No. 17-1300

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

All agree that petitioners here did not sell any of the securities in question or receive any of the proceeds from those sales. Nor does the government contest 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*." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 214 (2002) (emphasis added). Under this Court's precedent, therefore, this should have been an easy case: Because petitioners did not possess any of the proceeds of the sales, they could not "restore to" FHFA the "funds or property" at issue in the underlying transactions. Instead, the judgment imposed personal liability against petitioners (including five individuals who never sold any securities) to pay over $800 million. And as the government concedes, the "imposition of such 'personal liability … to pay money' was a *legal remedy*." Opp.28 (quoting *Great-West*, 534 U.S. at 210) (emphasis added). Thus, under *Great-West* and the Seventh Amendment, petitioners were entitled to a jury trial.

In addition to that inescapable conflict with *Great-West*, the decision below is inconsistent with this Court's broader Seventh Amendment jurisprudence. The government does not dispute that the elements of a claim under Section 12(a)(2) parallel the elements of a claim under Section 11, which all agree is "legal" for Seventh Amendment purposes. Instead, the government asserts that the parallelism is irrelevant because the rescission remedy that Section 12 authorizes is equitable. But even the

authorities cited by the government confirm that rescission under Section 12 is a legal remedy under this Court's Seventh Amendment cases.

The government's arguments on the statute of repose issue are equally unavailing. The government's merits arguments falter given the statutory text and this Court's decisions in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), and *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014). And while the government contends that this Court has declined to review this issue in several recent cases, *all* were in an interlocutory posture and predated *ANZ*. Indeed, the government concedes that because similar extender provisions work to the government's exclusive benefit in multiple contexts, the issue has "continuing significance." This case is an ideal vehicle for review of this exceptionally important issue, as petitioners are liable for $800 million based on claims concededly barred by statutes of *repose* that proceeded only due to a statute-of-*limitations* extender.

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

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

The government agrees that a claim under Section 11 of the Securities Act triggers the Seventh Amendment right to a trial by jury, and 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 Section 12(a)(2)'s "similarities to Section 11 are immaterial"

because Section 12(a)(2)'s recission remedy is equitable. Opp.25. That claim lacks merit.

To be sure, the Seventh Amendment inquiry "primarily" depends on the nature of the remedy the claim authorizes and the claimant seeks. Opp.25. But that does not render irrelevant the first step in the inquiry—*i.e.*, whether the claim's elements mirror the elements of a claim that could be brought in pre-merger courts of law. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). Indeed, this Court's decisions hold otherwise. *See, e.g.*, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (holding that Seventh Amendment right applies to statutory copyright-infringement actions because "the common law and statutes in England and this country granted copyright owners causes of action for infringement"). The conceded "similarities" between Section 11 and Section 12(a)(2) thus militate strongly in favor of the conclusion that Section 12(a)(2) triggers the jury right.

As to remedy, the government's own description of what constitutes "equitable" rescission for purposes of the Seventh Amendment makes clear that the remedy that Section 12(a)(2) authorizes is legal, not equitable. The government contends that, at common law, "unilateral rescission" would have been an action at law, but that FHFA "did not unilaterally rescind the contract before bringing suit." Opp.23-24. The government ignores, however, that the district court found that FHFA "constructively tendered its securities as of September 2, 2011, the date of the initial complaint." Pet.App.480. And it is well-established that a unilateral offer to tender (which

indisputably occurred here) is the equivalent of a unilateral rescission (which the government concedes is an action at law). *See* Hugh S. Koford, *Rescission at Law and in Equity*, 36 Cal. L. Rev. 606, 607 (1948). Because FHFA tendered certificates at the outset, "the requirements of a unilateral rescission" were satisified and its suit was an "action at law." Opp.23.

The government argues that Section 12(b)'s loss-causation defense fits within general equitable principles. *See* Opp.26. But that ignores the relevant point, which is that "[a]t common law, equitable rescission required the seller to refund the buyer the *full original purchase price* in exchange for … the purchased item." Pet.21 (emphasis added); *see Lyon v. Bertram*, 61 U.S. (20 How.) 149, 154-55 (1857). That specific command cannot be squared with a loss-causation defense, which contemplates money paid to the buyer in an amount *less* than the "full original purchase price." Nor does the government offer any response to the fact that, under Section 12(b)'s loss-causation provision, a trier of fact *must* apply proximate-causation principles, in contrast to the discretion afforded equity courts. *See* Pet.21 & n.8.

