No. 04-693

In the Supreme Court of the United States

FRANKLIN SAVINGS CORPORATION AND FRANKLIN SAVINGS ASSOCIATION, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Director of the Office of Thrift Supervision to appoint a conservator for petitioner Franklin Savings Association (FSA), based on the Director's determination that FSA was being operated in an unsafe and unsound manner, constituted a taking of petitioners' property requiring the payment of just compensation.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a) is not published in the *Federal Reporter*, but it is *reprinted at* 97 Fed. Appx. 331. The initial opinion of the Court of Federal Claims (CFC) on liability (Pet. App. 80a-89a) is reported at 46 Fed. Cl. 533. The CFC's opinion denying reconsideration of that initial decision and resolving petitioners' remaining claims (Pet. App. 2a-79a) is reported at 56 Fed. Cl. 720.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2004. A petition for rehearing was denied on July 20, 2004 (Pet. App. 90a). On October 7, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including Novem-

ber 17, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Franklin Savings Corporation (FSC) owns approximately 94% of the stock of petitioner Franklin Savings Association (FSA), a federally insured savings and loan (or thrift). After federal regulators determined that FSA was being operated in an unsafe and unsound manner, a conservator was appointed for FSA in February 1990. That action began a long series of unsuccessful legal challenges and damages claims pursued by petitioners in various courts. Pet. App. 6a, 48a (chronicling the "mass litigation odyssey" by which petitioners have pursued "every possible means to relitigate" their disputes arising from FSA's seizure); see *id.* at 35a-49a. In this case, petitioners contend that such action with respect to a federally insured thrift constitutes a compensable taking under the Fifth Amendment. The Court of Federal Claims (CFC) dismissed that claim, *id.* at 83a-86a, and the court of appeals affirmed without opinion, *id.* at 1a.

1. During the 1970s, FSC acquired a controlling interest in FSA. See Pet. App. 82a. FSA had been a federally regulated thrift since the early 1950s, when its predecessor, the Ottawa Building and Loan Association, applied for deposit insurance from the Federal Savings and Loan Insurance Corporation (FSLIC), and FSLIC approved that application. See C.A. App. A20435-A20437. In applying for federal deposit insurance, FSA's predecessor recognized that it was subject to "all valid rules and regulations made by [FSLIC] for the insurance of accounts * * * as the same may be from

time to time amended." See *id.* at A20436. One of the principal rules of federal deposit insurance has long been that a "conservator or receiver for an association" such as FSA can be appointed to operate and/or liquidate the insured thrift if federal regulators determine that the association is operating in "an unsafe or unsound condition[] to transact business." 12 U.S.C. 1464(d)(6)(A)(iii) (1988); cf. 12 U.S.C. 1464(d) (1952); 24 C.F.R. 146.1(a)(1) and (2) (1949).

2. In August 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (FIRREA), to address widespread problems in the savings and loan industry. As part of FIRREA, Congress created the Office of Thrift Supervision (OTS) and charged it with responsibility for examining, supervising, and regulating federally insured thrifts. 12 U.S.C. 1462a, 1463. FIRREA authorized the Director of OTS to appoint a conservator or receiver for any insured savings association if the Director determined, in the exercise of his discretion, that one or more specified bases for doing so existed. 12 U.S.C. 1464(d)(2)(A), 1821(c)(5). FIRREA also created the Resolution Trust Corporation (RTC), which was charged with responsibility for resolving the affairs of thrifts closed between January 1989 and July 1995. 12 U.S.C. 1441a(b)(3).

3. On February 15, 1990, the Director of OTS determined that RTC should be appointed as conservator for FSA. The Director explained that "[FSA] is in an unsafe and unsound condition to transact business in that, among other things, the Association has a significant level of high risk assets, and has placed undue reliance on brokered deposits." C.A. App. A20251. He further found that "[FSA] has incurred and is likely to

incur losses that will deplete all or substantially all of its capital," and that "there is a violation or violations of laws or regulations, or an unsafe or unsound practice or condition which is likely to cause insolvency or substantial dissipation of assets or earnings." *Ibid.* OTS also determined that "[FSA] has suffered a pattern of consistent losses, and there is an unsafe and unsound condition or activity other than a failure to meet capital standards." *Ibid.*

Petitioners assert that "critically important here" is their allegation that, at the time the conservator was appointed, "FSA was in regulatory compliance with all *capital* requirements." Pet. 5 (emphasis added). Although petitioners repeatedly refer to that allegation and their related assertion concerning FSA's solvency (see Pet. 5, 7 n.2, 9, 18, 22), those assertions are irrelevant to the propriety of the appointment.[1] FSA was seized because, in addition to the reasons set forth above, it was found to be operating in an unsafe and unsound manner.

