No. 15-1872(L)

15-1874-cv(CON)

United States Court of Appeals
For the Second Circuit

FEDERAL HOUSING FINANCE AGENCY, AS CONSERVATOR FOR THE FEDERAL NATIONAL MORTGAGE ASSOCIATION AND THE FEDERAL HOME LOAN MORTGAGE CORPORATION,
Plaintiff-Appellee,

v.

NOMURA HOLDING AMERICA INC., NOMURA ASSET ACCEPTANCE CORPORATION, NOMURA HOME EQUITY LOAN, INC., NOMURA CREDIT & CAPITAL, INC., NOMURA SECURITIES INTERNATIONAL, INC., RBS SECURITIES INC., F/K/A GREENWICH CAPITAL MARKETS, INC., DAVID FINDLAY, JOHN MCCARTHY, JOHN P. GRAHAM, NATHAN GORIN, AND N. DANTE LAROCCA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CLEARING HOUSE ASSOCIATION LLC IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

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[1] All parties have consented to the filing of this brief, in accordance with Fed. R. App. P. 29(a). This brief was not authored in whole or in part by counsel for any party, and no counsel or party other than *amici curiae*, their members or their counsel made a monetary contribution to fund the preparation or submission of this brief.

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INTEREST OF *AMICI CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is an association of hundreds of securities firms, banks and asset managers, including many of the largest financial institutions in the United States. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA's members operate and have offices in all fifty states. SIFMA has offices in New York and Washington, D.C. and is the United States regional member of the Global Financial Markets Association.

The Clearing House, established in 1853, is the oldest banking association and payments company in the U.S. It is owned by the world's largest commercial banks, which collectively hold more than half of all U.S. deposits and employ over one million people in the U.S. and more than two million worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C. is regulated as a systemically important financial market utility. It owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions. It leads

innovation and thought leadership activities for the next generation of payments. And it clears almost $2 trillion each day, representing nearly half of the automated clearing house, funds transfer and check-image payments in the U.S.

In this action, the Federal Housing Finance Agency ("FHFA") concedes it did not bring its claims under the Securities Act of 1933 (the "Securities Act") and the District of Columbia and Virginia Blue Sky laws (together, the "Blue Sky Laws") within the periods allowed by their statutes of repose. However, the District Court construed a provision of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008) ("HERA") that clearly and unambiguously extends only the statutes of limitations for State law contract and tort claims brought by FHFA as conservator or receiver (the "Extender Statute" or the "Statute"), to allow FHFA to bring its claims beyond the periods prescribed by those statutes of repose. *Amici* and their members are concerned about this unwarranted elimination of repose, about the unwarranted application to federal claims and *sui generis* Securities Act and Blue Sky Laws claims, and that the District Court premised its decision on its own view of what would best serve HERA's purpose.

Amici and their members have a strong interest in this appeal for four principal reasons.

First, the Supreme Court in *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2189 (2014), enunciated clear and categorical principles on the questions of (i) whether the extension of "statutes of limitations" for certain state law claims also extends statutes of repose for federal and statutory claims, and (ii) whether a court's view of the purpose of a statute should override the clear and unambiguous text of the statute. Those principles, which the court below failed to apply here, have a significant impact on *amici*'s members and the securities markets because they minimize uncertainty, which is the primary purpose of statutes of repose.

Second, *amici* and their members rely on the fair, consistent and timely enforcement of securities laws to deter and remedy wrongdoing. One key component of ensuring timely enforcement is the consistent application of the statutes of repose that are a critical part of those laws and serve purposes wholly distinct from statutes of limitation. By establishing a definitive time limit for claims that cannot be tolled, statutes of repose provide the markets with a measure of certainty and finality, set a time after which market participants are free from the fear of lingering liabilities and stale claims, and ensure that claims can be adjudicated based on recent evidence. This is important for financial planning and operations. The unwarranted narrowing of such statutes would undermine the finality upon which the orderly operation of the markets depends.

Third, *amici* and their members recognize the importance of the application of securities and other laws as they are written by legislatures, not based on subjective assertions of legislative purpose that do not account for the often competing objectives that lawmakers weigh when drafting legislation. That application of the law is essential to ensure predictability. Predictability is crucial for business planning and the effective and efficient functioning of the securities markets because it allows participants to understand how to comply with the law and how the law will be enforced.

Fourth, *amici* and their members rely on the correct application of the "reasonable care" and "loss causation" defenses to actions under federal and State securities laws.

Amici often appear as *amici curiae* in appeals that implicate these concerns. This case has far-reaching practical significance for the securities industry. FHFA, FDIC and National Credit Union Administration Board ("NCUA") have brought numerous securities claims against financial institutions that are barred by applicable statutes of repose, but seek to avoid dismissal of such claims based on the same incorrect construction of extender statutes that the lower court adopted here.

