No. 04-1709

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CALIFORNIA FEDERAL BANK, FSB

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

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a *Winstar*-related case, an exchange of documents between thrift regulators and a thrift institution that simply embodies a request for and grant of regulatory approval of a proposed acquisition by the thrift constitutes a contract between the United States and the thrift.

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The Solicitor General, on behalf of the United States, respectfully conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. If the Court grants the petition in *California Federal Bank, FSB* v. *United States*, No. 04-1557, it should grant this cross-petition. If the Court denies that petition, it also should deny this cross-petition.

OPINIONS BELOW

The opinion of the court of appeals (04-1557 Pet. App. 1a-17a) regarding liability and other matters is reported at 245 F.3d 1342. The opinion of the court of appeals after remand proceedings on certain remedial issues (04-1557 Pet. App. 122a-143a) is reported at 395 F.3d 1263. The opinion of the Court of Federal Claims regarding liability (04-1557 Pet. App. 57a-121a) is reported at 39 Fed. Cl. 753. The initial opinion of the Court of Federal Claims regarding remedies (04-1557 Pet. App. 18a-56a) is reported at 43 Fed. Cl. 445. The opinion of the Court of Federal Claims on remand re-

garding remedies (04-1557 Pet. App. 144a-173a) is reported at 54 Fed. Cl. 704.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2005. The petition for a writ of certiorari in *California Federal Bank, FSB* v. *United States*, No. 04-1557, was placed on this Court's docket on May 20, 2005. This conditional cross-petition is filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 12 U.S.C. 1464(a) (1982), 12 U.S.C. 1730(q)(1) and (6) (1982), and 12 U.S.C. 1730a(e)(1) are set forth in the Appendix to this petition. App., *infra*, 1a-3a.

STATEMENT

This case is one of approximately 39 *Winstar*-related cases (see *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996)) that were filed after the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 107-73, 103 Stat. 183, and that are still pending in the Court of Federal Claims and the Federal Circuit. This conditional cross-petition concerns the court of appeals' affirmance of the trial court's liability ruling on summary judgment that the United States and California Federal Bank (CalFed) had a contractual relationship with respect to two particular transactions, such that a breach of contract could arise from a change in the regulatory scheme brought about by FIRREA. The petition in No. 04-1557, filed by CalFed, concerns one of the court of appeals' rulings on remedial issues. That petition asks this Court to grant, vacate, and remand the deci-

sion below in light of a subsequent decision by the Federal Circuit, a course the United States opposes for reasons that will be explained in a brief in opposition to that petition. In the unlikely event this Court grants plenary review based on that petition, however, the United States believes that it would be appropriate to grant review of this cross-petition as well. The United States filed a substantially identical conditional cross-petition in response to an earlier petition in this case, and the Court denied review.

1. From the 1930's until after the events at issue in this case, federal regulation of the thrift industry was the primary responsibility of the Federal Home Loan Bank Board (FHLBB or Bank Board). See generally 12 U.S.C. 1464 (1982). "Congress delegated power to the Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 168 (1982). The Federal Savings and Loan Insurance Corporation (FSLIC) administered a fund that insured deposits held by thrift institutions. 12 U.S.C. 1726 (1982). FSLIC was a separate entity under the direction of the FHLBB. See 12 U.S.C. 1725(a) (1982).

At the times pertinent to this case, Congress had by statute prohibited any insured thrift institution from acquiring or merging with another insured institution without regulatory approval. See 12 U.S.C. 1730(q)(1) (1982) ("No person * * * shall acquire control of any insured institution * * * unless [FSLIC] has been given sixty days' prior written notice * * * and within that time period [FSLIC] has not issued a notice disapproving the proposed acquisition."); 12 U.S.C. 1730a(e)(1)(A)(i) (1982) ("It shall be unlawful for * * *

any savings and loan holding company * * * to acquire, except with the prior written approval of [FSLIC], the control of an insured institution or a savings and loan holding company."). A notice to FSLIC of a proposed merger of a thrift had to include "[t]he terms and conditions of the proposed acquisition." 12 U.S.C. 1730(q)(6)(C) (1982); see 12 C.F.R. 563.22 (1982) (no thrift may increase its insurable accounts as part of any merger or consolidation without FSLIC's approval); 12 C.F.R. 571.5(b)(2) (1982) (similar information for savings and loan holding company). At all relevant times, the acquiring institution had to submit an application for approval of a merger, acquisition, consolidation, or change in control of a thrift. See, *e.g.*, 12 C.F.R. 546.2(c), 563.22(a), 584.4(f) (1982). The regulations prescribed that in ordinary merger situations, "[t]he proposed treatment of goodwill in connection with the merger must be fully described in the application," 12 C.F.R. 571.5(e) (1982), and potential merger applicants were "encouraged to review proposed mergers with the Supervisory Agent prior to proceeding with the formal application process," 12 C.F.R. 571.5(a) (1982).

