No. 07-76

In the Supreme Court of the United States

JOHN HENRICHS AND
ANNE HENRICHS, PETITIONERS

v.

VALLEY VIEW DEVELOPMENT, ET AL.

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

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that 12 U.S.C. 1821(d)(13)(D) and (j), which limit a court's jurisdiction over claims against the Federal Deposit Insurance Corporation (FDIC), do not restrict suits against assignees of assets that were formerly owned by an FDIC receivership that has been terminated.

2. Whether the court of appeals correctly dismissed petitioners' claim against the FDIC receivership, which had been terminated, with all its assets distributed, three years before petitioners filed their claim with the FDIC.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 474 F.3d 609. The order of the district court (Pet. App. 15a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2007. A petition for rehearing was denied on April 19, 2007 (Pet. App. 32a-33a). The petition for a writ of certiorari was filed on July 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from a dispute between petitioners and respondent Valley View Development (Valley View) about whether a deed of trust owned, in part, by petitioners encumbered a parcel of real property (the Balboa lot) owned by Valley View. The dispute had been fully litigated in state court before petitioners filed this federal court action and added the Federal Deposit Insurance Corporation (FDIC or Corporation) as a party. Pet. App. 3a-7a, 9a, 107a, 109a.

1. In 1990, Valley View owned two plots of land, the Balboa lot and the Chatsworth lot, in Granada Hills, California. Petitioner John Henrichs and respondents Michael Blaha and Marc Gelman formed Granada Plaza Associates, Ltd. (GPA) to purchase and to develop the Chatsworth lot. GPA could not purchase that lot separately until a tract map subdividing it from the Balboa lot had been recorded, so GPA purchased both lots from Valley View. Pet. App. 4a.

GPA leased the Balboa lot to Valley View for one dollar per year and granted it an option to repurchase the lot for one dollar after the tract map was recorded. The ground lease provided that, if Valley View exercised the repurchase option, GPA would convey the Balboa lot to Valley View in fee simple, free of all liens and encumbrances. Pet. App. 4a.

GPA obtained a construction loan from Capital Bank of California to develop the Chatsworth lot. The loan was guaranteed by Gelman and Blaha and secured by a deed of trust on both the Chatsworth and Balboa lots. Pet. App. 4a, 17a.

After the tract map was recorded in 1992, Valley View exercised its option to repurchase the Balboa lot. Valley View believed that it obtained title free and clear of the lien created by the deed of trust. Pet. App. 5a.

In June 1993, the FDIC was appointed receiver of Capital Bank and succeeded to Capital Bank's interest in the construction loan and deed of trust. Pet. App. 5a. As required by statute, the FDIC published notice to creditors that they must submit any claims against the receivership for resolution by the FDIC's administrative claims process no later than October 8, 1993. See 12 U.S.C. 1821(d)(3)(B).

In 1994, GPA's loan was in default. The FDIC entered into a settlement agreement (FDIC Settlement Agreement) with GPA and the two loan guarantors (Gelman and Blaha) under which they agreed to pay the FDIC $300,000, and the FDIC agreed to cancel or to assign the loan and the deed of trust to any party designated by GPA. Pursuant to GPA's instructions, the FDIC assigned its interest in the loan and deed of trust, "without recourse, representation or warranty, expressed or implied" (Pet. App. 43a), to various parties, including petitioners, who received a 22.38% interest. *Id.* at 5a, 18a-19a, 41a-43a.

2. In 1996, a dispute arose concerning whether the Balboa lot was subject to a lien based on petitioners' interest in the deed of trust, and Valley View filed a state court action to quiet title to the property. In December 2001, Valley View amended its complaint, requesting a reformation of the FDIC Settlement Agreement to reflect the contracting parties' intent to release any lien on the Balboa Lot. The state court granted that request and ordered petitioners to execute a release of their interest in the lien on the Balboa Lot. The California Court of Appeal affirmed that judgment, and the California Supreme Court denied a petition for further review. Pet. App. 5a-6a, 18a-19a, 43a-49a.

