No. 16-463

In The
Supreme Court of the United States

FIRST HORIZON ASSET SECURITIES, INC., et al.,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

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

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

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INTEREST OF *AMICI CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is an association of hundreds of securities firms, banks and asset managers, including many of the largest financial institutions in the United States. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA's members operate and have offices in all fifty states. SIFMA has offices in New York and Washington, D.C. SIFMA is the U.S. regional member of the Global Financial Markets Association.[1]

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its more than one million employees. ABA members are located in all fifty States and Washington, D.C. and include large and small financial institutions. The ABA's members hold a substantial majority of the U.S. banking industry's domestic assets and are leaders in all forms of consumer financial services.

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[1] *Amici* have submitted to the Clerk letters from all parties consenting to this filing. This brief was not authored in whole or in part by any party's counsel. No counsel or party other than *amici*, their members or their counsel made a monetary contribution to fund its preparation or submission. The parties received timely notice of *amici*'s intention to file.

The Clearing House, established in 1853, is the oldest banking association and payments company in the U.S. It is owned by the world's largest commercial banks, which hold more than half the deposits and employ over one million people in the U.S. They have more than two million employees worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., is regulated as a systemically important financial market utility. It owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions, and clears almost $2 trillion every day.

In *CTS v. Waldburger*, 134 S.Ct. 2175 (2014), this Court ruled that Section 9658 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), which extends the "statute of limitations" for state-law tort claims by people exposed to toxic contaminants, does *not* preempt statutes of repose. This Court explained that courts should follow the plain language of an extender statute, not their own views of Congress's purpose in enacting the statute. However, a divided Second Circuit panel in this case has now joined the Fifth Circuit in ruling that 12 U.S.C. § 1821(d)(14), a similar, subsequently-enacted extender statute applicable to FDIC claims (the

"Statute"), that also refers only to the "statute of limitations," nevertheless applies to statutes of repose. *See FDIC v. RBS Secs. Inc.*, 798 F.3d 244 (5th Cir. 2015). Two other Circuits have reached the same result concerning 12 U.S.C. § 1787(b)(14), a virtual identical extender statute for NCUA claims. *See NCUA v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014); *NCUA v. RBS Secs., Inc.*, 2016 U.S. App. LEXIS 14948 (9th Cir. Aug. 15, 2016). And those courts have approved another Second Circuit ruling, rendered before *CTS*, that so applied a third similar, subsequently-enacted extender statute for FHFA claims. Since none of these courts followed *CTS*, they raise the question whether this Court somehow *sub silentio* intended, and now intends, that the basic principles of law articulated in *CTS* or the rationale for that decision should be limited to its facts. Or does *CTS* stand for the proposition it articulated that extender statutes that refer only to the "statute of limitations" should *not* be applied to "statutes of repose"?

Amici believe there is no basis to confine the principles of law *CTS* articulated to its facts. They and their members have a strong interest in this Court granting the petition for certiorari because the decision below is untenable and enormously consequential, and has far-reaching implications, for four principal reasons:

First, the decision defies and is flatly inconsistent with *CTS* and the text of the Statute and overlooks the critical significance of the Securities Act of 1933's statute of repose. *CTS* enunciated clear and categorical

principles on the important question whether the Congressional extension of statutes of limitations for certain state law claims also extends the Securities Act's statute of repose. The Second Circuit's failure to follow those principles is of grave concern to *amici*'s members because it creates uncertainty, undermines the ability of market participants to act based on reasoned assumptions about the meaning of the law, and therefore has a destabilizing effect on the efficient functioning of the securities markets. This Court should definitively settle this issue now.

Second, the decision departs from this Court's teaching on whether the plain language of a statute should yield to a lower court's view of the statute's purpose. *Amici* recognize the importance of applying laws as they are written by Congress, not based on subjective judicial assertions of legislative purpose that do not take account of the often competing objectives Congress weighs in drafting particular provisions. That is essential to ensure predictability. Predictability is crucial for business planning and the effective and efficient functioning of the markets because it allows participants to understand how to comply with the law and how it will be enforced. This Court should take this valuable opportunity to restore the focus to the Statute's text and correct interpretations that stray from its plain language and structure. A failure to do so would risk encouraging courts around the country to depart from text and divine intent and policy.

