No. 04-835

In the Supreme Court of the United States

AG ROUTE SEVEN PARTNERSHIP, ET AL.,
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

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

DAVID M. COHEN
JEANNE E. DAVIDSON
WILLIAM F. RYAN
JEFFERY T. INFELISE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, assuming there was a contract between a thrift and the government in this case and the government breached it, the thrift's shareholders may recover damages as intended third-party beneficiaries.

2. Whether the government's breach of its contract with a thrift constituted a taking of any property rights the thrift's shareholders possessed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 04-835

AG ROUTE SEVEN PARTNERSHIP, ET AL., 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

OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-2a) is not reported in the Federal Reporter, but it is reprinted at 104 Fed. Appx. 184. The opinion of the Court of Federal Claims (Pet. App. 3a-47a) is reported at 57 Fed. Cl. 521.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2004. A petition for rehearing was denied on September 20, 2004 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on December 20, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the shareholders of Surety Federal Savings & Loan Association, FSA (New Surety), which acquired all of the assets and liabilities of Surety Federal Savings and Loan Association (Old Surety), an ailing thrift, from the Federal Savings and Loan Insurance Corporation (FSLIC) in 1987. Pet. App. 4a, 7a-9a.

2. Old Surety was founded in 1925 as a state-chartered thrift under the laws of North Carolina. Approximately 30 years later, it became a stock institution and a member of the Federal Home Loan Bank system. Old Surety was a healthy thrift until 1983, when it was discovered that its chief financial officer had engaged in unauthorized futures contracts trading, causing the thrift to suffer over $14 million in losses. Old Surety's financial condition continued to deteriorate until 1987, when it had a negative net worth of $8.8 million. Pet. App. 8a.

In 1984, FSLIC began soliciting bids for the acquisition of Old Surety. Pet. App. 8a-9a. In December 1986, an investor group led by the National Capital Group (NCG), submitted a bid for Old Surety, but FSLIC rejected it. *Id.* at 9a. In September 1987, however, NCG submitted another bid for Old Surety that was accepted by FSLIC. *Ibid.* The new bid called for petitioners to invest $4.2 million to acquire all of the stock of New Surety which would, in turn, acquire all of the assets and liabilities of Old Surety. *Ibid.* The bid proposal identified petitioners as "passive investors only" who did not intend to participate in the day-to-day operations of New Surety. *Id.* at 26a.

New Surety's acquisition of Old Surety was completed on December 11, 1987. At the time of the acquisition, the fair market value of Old Surety's liabilities exceeded the fair market value of its assets by $12.2 million. The government permitted New Surety to recognize $12.2 million of goodwill on its books, which, coupled with the direct credit of petitioner's $4.2 million investment, resulted in New Surety having a positive net worth. Pet. App. 9a-10a.

3. In August 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, 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 gave the Director of OTS the authority 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 bases for the seizure of the thrift 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 winding up the affairs of thrifts closed between January 1989 and July 1995. 12 U.S.C. 1441a(b)(3).

4. In July 1991, the Office of Thrift Supervision placed New Surety into receivership for failure to comply with FIRREA's capital requirements. Pet. App. 10a.

5. In 1995, petitioners filed suit in the Court of Federal Claims in their individual and derivative capacities alleging that the enactment of FIRREA, and its imple-

menting regulations, constituted a breach of contract with New Surety and petitioners, effected a taking of their property without just compensation in violation of the Fifth Amendment, and was a deprivation of property without due process of law in violation of the Fifth Amendment. In 1997, the Federal Deposit Insurance Corporation (FDIC) intervened as substitute plaintiff for New Surety. In its complaint, the FDIC similarly alleged that FIRREA and its regulations breached a contract with New Surety, effected a taking of New Surety's property without just compensation, and was a deprivation of property in violation of the Due Process Clause of the Fifth Amendment. Pet. App. 10a.

Petitioners filed an amended complaint in April 1997 in which they added a cross-claim against the FDIC, in addition to their original claims. Pet. App. 10a.

