No. 15-783

In The
Supreme Court of the United States

RBS SECURITIES INC.; DEUTSCHE BANK SECURITIES INC.; GOLDMAN, SACHS & CO.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR GUARANTY BANK,

Respondent.

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

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

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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. SIFMA is the United States regional member of the Global Financial Markets Association.[1]

The Clearing House, established in 1853, is the oldest banking association and payments company in the United States. 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 United States and more than two million people worldwide. The Clearing House Association LLC is a nonpartisan advocacy organization that represents the interests of its owner banks by

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[1] Pursuant to this Court's Rule 37.2(a), SIFMA gave all parties at least 10 days' notice of intention to file this brief. *Amici* have submitted to the Clerk letters from all parties consenting to the filing of this brief. This brief was not authored in whole or in part by counsel for any party. No counsel or party other than *amici*, their members or their counsel made a monetary contribution to fund the preparation or submission of this brief.

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., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost $2 trillion each day, which is nearly half of the automated clearing house, funds transfer and check-image payments made in the United States.

In this action, the Federal Deposit Insurance Corporation ("FDIC") concedes it did not bring its claims under the Texas Securities Act (the "TSA") within the period allowed by the TSA's five-year statute of repose. Petitioners moved for judgment on the pleadings on those claims because they are barred by that statute of repose. The FDIC responded that Petitioners' motion should be denied based on a provision of 12 U.S.C. § 1821(d)(14) (the "FDIC Extender Statute" or the "Statute") which was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). The Statute extends the "statute of limitations" for certain claims by the FDIC. However, the Statute clearly and unambiguously extends *only* the "statute of limitations," and not the statute of repose. Accordingly, the District Court properly rejected the FDIC's argument and granted Petitioners' motion. The court explained

that the plain language of the Statute and this Court's decision in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014), "compel[ ] the conclusion" that the TSA's statute of repose governs the FDIC's TSA claims and requires the dismissal of those claims. Pet.App. 50a. On August 10, 2015, the Court of Appeals for the Fifth Circuit reversed. The Fifth Circuit construed the Statute to permit the FDIC to bring claims after the period allowed by the TSA's statute of repose. *Amici* and their members are concerned about this unwarranted elimination of repose and the Fifth Circuit's decision to premise its ruling on its own view of the Statute's purpose.

Amici and their members have a strong interest in this Court granting Petitioners' petition for certiorari for five principal reasons:

First, the Fifth Circuit's decision defies and is utterly contrary to *CTS*. *CTS* enunciated clear and categorical principles on the important federal question of whether the Congressional extension of statutes of limitations for certain state law claims also extends statutes of repose. The Fifth Circuit's failure to follow those principles, and the potential application of its decision to other extender provisions, is of grave concern to *amici's* members because it creates uncertainty, undermines the ability of market participants to act based on reasoned assumptions concerning the meaning of the law, and therefore has a destabilizing effect on the efficient functioning of the securities markets. This Court should definitively settle this issue now.

Second, the Fifth Circuit's decision departs from this Court's teaching on whether the text of a Congressional statute should yield to a lower court's view of the purpose of the statute. *Amici* and their members recognize the importance of applying laws as they are written by Congress, not based on subjective judicial assertions of legislative purpose that do not take account of the often competing objectives that Congress weighs in drafting particular provisions. That is essential to ensure predictability. Predictability is crucial for business planning and the effective and efficient functioning of the markets because it allows participants to understand how to comply with the law and how it will be enforced. This Court should take this valuable opportunity to address this issue, restore the focus to the text of the Statute and correct an interpretation that strays from its plain language and structure.

Third, *amici's* members rely on the fair, consistent and timely enforcement of federal and state securities laws to deter and remedy wrongdoing. One key component of that enforcement is the consistent application of statutes of repose that are a critical part of those laws and serve purposes wholly distinct from statutes of limitation. By establishing a definitive outside 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 participants are free from the fear of lingering liabilities and stale claims, and ensure that claims can be adjudicated based on evidence that is fresh.

