No. 02-938

In the Supreme Court of the United States

JOHN K. CASTLE, 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

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, assuming that there was a contract in this case and the government breached it, petitioners Castle and Harlan, who were under no obligation to infuse capital into the thrift institution that was the subject of the alleged contract, may recover as "restitution" the amount of capital that they and other investors chose to invest in the thrift.

2. Whether the investors in the thrift other than Castle and Harlan were intended third-party beneficiaries of the alleged contract.

3. Whether the government's alleged breach of contract in this case is compensable as a taking without just compensation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 301 F.3d 1328. The opinions of the trial court on the issues of liability and remedies (Pet. App. 106a-125a; Pet. App. 28a-105a) are reported at 42 Fed. Cl. 859 and 48 Fed. Cl. 187, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2002. On November 14, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 17, 2002, and the petition was filed on December 16, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

Petitioners, who had acquired a savings and loan in 1988 by purchasing its stock, brought this action in the Court of Federal Claims. They claimed that the government had breached a *Winstar*-type contract and that they were entitled, *inter alia*, to restitution. See *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996). The trial court held that petitioners were entitled to summary judgment on liability issues and, after a trial on the merits, the court held that they were entitled to recover as restitution their entire initial investment in the thrift. The court of appeals reversed. Without deciding whether the regulatory approval of the acquisition had resulted in a contract with the regulatory agency, the court of appeals held that, if a contract had been formed and had been breached, the petitioners other than Castle and Harlan could not maintain a suit for breach of the contract because they were not third-party beneficiaries of it. The court also held that Castle and Harlan were not entitled to restitution of the sums they had invested, because they were not required by the alleged contract to make the investment. The court also held that petitioners were not entitled to compensation under the Just Compensation Clause of the Fifth Amendment.

1. Petitioners Castle and Harlan were owners of a merchant banking firm, Castle Harlan, Inc. In 1988, they decided to purchase an ailing thrift, Western Empire Savings and Loan Association, and merge it into a new institution. Pet. App. 7a. In accordance with regulatory requirements at the time, they filed a "Notice of Change of Control" and a business plan with the Federal Home Loan Bank Board. That plan included substantial investment in nontraditional, high-risk "junk"

bonds. It also stated that Western Empire would issue preferred stock and subordinated debt to obtain new equity capital. The submission to the Bank Board also included "Requests for Forbearances, Approvals, Waivers and Certifications" as a "condition precedent" to the merger. *Id.* at 7a-8a; see C.A. App. A5000733.

On December 30, 1988, the Bank Board sent Castle and Harlan an approval letter, subject to the condition that the new institution (to be called "New Western Empire") execute a Regulatory Capital Maintenance Agreement (RCMA), which would set forth the "minimum acceptable level of Tangible Capital"—generally two percent of the institution's liabilities, see C.A. App. A5000032, § 2(g)—for the new thrift. Pet. App. 8a. On the same day, the RCMA was executed by Western Empire, Castle, Harlan, and the Federal Savings and Loan Insurance Corporation (FSLIC). A provision of the RCMA specified that Castle and Harlan, "individually, have not agreed to maintain the Tangible Capital of New Western Empire." *Id.* at 21a. The RCMA also made clear that:

> All references to regulations of the Bank Board or the FSLIC used in this Agreement shall include any successor regulation thereto, *it being expressly understood that subsequent amendments to such regulations may be made and that such amendments may increase or decrease the Acquiror's obligation under this Agreement.*

Id. at 25a (emphasis added by court of appeals).

Upon the signing of the RCMA, Castle and Harlan contributed $502,000 to New Western Empire. Pet. App. 9a, 23a. Other individuals (the investor petitioners) purchased stock and other securities of New

Western Empire for an additional $14.6 million. *Id.* at 9a.

About eight months later, in August 1989, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. Meanwhile, New Western Empire's business lagged behind its business plan. In September 1989, the Office of Thrift Supervision (OTS) informed New Western Empire that it had fallen out of capital compliance. In February 1990, OTS placed New Western Empire in receivership. Pet. App. 9a-10a.

2. Castle, Harlan, and the investor petitioners brought suit in the Court of Federal Claims, alleging that the Government, in applying FIRREA's new capital requirements to New Western Empire, had breached a contract to which they were parties or third-party beneficiaries. The court granted summary judgment for petitioners with respect to liability, holding that a contract had been formed between the regulatory authorities and Castle and Harlan and that the contract was memorialized in the business plan, the Bank Board's approval letter, and the RCMA. Pet. App. 109a-110a. The court also held that the contract had been breached. See *id.* at 111a-116a. The court further held that the investor petitioners had standing to sue for that breach, because they were third-party beneficiaries of the contract. *Id.* at 116a-123a.

