No. 05-1087

In the Supreme Court of the United States

SOUTHWEST INVESTMENT COMPANY, INC., ON BEHALF OF ITSELF AND ON BEHALF OF FIRST LOUISIANA FEDERAL SAVINGS BANK, 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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QUESTION PRESENTED

Whether, assuming the existence of an agreement between the government and a savings and loan holding company, the trial court correctly held that the holding company was not entitled to restitution because any breach of that agreement was not material, the holding company was not harmed by the breach, and any award of restitution would constitute a windfall.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1) is not published in the *Federal Reporter*, but is reprinted in 158 Fed. Appx. 283. The opinion of the Court of Federal Claims (Pet. App. 2-44) is reported at 63 Fed. Cl. 182.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 2005. The petition for a writ of certiorari was filed on February 17, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Petitioner invokes jurisdiction under 28 U.S.C. 2101(c), which does not confer subject matter jurisdiction upon the Court to review the judgment in this case.

STATEMENT

This is one of approximately 33 remaining (out of an original total of approximately 122) *Winstar*-related cases (see *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996)) that were filed after the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, and that remain pending in this Court, the Court of Appeals for the Federal Circuit, or the Court of Federal Claims. In this case, the court of appeals summarily affirmed the trial court's judgment that any breach of contract was not material and that any award of restitution would confer a windfall.

1. In early 1984, several local businessmen in the area of Lafayette, Louisiana, formed First Louisiana Holding Company (FLHC).[2] In June 1984, FLHC submitted an application to the Federal Home Loan Bank (FHLBB) of Dallas for permission to form a new savings institution, First Louisiana Federal Savings Bank (First Louisiana). Pet. App. 5.

In January 1985, the Federal Home Loan Bank Board (FHLBB) conditionally approved FLHC's application for permission to form First Louisiana. Among the conditions of the approval was a requirement that FLHC (and each individual director) execute a Net Worth Maintenance Agreement, which provided a limited guarantee that the investors would maintain the net worth of First Louisiana. Pet. App. 6-7. The approval also required FLHC to infuse "at least" $3 million in capital into First Louisiana. *Id.* at 7. The trial court

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[2] Petitioner, Southwest Investment Company, Inc., is the successor in interest to FLHC. Pet. App. 3.

assumed that, ultimately, FLHC infused $4 million into First Louisiana. *Ibid.*

In November 1984, FLHC and Union Federal Savings and Loan (Union), a troubled thrift, entered into an "Agreement, Plan of Conversion and Merger." Pet. App. 7-8. In December 1984—one month after it had signed an agreement to merge with Union—FLHC submitted an application to acquire Union and to merge Union into First Louisiana. That application included a request for several forbearances from regulatory requirements. *Id.* at 8.

In June 1985, the FHLBB conditionally approved FLHC's application to acquire Union and to merge Union into First Louisiana. Pet. App. 8. Among the conditions for approval was a requirement that FLHC stipulate that it would maintain the net worth of First Louisiana to satisfy regulatory capital requirements following its merger with Union. *Id.* at 8-9. FLHC sent a letter to FHLBB making that stipulation. *Id.* at 9.

In the same month, the FHLBB granted certain regulatory forbearances to First Louisiana, including that: (1) the regulators would forbear, for a period of five years, from taking certain regulatory actions for any failure of First Louisiana to meet its net worth requirements arising solely from certain acquired Union Federal assets and liabilities, and from certain losses generated from those assets and liabilities; and (2) any goodwill resulting from the Union acquisition could be amortized over a period of 40 years for regulatory accounting purposes, rather than over a period of 20 years as required by generally accepted accounting principles. Pet. App. 9.

FLHC acquired Union and merged it into First Louisiana in July 1985. The Federal Savings and Loan Insurance Corporation (FSLIC) provided no direct financial assistance to either FLHC or First Louisiana. The acquisition was accounted for by the purchase method, and, using the purchase method, First Louisiana recorded $5.8 million in goodwill. Pet. App. 9.