3. The FDIC receivership was never made a party to the state court action, and petitioners did not file any claim with the receivership. On January 1, 2001, before

Valley View had amended its complaint in the state court litigation, the receivership was terminated, because all available assets to pay outstanding and approved claims had been distributed. On March 31, 2004, more than three years after the receivership had been terminated, petitioners sent a letter to the FDIC claiming damages for the FDIC's purported breach of the agreement assigning the loan and deed of trust. The FDIC took no action on that claim, which was untimely. Pet. App. 9a, 11a, 109a-110a; 12 U.S.C. 1821(d)(5)(C) (claims not filed within the time limit specified by the FDIC in its notice to creditors to present their claims shall be disallowed unless they are filed in time to permit payment).

4. In June 2004, petitioners filed the instant suit in the United States District Court for the Central District of California against Valley View and others, including the FDIC. Pet. App. 15a. Petitioners sought, among other things, a declaration that the state court judgment in favor of Valley View was void because the state court lacked jurisdiction over Valley View's claims. *Id*. at 6a, 8a, 15a; Pet. 10. Alternatively, petitioners sought damages from the FDIC based on a claim that the state court judgment rendered the FDIC in breach of the assignment agreement. *Ibid*. The district court held that the *Rooker-Feldman* doctrine barred petitioners' attempt to seek federal review of a state court judgment, and the district court dismissed the suit for lack of subject matter jurisdiction. Pet. App. 15a-31a.

5. The court of appeals affirmed the dismissal. Pet. App. 1a-14a. The court held that petitioners' attempt to void the state court judgment was barred by the *Rooker-Feldman* doctrine, which precludes federal district courts from exercising appellate review over final state

court judgments. *Id.* at 7a-10a. The court rejected petitioners' argument that the *Rooker-Feldman* doctrine did not apply on the theory that federal law deprived the state court of jurisdiction. *Id.* at 8a-9a. The court concluded that 12 U.S.C. 1821(j), which bars courts from awarding equitable relief against the FDIC, did not apply to the state court action because the FDIC was not a party to that action and the state court ordered relief only against petitioners. Pet. App. 9a. The court also concluded that 12 U.S.C. 1821(d)(13)(D) did not apply to the state court action. Pet. App. 9a-10a. Section 1821(d)(13)(D) requires the exhaustion of administrative remedies as a jurisdictional prerequisite to any action for payment from the assets of a depository institution for which the FDIC has been appointed receiver or any claim relating to any act or omission of such institution or the FDIC as receiver. The court of appeals held that "the statute does not reach assignees of assets once owned by the FDIC" as receiver but no longer owned by the FDIC. *Id.* at 10a.

The court of appeals also affirmed the dismissal of petitioners' claim that the FDIC had breached the assignment agreement. Pet. App. 10a-11a. The court concluded that, although the claim was not necessarily barred by the *Rooker-Feldman* doctrine, dismissal was nonetheless appropriate because the claim is moot. *Id.* at 10a. The court explained that petitioners could look only to the assets of the Capital Bank receivership to satisfy the claim, and the receivership had distributed all of those assets and been terminated in January 2001, more than three years before petitioners raised the claim. *Id.* at 10a-11a. Because "[n]o assets remain in the receivership to satisfy a late-filed claim," the court concluded that the claim is moot. *Id.* at 11a (citing decisions from other courts of appeals reaching similar results).

ARGUMENT

The court of appeals correctly affirmed the dismissal of petitioners' suit. The court's decision does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioners mistakenly contend (Pet. 11-18, 26-27) that two jurisdictional provisions, 12 U.S.C. 1821(d)(13)(D) and (j), which were enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 212(a), 103 Stat. 222, deprived the state court of jurisdiction over Valley View's claim seeking the release of the lien on the Balboa lot. As the court of appeals correctly held, the jurisdictional bars in FIRREA do not apply to suits, such as Valley View's, that are brought, not against the FDIC, but against an assignee of an asset formerly held by the FDIC. Pet. App. 9a-10a. That issue does not warrant further review.