The case was then transferred to another judge in the Court of Federal Claims for further proceedings. After a four-month trial on damages, the court awarded petitioners $15.1 million as restitution. Pet. App. 28a-94a. The court, however, rejected petitioners' claims that there had been a taking and that they were entitled to just compensation under the Fifth Amendment. *Id.* at 95a-102a.

3. The court of appeals reversed the award of damages and affirmed the trial court's holding that there had been no taking without just compensation. Pet. App. 1a-27a. The government argued that the Court of Federal Claims had erred in its liability ruling, because, *inter alia*, that ruling rested on an alleged concession by the government about the existence of a contract and its terms—a concession that the government argued had never been made. In light of its holding that petitioners were in any event not entitled to damages even if a binding contract had existed, the court emphasized that it "expressly decline[d] to consider the liability issue." *Id.* at 15a; see *id.* at 19a (same), 24a (same).

The court held that, assuming that there had been a contract and a breach, the investor petitioners were not third-party beneficiaries and accordingly had no standing to sue for the breach. The court applied the rule that, where a shareholder of a corporation sues as a third-party beneficiary of a corporation's contract, "the contract must express the intent of the promissor to benefit the shareholder *personally, independently of his or her status as a shareholder*." Pet. App. 17a (quoting *Glass* v. *United States*, 258 F.3d 1349, 1353-1354, amended on reh'g, 273 F.3d 1072 (2001) aff'd after remand, No. 02-5175, 2003 WL 1878953 (Fed. Cir. Apr. 15, 2003). The court explained that in this case "[n]othing suggests that the government made any promises, contractual or otherwise, that were expressly intended to benefit the shareholders personally, independently of their status as shareholders of [New] Western Empire." *Ibid.* Although the investor beneficiaries "could, of course, expect to benefit from [the government's] performance as the value of the bank grew, they held no rights to that performance for themselves." *Ibid.*[1]

The court of appeals further held that, although Castle and Harlan had standing to sue for breach of contract, see Pet. App. 18a-19a, they "are not entitled to damages," *id.* at 19a. Castle and Harlan had argued that they had personally agreed to recapitalize New Western Empire, that they had accordingly convinced the investor petitioners to invest in the thrift, and that they were personally liable for the amount of that investment. See *id.* at 20a. The court of appeals noted, however, that the RCMA—a document that "Castle and Harlan characterize as the basic contractual document," *id.* at 21a—specifically provided that Castle and Harlan "*individually, have not agreed to maintain the Tangible Capital of New Western Empire.*" *Ibid.* (emphasis added by court of appeals). See *id.* at 20a (similar for business plan). Accordingly, Castle and Harlan "incurred no individual financial liability" in entering into the alleged contract, and they therefore "cannot recover restitutionary damages in any amount contributed voluntarily, beyond their contractual obligations." *Ibid.* As the court explained, "[t]he law is well settled * * * that in order to be compensable as restitution, the plaintiff's contribution must have been made in performance of its contractual obligations." *Id.* at 22a (quoting *Landmark Land Co.* v. *FDIC*, 256 F.3d 1365, 1375 (Fed. Cir. 2001)).[2]

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[1] The court of appeals also agreed with the trial court's factual determination that the investor petitioners could not succeed on the alternative ground that they were parties to the alleged contract, rather than third-party beneficiaries. Pet. App. 18a. The petition for certiorari does not challenge that ruling.

[2] The court of appeals also rejected the claim by Castle and Harlan that they were entitled to recover the amount the investors

Finally, the court of appeals rejected petitioners' claim that FIRREA had effected a taking of their property without just compensation. Pet. App. 24a-26a. The court agreed with the trial court that "seizure of a bank for failure to meet regulatory capital requirements does not constitute a taking." *Id.* at 24a. Moreover, to the extent Castle and Harlan based their claim upon the existence of an alleged contractual guarantee, the court reasoned that their rights, if any, were only to have the government "regulate Western Empire consistently with the contract's terms, or to pay damages for breach." *Id.* at 26a (citing *Winstar*, 518 U.S. at 919 (Scalia, J., concurring)). FIRREA did not affect petitioners' right to obtain "the full range of remedies associated with any contractual property right they possessed." *Ibid.* Accordingly, "even assuming the enactment and enforcement of FIRREA breached a contract the government had with Castle and Harlan, it did not constitute a taking of the contract." *Ibid.*[3]

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had paid as reliance damages. The court reached that conclusion because Castle and Harlan "lack standing to assert any reliance interest on behalf of the other shareholders" and because, on the facts of this case, "the government's alleged breach cannot be said to have caused the loss of" the $502,000 that Castle and Harlan invested themselves. Pet. App. 22a-23a. The petition does not challenge the court's rejection of the claim for reliance damages.