6. The trial court granted the government's motions to dismiss all contract and non-contract claims asserted by petitioners. Pet. App. 5a-6a. The court rejected the contention that the Government had entered into either an express or an implied-in-fact contract with petitioners. *Id.* at 15a-17a, 19a. The Acquisition Agreement between New Surety and the government recited that it was "entered into * * * by and between [FSLIC] * * * and Surety Federal Savings and Loan Association." *Id.* at 16a. Moreover, the Agreement included a "Sole Benefit" clause, which provided:

> It is the intention of the parties that this Agreement, the assumption of obligations and statements of responsibilities under i[t] and all conditions and provisions of it are for the sole benefit of the [FSLIC] and [New Surety] and for the benefit of no other person. Nothing expressed or referred to in this Agreement is in-

> tended to or shall be construed to give any person other than the [FSLIC] or [New Surety] any legal or equitable right, remedy or claim under or with respect to this Agreement or any of its provisions.

Id. at 16a-17a. The court held that "[t]he foregoing clause unequivocally and unmistakably precludes the private plaintiffs from establishing an express contract with the government *vis a vis* the Acquisition Agreement." *Id.* at 17a.

The trial court also found that petitioners were not third-party beneficiaries of the contract. The court noted that, under Federal Circuit precedent, a party claiming third-party beneficiary status must show "an intention to benefit the party directly." Pet. App. 30a (quoting *Glass* v. *United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001)). In a case like this, in which shareholders are claiming to be third-party beneficiaries of a contract entered into by the corporation in which they own stock, "the contract must express the intent of the promisor to benefit the shareholder personally, independently of his or her status as shareholder." *Ibid.* (quoting *Glass*, 258 F.3d at 1353-1354). The court found that petitioners "have made no such demonstration or showing * * * nor has the court itself uncovered the same in the record." *Ibid.*

The trial court also concluded that petitioners' rights as shareholders under 12 U.S.C. 1812(d)(11)(A) to any surplus recovered by the FDIC as receiver for New Surety did not confer third-party beneficiary status upon them. Pet. App. 33a. The trial court then dismissed petitioners' cross-claims against the FDIC because, as the purported representative of New Surety, the FDIC's role was "tantamount to that of a private party," and the Court of Federal Claims does not possess jurisdiction to entertain claims by one private party against another. *Id.* at 34a.

The trial court also rejected petitioners' Fifth Amendment takings claims. Because the only property rights allegedly "taken" were rights under a contract to which appellants were neither parties nor third-party beneficiaries, the trial court held that their takings claim was moot. The court also determined that, where, as here, the government's actions are merely contractual, not sovereign, no taking could occur. In such a case, any rights and remedies must be rooted in contract, and, because FIRREA left intact the remedies for breach of contract, any alleged breach would not amount to a taking. Pet. App. 35a.

Finally, the trial court dismissed petitioners' due process claims, stating that it lacked jurisdiction to entertain those claims unless the action complained of constituted an illegal exaction— a claim that petitioners did not make here. Pet. App. 35a-36a.[1]

7. On appeal, the Federal Circuit affirmed the trial court's judgment in a brief order without issuing an opinion. Pet. App. 1a-2a.

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

[1] The trial court also granted the government's motion to dismiss the FDIC for failure to assert justiciable claims, given that the total amount sought by the FDIC was less than the amount owed by the receivership to the United States as a priority creditor. Pet. App. 44a-45a.

1. Petitioners contend that, "in a series of decisions * * * the Federal Circuit has failed in *Winstar*-related cases to adhere to well-established principles of contract law as set forth in the Restatement [of Contracts]" and this Court's decisions. Pet. 9-10. Because the court of appeals did not issue an opinion in this case, petitioners' conclusion (Pet. 10) that the court of appeals "adopt[ed] special rules to relieve the Federal Government of its obligation to pay compensation for its adjudicated breaches of contract," *ibid.*, is based on the trial court's application in this case of principles derived from the court of appeals' decisions in *Glass* v. *United States*, 258 F.3d 1349, 1353-1354 (Fed. Cir. 2001), and *Castle* v. *United States*, 301 F.3d 1328 (Fed. Cir. 2002), cert. denied, 539 U.S. 925 (2003). See Pet. 13-14. According to petitioners, those cases created a new and invalid requirement for third-party beneficiaries.

