No. 01-592

In the Supreme Court of the United States

CALIFORNIA FEDERAL BANK, FSB, PETITIONER

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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QUESTIONS PRESENTED

Whether, in this *Winstar*-related case, the court of appeals erred in affirming (1) the trial court's denial of petitioner's claim for restitution and (2) the trial court's calculation of petitioner's capital replacement costs.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 245 F.3d 1342. The opinions of the Court of Federal Claims are reported at 43 Fed. Cl. 445 (Pet. App. 17a-47a) and 39 Fed. Cl. 753 (Pet. App. 48a-101a).

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2001. A petition for rehearing was denied on July 10, 2001 (Pet. App. 16a). The petition for a writ of certiorari was filed on October 9, 2001 (a Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is one of more than 100 pending cases in which thrift institutions and investors are seeking to recover damages from the United States for breach of contract under *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996). In this case, after finding that federal regulators had entered into agreements with petitioner that were breached by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, the Court of Federal Claims awarded petitioner approximately $23 million in damages. On appeal, the Federal Circuit affirmed the trial court's judgment in most respects but vacated the trial court's denial of petitioner's claim for lost profits. At the same time that petitioner is pursuing its claim for lost profits on remand in the trial court, it asks this Court to review the Federal Circuit's interlocutory ruling regarding two other elements of petitioner's claim for damages.

1. a. During the early 1980s, rising interest rates threatened the survival of the thrift industry by forcing thrifts to pay higher rates to depositors than they were earning from their existing portfolios of long-term, fixed-rate mortgages. *Winstar*, 518 U.S. at 845. Petitioner California Federal Bank (CalFed) was among the thrifts whose existence was jeopardized by the interest rate squeeze. Indeed, as the trial court found, "Cal Fed would not have survived had interest rates stayed at the high levels of the early 1980s." Pet. App. 27a-28a; see also *id.* at 47a ("Credible expert testimony established that plaintiff would not have survived further increases in interest rates during those years."). By

1982, CalFed was economically insolvent by anywhere from \$1.1 to \$1.6 billion. *Id.* at 29a.[1]

Economically insolvent thrifts like CalFed found it attractive to acquire other troubled thrift institutions. The acquiring thrift did not risk its own capital in the acquisition, because it had little or no capital left to lose. 2 C.A. App. A3000709-A3000712. Indeed, ultimate liability for both its own deposits and those of the acquired thrift remained with the federal insurance fund. Yet, if interest rates fell and restored the industry to profitability, the net liabilities of both the acquiring and acquired thrift would disappear and the acquiring thrift would own an additional valuable thrift franchise. *Id.* at A3000722. The acquisition also could lead to a variety of accounting and regulatory benefits for the acquirer, including an increase in reported "accretion" income and the treatment of the acquired thrift's net liabilities as regulatory capital in the form of "goodwill." See, *e.g.*, *Winstar*, 518 U.S. at 851-853 (noting the favorable accounting and regulatory treatment of goodwill); 12 C.F.R. 556.5(a)(3) (1985); 2 C.A. App. A3000705.

Acquisitions of insolvent thrifts by other thrifts were attractive to regulators because they enabled the acquirers to "buy time" until interest rates fell. 2 C.A. App. A3000700-A3000701. Failing acquirers could not provide capital to bolster the insurance fund for thrifts, but by reporting accretion income and including goodwill in regulatory capital, they could appear to meet

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[1] See 1 C.A. App. A1000231-A1000234, A1000250-A1000254, A1002226-A1002230, A1002202-A1002203, A1005015-A1005016, A1005031-A1005034, A1005041-A1005043; 2 C.A. App. A3000304-A3000305, A3000692, A3000708-A3000716, A3000789-A3000790, A3000791-A3000793, A3000794-A3000798.

regulatory capital requirements, thereby preserving public confidence in the industry. *Id.* at A3000704, A3000725. Regulators could also pursue the same result through other artificial enhancements to a thrift's regulatory capital, or simply by replacing the thrift's management and waiting for rates to fall. *Id.* at A3000716.

b. CalFed made three acquisitions during the early 1980s that are relevant to its petition. In each instance, the acquired thrift institutions had net liabilities, which were recorded on CalFed's balance sheet as goodwill and treated as regulatory capital. See generally *Winstar*, 518 U.S. at 848-851 (discussing regulatory treatment of supervisory goodwill).

First, in February 1982, CalFed acquired four thrift institutions in Georgia and Florida, known collectively as Southeast. Pet. App. 18a & n.1. The Federal Savings and Loan Insurance Corporation (FSLIC) provided $9 million in cash assistance for the transaction, and CalFed recorded on its balance sheet the acquired thrifts' assets and approximately $305 million in net liabilities, as well as a comparable amount of goodwill, to be amortized over a period of 35 to 40 years. Pet. App. 2a, 18a-19a.

Second, in October 1982, CalFed acquired the parent company of Brentwood Savings and Loan Association. CalFed recorded Brentwood's assets, approximately $315 million in net liabilities, and a comparable amount of goodwill, to be amortized over a 35-year period. Pet. App. 3a; see 3 C.A. App. A5002325.

Finally, in January 1983, CalFed acquired Family Savings and Loan Association. CalFed recorded Family's assets and approximately $18 million in net liabilities, as well as a comparable amount of goodwill, to be amortized over a 40-year period. Pet. App. 3a.

