No. 13-56783
(Consolidated with Nos. 13-56675, 13-56781, and 14-57014)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR COLONIAL BANK,

Plaintiff - Appellant,

— v. —

BARCLAYS CAPITAL INC.; CREDIT SUISSE SECURITIES (USA) LLC; DEUTSCHE BANK SECURITIES INC.; EDWARD D. JONES AND CO. LP; RBS SECURITIES INC.,

Defendants - Appellees.

(*For Continuation of Caption See Inside Cover*)

On Appeals from the United States District Court for the Central District of California, the Hon. Mariana R. Pfaelzer, District Judge

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

Ira D. Hammerman
Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, D.C. 20005

Jeremy Newell
Paige E. Pidano
THE CLEARING HOUSE ASSOCIATION LLC
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004

Michael J. Dell
Counsel of Record
Jeffrey W. Davis
Susan Jacquemot
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
Attorneys for Amici Curiae Securities Industry and Financial Markets Association and The Clearing House Association LLC

No. 13-56675
FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR GUARANTY BANK,

Plaintiff – Appellant,

- v. -

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

Defendants – Appellees.

No. 13-56781
FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR STRATEGIC CAPITAL BANK,

Plaintiff – Appellant,

- v. -

DEUTSCHE BANK SECURITIES INC.,

Defendant – Appellee.

No. 14-57014
FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR FRANKLIN BANK, S.S.B.,

Plaintiff – Appellant,

- v. -

BNP PARIBAS SECURITIES CORP.; DEUTSCHE BANK SECURITIES INC.,

Defendants – Appellees.

CERTIFICATE OF INTERESTED PERSONS

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/S/ MICHAEL J. DELL
MICHAEL J. DELL
Counsel of Record
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
mdell@kramerlevin.com
Counsel for Amici Curiae

June 11, 2015

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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.[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 which employ over one million people in the United States and more than two million people 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,

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[1] 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. All parties have consented to the filing of this brief, in accordance with Fed. R. App. P. 29(a).

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, representing nearly half of all 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 Securities Act of 1933 (the "Securities Act") and the Texas Securities Act (the "TSA") within the period allowed by their statutes of repose. Defendants sought the dismissal of those claims because they are barred by those statutes of repose. The FDIC responded that Defendants' motions should be denied based on 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 FDIC Extender Statute extends the "statute of limitations" for certain claims brought by the FDIC. However, the Statute clearly and unambiguously extends *only* the "statute of limitations" for the FDIC's state-law "contract" and "tort" claims, and not the statutes of repose for its Securities Act and TSA claims. Accordingly, the District Court properly rejected the FDIC's

Extender Statute argument and granted Defendants' motions. The court explained that the plain language of the Statute and the Supreme Court's decision in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014), compel the conclusion that the Statute "unambiguously does not displace the . . . statute of repose." ER-Vol.I-Tab.5-p.4. The FDIC's Securities Act and TSA claims are therefore time-barred.

Amici respectfully submit this brief in support of affirmance of the District Court's orders dismissing the FDIC's actions. *Amici* and their members have a strong interest in this appeal for three principal reasons.

First, the Supreme Court in *CTS* enunciated clear and categorical principles on the questions of (i) whether the Congressional extension of "statutes of limitations" for certain state law claims also extends statutes of repose for federal and statutory claims, and (ii) whether the clear and unambiguous text of a Congressional statute should yield to a lower court's view of the purpose of the statute. Those principles, which the court below correctly applied 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. The FDIC's arguments on this appeal would undermine those principles.

Second, *amici* and their members rely on the fair, consistent and timely enforcement of the securities laws to deter and remedy wrongdoing. One key component of that 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 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 market 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. 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 federal securities and other laws as they are written by Congress and state legislatures, not based on subjective assertions of legislative purpose that do not account for the often competing objectives that lawmakers weigh in drafting legislation. That 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.

This case also has far-reaching practical significance for *amici's* members and the securities industry as a whole. The FDIC, the NCUAB and the FHFA have brought numerous federal and state law 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 FDIC urges on this appeal.

