No. 15-783

Supreme Court, U.S.
FILED
DEC 10 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

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

Petitioners,

—v.—

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Guaranty Bank,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

E. Joshua Rosenkranz
Thomas M. Bondy
Paul F. Rugani
Susannah L. Weaver
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, New York 10019
(212) 506-5000

Thomas C. Rice
Andrew T. Frankel
Counsel of Record
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
afrankel@stblaw.com

Shannon H. Ratliff
Lisa A. Paulson
RATLIFF LAW FIRM
600 Congress Avenue
Suite 3100
Austin, Texas 78701
(512) 493-9600

Counsel for Petitioner RBS Securities Inc.

(*Additional Counsel Listed on Inside Cover*)

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Guaranty Bank,

Petitioner,

—v.—

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

Respondents.

Shannon H. Ratliff
Lisa A. Paulson
RATLIFF LAW FIRM
600 Congress Avenue
Suite 3100
Austin, Texas 78701
(512) 493-9600

Thomas C. Rice
Andrew T. Frankel
SIMPSON THACHER
& BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Counsel for Petitioner Deutsche Bank Securities Inc.

Bruce Davidson Oakley
HOGAN LOVELLS US LLP
700 Louisiana Street
Suite 4300
Houston, Texas 77002
(713) 632-1400

Richard H. Klapper
Theodore Edelman
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner Goldman, Sachs & Co.

QUESTION PRESENTED

The Texas Securities Act ("TSA") includes both a *statute of limitations*, requiring plaintiffs to bring their claims within three years of when the claims accrue, and a *statute of repose*, foreclosing all liability five years after a sale. The Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") creates a new "*statute of limitations*" for claims that the Federal Deposit Insurance Corporation ("FDIC") brings as the receiver for a failed bank. FDIC brought claims against Petitioners under the Texas Securities Act long after the *statute of repose* for those claims had passed.

This Court has held that courts may not find a provision of state law preempted unless Congress's intention to preempt is clear and manifest. And less than two years ago, in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), this Court concluded that a similar provision in another statute, which also extended "*statutes of limitations*," did *not* preempt *statutes of repose*.

The question presented is whether the Court of Appeals erred in concluding that FIRREA's extender provision preempts state *statutes of repose*.

CORPORATE DISCLOSURE STATEMENT

Petitioners in this case, defendants-appellees below, are RBS Securities Inc., Deutsche Bank Securities Inc., and Goldman, Sachs & Co.

Respondent in this case, plaintiff-appellant below, is the FDIC, as receiver for Guaranty Bank.

Petitioner RBS Securities Inc. is a wholly owned subsidiary of RBS Holdings USA Inc., which is a wholly owned subsidiary of NatWest Group Holdings Corp., which is an indirect wholly owned subsidiary of the Royal Bank of Scotland Group plc, which has no parent corporation, and no publicly held company owns 10% or more of its stock.

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

Petitioner Goldman, Sachs & Co. is an indirectly wholly owned subsidiary of The Goldman Sachs Group, Inc., which has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 15

I. The Court Of Appeals' Decision Conflicts With *CTS* And This Court's Preemption Jurisprudence. 16

A. The Court of Appeals disregarded this Court's preemption jurisprudence. 16

B. The decision below directly conflicts with this Court's decision in *CTS*. 20

C. The Court of Appeals' statutory interpretation is fundamentally flawed. 23

II. This Court Should Address This Question Now Because It Is Recurring And Of Great Practical Significance. 27

III. This Case Presents An Ideal Vehicle For Addressing The Question Presented 35

CONCLUSION 36

APPENDIX A

5th Circuit Opinion
(Aug. 10, 2015) 1a

APPENDIX B

District Court Order on Motion to Dismiss
(No. A-14-CA-126, Aug. 18, 2014) 46a

APPENDIX C

District Court Order on Motion to Dismiss
(No. A-14-CA-129, Aug. 18, 2014) 70a

APPENDIX D

5th Circuit Order Denying Petition for Rehearing
(Sept. 11, 2015) 94a

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Altria Grp., Inc. v. Good,
555 U.S. 70 (2008).....17, 18, 26

Augutis v. United States,
732 F.3d 749 (7th Cir. 2013).....25

Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,
489 U.S. 141 (1989).....21

Chamber of Commerce of U.S. v. Whiting,
563 U.S. 582 (2011).....32

Cipollone v. Liggett Grp., Inc.,
505 U.S. 504 (1992).....17

Credit Suisse Sec. (USA) LLC v. Simmonds,
132 S. Ct. 1414 (2012).....23

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014).....*passim*

Edgar v. MITE Corp.,
457 U.S. 624 (1982).....6, 18

FDIC v. Bear Stearns Asset Backed Sec. I LLC, 92 F. Supp. 3d 206 (S.D.N.Y. 2015).....13, 34

FDIC v. Chase Mortg. Fin. Corp.,
42 F. Supp. 3d 574 (S.D.N.Y. 2014) 13, 34

FDIC v. Countrywide Sec. Corp.,
966 F. Supp. 2d 1018 (C.D. Cal. 2013)....13, 18, 34

FDIC v. Countrywide Sec. Corp.,
966 F. Supp. 2d 1031 (C.D. Cal. 2013).....10

FDIC v. Countrywide Sec. Corp.,
No. 12-cv-3279, slip op. (C.D. Cal.
Dec. 8, 2014).....13, 34

FDIC v. McSweeney,
976 F.2d 532 (9th Cir. 1992).....29

FDIC v. Goldman, Sachs & Co.,
No. A-14-CA-129, 2014 WL 4161567
(W.D. Tex. Aug. 18, 2014) 34

FDIC v. Merrill Lynch, Pierce, Fenner & Smith Inc., No. A-14-CA-126, 2014 WL 4161561 (W.D. Tex. Aug. 18, 2014).....13, 34

FDIC v. Morgan Stanley Capital I Inc.,
No. 14-cv-00418, 2015 WL 1381875
(D. Colo. Mar. 24, 2015).....34

FHFA v. Countrywide Fin. Corp.,
900 F. Supp. 2d 1055 (C.D. Cal.
2012).....14

FHFA v. HSBC N. Am. Holdings Inc.,
No. 11-cv-6189, 2014 WL 4276420
(S.D.N.Y. Aug. 28, 2014).....14, 34

FHFA v. Royal Bank of Scotland Grp. PLC,
No. 3:11-cv-1383, 2015 WL 4999912 (D.
Conn. Aug. 21, 2015).....14, 34

FHFA v. UBS Ams. Inc.,
712 F.3d 136 (2d Cir. 2013) 13, 19

Fid. Fed. Bank & Trust v. Kehoe,
547 U.S. 1051 (2006).....28

FTC v. Phoebe Putney Health Sys., Inc.,
133 S. Ct. 1003 (2013).....11, 20

Gobeille v. Liberty Mut. Ins. Co.,
No. 14-181, *cert. granted*, 135 S. Ct.
2887 (U.S. June 29, 2015) 31