2. Congress enacted FIRREA in 1989. Among other things, FIRREA required the phase-out of goodwill from regulatory capital over a five-year period. See *Winstar*, 518 U.S. at 856-857. This phase-out required CalFed to operate with the same ratio of tangible capital to assets as all other thrifts. 1 C.A. App. A1002170-A1002172, A1002178-A1002179-A1002180. To the extent that CalFed had relied upon goodwill to meet its capital requirements, the phase-out required it to infuse more money into the thrift to replace the phased-out goodwill, thereby operating with more tangible capital and less debt. *Id.* at A1002170-A1002172. Between 1992 and 1994, CalFed raised more than $400 million in capital in a series of stock transactions, an amount greater than the unamortized goodwill associated with the Southeastern, Brentwood, and Family transactions. See Pet. App. 44a-45a & n.13. CalFed could invest the additional capital to earn a return, as firms do whenever they raise capital to fund new investments. 1 C.A. App. A1002179, A1002169-A1002170; 2 C.A. App. A3000407-A3000408.

3. In 1992, CalFed filed a complaint in the Court of Federal Claims, alleging that the government had entered into contracts with CalFed when regulators approved each of the three acquisitions at issue here and that Congress had breached those contracts through the enactment of FIRREA. Pet. App. 2a-4a. In response, the government acknowledged that the Southeast acquisition involved an assistance agreement between FSLIC and petitioner, but denied that the regulatory approval of the Brentwood and Family acquisitions had resulted in any contract between the government and petitioner. In 1997, the Court of Federal Claims granted CalFed's motion for summary judgment on liability, concluding that the regulatory

approval of all three acquisitions resulted in contracts and that the government was liable for damages resulting from the breach of those contracts by FIRREA. *Id.* at 48a-101a.

The court then held proceedings with respect to CalFed's claims for damages. First, CalFed asserted a claim for over $600 million in lost profits, based on business opportunities with third parties that allegedly were forgone due to the phase-out of goodwill. Pet. App. 9a-11a. Second, CalFed sought $409 million in restitution, based on the amount of net liabilities assumed by CalFed in connection with the acquisitions of Southeast and Brentwood ($620 million) minus CalFed's calculation of its earnings from the acquired thrifts. *Id.* at 13a.[2] Third, CalFed presented a hypothetical "cost of replacement" claim, based upon a model purporting to show that it would cost almost $1 billion to replace the $390 million in goodwill that FIRREA excluded from CalFed's regulatory capital.

The trial court entered summary judgment against CalFed with respect to its lost-profits claim, ruling that the claim was too speculative as a matter of law. Pet. App. 20a-21a. The court thereafter held a six-week trial on CalFed's remaining claims for recovery. In April 1999, the court awarded CalFed approximately $23 million in damages. *Id.* at 17a-47a.

The trial court's award reflected the actual transaction costs incurred by CalFed in obtaining capital to replace the phased-out goodwill. Pet. App. 44a-46a. The court rejected petitioner's other claims for recov-

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[2] CalFed conceded that, under any standard of restitution, the Family transaction resulted in a net benefit to CalFed. CalFed therefore excluded the Family transaction from its restitutionary claim.

ery, finding that "[t]he facts of this particular case do not establish that [CalFed] suffered monetary loss beyond its expenses of raising new capital." *Id.* at 47a.

In denying CalFed's claim for restitution, the trial court rejected CalFed's theory that it had conferred a benefit on the government equal to the acquired thrifts' net liabilities by "assuming" those liabilities at the time of the acquisitions. The court pointed out that the government "remained responsible for those liabilities as if the contract[s] never had been executed" and found that, "[w]ere it not for falling interest rates, the United States probably would have had to make [the net] liabilities in the form of deposits good." Pet. App. 47a. The trial court rejected CalFed's claim that it had eliminated the need for the regulators to liquidate the acquired thrifts, finding instead that "[t]he Government had not made a decision to liquidate Brentwood or Southeast at the time of contracting" and "had several alternatives to liquidation available." *Id.* at 33a. The trial court found that the only benefit that CalFed had conferred upon the government was "buying time" until interest rates declined from their historic heights. *Id.* at 47a.

The trial court recognized that there could be "circumstances in which assumption of deposits would be a real cost" to an acquiring thrift, but it found that "they were not a cost to this plaintiff." Pet. App. 26a. The trial court found that, "[w]hen interest rates declined, the net liabilities disappeared," and CalFed paid the net liabilities "out of the acquired assets[,] * * * [which] produced the income or revenue needed to honor the liabilities." *Id.* at 27a-28a. The trial court further found that the Brentwood acquisition resulted in a net benefit to CalFed, rather than a net cost, and that CalFed's assertion that hundreds of million of dollars in costs from its California operations should be allocated to Southeast was based on "pure speculation." *Id*. at 32a.

The trial court also rejected CalFed's claim that it had incurred costs of replacing the goodwill above and beyond its transaction costs. Relying upon the testimony of Professor Merton Miller, a Nobel laureate in economic science, the trial court found that, "[o]n the day stock is issued, the amount you receive for the stock is equivalent to its worth and the only costs are transaction, or flotation costs." Pet. App. 45a. In contrast, the trial court found that the testimony of CalFed's expert regarding replacement costs was not credible, particularly because he assumed that the cash value of CalFed's goodwill, a non-earning asset, was approximately two and one-half times the amount of the goodwill. *Ibid*. The trial court concluded that any award in excess of transaction costs "would be more than necessary to make CalFed whole." *Ibid*.