[3] Petitioners submitted a petition for rehearing en banc on October 17, 2002. It was initially rejected for reasons of form. Petitioners moved for leave to file a corrected petition. The court initially denied the motion, but on March 6, 2003, it granted a joint motion of petitioners and the United States to file the corrected petition and to deem it timely filed. On May 1, 2003, the court of appeals denied rehearing and rehearing en banc in this case.

ARGUMENT

The judgment of the Federal Circuit is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners assert that the court of appeals' decision rests upon "special rules for the government in contract cases."[4] Pet. 8; see Pet. 9-11,

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[4] Petitioners cite (Pet. 9) three Federal Circuit decisions in other *Winstar*-related cases with which they apparently disagree, and they claim that those decisions demonstrate that the Federal Circuit has "adopt[ed] special rules to relieve the government of its obligation to pay compensation for its adjudicated breaches of contract," has "failed to adhere to well-established principles of contract law as set forth in the Restatement and this Court's precedents," has "demonstrated its willingness to ignore or distort established principles of contract law in order to hand victory to the government," and has committed a "gross injustice" by "repeatedly and consistently refusing to hold the United States to the legal standards applicable to private contractors." Pet. 8, 9, 10. Each of the cases cited by petitioners was decided on its own merits, and at least one (*California Federal Bank*, cited below) was the subject of a petition for certiorari that the Court denied. The decisions in those distinct cases have no material effect on whether further review is warranted in this case. In any event, insofar as petitioners mean to suggest that the Federal Circuit's decisions in *Winstar*-related appeals have uniformly favored the government, they are incorrect. See, *e.g.*, *LaSalle Talman Bank, F.S.B.* v. *United States*, 317 F.2d 1363 (Fed. Cir. 2003) (affirming summary judgment for plaintiffs on liability and ruling for plaintiffs on some damages issues); *Bluebonnet Sav. Bank* v. *United States*, 266 F.3d 1348 (Fed. Cir. 2001) (vacating judgment in government's favor on damages and remanding with instructions that the trial court interpreted to require entry of judgment in the amount of $132 million for plaintiffs); *Landmark Land Co.* v. *FDIC*, 256 F.3d 1365 (Fed. Cir. 2001) (rejecting government's appeal of $21.5 million damages award to plaintiff); *California Fed. Bank* v. *United States*, 245 F.3d 1342 (Fed. Cir. 2001) (affirming summary judgment for plaintiffs on liability, vacating summary

14-15, 21, 22-23. The court of appeals, however, did not mention, refer to, or otherwise rely in any respect on any special rule that is applicable only in government contract cases. Instead, the court squarely rested its decision on the application of well-settled principles of contract law regarding breach of contract remedies and third-party beneficiaries, as well as the established understanding of the Just Compensation Clause, to the facts of this case. Further review is therefore unwarranted.

1. The court of appeals correctly held that, even assuming that a contract guaranteeing particular regulatory treatment of the thrift came into existence and was breached, Castle and Harlan were not entitled to recover their investment as an award of restitution.

a. The court of appeals recognized that "[t]he documents comprising the alleged contract * * * contain no promise by Castle and Harlan to recapitalize [Western Empire] in their individual capacities." Pet. App. 20a. The Federal Circuit reached that conclusion after reviewing the business plan, which did not state that Castle and Harlan would invest in recapitalizing Western Empire, but instead stated only that the recapitalization of WESL was to be effectuated by an investor group. *Ibid.* The Federal Circuit also examined what petitioners themselves alleged was the "basic contractual document," the RCMA. *Id.* at 21a. At the insistence of Castle and Harlan, the RCMA contained a provision specifying that the "Acquirors [Castle and Harlan], individually, have not agreed to maintain the Tangible Capital of New Western Empire." *Ibid.* (emphasis omitted). Because Castle and Harlan were not

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judgment in favor of government, and remanding for trial on lost profits), cert. denied, 534 U.S. 1113 (2002).

contractually obliged to invest in New Western Empire, the court of appeals correctly held that they were not entitled to recover the $502,000 investment they in fact made. *A fortiori*, they could not recover the funds invested by the investor petitioners. Castle and Harlan were not obliged by any contractual obligation *with the government* to reimburse those funds, and they could not in any event so easily evade the limitations on third-party standing by obtaining a contractual recovery on behalf of the investor petitioners that those petitioners had no standing to obtain on their own. See *id.* at 22a.

