No. _______

In the Supreme Court of the United States

FIRST HORIZON ASSET SECURITIES, INC., ET AL.,
PETITIONERS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A so-called "extender" provision enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1821(d)(14)(A), lengthens "the applicable statute of limitations" for certain contract or tort claims brought by the Federal Deposit Insurance Corporation (FDIC) as the receiver of a failed bank, unless "the period applicable under State law" would be longer. The question presented is whether FIRREA's extender provision displaces the three-year federal statute of repose in Section 13 of the Securities Act of 1933, 15 U.S.C. 77m.

PARTIES TO THE PROCEEDINGS

Petitioners are First Horizon Asset Securities, Inc., FTN Financial Securities Corp., First Tennessee Bank, N.A., Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., HSBC Securities (USA) Inc., RBS Securities Inc., UBS Securities LLC, and Wells Fargo Asset Securities Corporation.

Respondent is the Federal Deposit Insurance Corporation.

CORPORATE DISCLOSURE STATEMENT

Petitioners First Horizon Asset Securities, Inc. and FTN Financial Securities Corporation are wholly owned by petitioner First Tennessee Bank National Association, which is the successor-in-interest by merger to named defendant First Horizon Home Loan Corporation. First Tennessee Bank National Association is wholly owned by First Horizon National Corporation, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Credit Suisse Securities (USA) LLC is wholly owned by Credit Suisse (USA), Inc., which in turn is wholly owned by Credit Suisse Holdings (USA), Inc., which in turn is jointly owned by Credit Suisse AG and Credit Suisse Group AG. Credit Suisse AG is wholly owned by Credit Suisse Group AG, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Deutsche Bank Securities Inc. is wholly owned by DB U.S. Financial Markets Holding Corporation, which in turn is wholly owned by DB USA Corporation, which in turn is wholly owned by Deutsche Bank AG. Deutsche Bank AG has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner HSBC Securities (USA) Inc. is wholly owned by HSBC Holdings plc, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner RBS Securities Inc. is wholly owned by

RBS Holdings USA Inc., which in turn is wholly owned by NatWest Group Holdings Corporation, which in turn is wholly owned by National Westminster Bank plc, which in turn is wholly owned by The Royal Bank of Scotland plc, which in turn is wholly owned by The Royal Bank of Scotland Group plc. The Royal Bank of Scotland Group plc has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner UBS Securities LLC is wholly owned by UBS Group AG, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Wells Fargo Asset Securities Corporation is wholly owned by Wells Fargo Bank, N.A., which in turn is wholly owned by Wells Fargo & Company, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case concerns a purely legal question of federal statutory interpretation: whether FIRREA's extender provision overrides the Securities Act's statute of repose. The court of appeals' answer to that question should have turned on the simple principle that Congress "mean[s] what it says." App., *infra*, 29a (Parker, J., dissenting). By its terms, FIRREA's extender provision lengthens "the applicable statute of *limitations*" for contract and tort claims brought by the FDIC on behalf of failed financial institutions. 12 U.S.C. 1821(d)(14)(A) (emphasis added). FIRREA says nothing about altering any applicable statute of *repose*. That is particularly important in the securities context, because when Congress enacted FIRREA, the Securities Act had long contained both a one-year limitations period *and* a three-year repose period. As the district court explained, "Congress chose language [in FIRREA] which focused on and changed the statute of limitations, and left the statute of repose untouched." App., *infra*, 41a.

This Court addressed virtually identical statutory language three Terms ago in *CTS Corporation* v. *Waldburger*. There, the Court considered the extender provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9658. Like FIRREA, CERCLA refers repeatedly to "limitations," without mentioning repose; describes the covered limitations period in the singular; and ties the running of the limitations period to claim accrual, which is classic limita-

tions language. For those reasons, Justice Kennedy's opinion for the Court in *CTS* held that CERCLA's extender provision does *not* affect the operation of statutes of repose. 134 S. Ct. 2175, 2182 (2014). *CTS* compels the same conclusion for FIRREA's extender provision, which was enacted three years *after* CERCLA's and makes the same distinction between limitations and repose.

The panel majority's decision is directly contrary to, and ignores the reasoning of, *CTS*. Over a lengthy dissent by Judge Barrington D. Parker, the panel majority held that because FIRREA establishes a federal "limitations period" that displaces any shorter state-law limitations period, "this structure suggests that Congress intended the Extender Statute to supersede *any and all other time limitations, including statutes of repose*." App., *infra*, 12a (emphasis added). The statute suggests no such thing. On its face, FIRREA provides for a federal limitations period (six years for contract claims and three years for tort claims), unless a state-law limitations period is longer. Nothing about that remotely requires setting aside statutes of repose. Indeed, as Judge Parker explained, the plaintiffs in *CTS* made this precise argument and "[this] Court rejected it." *Id.* at 24a.

Although this question divided the panel here and has divided numerous judges in federal district courts and state courts, it has not produced a circuit conflict. That should not stand in the way of this Court's review for four reasons. *First*, Justice Kennedy's opinion in *CTS* was explicit that invoking the remedial purposes of extender statutes is not "a substitute" for interpreting their "text and structure." 134 S. Ct. at 2185. Placing the CERCLA and FIRREA extender provisions side by side, there is no relevant distinction

in their text or structure. Here, the panel majority did not even conduct that analysis on a blank slate. It instead deferred to its pre-*CTS* precedent, which rests on the same goal-oriented reasoning that *CTS* rejects. Review is necessary to ensure that the substance of this Court's decisions, no less than the text of Congress's enactments, is given proper meaning and effect.

Second, the question of whether FIRREA's extender provision displaces the Securities Act's statute of repose is one of exceptional national importance, particularly now that the Second Circuit has taken a position post-*CTS*. The three federal agencies with materially identical extender provisions—the FDIC, Federal Housing Finance Agency (FHFA), and National Credit Union Administration (NCUA)—are currently seeking to recover damages related to *$37.5 billion* in securities, but many of those claims are barred by the Securities Act's three-year repose period. Nearly *$32 billion* of those securities are at issue in actions pending within the Second Circuit—a sum greater than the gross national product of approximately half the world's nations. The agencies also seek billions of dollars in prejudgment interest that arises *solely* from the period after the Securities Act's statute of repose expired. Moreover, the Act's broad venue provision means that, going forward, the agencies will be able to bring future securities claims within the Second Circuit and avoid the Securities Act's statute of repose. This Court should have the final word on whether that result comports with *CTS*.

Third, this Court has granted review in the absence of a circuit conflict when faced with an important question of federal law (let alone the partial invalidation of a longstanding federal statute) that has

significant economic consequences. Here, the Government cannot seriously dispute the importance of the question or the enormity of its financial ramifications. Although the Court has twice declined to review the question in cases arising from the Fifth and Tenth Circuits, neither case presented the same vehicle as this case. The Tenth Circuit issued its decision shortly after *CTS*, and the Solicitor General urged further percolation. The Fifth Circuit had before it only a state statute of repose, and thus did not address either the Securities Act's statute of repose (and the important federal policy it embodies) or the presumption against implied repeals. The case for this Court's review has now changed: the preeminent court of appeals in securities law has declared that FIRREA trumps the Securities Act in a decision governing many billions of dollars in potential liability.

Fourth and finally, "[t]he Government cannot have it both ways." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1690 (2013). At the Government's urging, this Court held in *CTS* that CERCLA's extender provision does not displace statutes of repose. In *CTS*, the Government wanted to dispose of ongoing litigation against the United States involving allegations of contaminated drinking water at the Camp Lejeune Marine Corps Base. But here, where the Government wants to *salvage* its litigation against securities issuers and underwriters, it sees things quite differently. The FIRREA extender provision becomes a "comprehensive time period[] to bring suit that displace[s] all prior [time] limits, including periods of repose." FDIC C.A. Br. 10. The Government's about-face is at odds with both FIRREA's plain text and this Court's reasoning in *CTS*, and it merits this Court's review.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 821 F.3d 372. The opinion of the district court (App., *infra*, 30a-42a) is reported at 42 F. Supp. 3d 574.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2016. A petition for rehearing was denied on July 28, 2016 (App., *infra*, 43a-44a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in full in an appendix to this petition. App., *infra*, 45a-56a. FIRREA's extender provision provides in part:

> Statute of limitations for actions brought by conservator or receiver
>
> (A) In general
>
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—
>
> (i) in the case of any contract claim, the longer of—
>
> (I) the 6-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law; and
>
> (ii) in the case of any tort claim (other than a claim which is subject to sec-

tion 1441a(b)(14) of this title), the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

12 U.S.C. 1821(d)(14)(A).

STATEMENT

A. The FDIC's Complaint

Petitioners are issuers and underwriters of residential mortgage-backed securities (RMBS) that were offered to the public during 2006 and 2007.[1] Colonial Bank purportedly purchased eight of those securities in the summer and fall of 2007. See C.A. App. 166. In August 2009, Colonial failed and the FDIC was appointed as its receiver. App., *infra*, 3a.

Less than one year later, in April 2010, the FDIC's Office of Inspector General released a report reviewing Colonial's operations and the reasons for its failure. See No. 12-cv-6166, Dkt. No. 71-1, at 3 (S.D.N.Y. Nov. 13, 2012). Yet the FDIC waited until August 10, 2012—about five years after Colonial's purchases and nearly three years into the FDIC's receivership—to assert claims against petitioners under Sections 11

[1] Issuers typically create RMBS through a process known as securitization, in which a large number of mortgage loans are grouped together in a collateral pool and sold to a trust. The trust raises cash to purchase the loans by selling securities, usually called certificates, to investors, who in turn receive a portion of the cash flow generated when borrowers make payments on the loans underlying the certificates. C.A. App. 40-43.

and 15 of the Securities Act of 1933, 15 U.S.C. 77k and 77*o*.[2] App., *infra*, 3a. In its Complaint, the FDIC alleges that the offering documents for the eight RMBS that Colonial purchased in 2007 contained misrepresentations and omissions about the mortgage loans backing those securities. *Ibid.*

B. The Securities Act's Repose Provision

Because the FDIC filed its complaint approximately five years after Colonial's purchases, the Securities Act's three-year statute of repose expressly bars the FDIC's claims. Section 13 of that Act provides that "*[i]n no event shall any * * * action be brought*" under Section 11 more than three years after the public offering or sale of the relevant security. 15 U.S.C. 77m (emphasis added). Section 13's outer limit is "an unqualified bar on actions instituted" after three years, "giving defendants total repose" after that time. *Merck & Co., Inc.* v. *Reynolds*, 559 U.S. 633, 650 (2010) (discussing similar repose provision and referring to Section 13 as a "comparable bar"). Congress established this absolute limit because of its concern that "lingering [Securities Act] liabilities would disrupt normal business and facilitate false claims." *P. Stolz Family P'ship L.P.* v. *Daum*, 355 F.3d 92, 105 (2d Cir. 2004) (quoting *Norris* v.

[2] Section 11 of the Securities Act imposes civil liability for material misstatements or omissions in a securities offering registration, 15 U.S.C. 77k, and Section 15 imposes secondary liability on certain persons who "control[] any person liable under Section 11," 15 U.S.C. 77*o*. "To establish [Section] 15 liability, a plaintiff must show a primary violation of [Section] 11." *In re ProShares Tr. Sec. Litig.*, 728 F.3d 96, 109 (2d Cir. 2013).

Wirtz, 818 F.2d 1329, 1332 (7th Cir. 1987) (Easterbrook, J.)).

Since the 1930s, this three-year statute of repose has been an essential feature of the Securities Act. Section 11 places a "relatively minimal burden on a plaintiff" and contemplates "virtually absolute" liability for securities issuers, "even for innocent misstatements." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 382 (1983). Congress recognized that Section 11 would expose securities issuers and underwriters to unprecedented civil liability. See, *e.g.*, 78 Cong. Rec. 8201 (1934) (statement of Sen. Austin). Members of Congress thought the civil-liability provisions would be "nothing but blackmail" without a statute of repose, for investors might "discover [misrepresentations] after the market has gone down, and after something has happened, and they are looking for mistakes, and years afterwards there is a liability." 6 J.S. Ellenberger & Ellen P. Mahar, *Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934*, at 6565 (1973) (statement of Sen. Kean). Congress's desire to protect against indefinite liability resulted in Section 13's substantive right of repose after three years.[3]

[3] The period of repose in the Securities Act as enacted in 1933 was ten years, but Congress quickly shortened the period in 1934 to reduce the risk of civil litigation, particularly when a security's price fell after a market or other unanticipated disruption. See Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, 908. Congress did so because of its concern that the longer period was "too drastic, and [was] interfering with business," 78 Cong. Rec. 8668 (1934), and it thus decided "to curtail the extent to which the securities laws permit recoveries based on the wisdom given by hind-

C. The FIRREA Extender Provision

The FDIC has never maintained that its claims are timely if Section 13 of the Securities Act applies. The FDIC contends only that FIRREA's extender provision—which was enacted in 1989, 55 years after the Securities Act—displaces Section 13's three-year repose period for claims brought by the FDIC as conservator or receiver. By its terms, FIRREA's extender provision lengthens the "statute of limitations" for state-law contract and tort claims brought by the FDIC on behalf of failed banks, but leaves in place any longer state-law limitations periods. 12 U.S.C. 1821(d)(14)(A). The extender provision defines the date on which "the statute of limitations begins to run" as the later of "the date of the appointment of the [FDIC] as conservator or receiver" or "the date on which the cause of action accrues." 12 U.S.C. 1821(d)(14)(B)(i)–(ii). The provision says nothing about displacing, extending, or altering any statute of repose, but instead refers only to "statute[s] of limitations" for contract and tort claims.

