No. 17-10

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., CREDIT SUISSE MANAGEMENT LLC, CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK SECURITIES INC., HSBC SECURITIES (USA) INC., RBS SECURITIES INC., UBS SECURITIES LLC,

Petitioners,

—v.—

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

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

THOMAS C. RICE
Counsel of Record
ANDREW T. FRANKEL
LINTON MANN III
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-3073
trice@stblaw.com

Counsel for Petitioners Deutsche Bank Securities Inc., RBS Securities Inc., and UBS Securities LLC

(*Additional counsel listed on signature page*)

TABLE OF CONTENTS

I. THE FDIC DOES NOT DISPUTE THAT THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO MARKET STABILITY. 2

II. THE FDIC CANNOT RECONCILE THE DECISION BELOW WITH THIS COURT'S PRECEDENTS. 5

A. The Court of Appeals' decision conflicts with *CTS*. 5

1. The extender provision's text does not create an exclusive time limit. 5

2. The extender provision's purported purpose cannot override its plain text. 8

B. The Court of Appeals' decision cannot be squared with the presumption against implied repeals. 9

C. The FDIC's position is irreconcilable with *O'Melveny* and unanimous precedent under the FTCA. 11

TABLE OF AUTHORITIES

Page(s)

Cases:

Augutis v. United States,
732 F.3d 749 (7th Cir. 2013)...................... 11

California Public Employees' Retirement System v. ANZ Securities, Inc.,
137 S. Ct. 2042 (2017).............................. 1, 3

Campbell-Ewald Co. v. Gomez,
136 S. Ct. 663 (2016).................................... 5

Credit Suisse v. Simmonds,
566 U.S. 221 (2012).................................... 11

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014).......................... 4, 8, 9

De Buono v. NYSA-ILA Med. & Clinical Servs. Fund,
520 U.S. 806 (1997)...................................... 4

Encino Motorcars, LLC v. Navarro,
No. 16-1362, 2017 WL 2021593
(2017).. 5

Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.,
873 F.3d 85 (2d Cir. 2017) 4

Fed. Hous. Fin. Agency v. UBS Americas Inc.,
712 F.3d 136 (2d Cir. 2013) 7, 9

Hall v. Hall,
No. 16-1150, 2017 WL 1092484 (2017) ... 5

Harper v. Va. Dep't of Tax'n,
509 U.S. 86 (1993) ... 4

Henson v. Santander Consumer USA Inc.,
137 S. Ct. 1718 (2017) ... 9

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) ... 4

National Ass'n of Home Builders v. Defenders of Wildlife,
551 U.S. 644 (2007) ... 10

NCUA v. *Nomura Home Equity Loan, Inc.*,
764 F.3d 1199 (10th Cir. 2014) ... 6, 10

O'Melveny & Myers v. FDIC,
512 U.S. 79 (1994) ... 12

United States v. Wong,
135 S. Ct. 1625 (2015) ... 7

Univ. of Texas Sw. Med. Ctr. v. Nassar,
133 S. Ct. 2517 (2013) ... 9

Statutes:

11 U.S.C. 108(a) ... 2

Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 1821:

12 U.S.C. 1821(a)(1) 2

12 U.S.C. 1821(a)(2) 2

12 U.S.C. 1821(a)(4) 2

12 U.S.C. 1821(c)(1) 2

12 U.S.C. 1821(d)(14) 6

12 U.S.C. 1821(e)(8) 2

12 U.S.C. 1821(g)(1) 2

12 U.S.C. 1821(i)(1) 2

12 U.S.C. 1821(i)(3) 2

12 U.S.C. 1821(m)(10) 2

12 U.S.C. 1821(n)(12) 2

Miscellaneous:

U.S. Amicus Br., *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014) (No. 13-339) 8, 12

REPLY BRIEF FOR THE PETITIONERS

The FDIC does not negate the necessity or urgency of this Court's review of rulings that will sweep away an 80-year statute of repose described by this Court in its last term as "a necessity" to the financial markets.