4. Petitioners contested the appointment of a conservator, alleging that the appointment violated 12 U.S.C. 1464(d)(2)(A) and (B). That challenge was reviewed under the standards set forth in the Administrative Procedure Act, 5 U.S.C. 706. The district court ruled in petitioners' favor, see *Franklin Sav. Ass'n* v. *Office of*

[1] After its appointment, RTC (as conservator) complied with instructions provided by OTS, which remained FSA's regulator, to write down the value of certain assets. See *Franklin Sav. Corp.* v. *Office of Thrift Supervision*, 303 B.R. 488, 491-493 (D. Kan. 2004). Those adjustments to FSA's books were "made * * * effective as of January 1990," *i.e.*, before the seizure, and "[i]t is undisputed that * * * a capital deficiency resulted when the conservator" effected those adjustments. *Id.* at 493.

Thrift Supervision, 742 F. Supp. 1089 (D. Kan. 1990), but the court of appeals reversed, vacated the district court's decision in its entirety, and sustained the appointment of the conservator, *Franklin Sav. Ass'n* v. *Office of Thrift Supervision*, 934 F.2d 1127, 1150 (10th Cir. 1991). This Court denied review of that decision. 503 U.S. 937 (1992).

In sustaining the appointment of a conservator, the Tenth Circuit explained the bases of OTS's action. During the 1980s, FSA had pursued an aggressive growth and investment strategy in which its liabilities to depositors grew from $200 million to $11 billion, with most of that growth attributable to unstable (*e.g.*, short-term, high-cost) brokered deposits. 934 F.2d at 1133. At the same time, FSA's investments had transformed the thrift "from a traditional savings and loan into something totally different." *Id.* at 1134. FSA's asset base became concentrated in high-risk and complex securities that were part of a thin secondary market. For instance, high-yield (or so-called "junk") bonds and derivative securities represented approximately 35% of FSA's total assets. *Id.* at 1133. During 1988-1989, the federal regulators became increasingly concerned with the substantial concentration of those investments because they "were extremely sensitive" to certain interest-rate related risks, resulting in a highly volatile income stream. *Ibid.* Moreover, FSA's "earnings were declining"; "[i]n the fifteen-month period ending December 31, 1989, [FSA] had a loss in excess of $58 million," and OTS determined that FSA would incur losses greater than $300 million in the near future. *Id.* at 1134. Instead of capitalizing its subsidiary to protect depositors against the risks related to such losses, FSC allowed FSA to pay generous executive salaries and

siphoned large sums from the institution in the form of dividends. *Ibid.*

As the Tenth Circuit summarized the record:

> A review of the administrative file clearly reveals a high-flying, debt-laden, troubled savings and loan. The record reveals the owners diverting millions of dollars into their pockets through large salaries, bonuses and dividends, notwithstanding the losses being incurred by the association. The record reveals a financial institution taking what the [OTS] director deemed to be unacceptable risks with its depositors' monies. In fact, the record reveals a financial institution both unable and unwilling to comply with the director's requirements relating to safety and soundness concerns.

934 F.2d at 1150 (footnote omitted). After finding that the bases articulated by the Director for appointment of a conservator were fully supported by OTS's record, the Tenth Circuit held that the appointment of a conservator was not arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* at 1142-1150.

In July 1992, the Director of OTS replaced RTC as conservator of FSA with RTC in its receivership capacity. See C.A. App. A20344-A20350; Pet. 8. FSC unsuccessfully challenged the imposition of the receivership. See *Franklin Sav. Ass'n* v. *Office of Thrift Supervision*, 35 F.3d 1466, 1468-1471 (10th Cir. 1994).

5. In addition to challenging those regulatory actions, petitioners have pursued several lawsuits seeking damages purportedly resulting from OTS's

actions.[2] The instant suit began in the United States District Court for the District of Kansas, where FSC filed for bankruptcy in 1991, and was eventually transferred to the CFC. *Franklin Sav. Corp.* v. *Office of Thrift Supervision*, 213 B.R. 596, 601-602 (D. Kan. 1997); Pet. 9. The CFC rejected petitioners' contention that the appointment of a conservator for FSA had effected a taking of petitioners' property. Pet. App. 83a-85a. The court explained that, "[o]n three occasions, the Federal Circuit has explicitly" ruled "that a seizure of a financial institution under the statutes and regulations designed to insure safe and secure banking institutions * * * does not constitute a Fifth Amendment taking." *Id.* at 83a. The CFC further explained that the "fundamental rationale" of those Federal Circuit precedents "is that banking is a highly regulated industry and that one engaged in that business is deemed to understand that if his bank * * * is engaged in unsafe or unsound banking practices, the bank may be seized by government officials and be operated and/or liquidated by them." *Id.* at 84a.

