otherwise provide[s]" (*ibid.*) that a federal court "shall have jurisdiction" only over a claim filed after the plaintiff has exhausted its administrative remedies, 12 U.S.C. 1821(d)(6)(A), and that "claims filed after the [claims bar date] shall be disallowed and such disallowance shall be final," 12 U.S.C. 1821(d)(5)(C)(i). That text unambiguously carries jurisdictional consequences. And interpreting FIRREA's claims bar date as a jurisdictional requirement also accords with the statutory purposes to "ensure that the assets of a failed institution are distributed fairly and promptly among those with valid claims" and "to expeditiously wind up the affairs of failed banks, without unduly burdening the [d]istrict [c]ourts." *Rundgren* v. *Washington Mut. Bank, FA*, 760 F.3d 1056, 1060 (9th Cir. 2014) (citations omitted), cert. denied, 575 U.S. 914 (2015).

Citing *Carlyle Towers Condominium Ass'n, Inc.* v. *FDIC*, 170 F.3d 301 (2d Cir. 1999), and *Heno* v. *FDIC*, 20 F.3d 1204 (1st Cir. 1994), petitioner contends (Pet. 6 n.7, 15, 18 n.13) that "[o]ther [c]ircuit [c]ourts" have held that FIRREA's claims bar date is "not jurisdictional" but instead a claims-processing rule. Petitioner

is incorrect. Neither of those decisions addressed the jurisdictional status of the claims bar date; they instead involved circumstances where a party's claim arose after that date. See *Carlyle Towers*, 170 F.3d at 310 ("The bar date cannot act as a jurisdictional bar to the [plaintiff's] claim because the claim arose after the bar date."); *Heno*, 20 F.3d at 1207-1208 (finding that the claimant "held *no* assertable or provable 'claim' until *after* the bar date"). Outside that narrow circumstance, petitioner has identified no decision of any court of appeals suggesting that FIRREA's claims bar date is not a jurisdictional deadline.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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