D. The District Court's Decision

1. In November 2012, petitioners moved to dismiss the FDIC's complaint on the ground that, among other things, the FDIC's claims are time-barred by the Securities Act. While that motion was pending, the court of appeals issued its decision in *Federal Housing Finance Agency* v. *UBS Americas, Inc.*, 712 F.3d 136 (2d Cir. 2013). In *UBS*, the court of appeals held that the extender provision in the Housing

sight," *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990) (Easterbrook, J.).

and Economic Recovery Act of 2008 (HERA), 12 U.S.C. 4617(b)(12), which is materially identical to the FIRREA extender provision, displaces the Securities Act's statute of repose. Following that decision, petitioners withdrew their time-bar argument but reserved the right to reassert it at a later date. The district court denied the motion to dismiss on the other grounds asserted.

2. In July 2014, shortly after this Court decided *CTS*, petitioners moved for judgment on the pleadings and reasserted their argument that the FDIC's claims are untimely. In September 2014, the district court applied *CTS* and granted judgment to petitioners. App., *infra*, 33a. The court emphasized that, as with the CERCLA provision at issue in *CTS*, the FIRREA extender provision "uses the term 'statute of limitations' multiple times," "focus[es] on claim accrual," and "describes the covered time period in the singular." *Id.* at 39a-40a. The court further reasoned that the Securities Act contains two independent time limits—"a statute of limitations and a statute of repose"—and "Congress chose language [in the extender provision] which focused on and changed the statute of limitations, and left the statute of repose untouched." *Id.* at 41a. "That gives no support," the court concluded, "to the FDIC's argument that [Congress] intended to replace both." *Ibid.*

The district court also held that interpreting the FIRREA extender provision according to its plain terms is consistent with its legislative history and purpose. "By postponing otherwise applicable times of accrual of claims in state statutes of limitations," the extender provision gives "the FDIC more time to bring claims that would otherwise have been lost, thus increasing the FDIC's ability to collect money

through litigation." App., *infra*, 41a. Moreover, because the statute of limitations in the Securities Act is only one year, the court explained, "[t]he FDIC Extender Statute increases the statute of limitations for any 1933 Act claims brought by the FDIC as receiver to three years, thereby significantly increasing the amount of money that can be recovered by the Federal Government through litigation." *Id.* at 42a (internal citation, quotation marks, and brackets omitted).

E. The Court of Appeals' Decision

1. Over a lengthy dissent by Judge Parker, a divided panel of the court of appeals reversed. App., *infra*, 1a-29a.

a. The panel majority concluded that it was bound by that court's earlier decision in *UBS*, notwithstanding this Court's intervening decision in *CTS*. App., *infra*, 3a. According to the panel majority, *CTS* does not apply because CERCLA's references to a singular "limitations period" show that CERCLA "was intended to modify only one limitations period per claim * * * and to leave in place the second period provided by the applicable statute of repose." *Id.* at 14a. In the panel majority's view, when FIRREA similarly "refers to the 'applicable statute of limitations,' it is referring to" something entirely different: "the new limitations period that [it] create[s]." *Ibid.* (emphasis omitted). The panel majority therefore held that FIRREA's text and structure "provide[] no guidance" on whether it "displaces otherwise applicable statutes of repose—a question on which we must thus defer to our binding *UBS* precedent." *Id.* at 15a (emphasis omitted).

Likewise on the basis of *UBS*, the panel majority rejected petitioners' argument that FIRREA's ex-

tender provision does not apply to federal Securities Act claims. App., *infra*, 17a.[4] The panel majority also rejected petitioners' argument that interpreting FIRREA's extender provision to displace Section 13 of the Securities Act for a class of claims (*i.e.*, those claims brought under the Act by the FDIC as conservator or receiver) violates the presumption against implied repeals. The panel majority did not disagree that its interpretation effected an implied repeal, nor did it hold that FIRREA's extender provision is sufficiently clear to overcome the presumption. The panel majority merely held that, although *UBS* did not address the presumption, it "would have applied with equal force in *UBS*," and the panel majority was therefore bound by its earlier decision. *Id.* at 17a-18a.

b. Judge Parker dissented. App., *infra*, 18a-29a. He explained that the *UBS* court "did not have the benefit of [this] Court's identification of the factors relevant to assessing what an extender statute achieves." *Id.* at 23a. The *UBS* court therefore "did not, as is now required by *CTS*, examine: (i) the meaning of the term 'statute of limitations' when Congress passed the Extender Statute, (ii) Congress'

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[4] Because FIRREA's extender provision sets a limitations period for "contract" and "tort" claims, unless "the period applicable under State law" is longer, 12 U.S.C. 1821(d)(14)(A), the extender provision does not apply to federal claims, let alone federal statutory claims under the Securities Act. See, *e.g.*, Pet. C.A. Br. 61-63; *Wilson* v. *Saintine Expl. & Drilling Co.*, 872 F.2d 1124, 1127 (2d Cir. 1989) (statutory securities claims are "not derived from tort law principles"). The fact that FIRREA only supplies a uniform statute of limitations for state-law contract and tort claims provides an additional and independent basis for reversing the panel majority's decision.

reference to a single limitations period, or (iii) its reference to the accrual date of claims." *Ibid.* Instead, Judge Parker observed, the court in *UBS* "briefly examined the [HERA] Extender Statute, highlighted imprecise uses of the term 'statute of limitations' in the past, and concluded in essence that when Congress referred to a limitations period it was probably talking about both statutes of limitations and statutes of repose." *Ibid.*

As Judge Parker explained, "*CTS* changed the law" by providing "instruction on how to read extender statutes." App., *infra*, 23a. Judge Parker stressed that, like the CERCLA extender provision in *CTS*, the FIRREA extender provision here refers "to a 'statute of limitations' in four separate places (with a fifth reference in the heading)," without using "any language that could be construed as encompassing statutes of repose." *Id.* at 24a-25a. The FIRREA extender provision also "refers to the relevant limitations period in the singular," and "contains numerous references to the accrual of claims." *Id.* at 25a. In Judge Parker's view, "these pellucid textual markers" indicate "that when Congress referred in the Extender Statute to the type of time limit that accrues and targets plaintiffs' diligence, it could only have meant a statute of limitations." *Ibid.*

Finally, Judge Parker rejected the panel majority's view "that Congress, without ever saying so, passed a statute of limitations that somehow eliminated a widely relied on and widely applied statute of repose," because that approach "violates the presumption against implied repeals." App., *infra*, 26a. "[I]f Congress had intended to do away with a statute of repose, it had to say so clearly and unmistakably. But it didn't." *Id.* at 27a. "Fidelity to this rule is especial-

ly important," Judge Parker emphasized, "in the case of a statute of repose * * * that has been a prominent and conspicuous provision in this nation's securities regulation regime" for the last eight decades. *Ibid.* Judge Parker concluded that although interpreting the FIRREA extender provision "to exclude statutes of repose means that the FDIC is able to pursue fewer claims, * * * [courts] are obligated to read the statute as it is written." *Ibid.*

2. Petitioners filed a timely petition for rehearing by the panel or en banc, urging the court of appeals to apply this Court's decision in *CTS* without deferring to its previous panel opinion in *UBS*. The court of appeals denied the petition. App., *infra*, 43a-44a.

REASONS FOR GRANTING THE PETITION

The panel majority's decision directly conflicts with this Court's decision in *CTS* by holding that the term "statute of limitations" in FIRREA's extender provision "displaces otherwise applicable statutes of repose." App., *infra*, 15a. As Judge Parker explained in dissent, that conclusion cannot be reconciled with FIRREA's text, structure, history, or purpose, or with this Court's guidance in *CTS* on how to interpret a federal extender provision. *Id.* at 18a-29a. In reaching that conclusion, the panel majority turned the presumption against implied repeals on its head: it effectively held that if Congress did *not* want to displace the Securities Act's statute of repose, it had to say so more clearly. Because the decision below partially invalidates an important provision of federal securities law, this Court's review is warranted and necessary.

Although the conflict between two federal statutes alone merits review, the question presented is of tre-

mendous national importance. Eight years after the financial crisis, three federal agencies are still seeking to recover tens of billions of dollars from securities issuers and underwriters, much of which is based on claims that are barred by the plain terms of the Securities Act. The very purpose of that Act's statute of repose is to prevent litigation on stale facts, which in turn provides much-needed certainty to financial markets. Absent this Court's intervention, parties and lower courts will continue to expend significant resources litigating potentially enormous liability. This Court's review is therefore urgently needed to reconcile FIRREA's extender provision and the Securities Act's statute of repose, and this case is the ideal vehicle for doing so.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

A. The Second Circuit's Decision Cannot Be Squared With *CTS*

In *CTS*, this Court addressed CERCLA's extender provision, 42 U.S.C. 9658, which delays the running of "statute[s] of limitations" for certain state-law tort claims. In ruling that CERCLA's extender provision affects only state statutes of limitations and not statutes of repose, this Court provided clear direction for how to properly interpret the scope of extender provisions in other federal statutes. Because the panel majority did not follow those instructions, it concluded—unlike Judge Parker and the district court—that FIRREA's extender provision impliedly repeals the Securities Act's statute of repose.

1. The Extender Provision Affects Only "Statute[s] Of Limitations"

The *CTS* Court focused on three textual features of CERCLA's extender provision: (a) it refers only to statutes of limitations, without using any language that would encompass statutes of repose; (b) it describes the relevant limitations period in the singular, which would be an unusual way to cover multiple time periods; and (c) it refers to the accrual of claims, which is classic language of limitations rather than repose. 134 S. Ct. at 2185-2187. As Judge Parker explained, the same "textual markers" apply with equal or greater force to FIRREA's extender provision. App., *infra*, 24a-25a. Just as in *CTS*, FIRREA draws a narrow exception to existing statutes of limitations (for certain contract and tort claims brought by the FDIC as conservator or receiver). It does not create an exclusive and comprehensive time limit that impliedly repeals the Securities Act's statute of repose.

(a) Like CERCLA, FIRREA Refers Only To The "Statute Of Limitations"

In *CTS*, this Court found "instructive" that CERCLA "uses the term 'statute of limitations' four times (not including the caption)," but never the term "repose." 134 S. Ct. at 2185. Judge Parker correctly emphasized that FIRREA is exactly the same: it "refers to a 'statute of limitations' in four separate places (with a fifth reference in the heading)," but "says nothing about extending, displacing, or altering any statutes of repose." App., *infra*, 24a-25a. This difference in language is significant because statutes of repose are keyed to defendants' conduct and protect defendants by extinguishing potential liability after a finite period, whereas statutes of limitations are trig-

gered by notice to plaintiffs and encourage prompt action by plaintiffs in asserting their claims. *CTS*, 134 S. Ct. at 2182-2183.

The panel majority did not squarely address that fundamental point. Instead, it relied upon *UBS*—a Second Circuit decision rendered before *CTS*—which concluded that in setting a single "statute of limitations" that "shall" apply to certain actions, "Congress precluded the possibility that some other limitations period might apply." 712 F.3d at 141-142 (quotations and emphasis omitted). But as Judge Parker correctly explained, "[t]he rationale of *UBS*" was that the term "'statute of limitations' was a catch-all limitations period that applied indiscriminately to statutes of repose and statutes of limitations." App., *infra*, 22a. *CTS* requires courts to apply the *opposite* presumption—*i.e.*, that the term "statute of limitations" conveys "its primary meaning" as a period of limitation, not repose. 134 S. Ct. at 2185.[5]

The panel majority also did not address why, if Congress intended to sweep away the Securities Act's repose period, it began FIRREA's extender provision with the modest qualification "[n]otwithstanding any provision of any *contract*." 12 U.S.C. 1821(d)(14)(A) (emphasis added). Instead, Congress would have used one of the many broader *non-obstante* clauses that appear throughout FIRREA, such as "notwith-

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[5] The rationale of *UBS* also conflicts with this Court's recent ruling that mandatory terms like "shall" are "mundane statute-of-limitations language," are found in "most such statutes," and thus are "of no consequence" in assessing the breadth or scope of a statute of limitations. *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015).

standing any other provision of Federal or State law." 12 U.S.C. 1821(m)(10). Congress's reference to "contract[s]" shows that it had in mind only ordinary statutes of limitations, which generally may be altered by agreement of the parties, rather than statutes of repose, which may not. See, *e.g.*, *NCUA* v. *Barclays Capital Inc.*, 785 F.3d 387, 391 (10th Cir. 2015) ("A statute of limitations, in contrast to a statute of repose, is waivable unless the statute says otherwise.").

