No. 00-448

In the Supreme Court of the United States

CAGUAS CENTRAL FEDERAL SAVINGS BANK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

DAVID M. COHEN
JEANNE E. DAVIDSON
GREGORY R. FIREHOCK
Attorneys

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

QUESTIONS PRESENTED

Whether the court of appeals erred in holding that petitioners' complaint was untimely.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 00-448

CAGUAS CENTRAL FEDERAL SAVINGS BANK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A14) is reported at 215 F.3d 1304. The order of the Court of Federal Claims (Pet. App. A1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2000. The petition for a writ of certiorari was filed on September 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In response to the financial crisis that enveloped the savings and loan industry in the early 1980s, Congress enacted the Financial Institutions Reform, Re-

covery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. FIRREA made sweeping changes to the regulatory framework governing thrifts. The Act abolished the Federal Home Loan Bank Board (FHLBB) and replaced it with the Office of Thrift Supervision (OTS); abolished the Federal Savings and Loan Insurance Corporation (FSLIC) and replaced it with the Federal Deposit Insurance Corporation (FDIC); and created the Resolution Trust Corporation (RTC) as a temporary agency designed to resolve the thrift crisis. FIRREA also phased out the ability of thrifts to count "goodwill" toward meeting regulatory capital requirements. OTS promptly issued regulations implementing FIRREA's new regulatory capital standards. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 856-857 (1996).

The adoption of FIRREA and regulations implementing its regulatory capital requirements resulted in numerous law suits similar to the *Winstar* action. The actions were typically brought by thrifts, holding companies, and individuals claiming that, in connection with their acquisition of savings and loan associations in the 1980s, they had entered into contracts with the federal government, through FSLIC and FHLBB, regarding the treatment of goodwill for purposes of calculating regulatory capital, and that in the wake of FIRREA federal regulators had impermissibly failed to honor those agreements. See 518 U.S. at 858-859; Pet. App. A5-A6. In *Winstar*, this Court held that the United States was liable for breach of contracts providing for the treatment of goodwill for purposes of calculating regulatory capital, and remanded for a determination of damages. See 518 U.S. at 910.

On September 29, 1995, the Department of Justice (DOJ) and the RTC entered into an agreement providing for alternative dispute resolution of the *Winstar*-related claims that the RTC may possess in its capacity as receiver of failed thrifts. The agreement contained a number of "RECITALS," including that "the RTC may possess certain claims against the United States arising out of the enactment of certain provisions of" FIRREA and its implementing regulations; "the RTC contends that these changes may have breached contractual obligations of the FHLBB to some institutions for which the RTC has been appointed receiver, or may have otherwise damaged these institutions. These claims shall be referred to herein as 'Goodwill Claims'"; and "the RTC and the United States both desire to avoid litigation of these Goodwill Claims" and "both intend to try to resolve these Goodwill Claims, if any, at the appropriate time, by amicable measures in order to avoid costly and contentious litigation." Pet. App. A7 (quoting agreement).

The agreement further provided that "the parties agree to toll the statute of limitations that may apply to Goodwill Claims, as set forth below." Pet. App. A7 (quoting agreement); see 28 U.S.C. 2501 (establishing six-year statute of limitations for filing claims in the Court of Federal Claims). The first three provisos of the tolling provision were as follows:

> 1. The running of the statute of limitations for all Goodwill Claims the RTC may possess shall be tolled from the date of this Agreement to and including one hundred-thirty (130) days after the entry of either a final and unappealable judgment in [the *Winstar* case (in which such judgment has not yet been entered)].
>
> 2. During the first one hundred-twenty days of the period referred to in paragraph 1, the parties shall

> attempt to resolve amicably, without litigation, any and all Goodwill Claims that the RTC may then possess.
>
> 3. Following the conclusion of the one hundred-twenty day period specified in paragraph 2, the RTC shall have ten (10) days in which to file suit on any Goodwill Claim not amicably resolved by the parties. Any such claim filed by the RTC against the United States within this ten day period shall be deemed by the United States, for the purposes of computation of the statute of limitations, to have been filed on August 8, 1995, and the United States agrees that it will not raise the statute of limitations as a defense in that litigation.