b. Petitioners assert (Pet. 10) that the court of appeals' decision held "that as a matter of law a party who performs under a unilateral contract with the government is not entitled to restitution in the event of the government's subsequent breach." See Pet. 12 (referring to "[t]he Federal Circuit's holding that performance of a unilateral contract does not give rise to a right to restitution"). The court of appeals, however, reached no such holding. The court neither mentioned nor discussed unilateral contracts in its decision, because the court viewed this case as involving a standard case of a bilateral contract (*i.e.*, an exchange of a promise for a promise), rather than a unilateral contract (*i.e.*, an exchange of a promise for performance).

The court of appeals viewed the case as involving a bilateral contract because that is the way petitioners presented it. Prior to their petition for a writ of certiorari, petitioners never asserted that their alleged contract with the government was a unilateral contract. Instead, they contended in the trial court that they had entered into a bilateral contract that was "memorialized" in several documents, the terms of which were "heavily negotiated" over a period of several months.

Pet. App. 109a; see *id.* at 30a-31a ("After several months of negotiations with government regulators, Castle Harlan * * * agreed to infuse Western Empire with up to $25 million in new capital in exchange for certain regulatory forbearances."). Petitioners made the same argument to the court of appeals. See *id.* at 9a ("Castle and Harlan contend that, pursuant to this contract, they agreed to acquire and recapitalize Western Empire, and that, in exchange, the Bank Board and FSLIC promised to afford Western Empire special regulatory treatment."). Indeed, they continue to advance the same claim in their petition for certiorari. See Pet. 3 (Castle and Harlan "agreed to acquire and recapitalize a failing savings and loan association * * * in exchange for the government's promises that they could operate Western Empire in accordance with a non-traditional business plan."). Relying on the clear terms of the RCMA and other documents, the court of appeals rejected petitioners' contention that petitioners were personally obligated to recapitalize the thrift. Pet. App. 21a. But the court never questioned petitioners' claim that the alleged contract that was said to have been breached was a bilateral one. Accordingly, this case raises no issue regarding the legal rules applicable to restitution in cases involving unilateral contracts, and the court of appeals decided no such issue.

c. Petitioners were correct in understanding this case to involve claims of breach of a bilateral contract; they did not, as they now assert, "perform[] under a unilateral contract." Pet. 9. Unilateral contracts were recognized as a distinct type of contract by the First Restatement of Contracts, see Restatement of Contracts § 12 (1932), but the concept was abandoned as unhelpful in the Restatement (Second) of Contracts

(1979).[5] The concept of mutuality of obligation does not apply to unilateral contracts, where only one party makes a promise. See E. Allan Farnsworth, *Contracts* § 3.4 (3d ed. 1999). A classic "unilateral" contract is an offer of a reward for completion of a specific act or an offer of a price for particular goods or services. Richard A. Lord, *Williston on Contracts* § 1:17 (4th ed. 1990).

There is no evidence in the record here that the government in this case ever extended the kind of open invitation that might constitute an offer for a "unilateral" contract. There is no evidence that the government ever offered to enter into a contract with anyone who volunteered to infuse any amount, without limitation, into Western Empire, and thus no evidence that the infusion by petitioners of capital constituted "performance" that "accepted" an alleged "offer." Indeed, because any government "offer" that occurred in this case did not by its plain terms require the infusion of capital by Castle and Harlan, any infusion of capital by them was an independent business decision by them and not the result of a contractual obligation, whether characterized as express, implied, unilateral or bilateral.

d. Petitioners also err in asserting (Pet. 11-14) that the court of appeals' holding is in some way inconsistent

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[5] See, *e.g.*, K. N. Llewellyn, *On our Case-Law of Contract: Offer and Acceptance, I*, 48 Yale L.J. 1, 36 (1938) ("[U]nilaterals, at large, for purposes of studying formation, are not usefully conceived as one of two coordinate bodies of Contracts cases, * * * but belong[] in the freak tent as an interesting and often instructive curiosity."); Restatement (Second) of Contracts § 1, cmt. f (1979) (noting that "[t]he term contract is generic * * * and * * * includes varieties described as voidable, unenforceable, formal, informal, express, implied * * *, unilateral, bilateral").