Instead of addressing FIRREA's plain text as *CTS* directs, the panel majority noted that the extender provision's "mere use of the term 'statute of limitations' does not settle the issue," because "Congress has never used the expression 'statute of repose' in a statute codified in the United States Code." App., *infra*, 13a. It concluded that the provision "provides no guidance on the question whether the Extender Statute displaces otherwise applicable statutes of repose." *Id.* at 15a (emphasis omitted). But the relevant point is that Congress knows both how to create a repose period (as it did in the Securities Act by tying the running of the three-year period to the underlying transaction) *and* how to displace a repose period. See 11 U.S.C. 108(a) (setting exclusive two-year time limit notwithstanding any other law that "fixes a period" for "commenc[ing] an action"). In the FIRREA extender provision, Congress did not use "any language that could be construed as encompassing statutes of repose." App., *infra*, 25a (Parker, J., dissenting). FIRREA refers only to extending contract and tort limitations periods.

Moreover, the fact that FIRREA does not address any extension of statutes of repose is precisely the point. In light of the extender provision's references to modifying "statute[s] of limitations," this Court's

decision in *CTS* interpreting similar language not to affect repose periods, and the presumption against the implied repeal of one federal statute by another, *see infra* at 24-27, the absence of any repose-displacing language should have ended the analysis. As Judge Parker put it, "Congress chose to remain silent, and we are not at liberty to infer displacement from silence." App., *infra*, 27a.

(b) Like CERCLA, FIRREA Refers To The "Statute Of Limitations" In The Singular

The *CTS* Court also stressed that CERCLA refers to "the applicable limitations period" in the singular, which "would be an awkward way to mandate the pre-emption of two different time periods with two different purposes." 134 S. Ct. at 2186-2187. FIRREA similarly refers to "the applicable statute of limitations" in the singular. 12 U.S.C. 1821(d)(14)(A). The panel majority disregarded that clear textual parallel on the ground that CERCLA alters the commencement date of state statutes of limitations, whereas FIRREA alters both their commencement date and their length. App., *infra*, 11a-12a. But it does not matter whether CERCLA and FIRREA modify state statutes of limitations in exactly the same way. What matters is that both extender provisions plainly modify *only one time period—i.e.*, the applicable limitations period.

(c) Like CERCLA, FIRREA's Limitations Period Is Tied To The Accrual Of A Claim

This Court in *CTS* relied on the fact that CERCLA implicitly incorporates concepts of claim accrual, which are tied to statutes of limitations, not statutes of repose. 134 S. Ct. at 2187. Here, FIRREA's limi-

tations periods explicitly commence on "the date the claim accrues." 12 U.S.C. 1821(D)(14)(a). Congress thus left no doubt that when it referred to "the statute of limitations," it meant only the kind of time limit that begins to run at the point of accrual—*i.e.*, a limitations period, not a repose period. The panel majority again responded that FIRREA's references to accrual, like its references to a single limitations period, "tell[] us only that the Extender Statute is itself a statute of limitations," not "whether the Extender Statute displaces otherwise applicable statutes of repose." App., *infra*, 15a. But this misses *CTS*'s point: the fact that FIRREA uses only concepts related to statutes of limitations reinforces that Congress did not intend to repeal statutes of repose.

(d) Like CERCLA, FIRREA Does Not Create An Exclusive And Comprehensive Time Limit

At bottom, the panel majority's textual analysis boils down to an *ipse dixit* lifted from its pre-*CTS* decision in *UBS*: that by "creat[ing]" a "new" federal limitations period, "Congress intended the Extender Statute to supersede any and all other time limitations, including statutes of repose." App., *infra*, 12a; see *UBS*, 712 F.3d at 141-142. The panel majority's premise was rejected by *CTS* and its conclusion is incorrect.

i. The panel majority's assertion that FIRREA "created" a new limitations period is at odds with its own description of FIRREA throughout its opinion as an "*Extender* Statute." App., *infra*, 2a (emphasis added). Like CERCLA, FIRREA simply lengthens certain existing state statutes of limitations. Both CERCLA and FIRREA lay down general rules

(whether for the commencement date or length of the limitations period) that carve out narrow exceptions when state law would provide a shorter statute of limitations. See *NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1235 (10th Cir. 2014) ("[T]he Extender Statute * * * functions as a narrow exception for actions brought by [the conservator]."). Conversely, when existing state limitations periods are longer than those specified in FIRREA (six years for contract claims and three years for tort claims), the extender provision does not affect them.

ii. Even if the panel majority were correct that FIRREA creates a wholly new federal statute of limitations, there is no textual or structural indication that FIRREA's limitations period is the *sole* applicable time limit—*i.e.*, that it displaces both statutes of limitations *and* statutes of repose. On the panel majority's reading, the extender provision still does nothing more than establish a federal limitations period that applies to state contract and tort claims in any action brought by the FDIC on behalf of a failed bank, unless a state-law limitations period is longer. None of that suggests that the federal limitations period is an "exclusive" time limit or a "comprehensive timeliness provision" that displaces the statute of repose in the Securities Act. FDIC C.A. Br. 21, 33.

The panel majority's only argument for exclusivity is that the extender provision establishes "*the* applicable statute of limitations" for contract and tort claims in "*any* action" brought by the FDIC on behalf of a failed bank. 12 U.S.C. 1821(d)(14)(A) (emphases added); see App., *infra*, 4a. But as Judge Parker explained, in *CTS* this Court squarely rejected the argument that in drafting CERCLA's extender provision—which refers to "the applicable limitations peri-

od" for "any action" for certain state-law torts, 42 U.S.C. 9658(a)(1)—"Congress intended comprehensively to address the applicable period during which a claim could be brought." Brief for Respondents at 21, *CTS Corp*. v. *Waldburger*, 134 S. Ct. 2175 (2014) (No. 13-339). Here, just as in *CTS*, the statutory breadth ensures that FIRREA's limitations period applies to all contract and tort claims brought by the FDIC as conservator or receiver. It does not convert FIRREA's limitations period into a comprehensive time limit.

Finally, the panel majority reasoned that the term "statute of limitations" describes the type of time limit that the FIRREA extender provision *establishes*, not the type of time limit it *displaces*. App., *infra*, 13a-14a. But establishing a federal statute of limitations does not require setting aside federal (or state) statutes of repose. FIRREA's extender provision necessarily extends only any shorter statute of limitations, because any law that sets a shorter statute of limitations conflicts with the extender provision. The statute of limitations in FIRREA and the three-year statute of repose in the Securities Act can coexist peacefully, just as in *CTS* CERCLA's statute of limitations and North Carolina's statute of repose could coexist without any difficulty.

2. The Extender Provision's History And Purpose Confirm That It Applies Only To Statutes Of Limitations

a. In *CTS*, this Court found support for its textual analysis in Congress's awareness of the historical distinction between statutes of limitations and statutes of repose. By the time Congress enacted the CERCLA extender provision in 1986, the distinction between

statutes of limitations and of repose was "well enough established" to show that Congress gave the term "statute of limitations" its more precise, modern meaning. 134 S. Ct. at 2186. FIRREA's extender provision was enacted in 1989, three years *after* CERCLA's. By then, as Judge Parker underscored, "[i]f anything, congressional understanding of the distinction between statutes of limitations and statutes of repose [had] only deepened." App., *infra*, 21a. "In light of this history, the notion that when Congress said 'statute of limitations' it also meant 'statute of repose' is not viable." *Id*. at 22a.

The panel majority attempted to distinguish *CTS* on the ground that, unlike with CERCLA, the legislative history of FIRREA does not expressly mention both statutes of limitations and statutes of repose. App., *infra*, 8a. But this Court relied on CERCLA's legislative history in *CTS* only in support of the modest proposition that Congress understood the difference between these two statutory mechanisms in 1986. See 134 S. Ct. at 2186. As Judge Parker catalogued, ample other evidence here—in the Congressional Record, judicial opinions, and academic commentary—confirms that "Congress understood the distinction between statutes of limitations and statutes of repose in 1989 when it enacted the Extender Statute." App., *infra*, 21a-22a.

b. In *CTS*, this Court admonished courts not to treat CERCLA's remedial purpose "as a substitute" for "the statute's text and structure." 134 S. Ct. at 2185. Having not yet received that guidance, the Second Circuit committed precisely that error in its 2013 *UBS* decision (before *CTS*), when it relied heavily on the notion that "Congress enacted HERA's extender statute to give [the agency] the time to investigate

and develop potential claims." 712 F.3d at 142. The panel majority's decision repeats the same error by deferring to *UBS* and ignoring this Court's intervening reasoning in *CTS*. As the district court noted, FIRREA's extender provision lengthens the one-year limitations period in the Securities Act, and thereby serves its purpose of permitting the FDIC additional time to bring state-law contract and tort claims on behalf of failed banks. App., *infra*, 41a-42a. This Court reiterated in *CTS*, however, that "no legislation pursues its purposes at all costs." 134 S. Ct. at 2185 (internal quotation marks omitted). The panel majority did not point to any indication that Congress also intended to extinguish the Securities Act's longstanding statute of repose.

B. The Second Circuit's Decision Cannot Be Squared With The Presumption Against Implied Repeals

1. In addition to failing to follow this Court's instructions in *CTS* on how to interpret the scope of a federal extender provision, the panel majority's conclusion that "Congress, without ever saying so, passed a statute of limitations that somehow eliminated a widely relied on and widely applied statute of repose violates the presumption against implied repeals." App., *infra*, 26a (Parker, J., dissenting). Repeals by implication—including "implied amendments" and "partial repeals," *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007)—"are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Hui* v. *Castaneda*, 559 U.S. 799, 810 (2010).

Here, FIRREA refers only to extending "the applicable statute of limitations" for contract and tort

claims brought by the FDIC as conservator or receiver, and thus does not clearly repeal the Securities Act's repose period. The panel majority conceded that FIRREA's text "provides no guidance" on whether Congress intended such a repeal. App., *infra*, 15a. But the panel majority nevertheless declined to address the presumption because it "would have applied with equal force" in *UBS*. *Id.* at 17a-18a. The irony is that the *UBS* panel effectively *reversed* the presumption by asserting—based on its own assessment of Congress's remedial purposes—that "[i]f Congress had really wanted to exclude securities claims from the ambit of HERA's extender statute, it surely would have done so clearly and explicitly." 712 F.3d at 143.

2. "Fidelity to th[e] rule" against implied repeals is "especially important" when, as here, the preexisting federal statute establishes a key "substantive right[]." App., *infra*, 27a (Parker, J., dissenting). "[U]nlike securities fraud claims pursuant to [S]ection 10(b) of the Securities Exchange Act," claims under Section 11 of the Securities Act do not require proof of scienter, reliance (in most cases), or loss causation. *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010). Section 11 is thus "notable * * * for the *in[] terrorem* nature of the liability" it creates. *Ibid.*; see *Huddleston*, 459 U.S. at 382 (Section 11 contemplates "virtually absolute" liability for issuers, "even for innocent misstatements.").

Because of the relative ease of proving liability, Congress established a strict repose period in the Securities Act based on its "fear that lingering liabilities would disrupt normal business and facilitate false claims." *Norris* v. *Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987) (Easterbrook, J.). The Act's longstanding re-

pose period reflects Congress's determination that, once three years have passed from the public offering or sale of a security, a "company's management [may] treat a given securities transaction as closed, allowing them to proceed more confidently with running the company." *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1546 (3d Cir. 1988) (internal quotation marks omitted); see Brief for the Securities and Exchange Commission as Amicus Curiae at 28–29 in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991) (No. 90-333).

3. In light of Congress's concerns, this Court correctly has viewed the Securities Act's three-year repose period as "an unqualified bar on actions instituted" after three years, "giving defendants total repose" after that time. *Merck & Co., Inc.* v. *Reynolds*, 559 U.S. 633, 650 (2010) (discussing similar repose provision and referring to Section 13 as a "comparable bar"). In other words, Section 13 "create[s] a *substantive* right in those protected to be free from liability" three years after the relevant sale or offering of a security. *Police & Fire Ret. Sys. of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95, 106 (2d Cir. 2013) (internal quotation marks omitted). "Unlike a statute of limitations, a statute of repose is not a limitation of a plaintiff's remedy, but rather defines the right involved in terms of the time allowed to bring suit." *P. Stolz Family P'ship L.P.* v. *Daum*, 355 F.3d 92, 102 (2d Cir. 2004); see *CTS*, 134 S. Ct. at 2182-2183.

