No. 15-___

IN THE

Supreme Court of the United States

FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the well-settled rule of contract interpretation—that specific provisions control over conflicting general provisions—applies when interpreting contracts governed by federal law.

CORPORATE DISCLOSURE STATEMENT

Petitioner First American Title Insurance Company is a wholly owned subsidiary of its parent corporation First American Financial Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner First American Title Insurance Company ("First American") respectfully requests that this Court grant certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unreported opinion (Pet. App. 1a-26a) is available at 611 F. App'x 522. The Eleventh Circuit's unreported order denying panel rehearing, included here at Pet App. 95a-97a, was not reported. The unreported decision denying summary judgment of the District Court for the Southern District of Florida (Pet. App. 72a-92a) is available at 2013 U.S. Dist. LEXIS 137442. The district court's opinion and order granting judgment for Respondent Federal Deposit Insurance Corporation ("FDIC") (Pet. App. 29a-71a), likewise unreported, is available at 2013 U.S. Dist. LEXIS 144663. The district court's final judgment, included here at Pet. App. 27a-28a, was also not reported.

JURISDICTION

The Eleventh Circuit issued its opinion on April 28, 2015. (Pet. App. 1a.) The Eleventh Circuit denied First American's petition for panel rehearing on June 9, 2015. (Pet. App. 95a.) On August 10, 2015, Justice Thomas granted an extension of time to file a petition for certiorari up to and including November 6, 2015. (Pet. App. 98a.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

INTRODUCTION

American courts around the nation, both state and federal, rely on standard interpretive rules when construing the terms of a contract. At issue here is one of the most fundamental of those rules: specific provisions control over conflicting general provisions. Although accepted by seemingly every other court across America, the rule was ignored by the Eleventh Circuit below in interpreting a federal contract governed by federal common law. After finding that a specific provision applied, the Eleventh Circuit nonetheless rejected it in favor of a broader "catch-all" provision. That holding not only runs counter to the overwhelming weight of authority in other courts, it also creates a circuit split. More importantly, the holding is fundamentally wrong and this Court should summarily reverse.

In the proceedings below, Respondent Federal Deposit Insurance Corporation contended that petitioner First American is liable to it pursuant to closing protection letters ("CPLs") provided by First American to the FDIC's predecessor-in-interest, a failed bank for which the FDIC had become the receiver. First American countered that the FDIC had assigned its rights under the CPLs to a successor-in-interest—namely, an acquiring bank that had agreed to assume the failed bank's assets and liabilities pursuant to a standard purchase and assumption agreement ("Purchase Agreement") with the FDIC, which expressly invokes federal common law.

The Eleventh Circuit disagreed. It held that the FDIC retained CPL claims under the terms of the Purchase Agreement. While the court agreed with

First American that CPL claims were covered by specific terms expressly including certain assets in the sale, the court found that such claims also fell under a general, vague provision excluding certain assets. In particular, although the Purchase Agreement specifically sold to the acquiring bank claims accruing to loan holders arising under agreements executed in connection with loans—which all acknowledge covers CPLs—the court held controlling a provision excluding, under the court's interpretation, *any claims* related to *any loss* of the failed bank. In the Eleventh Circuit's view, that general exclusionary provision, which it described as "a contractual 'catch-all,'" trumped the more specific inclusionary provision, meaning that CPL claims were retained by the FDIC.

The Eleventh Circuit's holding conflicts with the basic rule of contract interpretation that specific provisions control over general ones. Other circuit courts of appeal have applied that rule under federal common law, but the Eleventh Circuit refused to do so. The Eleventh Circuit's decision creates a circuit split on the issue, leaving the federal common law of contracts in a state of flux. It likewise creates a split with state courts, virtually all of which apply this standard rule of construction.

The ramifications of the Eleventh Circuit's holding are particularly troublesome given the vast world of federal government contracts, where the need for uniformity is pressing. For example, the government contract utilized by the FDIC at issue here has been used in hundreds of other bank failures in just the last few years. *See* FDIC, Failed Bank List, http://www.fdic.gov/bank/individual/failed/banklist.html (last visited Oct. 28, 2015) (linking to each con-

tract). Myriad other the federal contracts are executed each day. Yet if the decision below is left undisturbed, contracting parties that have long understood the terms of their bargain based on a well-settled legal backdrop will now be left to question their rights under federal common law, especially as against the government.

