14-3648-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver for Colonial Bank,

Plaintiff-Appellant,

—against—

FIRST HORIZON ASSET SECURITIES, INC., FIRST HORIZON HOME LOAN CORPORATION, CREDIT SUISSE SECURITIES (USA) LLC, DEUTSCHE BANK SECURITIES INC., FTN FINANCIAL SECURITIES CORP., HSBC SECURITIES (USA) INC., RBS SECURITIES INC., UBS SECURITIES LLC, WELLS FARGO ASSET SECURITIES CORPORATION,

Defendants-Appellees,

CHASE MORTGAGE FINANCE CORP., JP MORGAN CHASE & CO., JP MORGAN SECURITIES LLC, CITICORP MORTGAGE SECURITIES, INC., CITIMORTGAGE, INC., CITIGROUP GLOBAL MARKETS INC., ALLY SECURITIES LLC, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE AMERICAN BANKERS ASSOCIATION, AND THE CLEARING HOUSE LLC IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that *amici curiae* do not issue stock or have parent corporations that issue stock.

The Clearing House is a limited liability company and as such has no shareholders. Rather, each member holds a limited liability company interest in The Clearing House that is equal to each other member's interest, none of which is more than a 10% interest in The Clearing House. SIFMA and the American Bankers Association are non-profit trade groups and have no shares or securities that are publicly traded.

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INTEREST OF *AMICI 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 United States regional member of the Global Financial Markets Association.[1]

The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. The ABA, whose members hold a substantial majority of domestic assets of the banking industry of the United States and are leaders in all

[1] This brief was not authored in whole or in part by counsel for any party, and no counsel or party other than *amici curiae*, their members or their counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, in accordance with Fed. R. App. P. 29(a).

forms of consumer financial services, often appears as *amicus curiae* in litigation that affects the banking industry.

The Clearing House, established in 1853, is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively hold more than half of all U.S. deposits and which employ over one million people in the United States and more than two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost $2 trillion each day, representing nearly half of all automated clearing house, funds transfer and check-image payments made in the United States.

In this action, the Federal Deposit Insurance Corporation ("FDIC") concedes that it did not bring its claims under the Securities Act of 1933 (the "Securities Act") within the period allowed by its three-year statute of repose.

Defendants therefore moved for judgment on the pleadings on those claims because they are barred by that statute of repose. The FDIC responded that Defendants' motion should be denied based on a provision of 12 U.S.C. § 1821(d)(14) (the "FDIC Extender Statute") that was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). The FDIC Extender Statute extends the "statute of limitations" for certain claims bought by the FDIC. However, the Statute clearly and unambiguously extends *only* the "statute of limitations" for the FDIC's state-law "contract" and "tort" claims, and not the statute of repose for its Securities Act claims. Accordingly, the District Court properly rejected the FDIC's Extender Statute argument and granted Defendants' motion. The court explained that the plain language of the FDIC Extender Statute and the United States Supreme Court's decision in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014), compel the conclusion that the FDIC Extender Statute "does not alter applicable statutes of repose," and the FDIC's Securities Act claims are therefore time-barred. JA 177.

Amici respectfully submit this brief in support of affirmance of the District Court's order dismissing the action. *Amici* and their members have a strong interest in this appeal for three principal reasons.

First, the Supreme Court in *CTS* enunciated clear and categorical principles on the important questions of (i) whether the Congressional extension of "statutes of limitations" for certain state law claims also extends statutes of repose for federal and statutory claims, and (ii) whether the clear and unambiguous text of a Congressional statute should yield to a lower court's view of the purpose of the statute. Those principles, which the court below correctly applied in this action, have a significant impact on *amici*'s members and the securities markets because they minimize uncertainty, which is the primary purpose of statutes of repose. The FDIC's arguments on this appeal, however, would undermine those principles.

Second, *amici* and their members rely on the fair, consistent and timely enforcement of federal securities laws to deter and remedy wrongdoing. One key component of that enforcement is the consistent application of the statutes of repose that are a critical part of those laws and serve purposes wholly distinct from statutes of limitation, including in particular the three-year statute of repose in Section 13 of the Securities Act. By establishing a definitive outside time limit for claims that cannot be tolled, statutes of repose provide the markets with a measure of certainty and finality, set a time after which market participants are free from the fear of lingering liabilities and stale claims, and ensure that claims can be adjudicated based on evidence that is fresh. This is important for financial planning and operations. The unwarranted narrowing of such statutes would undermine the finality upon which the orderly operation of the markets depends.