SUMMARY OF ARGUMENT

A central issue in this appeal is whether the Extender Statute, which is expressly limited to the "applicable statute of limitations" for State law "contract" and "tort" claims, should nevertheless also be applied to statutes of repose. *Amici* support Defendants' argument that the Statute should be construed in accordance with its plain language and the Supreme Court's prior rulings and thus should not apply to statutes of repose, federal claims, or statutory claims (whether federal or State). *Amici* submit this brief to elaborate on why the ruling below should be reversed, and why the Statute should not be expanded beyond the scope enacted by Congress.

Congress long ago included in Section 13 of the Securities Act both a statute of limitations and a three-year statute of repose. *See* 15 U.S.C. § 77m. The Blue Sky Laws also contain statutes of repose. *See* D.C. Code § 31-5606.05(f)(1); Va. Code Ann. § 131-522(D).

In 2008, Congress enacted the Statute. 12 U.S.C. § 4617(b)(12). The Statute is clear and unambiguous. It extends only the statute of limitations for State law contract and tort claims brought by FHFA as conservator or receiver. Nothing in the text extends the statute of repose for any claims, nor the statute of limitations for any federal claims or federal or State statutory claims. Congress's repeated use of the phrase "federal or state" in other provisions of HERA shows

that when Congress wanted HERA to cover both federal and State law, Congress did so expressly.

There was nothing novel about Congress drafting the Statute to override statutes of limitations while preserving statutes of repose. The Supreme Court explained in *CTS* that Congress did just that in 1986 when it amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") to extend the "commencement date" of the statute of limitations, but not the repose period, for certain environmental actions under State law. 134 S.Ct. at 2191. The CERCLA extender provision, Section 9658, extends the statute of limitations for State law tort claims by persons exposed to a toxic contaminant. The Supreme Court found Section 9658 extends *only* the statute of limitations and *not* statutes of repose.

Applying *CTS*'s logic to the Statute compels the conclusion that, like the CERCLA extender statute enacted earlier, the Statute does not preempt statutes of repose. Congress deliberately extended the minimum length of statutes of limitations for FHFA's State law contract and tort claims to make them uniform, and in doing so, Congress preserved both the existing repose for defendants and the federal statutes of limitations that already apply nationwide. If Congress wanted to do more, it knew how to do so and would have done so. In contrast, the

decision below assumes that in 2008 Congress did not remember and no longer understood the distinction between statutes of limitations and statutes of repose.

If statutes are interpreted based on the assumption that Congress does not understand or forgets critical distinctions between terms — such as the distinction between statutes of limitations and statutes of repose that *CTS* found Congress understood before it enacted the Statute — and based on subjective judicial views of how best to accomplish legislative purposes, there is no limit to how statutes can be misconstrued. That would undermine the bedrock principle of predictability upon which *amici's* members and all market participants rely. It is vital to the securities and banking industries and financial markets that applicable laws are construed and applied as enacted by Congress, and that statutes of repose are strictly enforced. This Court should reverse the decision below.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE EXTENDER STATUTE AND THE SUPREME COURT'S DECISION IN *CTS* REQUIRE THE REVERSAL OF THE DECISION BELOW

A. The Statute Does Not Displace Statutes of Repose

1. The Supreme Court Held in *CTS* that a "Natural Reading" of CERCLA, Which Extends the "Statute of Limitations" for Certain Claims, Does Not Displace Statutes of Repose

CTS resolved a division among lower courts as to whether Congressionally-enacted extender provisions that expressly apply to the "statute of limitations" also displace statutes of repose. The Supreme Court held CERCLA's

extender provision does *not* displace statutes of repose. The Court based its ruling primarily on the "natural reading of [CERCLA's] text" which — like the Statute — refers only to the "statute of limitations" and contains other textual features that are incompatible with applying it to statutes of repose. 134 S.Ct. at 2188.

2. The District Court Failed to Follow the Plain Language of the Statute, Which Also Applies Only to "the Applicable Statute of Limitations"

The District Court's application of the Statute's provision for "the applicable statute of limitations" to statutes of repose is inconsistent with the text of the Statute, which does not refer to statutes of repose, and with *CTS*. The court below violated the first rule of statutory construction, that "the starting point for interpreting a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). This Court too has emphasized the importance of this fundamental rule of statutory construction. *See U.S. v. Desposito*, 704 F.3d 221, 226 (2d Cir.), *cert. denied*, 133 S.Ct. 2402 (2013). This Court should apply this bedrock principle to the Statute, follow the Supreme Court's logic and analysis in *CTS* concerning the textually similar CERCLA extender statute, and find that FHFA's claims are time-barred by the Securities Act's and Blue Sky Laws' statutes of repose.