Gordon v. New York Stock Exch., Inc.,
422 U.S. 659 (1975).....33

Gregory v. Ashcroft,
501 U.S. 452 (1991).....31, 32

Guinn v. FDIC,
No. 2:09-cv-01809, 2015 WL 139386
(D. Nev. Jan. 12, 2015) 34

Huddleston v. United States,
485 F. App'x 744 (6th Cir. 2012) 25

Liberty Mut. Ins. Co. v. Donegan,
746 F.3d 497 (2d. Cir. 2014) 31

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996).....18, 26

N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,
514 U.S. 645 (1995).....17

NCUA v. Barclays Capital, Inc.,
785 F.3d 387 (10th Cir. 2015).....30, 34

NCUA v. Goldman, Sachs & Co.,
No. 2:11-cv-05887, 2012 U.S. Dist.
LEXIS 188995 (C.D. Cal. Sept. 4, 2012) 13

NCUA v. Morgan Stanley & Co.,
No. 13-cv-6705, 2014 WL 5017822
(S.D.N.Y. Sept. 30, 2014) 13, 34

NCUA v. Nomura Home Equity Loan, Inc.,
727 F.3d 1246 (10th Cir. 2013).....30

NCUA v. Nomura Home Equity Loan, Inc.,
764 F.3d 1199 (10th Cir. 2014)....13, 19, 32, 33, 34

O'Melveny & Myers v. FDIC,
512 U.S. 79 (1994).....18, 21

Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342 (1944).....31

Pinter v. Dahl,
486 U.S. 622 (1988).....33

Raygor v. Regents of the Univ. of Minn.,
534 U.S. 533 (2002).....32

Rice v. Santa Fe Elevator Corp.,
331 U.S. 218 (1947).....17

Riegel v. Medtronic, Inc.,
552 U.S. 312 (2008).....18

Short v. Belleville Shoe Mfg. Co.,
908 F.2d 1385 (7th Cir. 1990).....30

Smith v. United States,
430 F. App'x 246 (5th Cir. 2011) 25

Sturgeon v. Masica,
768 F.3d 1066 (9th Cir. 2014) 32

Sturgeon v. Masica,
No. 14-1209, *cert. granted*, 136 S. Ct. 27
(Oct. 1, 2015) 32

Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643 (1950) 6

United States v. Centennial Sav. Bank FSB,
499 U.S. 573 (1991).....28

United States v. Kubrick,
444 U.S. 111 (1979).....31

United States v. Wong,
135 S. Ct. 1625 (2015).....24

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011).....33

Wos v. E.M.A.,
133 S. Ct. 1391 (2013).....18

Wyeth v. Levine,
555 U.S. 555 (2009).....21

Wyoming v. Oklahoma,
502 U.S. 437 (1992).....32

State Cases

FDIC v. Rhodes,
336 P.3d 961 (Nev. 2014) 13, 34

Galbraith Eng'g Consultants, Inc. v. Pochucha,
290 S.W.3d 863 (Tex. 2009) 7, 8, 19

Jefferson State Bank v. Lenk,
323 S.W.3d 146 (Tex. 2010) 7, 19

Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin, 307 S.W.3d 283
(Tex. 2010) 8

Sterling Trust Co. v. Adderley,
119 S.W.3d 312 (Tex. App. 2003) 6

Trinity River Auth. v. URS Consultants, Inc.,
889 S.W.2d 259 (Tex. 1994) 8

Federal Statutes

11 U.S.C. § 108 23

12 U.S.C. § 1787 9

12 U.S.C. § 1821(a) 9, 22

12 U.S.C. § 1821(c) 9, 22

12 U.S.C. § 1821(d) 3, 9, 10, 21, 22, 23, 25, 29, 30

12 U.S.C. § 1821(e) 22

12 U.S.C. § 1821(i) 22

12 U.S.C. § 1821(m) 22

12 U.S.C. § 1821(n) 22

12 U.S.C. § 4617 9

28 U.S.C. § 1254 3

28 U.S.C. § 1367 32

42 U.S.C. § 9658 .....11, 24

Housing and Economic Recovery Act, Pub. L. No. 110-289, 112 Stat. 2654 9

State Statutes

Tex. Rev. Civ. Stat. Ann. art. 581 .....5, 6, 7, 17

Other Authorities

135 Cong. Rec. 18866 (Aug. 4, 1989) 26

Brief of the United States, *Augutis v. United States*, No. 12-3536, 2013 WL 1950317 (7th Cir. May 2, 2013) 25

Petition for Writ of Certiorari, *Nomura Home Equity Loan, Inc. v. NCUA*, No. 14-1379, 2014 WL 4948943 (Oct. 2, 2014) 32

Vernon's Civil Statutes of the State of Texas Annotated (West 2010) 7, 17

Weinberger, Evan, *Banks Paid Out $132B In Post-Crisis Mortgage Deals: Report*, Law 360 (Aug. 17, 2015) 28

INTRODUCTION

Suppose a manufacturer is accused of contaminating land in North Carolina. The landowners sue under North Carolina's nuisance law, but their lawsuit is too late. North Carolina nuisance claims are permanently extinguished after ten years, under a state statute of repose meant to bring certainty to potential defendants. There simply is no claim to bring. Not so fast, say the landowners. There is a federal law. It does not give us a cause of action, but it does extend the statute of limitations for state law claims. And Congress must have meant it to sweep away statutes of repose too—otherwise many suits like ours will be barred.

Were they right? Absolutely not, as this Court held less than two years ago in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014). In our federal system, "the States' coordinate role in government counsels against reading" the federal law "to restrict the States' sovereign capacity to regulate in areas of traditional state concern." *Id.* at 2185. The "remedial ... purpose" of a statute does not trump this presumption. *Id.*

In this case, several financial institutions are accused of making misstatements in selling securities in Texas. A bank that purchased those securities might have had a claim under Texas's securities law, but its lawsuit is too late. Texas securities claims are permanently extinguished after five years, under a state statute of repose meant to bring certainty to potential defendants. There is simply no claim to bring. Not so fast says a federal agency, FDIC, which

has stepped into the shoes of the bank as its receiver. There is a federal law. It does not give us a cause of action, but it does extend the statute of limitations for state law claims. And Congress must have meant it to sweep away statutes of repose too—otherwise many suits like ours will be barred.

Are they right? The answer should be the same as the one this Court gave in *CTS*, and for the same reasons. Texas has every right to place substantive limitations on a cause of action it created, and unless Congress clearly directs otherwise, federal courts should respect the legislative decisions and balances Texas made in its coordinate role in government. Disregarding *CTS*, the Fifth Circuit here held that Congress must have intended to sweep away state statutes of repose, and that "any doubt" about Congress's intent is "dispelled by the statute's [remedial] purpose"—to fill the federal coffers. Pet. App. 40a.

The Court of Appeals' decision is an affront to this Court's decision in *CTS* and to this Court's preemption jurisprudence, which holds that federal statutes do not preempt state laws unless Congress was clear. It is an affront to state law and our system of federalism. And it creates the very uncertainty in the markets that statutes of repose are intended to quell, exposing just about every major financial institution in the country to a flood of litigation claiming well over a hundred billion dollars.

Courts around the country are divided on this threshold issue. So litigants and courts (both state and federal) are expending enormous resources on extensive discovery and are exposed to massive trials

on stale facts. This Court's review is urgently needed to resolve this threshold question of the correct interpretation of a federal statute in order to bring stability to our financial markets and put an end to this huge and needless waste.

