

No. 11-855

In the Supreme Court of the United States

RICHARD AMERICA, PETITIONER

v.

KAREN G. MILLS, ADMINISTRATOR,
SMALL BUSINESS ADMINISTRATION

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's determination that the government did not materially breach its settlement agreement with petitioner, when the agreement contemplated that the government would provide "neutral" employment references for petitioner, and the government provided a reference that was on the whole "quite positive, and at worst neutral."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 643 F.3d 330. The opinion of the district court (Pet. App. 10a-35a) is reported at 714 F. Supp. 2d 88.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2011. Petitions for rehearing were denied on September 9, 2011 (Pet. App. 8a-9a). The petition for a writ of certiorari was filed on January 6, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an African-American man who worked for the Small Business Administration (SBA) in the District of Columbia from 1980 until 1997. Pet. App. 2a, 12a. In 1995, the SBA decided to reassign his position to Kansas City, Missouri. *Id.* at 2a. Petitioner did not wish to relocate and, in March 1997, he accepted early retirement. *Id.* at 2a, 13a.

Petitioner subsequently filed several administrative complaints against the SBA, alleging that the attempted relocation had been motivated by race, gender, and age discrimination, as well as retaliation. Pet. App. 2a, 13a. He settled those claims in exchange for \$92,500. *Id.* at 2a. In the settlement agreement, the SBA agreed, among other things, to refer any prospective employers' inquiries about petitioner to its human resources department. *Id.* at 2a, 40a. The purpose of that provision was to "ensure that the SBA provided only neutral references about him." *Id.* at 2a (citation omitted).

2. After petitioner was unsuccessful in finding full-time post-SBA employment, he began to suspect (but had no evidence) that the SBA was providing negative references. Pet. App. 14a-15a. He decided to test that suspicion by hiring a reference-investigation company, Documented Reference Check (DRC). *Id.* at 15a. DRC would provide (for a fee) a report purporting to document what petitioner's references said about him. *Id.* at 15a-18a. DRC would first have someone call several references provided by petitioner, pretending to be a prospective employer, and produce a written transcript of the conversations. *Id.* at 16a-17a. Those transcripts would be sent to DRC's chief service officer, who would potentially make corrections, perform follow-up, and produce the final report. *Id.* at 17a-18a.

Petitioner provided as his references three SBA employees who had never directly supervised him, but who were involved in his removal. Pet. App. 18a-19a. DRC's 2002 report indicated that one of the references immediately directed the caller to the human resources department and that another made only a few neutral statements before likewise directing the caller to that same department. *Id.* at 22a-23a. The report further indicated that a third reference, Arnold Rosenthal, did not direct the caller to the human resources department. *Id.* at 23a. Instead, according to the report, he made substantive comments about petitioner, including that petitioner "was a very bright think-tank type of individual"; that he was "a very good guy" and a "[h]igh level thinker"; that he "may not be the guy to take it to the next level, but he is very good about identifying ideas"; and that he was "very smart." *Ibid.* Rosenthal also, according to the report, referred to petitioner's transfer to Kansas City, observing that it "was a difficult experience for him. . . . I don't think he got along with everybody the way he got along with me. There was an internal battle going on with his transfer." *Ibid.*

3. Petitioner filed this suit in the United States District Court for the District of Columbia, alleging based on DRC's report that the SBA had materially breached the parties' settlement agreement and seeking reinstatement of his original discrimination claims. Pet. App. 10a-11a. Following a bench trial, the district court held that the SBA had not materially breached the settlement agreement. *Id.* at 10a-35a.

As an initial matter, the court addressed the reliability of the 2002 DRC report (as well as another DRC report prepared in 2000). Pet. App. 24a-28a. The court determined that "DRC did not manufacture the refer-

ence check reports from whole cloth,” but stated that “the Court cannot find by a preponderance of the evidence that either report is a totally accurate transcription of phone calls with” petitioner’s references. *Id.* at 27a-28a. The court expressed concern that “DRC’s internal quality controls appear variable and not reliable”; that the DRC employee who made the calls, although credible, did not specifically remember them; that DRC’s chief service officer’s testimony was “completely incredible,” as well as “evasive and belligerent”; and that the chief service officer was “in a position to change a report without the knowledge of the person who created the report.” *Id.* at 24a-25a.

The district court next addressed whether the government had materially breached the settlement agreement. Pet. App. 28a-35a. The court acknowledged that the evidence demonstrated a technical breach (because the SBA employees had not all immediately directed the calls to the human resources department), but emphasized that “only a material breach would permit rescission” of the agreement and reinstatement of petitioner’s original discrimination claims. *Id.* at 28a. The court observed that the standard for materiality “is necessarily imprecise and flexible,” *id.* at 29a (quoting *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548, 1550-1551 (Fed. Cir. 1992)), and depends on a variety of factors, including “the extent to which the plaintiff was deprived of the benefit that he reasonably expected under the contract,” *ibid.* “A breach is material,” the court explained, “only if it relates to a matter of vital importance or if it goes to the essence of the contract and frustrates substantially the purpose for which the contract was agreed to by the injured party.” *Ibid.* (citing, *inter alia*, *Thomas v. HUD*, 124 F.3d 1439, 1442 (Fed. Cir.

