No. 05-1221

In the Supreme Court of the United States

PRESTON MARTIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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, under the terms of the Regulatory Capital Maintenance Contract at issue in this case, petitioners were entitled to damages for dilution of their ownership interest in a thrift and a thrift holding company after Congress enacted legislation phasing out the thrift's reliance upon goodwill to satisfy regulatory capital requirements.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 422 F.3d 1319. The opinion of the Court of Federal Claims on damages (Pet. App. 31a-124a) is reported at 57 Fed. Cl. 598. The opinion of the Court of Federal Claims on liability (Pet. App. 125a-175a) is reported at 52 Fed. Cl. 531.

JURISDICTION

The corrected judgment of the court of appeals was entered on August 30, 2005. Petitions for rehearing were denied on December 27, 2005 (Pet. App. 176a-177a). The petition for a writ of certiorari was filed on March 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. This is one of approximately 30 (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 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, and that remain pending in the Court of Appeals for the Federal Circuit or the Court of Federal Claims. In this case, the court of appeals affirmed the trial court's ruling that the government had breached a contract with a thrift holding company and the thrift institution it owns, and the court affirmed in part and reversed in part the trial court's award of damages to those parties. The court of appeals, however, reversed the trial court's holding that the government had breached a broad contract with petitioners that encompassed several distinct documents, and it also held that petitioners were not entitled to damages under a narrower contract theory.

2. This case involves a group of shareholders, including Roy Doumani, Preston Martin, Larry B. Thrall, William E. Simon, Jr., and a Simon family-owned corporation, Arbur, Inc. In 1987, those investors and others formed a holding company, SoCal Holdings, Inc. (SCH), which later acquired a failed thrift and renamed it Southern California Federal Savings and Loan Association (SoCal). Pet. App. 5a.

The Federal Home Loan Bank Board (FHLBB), a federal agency that regulated the thrift industry, approved the acquisition. Pet. App. 131a. The Federal Savings and Loan Insurance Corporation (FSLIC), an entity subordinate to the FHLBB, infused $217.5 million into SoCal; permitted SoCal not to reduce its goodwill by the $217.5 million infusion (the "capital credit"), as would have been required by Generally Accepted Accounting Principles (GAAP); permitted SoCal to record almost $300 million in goodwill on its balance sheet; and authorized SoCal to amortize the goodwill over a 25-year period. *Id.* at 131-133a. See *Coast Fed. Bank, FSB* v. *United States*, 323 F.3d 1035 (Fed. Cir. 2003) (en banc) (discussing relationship between capital credit and goodwill).

Various aspects of the transaction were memorialized in various documents, executed by different parties. They included: (1) an Assistance Agreement, signed by FSLIC, SCH, and SoCal, but *not* by petitioners; (2) FHLBB resolutions which, among other things, authorized the transmittal of a Forbearance Letter from FHLBB to SCH; and (3) a Regulatory Capital Maintenance Agreement (RCMA), signed by FSLIC, SCH, SoCal, and each of petitioners.

Assistance Agreement. The Assistance Agreement was signed by FSLIC, SCH, and SoCal, but not by petitioners. Under the Assistance Agreement, the government agreed, *inter alia*, that "[f]or purposes of reports to the Bank Board, the [capital credit] shall be credited to [SoCal's] regulatory capital account and shall constitute regulatory capital." C.A. App. A400755.[1] The As-

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[1] The relevant provision states in full:

> For purposes of reports to the Bank Board, the cash contribution made under § 3(a)(1) above [which required FSLIC to wire $217.5 million to SoCal] shall be credited to [SoCal's] regulatory capital account and shall constitute regulatory capital as defined in § 561.13 of the Insurance Regulations, 51 Fed. Reg. 33,565 (1986) (to be codified at 12 C.F.R. § 561.13 (1987)), notwithstanding the accounting treatment of such contribution that must be reflected in any filing that [SoCal] may make, whether

sistance Agreement contained an "Entire Agreement" clause, which stated:

> This Agreement, together with any interpretation or understanding agreed to in writing by the parties, constitutes the entire agreement between the parties and supersedes all prior agreements and understandings of the parties in connection with it, excepting only any resolutions or letters concerning the Conversion, the Acquisition or this Agreement issued by [FHLBB] or [FSLIC] in connection with the approval of the Conversion, the Acquisition, and this Agreement.

Pet. App. at 131a.

The Assistance Agreement also contained a "Sole Benefit" clause, which stated that all conditions, obligations, and responsibilities under the agreement were "for the sole benefit of the parties hereto and for the benefit of no other person," and that nothing in the agreement was "intended or shall be construed to give any person other than the parties hereto any legal or equitable right, remedy, or claim under, or in respect to, this Agreement or any of its provisions." Pet. App. 11a.

FHLBB Resolutions. The Bank Board adopted resolutions which, among other things, authorized the transmittal of a Forbearance Letter from FHLBB to SCH. The Forbearance Letter, in turn, authorized SoCal to depart from GAAP by counting the $217.5 million cash infusion as a contribution to SoCal's regulatory net worth. It also authorized SoCal to amortize an addi-

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> to the Bank Board or otherwise, that requires the submission of financial statements prepared in accordance with GAAP.

