17-No. 10

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., CREDIT SUISSE MANAGEMENT LLC, CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK SECURITIES INC., HSBC SECURITIES (USA) INC., RBS SECURITIES INC., UBS SECURITIES LLC,

Petitioners,

—v.—

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Citizens National Bank and receiver for Strategic Capital Bank,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

THOMAS C. RICE
Counsel of Record
ANDREW T. FRANKEL
LINTON MANN III
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-3073
trice@stblaw.com

Counsel for Petitioners Deutsche Bank Securities Inc., RBS Securities Inc., and UBS Securities LLC

(*Additional counsel listed on signature page*)

QUESTION PRESENTED

A provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1821(d)(14)(A), extends the "statute of *limitations*" for certain "contract" or "tort" claims brought by the Federal Deposit Insurance Corporation (FDIC) as the receiver of a failed bank, but says nothing of statutes of *repose,* which place an outer limit on the right to bring a civil action and have different purposes and objectives than statutes of limitation. The question presented is whether the court of appeals erred by construing this federal statute not only to extend statutes of limitation, but also to impliedly displace the three-year statute of repose in Section 13 of the Securities Act of 1933, 15 U.S.C. 77m, so as to allow the FDIC, standing in the shoes of a failed bank, to bring securities claims that had been extinguished by the Securities Act's statute of repose.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners in this case, defendants-appellees below, are RBS Securities Inc., Deutsche Bank Securities Inc., UBS Securities LLC, Credit Suisse First Boston Mortgage Securities Corp., Credit Suisse Management LLC, Credit Suisse Securities (USA) LLC, and HSBC Securities (USA) Inc.

The Respondent in this case, plaintiff-appellant below, is the Federal Deposit Insurance Corporation, as Receiver for Citizens National Bank and Receiver for Strategic Capital Bank.

CORPORATE DISCLOSURE STATEMENT

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 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 a wholly owned subsidiary of Deutsche Bank AG. Deutsche Bank AG 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 Americas Holding LLC and UBS Americas Inc., the latter of which is wholly owned by UBS Americas Holding LLC. UBS Americas Holding LLC is wholly owned by UBS AG, which in turn is wholly owned by UBS Group AG. UBS Group AG 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. Petitioner Credit Suisse First Boston Mortgage Securities Corp. is a wholly owned subsidiary of Petitioner Credit Suisse Management LLC, which is also a wholly owned subsidiary of Credit Suisse (USA), Inc. Credit Suisse (USA), Inc. is wholly owned

by Credit Suisse Holdings (USA), Inc., which in turn is jointly owned by Credit Suisse AG and Credit Suisse Group AG, Guernsey Branch, the latter of which is a branch of Credit Suisse Group AG. Credit Suisse AG is wholly owned by Credit Suisse Group AG, which is a Swiss corporation whose shares are publicly traded on the SIX Swiss Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares. Credit Suisse Group 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.

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PETITION FOR A WRIT OF CERTIORARI

RBS Securities Incorporated, Deutsche Bank Securities Incorporated, UBS Securities LLC, Credit Suisse First Boston Mortgage Securities Corp., Credit Suisse Management LLC, Credit Suisse Securities (USA) LLC, and HSBC Securities (USA) Inc. (collectively, "Petitioners") respectfully petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit.

INTRODUCTION

This case concerns a purely legal question of federal statutory interpretation: whether, by enacting a statute extending only "the applicable statute of *limitations*" for certain contract and tort claims brought by the FDIC as receiver for failed banks, Congress intended to override the Securities Act's three-year statute of *repose*, which financial institutions and the securities markets have relied upon for over 80 years as providing an absolute outer limit on liability. *See* 12 U.S.C. § 1821(d)(14). The Securities Act's statute of repose is "a necessity in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors." *Cal. Pub. Employees Ret. Sys. v. ANZ Securities*, 2017 WL 2722415, No. 16-373, slip op. at 16 (U.S. June 26, 2017) ("*CALPERS*"). "[T]he basic and unexceptional rule [is] that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands,*

Inc., 137 S. Ct. 1002, 1010 (2017) (citation omitted). The court of appeals' answer to the question presented here, therefore, should have turned on the simple principle that FIRREA "mean[s] what it says." *FDIC v. First Horizon*, App., *infra*, 73a (2d Cir. 2016) (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, "[r]eading the statute of repose as preempted could * * * produce extraordinarily open ended liability for securities issuers. * * * Nothing in the text of the FDIC Extender Provision suggests that Congress intended such a result." App., *infra*, 21a-22a. And "the proper role of the judiciary * * * [must be] to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 2017 WL 2507342, No. 16-349, slip op. at 11 (U.S. June 12, 2017).

Indeed, hours before this Petition went to print, the Court definitively recognized that § 13 of the Securities Act is a statute of repose, "the text, purpose, structure, and history of [which] all disclose the congressional purpose to offer defendants full and final security after three years." *CALPERS*, slip op. at 11. It "admits of no exception and on its face creates a fixed bar against future liability." *Id.* at 5.

Statutes of repose are intended "to grant complete peace to defendants," *id.* at 11, and "allow more certainty and reliability," which "are a necessity" in the context of the financial markets. *Id.* at 16.

The Court has also addressed similar statutory "extender" language in *CTS Corporation v. Waldburger*, which confirmed that a federal statute extending a statute of limitations should be afforded its plain meaning and not read to displace statutes of *repose*, which extinguish a cause of action altogether and reflect a legislative "judgment that defendants should be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (internal quotations omitted). Statutes of limitation and statutes of repose are "targeted at a different actor," "are measured from different points," and "seek to attain different purposes and objectives." *Id.* at 2182-83; *accord CALPERS*, slip op. at 7-8.

The extender provision in *CTS* was part 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 limitations language. For those reasons, the Court held that CERCLA's extender provision does *not* affect the operation of statutes of repose. 134 S. Ct. 2175, 2182 (2014).

Though *CTS* compels the same conclusion for FIRREA's extender provision, in *Federal Deposit*

Insurance Corporation v. First Horizon Asset Securities, App., *infra*, 39a, the Court of Appeals disregarded this Court's clear textual analysis in favor of a decision that would "eliminate[] a widely relied on and widely applied statute of repose" critical to the capital markets. App., *infra*, 69a (Parker J. dissenting). The summary order in this case asserted that the panel was bound by *First Horizon*'s analysis, thereby compounding the errors of a decision that is directly contrary to the plain language of the FIRREA extender statute, ignores the reasoning of *CTS*, and was rendered without the opportunity to consider *CALPERS*. Over a lengthy dissent by Judge Barrington D. Parker, the panel majority in *First Horizon* 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*, 54a (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 67a.

Although this question divided the *First Horizon* panel 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, a principle reinforced in *CALPERS*, slip op. at 16. Placing the CERCLA and FIRREA extender provisions side by side, there is no relevant distinction in their text or structure. Yet the *First Horizon* majority upon which the panel below relied 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 refused to reconsider its pre-*CTS* position. 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 *tens of billions* of dollars in securities by asserting claims barred by the Securities Act's three-year repose period. This Court should have the final word on whether such claims comport 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.

Fourth, "[t]he Government cannot have it both ways." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013). At the Government's urging, the courts of appeals have unanimously agreed that "statutes of limitations" under the Federal Tort Claims Act do not displace relevant statutes of repose, which serve to cut off Government liability. Likewise, 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 seeks to extract large settlements from securities issuers and underwriters, the FIRREA extender provision becomes a "comprehensive provision that displaces all shorter times bars, including periods of repose." FDIC C.A. Br. 28. The Government's about-face is at odds with both FIRREA's plain text and this Court's reasoning in *CTS*. It also introduces confusion among lower courts over which of the conflicting circuit court precedents to follow in determining whether statutes of repose are displaced.

