No. 17-10

In The Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., et al.,

Petitioners,

v.

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

Respondent.

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

BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*

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

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. Last month, in *Cal. Pub. Emp.'s Ret. Sys. v. ANZ Secs., Inc.*, 137 S.Ct. 2042 (2017) ("*CALPERS*"), this Court ruled that the statute of repose in Section 13 of

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

the Securities Act of 1933 ("Section 13") "admits of no exception and on its face creates a fixed bar against future liability" that "offer[s] defendants full and final security after three years." *Id*. at 2049, 2053.

However, in this case a Second Circuit panel found that 12 U.S.C. § 1821(d)(14), an extender statute applicable to FDIC claims (the "Statute") that was enacted *after* CERCLA's extender statute and, like CERCLA's provision, refers *only* to the "statute of limitations," is nevertheless an exception to Section 13's statute of repose. The panel decided it was bound by *FDIC v. First Horizon Asset Securities*, App.39a-73a (2d Cir. 2016), in which a divided Second Circuit joined the Fifth Circuit in arriving at the same result. *See FDIC v. RBS Secs., Inc*., 798 F.3d 244 (5th Cir. 2015). Two other Circuits reached the same conclusion concerning 12 U.S.C. § 1787(b)(14), a virtually identical extender statute for NCUA claims. *See NCUA v. Nomura Home Equity Loan, Inc*., 764 F.3d 1199 (10th Cir. 2014); *NCUA v. RBS Sec*., 833 F.3d 1125 (9th Cir. 2016). And those courts approved another Second Circuit ruling, decided before *CTS*, that so applied a third similar, subsequently-enacted extender statute for FHFA claims (together, the "Circuit Extender Decisions").

None of the Circuit Extender Decisions applied the teachings of *CTS*. Instead, to further their own views of the legislative purpose, they failed to follow the plain language of the extender statutes they addressed. Accordingly, the decision below and the other Circuit Extender Decisions raise the question whether this Court *sub silentio* intended, and now intends, that

the basic principles of law articulated in *CTS*, and now in *CALPERS*, or the rationale for those decisions, should not be followed. Or do *CTS* and *CALPERS* stand for the propositions they articulated that extender statutes that refer only to the "statute of limitations" should *not* be applied to "statutes of repose" and that Section 13's repose statute provides "defendants full and final security after three years"?

SIFMA believes the Statute should be interpreted in accordance with its text. SIFMA and its members have a strong interest in this Court granting the petition for certiorari because the decision below and the other Circuit Extender Decisions are untenable and have far-reaching implications, for four principal reasons:

First, the decision (like the other Circuit Extender Decisions) 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. SIFMA recognizes 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 plain language of the Statute and Section 13. A failure to do so would

risk encouraging courts around the country to depart from text and divine intent and policy.

Second, the decision and the other Circuit Extender Decisions defy and are flatly inconsistent with *CTS* and *CALPERS*. *CTS* enunciated clear and categorical principles on the important question whether the Congressional extension of statutes of limitations also extends statutes of repose, and *CALPERS* clearly and categorically explained that the Securities Act's repose statute has no exceptions. The Second Circuit's failure to follow these principles, or harmonize the Statute with Section 13's repose statute, is of grave concern to SIFMA's members because it undermines the ability of market participants to act based on plain readings of the law, and therefore has a destabilizing effect on the efficient functioning of the securities markets. This Court should definitively settle these issues now.

Third, SIFMA'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. By establishing a definitive outside time limit for claims that cannot be tolled, statutes of repose provide the markets with 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. SIFMA's members and their investors and customers depend on statutes of repose in their financial planning and operations. However, the

decision undermines important aspects of the statute of repose that Congress made a central component of the Securities Act "to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability." *CALPERS*, 137 S.Ct. at 2050.

Fourth, the panel's decision raises important issues of federal law. The FDIC, NCUA, and FHFA brought numerous actions against financial institutions concerning hundreds of billions of dollars of securities, seeking billions of dollars of damages, that were 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 that have displaced statutes of repose. This case presents an ideal vehicle because the pressure to settle similar, future lawsuits seeking large recoveries, which has already led to large settlements, could be a roadblock to appeals reaching this Court in other cases.