6. The court of appeals affirmed without opinion. Pet. App. 1a. The court subsequently denied rehearing and rehearing en banc. *Id.* at 90a.

ARGUMENT

In three prior decisions, the Federal Circuit has rejected the contention that appointment of a conservator or receiver for a federally insured bank or thrift constituted a Fifth Amendment taking, and in each of

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[2] See, *e.g.*, *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124 (10th Cir.) (rejecting a Federal Tort Claims Act challenge), cert. denied, 528 U.S. 964 (1999); *In re Franklin Sav. Corp.*, 385 F.3d 1279 (10th Cir. 2004) (rejecting "refile[d]" tort claim).

those cases this Court denied a petition for a writ of certiorari. See *Branch* v. *United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995), cert. denied, 519 U.S. 810 (1996); *Golden Pac. Bancorp* v. *United States*, 15 F.3d 1066, 1075-1076 (Fed. Cir.), cert. denied, 513 U.S. 961 (1994); *California Hous. Sec., Inc.* v. *United States*, 959 F.2d 955, 958 (Fed. Cir.), cert. denied, 506 U.S. 916 (1992). Those decisions correctly applied established Just Compensation Clause principles to the particular circumstances of such claims. There is no reason for a different result here.[3]

1. Petitioners contend that OTS's appointment of a conservator for FSA constituted a "categorical taking," the most common example of which "occurs when the government 'physically takes possession of an interest in property.'" Pet. 10-11 (quoting *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)). FSC and FSA contend that "three essential inquiries" must be undertaken to determine whether such a taking occurred: "(1) whether the claimed property interest is a valid one; (2) whether the

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[3] The petition for a writ of certiorari identifies both FSC and FSA as petitioners. Because FSA has been seized by regulatory officials, however, its actions are controlled by the Federal Deposit Insurance Corporation (FDIC), which succeeded to RTC's right to control legal claims held by FSA (see 12 U.S.C. 1441a(m)(2)). The FDIC has not asserted any claim on behalf of FSA. Although FSC possesses standing to pursue a taking claim related to property it purportedly held, it lacks authority to proceed on behalf of FSA. See *First Hartford Corp.* v. *United States*, 194 F.3d 1279, 1294-1295 (Fed. Cir. 1999) (describing requirements for shareholders to assert claims of seized financial institutions); see also *Castle* v. *United States*, 301 F.3d 1328, 1337-1339 (Fed. Cir. 2002) (holding that owners of seized thrift lacked standing to assert the financial institution's legal claims as a third-party beneficiary), cert. denied, 539 U.S. 925 (2003).

property has been taken; and (3) if property was taken, what amount of compensation is 'just.'" Pet. 10. Focusing almost exclusively upon "the second of these three questions" (*ibid.*), petitioners argue that the federal government necessarily takes property when it obtains physical possession of a thrift and manages its affairs as part of a regulatory seizure. That argument lacks merit.

a. In *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court explained the basis for invoking the "traditional rule that a permanent physical occupation of property is a taking" by stating that, "[i]n such a case, the property owner entertains a *historically rooted expectation* of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation." *Id.* at 441 (emphasis added). When the owners of a thrift decide to "obtain[] federal deposit insurance," however, or, as here, to acquire a federally insured thrift, they "voluntarily subject[]" themselves and their state-law based property rights in the financial institution "to an expansive statutory regulatory system." *California Hous.*, 959 F.2d at 958. Thrift owners are charged with knowledge that, with respect to financial institutions that have been voluntarily subjected to that regulatory system, "the federal government [can] take possession of [the thrift's] premises and holdings as conservator or receiver" if regulatory officials determine that one of the grounds doing so exists. *Ibid.*