4. CalFed appealed the trial court's rejection of the lost profits, restitution, and hypothetical cost of replacement claims. The government cross-appealed the trial court's grant of summary judgment on liability with respect to the Brentwood and Family transactions. The Federal Circuit vacated the trial court's denial of CalFed's lost profits claim and affirmed the judgment in all other respects. Pet. App. 1a-15a. The Federal Circuit remanded the case for further proceedings on the lost profits claim; those proceedings are now under way before the trial court.

a. In addressing CalFed's claim for restitution, the court began with the proposition that "restitution is [intended] to restore the non-breaching party to the position it would have been in had there never been a contract to breach." Pet. App. 12a. In applying that proposition to CalFed's claim, the court looked for guidance to *Glendale Federal Bank, F.S.B.* v. *United States*, 239 F.3d 1374 (Fed. Cir. 2001). See Pet. App. 13a-14a.

In *Glendale*, as in this case, an acquiring thrift argued that its assumption of an acquired thrift's net liabilities conferred a dollar-for-dollar benefit on the government and that it was therefore entitled to recover the amount of the net liabilities as restitution. The Federal Circuit held that the net liabilities did not constitute an appropriate basis for restitution because the acquisition "did not result in the Government * * * saving the dollar value of the net obligations of the [acquired] thrift." 239 F.3d at 1382. The court pointed out that, even after the acquisition, the government remained potentially liable for the liabilities of the failing thrift, and if interest rates had not fallen, "the Government's contingent liability would have matured." *Ibid.* Moreover, the court noted that the government had a variety of regulatory alternatives to liquidating the failing thrift and paying off its depositors, such as "hiring new and better management to * * * make a go of it," and hence the government would not necessarily have had to make up the thrift's deficit in the absence of the acquisition. *Ibid.*

The court concluded in *Glendale* that "what the Government received" by virtue of the acquisition "was time," and "[t]hough the value of time was more than zero, there is *no proof* of what in fact it was worth." 239 F.3d at 1382 (emphasis added). The court found no basis for "granting restitution based on an assumption that the non-breaching party is entitled to the supposed gains received by the breaching party, when those gains are both speculative and indeterminate," and when the plaintiff relies on "a liability that never came to pass, and * * * a speculative assessment of what might have been." *Ibid.* Here, the Federal Circuit found "no meaningful difference between the restitution claims in this case and [those in] *Glendale*," and therefore affirmed the trial court's denial of restitution. Pet. App. 14a.

b. The court of appeals also affirmed the trial court's finding that the cost of replacing CalFed's phased-out goodwill was the transaction costs incurred in obtaining the new capital. Noting Professor Miller's expert testimony, the court of appeals affirmed the trial court's finding that these costs, which totaled $23 million, "provided an appropriate measure of CalFed's damages incurred in replacing the supervisory goodwill with tangible capital." Pet. App. 12a.

c. Finally, the court of appeals reversed the trial court's summary judgment in favor of the government on CalFed's claim for lost profits, concluding that CalFed had presented sufficient evidence of actual post-breach business transactions to create a genuine issue of material fact. Pet. App. 10a-11a. The case was remanded to the trial court for completion of expert discovery and a trial on CalFed's lost profits claim. Those proceedings are now under way.

ARGUMENT

The decision of the court of appeals on the restitution and cost-of-capital issues is correct and does not conflict with any decision of this Court or any other court of appeals. Far from relying on "novel 'special rules'" that give preferential treatment to the government (Pet. 10), the decision rests on well-settled principles of general applicability regarding remedies for breach of contract. The Federal Circuit's application of those settled principles to the factual record in this case is correct and does not warrant review by this Court. Moreover, even if the remedial issues raised by CalFed might be suitable for review at the conclusion of this litigation, they are premature in the present interlocutory posture of this case.[3]

1. This Court's customary practice is to "await final judgment in the lower courts before exercising our certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); see, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). There is no reason for the Court to depart from—and particularly strong reasons to follow—that practice in this case. CalFed's pending unresolved claim for lost profits could potentially moot the issues raised in this petition and the pendency of that claim counsels strongly against piecemeal review of CalFed's other remedial claims at this time.

If CalFed prevails on its claim for lost profits, then its claim for restitution—the claim at the heart of its petition—may be rendered entirely moot. In the remand proceedings, CalFed claims to be entitled to more than $600 million in alleged lost profits, roughly $200 million more than the amount of its claim for restitution. The same ordinary rules of contract remedies on which petitioner relies make clear that CalFed cannot recover both lost profits and restitution, for expectancy damages and restitution are exclusive and incompatible remedies. *Petrofsky* v. *United States*, 488 F.2d 1394, 1405 (Ct. Cl. 1973); *Dolmatch Group, Ltd.* v. *United States*, 40 Fed. Cl. 431, 439-440 (1998); see Restatement

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[3] The United States has filed a conditional cross-petition for a writ of certiorari (No. 01-698) seeking review of the Federal Circuit's liability holding at this interlocutory stage if, but only if, the Court grants this petition.

(Second) of Contracts § 378, Comment d (1981) ("[T]he remedy of restitution and that of damages for total breach are inconsistent."); Restatement of Contracts § 384, Comment c (1932) ("The entry of a final judgment in the plaintiff's favor for either damages or restitution operates to bar any further action for either remedy for the same breach."); 5A *Corbin on Contracts* § 1223 (1964 & Supp. 2000). Thus, if CalFed recovers the full amount of its lost-profits claim, or anything approaching that amount, CalFed's claim for restitution will be rendered moot, because CalFed will have recovered more than it could obtain on the basis of its alternative restitutionary claim.