Pet. App. A7 (quoting agreement).

Because final judgment has not yet been entered in the original *Winstar* action, the period of review and settlement of claims—which must precede the filing of any claims subject to the September 29, 1995, agreement—has not yet commenced. Meanwhile, substantial doubt has arisen as to whether the agreement's tolling provision is enforceable. The statute of limitations for filing claims against the United States in the Court of Federal Claims is a condition of the waiver of sovereign immunity in the Tucker Act, 28 U.S.C. 1491(a) (1994 & Supp. IV 1998). And the Court of Federal Claims has recently "reject[ed] the notion that litigating parties can modify the terms that Congress has specified for the initiation of [such claims]," and therefore has held that the tolling agreement between the RTC and DOJ is "a legal nullity." *Castle* v. *United States*, No. 90-1291 C, 2000 WL 1690248, at *4 (Fed. Cl. Nov. 9, 2000).

2. Petitioner Caguas Central Federal Savings Bank (Caguas) acquired two thrifts in the early 1980s. In

connection with those acquisitions, federal regulators provided various forms of financial assistance to Caguas, including loans, notes, and indemnification, which were memorialized in "assistance agreements" containing integration clauses. Compl. 4-7. The agreements approved the use of goodwill to meet regulatory capital requirements. *Id.* at 4-6. Following the enactment of FIRREA and the implementation of its regulatory capital requirements, Caguas became insolvent and, in 1990, was placed by OTS into receivership administered by the RTC. In 1995, the FDIC succeeded the RTC as receiver.

On October 21, 1998, Caguas and certain former members and account holders of Caguas, petitioners here, filed this action derivatively on behalf of Caguas, alleging claims similar to those described in *Winstar*. Pet. App. A8-A9. The claims were based on events that took place in the 1980s, namely the acquisition of the thrifts and treatment of those acquisitions for accounting purposes. The complaint alleged that the FDIC, as the successor to the RTC, "had the obligation to institute the present action on behalf of the receivership but has neglected to do so due to several conflicts of interests." *Id.* at A9 (quoting complaint). The government moved to dismiss for lack of jurisdiction, arguing that the action was barred by the six-year statute of limitations applicable to claims against the United States filed in the Court of Federal Claims. 28 U.S.C. 2501.

Petitioners acknowledged that their claims normally would be time barred by the statute of limitations. But they argued that the claims were preserved by the tolling agreement entered into by DOJ and the RTC, claiming that they were third-party beneficiaries of that agreement. Because the FDIC (as successor to the

RTC) had not taken action to assert the thrift's claims, petitioners also contended that they were entitled to step into the shoes of the receiver and assert any claims remaining in the receivership estate, on the ground that the FDIC was not diligently pursuing these claims due to a conflict of interest. The FDIC responded by arguing that—to the extent it was enforceable at all—the tolling agreement only applied to the RTC (or the FDIC, as its successor) and DOJ, and not to third parties.

The Court of Federal Claims dismissed the complaint for lack of jurisdiction and failure to state a claim for which relief may be granted. Pet. App. A1. The court "view[ed] the 'tolling agreement' as being strictly limited in its application to the parties [*i.e.*, the RTC and DOJ], if it is enforceable at all." *Ibid.* With respect to petitioners' claim that the agreement created rights in third parties, namely Caguas or its members, the court concluded that "the parties to the tolling agreement did not show an interest in creating any rights in these plaintiffs." *Ibid.*

3. The Federal Circuit affirmed. Pet. App. A3-A14. The court of appeals first rejected the argument that petitioners were third-party beneficiaries of the tolling agreement. As the court explained, "[n]othing in the tolling agreement * * * even suggests, much less establishes, that the parties to it intended to toll the statute of limitations for suits brought by members of an insolvent savings and loan association on behalf of the association." *Id.* at A11. Rather, by its terms, the agreement "toll[s] the statute of limitations only for cases filed by [the RTC] on Goodwill Claims it possesses." *Id.* at A12. Moreover, petitioners' third-party beneficiary theory is inconsistent with the express purpose of the agreement—"that, once *Winstar* finally

was decided, the other [*Winstar*-type] claims could be 'amicably' resolved 'without litigation,'" and "not to permit litigation of those claims by third parties." *Ibid.* (quoting agreement).

