No. _____

In the
Supreme Court of the United States

DAVID FINDLAY, NATHAN GORIN, JOHN P. GRAHAM, N. DANTE LAROCCA, JOHN MCCARTHY, *et al.*,

Petitioners,

v.

FEDERAL HOUSING FINANCE AGENCY, as Conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Amendment requires a claim under Section 12(a)(2) of the Securities Act to be tried by a jury where petitioners did not sell the relevant securities and never possessed any proceeds from those sales.

2. Whether the Housing and Economic Recovery Act of 2008, which extends "the applicable statute of limitations" for claims brought by the Federal Housing Finance Agency, displaces federal and state statutes of repose as well as statutes of limitations.

PARTIES TO THE PROCEEDING

Petitioners David Findlay, Nathan Gorin, John P. Graham, N. Dante Larocca, John McCarthy, and Nomura Holding America Inc., Nomura Asset Acceptance Corporation, Nomura Home Equity Loan, Inc., and Nomura Credit & Capital, Inc. were defendants-appellants below.

Respondents Nomura Securities International, Inc. and RBS Securities Inc. f/k/a Greenwich Capital Markets, Inc. were also defendants-appellants below.

Respondent Federal Housing Finance Agency was plaintiff-appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Nomura Holding America Inc., a private company, is wholly owned by Nomura Holdings, Inc. Nomura Holdings, Inc. is a publicly held corporation that has no parent corporation, and no publicly held company owns 10% or more of its stock. Petitioner Nomura Holding America Inc. is the parent company and 100% owner of Nomura America Mortgage Finance, LLC, which is the parent company and 100% owner of petitioners Nomura Asset Acceptance Corporation, Nomura Home Equity Loan, Inc., and Nomura Credit & Capital, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

After a bench trial in an action under Sections 12 and 15 of the Securities Act, the nine petitioners here—five of whom are natural persons—were held jointly and severally liable to a federal agency for more than $800 million in damages, despite their Seventh Amendment objections and the fact that none of them sold the securities at issue or ever possessed any proceeds from the sale of those securities. The Second Circuit nonetheless concluded that petitioners had no right to a jury trial. But the Seventh Amendment generally affords a defendant a jury trial for statutory claims for damages; the Section 12 action here is precisely the type of claim that triggers the jury-trial right; and on close questions, the tie goes to preserving Seventh Amendment rights. *See, e.g.*, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959). The Second Circuit's decision is irreconcilable with this Court's precedent in multiple respects and warrants certiorari.

First, because it is undisputed that petitioners did not sell the securities in question or receive any proceeds from those sales, petitioners were entitled to a jury trial under *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 214 (2002). In *Great-West*, this Court squarely held that "for restitution to lie in equity, the action generally must seek … to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214. What is true of restitution is no less true of rescission, which, like restitution, can sound in either law or equity. *See Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 793 (2015). If a defendant never

sold the property at issue and never received any of the proceeds of that sale, then he cannot "restore to the plaintiff" any "funds or property." *Great-West*, 534 U.S. at 214. Under that well-established law, petitioners—especially the individual petitioners, who were merely signatories to registration statements—were entitled to a jury.

Second, in addition to creating a conflict with *Great-West*, the Second Circuit flouted the Seventh Amendment by holding that claims under Section 12 of the Securities Act are equitable and thus do not trigger the jury-trial right. The elements of a Section 12 claim parallel those of a claim under Section 11 of the Securities Act, which is unquestionably "legal" for Seventh Amendment purposes. For a plaintiff who has sold the securities at issue before filing suit, Section 12 authorizes recovery of money damages (the classic form of legal relief), and all claims under Section 12 are subject to a loss-causation defense (added by Congress in 1995) that makes them entirely unlike a classic equitable claim.

The Second Circuit nonetheless affirmed the district court's decision to grant the government's eleventh-hour request for a bench trial (made only after concededly legal Section 11 claims were dropped and earlier rulings signaled the judge's favorable disposition to the government's case). The Second Circuit believed that this Court's precedents tied its hands, but that is wrong and underscores the need for this Court's review. The centrality of the jury-trial right, especially when flesh-and-blood individuals (including those of modest means) are pursued by the federal government and subject to liability for

hundreds of millions in damages, is too important to allow the decision below to stand.

The Second Circuit's decision separately warrants certiorari on the significant issue of whether §4617(b)(12) of the of the Housing and Economic Recovery Act of 2008 (HERA) displaces not just statutes of limitations but statutes of repose. In two recent decisions, this Court has emphasized that statutes of repose are not statutes of limitations by another name. Each type of statute "has a distinct purpose," and each "is targeted at a different actor." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014). Statutes of limitations "are designed to encourage plaintiffs 'to pursue diligent prosecution of known claims.'" *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (quoting *CTS*, 134 S. Ct. at 2182). In contrast, "statutes of repose are enacted to give more explicit and certain protection to defendants" by "grant[ing] complete peace" to them after a specified period of time. *Id.* at 2049, 2052 (citation omitted). Thus, statutes of repose establish "an absolute bar on a defendant's temporal liability," and events that extend a statute of limitations have no effect on a statute of repose. *Id.* at 2050.

Section 4617(b)(12) of HERA three times references "statute[s] of limitations," and four times references "the date on which the [relevant] cause of action accrues," a factor pertinent only to statutes of limitations. The section never once refers to statutes of repose, much less says anything about extending their absolute terms. The Second Circuit nonetheless held that §4617(b)(12) "displaces" both the federal statute of repose in the Securities Act of 1933 and

state-law statutes of repose, thereby permitting the government to pursue securities claims against petitioners that were indisputably outside the repose period when they were brought. That exceptional result flouts this Court's most recent precedents and demands review.