There is no dispute that the Securities Act contains a three-year statute of repose, and the Blue Sky Laws contain two- and three-year statutes of repose. *FHFA v. HSBC*, 2014 WL 4276420, *1 (S.D.N.Y. 2014). This Court has ruled that a statute of repose, such as the ones at issue here, "'extinguishes [a] cause of action ... after a fixed period of time ... regardless of when the cause of action accrued.'" *Police & Fire Ret. Sys. of Detroit v. Indymac MBS, Inc.*, 721 F.3d 95, 101 n.1 (2d Cir. 2013), *cert dismissed*, 135 S.Ct. 42 (2014). "[I]n contrast to statutes of limitations, statutes of repose 'create[] a *substantive* right in those protected to be free from liability after a legislatively-determined period of time.'" *Id.* at 106.

There is also no dispute that the Statute, like the extender statute at issue in *CTS*, refers to the "statute of limitations" several times but never mentions statutes of repose. *CTS* explained the "critical distinction" between those two concepts, and that Congress was well aware of the difference when it enacted the CERCLA extender statute in 1986, yet chose not to refer to statutes of repose. 134 S.Ct. at 2186. Congress certainly retained that awareness when it enacted the Statute.[2]

[2] *See In re Countrywide Fin. Corp. Mortg.-Backed Secs. Litig.*, 966 F. Supp. 2d 1031, 1037, 1039 (C.D. Cal. 2013) (a "search of the Congressional Record from 1985 until the enactment of FIRREA reveals at least forty-four separate uses of the phrase 'statute of repose' across twenty-seven different statements by members of Congress." These statements "suggest that Congress understood the meaning of the term 'statute of repose' but nevertheless failed to use it in the [FDIC] extender statute."); *FDIC v. Chase Mortg. Fin. Corp.*, 42 F. Supp. 3d 574, 579 (S.D.N.Y.

In short, the Supreme Court's strict statutory construction in *CTS* applies with equal force here. Congress, in making a similar choice in the Statute to refer only to statutes of limitations, did *not* displace statutes of repose.

3. The District Court Substituted its Own View of the Purpose of the Statute for the Language Enacted by Congress

The District Court gave short shrift to Congress's omission in the Statute of any reference to statutes of repose, even though the Supreme Court explained that the same omission in CERCLA was "instructive." 134 S.Ct. at 2185. Instead the court below grounded its decision on flawed logic.

For example, the court reasoned that "by establishing all-purpose time limits for any actions [FHFA] may wish to pursue, the Extender Statute displaces all pre-existing limits on the time to bring suit, whatever they are called." 2014 WL 4276420, at *3. But Congress did not say in the Statute that it was establishing "all-purpose time limits" or displacing "all pre-existing limits." The court's statement could be true only if Congress's reference to "the applicable statute of limitations" and "contract" and "tort" claims, and failure to refer to statutes of repose and any other claims were overlooked. By referring only to the "statute of limitations" for "contract" and "tort" claims, Congress very clearly

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2014) ("when faced with a statute which presented both a statute of limitations and a statute of repose, Congress chose language which focused on and changed the statute of limitations, and left the statute of repose untouched."), *appeal pending*.

described what the Statute displaced — namely, only "the applicable statute of limitations" for "contract" and "tort" claims.

The court next stated that Congress referred in the Statute to the "period applicable under State law" "to help construct a new exclusive time framework for [FHFA] actions that replaces all pre-existing time limits (including repose periods)." *Id.* at *3. But that "period" refers to the "the applicable statute of limitations" for "contract" and "tort" claims. Had Congress wanted to include statutes of repose or other claims, it would have referred to them. Nothing in the Statute shows Congress intended to "construct a new exclusive time framework for [FHFA] actions that replaces all pre-existing time limits (including repose periods)." The court simply assumed that outcome.

The court's finding that its ruling was supported by HERA's legislative history and purpose, too, rested on its assumption that "HERA created a new statute of limitations running, at the earliest, from the appointment of FHFA as conservator, that 'supplants any other time limitations that otherwise might have applied' to FHFA's claims." *Id.* at *4. In other words, the court again *assumed* the outcome — that the Statute's reference to "the applicable statute of limitations" "supplants any other time limitations," including the applicable statutes of repose, and for claims that are not "contract" or "tort" claims, even though Congress did

not say so. That reasoning is simply untenable because the language of the Statute must control.

