

Supreme Court, U.S.

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No. 19-74

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In The  
**Supreme Court of the United States**

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MICHAEL A. WILLNER AND  
MARGUERITE EVANS WILLNER  
*Petitioners,*

v.

JAMES DIMON, *et al.*,  
*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (“FIRREA”) to enable the Federal Deposit Insurance Corporation (“FDIC”) to expeditiously wind up the affairs of literally hundreds of failed financial institutions throughout the country. *See Freeman v. FDIC*, 56 F.3d 1394, 1398 (1995). Claims filed against a failed financial institution under FIRREA which are disallowed by the FDIC may be filed in the U.S. District Court for the District of Columbia (“DDC”) for *de novo* review so long as they are filed within 60 days of the FDIC’s disallowance. 12 U.S.C. § 1821(d)(6)(A). The statute is silent, however, regarding the filing of claims against the FDIC for constitutional violations arising from its determination to disallow claims filed against a failed financial institution for which it is the receiver. The question presented is:

Whether the DC Circuit erroneously held that 12 U.S.C. § 1821(d)(6)(A) required claimants to have filed their constitutional claims against the FDIC in federal court within 60 days of the accrual of such claims, where the statute’s clear and unambiguous language expressly applies only to claims that were disallowed by the FDIC and claimants’ constitutional claims were not considered or disallowed by the FDIC.

## **PARTIES TO THE PROCEEDING**

All parties do not appear in the caption of the case on the cover page. The following is a list of all parties to the proceeding:

JAMES DIMON, individually, as President and CEO of JPMorgan Chase Bank, N.A.

JPMORGAN CHASE BANK, N.A.

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the WaMu Mortgage Pass-Through Certificates Series 2006-AR15 Trust

SELECT PORTFOLIO SERVICING, INC.

THE FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Washington Mutual Bank

## **RULE 29.6 STATEMENT**

The petitioners are individuals not non-governmental corporations, and do not have a parent corporation or shares held by a publicly traded company.

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Michael A. Willner and Marguerite Evans Willner, pro se, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## INTRODUCTION

When Washington Mutual Bank (“WMB”) failed in 2008, the FDIC became its receiver and established a Bar Date by which parties aggrieved by WMB’s conduct were required to file claims with the FDIC. Any claims filed after the Bar Date were to be disallowed as untimely filed with one exception – the FDIC could consider claims if the claimant did not receive notice of the appointment of the receiver in time to file its claims before the Bar Date.<sup>1</sup> The FDIC and several federal circuit courts have determined that claims that accrued after the Bar Date fall within this “late-filed claim” exception.<sup>2</sup>

Despite the fact that the Willners’ claims against the FDIC as Receiver for WMB and WMB’s successors in interest (together the “Respondents”) accrued after the Bar Date, the FDIC disallowed them as untimely filed without explanation.

The Willners timely filed suit in the U.S. District Court for the District of Columbia (“DDC”) within 60 days of the FDIC’s disallowance as required by 12 U.S.C. §1821(d)(6)(A),<sup>3</sup> seeking *de novo* review of their

<sup>1</sup> 12 U.S.C. §1821(d)(5)(C)(ii).

<sup>2</sup> *Heno v. FDIC*, 20 F.3d 1204, 1209 (1st Cir. 1994).

<sup>3</sup> DDC, Case 1:15-cv-01840-CRC Document 1, Filed 10/29/15.

claims against Respondent Banks. The Willners subsequently filed an amended complaint after the 60-day period had expired adding constitutional claims against the FDIC for disallowing their post-Bar Date claims against Respondents.<sup>4</sup>

The DDC ruled that it lacked jurisdiction to hear the Willners' claims against Respondents, but it dismissed the Willners' constitutional claims against the FDIC on the merits, implying that it had jurisdiction to hear them. *See Willner v. Dimon*, 2018 U.S. Dist. LEXIS 13101. On appeal, the DC Circuit affirmed the DDC's dismissal of the property claims against Respondents, but it did not reach the question of whether the DDC correctly concluded that the constitutional claims lacked merit. Instead, it ruled that the DDC lacked jurisdiction over the constitutional claims because the Willners had failed to file them within 60 days of the FDIC's disallowance of their property claims. *See Willner v. Dimon*, 761 F. App'x 1 (D.C. Cir. 2019).