OPINIONS BELOW

The Second Circuit's January 18, 2017 summary order (App., *infra*, 1a-5a) is not reported but is available at 2017 WL 212036 and 2017 U.S. App. LEXIS 816. The district court's March 24, 2015 opinion (App., *infra*, 6a-25a) is reported at 92 F. Supp. 3d 206.

JURISDICTION

The Court of Appeals entered its judgment on January 18, 2017 (App., *infra*, 1a-5a), and denied a petition for rehearing *en banc* on March 27, 2017 (App., *infra*, 26a-27a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent statutory provisions are reprinted in full in an appendix to this petition. App., *infra*, 28a-38a. 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 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.

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

STATEMENT OF THE CASE

A. The FDIC's Complaint

Petitioners issued and underwrote residential mortgage-backed securities (RMBS) that were offered to the public beginning in 2006. Citizens National Bank ("Citizens") and Strategic Capital Bank ("Strategic") (collectively, the "Banks") purportedly purchased $140 million in those securities between September 2007 and April 2008. *See* C.A. App. 156. Despite the considerable turmoil in the housing and credit markets, the Banks' executives concluded that it was an "opportunistic time" to invest in RMBS, which were being offered at a "significant discount" on the secondary market. *See* No. 12-cv-4000, Dkt. No. 59-1, at 9 (S.D.N.Y. July 30, 2012). In May 2009, both banks failed and the FDIC was appointed as receiver. App., *infra*, 11a.

Several months later, the FDIC's Office of Inspector General (OIG) released a report reviewing Strategic's failure and described the bank's decision to invest in RMBS at the time as "speculative," "ill-timed," and reflective of a "poor" selection of risk. *See* No. 12-cv-4000, Dkt. No. 59-1, at 3 (S.D.N.Y. July 30, 2012). The Treasury Department's OIG in March 2010 similarly condemned Citizens' "high-risk strategy" of "heav[y]" RMBS investment without adequate risk controls. *See* No. 12-cv-4000, Dkt. No. 59-2, at 7 (S.D.N.Y. July 30, 2012).

Yet the FDIC waited until May 18, 2012—more than four years after all of the Banks' purchases and almost five years after some of the purchases—to assert claims against petitioners

under Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. 77k and 77*o*. App., *infra*, 11a. In its Complaint, the FDIC alleges that the offering documents for the securities that the Banks purchased in 2007 and 2008 contained misrepresentations and omissions about the mortgage loans backing those securities. *Id.*

B. The Securities Act's Repose Provision

Because the FDIC filed its complaint more than four years after the Banks' 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). 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. 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); *see Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1331 n.11 (2015) ("§ 11 discards the common law's intent requirement making omissions unlawful regardless of the issuer's state of mind."). 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.

C. The FIRREA Extender Provision

By its terms, FIRREA's extender provision—which was enacted in 1989, 55 years after the Securities Act—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

In December 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. In October 2014, after this Court decided *CTS*, petitioners reasserted their argument that the FDIC's claims are untimely. In March 2015, the district court applied *CTS* and granted judgment to petitioners. App., *infra*, 24a. The court emphasized that, as with the CERCLA provision at issue in *CTS*, the FIRREA extender provision "refers only to 'statute of limitations' in the singular, several times," "includes no reference to any statute of repose," and "is phrased by reference to the accrual of causes of action." *Id.* at 19a. The court concluded, "[t]he text of the FDIC Extender Provision, read in light of the [*CTS*] Court's analysis, thus indicates strongly that Congress did not intend to encompass both types of timing provisions when it referred to statutes of limitation." *Id* at 20a.

The district court also held that interpreting the FIRREA extender provision according to its plain terms is consistent with its legislative history and purpose. Because the extender provision gives the FDIC more time to bring claims, "[a] literal reading of the FDIC Extender Provision is thus effective to promote the purposes of the provision." *Id.* at 21a. Moreover, a reading that found the statute of repose as displaced could "subject [a securities] issuer to

potentially unlimited exposure to suit. Nothing in the text of the FDIC Extender Provision suggests that Congress intended such a result." *Id.* at 22a.

E. The Court of Appeals' Decision

1. The court of appeals' summary order found that *First Horizon* "controls the outcome of this appeal" and on that ground vacated the District Court's ruling. App., *infra*, 1a-5a. In *First Horizon*, a divided panel of the court reversed a substantively identical ruling over a lengthy dissent by Judge Parker. App, *infra*, 39a-73a.

a. The *First Horizon* panel majority concluded that it was bound by that court's earlier decision in *Fed. Housing Finance Agency v. UBS Americas*, 712 F.3d 136 (2d Cir. 2013), notwithstanding this Court's intervening decision in *CTS*. App., *infra*, 40a. According to the panel majority, *CTS* did 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 56a. 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]." *Id.* (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 57a. (emphasis omitted).

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. Apparently failing to recognize that *UBS* had found an *express* repeal, the panel majority asserted that the presumption "would have applied with equal force in *UBS*," and the panel majority was therefore bound by its earlier decision. *Id.* at 60a.

b. Judge Parker dissented, applying the strict textual analysis required by *CTS*. App., *infra*, 61a-73a. 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 65a-66a. 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' reference to a single limitations period, or (iii) its reference to the accrual date of claims." *Id* at 66a. 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." *Id.*

As Judge Parker explained, "*CTS* changed the law" by providing "instruction on how to read extender statutes." *Id.* 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 68a. The FIRREA extender provision also "refers to the relevant limitations period in the singular," and "contains numerous references to the accrual of claims." *Id.*. 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." *Id* at 69a.

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." *Id.* "[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 70a. "Fidelity to this rule is especially 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. *Id.* 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." *Id.* at 72a.

Petitioners filed a timely petition for rehearing *en banc*, urging the court of appeals to apply this Court's decision in *CTS* without deferring to its previous panel opinions in *UBS* or *First Horizon*. The court of appeals denied the petition. App., *infra*, 26a-27a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's reasoning abandons the plain language of the FIRREA extender statute and directly conflicts with *CTS* by holding that the term "statute of limitations" in FIRREA's extender provision "displaces otherwise applicable statutes of repose." App., *infra*, 43a. As Judge Parker explained in dissent in *First Horizon*, that conclusion cannot be reconciled with FIRREA's text, structure, history, or purpose, or with this Court's guidance in *CTS*. *Id.* at 61a-73a.[1] The Second Circuit has also turned the presumption against implied repeals on its head: it effectively holds that if Congress did *not* want to

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[1] Because FIRREA's extender provision addresses only limitations periods for "contract" and "tort" claims, 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.*, *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 supplies a uniform statute of limitations for only state-law contract and tort claims provides an additional and independent basis for reversing the decision below, and further evidence that the court of appeals failed to apply fundamental principles of statutory interpretation in its analysis of FIRREA.

displace the Securities Act's statute of repose, it had to say so more clearly. Further, the Second Circuit's approach conflicts with unanimous circuit court precedent that "statutes of limitation" under the Federal Tort Claims Act do not displace statutes of repose. Those decisions, which recognize that Congress's creation of a federal statute of limitations does not displace otherwise applicable statutes of repose, cannot be squared with the *First Horizon* decision relied upon in the ruling below. Because the decision below partially invalidates a critically important provision of federal securities law and undermines uniformity of federal courts, this Court's review is necessary.