OPINIONS BELOW

The Court of Appeals' August 10, 2015 opinion is reported at 798 F.3d 244, and reproduced at Pet. App. 1-45a. The district court's August 18, 2014 opinions are not officially reported, but are available at 2014 WL 4161561 and 2014 WL 4161567, and reproduced at Pet. App. 46-69a and 70-93a.

JURISDICTION

The Court of Appeals entered its judgment on August 10, 2015, and denied a timely petition for rehearing and rehearing en banc on September 11, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 1821(d)(14) states:

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.

***

Article 581-33(H)(2) of the Texas Revised Civil Statutes provides:

(2) No person may sue under Section 33A(2), 33C, or 33F so far as it relates to 33A(2) or 33C:

(a) more than three years after discovery of the untruth or omission, or after discovery should have been made by the exercise of reasonable diligence; or

(b) more than five years after the sale; or

(c) if he received a rescission offer (meeting the requirements of Section 33I) before suit, unless he (i) rejected the offer in writing within 30 days of its receipt, and (ii) expressly reserved in the rejection his right to sue; or

(d) more than one year after he so rejected a rescission offer meeting the requirements of Section 33I.

STATEMENT OF THE CASE

The Texas Legislature Enacts A Five-Year Statute Of Repose For Texas Securities Claims

"States have traditionally regulated intrastate securities transactions." *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982). So-called state "Blue Sky" laws regulate activities such as registering and selling securities within the state. "Blue Sky Laws are a well-recognized exercise of the police powers of the states." *Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 653 (1950) (Douglas, J., concurring).

The Texas Securities Act prohibits misrepresentations or omissions in the offer or sale of any securities in Texas. Tex. Rev. Civ. Stat. Ann. art. 581-1 *et seq.* Like many other Blue Sky laws, the Texas Securities Act creates private rights of action that impose near strict liability on sellers of securities for misrepresentations and omissions, without any need for the plaintiff to prove reliance, scienter, or even injury. *See, e.g., Sterling Trust Co. v. Adderley*, 119 S.W.3d 312, 317 (Tex. App. 2003) (discussing the "strict liability provisions of the TSA"), *rev'd on other grounds*, 168 S.W.3d 835 (Tex. 2005).

One of the few measures of protection against that liability is a five-year statute of repose, a provision the legislature added to the Texas Securities

Act in 1977. Tex. Rev. Civ. Stat. Ann. art. 581-33(H)(2)(b). This provision declares that "[n]o person may sue ... more than five years after the sale" of the securities at issue. *Id.* It was part of a "carefully negotiated compromise" that "reflect[ed], in a balanced way, the interests of buyers, sellers, investors, dealers, issuers and regulators." Vernon's Civil Statutes of the State of Texas Annotated, Articles 581-5 to 1175, Comment—1977 Amendment at 137 (West 2010). The Texas legislature specifically intended the statute of repose to impose "a cutoff ... to avoid the litigation of stale claims, ... [and] bring finality to transactions." *Id.* at 143-44. As the legislature explained, the need for such a cutoff was particularly "acute" in view of the harsh liability imposed by the Texas Securities Act, which does not require the plaintiff to prove that the violation caused any injury or that he or she relied on any misstatement or omission. *Id.* at 143.

Under Texas law, "[a] statute of repose is ... a *substantive* definition of rights, rather than a procedural limitation." *Jefferson State Bank v. Lenk*, 323 S.W.3d 146, 147 n.2 (Tex. 2010) (emphasis added). As such, "while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time." *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex. 2009). To effect this purpose, "unlike traditional limitations provisions, which begin running upon accrual of a cause of action, a statute of repose runs from a specified date without regard to accrual of any cause of action." *Trinity River Auth. v. URS Consultants, Inc.*,

889 S.W.2d 259, 261 (Tex. 1994). Texas's statute of repose "represents the Legislature's considered judgment as to the inadequacy of the traditional statutes of limitations for some types of claims," *Galbraith Eng'g*, 290 SW.3d at 868, and "creates a right to repose precisely where the applicable statute of limitations would be tolled or deferred," *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 290-91 (Tex. 2010). Consequently, Texas has recognized that to "treat a statute of repose like a statute of limitations" is to "effectively repeal ... [the] statutes of repose." *Id.*

The Texas Supreme Court has explained that "the key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions." *Rankin*, 307 S.W.3d at 287. Statutes of repose thus reflect the Texas legislature's determination "that the general welfare of society, and various trades and professions that serve society, are best served with statutes of repose that do not submit to exceptions." *Id.* In the securities context, the statute provides certainty and repose to issuers of securities and the financial markets more generally, particularly given the harsh liability that the Texas Securities Act otherwise imposes.

Congress Passes Laws Extending Statutes Of Limitations For Certain Government Actions

Respondent FDIC is a federal agency responsible for insuring deposits in banks and thrift institutions. *See* 12 U.S.C. § 1821(a)(1)(A), (E). When an insured

institution fails, the FDIC, as receiver, attempts to revive the institution by arranging an acquisition of all or part of its assets and liabilities or, if necessary, closing the institution and disposing of its assets. *See id.* §§ 1821(c), (d). Congress granted FDIC the authority to stand in the shoes of the failed institution to bring any legal claims that bank or thrift institution might have brought. The provision at issue in this case, enacted in 1989 in FIRREA, extends the "statute of limitations" under "State law" for "contract" or "tort" claims brought by the FDIC in this capacity. *See* 12 U.S.C. § 1821(d)(14).

FIRREA also contains another, materially identical extender statute for claims brought by the National Credit Union Administration Board ("NCUA") in its capacity as conservator or liquidating agent of a failed credit union. *See* 12 U.S.C. § 1787(b)(14). And in 2008, Congress enacted yet another materially identical extender provision in the Housing and Economic Recovery Act ("HERA"), Pub. L. 110-289, 122 Stat. 2654, for the Federal Housing Finance Agency ("FHFA") acting as conservator for Fannie Mae and Freddie Mac. *See* 12 U.S.C. § 4617(b)(12).

The relevant language in all three statutes is identical. It provides that "[n]otwithstanding any provision of any contract, the applicable statute of limitations ... shall be" the longer of (a) six years for "any contract claim" or three years for "any tort claim ... beginning on the date the claim accrues" or (b) "the period applicable under State law." *E.g.*, 12 U.S.C. § 1821(d)(14)(A). The statutes further state that the claim accrues on the later of (a) the "date of the appointment ... as conservator or receiver" or

(b) "the date on which the cause of action accrues." *E.g.*, *id.* § 1821(d)(14)(B).

In the wake of the financial crisis of 2007-2008, the FDIC, NCUA, and FHFA have taken full advantage of these extender provisions. They have filed dozens of suits alleging state and federal securities claims concerning various failed financial institutions' investments in mortgage-backed securities, many after the lapse of the applicable repose period. As one court has put it, "the use of FIRREA's extender provision to supplant state statutes of repose has not been, and likely will not continue to be, a periodic, narrowly tailored occurrence." *FDIC v. Countrywide Sec. Corp.*, 966 F. Supp. 2d 1031, 1043 (C.D. Cal. 2013). The agencies' claims exceed a hundred billion dollars.