Instead, the FDIC urges the Court to deny certiorari because it has denied certiorari before. Opp. 8, 21. But the assertion that there are "no changed circumstances" is wrong for at least three reasons. *First*, the FDIC disregards *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017) ("*CalPERS*"), which clarified not only that the Securities Act's statute of repose is "a necessity" for market stability, but also that it "displaces the traditional power of courts to modify statutory time limits in the name of equity." *Second*, the Court of Appeals recently expanded its decision to preempt *state* statutes of repose, thereby encroaching on the historical police powers of the states to set liability for their own market participants. *Third*, this Petition is the best vehicle to correct a decision that will otherwise override the legislative balance embedded in the securities laws.

The FDIC attempts to expand the plain text of the statute based on the FDIC's assertion of the statute's supposed purposes. The FDIC argues that "[t]he clear purpose *** of Section 1821(d)(14) [the Extender Statute] is to ensure that FDIC suits filed within *the statutory deadline* will be treated as timely, even if they would otherwise be time-barred by *other provisions of law*." Opp. 18 (emphasis

added). But that is not what the Extender Statute says, despite the fact that Congress knew how to say explicitly what the FDIC wants FIRREA to say. *See* Pet. at 21–22; *cf*. 11 U.S.C. 108(a). Rather, Congress provided that, "[n]otwithstanding any provision of any *contract*,[1] the applicable *statute of limitations*" shall be the three- or six-year period for contract or tort claims brought by the FDIC. *CTS* recognized that Congress was aware years before the Extender Statute was enacted that "statute of limitations" does not encompass statutes of repose. The FDIC argues that this statute is somehow different than the statute at issue in *CTS*, because here Congress created a new statute of limitations. Even if true, there is no basis to infer that Congress impliedly eradicated a statute of repose that has long been a critical component of the securities laws. That conclusion cannot be reconciled with the plain text of the statute, the presumption against implied repeals, or with the overriding structure and purpose of FIRREA.

I. THE FDIC DOES NOT DISPUTE THAT THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO MARKET STABILITY.

Since 1934, the Securities Act has offered "defendants full and final security after three years."

---

[1] This narrow peremptory language contrasts sharply with the peremptory language used throughout FIRREA, such as "Notwithstanding any other provision of Federal or State law." *See, e.g.*, 12 U.S.C. §§ 1821(a)(1)(e); 1821(a)(2)(A); 1821(a)(4)(C); 1821(c)(1); 1821(e)(8)(E); 1821(g)(1); 1821(i)(1); 1821(i)(3)(A); 1821(n)(12)(a); 1821(m)(10). *See also* Pet. at 21.

CalPERS, 137 S. Ct. at 2052. Congress's purpose in enacting this statute of repose was to provide "certainty and reliability" to financial markets. *Id.* at 2055. "These ends [] are a necessity in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors." *Id.* For that reason, Congress "grant[ed] complete peace to defendants" after three years. *CalPERS*, 137 S. Ct. at 2052. In fact, "[t]he original version of the 1933 Securities Act featured *** a 10-year outside limit." *Id.* at 2050. Just one year later, Congress changed "the outside limit to three years *** to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability." *Id.*

Thus, if there was any question as to the importance of the issue raised here, *CalPERS* reinforces why the Securities Act's statute of repose—and resulting "full and final security" to financial markets—may not be swept aside by judicial fiat. Tellingly, rather than meaningfully address *CalPERS*, the FDIC dismissively characterizes the statute of repose as a mere "time limit enacted in the 1930s" (Opp. 5) and limits its discussion of *CalPERS* to three sentences at the end of its brief.

The urgency and importance of this issue is further reinforced by the Court of Appeals' recent decision in *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 873 F.3d 85 (2d Cir. 2017), which expanded its decision to preempt *state* statutes of repose. Thus, the Court of Appeals' decision now permanently compromises both federal statutes of repose as well as "the historic police powers of the

States." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188 (2014) (Kennedy, J., concurring) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

Lastly, this case is an ideal vehicle for addressing the question presented, particularly now that the Second Circuit has clarified that it will not reconsider this issue. Without review by this Court, the volatility and uncertainty in the financial markets that Congress sought to restrain will be reintroduced permanently. Review is necessary to ensure that Congress's directives, as well as this Court's directives in *CTS* and *CalPERS*, are followed. *See, e.g.*, *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 812–813 (1997) (granting certiorari when "the court appear[ed] to have adhered to [its previous] approach, failing to give proper weight" to an intervening decision of this Court).[2]

---

[2] The FDIC's misleading assertion that "review would be especially unwarranted in this particular case because the question arises in an interlocutory posture" (Opp. 22) is wrong. This Petition arises out of a final judgment which dismissed the FDIC's case in full. That the Court of Appeals reversed and remanded does not make this case interlocutory. This Court does not—and should not—evade review of decisions reinstating previously dismissed cases. *E.g., Encino Motorcars, LLC v. Navarro*, No. 16-1362, 2017 WL 2021593 (2017); *Hall v. Hall*, No. 16-1150, 2017 WL 1092484 (2017).