Although the conflict between two federal statutes alone merits review, the question presented is of tremendous national importance. Three federal agencies are seeking to recover tens of billions of dollars from securities issuers and underwriters based on claims that are barred by the plain terms of the Securities Act. The very purposes of that Act's statute of repose is to prevent litigation on stale facts and to provide much-needed certainty to financial markets. Those purposes were achieved as part of a legislative bargain providing for the near-strict liability imposed under the Act. Absent this Court's intervention, parties and lower courts will continue to expend significant resources litigating potentially enormous liability and fueling uncertainty in the financial markets. This Court's review is 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 THE PLAIN LANGUAGE OF THE STATUTE AND THIS COURT'S PRECEDENTS

This case is really very simple. On its face, 12 U.S.C. 1821(d)(14) says nothing at all about statutes of repose. Rather, it extends the applicable statute of limitations for certain contract or tort claims brought by the FDIC as receiver. Statutes of limitation and statutes of repose are different statutes with different purposes and other important differences as recognized by this Court—most recently in *CALPERS* and *CTS*—and by state and federal courts throughout the country. By construing Section 1821(d)(14) as not only extending certain statutes of limitation, but also impliedly overriding separate statutes of repose, the court below has re-written the statute to say something far different than what Congress actually enacted. In doing so, the court below, joined by several other courts of appeals, have effectively provided the FDIC the right to assert claims that Congress never intended and which are substantively different than the claims the failed banks themselves could have brought directly. That result flies in the face not only of the plain language of the statute, but of the overriding structure and intent of FIRREA, which places the FDIC in the shoes of the failed bank when acting as receiver.

A. The Second Circuit's Decisions Cannot Be Squared With This Court's Textual Analysis In *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, and held that "the definition of * * * 'limitations' * * * is best read to encompass only statutes of limitations" and not statutes of repose. 134 S. Ct. at 2187. In ruling that CERCLA's extender provision does not affect statutes of repose, this Court provided clear direction for how to properly interpret the scope of extender provisions in other federal statutes. Specifically, 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. *Id.* at 2185-2187. As Judge Parker explained, the same "textual markers" apply with equal or greater force to FIRREA's extender provision. App., *infra*, 69a. 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.

1. 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. 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*, 68a (Parker, J., dissenting). 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 triggered by notice to plaintiffs and encourage prompt action by plaintiffs in asserting their claims. *CTS*, 134 S. Ct. at 2182-2183.

Neither the panel below nor the *First Horizon* majority squarely addressed that fundamental point. Instead, both panels relied upon *UBS*—a Second Circuit decision pre-dating *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*, 65a. *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.

Nor did either panel address why, if Congress intended to sweep away the Securities Act's repose period, it began FIRREA's extender provision with the narrow 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 "notwithstanding any other provision of Federal or State law." 12 U.S.C. 1821(m)(10). Congress's reference to "contract[s]" only reinforces that it had in mind only ordinary statutes of limitations, which generally may be altered by agreement, 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 decision below 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*, 55a. It concluded that the provision "provides no guidance on the question whether the Extender Statute displaces otherwise applicable statutes of repose." *Id* at 57a. (emphasis omitted). But the 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—even without explicitly using the expression "statute of repose." *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*, 68a (Parker, J.,

dissenting). Moreover, in light of the extender provision's references to modifying "statute[s] of limitations," 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." *Id.* at 70a.

2. 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 preemption 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 court of appeals 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*, 53a. 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.

3. 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 limitations 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 Second Circuit 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*, 57a. 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.

4. Like CERCLA, FIRREA Does Not Create An Exclusive And Comprehensive Time Limit

At bottom, the textual analysis employed by the Second Circuit boils down to an *ipse dixit* derived 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*, 54a; *see UBS*, 712 F.3d at 141-142. This premise was rejected by *CTS* and its conclusion is incorrect.

The notion that FIRREA "created" a new limitations period is at odds with the court's own description of FIRREA as an "*Extender* Statute."

E.g., App., *infra*, 54a (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.

Even if FIRREA *created* a wholly new federal statute of *limitations*, there is no textual or structural indication that this new limitations period displaces both statutes of *limitations* and statutes of *repose*. The extender provision does nothing more than establish a federal limitations period that applies to state contract and tort claims in any action brought by the FDIC as receiver, unless a state-law limitations period is longer. None of that suggests that the federal limitations period is a "comprehensive, exclusive limitations framework for FDIC actions" that displaces the statute of repose in the Securities Act. FDIC C.A. Br. 12.

The only argument for exclusivity articulated below 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). 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 period" 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 statute does not convert FIRREA's limitations period into a comprehensive time limit.

Moreover, this reasoning, and the Second Circuit's similar reliance on *UBS*'s reasoning that the FDIC extender provision's use of the phrase "shall be" was strong evidence that no other time periods can apply, App., *infra*, 59a (quoting *UBS*, 712 F.3d at 141-42), is also irreconcilable with *United States v. Wong*, 135 S. Ct. 1625 (2015). In *Wong*, the Government argued that the FTCA's statute of limitations is jurisdictional, relying in part on the fact that the statute uses "mandatory terms." 135 S. Ct. at 1632. In rejecting the Government's argument, this Court observed that most statutory time limits are "framed in mandatory terms" and that no significance can be drawn from such mandatory terms "however emphatically expressed those terms may be." *Id.* As in *Wong*, the FDIC extender provision's use of such "mandatory language" is merely "mundane statute-of-limitations language, saying only what every time bar, by definition, must: that after a certain time a claim is barred." *Id.* Thus, although the FDIC extender provision is mandatory *when* it applies, that mandatory language says nothing about *whether* it applies to repeal statutes of repose.

In short, even if the distinction relied upon below between "extending" a statute of limitations and "creating" one could be reconciled with *CTS* and *Wong*, which it cannot, the statute of limitations in FIRREA and the three-year statute of repose in the Securities Act can coexist in harmony, just as in *CTS* CERCLA's statute of limitations and North Carolina's statute of repose could coexist without any difficulty. "[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143–44 (2001) (internal quotations omitted).

5. 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, "[i]f anything, congressional understanding of the distinction between statutes of limitations and statutes of repose [had] only deepened." App., *infra*, 63a (Parker, J., dissenting). "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 65a.

The Second Circuit 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,* 50a. 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*, 64a.

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 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. By its continued deference to *UBS,* the Second Circuit has ignored this Court's intervening reasoning in *CTS*. Moreover, 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 claims on behalf of failed banks. App., *infra,* 20a-21a. This Court reiterated in *CTS,*

however, that "no legislation pursues its purposes at all costs." 134 S. Ct. at 2185 (internal quotation marks omitted). Further, CERCLA's purpose—extending limitations periods for the victims of toxic waste dumping—is no less remedial than FIRREA's goal. By relying on FIRREA's so-called remedial purpose and disregarding *CTS*'s clear rejection of such arguments, the Second Circuit arbitrarily elevated the FDIC's concerns over the concerns of those harmed by toxic contaminants at issue in *CTS*. This Court has long rejected such reasoning. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994) (rejecting an expansive reading of FIRREA urged by the FDIC and noting that "there is no federal policy that the [FDIC] fund should always win").

B. The Second Circuit's Decision Violates The Presumption Against Implied Repeals

The court of appeals acknowledged that FIRREA "provides no guidance on the question whether the Extender Statute *displaces* otherwise applicable statutes of repose." App., *infra*, 57a. The conclusion that that *is* what Congress intended is the essence of an implied repeal. But 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)—"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).

FIRREA does not clearly repeal the Securities Act's repose period. Since *CTS*, eight federal and state judges have held that FIRREA did not displace

the Securities Act's statute of repose. *See infra*, nn.2-3. The broad disagreement over FIRREA's interpretation demonstrates the absence of a clear and manifest repeal of the statute of repose. In *CTS*, Justice Kennedy recognized that the presumption against preemption—the close cousin of the presumption against implied repeals—foreclosed reading the extender statute to displace statutes of repose, 134 S. Ct. at 2188-89, a conclusion not joined by the concurring justices only because of their agreement that under the plain language of the extender statute Congress did not intend to displace statutes of repose, *id.* at 2189 (Scalia, J., concurring).