The resolution of CalFed's lost-profits claim also may affect CalFed's hypothetical cost of replacement claim. In the course of the current remand proceeding, CalFed has served the government with an expert report that takes the position that CalFed never replaced its phased-out goodwill.[4] If CalFed were to persuade the trial court to adopt that position for purposes of CalFed's lost-profits claim, then the factual predicate for CalFed's cost-of-replacement claim—namely, that CalFed *did* replace the goodwill through stock offerings,

[4] See Report of Prof. Christopher James (Nov. 21, 2001), *California Federal Bank* v. *United States*, No. 92-138C (Ct. Fed. Cl.). In the Report, Prof. James opines that "CalFed would have raised approximately the same amount of new capital during approximately the same period of time even absent the breach, and hence would have had *both* the supervisory goodwill capital and this additional capital." *Id.* at 3. CalFed seeks $645.9 million of alleged lost profits, *id.* at 22, but concedes that its lost profits totaled no more than $281.5 million, including the previously-awarded replacement costs, if its raising of capital replaced the goodwill, *id.* at 23.

for which it incurred and continues to incur actual costs —would disappear.

Moreover, in light of the magnitude of CalFed's lost-profits claim and the legal theories on which it rests, either the United States or CalFed might have occasion to seek further review, including review by this Court, after proceedings in the trial court on that claim. The Court could thus find itself called upon to review the remedial issues in this case in piecemeal fashion, addressing some issues at an interlocutory stage and others when the litigation is over. One of the principal reasons why the Court traditionally has deferred review until the entry of a final judgment, even when finality is not a jurisdictional prerequisite, is to avoid the inefficiency inherent in such piecemeal review.

CalFed suggests (Pet. 28) that interlocutory review is nevertheless warranted because the present decision will deny replacement costs and restitution to "hundreds of injured parties" in the *Winstar*-related cases pending before the Court of Federal Claims and the Federal Circuit. CalFed overstates the breadth of the Federal Circuit's decision. The decision sustains, rather than rejects, the awarding of damages for capital replacement costs; CalFed's only quarrel is with the lower court's calculation of what those costs were.

With respect to restitution, the Federal Circuit has only held that CalFed failed to prove that it conferred the benefit it alleged and has presented "no proof" that could support an award of restitution based upon the actual benefit conferred. Pet. App. 14a. Recent decisions by the Federal Circuit and the Court of Federal Claims suggest that restitution may be available in certain other *Winstar*-related cases, based on different theories of restitution than those presented here. For example, the Federal Circuit has suggested that restitution might be appropriate where—unlike here—an outside investor infused tangible assets into an acquired thrift that was seized by the government after FIRREA. See, *e.g.*, *Landmark Land Co.* v. *FDIC*, 256 F.3d 1365 (Fed. Cir. 2001). Thus, while CalFed was unable to prove that its assumption of net liabilities resulted in a corresponding saving to the government that would justify an award of restitution, that does not mean that all plaintiffs in *Winstar*-related cases will be foreclosed, as a matter of law, from obtaining restitution in appropriate cases.

Thus far, only a comparative handful of *Winstar*-related cases have proceeded to final judgment in the Court of Federal Claims, and fewer still have been resolved by the Federal Circuit on appeal. If this body of litigation gives rise to remedial issues that warrant review by this Court, there will be ample time and opportunity for the Court to identify those issues and to review them in cases that have gone to final judgment.

2. Even if it were not premature, review by this Court would remain unwarranted because the Federal Circuit correctly sustained the trial court's denial of CalFed's claim for restitution. Far from relying on "novel legal propositions" (Pet. 10), the Federal Circuit employed well-settled principles governing restitution as a remedy for breach of contract. Applying those principles, the Federal Circuit properly affirmed the trial court's finding that CalFed's assumption of net liabilities in the Southeast and Brentwood transactions did not confer a benefit of equal dollar value on the government and that CalFed introduced "no proof" with respect to "the value of time"—the only benefit that could have been conferred.

a. The court of appeals proceeded from the basic premise that "restitution is [intended] to restore the non-breaching party to the position it would have been in had there never been a contract to breach." Pet. App. 12a. The court relied on the same premise in *Glendale*, explaining that "[t]he idea behind restitution is to restore—that is, to restore the non-breaching party to the position he would have been in had there never been a contract to breach." *Glendale*, 239 F.3d at 1380. Far from being either novel or wrong, that premise is a bedrock element of the law of restitution and contract. See, *e.g.*, *Acme Process Equip. Co.* v. *United States*, 347 F.2d 509, 528 (Ct. Cl. 1965) (purpose of restitution is to "restore the injured party to the pre-contract status quo, not to put him in his post-contract position"), rev'd on other grounds, 385 U.S. 138 (1966); *Arizona* v. *United States*, 575 F.2d 855, 864 (Ct. Cl. 1978) (purpose of restitution is "making plaintiff whole"); Restatement of Contracts § 347, Comment b (1932) (purpose of restitution is "restoration of the injured party to as good a position as that occupied by him before the contract was made"); *id.* § 349, Comment a (purpose of restitution is "restoration of the status quo ante as far as is practicable"); Restatement (Second) of Contracts § 384, Comment a (1981) (purpose of restitution is "to return the parties, as nearly as is practicable, to the situation in which they found themselves before they made the contract"); John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 15.4 (4th ed. 1998) (purpose of restitution is "to place the plaintiff in the same economic position as the plaintiff enjoyed prior to contracting").