For the same reasons, this Court should not follow the decisions in *FDIC v. RBS Secs., Inc.*, 2015 U.S. App. LEXIS 13985 (5th Cir. Aug. 10, 2015), and *NCUA v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014), *cert. denied*, 135 S.Ct. 949 (2015). In *RBS*, the Fifth Circuit based its holding on its view that Congress could not have wanted to "provid[e] the FDIC with less than three years from the date of its appointment as receiver to bring claims" even though Congress did not say that in the FDIC Extender Statute; the "Statute did not create a new statute of limitations merely for the ordinary reasons" even though Congress did not say that in that Statute either; and "[t]he text of the FDIC Extender Statute indicates that it prescribes a new mandatory statute of limitations for actions brought by the FDIC as receiver," even though that statute limits the new statute of limitations to certain types of claims and does not displace statutes of repose. 2015 U.S. App. LEXIS 13985, at *25-26, *34.

Similarly, in *NCUA v. Nomura,* on which the court below misplaced heavy reliance, the Tenth Circuit based its decision on its view that "the legislative purpose of FIRREA supports the conclusion that the Extender Statute applies to

statutes of repose," even though Congress mentioned only "the applicable statute of limitations." 764 F.3d at 1216-17.[3]

4. The District Court Overlooked the Nature of the Legislative Process and the Principle that No Legislation Pursues its Purposes at All Costs

The District Court overlooked the fact that when Congress crafts complex legislation such as HERA, it inevitably balances competing policy goals. For example, HERA was intended, among other things, to provide grants to States and local governments to purchase and rehabilitate foreclosed properties, "expand access to the middle class to the low interest, low fee loans provided by the FHA," "build more affordable housing," restore confidence in the GSEs and the housing

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[3] Likewise, in *FDIC v. Rhodes*, the Nevada Supreme Court, in a 4-3 decision, incorrectly found that by using the term "shall" to mandate the "applicable statute of limitations" Congress "barred the possibility that some other time limitation would apply," 336 P.3d 961, 965 (Nev. 2014), even though "shall" applies only to the "statute of limitations" and not the statute of repose. The court failed even to address *CTS*'s holding that the absence of any reference to "statute[s] of repose" is "instructive" in determining that an extender statute applies only to statutes of limitations. 134 S.Ct. at 2185.

This Court's pre-*CTS* decision in *Fed. Housing Fin. Agency v. UBS Americas Inc.*, which was based on its assumption that Congress "used the term 'statute of limitations' to refer to statutes of repose" and its assessment of Congress's purpose, 712 F. 3d 136, 143 (2d Cir. 2013), has been abrogated by the Supreme Court's ruling on the same issue in *CTS*. *See FDIC v. Bear Stearns Asset Backed Secs. I LLC*, 2015 U.S. Dist. LEXIS 37055, *19 (S.D.N.Y. Mar. 24, 2015) ("The analytical framework set out by the Supreme Court in [*CTS*] calls into question the Second Circuit's analysis of the extender provision of HERA in its *UBS* decision, implicitly overruling material aspects of the *UBS* decision's rationale."), *appeal pending*; *Chase*, 42 F. Supp. 3d 574 (following *CTS* in finding the FDIC Extender Statute does not alter statutes of repose).

market, and reduce foreclosures. 154 Cong. Rec. H.6841-50 (daily ed. July 23, 2008) (Statement of Rep. Sessions); *accord* 154 Cong. Rec. S.7448-50 (daily ed. July 25, 2008) (Statement of Rep. Reed). The compromises Congress reached to achieve those goals are reflected in the language it enacted.

CTS rejected the argument that such goals — or judicial views as to how they are best achieved — can override the plain language of a statute. Instead, the Court reaffirmed the fundamental principle that "Congressional intent is discerned primarily from the statutory text." 134 S.Ct. at 2185.

CTS explained that "almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem," but "no legislation pursues its purposes at all costs." *Id.* (quoting *Rodriguez v. U.S.*, 480 U.S. 522, 525-26 (1987)). The compromises Congress reaches in trying to achieve its goals are reflected in the language it enacts. As the Supreme Court observed in *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986):

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

"Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 525-26.

The Supreme Court has repeatedly emphasized in recent terms that legislation must be enforced in accordance with its plain language and not according to a judicial assessment of how best to effectuate a perceived legislative purpose. *See, e.g., Loughrin v. U.S.*, 134 S.Ct. 2384, 2390 (2014) (applying the "plain text" of the federal bank fraud statute, which does not require proof of intent to defraud a financial institution, even though that extends its coverage "to a vast range of fraudulent schemes, thus intruding on the historic criminal jurisdiction of the States"); *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S.Ct. 1184, 1196, 1199-1200 (2013) ("under the plain language of Rule 23(b)(3)," securities fraud plaintiffs are not required to prove materiality at the class-certification stage even though "certain 'policy considerations' militate in favor of requiring [such] proof").