1997)) (internal quotation marks, brackets, and citation omitted).

The court determined that the SBA's breach did not meet that materiality standard. Pet. App. 28a-35a. The court found that the settlement agreement's requirement that reference calls be immediately directed to the human resources department was not "an end in itself," but instead merely "one way of assuring that the agency provide neutral references" and not interfere with petitioner's prospects for future employment. *Id.* at 31a. And the court reasoned that none of the SBA employees had materially denied petitioner the benefit of his agreement by giving a negative reference. Of the two who made substantive comments, one's comments "were not negative and could not have had a prejudicial impact on [petitioner's] employment prospects, even if [the DRC caller] had been the representative of an actual potential employer." *Id.* at 32a-33a. The other, Rosenthal, also said "nothing * * * [that] could be construed as an effort to 'block' [petitioner] from obtaining employment elsewhere—the real benefit which [the relevant provision of the settlement agreement] served." *Id.* at 33a.

Specifically, the court found that Rosenthal's "reference to the 'difficult experience' [of] the 'internal battle' over [petitioner's] possible transfer to Kansas City was not a matter of 'vital importance'" and "did not 'frustrate[] substantially' the purpose of the contract." Pet. App. 33a (last brackets in original; citations omitted). The court further determined that "[e]ven if Mr. Rosenthal's statements that [petitioner] may not have gotten along with everyone as well as he got along with Mr. Rosenthal and that [petitioner] might not be the person to 'take it to the next level' could be construed as having a negative connotation to a potential employer,

all of the other statements made by Mr. Rosenthal were either positive or neutral.” *Ibid.* The court concluded that, “[t]aken together,” Rosenthal’s statements “could not have prejudiced [petitioner’s] employment prospects, so [petitioner] was not deprived of the benefit he reasonably expected under the” settlement agreement. *Ibid.*

The court additionally reiterated its concern about the accuracy of the transcribed conversations. Pet. App. 34a. The court reasoned that “even if one were to conclude that some of Mr. Rosenthal’s statements would have had a negative impact on a potential employer, and therefore amounted to a material breach, such a conclusion would turn on a few words that Mr. Rosenthal is reported to have said, not on the general tenor of his recorded conversation.” *Ibid.* “In light of the Court’s doubts as to the accuracy of the 2002 DRC Report,” the district court continued, “the Court cannot conclude that the two or three conceivably negative statements attributed to Mr. Rosenthal, standing alone, are adequate to meet [petitioner’s] burden of proof that a material breach occurred.” *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-7a. Noting first the district court’s finding that petitioner had failed to prove that the DRC reports were “a totally accurate transcription” of DRC’s phone calls to SBA employees, the court of appeals identified “only one relevant exception to the District Court’s broad factual conclusion that SBA employees did not make the allegedly negative statements” about petitioner. *Id.* at 3a. That exception was Rosenthal’s comment that there was “an internal battle going on with [petitioner’s] transfer.” *Id.* at 3a-4a. The court of appeals agreed with the district

court that this comment did not constitute a material breach of the settlement agreement. *Id.* at 4a.

The court observed that the agreement’s purpose was “to ensure neutral references about [petitioner].” Pet. App. 4a. And it pointed out that Rosenthal “made numerous unequivocally positive statements” about petitioner and that Rosenthal’s “overall description of [petitioner] was quite positive, and at worst neutral.” *Ibid.* The court further emphasized that “[e]ven under the materiality standard proposed by [petitioner], a breach is material only if it ‘relates to a matter of vital importance,’” and it concluded that petitioner “ha[d] not met that standard.” *Ibid.* (quoting *Thomas*, 124 F.3d at 1442).

Judge Brown dissented. Pet. App. 5a-7a. In her view, Rosenthal breached the settlement agreement by making “negative statements,” notwithstanding his positive comments. *Id.* at 6a.

ARGUMENT

Petitioner contends (Pet. 7-12) that the court of appeals erred in affirming the district court’s determination that the SBA did not materially breach the settlement agreement. The court of appeals’ decision is correct and does not conflict with any decision of this Court or any other court of appeals. At petitioner’s own urging, the court of appeals expressly applied the same standard the Federal Circuit employs for assessing the materiality of a breach. Like the district court, it concluded that the particular facts of this case did not satisfy that standard. No further review of petitioner’s fact-bound breach-of-contract claim is warranted.