OPINIONS BELOW

The Second Circuit's opinion is reported at 873 F.3d 85 and reproduced at App.1-143. The district court's opinion stating that no jury-trial right exists for Section 12 claims is reported at 68 F. Supp. 3d 486 and reproduced at App.145-61. The district court's unpublished opinion denying petitioners' motion for summary judgment is reported at 2014 WL 4276420 and reproduced at App.162-85. The district court's opinion determining liability and damages is reported at 104 F. Supp. 3d 441 and reproduced at App.186-515.

JURISDICTION

The Second Circuit issued its opinion on September 28, 2017, and denied petitioners' rehearing petition on December 11, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution is reproduced at App.516. Section 12 of the Securities Act, 15 U.S.C. §77*l*, is reproduced at App.516-17. 12 U.S.C. §4617 is reproduced at App.517-82.

STATEMENT OF THE CASE

A. The Securities Act and State Blue Sky Laws

1. Under Section 12(a)(2) of the Securities Act, anyone who "solicits securities sales for financial gain" or "who actually parts title with the securities"—so-called "statutory sellers," who by definition need not be *actual* sellers—may be liable to purchasers of securities offered "by means of a prospectus" if the prospectus contains a material misstatement or omission of which the purchaser was unaware. *Pinter v. Dahl*, 486 U.S. 622, 648-50 (1988); *see* 15 U.S.C. §77*l*(a)(2). The elements of a claim under Section 12(a)(2) are "roughly parallel" to the elements of a claim under Section 11 of the Act, which "prohibits materially misleading statements or omissions in registration statements filed with the SEC." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358-59 (2d Cir. 2010); *see* 15 U.S.C. §77k.

A prevailing plaintiff on a Section 12(a)(2) claim has one of two mutually exclusive remedy options. A plaintiff who still owns the security may, "upon the tender of such security," rescind the contract and return the security to the defendant in exchange for the purchase price, less any income and interest. *Id.* §77*l*(a)(2). A plaintiff who "no longer owns the security," in contrast, may recover "damages." *Id.* In either case, a defendant may assert a "loss causation" defense that reduces the amount owed to the plaintiff by any reduction in value caused by something other than the misstatement or omission. *Id.* §77*l*(b).

A claim under Section 12(a)(2) must be filed in conformity with the two time bars set forth in Section

13 of the Act: a one-year statute of *limitations* and a three-year statute of *repose*. *See id.* §77m. The shorter limitations period "may be tolled" where circumstances demand flexibility; the longer period may not. *ANZ*, 137 S. Ct. at 2053. "In no event" may a plaintiff recover on a Section 12 claim filed "more than three years after the sale" of the security. 15 U.S.C. §77m; *see ANZ*, 137 S. Ct. at 2047-55.

2. In addition to the Securities Act, so-called Blue Sky laws "apply to dispositions of securities *within* [each] state." *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557 (1917). One such statute—the D.C. Securities Act—is relevant here. This Blue Sky law is effectively identical to the Securities Act when it comes to liability. *Hite v. Leeds Weld Equity Partners, IV, LP*, 429 F. Supp. 2d 110, 114 (D.D.C. 2006). It also contains a three-year statute of repose substantially identical to that in Section 13 of the Securities Act. *See* D.C. Code §31-5606.05(f)(1).

B. Fannie and Freddie and the Enactment of HERA

This case arises out of the sale of seven residential mortgage-backed securities, or RMBS, to two government-sponsored entities, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).[1]

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[1] "RMBS are intricately structured financial instruments backed by hundreds or thousands of individual residential mortgages, each obtained by individual borrowers for individual houses." App.197. "A buyer of an RMBS certificate pays a lump sum in exchange for a certificate representing the right to a future stream of income from the mortgage loans' principal and income payments." App.11; *see* App.14-20.

Specifically, between 2005 and 2007, Respondent Nomura Securities International, Inc. (Nomura Securities) sold one RMBS to Fannie Mae and one to Freddie Mac, and Respondent RBS Securities Inc. (RBS) sold four RMBS to Freddie Mac.[2] App.2-3. Petitioners Nomura Home Equity Loan, Inc. (NHELI) and Nomura Asset Acceptance Corporation (NAAC) served as "depositors" for these RMBS, meaning they played a role in creating the securities but had "no direct involvement in passing title … to buyers."[3] App.95. The individual petitioners signed registration statements for some or all of the seven RMBS in their capacities as employees or outside directors of Nomura entities, but they had no involvement in selling the securities to Fannie or Freddie.[4]

Fannie and Freddie were prolific purchasers of RMBS in the mid-2000s. By 2005, Fannie and Freddie owned $350 billion worth of privately-issued RMBS, a

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[2] The seller of the seventh RMBS at issue was not named as a defendant.

[3] A "depositor" is a "special purpose vehicle created solely to facilitate" private-label securitizations, a subset of RMBS. App.2, 16. A depositor receives certificates issued by a trust and sells those certificates to an underwriter. App.17.

[4] The individual petitioners are (1) David Findlay, Nomura's Chief Legal Officer; (2) John P. Graham and (3) N. Dante LaRocca, who "served, at different terms, as the head of" Nomura's Transaction Management Group, which "oversaw the process of purchasing and conducting due diligence of loans intended for securitization"; and (4) Nathan Gorin and (5) John McCarthy, who merely "signed each of the Registration Statements and their amendments pursuant to which the Securitizations were issued." App.3, App.66, App.397.

majority of which were backed by loans rated lower than prime.[5] App.22.