Thus, as a matter of substantive securities law, Colonial Bank had a federal right to sue for alleged misstatements made in connection with the securities it purportedly purchased in 2007—but that right was extinguished three years after the securities were offered or sold. The converse is equally true: three

years after offering and selling the securities at issue, petitioners had a substantive right to be free from potential liability. When the FDIC stepped into Colonial's shoes in 2009, it succeeded solely to the "rights, titles, powers, and privileges" then belonging to Colonial, including the bank's three-year extinguishable right to sue on securities that it had purchased in 2007. *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) (internal quotation marks omitted).

To be sure, Congress could have used FIRREA to set aside the repose period for federal securities claims brought by the FDIC on behalf of failed banks. But FIRREA, like the Securities Act, represented a compromise—this time between the FDIC's desire to pursue claims on behalf of failed banks and third parties' need to have closure in their affairs. See, *e.g.*, 135 Cong. Rec. S10403 (daily ed. Aug. 15, 1989). As part of that compromise, FIRREA's extender provision prolonged only "statute[s] of limitations" for certain contract and tort claims. Congress made no effort to alter the substantive rights afforded issuers or underwriters, including the substantive right—set forth in Section 13—to be "free from liability after the legislatively determined period of time." *CTS*, 134 S. Ct. at 2183 (internal quotation marks omitted). The decision below improperly redraws that legislative bargain.

II. THE QUESTION PRESENTED IS RECURRING AND EXCEPTIONALLY IMPORTANT

A. The panel majority's partial invalidation of Section 13 of the Securities Act alone merits review, but the financial stakes here are staggering. In addition to the FDIC, the FHFA and NCUA have brought Securities Act claims against a host of issuers and un-

derwriters, often arguing that those claims are timely under materially identical extender provisions in HERA and elsewhere in FIRREA. See App., *infra*, 47a-48a (HERA extender provision invoked by FHFA); *id.* at 48a-50a (separate FIRREA extender provision invoked by NCUA). These actions routinely involve hundreds of millions to billions of dollars in potential liability.

There are at least a dozen cases pending in federal courts across the country in which some or all of the claims at issue would be time-barred if this Court were to reverse the decision below. In those cases, the three agencies seek damages relating to approximately $37.5 billion in securities originated or underwritten by over two dozen financial institutions and other defendants. As the tables below summarize, 85 percent of the contested securities—or almost $32 billion—are at issue in cases pending within the Second Circuit. The agencies' supposed damages are not based only on the securities themselves, many of which have performed with little or no loss. The agencies also seek billions of dollars in prejudgment interest, which is premised solely on the extensive delay attributable to the extender provisions.

PENDING ACTIONS IN THE SECOND CIRCUIT			
Case Name	**Docket No.**	**Court**	**Amount**
FDIC v. *Bear Stearns Asset Backed Securities I LLC et al.*	15-1037	2d Cir.	$140.5 million
FDIC v. *Chase Mortgage Finance Corp. et al.*	1:12-cv-06166-LLS	S.D.N.Y.	$388 million
FHFA v. *Nomura Holding America, Inc. et al.*	15-1872	2d Cir.	$806 million[6]
FHFA v. *Royal Bank of Scotland Group et al.*	3:11-cv-01383	D.Conn.	$30.4 billion
Total Potential Liability in Pending Actions Within the Second Circuit			**~$31.7 billion**

PENDING ACTIONS IN OTHER CIRCUITS			
Citation	**Docket No.**	**Court**	**Amount**
FDIC v. *Ally Securities LLC et al.*	1:14-cv-00129	W.D.Tex.	$1.8 billion
FDIC v. *Banc of America Funding Corp. et al.*	1:14-cv-0418-PAB-MJW	D.Colo.	$110.4 million
FDIC v. *Merrill Lynch et al.*	1:14-cv-0126	W.D.Tex.	$2.1 billion
NCUA v. *Credit Suisse Securities (USA) LLC et al.*	12-cv-2648 JWL/JPO	D.Kan.	$715.5 million
NCUA v. *UBS Securities LLC et al.*	12-cv-2591 KHV/GLR	D.Kan.	$1.1 billion
Total Potential Liability in Pending Actions Outside the Second Circuit			**~$5.8 billion**

[6] The securities total approximately $2 billion, but as explained below, a bench trial resulted in an $806 million judgment that is currently on appeal to the Second Circuit. See *infra* at 30.

Given the sheer scope of the potential liability that turns on the purely legal question of how various extender provisions relate to the Securities Act, this Court should resolve that question on a nationwide basis. See *United States* 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); *Fid. Fed. Bank & Tr.* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) (where multiple actions "involv[e] the same question" and "the total amount at stake may reach $40 billion," the "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari").

B. The need for review is heightened by the fact that the pending cases are fact-intensive, consume substantial judicial resources, and are extremely expensive to litigate. As an example, one of the cases brought by the FHFA resulted in several years of discovery and motions practice, almost 50 orders on dispositive or substantial motions, and then a four-week bench trial, which yielded a 361-page trial opinion and an $806 million judgment that is currently on appeal to the Second Circuit. See *FHFA* v. *Nomura Holding Am.*, *Inc.*, No. 15-1872 (2d Cir.). All of that would have been avoided by applying Section 13 of the Securities Act—the very purpose of which is to give markets predictability by "giving defendants total repose" after three years. *Merck*, 559 U.S. at 650.

C. The fact that this case comes from the Second Circuit amplifies not only its present importance (because of the cases pending there), but also its prospective importance. The Securities Act's venue provision on which the FDIC relied in this case authoriz-

es suit in any "district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein." 15 U.S.C. 77v. Of course, virtually every securities issuer or underwriter "is found or is an inhabitant or transacts business" in New York. As a practical matter, the FDIC, FHFA, and NCUA will be able to bring all of their claims—whether stemming from the 2008 financial crisis or from any future failure of any financial institution, whatever the reason—within the Second Circuit and avoid the Securities Act's statute of repose. If the panel majority's decision is permitted to stand without review by this Court, it may effectively be the last word on this issue.

D. This Court has granted review when faced with an important question of federal law (let alone the partial invalidation of a longstanding federal statute) that has significant economic consequences. See, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2547 (2011) ("We are presented with one of the most expansive class actions ever."); *Pinter* v. *Dahl*, 486 U.S. 622, 632 (1988) ("Because of the importance of the issues involved to the administration of the federal securities laws, we granted certiorari."); *Gordon* v. *N.Y. Stock Exch., Inc.*, 422 U.S. 659, 663 (1975) (explaining that in part "[b]ecause of the vital importance of the question" in a case requesting $1.5 billion in damages, "we granted certiorari"). Here, the Government cannot seriously dispute the importance of the question or the significance of its financial ramifications.

Moreover, the issue has persistently divided lower court judges, as it divided the panel here. Since this Court decided *CTS* just over two years ago, six federal and state judges (eight including Judge Parker and

the district court here) have held that *CTS* requires interpreting federal extender provisions not to displace the Securities Act's statute of repose.[7] By contrast, other courts have interpreted those same extender provisions to create all-purpose time limits and thus to override applicable statutes of repose, notwithstanding *CTS*.[8] The extent of the disagreement among lower court judges weighs in favor of this Court's providing a final answer on such an important question of federal law.

This Court has declined to provide a final answer twice before, but neither case presented the same vehicle as this case. See *NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014), cert. denied, 135 S. Ct. 949 (2015); *FDIC* v. *RBS Sec. Inc.*,

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[7] See *FDIC* v. *Bear Stearns Asset Backed Sec. I LLC*, 92 F. Supp. 3d 206, 213 (S.D.N.Y. 2015) (Swain, J.) ("[*CTS*] instructs that the remedial purpose of a statute is not a license to eschew the import of the text of an extender provision as enacted by Congress."); *FDIC* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2014 WL 4161561, at *9 (W.D. Tex. Aug. 18, 2014) ("*UBS*'s conclusion is irreconcilable with [*CTS*], and it is ultimately the Supreme Court's analysis which must control."); *FDIC* v. *Countrywide Sec. Corp.*, No. 12 Civ. 3279, Doc. No. 196, at 4 (C.D. Cal. Dec. 8, 2014) ("Defendants argue that [*CTS*] compels this Court to revisit the application of the Extender Statute to the Act. This Court agrees and now holds that the Extender Statute unambiguously does not displace the Act's statute of repose."); *FDIC* v. *Rhodes*, 336 P.3d 961, 969 (Nev. 2014) (Gibbons, C.J., dissenting, joined by Parraguiree and Cherry, JJ.).

[8] See *NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014); *FDIC* v. *RBS Sec. Inc.*, 798 F.3d 244 (5th Cir. 2015); *NCUA* v. *RBS Sec., Inc.*, 2016 WL 4269897 (9th Cir. Aug. 15, 2016); *FHFA* v. *HSBC N. Am. Holdings, Inc.*, 2014 WL 4276420 (S.D.N.Y. 2014); *FDIC* v. *Rhodes*, 336 P.3d 961 (Nev. 2014).

798 F.3d 244 (5th Cir. 2015), cert. denied, 136 S. Ct. 1492 (2016). *Nomura* was the first federal appellate decision to address the issue after *CTS*, and the Solicitor General urged the Court to allow for further percolation. See Brief for Respondent in Opposition at 27, *Nomura Home Equity Loan, Inc.* v. *NCUA* (No. 14-379). It is now clear that other circuits, following the Tenth Circuit's lead in *Nomura*, have not taken *CTS* to heart. The Fifth Circuit in *RBS* addressed only whether the FIRREA extender provision sets aside a *state* statute of repose, and thus had no occasion to consider either the Securities Act's statute of repose (and the important federal policy it embodies) or the presumption against implied repeals.

The Government can no longer claim a need for further percolation. Its only argument for avoiding this Court's review can be the absence of a circuit conflict. But as explained above, the vast bulk of potential liability is centered within the Second Circuit, which is the preeminent court of appeals in securities law. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting) (The Second Circuit is "regarded as the 'Mother Court' in this area of the law."). The outsized importance of that court's resolution of this issue diminishes the need for a circuit conflict. Now that the panel majority has declared that FIRREA trumps the Securities Act, a host of factors—the issue's magnitude, FIRREA's plain text, this Court's clarity in *CTS*, the federal policy underlying the Securities Act's statute of repose, and the Government's change in positions from *CTS* to this and other cases—all cut decisively in favor of further review.

III. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THE QUESTION PRESENTED

The FDIC has never disputed that the question presented here is dispositive: the agency's claims are timely if, and only if, the FIRREA extender provision impliedly repeals the statute of repose in Section 13 of the Securities Act. In addition, the panel majority's opinion and Judge Parker's lengthy dissent fully air both sides of that issue, and thus the Court can be assured that the court of appeals considered all aspects of FIRREA's extender provision, this Court's decision in *CTS*, and the presumption against an implied repeal. Nor is there any likelihood that the Second Circuit will reconsider its decision. Having reaffirmed its *UBS* decision even after this Court's instructions in *CTS*, and having denied rehearing, the panel majority's reading of FIRREA is here to stay unless this Court intervenes. It should do exactly that and take this opportunity to clarify the import of its decision in *CTS*. See, *e.g.*, *De Buono* v. *NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 812-813 (1997) (granting certiorari when "the court appear[ed] to have adhered to [its previous] approach, failing to give proper weight" to an intervening decision of this Court); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 94 (1993) (same).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 6, 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Colonial Bank,

Plaintiff-Appellant,

— v. —

FIRST HORIZON ASSET SECURITIES, INC., FIRST HORIZON HOME LOAN CORPORATION, CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK SECURITIES INC., FTN FINANCIAL SECURITIES CORP., HSBC SECURITIES (USA) INC., RBS SECURITIES INC., UBS SECURITIES LLC, AND WELLS FARGO ASSET SECURITIES CORPORATION,

Defendants-Appellees,

CHASE MORTGAGE FINANCE CORP., JP MORGAN CHASE & CO., JP MORGAN SECURITIES LLC, CITICORP MORTGAGE SECURITIES, INC., CITIMORTGAGE, INC., CITIGROUP GLOBAL MARKETS INC., ALLY SECURITIES LLC, and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Defendants.

(Argued: October 8, 2015 Decided: May 19, 2016)

Before: PARKER, LYNCH, and CARNEY, *Circuit Judges*.