Section § 1821(d)(6)(A) expressly states, however, that the only claims that must be filed within the 60-day limitations period are claims that were originally filed with and disallowed by the FDIC. The Willners did not file their constitutional claims with the FDIC when they filed their property claims against Respondent Banks because their constitutional claims had not yet accrued. The Willners' constitutional

<sup>4</sup> DDC, Case 1:15-cv-01840-CRC Document 12, Filed 05/22/17.

rights were not violated until the FDIC disallowed the property claims against Respondents as untimely failed despite the fact that they accrued after the Bar Date.

The DC Circuit's decision to dismiss the Willners' constitutional claims for lack of jurisdiction, greatly expands the scope of §1821(d)(6)(A)'s limitations period by applying it to constitutional claims against the FDIC that are not encompassed by the clear and unambiguous language of the statute, thus severely limiting the time frame for parties to assert their constitutional rights. The proper interpretation of §1821(d)(6)(A) presents a question of surpassing importance regarding (1) the ability of citizens to hold the federal government accountable for its unconstitutional conduct and (2) the Constitution's separation of powers designed to prevent the courts from going beyond interpreting statutes enacted by Congress and effectively rewriting them.

#### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, la-4a) is available at *Willner v. Dimon*, 761 F. App'x 1 (D.C. Cir. 2019). The opinion of the district court (App. D, *infra*, 7a-20a) is available at *Willner v. Dimon*, 2018 U.S. Dist. LEXIS 13101.

## **JURISDICTION**

The court of appeals entered its judgment on March 1, 2019 and denied a petition for rehearing and rehearing *en banc* on April 24, 2019. *See* Apps. A, B, C, *infra*, 1a-6a. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

## **STATUTORY PROVISIONS INVOLVED**

Relevant provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1811 et seq., are reproduced at App. F, *infra*, 46a-49a.

## **STATEMENT**

In 2014 the Willners filed claims against Respondents James Dimon, JP Morgan Chase Bank, NA, U.S. Bank National Association, and Select Portfolio Servicing, Inc. (“Respondent Banks”) in the District Court for the Eastern District of Virginia (“EDVA”) to stop them from conducting an illegal, nonjudicial foreclosure and to recover related damages. The EDVA held that the Willners’ claims were functionally against Washington Mutual Bank (“WMB”), which had purportedly sold Mr. Willner’s note to Respondent Banks in 2006, two years before WMB was placed into FDIC receivership. The EDVA dismissed the Willners’ claims, holding that it lacked

jurisdiction because they were functionally against WMB and the Willners had failed to exhaust their administrative remedies.<sup>5</sup>

The Willners appealed the EDVA's decision to the Fourth Circuit. They also filed administrative claims with the FDIC, as required by the EDVA's ruling, presenting evidence that they accrued after December 30, 2008, the Bar Date set by the FDIC by which all claims against WMB were to be filed. With limited exceptions, failure to file by the Bar Date prevents aggrieved parties from seeking judicial review of their claims. The exception relevant here is that if the claims accrued after the Bar Date, as did the Willners' FIRREA claims (the "property claims"), the FDIC may review them. Nevertheless, the FDIC disallowed the Willners' post-Bar Date property claims as being untimely filed without explanation. Following the disallowance, the Willners timely filed their property claims with the DDC pursuant to 12 U.S.C. § 1821(d)(6)(A). The DDC case was stayed pending the Fourth Circuit's decision on whether the EDVA correctly ruled that Willners' property claims were in fact subject to FIRREA and, if so, the Bar Date. While the appeal was pending, the FDIC disallowed the Willners' claims as untimely filed.

The Fourth Circuit subsequently affirmed the

<sup>5</sup> *Willner v. Dimon*, Civil Action No. 1:14-cv-1708 (AJT/MSN), 2015 U.S. Dist. LEXIS 185834 (E.D. Va. May 11, 2015).