Third, *amici*'s members rely on the fair, consistent and timely enforcement of the securities laws to deter

and remedy wrongdoing. One key component is the consistent application of statutes of repose that are a critical part of those laws and serve purposes wholly distinct from statutes of limitations. By establishing a definitive outside time limit for claims that cannot be tolled, statutes of repose provide the markets with a measure of certainty and finality, set a time after which participants are free from lingering liabilities and stale claims, and ensure that claims can be adjudicated based on evidence that is fresh. *Amici*'s members and their investors and customers depend upon statutes of repose in their financial planning and operations. The decision, however, undermines important aspects of the statute of repose that Congress made a central component of the Securities Act.

Fourth, the panel's decision raises important and recurring issues of federal law. The FDIC, NCUA, and FHFA have commenced numerous actions against financial institutions concerning the sale of hundreds of billions of dollars of securities, and seeking billions of dollars of damages. Their claims have been kept "alive only because of so-called 'extender statutes,'" Alison Frankel, *SCOTUS Repose Opinion Is Good News for Securities Defendants*, Reuters: On the Case (June 9, 2014), http://blogs.reuters.com/alison-frankel/2014/06/09/scotus-repose-opinion-is-good-news-for-securities-defendants, and their incorrect application to displace statutes of repose. Accordingly, if the Second Circuit's misreading of the Statute and failure to follow *CTS* is allowed to stand, it will have far-reaching consequences for the securities industry and the economy. This Court's

review is imperative now to bring the lower courts' constructions of extender statutes and treatment of critical statutes of repose into alignment with *CTS*. This case presents an ideal vehicle because the pressure to settle similar lawsuits seeking large recoveries could be a roadblock to appeals reaching this Court in other cases.

SUMMARY OF ARGUMENT

This case concerns the question whether the dispositive principles of law *CTS* articulated should be *sub silentio* confined to the facts of that case, and extender statutes that expressly apply only to statutes of limitations should also be applied to a statute of repose Congress enacted as a fundamental limitation on a statutory near strict liability claim. *Amici* support Petitioners' argument that *CTS* means what it says. The Statute should be construed in accordance with its plain language and this Court's rulings. It should not apply to the Securities Act's statute of repose.

The FDIC concedes in this action that it did not bring its Securities Act claims within the period allowed by its three-year statute of repose. Petitioners moved for judgment on those claims as barred by that statute of repose. The FDIC responded that Petitioners' motion should be denied based on a provision of the Statute that extends the "statute of limitations" for certain claims. However, the Statute extends *only* the "statute of limitations," and not statutes of repose.

Accordingly, the District Court properly rejected the FDIC's argument and granted Petitioners' motion. A divided Second Circuit panel reversed. The majority construed the Statute to permit the FDIC to bring claims after the period allowed by the Securities Act's statute of repose. Judge Parker filed a compelling dissent, explaining that *CTS* mandates that the Act's statute of repose governs and the FDIC's claims must be dismissed.

The Statute is clear and unambiguous. It extends only the "statute of limitations" for certain claims by the FDIC as a conservator or liquidating agent.[2] Statutes of repose are not mentioned. Nothing in the Statute extends the statute of repose for any claim.

There is nothing novel about overriding a statute of limitations while continuing to give effect to a statute of repose. *CTS* explained that Congress did just that in 1986 when it amended CERCLA to extend the "commencement date" of the statute of limitations for certain State law environmental actions, but not the repose period. 134 S.Ct. at 2191.

Congress enacted the Statute only three years later. However, the Second Circuit failed to follow the Statute's plain language or *CTS*. Instead, the panel majority substituted its view that the Statute's purpose was "to supersede any and all other time limitations, including statutes of repose." App. 12a.

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[2] The Petition's Statutory Provisions section provides the full text.

Compelling and urgent reasons warrant granting certiorari. The decision below is contrary to both the plain language of the Statute, which applies only to "the applicable statute of limitations," and *CTS*. *CTS* emphasized that Congressional intent must be "discerned primarily from the statutory text," that no legislation "pursues its purposes at all costs," and that Congress understood by 1986 (when CERCLA's extender provision was enacted) that statutes of repose are separate and distinct from statutes of limitations. 134 S.Ct. at 2182-83, 2185.