By statutory mandate, the FDIC functions in two separate capacities—a receivership capacity and a corporate capacity. 12 U.S.C. 1821(a)(1)(A) and (c)(1); *FDIC* v. *Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991). Section 1821(j) limits the relief that a court may award against the FDIC in its receivership capacity. It provides, in pertinent part, that "no court may take any action * * * to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 12 U.S.C. 1821(j). As the court of appeals explained (Pet. App. 9a), Section 1821(j) limits only a court's authority to award relief against the FDIC itself. A court does not take action "to restrain or affect the exercise" of the FDIC's powers unless it awards relief against the FDIC. The state court did not do that here, because the FDIC was not a party to the litigation. *Ibid.* As the court of appeals observed, "[i]t was [petitioners], not the FDIC, who [were] ordered to reconvey the note and deed referencing the Balboa lot." *Ibid.*

Section 1821(d)(13)(D) also did not deprive the state court of jurisdiction over Valley View's claim. That provision states that, unless the FDIC's administrative claims process has been exhausted, no court shall have jurisdiction over "(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or (ii) any claim relating to any act or omission of such institution or the Corporation as receiver." As the court of appeals correctly concluded, Section 1821(d)(13)(D) applies only in an action against the FDIC. Pet. App. 10a. It does not apply in an action, such as Valley View's state court suit, against a private party who owns an asset that was formerly held by an FDIC receivership, particularly when the receivership has since terminated. See *ibid.*

Section 1821(d)(13)(D) is designed to preserve the integrity of the administrative claims process established by FIRREA. It therefore "bars judicial review of any non-exhausted claim * * * which is 'susceptible of resolution through the claims procedure.'" *Henderson* v. *Bank of New England*, 986 F.2d 319, 321 (9th Cir.) (quoting *Rosa* v. *RTC*, 938 F.2d 383, 394 (3d Cir.), cert. denied, 502 U.S. 981 (1991)), cert. denied, 510 U.S. 995 (1993). But Section 1821(d)(13)(D) does not apply to claims that are not susceptible of resolution through the administrative procedure, such as claims against a private party who holds an asset that was once held by an FDIC receivership, particularly when the receivership has terminated. In that circumstance, there is no administrative claims procedure to exhaust, because that procedure governs only claims against the FDIC receivership. See 12 U.S.C. 1821(d)(3)-(6) and (10).[1]

Petitioners argue (Pet. 15-16) that, if Congress intended to limit the application of Section 1821(d)(13)(D) to assets in the possession of the FDIC, it would have done so more explicitly, by modifying the statute's reference to "assets" with the phrase "in the possession of the receiver." But that limitation is inherent in the phrase "assets of any depository institution for which the Corporation has been appointed receiver." 12 U.S.C. 1821(d)(13)(D). Once the receivership has transferred an asset to a third party, the asset is no longer an "asset[] of [the] depository institution for which the Corporation has been appointed receiver." *Ibid.* For that reason, Congress expressly provided that Section

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[1] Petitioners mistakenly suggest in passing (Pet. 18) that the administrative process applies only to claims based on the pre-closing actions of the failed institution and not to claims based on the conduct of the receiver itself. As almost every court of appeals that has addressed the issue has concluded, the administrative process applies to both categories of claims. See *McCarthy* v. *FDIC*, 348 F.3d 1075, 1080 (9th Cir. 2003); *FDIC* v. *Scott*, 125 F.3d 254, 259 (5th Cir. 1997); *Stamm* v. *Paul*, 121 F.3d 635, 642 (11th Cir. 1997); *Hudson United Bank* v. *Chase Manhattan Bank*, 43 F.3d 843, 851 (3d Cir. 1994); *Heno* v. *FDIC*, 20 F.3d 1204, 1208-1210 (1st Cir. 1994); *Office & Prof'l Employees Int'l Union, Local 2* v. *FDIC*, 962 F.2d 63, 66 n.7 (D.C. Cir. 1992); but see *Homeland Stores, Inc.* v. *RTC*, 17 F.3d 1269, 1272-1275 (10th Cir.), cert. denied, 513 U.S. 928 (1994). This case does not present an opportunity to resolve the disagreement among the courts of appeals on that issue, because the court below did not base its decision on a failure by petitioners to exhaust administrative remedies.