Accordingly, when the responsible officials determined that FSA was being operated in an unsafe and unsound manner—a statutory basis for appointment of a conservator, see 12 U.S.C. 1464(d)(2)(A), 1821(c)(5)—petitioners "did not possess the most valued property right in the bundle of property rights, the right to

exclusive possession * * * at the time of the alleged taking in this case." *California Hous.*, 959 F.2d at 958. Because FSC and FSA had relinquished the right to exclude the government in the event that certain statutory conditions were met (as they were here), they could not have possessed an "historically rooted expectation of compensation for such a seizure" and thus cannot maintain a taking claim based on the government's seizure of FSA. *Ibid.*

b. In challenging the Federal Circuit's prior ruling "that there could be no categorical taking 'because [plaintiffs] could [not] have developed a historically rooted expectation of compensation for such a seizure,'" petitioners contend that the court of appeals' analysis "conflates two separate issues under the Fifth Amendment's Takings Clause." Pet. 14 (quoting *California Hous.*, 959 F.2d at 958). In petitioners' view, the inquiry regarding "historically rooted expectatation[s]" of compensation described in *California Housing* is relevant only to the "analysis of *regulatory* takings" under *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978), and "is not relevant where *per se* takings are concerned." Pet. 14.

This Court has attributed far broader significance to property owners' historically rooted expectations than petitioners acknowledge. The court of appeals' emphasis in *California Housing* upon the owner's expectations is consistent with this Court's "'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). Even in the context of a permanent physical

occupation of real property, the Court has recognized that a landowner's property rights may be limited by a pre-existing right of the government to occupy the land. Thus, the Court explained in *Lucas* that it "assuredly *would* permit the government to assert [without compensation] a permanent easement that was a pre-existing limitation upon the landowner's title." *Id.* at 1028-1029.

As in *California Housing*, the government's occupation of FSA's premises is analogous to the occupation of land pursuant to a pre-existing easement. The statute authorizing the government to take control of a federally insured thrift, upon the occurrence of specified conditions for the appointment of a conservator or receiver, pre-existed the chartering of FSA, as well as FSC's acquisition of control over the thrift. Thus, at the time petitioners entered the thrift industry, the regulatory scheme specifically subjected insured financial institutions to a governmental right to intrude when the regulators determined that circumstances warranting a conservatorship or receivership existed.[4] Petitioners

[4] Petitioners dispute the bases upon which the Director appointed a conservator, Pet. 5, and they contend that the deferential arbitrary-and-capricious standard of review applied in the conservatorship challenge constrained their ability to contest that administrative action. Pet. 7-8, 10. Under the statutes and regulations governing FSA's operations, however, the government had a right to occupy, operate, and (eventually) liquidate FSA once the Director decided—in a manner that was not arbitrary and capricious—that a proper basis for seizure existed. The Tenth Circuit dispositively held that FSA's seizure was not arbitrary and capricious, *Franklin Sav. Ass'n*, 934 F.2d at 1150, and the government's right to occupy FSA therefore cannot be questioned. Petitioners have identified no statute or regulation providing a right to review of the Director's decision under a *de novo* standard. As the Tenth Circuit in that prior suit explained, such a rule would be flatly

voluntarily entered the industry, obtained the perceived benefit of federal deposit insurance for FSA, and in turn subjected the thrift to the government's potential right to appoint a conservator or receiver for the thrift, if it was operated in an unsafe and unsound manner.

In sum, petitioners' "bundle of rights" in their property was always limited by the government's right to occupy FSA's premises in accordance with statutory and regulatory requirements. That governmental right to occupy FSA, rather than the mere fact that the thrift was operated in a pervasively regulated industry (see Pet. 14), was the basis for the Federal Circuit's conclusion that no taking occurred in *California Housing* or here.

c. Petitioners cite no appellate decision holding that the government's appointment of a conservator or receiver for an unsoundly managed thrift effects a Fifth Amendment taking. Rather, petitioners rely (Pet. 10-13) on an array of cases involving plaintiffs whose property rights were subject to no pre-existing limitations comparable to those that govern participants in the banking industry. Many of those cases involved World War I and World War II era seizures of various businesses under broad war powers statutes. Putting aside the damages issues that were actually the subject of dispute in most of those cases, no one could (or did) contest that a railroad company, *Marion & Rye Valley Ry.* v. *United States*, 270 U.S. 280, 282-283 (1926), or a laundry business, *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 3 (1949), had a right to exclude the government that was sufficient to support a taking claim

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contrary to the statutory and regulatory scheme established by Congress for the oversight of the thrift industry. *Id.* at 1137-1140.

when those businesses were seized in furtherance of the war effort.[5] Those precedents do not support petitioners' takings claim, since FSC and FSA lacked the legal right to exclude the government from FSA's premises.[6]

