No. 11-912

In the Supreme Court of the United States

FIRST ANNAPOLIS BANCORP, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a bank holding company, had standing to sue the United States for breach of a promise made by the government to a savings bank owned by petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 644 F.3d 1367. The opinions of the United States Court of Federal Claims (Pet. App. 20a-142a, 143a-186a) are reported at 89 Fed. Cl. 765 and 75 Fed. Cl. 263.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2011. A petition for rehearing was denied on October 19, 2011 (Pet. App. 194a-195a). The petition for a writ of certiorari was filed on January 17, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1987, First Federal Savings & Loan Association of Annapolis (First Federal) was suffering from a weak capital position due to net losses for each of the six prior fiscal years. Pet. App. 4a-5a. This placed it at risk of violating federal regulatory provisions concerning the amount of capital it was required to maintain. *Id.* at 5a. Seeking to avoid enforcement proceedings, First Federal proposed to federal regulators that it would obtain outside capital by converting from a savings and loan association to a stock savings bank. *Ibid.*

First Federal proposed its conversion in an application submitted on November 5, 1987, to the relevant federal agency, the Federal Home Loan Bank Board (FHLBB). Pet. App. 5a; see *id.* at 2a-3a. First Federal planned to merge with a newly formed stock savings bank, First Annapolis Savings Bank, FSB (First Annapolis). *Ibid.* The merged entity would then be owned by petitioner, a holding company that did not yet exist but would be created for this purpose. *Ibid.* First Federal submitted to the FHLBB a holding-company application describing the new entity. *Ibid.*

Petitioner was incorporated approximately two weeks later, on November 20, 1987. Pet. App. 5a. In May 1988, the conversion and holding-company applications were amended to account for petitioner's creation. *Ibid.* The relevant materials proposed that petitioner would infuse $11 million (raised by selling stock) into the new bank, and that it would ensure the bank's maintenance of certain capital levels for five years. *Id.* at 5a-6a, 148a-149a.

In July 1988, the FHLBB issued resolutions approving First Federal's conversion application and authorizing petitioner to acquire control over the new entity.

Pet. App. 6a-7a, 153a. The approval was conditioned in part on petitioner's capital infusion, petitioner's agreement that First Annapolis would maintain certain capitalization levels, and petitioner's execution of a Regulatory Capital Maintenance and Dividend Agreement (RCMDA) with the Federal Savings and Loan Insurance Corporation (FSLIC). *Id.* at 7a.

In July and August 1988, FHLBB sent three letters concerning the manner in which First Annapolis's compliance with federal capitalization requirements would be assessed. Those letters were addressed solely to First Annapolis, not to petitioner. The letters granted First Annapolis a forbearance from the usual regulatory accounting requirements by permitting First Annapolis to count an intangible asset, goodwill, towards its capitalization requirements. Pet. App. 7a-8a.

On August 12, 1988, petitioner entered into its RCMDA with the FSLIC. Pet. App. 8a. Consistent with the FHLBB resolutions, petitioner guaranteed in that agreement that First Annapolis would meet certain capital requirements. *Ibid.* "In exchange, the FSLIC agreed to approve the acquisition" of First Annapolis by petitioner. *Ibid.*

2. The following year, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. FIRREA "completely restructured regulation of the federal thrift industry." Pet. App. 3a. As particularly relevant here, FIRREA eliminated (after a transition period) the ability of thrifts like First Annapolis to count supervisory goodwill as an asset for purposes of meeting their regulatory capitalization requirements. *Ibid.* As a result of FIRREA's stricter regulation of thrifts, First Annapolis was no longer able to meet its capitalization

requirements, and in 1990 it was placed into federal receivership. *Id.* at 9a-10a.