Third, *amici* and their members recognize the importance of the application of federal securities and other laws as they are written by Congress, not based on subjective assertions of legislative purpose that do not account for the often competing objectives that lawmakers weigh in drafting particular provisions. That is essential to ensure predictability. Predictability is crucial for business planning and the effective and efficient functioning of the securities markets because it allows participants to understand how to comply with the law and how the law will be enforced. *Amici* often appear as *amici curiae* in appeals that implicate these concerns.

This case also has far-reaching practical significance for *amici*'s members and for the securities industry as a whole. The FDIC, the National Credit Union Administration Board ("NCUA") and the Federal Housing Finance Agency ("FHFA") have brought numerous federal and state law securities claims against financial institutions that are barred by the Securities Act's three-year repose period or other applicable statutes of repose, but seek to avoid dismissal of such claims based on the same incorrect construction of extender statutes that the FDIC urges on this appeal.

SUMMARY OF ARGUMENT

This case concerns the question of whether extender statutes that are expressly limited to "statutes of limitations" for state law "contract" and "tort" claims should nevertheless also be applied to statutes of repose under the Securities Act or other federal statutes. *Amici* support Defendants' argument, and the District Court's holding, that the FDIC Extender Statute should be construed in accordance with its plain language and the Supreme Court's prior rulings and thus should not apply to statutes of repose. *Amici* submit this brief to elaborate on the reasons why the ruling below should be affirmed, and why the FDIC Extender Statute should not be expanded beyond the limited scope expressly provided by Congress.

Congress long ago included in Section 13 of the Securities Act both a statute of limitations and a three-year statute of repose. *See* 15 U.S.C. § 77(m).

In 1989, Congress enacted FIRREA, which added the FDIC Extender Statute that provides as follows:

> (14) *Statute of limitations* for actions brought by conservator or receiver
>
> (A) In general
>
> Notwithstanding any provision of any contract, *the applicable statute of limitations* with regard to any action brought by the [FDIC] as conservator or receiver shall be—
>
>> (i) in the case of any contract claim, the longer of—

> (I) the 6-year period beginning *on the date the claim accrues*; or
>
> (II) *the period applicable under State law*; and
>
> (ii) in the case of *any tort claim* . . ., the longer of—
>
> (I) the 3-year period beginning *on the date the claim accrues*; or
>
> (II) *the period applicable under State law*.
>
> (B) Determination of the date on which a claim accrues
>
> For purposes of subparagraph (A), the date on which the *statute of limitation* begins to run on any claim described in such subparagraph shall be the later of—
>
> (i) the date of the appointment of the [FDIC] as conservator or receiver; or
>
> (ii) the date *on which the cause of action accrues*.

12 U.S.C. § 1821(d)(14) (emphasis added).

The FDIC Extender Statute is clear and unambiguous. It extends only the "statute of limitations" for state law "contract" and "tort" claims brought by the FDIC as a conservator or receiver. Statutes of repose are not mentioned. Nothing in the FDIC Extender Statute extends the statute of repose for any claims.

There was nothing novel about Congress overriding statutes of limitations while continuing to give effect to applicable statutes of repose. The Supreme Court explained in *CTS* that Congress did just that in 1986 when it amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") to extend the "commencement date" of the statute of limitations but not the repose period for certain environmental actions under State law. 134 S. Ct. at 2191. Congress enacted the FDIC Extender Statute only three years later. As the District Court found, the application of *CTS*'s logic to the FDIC Extender Statute compels the conclusion that, like the CERCLA extender statute enacted only three years earlier, "the FDIC Extender Statute does not alter applicable statutes of repose." JA 177.

In *CTS*, the Supreme Court addressed the CERCLA extender provision, Section 9658, which, in language that is in all material respects similar to the FDIC Extender Statute, extends statutes of limitations for state-law tort claims by persons exposed to a toxic contaminant. The Supreme Court found that Section 9658 extends *only* statutes of limitations and *not* statutes of repose. The District Court in this case correctly held that the same textual language, Congressional intent, and pertinent public policies require the same outcome here.