The court of appeals also rejected petitioners' argument that the FDIC failed to protect petitioners' interest because of a "conflict of interest," and that "because of this conflict, they may step into the shoes of the receiver and assert on behalf of Caguas the claims that the receiver should have, but improperly failed to assert." Pet. App. A13. As the court explained, "[o]nce again," there is absolutely no indication that the tolling agreement "cover[s] such a suit." *Ibid.* Thus, "[i]f [the FDIC] has been derelict in the performance of its duties to Caguas, as [petitioners] complain, the proper remedy would have been a suit against [the FDIC], not one against the United States." *Ibid.*

Because the court of appeals concluded that petitioners were not entitled to invoke the tolling provision, it did not need "to address the question whether the statute of limitations applicable to the Court of Federal Claims is waivable by the Government, as was done under the tolling agreement here," and it accordingly "offer[ed] no opinion on that question." Pet. App. A14.

ARGUMENT

The court of appeals correctly held that petitioners' action is time-barred. Its decision does not conflict with any decision of this Court or of any other court of appeals, and it does not present any federal question of general significance. Further review by this Court therefore is not warranted.

1. Petitioners renew the argument that the statute of limitations on their *Winstar*-related claims was tolled by the September 29, 1995, agreement between the

RTC and DOJ, because they are third party beneficiaries of that agreement. Pet. 18-19. That argument is contradicted by the express terms of the tolling agreement, and was properly rejected by the courts below.

To the extent the tolling agreement is enforceable at all (see pp. 12-13, *infra*), it only preserves the right of the RTC (or its successor, the FDIC) to assert *Winstar*-related claims against the United States. As the court of appeals explained, "[o]rdinarily, only the parties to a contract have rights thereunder that they may enforce." Pet. App. A11. The parties to a contract "may create rights for the benefit of third persons." *Ibid.* But to create such rights, "the contract must 'reflect[] the express or implied intention of the parties to benefit the third-party,'" and the third party "must fall within a class clearly intended to be benefitted thereby." *Montana* v. *United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (quoting *Schuerman* v. *United States*, 30 Fed. Cl. 420, 433 (1994)); see also *Williams* v. *Fenix & Scisson, Inc.*, 608 F.2d 1205, 1209 (9th Cir. 1979) ("Contracting parties are presumed to act only for themselves unless there is a clear expression of an intent to benefit a third party."); Restatement (Second) of Contracts §302(l) (1979). The interagency agreement between the RTC and DOJ in no way indicates an intent to confer rights on any third parties, and there is accordingly no basis for concluding that petitioners fall within any "clearly intended" class of beneficiaries.

The agreement purported to toll the "running of the statute of limitations for all Goodwill Claims *the RTC* may possess." Pet. App. A11 (quoting agreement) (emphasis added). The agreement refers in multiple places to the claims that "the RTC may possess," see *id.* at A11-A12 (quoting provisions), and nowhere suggests that it applies to claims possessed by any other party, let alone an entire class of unnamed parties. The agreement also provides that "the parties [*i.e.*, the RTC and DOJ] shall attempt to resolve amicably, without litigation, any and all Goodwill Claims that the RTC may then possess." *Id.* at A11 (quoting agreement). As the court of appeals concluded, construing the agreement to include perhaps thousands of additional parties—former shareholders and members of failed thrifts—would all but guarantee that litigation would *not* be avoided and would eliminate any possibility of an "amicabl[e]" resolution of such claims. *Id.* at A12; see *id.* at A7 (quoting preamble). That would plainly frustrate the intent of the parties by subverting the carefully crafted alternative dispute resolution process set forth in the September 29, 1995, agreement.[1]