In *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), this Court held that FIRREA exposed the United States to suits seeking damages for breach of pre-FIRREA agreements in which the government had promised to allow goodwill to count towards capitalization requirements. Petitioner filed a breach-of-contract suit in 1994. Pet. App. 10a. In contesting the suit, the government argued, *inter alia*, that petitioner lacked standing to bring the claim because the government's promise to allow accounting of goodwill had been made to First Annapolis, not to petitioner. *Id.* at 164a.

The Court of Federal Claims (CFC) recognized that "[i]n order to have standing to enforce a contract, a plaintiff must establish that it is in privity of contract with the Government." Pet. App. 164a. The court explained that, to demonstrate standing in this case, petitioner was required to show "that it has a direct claim against the Government, separate and apart from its status as a shareholder" of First Annapolis. *Ibid.* The CFC additionally recognized that petitioner "was only a signatory to the RCMDA and the Holding Company Application and its amendments," and not to the forbearance letters promising that First Annapolis could count goodwill towards its capitalization requirements. *Id.* at 166a.

The CFC nevertheless concluded that petitioner had standing to sue for breach of the goodwill promise. Pet. App. 164a-168a. The court based that conclusion primarily on its belief that the case was "strikingly similar" to the Federal Circuit's decision in *Home Savings of America, FSB* v. *United States*, 399 F.3d 1341 (2005). Pet. App. 165a. The court interpreted *Home Savings* to

hold that a holding company could sue for breach of a goodwill-related promise to a subsidiary bank when the holding company is "'not only a shareholder, but an essential participant as a contracting party,'" and the "Government's promise r[uns] directly to the holding company." *Ibid.* (quoting *Home Savings*, 399 F.3d at 1349-1350). The court believed that standard to be satisfied here, focusing on petitioner's role in providing the capital for the merger, petitioner's signing of the RCMDA, and the fact that documents issued by the FHLBB contemplated petitioner's acquisition of First Annapolis. *Id.* at 165a-168a.

The CFC entered summary judgment on liability for petitioner. Pet. App. 10a, 181a. It then held a trial on damages and awarded petitioner $13,665,907. *Id.* at 10a-11a, 20a, 127a.

3. The court of appeals reversed, agreeing with the government that petitioner lacked standing to sue for breach of the government's promise about how First Annapolis's capitalization would be calculated. Pet. App. 1a-19a. The court therefore found it unnecessary to address the additional arguments asserted by the government as grounds for reversing the CFC's judgment. See *id.* at 11a.

The court of appeals observed that "'[a] corporation is generally considered to be a separate legal entity from its shareholder'"; that, as a result, "a shareholder, whether an individual or a holding company, 'generally does not have standing to assert a breach of contract claim on behalf of the corporation'"; and that "shareholders are not allowed 'to rely on their involvement in the negotiation process or their role in funding a transaction to alter their chosen legal status.'" Pet. App. 13a (quoting *Southern Cal. Fed. Sav. & Loan Ass'n* v.

United States, 422 F.3d 1319, 1331-1332 (Fed. Cir. 2005), cert. denied, 548 U.S. 904 (2006), and *FDIC* v. *United States*, 342 F.3d 1313, 1319 (Fed. Cir. 2003)). The court further concluded that petitioner's case did not fit within the "narrow exception" recognized in *Home Savings* "to the general rule that shareholders lack standing." *Id.* at 14a-15a.

The court of appeals observed that *Home Savings* had involved "reciprocal promises" between the plaintiff holding company and the government, in which the plaintiff had "promised it would maintain [a bank's] net worth" and, "in exchange," the government had promised "certain accounting treatment for goodwill." Pet. App. 14a (quoting 399 F.3d at 1349). The court identified three "critical differences" between that case and this one. *Id.* at 15a. First, the plaintiff in *Home Savings* had itself initiated and conducted the negotiations with the government, whereas First Federal (not petitioner) had performed that role here. *Ibid.* Second, the plaintiff in *Home Savings* had existed before the negotiations began, whereas petitioner was created afterwards. *Id.* at 15a-16a. Third, the agreements in *Home Savings* contained integration clauses demonstrating that the plaintiff was a "party to the larger transaction," including the goodwill-accounting promises, whereas no such clauses existed in this case. *Id.* at 16a (quoting 399 F.3d at 1349).