This Court Holds That A Similar "Extender Provision" Does Not Preempt Statutes Of Repose

Not long after the surge of cases brought by the FDIC, NCUA, and FHFA hit the lower courts, this Court decided *CTS*. *CTS* held that a similar extender provision, found in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), did not preempt statutes of repose.

CERCLA's extender provision provides that "[i]n the case of any action brought under State law" involving certain environmental tort claims, "the applicable limitations period" shall commence at the later of a discovery-based "federally required commencement date" or the date specified under appli-

cable state law. 42 U.S.C. § 9658. The question presented in *CTS* was whether CERCLA's extender provision preempted state-law statutes of repose in addition to state-law statutes of limitations. 134 S. Ct. at 2180.

This Court held that it did not. *Id.* The Court first flatly rejected the lower court's "proposition that remedial statutes should be interpreted in a liberal manner" and its contention that the perceived purpose of the statute trumps any analysis of its text or principles of statutory construction and preemption. *Id.* at 2185. Emphasizing that "no legislation pursues its purposes at all costs," this Court dictated that any conclusion must be "grounded in the statute's text and structure." *Id.* And it highlighted that far from taking the federal statute's purpose to the furthest extent possible, where state law is implicated, "'the States' coordinate role in government counsels against' reading federal laws ... 'to restrict the States' sovereign capacity to regulate' in areas of traditional state concern." *Id.* (quoting *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1016 (2013)).

This Court's opinion next discussed at length the accepted differences between statutes of limitations and statutes of repose, explaining that the two "are measured from different points," "seek to attain different purposes," and are "targeted at ... different actor[s]." *Id.* at 2182-83. While "a statute of limitations creates a time limit for suing in a civil case based on the date when the claim accrued," a "statute of repose ... puts an outer limit on the right to bring a civil action" and is "in essence an 'absolute

bar' on a defendant's temporal liability." *Id.* at 2182-83; *see also id.* at 2187 ("A statute of repose can be said to define the scope of the cause of action, and therefore the liability of the defendant."). Based on these significant differences, the Court pointed to a number of reasons why the CERCLA extender provision should not be interpreted to preempt state-law statutes of repose. Among these, the provision "uses the term 'statute of limitations'"; it describes the covered period "in the singular" (*i.e.*, "limitations period," not periods); and it incorporates concepts of accrual ill-suited to "a statute of repose," which "is not related to the accrual of any cause of action." *Id.* at 2185-87.

This Court further emphasized that CERCLA "does not provide a general cause of action for all harm caused by toxic contaminants," but rather "leaves untouched States' judgments about causes of action, the scope of liability, ... burdens of proof, ... and other important rules governing civil actions." *Id.* at 2188. As such, the "case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them." *Id.*

After The Financial Crisis, Cases Proliferate, And Courts Around The Country Split

Both before and after this Court's decision in *CTS*, courts around the country have split as to whether the FDIC, NCUA, and FHFA extender provisions preempt statutes of repose. Several courts,

including district courts in the Second and Ninth Circuits (and the district court below), have concluded that the extender provisions *do not preempt* statutes of repose. *FDIC v. Bear Stearns Asset Backed Sec. I LLC*, 92 F. Supp. 3d 206 (S.D.N.Y. 2015) (concluding that *CTS* dictates that statutes of repose are not preempted); *FDIC v. Chase Mortg. Fin. Corp.*, 42 F. Supp. 3d 574 (S.D.N.Y. 2014) (same); *FDIC v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. A-14-CA-126, 2014 WL 4161561 (W.D. Tex. Aug. 18, 2014) (same); *FDIC v. Countrywide Sec. Corp.*, No. 12-cv-3279, slip op. (C.D. Cal. Dec. 8, 2014), ECF No. 196 (same); *FDIC v. Countrywide Sec. Corp.*, 966 F. Supp. 2d 1018 (C.D. Cal. 2013) (pre-*CTS*), *reconsideration denied*, 966 F. Supp. 2d 1031; *NCUA v. Goldman, Sachs & Co.*, No. 2:11-cv-05887, 2012 U.S. Dist. LEXIS 188995 (C.D. Cal. Sept. 4, 2012) (pre-*CTS*).

Other courts, including the Tenth Circuit and the Nevada Supreme Court (splitting 4-3) have concluded that the extender provisions *do preempt* statutes of repose. *See NCUA v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 949 (Jan. 12, 2015) (post-*CTS*); *FDIC v. Rhodes*, 336 P.3d 961 (Nev. 2014) (post-*CTS*); *see also FHFA v. UBS Ams. Inc.*, 712 F.3d 136 (2d Cir. 2013) (pre-*CTS*); *NCUA v. Morgan Stanley & Co.*, No. 13-cv-6705, 2014 WL 5017822 (S.D.N.Y. Sept. 30, 2014) (post-*CTS*); *FHFA v. Royal Bank of Scotland Grp. PLC*, No. 3:11-cv-1383, 2015 WL 4999912 (D. Conn. Aug. 21, 2015) (post-*CTS*); *FHFA v. HSBC N. Am. Holdings Inc.*, No. 11-cv-6189, 2014 WL 4276420 (S.D.N.Y. Aug. 28, 2014) (post-*CTS*); *FHFA v. Countrywide Fin. Corp.*, 900 F. Supp. 2d 1055

(C.D. Cal. 2012) (pre-*CTS*). The courts finding preemption have widely diverged in their reasoning, including how to apply this Court's preemption decisions, the meaning of identical statutory language, and the significance of the perceived purposes of these statutes.

The District Court Here Concludes That The Extender Does Not Preempt Statutes Of Repose, But The Fifth Circuit Reverses

The FDIC brought this case as receiver for Guaranty Bank, one of the largest banks in Texas, with total assets of over $16 billion. Guaranty Bank invested heavily in residential mortgage-backed securities, including $850 million purchased in 2004 and 2005 from Petitioners. After the collapse of the housing market, these investments lost value. For this and other reasons, Guaranty Bank was placed into receivership on August 21, 2009.

On August 17, 2012, the FDIC sued Petitioners and other defendants under the Texas Securities Act in two separate suits. That was between six and eight years after the securities at issue were sold—far past the expiration of Texas's statute of repose. After this Court's decision in *CTS*, Petitioners moved for judgment on the pleadings, arguing that *CTS* compelled the conclusion that FIRREA's extender provision did not preempt Texas's statute of repose, and that the FDIC's claims were therefore barred.

The district court dismissed the actions. Analyzing "the FDIC Extender Statute's text, legislative history, and statutory purpose," the district court

concluded that "a faithful application of [*CTS*'s] logic ... compels the conclusion the TSA's statute of repose is not preempted, and operates to bar the FDIC's untimely claims." Pet. App. 50a & 74a. The FDIC appealed, and the appeals were consolidated.