Thus, when the Ninth Circuit recently limited the statute of repose in Section 16(b) of the Securities Exchange Act of 1934 based on its view of Congressional policy, instead of applying its text, the Supreme Court reversed. Its

explanation is instructive as to why the Statute should not be applied to statutes of repose here:

> Congress could have very easily provided that 'no such suit shall be brought more than two years after the filing of a statement under subsection (a)(2)(C).' But it did not. The text of [Section] 16 simply does not support [such a] rule. . . . [Respondent] disregards the most glaring indication that Congress did not intend that the limitations period be categorically tolled until the statement is filed: The limitations provision does not say so.

Credit Suisse Sec. (USA) LLC v. Simmonds, 132 S.Ct. 1414, 1419-20 (2012).

The Supreme Court has repeatedly reminded courts not to "rewrite a statute because they might deem its effects susceptible of improvement" to carry out perceived legislative purposes. *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398 (1984). Untethering statutory construction from the plain language of the statute, and relying instead on subjective judicial speculation about how best to accomplish Congressional policy would infringe on the role of our elected legislators. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004).

For these reasons, *amici* strongly urge that the construction of the Statute should begin and end with its text. Failure to follow express plain and unambiguous language would create great uncertainty as to how laws will be interpreted and enforced.

B. The Plain Language of the Statute Is Limited to State Common Law "Contract" and "Tort" Claims

The Statute does not apply to FHFA's Securities Act and Blue Sky Laws claims for another independent reason. The text refers only to State law "contract" and "tort" claims, 12 U.S.C. § 4617(b)(12)(A), not federal or statutory claims. Contrary to the District Court's reasoning, 2014 WL 4276420, at *5, the Statute's statement that it applies to "any action brought by" FHFA does not mean it applies to every claim asserted in such actions. 12 U.S.C. § 4617(b)(12)(A).[4]

Congress's distinction in the text between "actions" and "claims" within those actions demonstrates it did not treat those words as synonyms. The Statute refers to and modifies the statute of limitations for only two types of *claims* — "tort claim[s]" and "contract claim[s]" — and only to the extent those *claims* arise "under State law." *Id.* The text therefore provides no basis to read the Statute to apply to any other claim. Indeed, Congress could not have intended it to apply to any other claims because it does not say *how* the statutes of limitations for any other claim should be changed.[5]

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[4] The word "any" modifies the word "action," not "claim." "Any" "must 'be limited' in [its] application 'to those objects to which the legislature intended [it] to apply.'" *Small v. U.S.*, 544 U.S. 385, 388 (2005).

[5] Congress's choice not to include claims "founded upon" a tort or contract, as in 28 U.S.C. § 2415, further reflects Congress's decision to limit the Statute's application to the State contract and tort claims to which it refers. A statutory claim may be "founded upon" a contract or tort, even if it is not a "tort" or "contract" claim, *see, e.g., Wilson v. Saintine Expl. & Drilling Corp.*, 872 F.2d

Thus, since FHFA's Securities Act and Blue Sky Laws claims here are *sui generis* statutory claims, not "tort" or "contract" claims, the Statute does not apply to them. *See Wilson*, 872 F.2d at 1127 (agreeing with SEC that "Section 12(2) does not permit an analogy to tort or criminal law" and "is not derived from tort law principles"); *Burnett v. S.W. Bell Tel., L.P.*, 151 P.3d 837, 843 (Kan. 2007) (ERISA § 510 claim is not a tort); *Benedetto v. PaineWebber Grp., Inc.*, 1998 WL 568328, *4 (10th Cir. Sept. 1, 1998) (unpublished) (distinguishing securities and tort claims); *Malley-Duff & Assoc. v. Crown Life Ins. Co.*, 792 F.2d 341, 353 (3d Cir. 1986) ("civil RICO . . . cannot be readily analogized to causes of action known at common law"), *aff'd*, 483 U.S. 143 (1987); *Chevron Chem. Co. v. Voluntary Purchasing Grps. Inc.*, 659 F.2d 695, 702 (5th Cir. 1981) (Lanham Act "created a *sui generis* federal statutory cause of action").