A 33% decline in average home prices from April 2007 to May 2009 left Fannie and Freddie in precarious financial positions. App.26. To address this concern, Congress enacted HERA, which created the Federal Housing Finance Agency (FHFA), an "independent agency of the Federal Government," 12 U.S.C. §4511(a), to serve as conservator and receiver for Fannie and Freddie. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, 122 Stat. 2654; *FHFA v. UBS Ams. Inc.*, 712 F.3d 136, 138 (2d Cir. 2013); 12 U.S.C. §4617(a). HERA specifically authorizes the new agency to bring suit on Fannie and Freddie's behalf, and includes an "extender" provision that lengthened the "statute of limitations" for "contract" and "tort" claims brought by FHFA, but made no mention of any statute of repose. *See* 12 U.S.C. §4617(b)(12).

C. The District Court Proceedings

1. On September 2, 2011, FHFA initiated sixteen securities actions in the Southern District of New York against financial institutions that sold RMBS certificates to Fannie and Freddie in the mid-2000s. Because the potential damages exposure was enormous, fifteen of the sixteen cases settled before trial. The present action is the lone exception. App.28.

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[5] $145 billion was backed by subprime loans, and another $40 billion was backed by Alt-A loans (*i.e.*, loans rated lower than prime but higher than subprime). App.22.

It is undisputed that underwriters Nomura Securities and RBS are the *only* defendants that ever sold securities to, or "receive[d] funds from," Fannie and Freddie "in exchange for" the securities. App.94. Petitioners NHELI and NAAC, who served as the securities' depositors, did not sell the certificates and never "possessed the funds in question." App.93. And the individual petitioners likewise never sold any securities or received any money from Fannie and Freddie.

FHFA brought claims under Sections 11 and 12(a)(2) of the Securities Act, as well as Virginia's and D.C.'s analogous Blue Sky laws, contending that the seven RMBS were misrepresented to them. FHFA sued not only the underwriters, Nomura Securities and RBS, but also the nine petitioners here: the depositors (NHELI and NAAC), and, on a "control person" theory, the sponsor of the securitizations (Nomura Credit & Capital, Inc.), a holding company (Nomura Holding America, Inc.), and the five individuals who signed the registration statements in their capacities as officers or directors of various Nomura entities.[6]

2. It is undisputed that the last sale of the securities at issue took place in 2007—more than four years before FHFA filed its lawsuit. All defendants, including petitioners, thus moved for summary judgment under the respective statutes of repose contained in the Securities Act and Blue Sky laws. Relying on Second Circuit precedent, the district court

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[6] Section 15 of the Securities Act imposes joint-and-several liability on "[e]very person who … controls any person liable under" Sections 11 or 12. 15 U.S.C. §77*o*(a).

denied the motion, noting that the government's Securities Act claims were "contract" claims filed within six years of FHFA's appointment as conservator. App.149-53; *UBS*, 712 F.3d at 143-44.

The district court subsequently issued a number of pretrial rulings; all favored FHFA.[7] Following these decisions, and just weeks before a jury trial was to begin, FHFA voluntarily withdrew its indisputably legal Section 11 claims, and moved for a bench trial on its remaining Section 12(a)(2) claims. App.30. All defendants raised a Seventh Amendment objection; petitioners separately argued that they were entitled to a jury trial because none of them (as opposed to the underwriters) could rescind the transactions or "restore" the "particular funds or property" in question, making it patently obvious that FHFA's claims against them were legal rather than equitable. The district court rejected both arguments. App.179-85.

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[7] *See, e.g.*, *FHFA v. HSBC N. Am. Holdings Inc.*, 988 F. Supp. 2d 363 (S.D.N.Y. 2013) (ruling that the Blue Sky laws do not provide a loss causation defense); *FHFA v. HSBC N. Am. Holdings Inc.*, 33 F. Supp. 3d 455 (S.D.N.Y. 2014) (granting FHFA's motion for summary judgment on Section 12(a)(2)'s absence-of-knowledge element); *FHFA v. Nomura Holding Am. Inc.*, 68 F. Supp. 3d 439 (S.D.N.Y. 2014) (granting FHFA's motion for summary judgment on reasonable care, despite finding that Nomura's due diligence practices exceeded industry standards); *FHFA v. Nomura Holding Am., Inc.*, 68 F. Supp. 3d 499 (S.D.N.Y. 2014) (granting FHFA's motion *in limine* to exclude evidence that Fannie and Freddie bought the securities before reading prospectus supplements); *FHFA v. Nomura Holding Am., Inc.*, No. 11-cv-6201, 2015 WL 353929 (S.D.N.Y. Jan. 28, 2015) (denying defendants' *Daubert* challenges to FHFA's novel and untested expert opinions).

At the end of the subsequent bench trial, the district court found in favor of FHFA on every one of its claims, and awarded FHFA more than $800 million in damages—some $250 million for violations of Section 12(a)(2) of the Securities Act, and some $555 million for violations of state Blue Sky laws. App.186-515. Pursuant to Section 15 of the Securities Act, the district court imposed joint-and-several liability on all seven of the "control persons" identified by the government—who, along with the two depositors, are the petitioners here. App.483-502; *see* 15 U.S.C. §77*o*(a).

D. The Second Circuit's Decision

The Second Circuit affirmed. As to the Seventh Amendment issue, the Second Circuit held that none of the defendants was constitutionally entitled to a jury trial on the government's Section 12(a)(2) claims. The court first rejected the argument, made by all defendants, that the nature of Section 12(a)(2) claims and relief are legal, thereby triggering the Seventh Amendment. The court believed there to be a "long-established consensus that Section 12(a)(2) is an equitable claim that authorizes equitable relief." App.91-92. The court also rejected the alternative argument advanced by petitioners that, because "they did not in fact sell the Certificates nor did they receive funds from [Fannie or Freddie] in exchange for the Certificates," App.94, then under *Great-West*, any rescission remedy against them must be legal, not equitable, triggering Seventh Amendment protections. In the Second Circuit's view, the jury-trial right yielded to Congress' decision to "impose [rescission-like] relief on any defendant it classified as

a statutory seller"—although the court recognized that imposing such relief "was somewhat inconsistent with the use of rescission at common law." App.94. Wrongly concluding that all petitioners were "statutory sellers," notwithstanding that seven of them were never alleged to serve in that role, the court accordingly held that none of the petitioners was entitled to a jury trial.