GERARD E. LYNCH, *Circuit Judge*:

Plaintiff-Appellant Federal Deposit Insurance Corporation ("FDIC") brought this action under the Securities Act of 1933 as receiver for Colonial Bank ("Colonial"). Because the complaint was filed less than three years after the FDIC was appointed receiver, it was timely under the terms of the FDIC Extender Statute, which provides "the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver." 12 U.S.C. § 1821(d)(14)(A). But because the complaint was filed more than three years after the securities at issue were offered to the public, it would be untimely under the terms of the Securities Act's statute of repose, 15 U.S.C. § 77m. Although they recognize that the FDIC Extender Statute displaces otherwise applicable statutes of limitations, the defendants argue that it does not displace the Securities Act's statute of repose, and that the complaint should be dismissed as untimely.

We do not consider this argument on a blank slate. In Federal Housing Finance Agency v. UBS Americas Inc., 712 F.3d 136 (2d Cir. 2013), we held that a materially identical extender statute for actions brought by the Federal Housing Finance Authority ("FHFA") *did* displace the Securities Act's statute of repose. The defendants do not argue that the FDIC Extender Statute is in any way distinguishable from the one at issue in UBS; rather, they assert that our UBS holding was abrogated by the subsequent Supreme Court decision in CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014), which construed yet another, somewhat different federal limitations-extending provision – 42 U.S.C. § 9658, enacted as an

amendment to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") – to preempt only state statutes of limitations, and not state statutes of repose. The district court agreed, and dismissed the complaint. We conclude, to the contrary, that UBS remains good law and that, under UBS, the FDIC's complaint was timely. Accordingly, the judgment of the district court is VACATED, and the case is REMANDED for further proceedings consistent with this opinion.

BACKGROUND

Between June 5 and October 19, 2007, Colonial, a federally insured bank headquartered in Montgomery, Alabama, invested approximately $300 million in nine residential mortgage-backed securities ("RMBS") issued or underwritten by the defendants. In a now-familiar turn of events, Colonial suffered heavy losses on those RMBS, and on August 14, 2009, the Alabama State Banking Department closed Colonial and appointed the FDIC as receiver.

On August 10, 2012 – within three years of its appointment as receiver, but more than three years after the RMBS had been offered to the public – the FDIC brought this action in the Southern District of New York, asserting claims under §§ 11 and 15 of the Securities Act, which render several classes of persons liable for material misstatements or omissions in securities registration statements. 15 U.S.C. §§ 77k, 77o. Specifically, the complaint alleges that prospectus supplements for the RMBS at issue misrepresented the loan-to-value ratios of the mortgage loans backing the RMBS, the occupancy status of the properties that secured the mortgage

loans, and the underwriting standards used to originate those loans.

The defendants moved to dismiss the complaint on several grounds, including that it was barred by the Securities Act's statute of repose, which, the defendants argued, was not displaced by the FDIC Extender Statute. While that motion was pending, this Court decided UBS. One of the issues in that case, which was brought by the FHFA and also involved claims under §§ 11 and 15 of the Securities Act, was whether those claims' timeliness was governed by the Securities Act's statute of repose or by the FHFA Extender Statute, 12 U.S.C. § 4617(b)(12). Examining the text and legislative history of the FHFA Extender Statute, we concluded that Congress intended for it to supplant "any other time limitations that otherwise might have applied." UBS, 712 F.3d at 143–44. We emphasized that the statute by its terms established "*the* applicable statute of limitations with regard to *any* action brought by [FHFA] as conservator or receiver." Id. at 141, quoting 12 U.S.C. § 4617(b)(12)(A) (emphasis and alteration in UBS). And we rejected the argument that the Extender Statute's use of the term "statute of *limitations*" meant that it left in place otherwise applicable statutes of *repose*, observing that Congress frequently uses the term "statute of limitations" to refer to what might more precisely be designated as statutes of repose. Id. at 143.

The FHFA Extender Statute was modeled on, and is materially identical to, the FDIC Extender

Statute.[1] Recognizing that UBS controlled, the defendants in this case withdrew their Securities Act statute of repose argument (reserving the right to reassert it at a later date), and the district court (Louis L. Stanton, *J.*) denied the rest of the motion to dismiss.

The following year, the Supreme Court decided CTS, in which the plaintiffs alleged injury and damage from contaminants on land on which the defendant had previously operated an electronics plant. The plaintiffs argued that their claims were timely under § 9658, the CERCLA amendment, which creates an "[e]xception" to state statutes of limitations for state-law toxic tort actions. 42 U.S.C. § 9658(a)(1). The Supreme Court, however, held that CERCLA preempted state statutes of limitations but left state statutes of repose in place, and that the applicable statute of repose barred the action. CTS, 134 S. Ct. at 2180. It chided the court below, which had come to the opposite conclusion, for using "the proposition that remedial statutes should be interpreted in a liberal manner" as a "substitute for a conclusion grounded in the statute's text and structure." Id. at 2185.

Armed with the CTS decision, the defendants here reasserted their argument that this action is barred by the Securities Act's statute of repose, in a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c). They claimed that UBS was inconsistent with CTS, because it failed to give weight to the textual

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[1] A third materially identical extender statute governs actions brought by the National Credit Union Administration ("NCUA"). 12 U.S.C. § 1787(b)(14).

markers that the CTS Court found instructive in its analysis of § 9658, and instead put too much emphasis on the FDIC Extender Statute's remedial purpose. The district court agreed, holding that, after CTS, the FDIC Extender Statute could not be read to displace the Securities Act's statute of repose. Accordingly, it granted judgment in favor of the defendants. The FDIC timely appealed.

DISCUSSION

"In general, a panel of this Court is bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 405 (2d Cir. 2014) (internal quotation marks omitted). The defendants make no attempt to distinguish the FDIC Extender Statute from the FHFA Extender Statute at issue in UBS. Consequently, the outcome here is controlled by UBS, unless the defendants can show that its "rationale [was] overruled, implicitly or expressly, by the Supreme Court" in CTS. United States v. Ianniello, 808 F.2d 184, 190 (2d Cir. 1986), abrogated on other grounds by United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989).[2] For the following reasons, the defendants have not made that showing.

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[2] Thus, we need not determine whether we would reach the same result as the UBS panel did if we were not bound by that precedent. We note, however, that both federal Courts of Appeals that have addressed the issue since CTS have concluded, even in the absence of binding circuit precedent, that the Extender Statutes displace otherwise applicable statutes of repose. See FDIC v. RBS Secs. Inc., 798 F.3d 244 (5th Cir. 2015) (holding that the FDIC Extender Statute preempts the Texas Securities Act's statute of repose); Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.,

CTS held that § 9658, although it preempted state-law statutes of limitations, left in place applicable state-law statutes of repose. Significantly, however, CTS did *not* hold that a federal statute extending "statutes of limitations" must always be read to leave in place existing statutes of repose. Instead, the Supreme Court explained that § 9658's use of the term "statute of limitations" "is instructive, but it is not dispositive." CTS, 134 S. Ct. at 2185. The Court acknowledged that "Congress has used the term 'statute of limitations' when enacting statutes of repose," id., citing 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)(aa) and 42 U.S.C. § 2278, and that only a few years before § 9658 was enacted, one scholar "described multiple usages of the terms, including both a usage in which the terms are equivalent and also the modern, more precise usage." Id. at 2186, citing Francis E. McGovern, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am. U. L. Rev. 579, 584 (1981). Accordingly, CTS instructs, a court must consider "other features of the statutory text," id., before determining whether a statute displaces otherwise applicable statutes of repose.

Nor did the CTS opinion purport to lay out a novel framework for analyzing that question, which might cast doubt on the validity of the analysis used in UBS.[3] Instead, the Supreme Court reiterated the

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764 F.3d 1199 (10th Cir. 2014) (holding that the NCUA Extender Statute displaces the federal Securities Act's statute of repose).

[3] The dissent suggests that the novel ingredient supplied by CTS is its "focus on the central distinction between statutes of limitations and statutes of repose." Dissent at 2 (internal quotation marks omitted). But the UBS court was fully aware of the import of that distinction. See UBS, 712 F.3d at 140 (explaining that the two types

uncontroversial principle that "[c]ongressional intent is discerned primarily from the statutory text." Id. at 2185. While it did state that "invoking the proposition that remedial statutes should be interpreted in a liberal manner" was no "substitute for a conclusion grounded in the statute's text and structure," id., it did not direct courts never to use that canon as an interpretative aid. Nor did it rule out resort to legislative history in interpreting federal statutes that alter existing statutes of limitations. In fact, CTS itself relied on § 9658's legislative history, citing a report that was before Congress at the time § 9658 was enacted that explicitly noted the distinction between statutes of limitations and statutes of repose. Id. at 2186. The defendants have pointed us to no materials making the same distinction in the FDIC Extender Statute's legislative history.

Indeed, it is precisely because CTS's holding is firmly rooted in a close analysis of § 9658's text, structure, and legislative history that it has limited bearing on this case. Although they both have the effect of extending the time to file certain types of claims, the FDIC Extender Statute and § 9658 are

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of statutes "are distinct," that "statutes of repose affect the underlying right, not just the remedy," and that "a statute of repose may bar a claim even before the plaintiff suffers injury, leaving her without any remedy"). Even before UBS, several of our cases drew the distinction, along much the same lines as CTS. See, e.g., Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 n.4 (2d Cir. 2010); P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 102–03 (2d Cir. 2004); Stuart v. Am. Cyanamid Co., 158 F.3d 622, 627 (2d Cir. 1998). CTS's restatement of the differences between the two types of statute thus does not constitute a change in controlling precedent that would allow us to revisit UBS.

structured and worded in fundamentally different ways. Section 9658 reads, in relevant part:

> (a) State statutes of limitations for hazardous substance cases
>
> (1) Exception to State statutes
> In the case of any [toxic tort] action brought under State law . . . , if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.
>
> (2) State law generally applicable
> Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all [toxic tort] actions brought under State law . . . .
>
> . . . .
>
> (b) Definitions
> As used in this section –
>
> . . . .
>
> (2) Applicable limitations period
> The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) Special rules

In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such

> individual becomes competent or has had a legal representative appointed.

42 U.S.C. § 9658. Section 9658 does not purport to create an entirely new statute of limitations framework for state toxic tort actions; instead, it provides a limited "[e]xception to State statutes," id. § 9658(a)(1), which otherwise remain "generally applicable." Id. § 9658(a)(2); see also CTS, 134 S. Ct. at 2185 ("Under this structure, state law is not pre-empted unless it fits into the precise terms of the exception."). The exception applies only if the state statute "provides a commencement date which is earlier than the federally required commencement date," 42 U.S.C. § 9658(a)(1), which is defined as "the date the plaintiff knew (or reasonably should have known)" that the injury complained of was "caused or contributed to by the hazardous substance or pollutant or contaminant concerned." Id. § 9658(b)(4)(A). Thus, § 9658's "exception" does not change the length of the applicable limitations period; it simply modifies the time at which the limitations period begins to run, requiring states that do not already do so to apply the "discovery rule."

By contrast, the Extender Statute establishes "the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver." 12 U.S.C. § 1821(d)(14)(A). That limitations period (six years for "any contract claim" and three years for "any tort claim") applies unless "the period applicable under State law" is longer. Id. And the Extender Statute further provides that

> the date on which the statute of limitations begins to run on any claim described in

> [the previous] subparagraph shall be the later of –
>
> (i) the date of the appointment of the [FDIC] as conservator or receiver; or
>
> (ii) the date on which the cause of action accrues.

12 U.S.C. § 1821(d)(14)(B).[4] Rather than creating a limited exception, the Extender Statute thus establishes, for "any" action brought by the FDIC as conservator or receiver, the length of the limitations period, as well as the time at which the period begins to run. As we concluded in UBS, this structure suggests that Congress intended the Extender Statute to supersede any and all other time limitations, including statutes of repose.

Because of the differences in the statutes, much of CTS's reasoning is simply inapplicable to the Extender Statute. For instance, the CTS Court relied on § 9658's definition of "applicable limitations period" to mean "the period . . . during which a civil action . . . may be brought." 42 U.S.C. § 9658(b)(2). It explained that, technically speaking, only statutes of limitations "limit the time in which a civil action 'may

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[4] In the most common scenario, this provision will operate literally to *extend* the time to file a claim that is not yet time-barred. The Extender Statute also addresses the situation in which the otherwise-applicable limitations period has already caused a claim to expire before the FDIC's appointment as receiver. In that situation, the Extender Statute operates to revive the claim, in a limited category of cases, see 12 U.S.C. § 1821(d)(14)(C)(ii), in which the limitations period had expired "not more than 5 years before the appointment of the [FDIC] as conservator or receiver," id. § 1821(d)(14)(C)(i).

be brought,'" whereas statutes of repose "can prohibit a cause of action from coming into existence" in the first place. CTS, 134 S. Ct. at 2187. The Extender Statute, however, contains no such definition of "applicable limitations period." Similarly, the CTS Court observed that § 9658 includes an equitable tolling provision for minors and incompetents, 42 U.S.C. § 9658(b)(4)(B), a feature that is typical of statutes of limitations but not of statutes of repose. CTS, 134 S. Ct. at 2187–88. But there is no similar tolling provision in the Extender Statute.