SUMMARY OF ARGUMENT

This case presents the question whether the dispositive principles of law *CTS* articulated should be *sub silentio* confined to the facts of that case, and an extender statute that expressly applies only to statutes

of limitations should also be applied to a statute of repose Congress enacted as a fundamental limitation on near-strict-liability claims. SIFMA supports Petitioners' argument that *CTS* and *CALPERS* mean what they say. The Statute should be construed in accordance with its plain language and this Court's rulings. It does not create an exception to Section 13.

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 Section 13. 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 does not purport to extend statutes of repose. Accordingly, the District Court properly rejected the FDIC's argument and granted Petitioners' motion. The Second Circuit found that *First Horizon* "controls the outcome of this appeal" and vacated the District Court's ruling. App.4a. *First Horizon* construed the Statute to permit the FDIC to bring claims after the period allowed by Section 13. Judge Parker filed a compelling dissent, explaining that *CTS* mandates that Section 13's repose statute govern and the FDIC's claims should 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. Statutes of repose are not mentioned. Nothing in the Statute extends the repose statute 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 text or *CTS* and failed to acknowledge that Section 13's repose statute "admits of no exception." 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.54a.

Compelling reasons warrant granting certiorari. The decision below is contrary to the plain language of the Statute (which applies only to "the applicable statute of limitations"), *CTS*, Section 13, and *CALPERS*. *CTS* emphasized that Congressional intent must be "discerned primarily from the statutory text," no legislation "pursues its purposes at all costs," and Congress understood by 1986 (when CERCLA's extender provision was enacted) that statutes of repose are distinct from statutes of limitations. 134 S.Ct. at 2182-83, 2185. *CALPERS* emphasized that Section 13 provides "defendants full and final security after three years." 137 S.Ct. at 2052.

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*, *CALPERS* and other decisions of this Court, halt the improvident erosion of Section 13's repose statute, 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 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 Section 13's repose statute is 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 F.S.B.*, 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*, *CALPERS*, THE TEXT OF THE STATUTE AND SECTION 13

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 decision below. It requires this Court's review to make clear that this Court meant what it said in *CTS* and *CALPERS*, and to ensure that the Statute is not misapplied to displace the Securities Act's statute of repose.

B. *CTS*, *CALPERS*, the Plain Language of the Statute and Section 13 Establish That the Statute Applies Only to "Statutes of Limitations" and Does Not Displace the Securities Act's Repose Statute

CTS resolved a division among the lower courts as to whether extender provisions that expressly apply to the "statute of limitations" also displace repose statutes. 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" its text, 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 of Jam v. United States*, 340 U.S. 593, 596 (1951).

A dominant theme of this Court's jurisprudence is that legislation must be enforced in accordance with its text, and not based on a judicial assessment of how

best to effectuate a perceived legislative purpose. The Court "presume[s] more modestly instead that [the] legislature says . . . what it means and means . . . what it says." *Henson v. Santander Consumer USA Inc*., 137 S.Ct. 1718, 1725 (2017) (Gorsuch, J.). *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 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"); *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd*., 566 U.S. 560, 562, 573 (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*, 566 U.S. 506, 508-09, 511 (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 repose statute 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, repose statutes create an outer limit measured from the date of the culpable act. *CTS* concluded Congress was well aware of this difference when it enacted CERCLA's 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 limitations and statutes of repose only deepened between the 1986 amendments to CERCLA and the 1989 enactment of the Extender Statute." App.63a. Yet as the District Court found, the Statute "refers only to 'statute of limitations' in the singular, several times, and includes no reference to any statute of repose," App.19a, even though "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 [Statute]." App.22a.

As *CTS* explained, the primary meaning of "statute of limitations" excludes repose statutes. 134 S.Ct. at 2185. Statutory terms should generally be interpreted in accordance with their primary meaning. *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91-92 (2006). That is particularly true here where, as *CALPERS* explained, Section 13 "admits of no exception." 137 S.Ct. at 2045. Thus, contrary to the court below'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 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.67a. The word "*any*" modifies "action," not "claim." It does not apply to every *claim* asserted in such actions.