The Statute also should not be read to apply to federal claims because it would defeat the purpose reflected in its text that claims it covers have *two* alternative statutes of limitations. The Statute's introductory paragraph states the

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1124, 1127 (2d Cir. 1989), and a "change of [statutory] language is some evidence of a change of purpose." *Johnson v. U.S.*, 225 U.S. 405, 415 (1912). Moreover, even courts addressing the broader language of Section 2415 have declined to apply it to statutory claims that are not grounded on common law claims. *See, e.g.*, *U.S. v. Tri-No Enters., Inc.*, 819 F.2d 154, 158-59 (7th Cir. 1987) (Surface Mining Control and Reclamation Act claim for reclamation fees); *United States v. City of Palm Beach Gardens*, 635 F.2d 337, 339-40 (5th Cir. 1981) (Hill-Burton Act claim for recovery of funds used to construct non-profit hospital); *U.S. v. Lutheran Med. Ctr.*, 680 F.2d 1211, 1214 (8th Cir. 1982) (Community Mental Health Center Act claim to recover grant).

statute of limitations for "contract" and "tort claims" — the only claims to which it refers — shall be "the longer of" the new period in subparagraph (I) of the Statute or, pursuant to subparagraph (II), "the period applicable under State law." 12 U.S.C. § 4617(b)(12)(A)(i) & (ii). But subparagraph (II) cannot apply to federal claims because it does not refer to the period applicable under federal law. 12 U.S.C. § 4617(b)(12)(A)(i)(II) & (ii)(II). Thus, the Statute's reference to "the longer of" two applicable periods would make no sense as to federal claims if they were covered.

Furthermore, if the Statute's reference to "any tort claim" applied to federal claims, it would not preserve the pre-existing federal statute of limitations for such claims when it is longer than the three-year alternative under subparagraph (A)(ii)(I). That application would therefore have the perverse effect of reducing to three years FHFA's time to bring actions that would otherwise be governed by a longer federal statute of limitations. *See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 143 (1987) (four years for RICO claims); 15 U.S.C. § 15(b) (four years for Clayton and Sherman Act claims); 28 U.S.C. § 1658(a) (four years for federal claims without a specific statute of limitations). There is nothing in the text of HERA to support that untoward

outcome. For all of these reasons, the more natural and logical reading of the text is that the Statute does not apply to federal claims. *CTS*, 134 S.Ct. at 2188.[6]

The distinction between statutory claims created by Congress and State legislatures and State contract and tort claims is important to *amici* and their members. When legislatures enact statutes that create private securities law claims, they balance public policies and competing factors. One of the key legislative determinations is the point at which such claims are abolished by the passage of time, regardless of when the plaintiff's injury occurred or was discovered. That determination should not be overruled by statutes of limitations applicable to contract and tort claims.

C. The Ruling Below Should Be Reversed to Preserve Legislatively-Enacted Statutes of Repose and Important Federalism Principles

The District Court, applying its own view of the purpose of the Statute, emphasized the importance *to FHFA* of having "time to investigate and

[6] This Court's *UBS* decision and the Tenth Circuit's *Nomura I* decision do not require a different outcome. While FHFA has argued that those pre-*CTS* decisions found the Statute is not limited to "contract claim[s]" and "tort claim[s]" that arise "under State Law", those decisions were based on a judicial assessment of Congress's supposed purpose in passing extender statutes. *See UBS*, 712 F.3d at 142 (exempting securities claims from the scope of the Statute "would have undermined Congress's intent to restore Fannie Mae and Freddie Mac to financial stability."); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1269 (10th Cir. 2013) ("Applying the Extender Statute to statutory claims serves the statute's purpose by providing NCUA sufficient time to investigate and file all potential claims. . . ."). *CTS* rejected that mode of analysis, and explained that Congressional intent is discerned primarily from the statutory text.

develop potential claims," 2014 WL 4276420, at *4, but did not mention the enormous importance of the legislatively-enacted statutes of repose FHFA seeks to displace. Statutes of repose in general, and the Securities Act's and Blue Sky Laws' statutes of repose for strict liability claims in particular, are critical to ensure certainty and finality. Moreover, federalism principles strongly disfavor preemption of the Blue Sky Laws' statutes of repose.

CTS explained the important rationale for statutes of repose: they "effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time'. . . . Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability." 134 S.Ct. at 2183. *See also Bradway v. Am. Nat'l Red Cross*, 992 F.2d 298, 301 n.3 (11th Cir. 1993) ("In passing a statute of repose, a legislature decides that there must be a time when the resolution of even just claims must defer to the demands of expediency."); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1300 n.7 (4th Cir. 1993) (statute of repose "serves the need for finality in certain financial and professional dealings").

Statutes of repose are particularly important to ensure finality in the context of strict liability claims under the Securities Act and Blue Sky Laws. As the Tenth Circuit explained, the "legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would

disrupt normal business and facilitate false claims. It was understood that the three-year rule [in Section 13] was to be absolute." *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1435 (10th Cir. 1991), *judgment vacated on other grounds*, *Dennler v. Trippet*, 503 U.S. 978 (1992). Indeed, Congress quickly shortened the Securities Act's statute of repose to three years when it realized the strict liability the Act created was stifling the economy. 78 Cong. Rec. 8709-10 (1934) ("it is well known that because of this law the issuance of securities has practically ceased").