This case presents the Court with a valuable opportunity to correct a ruling that impermissibly disregards the basic tenets of statutory construction established in *CTS* and other decisions of this Court, halt the improvident erosion of statutes of repose, and reverse the expansion of extender statutes beyond their express terms. If statutes are interpreted based on courts' subjective views of how best to accomplish legislative purposes, and based on the assumption that Congress does not understand or forgets critical distinctions between terms – such as between a statute of limitations and a statute of repose that *CTS* found Congress understood only three years before it enacted the Statute – there is no limit to the manner in which statutes may be construed in contravention of their terms. That would undermine the rule of law and the bedrock principle of predictability upon which all market participants rely. It is vital to the securities

industry and financial markets that laws are construed and applied as enacted by Congress and that statutes of repose are enforced.

This Court's review is also needed because the question presented here is recurring, important, and involves enormous potential liability. *See U.S. v. Centennial Sav. Bank FSB*, 499 U.S. 573, 578 n.3 (1991) (granting certiorari "in light of the significant number of pending cases" concerning the question presented); *Pinter v. Dahl*, 486 U.S. 622, 632 (1988) (granting certiorari "[b]ecause of the importance of the issues involved to the administration of the federal securities laws"); *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) ("This enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari.").

ARGUMENT

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

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

This Court's grant of certiorari in *CTS* recognized the importance of the question whether extender provisions that expressly apply to statutes of limitations also displace statutes of repose. *See* 134 S.Ct. at 2182. That is equally true of the divided decision below. It requires this Court's review to make clear that this Court meant what it said in *CTS*, and to ensure that the Statute is not misapplied to displace the Securities Act's statute of repose.

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

CTS resolved a division among the lower courts as to whether extender provisions that expressly apply to the "statute of limitations" also displace statutes of repose. This Court held CERCLA's extender provision does *not* displace statutes of repose. This Court based its ruling primarily on the "natural reading of [CERCLA's]

text" which – like the Statute – refers only to statutes of limitation and contains other textual features inconsistent with applying it to statutes of repose. 134 S.Ct. at 2188.

This Court has long emphasized that "the starting point for interpreting a statute is the language of the statute itself," and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Dean v. United States*, 556 U.S. 568, 572 (2009). Courts must look to "what Congress has written . . . neither to add nor to subtract, neither to delete nor to distort." *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951).

Indeed, a dominant theme of this Court's jurisprudence is that legislation must be enforced in accordance with its plain language, and not based on a judicial assessment of how best to effectuate a perceived legislative purpose. *See, e.g.*, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S.Ct. 1184, 1196, 1199-1200 (2013) (Ginsburg, J.) ("under the plain language of Rule 23(b)(3)," securities fraud class action plaintiffs are not required to prove materiality at the class-certification stage even though "certain 'policy considerations' militate in favor of requiring precertification proof of materiality"); *Taniguchi v. Kan Pac. Saipan, Ltd.,* 132 S.Ct. 1997, 1999-2000, 2006 (2012) (Alito, J.) ("ordinary meaning" of 28 U.S.C. § 1920, allowing costs

for "compensation of interpreters," excludes document translation even though "it would be anomalous to require the losing party to cover translation costs for spoken words but not for written words"); *Hall v. United States*, 132 S.Ct. 1882, 1887, 1893 (2012) (Sotomayor, J.) (under a "plain and natural reading" of Bankruptcy Code § 503(b), the phrase "any tax . . . incurred by the estate" does not cover tax on individual debtors' farm sale even though "there may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable"); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407, 414 (2011) (Thomas, J.) (the False Claims Act public disclosure bar's reference to "report" "carries its ordinary meaning", which includes responses to FOIA requests, even though this permits potential defendants to "insulate themselves from liability by making a FOIA request for incriminating documents").