2. CalFed made three sets of acquisitions in the 1980's. We do not challenge the court of appeals' ruling that the United States is liable for breach of contract with respect to one of CalFed's acquisitions, which involved four thrifts known collectively as "Southeast." That transaction involved more than mere regulatory approval. We do, however, dispute the court of appeals' rulings, on undisputed facts, that the United States entered into contracts with CalFed when the FHLBB and FSLIC took regulatory actions concerning CalFed's other two acquisitions—of Brentwood Savings and Loan Association and the Family Savings and Loan As-

sociation—and that those "contracts" could in turn give rise to liability for breach.

a. In February 1982, CalFed acquired the four Southeast thrift institutions. 04-1557 Pet. App. 20a & n.2. The acquisition resulted in an assumption by CalFed of $305 million in net liabilities. *Id.* at 3a, 20a. On February 3, 1982, the Bank Board passed a resolution approving the transactions and specifically reciting that "[t]he mergers are conditioned upon the execution of an Assistance Agreement between [CalFed] and the FSLIC." 2 C.A. App. A5000205.[1] On February 5, 1982, CalFed accordingly entered into an assistance agreement with FSLIC, under which it received a $9 million capital credit from FSLIC. The FHLBB issued a forbearance letter to CalFed permitting it to record an amount equal to the excess liabilities as goodwill and to amortize that amount over 35 to 40 years. The agreement between FSLIC and CalFed was a contract. It was entitled "Assistance Agreement," and it stated in its first sentence that it "is entered into between the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, an independent agency of the United States Government ('FSLIC'), and CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION." *Id.* at A5000223. After a series of recitals, the agreement stated that "[i]n consideration of the mutual promises herein contained, the parties enter into the following agreement." *Id.* at A5000224. The agreement included an integration clause, similar to the clauses in the contracts at issue in *Winstar*, see 518 U.S. at 862, 864, 867 (plurality opinion), that incorporated the

[1] All references to "C.A. App." refer to the joint appendix submitted to the court of appeals in connection with its liability decision reproduced at 04-1577 Pet. App. 1a-17a and reported at 245 F.3d 1342.

FHLBB forbearance letters that were issued contemporaneously with the assistance agreement. 2 C.A. App. A5000228.

The government does not dispute that the Southeast assistance agreement was a contract and, for purposes of this cross-petition, we do not dispute that the United States is liable for breach of that contract after enactment of FIRREA, which prohibited CalFed from using the goodwill to satisfy federal capital requirements for the entire 35-40 year period. CalFed's acquisition of the Southeast thrifts is therefore not at issue in this cross-petition. That transaction does, however, illustrate the steps necessary for a contract with the United States, steps which were not taken with respect to the transactions that are at issue in this cross-petition.

b. In October 1982, CalFed acquired the parent company of Brentwood Savings, a federally insured thrift institution in Los Angeles. There was no assistance agreement between FSLIC and CalFed in which FSLIC furnished guarantees or other financial assistance to CalFed in connection with its acquisition of Brentwood. CalFed negotiated a merger agreement with the owner of Brentwood. 2 C.A. App. A5000302-A5000339. On July 12, 1982, Brentwood submitted to the Bank Board a document entitled "Application of [CalFed] For Merger With Brentwood Savings" and asked that certain forbearances be granted in connection with the merger. *Id.* at A5000374. The application was submitted pursuant to 12 U.S.C. 1730a(e) (1982), which required FSLIC approval of an acquisition of an insured thrift by a savings and loan holding company. See 3 C.A. App. A5002319. In a letter dated July 27, 1982, CalFed set forth "the reasons for the supervisory forbearances requested" in connection with the proposed merger. *Id.* at A5000475. In a letter dated Sep-

tember 2, 1982, CalFed again requested approval for the transaction and asked to be able to record the net liabilities it assumed in the transaction (which amounted to $314 million) as supervisory goodwill to be amortized over 35 years. 04-1557 Pet. App. 4a; see 3 C.A. App. A5002325.

The FHLBB, as the operating head of FSLIC, approved the transaction in a resolution dated September 30, 1982. 3 C.A. App. A5002319-A5002321. The resolution begins with several "whereas" clauses, and continues that "IT IS HEREBY RESOLVED, that the subject acquisition of * * * Brentwood is hereby approved * * *, provided that the following conditions are complied with." *Id.* at A5002319. Among the conditions was that CalFed "shall furnish analyses * * * satisfactory to" FHLBB's agents

> which (a) specifically describe, as of the effective date, any intangible assets, including goodwill, or discounts and premiums arising from the merger to be recorded on the books of Applicant, and (b) substantiate the reasonableness of amounts attributed to intangible assets, including goodwill, and the discounts and premiums and the related amortization periods and methods.

Id. at A5002321.

In a letter to CalFed dated October 1, 1982, the FHLBB, in its own capacity and as operating head of FSLIC, stated that "[i]n its approval of the merger [of CalFed and Brentwood], the Bank Board determined to exercise supervisory forbearance, to grant waivers and to confirm the manner of application of certain regulatory requirements of the Bank Board and the FSLIC applicable to the Resulting Association." 3 C.A. App. A5002322. The letter went on to specify "the nature and extent of the confirmations, forbearances and waiv-

ers granted in recognition of the circumstances of the merger." *Ibid.* Among the forbearances was a statement that CalFed

> may amortize any goodwill created under the purchase method of accounting using the straight line method over the estimated useful life of 35 years * * *. Notwithstanding any change in generally accepted accounting principles or interpretation thereof, [CalFed] may report for any and all reports to the Federal Home Loan Bank Board its financial condition and operations in accordance with the accounting method described in the preceding sentences.

Id. at A5002323-A5002324.

c. In January 1983, CalFed acquired Family Savings and Loan Association, which had operated in Reno, Nevada. That transaction was preceded by negotiation of an acquisition agreement between CalFed and Family. 2 C.A. App. A5000490-A5000521. CalFed then applied for FHLBB approval of the merger. *Id.* at A5000531. CalFed's application included a copy of the acquisition agreement between CalFed and Family, which recited, *inter alia*, that any goodwill created by the merger (which in fact ultimately amounted to $17.74 million, 04-1557 Pet. App. 5a) would be amortized using the straight line method over a 40-year period. 2 C.A. App. A5000503. CalFed's application to the Bank Board stated that CalFed "requests that the FHLBB specifically approve the amortization of any goodwill created under the purchase method of accounting using the straight line method over the estimated useful life of 40 years." *Id.* at A5000536. CalFed also submitted a letter to the Bank Board requesting, *inter alia*, the same sort of forbearance it had requested in connection with

its acquisition of Brentwood. *Id.* at A5000484-A5000488.