The court of appeals further explained that this case was more analogous to *Southern California Federal Savings & Loan Ass'n* v. *United States*, in which the Federal Circuit had held that "individual plaintiff shareholders did not have standing to sue on behalf of the corporation because they were not in privity of contract with the government." Pet. App. 16a. The court in

Southern California Federal Savings & Loan had rejected the contention that "a party to one contract can be deemed a party to a related contract simply because the separate contracts constitute components of one transaction." *Id.* at 17a (quoting *Southern Cal. Fed. Sav. & Loan*, 422 F.3d at 1330). The court of appeals emphasized that petitioner "was a signatory to the RCMDA, but was not the recipient of the FHLBB's Forberance Letters," and that "the [g]overnment's goodwill promises were contained in the Forbearance Letters, not the RCMDA." *Ibid.*

The court of appeals further observed that the "RCMDA merely obligated [petitioner] to maintain First Annapolis's regulatory capital level in exchange for the Government's approval of the acquisition—which the Government gave when it issued the Resolutions." Pet. App. 17a. The court noted that approval of the acquisition was "'nothing more than [the] performance of [a] regulatory function,' which 'does not create contractual obligations.'" *Ibid.* (quoting *Cain* v. *United States*, 350 F.3d 1309, 1315 (Fed. Cir. 2003)). The court also explained that the government's potential awareness of petitioner's role in capitalizing First Annapolis was "irrelevant" because "'neither that knowledge, the supplying of the new capital, or [petitioner's] position as a stockholder' transforms [petitioner] into a party that contracted with the Government." *Id.* at 18a (quoting *FDIC* v. *United States*, 342 F.3d at 1319) (brackets omitted).

4. The court of appeals denied petitioner's request for rehearing en banc without reported dissent. Pet. App. 194a-195a.

ARGUMENT

The court of appeals correctly held that petitioner lacked standing to sue for a breach of the government's promise concerning First Annapolis's accounting because that promise was not made to petitioner. The court's decision does not conflict with any decision of this Court or any other court of appeals, or with any other decision of the Federal Circuit. Further review is not warranted.

1. a. Petitioner does not dispute that "[a] plaintiff must be in privity with the United States to have standing to sue the sovereign on a contract claim." *Southern Cal. Fed. Sav. & Loan Ass'n* v. *United States*, 422 F.3d 1319, 1328 (Fed. Cir. 2005); see Pet. 13. Nor does petitioner dispute that "[a] shareholder generally does not have standing to assert a breach of contract claim on behalf of [a] corporation." *FDIC* v. *United States*, 342 F.3d 1313, 1319 (Fed. Cir. 2003). Rather, petitioner acknowledges that, as relevant here, a shareholder may sue on a government contract only when the government's promises run "directly to the shareholder." Pet. 13; see, *e.g.*, *Anderson* v. *United States*, 344 F.3d 1343, 1352 (Fed. Cir. 2003).

That rule follows from the standard contract-law requirement that a plaintiff generally must be either a direct party to the contract or an intended and direct third-party beneficiary. See, *e.g.*, *FDIC* v. *United States*, 342 F.3d at 1319-1320 (citing Restatement (Second) of Contracts § 315 (1981)). Consistent with that principle, the Federal Circuit has "regularly acknowledged the legal distinction between a corporation and its shareholders and rejected claims by shareholders to assert a breach of contract claim on behalf of the corporation." *Southern Cal. Fed. Sav. & Loan*, 422 F.3d at

1332 (citing cases). In particular, that court has regularly rejected attempts by shareholders of a bank to sue on goodwill-accounting promises made to that bank. See, *e.g.*, *id.* at 1333-1335; *FDIC* v. *United States*, 342 F.3d at 1319-1320; *D & N Bank* v. *United States*, 331 F.3d 1374, 1378-1380 (Fed. Cir. 2003); *Castle* v. *United States*, 301 F.3d 1328, 1338-1339 (Fed. Cir. 2002), cert. denied, 539 U.S. 925 (2003); *Glass* v. *United States*, 258 F.3d 1349, 1354-1355 (Fed. Cir. 2001); *First Hartford Corp. Pension Plan & Trust* v. *United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999).