In contrast, the FDIC assumes here that Congress in 1989 no longer understood the statutory distinction between statutes of limitations and statutes of repose that the Supreme Court found Congress made in CERCLA in 1986. If statutes are interpreted based on the assumption that Congress did not understand critical distinctions between terms (such as statutes of limitations and statutes of repose), and based on subjective judicial views of how best to accomplish legislative purposes, there is no limit to the manner in which statutes may be misconstrued. That would undermine the bedrock principle of predictability upon which *amici*'s members and all market participants rely. It is vital to the securities industry and financial markets that applicable laws are construed and applied as enacted by Congress and state legislatures, and that statutes of repose are strictly enforced. This Court should affirm the decision below.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE FDIC EXTENDER STATUTE AND THE SUPREME COURT'S DECISION IN *CTS* REQUIRE THE AFFIRMANCE OF THE DECISION BELOW

A. The Supreme Court's Decision in *CTS* and the Plain Language of the FDIC Extender Statute Establish that the FDIC Extender Statute Applies Only to "Statutes of Limitation" and Does Not Displace Statutes of Repose

In *CTS*, the Supreme Court resolved a division among the lower courts as to whether Congressionally-enacted extender provisions that expressly apply to statutes of limitations also displace statutes of repose. The Court held that CERCLA's extender provision does *not* displace statutes of repose. The Court based its ruling primarily on the "natural reading of [CERCLA's] text" which — like the FDIC Extender Statute — refers only to statutes of limitations and contains other textual features that are incompatible with its application to statutes of repose. 134 S. Ct. at 2188. The application of this ruling to the plain language of the FDIC Extender Statute, which is in all material respects similar to the

CERCLA extender statute, requires the affirmance of the decision below dismissing the FDIC's Securities Act claims.

The Supreme Court has long emphasized that "the starting point for interpreting a statute is the language of the statute itself," 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). This Court too has emphasized the importance of this approach to statutory construction. *See United States v. Desposito,* 704 F.3d 221, 225 (2d Cir. 2013) ("In construing a statute, we begin with the plain language, giving all undefined terms their ordinary meaning. Absent ambiguity, our analysis also ends with the statutory language. We must presume that the statute says what it means.") (citations and internal quotation marks omitted). The District Court correctly applied this bedrock principle to the FDIC Extender Statute, and followed the Supreme Court's logic and analysis in *CTS* concerning the textually similar CERCLA extender statute, in finding that the FDIC's claims here are time-barred by the Securities Act's statute of repose.

There is no dispute that the Securities Act contains a three-year statute of repose. *Police & Fire Retirement Sys. of Detroit v. Indymac MBS, Inc.*, 721 F.3d 95, 107 (2d Cir. 2013). This Court has ruled that a statute of repose, such as the one at issue here, "'extinguishes [a] cause of action ... after a fixed period of time ... regardless of when the cause of action accrued.'" *Id.* at 100 n.1 (alteration in original) (citation omitted). "In contrast to statutes of limitations, statutes of repose 'create[] a *substantive* right in those protected to be free from liability after a legislatively-determined period of time.'" *Id.* at 106 (alteration in original) (citation omitted).

There is also no dispute that the FDIC Extender Statute, like the extender provision at issue in *CTS*, refers many times to "statute[s] of limitations" but never mentions statutes of repose. *CTS* explained the "critical distinction" between those two concepts, and concluded that Congress was well aware of the difference at the time the CERCLA extender statute was enacted in 1986, yet chose not to refer to statutes of repose in that provision. 134 S. Ct. at 2186. That awareness "can fairly be imported to Congress three years later when it enacted" the FDIC Extender Statute." *FDIC v. Merrill Lynch, Pierce, Fenner & Smith*, 2014 WL 4161561, at *7 (W.D. Tex. Aug. 18, 2014). In *In re Countrywide Fin. Corp. Mort.-Backed Secs. Litig.*, 966 F. Supp. 2d 1031, 1039 (C.D. Cal. 2013), the court observed that a "search of the Congressional record from 1985 until the enactment of FIRREA reveals at least forty-four separate uses of the phrase 'statute of repose' across twenty-seven different statements by members of Congress." The *Countrywide* court concluded that these statements "both prior to and contemporaneous with the enactment of FIRREA suggest that Congress understood the meaning of the term 'statute of repose' but nevertheless failed to use it in the [FDIC] extender statute." *Id.* at 1037. As the court below found, "when faced with a statute which presented both a statute of limitations and a statute of repose, Congress chose language which focused on and changed the statute of limitations, and left the statute of repose untouched. That gives no support to the FDIC's argument that it intended to replace both." JA 175. Thus, the Supreme Court's strict statutory construction in *CTS* applies with equal force here. Congress, in making a similar choice to refer only to statutes of limitations in the FDIC Extender Statute, did *not* intend to displace statutes of repose.[2]