As with CalFed's acquisition of Brentwood, there was no assistance agreement between FSLIC and CalFed in connection with CalFed's acquisition of Family. The FHLBB approved the transaction in two resolutions dated January 5, 1983. 2 C.A. App. A5000179-A5000180, A5000182-A5000189. The resolutions were in form quite similar to the resolutions in the Brentwood transaction. The first resolution granted CalFed a federal charter for the new Nevada institution that would result from the merger. *Id.* at A5000179. The second resolution approved CalFed's acquisition of control of Family, pursuant to 12 U.S.C. 1730a(e) (1982). *Id.* at A5000182. The FHLBB also sent a forbearance letter to CalFed in connection with the Family transaction on January 5, 1983, that was in relevant respects identical to the October 1, 1982, letter it sent in connection with the Brentwood transaction. 3 C.A. App. A5002559.[2]

3. In 1989, Congress enacted FIRREA, which overhauled the entire structure of federal thrift regulation. Of particular relevance here, it obligated thrifts to comply with strict new capital standards, which phased out over a five-year period the ability of thrifts to count goodwill as capital for federal regulatory purposes. See

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[2] The court of appeals erroneously stated that there was a forbearance letter dated November 26, 1982, in addition to the forbearance letter dated January 5, 1983. 04-1557 Pet. App. 5a. There was no such letter prior to January 5, 1983, since the Bank Board would not issue a forbearance letter prior to having approved the transaction. It appears that the court of appeals was referring to an internal Bank Board memorandum dated November 26, 1982, which analyzed the proposed acquisition, including the forbearances sought by CalFed. See 3 C.A. App. A5002612, A5002616.

generally *Winstar Corp.*, 518 U.S. at 856-857 (plurality opinion).

4. CalFed brought suit against the government in the Court of Federal Claims, asserting that FIRREA's prohibition on the use of goodwill to satisfy the new capital requirements breached contracts it allegedly entered into with the government in connection with its acquisitions of Southeast, Brentwood, and Family. After this Court's decision in *Winstar*, then-Chief Judge Smith of the Court of Federal Claims adopted a plan to resolve common issues in the more than 120 *Winstar*-related cases then pending in that court. 04-1557 Pet. App. 3a. The plan ultimately included a process by which the court first addressed summary judgment motions on liability in this case and three other cases. The four cases were selected because they "raise issues that are potentially relevant in a large number of the pending *Winstar*-related cases," *id.* at 63a, and "would ventilate the broadest cross-section of the contract defenses raised by defendant," *id.* at 67a.

In this case, the government argued in opposition to CalFed's summary judgment motion with respect to its acquisitions of Brentwood and Family that, *inter alia*, "no 'Winstar-like contractual obligations' were imposed on the government." 04-1557 Pet. App. 105a. The government reasoned that the relevant documents consisted only of requests by a regulated entity for the necessary regulatory approval of its acquisitions of another entity, followed by grants by the government authorities of that approval, subject to certain conditions. Those regulatory approvals, the government argued, do not constitute a contractual undertaking by the government. The Court of Federal Claims, however, framed the issue as whether:

> Absence of a written Assistance Agreement *per se* eliminates any possibility that an acquiring thrift and the government executed a capital contract, because without such an assistance agreement, the FHLBB/FSLIC resolutions, letters and other documents and evidence cannot be given contractual effect.

Id. at 103a.

Having framed the claim as stated above, the trial court rejected it. It agreed with CalFed's contention that "[t]he common operative fact in all *Winstar*-type transactions is that 'the Government sought to induce the acquisition of a troubled thrift through promises regarding supervisory goodwill and capital compliance and was successful.'" 04-1557 Pet. App. 104a. The court stated that, "[i]f the factual records of individual cases show intent to contract with the government for specified treatment of goodwill, and documents such as correspondence, memoranda, and Bank Board resolutions confirm that intent, the absence of an [assistance agreement] or [supervisory action agreement] should be irrelevant to the finding that a contract existed." *Id.* at 105a. The court then concluded "that contracts existed between CalFed and the government" with respect to CalFed's acquisitions of Brentwood and Family and granted summary judgment on liability to CalFed. *Id.* at 107a. The court explained, moreover, that it found an express contract between CalFed and the government in this case. *Id.* at 106a-107a. The court did not, however, specify which of the documents reflecting regulatory approval by the FHLBB and FSLIC constituted that express contract. Nor did it identify the basis on which it concluded, on a motion for summary judgment, that there was an intent to contract in this case. Rather, the court stated simply that

"[m]utuality of intent, even in the context of written contracts, may be established by several contractual instruments as opposed to one superseding document," and that "[c]ontracts are frequently found to exist despite the absence of an integrating document." *Id.* at 106a.

5. The case was then transferred to Judge Hodges for resolution of damages issues. Judge Hodges held that CalFed had failed to prove many elements of its claimed billions of dollars in damages, but he ultimately awarded CalFed approximately $23 million in compensation for costs it incurred in replacing the goodwill the continued use of which to satisfy regulatory capital requirements was eliminated by FIRREA. One of the damages issue in this case is the subject of the petition in No. 04-1557. This cross-petition, however, concerns the liability issue that had already been decided on summary judgment by Chief Judge Smith.