SUMMARY OF ARGUMENT

This case concerns the question whether extender statutes that are expressly limited to "statutes of limitations" for state law "contract" and "tort" claims should nevertheless also be applied to statutes of repose under the Securities Act or state securities laws such as the TSA. *Amici* support Defendants' argument, and the District Court's holding, 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. *Amici* also support Defendants' argument, and the District Court's holding, that the statutes of repose in the Securities Act and the TSA cannot be tolled. *Amici* submit this brief to elaborate on the reasons why the rulings below should be affirmed, and why the Statute should not be expanded beyond the limited scope expressly provided 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. § 77(m). Similarly, the Texas legislature included in the TSA both a three-year statute of limitations and a five-year statute of repose. *See* Tex. Rev. Civ. Stat. Ann. Art. 581-33(H)(2)(a) & (b).

In 1989, Congress enacted FIRREA, which added the FDIC Extender Statute. The Statute is clear and unambiguous. It extends only the "statute of limitations" for state law "contract" and "tort" claims brought by the FDIC as a conservator or receiver. 12 U.S.C. § 1821(d)(14). Statutes of repose are not mentioned. Nothing in the Statute extends the statute of repose for any claims.

There was nothing novel about Congress drafting the Statute to override statutes of limitations while continuing to give effect to 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. Congress enacted the Statute only three years later. As the District Court found, applying *CTS*'s logic to the Statute compels the conclusion that, like the CERCLA extender statute enacted only three years earlier, the Statute does not alter applicable statutes of repose. ER-Vol.I.-Tab.5-p.6.

In *CTS*, the Supreme Court addressed the CERCLA extender provision, Section 9658. Section 9658 extends statutes of limitations for state-law tort claims by persons exposed to a toxic contaminant, in language that is in all material respects similar to the Statute. The Supreme Court found that Section 9658 extends *only* statutes of limitations and *not* statutes of repose. The District

Court in this case correctly held that the same textual language, Congressional intent, and pertinent public policies require the same outcome here. In contrast, the FDIC assumes that Congress in 1989 no longer understood the statutory distinction between statutes of limitations and statutes of repose that the Supreme Court found Congress made three years earlier in CERCLA.

If statutes are interpreted based on the assumption that Congress did not understand critical distinctions between terms (such as statutes of limitations and statutes of repose), and based on subjective judicial views of how best to accomplish legislative purposes, there is no limit to how they can be misconstrued. That would undermine the bedrock principle of predictability upon which *amici's* members and all market participants rely. Allowing statutes of repose to be tolled would also defeat the essential legislative purpose of such statutes. It is vital to the securities industry and financial markets that applicable laws are construed and applied as enacted by legislatures, and that statutes of repose are strictly enforced.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE STATUTE AND THE SUPREME COURT'S DECISION IN *CTS* REQUIRE THE AFFIRMANCE OF THE DISTRICT COURT'S RULINGS BECAUSE THE FDIC'S CLAIMS ARE BARRED BY STATUTES OF REPOSE

A. *CTS* and the Plain Language of the Statute Establish that the Statute Applies Only to "Statutes of Limitation" and Does Not Displace Statutes of Repose

In *CTS*, the Supreme Court resolved a division among the lower courts as to whether Congressionally-enacted extender provisions that expressly apply to statutes of limitations also displace statutes of repose. The Court held that 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 statutes of limitations and contains other textual features that are incompatible with its application to statutes of repose. 134 S. Ct. at 2188. The application of this ruling to the plain language of the Statute, which is in all material respects similar to the CERCLA extender statute, requires the affirmance of the decisions below dismissing the FDIC's claims.

The Supreme 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 too has emphasized the importance of this

approach to statutory construction. *See Aragon-Salazar v. Holder*, 769 F.3d 699, 708 (9th Cir. 2014). The District Court correctly applied this bedrock principle to the Statute, and followed the Supreme Court's logic and analysis in *CTS* concerning the textually similar CERCLA extender statute, in finding that the FDIC's claims here are time-barred by applicable statutes of repose.