The defendants and the dissent make much of the fact that the Extender Statute uses the term "statute of limitations" (rather than "statute of repose"), and uses it in the singular. In CTS, the Supreme Court noted that § 9658 "includes language describing the covered period in the singular," and observed: "This would be an awkward way to mandate the pre-emption of two different time periods with two different purposes." Id. at 2186–87. But first, as we have explained, the Extender Statute's mere use of the term "statute of limitations" does not settle the issue. As counsel for the defendants conceded at oral argument, Congress has never used the expression "statute of repose" in a statute codified in the United States Code. Indeed, the very statute of repose on which the defendants rely here is located in a section of the Code entitled "Limitation of actions." See 15 U.S.C. § 77m.

Further, when § 9658 uses the term "statute of limitations," and similarly refers to "the applicable limitations period" in the singular, it is describing the *existing* period that is *modified* by § 9658 and otherwise remains "generally applicable." The

Supreme Court thus took the use of the singular as an indication that § 9658 was intended to modify only one limitations period per claim – the period provided by the statute of limitations – and to leave in place the second period provided by the applicable statute of repose. By contrast, when the Extender Statute refers to "the applicable statute of limitations," it is referring to the *new* limitations period that is *created* by the Extender Statute.[5] The fact that the Extender Statute purports to create only one limitations period – rather than a dual statute of limitations/statute of repose framework such as that which ordinarily governs Securities Act claims – does not, standing alone, tell us anything about the number of limitations periods it was intended to displace.

The defendants and the dissent also emphasize that the Extender Statute's limitations period is tied to the concept of "accrual" of a claim. In CTS, the Supreme Court explained: "A statute of repose . . . is not related to the accrual of any cause of action[, but instead] mandates that there shall be no cause of action beyond a certain point, even if no cause of action has yet accrued." Id. at 2187 (internal quotation

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[5] Thus, we do not hold, as the dissent suggests, that "when Congress said 'statute of limitations' it also meant 'statute of repose.'" Dissent at 4. For that reason, the dissent's discussion of evidence that Congress knew the difference between the two types of statutes when it enacted the Extender Statute is beside the point. See id. at 2–4. But we note that even on its own terms, the dissent's argument is unpersuasive. Congress has continued to enact statutes of repose under the label "statute of limitations," despite the fact that it has been aware of the distinction since at least the 1980s. See 15 U.S.C. § 78u-6(h)(1)(B)(iii)(I)(aa) & (II), enacted in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1846.

marks and citation omitted). A statute of repose typically measures that cutoff point "from the date of the last culpable act or omission of the defendant." Id. at 2182. The limitations period established by the Extender Statute, however, runs from "the later of (i) the date of the appointment of the [FDIC] as conservator or receiver; or (ii) the date on which the cause of action accrues." 12 U.S.C. § 1821(d)(14)(B). But this tells us only that the Extender Statute is *itself* a statute of limitations, and not a statute of repose. Cf. Nat'l Credit Union Admin. Bd. v. Barclays Capital Inc., 785 F.3d 387, 395 & n.2 (10th Cir. 2015) (holding that the NCUA Extender Statute is a statute of limitations that can be waived, and collecting cases so holding). It provides no guidance on the question whether the Extender Statute *displaces* otherwise applicable statutes of repose – a question on which we must thus defer to our binding UBS precedent.[6]

Finally, the defendants take aim at what they perceive to be UBS's overreliance on the Extender Statute's legislative history and remedial purpose. As noted above, the Supreme Court in CTS directed courts not to treat "the proposition that remedial statutes should be interpreted in a liberal manner . . . as a substitute for a conclusion grounded in the statute's text and structure." CTS, 134 S. Ct. at 2185.

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[6] We thus disagree with the dissent that superficially similar "textual markers" in § 9658 and the Extender Statute require us to read the latter as the Supreme Court read the former. Dissent at 7. The dissent errs, in our view, by focusing on those markers in isolation, without considering their place within the larger statutory structure. Instead, "we follow the cardinal rule that statutory language must be read in context since a phrase gathers meaning from the words around it." Hibbs v. Winn, 542 U.S. 88, 101 (2004) (alteration and internal quotation marks omitted).

The UBS opinion, however, does no such thing. Rather, it begins with two paragraphs of textual analysis, which conclude that "[b]y using these words, Congress precluded the possibility that some other limitations period might apply to claims brought by FHFA as conservator." UBS, 712 F.3d at 142. Only then does it turn to the legislative history, which it considers relevant only "[t]o the extent there is any ambiguity in the words of the extender statute." Id. The UBS panel based its holding on what it determined to be "[t]he more natural reading of the provision, the one that is both inline with everyday usage and consistent with the objectives of the statute overall." Id. at 143, quoting Fed. Hous. Fin. Agency v. UBS Ams., Inc., 858 F. Supp. 2d 306, 316–17 (S.D.N.Y. 2012). It thus used the Extender Statute's legislative history and purpose as a complement to textual analysis, not as a substitute. Accordingly, we perceive nothing in CTS that undercuts the UBS opinion's analysis of the Extender Statute.[7]

We can dispose of the defendants' other arguments, which are not based on the holding or reasoning of CTS, more briefly. The defendants assert, for instance, that the FDIC Extender Statute does not apply to claims under the Securities Act, and instead applies only to state-law contract and tort claims. The textual basis for this argument is that the Extender Statute sets out limitations periods for "any contract claim" and "any tort claim," without specifically mentioning other types of claims or claims

[7] As noted above, see note 2, our conclusion that CTS does not undermine the displacement of statutes of repose by the various Extender statutes is shared by both of the other Courts of Appeals that have considered the question.

under federal law. 12 U.S.C. § 1821(d)(14)(A). In UBS, however, we squarely rejected that argument with respect to the FHFA Extender Statute, concluding that "a reasonable reader could only understand [that statute] to apply to both the federal and state claims in [that] case." UBS, 712 F.3d at 142. We relied on Congress's "explicit[] stat[ement] that '*the*' statute of limitations for '*any action*' brought by FHFA as conservator '*shall be*' as specified in [the Extender Statute]." Id. at 141, quoting 12 U.S.C. § 4617(b)(12) (emphases in UBS). Because no issue was presented in CTS about the types of claims to which § 9658 applied, CTS has no relevance to that part of UBS's holding.

Similarly, the defendants and the dissent argue that reading the Extender Statute to displace the Securities Act's statute of repose violates the presumption against repeals by implication, see Auburn Hous. Auth v. Martinez, 277 F.3d 138, 144 (2d Cir. 2002) (acknowledging "the important principle that repeals by implication are not favored"), contending that, under the FDIC's position, the Extender Statute in effect repeals the statute of repose for a class of cases (those brought by the FDIC as conservator or receiver). The dissent further explains that the presumption takes on added importance when it applies to the Securities Act's statute of repose, "a prominent and conspicuous provision in this nation's securities regulation regime" over the past eight decades. Dissent at 8. But the CTS opinion does not even mention the presumption, and the policy arguments raised by the dissent would have applied with equal force in UBS, which also dealt with the Securities Act's statute of repose, but which nevertheless held it to be superseded by the Extender

Statute. The presumption against repeals by implication thus does not provide us with any basis for holding that CTS undermines the authority of UBS.

CONCLUSION

The defendants have not identified any aspect of the Supreme Court's decision in CTS that requires us to revisit our UBS holding. Accordingly, that holding controls this case, and mandates the conclusion that the FDIC's complaint was timely. The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.

BARRINGTON D. PARKER, *Circuit Judge*, dissenting:

The FDIC Extender Statute, 12 U.S.C. § 1821(d)(14), extends "statute[s] of limitations" under "State law" for certain "contract" and "tort" claims, and it says nothing whatsoever about statutes of repose. Nonetheless, the majority opinion interprets this statute to impliedly repeal federal and state statutes of repose, including the statute of repose in the Securities Act of 1933, one of its key provisions. That result is not grounded in the text of the Extender Statute. Instead, it is extrapolated from our court's decision in *FHFA* v. *UBS Americas Inc.*, 712 F.3d 136 (2d Cir. 2013), where we held that the FHFA Extender Statute, 12 U.S.C. § 4617(b)(12), which is materially identical to the FDIC's, superseded the Securities Act's three-year repose period. But *UBS* was decided without the benefit of the Supreme Court's subsequent decision in *CTS* v. *Waldburger*, 134 S. Ct. 2175 (2014). That case

discussed, in considerable detail, the differences between statutes of limitation and statutes of repose. *See id.* at 2190. The majority's reasoning fails, in my view, to adequately account for those differences and perpetuates the confusion surrounding the two types of statutes that existed before *CTS*. Accordingly, I respectfully dissent.

The question before the Supreme Court in *CTS* was whether CERCLA's reference to a "statute of limitations" also encompassed a state-law statute of repose, a question of direct relevance to this case. Plaintiffs in *CTS* had brought a nuisance action under North Carolina law, which uses a three-year statute of limitations and a ten-year statute of repose for such tort suits. 134 S. Ct. at 2181, 2184. Because plaintiffs had brought suit well outside the ten-year repose period, their action was untimely unless CERCLA's extender provision, 42 U.S.C. § 9658, delayed the running of both the state-law statute of limitations and the state-law statute of repose. The Supreme Court held that CERCLA's reference to a "statute of limitations" means exactly what it says: it extends only limitations periods, not repose periods. *Id.* at 2182 ("[Section] 9658 mandates a distinction" between "statutes of limitations and statutes of repose.").

The majority contends that *CTS* did not "purport to lay out a novel framework" for determining the scope of an extender provision. Majority Op. at 10. I read the case differently. What the Court did was to focus on the "central distinction between statutes of limitations and statutes of repose" and to make clear that those two types of statutes are "measured from different points," "seek to attain different purposes," and are "targeted at a different actor." 134 S. Ct. at

2182–83. A statute of limitations, the Court emphasized, "creates a time limit for suing in a civil case, based on the date when the claim accrued" and targets a plaintiff's obligation "to pursue diligent prosecution of known claims." *Id.* By contrast, a statute of repose "puts an outer limit on the right to bring a civil action," "measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Id.* at 2182. In other words, a statute of repose targets a defendant's right to "be free from liability after the legislatively determined period of time." *Id.* at 2183. Therefore, *CTS* most certainly *does* provide the legal framework for determining the scope of the FDIC Extender Statute.

CTS also makes clear that in 1989 when Congress passed the FDIC Extender Statute, it knew the difference between the two types of statutes. After an in-depth historical review, the Court determined that the "general usage of the legal terms has not always been precise, but the concept that the statutes of repose and statutes of limitation are distinct was well enough established to be reflected in the 1982 Study Group Report, commissioned by Congress" as it considered amendments to CERCLA. 134 S. Ct. at 2185–86. "The Report acknowledged that statutes of repose were not equivalent to statutes of limitation and that a recommendation to pre-empt the latter did not necessarily include the former." *Id.* at 2186. The Court observed that "[t]he scholars and professionals who were discussing this matter (and indeed were *advising Congress*) knew of a clear distinction between the two." *Id.* (emphasis added).

If anything, congressional understanding of the distinction between statutes of limitations and statutes of repose only deepened between the 1986 amendments to CERCLA and the 1989 enactment of the Extender Statute. As one court has noted, "an electronic search of the Congressional Record from 1985 until the enactment of [the Extender Statute] reveals at least forty-four separate uses of the phrase 'statute of repose' across twenty-seven different statements by members of Congress." *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 966 F. Supp. 2d 1031, 1039 (C.D. Cal. 2013). That number rises to "fifty-seven separate mentions . . . across thirty different statements" if one searches for "'statute of repose' combined with closely related phrases such as 'statute of limitations and repose.'" *Id.* at 1039 n.3.

Throughout the 1980s, many commentators cited the Securities Act's repose period as a template for various regulatory reforms. In 1987—two years before enactment of the Extender Statute—Judge Frank Easterbrook observed that the 1933 Securities Act and 1934 Securities Exchange Act "called for uniform statutes of limitations *coupled with statutes of repose*." *Norris* v. *Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987), *overruled on other grounds by Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990). Several scholars urged Congress in the 1980s to adopt similar repose periods for other causes of action, including those brought under Rule 10b-5. *See, e.g.*, Louis Loss, *Fundamentals of Securities Regulation* 1166 (1983); ABA Comm. on Fed. Regulation of Sec., *Report on the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 657–58 (1986). Accordingly, there can be no serious question that

Congress understood the distinction between statutes of limitations and statutes of repose in 1989 when it enacted the Extender Statute. In light of this history, the notion that when Congress said "statute of limitations" it also meant "statute of repose" is not viable.