"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*, 72a. (Parker, J., dissenting). The Securities Act's 3-year repose period is critically important "to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability." *CALPERS*, slip op. at 6-7. Congress was aware when it enacted the extender provision in 1989 that the Securities Act's repose period creates "an absolute bar on a defendant's temporal liability," *id.* at 7 (internal quotations omitted), which "admits of no exception," *id.* at 5, that it was afforded "to grant complete peace to defendants" by providing "full and final security after three years," *id.* at 11, and that its goals were "a necessity" for financial actors and proper functioning of the financial markets, *id.* at 17. Judge Parker had it right in concluding that the "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." App., *infra*, 69a (Parker, J., dissenting).

C. The Second Circuit's Decision Is Irreconcilable With FIRREA's Structure And Binding Precedent Establishing That The FDIC "Steps Into The Shoes" Of A Failed Financial Institution When It Asserts Claims As Receiver

1. The receivership structure adopted under FIRREA further demonstrates that Congress had no intent to displace the Securities Act's statute of repose. The FDIC extender provision was enacted by Congress as part of FIRREA, which provides that when the FDIC brings claims as receiver, those claims are defined by the substantive law otherwise applicable to the claims had they been brought directly by the failed bank. As this Court has explained, FIRREA places the FDIC "in the shoes of the insolvent [institution]." *O'Melveny*, 512 U.S. at 86-87 (citations omitted). In this respect, FIRREA "leaves untouched" judgments about "burdens of proof, rules of evidence, and other important rules governing civil actions." *CTS*, 134 S. Ct. at 2188.

Reading the FDIC extender provision to displace statutes of repose, however, would substantively alter the nature of the underlying claim. The Securities Act's three-year repose period is "an unqualified bar on actions instituted" after three years, "giving defendants total repose" after that time, *Merck*, 559 U.S. at 650, that "admits of no exception and on its face creates a fixed bar against future liability." *CALPERS*, slip op. at 5. 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 quotations 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*, 355 F.3d at 102; *see CTS*, 134 S. Ct. at 2182-2183. Thus, the need to bring an action within three years of a public offering is no less a ***substantive element*** of a Securities Act claim than the need to show there has been a material misstatement or omission. Under the court of appeals ruling, however, the extender provision allows the FDIC to bring an entirely new substantive cause of action—one Congress never contemplated when it enacted the Securities Act—and one the failed banks could not have asserted.

That holding is contrary to the receivership structure embedded in FIRREA as recognized in *O'Melveny*, which clarifies that while FIRREA's "explicit" provisions govern the FDIC's claims, "matters left unaddressed by [FIRREA] are presumably left subject to the disposition provided by [preexisting] law." 512 U.S. at 85. The text, context and structure of the FDIC extender provision show that the FDIC would "stand in the shoes" of failed banks, with an extended statute of limitations but otherwise subject to any statutes of repose.

Like the Securities Act, FIRREA 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. The decision below improperly redraws that legislative bargain.

2. The decision below is also inconsistent with unanimous circuit court precedent holding that a federal statute of limitations does not preempt or repeal otherwise applicable statutes of repose. Specifically, under the Federal Tort Claims Act, tort claims against the United States are governed by the same substantive state laws that apply to tort claims brought against private individuals under like circumstances. *See, e.g.*, *Augutis v. United States*, 732 F.3d 749, 752 (7th Cir. 2013). In this way, claims under the FTCA are analogous to claims brought by the FDIC as receiver: while they are subject to a federal statute of limitations regardless of otherwise applicable limitations periods, the claims themselves are defined by underlying substantive law. *See* 28 U.S.C. § 2401(b). For that reason, virtually every federal court of appeals to consider the issue has concluded that Congress's creation of a federal statute of limitations under the FTCA does not displace otherwise applicable statutes of repose. *See Augutis*, 732 F.3d at 754; *Anderson v. United States*, 669 F.3d 161, 165 (4th Cir. 2011); *Bryant v. United States*, 768 F.3d 1378, 1383 (11th Cir. 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). The government itself has argued repeatedly (when it is sued as a defendant) "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 the federal statute of limitations. *E.g.*, Br. of the United States, *Augutis v. United States*, No. 12-3536, ECF No. 15 (7th Cir. May 2, 2013).

The resulting conflicts between the decision below on one hand and the text, structure and purpose of FIRREA and the caselaw recognizing the important differences between statutes of limitations and statutes of repose on the other, can be reconciled by the presumption against implied repeals—the very issue sidestepped below.

II. THE QUESTION PRESENTED IS RECURRING AND EXCEPTIONALLY IMPORTANT

Because of the potential to upend market stability and the staggering amounts at issue, the issue underlying this petition is one of "exceptional importance." The Securities Act's statute of repose was enacted "because of fear that lingering liabilities would disrupt normal business and facilitate false claims." *P. Stolz*, 355 F.3d at 105 (internal quotations omitted). To address this fear, the repose period is an "absolute limitation" that "serve[s] as a cutoff" on all Securities Act claims after that date. *IndyMac MBS*, 721 F.3d at 107 (quotations and emphasis omitted). And to find a repeal of this "legislative compromise that was at the heart of the 1933 Act," App., *infra*, 71a (Parker, J., dissenting), is to invite uncertainty and market instability.

A. The court of appeals' 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 underwriters, often arguing that those claims are timely under materially identical extender provisions in HERA and elsewhere in FIRREA. *See* App., *infra*, 30a (HERA extender provision invoked by FHFA); *id.* at 31a (separate FIRREA extender provision invoked by NCUA). These actions routinely involve hundreds of millions to billions of dollars in potential liability.

Cases are 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 billions of dollars in securities originated or underwritten by over two dozen financial institutions and other defendants. Many of the contested securities are at issue in cases pending within the Second Circuit. The agencies' also seek billions of dollars in prejudgment interest premised on the extensive delay attributable to the extender provisions.

The resulting potential liability and uncertainty has not been lost on the financial markets and the financial press around the globe, which have taken note of the uncertainty facing financial institutions because of the enormous potential liability for securities cases brought by government agencies like the FDIC, cases based on events that happened a decade or more ago. These are precisely the concerns that Congress sought to address by operation of the Securities Act's statute of repose.

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).

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.).

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 authorizes 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.

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 in *First Horizon*. Since this Court decided *CTS* just over three 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.[2] By contrast, other courts

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[2] *See FDIC v. Chase Mortg. Fin. Corp.*, 42 F. Supp. 3d 574, 579 (S.D.N.Y. 2014) (Stanton, J.), *vacated sub nom. FDIC v. First Horizon Asset Sec., Inc.*, 821 F.3d 372 (2d Cir. 2016) ("[W]hen faced with a statute which presented both a statute of limitations and a statute of repose, Congress chose language which focused on and changed the statute of limitations, and

have interpreted those same extender provisions to create all-purpose time limits and thus to override applicable statutes of repose, notwithstanding *CTS*.[3]

The outsized importance of the Second Circuit's resolution of this issue diminishes the need for a circuit conflict. 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 FTCA litigation—all cut decisively in favor of further review.

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left the statute of repose untouched."); *FDIC v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2014 WL 4161561, at *9 (W.D. Tex. Aug. 18, 2014), *rev'd and remanded sub nom. FDIC v. RBS Sec. Inc.*, 798 F.3d 244 (5th Cir. 2015) ("*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.).

[3] 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.*, 833 F.3d 1125 (9th Cir. 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).