6. The government appealed the liability ruling, and CalFed appealed the damages ruling to the Federal Circuit. The court of appeals affirmed the trial court's determination on summary judgment that the United States had entered into a contract with CalFed. 04-1557 Pet. App. 6a-10a. Initially, the court agreed with the trial court that "[t]he fact that Cal Fed did not enter into an assistance agreement by which it would receive direct cash assistance from the FSLIC in the Brentwood and Family transactions * * * is not dispositive of the issue of contract formation between the government and Cal Fed." *Id.* at 7a. The court stated that "the government bargained with Cal Fed to assume the net liabilities of the acquired thrifts in exchange for favorable regulatory consideration allowing goodwill to be counted as an asset." *Ibid.* The court also concluded that "both the government and Cal Fed

provided consideration for the agreements," which included the government's commitments regarding CalFed's use of goodwill. *Id.* at 8a. The court concluded, "[b]ased on all of the contemporaneous documents in each of the * * * transactions," *ibid.*, that "[j]ust as in [this Court's decision in *Winstar*], all of the necessary elements of contract formation are present here, and the parties are bound by the terms of that contract." *Id.* at 9a. Like the trial court, however, the court did not identify any evidence that supported the conclusion that CalFed and the United States intended to form a contract, rather than to seek and grant, respectively, the necessary regulatory approval for CalFed's acquisitions of Brentwood and Family.

With respect to damages issues, the court of appeals affirmed the trial court's rulings, with one exception. The court vacated the trial court's ruling that CalFed's proof of lost profits damages was insufficient as a matter of law, holding that the evidence was sufficient "to create a genuine issue of material fact as to the existence and quantum of lost profits." 04-1557 Pet. App. 13a. The court therefore remanded the case to the trial court for further proceedings with respect to that issue. *Id.* at 17a.

7. On remand, the trial court again rejected CalFed's lost profits claim after a six-week trial, finding that CalFed "did not prove causation, foreseeability, or reasonable certainty of damages at trial," and that CalFed in fact "improved its tangible capital position because it phased out supervisory goodwill." See 04-1557 Pet. App. 145a; see *id.* at 144a-173a.

8. Both parties again appealed. On CalFed's appeal, the Federal Circuit affirmed the trial court's ruling, on remand, leaving in place the award of $23 million in costs for replacement of supervisory goodwill. 04-1577

Pet. App. 126a-139a. The government renewed its appeal of the liability ruling with respect to the Brentwood and Family transactions on the ground that no contract had been formed, albeit expressly recognizing that "[t]o the extent the law of the case doctrine prevents a re-examination" of the Federal Circuit's previous ruling on that subject, "the issue will have to await any Supreme Court review." *Id.* at 140a. On the basis of "law-of-the- case principles," the court of appeals rejected the government's liability argument. *Ibid.* The court also rejected an additional liability argument, not at issue on this cross-petition, that intervening Federal Circuit precedent had established that FHLBB and FSLIC representatives were unauthorized to enter into the contract that was allegedly formed in this case. *Id.* at 140a-142a.

ARGUMENT

This Court should deny the petition in No. 04-1557 for the reasons the government will detail in a brief in opposition to be filed with the Court. Four years ago, the government filed a conditional cross-petition to CalFed's earlier petition for certiorari, which presented, *inter alia*, the same issue presented in CalFed's current petition. The Court denied CalFed's petition and therefore had no occasion separately to consider the government's cross-petition. The government hereby renews its cross-petition, essentially for the same reasons that supported it last time. Accordingly, if the Court grants the petition in No. 04-1557, it should also grant this cross-petition.

The damages issue raised in CalFed's petition is premised on the proposition that the government entered into a contractual relationship with CalFed, such that a subsequent breach should lead to an award of damages. This cross-petition challenges that funda-

mental premise. The actions by the FHLBB and FSLIC at issue in this cross-petition involved no *contractual* commitments by the government that could form the basis for any claim for contract damages, but instead involved instances in which CalFed merely applied for and obtained the necessary *regulatory* approval to engage in regulated transactions. If the Court decides that the factbound damages issues raised by petitioner warrant its consideration, it should also consider the antecedent liability issue raised herein, which presents a legal issue that could have far greater significance for the remaining *Winstar*-related cases.

The court of appeals' decision is an extraordinary extension of contract law principles to federal regulatory action. In the cases before this Court in *Winstar*, the existence of contracts with the government was undisputed, based on the existence of assistance agreements between FSLIC and the acquiring thrift, pursuant to express statutory authority. The Court construed those contracts to contain a guarantee by FSLIC against loss by the acquiring thrift resulting from a change in the law governing the use of goodwill to satisfy federal capital requirements. The record in this case, by contrast, consists of materials documenting only the regulatory approval of private transactions, accompanied by statements of regulatory forbearance. Those documents do not constitute a contract at all. In affirming the Court of Federal Claims' grant of summary judgment to CalFed on the question of liability, the court of appeals held, as a matter of law, that a request for and grant of regulatory approval for a transaction constituted a contract binding on the United States and remediable in damages. That conclusion flies in the face of settled principles of administrative law, under which the mere exercise of governmental

regulatory authority does not create a contractual relationship between the government and regulated entities.

1. "Banking is one of the longest regulated and most closely supervised of public callings." *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947). Savings and loan associations were "created, insured and aided by the Federal Government." *Ibid.* At the time CalFed acquired Brentwood and Family, no insured savings and loan association could conclude a merger without the regulatory approval of FSLIC. 12 U.S.C. 1730(q), 1730a(e) (1982).