Invoking *Deckert v. Independent Shares Corp.*, 311 U.S. 282 (1940), and *Pinter v. Dahl*, 486 U.S. 622 (1988), the government claims that "this Court has long made clear" that "rescission under Section 12(a)(2) is an equitable remedy." Opp.24-25. But as petitioners have explained (and the government does not answer), the government overreads these decisions, neither of which addressed whether Section 12(a)(2) claims trigger the Seventh Amendment. Pet.19-21. In *Deckert*, the Court simply rejected the

sweeping 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. *Pinter* addressed "whether one must intend to confer a benefit on himself or on a third party in order to qualify as a 'seller' within the meaning of" what is now Section 12(a)(1). 486 U.S. at 624-25. The Court's passing footnote commentary on Section 12's origins was thus *dicta*. And even that *dicta* acknowledged that while Section 12 was "adapted from common-law (or equitable) rescission," it nevertheless "differs significantly" from its historical source material. *Id.* at 641 n.18. And that was before loss-causation principles were introduced into the provision. *See* Pet.21.

The government highlights *Pinter*'s observation that a Section 12 plaintiff can "sue for damages" and the "damages calculation results in what is the substantial equivalent of rescission." Opp.25. But that remark does not support the government; *equating* Section 12's rescission remedy with the legal remedy of damages only underscores that Section 12 rescission more closely tracks rescission at law rather than rescission at equity. *See* Pet.18-19.

In short, *Pinter* and *Deckert* do not come close to demonstrating that Section 12(a)(2) claims do not trigger the Seventh Amendment right. If anything,

they show that this Court has not squarely addressed the question, confirming the need for review here.

B. Petitioners Who Never Owned the Securities in the First Place Were Entitled to a Jury Trial.

This Court held in *Great-West* 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 (emphasis added). The government concedes that the nine petitioners here never owned the securities at issue and never possessed the "particular funds or property" that FHFA paid for the securities. *See* Opp.28. The government also identifies no material difference between the restitution remedy in *Great-West* and the rescission remedy here. *See* Pet.22. Accordingly, under *Great-West*, because "the funds being sought" by FHFA "are not in the defendants' possession," a jury trial was "require[d]," even assuming that "the basis of the claim is" equitable. *Pereira v. Farace*, 413 F.3d 330, 346-47 (2d Cir. 2005) (Newman, J., concurring); *see* Pet.22-24.

The government's only response is to argue that rescission could be granted in equity even against a defendant who was not a party to the contract. Opp.27. But that was true only for a defendant who actually induced the fraudulent purchase, as the government's own authorities confirm. *See, e.g.*, *Gordon v. Burr*, 506 F.2d 1080, 1085 (2d Cir. 1974) (noting that "the wrongdoer who, though not a privy to the fraudulent contract, nonetheless induced the victim to make the purchase" must "restore the victim

to the status quo"). FHFA has never argued that any petitioner here "induced" the purchases.[1]

The government's attempt to distinguish *Great-West* is even less plausible. The government contends that under *Great-West*, an order to pay out of any "available funds" can be equitable, even if not directed to the "precise funds that were paid for the securities." Opp.28. But the relevant language in *Great-West* commands that an equitable remedy must "restore to the plaintiff *particular* funds or property *in the defendant's possession*." 534 U.S. at 214 (emphases added). Petitioners, including five individuals, indisputably never possessed the securities in question, and never possessed any of the proceeds from the sale of those securities. They were nevertheless held jointly and severally liable for the entire amount of money necessary to "satisfy[]" the $800 million judgment. Final Judgment at ¶2, Dkt.1717. Forcing petitioners to return to FHFA money they never possessed, in exchange for securities they never held, does not restore the status quo, and it is not a rescission. It is the imposition of "personal liability … to pay money," *Great-West*, 534 U.S. at 210, which, as even the government concedes, is a "legal remedy" triggering the Seventh Amendment jury right, Opp.28.

