No. 21-942

IN THE

Supreme Court of the United States

CLARK COUNTY BANCORPORATION,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR BANK OF CLARK COUNTY,

Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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I. FDIC DISENGENOUSLY MISCHARACTERIZES THE SUPREME COURT DECISION IN *RODRIGUEZ* AS RESTING ON AN "UNNOTICED FAILURE OF JURISDICTION."

It is axiomatic that the Supreme Court satisfies itself of its own jurisdiction before proceeding to determine the merits of a matter before it. The rule that federal courts are obliged to confirm their own jurisdiction is "inflexible and without exception …." *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 501 (1982).

As such, the FDIC's suggestion that the Supreme Court issued the decision in *Rodriguez v. FDIC, as Receiver for United Western Bank*, 589 U.S. ___, 140 S. Ct. 713 (2020) ("*Rodriguez*") based on an "unnoticed failure of jurisdiction," without first establishing its own jurisdiction, ignores fundamental jurisprudence. Opp. 14.

A. *Rodriguez* Confirms That FIRREA Is Not Applicable In Tax Refund Determination Lawsuits.

Rodriguez is controlling in the instant action for adjudication of the 852 and 816 tax refund determination lawsuits between the parent Clark County Bancorporation ("CCB"), and its subsidiary (Bank of Clark County, FDIC as Receiver).[1]

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1. 852 case commenced July 30, 2014 in the District of Columbia District Court, *CCB v. FDIC, et al.*, Case No. 1:14-cv-01304-JEB (D.D.C.), thereafter transferred October 27, 2014 to the

The 2020 *Rodriguez* decision, confirming that FIRREA[2] is not applicable to tax refund determination lawsuits, is the governing law at the time of the instant Ninth Circuit Memorandum of May 21, 2021 (not for publication). Pet. App. 1a.

B. Certiorari Should Be Granted When Lower Courts Fail To Adhere To Supreme Court Decisions.

The Ninth Circuit Memorandum directly conflicts with the *Rodriguez* Supreme Court decision, which confirmed that FIRREA does not apply to tax refund allocation lawsuits. FIRREA was not implicated in *Rodriguez*. If FIRREA were applicable, in *Rodriguez* the Supreme Court would not have accepted certiorari, would not have issued a decision, and would have dismissed for lack of jurisdiction. Notwithstanding *Rodriguez*, the Ninth Circuit Memorandum applied FIRREA to the instant tax refund appeal, dismissing for lack of jurisdiction for failure to file a FIRREA claim by the claims filing date, citing to a jurisdictional dismissal for failure to file a FIRREA claim by the claims filing date in a 2013 District of Columbia District Court case, a separate and different case ("constitutional challenge action"), which was not

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District Court for the Western District of Washington, assigned as *CCB v. FDIC*, Case No. 3:14-cv-05852-BHS (W.D.Wash.) ("852" case), subsequently consolidated (Dkt. No. 69) with *CCB v. FDIC*, Case No. 3:14-cv-05816-BHS filed in the District Court for the Western District of Washington on October 15, 2014 ("816" case). Pet. 1 n.1.

2. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law 101-73.

a tax refund lawsuit. The District of Columbia District Court decision acknowledged several times that CCB's 2013 constitutional challenge action was not a tax refund lawsuit: "This case … is not a tax-refund suit."[3] Pet. 10-12.

In any event, the 2013 constitutional challenge action ruling has been superseded by the 2020 *Rodriguez* Supreme Court decision, which confirmed FIRREA was inapplicable to tax refund allocation lawsuits. Adherence to Supreme Court decisions is required. Subsequent Supreme Court decisions control. *Herrera v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686, 1697 (2019); *Bobby v. Bies*, 556 U.S. 825, 836 (2009) (issue preclusion inapplicable where subsequent Supreme Court decisions). Pet. 8-9. The Ninth Circuit failed to adhere to the *Rodriguez* Supreme Court decision.