II. THE FDIC CANNOT RECONCILE THE DECISION BELOW WITH THIS COURT'S PRECEDENTS.

A. The Court of Appeals' decision conflicts with *CTS*.

The FDIC does not address the fact that FIRREA, like CERCLA, "refers to a 'statute of limitations' in four separate places (with a fifth reference in the heading)," but "says nothing about extending, displacing, or altering any statutes of repose." Pet. App. 68a (Parker, J., dissenting). The FDIC instead emphasizes that "'*the* applicable statute of limitations with regard to *any* action brought by the [FDIC] as conservator or receiver *shall be*' the one that Section 1821(d)(14) specifies." Opp. 9 (quoting 12 U.S.C. 1821(d)(14)(A)). Petitioners agree: in actions brought by the FDIC on behalf of failed banks, FIRREA provides "the applicable statute of *limitations*" for state-law contract and tort claims. But the FDIC cannot explain how that language displaces applicable statute of *repose*. The FDIC's arguments are at odds with *CTS*.

1. The extender provision's text does not create an exclusive time limit.

a. The FDIC wrongly asserts that, unlike CERCLA, FIRREA's extender provision creates "a comprehensive, freestanding time limit." Opp. 10. Section 1821(d)(14) states that in any action brought by the FDIC as receiver, if the agency alleges contract or tort claims, "the applicable statute of limitations *** shall be" the longer of a specified

three- or six-year window, or the "period applicable under State law." 12 U.S.C. 1821(d)(14)(A)(i)–(ii). By its terms, FIRREA only displaces any statute of limitations that would be shorter than three years (for tort claims) or six years (for contract claims). The statutory text simply does not support the FDIC's argument that FIRREA's extended statute of limitations somehow overrides statutes of repose.

To evade *CTS*, the FDIC argues (Opp. 10, 13–14) that FIRREA creates a new federal statute of limitations, whereas CERCLA merely carves out an exception to state limitations periods. The argument is both wrong and irrelevant. CERCLA and FIRREA each provide a limitations framework by displacing some state laws while preserving others. FIRREA thus creates a narrow exception to shorter limitations periods for state-law contract or tort claims when those claims are brought by the FDIC as conservator or receiver. *See NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1235 (10th Cir. 2014) ("[T]he Extender Statute *** functions as a narrow exception for actions brought by [the conservator]."). In reaching the contrary conclusion, the Court of Appeals apparently placed great weight on FIRREA's use of the word "shall"—having emphasized it in both *First Horizon* and *UBS*. *See* Pet. App. 59a (citing *Fed. Hous. Fin. Agency v. UBS Americas Inc.*, 712 F.3d 136, 141 (2d Cir. 2013)). This approach to statutory interpretation cannot be squared with *United States v. Wong*, which held that such "mandatory language" is merely "mundane statute-of-limitations language" and that no significance can be drawn "however emphatically expressed those [mandatory] terms might be." 135 S. Ct. 1625, 1632 (2015) (internal quotation marks

omitted). The FDIC limits its discussion of *Wong* to a footnote, distinguishing it only on the ground that it concerned a jurisdictional question under the FTCA. That evades the point: most statutes of limitations use similar mandatory language, which clarifies only that it is mandatory *when* it applies, but in no way addresses *whether* it applies to statutes of repose.