The Federal Circuit has emphasized that shareholders typically cannot "stand[] in the shoes" of a corporation to obtain the benefit of the corporation's contracts because shareholders do not assume the corresponding burdens of those contracts. *First Hartford Corp.*, 194 F.3d at 1289; see *Southern Cal. Fed. Sav. & Loan*, 422 F.3d at 1331-1332. "Indeed," the Federal Circuit has noted, "one of the principal motivations behind utilizing the corporate form is often the desire to limit the risk of ownership to the amount of capital invested and thus avoid the obligations, contractual or otherwise, of the corporation." *First Hartford Corp.*, 194 F.3d at 1289. The court has also cautioned against the double recovery that might result if shareholders could recover both through the corporation and through their status as shareholders. *Southern Cal. Fed. Sav. & Loan*, 422 F.3d at 1332-1333.

b. The Federal Circuit's precedents do not categorically foreclose shareholders from suing to enforce their corporations' contracts. See *First Hartford Corp.*, 194 F.3d at 1289. The court has recognized, however, that "whether the government has entered into a contract with a thrift's shareholders necessarily turns on the

facts of the particular case." *Cain* v. *United States*, 350 F.3d 1309 (Fed. Cir. 2003); see *Glass*, 258 F.3d at 1353 ("The underlying question of whether the shareholders are third party beneficiaries to the alleged contract is a mixed question of law and fact."). The evidence in this case demonstrates that the government's promise to allow the use of goodwill to meet capitalization requirements was made to First Annapolis, not to petitioner.

The RCMDA was the only relevant contract to which petitioner was a signatory. That contract did not promise favorable accounting treatment for First Annapolis, but instead "obligated [petitioner] to maintain First Annapolis's regulatory capital level in exchange for the Government's approval of the acquisition—which the Government gave when it issued the Resolutions." Pet. App. 17a. The only documents that contained a promise concerning accounting treatment of goodwill were the forbearance letters, and those were addressed to First Annapolis, not to petitioner. *Ibid.*; see *id.* at 7a.

No overarching agreement incorporated both the RCMDA and any goodwill-accounting promises. Pet. App. 16a. And nothing about the negotiations suggests privity between the government and petitioner on the goodwill-accounting promise. To the contrary, "First Federal, not [petitioner], initiated the negotiations and negotiated with the government"; the transaction's material terms remained unchanged after the initial terms were proposed; and petitioner "was not even in existence" when First Federal decided to raise capital through a conversion or when it proposed conversion to the government. *Ibid.*

The court of appeals correctly analogized the situation in this case to the circumstances of *Southern California Federal Savings & Loan*, another case in which

the Federal Circuit concluded that shareholders lacked privity to sue the government to enforce a goodwill-accounting promise. Pet. App. 17a-18a. The court in that case squarely rejected the contention "that a party to one contract can be deemed a party to a related contract simply because the separate contracts constitute components of one transaction." 422 F.3d at 1330. The Federal Circuit has additionally concluded that a shareholder has no automatic right to enforce a goodwill-accounting promise made to a bank simply because the shareholder negotiated aspects of the transaction giving rise to the promise. *Id.* at 1331. The court has likewise found it insufficient that "regulators undoubtedly were aware" of a shareholder's role in supplying the money needed to recapitalize the bank, *FDIC* v. *United States*, 342 F.3d at 1319; or that government regulators approved the transaction that the shareholder capitalized, *D & N Bank*, 331 F.3d at 1378-1379.