There is no dispute that both the Securities Act and the TSA contain a statute of repose. *See Police & Fire Retirement Sys. of Detroit v. Indymac MBS, Inc.*, 721 F.3d 95, 107 (2d Cir. 2013); *Booth v. Strategic Realty Trust, Inc.*, 2014 WL 3749759, at *7 (N.D. Cal. July 29, 2014); *Williams v. Khalaf*, 802 S.W.2d 651, 654 n.3 (Tex. 1990). This Court has ruled that a statute of repose, such as those at issue here, "extinguishes a cause of action after a fixed period of time ... *regardless of when the cause of action accrued.*" *Narayanan v. British Airways*, 747 F.3d 1125, 1131 (9th Cir. 2014). In contrast to a statute of limitations, a statute of repose "has a more substantive effect because it can bar a suit even before the cause of action could have accrued, or, for that matter, retroactively after the cause of action has accrued. In proper circumstances, it can be said to destroy the right itself. It is not concerned with the plaintiff's diligence; it is concerned with the defendant's peace." *Underwood Cotton Co. v. Hyundai Merchant Marine (America), Inc.*, 288 F.3d 405, 408-09 (9th Cir. 2002).

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

That awareness "can fairly be imported to Congress three years later when it enacted" the Statute. *FDIC v. Merrill Lynch, Pierce, Fenner & Smith*, 2014 WL 4161561, at *7 (W.D. Tex. Aug. 18, 2014). As the court below observed, 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." ER-Vol.I-Tab.3-p.10. The court correctly concluded that these 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 [Statute]." ER-Vol.I-Tab.3-p.7. *See also FDIC v. Chase Mtge. Fin. Corp.*, 42 F. Supp. 3d 574, 579 (S.D.N.Y. 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. That gives no support to the FDIC's argument that it

intended to replace both."). Thus, the Supreme Court's strict statutory construction in *CTS* applies with equal force here. Congress, in making a similar choice to refer only to statutes of limitations in the Statute, did *not* intend to displace statutes of repose.[2]

CTS teaches that the Statute does not apply to statutes of repose for several additional reasons. *First*, *CTS* held that the CERCLA extender statute's use of the concept of "accrual" indicates that the statute was intended to apply only to statutes of limitations, because that concept is not relevant to repose. 134 S. Ct. at 2187. That logic applies equally to the Statute, which also employs the concept of accrual. The "statute of limitation . . . begins to run" on the date the FDIC becomes the receiver or on "the date on which the cause of action *accrues*." 12

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[2] The cases on which the FDIC relies do not detract from this analysis. The Second Circuit's decision in *FHFA v. UBS Americas, Inc.*, 712 F.3d 136 (2d Cir. 2013), has been displaced by the Supreme Court's ruling in *CTS*. *See FDIC v. Bear Stearns Asset Backed Sec. I LLC*, 2015 WL 1311300, at *7 (S.D.N.Y. Mar. 24, 2015); *FDIC v. Merrill Lynch*, 2014 WL 4161561, at *9 (W.D. Tex. Aug. 18, 2014). The Tenth Circuit in *NCUA v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014), which involved an extender statute virtually identical to the Statute, failed properly to take into account the Supreme Court's decision in *CTS* and the substantial similarities between the NCUA and CERCLA extender statutes. Instead, the court mistakenly relied on generalized pronouncements about FIRREA's remedial purpose to override the extender statute's plain text, precisely the approach proscribed by *CTS*. Similarly, in *FDIC v. Rhodes*, 336 P.3d 961 (Nev. 2014), the Nevada Supreme Court, in a 4-3 decision, improperly relied on superficial differences between the CERCLA and FDIC extender statutes. 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.

U.S.C. § 1821(d)(14)(B) (emphasis added). Consistent with *CTS*, the District Court found "[t]he Extender Statute's focus on accrual, a concept incompatible with statutes of repose, militates against a finding that the Extender Statute applies to statutes of repose." ER-Vol.I-Tab.5-pp.7-8.

Second, CERCLA, like the Statute, "describe[s] the covered [time] period in the singular," not the plural as would be expected if it applied both to statutes of limitations and statutes of repose. *CTS*, 134 S. Ct. at 2186. CERCLA's Section 9658 refers to "the applicable limitations period," "such period" and "the statute of limitations established under State law." 42 U.S.C. § 9658(a)(1) & (2). Similarly, the Statute makes "the applicable statute of limitations" the longer of the period mandated by the statute or "the period applicable under State law." Thus, the Supreme Court's finding that CERCLA's reference to a single covered time period "would be an awkward way to mandate the pre-emption of two different time periods with two different purposes," *CTS*, 134 S. Ct. at 2187, is equally applicable here.