with settled principles of contract law, as set forth in the Restatements of Contracts or Restitution. The provision of the Restatement (Second) of Contracts upon which petitioners rely (see Pet. 13) makes clear that the "injured party is entitled to restitution for any benefit that *he* has conferred on the other party *by way of part performance* or reliance." Restatement (Second) of Contracts § 373 (1979) (emphasis added); see Restatement (Second) of Contracts, Topic 4, Intro. Note (1979) ("A party who has received a benefit *at the expense of the other party* to the agreement is required to account for it, either by returning it in kind or by paying a sum of money.") (emphasis added). Thus, restitution is available to a party only for a benefit conferred *by that party* while performing *that party's* contractual obligations. The money invested by the investor petitioners was not money that Castle and Harlan paid, and it was not invested as performance of contractual obligations by Castle or Harlan. The Restatement of Restitution makes clear that "[a] person who officiously confers a benefit upon another is not entitled to restitution therefor." Restatement of Restitution § 2 (1932). The court of appeals simply followed those authorities.

e. Petitioners contend (Pet. 15) that the Federal Circuit's restitution holding conflicts with the Ninth Circuit's award of restitution in *Far West Federal Bank* v. *Office of Thrift Supervision-Dir.*, 119 F.3d 1358 (1997). In *Far West*, certain "prospective shareholders" who were specifically identified in the Conversion Agreement—the key contractual document—"invest[ed] $26.6 million in Far West in exchange for promises by the FHLBB." *Id.* at 1364. Those investors had by the time of the Conversion Agreement already "executed a 'Stock Purchase Agreement,' under which the Investors agreed to provide Far West with approximately $26.6 million in new capital through the purchase of Far West stock." *Id.* at 1361. Insofar as the court of appeals' decision in this case rests on a refusal to permit Castle and Harlan to recover the $502,000 that they themselves invested, its decision does not conflict with *Far West* because, unlike the investors in *Far West*, Castle and Harlan had specifically *disclaimed* any obligation to invest any of their own money in the thrift. See Pet. App. 21a. Insofar as the court of appeals' decision in this case rests on a refusal to permit Castle and Harlan to recover funds invested by third parties—the investor petitioners—it also does not conflict with *Far West*, because, first, no investor in *Far West* was attempting to recover as restitution funds that had been invested by others, and, second, the investor petitioners in this case were not specifically identified in the relevant documents.[6]

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[6] Petitioners also assert (Pet. 15-16) that the court of appeals' decision conflicts with the Tenth Circuit's award of restitution in *Resolution Trust Corp.* v. *FSLIC*, 25 F.3d 1493, 1497 (1994). Although the opinion in *Resolution Trust Corp.* does not recite the relevant terms of the contract in that case, there is no reason to doubt that the parties seeking restitution had made investments that they were, as individuals, contractually committed to making. By contrast, Castle and Harlan had disclaimed any such contractual obligation in this case. Moreover, the parties who were awarded restitution in *Resolution Trust Corp.* apparently obtained the award for funds that they themselves had invested. Castle and Harlan, by contrast, sought restitution of the funds of other, third-party investors who had no standing to sue. See *id.* at 1505 (referring to "the undisputed fact that the Investors [*i.e.*, plaintiffs with standing] had infused $6 million into [the thrift]"). Thus, as in *Far West*, the Tenth Circuit's decision that restitution was warranted on the facts of *Resolution Trust Corp.* does not conflict with the

Finally, even if there were a narrow conflict between the Federal Circuit's decision in this case and a decision of a regional court of appeals in an earlier *Winstar*-related case, further review would not be warranted. There are at present no *Winstar*-related cases that are being pressed outside the Court of Federal Claims and the Federal Circuit, and the applicable statute of limitations would preclude the filing of new *Winstar*-related claims at this late date. See 28 U.S.C. 2501 (six-year statute of limitations generally applicable to actions in Court of Federal Claims). Petitioners have not shown that the specific issue presented here has arisen outside the Federal Circuit in other, non-*Winstar* contexts or is likely to do so in the future.[7] For that reason, too, further review is not warranted.

2. Contrary to petitioners' contentions (Pet. 17-21), the court of appeals' holding that the investor petitioners were not third-party beneficiaries entitled to sue for breach is fully consistent with decisions of this Court and other courts of appeals. As the Federal Circuit explained, "shareholders seeking status to sue as third-party beneficiaries of an allegedly breached con-

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Federal Circuit's decision that restitution was not warranted on the substantially different facts here.