Based primarily upon extraordinary gains it recognized on the sale of loans it acquired from Union, First Louisiana reported a net profit of $445,000 in 1985. Pet. App. 10. However, 1985 was the only year in which First Louisiana ever realized a profit. *Ibid.* First Louisiana's losses in subsequent years resulted from a severe economic downturn in the oil-dependent community that First Louisiana serviced, which created a "near-depression economy," *ibid.*, and from deficiencies in the management of the savings institution. See *id.* at 10-17. Among the many management deficiencies were violations of "restrictions on dealing with insiders," *id.* at 11-12, "deficiencies in internal control procedures," *id.* at 12, "deep" involvement in "volatile" transactions, *ibid.*, "improper loans" to "affiliated persons," *id.* at 15-16, transactions that gave the "appearance of a conflict of interest," *id.* at 16, "high operating expenses," including "compensation" that "was 55% more than the peer group average" in one year, *id.* at 17, and "high fixed asset expense," *ibid.*

Based upon First Louisiana's problems, in July 1987, the Federal Home Loan Bank of Dallas concluded that First Louisiana was not in compliance with its capital requirements, even with the benefit of the forbearances granted in connection with the Union merger. Pet. App. 14-15.

In October 1988, the Federal Home Loan Bank of Dallas notified First Louisiana that it was designated as a "Troubled Institution" under existing regulations. Pet. App. 19. That designation required First Louisiana to submit a capital restoration plan to the FHLBB. *Ibid.* In February 1989, First Louisiana submitted a capital restoration plan in response to the order of the Federal Home Loan Bank of Dallas, in which it conceded that, even taking into account the forbearances it had been granted in conjunction with the Union acquisition, First Louisiana is "nearing insolvency." *Ibid.* First Louisiana also stated that it could not raise additional capital to meet its minimum regulatory net worth requirements unless FSLIC agreed to provide assistance. First Louisiana proposed three scenarios for its recapitalization, each of which involved the provision by FSLIC of substantial assistance. *Id.* at 20-22.

In March 1989, First Louisiana's comptroller concluded that, even taking into account the forbearances granted as part of the Union transaction, First Louisiana was insolvent under both Generally Accepted Accounting Principles and Regulatory Accounting Principles, which at the time allowed goodwill to count as regulatory capital. Pet. App. 22-23. During the same month, First Louisiana's independent auditors concluded that, because of the thrift's recurring losses and its net capital deficiency, there was "substantial doubt about First Louisiana's ability to continue as a going concern." *Id.* at 22.

As the result of a regulatory examination that concluded in June 1989, the Federal Home Loan Bank of Dallas concluded that, after giving full effect to the forbearances granted as part of the Union transaction, First Louisiana was insolvent by $460,000. Pet. App. 24. As a result of their computations, the examiners concluded that "had the Union Federal merger never occurred, [First Louisiana] would still be insolvent." *Ibid.*

In July 1989, the Federal Home Loan Bank of Dallas invoked the Net Worth Maintenance Agreement and directed that, within 60 days, FLHC infuse additional capital into First Louisiana to bring it into capital compliance. Pet. App. 25.

2. In August 1989, Congress enacted FIRREA to address widespread problems in the savings and loan industry. FIRREA and its implementing regulations phased out reliance upon goodwill and other intangible assets as regulatory net worth, beginning in December 1989. 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 institution 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).

On August 15, 1989, the Federal Home Loan Bank of Dallas requested that First Louisiana's board of directors sign a "consent agreement," which stated that there were grounds for the OTS to assign a conservator or receiver for First Louisiana and, therefore, the institution should agree to certain operating restrictions. First Louisiana's board of directors declined to sign the consent agreement, and on November 1, 1989, the OTS placed First Louisiana in receivership. The implementing regulations of FIRREA became effective one month later, on December 7, 1989. Pet. App. 26.

3. In August 1995, petitioner filed suit in the Court of Federal Claims on its own behalf and on behalf of FLHC. Pet. App. 3.[3] In October 2003, the trial court concluded, with the consent of the parties, that the most expeditious means to resolve the case was to address petitioner's claim for damages before addressing the issues concerning liability. The court directed the parties to file cross-motions for summary judgment on damages. Pet. App. 3-4.