Amici's members and their investors and customers depend upon statutes of repose in their financial planning and operations. The Fifth Circuit's decision undermines important aspects of the statute of repose that the Texas legislature made a central component of the TSA.

Fourth, the Fifth Circuit's decision does not follow this Court's instruction that federal statutes should not be construed to pre-empt state law unless the intention to do so is unmistakably clear. This Court should accept this appeal to provide guidance on this important federalism principle.

Fifth, the Fifth Circuit's decision raises important and recurring issues of federal law and federalism, and deepens a persistent conflict in the lower courts concerning the application of extender statutes to statutes of repose. The FDIC, the National Credit Union Administration Board ("NCUA"), and the Federal Housing Finance Agency ("FHFA") have commenced numerous actions against financial institutions concerning the sale of tens of billions of dollars of residential mortgage-backed securities. They seek to apply the same or similar extender statutes to assert federal and state law securities claims based on the same incorrect construction that the Fifth Circuit adopted. Accordingly, if the Fifth Circuit's misreading of the Statute and failure to follow this Court's express holding in *CTS* concerning statutes of repose is allowed to stand, even for a few years, it will have far-reaching consequences for the securities industry and the economy. The absence of uniformity

on such an important issue of federal law is particularly problematic for *amici's* members because they are located throughout the United States and operate in multiple jurisdictions. This Court's review is needed now to bring the Fifth Circuit's and other lower courts' sharply divergent constructions of extender statutes and treatment of venerable statutes of repose into alignment with *CTS*. The meaning of federal law should not depend on where suit is filed. This case presents an ideal vehicle to resolve this issue because the pressure to settle similar lawsuits seeking large recoveries could be a roadblock to appeals reaching this Court in other cases.

SUMMARY OF ARGUMENT

This case concerns the question whether an extender statute that expressly applies to statutes of limitations should also be applied to a statute of repose enacted by a state legislature as a fundamental substantive limitation on a near strict liability state statutory claim. *Amici* support Petitioners' argument that the Statute should be construed in accordance with this Court's prior rulings and its plain language, and thus should not apply to or preempt the TSA's statute of repose.

The Statute is clear and unambiguous. It extends only the "statute of limitations" for certain claims

brought by the FDIC as a conservator or liquidating agent.[2] Statutes of repose are not mentioned. Nothing in the Statute extends the statute of repose for any claim.

There is nothing novel about overriding a State's statute of limitations while continuing to give effect to its statute of repose. This 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 for certain State law environmental actions, but not the repose period. 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 toxic contaminants. This Court found in *CTS* that Section 9658 extends *only* the statute of limitations and *not* statutes of repose.

Congress enacted the Statute only three years after enacting Section 9658. As the District Court correctly found, "a faithful application of [*CTS*]'s logic to the FDIC Extender Statute compels the conclusion the TSA's statute of repose is not preempted, and operates to bar the FDIC's untimely claims." Pet.App. 50a. However, the Fifth Circuit did not follow the plain language of the Statute and the analysis required by *CTS*. Instead, the Fifth Circuit substituted

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[2] The Petition for Writ of Certiorari provides the full text of the relevant statutes in its Statutory Provisions section.

its view that the purpose of the Statute was "to grant the FDIC a three-year grace period after its appointment as receiver to investigate potential claims." Pet.App. 21a.

Compelling and urgent reasons warrant granting certiorari now. The Fifth Circuit's decision is contrary to both the plain language of the Statute, which applies only to "the applicable statute of limitations," and this Court's holding in *CTS*. This Court in *CTS* emphasized that the intent of Congress must be "discerned primarily from the statutory text," that no legislation "pursues its purposes at all costs," and that Congress understood by 1986 (when CERCLA's extender provision was enacted) that statutes of repose are separate and distinct from statutes of limitations. 134 S. Ct. at 2182-83, 2185. This Court has also explained that federal statutes should not be construed to pre-empt state law unless the intention to do so is unmistakably clear. The Statute does not manifest any such intention.