[7] Petitioners complain that "[e]very other investor with standing to enforce a *Winstar*-type contract has received the amount of its initial cash investment as restitution." Pet. 16. Approximately 72 of the 120 *Winstar*-related cases remain pending at this time, and insofar as petitioners' statement suggests that those cases have been finally resolved, it is erroneous. In any event, petitioners—unlike many other *Winstar* plaintiffs—negotiated for and obtained an (alleged) agreement expressly absolving them of any responsibility to make a cash investment. Insofar as they rely on that (alleged) agreement to support their claims, they are also bound by it.

tract must 'demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party *directly*.'" Pet. App. 16a-17a (quoting *Glass* v. *United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001)).

a. The requirement that third parties may not sue to enforce a contract unless the parties to the contract manifested their intent to benefit those specific third parties is well settled. If there were no such requirement, virtually anyone affiliated with a party (*e.g.*, shareholders, employees, creditors, and suppliers) could sue for breach of contract, seeking losses they suffered that were indirectly caused by the breach. Shareholders could sue for lost dividends; employees could sue for lost salary increases or bonuses; creditors and suppliers could sue for amounts that, if they had been given to the debtor or purchaser firm in accordance with the contract, might have been used to pay debts or invoices. The parties to a contract could not anticipate with any degree of certainty the universe of third-parties who might sue for breach of the contract or the extent of their potential liability for breach.

Because the universe of parties who may sue for breach of contract does not extend indefinitely, the principle that an individual may sue as a third-party beneficiary only if the parties intended to "directly benefit" that individual has been accepted at least since this Court's decision in *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U.S. 220 (1912). In that case, the Court held that the right of a third-party beneficiary to sue is an exception to the general rule limiting the right to sue on a contract to the contracting parties and that, "[b]efore a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was *intended for his direct benefit*." *Id.* at 230 (emphasis added) (citing *National Bank* v. *Grand Lodge*, 98 U.S. 123 (1878)). The Federal Circuit's analysis in *Glass* was squarely based upon this Court's decision in *German Alliance*, see 258 F.3d at 1354, and its decision in this case in turn rested on *Glass*. See Pet. App. 16a-18a.

Numerous courts, including this Court, have since applied the "direct benefit" test of *German Alliance* to contract cases involving private parties and contracts not designed to benefit the general public. *E.g.*, *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 307-308 (1927); *Maher* v. *United States*, 314 F.3d 600, 605-606 (Fed. Cir. 2002); *Williams* v. *Fenix & Scisson, Inc.*, 608 F.2d 1205, 1208 (9th Cir. 1979); *Safer* v. *Perper*, 569 F.2d 87, 92 (D.C. Cir. 1977); *King* v. *National Indus., Inc.*, 512 F.2d 29, 32 (6th Cir. 1975); *Ogden Dev. Corp.* v. *Federal Ins. Co.*, 508 F.2d 583, 588 (2d Cir. 1974). The Federal Circuit's predecessor, the Court of Claims, applied the "direct benefit" test in cases directly analogous to this one, in which shareholders sought to enforce rights of the corporation in which they had invested. See, *e.g.*, *Robo Wash, Inc.* v. *United States*, 223 Ct. Cl. 693, 697 (1980); *Bogart* v. *United States*, 531 F.2d 988, 991 (Ct. Cl. 1976).[8]

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[8] The Federal Circuit's standard is not overly strict. In applying the "intended beneficiary" test, that court has held that "[t]he intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended to be benefited thereby." *Montana* v. *United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). Thus, the Federal Circuit simply requires evidence that the contracting parties had a clear intent to benefit directly the third parties, as opposed to an understanding that third parties would be likely to obtain indirect benefit. The court

b. The court of appeals properly held that, on the facts of this case, the investor petitioners cannot satisfy the "intended beneficiary" standard. Pet. App. 17a; see Pet. 17. The court observed that:

> Under the alleged contract, every promise the government failed to keep in the wake of FIRREA pertains to the regulatory treatment of Western Empire. Nothing suggests that the government made any promises, contractual or otherwise, that were expressly intended to benefit the shareholders personally, independently of their status as shareholders of Western Empire.

Pet. App. 17a. The only benefits they stood to receive under the alleged contract were those of ordinary shareholders—that is, the receipt of dividends if the thrift earned profits that were distributed to shareholders (or, in the event of dissolution, ultimate distribution of the corporate's remaining assets). See *Dole Food Co.* v. *Patrickson*, No. 01-593 (Apr. 22, 2003), slip op. 5 ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."). Accordingly, the court of appeals properly concluded that the investor petitioners were mere passive investors and were not intended to be third-party beneficiaries with rights to sue for breach of the alleged contract. Pet. App. 17a-18a.