2. Petitioner does not ask this Court to overturn those Federal Circuit precedents. Rather, petitioner accepts the general body of Federal Circuit law on this issue, while arguing that the court below misapplied that framework to the facts of this case. That factbound challenge lacks merit and does not warrant this Court's review.

As an initial matter, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Petitioner suggests (Pet. 9-13) that this Court's intervention is necessary because the Federal Circuit is "actively discouraging petitions" for en banc review. Petitioner bases that suggestion solely on informational notices by the Federal Circuit that acknowledge the infrequency with which en banc petitions are

granted and observe that a request for en banc review is not a prerequisite for a petition for certiorari. See Pet. 9 (citing Pet. App. 189a-193a). Those notices are not unique to the Federal Circuit, and they accurately reflect governing law. Fed. R. App. P. 35(a) ("An en banc hearing or rehearing is not favored."); see, *e.g.*, 3d Cir. Local App. R. 35.4; 5th Cir. R. 35.1; 10th Cir. R. 35.1(b); Practitioners' Guide to the United States Court of Appeals for the Tenth Circuit 59-60 (2012); see also *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685, 689 (1960) ("En banc courts are the exception, not the rule.").[*] They accordingly provide no sound reason to grant certiorari in this case.

In any event, petitioner is wrong in asserting (Pet. 13-32) that the decision below conflicts with other Federal Circuit precedents. In five of the cases cited by petitioner—*Hughes* v. *United States*, 498 F.3d 1334 (2007), cert. denied, 552 U.S. 1309 (2008); *Bank of Am., FSB* v. *Doumani*, 495 F.3d 1366 (2007); *Hometown Fin., Inc.* v. *United States*, 409 F.3d 1360 (2005); *California Fed. Bank, FSB* v. *United States*, 245 F.3d 1342 (2001),

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[*] The Federal Circuit has reviewed a number of cases en banc over the past two years. See *Marine Polymer Techs., Inc.* v. *HemCon, Inc.*, No. 2010-1548, 2012 WL 255331 (Jan. 20, 2012); *Bush* v. *United States*, 655 F.3d 1323 (2011), petition for cert. pending, No. 11-895 (filed Nov. 22, 2011); *Cloer* v. *Secretary of Health & Human Services*, 654 F.3d 1322 (2011), petition for cert. pending, No. 11-832 (filed Dec. 11, 2011); *Therasense, Inc.* v. *Becton, Dickinson & Co.*, 649 F.3d 1276 (2011); *Akamai Techs., Inc.* v. *MIT*, 419 Fed. Appx. 989 (2011); *TiVo Inc.* v. *EchoStar Corp.*, 646 F.3d 869 (2011); *Slattery* v. *United States*, 635 F.3d 1298 (2011); *McKesson Techs. Inc.* v *Epic Sys. Corp.*, No. 2010-12191, 2011 WL 2173401 (May 26, 2011); *Hyatt* v. *Kappos*, 625 F.3d 1320 (2010), cert. granted, 131 S. Ct. 3064 (2011); *i4i Ltd. P'ship* v. *Microsoft Corp.*, 598 F.3d 831 (2010), aff'd, 131 S. Ct. 2238 (2011); *Nebraska Pub. Power Dist.* v. *United States*, 590 F.3d 1357 (2010).

cert. denied, 535 U.S. 1113 (2002); and *Southern California*, *supra*—the court did not expressly address whether a holding company had standing to sue the government on a goodwill-related promise. The court appears to have assumed such standing in some of those cases, but such an assumption would not constitute binding precedent on the issue. See *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1448-1449 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."). Indeed, two of the decisions addressed related shareholder-standing issues (the standing of shareholders in a holding company to sue for breach of a goodwill-accounting promise) and concluded that the shareholders did not have standing. *Southern Cal. Fed. Sav. & Loan*, 422 F.3d 1328-1333; *Bank of Am.*, 495 F.3d at 1373; see pp. 10-11, *supra* (discussing the court of appeals' conclusion that this case was materially similar to *Southern California Federal Savings & Loan*).