The Fifth Circuit reversed. It held that FIRREA "preempts all limitations periods, whether characterized as statutes of limitations or as statutes of repose." Pet. App. 2a. While allowing that FIRREA shared "superficial similarities" with the statute addressed in *CTS*, the Court of Appeals concluded that in using the term "statute of limitations," the FIRREA extender provision referred to a "new, mandatory federal period being created" rather than "the limitations period being displaced." Pet. App. 22a. Thus, the Court of Appeals held, this Court's analysis in *CTS* was inapposite. In a portion of the ruling joined only by two members of the panel, the Court of Appeals disregarded *CTS*'s admonition against excessive focus on statutory purpose, concluding that "any doubt" as to the scope of the extender provision's coverage "is dispelled by the statute's purpose" which, to the panel majority, compelled a broad construction. Pet. App. 40a. The Court of Appeals denied rehearing.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision cries out for this Court's review. In holding that FIRREA preempts not only statutes of limitations but also statutes of repose, the decision turns preemption analysis on its head and defies this Court's opinion in *CTS*. And it does so amidst continuing disarray in the lower

courts adjudicating an ongoing flood of claims seeking billions of dollars from banks and other financial institutions. All the while it runs roughshod over substantive decisions made by state legislators precisely to avoid this type of uncertainty in the financial markets. The preemption issue is of vital importance, it is squarely presented, and it needs this Court's resolution now. Certiorari should be granted.

I. The Court Of Appeals' Decision Conflicts With *CTS* And This Court's Preemption Jurisprudence.

The question presented in this case is whether FIRREA's extender provision is properly construed to displace not just the state statutes of limitations it mentions expressly, but also the substantive state statutes of repose that it does not mention. Less than two years ago, this Court addressed that very same question in the context of a similar statute and answered "no." Only by disregarding *CTS*'s reasoning, and this Court's preemption jurisprudence—which requires finding a "clear and manifest" intent to preempt state law—could the Court of Appeals rule as it did here.

A. The Court of Appeals disregarded this Court's preemption jurisprudence.

The Texas Securities Act, and the cause of action it creates for material misrepresentations in securities transactions in Texas, Tex. Rev. Civ. Stat. Ann. art. 581-33(A)(2), represent Texas's substantive securities law. In passing this law, Texas legislators

carefully balanced the interests of investors with the need for certainty and repose in the securities markets. Its statute of repose in particular was part of a "carefully negotiated compromise" that "reflect[ed], in a balanced way, the interests of buyers, sellers, investors, dealers, issuers and regulators." Vernon's Civil Statutes of the State of Texas Annotated, Articles 581-5 to 1175, Comment—1977 Amendment at 137 (West 2010). In defining the cause of action, as discussed above (at 6-9), Texas legislators made the considered decision to impose a five-year statute of repose in exchange for otherwise allowing for near strict liability.

This Court has "never assumed lightly that Congress has derogated state regulation, but instead ha[s] addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Recognizing states' authority to create and enforce state law, this Court has instructed that "the historic police powers of the States are not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Thus, "when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors preemption." *Altria Grp.*, 555 U.S. at 77 (quotation marks omitted); *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (where the presumption against preemption applies, it bears on the "*scope* of [the fed-

eral law's] invalidation of state law," requiring a "narrow interpretation" of ambiguous terms).

The presumption against preemption is at its apex where, as here, "Congress has legislated in a field traditionally occupied by the States." *CTS*, 134 S. Ct. at 2188-89 (quoting *Altria Grp.*, 555 U.S. at 77); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 334 (2008) (presumption is "heightened" where the state law subject to preemption is in a "field[] of traditional state regulation") (quotation marks omitted). A state's "traditional role in regulating securities transactions" is such a field. *Countrywide Sec. Corp.*, 966 F. Supp. 2d at 1025; *see Edgar*, 457 U.S. at 641 ("States have traditionally regulated intrastate securities transactions."). So is determining the scope of remedies available to a state's citizens "'as [the state] see[s] fit,'" including by providing statutes of repose. *CTS*, 134 S. Ct. at 2189 (quoting *Wos v. E.M.A.*, 133 S. Ct. 1391, 1400 (2013)).

Accordingly, the Court of Appeals' analysis of the question presented should have begun by recognizing the heavy presumption that Congress did not intend to preempt state substantive law in an area of traditional state regulation. In FIRREA, Congress empowered the FDIC to sue on *state* causes of action when it steps into the shoes of a failed bank, but it did not empower the FDIC to redefine those substantive rights. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). It is undisputed that the State of Texas created the right upon which the FDIC sues. Texas law defines the existence of the right. Texas law defines the scope of the right. And Texas law defines the limitations of the right, including the time

periods during which it exists. The Texas Supreme Court has held that statutes of repose are not a procedural limitation but "a substantive definition of rights." *Jefferson State Bank*, 323 S.W.3d at 147 n.2. As such, the Texas Securities Act's statute of repose defines, limits, and even "takes away the right altogether." *Galbraith Eng'g*, 290 S.W.3d at 866. Without a "clear and manifest" indication that Congress intended to extinguish Texas's substantive statute of repose, FIRREA cannot be interpreted to do so.

Far from complying with this rule, the Court of Appeals declared it irrelevant. Instead of finding that Congress's intent to preempt statutes of repose was "clear and manifest"—which it plainly was not—the court concluded, without explanation, that it "need not reach the applicability of the presumption against preemption." Pet. App. 45a n.14. It explained that its reading was "the only interpretation consistent with the statute's purpose," and that "[t]he contrary interpretation would thwart th[is] purpose." *Id.* This has been the approach of virtually all of the courts that have concluded that the extender provisions preempt statutes of repose. *See, e.g.*, *Nomura Home Equity*, 764 F.3d 1199; *UBS*, 712 F.3d 136.

At a minimum, the conflict on the meaning of the extender statutes in the lower courts (discussed above at 13-14) demonstrates that Congress's intent was not "clear and manifest." By disregarding this Court's direction, the Court of Appeals granted the FDIC, as receiver, a substantially different right from the one Texas law created and Guaranty Bank held. Though the FDIC stands in the shoes of Guaranty Bank, by judicial fiat the FDIC now would get

the benefit of the near-strict-liability standard the Texas legislature created, shorn of the key substantive limitations the Texas legislature imposed in exchange, all without any clear direction from Congress. The Court of Appeals' decision amounts to a direct attack on this Court's preemption jurisprudence and Texas state sovereignty. It should not stand.

B. The decision below directly conflicts with this Court's decision in *CTS*.

Even leaving aside the requirement of a "clear and manifest" intent to displace statutes of repose, the Court of Appeals flouted this Court's decision in *CTS*. There, this Court addressed an almost identical question, in an almost identical statute, and found that Congress did not preempt statutes of repose.

Every axiom this Court pronounced in *CTS* applies with equal force here. As there, the starting point here must be the proposition that "the States' coordinate role in government counsels against reading federal laws ... to restrict the States' sovereign capacity to regulate in areas of traditional state concern." 134 S. Ct. at 2185 (citing *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1016 (2013)). And here, too, "[t]he case for federal pre-emption is *particularly weak*," because "Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Id.* at 2188 (quotations omitted) (emphasis added).