Petitioners contend (Pet. 18-19) that the court of appeals "did not overturn [the trial court's] finding" of an "*implied intention*" to benefit the investor petitioners, and that its ruling is therefore inconsistent with the "intended beneficiary" rule. The trial court,

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determined that, on the specific facts of this case, petitioners were unable to satisfy that standard.

which did not explain its reasoning in stating that there was such an implied intent, made no factual "finding" on the subject, because it reached its conclusion in ruling on a summary judgment motion. The court of appeals thus properly reviewed the trial court's judgment *de novo*. Based upon its independent review of the record, the court of appeals concluded that "[n]othing [in the alleged contract] suggests that the government made any promises, contractual or otherwise, that were expressly intended to benefit the shareholders personally, independently of their status as shareholders of Western Empire." Pet. App. 17a. Thus, the court of appeals squarely rejected the trial court's conclusion that there was any intention to grant the shareholders third-party beneficiary status. The court's conclusion on that case-specific fact does not warrant further review.[9]

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[9] The investors were not "induce[d]," see Pet. 18, to invest by the regulators with whom they had no contact. Indeed, if they were "induce[d]" at all, the inducement was by means of the private placement memorandum issued by Castle Harlan, Inc. The private placement memorandum made no reference to any contract with the regulators, and it did not suggest that the investors would have rights to enforce any contract. Instead, it advised the investors that the venture was very risky. See C.A. App. A2000007 (investor acknowledgement form reciting that investor "has the financial ability to bear the economic risk of his investment * * * for an indefinite period of time (including its possible loss), has adequate means for providing for his current needs and personal contingencies, and has no need for liquidity with respect to this investment"), A200008 (further recitation of investor's acknowledgement that "the Company has no operating history and after the Merger it will succeed by operation of law to the business and operations of Western Empire Savings and Loan Association, which currently has a negative net worth, * * * and has been in non-compliance with state and Federal regulatory requirements applicable to it").

c. Petitioners' argument (Pet. 18-19) that the Restatement (Second) of Contracts contravenes the settled "direct benefit" test is mistaken. The portions of the Restatement upon which petitioners rely merely establish that a third-party beneficiary may sue to enforce the contract. See, *e.g.*, Restatement (Second) of Contracts § 302 (1979) ("[A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and * * * the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."). The court of appeals did not question the right of a true third-party beneficiary to sue. But the fact that a third-party beneficiary possesses the right to sue for breach of contract merely serves to highlight the need for certainty in identifying those who possess this right. That is particularly important in light of the third-party beneficiary rule's status as an exception to the general rule that only those with privity of contract may sue to enforce a contract. Indeed, Section 302 of the Restatement (Second) of Contracts, makes clear that incidental beneficiaries, such as the shareholders here, have no rights to enforce a contract. Restatement (Second) of Contracts §§ 302, 315 (1979); see *Glass*, 258 F.3d at 1354.

d. Petitioners assert (Pet. 19-21) that this aspect of the Federal Circuit's decision also conflicts with the Ninth Circuit's decision in *Far West*. Although the court of appeals in this case stated that it had "adopted a test [for third-party beneficiary status] more stringent than the one applied in *Far West*," Pet. App. 16a, whatever modest differences there may be in verbal formulation do not create a conflict in the circuits.

In *Far West*, specifically named individual investors executed an agreement to purchase a specified amount of Far West stock if and when the thrift were permitted to convert from a mutual to a stock form. *Far West*, 119 F.3d at 1361. As the trial court in this case recognized, a separate Conversion Agreement in *Far West* "specifically identifie[d] both Far West *and its prospective shareholders* as intended beneficiaries of [the Bank Board's] promises." *Id.* at 1364 (emphasis added); see *id.* at 1364 n.2 (terms of agreement). No such similar identification of the investor petitioners as intended third-party beneficiaries exists in this case. Accordingly, it cannot be concluded that the Federal Circuit would have differed with the Ninth Circuit had the Federal Circuit been presented with the third-party beneficiary issue presented in *Far West*.

In any event, as noted above, see pp. 14-15, *supra*, the practical significance of any conflict would be minimal, because no *Winstar*-related cases are being litigated outside of the Federal Circuit and petitioners have made no showing that the third-party beneficiary rule adopted by the Federal Circuit would make any difference in any other category of case that is likely to be litigated in the regional courts of appeals in the future.