1. Both the court of appeals and the district court, in reciting the standard for determining whether the

breach of a settlement agreement is material, quoted the Federal Circuit’s decision in *Thomas v. HUD*, 124 F.3d 1439 (1997), for the proposition that a “breach is material only if it ‘relates to a matter of vital importance.’” Pet. App. 4a, 29a (quoting 124 F.3d at 1442). As the court of appeals noted, that materiality standard was “proposed by” petitioner. *Id.* at 4a. Both courts determined that petitioner’s case does not satisfy his proposed standard. *Id.* at 4a, 33a.

Notwithstanding the court of appeals’ application of the Federal Circuit standard that he advocated, petitioner nevertheless suggests that the court of appeals’ decision conflicts with three Federal Circuit decisions—including the very Federal Circuit decision from which that standard was drawn. That suggestion lacks merit. The plaintiff-favorable outcomes in those cases reflect their factual differences from this case, rather than any difference in legal standards.

In *Thomas* itself, the Department of Housing and Urban Development (HUD) was required in a settlement agreement to provide “no information” to any person “concerning this agreement or the reasons for [the plaintiff’s] departure from HUD, or other adverse action, performance rating, or the terms of the settlement between [the plaintiff] and HUD.” 124 F.3d at 1440. HUD nevertheless subsequently revealed to a prospective employer that the plaintiff “had been the subject of an Inspector General (‘IG’) matter.” *Id.* at 1441. The Federal Circuit reasoned that this was a material breach of the agreement because the information “at a minimum would put a responsible employing official on inquiry notice, which was exactly what [the plaintiff] wanted to avoid.” *Id.* at 1442. In this case, by contrast, the purpose of the settlement agreement was not to

avoid the mention of a specific matter, but instead simply to ensure that petitioner received “neutral references,” Pet. App. 2a (citation omitted), and both lower courts found that the references he received were at the very least neutral, and could be considered positive. *Id.* at 4a, 33a.

In *Lutz v. United States Postal Service*, 485 F.3d 1377 (Fed. Cir. 2007), a settlement agreement required the Postal Service “to take all necessary steps to cooperate and facilitate” acceptance of the plaintiff’s federal disability-retirement application and “not to place negative statements in the supervisor statement” that was necessary to support that application. *Id.* at 1379. The plaintiff’s benefits application was subsequently denied, after the Postal Service submitted a supervisor statement saying that he had “[r]efused to work” when deemed fit for duty; that he had “claimed an accident” even though he had been found fit; and that he had “supposedly hurt his back.” *Ibid.* The Federal Circuit concluded that the negative statements were a material breach, reasoning that the “essential purpose” of the relevant provision of the settlement agreement “was to accommodate” the plaintiff’s application for disability retirement; that the decisionmaker “explicitly relied on the supervisor’s statements as one of two factors in denying the request for disability retirement”; and that the statements “did discourage * * * acceptance of [the plaintiff’s] disability retirement application.” *Id.* at 1381-1382. The reasoning of *Lutz* would not dictate any different outcome in this case, in which the facts showed that the “essential purpose” of the settlement provision (to provide a neutral reference) was not violated.

Finally, in *Pagan v. Department of Veterans Affairs*, 170 F.3d 1368 (Fed. Cir. 1999), a federal agency agreed

in a settlement to provide the plaintiff with a “clean record.” *Id.* at 1370. The plaintiff subsequently failed to get a job after the agency refused to answer a question from a prospective employer seeking a rating of the plaintiff’s attendance, work performance, behavior, and attitude. *Ibid.* The Federal Circuit concluded that this was a breach of the settlement agreement, which it interpreted to require that the plaintiff’s record “be restored to its former state—with his ‘fully successful’ and ‘highly successful’ ratings uncontroverted by any evidence of charges or the related removal action.” *Id.* at 1371. The decision did not expressly address whether that breach was material. But even if it had held the breach material, that would not suggest the same result here. In *Pagan*, the plaintiff was promised a favorable reference and did not get one; here, the facts showed that petitioner received the neutral reference contemplated by the settlement.

2. Petitioner’s argument, at bottom, is that the lower courts reached the wrong conclusion on the facts of his case. Even if that argument had merit, it would not warrant certiorari. See Sup. Ct. R. 10; *Exxon Co., U.S.A. v. Softec, Inc.*, 517 U.S. 830, 841 (1996) (explaining that this Court ordinarily does not review factual findings on which two courts agree).

This case, moreover, is an especially poor candidate for certiorari because of the substantial uncertainty about the reliability of plaintiff’s evidence. In addition to concluding that petitioner received a neutral (or positive) reference, the district court also premised its denial of relief on its “doubts as to the accuracy of the 2002 DRC Report.” Pet. App. 34a. The district court observed that “[i]f even a few of [Rosenthal’s] reported words were transcribed or reported inaccurately or per-

haps were never said at all, there would be no negative connotations from his reported conversation.” *Ibid.* Because petitioner “simply has not shown by a preponderance of the evidence that such an inaccuracy did not occur,” *id.* at 34a-35a, this case would not provide an adequate factual record for further review, even assuming that such review were otherwise warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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