Third, CERCLA, like the Statute, refers to existing actions. The Statute defines "the applicable statute of limitations" "with regard to [certain claims in] any *action* brought by" the FDIC. 12 U.S.C. § 1821(d)(14)(A) (emphasis added). The Supreme Court explained in *CTS* that CERCLA's reference to a "civil action" "presupposes that a [covered] civil action exists" and

is inconsistent with a statute of repose, which "can prohibit a cause of action from coming into existence." 134 S. Ct. at 2187. Accordingly, consistent with *CTS*, the District Court correctly found that the similar language of the Statute does not apply to statutes of repose, which "may extinguish a claim before that claim even accrues." ER-Vol.I-Tab.5-p.7.

The FDIC's argument that the plain language of the Statute, its similarities to CERCLA, and the Supreme Court's logic in *CTS*, should give way to the FDIC's parochial pronouncements about the remedial purpose of the Statute (FDIC Br. 71-72), is untenable because it ignores the fundamental nature of the legislative process. When Congress crafts complex legislation, it inevitably balances competing policy goals. For example, CERCLA was concerned with the goals of environmental remediation, addressing public health threats, and imposing liability on persons responsible for hazardous waste. FIRREA was intended, among other things, "to reform, recapitalize, and consolidate the Federal deposit insurance system" and "enhance the regulatory and enforcement powers of Federal regulatory agencies" for financial institutions. 135 Cong. Rec. S10182-01, 101st Congress, First Session, 1989 WL 193738 (Aug. 4, 1989). However, the Supreme Court in *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.

The Supreme Court explained in *CTS* 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. United States*, 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.

Indeed, it has been a dominant theme of the Supreme Court in recent terms that legislation must be enforced according to its plain language and not according to a judicial assessment of how best to effectuate a perceived legislative purpose. *See, e.g., Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (applying "plain text" of 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 & Trust 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 this Court recently limited the statute of repose in Section 16(b) of the Securities Exchange Act of 1934 based on the policy behind the statute, instead of its plain language, the Supreme Court reversed. The Supreme Court's explanation is instructive as to why the FDIC Extender 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 "improve" or "rewrite a statute because they might deem its effects susceptible of improvement" to carry out perceived legislative purposes. *Badaracco v. Comm'r*, 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 concerns would infringe on the role of elected legislators. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (declining to "read an absent word into the statute" out of "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill"); *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them. . . . [T]he text . . . may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted.").

Failing to follow express statutory language would create great uncertainty as to how laws will be interpreted and enforced. Accordingly, *amici*

strongly urge that the construction of the Statute begin and end with its plain and unambiguous language.

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

The Statute does not apply to the FDIC's Securities Act and TSA claims for another independent reason. The plain language of the Statute refers only to state-law "contract" and "tort" claims, 12 U.S.C. § 1821(d)(14)(A), and not to federal claims or statutory claims. Contrary to the FDIC's arguments, the Statute's statement that it applies to "any *action* brought by" the FDIC does not have a broad displacing effect because it does not mean that it applies to every *claim* asserted in such actions. 12 U.S.C. § 1821(d)(14)(A) (emphasis added).[3]

Congress's distinction in the text between "actions" and "claims" within those actions demonstrates that it did not treat those words as synonyms.

[3] The FDIC argues that the word "any" has an expansive meaning (FDIC Br. 26, 61-62), but that word modifies the word "action," not "claim." The word "any" "must 'be limited' in [its] application 'to those objects to which the legislature intended [it] to apply.'" *Small v. United States*, 544 U.S. 385, 388 (2005). Moreover, "any" "can and does mean different things depending upon the setting." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004). It can "never change in the least [] the clear meaning of the phrase selected by Congress . . . ." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012). Accordingly, courts commonly interpret its meaning in the context in which the word is used. *See, e.g.*, *Nixon,* 541 U.S. at 132 ("any entity" refers only to private and not public entities). The cases the FDIC cites on this point are not to the contrary. They interpret the relevant statutory language in accordance with its plain meaning and properly limit application of the word "any" to the object identified in the statute. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008) ("any" "other law enforcement officers" means "law enforcement officers of whatever kind").

