No. 17-1302

In the
Supreme Court of the United States

NOMURA SECURITIES INTERNATIONAL, INC.;
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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF

Just last year, this Court held that repose means repose and that the statute of repose in Section 13 of the Securities Act "admits of *no exception*." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (emphasis added). Yet the government concedes—indeed, *explicitly argues*—that §4617(b)(12) is an "exception" to Section 13 available for the exclusive benefit of the government. Opp.18. The resulting direct conflict with this Court's precedent is reason enough to grant review. But the government is wrong on the merits as well. The government fails to anchor its construction of §4617(b)(12) in the statutory text, and its arguments based on the special needs of the government as plaintiff ignore a central lesson of *ANZ* and *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), namely, that statutes of repose, in contradistinction to statutes of limitations, focus on defendants and their equities. Similarly, the government declares that the statutory text "clearly demonstrates" that Congress intended to preempt state statutes of repose, Opp.21, but that *ipse dixit* is fanciful given that the provision refers only to statutes of limitations and never mentions statutes of repose.

The government contends that this Court has declined to review this issue in several recent cases, but *all* of those cases were in an interlocutory posture, and *all* predated *ANZ*. This case presents a final judgment of *$800 million* for claims that *all agree* would be barred by statutes of repose absent application of §4617(b)(12). If §4617(b)(12) and similar statutes really do grant the government—and

the government alone—the ability to disregard the "complete peace" otherwise afforded to private parties by Section 13 and other statutes of repose, *ANZ*, 137 S. Ct. at 2052, that extraordinary determination should at least come from this Court.

The government's arguments on the Seventh Amendment question fare no better. The government does not dispute that the elements of a Section 12(a)(2) claim parallel those of a Section 11 claim, which is indisputably "legal" for Seventh Amendment purposes. And the government's own description of what constitutes "equitable" rescission makes clear that the remedy that Section 12(a)(2) authorizes is legal, not equitable. The government insists that this Court has settled the issue, but it invokes only *dicta* that predate recent amendments making Section 12(a)(2) even more obviously legal and that, if anything, underscore the need for plenary review.

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

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

1. While the government stresses that this Court has denied previous petitions arising in an interlocutory posture and predating *ANZ*, it has relatively little to say in defense of the proposition that §4617(b)(12), which extends the "statute[s] of limitations" for claims by FHFA, overrides statutes of repose like Section 13. The government does not dispute that §4617(b)(12) refers three times to "statute

of limitations" and four times to the accrual of a claim, a concept relevant only to statutes of limitations. *See ANZ*, 137 S. Ct. at 2049; *CTS*, 134 S. Ct. at 2182-83. Nor does the government contest that §4617(b)(12) never refers to statutes of repose or otherwise indicates that Congress confronted the distinct policy and constitutional issues implicated by overriding a defendant's right to repose. Further, though the government dismisses *ANZ*'s significance, it cannot deny that *ANZ* addressed the same federal repose provision at issue here, Section 13, and held that it "give[s] a defendant a *complete defense* to *any* suit after a certain period" and "admits of *no exception*." 137 S. Ct. at 2049 (emphases added). While the government's claim that §4617(b)(12) creates an "exception" to Section 13 and other statutes of repose and eviscerates a defendant's "complete defense" was problematic before *ANZ*, the government's argument and the Second Circuit's acceptance of it plainly conflict with, and cannot survive, *ANZ*.

The government's principal textual argument is that the extender statute "directs that '*the* applicable statute of limitations with regard to *any* action brought by [FHFA] as conservator or receiver *shall be*' the one that Section 4617(b)(12) specifies." Opp.13 (government's emphases). This "mandatory language," the government argues, "precludes the possibility that some other limitations period might apply." *Id.* Exactly. But the fact that §4617(b)(12) was intended to be the exclusive statute *of limitations* for certain government claims says nothing about whether it was meant to override statutes *of repose*. And given that the statutory text (and the government's brief) is silent on that question, there is

nothing to suggest that Congress wanted to take the extraordinary step of overriding both federal and state statutes of repose for the exclusive benefit of the government in every contract and tort claim addressed by the provision.[1]