As to the timeliness of the government's suit, the Second Circuit invoked the same 2013 circuit precedent that the district court had invoked, *FHFA v. UBS*, which held that HERA "displaces" the statute of repose in both Section 13 of the Securities Act and the D.C. Blue Sky law. App.32-38; *see UBS*, 712 F.3d at 143-44. The court then addressed whether this Court's subsequent (2014) decision in *CTS* abrogated *UBS*. App.39-44. Turning again to its own precedent, the Second Circuit noted that it had recently rejected that proposition in the context of the federal Securities Act's statute of repose. *See FDIC v. First Horizon Asset Sec., Inc.*, 821 F.3d 372, 380-81 (2d Cir. 2016). The court nevertheless examined whether *CTS* abrogated *UBS*'s holding that §4617(b)(12) preempts state-law repose periods. The court acknowledged that §4617(b)(12) "uses some similar language" as 42 U.S.C. §9658, the statute at issue in *CTS*, which this Court held does not preempt state statutes of repose. App.41. But the Second Circuit ultimately found the similarities unavailing and "reaffirm[ed] [its] prior holding that Congress designed §4617(b)(12) to pre-empt state statutes of repose." App.44.

REASONS FOR GRANTING THE PETITION

The decision below deprives petitioners of "a vital and cherished right, integral in our judicial system"—the right to trial by jury in civil cases. *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 258 (1949). A defendant is entitled to a jury trial unless a case involves "equitable rights alone." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989). This Court has made clear that "for restitution to lie in equity, the action generally must seek … to restore to the plaintiff particular funds or property *in the defendant's possession*." *Great-West*, 534 U.S. at 214 (emphasis added). What is true for restitution is no less true for rescission (which includes restitution as part of the remedy). Nonetheless, the Second Circuit affirmed the district court's decision to conduct a bench trial on the government's claims seeking rescission against petitioners, even though it is undisputed that none of the petitioners *ever* sold the securities or possessed any of the proceeds of the sales. *See id.* at 213 ("a plaintiff could seek restitution in equity…where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession"). The Second Circuit's contention that petitioners' Seventh Amendment rights must yield because they supposedly were "statutory sellers" is incorrect and is in any event a *non sequitur* that flouts the bedrock principle that statutes give way to the Constitution, not the other way around.

The Second Circuit's denial of petitioners' Seventh Amendment right was deeply flawed in

another respect. The elements of a Section 12(a)(2) claim closely parallel the elements of a Securities Act claim under Section 11, which is indisputably "legal" and triggers Seventh Amendment protections. Section 12(a)(2) likewise allows recovery of either money damages (the classic form of legal relief) or *legal* rescission, depending on whether the plaintiff still holds the securities, and it contains a loss-causation defense unheard of in courts of equity. Petitioners were thus entitled to a trial by jury even independent of *Great-West*.

In denying petitioners a jury trial, the Second Circuit pointed to a supposed "consensus" in this Court that Section 12(a)(2) is an equitable claim authorizing equitable relief. Nothing in this Court's decisions so indicates, and indeed, those precedents point in the opposite direction. Given the fundamental importance of the jury right and the Second Circuit's plainly incorrect analysis, this Court's review is imperative.

Certiorari is also warranted because the Second Circuit's decision is irreconcilable with this Court's recent decisions in *ANZ* and *CTS*, which establish that statutes of limitations and statutes of repose are not interchangeable synonyms, and that repose means repose. HERA extends the "statute of limitations" for tort and contract claims brought by FHFA. Nothing in the statutory text suggests that Congress acted with the clear and manifest intent necessary to impliedly repeal Section 13's statute of repose or to preempt states' statutes of repose. Under *ANZ* and *CTS*, this should have been an easy case, but the

decision below barely mentions those decisions, relying instead on its own antecedent caselaw.

As the Court's recent grants of certiorari in *ANZ* and *CTS* confirm, the question whether federal law directed only to statutes of limitations may also displace statutes of repose is a recurring and important one. Furthermore, while *ANZ* and *CTS* involved efforts to override a single federal statute of repose for the benefit of all plaintiffs asserting a limited class of federal claims, the Second Circuit construed HERA to displace *all* statutes of repose—both federal *and state*—for any tort or contract claim for the exclusive benefit of *one* party—the federal government. Because HERA itself mentions only statutes of limitations, there is no reason to think Congress intended to give HERA the enormously broad sweep the Second Circuit gave it. Moreover, because the Second Circuit is the epicenter of the nation's financial markets, its decision rejecting *ANZ* and *CTS* has outsized practical importance.

I. The Court Should Grant Certiorari To Determine Whether Defendants Have A Seventh Amendment Right To Have Claims Under Section 12(a)(2) Of The Securities Act Tried By A Jury.

The Seventh Amendment provides that "[i]n Suits at common law" exceeding twenty dollars in value, "the right of trial by jury shall be preserved." U.S. Const. amend. VII. Claims under Section 12(a)(2) of the Securities Act are precisely such "Suits at common law" for which the jury right "shall be" preserved. The elements of a Section 12(a)(2) claim parallel the elements of a Section 11 claim, which is indisputably

legal in nature. And Section 12(a)(2) claims authorize recovery of damages—the classic form of legal relief—as well as a form of rescission that tracks rescission *at law* but not rescission *in equity*.