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3. *Clark Cnty. Bancorporation v. U.S. Dep't of Treasury*, No. 13–632 (JEB), 2014 U.S. Dist. LEXIS 147984 and 2014 WL 5140004, at *1, *11, *12 (D.D.C. Sept. 19, 2014): "… Plaintiff never asserts a tax-refund claim in this suit …"; "[Plaintiff] does not bring such a tax-refund suit in these proceedings." The 2013 action challenged the constitutionality of IRS statutes and regulations permitting a consolidated group refund to be issued to anyone other than the parent taxpayer without contemporaneous IRS notice to the parent taxpayer, counts included violations of the Fourth and Fifth Amendments, due process, property rights and unconstitutionality of 26 C.F.R. § 301.6402-7. Contrary to the Ninth Circuit, the appeal did not involve the "same tax-refund claims," Pet. App. 3a; the instant tax refund lawsuits were not a part of the 2013 constitutional challenge complaint.

C. That FIRREA Is Not Applicable In Tax Refund Allocation Lawsuits Had Been Previously Established.

BankUnited denied the FIRREA argument, ruling with regard to 12 U.S.C. § 1821(d)(13)(D):

> The FDIC's argument is unpersuasive. Section 1821(d)(13)(D) applies only to assets of the FDIC's receivership. It therefore does not preclude the Bankruptcy Court from determining the threshold question of whether the tax refunds are an asset of the bankruptcy estate.[4]

This is consistent with IRS regulation, 26 C.F.R § 301.6402-7(j): "This section … is *not determinative of ownership* of any such amount among current or former members of a consolidated group …" (emphasis added), therefore issuance of consolidated tax refunds does not establish that they are an asset of the subsidiary.

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4. *Zucker v. FDIC* (*In re BankUnited Fin. Corp.*), 727 F.3d 1100, 1104 n.5 (11th Cir. 2013) ("*BankUnited*"). See also, *FDIC v. Zucker (In re NetBank, Inc.)*, 729 F.3d 1344 (11th Cir. 2013) *("Netbank")*; *Cantor v. FDIC (In re Downey Fin. Corp.)*, 593 F. App'x 123 (3d Cir. 2015) ("*Downey*"); and *Rodriguez v. FDIC, as Receiver for United Western Bank*, 893 F.3d 716 (10th Cir. 2018), 917 F.3d 1262 (10th Cir. 2019).

D. The FDIC's Instant Position, That FIRREA Applies When The FDIC Filed For And Received Tax Refunds On Behalf Of The Consolidated Group, Contradicts The FDIC's Position Before The Supreme Court In *Rodriguez*.

The FDIC has demonstrated time and again that it will change its position to suit the perceived exigencies at hand. The FDIC took the unabashed position before the Supreme Court in *Rodriguez* that whether the parent or bank subsidiary received the tax refund checks was inconsequential and not determinative. In an unavailing attempt to evade *Rodriguez*' confirmation that FIRREA does not apply to tax refund lawsuits, the FDIC now comes before the Supreme Court claiming that receipt of tax refunds is determinative of ownership such that FIRREA applies.

E. The FDIC Admitted At The Supreme Court In *Rodriguez* That Payee Designation On Refund Checks Is Not Determinative.

The FDIC in *Rodriguez* admitted that it is inconsequential whether the parent or subsidiary received the refund check.

In *Rodriguez*, the FDIC cited IRS regulations, noting they are:

> 'basically procedural in purpose and were adopted solely for the convenience and protection of the federal government.' (citations omitted).
>
> …

> The regulations further explain that '[t]his section determines the party to whom a refund * * * will be paid but *is not determinative of ownership of any such amount among current or former members of a consolidated group* (including the [insolvent] institution).' 26 C.F.R. 301.6402-7(j) (emphasis added).
>
> …
>
> [payee designation on refund checks] was not intended to give the designated representative any special advantage vis-à-vis other members of the group.

Rodriguez, Supreme Court Docket, No. 18-1269, Respondent [FDIC] Brief, October 17, 2019, at 5, 37, 37.