Petitioners cite two district court cases for the proposition that a tolling agreement can be extended to unnamed individuals. See Pet. 19 (citing *MCC Proceeds, Inc.* v. *Whitman & Ransom*, No. 95 Civ. 10086, 1997 WL 289470, at *6-*8 (S.D.N.Y. May 30, 1997); *Lindner Dividend Fund, Inc.* v. *Ernst & Young*, 880 F. Supp. 49, 55 (D. Mass. 1995)). The cases on which peti-

---

[1] Indeed, because petitioners have alleged (Pet. 13-14) only vague conflicts of interest stemming from the FDIC's different statutory duties, allowing suit in this case would permit numerous former members and shareholders of failed thrifts to file time-barred, *Winstar*-related claims. Allowing those claims to proceed would have the anomalous result of giving private plaintiffs (including petitioners here) more leeway to litigate such claims than that possessed by the FDIC. As discussed above, under the September 29, 1995, agreement, the FDIC is not permitted to bring goodwill claims until after the *Winstar* action has become final and a 120-period has passed without any settlement. While they rely on the tolling agreement to resurrect their *Winstar*-related claims, petitioners obviously have no intention of abiding by the agreement's provisions limiting when those claims may be brought.

tioners rely, however, in fact reaffirm that a tolling agreement is enforceable only by those persons that are clearly identified in the agreement, or that fall into a class of individuals that is so identified. Thus, the court in *MCC Proceeds* rejected the argument that "individual partners" were not covered by a tolling agreement that expressly provided that it was "binding upon [the partnership] and *its partners*." 1997 WL 289470, at *2 (emphasis added). Cf. *Resolution Trust Corp.* v. *Bonner*, 848 F. Supp. 96, 99 (S.D. Tex. 1994) (individual partners of a law firm were not bound by a tolling agreement signed by the law firm because the agreement bound the law firm but not "its partners."). Likewise, the court in *Lindner Dividend* recognized that, even though they were not individually named in the agreement, plaintiffs who were members of a class in a class action were covered by a tolling agreement that expressly applied to "all putative class members." 880 F. Supp. at 55.

This case could not be more different. The pertinent provisions of the tolling agreement in this case, as well as its express purpose, unambiguously point to the conclusion that only the named parties—*i.e.*, the RTC and DOJ—are covered.[2]

2. Petitioners also claim (Pet. 14) that they should be permitted to step into the shoes of the FDIC to bring *Winstar*-related claims on behalf of Caguas that the FDIC thus far has not pursued. But, as the court of appeals concluded, the "reasoning in denying [petitioners'] third-party beneficiary claims also requires

---

[2] Nothing in the September 29, 1995, agreement prevented petitioners from filing a timely lawsuit on their own—as did the plaintiffs in more than 40 other *Winstar*-related actions, in timely asserting claims involving thrifts in receivership.

rejection of their alternative argument that the tolling agreement itself covers Caguas, on whose behalf they are suing"; "Caguas was not a party to that agreement, and it did not become one merely because any recovery [the RTC] might obtain on Caguas' claims would be for Caguas' benefit." Pet. App. A12-A13. Once again, that conclusion is dictated not only by the terms of the September 29, 1995, agreement, but also by its purpose. The agreement was intended "to freeze the situation until *Winstar* was finally determined, in the hope that thereafter the remaining supervisory Goodwill Claims that [the RTC] possessed—including those of Caguas —could be amicably settled without litigation." *Id.* at A13. Construing the agreement to allow Caguas to bring the time-barred claims in this case would thwart that purpose by "facilitat[ing] litigation in the interim by savings and loan institutions themselves." *Ibid.*[3]

Petitioners suggest (Pet. 13) that the courts must nevertheless permit this action to proceed in order to prevent the FDIC from "squandering" valuable claims belonging to the receivership, since the FDIC assert-

---

[3] Furthermore, Congress has provided that the shareholders or members of a thrift in receivership may not exercise any particular function of the receivership unless the receiver expressly delegates that function:

> [The FDIC] may, by regulation or order, provide for the exercise of any function by any member or stockholder, director, or officer of any insured depository institution for which [the FDIC] has been appointed conservator or receiver.