STATEMENT OF THE CASE

A. The 2008 financial crisis resulted in the failure of more than 500 banks. *See id.* In most every instance, the FDIC was appointed receiver for the failed bank pursuant to 12 U.S.C. § 1821(c). In turn, the FDIC typically transferred the assets and liabilities of the failed bank to a solvent acquiring bank, pursuant to a standard purchase and assumption agreement between the FDIC and the acquiring bank. The interpretation of those agreements—which involve a federal government agency—presents a question of federal law. *See*, *e.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); (*see also* Pet. App. 145a (FDIC Purchase Agreement providing it is governed by federal law)).

These various transfers have prompted an outbreak of litigation over whether the FDIC or the acquiring bank owns particular claims, or is responsible for particular liabilities, of the failed bank. Each dispute turns on the question whether the FDIC, through its customary purchase and assumption agreement, transferred the relevant claim or liability to the acquiring bank or retained the claim or liability for itself. Thus, every court faced with one of these cases must interpret the terms of the agreement,

including the same inclusionary and exclusionary provisions at issue here.

B. In 2007, BankUnited, F.S.B. ("Old Bank") made two loans to a buyer to purchase two condominiums. (Pet. App. 3a.) First American's title agent, Property Transfer Services ("PTS"), served as closing agent. (*Id.* at 3a-4a.) Pursuant to Old Bank's closing instructions, the buyer was to cover the down payments with his own funds. (*Id.* at 4a.) PTS received wire transfers for the down payments but did not verify the source, which turned out not to be the buyer. (*Id.*)

Prior to closing, First American issued CPLs and title insurance to Old Bank for the loans. (*See id.*) Both CPLs and title insurance are standard instruments in the real estate industry. CPLs protect lenders against wrongdoing before closing: the title insurance company agrees to indemnify the lender for its losses if the closing agent commits fraud or fails to follow the lender's closing instructions. *See Walsh Secs., Inc. v. Cristo Prop. Mgmt., Ltd.*, 858 F. Supp. 2d 402, 417-18 (D.N.J. 2012). Title insurance, in contrast, protects lenders from title deficiencies following a real estate closing. *See* 43 Am. Jur. 2d *Insurance* § 518 (2014).

Ultimately, the buyer defaulted on his mortgages and Old Bank filed foreclosure proceedings. (Pet. App. 4a-6a.) In 2009, during the foreclosure process, Old Bank failed. (*Id.*) The FDIC took over as receiver and transferred Old Bank's assets and liabilities to BankUnited, N.A. ("New Bank") pursuant to the FDIC's standard Purchase Agreement. (*Id.*) The FDIC later sued First American under the CPLs, as-

serting that it retained such claims. (*See id.* at 6a.) The FDIC alleged that First American was obligated to indemnify the FDIC for losses on Old Bank's loans because PTS failed to follow Old Bank's closing instructions regarding the down payments. (*See id.* at 6a, 21a.)

The district court had subject-matter jurisdiction based on the FDIC's status as an agency of the United States, and the fact that its claims arose under federal law. 12 U.S.C. § 1819(b)(2)(A).

C. The Purchase Agreement the FDIC used to convey Old Bank's assets to New Bank was its standard agreement for selling the assets of a failed bank. (*See* Pet. App. 4a.) The agreement broadly conveys "all right, title, and interest of the [FDIC] in and to all of the assets . . . of [Old Bank]." (Pet. App. 138a, § 3.1.) The agreement also includes general provisions excluding some assets from the sale to New Bank. (*Id.* at 142a, § 3.5.) Specifically, the agreement excludes "*any* interest, right, action, claim, or judgment" within categories that the court broadly construed. (*See* Pet. App. 10a-13a.) First, the Purchase Agreement excluded rights against any entity that provided a service *of any kind* to Old Bank. (*See id.* at 10a-11a.) Second, the agreement excluded rights against *any* underwriter of *any* of Old Bank's insurance policies. (*See id.* at 11a-12a.) And third, the agreement included a "catch-all" exclusion of *any* rights against *anyone* related to *any loss* of Old Bank. (*See id.* at 12a-13a.)