The Statute refers to and modifies the statutes 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 the Statute to apply to any other claims because it does not say *how* the statute of limitations for any other claim should be changed.[4]

Thus, since the FDIC's Securities Act and TSA claims are statutory claims, and indeed *sui generis* statutory claims, not "tort" or "contract" claims, the FDIC Extender Statute does not apply to them. *See Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d at 1127 (2d Cir. 1989) (quoting and agreeing with SEC

[4] The fact that the Statute refers only to state law "contract" and "tort" claims further demonstrates Congress intended a narrow application, because it does not include claims "founded upon" a tort or a contract, unlike 28 U.S.C. § 2415(a). The absence of such "founded upon" language — which has been held, in the application of Section 2415, to invite analogies between statutory claims and tort or contract claims — reflects Congress's decision to limit the Statute's application to the state common law contract and tort claims to which it refers. *See Johnson v. United States*, 225 U.S. 405, 415 (1912) ("A change of [statutory] language is some evidence of a change of purpose."). Although a statutory claim may be "founded upon" a contract or tort, that does not mean a particular statutory claim is a "tort" or "contract" claim. In fact, numerous courts have ruled to the contrary. *See, e.g.*, *In re Zilog, Inc.*, 450 F.3d 996, 998 (9th Cir. 2006); *Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1127 (2d Cir. 1989). Indeed, even courts applying the broader language of Section 2415 have declined to apply it to *sui generis* statutory claims that are not grounded on common law claims. *See, e.g.*, *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 158-59 (7th Cir. 1987) (claim under Surface Mining Control and Reclamation Act); *United States v. Palm Beach Gardens*, 635 F.2d 337, 339-40 (5th Cir. 1981) (claim under Hill-Burton Act); *United States v. Lutheran Med. Ctr.*, 680 F.2d 1211, 1214 (8th Cir. 1982) (claim under Community Mental Health Center Act).

position 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) (claim under ERISA § 510 is not a tort); *Benedetto v. PaineWebber Grp., Inc.*, 1998 WL 568328, at *4 (10th Cir. Sept. 1, 1998) (distinguishing securities and tort claims); *Malley-Duff & Assoc., v. Crown Life Ins. Co.*, 792 F.2d 341, 353 (3d Cir. 1986) ("civil RICO is truly *sui generis* and that particular claim 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 Grp. Inc.*, 659 F.2d 695, 702 (5th Cir. 1981) (because the Lanham Act "created a *sui generis* federal statutory cause of action," common law trade dress infringement precedent was not controlling).

The Statute also should not be read to apply to federal claims because it would defeat the statutory purpose reflected in the text that there be *two* alternative statutes of limitations applicable to claims covered by the Statute, and would have the perverse effect of *reducing* the FDIC's time to bring some federal claims. The Statute's introductory paragraph states that the statute of limitations for "contract" and "tort claims" — the only claims to which it refers — shall be "the longer of" a new period set forth in subparagraph (I) of the Statute or, pursuant to subparagraph (II), "the period applicable under State law." 12 U.S.C. § 1821(d)(14)(A)(i) & (ii). But subparagraph (II) has no possible application to

federal claims because it does not refer to the period applicable under federal law. 12 U.S.C. § 1821(d)(14)(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, even if the Statute's reference to "any tort claim" also applied to federal claims, it would not preserve the pre-existing federal statute of limitations for such a claim when that period exceeds the three-year alternative provided by subparagraph (A)(ii)(I) of the Statute. Thus, that application would have the perverse effect of *reducing* to three years the FDIC's time to bring actions that would otherwise be governed by longer federal statutes of limitations. *See, e.g., Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 143 (1987) (four-year statute of limitations for RICO claims); 15 U.S.C. § 15(b) (four-year statute of limitations for Clayton and Sherman Act claims); 28 U.S.C. § 1658(a) (four-year statute of limitations for federal claims without a specific statute of limitations). There is nothing in the text of FIRREA 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 at all.[5] *CTS*, 134 S. Ct. at 2188.