The majority opinion claims that Appellees have failed to overcome *UBS* by "show[ing] that 'its rationale [was] overruled, implicitly or expressly, by the Supreme Court' in *CTS*." Majority Op. at 9 (quoting *United States* v. *Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986)). I disagree. The rationale of *UBS* is that the FHFA Extender Statute displaced statutes of repose because "statute of limitations" was a catch-all limitations period that applied indiscriminately to statutes of repose and statutes of limitations. The court presumed that that Extender Statute displaced statutes of repose, reasoning that "[i]f Congress had really wanted to exclude securities claims from the ambit of HERA's extender statute, it surely would have done so clearly and explicitly." *UBS*, 712 F.3d at 143. [8] But this rationale cannot be reconciled with *CTS*.

[8] It is of course settled that our panel is bound by the decisions of prior panels until such time as they are overruled either en banc panel or by the Supreme Court. *Lotes Co.* v. *Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014). However, where, as here, "there has been an intervening Supreme Court decision that casts doubt on controlling precedent, one panel of this Court may overrule a prior decision of another panel." *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010). Importantly, the intervening decision need not address the precise issue decided by the panel for this exception to apply. *Id.*

When we decided *UBS*, we did not have the benefit of the Supreme Court's identification of the factors relevant to assessing what an extender statute achieves. Consequently, when we concluded in *UBS* that the FHFA Extender Statute reached statutes of repose, we did not, as is now required by *CTS*, examine: (i) the meaning of the term "statute of limitations" when Congress passed the Extender Statute, (ii) Congress' reference to a single limitations period, or (iii) its reference to the accrual date of claims. Instead, we briefly examined the FHFA Extender Statute, highlighted imprecise uses of the term "statute of limitations" in the past, and concluded in essence that when Congress referred to a limitations period it was probably talking about both statutes of limitations and statutes of repose, unless it explicitly stated otherwise. *See UBS*, 712 F.3d at 141–43. While I have no quarrel with our court's thoughtful and careful decision in *UBS*, the law changes, and as far as the resolution of this case is concerned, *CTS* changed the law.

The majority reasons that simply because *CTS* deals with a materially different statute, it is largely "inapplicable to the [FDIC] Extender Statute." *See* Majority Op. at 15. That assertion misses the mark. The importance of *CTS* does not depend on whether it dealt with a textually congruent statute. Its importance derives from its instruction on how to read extender statutes. In *UBS*, we reasoned that by extending "*the* applicable statute of limitations" for actions brought by the FHFA as conservator, 12 U.S.C. § 4617(b)(12)(A) (emphasis added), "Congress intended one statute of limitations" to apply to all such actions, 712 F.3d at 143. In *CTS*, however, the Supreme Court treated virtually

identical language describing the covered period in the singular as evidence that Congress did not intend to alter "two different time periods with two different purposes." 134 S. Ct. at 2186–87.

The *UBS* panel also reasoned that by providing the statute of limitations for "*any* action" brought by the FHFA as conservator, 12 U.S.C. § 4617(b)(12)(A) (emphasis added), "Congress precluded the possibility that some other limitations period might apply," 712 F.3d at 141–42. But plaintiffs in *CTS* made the same argument and the Supreme Court rejected it. *See* Brief for Respondents at 21, *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014) (No. 13-339) (arguing that because the CERCLA provision "applies to 'any action,'" it "comprehensively addresses all state limitations periods"). The Court declined to accept the terms "the" and "any action" as textual indications that CERCLA § 9658 extends statutes of repose because such an interpretation disregards the reality that statutes of limitations and statutes of repose are different. This reasoning is not compatible with the rationale of *UBS* that "[a]lthough statutes of limitations and statutes of repose are distinct in theory, the courts . . . have long used the term 'statute of limitations' to refer to statutes of repose." 712 F.3d at 142–43. Once it is accepted that statutes of limitation and statutes of repose are different, the conclusion that the Extender Statute only extends statutes of limitation follows from a straightforward reading of the Statute, a reading whose correctness is confirmed by multiple markers in the text.

The Statute refers to a "statute of limitations" in four separate places (with a fifth reference in the

heading). It says nothing about extending, displacing, or altering any statutes of repose; indeed, it never once mentions the word "repose." Nor does the Extender Statute use any language that could be construed as encompassing statutes of repose—it does not mention "limitation of actions" (the language used in the Securities Act) or any other broad terms that might be read to include periods of repose. Additionally, the Extender Statute, like CERCLA § 9658, refers to the relevant limitations period in the singular, which, according to the Supreme Court, "would be an awkward way to mandate the pre-emption of two different time periods with two different purposes." *CTS*, 134 S. Ct. at 2186–87.

The Statute also contains numerous references to the accrual of claims. As *CTS* emphasizes, the time at which a claim accrues is relevant to statutes of limitation, but not statutes of repose. The Extender Statute fixes its start date as an accrual date and provides as one of the options the date on which a state tort or contract claim would otherwise accrue. 12 U.S.C. § 1821(d)(14)(B)(i)–(ii). The other option for accrual, the date of the FDIC's appointment, is the earliest date when the FDIC as a plaintiff could bring a claim on behalf of a failed bank. As the *CTS* Court also observed, it is a statute of limitations, not a statute of repose, that "require[s] plaintiffs to pursue diligent prosecution of known claims." 134 S. Ct. at 2183 (internal quotation marks omitted).

Given these pellucid textual markers, I conclude that when Congress referred in the Extender Statute to the type of time limit that accrues and targets plaintiffs' diligence, it could only have meant a statute of limitations. Even were I persuaded by the

majority's theory that the Extender Statute creates a statute of limitations that displaces statutes of repose, Majority Op. at 17, this contention is insufficient to overcome the plain text of the statute, which offers no textual clues suggesting that "statute of limitations" should be read to broadly encompass any applicable limitations period. Courts are not at liberty to selectively pick apart statutes. When two statutes are capable of co-existence, it is our obligation, absent a clearly expressed congressional intention to the contrary, to regard each as effective. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). No such intention exists here.

Moreover, the majority's view that Congress, without ever saying so, passed a statute of limitations that somehow eliminated a widely relied on and widely applied statute of repose violates the presumption against implied repeals. The Supreme Court has emphasized in no uncertain terms that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Hui* v. *Castaneda*, 559 U.S. 799, 810 (2010). The same presumption applies against modifying or superseding prior statutes by implication. "It does not matter whether this alteration is characterized as an amendment or a partial repeal. Every amendment of a statute effects a partial repeal to the extent that the new statutory command displaces earlier, inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals." *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007); *see also In re WTC Disaster Site*, 414 F.3d 352, 366 (2d Cir. 2010) ("The intention of Congress to repeal, *modify* or

supersede must be clear and manifest." (emphasis added) (quoting *In re Bear River Drainage District*, 267 F.2d 849, 851 (10th Cir. 1959))); *Schiller* v. *Tower Semiconductor Ltd.*, 449 F.3d 286, 300 (2d Cir. 2006) ("[T]he strong judicial policy disfavoring the inference that a statute has been repealed *sub silentio* by subsequent legislation applies with equal force to claims of implied amendment." (internal quotation marks and citation omitted) (quoting *Regan* v. *Ross*, 691 F.2d 81, 87 (2d Cir. 1982))).

As this law makes clear, if Congress had intended to do away with a statute of repose, it had to say so clearly and unmistakably. But it didn't. Instead, Congress chose to remain silent, and we are not at liberty to infer displacement from silence. Fidelity to this rule is especially important in the case of a statute of repose that Congress enacted in 1933, that it explicitly modified a year later, and that has been a prominent and conspicuous provision in this nation's securities regulation regime over the ensuing eight decades. *See* Securities Exchange Act of 1934, Pub. L. No. 73-291, § 207, 48 Stat. 881, 908. Statutes of repose confer important substantive rights, and the Securities Act's statute of repose is especially important for issuers and underwriters of securities to be free from near-strict statutory liability three years after the offering or sale of securities. In setting aside the Securities Act's repose period, the majority disrupts a legislative compromise that was at the heart of the 1933 Act. The Act created private causes of action "to insure honest securities markets and thereby promote investor confidence." *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1067 (2014). Those causes of action are "notable both for the limitations on their scope as well as the *in*[]

terrorem nature of the liability they create." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010). "[U]nlike securities fraud claims pursuant to [S]ection 10(b) of the Securities Exchange Act," claims under Sections 11 and 12 of the Securities Act do not require plaintiffs to prove scienter, reliance (in most cases), or loss causation. *Id.* As we have noted, Sections 11 and 12 of the Securities Act "apply more narrowly but give rise to liability more readily." *Id.* at 360.

Because of the relative ease of proving liability, Congress established a strict repose period in the Securities Act based on its "fear that lingering liabilities would disrupt normal business and facilitate false claims." *P. Stolz Family P'ship L.P.* v. *Daum*, 355 F.3d 92, 105 (2d Cir. 2004) (internal quotation marks omitted). The Act's repose period reflects a legislative determination that, once three years have passed from the public offering or sale of a security, a company's management may treat a securities transaction as closed. *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537, 1546 (3d Cir. 1988). Few compromises in the securities laws are as integral to the operation of the nation's capital markets as this compromise.

I suppose that there may be compelling policy arguments that receivers should be given relief from periods of repose, and I can imagine a robust debate on that topic. But the resolution of competing policy choices is for Congress, not for us. Although reading the Extender Statute to exclude statutes of repose means that the FDIC is able to pursue fewer claims, we are not authorized to fix that problem because we are obligated to read the statute as it is written.

Baker Botts L.L.P. v. *ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015). "When a statute's language is clear, our only role is to enforce that language according to its terms." *Life Receivables Trust* v. *Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 216 (2d Cir. 2008).

Colonial had a right to sue for alleged misstatements made in connection with the securities it purportedly purchased in 2007. But that right was extinguished three years after the securities were offered or sold to the public. The converse is equally true: three years after offering and selling the securities, Appellees had a substantive right to be free from potential liability. When the FDIC stepped into Colonial's shoes in 2009, it succeeded solely to the "rights, titles, powers, and privileges" then belonging to Colonial, including the bank's three-year extinguishable right to sue on securities that it had purchased in 2007. *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994); *FDIC* v. *Ernst & Young LLP*, 374 F.3d 579, 581 (7th Cir. 2004). When the FDIC filed its Securities Act claims in 2012, the statute of repose had expired. The expiration of that period of repose did not simply mean that the claims could not be made, but it meant that they no longer existed. *See CTS*, 134 S. Ct. at 2187 ("[A] statute of repose can prohibit a cause of action from coming into existence."). A necessary corollary of the majority's reasoning is that Congress, when passing the Extender Statute, brought dead claims back to life. For me, it is several bridges too far to believe that Congress intended that result without so much as a word to that effect. Reading the Extender Statute to mean what it says, I would hold that it did not extend the Securities Act's statute of repose, and I would affirm the judgment of the District Court.

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

- X

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR COLONIAL BANK,

Plaintiff,

12 Civ. 6166 (LLS)

- against –

OPINION AND ORDER

CHASE MORTGAGE FINANCE CORP., et al,

Defendants.

- X

This action is brought by the Federal Deposit Insurance Corporation (the "FDIC"), as receiver for Colonial Bank ("Colonial"), for violations of the Securities Act of 1933, 15 U.S.C. § 77a *et seq*. (the "1933 Act"), based on alleged misstatements made in connection with Colonial's purchase of securities issued or underwritten by defendants.

Under the 1933 Act, "In no event shall any such action be brought to enforce a liability created under section 77k or 771(a)(1) of this title more than three

years after the security was bona fide offered to the public, or under section 771(a)(2) of this title more than three years after the sale[,]" 15 U.S.C. § 77m.

The securities at issue in this action were offered to the public in 2006 and 2007, and purchased by Colonial in the summer and fall of 2007. Colonial subsequently failed, and the FDIC was appointed receiver on August 14, 2009. The FDIC filed the instant complaint on August 10, 2012.

The FDIC maintains that its claims are timely under the following provision of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), 12 U.S.C. § 1821 *et seq*.:

> (14) Statute of limitations for actions brought by conservator or receiver
>
> > (A) In general
> >
> > Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be–
> >
> > > (i) in the case of any contract claim, the longer of–
> > >
> > > > (I) the 6-year period beginning on the date the claim accrues; or
> > > >
> > > > (II) the period applicable under State law; and

(ii) in the case of any tort claim (other than a claim which is subject to section 1441a(b)(14) of this title), the longer of–

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of–

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

12 U.S.C. § 1821(d)(14) (hereinafter referred to as the "FDIC Extender Statute").

Defendants contend that the FDIC Extender Statute only extends the 1933 Act's statute of limitations (otherwise one year, see p. 11 below), and does not alter its three year statute of repose (quoted on p. 1 above). They moved to dismiss the amended complaint, arguing (among other things) that the FDIC's claims are time-barred.