C.A. App. A400755.

tional $79 million in goodwill for a period of 25 years by the straight-line method for purposes of calculating SoCal's regulatory capital. See Pet. App. 5a, 130a, 133a.

Regulatory Capital Maintenance Agreement. In addition to FSLIC, SCH, and SoCal, petitioners too signed the RCMA. Pet. App. 180a-196a. It had the following key provisions:

Section 1 of the RCMA required SCH and SoCal to maintain SoCal's compliance with certain federal capital requirements, "*provided* * * * that" the capital credit be "includable in capital for purposes of" determining whether those capital requirements are satisfied.[2] Pet. App. 182a. Section 1 itself did not mention petitioners.

Section 2 of the RCMA stated that "[f]or purposes of this Agreement, any computation of [SoCal's] Required Regulatory Capital shall be as determined" by the Principal Supervisory Agent of the Bank Board (P.S.A.) "in accordance with," *inter alia*, the "includable in capital"

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[2] Section 1 of the RCMA is reproduced in full at Pet. App. 181a-183a. In relevant part, it states:

> [SCH] and [SoCal] shall cause the 'regulatory capital,' as defined in [certain regulations], or any successor regulation, as now or hereafter in effect, of [SoCal] to be maintained at the level required by [other regulations], or any successor regulation, as now or hereafter in effect ("Regulatory Capital Regulation") ("Required Regulatory Capital"), * * * *provided* that [the regulations regarding certain liabilities and "base ratio" shall be calculated in a certain way], and *provided further*, that regardless of any changes in the method of calculating regulatory capital or the items includable in such calculation, the $217.5 million of assistance from [FSLIC] shall be includable in capital for purposes of determining whether [SoCal] has maintained its regulatory capital at the Required Regulatory Capital level.

proviso in Section 1 and "shall reflect," *inter alia*, that proviso. Pet. App. 182a-183a.[3]

Section 4 of the RCMA, which did mention petitioners, stated that "so long as [SCH] shall be obligated pursuant to § 1, [petitioners] * * * hereby guarantee the performance of [SCH] and [SoCal] under § 1, *provided* that [certain guarantees of petitioners shall be joint and several], and *provided further*, that the personal obligations of [petitioners] under said guarantees shall not exceed $5,000,000 in the aggregate." Pet. App. 183a.

The RCMA thus required petitioners to contribute up to $5 million, if necessary, to enable SoCal to maintain its capital at acceptable levels under federal capital requirements. But SoCal's obligation to do so under the RCMA (and, therefore, petitioners' obligation as guarantors) was conditioned on the government's permitting SoCal to include the $217.5 million FSLIC contribution as capital in determining, for purposes of the RCMA, whether SoCal satisfied the specified regulatory capital requirements. The RCMA also required petitioners to maintain control of SCH. Pet. App. 185a. The RCMA did not mention goodwill or the method that was to be utilized to account for goodwill. See *id.* at 180a-196a.

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[3] Section 2 of the RCMA is reproduced in full at Pet. App. 183a. In relevant part, it states:

> For purposes of this Agreement, any computation of [SoCal's] Required Regulatory Capital shall be as determined by the P.S.A., in accordance with applicable regulations, standards and procedures generally applicable to institutions under the P.S.A.'s jurisdiction and the second proviso of § 1, and shall reflect any directives issued by the P.S.A., in accordance with such regulations, standards and procedures and the second proviso of § 1, regarding [SoCal's] calculation of Required Regulatory Capital.

3. 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 over a five-year period. See *Winstar,* 518 U.S. at 856-857. To the extent that SoCal had relied upon goodwill (including the capital credit) to meet its capital requirements, the phase-out required SoCal to obtain more money to replace the phased-out goodwill.

In 1992, SCH raised $48 million by selling notes to two new investors and to Arbur. Pet. App. 6a. As part of the transaction, SCH converted its original common shares, owned by petitioners, to Class B common shares, and issued new Class A common stock to the two new investors and Arbur. *Id.* at 7a. The result of the recapitalization was to reduce petitioners' ownership of SCH from 100% to 51.36%. *Ibid.* SCH infused $43.5 million of the proceeds into SoCal and, as a result, SoCal returned to regulatory capital compliance. *Id.* at 6a-7a, 62a.

SoCal's financial condition, however, continued to deteriorate. In 1995, SCH raised $60.5 million in new debt and preferred stock from the 1992 investors, $60.4 million of which SCH then infused into SoCal. Pet. App. 7a, 66a, 68a. As part of that capital-raising transaction, SCH cancelled its outstanding Class B common stock, which was owned by petitioners. *Id.* at 7a, 67a.

4. In 1993, SoCal, SCH, and petitioners filed a complaint in the Court of Federal Claims, alleging that the government had entered into a contract permitting SoCal to include the $21.7.5 million capital credit and an additional $79 million in supervisory goodwill in its calculation of its regulatory capital. Pet. App. 127a, 140a.

The complaint alleged that Congress had breached that contract through the enactment of FIRREA. *Id.* at 127a. In response, the government acknowledged that the Assistance Agreement was an express contract between FSLIC and SoCal and SCH permitting SoCal to include the $217.5 million capital credit in its regulatory capital. The government denied, however, that petitioners had standing to enforce that promise, because they were not parties to the Assistance Agreement. See *id.* at 8a.