Following those general exclusions, the Purchase Agreement attaches a schedule identifying certain specific assets *included* in the sale and specifying

their purchase price. (Pet. App. 147a.) Among those assets are Old Bank's "Loans." (*Id.*) "Loans" were specifically defined to include claims accruing to the holder of loans arising under "Credit Documents." (*Id.* at 132a-133a.) The definition of "Credit Documents" provided further specificity, comprising agreements executed in connection with loans. (*Id.* at 127a-128a.) CPL claims constitute Loans under these precise definitions. (Pet. App. 9a-10a.)

D. After the close of discovery, First American moved for summary judgment, asserting that the FDIC had sold its CPL claims to New Bank under these explicit inclusionary provisions in the Purchase Agreement. (*See* Pet. App. 116a-120a.) As a result, the FDIC had no authority to pursue its claims here. (*See id.*) The district court denied summary judgment, concluding that the FDIC retained its claims under the broad exclusionary provisions. (Pet. App. 82a-83a.) The case proceeded to a bench trial and the court ultimately awarded the FDIC $500,971.79 in damages. (*See* Pet. App. 7a; Pet. App. 27a-28a.)

E. The Eleventh Circuit affirmed the district court. (Pet. App. 26a.) Analyzing the terms of the Purchase Agreement, the court correctly found that CPL claims fell under the agreement's express terms conveying assets to New Bank. (*Id.* at 9a-10a.) "Because the [CPLs] 'relate to' and 'were executed in connection with' the two loans that Old Bank extended to [the buyer]," the court concluded, they were among the "Loans" expressly sold to New Bank. (*Id.*)

That conclusion, however, did not end the court's analysis. Turning to the broad exclusionary provisions in the Purchase Agreement, the Eleventh Cir-

cuit held that CPL claims were nonetheless retained by the FDIC. (*Id.* at 10a-13a.) According to the court, the CPL claims against First American fell within each of the three exclusions noted above, one of which the court labeled "a contractual 'catch-all.'" (*Id.*) Those general exclusions controlled over the provisions specifically defining included assets. (*See id.* at 10a.)

First American moved for panel rehearing, which the Eleventh Circuit denied. (Pet. App. 97a.) The court then granted First American's motion to stay its mandate pending a petition for writ of certiorari to this Court. (Pet. App. 94a.)

REASONS FOR GRANTING THE PETITION

For several reasons, the Court should grant First American's petition and either summarily reverse the judgment below or set the case for plenary review. *First*, for purposes of federal contract law, the Eleventh Circuit's decision abandons the well-settled rule of contract interpretation that specific provisions control over conflicting general provisions. The decision breaks with those of other circuits as well as virtually every state court, and calls into question the ongoing viability of traditional canons of contract construction under federal common law.

Second, the contract interpretation issue here is frequently recurring. Every year, the government enters into thousands of contracts governed by federal common law. Courts faced with a dispute regarding such a contract naturally turn to settled rules of interpretation. The decision below, however, calls into question the very interpretive rules parties would otherwise expect to apply to their contracts,

creating deep uncertainty for parties who contract with the federal government.

Among other places, the issue is frequently recurring in the specific context of the FDIC's standard purchase and assumption agreement. With more than 500 failed banks since 2008, countless disputes have arisen regarding whether the FDIC or the acquiring bank owns certain claims or liabilities. Those cases will all be decided based on an interpretation of the purchase and assumption agreement, often, in particular, the inclusion and exclusion provisions at issue here. Indeed, the FDIC has pursued dozens of CPL claims against title insurers on the same theory asserted here. Those decisions will now be subject to varied and unreliable outcomes based on uncertainty over whether to apply standard rules of contract construction to the FDIC's contracts.

Third, this case provides an ideal vehicle for reviewing the question presented. There is no dispute that the CPL claims fall within the specific inclusionary provisions conveying assets to New Bank—the Eleventh Circuit recognized as much. Because the court determined that the CPL claims are also covered by the vague exclusionary provisions, this case turns entirely on whether the inclusionary or exclusionary provisions control. After all, if the CPL claims were sold to New Bank, the FDIC had no claims to maintain below, meaning that its suit must be dismissed.