This is consistent with IRS regulations that IRS refund checks, although issued payable to the subsidiary [FDIC], are not assets of the subsidiary as no determination of ownership is conferred by IRS payee designation. FIRREA does not apply.

F. The FDIC Now Contends That Payee Designation On Refund Checks Is Determinative.

Now, in a pretextual effort to avoid *Rodriguez*, the FDIC contradicts itself, arguing that payee designation is determinative, referencing a case which was not a tax refund allocation lawsuit.

Waldron, Trustee for Venture Financial Group, Inc. v. FDIC, 935 F.3d 844 (9th Cir. 2019), does not stand for the proposition offered by the FDIC. Opp. 16.

First, the *Waldron* parent and the FDIC had already agreed in 2011 to distribution of refunds to the subsidiary [FDIC] as assets of the subsidiary. Thereafter, more than two years later, the parent filed bankruptcy and under bankruptcy preference law, sought to undo and seek these monies back from the FDIC. *Waldron* thus was not a tax refund allocation lawsuit. As the refunds were already assets of the FDIC, FIRREA was implicated. However, this is not the circumstance in tax refund allocation cases, including the instant case.

Second, *Waldron* involved different circumstances, including that no Notice of Disallowance existed. However, a Notice of Disallowance does exist in the instant CCB case. Pet. App. 82a-84a. Under the applicable statute therein, 12 U.S.C. § 1821(d)(6)(A), absolute jurisdiction existed if lawsuit commenced:

> Before the end of the 60-day period beginning on … (ii) the date of any notice of disallowance … in the [United States District Court] … (and *such court shall have jurisdiction to hear such claim*) (emphasis added).

See full discussion, Pet. Reply, Section III, *infra*; Pet. 12-14.

Third, the Opposition contention that no other case involves the instant circumstances is inaccurate and belies the FDIC's contradictory (albeit correct) position in *Rodriguez*. Numerous cases exist where the FDIC had applied for and/or received the refunds, for example, *Downey* and *NetBank*. Neither case involved FIRREA.

In any event, even if *Waldron* were considered a tax refund allocation lawsuit, *Waldron* has been superseded by *Rodriguez*.

II. UNDER ANY HYPOTHETICAL APPLICATION OF FIRREA, THE NINTH CIRCUIT MEMORANDUM CONFLICTS WITH THE SUPREME COURT DECISION IN *WONG*, WHICH ESTABLISHES THAT THE FIRREA CLAIMS FILING DATE IS AN ADMINISTRATIVE CLAIMS PROCESSING RULE AND IS NOT JURISDICTIONAL.

United States v. Wong, 575 U.S. 402 (2015) ("*Wong*") defined where a claims filing date provision is in a separate location from the jurisdictional section, and the jurisdictional section discusses jurisdiction and a court's power, the claims filing date provision is an administrative claims processing rule and is not jurisdictional.

A. The FIRREA Claims Filing Date Provision Does Not Contain Jurisdictional Language And Is Separate From The FIRREA Section On Jurisdiction.

Pursuant to *Wong*, 12 U.S.C. § 1821(d)(3)(B)(i), is an administrative claims processing rule, addressing the claims filing date:

> (3) AUTHORITY OF RECEIVER TO DETERMINE CLAIMS
>
> (i) … [claims to be presented] … to the receiver by a date specified in the notice which shall be

> not less than 90 days after the publication of such notice;

This claims filing date provision does not speak in jurisdictional terms and does not address the powers of the court.

B. The FIRREA Section Addressing Jurisdiction And The Court's Powers Is Located In A Different Section From The Foregoing Claims Filing Date Provision.