Although the Federal Circuit in *Home Savings of America, FSB* v. *United States*, 399 F.3d 1341 (2005), recognized a "narrow exception to the general rule that shareholders lack standing," Pet. App. 14a, the court of appeals correctly concluded that the exception does not apply here. In *Home Savings*, the Federal Circuit held that a holding company had standing to sue on a goodwill-accounting promise when the government had provided that promise "in exchange" for the holding company's promise to maintain the bank's net worth. 399 F.3d at 1349. The court of appeals correctly distinguished *Home Savings* on three factual grounds: (1) the holding company in that case initiated the negotiations with the government, whereas petitioner did not; (2) the

holding company in that case actually existed at the time of the negotiations, whereas petitioner did not; and (3) the various agreements in *Home Savings* "contained clauses that integrated" the agreements the government had reached with the holding company and the bank, whereas no such clauses exist here. Pet. App. 15a-16a (quoting 399 F.3d at 1345).

Other cases on which petitioner relies, in which the Federal Circuit recognized the standing of a holding company to sue for breach of a promise relating to capitalization of a subsidiary, likewise involved materially different facts. In *Franklin Federal Savings Bank* v. *United States*, 431 F.3d 1360 (Fed. Cir. 2005), the court found standing when the government's agreement with a holding company "clearly promised to issue" the goodwill-accounting promise "in exchange for [the holding company's] undertakings." *Id.* at 1367. And in *Caroline Hunt Trust Estate* v. *United States*, 470 F.3d 1044 (Fed. Cir. 2006), the holding company "made an offer that was accepted by the government, which in turn entered into 'mutual reciprocal obligations' with the holding company," including the obligation on which the holding company sued. *Id.* at 1052 n.4; see *id.* at 1049-1052.

Even if petitioner had identified an inconsistency among the relevant Federal Circuit decisions, the question presented here would not be sufficiently important to warrant this Court's review. The six-year statute of limitations for breach-of-contract claims based on FIRREA (which was passed in 1989) expired long ago. See 28 U.S.C. 2501. Only four such cases remain pending. And this is the only one in which the claim was brought directly by a bank holding company rather than by, or on behalf of, the bank itself.

3. Petitioner also contends that the decision below conflicts with decisions of this Court and other courts of appeals. Neither contention is correct.

Petitioner asserts (Pet. 7) that the decision below "ignores precedent from this Court directing that contract principles generally applicable to contracts between private parties be applied to Government contracts." As discussed above (see p. 8, *supra*), however, the Federal Circuit's general rule is consistent with standard contract-law principles disfavoring suits by a party that is not a signatory to a contract. See, *e.g.*, Restatement (Second) of Contracts § 315 (discussing the limited third-party-beneficiary doctrine). Petitioner cites no decision of this Court specifically addressing the circumstances under which a bank holding company may sue on a promise made to its subsidiary.

Petitioner also asserts (Pet. 32) that the decision below conflicts with decisions of other circuits recognizing that "a corporation can be a party to a contract made on its behalf prior to its formal incorporation." That assertion misunderstands the decision below. The court of appeals did not hold that a corporation can never sue on a contract created on that corporation's behalf before the corporation was formed. Rather, the court simply held that the nonexistence of a holding company at the time negotiations commenced may be a factor in declining to apply the court's "narrow exception to the general rule that shareholders lack standing" to sue on a promise made to a subsidiary. Pet. App. 14a-16a. None of the out-of-circuit decisions petitioner cites (Pet. 32-35), conflicts with the Federal Circuit's fact-specific conclusion that the government's promise to permit relaxed accounting by First Annapolis did not "r[un] directly to" petitioner. *Id.* at 13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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