The trial court granted the government's motion for summary judgment with respect to all of petitioner's claims for damages and entered judgment for the government. Pet. App. 2-44. The trial court assumed, without deciding, that a contract existed between petitioner and the government and that the enactment of FIRREA breached the assumed agreement. *Id.* at 4. The trial court further assumed that petitioner did not commit a prior material breach of the contract. *Ibid.* The trial court concluded, however, that FIRREA did not harm First Louisiana and, therefore, held that all of petitioner's damage claims failed. *Ibid.*

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[3] In 1997, the Federal Deposit Insurance Corporation (FDIC) filed a complaint in intervention as successor to the rights of First Louisiana and as manager of the FSLIC Resolution Fund, which had succeeded to the assets and liabilities of the Resolution Trust Corporation that had been acquired in winding up the affairs of thrifts closed between January 1989 and July 1995. 12 U.S.C. 1441a(b)(3). In August 2002, the trial court dismissed the FDIC's complaint because it did not present a case or controversy. In September 2002, the FDIC filed a notice of appeal with the United States Court of Appeals for the Federal Circuit. In October 2003, however, the FDIC voluntarily dismissed its appeal.

The trial court held that petitioner's claim for "money-back restitution," based upon its initial contribution as part of the Union transaction, failed for several reasons. Pet. App. 33.

First, the court held that the enactment of FIRREA did not constitute a *material* breach of the agreement, because First Louisiana failed to satisfy net worth requirements even prior to the enactment of FIRREA, at a time when First Louisiana was allowed to count its goodwill as regulatory capital. Pet. App. 33-37. As the court explained, the government's promises were "worth nothing" and "irrelevant" by the time of the seizure. *Id.* at 34, 37. FIRREA "caused First Louisiana no harm at all either at enactment or at seizure," which in any event occurred "slightly over a month *before* FIRREA's implementing regulations came into effect." *Id.* at 37 (emphasis added).

Second, the trial court rejected petitioner's claim that the enactment of FIRREA frustrated its attempt to recapitalize First Louisiana with funds from two outside investors and an infusion of its own funds. Pet. App. 37-39. The trial court found, based upon the undisputed facts, that all plans to recapitalize First Louisiana predated the enactment of FIRREA and depended upon the government's agreement to provide substantial additional assistance to the failing thrift. *Id.* at 37-38. The government, cognizant of First Louisiana's many operational deficiencies since its inception, declined to enter into such an agreement. *Id.* at 38. The court also found that, even as a factual matter, petitioner's argument would fail, because, although petitioner "named the two would-be investors," it provided "no affidavits from those individuals." *Ibid.*

Third, the trial court held that because petitioner would have lost its entire investment in First Louisiana even in the absence of a breach, returning that investment under a restitution theory would result in a windfall, "transform[ing] the government into the insurer against First Louisiana's poor business decisions." Pet. App. 39-40. The trial court concluded that such a windfall damages award would contravene the holdings of the Federal Circuit in *Hansen Bancorp, Inc.* v. *United States*, 367 F.3d 1297, 1315 (2004), and *Admiral Financial Corp.* v. *United States*, 378 F.3d 1336, 1345 (2004). Pet. App. 39. In those cases, the court of appeals, relying upon this Court's decision in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604, 608 (2000), held that, while restitution provides an alternative measure of relief when a plaintiff has incurred, but cannot prove, expectancy damages, restitution is available only in cases of "total breach"—which did not occur here—and is not an appropriate remedy when it would result in a windfall to the plaintiff.

Finally, the trial court rejected petitioner's claim for restitution based upon the "benefit of time" conferred upon the government, because that claim was too speculative and indeterminate to be recoverable, as a matter of law. Pet. App. 41-43.

3. The court of appeals summarily affirmed the decision of the trial court without opinion. Pet. App. 1.

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 therefore unwarranted.

1. The court of appeals issued no opinion in this case, but instead summarily affirmed in a one-sentence judgment. Pet. App. 1. That judgment has no precedential value in future cases. See Fed. Cir. R. 36 ("The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value."). Because the court of appeals' summary disposition thus has an effect solely on the outcome of this particular case, further review is unwarranted.

Indeed, although petitioner contends (Pet. 13) that this case presents a question of exceptional importance to other *Winstar* plaintiffs and to "any party that contracts or wishes to contract with the government," petitioner has failed to show that even a published decision by the court of appeals repeating the conclusions reached by the trial court would have had any general importance. Petitioner cites no other case in which a court has decided the questions it presents, even in the *Winstar* context. Moreover, there is a progressively smaller and steadily dwindling number of *Winstar*-related cases. Of the approximately 122 *Winstar*-related cases that were originally filed, only 33 remain pending, and most of those cases are nearly through the litigation and appellate process. The government and petitioner disagree over whether the trial court erred in concluding that, based upon the facts of this case, restitution would be an appropriate remedy. That kind of case-specific disagreement, however, does not warrant further review by this Court.