This Court has denied further review in other *Winstar*-related cases in which the petitioners have similarly asserted that the court of appeals has applied special rules to relieve the government of ordinary liabilities for breach of contract, see, *e.g.*, *Bailey* v. *United States*, 124 S. Ct. 2412 (2004) (No. 03-1073); *Banks United* v. *United States*, 125 S. Ct. 33 (2004) (No. 03-1410), including *Castle*, in which the petitioners similarly based their argument on what they alleged was the Federal Circuit's unduly restrictive position on third-party beneficiary status for plaintiffs in *Winstar*-related cases. *Castle* v. *United States*, 539 U.S. 925 (2003) (No. 02-938). As in those decisions of the Federal Circuit, resolution of the issues by the trial court in this case followed from the application of general and settled principles of the law of contracts to the particular facts of this case. As in those other cases, further review is unwarranted in this case as well.[2]

a. As the Federal Circuit explained in *Castle* v. *United States*, 301 F.3d 1328 (2002), cert. denied, 539 U.S. 925 (2003), "shareholders seeking status to sue as third-party beneficiaries of an allegedly breached contract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party *directly*.'" *Id*. at 1338 (quoting *Glass*, 258 F.3d at 1354). More specifically, to convert a shareholder into a third-party beneficiary of a contract entered into by the corporation, "the contract must express the intent of the promissor to benefit the shareholder *personally, independently of his or her status as a shareholder*." *Castle*, 301 F.3d at 1338 (emphasis in original) (quoting *Glass*, 258 F.3d at 1353-1354).

b. The requirement that third parties may not sue to enforce a contract unless the parties to the contract manifested their intent to benefit those specific third parties is well settled. If there were no such requirement, virtually anyone affiliated with a party (*e.g.*, shareholders, employees, creditors, and suppliers) could sue for breach of contract, seeking losses they suffered that were indirectly caused by the breach. Shareholders could sue for lost dividends; employees could sue for lost salary increases or bonuses; creditors and suppliers could sue for amounts that, if they had been given to the

[2] Petitioners assert (Pet. 15) that further review is warranted to provide guidance for "approximately 120 *Winstar*-related cases * * * currently pending in the lower federal courts." Although there were originally more than 120 *Winstar*-related cases, two-thirds of them have now reached final judgment, and only approximately 45 *Winstar*-related cases now remain pending.

debtor or purchaser firm in accordance with the contract, might have been used to pay debts or invoices. The parties to a contract could not anticipate with any degree of certainty the universe of third parties who might sue for breach of the contract or the extent of their potential liability for breach.

Because the universe of parties who may sue for breach of contract does not extend indefinitely, the principle that an individual may sue as a third-party beneficiary only if the parties intended to "directly benefit" that individual has been accepted at least since this Court's decision in *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U.S. 220 (1912). In that case, the Court held that the right of a third-party beneficiary to sue is an exception to the general rule limiting the right to sue on a contract to the contracting parties and that, "[b]efore a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was *intended for his direct benefit*." *Id*. at 230 (emphasis added) (citing *National Bank* v. *Grand Lodge*, 98 U.S. 123 (1878)). The Federal Circuit's analysis in *Glass* was squarely based upon this Court's decision in *German Alliance*. See 258 F.3d at 1354.

Numerous courts, including this Court, have since applied the "direct benefit" test of *German Alliance* to contract cases involving private parties and contracts not designed to benefit the general public. *E.g.*, *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 307-308 (1927); *Maher* v. *United States*, 314 F.3d 600, 605-606 (Fed. Cir. 2002), cert. denied, 540 U.S. 821 (2003); *Williams* v. *Fenix & Scisson, Inc.*, 608 F.2d 1205, 1208 (9th Cir. 1979); *Safer* v. *Perper*, 569 F.2d 87, 92 (D.C. Cir. 1977); *King* v. *National Indus., Inc.*, 512 F.2d 29, 32