There is no dispute that Congress long ago included a three-year statute of repose in the Securities Act. *See* 15 U.S.C. § 77(m). There is also no dispute that the Statute, like the *CTS* extender provision, refers to the "statute of limitations," not to "statutes of repose." *CTS* explained the "critical distinction" between those concepts. 134 S.Ct. at 2187. "Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.' " *Id*. at 2183. Unlike statutes of limitations, which create a time limit for bringing an action measured from the date the claim accrues, statutes of repose create an outer limit measured from the date of the

defendant's culpable act. *CTS* concluded Congress was well aware of this difference when it enacted the CERCLA extender statute in 1986, yet chose not to refer to statutes of repose. *Id.* at 2187.

Congress plainly had not forgotten that difference three years later when it enacted the Statute. As Judge Parker explained, "[i]f anything, congressional understanding of the distinction between statutes of limitation and statutes of repose only deepened between the 1986 amendments to CERCLA and the 1989 enactment of the Extender Statute." App. 21a. Yet as the District Court found, "Congress chose language [in the Statute] which focused on and changed the statute of limitations, and left the statute of repose untouched. That gives no support to the FDIC's argument that it intended to replace both." App. 40a-41a.

As *CTS* explained, the primary meaning of "statute of limitations" excludes statutes of repose. 134 S.Ct. at 2185. Statutory terms should generally be interpreted in accordance with their primary meaning. *See BP Am. Prods. Co. v. Burton*, 549 U.S. 84, 91-92 (2006). Thus, contrary to the panel majority's conclusion, this Court's statutory construction in *CTS* applies with at least equal force here. Congress, in making the same choice in the Statute to refer only to the "statute of limitations" did *not* displace statutes of repose.

C. The Plain Language of the Statute Is Limited to State Contract and Tort Claims

The Statute does not apply to Securities Act claims for another reason. The Statute's text refers only to state law "contract" and "tort" claims, 12 U.S.C. § 1821(d)(14)(A), not federal or statutory claims. As Judge Parker explained, the Statute's statement that it applies to "'any *action*' brought by" the FDIC does not have a broad displacing effect. App. 24a. It does not mean it applies to every *claim* asserted in such actions.[3]

Congress's distinction between "actions", and "claims" within actions, demonstrates it did not treat those words as synonyms. The Statute refers to and modifies the statute of limitations for only two types of claims – "tort" and "contract claim[s]" – and only to the extent they arise "under State law." 12 U.S.C. § 1821(d)(14)(A). The text therefore provides no basis to apply the Statute to any other claim, including the FDIC's Securities Act claims. Indeed, Congress could not have intended to do so because it did not say how the statute of limitations for any other claim should be changed.[4]

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[3] The word "any" modifies "action," not "claim." "[A]ny" "must 'be limited' . . . 'to those objects to which the legislature intended [it] to apply.'" *Small v. U.S.*, 544 U.S. 385, 388 (2005).

[4] The importance of the Statute's restriction to "contract" and "tort" claims is underscored by the fact that it is narrower than 28 U.S.C. § 2415(a), which applies to claims "founded upon" a tort or contract. A statutory claim may be "founded upon" a contract or tort, but is not a "tort" or "contract" claim. *See Wilson v.*

Thus, since the FDIC's Securities Act claims are statutory claims – indeed *sui generis* claims – not "tort" or "contract" claims, the Statute does not apply. *See Burnett v. Sw. Bell Tel., L.P.*, 151 P.3d 837, 843 (Kan. 2007) (ERISA § 510 claim is not a tort); *Benedetto v. PaineWebber Grp., Inc.*, 1998 WL 568328, at *4 (10th Cir. Sept. 1, 1998) (unpublished) (distinguishing Kansas securities law and tort claims); *Malley-Duff & Assoc. v. Crown Life Ins. Co.*, 792 F.2d 341, 353 (3d Cir. 1986) ("civil RICO is truly *sui generis* . . . [and] cannot be readily analogized to causes of action known at common law"), *aff'd*, 483 U.S. 143 (1987); *Chevron Chem. Co. v. Voluntary Purchasing Grps. Inc.*, 659 F.2d 695, 702 (5th Cir. 1981) (Lanham Act "created a *sui generis* federal statutory cause of action").