2. Petitioners also contend that the court of appeals' decision "conflicts with this Court's precedents concerning regulatory takings." Pet. 15; see Pet. 16-21. Their arguments focus exclusively on the third factor of the regulatory taking analysis, *i.e.*, "the extent to which the regulation has interfered with distinct investment-backed expectations." Pet. 16. In the context of bank or thrift seizures, the Federal Circuit's regulatory takings analysis has similarly focused upon the "reasonable investment-backed expectations" factor. As the court of appeals explained in *Golden Pacific*, this Court's regulatory takings jurisprudence "teaches that 'the force of this factor [may be] so overwhelming . . . that it disposes of the taking question.'" 15 F.3d at 1074 (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984)).

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[5] See *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 115-117 (1951) (owner of coal mine seized to avoid work stoppage possessed right to exclude government and had to be compensated for taking of its property); *United States* v. *Petty Motor Co.*, 327 U.S. 372, 378-380 (1946) (leaseholder possessed right to exclude government from building); *United States* v. *General Motors Corp.*, 323 U.S. 373, 375 (1945) (same); see also *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 324 (1893) (owner of locks and dams built on river could maintain a claim for compensation based on condemnation and seizure of its property).

[6] Petitioners also cite (Pet. 11-12) several regulatory takings cases that are irrelevant to the categorical takings inquiry. See *Tahoe Sierra*, 535 U.S. at 323-325; *Yee* v. *City of Escondido*, 503 U.S. 519, 527-528 (1992); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 167-169 (1958); *Mugler* v. *Kansas*, 123 U.S. 623, 667-668 (1887).

Petitioners assert that the Federal Circuit has improperly "created a new category of cases * * * in which a federal regulatory regime purportedly abrogates existing property rights * * * thereby supposedly obviating the property owner's investment-backed expectations, and pretermitting any claim of a taking." Pet. 17. They characterize the Federal Circuit's decisions in this area as providing blanket authorization for uncompensated bank seizures, solely on the ground that "banking is a highly regulated industry." Pet. 17-18. Petitioners misconstrue the scope of the court of appeals' decisions, which are grounded in the specific facts of seizures of regulated financial institutions that are based on (and require) specific regulatory findings. In this case, the appointment of a conservator for FSA was predicated on 12 U.S.C. 1464(d)(2)(A), which provided—both at the time petitioners obtained control of FSA and at the time the Director appointed RTC as conservator—that the Director could take that action if one or more of certain specified conditions existed. Because FSC voluntarily invested in a financial institution subject to that statutory and regulatory regime, its "reasonable investment-backed expectations" must have incorporated the potential effect on the thrift of the possible regulatory seizure of FSA if the responsible officials determined that FSA was operating in an unsafe and unsound manner.

In *Golden Pacific*, the Federal Circuit correctly explained that the owners of the seized bank "could not have reasonably expected that the government 'would fail to enforce the applicable statutes and regulations.'" 15 F.3d at 1074 (quoting *American Cont'l Corp.* v. *United States*, 22 Cl. Ct. 692, 697 (1991)). Similarly here, FSC could reasonably have anticipated that

regulatory officials would exert control over FSA if the Director determined that the thrift was operating in an unsafe and unsound manner. See *ibid.* Because the prospect of seizure in that circumstance was apparent on the face of 12 U.S.C. 1464(d)(2)(A), petitioners could not have developed any "historically rooted expectation of compensation" related to the imposition of a conservatorship or receivership instituted under that statute (or its predecessors). *Golden Pac.*, 15 F.3d at 1074.

Petitioners attack the court of appeals' investment-backed expectations analysis, deriding as "circular reasoning" the purported holding that "the very existence of the statutes and regulations being challenged was held to mean that they could constitutionally be enforced, despite the lack of just compensation." Pet. 19 (discussing *Golden Pac.*, 15 F.3d at 1074). But nothing in the court of appeals' opinions indicates that the "very existence" of statutes and regulations alone renders a government seizure non-compensable. To the contrary, *Golden Pacific* explained that the reasonable investment-backed expectations of bank owners must incorporate an understanding of the statutory and regulatory scheme in which such businesses operate—a scheme that authorizes the appointment of a conservator or receiver in the event the Director makes certain findings. That analysis of the manner in which the regulatory environment must be deemed to inform the investment-backed expectations of the owners of financial institutions is wholly consistent with this Court's Just Compensation Clause jurisprudence and does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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