[2] Contrary to FDIC's argument, this Court's pre-*CTS* decision in *Fed. Housing Fin. Agency v. UBS Americas, Inc.*, 712 F.3d 136 (2d Cir. 2013), does not compel a different result because that decision has been displaced by the Supreme Court's ruling on the same issue in *CTS*. As Judge Swain recently explained in *FDIC v. Bear Stearns Asset Backed Sec. I LLC*, No. 1:12-cv-4000-LTS, 2015 WL 1311300, at *7 (S.D.N.Y. Mar. 24, 2015), in reaching precisely the same conclusion that the lower court reached here, "[t]he analytical framework set out by the Supreme Court in [*CTS*] calls into question the Second Circuit's analysis of the extender provision of HERA in its *UBS* decision, implicitly overruling material aspects of the *UBS* decision's rationale." *See also FDIC v. Merrill Lynch*, 2014 WL 4161561, at *9 ("*UBS*'s conclusion is irreconcilable with the Supreme Court's interpretation of § 9658 in *Waldburger*, and it is ultimately the Supreme Court's analysis which must control."). Nor do the other cases cited by the FDIC support a contrary conclusion. In *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014), *cert. denied*, __ S. Ct. __, No. 14-379, 2015 WL 132974 (Jan. 12, 2015), which involved an extender statute that is virtually identical to the FDIC Extender Statute, the Tenth Circuit reached an incorrect result because it failed properly to take into account the Supreme Court's decision in *CTS* and the substantial similarities between the NCUA and CERCLA extender statutes, and mistakenly relied on generalized pronouncements about FIRREA's remedial purpose to override the extender statute's plain text.

CTS teaches that the FDIC Extender Statute does not apply to statutes of repose for several additional reasons. *First*, *CTS* held that CERCLA's use of the concept of "accrual" indicates that it was intended to apply only to statutes of limitations because that concept is not relevant to repose. 134 S. Ct. at 2187. That logic applies completely to the FDIC Extender Statute which also employs the concept of accrual. Under that statute, the "statute of limitation . . . begins to run" on the date the FDIC becomes receiver or "the date on which the cause of action *accrues*." 12 U.S.C. § 1821(d)(14)(B) (emphasis added). Consistent with *CTS*, the court below found that "the concept of accrual, which is central to the [FDIC] Extender Statute, is wholly absent from the 1933 Act's statute of repose." JA 174.

Second, CERCLA, like the FDIC Extender Statute, "describe[s] the covered [time] period in the singular," not the plural as would be expected if it applied both to the statute of limitations and the statute of repose. *CTS*, 134 S. Ct. at 2186. CERCLA's Section 9658 refers to "the applicable limitations period," "such period" and "the statute of limitations established under State law," 42 U.S.C. § 9658(a)(1) & (2), and the FDIC Extender Statute makes "the applicable

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Similarly, in *FDIC v. Rhodes*, 336 P.3d 961 (Nev. 2014), the Nevada Supreme Court, in a 4-3 decision, improperly relied on superficial differences between the CERCLA and FDIC extender statutes and failed even to address *CTS's* holding that the absence of any reference to "statute[s] of repose" is "instructive" in determining that an extender statute applies only to statutes of limitations. 134 S. Ct. at 2185.

statute of limitations" the longer of the period mandated by the statute or "the period applicable under State law." Thus, the Supreme Court's finding that CERCLA's reference to a single covered time period "would be an awkward way to mandate the pre-emption of two different time periods with two different purposes," *CTS*, 134 S. Ct. at 2187, is equally applicable to the FDIC Extender Statute.

Third, CERCLA, like the FDIC Extender Statute, refers to existing actions. The Statute defines "the applicable statute of limitations" for certain claims "with regard to any *action* brought by" the FDIC. 12 U.S.C. § 1821(d)(14)(A) (emphasis added). The Supreme Court explained in *CTS* that CERCLA's reference to a "civil action" "presupposes that a [covered] civil action exists" and is inconsistent with a statute of repose, which "can prohibit a cause of action from coming into existence." 134 S. Ct. at 2187. Accordingly, consistent with *CTS*, the District Court was correct in its finding that the similar language of the FDIC Extender Statute was designed "to encompass only statutes of limitations," which generally begin to run after a cause of action accrues. JA 175.