"Rather, in case after case, we have emphasized another distinction – that jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *Wong*, 575 U.S. at 412 n.4. "This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." *Wong*, 575 U.S. at 411.[5]

12 U.S.C. § 1821(d)(6) addresses jurisdiction:

> (6) PROVISION FOR AGENCY REVIEW OR JUDICIAL DETERMINATION OF CLAIMS
>
> (A) In general
>
> Before the end of the 60-day period beginning on …

5. Other Circuit Courts had ruled the FIRREA claims filing date provision an administrative claims processing rule, and not jurisdictional, including *Carlyle Towers Condo. Assn., Inc. v. F.D.I.C.*, 170 F.3d 301 (2d Cir. 1999) and *Heno v. FDIC*, 20 F.3d 1204 (1st Cir. 1994).

> (ii) the date of any notice of disallowance … claimant may … *file suit* on such claim … in the [United States District Court] … (and *such court shall have jurisdiction to hear such claim*) (emphasis added).
>
> (B) Statute of limitations
>
> If any claimant fails to …
>
> (ii) file suit on such claim … before the end of the 60-day period … the claimant shall have no further rights or remedies with respect to such a claim.

12 U.S.C. § 1821(d)(6) addresses jurisdiction and a court's power, including a statute of limitations. W*ong* sets forth where a filing deadline "speaks only to a claim's timeliness, not to a court's power," it is not jurisdictional. *Wong,* 575 U.S. at 410. Further, the separation of the claims filing deadline from this jurisdictional grant indicates that the claims filing deadline is not jurisdictional. *Wong,* 575 U.S. at 411. Pet. 14-18.

The FDIC incorrectly contends that 12 U.S.C. § 1821(d)(5)(C) is jurisdictional. Opp. 18.

However, 12 U.S.C. § 1821(d)(5), "PROCEDURES FOR DETERMINATION OF CLAIMS," involves FDIC internal procedures, and is not jurisdictional including by virtue of its title alone. It is § 1821(d)(6), "PROVISION FOR AGENCY REVIEW OR JUDICIAL DETERMINATION OF CLAIMS," which addresses jurisdiction including a statute of limitations, and in accord with *Wong* is a separate and subsequent section.

Language cited by the FDIC in 12 U.S.C. § 1821(d)(5)(C)(i), "disallowance shall be final," is the precise type of language that *Wong* found decidedly not jurisdictional (for example, "'shall be forever barred' … provision has no jurisdictional significance." *Wong,* 575 U.S. at 416-417). 12 U.S.C. § 1821(d)(5) is not jurisdictional, involves FDIC internal procedures as established by the title itself, "PROCEDURES FOR DETERMINATION OF CLAIMS," and does not address jurisdiction or a court's powers.

12 U.S.C. § 1821(d)(5)(C) is an administrative claims processing rule and is separate from the jurisdictional section at 12 U.S.C. § 1821(d)(6), which section does refer to jurisdiction and the court's powers including a statute of limitations.

III. IF FIRREA WERE TO APPLY, NEVERTHELESS, EXPRESS INDEPENDENT STATUTORY JURISDICTION EXISTS IN THE ORIGINAL 816 CASE AS LONG AS LAWSUIT FILED TIMELY. THE NINTH CIRCUIT DECISION IGNORED THIS ABSOLUTE JURISDICTION (12 U.S.C. § 1821(d)(6)(A)), THEREBY ENGAGING IN FEDERAL COMMON LAWMAKING CONTRARY TO THE DICTATES OF RODRIGUEZ.

12 U.S.C. § 1821(d)(6)(A) provides express independent jurisdiction for the original 816 case as long as lawsuit filed:

> Before the end of the 60-day period beginning on … (ii) the date of any notice of disallowance … in the [United States District Court] … (and

> *such court shall have jurisdiction to hear such claim*) (emphasis added).

The FDIC Notice of Disallowance itself references this statutory right to file a lawsuit:

> [y]our lawsuit must be filed within 60 days after the date of this notice .... Pet. App. 82a-84a.[6]

A. Jurisdiction Is Established When Lawsuit Is Filed Timely, Notwithstanding Alleged Untimely Administrative Claim.

Case law addresses this jurisdiction, including *Carlyle*, *Alltel*, and *O'Connor*, wherein jurisdiction is established in any event as long as the lawsuit is filed timely, although claims of untimely administrative filing exist.[7]

FDIC arguments regarding untimely claims are not relevant and inaccurate, as jurisdiction is determined by the filing date of the lawsuit itself, as long as the lawsuit is filed within the statutory sixty-day time period from the date of the Notice of Disallowance, pursuant to 12 U.S.C. § 1821(d)(6)(A)(ii). Pet. 12-15.