1821(d)(13)(D) also applies to assets that, although no longer owned by the receivership, are still owned by the FDIC in its corporate capacity. See *ibid.* (stating that the jurisdictional bar applies to suits regarding "assets which the Corporation may acquire from itself as such receiver"). If Section 1821(d)(13)(D) generally applied to assets that the receivership has assigned to others, there would have been no need to specify that the assets assigned to the FDIC in its corporate capacity are also covered. Accordingly, the court of appeals correctly held that Section 1821(d)(13)(D)'s jurisdictional bar does not apply to "assignees of assets once owned by the FDIC." Pet. App. 10a.[2]

Petitioners have not identified any decision by another court of appeals that has addressed the question whether FIRREA's jurisdictional limitations apply to suits against private party assignees of FDIC receivership assets, much less a decision that conflicts with the decision below. Because the issue has not arisen fre-

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[2] Petitioners note (Pet. 18-19) that courts of appeals have allowed assignees of receivership assets to invoke some of the FDIC's special defenses, such as the *D'Oench, Duhme* doctrine. See Pet. 18-19 (citing, *e.g.*, *Newton* v. *Uniwest Fin. Corp.*, 967 F.2d 340, 347 (9th Cir. 1992), and *Porras* v. *Petro Plex Sav. Ass'n*, 903 F.2d 379, 381 (5th Cir. 1990)). Petitioners argue (Pet. 19) that FIRREA's jurisdictional limitations should likewise apply to assignees. But even the cases that petitioners cite indicate that assignees do not receive the benefit of all of the FIRREA provisions that apply to the FDIC. See, *e.g.*, *Cadle Co.* v. *1007 Joint Venture*, 82 F.3d 102, 105 (5th Cir. 1996) (six-year statute of limitations does not apply to suit brought by assignee of note formerly owned by FDIC receivership when claim had not accrued before the FDIC assignment). Petitioners cite no case that has applied the jurisdictional limits in Sections 1821(j) and 1821(d)(13)(D) to private parties, and it would not be appropriate to do so for the reasons explained above.

quently and there is no conflict among the courts of appeals, this Court's review of the issue is not warranted.

2. Petitioners also contend (Pet. 20-24, 28-30) that the court of appeals erroneously dismissed their breach of contract claim against the FDIC receivership. The court of appeals correctly affirmed the dismissal of that claim, and its determination does not warrant further review.

Any claim against an FDIC receivership generally must be submitted to the receiver for determination by the date specified in the FDIC notice to creditors to present their claims, 12 U.S.C. 1821(d)(3)(B), or the claim "shall be disallowed and such disallowance shall be final," 12 U.S.C. 1821(d)(5)(C)(i). There is a limited exception for claims that could not have been filed before that date, but those claims still must be "filed in time to permit payment." 12 U.S.C. 1821(d)(5)(C)(ii)(II). Because the FDIC's liability for claims against a receivership is limited to the assets of the receivership, 12 U.S.C. 1821(i)(2); *Maher* v. *FDIC*, 441 F.3d 522, 525-526 (7th Cir. 2006), cert. denied, 127 S. Ct. 1357 (2007); *First Ind. Fed. Sav. Bank* v. *FDIC*, 964 F.2d 503, 507 (5th Cir. 1992), claims filed after the receivership has terminated and its assets have been distributed are not "filed in time to permit payment," 12 U.S.C. 1821(d)(5)(C)(ii)(II). Petitioners did not file their claim until more than three years after the Capital Bank receivership had distributed all the failed bank's assets and been terminated. Accordingly, petitioners' claim was "disallowed" by operation of law, 12 U.S.C. 1821(d)(5)(C)(i), and it was correctly dismissed.

Moreover, as the court of appeals observed, petitioners "may look only to the assets of the Capital Bank receivership to satisfy" their claim against the receivership, and "[n]o assets remain in the receivership to satisfy [petitioners'] late-filed claim." Pet. App. 10a-11a (citing, *inter alia*, *Maher*, *supra*, and *First Ind. Sav. Bank, supra*). The court of appeals therefore concluded that petitioners' alleged injury cannot be "redressed by a favorable judicial decision," and their claim is moot. *Ibid*. As petitioners concede (Pet. 24), that conclusion accords with decisions of four other courts of appeals that have considered similar issues. See Pet. App. 10a-11a (citing cases). Because there is no conflict among the courts of appeals on the issue, this Court's review is not warranted.

Relying on 12 U.S.C. 1821(d)(20) and now-repealed 12 U.S.C. 1821(a)(7)(C)(i) (2000), petitioners contend (Pet. 20-23) that their claim should not have been dismissed because it is an administrative expense of the receiver payable out of the FDIC's Bank Insurance Fund. Petitioners did not raise that contention until they filed their reply brief in the court of appeals. The court of appeals did not address the issue, which was not timely raised under Ninth Circuit rules. See, *e.g.*, *Cedano-Viera* v. *Ashcroft*, 324 F.3d 1062, 1066 n.5 (2003); *Martinez-Serrano* v. *INS*, 94 F.3d 1256, 1259 (1996). Accordingly, this Court also should not consider the issue. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) (Court does not ordinarily address issues not passed on below).