2. Petitioner concedes (Pet. 8) that "[t]he trial court correctly held * * * that a party to a contract is only en-

titled to restitution if it demonstrates a total or material breach of contract." Petitioner also concedes that "[a] total breach is one that 'so substantially impairs the value of the contract at the time of breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance.'" *Id.* at 9 (quoting *Mobil Oil Exploration & Producing Se., Inc.* v. *United States*, 530 U.S. 604, 608 (2000)). But petitioner argues (Pet. 9-11) that the trial court erred in applying those principles to the facts of this case when it concluded that there was no total or material breach.

Petitioner's contention is without merit. Citing, *inter alia*, this Court's decision in *Mobil Oil*, the Federal Circuit has held that, in order for a breach to be considered material, "the breach 'must be of a relatively high degree of importance.'" *Hansen Bancorp, Inc.* v. *United States*, 367 F.3d 1297, 1312 (Fed. Cir. 2004) (quoting 1 George E. Palmer, *The Law of Restitution* § 4.5 (1978)). As the court of appeals has observed, determining whether a breach is of a "high degree of importance" requires consideration of "the nature and effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and performed by the parties." *Stone Forest Indus., Inc.* v. *United States*, 973 F.2d 1548, 1550 (Fed. Cir. 1992). Whether a breach is total is assessed "in light of the totality of events and circumstances." *Id.* at 1552 (citing 2 Restatement (Second) of Contracts (Restatement) § 241, cmt. a (1981)).

The trial court here correctly focused upon the time of the alleged breach in determining whether it was total or material. At that time, the court concluded, the allegedly breached promises were "worth nothing," Pet. App. 34, and were "irrelevant," *id.* at 37, to petitioner, because First Louisiana was insolvent and subject to immediate seizure, regardless of whether the government continued to let it count goodwill as capital for regulatory purposes. See *ibid.* ("First Louisiana was insolvent notwithstanding the promises."). The court reached that conclusion after a careful and exhaustive review of the record in this case. See *id*. at 9-30, 33-39. As the court explained:

> In the end, [petitioner] may quibble with the precise net worth numbers related by the various sources. But there can be no doubt that as of mid-1989 [*i.e.*, prior to both the enactment of FIRREA and the promulgation of its implementing regulations], First Louisiana was sustaining losses of ever-greater amounts, that it was far below its required regulatory capital level, that it had in fact a negative net worth, and that this was true even giving full recognition to the forbearances granted in the Union merger.

Id. at 30.

3. Petitioner contends that the trial court erred in considering the effect of the breach upon the plaintiff in determining if the breach was total or material. Petitioner argues (Pet. 11) that this Court did not consider such an effect in *Mobil Oil*, but instead established that the only relevant consideration is whether the breach deprived First Louisiana of "the benefit of the bargain or a material condition of the contract." Petitioner's argument is mistaken.

In *Mobil Oil*, this Court held that the oil company plaintiffs were not required to establish that the contract ultimately would have resulted in a financial gain, or that they would have succeeded in obtaining the right to explore for oil, in order to be entitled to restitution. 530 U.S. at 623-624. The Court found, however, that the breach was "material" at the time of breach because the change in the law denied them the benefit for which they paid the government $156 million and which remained available at the time of breach—the "*opportunity* to try to obtain exploration and development rights in accordance with the procedures and under the standards specified in the cross-referenced statutes and regulations." *Id.* at 620. Regardless of whether the plaintiffs would ever have been successful in obtaining approval to explore for and develop oil, the change in the law "significantly narrow[ed]" their "gateway" to the enjoyment of all their other rights under the contract. *Id.* at 621. That was the harm suffered by the plaintiff in *Mobil Oil* on the date of the breach, and it was central to this Court's holding that the breach was material.