(6th Cir. 1975); *Ogden Dev. Corp.* v. *Federal Ins. Co.*, 508 F.2d 583, 588 (2d Cir. 1974). The Federal Circuit's predecessor, the Court of Claims, applied the "direct benefit" test in cases directly analogous to this one, in which shareholders sought to enforce rights of the corporation in which they had invested. See, *e.g.*, *Robo Wash, Inc.* v. *United States*, 223 Ct. Cl. 693, 697-698 (1980); *Bogart* v. *United States*, 531 F.2d 988, 991 (Ct. Cl. 1976).[3]

c. The courts below correctly concluded that, on the facts of this case, petitioners cannot satisfy the "intended beneficiary" standard. The only benefits petitioners stood to receive under the alleged contract were those of ordinary shareholders—that is, the receipt of dividends if the thrift earned profits that were distributed to shareholders (or, in the event of dissolution, ultimate distribution of the corporation's remaining assets). Accordingly, the courts properly concluded that petitioners were mere passive investors, and were not intended to be third-party beneficiaries with rights to sue for breach of the alleged contract. See Pet. App. 30a.

That conclusion is strongly reinforced in this case by the "Sole Benefit" provision of the contract between New Surety and the government. This Court has

---

[3] In applying the "intended beneficiary" test, the Federal Circuit has held that "[t]he intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefited thereby." *Montana* v. *United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). Thus, the Federal Circuit simply requires evidence that the contracting parties had a clear intent to benefit directly the third parties, as opposed to an understanding that third parties would be likely to obtain indirect benefit. On the specific facts of this case, petitioners were unable to satisfy that standard.

recognized that the language of a contract provides the best indication of the parties' intent to create third-party rights. See *United Steelworkers* v. *Rawson*, 495 U.S. 362, 374 (1990) ("If an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees."). As the trial court observed, the contract in this case expressly recited that the parties were the FSLIC and New Surety—and the "Sole Benefit" clause provided that the parties did *not* intend "to give any person other than the [FSLIC] or [New Surety] any legal or equitable right, remedy or claim under or with respect to this Agreement or any of its provisions." Pet. App. 16a-17a. It would be particularly inappropriate to recognize third-party contractual rights when the parties to the contract expressly precluded the creation of such rights in their agreement.[4]

[4] Petitioners' attempted reliance (Pet. 12) on the Restatement (Second) of Contracts (1981) is misplaced. The provisions they cite, Sections 302 and 304, establish that an intended third-party beneficiary may sue to enforce a contract. That principle is not in dispute in this case. Insofar as Sections 302 and 304 are instructive on the question of who is a third-party beneficiary, they establish only that the question whether a party is a third-party beneficiary is determined in large part by the intent of the parties. See Restatement (Second) of Contracts § 302, at 440 (1981) (Restatement) ("A beneficiary of a promise is an intended beneficiary if recognition of a right to performance is *appropriate to effectuate the intent of the parties* and * * * the circumstances indicate that the promisee *intends* to give the beneficiary the benefit of the promised performance.") (emphasis added). The facts of this case—as made particularly clear by the Sole Benefit clause—establish that petitioners were *not* intended beneficiaries. Accordingly, as the Restatement makes clear, they are at most "incidental beneficiaries," see Restatement § 302(b), and they thus "acquire[] by virtue

d. Petitioners' suggestion (Pet. 10-11, 14-16) that the "direct benefit" test conflicts with this Court's decisions in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000), and in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996) (Pet. 10-11, 14-16), is incorrect. Nothing in *Mobil* or *Winstar* disturbs or contravenes the "direct benefit" test set forth by this Court and the Federal Circuit. In both cases, the plaintiffs were actual parties to the contracts at issue. See *Mobil*, 530 U.S. at 611 (recognizing that plaintiff oil companies entered into contracts and made payments under such contracts); *Winstar*, 518 U.S. at 860-871 (recognizing that plaintiffs, who acquired thrifts, entered into supervisory and assistance agreements with FSLIC). For that reason, the plaintiffs' standing to assert claims under the contracts at issue was not at issue or considered by this Court in either *Mobil Oil* or *Winstar*.

e. Finally, petitioners err in contending (Pet. 11-14) that the Federal Circuit's test for third-party beneficiary status conflicts with the Ninth Circuit's decision in *Far West Federal Bank* v. *Office of Thrift Supervision*, 119 F.3d 1358 (1997). In *Castle*, the Federal Circuit apparently accepted the plaintiffs' characterization of *Far West* and, based upon that characterization, decided that it applied a "test more stringent than the one applied in *Far West*." See *Castle*, 301 F.3d at 1338. In fact, the circumstances presented in *Far West* differ from the facts presented here or in *Castle*, and it is not at all clear that the Federal Circuit would have differed with the Ninth Circuit had the Federal

---

of the promise no right against the promisor or the promisee," Restatement § 315, at 477.