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6. *Waldron*, cited by the FDIC, did not involve a Notice of Disallowance, thus not possessing this statutory jurisdiction under 12 U.S.C. § 1821(d)(6)(A)(ii).

7. *Carlyle Towers Condo. Assn., Inc. v. F.D.I.C.*, 170 F.3d 301 (2d Cir. 1999) ("*Carlyle*"); *Alltel Info. Services, Inc. v. F.D.I.C.*, 970 F. Supp. 775 (C.D. Cal. 1997) ("*Alltel*"); *O'Connor v. Unum Life Ins. Co.*, No. C-95-3287 SI, 1996 WL 532153 (N.D. Cal. September 9, 1996) ("*O'Connor*").

The FDIC is unable to address directly the Ninth Circuit disregard of this express statutory jurisdiction as well as the failure to adhere to Supreme Court decisions, *Rodriguez* and *Wong*.[8] The FDIC devotes most of the Opposition discussing a myriad of inaccurate assertions regarding underlying case issues, not relevant to the certiorari issue of failure to adhere to Supreme Court decisions.[9]

The Ninth Circuit failed to acknowledge the independent statutory jurisdiction of 12 U.S.C. § 1821(d)(6)(A), thus engaging in federal common lawmaking.

In any event, *Rodriguez* confirms that the FIRREA process is inapplicable with respect to tax refund determination lawsuits.

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8. The Opposition intimates that certiorari should be denied because after trial on the merits the FDIC would prevail. However, this is not relevant to the issue of certiorari. CCB submits that after trial on the merits CCB would prevail.

9. For example, the Opposition at 6 incorrectly asserts the refunds belonged to the subsidiary although the tax allocation agreement mandated equitable adjustment provisions which allocated refunds by percentage of income (in this instance, one-third to parent CCB) in accord with IRS regulation 26 C.F.R. § 1.1552-1(a)(2)(i), and the Opposition ignores application of Alternative Minimum Tax rules, as well as a $16,000,000.00 setoff in favor of CCB. *CCB v. FDIC*, Case No. 19-35097, CCB Excerpts of Record, Tax Allocation Agreement, 123-125.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS ADHERENCE TO SUPREME COURT DECISIONS.

The Ninth Circuit failed to adhere to two Supreme Court decisions.

Rodriguez confirmed FIRREA is not applicable to tax refund determination lawsuits between a parent and the FDIC as Receiver for a subsidiary. Contrary to *Rodriguez*, the Ninth Circuit applied FIRREA to the tax refund determination lawsuits between the parent CCB and the FDIC as Receiver for a subsidiary.

In addition, contrary to *Rodriguez*, the Ninth Circuit engaged in federal common lawmaking in failing to acknowledge the express independent statutory jurisdiction of 12 U.S.C. § 1821(d)(6)(A)(ii).

Wong defined whether federal statutory provisions are either administrative claims processing rules or jurisdictional. Under *Wong*, the FIRREA claims filing date provision is an administrative claims processing rule and is not jurisdictional. Pursuant to *Wong*, as the jurisdictional section discusses jurisdiction and a court's powers, and the claims filing date provision is in a separate location from the jurisdictional section, the claims filing date provision is an administrative claims processing rule and is not jurisdictional. In ruling that the FIRREA claims filing date provision is jurisdictional, the Ninth Circuit conflicts with *Wong*.

CONCLUSION

As the Ninth Circuit is in conflict with two separate Supreme Court decisions, the petition for a writ of certiorari should respectfully be granted.

Dated: April 7, 2022

Respectfully submitted,

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