I. THE ELEVENTH CIRCUIT INDEFENSIBLY REFUSED TO APPLY THE WELL-ESTABLISHED RULE OF CONTRACT INTERPRETATION THAT SPECIFIC PROVISIONS CONTROL OVER GENERAL PROVISIONS.

The decision below ignored a fundamental rule of contract interpretation that, if properly applied, would have required dismissal of the case. By reading the contract at issue without even considering the interpretive rules that other courts have widely adopted, the Eleventh Circuit placed federal contracts into a category all their own, one in which standard principles do not apply. That approach is plainly flawed.

A. "Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) (noting "high value the Framers placed on the protection of private contracts"). Accordingly, "parties generally rely on contract law 'to reduce the costs of contract negotiation by supplying contract terms that the parties would probably have adopted explicitly had they negotiated over them.'" *United States v. Winstar Corp.*, 518 U.S. 839, 884 n.27 (1996) (quoting Posner & Rosenfield, Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6 J. Legal Studies 83, 88-89 (1977)). Contract law precedent thus plays a critical role in the contractual drafting process, as "parties are especially likely to rely on such precedents when ordering their affairs."

Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2410 (2015).

One such "rule[] of construction of contracts" upon which parties rely is that "if a specific provision found in the [contract] conflicts with a general provision, the specific provision should control." *Saltzman v. Independence Blue Cross*, 384 F. App'x 107, 114 (3d Cir. 2010); *see also Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808, 823 (7th Cir. 2010) (applying "general principle[] of contract interpretation" that "if both a general and a specific provision apply to the subject at hand, the specific provision controls"). That rule is so ingrained as an interpretive principle that it is recognized in treatises from Corbin to the Restatement. *See* Restatement (Second) of Contracts § 203(c) ("specific terms and exact terms are given greater weight than general language"); 5 Corbin on Contracts § 24.23 (2007) ("[T]he more specific term should usually be held to prevail over the more general term.").

Notably, courts apply this rule as a matter of routine, in all types of contractual settings. *See, e.g.*, *Saltzman*, 384 F. App'x at 114 (applying rule to ERISA plan); *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry.*, 762 F.3d 165, 179 (2d Cir. 2014) (applying rule under maritime law); *United States v. Weon*, 722 F.3d 583, 590 (4th Cir. 2013) (applying rule to federal plea agreement); *St. Paul Surplus Lines Ins. Co. v. Settoon Towing, L.L.C.*, 720 F.3d 268, 279 (5th Cir. 2013) (applying rule under state law); *Puerto Rico Tel. Co. v. Sprintcom, Inc.*, 662 F.3d 74, 96 (1st Cir. 2011) (same); *Young*, 615 F.3d at 823 (applying rule to ERISA plan).

B. The Eleventh Circuit rejected this universal rule and instead followed the reverse principle. Under the Purchase Agreement, the FDIC sold "all right, title, and interest of the [FDIC] in and to all of the assets . . . of [Old Bank]." (Pet. App. 138a, § 3.1.) That general term is buttressed by other provisions defining particular assets as being included in the sale. The Purchase Agreement expressly included Old Bank's "Loans" among the assets sold. (*Id.* at 147a, Sched. 3.2.) "Loans" were defined to include not just outstanding loans themselves, but all rights relating to those loans: "all . . . rights . . . [and] claims . . . owned or held by, or accruing or to accrue to or for the benefit of, the holder of the [loans] . . ., including but not limited to those arising under or based upon Credit Documents." (*Id.* at 132a-133a, Art. I.) "Credit Documents" were likewise defined with precision: "agreements . . . or other documents . . . relating to . . . or executed in connection with . . . a Loan." (*Id.* at 127a-128a.)

There is no dispute that CPLs are agreements relating to or executed in connection with loans and are thus Credit Documents. (Pet. App. 9a-10a.) Accordingly, "a claim 'arising under or based upon' a closing protection letter is a 'Loan'" expressly included in the sale to New Bank. (*Id.* at 10a.)