Applying the Statute to federal claims would also be inconsistent with the textual purpose that covered claims have two alternative statutes of limitations. The Statute's introductory paragraph states the statute of limitations for "contract" and "tort claim[s]" shall be "the longer of" the new subparagraph (I) period and

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Saintine Expl. & Drilling Corp., 872 F.2d 1124, 1127 (2d Cir. 1989). A "change of [statutory] language is some evidence of a change of purpose." *Johnson v. U.S.*, 225 U.S. 405, 415 (1912).

Even the "founded upon" language has been held not to apply to statutory claims, like the Securities Act claims, that are not grounded on common law claims. *See, e.g.*, *U.S. v. Tri-No Enters., Inc.*, 819 F.2d 154, 158-59 (7th Cir. 1987) (Surface Mining Control and Reclamation Act claims); *U.S. v. City of Palm Beach Gardens*, 635 F.2d 337, 339-40 (5th Cir. 1981) (Hill-Burton Act claims); *U.S. v. Lutheran Med. Ctr.*, 680 F.2d 1211, 1214 (8th Cir. 1982) (Community Mental Health Center Act claims).

the subparagraph (II) "period applicable under State law." 12 U.S.C. § 1821(d)(14)(A)(i) & (ii). However, subparagraph (II) cannot apply to federal claims because it does not refer to the period applicable under federal law. 12 U.S.C. § 1821(d)(14)(A)(i)(II) & (ii)(II). Thus, the reference to "the longer of" two applicable periods would make no sense as to federal claims if they were covered.

Furthermore, if the Statute applied to federal claims, it would not preserve the pre-existing statute of limitations for such claims when it is longer than the three-year subparagraph (A)(ii)(I) alternative. It would therefore have the perverse effect of *reducing* the FDIC's time to bring actions that would otherwise be governed by a longer federal statute of limitations. *See, e.g.*, *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 143 (1987) (four years for RICO claims); 15 U.S.C. § 15(b) (four years for Clayton and Sherman Act claims); 28 U.S.C. § 1658(a) (four years for federal claims without a specific statute of limitations). Nothing in FIRREA supports that untoward outcome. For all of these reasons, the more natural and logical reading of the text is that it does not apply to federal claims.[5]

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[5] Before *CTS*, the Second and Tenth Circuits rejected, based on their assessment of Congress's supposed purpose, limiting the Statute to "contract" and "tort claim[s]" that arise "under State Law", but *CTS* rejected that very mode of analysis. *See FHFA v. UBS Americas Inc.*, 712 F.3d 136, 142 (2d Cir. 2013) (exempting securities claims would "undermine[ ] Congress's intent to restore Fannie Mae and Freddie Mac to financial stability."); *NCUA v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1269 (10th Cir.

The distinction between Congressionally created statutory claims and state common law contract and tort claims is important to *amici*'s members. When Congress enacts statutes that create new private securities law claims, the legislation reflects a balancing of public policies and competing factors. One key legislative determination is when such claims are abolished by the passage of time, regardless of when plaintiff's injury occurred or was discovered. That determination should not be overruled by statutes of limitations applicable to common law claims.

D. The Second Circuit Substituted Its Own View of the Purpose of the Statute for the Language Enacted by Congress

Instead of being guided by *CTS*, the Statute's plain language, and its textual similarities to CERCLA's extender statute, the court below relied on flawed logic and strained reasoning that conflicts with *CTS*'s fundamental holdings. For example, the majority grounded its decision on its conclusion that it was bound to follow the pre-*CTS* decision in *UBS* because its rationale purportedly was not overruled by *CTS*. App. 2a-3a. That is incorrect. *UBS* based its decision on its assumption that Congress "used the term 'statute of limitations' to refer to statutes of repose" and on its view of "the objectives of the statute overall." 712 F.3d at 143. *CTS* expressly rejected those rationales,

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2013) ("Applying the Extender Statute to statutory claims serves the statute's purpose by providing NCUA sufficient time to investigate and file all potential claims. . . .").

and found Congress understood the distinction between statutes of limitations and statutes of repose.