Circuit been presented with the third-party beneficiary issue presented in *Far West*.

In *Far West*, specifically named individual investors executed an agreement to purchase a specified amount of Far West stock if and when the thrift were permitted to convert from a mutual to a stock form. 119 F.3d at 1361. Unlike the Sole Benefit clause in the contract here, a separate Conversion Agreement "specifically identifie[d]" the investors "as intended beneficiaries of the FHLBB's promises." See *id*. at 1364 & n.2. Thus, the decision in *Far West* was based upon documentary evidence that does not exist in this case or in *Castle*, and the decisions in this case and *Castle* were based on documentary evidence (such as the "Sole Benefit" clause) in the contract here that apparently did not exist in *Far West*. There is no inherent conflict between the Ninth Circuit's decision in *Far West* and the Federal Circuit's decisions in *Castle* or in this case. In any event, even if there were some tension between the Ninth Circuit and the Federal Circuit with respect to the application of the test for third-party beneficiary status to the facts of *Winstar*-related cases, the practical significance of any such tension would be limited at best, because no *Winstar*-related cases are now being litigated outside of the Federal Circuit.[5]

[5] This case need not be held for *Orff* v. *United States*, No. 03-1566, which is currently pending before this Court and which presents the question whether farmers are third-party beneficiaries entitled to sue the government on water supply contracts between the federal government and a state water district. All parties to *Orff* appear to agree that the intent of the parties to a contract controls whether others have the status of intended third-party beneficiaries. As the trial court in this case recognized (and as the court of appeals presumably recognized in summarily affirming the trial court's disposition of this case), the facts here—and, in particular, the Sole Benefit Clause in the

2. Petitioners contend (Pet. 16-21) that the court of appeals erred in affirming the trial court's dismissal of their takings claim.

a. Initially, petitioners contend (Pet. 16-18) that, even if they were not themselves parties to the contract with the government, they are entitled to just compensation for the entire value of their business, including any government contracts the business held. Pet. 16. That contention is mistaken. Petitioners' property interest was in their stock, which represented their claim on New Surety's assets and which they retain; the government never took petitioners' stock. In any event, the government's seizure of the thrift was not itself a taking, because petitioners had no reasonable, investment-backed expectation that the government would not seize the thrift if it fell out of compliance with federal capital requirements. In *Winstar* itself, this Court expressly recognized that parties who owned thrifts could have no reasonable expectation that the government would cease regulating the thrift industry, or any particular thrift. The Court explained:

> [B]anking is one of the longest regulated and most closely supervised of public callings. That is particularly true of the savings and loan, or "thrift," industry which has been described as "a federally-conceived and assisted system to provide citizens with affordable housing funds."

518 U.S. at 844 (additional internal quotation marks omitted) (quoting *Fahey* v. *Mallonee*, 332 U.S. 245, 250

Acquisition Agreement—make clear that the parties did *not* intend that petitioners be intended beneficiaries of the contract. Accordingly, the Court's decision in *Orff* is unlikely to have any impact on the proper disposition of this case.