While that motion was pending, the Second Circuit decided Federal Housing Finance Agency v. UBS Americas, Inc., 712 F.3d 136 (2d Cir. 2013), which

seemed to resolve the statute of repose dispute in the FDIC's favor in a case involving a similar extender act.[9] Defendants withdrew their argument about the 1933 Act's statute of repose, reserving the right to reassert it at a later date, see Ds.' Reply in Further Support of Ds.' Mot. To Dismiss Am. Compl. at 4 n.4. This Court subsequently denied defendants' motion to dismiss, on grounds which did not consider the 1933 Act's statute of repose, see Fed. Deposit Ins. Corp. v. Chase Mortgage Fin. Corp. et al, No. 12 Civ. 6166 (LLS), 2013 WL 5434633 (S.D.N.Y. Sept. 27, 2013) [Dkt. No. 86].

Now, relying on the recent United States Supreme Court decision CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014), defendants renew their argument that the FDIC's claims are barred by the 1933 Act's statute of repose, and move for judgment on the pleadings.

For the reasons discussed below, defendants' motion is granted.

Waldburger

In Waldburger, the Supreme Court was presented with the question whether section 9658 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),[10] 42 U.S.C. § 9601 *et seq.*, which pre-

[9] UBS held that a similar provision in the Housing and Economic Recovery Act of 2008 ("HERA"), 12 U.S.C. § 4617(b)(12), alters both statutes of limitations and statutes of repose.

[10] Section 9658 provides:

. . .

(b) Definitions

As used in this section–

empts state law statutes of limitations in certain tort actions, also pre-empts the state law statute of repose that would otherwise bar the plaintiffs' claims.

---

(1) Subchapter I terms

The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) Special rules

In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

42 U.S.C. § 9658.

The Supreme Court stated:

> Statutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability for tortious acts. Both types of statutes can operate to bar a plaintiff's suit, and in each instance time is the controlling factor. There is considerable common ground in the policies underlying the two types of statute. But the time periods specified are measured from different points, and the statutes seek to attain different purposes and objectives. And, as will be explained, § 9658 mandates a distinction between the two.
>
> In the ordinary course, a statute of limitations creates a time limit for suing in a civil case, based on the date when the claim accrued. Measured by this standard, a claim accrues in a personal-injury or property-damage action when the injury occurred or was discovered. For example, North Carolina, whose laws are central to this case, has a statute of limitations that allows a person three years to bring suit for personal injury or property damage, beginning on the date that damage becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs.
>
> A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action. That limit is measured not

from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant. A statute of repose bars any suit that is brought after a specified time since the defendant acted (such as designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury. The statute of repose limit is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered. …

Although there is substantial overlap between the policies of the two types of statute, each has a distinct purpose and each is targeted at a different actor. Statutes of limitations require plaintiffs to pursue diligent prosecutions of known claims. Statutes of limitations promote justice by preventing surprises through plaintiffs' revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons. But the rationale has a different emphasis. Statutes of repose 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. Indeed, the

> Double Jeopardy Clause has been described as a "statute of repose" because it in part embodies the idea that at some point a defendant should be able to put past events behind him.

Waldburger, 134 S.Ct. at 2182-83.

The Supreme Court concluded that section 9658 does not pre-empt statutes of repose, reasoning that:

> The statute defines the "applicable limitations period," the "commencement date" of which is subject to pre-emption, as a period specified in "a statute of limitations." Indeed, § 9658 uses the term "statute of limitations" four times (not including the caption), but not the term "statute of repose." This is instructive, but not dispositive. While the term "statute of limitations" has acquired a precise meaning, distinct from "statute of repose," and while that is its primary meaning, it must be acknowledged that the term "statute of limitations" is sometimes used in a less formal way. In that sense, it can refer to any provision restricting the time in which a plaintiff must bring suit. Congress has used the term "statute of limitations" when enacting statutes of repose.

Waldburger, 134 S.Ct. at 2185. And, in language which applies equally this case:

While the use of the term "statute of limitations" in § 9658 is not dispositive, the Court's textual inquiry does not end there, for other features of the statutory text further support the exclusion of statutes of repose. The text of § 9658 includes language describing the covered period in the singular. The statute uses the terms "the applicable limitations period," "such period shall commence," and "the statute of limitations established under State law." This would be an awkward way to mandate the pre-emption of two different time periods with two different purposes.

*   *   *   *   *

A statute of repose, however, as noted above, is not related to the accrual of any cause of action. Rather, it mandates that there shall be no cause of action beyond a certain point, even if no cause of action has yet accrued. Thus, a statute of repose can prohibit a cause of action from coming into existence. A statute of repose can be said to define the scope of the cause of action, and therefore the liability of the defendant. …

In light of the distinct purpose for statutes of repose, the definition of "applicable limitations period" (and thus also the definition of "commencement date") in § 9658(b)(2) is best read to encompass only statutes of limitations, which generally begin to run after a cause of action accrues

> and so always limit the time in which a civil action "may be brought." A statute of repose, however, may preclude an alleged tortfeasor's liability before a plaintiff is entitled to sue, before an actionable harm ever occurs.

Waldburger, 134 S.Ct. at 2186-87, quoting 42 U.S.C. § 9658 (internal quotations and citations omitted).

Discussion

Statutory Text

Like section 9658 of CERCLA, the FDIC Extender Statute uses the term "statute of limitations" multiple times, and never uses the term "statute of repose." "This is instructive, but not dispositive," Waldburger, 134 S. Ct. at 2185. The Court must examine other features of the statutory text to determine whether Congress intended to include statutes of repose in the FDIC Extender Statute's ambit.

Like CERCLA, the FDIC Extender Statute describes the covered time period in the singular by setting forth the applicable statute of limitations and the date on which the statute of limitations begins to run, and looking to "the period applicable under State law" and "the date on which the cause of action accrues." "This would be an awkward way to mandate the pre-emption of two different time periods with two different purposes." Waldburger, 134 S. Ct. at 2187.

Furthermore, the FDIC Extender Statute addresses (and changes) the dates of accrual of

claims. It states that "the applicable statute of limitations … shall be" the longer of the "period beginning on the date the claim accrues" or "the period applicable under State law." Subsection B, "Determination of the date on which a claim accrues," defines and changes the date on which a claim accrues.

In contrast, the 1933 Act's statute of repose has nothing to do with when a claim accrues. It looks to only one thing: the date the security was offered and sold to the public. After three years from then, no action thereon can be brought. The concept of accrual, which is central to the Extender Statute, is wholly absent from the 1933 Act's statute of repose.

"A statute of repose … is not related to the accrual of any cause of action. Rather, it mandates that there shall be no cause of action beyond a certain point, even if no cause of action has yet accrued." Waldburger, 134 S. Ct. at 2187. Like section 9658 of CERCLA, the FDIC Extender Statute's focus on claim accrual "is best read to encompass only statutes of limitations," Waldburger, 134 S.Ct. at 2187.

The 1933 Act's grant of repose after three years is similarly impervious to equitable tolling, a concept often applied to statutes of limitations. See Waldburger 134 S.Ct. at 2183. The Supreme Court found it notable that section 9658 provides for equitable tolling, whereas "a repose period is fixed and its expiration will not be delayed by estoppel or tolling," Waldburger 134 S.Ct. at 2187.

In sum, 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.

Legislative History and Purpose

The FDIC argues that the legislative purpose of FIRREA was to "significantly increase the amount of money that can be recovered by the Federal Government through litigation," FDIC's Opp. 11, quoting 135 Cong. Rec. S10182-01, and "maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law claims that otherwise would have been lost due to the expiration of hitherto applicable limitations periods," id., and that "Defendants' interpretation of the statute, which would interfere with the FDIC's ability to carry out its mandate, is in direct conflict with this purpose," FDIC's Surreply 8.

By postponing otherwise applicable times of accrual of claims in state statutes of limitations, the FDIC Extender Statute did give the FDIC more time to bring claims that would otherwise have been lost, thus increasing the FDIC's ability to collect money through litigation.

The statute of limitations in the 1933 Act is one year, see 15 U.S.C. § 77m ("No action shall be maintained to enforce any liability created under section 77k or 771(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 771(a)(1) of this title, unless

brought within one year after the violation upon which it is based."). The FDIC Extender Statute increases the statute of limitations for any 1933 Act claims brought by the FDIC as receiver to three years, see 12 U.S.C. § 1821(d)(14)(A)(ii)(I), thereby "significantly increase[ing] the amount of money that can be recovered by the Federal Government through litigation."

Conclusion

The FDIC Extender Statute does not alter applicable statutes of repose. Accordingly, the FDIC's claims are time-barred.

Defendants' motion for judgment on the pleadings [Dkt No. 133] is granted.

The clerk will enter judgment for defendants, with costs and disbursements according to law.

So ordered.

Dated: New York, New York
August 29, 2014

/s/ Louis L. Stanton
Louis L. Stanton
U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of July, two thousand sixteen.

Federal Deposit Insurance Corporation,
AS Receiver For Colonial Bank,

Plaintiff - Appellant,

v. **ORDER**

Docket No: 14-3648

First Horizon Asset Securities, Inc., First Horizon Home Loan Corporation, Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., FTN Financial Securities Corp., HSBC Securities (USA) Inc., RBS Securities Inc., UBS Securities LLC, Wells Fargo Asset Securities Corporation,

Defendants - Appellees,

Chase Mortgage Finance Corp., JP Morgan Chase & Co., JP Morgan Securities LLC, Citicorp Mortgage Securities, Inc., Citimortgage, Inc., Citigroup Global Markets Inc., Ally

Securities LLC, Merrill Lynch, Pierce,
Fenner & Smith Incorporated,

Defendants.

Appellees, First Horizon Asset Securities, Inc., First Horizon Home Loan Corporation, Credit Suisse Securities (USA) LLC, Deutsche Bank Securities Inc., FTN Financial Securities Corp., HSBC Securities (USA) Inc., RBS Securities Inc., UBS Securities LLC, and Wells Fargo Asset Securities Corporation, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[Seal]

/s/ Catherine O'Hagan Wolfe

APPENDIX D

RELEVANT STATUTORY PROVISIONS

* * * * *

1. 12 U.S.C. 1821(d) provides in pertinent part:

§ 1821. Insurance Funds

(d) Powers and duties of Corporation as conservator or receiver

(14) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim (other than a claim which is subject to section 1441a(b)(14) of this title), the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

(C) Revival of expired State causes of action

(i) In general

In the case of any tort claim described in clause (ii) for which the statute of limitation applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the Corporation as conservator or receiver, the Corporation may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitation applicable under State law.

(ii) Claims described

A tort claim referred to in clause (i) is a claim arising from fraud, intentional misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the institution.

*   *   *   *   *

2. 12 U.S.C. 4617(b) provides in pertinent part:

§ 4617. Authority over critically undercapitalized regulated entities

(b) Powers and duties of the Agency as conservator or receiver

(12) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Agency as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date on which the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date on which the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Agency as conservator or receiver; or

(ii) the date on which the cause of action accrues.

* * * * *

3. 12 U.S.C. 1787(b) provides in pertinent part:

§ 1787. Payment of insurance

(b) Powers and duties of Board as conservator or liquidating agent

(14) Statute of limitations for actions brought by conservator or liquidating agent

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Board as conservator or liquidating agent shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Board as conservator or liquidating agent; or

(ii) the date on which the cause of action accrues.

* * * * *

4. 15 U.S.C. 77k(a) provides:

§77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

* * * * *

5. 15 U.S.C. 77*o* provides:

§77*o*. Liability of controlling persons

(a) Controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

(b) Prosecution of persons who aid and abet violations

For purposes of any action brought by the Commission under subparagraph (b) or (d) of section 77t of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this subchapter, or of any rule or regulation issued under this subchapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

* * * * *

6. 15 U.S.C. 77m provides:

§ 77m. Limitation of actions

No action shall be maintained to enforce any liability created under section 77k or 77*l*(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77*l*(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77*l*(a)(2) of this title more than three years after the sale.

* * * * *

7. 42 U.S.C. 9658 provides:

§ 9658. Actions under State law for damages from exposure to hazardous substances

(a) State statutes of limitations for hazardous substance cases

(1) Exception to State statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations

period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable

Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) Actions under section 9607

Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this title.

(b) Definitions

As used in this section—

(1) Subchapter I terms

The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) Special rules

In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.