CONCLUSION

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

June 26, 2017

Respectfully submitted,

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

Counsel for Petitioners Deutsche Bank Securities Inc., RBS Securities Inc., and UBS Securities LLC

Richard W. Clary
CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, New York 10019
Phone: (212) 474-1000
Fax: (212) 474-3700

Counsel for Petitioners Credit Suisse Securities (USA) LLC, Credit Suisse First Boston Mortgage Securities Corp., and Credit Suisse Management LLC

Michael O. Ware
Scott A. Chesin
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
Phone: (212) 506-2500
Fax: (212) 262-1910

Counsel for Petitioner HSBC Securities (USA), Inc.

APPENDIX

Appendix A

15-1037-cv
FDIC v. Credit Suisse First Boston Mortgage Securities Corp.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

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 18th day of January, two thousand seventeen.

PRESENT: JOSÉ A. CABRANES,
ROSEMARY S. POOLER,
BARRINGTON D. PARKER,
Circuit Judges.

15-1037-cv

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CITIZENS NATIONAL BANK AND RECEIVER FOR STRATEGIC CAPITAL BANK,

Plaintiff-Appellant,

v.

CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., CREDIT SUISSE MANAGEMENT LLC, CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK SECURITIES INC., HSBC SECURITIES (USA), INC., RBS SECURITIES INC., AND UBS SECURITIES LLC.,

Defendants-Appellees,

BEAR STERNS ASSET BACKED SECURITIES I L.L.C., THE BEAR STERNS COMPANIES L.L.C., JP MORGAN SECURITIES L.L.C., CITICORP MORTGAGE SECURITIES, INC., CITIMORTGAGE, INC., CITIGROUP GLOBAL MARKETS INC., MERRILL LYNCH MORTGAGE INVESTORS, INC., MERRILL LYNCH MORTGAGE CAPITAL, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INC., AND ALLY SECURITIES LLC,

Defendants.

FOR PLAINTIFF-APPELLANT:

JAMES SCOTT WATSON (Colleen J. Boles, Kathryn R. Norcross, Jaclyn C. Taner, *on the brief*), for *Federal Deposit Insurance Corporation.*

FOR DEFENDANTS-APPELLEES:

ANDREW T. FRANKEL (Thomas C. Rice, *on the brief*), Simpson Thatcher & Bartlett LLP, New York, NY *for Deutsche Bank Securities Inc., RBS Securities Inc., and UBS Securities LLC.*

Richard W. Clary, Cravath Swaine & Moore LLP, New York, NY *for Credit Suisse Securities (USA) LLC, Credit Suisse First Boston Mortgage Securities Corp., and Credit Suisse Management LLC.*

Michael O. Ware, Mayer Brown LLP, New York, NY, *for HSBC Securities (USA), Inc.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Laura Taylor Swain, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and hereby is **VACATED AND REMANDED**.

Plaintiff-appellant Federal Deposit Insurance Corporation ("FDIC")—as receiver for two failed banks, Citizens National Bank ("Citizens") and Strategic Capital Bank ("Strategic")—appeals from a judgment dismissing its securities claims against defendants, issuers and/or underwriters of Residential Mortgage-Backed Securities, as time-barred. The FDIC filed its complaint alleging violations of Sections 11 and 15 of the Securities Act of 1933 on May 18, 2012. The date of that filing was more than three years after Citizens and Strategic had purchased the certificates at

issue, in 2006 and 2007, and thus the action would ordinarily be barred by the Securities Act's statute of repose. *See* 15 U.S.C. § 77m. But the so-called "FDIC Extender Statute," enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, sets "the applicable statute of limitations" for an action brought by the FDIC in its capacity as receiver to be (at a minimum) three years from the FDIC's appointment as receiver. *See* 12 U.S.C. § 1821(d)(14). Here, the complaint *was* filed within three years of FDIC's appointment. In granting Defendants' motion to dismiss, however, the District Court held that the FDIC Extender Statute "extends" or supersedes only statutes of limitations, and not statutes of repose.

That holding, which we review *de novo*, was error. Following the District Court's ruling and the submission of briefing in this appeal, another panel of this Court held that the FDIC Extender Statute *does* supersede the Securities Act's statute of repose, distinguishing *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), and reaffirming this Court's earlier ruling on a substantively identical Extender Statute in *Fed. Hous. Fin. Agency v. UBS Americas Inc.*, 712 F.3d 136, 138 (2d Cir. 2013). *See Fed. Deposit Ins. Corp. v. First Horizon Asset Sec., Inc.*, 821 F.3d 372 (2d Cir. 2016), *cert. denied*, 2017 WL 69213 (Jan. 9, 2017). Our sister panel's decision controls the outcome of this appeal, and the District Court's order dismissing the case on timeliness grounds must be vacated.

Accordingly, we **VACATE** the March 25, 2015 judgment of the District Court, and we **REMAND** the cause to the District Court for such further proceedings as may be appropriate in light of this order.

FOR THE COURT:

Catherine O'Hagan Wolfe,
Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL DEPOSIT INSURANCE CORP., as Receiver for CITIZENS NATIONAL BANK and Receiver for STRATEGIC CAPITAL BANK,

Plaintiff,

-v-

BEAR STEARNS ASSET BACKED SECURITIES *I LLC, et al.*,

Defendants.

No. 12CV4000-LTS-MHD

OPINION AND ORDER

APPEARANCES:

GRAIS & ELLSWORTH LLP

By: Mark B. Holton, Esq.
David J. Grais, Esq.
Kathryn E. Matthews, Esq.
1211 Avenue of the Americas
New York, New York 10036

Attorneys for Plaintiff Federal Deposit Insurance Corporation, as Receiver for Citizens National Bank and as Receiver for Strategic Capital Bank

SIMPSON THACHER & BARTLETT LLP

By: Andrew T. Frankel, Esq.
Thomas C. Rice, Esq.
Abigail W. Williams, Esq.
425 Lexington Avenue
New York, New York 10017

Attorneys for Defendants Deutsche Bank Securities Inc., RBS Securities Inc., and UBS Securities LLC

CRAVATH, SWAINE & MOORE LLP

By: Richard W. Clary, Esq.
Julie A. North, Esq.
Richard J. Stark, Esq.
Michael T. Reynolds, Esq.
Lauren A. Moskowitz, Esq.
825 Eighth Avenue
New York, New York 10019

Attorneys for Defendants Credit Suisse Securities (USA) LLC, Credit Suisse First Boston Mortgage Securities Corp., and Credit Suisse Management LLC

MAYER BROWN LLP

By: Michael O. Ware, Esq.
S. Christopher Provenzano, Esq.
1675 Broadway
New York, New York 10019

Attorneys for Defendant HSBC Securities (USA), Inc.

LAURA TAYLOR SWAIN,
United States District Judge

In this action Plaintiff, the Federal Deposit Insurance Corporation, as receiver for both Citizens National Bank ("CNB") and Strategic Capital Bank ("SCB," and together with CNB the "Banks"), sues Bear Stearns Asset Backed Securities I LLC ("BSABS"); the Bear Stearns Companies LLC; J.P. Morgan Securities LLC; Citicorp Mortgage Securities, Inc. ("CMSI"); CitiMortgage, Inc. ("CitiMortgage"); Citigroup Global Markets Inc. ("Citigroup"); Credit Suisse First Boston Mortgage Securities Corp.; Credit Suisse Management LLC ("Credit Suisse Mgmt."); Credit Suisse Securities (USA) LLC ("Credit Suisse Securities"); Merrill Lynch Mortgage Investors, Inc. ("Merrill Lynch"); Merrill Lynch Mortgage Capital Inc. ("MLMCI"); Merrill Lynch, Pierce, Fenner & Smith Inc.; Ally Securities, LLC; Deutsche Bank Securities Inc. ("DBS"); HSBC Securities (USA) Inc. ("HSBC"); RBS Securities Inc. ("RBS"); and UBS Securities LLC ("UBS") (collectively, "Defendants"),[1] alleging that Defendants violated the Securities Act of 1933 (the "1933 Act") in connection with the issuance of certain certificates backed by collateral pools of residential mortgage loans. Plaintiff amended the complaint on October 12, 2012 (the "Amended Complaint").