The Court of Federal Claims granted the plaintiffs' motions for summary judgment on liability. With respect to petitioners, the court concluded that the Assistance Agreement's Entire Agreement clause incorporated the RCMA and the FHLBB resolutions authorizing the transmittal of the Forbearance Letter which, in turn, authorized the inclusion of goodwill (including the capital credit) in the calculation of SoCal's regulatory capital. Pet. App. 146a. The trial court further held that the Entire Agreement clause rendered "unenforceable" the Assistance Agreement's Sole Benefit clause, to the extent the latter clause would exclude petitioners as parties. *Id.* at 145a. The court concluded that, although petitioners had not signed and were not parties to the Assistance Agreement itself, they were parties to what the court characterized as an "overall" agreement that encompassed the terms of the Assistance Agreement, the RCMA, and the FHLBB resolutions/Forbearance Letter adopted in connection with the transaction. *Id.* at 146a, 149a.

After a trial on damages, the trial court awarded over $90 million to petitioners based upon a "dilution theory." The court accepted that, in the absence of the breach, the 1992 and 1995 recapitalizations would not have occurred, and petitioners would have continued to possess their shares. The court therefore held that petitioners are entitled to the value of the shares they would have possessed in 1998. Pet. App. 106a-111a, 123a. The court also awarded $65.4 million in damages to SCH and SoCal. *Id.* at 123a.

5. On appeal, the Federal Circuit affirmed in part and reversed in part the trial court's award of damages to SCH and SoCal. Pet. App. 22a-27a. No party has sought further review of that decision. In the ruling at issue here, the court of appeals reversed the award of damages to petitioners. *Id.* at 27a.

The court held that the trial court had erred in concluding that the government had entered into an "overall" contract to which petitioners were parties, with the government's promises regarding the treatment of capital credits and supervisory goodwill running to all of the parties, thereby according standing to petitioners to recover damages for a breach. Pet. App. 10a-19a. The court of appeals found that conclusion to be contrary to the plain terms of the Assistance Agreement, to which SCH and SoCal were parties, but petitioners, as shareholders of SCH, were not. *Id.* at 11a-14a. The court noted in particular that the Sole Benefit clause of the Assistance Agreement excludes non-parties, such as petitioners, from the benefits of the Assistance Agreement, and that the trial court's conclusion to the contrary concededly made the Sole Benefit clause "unenforceable." *Id.* at 12a; see *id.* at 146a.

The court of appeals further held that the trial court had erred in concluding that the Entire Agreement clause required that petitioners be accorded the benefits of the Assistance Agreement notwithstanding their express exclusion under the terms of the Sole Benefit clause. The court noted that the Entire Agreement clause of the Assistance Agreement by its terms incorporated the FHLBB resolutions, the Forbearance Letter, and other "interpretations or understandings agreed to in writing by the parties." Pet. App. 13a. The court held, however, that the RCMA was not one of the types of documents incorporated into the Assistance Agreement, because it was neither an FHLBB resolution nor an "interpretation[] or understanding[] agreed to in writing by the parties" to the Assistance Agreement. *Ibid*. Rather, the court explained, the RCMA "is a separate contract that involves additional parties and distinct promises, including its own Entire Agreement clause." *Ibid.* Thus, the court concluded, "the plain language of the Sole Benefit clause and the Entire Agreement clause evidences the parties' intent to limit the scope of the Assistance Agreement to its specified terms." *Ibid.*

The court of appeals noted that the trial court had relied upon petitioners' participation, as shareholders, in the conversion and acquisition process to hold that the petitioners were parties to an "overall" contract based on the Assistance Agreement. Pet. App. 15a. The court explained, however, that petitioners' participation in the process does not show that they became parties to the Assistance Agreement or a broader, "overall" agreement, because of the well-settled principle "that a corporation is generally considered to be a separate legal entity from its shareholders." *Ibid.* Under the Assistance Agreement, the law of California was to govern its construction, and the court explained that California law would plainly treat the corporations as separate entities from their shareholders in the circumstances of this case. *Id*. at 15a-16a. In short, "[h]aving chosen to limit their personal liability by adopting a corporate form" with all of its advantages of limited liability, petitioners could not "rely on their involvement in the negotiation process or their role in funding a transaction to alter their chosen legal status" and be treated as the real contracting parties when it suited their interests. *Id.* at 17a.

The Federal Circuit then considered whether the much more limited RCMA, to which petitioners *were* parties, entitled petitioners to recover damages. Pet. App. 19a-22a. The court noted that the trial court itself did not find that petitioners' status as signatories to the RCMA was sufficient to allow them to recover damages. *Id.* at 15a n.4. In analyzing the RCMA, the court of appeals noted that the RCMA contained references to the capital credit (but not to goodwill). *Id.* at 19a-20a. Assuming, but not deciding, that the government had breached the RCMA, *id.* at 20a, the court determined that petitioners were not entitled to damages for dilution of their ownership interest in SCH and SoCal, because petitioners' relinquishment of their equity was neither caused by, nor a foreseeable result of, any alleged breach of the RCMA. *Id.* at 20a-21a.