Just like CERCLA, FIRREA "does not provide a complete remedial framework," but rather "leaves untouched States' judgments about causes of action, the scope of liability, ... burdens of proof, rules of evidence, and other important rules governing civil actions." *CTS*, 134 S. Ct. at 2188; *see O'Melveny & Myers*, 512 U.S. at 87 (FIRREA "places the FDIC in the shoes of the insolvent S & L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise."). Congress was plainly aware that when the FDIC brings contract and tort claims in its capacity as receiver, it would take state laws as it finds them. If the case for preemption was accordingly "particularly weak" in *CTS*, 134 S. Ct. at 2188, it is even more so here. *See also Wyeth v. Levine*, 555 U.S. 555, 575 (2009); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989).

CTS forecloses any statutory argument for preemption. The CERCLA extender provision in *CTS* and the FIRREA extender provision here are cut from the same textual cloth. Like the CERCLA extender provision, the FIRREA extender provision addresses "statute[s] of limitations," with no mention of statutes of repose. 12 U.S.C. § 1821(d)(14)(A); *CTS*, 134 S. Ct. at 2184; *see id.* at 2186 (where the statute does not "refe[r] to statutes of repose as a distinct category[,] ... it is proper to conclude that Congress did not exercise the full scope of its preemption power"). As this Court recognized, statutes of repose and statutes of limitations are fundamentally different; they "are measured from different points," "seek to attain different purposes," and are "targeted at ... different actor[s]." *CTS*, 134 S. Ct. at

2182-83. And just as in CERCLA, the FIRREA provision speaks about the state periods that it preempts in the singular, which "would be an awkward way to mandate the pre-emption of two different time periods with two different purposes." *Id.* at 2185-88.

Beyond these commonalities, Congress adorned FIRREA with additional "unambiguous textual indication[s]" of its intent not to extend statutes of repose. *Id.* at 2187. First, FIRREA refers explicitly (four times) to the date the claim "accrues." 12 U.S.C. § 1821(d)(14). But as this Court underscored in *CTS*, "[a] statute of repose is not related to the accrual of any cause of action." *Id.* at 2187 (citation omitted). Drafters who intended to cover statutes of repose would not have repeatedly used a phrase that is specific to statutes of limitations. Second, when FIRREA's drafters intended a sweeping preemptive scope—as they did no fewer than a dozen times in FIRREA—they prefaced the command with expansive language, such as, "notwithstanding any other state or federal law." *Id.* §§ 1821(a)(1)(E), (a)(2)(A), (a)(4)(C), (c)(1), (c)(4), (e)(8)(A), (e)(8)(E), (i)(1), (i)(3)(A), (m)(10), (n)(5)(A)(ii), (n)(12)(a). The drafters rejected this stock formulation for the extender provision, in favor of far narrower language, "[n]otwithstanding any provision of any contract." 12 U.S.C. § 1821(d)(14)(A).

Notably, Congress, in the course of exercising its bankruptcy power, *has* taken the extraordinary step of broadly preempting *all* timing rules. *See* 11 U.S.C. § 108(a) (providing an exclusive two-year period for bankruptcy trustees to commence an action notwith-

standing any other "applicable nonbankruptcy law" that "fixes a period" for "commenc[ing] an action"). Congress's decision not to use similar language in FIRREA's extender provision is a "glaring indication" of its contrary intent. *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419-20 (2012).

C. The Court of Appeals' statutory interpretation is fundamentally flawed.

The Court of Appeals ignored all the glaring similarities between this case and *CTS* in favor of a few superficial differences. The flimsiness of the distinctions merely underscores the direct conflict between the opinion below and *CTS*.

The court relied heavily on the fact that FIRREA's extender provision "prescribes a new, mandatory statute of limitations for actions brought by the FDIC as receiver" by using the phrase "'the applicable statute of limitations ... *shall be*.'" Pet. App. 22a (quoting § 1821(d)(14)(A)) (emphasis added). The court reasoned that unlike in *CTS*, "[i]nterpreting the statute as excluding repose periods from its ambit would circumvent [this] mandatory language by providing the FDIC with less than three years from the date of its appointment as receiver to bring claims." Pet. App. 22a. But this is a distinction without a distinction: The statute this Court construed in *CTS* contains identical "mandatory" language. *See* 42 U.S.C. § 9658(a)(1) (the "statute of limitations" "*shall* commence at the federally required commencement date" (emphasis added)). That did not change the result in *CTS* and should not change the result here, because all that is "man-

datory" about this provision is its applicability to statutes of limitations. A law declaring "all passengers must wear seat belts" is mandatory too, but that does not mean it commands passengers to wear helmets. Moreover, this Court has observed that most statutes of limitations use this sort of mandatory language and has "consistently found it of no consequence" in assessing their breadth or scope. *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015).

The Court of Appeals next asserted that while the term "statute of limitations" in the CERCLA extender provision refers to the state statutes of limitations being *displaced*, the same words in FIRREA's extender provision do not, but refer to the new statute of limitations being *created*. Pet. App. 23-25a. There is no way to read this statute to reach that conclusion. When FIRREA says "statute of limitations," it has to mean the state law that is subject to preemption. Subparagraph (A) provides that where longer than the minimum federal period, "the applicable statute of limitations ... shall be ... the period applicable *under State law*." Subparagraph (B) creates a federal rule for assessing "the date on which the statute of limitations begins to run on any claim described in [subparagraph (A)]," which describes the "period applicable *under State law*." Similarly, subparagraph (C), which applies in limited circumstances not present here, allows the FDIC to bring certain claims "without regard to the expiration of the statute of limitation applicable *under State law*." Indeed, the Court of Appeals' rationale is effectively identical to the *rejected* rationale of the *CTS* dissenters, who reasoned that CERCLA's creation of a "federally required commencement date" should be

construed as an exclusive period created by Congress that displaces any state-law time to commence suit, including statutes of repose. 134 S. Ct. at 2190.[1]

Thus, just as the partially preempted "period" in *CTS* was one "specified in a statute of limitations," the partially preempted "period applicable under State law" under § 1821(d)(14) is repeatedly described as a "statute of limitations." The Court of Appeals' pronouncement that "[t]he statute does not address the preexisting limitations periods being displaced," Pet. App. 23a, is like saying "Blowin' in the Wind" does not address where the answer is.

But even if FIRREA described the "statute of limitations" being created, the Court of Appeals did not, and could not, explain how this resulted in the preemption of repose periods. It merely assumed such preemption because the statutory text did not affirmatively express an intent to preserve state law.

---

[1] Notably, here, the Fifth Circuit effectively conflated statutes of limitations and statutes of repose, treating them both as simply procedural time limitations for filing suit that must give way to the extended federal statute of limitations. In other contexts, however, the courts of appeals have uniformly agreed with the position of the United States when its own tort liability is at stake, "that statutes of repose, as substantive state law that defines when a cause of action no longer exists," must be satisfied in addition to any time limitation that may be imposed under a federal statute of limitations. Brief of the United States, *Augutis v. United States*, No. 12-3536, 2013 WL 1950317 (May 2, 2013); *see Augutis v. United States*, 732 F.3d 749, 753, 754 (7th Cir. 2013) (en banc), *cert. denied*, 135 S. Ct. 53 (2014); *Huddleston v. United States*, 485 F. App'x 744, 745-46 (6th Cir. 2012); *Smith v. United States*, 430 F. App'x 246, 247 (5th Cir. 2011).