The government contends that the term "statute of limitations" in §4617(b)(12) "describes the new time limit itself, not any other time limit that Section 4617(b)(12) might lengthen or supersede." Opp.15. But that is just a roundabout way of saying that §4617(b)(12) says nothing to suggest that the "new" statute of limitations supplants any statute of repose. The government remarks that "the fact that Section 4617(b)(12) is itself a statute of limitations … does not provide guidance on the question whether [it] displaces otherwise applicable statutes of repose." Opp.15 (quotations and emphases omitted). Yet that is the whole problem. Given the critical distinctions between (and policy reasons for) statutes of limitations and statutes of repose, and the "complete defense" provided by Section 13 that "admits of no exception," the absence of "guidance" in §4617(b)(12)'s text is fatal to the government's argument.

2. Lacking a textual argument, the government invokes a purposive one: Congress must have wanted FHFA to be able to evaluate potential claims unimpeded by "limitations periods" that might

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[1] Similarly, the government asserts that petitioners "acknowledge that Section 4617(b)(12) displaces at least *some* potential time limits." Opp.14-15. Of course: Petitioners do not dispute that §4617(b)(12) displaces statutes of *limitations*. But that does not answer whether §4617(b)(12) displaces statutes of *repose*.

otherwise apply. Opp.14. But "no legislation pursues its purposes at all costs," *CTS,* 134 S. Ct. at 2185, and Congress could just as readily have wanted to sweep away "limitations periods" (which are primarily focused on the equities of allowing a plaintiff to sue) while leaving undisturbed repose periods (which are primarily focused on the equities of defendants). Indeed, given that HERA substitutes in a new plaintiff, it would make perfect sense to create a new plaintiff-focused statute of limitations while leaving alone defendant-focused repose periods.

The government contends that when §4617(b)(12) was enacted, lower courts had construed similar provisions to allow the government to bring "any causes of action" within three years after the government's appointment as receiver. Opp.14. But the government identifies no decision holding that those other statutes displaced a statute of repose, much less Section 13. And, of course, those decisions predated *CTS* and *ANZ*, which not only rejected the casual conflation of statutes of limitations and statutes of repose but also made clear that Section 13 establishes a repose period that is a "complete defense" without exceptions. *ANZ*, 137 S. Ct. at 2049.

The government claims that applying §4617(b)(12) only to statutes of limitations, and not statutes of repose, would "impermissibly bifurcate" Section 13. Opp.16. But Congress already did the bifurcating by establishing a one-year limitations period and a three-year repose period, and *ANZ already* gave effect to that bifurcation by limiting tolling to Section 13's one-year limitations period. *ANZ*, 137 S. Ct. at 2049-55.

The government asserts that *ANZ* "did not suggest" that Section 13 "bars actions as to which Congress has specified a special exclusive time limit." Opp.18. Nonsense: *ANZ* unequivocally held that Section 13 "give[s] a defendant a *complete* defense to *any* suit" filed more than three years after a security's offering. 137 S. Ct. at 2049 (emphases added). Moreover, *ANZ* reinforces that repose means repose. Repose except for actions brought by the full prosecutorial force of the federal government is hardly true repose or a "complete defense." The conflict between the government's position and *ANZ* is stark: *ANZ* held that Section 13's three-year statute of repose "admits of *no exception*," and yet the government *expressly describes* §4617(b)(12) as an "exception" to Section 13. Opp.18.

3. The government does not dispute that §4617(b)(12) lacks the "clear and manifest" intent necessary to impliedly repeal Section 13. *See* Pet.21-22. It contends instead that the "general principle disfavoring repeals by implication" does not apply here because Section 13 "would continue to have 'the same effect' in all situations not specifically addressed" by §4617(b)(12). Opp.19. But that is exactly the point: In the situations §4617(b)(12) *does* address, the government's theory would make it an "implied amendment[]" resulting in a "partial repeal"—precisely the circumstances in which the presumption attaches. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007).