EDVA's decision that the Willners' claims were subject to FIRREA and that the Bar Date could not be equitably tolled in order for the EDVA to have jurisdiction.<sup>6</sup> The Willners filed an amended complaint in the DDC adding the FDIC as a defendant and claiming that by disallowing their post-Bar Date claims without considering the merits, the FDIC violated the Willners' constitutional rights to due process, trial by jury, and to have an Article III Court adjudicate their claims.<sup>7</sup>

In its decision dismissing the Willners' property claims against Respondents and their constitutional claims against the FDIC, the DDC acknowledged that but for issue preclusion it "might well agree" with the Willners' "persuasive arguments" that it had jurisdiction over their claims and that the lack thereof "implicates grave due process concerns."<sup>8</sup> It also opined that "[t]he Fourth Circuit's holding was avowedly 'severe'... and is somewhat in tension with the DC Circuit's decision in *Freeman*."<sup>9</sup>

The Willners appealed the DDC's decision.

<sup>6</sup> *Willner v. Dimon*, 849 F.3d 93 (4th Cir. 2017).

<sup>7</sup> Amended Complaint ¶ 218 (D.D.C., Case 1:15-cv-01840-CRC, Document 12).

<sup>8</sup> *Willner v. Dimon*, 2018 U.S. Dist. LEXIS 13101, \*21.

<sup>9</sup> *Freeman v. FDIC*, 56 F.3d 1394, 1403 (1995) ("Where a claim arises after the bar date, 'the jurisdictional bar of § 1821(d) [of FIRREA] might . . . implicate due process concerns by denying an aggrieved party any avenue of relief, administrative or judicial.'")

Although the DDC had dismissed the Willners' constitutional claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim, a panel of the DC Circuit did not reach the question of whether the DDC correctly concluded that the constitutional claims lack merit. Rather, the DC Circuit held that the DDC lacked jurisdiction under §§ 1821(d)(6)(A) and 1821(d)(13)(D) because the Willners failed to timely file suit in the DDC on their constitutional claims after the FDIC's disallowance of their property claims against Respondents.

The Willners filed petitions for rehearing by the panel and *en banc*, both of which were summarily denied.

This petition for a writ of certiorari seeks reversal of the DC Circuit's decision that the DDC lacked jurisdiction over the Willners' constitutional claims and a remand to the DC Circuit to consider the Willners' constitutional claims on the merits.

**REASONS FOR GRANTING THE PETITION**

**THE DDC HAS JURISDICTION OVER THE WILLNERS'**

**CONSTITUTIONAL CLAIMS**

**I. The DC Circuit Improperly Expanded the Class of Claims Subject to FIRREA to Include the Willners' Constitutional Claims**

The DC Circuit based its decision that the DDC lacked jurisdiction over the Willners' constitutional claims on an unsupported presupposition that they were "FIRREA claims."<sup>10</sup> The Panel acknowledged that the Willners' constitutional claims arose from the FDIC's disallowance of the property claims, yet the Panel provided no citation or statutory support for its presumption that the Willners' constitutional claims were subject to FIRREA's jurisdictional deadlines. "The Supreme Court has long held that a statutory bar to judicial review precludes review of constitutional claims only if there is 'clear and convincing' evidence that the Congress so intended..." which is not the case here.<sup>11</sup>

<sup>10</sup> DC Circuit, USCA Case #18-5107, Document #1775579, Filed: 03/01/2019, Panel Judgment and Memorandum at 5 (Appendix A, *infra* at 7a).

<sup>11</sup> *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d 296, 308-09 (2014) citing *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986); *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974).

In ruling that 12 U.S.C. § 1821(d)(6)(A) required the Willners to file their constitutional claims against the FDIC in the DDC within 60 days of the FDIC's **disallowance of their property claims**, the Panel failed to address the Willners' arguments that according to the plain meaning of § 1821(d)(6)(A), it does not apply to their **constitutional claims** because they were not filed with nor disallowed by the FDIC. The Willners' constitutional claims did not accrue until the FDIC disallowed their property claims. And, according to its clear and unambiguous language, § 1821(d)(6)(A) only required the Willners to file suit in the DDC on the claims that were disallowed by the FDIC within 60 days of such disallowance, which they did.