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[5] The FDIC has previously argued that the Second Circuit's *UBS* decision and the Tenth Circuit's holding in *Nomura I* require that the plain meaning of Congress's express limitation of the Statute to "contract claim[s]" and "tort claim[s]" that arise "under State Law" be ignored. While those pre-*CTS* decisions did reject this express limitation, however, they did so based on a judicial assessment of

The distinction between statutory claims created by federal and state legislatures and state common law contract and tort claims is important to *amici* and their members. When legislatures enact statutes that create new private securities law claims, the legislation reflects a balancing of public policies and competing factors. One of the key legislative determinations is the point at which such claims are deemed to be 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 common law contract and tort claims.

II. THE DISTRICT COURT'S DECISIONS SHOULD BE AFFIRMED TO PRESERVE LEGISLATIVELY ENACTED STATUTES OF REPOSE

Statutes of repose in general, and the statutes of repose under the Securities Act and the TSA in particular, are critical to ensure certainty and finality in the securities industry. *CTS* explained the important rationale behind such statutes: "[s]tatutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time'. . . . Like a

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Congress's supposed purpose in passing the Statute, the very mode of analysis *CTS* rejected. *See UBS*, 712 F.3d at 142 (exempting securities claims from the scope of the extender statute "would have undermined Congress's intent to restore Fannie Mae and Freddie Mac to financial stability"); *NCUA 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 . . . .").

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. As the Tenth Circuit has 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, 1435-36 (10th Cir. 1991), *judgment vacated on other grounds by 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 free up 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 the SEC, as Amicus Curiae at *8, *P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92 (2d Cir. 2004) (No. 02-7680), 2003 WL 23469697. By including a statutory repose period in the TSA, the Texas legislature clearly intended to provide businesses with the same types of assurances and benefits. *See, e.g., Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 286-87 (Tex. 2010) ("In recognizing the absolute nature of a statute of repose, we have explained that 'while 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).

Statutes of repose relating to securities claims 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 further 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). Instead, statutes of repose encourage prompt enforcement of the securities laws and serve cultural values of diligence. They also protect new shareholders, bondholders and management from liability for challenged conduct that occurred at a time when they were not associated with the business. Allowing the FDIC's claims here to proceed would undercut these important objectives.

The Supreme Court's decision and analysis of the CERCLA extender statute in *CTS* has put to rest any question whether similar extender statutes apply to statutes of repose. The court below and other courts have recognized this. *See, e.g.*, *FDIC v. Bear Stearns Asset Backed Sec. I LLC*, 2015 WL 1311300, at *7 (FDIC Extender Statute "does not preempt the statute of repose set forth in Section 13"); *FDIC v. Chase Mtge. Fin. Corp.*, 42 F. Supp. 3d at 579 (same); *FDIC v. Goldman, Sachs & Co.*, 2014 WL 4161567, at *4 (W.D. Tex. Aug. 18, 2014) (same). These courts have acknowledged the critical importance of statutes of repose and refused to modify the substantive repose rights created by legislatures.

III. THE SECURITIES ACT AND TSA STATUTES OF REPOSE ARE NOT SUBJECT TO *AMERICAN PIPE* TOLLING

The Supreme Court's logic and analysis in CTS also supports appellees' argument that tolling under *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 559 (1974), is not available to salvage the FDIC's claims. *See* ER-Vol.I-

Tab.2-p.4; *accord, Police & Fire Retirement System of Detroit v. Indymac MBS, Inc.*, 721 F. 3d 95, 101 (2d Cir. 2013) ("*American Pipe's* tolling rule does not apply to the three-year statute of repose in Section 13"); *Hildes v. Arthur Andersen LLP*, No. 08-CV-0008-BEN-RBB (S.D. Cal. May 15, 2015), ECF No. 159 (same).