No less today than 80 years ago, statutes of repose enable financial institutions to deploy for productive use capital that might otherwise be tied up indefinitely in reserves to cover potential liability. The SEC has extolled the beneficial purposes of the Securities Act's statute of repose: "The three-year provision assures businesses that are subject to liability under [Sections 11 and 12] that after a certain date they may conduct their businesses without the risk of further strict liability for non-culpable conduct." Brief of SEC as Amicus Curiae, *P. Stolz Family P'ship L.P. v. Daum,* No. 02-7680, 2003 WL 23469697, *8 (2d Cir. Sept. 8, 2003).

The statutes of repose at issue here are also critical because they protect market participants from "problems of proof . . . that arise if long-delayed litigation is permissible." *Norris v. Wirtz*, 818 F.2d 1329, 1333 (7th Cir. 1987).

Statutes of repose encourage prompt enforcement of the securities laws and serve cultural values of diligence. They prevent strategic delay by plaintiffs, who could otherwise seek "recoveries based on the wisdom given by hindsight" and the "volatile" prices of securities. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990). They also protect new shareholders, bondholders and management from liability for conduct that occurred at a time when they were not associated with the business. Allowing FHFA's claims here to proceed would undercut these important objectives.

The Virginia legislature and the District of Columbia, by including statutory repose periods in their Blue Sky Laws, intended to provide these same types of assurances and benefits. *See, e.g.*, *Hess v. Snyder Hunt Corp.*, 392 S.E.2d 817, 819 (Va. 1990) ("Statutes of repose evince a legislative policy decision that after the expiration of a specific time a defendant should no longer be subjected to liability.").

Allowing FHFA's Blue Sky Laws claims to proceed would undercut these important State law objectives. Long-dead FHFA claims could be resurrected despite the mandate of the statutes of repose. Potential liability for such claims in connection with future mortgage loan defaults could extend virtually indefinitely because under the Statute the claims might not even accrue

until FHFA is appointed as conservator of an entity that purchased the defaulting loans, an event untethered to the alleged wrongdoing that could occur at any time.

Under federalism principles, these important State law objectives, and Virginia's and the District of Columbia's exercise of their traditional powers to define and limit causes of action they create, make a finding of preemption of their statutes of repose particularly inappropriate here. As the Supreme Court has explained, the power to supplant State law is "an extraordinary power in a federalist system" that "we must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). Here, as explained above, the Statute is at a minimum susceptible of a plausible reading that disfavors pre-emption, as several courts have held.

Moreover, the "case for federal pre-emption is particularly weak" where, as is also true here, Congress has indicated "its awareness of the operation of state law in a field of federal interest." *CTS*, 134 S.Ct. at 2188. Congress knew that HERA, like CERCLA, does not create a complete remedial scheme. Under HERA, FHFA stands in the shoes of the GSEs in asserting State law claims.

The Supreme Court's decision and analysis of the CERCLA extender statute in *CTS* have put to rest any question whether similar extender statutes apply

to statutes of repose. Nevertheless, if the Extender Statute is interpreted in accordance with its perceived purpose, and not simply its plain and unambiguous language as required by Supreme Court precedent, *amici* strongly urge that the purpose of preserving critically important substantive legislatively-created repose rights, and principles of federalism, should be a paramount consideration in arriving at an understanding why Congress chose not to refer to statutes of repose in the Statute. Furthermore, the presumption against preemption requires the Statute to be read not to preempt the Blue Sky Laws' statutes of repose.

II. THE DISTRICT COURT INCORRECTLY APPLIED THE "REASONABLE CARE" DEFENSE

The District Court granted FHFA's summary judgment motion to dismiss appellants' "reasonable care" defense to FHFA's claims under Section 12 and the Blue Sky Laws because it found "Defendants had to investigate whether the statements in the Offering Documents were reliable" and failed to do so. *FHFA v. Nomura,* 68 F. Supp. 3d 439, 485 (S.D.N.Y. 2014). That decision was erroneous.

As the District Court explained, "Section 12(a)(2)'s reasonable care defense is 'less demanding' in some respects than Section 11's due diligence defense." *Id.* at 475. While Section 11 expressly predicates that defense on a "reasonable investigation," 15 U.S.C. § 77k(b)(3), Section 12(a)(2) and the Blue Sky Laws do not impose that requirement. *Id.* at 771. A defendant must show only

that "he did not know, and in the exercise of reasonable care could not have known" of the alleged misstatement. 15 U.S.C. § 77l(a)(2).