This case therefore presents the Court with a valuable opportunity to correct a ruling that impermissibly disregards basic tenets of statutory construction established in *CTS* and other decisions of this Court, and halt the improvident erosion of statutes of repose and important federalism principles and the expansion of extender statutes beyond their express terms. If statutes are interpreted based on courts' subjective views of how best to accomplish legislative purposes, or based on the assumption that Congress does not understand critical distinctions between

terms (such as between statutes of limitations and statutes of repose), or based on the assumption that Congress does not understand how to make clear a supposed intention to pre-empt state law, there is no limit to the manner in which statutes may be misconstrued and state statutes circumvented. That would undermine the bedrock principle of predictability upon which all market participants rely. It is vital to the securities industry and financial markets that laws are construed and applied as enacted by Congress and that statutes of repose are strictly enforced.

This Court's review is also needed now to resolve a deep and persistent conflict in the lower courts and to ensure that extender statutes are consistently applied. At least ten District Court rulings, including seven after *CTS*, have considered whether the FDIC, NCUA and FHFA extender statutes displace statutes of repose. Although the Fifth Circuit, and the Tenth Circuit in *NCUA v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015), have concluded incorrectly that the extender statutes preempt statutes of repose, the majority of district courts to consider this question have found no displacement of statutes of repose. The rulings of the Fifth and Tenth Circuits have created considerable uncertainty. The questions presented here are plainly recurring, important, and involve enormous claims. They should be resolved by the Court. *See U.S. v. Centennial Sav. Bank FSB*, 499 U.S. 573, 578 n.3 (1991) (granting certiorari "in light of the significant number of pending cases" concerning

the question presented); *Pinter v. Dahl*, 486 U.S. 622, 632 (1988) (granting certiorari "[b]ecause of the importance of the issues involved to the administration of the federal securities laws"); *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) ("This enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari.").

ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED BECAUSE THE DECISION BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF THE EXTENDER STATUTE AND THIS COURT'S DECISION IN *CTS*

A. This Court Granted Certiorari in *CTS* Because of the Critical Importance of Determining Whether Extender Statutes That Apply to Statutes of Limitations Also Affect State Law Statutes of Repose

This Court's grant of certiorari in *CTS* recognized the importance of the question whether extender provisions that expressly apply to statutes of limitations also displace state law statutes of repose, and that it required resolution by this Court. Prior to *CTS*, lower courts were divided on this question in cases brought under the extender provisions of CERCLA and other statutes, including FIRREA. *See*

134 S. Ct. at 2182 (citing cases); Pet. at 12-14 (same). The Fifth Circuit's decision makes that equally true now, and equally requires this Court's review to make it clear that this Court meant what it said in *CTS*.

B. The Plain Language of the Statute and This Court's Decision in *CTS* Establish That the Statute Applies Only to "Statutes of Limitation" and Does Not Displace Statutes of Repose

In *CTS*, this Court held that CERCLA's extender provision does *not* displace statutes of repose. This Court based its ruling primarily on the "natural reading of [CERCLA's] text" which – like the Statute – refers only to statutes of limitation and contains other textual features that are incompatible with its application to statutes of repose. 134 S. Ct. at 2188.

This Court has long emphasized 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 has explained that "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Dean v. United States*, 129 S. Ct. 1849, 1853 (2009) (citation and quotation marks omitted). Courts must look to "what Congress has written . . . neither to add nor to subtract, neither to delete nor to distort." *62 Cases, More*

or Less, Each Containing Six Jars of Jam v. United States, 340 U.S. 593, 596 (1951).