3. Petitioners contend (Pet. 24-30) that the court of appeals erred in rejecting their claim under the Just Compensation Clause. The court of appeals correctly held that there was no taking of the thrift institution itself, because the placement of the thrift into receivership under the regulatory scheme was not a taking. Pet. App. 24a-26a. The court also correctly held that there was no taking of the thrifts' alleged contract with the regulatory agency, because the alleged contract created only an expectation of performance or, in the

event of breach, contract damages. Although the government failed to perform the alleged contract, the thrift's right to seek damages for that failure remained intact. As this Court held in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 n.27 (1949), the right of a non-breaching party to a contract with the government to seek contract damages for the government's breach of the contract forecloses a claim that the government's breach constituted a taking. Cf. *Lujan* v. *G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) ("Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, * * * it is an interest * * * that can be fully protected by an ordinary breach-of-contract suit.").

a. Petitioners contend that the court of appeals erred in considering the thrift and the thrift's alleged contract right separately. They allege (Pet. 24) that the court should have considered the fact that the thrift and the thrift's contract with the government "were merged into a * * * reasonable, investment-backed expectation [on the part of petitioners] that the government would not seize the thrift so long as petitioners operated in accordance with the contract (as they did)."

Initially, there is no evidence in the record to support petitioners' allegation of an alleged "merged" expectation, and there is thus no reason for the court of appeals to consider it separately. Moreover, the court of appeals was correct in finding that petitioners could not have reasonably expected that the thrift would be immune from seizure under the regulatory scheme. As the court of appeals recognized (see Pet. App. 25a), this Court in *Winstar* explained that those in petitioners' position could have no reasonable expectation that the government would cease regulating the thrift industry in general or any particular thrift:

> Banking is one of the longest regulated and most closely supervised of public callings." That is particularly true of the savings and loan, or "thrift," industry which has been described as a "federally-conceived and assisted system to provide citizens with affordable housing funds.

Winstar, 518 U.S. at 844 (quoting *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947)).

The contract itself confirms that petitioners had no expectation that they would be free from seizure or new regulations. As the Federal Circuit noted, the terms of the alleged contract in Section 7(c) of the RCMA placed the risk of regulatory change upon the thrift:

> All references to regulations of the Bank Board or the FSLIC used in this Agreement shall include any successor regulation thereto, *it being expressly understood that subsequent amendments to such regulations may be made and that such amendments may increase or decrease the Acquiror's obligation under this Agreement*.

Pet. App. 25a (emphasis supplied by court of appeals). Accordingly, the Federal Circuit correctly concluded that, "[a]t most, the contract promised either to regulate [New Western Empire] consistently with the contract's terms, or to pay damages [to New Western Empire] for breach." *Id.* at 26a. Cf. 518 U.S. at 919 (Scalia, J., concurring in judgment). Because the thrift and petitioners retained the full range of contract remedies to establish liability and damages as a result of non-performance, the court of appeals properly found that no taking had occurred. Pet. App. 26a; *Larson*, 337 U.S. at 703 n.27.

b. Petitioners argue (Pet. 25-26) that the court of appeals' decision is inconsistent with *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893). In *Monongahela*, one sovereign (Congress) condemned property that included a franchise to operate locks on a river and collect tolls that another sovereign (the Commonwealth of Pennsylvania) had granted. The Court has since recognized that its conclusion that the damages payable upon condemnation included both the tangible property of the firm and the value of the franchise right rested upon special facts not present here, such as the applicability of the Impairment Clause to the franchise to collect tolls.[10] *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 282 n.12 (1943). In any event, *Monongahela* establishes at most that, where a taking has occurred, the compensation payable may in some circumstances include the value of both tangible property and a franchise right. That principle has no application here, where the issue is whether a taking has occurred in the first place. The court of appeals' decision is thus in no way inconsistent with *Monongahela*.

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[10] Similarly, the issue in *Long Island Water-Supply Co.* v. *City of Brooklyn*, 166 U.S. 685 (1897), upon which petitioners also rely (Pet. 25-26), was whether a municipality was prevented from taking by condemnation a water company with which the municipality had contracted. As the Court noted, the issue was whether "the prohibition against a law impairing the obligation of contracts stays the power of eminent domain in respect to property which otherwise could be taken." 166 U.S. at 689. The Court answered that question in the negative, noting that the water company's contract was not impaired but taken and that it would receive compensation for the taking.

c. Petitioners also contend (Pet. 27-29) that the decision of the court of appeals conflicts with *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), and *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979). That contention is mistaken. Neither *Monsanto* nor *Kaiser Aetna* involved a contract between a private party and the government. *Monsanto* involved the government's appropriation and destruction of private property—trade secrets—entrusted to the government, and *Kaiser Aetna* involved a federal requirement that a private entity may not exclude the public from real property it owned. Although in each case the government had made a commitment of some sort that was relevant in assessing whether the property owner had an investment-backed expectation, neither case involved a contract, and the Court had no occasion to—and did not—in either case address any question regarding contract law or the availability of a remedy under the Just Compensation Clause for the government's breach of a contract.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
DAVID M. COHEN
JEANNE E. DAVIDSON
Attorneys

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