No. 17-1302

# In The Supreme Court of the United States

NOMURA SECURITIES INTERNATIONAL, INC. AND RBS SECURITIES, INC.,

*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 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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## 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 year, in *Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S.Ct. 2042 (2017), this Court ruled that the repose statute in Section 13 of the Securities Act of 1933 ("Section 13"), 15 U.S.C. § 77m, "admits of no

[1] The parties received notice of SIFMA's intention to file, and their consents have been received. This brief was not authored in whole or in part by any party's counsel. No one other than SIFMA, its members or its counsel made a monetary contribution to fund its preparation or submission.

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, 2052.

However, in this case a Second Circuit panel found that an extender statute for FHFA claims (the "Statute") in the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008) ("HERA"), 12 U.S.C. §4617, that was enacted *after* CERCLA's extender statute and, like that provision, refers *only* to the "statute of limitations," is nevertheless an exception to the repose statutes in Section 13, and the District of Columbia and Virginia Blue Sky laws (the "Blue Sky Laws"). D.C. Code §31-5606.05(f)(1); Va. Code Ann. §13.1-522(D). The panel held it was bound by *FDIC v. First Horizon Asset Securities*, 821 F.3d 372 (2d Cir. 2016), *cert. denied*, 137 S.Ct. 628 (2017), in which a divided panel joined the Fifth Circuit in arriving at the same result under 12 U.S.C. § 1821(d)(14), an extender statute for FDIC claims. *See FDIC v. RBS Secs., Inc.*, 798 F.3d 244 (5th Cir. 2015). Two other Circuits have 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) (together with the other Circuit decisions cited in this paragraph, the "Circuit Extender Decisions").

None of the Circuit Extender Decisions applied the teachings of *CTS*. Instead, to further their own views of the purpose of the extender statutes they addressed, they failed to follow the statutes' plain

language. 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 *ANZ*, and the rationales for those decisions, should not be followed. Or do *CTS* and *ANZ* 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 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's 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 a statute's plain language should yield to a lower court's view of its purpose. SIFMA recognizes the importance of applying laws as legislatures write them, not based on subjective judicial assertions of purpose that do not take account of the often competing objectives legislatures weigh in drafting particular provisions. That is essential to ensure predictability. Predictability is crucial for business planning and the 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, Section 13 and the Blue Sky Laws. Failing to do so would risk encouraging courts to depart from text and divine intent and policy.

*Second*, the decision below, and the other Circuit Extender Decisions, defy and are flatly inconsistent with *CTS* and *ANZ*. *CTS* enunciated clear and categorical principles on the important question whether the Congressional extension of statutes of limitations also extends repose statutes, and *ANZ* 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 this Court's rulings, 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, including the consistent application of repose statutes that are a critical part of those laws. By establishing a definitive outside time limit for claims that cannot be tolled, repose statutes give the markets 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 fresh evidence. SIFMA's members, their investors and their customers depend on repose statutes in their financial planning and operations. However, the decision below undermines

important aspects of the repose statute 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." *ANZ*, 137 S.Ct. at 2050.

*Fourth*, the panel's decision raises important issues of federal law. The FHFA, NCUA and FDIC have 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 (June 9, 2014), http://blogs.reuters.com/alison-frankel/2014/06/09/scotus-repose-opinion-is-good-news-for-securities-defendants, and their incorrect application to displace statutes of repose. In this action alone, the District Court awarded FHFA more than $800 million in damages. 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 again.

## SUMMARY OF ARGUMENT

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

applies only to statutes of limitations should also be applied to repose statutes enacted as a fundamental limitation on near-strict-liability claims. SIFMA supports Petitioners' argument that *CTS* and *ANZ* mean what they say and the Statute should be construed in accordance with its plain language. It does not create an exception to the Section 13 or Blue Sky Laws repose statutes.

It is undisputed that FHFA did not bring its Securities Act and Blue Sky Laws claims within the periods allowed by their repose statutes, but the District Court nevertheless construed the Statute to allow FHFA to bring those claims. The Second Circuit affirmed, invoking its own precedent, *FHFA v. UBS Ams. Inc.*, 712 F.3d 136 (2d Cir. 2013), which held that HERA "displaces" the repose statutes. App-32-38; *see id*. at 143-44. The panel also concluded that it was bound, concerning Section 13's repose statute, by *First Horizon*, which held that *CTS* did not abrogate *UBS*. App-37, 44.