Judge Mayer dissented in part. Pet. App. 28a-30a. He would have affirmed the trial court's conclusion that "[t]he combined content of the [RCMA], the Assistance Agreement, and the [FHLBB] implementing resolutions * * * proves that [petitioners] entered into an overall contract with the government." *Id.* at 28a. In his view, that "overall contract" gave petitioners "standing to enforce both the capital credit and the supervisory goodwill promises of the government." *Id.* at 30a. Judge Mayer did not disagree with the court's conclusion that petitioners had no right to damages based upon a breach of the narrower RCMA itself.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The narrow issues decided by the court of appeals concerning the construction of the particular documents in this case and the causation and foreseeability of petitioners' alleged damages by the alleged breach do not warrant further review.

1. Petitioners do not challenge the court of appeals' conclusion that the trial court erred in finding a broad, overall agreement based on the Assistance Agreement, incorporating the FHLBB Resolutions and Forbearance Letter, and including the RCMA as well. Nor do petitioners challenge the court of appeals' articulation, see Pet. App. 20a-21a, of the general rules governing contract damages under an expectation, reliance, or restitution theory, including the court's recitation of the ordinary causation and foreseeability requirements for expectation damages. See Pet. 20. Petitioners' sole challenge is to the application of those general standards to the particular contract and the particular transaction in this case. Further review of that fact-based claim is not warranted. In any event, the court of appeals correctly held that petitioners are not entitled to damages for breach of the RCMA.

a. The plain terms of the RCMA make clear that it did not include a promise by the government to permit SoCal to include the $217.5 million capital credit in its regulatory capital for federal regulatory purposes. Without such a promise, petitioners' claim for damages must be rejected.

As discussed above, Section 1 of the RCMA by its terms embodied a promise by SCH and SoCal that they would "cause" SoCal to satisfy what Secton 1 termed the "Required Regulatory Capital" level, *i.e.*, the level required by federal regulations. Pet. App. 181a-182a. Section 1 then stated two qualifications on that promise by SCH and SoCal, each introduced with a "provided that" clause. *Id.* at 182a. Under the second "provided that" clause, SCH and SoCal would cause SoCal to satisfy the Required Regulatory Capital level, "*provided further* that * * * the $217.5 million of assistance from the CORPORATION [*i.e.*, the so-called "capital credit"] shall be includable in capital for purposes of determining whether [SoCal] has maintained its regulatory capital at the Required Regulatory Capital level." *Ibid.*; see note 2, *supra*. Accordingly, SCH and SoCal would have an obligation under the RCMA to ensure compliance with the Required Regulatory Capital level *provided that* the $217.5 million cash infusion was includable in capital for purposes of the calculation. Because the government's commitment regarding the capital credit was introduced in a "provided that" clause, it was merely a condition on the performance of SCH and SoCal. The language of Section 1—which was written as a condition on the perofrmance by SCH and SoCal, not as an affirmative undertaking by FSLIC—thus makes clear that the government was not making a more general, affirmative commitment in the RCMA about how SoCal's capital would be calculated or regulated for other purposes. While such a more general commitment was made to SCH and SoCal (but *not* to petitioners) in the Assistance Agreement, see pp. 14-15, *infra*, it was not included in the RCMA.

Section 2 reinforced that conclusion. Under Section 2, "[f]or purposes of this Agreement, any computation of [SoCal's] Required Regulatory Capital shall be as determined by," *inter alia*, "the second proviso of § 1," *i.e.*, the $217.5 million "includable in capital" proviso. Pet. App. 182a-183a. Section 2 thus made clear that the $217.5 million "includable in capital" proviso was to be controlling solely "[f]or purposes of this Agreement," *i.e.*, for purposes of determining whether SCH and SoCal would have to perform their contractual commitment in the RCMA to maintain SoCal's capital at a certain level. The proviso was to have no further force in, for example, calculating SoCal's compliance with regulatory or statutory capital standards for thrifts more generally, or the liability of the government for breach of any promises FSLIC may have made to SCH or SoCal in some other agreement.

The above promises made by SCH and SoCal in Section 1 of the RCMA are relevant to petitioners solely by virtue of Section 4 of the RCMA. Section 4 states that, "so long as [SCH] shall be obligated pursuant to § 1," petitioners "guarantee the performance of [SCH] and [SoCal] under § 1," subject to petitioners' maximum obligation in the aggregate of $5 million. Pet. App. 183a. Because *SCH and SoCal* have contractual obligations under Section 1 to maintain capital levels only if the $217.5 million "includable in capital" proviso in that section is satisfied, Section 4 similarly limits *petitioners'* obligations as guarantors of SCH and SoCal to circumstances in which the $217.5 million "includable in capital" proviso is satisfied. Neither Section 4 nor any other portion of the RCMA, however, includes or suggests a government promise to SCH or SoCal, much less to petitioners, to permit SoCal to treat the capital credit in any particular way for purposes other than determining the obligations of SCH and SoCal—and the derivative obligations of petitioners as guarantors of the performance of SCH and SoCal—under Section 1 of the RCMA.