Each of the merger and acquisition transactions at issue on this cross-petition involved CalFed's seeking—and the Bank Board's granting—the necessary regulatory approval. With respect to each of the transactions, CalFed submitted an application seeking the Board's approval. 2 C.A. App. A5000374-A5000455, (Brentwood), A5000531-A5000743 (Family). As the then-current regulations required, see 12 C.F.R. 571.5(b)(2), 571.5(e) (1982), CalFed included in each application a description of the accounting methods it anticipated it would use to account for the merger, and it included a list of the regulatory forbearances that it desired the Bank Board to grant. 2 C.A. App. A5000382, A5000454-A5000455 (Brentwood), A5000536 (Family). CalFed sent the Bank Board two letters in connection with the Brentwood acquisition and one letter in connection with the Family acquisition concerning the requested forbearances. *Id.* at A5000475-A5000480 (Brentwood); 3 C.A. App. A5002325 (Brentwood); 2 C.A. App. A5000484-A5000488 (Family). The Bank Board adopted resolutions approving each merger or acquisition, 3 C.A. App. 5002319-A5002321, A5000461-A5000463 (Brentwood merger); 2 C.A. App. A5000179-

A5000180, A5000182-A5000188 (Family acquisition), and issued letters setting forth the forbearances CalFed sought, *id.* at A5000465-A5000467 (Brentwood); 3 C.A. App. A5002559-A5002561 (Family).

All of the documents in both of the transactions manifest a straightforward exercise of federal regulatory authority, in which the regulated entity explains how a transaction it seeks will serve the public interest and satisfy specific statutory and regulatory standards, and the federal regulator decides to approve the transaction on that basis. There is no document with respect to either of the transactions that remotely suggests that a contractual commitment—as opposed to a regulatory approval—by the government was at issue. The Bank Board resolutions, for example, recited simply that the mergers by petitioner were "approved." See, *e.g.*, 3 C.A. App. A5002321 (Brentwood); 2 C.A. App. A5000179-A5000183 (Family). Similarly, the forbearance letters stated that the Bank Board had "determined to exercise supervisory forbearance" and set forth "the nature and extent" of the forbearances granted. See 3 C.A. App. A5002322 (Brentwood), A5002559 (Family). All of those documents, by their terms, are framed in terms of determinations to exercise (or, in the case of forbearances, determinations not to exercise) regulatory authority. None of the documents suggests an exchange of contractual commitments.[3]

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[3] One former Bank Board employee gave CalFed a declaration in connection with this litigation in which he stated that "[a]n acquiring institution, such as CalFed, would have had the same level of assurance as to the treatment of goodwill between assisted and unassisted transaction"—*i.e.*, transactions in which the government made payments and entered into express contracts (as in *Winstar*) and transactions in which it did not (as in this case). 3 C.A. App. A5002914 (declaration of D. James Croft). Both the de-

Certainly, the fact that the regulatory approvals here were preceeded by an application filed by CalFed and one or two subsequent letters attempting to secure the regulators' approval does not suggest that the parties engaged in contractual "negotiations" or that the resulting documents—contrary to their terms—embodied contractual commitments. Such "negotiations" between regulator and regulated entity are an accepted part of ordinary agency practice. Cf. *USA Group Loan Servs., Inc.* v. *Riley*, 82 F.3d 708, 714-715 (7th Cir. 1996) (discussing Negotiated Rulemaking Act of 1990, 5 U.S.C. 561 *et seq.*). Moreover, there was no documentary evidence that the federal regulators played any role whatever in the only genuinely contractual negotiations that did occur—those between CalFed and the owners of the institutions it acquired.[4]

Nor was there anything "contractual" about the Bank Board's decision to forbear from enforcing particular regulatory requirements. To the contrary, such forbearances are an exercise of the enforcement discretion

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tails and the conclusion of that declaration were substantially disputed by the government. See, *e.g.*, *id.* at A5001450-A5001451 (declaration of Lawrence Hayes, former FHLBB General Counsel). The declaration accordingly could not have been (and was not) relied upon by either court below in granting and affirming summary judgment to CalFed on liability.

[4] The record before the trial court included a single declaration by a CalFed attorney asserting that the federal regulators had induced CalFed to acquire Family. See 04-1577 Pet. App. 92a-93a (discussing affidavit of William Callender in connection with another issue). That evidence could not have furnished a basis for granting summary judgment in this case, because it was contradicted by the government's evidence that CalFed was independently interested in acquiring Family. See 3 C.A. App. A5001500 (internal CalFed document stating that Family was showing "good progress"), A5000861-A5000863 (company's interest in "extension of operations into new market areas").

vested in federal regulatory agencies, informing regulated entities that the regulators have no present intention to take action against them on the specified grounds. The legitimate grounds for declining to enforce regulatory requirements are so varied, and the discretion to weigh those grounds is so central to an agency's proper discharge of its regulatory responsibilities, that agency decisions to forbear from enforcing regulatory requirements are presumptively beyond the scope of judicial review. See, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. 821 (1985). A fortiori, an agency's exercise of enforcement discretion does not suggest that the agency has entered into a binding contractual undertaking.

2. A comparison between *Winstar* and this case vividly illustrates the differences between the undoubted contracts in the *Winstar* cases and the absence of a contract here. The court of appeals stated that this case is like *Winstar* because, "[j]ust as in *Winstar* * * *, all of the necessary elements of contract formation are present here, and the parties are bound by the terms of that contract." 04-1557 Pet. App. 9a. In each of the transactions before the Court in *Winstar*, however, FSLIC and a thrift institution had formally signed a document entitled "Assistance Agreement" or "Supervisory Action Agreement." See 518 U.S. at 861-868. Those documents thus identified themselves as "agreements," and they included standard contractual clauses, such as integration clauses. See *ibid.* The issue before the Court in *Winstar* was not whether contracts had been formed, but whether the contracts that undoubtedly existed contained terms regarding the treatment of goodwill that gave rise to liability on the part of the United States when Congress passed a law that affected that treatment. Far from including all of the

necessary elements of contract formation present in *Winstar*, the Brentwood and Family acquisitions do not feature the most elemental aspect of contract formation—evidence of a mutual intent to contract. See *Lewis* v. *United States*, 70 F.3d 597, 600 (Fed. Cir. 1995) ("Like an express contract, an implied-in-fact contract requires (1) mutuality of intent to contract; (2) consideration; and, (3) lack of ambiguity in offer and acceptance" and (4) "actual authority to bind the government.").