At a bare minimum, the Seventh Amendment jury right attaches to the seven petitioners who indisputably never sold securities to Fannie or Freddie and never possessed any of the proceeds from such sales. However a *statute* might categorize them, the *Constitution* entitled these petitioners—who were not parties to the underlying transactions—to a trial by jury. The Second Circuit's contrary holding is irreconcilable with this Court's precedents, warranting plenary review of this exceptionally important question.

A. Claims Under Sections 12(a)(2) Trigger the Seventh Amendment Right to a Jury.

A two-step analysis governs the question whether a statutory action is legal or equitable for purposes of the Seventh Amendment. First, courts "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Granfinanciera*, 492 U.S. at 42. Second, and "more important," courts then "examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* Under this framework, Section 12(a)(2) claims plainly trigger Seventh Amendment protections.

1. A Section 12(a)(2) claim is akin to a common-law legal claim and has no equitable analog in 18th-century English courts. Under Section 12(a)(2), "[a]ny person who … offers or sells a security … by means of a prospectus … shall be liable … to the person

purchasing such security from him" if the prospectus "includes an untrue statement of a material fact or omits to state a material fact" and the purchaser "did not know, and in the exercise of reasonable care could not have known, of such untruth or omission." 15 U.S.C. §77*l*(a)(2). Those elements "parallel" Section 11, *Morgan Stanley*, 592 F.3d at 359, under which liability turns on whether "the registration statement … contained an untrue statement of a material fact or [omission]" and the purchaser did not "kn[o]w of such untruth or omission," 15 U.S.C. §77k(a). It is undisputed that a Section 11 claim is legal and entitles the defendant to a jury trial. *See id.* §77k(e) (authorizing recovery of "damages" only); *see also, e.g.*, *Hohmann v. Packard Instrument Co.*, 471 F.2d 815, 819 (7th Cir. 1973) ("A jury trial is appropriate in a damage action alleging … violations" of Section 11.); H.R. Rep. No. 73-85, at 9 (1933) (Section 11 creates "legal liability"). Given its "parallel" elements, a Section 12(a)(2) claim is no less comparable to a statutory action brought in courts of law in 18th-century England than is a Section 11 claim.

Furthermore, rescission under Section 12 "differs significantly" from the common-law doctrine of "equitable[] rescission." *Pinter*, 486 U.S. at 641 n.18. In courts of equity, a claim for rescission required the plaintiff to prove that he justifiably relied on a misstatement that the defendant knew to be false. *See* Joseph Story, *Commentaries on Equity Jurisprudence* §§191, 193, 195, 199, 200, 391 (4th ed. 1846). But Section 12 (like Section 11) has no justifiable reliance requirement, and a defendant's state of mind is irrelevant under the statute, which imposes near strict liability. *Rombach v. Chang*, 355 F.3d 164, 169

n.4, 171 (2d Cir. 2004). The "'abstruse historical' search for the nearest 18th-century analog," *Tull v. United States*, 481 U.S. 412, 421 (1987), thus turns up no equitable comparator, confirming the legal nature of a Section 12(a)(2) claim.

2. The remedy available under Section 12(a)(2) bolsters the conclusion that the claim is legal rather than equitable. Under Section 12(a)(2), a plaintiff may recover one of two mutually exclusive remedies. If he still owns the security, he may sue for rescission "upon the tender of such security"; but "if he no longer owns the security," he may sue only "for damages." 15 U.S.C. §77*l*(a)(2). "Money damages are, of course, the classic form of *legal* relief." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993). Consequently, at least one of the two forms of relief under Section 12(a)(2) is indisputably legal, and it is illogical to think that petitioners' entitlement to a jury trial turns on whether FHFA decided to hold or sell the securities at the time it brought suit.

As for the rescission remedy, in and after 1791, the common law recognized two forms of rescission—rescission at law and rescission in equity—that were critically distinct. Claimants pursuing rescission at law had to identify proper grounds to rescind (*e.g.*, fraud or duress) and to provide clear and unambiguous notice of rescission. 2 Henry C. Black, *A Treatise on the Rescission of Contracts and Cancellation of Written Instruments* §569, at 1341 (1916). Claimants pursuing rescission in equity, however, were not subject to any such "inexorable formula." *Marr v. Tumulty*, 175 N.E. 356, 357 (N.Y. 1931) (Cardozo, C.J.).

Here, rescission is available under Section 12(a)(2) only "upon the tender of [the] security." 15 U.S.C. §77*l*(a). That tracks rescission at law: "Notice and offer to restore … must precede an action at law." Hugh S. Koford, *Rescission at Law and in Equity*, 36 Cal. L. Rev. 606, 607 (1948). "[I]n equity," in contrast, "there need be no offer to restore antecedent to the proceedings." Restatement (First) of Restitution §65 cmt. d (1937); *accord Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426 (1998); *see also Gould v. Cayuga County Nat'l Bank*, 86 N.Y. 75, 83 (1881) (an action in equity "does not proceed as *upon* a rescission, but proceeds *for* a rescission" (emphases added)). In short, Section 12(a)(2)'s rescission remedy not only departs sharply from equitable rescission; it parallels the components of rescission at law, confirming that the claim triggers the Seventh Amendment.

3. The Second Circuit's contrary holding depended on a fundamentally flawed premise. According to the Second Circuit, *this* Court has previously "recognized that a Section 12(a)(2) action is the Securities Act-equivalent of equitable rescission," creating a "long-established consensus that Section 12(a)(2) is an equitable claim that authorizes equitable relief." App.91-92. The three decisions on which the Second Circuit relied for that critical proposition, however, say no such thing.