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[1] Ally Securities, LLC, Bear Stearns Asset Backed Securities I LLC; the Bear Stearns Companies LLC; J.P. Morgan Securities LLC, Citicorp Mortgage Securities, Inc., CitiMortgage, Inc., Citigroup Global Markets Inc., and the Merrill Lynch Defendants have each been dismissed with prejudice by stipulated order pursuant to Federal Rule of Civil Procedure 41. (Docket entry numbers 101, 102, 115, and 126.)

Defendants later brought the instant motion to dismiss the Amended Complaint (the "Motion"), arguing that the action is untimely and that the Amended Complaint fails to state a claim upon which relief can be granted. Among Defendants' arguments was the assertion that the FDIC's 1933 Act claims are barred by the statute of repose provision set forth in Section 13 of the 1933 Act, 15 U.S.C. § 77m. Plaintiff asserted that the statute of repose was preempted by an extension provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), codified as 12 U.S.C. § 1821(d)(14) (the "FDIC Extender Provision"). While the motion was pending, the Second Circuit held, in Federal Housing Finance Agency v UBS Americas, Inc., 712 F.3d 136 (2d Cir. 2013), that the Section 13 statute of repose was preempted by the extension provision of the Housing and Economic Recovery Act of 2008 ("HERA"), 12 § 4617(b)(12), which is substantially identical to the FDIC Extender Provision, and Defendants withdrew the Section 13 aspect of their motion. The Supreme Court thereafter held in CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014), that an extender provision of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") did not preempt statutes of repose, and remanded, in light of that decision, a Tenth Circuit decision[2] that had held that statutes of repose were

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[2] Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 727 F.3d 1246, 1249 (10th Cir. 2013), cert. granted, judgment vacated, 134 S. Ct. 2818 (2014), remand decision, 764 F.3d 1199 (10th Cir. 2014), cert. denied, 135 S. Ct. 949 (2015).

preempted by another statutory provision that is substantially identical to the FDIC Extender Provision. At the parties' suggestion, the Court ordered supplemental briefing of Defendants' reinstated statute of repose argument.

This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331, and has considered carefully the submissions of the parties. For the reasons stated below, Defendants' Motion is granted.

BACKGROUND

The following facts are taken from the Amended Complaint. Plaintiff's factual allegations are accepted as true for the purpose of resolving this Motion.

Defendants were involved in various aspects of the securitization of an issuance of residential mortgage backed securities ("RMBS"). Between September 2007 and April 2008, CNB purchased ten RMBS certificates for approximately $67.5 million, and SCB purchased nine of the certificates for approximately $73 million (together, the "Securities"). Each of the Securities was offered to the public in 2006 and 2007. (See Am. Compl., Schedules 1-3, 5, 7, 10-12 Items 38(a) & 38(b).)

BSABS, MLMI, and CMSI issued certain of the Securities. Certain of the Defendants–Citigroup, Credit Suisse Securities, RBS, Bear Stearns, Merrill Lynch, DBS, UBS, and HSBC–acted as underwriters for the Securities. These underwriters purchased certificates from the trust

and sold them to various investors, including the Banks. CitiMortgage, MLMCI, and Credit Suisse Mgmt. are sued as control persons.

The Banks were closed by the FDIC on May 22, 2009, and were placed into receivership. The FDIC thereafter conducted an extensive investigation of the Securities, including a detailed analysis of a random sample of the loans underlying each of the twelve Securities at issue here. This investigation included use of an automated valuation model which was based on "objective criteria like the condition of the property and the actual sale prices of comparable properties in the same locale shortly before the specified date." (Amend. Compl. ¶ 50.) The FDIC alleges that this modeling revealed that loan-to-value ratios were misstated significantly in the offering documents for the Securities, and that "the number of properties on which the value was overstated exceeded by far the number on which the value was understated, and the aggregate amount overstated exceeded by far the aggregate amount understated." (Amend. Compl. ¶ 51.)

The FDIC, as receiver for the Banks, filed this lawsuit on May 18, 2012, well over three years after each of the Securities was offered to the public.

DISCUSSION

Claims brought under Section 11 of the 1933 Act are subject to the two-pronged timing provision of Section 13 of that Act, which is codified as 15 U.S.C. § 77m. The first prong of

Section 13 is a statute of limitations, which provides that Section 11 claims must be brought within one year of "the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C.S. § 77m (LexisNexis 2012). The statute of limitations may be tolled based on equitable considerations, but not beyond three years from the date of the relevant offering, at which point a plaintiff's claim is extinguished by Section 13's second prong – a statute of repose – which provides that "[i]n no event shall any such action be brought . . . more than three years after the security was bona fide offered to the public." Id.

The FDIC asserts that its claims are timely, notwithstanding the three-year Section 13 statute of repose, because the statute of repose is preempted by the FDIC Extender Provision, which reads in pertinent part as follows:

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 [FDIC] 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 [FDIC] as conservator or receiver; or

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

12 U.S.C.S. § 1821(d)(14) (LexisNexis 2008).

The FDIC asserts that the Second Circuit's 2013 decision in Federal Housing Finance Agency v. UBS Americas, Inc., 712 F.3d 136 (2d Cir. 2013), holding that a substantially identical extender statute, governing actions brought by the Federal Housing Finance Agency (the "FHFA"), preempted the 1933 Act's statute of repose, is binding precedent that requires this Court to reject Defendants' untimeliness argument.

Defendants contend that the Supreme Court's decision in CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014), requires a different result. In Waldburger, the Court held that section 9658 of the CERCLA, which preempts state law statutes of limitations in certain tort actions, does not preempt state statutes of repose. The question thus before the Court is whether the Supreme Court's analysis in Waldburger calls the Second Circuit's UBS analysis into question sufficiently to relieve this Court of any obligation to follow UBS in determining the scope of the FDIC Extender Provision.

In UBS, the Second Circuit held that the extender statute applicable to actions brought by the FHFA, in its capacity as conservator of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation under HERA, operated to extend the FHFA's time to assert federal securities law claims, notwithstanding the repose provision of Section 13 of the 1933 Act. HERA's extender provision provides in pertinent part that:

> (A) In General
> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the [FHFA] 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 [FHFA] as conservator or receiver; or

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

12 U.S.C.S. § 4617(b)(12) (LexisNexis 2014). In reaching its decision, the Second Circuit found that, in using the phrase "the applicable statute of limitations with regard to any action brought by [FHFA] as conservator or receiver," Congress had expressed its intent to set a timing rule that a "reasonable reader could only understand . . . to apply to both the federal and state claims in" the case – that is, to both statutes of limitation and the federal statute of repose. UBS, 712 F.3d at 141-42 (quoting 12 U.S.C. § 4617(b)(12)(A) (emphasis supplied by UBS Court)). "[A]ny ambiguity" in the text of the statute was, the court held, eliminated by the legislative history of the extender provision, which makes it clear that

HERA was intended to empower the FHFA to collect all monies due to the conservatee agencies and provide the FHFA with time to mobilize and determine what claims to bring. According to the UBS Court, "it would have made no sense for Congress to have carved out securities claims from the ambit of the extender statute, as doing so would have undermined Congress' intent to restore [the conservatee agencies] to financial stability." Id. at 142.