The Court did address questions of contract interpretation in *Winstar*, ruling that the contracts there included commitments regarding the treatment of goodwill, as stated in Bank Board documents. But that conclusion was not based on the implausible assumption that the Bank Board documents themselves, contrary to their express terms, were inherently contractual in nature. Rather, the plurality concluded that the contracts that plainly existed between FSLIC and the acquiring thrifts—the assistance agreements—in turn incorporated and "characterize[d] the Board's resolutions and letters not as statements of background rules, but as part of the 'agreements and understandings' between the parties"—*i.e.*, between FSLIC and the acquiring thrifts. 518 U.S. at 863 (Glendale contract); see *id.* at 862 (noting that the terms of the Glendale contract were "similar in all relevant respects to the analogous provisions in the" other two transactions before the Court in Winstar). That reasoning does not suggest that Bank Board regulatory approvals were contractual in nature; it suggests to the contrary that a separate contract between FSLIC and the acquiring thrifts, which incorporated by reference the Bank Board resolutions, gave those resolutions a significance in addition

to their status as regulatory documents. No such contract exists in this case.

That conclusion is buttressed by the *Winstar* plurality's conclusions regarding the terms of the promise made by the government in that case. The plurality construed the promise not as one that "purported to bind Congress to ossify the law in conformity to the contracts," 518 U.S. at 871; see *id.* at 868-869, 881, 888, but as a contractual undertaking on the part of the United States to "assume[] the risk that subsequent changes in the law" would occur and to guarantee against losses the acquiring thrifts might incur as a result of any such change, *id.* at 871; see also *id.* at 868-869, 881-883, 888-890, 907-908, 909-910; *id.* at 911, 918 (Breyer, J., concurring); cf. *id.* at 919-920, 923 (Scalia, J., concurring in the judgment). Thus, the relevant contractual undertaking stemmed not from the regulatory approvals and forbearances themselves, on the theory that they contained an implied promise not to alter governing laws and enforcement discretion, but rather from the distinct actions by the government in entering into the FSLIC assistance agreements, which incorporated and thereby "contractualized" the otherwise regulatory approvals and forbearances.

Indeed, the plurality twice cited 12 U.S.C. 1729(f)(2)(A)(iii) (1982), which granted FSLIC authority to "guarantee" an acquiring thrift against loss resulting from its acquisition of a failing insured thrift. See 518 U.S. at 883, 890. At the time of the transactions in *Winstar* and this case, however, 12 U.S.C. 1729(f) (1982) provided that no such guarantee or other financial assistance could be provided by FSLIC in connection with such an acquisition in excess of the amount FSLIC determined to be reasonably necessary to save the cost of liquidating the failing insured institution.

See 12 U.S.C. 1729(f)(4) (1982). That requirement ensured that FSLIC would specifically consider the appropriateness of entering into a contractual commitment, in addition to giving regulatory approval, to facilitate the acquisition of a failing thrift.

In *Winstar*, the FHLBB (acting in its capacity as the head of the FSLIC) expressly made the required determination under 12 U.S.C. 1729(f)(4) (1982) in approving the assistance agreement between FSLIC and the acquiring thrift in connection with each of the acquisitions at issue. See 95-865 J.A. 81, 455-456, 608. The FHLBB likewise made that determination in approving the assistance agreement in connection with CalFed's acquisition of Southeast. See 2 C.A. App. A5000207. No such determination was made for CalFed's acquisitions of Brentwood and Family—for the simple reason that FSLIC provided no guarantee or other financial assistance to CalFed in connection with its acquisition of those thrifts. These starkly different modes of proceeding confirm that, unlike in *Winstar*, FSLIC did not enter into a guarantee contract in this case.

In short, what is missing in this case is any basis comporable to that in *Winstar* for concluding that the government and CalFed intended to (and did) give the Bank Board's regulatory approvals of the transactions and the accompanying regulatory treatment of goodwill a status beyond their manifest character as exercises of regulatory authority, by making, in addition, contractual commitments with respect to them. A court cannot properly find the existence of a contract—especially an "express" one, see 04-1557 Pet. App. 106a & n.21—between the United States and a private party based on the issuance of documents by a federal agency that constitute mere *regulatory* approval of a private trans-

action. To find a contract on the basis of actions by a federal agency in executing a regulatory law would not only violate ordinary principles of contract formation and administrative law, but would also violate the prohibition under the Tucker Act against recognizing contracts implied in law. See *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980) (per curiam); *United States* v. *Algoma Lumber Co.*, 305 U.S. 415, 418 (1939).

The courts below erroneously framed the government's contention to be that "the absence of an assistance agreement incorporating the forbearance letters precludes a finding that a contract existed in the Brentwood and Family transactions." 04-1557 Pet. App. 6a-7a; see *id.* at 103a ("Absence of a written Assistance Agreement per se eliminates any possibility that" there was a contract.). Of course, contrary to the court of appeals' view that the existence of such an agreement is "irrelevant" (see *id.* at 7a), the absence of such an assistance agreement powerfully supports the conclusion that the actions by the FHLBB and FSLIC in approving CalFed's acquisitions of Brentwood and Family were not contracts and should at least have precluded a grant of summary judgment against the government. Moreover, the presence of express agreements in *Winstar* and in the Southeast transactions and the exceptional nature of those agreements suggest that it would be remarkable for a regulatory agency to make similar undertakings in an oral or implicit contract.