To be sure, a more general promise committing the government to calculate SoCal's capital in a particular way for federal regulatory purposes was made in the Assistance Agreement, to which petitioners were not parties. The terms of that promise may usefully be contrasted with the RCMA. Under the Assistance Agreement, the government agreed that "[f]or purposes of reports to the Bank Board, the [capital credit] shall be credited to [SoCal's] regulatory capital account and shall constitute regulatory capital." C.A. App. A400755; see note 1, *supra*. Had the parties desired in the RCMA to include an affirmative promise by the government to permit the capital credit to constitute regulatory capital generally under the applicable federal regulations, the parties thus had a readily available model to achieve that end. The RCMA, however, was directed to a different and more limited purpose—*i.e.*, establishing the obligation of SCH and SoCal, as corporations, to maintain the regulatory capital of SoCal, subject to certain conditions. And the purpose of Section 4 of the RCMA was also different and far more limited still—to obtain the personal guarantee of petitioners, as individual shareholders of SCH, for the performance by SCH and SoCal of their conditional obligations under Section 1. Furthermore, even that guarantee was capped at $5 million. Accordingly, petitioners did not obtain—and the government did not agree to—a general contractual commitment *to petitioners* that the capital credit would constitute regulatory capital of SoCal for purposes of determining compliance with federal banking regulations.[4] Indeed, it is exceedingly unlikely that the government would have exposed itself to the sort of broad liability petitioners assert in this case in exchange for a conditional guarantee capped at $5 million.

b. With the terms of the RCMA in mind, petitioners' damages claim can be analyzed. The court of appeals correctly rejected petitioners' claim "that the incorporation of the capital credit promise into the terms of the RCMA is sufficient to uphold the Court of Federal Claims' award of damages." Pet. App. 20a. Because the treatment of the capital credit was only a condition on petitioners' performance of *their* obligation, there was no breach of the RCMA by the government when the condition that excused Sch and SoCal from performing occurred.

Put another way, as the court of appeals explained, "the damages for which [petitioners] seek to recover, namely the dilution and the extinguishment of their ownership interest in SCH, were not caused by the obli-

[4] In the court of appeals, petitioners and the government focused almost all of their attention on whether there was an overall agreement to which petitioners were parties and which included not only the RCMA, but also the Assistance Agreement, the Bank Board Resolutions, and the Forbearance Letter. Only three pages in one of the two 59-page appellate briefs submitted by the two separate groups of petitioners mentioned the possibility of an asserted breach of the RCMA as a separate basis for liability. See C.A. Br. for Roy Doumani et al. 19-22. The parties' focus on the Assistance Agreement and Forbearance Letter is entirely explicable when the terms of the RCMA are examined, since those terms make clear that the RCMA did not include a general promise, as in the Assistance Agreement, that the capital credit "shall be credited to [SoCal's] regulatory capital account and shall constitute regulatory capital" for federal regulatory purposes. C.A. App. A400755.

gations they incurred in the RCMA." Pet. App. 20a. Indeed, as the court of appeals further noted, "[t]he RCMA did not require that the Individual Plaintiffs invest in SCH," but "[a]t the most, the RCMA obligated the Individual Plaintiffs to collectively contribute to SCH and SoCal an additional $5 million in the event that SCH and SoCal did not maintain SoCal's regulatory capital at the required level." *Ibid.* And petitioners in fact never even made that contribution. *Ibid.* Thus, because the government's only undertaking to petitioners in the RCMA was a "provided that" condition on petitioners' performance of their up-to-$5 million guarantee (which was in turn conditional on a failure by SCH and SoCal to fulfill their conditional undertakings as primary obligors under Section 1 of the RCMA)—and because petitioners never rendered that performance—the nonoccurrence of the condition that excused SCH and SoCal from their obligations under the RCMA could not have caused petitioners any damages under the RCMA, much less the damages they claimed for dilution of their ownership interest in SCH.

That holding was independently sufficient to dispose of petitioners' claims. Nonetheless, the court of appeals additionally went on to address the issue in terms of foreseeability and damages, concluding that, "even if [the court] assume[s] that the passage of FIRREA constituted a breach of the RCMA, [petitioners] are not entitled to recover the damages they seek." Pet. App. 20a. The damages petitioners seek are for dilution of their ownership interest in SCH and SoCal. From the beginning, however, petitioners (like all other shareholders of thrifts and holding companies) faced a risk that if the thrift needed more capital, SCH might issue more stock (and even cancel the old stock) to raise money to infuse into the thrift. That risk would have existed even if the shareholders never entered into the RCMA. Thus, assuming there was a breach here, petitioners could prevail only if the RCMA shifted that particular risk—the risk that SCH would dilute petitioners' ownership interest in order to raise capital—from the shareholders to the government.