In the first of those decisions, *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), the Court merely rejected the sweeping proposition that the Securities Act "restrict[s] purchasers seeking relief under its provisions to a money judgment." *Id.*

at 287. In turn, it held that the petitioners' bill contained "allegations which, if proved, entitle petitioners to some equitable relief." *Id.* at 289. But the bill brought "prayers for an accounting, appointment of a receiver, an injunction pendente lite, and for return of [their] payments." *Id.* at 288. Given that mix of claimed relief, much of which was indisputably equitable, the decision provides no guidance as to whether Section 12(a)(2) claims, including claims against persons who cannot return funds or otherwise provide equitable relief, always sound in equity and are plainly outside the Seventh Amendment's purview.

The next decision, *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), is even less relevant. *Gustafson* simply recognized that Section 12 grants "the right to rescind." *Id.* at 571. As explained, however, rescission can be at law or in equity, and *Gustafson* did not have reason to explore that distinction. *Gustafson* thus sheds no light on the question presented here, and certainly did not consider whether individuals and entities not parties to the transactions at issue can ever be subject to equitable rescission.

The last decision, *Pinter v. Dahl*, addressed the meaning of "seller" in Section 12. In a footnote, the Court stated that "Section 12 was adapted from common-law (or equitable) rescission." 486 U.S. at 641 n.18; *see* App.87-89. But in the very next sentence, the Court went on to emphasize that Section 12 "differs significantly from the source material." 486 U.S. at 641 n.18. The Court also expressly equated Section 12's rescission remedy with Section 12's damages remedy. *Id.* These observations do not

reflect a conclusion or "consensus" that Section 12(a)(2) claims are categorically equitable for purposes of the Seventh Amendment.

Moreover, since *Pinter* (decided in 1988), the differences between rescission in equity and rescission under Section 12 have only become more pronounced, and the basis for treating Section 12(a)(2) claims as triggering the Seventh Amendment have become more robust. At common law, equitable rescission required the seller to refund the buyer the full original purchase price in exchange for return of the purchased item, regardless of its value at the time of judgment. *See Lyon v. Bertram*, 61 U.S. (20 How.) 149, 154-55 (1857). In 1995, however, Congress added a loss-causation defense to Section 12. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, §105(3), 109 Stat. 737, 757 (codified at 15 U.S.C. §77*l*(b)). As a result, a plaintiff's rescission remedy under Section 12(a)(2) may now be reduced—or nullified entirely—to the extent the plaintiff's loss was caused by something other than the alleged misstatement or omission. *See* 15 U.S.C. §77*l*(b). Such a limitation on the amount refunded to the plaintiff upon return of the purchased item would have been anathema in equity.[8]

In short, nothing in this Court's decisions suggests that there is a "long-established consensus that Section 12(a)(2) is an equitable claim that

[8] So too would the substantive requirements of loss causation. Loss causation implicates the doctrine of proximate cause, which defines the scope of *legal* liability but did not constrain a chancellor's discretion to do equity. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692-93 (2011).

authorizes equitable relief." App.91-92. If anything, by equating Section 12(a)(2)'s damages and rescission remedies, *see Pinter*, 486 U.S. at 641 n.18, the Court has cast serious doubt on that proposition—even before Congress added the loss-causation defense to Section 12(a)(2). In all events, the Second Circuit completely misread this Court's precedents.

4. At the very least, the Section 12(a)(2) claims brought against petitioners (as opposed to the respondent underwriters) entitle them to a jury trial under the Seventh Amendment in light of this Court's decision in *Great-West*. There, the Court made clear that for a restitution remedy "to lie in equity, the action generally must seek … to restore to the plaintiff particular funds or property in the defendant's possession." 534 U.S. at 214. If "the funds being sought … are not in the defendants' possession," then the Seventh Amendment "require[s] a jury" *even if* "the basis of the claim is" traditionally understood as equitable—for example, the equitable-lien claim at issue in *Great-West*. *Pereira v. Farace*, 413 F.3d 330, 346-47 (2d Cir. 2005) (Newman, J., concurring).

What is true of restitution is no less true of rescission. *See* Dan B. Dobbs, *Handbook on the Law of Remedies* §4.3, at 254 (1973) ("[R]escission will normally be accompanied by restitution on both sides."). And that is particularly true of the rescission remedy in Section 12. Even more than the restitution at issue in *Great-West*, rescission under Section 12 is premised on the return of *specific securities* in exchange for the purchase price (less, of course, any interest and principal payments and any diminution in the value of the securities unrelated to the

misstatement or omission). *See* 15 U.S.C. §77*l*. It is obvious that only a seller who received funds in exchange for the securities can restore anything to the purchaser. Thus, where (as here) the plaintiff sues defendants who concededly did not sell the securities and never possessed any of the proceeds of those sales, *Great-West* guarantees those defendants a right to a jury trial. *See* 534 U.S. at 214.

The Second Circuit's contrary holding relied on the dubious assertion that labeling a defendant a "statutory seller" could affect the defendant's constitutional rights. According to the court below, "all of the Defendants were statutory sellers," and because the Securities Act "impose[s]" rescission "on any defendant it classifie[s] as a statutory seller," there is no Seventh Amendment problem with depriving a statutory seller of a jury trial, even if that "seller" never in fact sold anything and thus never possessed the funds to be returned to the purchaser via rescission. App.94 (quoting *Pinter*, 486 U.S. at 647 n.23). The initial problem with this reasoning is that seven of the nine petitioners—Nomura Credit & Capital, Inc.; Nomura Holding America, Inc.; and the five individual petitioners—were *not* statutory sellers, as even the district court recognized.[9] App.457-58, App.513-15. But even putting that issue to the side, Congress' determination of who may be liable under a *statutory* cause of action is not dispositive of—or even particularly relevant to—the separate, and more significant, question whether a particular action against a particular defendant implicates the

[9] These seven petitioners were found liable only on a Section 15 "control person" theory. *See* p.9 & n.6, *supra*.

constitutional right to a trial by jury. Indeed, permitting the constitutional question to turn on statutory considerations like whether a particular defendant is a "statutory seller" means that a mere error in applying the statute results in a constitutional violation—precisely what occurred here with respect to seven of the petitioners. Because the Second Circuit's decision cannot be reconciled with *Great-West*, certiorari is warranted.