But even if it is assumed, arguendo, that a contract could permissibly be found in these circumstances—despite, *e.g.*, the absence of any determination by FSLIC pursuant to 12 U.S.C. 1729(f)(4) (1982), concerning the extent of and need for a guarantee or other financial assistance—the even more fundamental point

is not that an Assistance Agreement was absent from the record for these transactions, but that there was nothing *present* in the record that would permit (much less compel) the conclusion that there *were* contracts. In a situation in which regulatory approval is required for a private entity to engage in a transaction, a determination by a court that the government has entered into a contract must be based on something more than a record of regulatory approval. There must be a manifestation of an intent to enter into a contract embodied in documents or conduct aside from the documents that record the agency's approval and the mere give-and-take of the regulatory process.[5]

3. The court of appeals' conclusion that a simple regulatory approval of a regulated entity's transaction may be construed to create a contract between the government and the regulated entity conflicts with long-standing principles of administrative law. "Congress delegated power to the [Bank] Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase." *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 168 (1982). The

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[5] The Fourth Circuit in *Charter Federal Savings Bank* v. *Office of Thrift Supervision*, 976 F.2d 203 (1992), cert. denied, 507 U.S. 1004 (1993), also addressed a *Winstar*-related case in which the documents, like those here, were entirely consistent with a regulatory approval and manifested no intent to form a contract. The court noted that "no express, written contract exist[ed] between the parties," *id.* at 210-211, and that in that respect the case "differ[ed] from similar supervisory goodwill cases, which have all involved written agreements between the complaining thrift and the FHLBB or FSLIC." *Id.* at 211. The court concluded that for that reason it was "reluctant to rule that a contract exists," *ibid.*, but it ultimately decided the case on other grounds.

Bank Board was charged with making federal policies to govern the thrift industry and to exercise its delegated authority in service of those policies. The regulated entities, however, had no assurance that those policies would remain unchanged in the future or that they would not be subject to new or different requirements as the regulatory scheme unfolded.

Nor did the regulated entities have any expectation that the government would bear the costs if new or different regulations were adopted that increased their costs. To the contrary, although the Bank Board's actions were of course subject to the constraints imposed by its own organic statute and the Administrative Procedure Act, see, *e.g.*, *Getty* v. *FSLIC*, 805 F.2d 1050 (D.C. Cir. 1986) (unsuccessful bidder to acquire troubled thrift successfully challenged award under the APA), those sources of authority plainly allowed for changes in Board policies and the broader regulatory environment. "An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances." *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991)) (internal quotation marks, brackets, and citations omitted); see *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990); *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 862 (1984). That is especially so in the context of banking, in which regulatory agencies and Congress might be required to revise existing laws and policies to protect the banking system and the public.

Under the court of appeals' holding, however, the Bank Board's exercise of delegated regulatory authority committed the United States to a contractual obligation to make regulated entities financially whole when a

change in the regulatory regime ensued. As this Court explained in addressing an analogous situation in *National Railroad Passenger Corp.* v. *Atchison, Topeka, & Santa Fe Railway*, 470 U.S. 451, 466-467 (1985), "absent 'an adequate expression of an actual intent' of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party" (citation omitted). *National Railroad Passenger Corp.* involved a claim that a statute, rather than a regulatory action, constituted a contract between the government and private entities. But the underlying rule in both instances is that "the principal function of a legislature [or regulatory agency] is not to make contracts, but to make laws that establish the policy of the state." *Id.* at 466. "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws [or regulatory actions] as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative [or administrative] body." *Ibid.*

The rationale of *National Railroad Passenger Corp.*, the continued authority of which was in no way questioned by this Court in *Winstar*, is rooted in fundamental principles that distinguish between the action of the government as lawmaker and the action of the government as a contracting entity. See *Wisconsin & Michigan Ry.* v. *Powers*, 191 U.S. 379, 387 (1903) (announcement of government policy in a statute "simply indicates a course of conduct to be pursued until circumstances or its views of policy change"). The court of appeals' holding that the Bank Board's regulatory approvals of the Brentwood and Family transactions were contractual commitments by the government—where

there was no "adequate expression of an actual intent" of the government to bind itself by contract, 470 U.S. at 466—violated that bedrock principle. To imply a contractual undertaking from a regulatory approval is impermissible, because in this case, as in *National Railroad Passenger Corp.*, "[t]he continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation." *Keefe* v. *Clark*, 322 U.S. 393, 397 (1944) (quoting *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837)).

4. The Federal Circuit in *Fifth Third Bank* v. *United States*, 402 F.3d 1221 (2005), has recently reaffirmed its decision in this case, see *id.* at 1229, holding that a series of communications that evidence nothing more than an application for, and grant of, regulatory approval for a thrift transaction was sufficient to establish that the regulator and the acquiring thrift formed a contract. In *Fifth Third*, the trial court ruled at the close of the plaintiffs' case that a mere regulatory approval—not a contractual commitment—was all that such an exchange of communications showed. The Federal Circuit reversed that factual finding and entered judgment for the plaintiffs, relying on the context of the savings-and-loan crisis of the 1980s, *id.* at 1231-1234, and after-the-effect testimony by officers of the thrift and the former thrift officials that they intended to enter into a contract, *id.* at 1235.[6]

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[6] In earlier cases, the Federal Circuit had appeared to adopt a more limited view of its liability ruling in this case. See *D&N Bank* v. *United States*, 331 F.3d 1374, 1378, 1381 (Fed. Cir. 2003) (holding that "mere approval of the merger does not amount to intent to contract" and "something more is necessary," and distinguishing this case); *Anderson* v. *United States*, 344 F.3d 1343, 1356 (Fed. Cir. 2003) (denying government liability where plaintiff

The court of appeals' determination that the federal regulatory approvals of CalFed's acquisitions of Brentwood and Family not only may but *must* be construed as government contracts is of potentially broad significance.[7] Its most immediate effect is on approximately 14 of the 39 still-pending *Winstar*-related cases that present a similar issue.