In any event, petitioners' reliance on those provisions is mistaken. Section 1821(d)(20) provides that a "final" judgment for a receiver's breach of a contract "shall be paid as an administrative expense of the receiver." 12 U.S.C. 1821(d)(20). That provision classifies those judgments as administrative expenses to clarify the order of priority in which they should be paid when receivership assets are distributed. See, *e.g.*, Cal. Fin. Code § 3119.5(a)(1) (West 1999).[3] But the classification of a "final" judgment for breach of contract as an "administrative expense" does not override the statutory command that a claim (including one for breach of contract) "shall be disallowed" if it is submitted after the receivership has been terminated and its assets distributed. 18 U.S.C. 1821(d)(5)(C)(i).

Petitioners' reliance on former 12 U.S.C. 1821(a)(7)(C)(i) (2000) is also misplaced. To begin with, petitioners inaccurately quote the provision as referencing the FDIC's responsibilities as "receiver." Pet. 21 (purporting to quote 12 U.S.C. 1821(a)(7)(C)(i) (2000)). The provision actually stated that "[a]ny personnel, administrative, or other overhead expenses *of the Corporation* shall be allocated—(i) fully to the Bank Insurance Fund, if the expense was incurred directly as a result of the Corporation's responsibilities solely with respect to Bank Insurance Fund members." 12 U.S.C. 1821(a)(7)(C)(i) (2000) (emphasis added). Section 1821(a)(7)(C)(i) was an accounting provision that directed how the Corporation's overhead expenses should be allocated, for bookkeeping purposes, between the FDIC's two insurance funds, the Bank Insurance Fund and the Savings Association Insurance Fund. The provision's limited role is confirmed by the fact that Congress repealed the provision in 2006, when the two funds were merged. See Federal Deposit Insurance

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[3] The California statutory priority schedule governed the distribution of assets in the Capital Bank receivership because Capital Bank was chartered by the State of California. FIRREA, Pub. L. No. 101-73, § 212(a), 103 Stat. 242 (12 U.S.C. 1821(g)(4)); *Goldblatt* v. *FDIC*, 105 F.3d 1325, 1328, n.1 (9th Cir. 1997). Under that schedule, liquidation expenses, *i.e.* administrative expenses, of the receiver were paid first.

Reform Conforming Amendments of 2005, Pub. L. No. 109-173, § 8(a)(11)(C) and (b), 119 Stat. 3612, 3616. The provision did not alter the statutory command that "[t]he maximum liability of the Corporation, acting as receiver or in any other capacity, to any person having a claim against the receiver or [a failed financial institution] shall equal the amount such claimant would have received if the Corporation had liquidated the assets and liabilities of such institution." 12 U.S.C. 1821(i)(2). As discussed above, petitioners received nothing (and were entitled to nothing) when the FDIC terminated the Capital Bank receivership and liquidated the assets and liabilities of the bank, because petitioners had not filed a timely claim. Nothing in now-repealed Section 1821(a)(7)(C)(i) changes that fact.

3. Petitioners also incorrectly argue (Pet. 24-26) that the state court decision reforming the FDIC Settlement Agreement constitutes an unconstitutional taking of the Balboa lien by the federal government. That claim was not included in petitioners' complaint, and petitioners raised it for the first time in their petition for rehearing before the court of appeals. Accordingly, the court of appeals did not address the claim. See *United States* v. *Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (court will not consider issues raised for the first time on appeal); *United States* v. *Lewis*, 787 F.2d 1318, 1323 n.6 (9th Cir. 1986) (court does not consider issues raised for the first time in a rehearing petition).

In any event, petitioners' taking claim lacks merit. The state court decision could not have effected a taking by the federal government because neither the FDIC nor any other component of the federal government participated in the state court litigation or obtained any property interest as a result of the state court decision.

Nor did the FDIC appropriate any of petitioners' property or enact any regulations depriving them of their property at any other time. See generally *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency,* 535 U.S. 302, 321-327 (2002) (a taking can occur by the appropriation of private property through direct governmental action or through governmental regulation).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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