(1947), and H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 292 (1989)). Thus, petitioners could not have reasonably expected that the thrift would be immune from regulation, or even seizure, if it failed to satisfy regulatory requirements.[6]

b. Petitioners also argue (Pet. 19) that the government's breach of its contract with New Surety constituted a taking, and that "the availability of contract remedies neither obviates the Federal Government's obligation to pay just compensation nor limits [p]etitioners' reasonable, investment-backed expectations." That is mistaken. This Court explained in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 n.27 (1949), that "[t]here could not be" a claim against the government for the taking of a contractual right where the party claiming the taking "has a remedy, in a suit for breach of contract, in the Court of Claims." Cf. *Lujan* v. *G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) ("Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, * * * it is an interest * * * that can be fully protected by an ordinary breach-of-contract suit."). Because a contract right is fully vindicated by the availability of ordinary contract remedies in the case of breach, the government's failure to comply with a

---

[6] Contrary to petitioners' contention (Pet. 18), *Tahoe Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), does not support their claim. In *Tahoe-Sierra*, this Court held that a temporary restriction on the use to which private property could be put as the result of two temporary moratoriums on development did not constitute a per se taking. *Id.* at 306. *Tahoe-Sierra* did not involve any issue concerning the impact of a regulatory change upon a contract with the government or, for that matter, the reasonable expectations of the shareholders of a party engaged in a highly regulated industry like the thrift industry.

contractual commitment does not constitute a taking, so long as ordinary contract remedies remain available. Nothing in FIRREA affected the availability of ordinary contractual remedies. *Castle*, 301 F.3d at 1342; *Larson*, 337 U.S. at 703 n.27.[7]

c. Petitioners argue (Pet. 17-18) that *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), supports their taking claim. In *Monongahela*, one sovereign (Congress) condemned property that included a franchise to operate locks on a river and collect tolls that another sovereign (the Commonwealth of Pennsylvania) had granted. This Court has since recognized that its conclusion that the damages payable upon condemnation included both the tangible property of the firm and the value of the franchise right rested upon special facts not present here, such as the applicability of the Impairment Clause to the franchise to collect tolls. *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282 n.12 (1943). In any event, *Monongahela*-

[7] Petitioners contend (Pet. 19-20) that their taking claim is supported by this Court's decision in *Lynch* v. *United States*, 292 U.S. 571 (1934). In *Lynch*, the Court stated that "[v]alid contracts are property," and that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Id.* at 579. The most important right created by a contract is the right to a remedy for breach. Although eliminating that right could require analysis under the Just Compensation Clause, continued recognition of that right precludes a claim under that Clause. Indeed, in *Lynch*, the court of appeals had held that it had no jurisdiction over suits for amounts due under certain federal insurance contracts, on the ground that Congress had removed the jurisdiction of the federal courts to provide such relief. See *id.* at 575. The holding of this Court was that Congress had *not* eliminated the federal courts' jurisdiction to provide a remedy for breach of the insurance contracts. See *id.* at 585-587. The Court accordingly had no occasion to rule on whether a taking had occurred in *Lynch*.

hela establishes at most that, where a taking has occurred, the compensation payable may in some circumstances include the value of both tangible property and a franchise right. That principle has no application here, where the issue is whether a taking has occurred in the first place. The decision in this case is thus in no way inconsistent with *Monongahela*.[8]

d. Petitioners' reliance (Pet. 19) upon *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), and *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979), is also misplaced. Neither *Monsanto* nor *Kaiser Aetna* involved a contract between a private party and the government. *Monsanto* involved the government's appropriation of private property—trade secrets— entrusted to the government, and *Kaiser Aetna* involved a federal requirement that a private entity may not exclude the public from real property it owned. Although in each case the government had made a commitment of some sort that was relevant in assessing whether the property owner had an investment-backed expectation, neither case involved a contract, and the Court had no occasion to—and did not—in either case address any question regarding contract law or the availability of a remedy under the Just Compensation Clause for the government's breach of a contract.

[8] Similarly, the issue in *Long Island Water Supply Co.* v. *City of Brooklyn*, 166 U.S. 685 (1897), upon which petitioners also rely, see Pet. 16-17, was whether a municipality was prevented from taking by condemnation a water company with which the municipality had contracted. As the Court noted, the issue was whether "the prohibition against a law impairing the obligation of contracts stays the power of eminent domain in respect to property which otherwise could be taken." 166 U.S. at 689. The Court answered that question in the negative, noting that the water company's contract was not impaired but taken, and that it would receive compensation for the taking.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DAVID M. COHEN
JEANNE E. DAVIDSON
WILLIAM F. RYAN
JEFFERY T. INFELISE
Attorneys

FEBRUARY 2005