The panel majority also reasoned that the Statute's reference to "the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver" means it applies to "any and all other time limitations, including statutes of repose." App. 11a-12a. That is a *non sequitur.* Congress did not say that. There is no dispute that the Statute, like the extender provision *CTS* considered, refers to the "statute of limitations" many times but never to any "statute of repose" or federal or statutory claim, let alone the Securities Act or its statute of repose. But the panel majority gave short shrift to Congress's omission of any mention of statutes of repose or federal or statutory claims in the Statute, and failed to acknowledge the importance of the Security Act's statute of repose. Moreover, "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). "[I]mplied amendments are no more favored than implied repeals." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 644 n.8 (2007). This is particularly true here, where the statute that was supposedly eliminated by implication was enacted by Congress in 1933, and has been a prominent feature of securities regulation for more than 80 years.

The panel majority gave great weight to its view that *CTS* did not say "'statutes of limitations' must *always* be read to leave in place existing statutes of

repose" and "did not direct courts *never* to use" the canon of interpreting remedial statutes in a liberal manner. App. 7a-8a (emphasis added). But the panel did not identify any tenable basis in the Statute for such a major exception to this Court's holdings. There is none here.

E. The Second Circuit Overlooked the Nature of the Legislative Process and That No Legislation Pursues Its Purposes at All Costs

The divided panel overlooked the fact that when Congress crafts complex legislation such as FIRREA, it inevitably balances competing policy goals. *CTS* explained that the Fourth Circuit erred by "invoking the proposition that remedial statutes should be interpreted in a liberal manner . . . [and] treat[ing] this as a substitute for a conclusion grounded in the statute's text and structure." 134 S.Ct. at 2185. "[A]lmost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem," but "'no legislation pursues its purposes at all costs.'" *Id.* (quoting *Rodriguez v. U.S.*, 480 U.S. 522, 525-26 (1987)). *See also Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the

expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.").

This Court has repeatedly reminded courts not to "rewrite a statute because they might deem its effects susceptible of improvement" to carry out perceived legislative purposes. *Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398 (1984). Untethering statutory construction from the plain language of the statute, and relying instead on subjective judicial speculation about how best to accomplish Congressional policy, would infringe on the role of our elected legislators. *See Lamie v. U.S.*, 540 U.S. 526, 538 (2004).

For these reasons, *amici* strongly urge that the construction of the Statute should begin and end with its text. Failure to follow express plain and unambiguous language would create great uncertainty as to how laws will be interpreted and enforced.

F. Review Is Needed Urgently to Undo the Uncertainty the Second Circuit Has Created in the Financial Markets

CTS and its analysis of CERCLA's extender statute should have put to rest whether similar extender statutes apply to statutes of repose, such as the Securities Act's three-year statute of repose. Nevertheless, the Second Circuit, in applying its own view of the Statute's purpose, instead of its plain language, disturbingly joined three other Circuits that have done the same thing. *See Nomura Home Equity Loan, Inc.*,

764 F.3d at 1216-17 (basing decision on court's view that "the legislative purpose of FIRREA supports the conclusion that the Extender Statute applies to statutes of repose," even though the text mentions only "the applicable statute of limitations"); *RBS Secs. Inc.*, 798 F.3d at 254 (relying on court's view that the Statute's purpose was "to grant the FDIC a three-year grace period after its appointment as receiver to investigate potential claims"); *RBS Secs., Inc.*, 2016 U.S. App. LEXIS 14948, at *13 (substituting court's view that the "policy of protecting the government's right to recovery" is "best advanced by interpreting the Extender Statute to supplant the 1933 Act's statute of repose"). It is therefore imperative that this Court now make clear that it meant what it said in *CTS*. The unambiguous statutory language controls.

These decisions will otherwise have an enormously destabilizing effect on the efficient functioning of the securities markets because they eliminate predictability and undermine the ability of industry participants to act based on reasoned assumptions about the meaning of the law. Securities law is "an area that demands certainty and predictability." *Pinter*, 486 U.S. at 652. Unclear rules are "not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). Such rules "can have ripple effects" across the financial markets, "increas[ing] costs incurred by professionals"

which then "may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute." *Id.* at 189.