Petitioner argues (Pet. 11-12) that restitution should be calculated solely on the basis of the benefit conferred by the plaintiff on the defendant, not on the basis of the costs incurred by the plaintiff through its performance. Petitioner's argument conflates notions of disgorgement with the distinct remedy of restitution. Requiring the defendant to restore benefits conferred by the plaintiff, even when those benefits exceed the sums needed to restore the plaintiff to its *status quo ante*, amounts to a form of disgorgement. The remedy of disgorgement is ordinarily confined to circumstances in which defendants have consciously made wrongful use of another's property, such as embezzlement, conversion, and copyright infringement. See Pet. App. 47a. Disgorgement has never been accepted as a remedy for ordinary breach of contract. *Burger King Corp.* v. *Mason*, 710 F.2d 1480, 1494 (11th Cir. 1983); Restatement (Second) of Contracts § 371, Ill. 2 (1981); 3 Dan B. Dobbs, *Law of Remedies* § 12.7(3), at 167 (2d ed. 1993); *id.* § 12.7(4), at 171; see Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 Tex. L. Rev. 2021, 2021-2027, 2043-2044 (2001); E. Allan Farnsworth, *Your Loss or My Gain?—The Dilemma of a Disgorgement Principle in Breach of Contract*, 94 Yale L.J. 1339 (1985).

But even assuming *arguendo* that a plaintiff is entitled to restitution of benefits conferred even when they exceed the plaintiff's own costs of performance[5]—and even assuming as well that a restitutionary remedy restoring the parties to their pre-contract situation is permissible in a case like this, in which CalFed operated the acquired thrifts for many years and "unscrambling the egg" is likely to be impossible[6]—nothing in the

[5] But see Illustration 2, Restatement (Second) of Contracts § 371 (1981).

[6] See Restatement (Second) of Contracts § 384 Comment a (1981) (noting that if the non-breaching party "has received land, goods or other property, he is expected to return it" and that "[i]f it has been used, destroyed or substantially altered in character while in his possession, restitution is generally not available");

decision below is inconsistent with the "benefits conferred" legal standard. In *Glendale*, the Federal Circuit expressly acknowledged that restitution "is sometimes described in terms of taking from the breaching party any benefits he received from the contract and returning them to the non-breaching party. * * * That requires determining what benefit from the contract the breaching party has received, and restoring that to the nonbreaching party." 239 F.3d at 1380-1381. And in this case, the Federal Circuit approached CalFed's restitution claim by asking precisely the question that CalFed says it should have asked—namely, what benefit did CalFed actually confer on the government through the Southeast and Brentwood acquisitions? As the court stated, CalFed argued that the benefit conferred was the assumption of net liabilities totaling $409 million, Pet. App. 12a, while the government argued and the trial court held that "CalFed conferred no such benefit" and that the benefit conferred instead was "buying time" until rates declined, *id.* at 13a.

The Federal Circuit affirmed the trial court and rejected CalFed's argument not because it regarded the benefits conferred by CalFed as legally irrelevant, but instead because it agreed with the trial court that CalFed's assumption of net liabilities did not, as a matter of fact, confer the benefit that CalFed alleged—a dollar-for-dollar benefit equaling the amount of the assumed liabilities. Pet. App. 13a-14a; see *id.* at 13a

accord *LaSalle Talman Bank, F.S.B.* v. *United States*, 45 Fed. Cl. 64, 68, 120 (1999), appeals pending, Nos. 00-5005, 00-5027 (Fed. Cir.); *Aurigemma* v. *ARCO Petroleum Prods. Co.*, 734 F. Supp. 1025, 1032-1033 (D. Conn. 1990); *Svendborg* v. *United States*, 130 F. Supp. 363, 367 (Ct. Cl. 1955), certs. dismissed, 350 U.S. 978 and 979 (1956).

("[T]he action taken by the purchasing S & L in acquiring the failing thrift did not result in the Government, specifically the FSLIC, saving the dollar value of the net obligations of the thrift.") (quoting *Glendale*, 239 F.3d at 1382). CalFed's petition thus presents the Court not with a legal dispute regarding the proper benchmark for restitution, but rather with a factual dispute regarding the application of the legal benchmark petitioner endorses to the circumstances of this case. The resolution of that case-specific application of law to fact by the courts below is correct and does not warrant further consideration by this Court.

As the Federal Circuit noted, CalFed's acquisition of Southeast and Brentwood did not relieve the government of its potential financial responsibility for the net liabilities of those institutions. Pet. 14a. Absent a decline in interest rates, the government "would have had to step in at that time and assume the very losses that [CalFed] now claims were benefits the Government received." *Glendale*, 239 F.3d at 1382; Pet. App. 14a ("no meaningful difference" between *Glendale* and this case). CalFed now asserts that, at the time of the acquisitions, the risk of its failure was "nominal" and that it could provide a "permanent solution" for the acquired thrifts with "no material risk of failure." Pet. 14 n.4, 18-19. But the trial record is otherwise: as the trial court found, "Cal Fed would not have survived had interest rates stayed at the high levels of the early 1980s." Pet. App. 27a-28a; see also *id.* at 47a ("Credible expert testimony established that plaintiff would not have survived further increases in interest rates during those years."). Indeed, federal regulators and CalFed itself recognized at the time that CalFed's survival depended upon a decline in interest rates (2 C.A. App. A3000071; 3 C.A. App. A5001480), and CalFed conceded that point at trial. 1 C.A. App. A1002240-A1002242. And if rates did decline, as they ultimately did, the net liabilities would be eliminated and neither CalFed nor the government would have to pay them. *Glendale*, 239 F.3d at 1382.