Similarly, it does not matter whether the Extender Statute is labeled as a new federal limitations period or a modification of state limitations periods. Either way, FIRREA affects nothing more than the operation of any applicable statutes of limitations. The FDIC argues that "[t]he fact that Section 1821(d)(14) 'is *itself* a statute of limitations, and not a statute of repose *** provides no guidance on the question whether [it] *displaces*'" any statute of repose. Opp. 12 (quoting Pet. App. 57a). This makes no sense. The type of provision Congress established necessarily dictates its limits, and establishing a default federal statute of limitations does not require (or even suggest) setting aside statutes of repose. It requires setting aside only any shorter statute of limitations. And even if the *First Horizon* panel majority and the FDIC were right that FIRREA itself "provides no guidance," then the presumption against implied repeal should have resolved Congress's silence. *Infra*, pp. 9–10.

b. The FDIC alternatively argues (Opp. 12) that the term "statute of limitations" can sometimes refer broadly to both limitations and repose provisions. That argument fails for two independent reasons. First, in *CTS*, the FDIC contended—and this Court agreed—that by 1986 Congress fully

"recognized [the] line between statutes of limitations, which are considered procedural, and statutes of repose, which are substantive limits on liability." U.S. Amicus Br. 28–29, *CTS*, *supra* (No. 13-339); *see* *CTS*, 134 S. Ct. at 2186. If Congress understood the distinction in 1986, it certainly understood the distinction three years later when enacting FIRREA. Second, the FDIC points to nothing in FIRREA's text or structure indicating that Congress used the term "statute of limitations" in a less precise sense. Absent such evidence, *CTS* instructs that the term should be given "its primary meaning" as referring only to limitations, not repose. *Id.* at 2185. Or as Judge Parker put it, FIRREA "means exactly what it says." Pet. App. 62a, 67a, 69a.

2. The extender provision's purported purpose cannot override its plain text.

Because the FDIC contends that FIRREA's text "provides no guidance" (Opp. 12) whether it displaces statutes of repose, the FDIC's argument rests at bottom on FIRREA's legislative purpose. Opp. 3, 9–10, 15. This Court rejected that approach in *CTS*, holding that it was "error" to treat a statute's purpose "as a substitute" for "the statute's text and structure." 134 S. Ct. at 2185. The Second Circuit committed precisely that error in its 2013 pre-*CTS* decision in *UBS*, 712 F.3d at 142 ("Congress enacted HERA's extender statute to give [the agency] the time to investigate and develop potential claims"), and the *First Horizon* panel majority compounded that error by merely "defer[ring] to" *UBS*. Pet. App. 57a. But "no legislation pursues its purposes at all costs." *CTS*, 134 S. Ct. at 2185

(quotation marks omitted). Courts can therefore derive "legislative intention *** only from the words *** used," *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013) (citation omitted), and should not interpret statutes based on a party's "account of the statute's overarching goals," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). Moreover, by its terms, FIRREA's extender provision serves its purpose of allowing the FDIC more time by lengthening the Securities Act's shorter one-year limitations period to three years. The FDIC points to no evidence that Congress intended to completely extinguish Section 13's separate three-year repose period, which would substantively alter the nature of the claim itself.

B. The Court of Appeals' decision cannot be squared with the presumption against implied repeals.

When it wants to distinguish CERCLA and *CTS*, the FDIC frames FIRREA as a "comprehensive" time limit that is not "an exception to, or a modification of, existing time limits." Opp. 10; *see* Opp. 13–14. But when confronting the presumption against implied repeals, the FDIC says that FIRREA is merely "a narrow exception" to the Securities Act's repose period "for actions brought by the [FDIC] on behalf of failed banks." Opp. 17 (quoting *Nomura*, 764 F.3d at 1235). Under the FDIC's and the Court of Appeals' reading of Section 1821(d)(14), FIRREA eliminates the Securities Act's repose provision for claims brought by the FDIC. That is an "implied amendment[]" resulting in a

"partial repeal." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007).

Before a court may find that Congress impliedly displaced a prior statutory provision with a later enactment, however, Congress's intent must be "clear and manifest," and even then the two statutes must be in irreconcilable conflict. *Id.* at 662–63. Yet, despite the FDIC's bald assertion that its interpretation aligns with FIRREA's "clear" and "unambiguous purpose" (Opp. 18-19), the FDIC does not dispute that eight federal and state judges have disagreed (*see* Pet. 36–37 n.2), holding that FIRREA clearly does *not* preempt statues of repose. The notion that "Congress, without ever saying so, passed a statute of limitations that somehow eliminated a widely relied on and widely applied statute of repose violates the presumption against implied repeals." Pet. App. 69a (Parker, J., dissenting).