More generally, the court of appeals' holding threatens, in some undefined category of cases, to replace ordinary review of agency action under the Administra-

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failed to show "something more" beyond documentation demonstrating the government acting in its regulatory capacity). The court's *Fifth Third* decision makes clear that the Federal Circuit adheres to its view in this case that, at least in the *Winstar* context, a contract may be found on the basis of regulatory approval of a transaction.

[7] Before its decision in this case, the Federal Circuit and its predecessor had recognized the need to find evidence of contractual intent before finding that standard regulatory actions were actual contractual undertakings. See, *e.g.*, *Cienega Gardens* v. *United States*, 162 F.3d 1123, 1136 (Fed. Cir. 1998), cert. denied, 528 U.S. 820 (1999) (distinguishing *Winstar* and rejecting claim by owners of housing units that Department of Housing and Urban Development had contracted with them, on the ground that "[t]he plaintiffs in *Winstar* had contracts with integration clauses that expressly incorporated contemporaneous documents that allowed them to use supervisory goodwill," while plaintiff owners of housing units "can point to no similar contractual provisions"); *New Era Constr.* v. *United States*, 890 F. 2d 1152, 1155 (Fed. Cir. 1989) ("[T]he government's involvement in the financing and supervision of a contract between a [state] agency and a private contractor does not create a contract between the government and the contractor."); *Aetna Cas. & Sur. Co.* v. *United States*, 655 F.2d 1047, 1052 (Ct. Cl. 1981) ("[W]here the United States does not make itself a party to the contracts which implement important national policies, no express or implied contracts result between the United States and those who will ultimately perform the work."); *D.R. Smalley & Sons, Inc.* v. *United States*, 372 F.2d 505, 507 (Ct. Cl.), cert. denied, 389 U.S. 835 (1967).

tive Procedure Act with entirely different standards applicable to contractual commitments. It also threatens to convert regulatory agencies into insurers against statutory changes and replace the ordinary remedy of setting aside agency action or remanding in instances of unlawful agency action with an entirely new remedy of contract damages. In an action under the APA, the court may "compel agency action unlawfully withheld or unreasonably delayed" or "hold unlawful and set aside agency action" that fails to satisfy the APA's standards. 5 U.S.C. 706(1) and (2). Money damages are not available. 5 U.S.C. 702 (a suit "seeking relief *other than money damages* * * * shall not be dismissed nor relief therein be denied on the ground that it is against the United States") (emphasis added). Similarly, the Federal Tort Claims Act bars "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute be valid." 28 U.S.C. 2860(a).

The APA's preclusion of money damages reflects the fundamental difference between the government's actions as regulator and its actions as a contracting party. The decision below blurs—indeed obliterates—that line by dismissing the absence of an agreement reflecting a distinct contractual undertaking as insignificant. If the Court grants review of the damages issues at this time, it should grant this conditional cross-petition to redefine that critical line.

CONCLUSION

If the Court grants the petition for a writ of certiorari in *California Federal Bank, FSB* v. *United States*, No. 04-1557, it should also granted this cross-petition for a writ of certiorari.

Respectfully submitted.

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APPENDIX

1. Section 1464(a) of Title 12 of the United States Code (1982), provided:

> In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations, or Federal savings banks, and to issue charters therefor, giving primary consideration to the best banking practices of thrift institutions in the United States. The lending and investment authorities are conferred by this section to provide such institutions the flexibility necessary to maintain their role of providing credit for housing.

2. Section 1730(q)(1) of Title 12 of the United States Code (1982), provided in relevant part:

> No person, acting directly or indirectly or through or in concert with one or more other persons, shall acquire control of any insured institution through a purchase[,] assignment, transfer, pledge, or other disposition of voting stock of such insured institution unless the Corporation has been given sixty days' prior written notice of such proposed acquisition and within that time period the Corporation has not issued a notice disapproving the proposed acquisition or extending up to another thirty days the period during which a disapproval may issue. * * * An acquisition may be made prior to expiration of the disapproval period if the Corporation issues

written notice of its intent not to disapprove the action. * * *

3. Section 1730(q)(6) of Title 12 of the United States Code (1982) provided in pertinent part:

> Except as otherwise provided by regulation of the Corporation, a notice filed pursuant to this subsection shall contain the following information:
>
> * * * * *
>
> (C) The terms and conditions of the proposed acquisition and the manner in which the acquisition is to be made.
>
> * * * * *

4. Section 1730a(e)(1) of Title 12 of the United States Code (1982) provided in pertinent part:

> It shall be unlawful for—
>
> (A) any savings and loan holding company directly or indirectly, or through one or more subsidiaries or through one or more transactions—
>
> (i) to acquire, except with the prior written approval of the Corporation, the control of an insured institution or a savings and loan holding company, or to retain the control of such an institution or holding company acquired or retained in violation of this section as heretofore or hereafter in effect;
>
> (ii) to acquire, except with the prior written approval of the Corporation, by the process of merger, consolidation, or purchase of assets, another insured or uninsured institution or a

savings and loan holding company, or all or substantially all of the assets of any such institution or holding company.