Indeed, it has been a dominant theme of this Court 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.*, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196, 1199-1200 (2013) (Ginsburg, J.) ("under the plain language of Rule 23(b)(3)," plaintiffs in securities fraud class actions are not required to prove materiality at the class-certification stage even though "certain 'policy considerations' militate in favor of requiring precertification proof of materiality"); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 1999-2000, 2006 (2012) (Alito, J.) ("ordinary meaning" of 28 U.S.C. § 1920, which awards costs for "compensation of interpreters," excludes the cost of document translation even though "it would be anomalous to require the losing party to cover translation costs for spoken words but not for written words"); *Hall v. United States*, 132 S. Ct. 1882, 1887, 1893 (2012) (Sotomayor, J.) (under a "plain and natural reading" of Bankruptcy Code § 503(b), the phrase "any tax . . . incurred by the estate" does not cover tax liability resulting from individual debtors' sale of a farm even though "there may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable"); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1890, 1895 (2011) (Thomas, J.) (the word "report" in

the False Claims Act's public disclosure bar "carries its ordinary meaning" and thus includes responses to FOIA requests even though this permits potential defendants to "insulate themselves from liability by making a FOIA request for incriminating documents").

There is no dispute that the TSA contains a statute of repose. Article 581-33(H)(2)(b) states claims can "in no event" be brought "more than five years after the sale" of the securities at issue. *Williams v. Khalaf*, 802 S.W.2d 651, 654 n.3 (Tex. 1990). That statute of repose "abolishes the cause of action." *Servicios-Expoarma, C.A. v. Indus. Mar. Carriers, Inc.*, 135 F.3d 984, 989 (5th Cir. 1998). In *CTS*, this Court explained that "[s]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" 134 S. Ct. at 2183.

There is also no dispute that the Statute, like the extender provision at issue in *CTS*, refers to the "statute of limitations" many times but never to statutes of repose. *CTS* explained the "critical distinction" between those two concepts, and concluded 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 2187.

As the District Court correctly found, that awareness "can fairly be imported to Congress three years later when it enacted" the Statute. Pet.App.

63a. *Accord In re Countrywide Fin. Corp. Mortg.-Backed Secs. Litig.*, 966 F. Supp. 2d 1031, 1037, 1039 (C.D. Cal. 2013) (statements "both prior to and contemporaneous with the enactment of FIRREA 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. 2014) ("[W]hen 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. That gives no support to the FDIC's argument that it intended to replace both."), *appeal pending*, No. 14-3648 (2d Cir.).

Moreover, as *CTS* explained, the primary meaning of "statute of limitations" excludes statutes of repose. 134 S. Ct. at 2185. Statutory terms should generally be interpreted in accordance with their primary meaning. *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91-92 (2006). Furthermore, where possible, statutes should be read to harmonize federal and state law. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973) ("[T]he proper approach is to reconcile the operation of both [state and federal] statutory schemes with one another."). "[T]he starting presumption [is] that Congress does not intend to supplant state law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

Thus, contrary to the Fifth Circuit's conclusion, this Court's strict statutory construction in *CTS* applies with equal or greater force here. Congress, in making the same choice in the Statute to refer only to the "statute of limitations" did *not* displace statutes of repose.

C. The Fifth Circuit Substituted its Own View of the Purpose of the Statute for the Language Enacted by Congress

Instead of being guided by the plain language of the Statute, its textual similarities to CERCLA's extender statute and this Court's teaching in *CTS* concerning that language and pre-emption, the Fifth Circuit relied heavily on its own view of the purpose of the Statute to override its plain text. The Fifth Circuit concluded 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 Statute; that the "Statute did not create a new statute of limitations merely for the ordinary reasons," even though Congress did not say that in the Statute either; and that "[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 the Statute limits the new statute of limitations to certain types

of claims and does not displace statutes of repose. Pet.App. 22a, 29a, 45a.[3]

This Court rejected such reasoning in *CTS* and reaffirmed the fundamental principle that "Congressional intent is discerned primarily from the statutory text." 134 S. Ct. at 2185.

D. The Fifth Circuit Overlooked the Nature of the Legislative Process and the Principle That No Legislation Pursues its Purposes at All Costs

The Fifth Circuit overlooked the fact that when Congress crafts complex legislation such as FIRREA, it inevitably balances competing policy goals. As this Court explained in *CTS*, the Fourth Circuit erred in that case by "invoking the proposition that remedial statutes should be interpreted in a liberal manner . . . [and] treat[ing] this as a substitute for a conclusion grounded in the statute's text and structure." 134 S. Ct. at 2185. "[A]lmost 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. United States*, 480 U.S. 522, 525-26

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[3] Notably, an earlier Fifth Circuit decision states the purpose of the Statute quite differently – namely, to resolve a "split of authority" as to the accrual date of a cause of action brought by the FDIC as receiver. *SMS Financial v. ABCO Homes, Inc.*, 167 F.3d 235, 241-42 (5th Cir. 1999).