The statute states in relevant part:

Before the end of the 60-day period beginning on... **the date of any notice of disallowance of such claim...** the claimant may... file suit on such claim [in] the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).<sup>12</sup>

The FDIC never sent the Willners a notice of disallowance of their constitutional claims because

<sup>12</sup> 12 U.S.C. § 1821(d)(6)(A) (emphasis added). *See* Petitioners' Reply Brief at 15-17 (DC Circuit Case #18-5107, Document #1751675, Filed: 09/20/2018).

the FDIC never disallowed them. Moreover, when the FDIC sent each of the Willners a notice of disallowance of their property claims, it expressly refused to consent to any further administrative review of its claim determination.<sup>13</sup> Thus, the FDIC declined the opportunity to even consider the Willners' constitutional claims.<sup>14</sup> Consequently, due process was violated because the Panel barred judicial review of the Willners' claim that the FDIC's disallowance was unconstitutional despite the fact that the FDIC declined to consent to administrative review of its determination.<sup>15</sup>

The Panel erroneously concluded that the DDC lacked jurisdiction over the Willners' constitutional claims holding that § 1821(d)(6)(A) "requires that all **FIRREA claims** must be filed in district court within

<sup>13</sup> Amended Complaint, ¶ 199 (Case 1:15-cv-01840-CRC, Document 12, Filed 05/22/17, Page 31 of 55).

<sup>14</sup> Regardless, FIRREA did not require the Willners to seek administrative review of constitutional violations by the FDIC which occurred after WMB went into receivership. *See e.g., Homeland Stores v. Resolution Tr. Corp.*, 17 F.3d 1269, 1274 (10th Cir. 1994) ("the term 'claim' as used in 1821(d)(13)(D) should be interpreted to exclude claims ... arising from management actions of the RTC after taking over a depository institution.")

<sup>15</sup> *See National Union Fire Ins. Co. v. City Sav., F.S.B.*, 28 F.3d 376, 389-90 n.16 (3d Cir. 1994) ("Due process might be violated where a party that had no reasonable opportunity to submit a claim for administrative review had its claim barred from judicial review.")

sixty days of ... the date the claimant receives notice of a disallowance..."<sup>16</sup> However,

§ 1821(d)(6)(A) does not define "FIRREA claims" to include constitutional claims that arise as a result of the FDIC's disallowance of claims against a bank of which the FDIC is receiver. Rather, the statute clearly and unambiguously references claims that were filed with and disallowed by the FDIC.

"The starting point for interpretation of a statute is the language of the statute itself."<sup>17</sup> "If the language is clear and unambiguous, a court must give effect to its plain meaning."<sup>18</sup> When the words of the statute are "sufficient in and of themselves to determine the purpose of the legislation" and do not produce unreasonable results "plainly at variance with the policy of the legislation as a whole," courts must follow their plain meaning.<sup>19</sup> Indeed, "[t]here is ... no more persuasive evidence of the purpose of a statute than

<sup>16</sup> DC Circuit, Case #18-5107, Document #1775579 at 5 (emphasis added).

<sup>17</sup> *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990).

<sup>18</sup> *Albright v. United States*, 631 F.2d 915, 918 (1980) citing *United States v. Clarke*, 445 U.S. 253, 254 (1980). See also, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997)( "The 'first step' of statutory interpretation 'is to determine whether the language at issue has a plain and unambiguous meaning' by looking to 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'") (internal citations omitted).

<sup>19</sup> *United States v. Am. Trucking Ass'n*s, 310 U.S. 534 (1940) (quoting *Ozawa v. United States*, 260 U.S. 178 (1922)).

the words by which the legislature undertook to give expression to its wishes.”<sup>20</sup>

According to the plain meaning of § 1821(d)(6)(A), the Willners were required only to file suit in the DDC within 60 days of disallowance by the FDIC of claims that the FDIC had disallowed, which did not include their constitutional claims. Thus, the DDC had jurisdiction under 28 U.S.C. § 1331 to hear the Willners’ constitutional claims, which, as argued in their briefs,<sup>21</sup> it incorrectly dismissed under Rule 12(b)(6).<sup>22</sup> The DC Circuit should have construed FIRREA so as to avoid constitutional difficulties.<sup>23</sup>

<sup>20</sup> *Am. Trucking Ass’ns, supra*, 310 U.S. at 543; *Nat’l Ass’n for the Advancement of Colored People v. U.S. Dep’t of Homeland Sec.*, 364 F. Supp. 3d 568, 574–75 (D. Md. 2019).