However, the Statute is clear and unambiguous. It extends only the "statute of limitations" for State law contract and tort claims brought by FHFA as conservator or receiver. Repose statutes are not mentioned. Nothing extends them 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 after the CERCLA amendment. 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," as *ANZ* held. *ANZ*, 137 S.Ct. at 2045.

Compelling reasons warrant granting certiorari. This case presents the Court with a valuable opportunity to correct a ruling that impermissibly disregards the plain language of the Statute (which applies only to "the applicable statute of limitations") and fundamental tenets of statutory construction established in *CTS*, *ANZ* 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. *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 statute was enacted) that repose statutes are distinct from statutes of limitations. 134 S.Ct. at 2182-83, 2185. *ANZ* emphasized that Section 13 provides "defendants full and final security after three years." 137 S.Ct. at 2052.

If statutes are instead 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 years before it enacted the Statute – there is no limit to how statutes may be construed in contravention of their terms. That would undermine the rule of law and bedrock principles 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*, *ANZ*, THE TEXT OF THE STATUTE, SECTION 13 AND THE BLUE SKY LAWS

#### 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 repose statutes. *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 *ANZ*, and to ensure that the Statute is not misapplied to displace the Securities Act's and Blue Sky Laws' repose statutes.

#### B. *CTS*, *ANZ* and the Plain Language of the Statute Establish That it Applies Only to "Statutes of Limitations" and Does Not Displace the Securities Act and Blue Sky Laws Repose Statutes

*CTS* considered 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 repose statutes. 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 repose statutes. 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 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*, 568 U.S. 455, 468, 474 (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"); *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, 507-09, 511 (2012) (Sotomayor, J.) (under "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 "[t]here 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.) (False Claims Act public disclosure bar's reference to "report" "carries its ordinary meaning," including 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 the Statute, like the *CTS* extender provision, refers to the "statute of limitations," not to "statutes of repose." There is also no dispute that Congress long ago included a three-year repose statute in the Securities Act, and the Blue Sky Laws contain repose statutes. *CTS* explained the "critical distinction" between these concepts: "Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" 134 S.Ct. at 2187, 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 repose statutes. *Id*. at 2187.

Congress plainly did not forget the distinction between these concepts when it enacted the Statute. Yet the Statute refers only to "statute of limitations," in the singular, several times, and includes no reference to any repose statute.

As *CTS* explained, the primary meaning of "statute of limitations" excludes repose statutes. 134 S.Ct. at 2185. Statutory terms should ordinarily 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 *ANZ* 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 and Blue Sky Laws claims for another reason. The Statute refers only to state law "contract" and "tort" claims, 12 U.S.C. § 4617(b)(12)(A), not federal or statutory claims.

Although the Statute also states it applies to "'*any* action' brought by" FHFA, that does not have a broad displacing effect because 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," and only to the extent they arise "under State law." *Id*. The text therefore provides no basis to apply the Statute to any other claim, including FHFA's 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]

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[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 Exp. & 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).

Thus, since FHFA's claims are statutory, 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 . . . common law" claims), *aff'd*, 483 U.S. 143 (1987); *Chevron Chem. Co. v. Voluntary Purchasing Grps., Inc.*, 659 F.2d 695, 702 (5th Cir. 1981) (Lanham Act "created a *sui generis* federal statutory cause of action").

Applying the Statute to federal claims would also be inconsistent with the statement in its introductory paragraph that covered claims have *two* alternative statutes of limitations: "the longer of" a new subparagraph (I) period and a subparagraph (II) "period applicable under State law." 12 U.S.C. §§ 4617(b)(12)(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. §§ 4617(b)(12)(A)(i)(II), (ii)(II). Thus, the reference to "the longer of" two applicable periods would make no sense for 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* FHFA'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 HERA supports that outcome.[3]

For these reasons, the natural reading of the text is it does not apply to federal claims or state statutory claims. The distinction between claims created by Congress and state legislatures and state common law contract and tort claims is important to SIFMA's members. When legislatures enact statutes that create new securities law claims, they balance 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.

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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 Law," but *CTS* rejected that mode of analysis. *See UBS*, 712 F.3d at 142 (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. . . .").

### 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*, *ANZ*, the plain language of the Statute, Section 13 and the Blue Sky Laws, and the Statute's textual similarities to CERCLA's extender statute, the court below ruled it was bound by *First Horizon*, App-37, a divided decision that relied on flawed logic that conflicts with *CTS* and *ANZ*'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*. *First Horizon*, 821 F.3d at 376. 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 repose statutes.