Those specific provisions covering CPL claims should have resolved this case. The Eleventh Circuit, however, took an end run around these specific inclusions. It held that these inclusions controlled *unless* the CPL claims were separately retained. (*Id.*) Here, the Eleventh Circuit pointed to the Purchase Agreement's broad provision excluding:

> any interest, right, action, claim, or judgment against (i) any officer, director, employee, accountant, attorney, or any other Person employed or retained by [Old] Bank . . . arising out of any act or omission of such Person in such capacity, (ii) any underwriter of . . . any other insurance policy of [Old] Bank, . . . or (iv) any other Person whose action or inaction may be related to any loss . . . incurred by [Old] Bank.

(*Id.* at 5a-6a.)

The court determined that First American fell within each of these exclusions because (i) First American rendered a service to Old Bank; (ii) First American was an underwriter of title insurance issued to Old Bank; and (iv) First American took an action in issuing CPLs to Old Bank that were related to the FDIC's loss on Old Bank's loans. (*Id.* at 10a-13a.) Because the exclusionary provisions covered CPL claims, the Eleventh Circuit held that the FDIC retained them under the Purchase Agreement. (*Id.* at 14a.) In other words, those *general exclusionary* provisions—one of which the court itself described as "a contractual 'catch-all'" (*id.* at 12a)—trumped the *specific inclusionary* provisions.

In reaching that result, the Eleventh Circuit ignored the standard rule of contract interpretation invoked by First American below, that the specific controls over the general. (*See* Pet. App. 112a ("[T]he specific *inclusions* in the Purchase Agreement must control over the general and vague *exclusions*."); Pet. App. 106a (arguing for stay of mandate because certi-

orari petition would present substantial question regarding whether "standard canon of construction . . . applies to government contracts under federal common law").)

C. The Eleventh Circuit split with those circuits that hold that the longstanding interpretive rule that the "specific trumps the general" applies under the federal common law of contracts. At least the Third, Fourth, and Seventh Circuits have applied the rule to contracts governed by federal law. *See Saltzman*, 384 F. App'x at 114 (3d Cir.) (ERISA plan); *Weon*, 722 F.3d at 590 (4th Cir.) (federal plea agreement); *Young*, 615 F.3d at 823 (7th Cir.) (ERISA plan). No court other than the Eleventh Circuit, to Petitioner's knowledge, has rejected the rule.

The Eleventh Circuit's departure from an otherwise solidified rule also runs counter to the general notion that "federal common law . . . is largely informed by state law principles . . . [and] familiar rules of contract interpretation." *Sanford v. TIAA-CREF Individual & Institutional Servs., LLC*, 612 F. App'x 17, 20 (2d Cir. 2015) (quotation omitted) (second and third alterations original); *see also Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 459 n.33 (1st Cir. 2013) (en banc) ("[E]ven where 'federal common law governs as to contractual issues,' courts typically borrow from state law and apply ordinary contract principles." (quoting *LPP Mortg., Ltd. v. Sugarman*, 565 F.3d 28, 31 (1st Cir. 2009))); *Engleson v. Unum Life Ins. Co. of Am.*, 723 F.3d 611, 621 (6th Cir. 2013) (Where "there is no established federal common law . . ., we 'look to state-law principles for guidance.'" (quoting *Tinsley v. Gen. Motors Corp.*, 227 F.3d 700, 704 (6th Cir. 2000))). Indeed, the Se-

cond and Fifth Circuits have even applied this rule to the federal agreement at issue here, holding that "interpretation and effect of the [FDIC's purchase and assumption agreement] is governed by the federal common law of contracts, which draws on 'the core principles of the common law of contracts that are in force in most states.'" *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, N.A.*, 758 F.3d 592, 597 (5th Cir. 2014) (quoting *Smith v. United States*, 328 F.3d 760, 767 (5th Cir. 2003)); *see also Hillside Metro Assocs., LLC v. JPMorgan Chase Bank*, 747 F.3d 44, 49 (2d Cir. 2014) (regarding FDIC's purchase and assumption agreement: "To apply federal common law of contract, we look to general principles of contract law." (quotation omitted)).