The District Court acknowledged that "Nomura's position" that it exercised reasonable care "is not without a certain intuitive appeal" because Nomura looked at nearly 40% of the loans before it bought them, to confirm they were not defective, 68 F. Supp. 3d at 477, and that RBS tested two of the loan pools to be securitized. *Id.* at 481. The court also found that "Nomura has offered evidence that, in some respects, it met and even exceeded any industry-wide norms that existed during this period," *id.* at 481, Nomura conducted a "[v]aluation review . . . on all loans," and "[c]redit and compliance reviews were usually conducted on all loans in a mini-bulk trade pool, as well as any individual loans submitted through Nomura's conduit channel." *Id.* at 449. Accordingly, there were issues of fact requiring trial as to whether defendants exercised "reasonable care." *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 n.12 (1976) ("the jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment"); *Mass. Mut. Life Ins. Co. v. DB Structured Prods.*, 2015 U.S. Dist. LEXIS 80553, *32 (D. Mass. June 22, 2015) (denying summary judgment for plaintiff and declining, on the reasonable care defense under Massachusetts securities law that mirrors Section 12(2), to follow the court below's decision here: "the question of reasonableness, in this and in

other contexts, is generally a jury question, a principle Judge Cote herself acknowledged.").

Amici's members have a strong interest in this question because allowing the District Court's holding to stand would significantly weaken the "reasonable care" defense under Section 12 and Blue Sky analogues, and thereby impose unprecedented risks and burdens not contemplated by those statutes.

III. THE DISTRICT COURT INCORRECTLY LIMITED SECTION 12'S "LOSS CAUSATION" DEFENSE TO LOSSES "UNRELATED TO THE PHENOMENA UNDERLYING THE ALLEGED MISREPRESENTATION"

A person who violates Section 12 may limit his liability by proving that "any portion or all of the amount recoverable . . . represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted." 15 U.S.C. § 77l(b). Congress, in enacting that defense, deliberately balanced the strict liability imposed by Section 12 with a critical limitation of that liability to the consequences of the defendant's own misstatements.

However, the District Court denied defendants' loss causation defense that some or all of FHFA's losses were caused by the unprecedented housing market downturn, and not by the "prospectus[es] for or oral communication[s]" with respect to the seven securities at issue, which were purchased for $2.05 billion and "represented less than 0.1% of the roughly $3 trillion in [private-label RMBS]

issued in the period 2005 to 2007." 2015 WL 2183875, at *126. That ruling was incorrect.

The court acknowledged "there is a strong correlation between the collapse of housing prices and losses incurred by [Freddie and Fannie], whose entire existence is devoted to the housing market." *Id.* at *129. Freddie and Fannie asserted in contemporaneous litigation that "a systemic economic collapse" caused the drop in their stock prices. *Id.* at *128-29. The court nevertheless reasoned that defendants' loss causation defense should be denied because defendants could not prove the economic collapse was "unrelated to the phenomena underlying the alleged misrepresentations," *id.* at *126, *129, and the alleged market-wide "[s]hoddy origination practices that are at the heart of this lawsuit" "were part and parcel of the story of the housing bubble and the economic collapse that followed." *Id.* at *76.

The correct standard under 15 U.S.C. § 771(b), however, is whether any part of the loss did not result from the relevant "prospectus or oral communication," not whether it was "unrelated to the phenomena underlying the alleged misrepresentation." As this Court has explained, "'when the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases,' and a plaintiff's claim fails when 'it has not adequately ple[]d facts which, if

proven, would show that its loss was caused by the alleged misstatements.'" *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 174 (2d Cir. 2005).

Amici urge reversal because allowing this holding to stand would rewrite and undermine the statutory loss causation defense. It would make issuers and underwriters potentially liable for market-wide losses that did not result from their "prospectus[es] or oral communication[s]", whenever a court decides that a defendant's conduct was related in some way, however attenuated, to intervening economic events that actually caused the plaintiff's losses in whole or in part. Such a result would impose enormous risks and potential liabilities not contemplated by the text of the statute, and thereby increase transaction costs and market uncertainty.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed.

October 29, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,998 words, exclusive of the corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of digital submission and this certificate of compliance, which are exempted by Fed. R. App. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2010 in a proportionally spaced typeface, namely Times New Roman 14-point font.

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Dated: October 29, 2015

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing, as submitted in digital form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with McAfee's VirusScan Enterprise 8.8 and, according to the program, is free of viruses.

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Dated: October 29, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of October 2015:

I presented *Amici Curiae's* Brief to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record.

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Dated: October 29, 2015