This presumption *in favor of* preemption is, of course, fundamentally at odds with the Court's preemption jurisprudence—*see Lohr*, 518 U.S. at 485; *Altria Grp.*, 555 U.S. at 77—and, as cases construing the FTCA demonstrate (discussed above at note 1), the creation of a federal statute of limitations does nothing to disturb pre-existing, substantive state law.

Further, in a portion of the opinion that one member of the panel refused to join, the panel majority—undeterred by this Court's explicit holding in *CTS* that references to purpose have no place in this inquiry, 134 S.Ct. at 2185—addressed at length the "purpose" of FIRREA's extender provision, claiming that this "purpose" "dispel[led]" "any doubt" as to the statute's scope. Pet. App. 40a. From the *post*-enactment statement of a *single* senator, the panel gleaned that the FIRREA extender provision "should be construed to maximize potential recoveries by the Federal Government." Pet. App. 42a (quoting 135 Cong. Rec. 18866 (Aug. 4, 1989) (Sen. Riegle)). The majority reasoned that "[t]he proffered legislative purpose in *CTS* was general, 'to help plaintiffs bring tort actions for harm caused by toxic contaminants,'" but the "purpose of the FDIC Extender Statute—to give the FDIC at least three years to investigate and evaluate potential claims—is specific and tied to the statute's structure and function." Pet. App. 43a (quoting *CTS*, 134 S. Ct. at 2188).

The majority's focus on statutory purpose is improper, and its proffered distinction is inscrutable. Both statutes express the same congressional concern that certain plaintiffs would not be able to bring

their claims within the statutes of limitations provided by state law. Both statutes provide extra time to file such claims, while otherwise leaving their scope and disposition to state law. Both adjust statutes of limitations and do not mention statutes of repose. FIRREA's purposes are identical to—and certainly no more "specific" than—CERCLA's. Pet. App. 43a. In short, the Court of Appeals badly misinterpreted an important federal statute. And it did so in a way that disregards this Court's preemption jurisprudence and directly contravenes this Court's recent decision in *CTS*.

II. This Court Should Address This Question Now Because It Is Recurring And Of Great Practical Significance.

A. The Court should not delay resolving the issue because it raises an important and recurring legal issue with serious and ongoing real-world ramifications. To begin with, the financial stakes are staggering. Since the financial crisis of 2008, the question presented here has arisen in dozens of lawsuits brought not only by the FDIC under FIRREA, but also by the NCUA and FHFA under materially identical extender provisions. These actions routinely involve hundreds of millions to billions of dollars of potential liability, and have consumed vast judicial resources in state and federal courts throughout the country. The exposure is so high that many financial institutions do not go the distance, choosing to manage the risk by settling. The "significant number of pending cases" raising this issue (some of which are detailed above at 13-14) counsels strongly

in favor of certiorari. *United States v. Centennial Sav. Bank FSB*, 499 U.S. 573, 578 n.3 (1991).

In this case, the FDIC originally sought over $1.5 billion in damages regarding sales of $3.9 billion in residential mortgage-backed securities. Another pending case against Petitioner RBS—initiated by FHFA in reliance on HERA's analogous extender provision—concerns sales of $33 billion in securities. *FHFA v. The Royal Bank of Scotland Grp. PLC*, No. 11-cv-01383 (D. Conn.). Altogether, the post-financial crisis mortgage-backed securities litigation implicates over a hundred billion dollars in damages and interest. Weinberger, Evan, *Banks Paid Out $132B In Post-Crisis Mortgage Deals: Report*, Law 360 (August 17, 2015), *available at* http://www.law360.com/articles/691783/banks-paid-out-132b-in-post-crisis-mortgage-deals-report. "This enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari).

B. This is all the more true for cases, like these, that are enormously expensive to litigate, and consume substantial amounts of time and resources of the litigants and the state and federal judiciaries. A typical case—when not resolved at the threshold—requires extensive discovery and motions practice. Any trial involves fact-intensive issues. The cases affected by the issue here routinely involve a significantly higher investment of resources, judicial and otherwise. For example, another litigation that FHFA brought entailed several years of discovery

and motions practice, followed by almost 50 orders on dispositive or substantial motions, and a four-week bench trial, yielding a 361-page trial opinion and an $806 million judgment now on appeal. *FHFA v. Nomura Holding Am. Inc.*, No. 11-cv-6201 (S.D.N.Y.). All this for a case that could have been resolved at the threshold on a purely legal question under a statute whose very purpose is to guarantee respite from such litigation.

This flood of litigation is not some temporary problem borne out of the recent financial crisis. As depositary institutions, credit unions, and government-sponsored enterprises continue to struggle financially, federal agencies will continue to step in and attempt to assert stale claims that legislatures had extinguished through statutes of repose. These efforts will redefine state law, and disrupt the certainty and predictability that those very statutes of repose are meant to bring to market participants.

C. This uncertainty is exacerbated by the discord in the lower courts' interpretations of these statutes. In addition to disagreeing as to whether these statutes preempt statutes of repose, courts across the country have split on related and subsidiary issues, including (1) whether § 1821(d)(14)(B)'s accrual rules apply to all of subsection A, *compare* Pet. App. 33-34a (accrual rule applies only to federal period), *with FDIC v. McSweeney*, 976 F.2d 532, 536 (9th Cir. 1992) (accrual rule applies to state and federal periods under FIRREA); (2) whether Congress's use of the phrase "statute of limitations" is probative, *compare* Pet. App. 26a (finding language "minimally instructive") (internal quotation marks

omitted), *with NCUA v. Barclays Capital, Inc.*, 785 F.3d 387, 393 (10th Cir. 2015) (finding language "important"); and (3) whether state law functions as the exception or the rule, *compare* Pet. App. 35a (state law is exception to default federal rule), *with NCUA v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1266 (10th Cir. 2013) ("[T]he Extender Statute ... functions as a narrow exception"). Resolution of the question presented by this petition would end these debates and foster more efficient resolution of FIRREA cases.

Statutes of repose are intended to protect financial institutions and investors alike by encouraging prompt enforcement of the securities laws. They protect more recent investors from the consequences of liability for conduct that occurred years before their association with the business. And they prevent strategic delay by plaintiffs who otherwise might seek "recoveries based on the wisdom given by hindsight." *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990). That rationale has particular force here. If the FDIC's claims are permitted to proceed, they will call on a factfinder in 2016 or later to attempt to assess whether the mortgage loans underlying the securities at issue adhered to standards in the industry as they existed more than a decade earlier, based upon reviews of mountains of old and incomplete files.

Permitting securities claims to be brought so long after the disputed events creates a raft of real-world problems. When claims are "allowed to slumber" for so long, the risk is great that "evidence [will have] been lost, memories [will] have faded, and

witnesses [will] have disappeared" before the case can be tried, *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944), and that "the search for truth may be seriously impaired," *United States v. Kubrick*, 444 U.S. 111, 117 (1979). That concern is especially acute in the securities industry, where employee turnover is high, and cyclical downsizing is endemic. A construction of the extender statutes that leaves preexisting statutes of repose in place sensibly avoids these problems and, like the Texas Securities Act, carefully balances the interests of investors with the need for certainty and repose in the nation's securities markets.