D. The need to resolve this split is particularly acute given that it arises in the setting of federal contracting. "[G]overnment contracts are governed by federal common law." *Excel Willowbrook*, 758 F.3d at 597 n.6; *see also Schroeder v. United States*, 569 F.3d 956, 963 (9th Cir. 2009) (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943)). In crafting that common law, the Court has repeatedly emphasized the need for "greater uniformity in the important business of fairly interpreting government contracts." *United States v. Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966). Those "interests in interpretive uniformity and predictability . . . require that the meaning given a contract phrase or term be subject to uniform federal interpretation." *Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 857 (1987) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985)); *see also Miree v. De Kalb Cnty.*, 433 U.S. 25, 28 (1977) ("The necessity of uniformity of decision

demands that federal common law, rather than state law, control [a government] contract's interpretation."). The courts of appeals have likewise recognized the "long established policy that government contracts are to be given a uniform interpretation and application under federal law." *Woodbury v. United States*, 313 F.2d 291, 295 (9th Cir. 1963); *see also U.S. Marine, Inc. v. United States*, 722 F.3d 1360, 1367 (Fed. Cir. 2013) (noting "'the strong policy in favor of construing federal contracts under uniform federal law'" (quoting *Union Pac. R.R. Co. v. United States*, 591 F.3d 1311, 1320 (10th Cir. 2010))).

The Eleventh Circuit's abandonment of well-settled rules of contract interpretation, however, jeopardizes the uniformity of federal contract law. While most circuits will continue to apply standard interpretive rules, others, or at least the Eleventh Circuit, will not. Without those rules as guidelines, courts will be left to their own devices, creating unpredictable outcomes for litigants.

Consider, for example, interpretation of the FDIC's purchase and assumption agreement at issue here, a standard agreement, virtually identical for every failed bank for which the FDIC serves as receiver. That agreement has been and will continue to be subject to considerable litigation throughout the country. Yet following the decision below, this exact contract could well be interpreted differently in different jurisdictions. That is precisely the result this Court has guarded against by way of a uniform federal common law for government contracts.

E. Finally, the "specific trumps general" contract interpretation rule has much to recommend it as a

means for construing contracts. "The purpose of contract interpretation is to crystallize the parties' objectively manifested intent." *MACTEC, Inc. v. Bechtel Jacobs Co.*, 346 F. App'x 59, 83 (6th Cir. 2009) (quotation omitted). If a contract is contradictory in some regard, the parties' intent is more likely encapsulated by a specific provision on the issue rather than a general statement covering a number of issues.

For example, suppose the Purchase Agreement stated that the FDIC conveyed to New Bank "all assets of Old Bank, including CPL claims arising out of loans for Florida condominiums." Even if the agreement still included the same exclusionary provisions, there would be no reasonable interpretation under which the FDIC retained the CPL claims at issue here—the specific inclusion of CPL claims must trump a general exclusionary provision that happens to encompass CPL claims. Yet under the Eleventh Circuit's reasoning, it makes no difference how specifically an asset is described. Such an interpretation does not "crystallize the parties' objectively manifested intent," *MACTEC*, 346 F. App'x at 83; it ignores the parties' intent entirely.

* * * * *

The Eleventh Circuit's decision is contrary to long-established and well-accepted principles of contract interpretation. By rejecting those rules under the federal common law of contracts, the decision below breaks with precedent from other circuits and breeds uncertainty in an area of law where predictability is critical. Review of this aberrant decision is essential.

II. THE ELEVENTH CIRCUIT'S DECISION ADDRESSES A RECURRING LEGAL ISSUE.

The question of whether the "specific trumps general" contract interpretation rule applies under federal common law arises with considerable frequency. In fact, it could arise in *any case* requiring the interpretation of a contract governed by federal common law. And given the ever increasing number of government contracts, the question will only become more important, not less.

This appeal, moreover, implicates more than just the application of one interpretive rule. If the Court accepts this case for review, it could affirm that all standard rules of contract interpretation apply with equal force under federal common law. And on an even broader level, the Court could define the extent to which federal contract law should borrow from state law. In other words, countless cases could be affected by the Court's decision here.

The question presented as it relates specifically to the FDIC's purchase and assumption agreement is likewise frequently recurring. The interpretation of that standard agreement—including the inclusionary and exclusionary provisions—will arise in any case involving a claim by or against hundreds of recently failed banks, so long as there is a colorable dispute over whether the FDIC or the acquiring bank owns the relevant claim or liability.