In contrast to the plaintiffs in *Mobil Oil*, First Louisiana received the benefit of its bargain with respect to the Union forbearances right up until the date it was seized. First Louisiana became subject to seizure—and lost the opportunity to continue to operate—because of market conditions and its own serious deficiencies in management. Those reasons were entirely unrelated to and independent of any breach resulting from the enactment of FIRREA. First Louisiana would have been seized even if the government had been fully prepared to continue performance of the contract. Unlike *Mobil Oil*, there was no chance that petitioner could have continued to receive the benefits of the contract had the government not breached.

4. Petitioner contends (Pet. 12-13) that the trial court's decision is contrary to *Mobil Oil* for another reason as well. As an alternative basis for its decision, the trial court concluded that an award of restitution to petitioner would have placed it in a better position than it would have occupied absent the breach, thereby resulting in an improper windfall. Petitioner argues (Pet. 12) that this Court's decision in *Mobil Oil* bars consideration of any "windfall" resulting from an award. Petitioner asserts that the fact that First Louisiana would be better off with an award of damages than if the breach had not occurred at all is entirely irrelevant to a determination of its entitlement to restitution.

Petitioner's suggestion that the trial court's "windfall" analysis conflicts with this Court's decision in *Mobil Oil* is incorrect. See *Mobil Oil*, 530 U.S. at 608 (restitution is appropriate where "it is *just in the circumstances* to allow [the non-breaching party] to recover damages based on all his remaining rights to performance.") (emphasis added) (quoting 2 Restatement § 243(4)). Restitution, as a remedy for breach of contract, is most appropriate in the classic case in which the parties' performance can be easily unwound, as in *Mobil Oil*. In such a case, the non-breaching party paid money for contract performance which, as a result of a breach, it never received. The simplest remedy in that situation consists of an award to the non-breaching party of an amount equal to the amount it paid to the breaching party. That result is appropriate because, in entering into the contract, the nonperforming party implicitly agreed not to keep the money if it failed to perform at all. Henry Mather, *Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 Yale L.J. 14, 36-

37 (1982). An award of restitution in that situation restores both parties to their pre-contract positions. *Mobil Oil* follows that approach, because this Court concluded that the plaintiffs in that case had not received *any* significant performance and that the government's breach had a material effect upon their contract rights by depriving them of a "gateway to the companies' enjoyment of all other rights"—a "gateway" that this Court concluded was the essence of their bargain. 530 U.S. at 621.

It does not follow from such simple "money-back" restitution cases, however, that a non-breaching party is *always* entitled to restitution, regardless of the circumstances. See, *e.g.*, *Bernstein* v. *Nemeyer*, 570 A.2d 164, 169 (Conn. 1990). This case differs from the "money-back" cases upon which petitioner relies and from *Mobil Oil* because, as the undisputed facts establish, there was substantial performance on the part of the government here and the alleged breach did not affect First Louisiana's right to receive the benefits of the contract in the future. An award of restitution in this case therefore would be contrary to the well-established principles that restitution should only be awarded when "it is just in the circumstances," 2 Restatement § 243(4); see *Mobil Oil*, 530 U.S. at 608, and that restitution is precluded when the non-breaching party cannot return "any interest in property that he has received in exchange in substantially as good condition as when it was received by him." *Hansen*, 367 F.3d at 1315 (quoting 3 Restatement § 384 (1)(a)). An award of restitution equal to the full amount of petitioner's investment would impermissibly place petitioner in a position of receiving *both* the full amount it paid under the alleged contract (because it would get a restitution judgment in that amount) *and* all the benefits of the government's performance (because it had already enjoyed, and used up, the benefits of that performance, prior to its seizure).

As the trial court correctly concluded, an award of petitioner's investment in First Louisiana also would reallocate the risks that the parties had allocated for themselves. See 3 Dan B. Dobbs, *Law of Remedies* § 12.7(5) (2d ed. 1993). The alleged contract placed the risk of First Louisiana's profitability upon petitioner. Petitioner is not entitled to use restitution as an excuse to shift to the government the risk, which it agreed to assume, of the loss of its investment due to its failure to operate First Louisiana in a profitable manner. See *Admiral Fin. Corp.* v. *United States*, 378 F.3d 1336, 1345 (Fed. Cir. 2004); *Canfield* v. *Reynolds*, 631 F.2d 169, 178 (2d Cir. 1908); see also *Bernstein*, 570 A.2d at 169.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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