D. Further, this petition should be granted now because the question presented implicates the balance of power between the federal government and the states. The power of Congress to "legislate in areas traditionally regulated by the States" is "an extraordinary power in a federalist system," and one that this Court "must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). To protect state prerogatives, this Court has repeatedly granted certiorari to determine whether federal laws were unambiguously meant to intrude upon them, *see, e.g., Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 544-45 (2002) (deciding whether 28 U.S.C. § 1367(d) should be interpreted to toll state statutes of limitation); *Gregory*, 501 U.S. at 464-70 (deciding whether ADEA covers state judges), even when there was no split of authority in the courts of appeals, *see, e.g., Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497 (2d. Cir. 2014), *cert. granted, Gobeille v. Liberty Mut. Ins. Co.*, 135 S. Ct. 2887 (June 29, 2015) (No. 14-181); *Chamber of Commerce*

of U.S. v. Whiting, 563 U.S. 582 (2011); *cf. Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992) (exercising discretion to accept original jurisdiction because case "implicates serious and important concerns of federalism" (citation omitted); *Sturgeon v. Masica*, 768 F.3d 1066 (9th Cir. 2014), *cert. granted*, 136 S. Ct. 27 (Oct. 1, 2015) (No. 14-1209).

The question whether the extender statutes preempt *state law* statutes of repose was not presented in the petition for certiorari from the Tenth Circuit case, *Nomura Home Equity*, 764 F.3d 1199, that this Court denied last January. *See* Petition for Writ of Certiorari, *Nomura Home Equity Loan, Inc. v. NCUA*, No. 14-1379, 2014 WL 4948943 (filed Oct. 2, 2014). This case thus presents a more compelling and urgent question than *Nomura Home Equity* did—here (and in other similar cases throughout the country) a state substantive law has been effectively invalidated under the Supremacy Clause without any clear statement from Congress.

There is no question that this case raises serious federalism concerns. While FIRREA's extender provision undoubtedly invades the states' traditional authority to establish the limits that govern their *own* contract and tort actions by extending the statutes of limitations for bringing such claims, the Court of Appeals' decision dramatically increases the scope of this intrusion by eviscerating substantive state statutes of repose. The decision's impact on traditional state prerogatives justifies the Court's review.

E. For these reasons, this Court should grant certiorari without awaiting a split among the circuits, as it frequently has done in other cases that present important questions of federal law with huge economic ramifications. *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) (in securities case involving the correct statutory interpretation of who is a "seller," explaining that "[b]ecause of the importance of the issues involved to the administration of the federal securities laws, we granted certiorari"); *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 663 (1975) (in case involving antitrust action brought against two stock exchanges challenging the system of fixed commission rates and requesting $1.5 billion in damages, explaining that "[b]ecause of the vital importance of the question, and at the urging of all the parties, we granted certiorari").

Here, there is little to be gained from letting this issue percolate further. Because the Tenth Circuit's first *Nomura Home Equity* decision was granted, vacated, and remanded in light of *CTS*, when this Court denied certiorari in that court's subsequent decision, *Nomura Home Equity*, 764 F.3d 1199, few other courts had considered how *CTS* applies to the extender statutes. Since this Court denied certiorari from the Tenth Circuit's second *Nomura Home Equity* decision, however, five more courts have weighed in on this question in conflicting ways, bringing to fourteen the total number of decisions on this subject

since *CTS* was decided two Terms ago.[2] Eminent jurists have weighed in on both sides with the benefit of extensive briefing by counsel. In particular, Judges Swain and Pfaelzer have thoroughly explained why the extender provisions *do not* preempt statutes of repose. *See Bear Stearns*, 92 F. Supp. 3d 206; *Countrywide Sec. Corp.*, 966 F. Supp. 2d 1018.

Every month that this issue percolates, more defendants are settling rather than undergoing massive litigation. Since January, at least a dozen defendants have settled, paying out more than a billion dollars. And every month, more courts are deciding dispositive motions, overseeing trials, and entering judgment in these cases, expending vast judicial resources. *E.g.*, *FHFA v. Nomura*, No. 11-cv-6201 (S.D.N.Y.) (four-week trial from March 16, 2015 to April 9, 2015; 361-page trial opinion issued May 11, 2015). This Court ultimately will have to settle this question. Kicking the can down the road would do nothing to enrich this Court's understanding of this issue, but would impose huge costs in litigation

---

[2] *See RBS Securities Inc.*, 798 F.3d 244 (5th Cir. 2015); *Barclays Cap. Inc.*, 785 F.3d 393; *Nomura Home Equity*, 764 F.3d 1199; *Royal Bank of Scotland Group PLC*, 2015 WL 4999912; *FDIC v. Bear Stearns*, 92 F. Supp. 3d 206; *FDIC v. Morgan Stanley Capital I Inc.*, No. 14-cv-00418, 2015 WL 1381875 (D. Colo. Mar. 24, 2015); *Guinn v. FDIC*, No. 2:09-cv-01809, 2015 WL 139386 (D. Nev. Jan. 12, 2015); *NCUA v. Morgan Stanley & Co.*, 2014 WL 5017822; *Chase Mortg. Fin. Corp.*, 42 F. Supp. 3d 574; *Merrill Lynch*, 2014 WL 4161561; *FDIC v. Goldman, Sachs & Co.*, No. A-14-CA-129, 2014 WL 4161567 (W.D. Tex. Aug. 18, 2014); *Countrywide Sec. Corp.*, No. 12-cv-3279, ECF No. 196; *HSBC N. Am. Holdings Inc.*, 2014 WL 4276420; *FDIC v. Rhodes*, 336 P.3d 961.

expense, judicial resources, settlements that should never have been made, and market instability.

The far-reaching legal consequences—and profound economic implications—of this issue call for this Court's immediate review.

III. This Case Presents An Ideal Vehicle For Addressing The Question Presented.

Finally, this case presents an ideal vehicle for resolving the question presented. As an initial matter, there is no dispute that the question presented is case-dispositive. While there is disagreement on whether the FIRREA extender provision preempts statutes of repose, there is no dispute that the Texas Securities Act's statute of repose bars FDIC's claims if it is not preempted. Accordingly, FDIC's suit may proceed only if the Court of Appeals correctly interpreted the FIRREA extender provision to preempt the Texas Securities Act's statute of repose.

There is also no dispute that the Texas Securities Act's provision at issue constitutes a statute of repose rather than a statute of limitations. Both the district court and the Court of Appeals reached that conclusion, which the FDIC does not question. *See, e.g.*, Pet. App. 5a, 48a, 72a. Therefore, the Court does not have to resolve preliminary questions over whether the state statute under review in fact constitutes a "statute of repose," rather than a "statute of limitations" under state law, or otherwise address disputed issues of state law. Rather, the Court can focus solely on the core question of federal law presented by the Court of Appeals' determination that

FIRREA preempts statutes of repose as well as statutes of limitations. And unlike the Tenth Circuit's decision in *Nomura Home Equity*, this case did not arise in an interlocutory posture.

For these reasons, the Court could not hope for a better vehicle to resolve the compelling legal question presented by this petition and provide much-needed clarity to the lower courts and litigants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew T. Frankel
Counsel of Record
SIMPSON THACHER &
BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000
afrankel@stblaw.com

December 10, 2015