As noted above, the RCMA was directed to petitioners' obligation to invest *additional* funds in SCH, and the assurances petitioners sought regarding the conditions that would have to exist in order for that obligation to be triggered. Nothing in the RCMA addressed the more general risk that petitioners' pre-existing stock in SCH and SoCal would be diluted. As the court of appeals explained,"there are no terms in the RCMA that require [petitioners] to raise capital for SCH and SoCal by diluting their ownership interest in order to issue equity to new investors," but, "[a]t the most, the RCMA obligates [petitioners] to contribute an additional $5 million to the operation of SCH and SoCal." Pet. App. 21a. Accordingly, from the standpoint of the RCMA, a claim that petitioners lost a $5 million contribution required by the RCMA might have stated a claim for foreseeable damages up to that amount in certain circumstances, had petitioners ever made such a contribution. But a claim that petitioners' pre-existing stock was diluted was not within the scope of risks addressed by the RCMA, and any dilution of petitioners' stock was accordingly not foreseeable with respect to the RCMA. Accordingly, even if it is assumed, *arguendo*, that the change in regulatory capital requirements after FIRREA could be regarded as a breach of the RCMA, "[b]ased on the unambiguous terms of the RCMA, [petitioners'] loss of their ownership interests was neither the foreseeable result of nor caused by the government's breach of the RCMA and therefore dilution damages cannot be awarded as a form of expectation damages." *Ibid.*

c. Petitioners argue that further review is warranted on the ground that the court of appeals minted a new, and unduly limited, rule of contract damages in this case. They contend that, "[a]lthough [the court of appeals] *recited* the usual foreseeability standard, the court rejected expectation damages as a matter of law by adding a novel limitation to that standard: that the contract itself must require the equity loss upon breach or the acquisition of the destroyed property in the first place." Pet. 16; see Pet. 19-20.

Petitioners are correct that the court of appeals recited the ordinary standards of causation and foreseeability for contract damages. But they err in asserting that the court otherwise added any "novel limitation" to those standards. Contrary to petitioners' contentions, the court of appeals never stated any general principle that expectation damages are awardable only if the contract "require[s] the equity loss upon breach" or if the contract requires "the acquisition of the destroyed property in the first place." Pet. 16. Rather, the court applied the general principles of causation and foreseeability to this particular contract, where the only possible deficiency was the alleged failure of a condition precedent to petitioners' own obligations. In those circumstances, any claim for damages by petitioners would have to flow from their performance of their own obligations; having negotiated a contract in which the government's obligation was merely a condition precedent to theirs, they cannot now obtain consequential damages based on the proposition that the government made a general and unqualified promise.

Petitioners also argue (Pet. 21) that "the Federal Circuit nowhere questioned as a *factual* matter the trial-court finding that the loss of the 1987 equity was a foreseeable consequence of the Government's breach of its regulatory-capital contract." The trial court considered the RCMA, however, only as part of a broad, "overall" contract, a contract whose existence the court of appeals correctly rejected. See Pet. App. 10a-19a. Thus, the trial court never considered whether the petitioners' relinquishment of their equity was foreseeable as a result of an asserted breach of the RCMA standing alone. See *id*. at 15a n.4 ("It is noteworthy that the Court of Federal Claims did not find that the status of [petitioners] as signatories to the RCMA was sufficient to allow them to recover damages."). In any event, in light of the terms of the RCMA, no such finding would have been possible.

d. Finally, petitioners argue (Pet. 22-24) that the court of appeals' decision conflicts with its prior decisions in *Bluebonnet Savings Bank, FSB* v. *United States*, 266 F.3d 1348 (Fed. Cir. 2001), and *La Van* v. *United States*, 382 F.3d 1340 (Fed. Cir. 2004). Further review is not warranted to address a claim of an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no such conflict.

In *Bluebonnet,* the shareholder obligated himself to infuse money into the thrift at specified intervals. Based upon the facts of that case, the trial court held, and the Federal Circuit affirmed, that it was foreseeable that a breach of the promises in a forbearance letter sent to the shareholder would interfere with the shareholder's ability to raise capital. 266 F.3d at 1354. The damages sought in *Bluebonnet* arose from the alleged increased costs to the shareholder of making the required infusions after the breach. The alleged breach of the RCMA in this case arose in a completely different factual environment. Unlike in *Bluebonnet*, the contract in this case contained only a condition precedent to petitioners' performance, not an unqualified promise by the government. Moreover, unlike in *Bluebonnet*, the shareholders here did not actually infuse money into the thrift pursuant to the contract.

In the "fact-specific dispute" before the Federal Circuit in *La Van*, 382 F.3d at 1342, the trial court held that "the Government contracted with the Acquirors for * * * the amortization of the goodwill resulting from the [*Winstar*-type] transaction over thirty-five years." *Id.* at 1345. The court of appeals affirmed that conclusion. By contrast, the government entered into no such agreement with petitioners in the RCMA.[5] And just as in *La Van* the court of appeals held that "the standard for damages was the usual make-whole principle based on foreseeability," Pet. 24 (citing *La Van*, 382 F.3d at 1350-1351), the court of appeals in this case correctly held that "[e]xpectation damages are recoverable provided

[5] Moreover, contrary to petitioners' assertion (Pet. 24), the court of appeals did not hold that the plaintiffs in LaVan were entitled to "expectation damages * * * for loss in value of their stock." Rather, the court noted the trial court's unappealed award of restitution for "the amount of the [plaintiffs'] initial investment," 382 F.3d at 1349, and held that "the trial court erred in denying [plaintiffs] the opportunity to present a case for expectancy damages," *id.* at 1350 (emphasis added). The court declined to decide whether the plaintiffs were entitled to expectation damages, instead "remand[ing] for the trial court to determine whether expectancy damages would be appropriate in the present case." *Ibid.*

they are actually foreseen or reasonably foreseeable, are caused by the breach of the promisor, and are proved with reasonable certainty." Pet. App. 20a-21a (quoting *Bluebonnet*, 266 F.3d at 1355).