CTS explained that statutes of repose start to run from the alleged culpable act, are tantamount to "an additional element of the claim itself which must be satisfied in order for the claim to be maintained," "effect a legislative judgment that a defendant should be free from liability after a legislatively determined period of time" even if that is "before the plaintiff has suffered a resulting injury," and "may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." 134 S. Ct. at 2182-83, 2187; *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) ("[A] period of repose [is] inconsistent with tolling."). Tolling the Securities Act and TSA statutes of repose for putative class members until after a class certification decision would be contrary to these express holdings of *CTS*, and would frustrate the certainty and efficiency of the securities laws.

Since at least the 2003 amendments to Rule 23, class certification motions must be made only at "an early practicable time," and not "as soon as practicable." Fed. R. Civ. P. 23, Advisory Committee's Note. In most securities cases, a class certification motion is not made — or decided — until after extended

motion practice and discovery. Such proceedings are often lengthy. Motions to dismiss are heavily litigated. Class discovery usually overlaps with merits discovery. The district court must make findings concerning various factors relating to class certification. And appellate review may be sought and allowed. Tolling statutes of repose until all of this is completed would leave officers, directors and others who participate in offerings at risk of new lawsuits filed years after their involvement ends, and would therefore defeat the objectives of the Securities Act and TSA statutes of repose.

Tolling these statues of repose would also permit investors — often sophisticated institutional entities with substantial resources — opportunistically to delay filing individual actions. The extended uncertainty caused by allowing such sophisticated investors to sit on the sidelines until after class certification is decided would threaten both judicial economy and other absent class members who lack the financial wherewithal to opt out. Moreover, because discovery from absent class members is "ordinarily not permitted," *see* William B. Rubenstein, *Newberg on Class Action* § 9:11 n.10 (5th Ed.), tolling statutes of repose would increase duplicative discovery and deprive defendants of the ability to obtain timely and fresh recollections from persons who often have the most significant claims.

In contrast, the District Court's application of the Securities Act and TSA statutes of repose without an exception for *American Pipe* tolling allows defendants to know with certainty the size of their potential exposure, and resolve that exposure on a global basis, without unfairly reducing or eliminating the class recovery to account for the possibility of additional opt-out plaintiffs in the future. It thereby facilitates a more timely resolution of securities litigation, including the possibility of settlement in a manner that is fair to class members who cannot afford to opt out.

Even if statutes of repose were subject to *American Pipe* tolling — and they are not — such tolling should not be permitted for claims that the named plaintiffs lacked standing to assert. Such tolling would be inconsistent with *American Pipe*, which premised its ruling on the facts that the named plaintiff had claims that were "typical of the . . . class" and class certification was denied solely for failure to satisfy the numerosity requirement of Rule 23(a)(1) and "not for lack of standing of the representative." 414 U.S. at 551, 552-53. Such tolling would also invite abuse in securities litigation by encouraging the filing of placeholder claims the named plaintiffs lack standing to prosecute in the hope of belatedly finding an investor who might agree to pursue the claims. Incentivizing class plaintiffs and their lawyers to assert such claims would unfairly enhance a class action's settlement value by artificially increasing its *in terrorem* leverage. This

concern is particularly acute in securities cases, where class actions "present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80 (2006).

CONCLUSION

For the foregoing reasons, the District Court's decisions should be affirmed.

Dated: June 11, 2015

Respectfully submitted,

/s/ *Michael J. Dell*
Michael J. Dell
Counsel of Record
Jeffrey W. Davis
Susan Jacquemot
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
mdell@kramerlevin.com
Counsel for Amici Curiae the Securities Industry and Financial Markets Association and The Clearing House Association LLC

Of Counsel:

Ira D. Hammerman
Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, D.C. 20005

Jeremy Newell
Paige E. Pidano
THE CLEARING HOUSE ASSOCIATION LLC
1001 Pennsylvania Avenue, NW
Washington, D.C. 20004

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 6,914 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. P. 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.

/s/ *Michael J. Dell*
Michael J. Dell
Counsel for Amici Curiae

Dated: June 11, 2015

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2015, an electronic copy of the foregoing Brief of *Amici Curiae* Securities Industry and Financial Markets Association and The Clearing House Association LLC in Support of Appellees and in Support of Affirmance was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon registered CM/ECF participants.

/s/ *Michael J. Dell*
Michael J. Dell
Counsel for Amici Curiae

Dated: June 11, 2015