The only "clear" purpose that can be read from FIRREA's text is that Congress did not want the FDIC's tort and contract claims to be barred by shorter limitations periods. The FDIC points to no evidence that Congress also intended to eliminate substantive rights like those set forth in statutes of repose, and courts "are not at liberty to infer displacement from silence." *Id.* at 70a. The fact that Congress could have, but chose not to, explicitly displace all pre-existing state or federal time periods such as statutes of repose is "the most glaring indication" of what Congress intended. *Credit Suisse v. Simmonds*, 566 U.S. 221, 228 (2012).

C. The FDIC's position is irreconcilable with *O'Melveny* and unanimous precedent under the FTCA.

The FDIC does not dispute that, at the Government's urging, federal courts of appeals have unanimously held that the FTCA's statute of limitations does not displace otherwise applicable statutes of repose. *E.g.*, *Augutis v. United States*, 732 F.3d 749, 752 (7th Cir. 2013). In fact, the FDIC's only response is to say, in effect, that because the FTCA and FIRREA are different statutes, they need not be interpreted consistently. Opp. 21 ("The scope of the FTCA's sovereign-immunity waiver [] has no bearing on the interpretation of Section 1821(d)(14)."). Ultimately, the Government cannot disavow the position it takes when sued as a defendant: that a federal statute of limitations does not displace substantive rights conferred by statutes of repose. This principle should be applied consistently across the U.S. Code, and not only when it benefits the Government financially. Indeed, this Court recognized as much when rejecting what Justice Scalia characterized as the FDIC's "'more money' arguments." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994). *O'Melveny* clarifies that absent a *specific* provision of FIRREA, the FDIC merely steps "in the shoes of the insolvent [bank], to work out its claims under state law." *Id.* at 86–87. FIRREA provides a comprehensive receivership structure that allows the FDIC to bring claims that are defined by substantive state contract and tort law. It does not permit the FDIC to bring substantively different claims extinguished by statutes of repose. *See* Pet. at 30–31.

In *CTS*, the Government argued that Congress, by using the term "statute of limitations," had "hewed to a recognized line between statutes of limitations, which are considered procedural, and statutes of repose, which are substantive limits on liability." U.S. Amicus Br. 28–29. The FDIC's contrary argument here—that Congress used the same term three years later to silently abrogate the Securities Act's repose provision—should be rejected. To be sure, the Government also asserted in *CTS* that federal extender provisions "apply to the exclusion of any other time limitation." *Id*. at 22–23. But the Government's argument, from *CTS* through the present, has rested on a *non sequitur*: that because FIRREA establishes a "limitations period," "Congress intended the Extender Statute to supersede any and all other time limitations, including statutes of repose." Pet. App. 54a. Indeed, the plaintiffs in *CTS* made the same argument under CERCLA and "[this] Court rejected it." *Id*. at 67a (Parker, J., dissenting).

FIRREA's text, structure, and history show that when Congress refers to "the applicable statute of limitations," Congress "could only have meant a statute of limitations." *Id*. at 69a. Nonetheless, the FDIC has asserted claims throughout the country involving billions of dollars in securities issued more than a decade ago. Those claims have proceeded only because of lower courts' refusal to abide by this Court's decisions. The Court's review is urgently needed to restore the certainty provided to the financial markets by the Securities Act's statute of repose.

CONCLUSION

A writ of certiorari should be granted.

November 13, 2017

Respectfully submitted,

Thomas C. Rice
Counsel of Record
Andrew T. Frankel
Linton Mann III
SIMPSON THACHER &
BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
Phone: (212) 455-2000

Counsel for Petitioners Deutsche Bank Securities Inc., RBS Securities Inc., and UBS Securities LLC

Richard W. Clary
CRAVATH, SWAINE &
MOORE LLP
825 Eighth Avenue
New York, NY 10019
Phone: (212) 474-1000

Counsel for Petitioners Credit Suisse Securities (USA) LLC, Credit Suisse First Boston Mortgage Securities Corp., and Credit Suisse Management LLC

Michael O. Ware
Scott A. Chesin
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
Phone: (212) 506-2500

Counsel for Petitioner HSBC Securities (USA), Inc.