CalFed suggests (Pet. 5), contrary to the findings below, that it "reliev[ed] the government of hundreds of millions of dollars in insurance liabilities" by "pa[ying] the liabilities of the acquired thrifts as they became due." But based on testimony by the government's expert witness, the trial court found, and the court of appeals affirmed, that CalFed did not confer the alleged benefit, since CalFed paid the liabilities it acquired out of the assets that it also acquired. As the trial court found, "[w]hen interest rates declined, the net liabilities disappeared," and "[t]he rates 'fell well beyond the point needed simply to achieve a break-even status.'" Pet. App. 27a-28a (quoting expert testimony). CalFed "paid" the acquired liabilities "'out of the acquired assets," which "produced the income or revenue needed to honor the liabilities.'" *Ibid.*

b. CalFed argues (Pet. 12-13) that the Federal Circuit's consideration of post-acquisition events conflicts with this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000). In so arguing, CalFed mischaracterizes the Federal Circuit's reasoning. The Federal Circuit explicitly recognized in *Glendale* that "the critical event that fixes the damages [for purposes of restitution] is when the contract was entered into"—precisely the rule that CalFed accuses the Federal Circuit of having rejected. *Glendale*, 239 F.3d at 1383. To the extent that the Federal Circuit looked at potential events that occurred after the time "when the contract was entered into," it did so not because they subsequently reduced the original value of the benefit that CalFed had conferred on the government, but rather because the possibility of those events occurring showed that CalFed did not confer the benefit it claimed—the removal of the net liabilities of the acquired institutions from FSLIC's responsibility. Pet. App. 13a ("[T]he action taken by the purchasing S & L in acquiring the failing thrift did not result in the Government, specifically the FSLIC, saving the dollar value of the net obligations of the thrift.") (quoting *Glendale*, 239 F.3d at 1382).

The Federal Circuit was not presented with a case in which a plaintiff confers an immediate benefit on a defendant that is "*later* lost, destroyed, or squandered." Pet. 13 (quoting Restatement (Second) of Contracts § 370, Comment a (1981), with emphasis added in petition)). Instead, this is a case in which uncertainty over the future course of events renders the value of the plaintiff's performance inherently doubtful at the very time that the performance takes place, and where the plaintiff's own theory of restitution is itself "based on a speculative assessment of what might have been." *Glendale*, 239 F.3d at 1382.[7]

Nothing in the Federal Circuit's treatment of this situation conflicts with this Court's decision in *Mobil*. Indeed, *Mobil* undermines petitioner's argument because there the Court rejected an effort to allow speculation about what might transpire to affect the plaintiff's recovery. Specifically, in *Mobil*, the Court

[7] It is notable that CalFed itself relies upon post-acquisition events in describing its alleged performance. For example, CalFed contends (Pet. 5) that it was "fulfilling its end of the supervisory merger 'bargain'" by allegedly paying the net liabilities "as they became due" during the years after its acquisitions. Thus, to the extent the court of appeals considered "subsequent events" in this case, it did so at CalFed's invitation.

rejected an argument that the plaintiff oil companies were not entitled to recover their lease payments to the government because the leases would have proven unprofitable even if the government had performed its contractual obligations. 530 U.S. at 623-624. The Court explained that "the law entitles the companies to * * * restitution [of their payments] whether the contracts would, or would not, ultimately have produced a financial gain" for the companies. *Ibid.* In other words, a plaintiff who confers a contractual benefit on a defendant may recover the benefit *actually* conferred, regardless of any speculation about what benefit the plaintiff would have received if, contrary to fact, the defendant had honored the contract. Here, CalFed's restitution theory rests on similar counterfactual speculation. Unlike the cash payments at issue in *Mobil*, here the benefit that CalFed sought to recover—$620 million—was never conferred on the government at all. Indeed, the government remained contingently liable for the net liabilities as insurer both before and after CalFed's acquisitions of the thrifts.

c. CalFed asserts (Pet. 15-16) that the court of appeals erred by holding that restitution was unavailable "as a matter of law" because the government had options for resolving the acquired thrifts other than that of allowing CalFed to acquire them. However, the court of appeals addressed the existence of the government's regulatory options not as a matter of law, but rather as a factual matter bearing on CalFed's claim that it had conferred "indirect benefits" in the amount of the net liabilities by relieving the government of its alleged obligation to liquidate the acquired thrifts on the date of the acquisitions. The court of appeals concluded that CalFed's claim was factually incorrect because, as the record established, the government had no such obligation; it could have pursued options other than liquidation, such as installing new management for the acquired thrifts. Pet. App 13a-14a (citing *Glendale*, 239 F.3d at 1382); see also *id.* at 33a (trial court opinion); *LaSalle*, 45 Fed. Cl. at 117 n.87. Moreover, the existence of other options available to the government further underscores the "speculative and indeterminate" nature of CalFed's theory of recovery. Pet. App. 14a.[8]

d. CalFed claims (Pet. 14-15) that the court of appeals concluded that CalFed had conferred a "*substantial*" benefit upon the government, but improperly required CalFed to establish the "precise amount" of that benefit. That claim rests on a misreading of the court's opinion.