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.[2]

Thus, since the FDIC's Securities Act claims are statutory 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) (distinguishing Kansas securities law and tort claims); *Malley-Duff & Assocs. 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

[2] 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 when it is not a "tort" or "contract" claim. *See Wilson v. Saintine Exploration & 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. 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 Centers Act claims).

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 statement in its introductory paragraph that covered claims have *two* alternative statutes of limitations: the statute of limitations for "contract" and "tort claim[s]" shall be "the longer of" a new subparagraph (I) period and a subparagraph (II) "period applicable under State law." 12 U.S.C. § 1821(d)(14)(A)(i), (ii). 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 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., Malley-Duff & Assocs., Inc.*, 483 U.S. at 143 (RICO claims: four years); 15 U.S.C. § 15(b) (Clayton and Sherman Act claims: four years); 28 U.S.C. § 1658(a) (federal claims without a specific statute of limitations: four years). Nothing in FIRREA supports that outcome.[3]

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[3] 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

For these reasons, the natural and logical reading of the text is it does not apply to federal claims. The distinction between Congressionally-created claims and state common law contract and tort claims is important to SIFMA's members. When Congress enacts statutes that create new securities law claims, it balances 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 plain language of the Statute and Section 13, and the Statute's textual similarities to CERCLA's extender statute, *First Horizon* (which the court below found binding)

Law," but *CTS* rejected that 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. 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. . . ."). As the District Court found, "[t]he analytical framework set out by the Supreme Court in [*CTS*] 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." App.23a.

relied on flawed logic and strained reasoning that conflicts with *CTS* and *CALPERS's* fundamental holdings. For example, the *First Horizon* 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.47a-48a. 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, and found Congress understood the distinction between statutes of limitations and statutes of repose.

The *First Horizon* 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.53a-54a. 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 repose statute. But the *First Horizon* 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 Section 13's repose statute. 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. Defenders of Wildlife*, 551 U.S. 644, 644 n.8 (2007). That 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 *First Horizon* 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.48a-50a (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.

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

The divided *First Horizon* 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*, 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. Tr*., 540 U.S. 526, 538 (2004).

For these reasons, SIFMA strongly urges that the construction of the Statute should begin and end with its text. Failure to follow 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 Section 13's three-year repose statute. Nevertheless, the Second Circuit, in applying its own view of the Statute's purpose instead of its plain language, has disturbingly joined three other Circuits that have done the same thing. *See Nomura Home Equity Loan, Inc.*, 764 F.3d at 1216-17, 1220 (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 Sec.*, 833 F.3d at 1132 (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* and *CALPERS*. The unambiguous text 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. The goals of "certainty and reliability" served by a repose statute are "a necessity in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors." *CALPERS*, 137 S.Ct. at 2055. Unclear rules are "not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Cent. Bank, N.A. v. First Interstate Bank, 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 view of the Statute's purpose, did not address the enormous importance of the Securities Act's three-year statute of repose. Repose statutes in general, and Section 13's statute of repose for nearly-strict-liability claims in particular, are critical to ensure certainty and finality in the securities industry. *See CALPERS*, 137 S.Ct. at 2053 ("uncertainties" caused by permitting tolling of

the three-year repose period "can put defendants at added risk in conducting business going forward, causing destabilization in markets which react with sensitivity to these matters.").

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) (repose statute "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*, 566 U.S. 221 (2012) (reversing limitation on Section 16(b) repose statute). "The 3-year time bar in §13 reflects the legislative objective to give a defendant a complete defense to any suit after a certain period." *CALPERS*, 137 S.Ct. at 2049. 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.70a-72a. 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 the Act created was stifling the economy. 78 Cong. Rec. 8709-10 (1934) ("it is well known that because of this law the issuance of securities has practically ceased").[4]

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 95, 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 SEC has extolled the beneficial purposes of this statute of repose: "The three-year

[4] "[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).

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." *SEC Amicus Brief, P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92 (2d Cir. 2004), 2003 WL 23469697, at *8.

The Securities Act's statute of repose is also essential to the functioning of the Act's affirmative defenses, which could otherwise be undermined by the passage of time. The repose statute 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). 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 "volatile" securities prices. *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. SIFMA strongly urges that to the extent the Statute is interpreted in accordance with its perceived purpose, and not simply its text, 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 in the Statute not to refer to statutes of repose.

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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