12 U.S.C. 1821(d)(2)(C). OTS regulations are to the same effect. See 12 C.F.R. 558.1(b)(7). Thus, because the FDIC has not expressly delegated to petitioners the function of litigating *Winstar*-related claims on the FDIC's behalf, petitioners are not entitled to usurp that function. None of the common law or contract principles cited by petitioners alters that conclusion.

edly has a conflict of interest in proceeding with *Winstar*-related claims on behalf of failed thrifts such as Caguas. The FDIC has not acted in dereliction of its statutory duties. And in any event, as the court of appeals explained, "[i]f [the FDIC] has been derelict in the performance of its duties to Caguas, as the Members complain, the proper remedy would have been a suit against [the FDIC], not one against the United States." Pet. App. A13; see *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994) (in its receivership capacity, "the FDIC is not the United States"). Allegations of malfeasance or conflicts of interest on the part of the FDIC do not relieve petitioners from the statute of limitations on the *Winstar*-related claims that they seek to raise—years late—in this case *against the United States*.[4]

3. Finally, as noted above, substantial doubt has arisen over whether the tolling agreement between the RTC and DOJ is enforceable at all. The Court of Federal Claims has recently held that the agreement is "a legal nullity" on the ground that "[t]he limitations

---

[4] Contrary to petitioners' assertion, the FDIC never "consented to participate in the prosecution of these *Winstar*-related goodwill claims." Pet. 21; see Pet. 4-5, 9, 16 (implying that the FDIC sought to become a party to advance its *Winstar*-related claims). Rather, the FDIC consented to appear before the Court of Federal Claims for the limited purpose of requesting the court "to explicitly rule that [any jurisdictional] order applies only to plaintiffs, and not the FDIC as owner of the underlying claim." Involuntary Pl. FDIC's Mem. Regarding Applicable Statute of Limitations 3. The Court of Federal Claims never ordered joinder of the FDIC, and later recognized that the "FDIC is not yet a party to this action." Order (Jan. 7, 1999). On appeal, the FDIC participated solely as amicus curiae to urge affirmance, arguing that petitioners were not entitled to any benefit under the tolling agreement, and that FDIC had fulfilled its duties to Caguas.

period applicable to the actions brought in this court is a condition that attaches to the sovereign's waiver of immunity from suit," and that this condition cannot be waived by "litigating parties." *Castle* v. *United States*, No. 90-1291 C, 2000 WL 1690248, at *4 (Fed. Cl. Nov. 9, 2000). See also *Soriano* v. *United States*, 352 U.S. 270, 273 (1957); *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Hopland Band of Pomo Indians* v. *United States*, 855 F.2d 1573, 1576-1577 (Fed. Cir. 1988).[5] The courts below did not need to reach that issue because they correctly concluded that petitioners were not entitled to rely on the tolling agreement in the first place. See Pet. App. A14. Nevertheless, the serious doubt that exists with respect to the validity of the tolling agreement *vel non* provides an additional reason to deny review in this case.[6]

---

[5] The question whether the tolling agreement is valid is also currently pending before the Federal Circuit in *Landmark Land Co.* v. *United States*, Nos. 00-5073 & 00-5074 (filed Apr. 10, 2000).

[6] Contrary to petitioners' assertion (Pet. 7), the court of appeals did not seek to "immunize" the government from the consequences of *Winstar*. Rather, it merely applied settled principles of law and concluded that the particular claim in this case was time-barred. Accordingly, there is no conflict between the court of appeals' decision below and *Winstar*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
GREGORY R. FIREHOCK
Attorneys

NOVEMBER 2000