The Federal Circuit did not conclude that CalFed had conferred a "substantial" benefit upon the government. The court identified "buying time" as the only benefit conferred by CalFed, and the court concluded not that its value was "substantial," but simply that it was "more than zero." Pet. App. 14a (quoting *Glendale*, 239 F.3d at 1382). Contrary to CalFed's suggestion, the court of appeals did not demand that CalFed establish the "precise amount" of this benefit. Instead, the court observed that CalFed had presented "no proof" at all regarding the value of the benefit. *Ibid*. The court's decision is thus entirely consistent with the principle invoked by CalFed (Pet. 14-15) that a plaintiff need not

[8] CalFed apparently has abandoned its prior claim that the government would have liquidated the acquired thrifts absent CalFed's acquiring them, and now contends that whether the government would have liquidated the thrifts or pursued other options is "legally irrelevant." Pet. 15-17.

establish "the precise amount of the damage" in order to recover for a breach of contract.

CalFed suggests (Pet. 19) that it was denied a fair opportunity to establish the value of "buying time" because that benefit "is different from what either party had advanced" before and "was not clearly foreshadowed by pre-existing authority." But as the trial court's opinion indicates, the government consistently took the position below that the federal regulators were "merely 'buying time' by their negotiations" with acquiring thrifts such as CalFed. Pet. App. 47a. Thus, CalFed was well aware of the government's position, ultimately adopted by the trial court and the court of appeals, that the benefit received by both parties was additional time to ride out abnormally high interest rates and their effect on the industry. Instead of trying to establish the value of that benefit, as it was free to do, CalFed made the choice to rest its restitutionary claim exclusively on the net liabilities assumed in the acquisitions of Southeast and Brentwood. Even now, moreover, CalFed does not suggest that the value to the government of "buying time" exceeded the hundreds of millions of dollars of benefits that CalFed received from the government's own performance.

In any event, any benefit that CalFed conferred on the government must be reduced by the even greater benefits that CalFed itself realized from the Southeast and Brentwood acquisitions.[9] Contrary to CalFed's

[9] See Restatement (Second) of Contracts § 384 Comment a (1981) ("A party who seeks restitution of a benefit that he has conferred on the other party is expected to return what he has received from the other party."); see also *id.* § 384(a)(1) and (2)(b) (party seeking restitution must tender "any interest in property that he has received in exchange" or "compensation * * * in its place").

assertion that the government "produced *no* evidence whatsoever" concerning the value of the benefits that CalFed received (Pet. 13-14 n.4), the government presented expert testimony showing that CalFed had grossly understated the value of the benefits it received from the government's performance. See Pet. App. 30a-33a. Among other things, the government demonstrated that CalFed had improperly excluded $180 million of accretion income attributable to the Brentwood transaction, and that CalFed's allocation of $234 million of costs from its California operations to Southeast was impermissibly speculative. See *id.* at 32a; 1 C.A. App. A1003687-A1003719; 2 C.A. App. A3000519-A3000550, A3000624-A3000629, A3000655-A3000668. The testimony also showed that CalFed had understated Southeast's income by $115 million (1 C.A. App. A1005102-A1005103; 2 C.A. App. A3000520, A3000523, A3000646-A3000655) and that CalFed had improperly charged the government with responsibility for CalFed's bad loans and any other business decisions that went awry (1 C.A. App. A1001813-A1001814, A1001822; 2 C.A. App. A3000732-A3000733; see Pet. App. 31a-32a). Thus, even if CalFed's assumption of net liabilities had conferred a dollar-for-dollar benefit on the government, the benefits received by CalFed exceeded the amount of the assumed net liabilities, precluding any restitutionary award.

e. CalFed claims that the Federal Circuit's restitution holding conflicts with the Ninth Circuit's decision in *Far West Federal Bank* v. *Office of Thrift Supervision*, 119 F.3d 1358 (1997), and the Tenth Circuit's decision in *Resolution Trust Corp. (RTC)* v. *FSLIC*, 25 F.3d 1493, 1497, reh'g denied, 34 F.3d 982 (1994). Even if a conflict existed, its practical significance would be limited at best, because no *Winstar*-related cases are now being litigated outside of the Federal Circuit. In any event, there is no conflict, because *Far West* and *RTC* involve claims for restitution that are fundamentally different from CalFed's claim in this case.

In *Far West* and *RTC*, the plaintiffs were outside investors who infused cash in acquired thrifts, which were subsequently seized by the government upon the enactment of FIRREA. The courts reasoned that, in the circumstances of those cases, the plaintiffs' capital infusions conferred a corresponding benefit upon the government by giving the thrifts more capital than they would otherwise have possessed. See *Far West*, 119 F.3d at 1366 ("By investing $26.6 million in Far West, the Investors at the very least bore some of the government's risk of loss in the event of Far West's failure."); *RTC*, 25 F.3d at 1505 (restitution award justified by "the undisputed fact that the Investors had infused $6 million" into the thrift). Moreover, in both cases, returning the parties to their pre-contract position was possible because, given the seizure of the acquired thrift institutions, awarding restitution did not require "unscrambling the egg" to determine the net benefits that the non-breaching party received from the contract.