<sup>21</sup> DC Circuit, Case #18-5107 Document #1744278, Plaintiffs-Appellants’ Joint Opening Brief, pp. 35-37. DC Circuit Case #18-5107 Document #1751675, Plaintiffs-Appellants’ Brief in Reply to the FDIC as Appellee, pp. 17-21.

<sup>22</sup> See *Nat’l Union Fire Ins. Co. v. City Sav.*, F.S.B., 28 F.3d 376, 392 (3d Cir. 1994) (“[I]f and when the RTC seeks to use § 1821(d)(13)(D) unconstitutionally, it would seem that the courts should deem application of § 1821(d)(13)(D) unconstitutional as applied in that case, and take jurisdiction over the case.”)

<sup>23</sup> See *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749, (1961).

## **II. The FDIC Does Not Have the Authority to Resolve Constitutional Claims Against Itself**

In light of § 1331, which gives the DDC jurisdiction to hear the Willners' constitutional claims, the question is whether Congress, through § 1821(d)(6)(A), took away federal court jurisdiction over civil actions arising under the Constitution.<sup>24</sup> Where the Willners' constitutional claims fall outside the FDIC's expertise and are "wholly collateral" to the Willners' property claims against the Respondent Banks, adjudication of the Willners' constitutional claims is beyond the jurisdiction of the FDIC.<sup>25</sup> When the administrative appeals process does not address the kind of constitutional claims at issue, the DC Circuit should not have inferred that Congress intended to limit judicial review of these claims to the procedures set forth in FIRREA.<sup>26</sup>

<sup>24</sup> *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 25, (dissent) (2012) citing *Whitman v. Department of Transportation*, 547 U.S. 512, 514 (2006) (per curiam).

<sup>25</sup> *Id.* at 27-28, citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994).

<sup>26</sup> *Id.* at 29-30, citing *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 493 (1991) (internal quotation marks omitted).

### **III. The Panel's Decision Conflicts with this Court's Analysis in *Freeman v. FDIC* and Cases Cited Therein**

Where the FDIC refused to consent to review its disallowance of claims that accrued after the Bar Date, and where the Panel ruled that the DDC lacked jurisdiction to hear the Willners' constitutional claims, due process is implicated because the Willners have been denied "any avenue of relief, administrative or judicial" as the *Freeman* Court suggested would be the case under such circumstances.

The *Freeman* Court noted:

For example, if the claimant's claim does not accrue until after the deadline set by the FDIC for filing administrative claims, the administrative claim would apparently be barred as untimely, yet § 1821(d)(13)(D) would apparently deprive any court of jurisdiction over the claim because it had not been submitted to the administrative process. But see *Heno v. FDIC*, 20 F.3d at 1209 (affirming as reasonable FDIC's construction of § 1821(d)(5)(C) to authorize it to process a late-filed claim

**if the claim itself does not accrue until after the bar date).<sup>27</sup>**

The FDIC acknowledged that the *Freeman* Court was concerned that barring claims that did not accrue until after a bar date could pose due process concerns.<sup>28</sup> Nevertheless, in its brief in this case the FDIC raised, for the first time, an ineffectual, unsupported rationalization for its disallowance of the Willners' claims arguing that it was proper because even if the Willners were injured after the Bar Date, their claims were based on WMB's pre-Bar Date conduct.<sup>29</sup>

First, this makes no sense. If a claim has not accrued before the Bar Date because there is no injury, then it would be futile to file a claim with the FDIC because it would be disallowed for not being ripe.<sup>30</sup> Second,

<sup>27</sup> *Freeman* *supra* at 1403 (emphasis added). *See also Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269 (10th Cir.) (construing § 1821(d)(13)(D) jurisdictional bar narrowly, so as not to bar claims arising after deadline for filing administrative claims), *cert. denied*, 115 S. Ct. 317 (1994); *National Union Fire Ins. Co. v. City Savings, F.S.B.*, 28 F.3d 376, 392 (3d Cir. 1994) (broad bar to jurisdiction contained in § 1821(d)(13)(D) could raise constitutional concerns where party not provided reasonable notice and an opportunity to be heard in the administrative claims procedure).

<sup>28</sup> DC Circuit, Case #18-5107 Document #1749518, Brief of the Federal Deposit Insurance Corporation as Appellee at 35.