Indeed, more than a dozen pending cases, along with at least two dozen recently resolved cases, involve the precise factual scenario at issue here: CPL claims against title insurers of failed banks asserted

by the FDIC claiming to have retained those claims under its standard purchase and assumption agreement that, according to First American and various other defendants, unambiguously transferred the CPL claims to the acquiring bank. *See, e.g.*, *FDIC v. Stewart Title Guar. Co.,* No. 6:15-cv-01339-CEM-KRS (M.D. Fla. filed Aug. 13, 2015); *FDIC v. Commn. Land Title Ins. Co.,* No. 1:15-cv-23018-UU (S.D. Fla. filed Aug. 12, 2015); *FDIC v. Ticor Title Co.,* No. 2:15-cv-01029-RSM (W.D. Wash. filed June 26, 2015); *FDIC v. Westcor Land Title Ins. Co.,* No. 0:15-cv-61060-JIC (S.D. Fla. filed May 20, 2015); *FDIC v. Chic. Title Ins. Co.,* No. 1:15-cv-21920-MGC (S.D. Fla. filed May 20, 2015); *FDIC v. Fid. Nat'l Title Ins. Co.,* No. 2:15-cv-02817-PD (E.D. Penn. filed May 20. 2015); *FDIC v. First Am. Title Ins. Co.,* No. 2:15-cv-03446-CCC-JBC (D.N.J. filed May 19, 2015); *FDIC v. Stewart Title Guar. Co.,* No. 0:15-cv-60602-BB (S.D. Fla. filed Mar. 24, 2015); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 5:14-cv-13706-JCO-MKM (E.D. Mich. filed Sept. 24, 2014); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 2:14-cv-04317-WJM-MF (D.N.J. filed July 9, 2014); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 0:14-cv-61574-WPD (S.D. Fla. filed July 9, 2014); *FDIC. v. Attorneys Title Ins. Fund, Inc.,* No. 6:14-cv-01105-RBD-TBS (M.D. Fla. filed July 9, 2014); *FDIC v. First Am. Title Ins. Agency*; No. 8:14-cv-00617-AG-JPR (C.D. Cal. filed Apr. 18, 2014); *FDIC v. U.S. Titles, Inc.,* No. 1:12-cv-01946-JEB (D.D.C. filed Dec. 3, 2012); *FDIC v. Old Republic Nat'l Title Ins. Co.*, No. 9:12-cv-81172-WJZ (S.D. Fla. filed Oct. 23, 2012); *FDIC v. First Am. Title Co.,* No. 8:12-cv-02245-MSS-MAP (M.D. Fla. filed Oct. 3. 2012); *FDIC v. Floridian Title Grp., Inc.,* No. 1:12-cv-21890-FAM (S.D. Fla. filed

May 18, 2012); *see also FDIC v. Stewart Title Guar. Co.*, No. 0:14-cv-62205-BB (S.D. Fla. filed Sept. 24, 2014) (stipulated dismissal Oct. 1, 2015); *FDIC v. First Am. Title Ins. Co.*, No. 2:14-cv-13624-GAD-MKM (E.D. Mich. filed Sept. 18, 2014) (stipulated dismissal Sept. 22, 2015); *FDIC v. Prof'l Nat'l Title Network, Inc.*, No. 1:14-cv-05227 (N.D. Ill. filed July 9, 2014) (stipulated dismissal July 16, 2015); *FDIC v. First Am. Title Ins. Co.*, No. 1:14-cv-22535-KMM (S.D. Fla. filed July 9, 2014) (stipulated dismissal Aug. 3, 2015); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 1:14-cv-22529-JAL (S.D. Fla. filed July 9, 2014) (dismissed per settlement Aug. 25, 2015); *FDIC v. Chi. Title Ins. Co.*, No. 9:14-cv-80909-JIC (S.D. Fla. filed July 9, 2014) (stipulated dismissal Apr. 2, 2015); *FDIC v. Fid. Nat'l Title Grp., Inc.*, No. 0:14-cv-61564-FAM (S.D. Fla. filed July 9, 2014) (judgment for defendant Oct. 9, 2015); *FDIC v. Stewart Title Guar. Co.*, No. 1:14-cv-22542-MGC (S.D. Fla. filed July 9, 2014) (stipulated dismissal Oct. 19, 2015); *FDIC v. Attorneys Title Ins. Fund, Inc.*, No. 9:14-cv-80915-DMM (S.D. Fla. filed July 9, 2014) (stipulated dismissal Mar. 30, 2015); *FDIC v. Commw. Land Title Ins. Co.*, No. 2:14-cv-05295-SVW-PJW (C.D. Cal. filed July 8, 2014) (dismissed per settlement July 9, 2015); *FDIC v. Commw. Land Title Ins. Co.*, No. 1:14-cv-22511-FAM (S.D. Fla. filed July 8, 2014) (dismissed per acceptance of offer of judgment Aug. 27, 2015); *FDIC v. Commw. Land Title Ins. Co.*, No. 1:14-cv-22512-KMW (S.D. Fla. filed July 8, 2014) (dismissed per settlement June 16, 2015); *FDIC v. Fid. Nat'l Title Ins. Co.*, No. 1:14-cv-22513-FAM (S.D. Fla. filed July 8, 2014) (dismissed Aug. 27, 2015); *FDIC v. Stewart Title Guar. Co.*, No. 1:14-cv-22514-KMW