Unlike CalFed, the plaintiffs in *Far West* and *RTC* did not contend that the benefit they conferred upon the government corresponded to allegedly saved liquidation costs or the assumption of net liabilities for which FSLIC retained contingent responsibility; those decisions involve an entirely different benefit and an entirely different (and more concrete and straightforward) method of measuring that benefit.

Contrary to CalFed's suggestion (Pet. 20), *Far West* does not hold that the existence of regulatory alternatives to liquidation "is legally irrelevant to the availability and amount of restitution." Instead, the Ninth Circuit in *Far West* merely held that the government's regulatory alternatives were immaterial in the particular circumstances before it, because "there is no question that the Investors conferred *some* benefit on the government" by infusing capital into the thrift. 119 F.3d at 1366 (emphasis in original). In *Far West*, the investors were ultimately held to be entitled to restitution of precisely the amount they invested in the thrift, a measure that would result in no recovery by CalFed here. In short, the Ninth Circuit did not purport to address a situation, like the one here, in which an acquirer contributes no capital at all to the acquired thrift. And the Federal Circuit, far from disagreeing with *Far West*, cited the decision with approval in *Glendale*. See 239 F.3d at 1380.

CalFed's reliance on *RTC* is likewise mistaken. *RTC* held that the plaintiffs' right to recover their capital infusion was not affected by the fact that the government ultimately had to liquidate the thrift after the enactment of FIRREA. 34 F.3d at 984. The court relied on the rule that a conferred benefit may be recovered even if it "was or may have been 'later lost, destroyed, or squandered.'" *Ibid.* (quoting Restatement (Second) of Contracts § 370, Comment a (1981)). As explained above, the Federal Circuit's decision in this case is consistent with that rule; the Federal Circuit rejected CalFed's claim for restitution not because the benefit that CalFed claimed to have conferred was "later lost, destroyed, or squandered," but because it was never conferred in the first place.

3. CalFed also challenges (Pet. 23-27) the Federal Circuit's conclusion that the trial court did not err in calculating the costs incurred by CalFed in replacing its goodwill. The trial court's factual findings regarding

the quantum of replacement costs are correct, and the Federal Circuit's affirmance of those findings does not warrant plenary review by this Court.

CalFed argues (Pet. 23) that the trial court erroneously held that goodwill is an "accounting gimmick" with no economic value and that the Federal Circuit's decision rests on that holding. The trial court's characterization of goodwill as an "accounting gimmick" can hardly be faulted, for the plurality characterized it in precisely the same terms in *Winstar* itself. See 518 U.S. at 900 (plurality opinion) (FIRREA "eliminat[ed] the * * * accounting gimmicks that acquiring thrifts had been promised"). Notwithstanding that characterization, neither the trial court nor the Federal Circuit held that goodwill had no economic value to CalFed. If the trial court had believed that goodwill has no economic value, it would not have awarded CalFed $23 million in damages for the costs incurred in replacing goodwill.

CalFed next contends (Pet. 24) that the court of appeals erred by measuring replacement costs as of the time of replacement, instead of "through the time of the complete promised performance." The court of appeals simply affirmed the Court of Federal Claims' finding that, as a matter of fact, CalFed did not incur any additional costs following the replacement, whether through the date of "promised performance" or any other period. That finding disposes of CalFed's hypothetical replacement-cost claim.

The trial court based its finding upon the expert testimony of the government's Nobel laureate economist, Professor Miller. Pet. App. 45a. Professor Miller explained that, "[o]n the day stock is issued, the amount you receive for the stock is equivalent to its worth and the only costs are transaction, or flotation[,] costs."

Ibid. Consistent with that testimony, the only capital-replacement costs that CalFed reported in its securities filings were transaction costs. 1 C.A. App. A1002461-1002462; 2 C.A. App. A3000407-3000408.

CalFed argues (Pet. 24-25) that the trial court's reliance on Professor Miller's testimony was misplaced because it overlooked the costs of paying dividends on the new capital. But, as Professor Miller explained, when a thrift raises capital, it receives from investors an amount equal to the value of the promise to pay future dividends, taking into account risk and the time value of money. Thus, the thrift replaces a promise to pay investors with the equivalent in cash. See *Glendale Fed. Bank, F.S.B.* v. *United States*, 43 Fed. Cl. 390, 401-402 (1999), rev'd on other grounds, 239 F.3d 1374 (Fed. Cir. 2001); 2 C.A. App. A3000400, A3000407-A3000409. In the end, CalFed is simply faulting the trial court for crediting the government's expert regarding replacement costs rather than CalFed's expert—a matter that does not warrant this Court's attention.[10]

[10] CalFed contends (Pet. 25) that the rejection of its hypothetical replacement-cost claim conflicts with the Federal Circuit's decision in *Bluebonnet Savings Bank, F.S.B.* v. *United States*, No. 00-5128, 2001 WL 1111519 (Fed. Cir. Sept. 21, 2001). As CalFed itself acknowledges, however, *Bluebonnet* involved a claim for increased financing costs as a result of FIRREA. CalFed pursued a similar financing-cost theory in this case, but it did so as part of its claim for so-called "wounded bank" damages (Pet. App. 20a), not its claim for replacement costs. The Court of Federal Claims rejected CalFed's "wounded bank" claim, and CalFed abandoned the claim on appeal. See *id.* at 14a n.1. As a result, the Federal Circuit was never presented with the kind of claim that it addressed in *Bluebonnet.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.