<sup>29</sup> *Id.*

<sup>30</sup> *See* DC Circuit., Case #18-5107, Doc. #1751675, Willners' Brief in Reply to FDIC at 18-19.

even if this after-the-fact rationalization for the FDIC's disallowance were valid, the Panel should have disregarded it because the FDIC violated 12 U.S.C. § 1821(d)(5)(A)(iv) by failing to state each reason for the disallowance in its notice to the Willners.<sup>31</sup>

The FDIC has assured several courts that it has "internal manual procedures" in place to review post-Bar Date claims.<sup>32</sup> In its notice of disallowance to the Willners, the FDIC did not explain why it was not following its internal manual procedures with regard to the Willners' post-Bar Date claims.

<sup>31</sup> Amended Complaint, ¶ 199 (Case 1:15-cv-01840-CRC, Document 12, Filed 05/22/17, Page 31 of 55).

<sup>32</sup> "Under the statutory interpretation implicit in its **internal manual procedures**, FDIC construes the pivotal statutory bar-date exception in subsection 1821(d)(5)(C)(ii) 'the claimant did not receive notice of the appointment of the receiver in time to file such claim before [the bar] date' as permitting late filing even by claimants who were on notice of FDIC's appointment but could not file their claim because it did not come into existence until after the bar date prescribed in subsections 1821(d)(3)(B)(i) and 1821(d)(5)(C)(i)." *Heno v. FDIC*, 20 F.3d 1204, 1209 (1st Cir. 1994) (emphasis added). See *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 439, (1986) (deference should be accorded to the FDIC's established administrative practices, as manifested here by its internal manual procedures, even if the FDIC had not posited its statutory interpretation as a specific regulation); See also *Carlyle Towers Condo. Ass'n. v. FDIC*, 170 F.3d 301, 306 (2d Cir. 1999); *Beck Bus. Ctr., Inc. v. Mich. Heritage Bank*, No. 10-CV-10914, 2010 U.S. Dist. LEXIS 83858, at \*25 (E.D. Mich. Aug. 17, 2010); *Centennial Assocs. v. FDIC*, 927 F. Supp. 806, 811 (D.N.J. 1996).

The Willners allege that the FDIC violated their constitutional rights when it disallowed their property claims as untimely filed despite the fact that they accrued after the Bar Date. Based on the Panel's misinterpretation of § 1821(d)(6)(A), the Willners had just 60 days from the date the FDIC violated their constitutional rights to file suit in the DDC based on the FDIC's post-Bar Date conduct, i.e., disallowing the Willners' property claims. However, it is unreasonable to interpret a statute to require aggrieved parties to file suit against a federal agency for violating their constitutional rights within a mere 60 days of the accrual of such claims. The Panel should have avoided interpreting the statute in such a way as to implicate the due process violation that concerned the *Freeman* Court.<sup>33</sup>

In addition, the Panel's interpretation of § 1821(d)(6)(A) contradicts the ruling in *Homeland*

<sup>33</sup> *Freeman* cited a number of cases in support of this argument: See e.g., *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749, (1961) ("Federal statutes are to be so construed as to avoid serious doubt of their constitutionality."); *Heno v. FDIC*, 20 F.3d at 1209 (construing § 1821(d)(5) to authorize FDIC to process a late-filed claim if the claim arose after the bar date, so as not to deprive claimant of all opportunities for administrative or judicial relief). See *Lynch v. Overholser*, 369 U.S. 705 (1962) ("... a statute should be interpreted, if fairly possible, in such a way as to free it from not insubstantial constitutional doubts.").

*Stores v. Resolution Tr. Corp.*,<sup>34</sup> a case cited by *Freeman*,<sup>35</sup> that supports the Willners' contention that their constitutional claims against the FDIC for an action it took after taking over WMB, i.e., disallowing the Willners' property claims, are not "claims" as defined by § 1821(d)(6)(A) and, therefore, are not subject to its time limitation.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

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<sup>34</sup> 17 F.3d 1269, 1274 (10th Cir. 1994).

<sup>35</sup> See e.g., *Freeman*, *supra* at 1401 citing *Homeland Stores v. Resolution Tr. Corp.*, 17 F.3d at 1274 ("the term 'claim' as used in 1821(d)(13)(D) should be interpreted to exclude claims ... arising from management actions of the RTC after taking over a depository institution.")