The government suggests that its theory "would not allow FHFA to bring claims that were already time-barred when FHFA assumed its role as

conservator." Opp.20. But it offers no support for that assurance except to cite several lower courts that did not construe "HERA's predecessors … to revive stale claims." *Id*. More problematically, accepting the government's argument would mean that §4617(b)(12) means one thing for already time-barred claims raising acute constitutional concerns, and another thing for other claims (those not already time-barred upon FHFA's appointment as conservator), in direct contradiction of *Clark v. Martinez*, 543 U.S. 371, 378 (2005). The government has no answer to this interpretive conundrum or to the constitutional difficulties its theory here implicates. *See* Pet.22. Under *Clark*, §4617(b)(12) must be construed consistently to apply to all statutes of limitations and no statutes of repose, *i.e.*, it must be construed consistently and constitutionally.

4. The government's argument is weaker still when it comes to the preemption of state statutes of repose. The government claims that §4617(b)(12) "clearly demonstrates" Congress' intent to preempt state statutes of repose. Opp.21. But the "plain wording" of §4617(b)(12), which "contains the best evidence of Congress' preemptive intent," *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011), does not once mention statutes of repose, much less state statutes of repose.

The presumption against preemption reinforces the result dictated by the statute's plain terms. *See* Pet.24 n.7. If "the text of a pre-emption clause is susceptible of more than one plausible reading," courts "accept the reading that disfavors pre-emption." *CTS*, 134 S. Ct. at 2188 (opinion of Kennedy, J.). At a

minimum, §4617(b)(12) is certainly "susceptible" of a reading that does not extend its reach to statutes of repose—thus requiring preservation, not preemption, of state statutes of repose.

B. The Question Presented is Exceedingly Important and Warrants Review Here.

1. The stakes of this case are unquestionably high. The purpose of statutes of repose in the securities laws is to provide the "certainty and reliability" that are "a necessity" for market stability. *ANZ*, 137 S. Ct. at 2049, 2055; *see* SIFMA Amicus Br.19-21. But "certainty and reliablity" are upended if a market participant can be held liable for *$800 million* based entirely on claims filed years *after* expiration of applicable repose periods. Facing such massive liability at the hands of the government is a far cry from the "complete peace" promised by statutes of repose, *ANZ*, 137 S. Ct. at 2052, the need for which is particularly acute for underwriters, who are involved in large numbers of offerings.

The government perceives the fact that §4617(b)(12) inures only to the government's benefit as a feature, not a bug. But the policies underlying statutes of repose, which focus on the equitable needs of the defendant, *id.* at 2049, are at their zenith when the government is the plaintiff. So too are the constitutional difficulties with a statute that could obliterate a vested right in repose for the sole and exclusive benefit of the government.

2. The government asserts that this Court has denied certiorari in four cases raising this issue. Opp.12-13, 22-23. But as the government concedes, *all* of those petitions "were filed at an interlocutory

stage," Opp.22, when the petitioners could have "still prevail[ed] … on any of a number of grounds," Brief in Opposition at 23, *RBS Sec., Inc. v. FDIC*, No. 15-783 (U.S. Feb. 18, 2016). This case alone comes to the Court after a final judgment. Absent review, petitioners *will* be liable for $800 million, rendering certiorari imperative. Indeed, given the enormous pressure to settle billion-dollar claims brought by the government, *see* Pet.9, it is the rare case that will make it to this Court after trial, making the opportunity for review on a full record particularly attractive.

The previous cases are distinguishable in other material respects. For example, the decision in *Credit Suisse First Boston Mortgage Securities Corp. v. FDIC*, 138 S. Ct. 501 (2017), was an unpublished summary order. *See* 674 F. App'x 86 (2d Cir. 2017). The decision in *First Horizon Asset Securities, Inc. v. FDIC*, 137 S. Ct. 628 (2017), did not address preemption of state statutes of repose, which contributed to $555 million of the judgment here. *See* 821 F.3d 372 (2d Cir. 2016); Pet.11. And, of course, *all* of the decisions predated *ANZ*.

The government claims that the question presented is "of diminishing practical importance" because most FHFA cases have "worked their way through the courts." Opp.22. But given the conceded identity between §4617(b)(12) and the FDIC and NCUA statutes on which it was modeled, *see* Opp.14, the broader question of whether such statutes can displace statutes of repose has "continuing significance," as even the government admits. Opp.22-23.