B. This Question is Exceedingly Important.

Petitioners need not belabor the obvious importance of the Seventh Amendment right to a jury. "Trial by jury is a vital and cherished right, integral in our judicial system." *City of Morgantown*, 337 U.S. at 258. As a result, "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

That is particularly true in the context of the Securities Act. Sections 11 and 12(a)(2) both impose strict (or near-strict) liability. App.413-15. In many Securities Act cases, therefore, the critical question is not what happened, but whether what happened was reasonable—and even if it was not, how much the defendant should be forced to pay, including what amounts can be deducted based on decreases in the value of the securities unrelated to the misstatement or omission. That is precisely the context in which the Framers expected a jury of peers to "reach a result that a judge either could not or would not reach." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 671 (1973). The Framers adopted the Seventh Amendment to preserve the jury's ability to decide legal claims. The

decision below tramples that constitutionally protected prerogative. This Court's review is imperative.

II. The Court Should Grant Certiorari To Determine Whether HERA's Extension Of Statutes Of Limitations Applies To Statutes Of Repose.

HERA extends "the applicable statute of limitations" for contract and tort claims brought by FHFA to six and three years, respectively. 12 U.S.C. §4617(b)(12)(A). While HERA refers three times to statutes of limitations by name, it never once mentions statutes of *repose*. And as this Court has emphasized twice in the past four Terms, statutes of repose are not merely statutes of limitations by another name. Instead, statutes of repose "grant complete peace to defendants" after a specified period of time, *ANZ*, 137 S. Ct. at 2052, and confer vested rights in true freedom from further litigation. Any effort to apply HERA's "statute[s] of limitations" extender to statutes of repose ignores the critical distinction between the two. Review of this important and recurring question is plainly warranted.

A. HERA Does Not Override Statutes of Repose in the Securities Act or Preempt State Blue Sky Laws.

1. Section 13 of the Securities Act "reflects the legislative objective to give a defendant a *complete defense* to any suit after a certain period." *id.* at 2049 (emphasis added). It "provides in clear terms that '*[i]n no event*' shall an action be brought more than three years after the securities offering on which it is based." *Id.* (alteration in original) (emphasis added). And it

"*admits of no exception*." *Id.* (emphasis added); *see* 15 U.S.C. §77m.

ANZ also makes clear that *not* treating Section 13's three-year period as an "absolute bar on a defendant's temporal liability" would make nonsense of the statute as a whole. 137 S. Ct. at 2050 (quoting *CTS*, 134 S. Ct at 2183). Section 13 includes a one-year statute of limitations—which itself contains an express discovery rule—and adds an absolute statute of repose on top of it. *See Gabelli v. SEC*, 568 U.S. 442, 453 (2013). Those two periods "work together"; the "discovery rule gives leeway to a plaintiff who has not yet learned of a violation," while "the rule of repose protects the defendant from an interminable threat of liability." *ANZ*, 137 S. Ct. at 2049-50. Allowing Section 13's three-year period to be extended would thus render it superfluous, "even in cases of extraordinary circumstances." *CTS*, 134 S. Ct. at 2183.

It is undisputed that the last RMBS sale at issue took place in 2007, more than four years before the government's suit was filed, and that any other plaintiff's suit would have been barred by Section 13's statute of repose.

2. Although Section 13's statute of repose "admits of no exception," *ANZ*, 137 S. Ct. at 2049, the Second Circuit nevertheless found one in HERA (and on that basis allowed a judgment for more than $800 million to stand). But nothing in HERA even refers to statutes of repose, much less indicates a congressional intent to confront the serious issues with overriding them. On the contrary, the relevant HERA provision refers, three times, to "statute[s] of limitations." 12

U.S.C. §4617(b)(12). Given the well-established distinction between statutes of limitations and statutes of repose, Congress' repeated references to "statute[s] of limitations" reflect a deliberate decision to extend only the former, not the latter. *See CTS*, 134 S. Ct. at 2185. That understanding is reinforced by HERA's four references to "the date on which the [relevant] cause of action accrues." As *ANZ* and *CTS* both explain, the notion of an "accrual" date is relevant only to statutes of limitations and is completely foreign to statutes of repose, which foreclose an action after a certain period of time regardless of when it might have accrued. *ANZ*, 137 S. Ct. at 2049; *CTS*, 134 S. Ct. at 2182-83.

Eliminating Section 13's statute of repose based on HERA's reference to a statute of limitations disregards the critically "distinct purpose[s]" between the former and the latter with respect to the actors at which they are targeted. *ANZ*, 137 S. Ct. at 2049 (quoting *CTS*, 134 S. Ct. at 2182). The purpose of a statute of repose is "to protect *defendants* against future liability" after a specified time. *Id.* at 2055 (emphasis added). The purpose of a statute of limitations, in contrast, is "to encourage *plaintiffs* 'to pursue diligent prosecution of known claims.'" *Id.* at 2049 (emphasis added) (quoting *CTS*, 134 S. Ct. at 2182-83). Section 4617(b)(12) is explicitly defined by reference to the particular *plaintiff* bringing suit (FHFA), and it explicitly extends only time bars applicable to that *plaintiff*—telltale signs that the provision was focused on and limited to statutes of limitations. In contrast, nothing suggests any intention to override a time bar designed "to give the

defendant full protection after a certain time," *i.e.*, a statute of repose. *Id.* at 2053 (emphasis added).