(1987) (*per curiam*)). *See also 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.").

This 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.

E. Review Is Needed Urgently to Undo the Uncertainty the Fifth Circuit Has Created in the Financial Markets

This Court's decision and analysis of CERCLA's extender statute in *CTS* should have put to rest whether similar extender statutes apply to state law statutes of repose, such as the TSA's five-year statute of repose. Nevertheless, the Fifth Circuit, in applying its own view of the purpose of the Statute, instead of the Statute's plain language, disturbingly joined two other Circuits and a State court which had done the same thing, and deepened a conflict in the lower courts. It is therefore imperative that the Court now step in and make it clear that it meant what it said in *CTS*. The unambiguous statutory language controls.

For example, in *NCUA v. Nomura Home Equity Loan, Inc.*, on which the Fifth Circuit misplaced heavy reliance, the Tenth Circuit, rather than applying the text of the Statute, 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 1199, 1216-17 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015) (citation and quotation marks omitted). 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. That 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. Similarly, the pre-*CTS* decision of the Second Circuit in *FHFA v. UBS Americas Inc.*, on which the Fifth Circuit also relied, was based on its assessment of Congress's purpose in the extender provision of the Housing and Economic Recovery Act ("HERA"), which is nearly identical to the Statute, and its assumption that Congress "used the term 'statute of limitations' to refer to statutes of repose." 712 F.3d 136, 143 (2d Cir. 2013). *See FDIC v. Bear Stearns Asset Backed Secs. I LLC*, 92 F. Supp. 3d 206, 213 (S.D.N.Y. 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*, No. 15-1037 (2d Cir.); *FDIC v. Chase Mortg. Fin. Corp.*, 42 F. Supp. 3d 574 (following *CTS* in finding the FDIC Extender Statute does not alter statutes of repose). And Judge Cote in the Southern District of New York ruled in *FHFA v. HSBC North American Holdings Inc.*, 2014 WL 4276420 (S.D.N.Y. Aug. 28, 2014), *appeal pending sub nom. FHFA v. Nomura Holding America, Inc.*, No. 15-874 (2d Cir.), after this Court's decision in *CTS*, that HERA's extender provision displaces statutes of repose.

On the other hand, Judge Stanton of the Southern District of New York, reconsidering in light of *CTS* his prior denial of a motion to dismiss, held the Statute does *not* displace Section 13's statute of repose. *FDIC v. Chase Mortg. Fin. Corp.*, 42 F. Supp. 3d at 578-79. Judge Swain of the same Court later agreed with Judge Stanton. *FDIC v. Bear Stearns Asset Backed Secs. I LLC*, 92 F. Supp. 3d 206. Courts in the Western District of Texas and the Central District of California have reached the same conclusion. *FDIC v. Goldman Sachs & Co.*, 2014 WL 4161567 (W.D. Tex. Aug. 18, 2014) (FDIC extender statute does not apply to statutes of repose, citing *CTS*); *FDIC v. Countrywide Sec. Corp.*, No. 12-cv-3279, slip op. (C.D. Cal. Dec. 8, 2014).[4]

The uncertainty resulting from the Fifth and Tenth Circuits' rulings, the potential application of those decisions to other similar extender provisions, and the continuing conflict on this issue in the lower courts has an enormously destabilizing effect on the efficient functioning of the securities markets, because it eliminates predictability and undermines the ability of industry participants to act based on reasoned