2. Petitioners also argue (Pet. i, 27) that review should be granted to determine whether the Bank Board resolutions themselves "created contract rights for petitioners."

a. Initially, petitioners never argued to the court of appeals that the Bank Board resolutions themselves created contract rights, and the court of appeals never addressed that issue. Instead, prior to the petition for certiorari, petitioners contended that the FHLBB resolutions had been incorporated into the Assistance Agreement and that those resolutions—and, in particular, the Forbearance Letter to which they referred—created contractual rights on that basis. The court of appeals agreed that "[t]he Entire Agreement clause [in the Assistance Agreement] specifically incorporates * * * resolutions or letters from the FHLBB or the FSLIC." Pet. App. 13a. But the court held that the petitioners were not parties to the Assistance Agreement into which the resolutions had been incorporated—a holding that petitioners do not challenge. *Ibid.* The contention presented in the petition, that the resolutions alone created a contract with petitioners, is thus a new contention that this Court should not consider.

b. In any event, further review would not be warranted to address petitioner's highly case-specific contention that the Bank Board resolutions in this case created contractual rights in petitioners. By statute and regulation, petitioners needed various approvals by the Bank Board before they could consummate the transaction in which they acquired SoCal. Three Bank Board resolutions granted those approvals. Resolution No. 87-514 approved the acquisition of SoCal's common stock by SCH, subject to any conditions that were imposed in a concurrent resolution. Pet. App. 223a. Resolution No. 87-511 noted the statutory and regulatory requirements for FHLBB approval of the conversion of SoCal to a stock organization, the acquisition of SoCal's stock by SCH, and the occupation of certain corporate offices by petitioners. *Id.* at 200a-201a. The resolution granted the requisite approvals subject to certain conditions, including (1) the execution of the Assistance Agreement by SoCal and SCH; (2) the execution of the RCMA by SoCal, SCH, and petitioners; (3) the execution of a Dividend Stipulation by SoCal and SCH; and (4) other stipulations and documents. *Id.* at 201a. The resolution also authorized the transmittal of the Forbearance Letter. *Id.* at 217a. The third resolution, No. 87-513, authorized FSLIC to execute and implement the Assistance Agreement, the RCMA, and other documents. *Id.* at 220a.

As petitioners acknowledge, "the requirements for a contract with the Government" include "mutual intent to contract." Pet. 29 (quoting *Massie* v. *United States*, 166 F.3d 1184, 1188 (Fed. Cir. 1999)). The Bank Board resolutions evidence no such mutual intent; they do not state that the Bank Board "agrees," "contracts," or "promises" to do anything. The resolutions are framed as exercises of federal regulatory authority, not contracts binding the government (and petitioners) and requiring payment of damages by the government (or petitioners) upon "breach" of the resolutions. Although the resolutions refer in various places to documents that are undoubtedly contractual (*i.e.*, the Assistance Agreement and the Regulatory Capital Maintenance Agreement), the resolutions do not incorporate those agreements; to the contrary, the Resolutions distinguish between those contracts, which are referred to as "agreements," and other documents, which are termed "stipulations." See, *e.g.*, Pet. App. 207a. Moreover, the documents in this case were carefully structured so that one agreement (the Assistance Agreement) imposed obligations upon SCH and SoCal but not on petitioners, while another agreement (the RCMA) included petitioners. Having structured the transaction to take advantage of the separate identities of SoCal and SCH and the limited liability advantage offered by those separate identities, petitioners cannot now frustrate that structure by claiming that, by virtue of the Bank Board resolutions, the parties' efforts to distinguish between the corporations (SCH and SoCal) and petitioners as individuals who were shareholders of SCH, and to limit petitioners' obligations and rights, were entirely illusory.

To adopt petitioners' view that a request for and grant of regulatory approval forms a contract between the regulatory agency and regulated entity would conflict with long-settled principles of administrative law. As this Court explained in addressing an analogous situation in *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railway*, 470 U.S. 451 (1985), "absent 'an adequate expression of an actual intent' of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party." *Id.* at 466-467 (citation omitted). *National Railroad Passenger Corp.* involved a claim that a statute, rather than a regulatory action, constituted a contract between the government and private entities. But the underlying rule in both instances is that "the principal function of a legislature [or regulatory agency] is not to make contracts, but to make laws that establish the policy of the state." *Id.* at 466. "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws [or regulatory actions] as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative [or administrative] body." *Ibid.* To imply a contractual undertaking from a regulatory approval is impermissible, because in this case, as in *National Railroad Passenger Corp.*, "[t]he continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation." *Keefe* v. *Clark*, 322 U.S. 393, 397 (1944) (quoting *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837)).