II. THIS COURT'S REVIEW IS NEEDED TO PRESERVE CONGRESSIONALLY-ENACTED STATUTES OF REPOSE

The Second Circuit, in applying its own view of the Statute's purpose, did not address the enormous importance of the Securities Act's three-year statute of repose. Statutes of repose in general, and the Securities Act's statute of repose for nearly strict liability claims in particular, are critical to ensure certainty and finality in the securities industry.

CTS explained that statutes of repose "effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time'. . . . Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability." 134 S.Ct. at 2183. *See also Bradway v. Am. Nat'l Red Cross*, 992 F.2d 298, 301 n.3 (11th Cir. 1993) ("In passing a statute of repose, a legislature decides that there must be a time when the resolution of even just claims must defer to the demands of expediency."); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1300 n.7 (4th Cir. 1993) (statute of repose "serves the need for finality in certain financial and professional dealings").

Congress determined that it is particularly important to ensure finality in the context of the Securities Act's near strict liability claims. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S.Ct. 1414, 1419-20 (2012) (reversing limitation on Section 16(b) statute of repose). As Judge Parker explained, "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" and "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." App. 27a-28a. Congress "fear[ed] that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule was to be absolute." *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1435-36 (10th Cir. 1991), *judgment vacated on other grounds by Dennler v. Trippet*, 503 U.S. 978 (1992). Indeed, Congress shortened the Securities Act's statute of repose to three years because it realized the strict liability created by the Act was stifling the economy. 78 Cong. Rec. 8709-10 (1934) ("it is well known that because of this law the issuance of securities has practically ceased").[6]

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[6] "[U]nlike securities fraud claims pursuant to [S]ection 10(b) of the Securities Exchange Act," Section 11 and 12 claims under the Securities Act do not require plaintiffs to prove scienter, reliance (in most cases), or loss causation. *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010).

Accordingly, the Securities Act "defines the right involved in terms of the time allowed to bring suit." *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 102 (2d Cir. 2004). The Act's statute of repose provides an important "substantive right," *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 92, 109 (2d Cir. 2013), and an "absolute limitation" on claims. *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 704 (2d Cir. 1994). The Securities and Exchange Commission has extolled the beneficial purposes of this statute of repose: "The three-year provision assures businesses that are subject to liability under [Sections 11 and 12] that after a certain date they may conduct their businesses without the risk of further strict liability for non-culpable conduct." Brief of the SEC, as Amicus Curiae at *8, *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92 (2d Cir. 2004), 2003 WL 23469697.

The Securities Act's statute of repose is also essential to the functioning of the Act's statutory affirmative defenses, which could otherwise be undermined by the passage of time. The statute of repose protects market participants from "the problems of proof . . . that arise if long-delayed litigation is permissible." *Norris v. Wirtz*, 818 F.2d 1329, 1333 (7th Cir. 1987). Congress was concerned that "lingering liabilities would disrupt normal business and facilitate false claims." *P. Stolz Family P'ship L.P.*, 355 F.3d at 105 (quoting *Norris*, 818 F.2d at 1332). Instead, statutes of repose encourage prompt enforcement of the securities laws and serve cultural values of diligence.

No less today than 80 years ago the Securities Act's statute of repose, by eliminating "protracted liability," *CTS*, 134 S.Ct. at 2183, adds predictability that serves the important purpose of enabling financial institutions to deploy for productive use capital that otherwise might be tied up indefinitely in reserves to cover potential liability. It protects new shareholders, bondholders and management from liability for conduct that occurred at a time when they were not associated with the business. And it prevents strategic delay by plaintiffs, who could otherwise seek "recoveries based on the wisdom given by hindsight" and the "volatile" prices of securities. *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1392 (7th Cir. 1990).

Allowing the FDIC's claims here to proceed would undercut these important objectives. If the Second Circuit's ruling stands, long-dead Securities Act claims could be resurrected despite the contrary mandate of its statute of repose.

Amici strongly urge that to the extent the Statute is interpreted in accordance with its perceived purpose, and not simply its plain and unambiguous language, the purpose of preserving critically important substantive repose rights created by Congress should be a paramount consideration in arriving at an understanding why Congress chose not to refer to statutes of repose in the Statute.

CONCLUSION

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

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Respectfully submitted,

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