(S.D. Fla. filed July 8, 2014) (dismissed per settlement June 18, 2015); *FDIC v. Attorneys Title Ins. Fund, Inc.*, No. 1:14-cv-22517-MGC (S.D. Fla. filed July 8, 2014) (stipulated dismissal June 26, 2015); *FDIC v. Commw. Land Title Ins. Co.*, No. 6:14-cv-00408 (M.D. Fla. filed Mar. 14, 2014) (stipulated dismissal July 28, 2014); *FDIC v. Commw. Land Title Ins. Co.*, No. 8:12-cv-02247-JSM-TGW (M.D. Fla. filed Oct. 4, 2012) (dismissed per settlement Sept. 12, 2013); *FDIC v. Stewart Title Guar. Co.*, No. 8:12-cv-02244-CEH-TBM (M.D. Fla. filed Oct. 3, 2012) (dismissed per settlement Feb. 27, 2015); *FDIC v. Attorneys' Title Ins. Fund, Inc.,* No. 1:12-cv-23599-PAS (S.D. Fla. filed Oct. 2. 2012) (appeal dismissed, No. 15-11224-BB (11th Cir. Oct. 22, 2015)); *FDIC v. Gil*, No. 1:12-cv-22939 (S.D. Fla. filed Aug. 10, 2012) (dismissed per settlement Jan. 23, 2014); *FDIC v. Stewart Title Guar. Co.*, No. 4:12-cv-10062-JLK (S.D. Fla. filed July 9, 2012) (stipulated dismissal Dec. 20, 2013); *FDIC v. Heritage Title & Escrow, Inc.*, No. 0:12-cv-60944-RNS (S.D. Fla. filed May 18, 2012) (stipulated dismissal May 21, 2013); *FDIC v. Creative Title Servs., Inc.*, No. 1:12-cv-21860-JLK (S.D. Fla. filed May 17, 2012) (stipulated dismissal July 17, 2013); *JP Morgan Chase Bank, N.A. v. First Am. Title Ins. Co.*, No. 2:09-cv-14891-MOB-VMM (E.D. Mich. filed Dec. 17, 2009) (certiorari denied by U.S. Supreme Court May 27, 2015).

A majority of the pending disputes, moreover, are in courts in the Eleventh Circuit, meaning they will be directly impacted by the erroneous decision below, should this Court not correct that error.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

This case cleanly raises the question presented. Both parties and the court below agree that CPL claims are covered by the specific inclusionary provisions of the Purchase Agreement. (*See* Pet. App. 9a-10a.) The court of appeals also agreed with the FDIC that CPL claims fall within the general exclusionary provisions. (*See id.* at 10a-13a.) This case thus comes down to the simple question of which controls: the specific inclusionary provisions or the general exclusionary provisions.

If the standard rule that the specific controls over the general applied, the CPL claims were indisputably conveyed to New Bank. Such a ruling would end this case. After all, if the FDIC sold the CPL claims, it had no claim to maintain here, requiring dismissal of the suit.

CONCLUSION

The petition for a writ of certiorari should be granted and the Court should either summarily reverse the judgment below or set the case for briefing and argument.

Respectfully submitted,

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