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." 821 F.3d at 378. 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 Blue Sky Laws or their repose statutes. But the *First Horizon* majority gave short shrift to Congress's omission of any reference to statutes of repose or federal or statutory claims in the Statute, and failed to acknowledge the importance of Section 13's and the Blue Sky Laws' repose statutes. 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, 664 n.8 (2007). That is particularly true here, where the statute supposedly eliminated by implication was enacted by Congress in 1933, and has been a prominent feature of securities regulation for 85 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. 821 F.3d at 376 (emphasis added). But the *First Horizon* majority (and the panel in the decision below) 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 court below and the divided *First Horizon* panel overlooked that when Congress crafts complex legislation such as HERA, 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 repose statutes, and *ANZ* should have ended any argument about Section 13. 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*, 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.*, 798 F.3d at 254 (relying on court's view that extender 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 "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 *ANZ*. The unambiguous text controls.

These decisions will otherwise have a 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. *See ANZ*, 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"). 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." *ANZ*, 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 LEGISLATIVELY-ENACTED STATUTES OF REPOSE AND IMPORTANT FEDERALISM PRINCIPLES

The Second Circuit, in applying its view of the Statute's purpose, did not address the enormous importance of the legislatively-enacted statutes of repose FHFA seeks to displace. Statutes of repose in general, and the Securities Act and Blue Sky Laws repose statutes for strict liability claims in particular, are critical to ensure certainty and finality. Moreover, federalism principles strongly disfavor preempting the Blue Sky Laws' statutes of repose.

*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").

Statutes of repose are particularly important to ensure finality for strict liability claims under the Securities Act and Blue Sky Laws. *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." *ANZ*, 137 S.Ct. at 2049. 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 repose statute to three years because it realized the strict liability the Act created was stifling the economy. 78 Cong. Rec. 8709-10 (1934) ("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 repose statute 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*

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[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).

*Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 704 (2d Cir. 1994). The SEC has extolled the beneficial purposes: "The three-year provision assures businesses that are subject to liability under [Sections 11 and 12] that after a certain date they may conduct their businesses without the risk of further strict liability for non-culpable conduct." *SEC Amicus Brief, P. Stolz Family P'ship L.P. v. Daum*, 2003 WL 23469697, at *8 (2d Cir. Sept. 8, 2003).

The Securities Act's repose statute is also essential to 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). Repose statutes encourage prompt enforcement of the securities laws and serve cultural values of diligence.

No less today than 85 years ago, statutes of repose, by eliminating "protracted liability," *CTS*, 134 S.Ct. at 2183, add predictability that allows financial institutions to productively use capital that otherwise might be reserved indefinitely to cover potential liability. They also protect new shareholders, bondholders and management from liability for conduct that occurred when they were not associated with the business. And they prevent 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 FHFA's claims here to proceed would undercut these important objectives.

The Virginia legislature and the District of Columbia, by including repose periods in their Blue Sky Laws, provided the same assurances and benefits. *See, e.g., Hess v. Snyder Hunt Corp*., 392 S.E.2d 817, 819 (Va. 1990) ("Statutes of repose evince a legislative policy decision that after the expiration of a specific time a defendant should no longer be subjected to liability."). Allowing FHFA's Blue Sky Laws claims to proceed would undercut these important State law objectives.

Under federalism principles, these important State law objectives, and Virginia's and the District of Columbia's exercise of their traditional powers to limit claims they create, make finding preemption of their statutes of repose particularly inappropriate. The power to supplant State law is "an extraordinary power in a federalist system" that "we must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). Here, as explained above, the Statute is at a minimum susceptible of a plausible reading that disfavors preemption.

If the Second Circuit's ruling stands, long-dead claims could be resurrected despite the mandate of statutes of repose. Liability for claims relating to future mortgage loan defaults could extend indefinitely because the claims might not even accrue until FHFA

is appointed as conservator of an entity that purchased the defaulting loans, an event untethered to the alleged wrongdoing that could occur at any time.

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 legislatively-created repose rights, and principles of federalism, should be paramount considerations in understanding why Congress chose in the Statute not to refer to statutes of repose. Furthermore, the presumption against preemption requires the Statute to be read not to preempt the Blue Sky Laws' statutes of repose.

## CONCLUSION

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

April 13, 2018

Respectfully submitted,

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