3. In holding that HERA supplanted Section 13's statute of repose, the Second Circuit barely grappled with the text of either the Securities Act or HERA. And it almost entirely disregarded *ANZ*, even though that decision not only comprises this Court's most recent word on statutes of repose but also made clear beyond cavil that Section 13's statute of repose means what it says.

Instead, the Second Circuit repeatedly cited its own 2013 decision in *UBS*, which predates both *ANZ* and *CTS*. There, the court construed §4617(b)(12)'s language to mean that "Congress precluded the possibility that some other limitations period might apply to claims brought by FHFA as conservator." 712 F.3d at 142. That is right—but completely irrelevant to the question whether Congress intended for some other *repose* period to apply to defendants when it comes to claims brought by FHFA. Given the distinctions that the later-decided *CTS* and *ANZ* drew between statutes of limitations and statutes of repose, the fact that Congress intended for HERA's limitations period to override other limitations periods applicable to FHFA says nothing about whether Congress intended for HERA to eliminate the repose provided by Section 13.

UBS—and, by extension, the decision below—also reasoned that "[a]lthough statutes of limitations and statutes of repose are distinct in theory," they are not sufficiently distinct in practice that HERA's explicit reference only to one should not be understood implicitly to encompass both. 712 F.3d at 142-43; *see*

App.34-40. But, again, that reasoning is irreconcilable with *ANZ* and *CTS*, which reject the notion that distinctions between statutes of limitations and statutes of repose are simply "theoretical."

Treating HERA as supplanting Section 13's statute of repose also violates the presumption against implied repeals. To be sure, the fact that a court may not use its equitable authority to extend Section 13's repose period does not mean that Congress may not legislatively do so. *See ANZ*, 137 S. Ct. at 2050. But implied repeals—and implied amendments, for that matter—"will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662, 664 n.8 (2007) (quotation marks and alteration omitted). There is nothing in HERA that signals Congress' "clear and manifest" intent to repeal or amend Section 13's statute of repose, particularly given that "the text, purpose, structure, and history of [Section 13] all disclose the congressional purpose to offer defendants *full and final security* after three years." *ANZ*, 137 S. Ct. at 2052 (emphasis added).

Moreover, the presumption against implied repeals applies with particular force to statutes of repose, because they confer vested rights to repose that differ from a defendant's interest in having the statute of limitations run. A statute purporting to extend a statute of repose, especially after that period had run, would unquestionably interfere with the defendants' vested rights and raise constitutional concerns under the due process and takings clause. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 312 n.8 (1945) ("[W]here a statute in creating a liability

also put[s] a period to its existence, a retroactive extension of the period after its expiration amount[s] to a taking of property without due process of law."). Although the three-year statute of repose had not run here at the point HERA was enacted, the government's theory would apply equally to such claims. Because the statute cannot mean one thing for some claims and another thing for other claims, *see Clark v. Martinez*, 543 U.S. 371, 378 (2005), the way to avoid the constitutional difficulties is to read HERA's references to statutes of limitations to mean just what they say.

4. In addition, HERA did not preempt, and could not have preempted, the statutes of repose in state Blue Sky laws, including the D.C. law at issue here. When a federal law "contains an express preemption clause," as §4617(b)(12) does, courts must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). The "plain wording" of §4617(b)(12) makes clear Congress' preemptive intent: in enacting a new statute of limitations to govern "any action" brought by FHFA in "contract" or "tort," Congress preempted only state statutes of limitations. 12 U.S.C. §4617(b)(12). Nothing in the "plain wording" of §4617(b)(12) mentions—much less demonstrates an intent to preempt—state statutes of repose.

As with its analysis of the impact of HERA on Section 13's statute of repose, the Second Circuit did not address the impact of HERA on state-law statutes

of repose with a full analysis of the relevant statutory text, congressional intent, or this Court's recent *ANZ* decision. Instead, it proceeded to examine whether this Court's *CTS* decision "undermined" its own prior decision in *UBS*, which held that HERA preempts state statutes of repose, and it determined that nothing in *CTS* "seriously undermine[d]" *UBS*. App.39. But both the methodology and the conclusion are seriously flawed. As it did with respect to Section 13's statute of repose, the Second Circuit left in place a rule demonstrably irreconcilable with this Court's precedents.

B. Whether Provisions Extending Statutes of Limitations Displace Statutes of Repose is an Important and Recurring Question Warranting Review Here.

As the Court's recent grants of certiorari in *ANZ* and *CTS* attest, the proper characterization of statutes of limitations vis-à-vis statutes of repose is an exceptionally important issue warranting the Court's review. And the only thing more troubling than allowing a statute that does not so much as mention statutes of repose to override them is to allow such an override for the exclusive benefit of the federal government.

The importance of the erroneous decision below is amplified by the fact that the Second Circuit is at the epicenter of the Nation's securities markets. Securities Act claims may be filed 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(a). Nearly every participant in the

financial markets does business in New York, and the Second Circuit is rightly "regarded as the 'Mother Court' in this area of the law." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting). Given the Second Circuit's rejection of *ANZ* and *CTS*, future claims by government agencies will almost certainly be filed in New York federal courts.

Finally, securities law is "an area that demands certainty and predictability," *Pinter*, 486 U.S. at 652, which is precisely why the Securities Act and its state-law analogs contain statutes of repose. *See ANZ*, 137 S. Ct. at 2052; *see* 78 Cong. Rec. 8709-10 (1934). Accordingly, the time for reviewing the Second Circuit's effective elimination of important protections put in place by Congress is now.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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