Although the court recognized the distinct theoretical character of statutes of limitation as compared to statutes of repose, it observed that both courts and Congress have long used the term "statute of limitations" to refer to both, and concluded that "[i]n view of the text of the statute and its legislative history . . . , it is clear that Congress intended one statute of limitations – [the HERA extender statute] . . . – to apply to all claims brought by FHFA as conservator." Id. at 143. Congress would have used distinct, explicit terminology had it "really wanted to exclude securities claims from the ambit of HERA's extender statute," according to the UBS Court. Id. Based on this analysis, the UBS Court held that the HERA extender statute "supplants any other time limitations that might otherwise have applied" and saved the FHFA's Securities Act claims from the otherwise-applicable statute of repose. Id. at 143-44.

The Supreme Court's Waldburger decision calls into question several aspects of the UBS Court's analysis. Focusing on the text of the CERCLA extender statute, the Waldburger Court noted that the CERCLA statute used the term "statute of limitations" four times (in addition to use in the statute's caption), finding that usage "instructive" but not "dispositive." 134 S. Ct. at 2185. Acknowledging that the term "statute of limitations" is sometimes used in a "less formal" sense, referring "to any provision restricting the time in which a plaintiff must bring suit," the Court proceeded "to examine other evidence of the meaning of the term 'statute of limitations'" as used in the CERCLA extender statute. Id. Textual clues to meaning included the use of singular terms in referring to the period covered by the extension: "'the applicable limitations period,' 'such period shall commence' and 'the statute of limitations established under State law.'" The Court observed that "[t]his would be an awkward way to mandate the pre-emption of two different time periods with two different purposes." Id. at 2186-87.

Focusing on the difference in operation between statutes of limitation, which limit the time period within which suits may be brought, and statutes of repose, which "mandat[e] that there shall be no cause of action beyond a certain point, even if no cause of action has yet accrued," the Court held that

> [i]n light of the distinct purpose for statutes of repose, the [CERCLA statute's] definition of 'applicable limitations period' [('the period specified in a statute of limitations during which a civil action . . . may be brought')] (and thus also the definition of 'commencement date' [(defined as 'the date specified in a statute of limitations as the beginning of the applicable limitations period')]) 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 occurs.

Id. at 2187. The Court also found particularly significant a 1982 Congressionally-commissioned Study Group Report concerning the effect of state statutes of limitation and statutes of repose on CERCLA claims, which specifically recommended that both types of statutes be repealed. This report confirmed that Congress had been advised of the clear distinction between the two types of statutes, and made it "proper to conclude that Congress did not exercise the full scope of its pre-emption power" when it enacted the CERCLA extender statute, referring only to statutes of limitation, in response to the Report. Id. at 2186.

As to the significance of the purpose of the CERCLA extender statute –"namely to help

plaintiffs bring tort actions for harm caused by toxic contaminants" – the Court cautioned that "the level of generality at which the statute's purpose is framed affects the judgment whether a specific reading will further or hinder that purpose." Id. at 2188. The Court noted that CERCLA does not provide a comprehensive remedial framework[3] but, rather, leaves "judgments about causes of action, the scope of liability, the duration of the period provided by statutes of limitations, burdens of proof, rules of evidence and other important rules governing civil actions" to state law. Id. In the context of this framework, the Court held that, "[r]espondents ha[d] not shown that in light of Congress' decision to leave those many areas of state law untouched, statutes of repose pose an unacceptable obstacle to the attainment of CERCLA's purposes." Id.

Like the CERCLA extender statute, the FDIC's Extender Provision refers only to "statute of limitations" in the singular, several times, and includes no reference to any statute of repose. The Extender Provision is phrased by reference to the accrual of causes of action – the uniform extended limitations periods provided for FDIC-initiated

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[3] The Waldburger Court expressly rejected application of "the proposition that remedial statutes should be interpreted in a liberal manner" to "substitute for a conclusion grounded in the statute's text and structure," noting that "[a]fter all, almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem." 134 S. Ct. at 2185. Instead, the congressional intent in enacting such statutes should be interpreted "primarily from the statutory text." Id.

actions "begin[] on the date the claim accrues," and "the date on which a claim accrues" is defined as "the date on which the statute of limitations begins to run on any claim described" in the relevant subparagraph, determined by reference to the date on which the FDIC was appointed as conservator or receiver or, if later, "the date on which the cause of action accrues." 12 U.S.C.S. § 1821(d)(14) (LexisNexis 2008). As the Supreme Court recognized in Waldburger, statutes of repose operate without regard to the accrual of causes of action and, indeed, may expire and extinguish potential causes of action before they accrue at all. See 134 S. Ct. at 2187. Unlike statutes of limitation, statutes of repose are "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. The FDIC Extender Provision's supplemental provision is triggered by, and measures accrual from, the appointment of the FDIC as conservator, not any action of the defendant. The text of the FDIC Extender Provision, read in light of the Waldburger Court's analysis, thus indicates strongly that Congress did not intend to encompass both types of timing provisions when it referred to statutes of limitation.

A finding that the Extender Provision does not supplant both types of timing provisions is not inconsistent with its remedial purpose, which is "to 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." See 135 Cong. Rec. § 10205 (daily ed. Aug. 4, 1989). Like the CERCLA extender statute, the FDIC Extender Provision does not create new causes of action or procedural provisions to supplant existing statutory provisions. Extending statutes of limitation broadens the FDIC's potential scope of recoveries; the fact that certain securities law causes of action may be extinguished by the statute of repose does not indicate that the statute of repose is "an unacceptable obstacle to the attainment of [the FDIC Extender Provision's] purpose." Cf. Waldburger, at 2188. As another judge of this District has observed, "[b]y postponing otherwise applicable times of accrual of claims in state statutes of limitations, the FDIC Extender Provision 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." F.D.I.C. v. Chase Mortgage Fin. Corp., No. 12CV6166, 2014 WL 4354671, at *5 (S.D.N.Y. Sept. 2, 2014). A literal reading of the FDIC Extender Provision is thus effective to promote the purposes of the provision. Reading the statute of repose as preempted could, furthermore, produce extraordinarily open- ended liability for securities issuers. If, for instance, the relevant statute of limitations is discovery-based and the FDIC takes over as receiver prior to discovery of the wrong, the FDIC Extender Provision, which sets the outside date as the later of the three-year period beginning on the date the FDIC is appointed and three years after the cause

of action accrues by reason of discovery, would subject the issuer to potentially unlimited exposure to suit. Nothing in the text of the FDIC Extender Provision suggests that Congress intended such a result.

In UBS, the Second Circuit also relied heavily on the remedial purposes discussed in the legislative history of the HERA statute and the mission of the FHFA, which is similar to that of the FDIC under FIRREA. Waldburger 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. UBS, in citing the mission of the FHFA as the proper basis of an assumption that Congress would not have intended to exclude securities law claims otherwise governed by a statute of repose, appears to have taken an analytical path inconsistent with the Supreme Court's new guidance.[4]

Furthermore, although there appears to be no legislative history indicating that Congress made a specific decision to exclude statutes of repose from the text or operation of the FDIC Extender Provision, it is clear that Congress was well aware of the two distinct concepts and had enacted both types of provisions in the time frame surrounding the enactment of the FDIC Extender Provision. See In re Countrywide Financial Corp. Mortgage-Backed Securities Litig., 966 F. Supp. 2d 1031, 1037-39 (C.D. Cal. 2013) (discussing Congressional Record statements and statutory enactments).

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[4] See supra note 3.