[1] Nor could FHFA have proved inducement. For example, at least two petitioners, Nathan Gorin and John McCarthy, were held liable solely for having signed the registration statements. *See* Pet.7 n.4; *see also* App.407-09.

C. This Issue is Exceptionally Important.

The government does not, and could not, dispute that the right to trial by jury in civil cases is "integral in our judicial system." *City of Morgantown v. Royal Ins. Co.*, 337 U.S. 254, 258 (1949). And if "any seeming curtailment of the right … should be scrutinized with the utmost care," *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935), then the need for scrutiny is heightened when the end result of a bench trial, rather than a trial by one's peers, is an $800 million judgment as to which every petitioner, including the five individual petitioners here, is jointly and severally liable.

The government instead argues only that the jury trial right is not *more* important in Section 12 cases than in other matters, because issues of reasonableness might not be front-and-center in such cases. Opp.29. In reality, however, all of the key questions in Section 12 cases turn on reasonableness. In assessing falsity, for example, the first step is interpretation—the question of how to reasonably read a representation in context. *See Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318, 1330 (2015). Likewise, materiality depends on how a representation "would have been viewed by the reasonable investor." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). The government suggests that it makes no difference whether a jury or judge addresses these interpretive questions. Opp.29. But that assertion is belied by the government's own tactics in this case, where the government dropped its Section 11 claims—which indisputably would have gone to a jury—only after a series of pre-trial rulings made clear that the district

judge viewed the government's case favorably. Pet.10. That stratagem underscores the importance of the Seventh Amendment, especially when a defendant faces massive claims brought by the government, and the need for this Court's review.

II. 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. The government offers little to defend the proposition that 12 U.S.C. §4617(b)(12) overrides statutes of repose like Section 13 of the Securities Act, preferring instead to emphasize that this Court has denied petitions presenting this issue in an interlocutory posture. 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. Instead, the government's principal textual argument is that the extender statute's "mandatory language" "precludes the possibility that some other limitations period might apply." Opp.13. 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*.

The government notes 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). But given the critical distinctions between statutes of limitations and statutes of repose, and the "complete defense" provided by Section 13 that "admits of no exception," *ANZ*, 137 S. Ct. at 2049, the absence of "guidance" in §4617(b)(12)'s text is fatal to the government's argument.

2. The government argues that Congress must have wanted FHFA to be able to evaluate potential claims unimpeded by "limitations periods" that might 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). The government also points to similar extender provisions to which Congress supposedly looked when enacting §4617(b)(12), but it identifies no decision holding that those provisions displaced statutes of repose, much less a decision postdating *CTS* and *ANZ*.

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. But *ANZ* unequivocally held that Section 13 "give[s] a defendant a *complete* defense to *any* suit" filed more than three years after the security is offered. 137 S. Ct. at 2049 (emphases added). Indeed, *ANZ* reinforces that repose means repose. Repose except for actions brought by the full prosecutorial force of the 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 contends 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).

4. The government's only argument in support of its contention that §4617(b)(12) preempts state statutes of repose is an assertion that §4617(b)(12) "clearly demonstrates" Congress' intent to preempt. Opp.21. But the "plain wording" of §4617(b)(12), which "necessarily contains the best evidence of Congress' preemptive intent," *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011), does not contain one reference to statutes of repose, much less state statutes of repose. *See* Pet.30-31.

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

Petitioners are liable for an *$800 million* judgment based entirely on an action by the government commenced *after* applicable repose periods had run, when they justifiably believed they

had obtained "complete peace." *ANZ*, 137 S. Ct. at 2052. The policies underlying statutes of repose, which focus on the equitable needs of the defendant, 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 government's exclusive benefit. Pet.25.

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." *Id.* at 22. This case alone comes to the Court after a final judgment—and after *ANZ*.

The government claims that the question presented is "of diminishing practical importance" because most FHFA cases have "worked their way through the courts." *Id.* But identical language is contained in extender statutes that are triggered every time a federally insured bank or credit union is placed in conservatorship and, as the government concedes, the question of whether these extender statutes displace statutes of repose has "continuing significance." *Id.* at 22-23. Given the continuing uncertainty over that question, this case presents an ideal vehicle for the Court to decide once and for all whether the promise of repose provided by statutes like Section 13 is real.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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