c. Contrary to petitioners' contention (Pet. 28), the decision below does not conflict with this Court's decision in *Winstar*. In *Winstar*, the plurality first concluded that an FHLBB resolution had been incorporated into the Supervisory Action Agreement (whose status as a contractual document was undisputed) by means of an integration clause. 518 U.S. at 862-863 (opinion of Souter, J). That conclusion was sufficient to establish that the terms of the contract were supplemented by the FHLBB resolution; the court of appeals in this case rejected the analogous conclusion with respect to the RCMA, and petitioners do not challenge that holding. Petitioners rely, however, on the plurality's added statement that "[t]o the extent that the integration clause leaves any ambiguity, the other courts that construed the documents found that the realities of the transaction favored reading those documents as contractual commitments, not mere statements of policy, and we see no reason to disagree." *Id.* at 863 (citation omitted).

That alternative reasoning by the plurality, which was not addressed by the concurring Justices, was not necessary to the decision in *Winstar*. By its own terms, moreover, that reasoning is inapplicable here, because "the other courts" that construed the documents here did not find that they were contractual commitments; to the contrary, neither lower court expressly addressed whether the Bank Board resolutions alone were sufficient to form a contract. In any event, the facts of this case are fundamentally different from those in *Winstar*. Here, the parties plainly did provide in a contract (the Assistance Agreement) for the regulatory treatment of goodwill, and they also made quite clear that that agreement incorporated certain Bank Board resolutions. But, unlike in *Winstar*, the parties also decided not to include petitioners in that agreement. What petitioners seek in this case, unlike in *Winstar*, is to use the Bank Board resolutions to create additional contract rights for themselves, notwithstanding the fact that, at the time of contracting, the parties decided to grant those rights only to others.

d. Petitioners also argue (Pet. 28-29) that the decision of the court of appeals conflicts with other decisions of the Federal Circuit. Further review would not be warranted to address a claim of an intra-circuit conflict. *Wisniewski*, 353 U.S. at 902. Moreover, the court of appeals' decision could not conflict on this point with any of its prior decisions, because the court of appeals in this case did not address (because petitioners did not raise) the argument that the Bank Board resolutions alone constituted contracts between the government and petitioners.

In any event, even had the court of appeals held that the Bank Board resolutions were not contractual documents giving rights to petitioners, there would have been no intra-circuit conflict. Petitioners cite *Home Savings of America, FSB* v. *United States*, 399 F.3d 1341 (Fed. Cir. 2005). In *Home Savings*, the court of appeals held that although a parent company, Ahmanson, was not a party to the Assistance Agreements in that case, it was a party to overall contracts with the government pursuant to which its subsidiary, Home Savings, acquired several thrifts. *Id.* at 1349. Unlike in this case, the Bank Board resolutions in *Home Savings* conditioned approval of the transaction on a direct undertaking by Ahmanson to assume full financial responsibility for the thrift. See, *e.g.*, *Home Sav. of Am., FSB* v. *United States*, 51 Fed. Cl. 487, 498 (2002); see also 399 F.3d at 1349 (Bank Board resolutions memorialized "reciprocal promises that were part of the overall bargains between the plaintiffs and the government"). In this case, by contrast, the Bank Board resolution approving SCH's acquisition of SoCal mentions petitioners, see Pet. App. 197a-199a, but it does not impose direct obligations on them or condition approval of the acquisition upon reciprocal promises by them.

Petitioners also cite *La Van*. See Pet. 29. The court of appeals in this case specifically distinguished *La Van*, noting that "the shareholders [in *La Van*] were so critical to the conversion transaction that they, rather than the corporation, were essentially the direct purchasers of the converted federally-insured institution." Pet. App. 17a. The court also noted that the contractual documents in *La Van* had not identified the state law intended to govern the contracts in that case, and the court in *La Van* accordingly had no occasion to consider the legal requirements under a particular state's law "mandating a distinction between a corporation and its shareholders." *Id.* at 18a; cf. *Domino's Pizza, Inc.* v. *McDonald*, 126 S. Ct. 1246 (2006) (emphasizing importance of distinction between corporation and its shareholders). In this case, by contrast, the parties provided in the Assistance Agreement that California law would govern the contract, and the court of appeals' analysis emphasized that under California law "there is no justification" to "disregard * * * the corporate structure invoked by [petitioners] facilitating the acquisition and conversion of [SoCal]." Pet. App. 17a. Finally, the court of appeals in *La Van* relied on specific evidence that the government intended to contract with the shareholders separately from the corporation in which they owned shares, such as internal deliberations, 382 F.3d at 1348, and an internal memorandum stating that "arm's length" negotiations were being conducted with the shareholder plaintiffs, *id.* at 1343. Here, in contrast, the facts show that any intent to reach an agreement with petitioners was confined to the terms contained in the RCMA.

In any event, the extent to which particular Bank Board resolutions constituted contracts between the thrift regulators, the banks, and their shareholders in the course of the 1980s is confined to the *Winstar* context. Only 30, out of the original total of approximately 122, *Winstar*-related cases are still pending. The question presented concerning the precise circumstances under which Bank Board regulations during the 1980s did—or did not—attain contractual status is one of limited future importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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