In all events, lingering uncertainty about the validity of these multiple extender statutes strikes at the heart of the repose promised by statutes like Section 13. Without clarity from this Court now, parties will be mired in doubt as to whether and to what extent such provisions supersede statutes of repose they thought afforded them "full and final security." *ANZ*, 137 S. Ct. at 2052. If statutes of repose are to confer true repose, there cannot be an exception for government claims under extender statutes—claims that come into play in the wake of financial upheavals and thus often involve massive damage claims. Nor can there be continuing uncertainty as to whether such a result is consistent with *CTS* and *ANZ*. This Court should act now to decide once and for all whether the promise of repose provided by statutes like Section 13 is real.

II. The Court Should Grant Certiorari To Determine Whether Section 12(a)(2) Claims Must Be Tried By A Jury.

The government does not dispute that a claim under Section 11 of the Securities Act triggers the Seventh Amendment right to a jury, or that the elements of a Section 12(a)(2) claim parallel the elements of a Section 11 claim. *See* Pet.17. The government nevertheless contends that these similarities "are immaterial" because Section 12(a)(2)'s rescission remedy is equitable. Opp.25. But while the Seventh Amendment inquiry "primarily" depends on the nature of the remedy, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989), the first step in the inquiry is not irrelevant. The conceded "similarities" between Section 11 and Section 12(a)(2)

thus strongly indicate that Section 12(a)(2) triggers the jury right.

As to remedy, the government contends that, at common law, "unilateral rescission" would have been an action at law, but FHFA "did not unilaterally rescind the contract before bringing suit." Opp.24. The government ignores, however, the district court's finding that FHFA "constructively tendered its securities as of September 2, 2011." App.480. And it is well-established that a unilateral offer to tender is the equivalent of a unilateral rescission. *See* Hugh S. Koford, *Rescission at Law and in Equity*, 36 Cal. L. Rev. 606, 607 (1948). Thus, whether FHFA can "physically return the Certificates," Opp.24, has no dispositive significance because FHFA already tendered them, "satisfy[ing] the requirements of a unilateral rescission" and rendering its suit an "action at law," Opp.23.

The government argues that Section 12(b)'s loss-causation defense is consistent with equitable principles. *See* Opp.26. But the point is that, at common law, "equitable rescission required the seller to refund the buyer the *full original purchase price* in exchange for the purchased item." Pet.32 (emphasis added). That command is irreconcilable with a loss-causation defense, which contemplates an amount to the buyer *less* than the "full original purchase price."

Neither *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), nor *Pinter v. Dahl*, 486 U.S. 622 (1988), addressed whether Section 12(a)(2) claims trigger the Seventh Amendment. *See* Opp.24-25. In *Deckert*, the Court rejected the proposition that Section 12(a)(2) authorizes *no* equitable relief

whatsoever and categorically "restrict[s] purchasers … to a money judgment." 311 U.S. at 287. The Court's observation in *dicta* that a rescission suit may be maintained in equity "at least where there are circumstances making the legal remedy inadequate" underscores the limited scope of the question before the Court. *Id.* at 289.

Pinter is equally unhelpful to the government. In *dicta*, the Court noted that Section 12 was "adapted from common-law (or equitable) rescission," but even that *dicta* acknowledged that Section 12 "differs significantly" from its historical source material. 486 U.S. at 641 n.18. The Court then *equated* Section 12's common-law rescission remedy with the legal remedy of damages, *id.*, which only confirms that Section 12 rescission more closely tracks rescission at law rather than rescission at equity, *see* Pet.32-33.

The government does not seriously dispute this issue's importance. Instead, it quarrels with the idea that Section 12 cases particularly call on juries to interpret and exercise judgment. Opp.29. The district court's usurpation of those functions here—interpreting alleged misrepresentations, assessing materiality from the standpoint of a reasonable investor, and in many other ways—proves otherwise. The Seventh Amendment protects against such judicial assessments and entitles defendants to jury determinations—an especially imperative right when the defendant faces claims brought by the government seeking massive damages.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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