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[4] Other courts reached the same conclusion prior to *CTS*. *See NCUA v. Goldman Sachs & Co.*, No. 2:11-cv-6521-GW-JEM (C.D. Cal. July 11, 2013) (Wu, J.) (§ 1787(b)(14) does not displace statutes of repose), ECF No. 159, interlocutory appeal pending, No. 13-56851 (9th Cir.); *In re Countrywide Fin. Corp. Mortg.-Backed Secs. Litig.*, 966 F. Supp. 2d 1031 (C.D. Cal. 2013) (Pfaelzer, J.) (FDIC extender statute does not displace state law statutes of repose).

assumptions concerning the meaning of the law. Securities law is "an area that demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. at 652. Unclear rules are "not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (citation omitted). Such rules "can have ripple effects" across the financial markets, "increas[ing] costs incurred by professionals" which then "may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute." *Id.* at 189.

Accordingly, this Court should act now to require the lower courts to apply its holdings in *CTS*, to resolve this growing conflict, to halt the erosion of statutes of repose and important federalism principles, and to ensure the uniform application of the Statute and similar extender provisions.

II. THIS COURT'S REVIEW IS NEEDED TO PRESERVE LEGISLATIVELY-ENACTED STATUTES OF REPOSE AND IMPORTANT FEDERALISM PRINCIPLES

The Fifth Circuit, applying its own view of the purpose of the Statute, emphasized the importance to *the FDIC* of having "three years from the date of [its] appointment as receiver to bring claims," Pet.App. 45a, but did not mention the enormous importance of the TSA's statute of repose that the FDIC seeks to

displace. The TSA's statute of repose is not just an essential part of the compromise that was a prerequisite to the enactment of the TSA, but also a "substantive definition of rights." *Jefferson State Bank v. Lenk*, 323 S.W.3d 146, 147 n.2 (Tex. 2010). More generally, statutes of repose are critical to ensure certainty and finality. Furthermore, federalism principles strongly disfavor preemption of Blue Sky 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 near strict liability claims, such as those under the TSA. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419-20 (2012) (reversing limitation on Section 16(b) statute of repose).

Statutes of repose enable financial institutions to deploy for productive use capital that otherwise might be tied up indefinitely in reserves to cover potential liability. Statutes of repose are also critical because they protect market participants from "the problems of proof . . . that arise if long-delayed litigation is permissible." *Norris v. Wirtz*, 818 F.2d 1329, 1333 (7th Cir. 1987). 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.

The Texas legislature, by including a statutory repose period in the TSA, provided these same types of assurances and benefits. *See*, *e.g.*, *Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283, 286-87 (Tex. 2010) ("[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time."); *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 363-64 (5th Cir. 2005) (same); *Servicios-Expoarma, C.A. v. Indus. Mar. Carriers, Inc.*, 135 F.3d at 989 (a statute of repose "abolishes the cause of action").

Under federalism principles, Texas's exercise of its traditional power to define and limit the TSA causes of action it creates makes a finding of preemption of

the TSA statute of repose particularly inappropriate here. As this Court has explained, the power to supplant state law "is an extraordinary power in a federalist system," which "upset[s] the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "If Congress intends to alter [this balance], it must make its intention to do so unmistakably clear in the language of the statute." *Id.* (citation omitted). Therefore, "when 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, it is at a minimum indisputable that the Statute is susceptible of a plausible reading that disfavors pre-emption. Indeed, several courts have already held that the Statute does not apply to statutes of repose.

Furthermore, the "case for federal pre-emption is particularly weak" here because 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 FIRREA, like CERCLA, does not create a complete remedial scheme. Under FIRREA, the FDIC, standing in the shoes of failed banks, asserts state law claims.

The Fifth Circuit's construction of the Statute to displace the TSA's statute of repose undercuts these important federal and state law objectives. If the Fifth Circuit's ruling stands, long-dead TSA claims could be resurrected despite the contrary mandate of the TSA's statute of repose. Potential liability for such

claims in connection with future financial institution failures could extend virtually indefinitely because under the Statute the claims may not even accrue until the FDIC is appointed as liquidator or conservator of the failed financial institution, an event that is untethered to the alleged wrongdoing and could occur at any time.

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, this Court should grant the writ.

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Respectfully submitted,

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