The Court recognizes that the Tenth Circuit, following the Supreme Court's remand in light of Waldburger, adhered to its earlier holding in Nomura that the National Credit Union Administration Board's extender statute, which is substantially identical to the FDIC Extender Provision, preempts both statutes of repose and statutes of limitation. See 764 F.3d at 1239. The Court respectfully disagrees with the Nomura decision on remand which, among other things, reads a provision measuring the extended statute of limitations from the date of appointment of the plaintiff conservator as "invok[ing] the concept of repose because it is based on when a specific event occurs, regardless of whether the plaintiff is aware of the injury." 764 F.3d at 1211. That provision appears under the heading "Determination of the date on which a claim accrues." 12 U.S.C.S. § 1787(b)(14)(B) (LexisNexis 2012). As explained above, concepts of claim accrual, and measurement from events distinct from the actions of the defendant, are entirely inconsistent with the conceptual and practical framework of statutes of repose. Cf. Waldburger, 134 S. Ct. at 2182.

The analytical framework set out by the Supreme Court in Waldburger calls into question the Second Circuit's analysis of the extender provision of HERA in its UBS decision, implicitly overruling material aspects of the UBS decision's rationale. "Lower courts are bound by Second Circuit precedent 'unless it is expressly or implicitly overruled' by the Supreme Court or an en banc panel of the Second Circuit. Courts have

interpreted this to mean that a decision of the Second Circuit is binding 'unless it has been called into question by an intervening Supreme Court decision or by one of the Second Circuit sitting in banc' or 'unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court, or the Second Circuit court in banc.'" In re S. African Apartheid Litig., 15 F. Supp. 3d 454, 459-60 (S.D.N.Y. 2014) (quoting World Wrestling Entm't Inc. v. Jakks Pac., Inc., 425 F. Supp. 2d 484, 499 (S.D.N.Y. 2006) and United States v. Agrawal, 726 F.3d 235, 269 (2d Cir. 2013), cert. denied, 134 S. Ct. 1527 (2014)) (internal quotation marks omitted). Accordingly, the UBS decision does not bind this Court in its evaluation of the parties' contentions regarding the scope of the FDIC Extender Provision.

Having considered the text of the FDIC Extender Provision in light of its legislative context and the guidance provided by the Supreme Court's Waldburger decision, the Court concludes that the FDIC Extender Provision does not preempt the statute of repose set forth in Section 13 of the 1933 Act. Accordingly, Defendants' motion to dismiss the Amended Complaint as untimely is granted and the Court need not address the parties' remaining arguments in connection with the motion practice.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Amended Complaint is granted. Plaintiff's motion for a partial lift of the PSLRA discovery stay is denied as moot.

The Clerk of the Court is directed to enter judgment in favor of Defendants and to close this case.

This Memorandum Opinion and Order resolves docket entry numbers 80 and 132.

SO ORDERED.

Dated: New York, New York
March 24, 2015

/s/ Laura Taylor Swain
LAURA TAYLOR SWAIN
United States District Judge

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 27th day of March, two thousand seventeen.

ORDER

Docket No: 15-1037

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Citizens National Bank and receiver for Strategic Capital Bank,

Plaintiff-Appellant,

STRATEGIC CAPITAL BANK,

Plaintiff,

v.

CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., CREDIT SUISSE MANAGEMENT L.L.C., CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK SECURITIES INC., HSBC SECURITIES (USA) INC., RBS SECURITIES INC., UBS SECURITIES LLC,

Defendants-Appellees,

BEAR STEARNS ASSET BACKED SECURITIES I L.L.C., THE BEAR STEARNS COMPANIES L.L.C., J.P. MORGAN SECURITIES L.L.C., CITICORP MORTGAGE SECURITIES, INC., CITIMORTGAGE, INC., CITIGROUP GLOBAL MARKETS INC., MERRILL LYNCH MORTGAGE INVESTORS, INC., MERRILL LYNCH MORTGAGE CAPITAL INC., MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, ALLY SECURITIES, LLC,

Defendants.

Appellees, Deutsche Bank Securities Inc., RBS Securities Inc., and UBS Securities LLC, 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. § 77o provides:

§ 77o. 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 77l(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 77l(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 77l(a)(1) of this title more than three years

after the security was bona fide offered to the public, or under section 77l(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.

Appendix E

14-3648
FDIC v. First Horizon Asset Securities, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2015

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

Docket No. 14-3648-cv

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.

Before:

PARKER, LYNCH, and CARNEY,
Circuit Judges.

Plaintiff-Appellant Federal Deposit Insurance Corporation ("FDIC") appeals from a decision of the United States District Court for the Southern District of New York (Louis L. Stanton, *Judge*) dismissing its complaint, which asserts claims under the Securities Act of 1933, as untimely. The FDIC brought this action within the limitations period provided by the FDIC Extender Statute, 12 U.S.C. § 1821(d)(14), but outside the Securities Act's three-year statute of repose. 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 Agency displaced the Securities Act's statute of repose. We now further hold that the Supreme Court's decision in CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014), did not abrogate our holding in UBS, which remains good law. Accordingly, the FDIC's complaint was timely.

VACATED AND REMANDED.

Judge Parker dissents in a separate opinion.

JAMES SCOTT WATSON, Counsel (Colleen J. Boles, Assistant General Counsel, Kathryn R. Norcross, Senior Counsel, Jaclyn C. Taner, Counsel, *on the brief*), Federal Deposit Insurance Corporation, Arlington, Virginia, *for Plaintiff-Appellant.*

ROBERT J. GIUFFRA, JR. (Bruce E. Clark, David B. Tulchin, Amanda Flug Davidoff, Jeffrey B. Wall, *on the brief*), Sullivan & Cromwell LLP, New York, New York, *for Defendants-Appellees First Horizon Asset Securities, Inc., First Horizon Home Loan Corporation, FTN Financial Securities Corp., and UBS Securities, LLC.*

Richard W. Clary, Cravath, Swaine & Moore LLP, New York, New York, *for Defendant-Appellee Credit Suisse Securities (USA) LLC.*

Thomas C. Rice, Andrew T. Frankel, Simpson Thacher & Bartlett LLP, New York, New York, *for Defendants-Appellees Deutsche Bank Securities Inc. and RBS Securities Inc.*

Marc T.G. Dworsky, Munger, Tolles & Olson LLP, Los Angeles, California, *for Defendant-Appellee Wells Fargo Asset Securities Corporation.*

Michael O. Ware, Mayer Brown LLP, New York, New York, *for Defendant-Appellee HSBC Securities (USA) Inc.*

KATHLEEN M. SULLIVAN, Quinn Emanuel Urquhart & Sullivan, LLP, New York, New York (Philippe Z. Selendy, Adam M. Abensohn, Quinn Emanuel Urquhart & Sullivan, LLP, New York, New York, David C. Frederick, Wan J. Kim, Gregory G. Rapawy, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, District of Columbia, *on the brief*), *for Amici Curiae Federal Housing Finance Agency and National Credit Union Administration Board in Support of Plaintiff-Appellant.*

Michael J. Dell, Kramer Levin Naftalis & Frankel LLP, New York, New York, Ira D. Hammerman, Kevin Carroll, Securities Industry and Financial Markets Association, Washington, District of Columbia, Thomas Pinder, American Bankers Association, Washington, District of Columbia, *for Amici Curiae Securities Industry and Financial Markets Association, The American Bankers Association, and The Clearing House LLC in Support of Appellees and Affirmance.*

William M. Jay, Goodwin Procter LLP, Washington, District of Columbia, Joshua M. Daniels, Goodwin Procter LLP, Boston, Massachusetts, *for Amicus Curiae The Business Roundtable in Support of Defendants-Appellees.*

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 §§ 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.

---

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

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 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.

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

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

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 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

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[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 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.

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 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 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

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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).

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

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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.

2187 (internal quotation 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.

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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).

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. 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]

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[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.

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 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. But this rationale cannot be reconciled with *CTS*.[1]

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

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[1] 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.*

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.