The FDIC's argument that the plain language of the FDIC Extender Statute, its similarities to CERCLA, and the Supreme Court's logic in *CTS*, should give way to the FDIC's parochial pronouncements about the remedial purpose of the Statute (Br. 35-37), is untenable because it ignores the fundamental nature of the legislative process. When Congress crafts complex legislation, it inevitably balances competing policy goals. For example, CERCLA was concerned with the laudable goals of environmental remediation, addressing public health threats, and providing for liability of persons responsible for hazardous waste. FIRREA was intended, among other things, "to reform, recapitalize, and consolidate the Federal deposit insurance system," as well as to "enhance the regulatory and enforcement powers of Federal regulatory agencies" for financial institutions. 135 Cong. Rec. S10182-01, 101st Congress, First Session, 1989 WL 193738, (Aug. 4, 1989). However, the Supreme Court in *CTS* rejected the argument that such laudable goals — or judicial views as to how they are best achieved — can override the plain language of a statute. Instead, the Court reaffirmed the fundamental principle that "Congressional intent is discerned primarily from the statutory text." 134 S. Ct. at 2185.

As the Supreme Court explained in *CTS*, "almost 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. United States*, 480 U.S. 522, 525-26 (1987)). The compromises Congress reached in trying to achieve its goals are reflected in the language it enacted. As the Supreme Court explained in *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.

"Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

Indeed, it has been a dominant theme of the Supreme Court in recent terms that legislation must be enforced in accordance with its plain language and not according to a judicial assessment of how best to effectuate a perceived legislative purpose. *See, e.g., Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (applying "plain text" of the federal bank fraud statute, which does not require proof of intent to defraud a financial institution, even though that extends its coverage "to a vast range of fraudulent schemes, thus intruding on the historic criminal jurisdiction of the States"); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196, 1199-1200 (2013) ("under the plain language of Rule 23(b)(3)," securities fraud plaintiffs are not required to prove materiality at the class-certification stage even though "certain 'policy considerations' militate in favor of requiring [such] proof").[3]

Thus, when the Ninth Circuit recently limited the statute of repose in Section 16(b) of the Securities Exchange Act of 1934 based on its view of the policy behind the statute, instead of applying its plain language, the Supreme Court reversed. The Supreme Court's explanation is instructive as to why the FDIC Extender Statute should not be applied to statutes of repose here:

> Congress could have very easily provided that 'no such suit shall be brought more than two years after the filing of a statement under subsection (a)(2)(C).' But it did not. The text of Section 16 simply does not support [such a] rule. . . . [Respondent] disregards the most glaring indication that Congress did not intend that the limitations period be categorically tolled until the statement is filed: The limitations provision does not say so.

Credit Suisse Sec. (USA) LLC v. Simmonds, 132 S. Ct. 1414, 1419-20 (2012).

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[3] *See also Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 1999-2000, 2006 (2012) (the "ordinary meaning" of 28 U.S.C. § 1920, which awards costs for "compensation of interpreters," excludes the cost of 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*, 132 S. Ct. 1882, 1886, 1893 (2012) (under a "plain and natural reading" of Bankruptcy Code § 503(b), the phrase "any tax . . . incurred by the estate" does not cover tax liability resulting from individual debtors' sale of a farm even though "there may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable"); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1887, 1890, 1895 (2011) (the word "report" in the False Claims Act's public disclosure bar "carries its ordinary meaning" and thus includes responses to FOIA requests even though this permits potential defendants to "insulate themselves from liability by making a FOIA request for incriminating documents").

The Supreme Court has repeatedly reminded courts not to "improve" or "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 concerns would infringe on the role of our elected legislators. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) (declining to "read an absent word into the statute" out of "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill."); *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them. . . . [T]he text . . . may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted.").

Failing to follow express statutory language would create great uncertainty as to how laws will be interpreted and enforced. *Amici* strongly urge that the construction of the FDIC Extender Statute should begin and end with its plain and unambiguous language.

B. The Plain Language of the FDIC Extender Statute Is Limited to State Common Law Contract and Tort Claims

The FDIC Extender Statute does not apply to the FDIC's Securities Act claims for another independent reason. The plain language of the FDIC Extender Statute refers only to state-law "contract" and "tort" claims, 12 U.S.C. § 1821(d)(14)(A), and not to federal claims or statutory claims. Contrary to the FDIC's arguments, the FDIC Extender Statute's statement that it applies to "any *action* brought by" the FDIC does not have a broad displacing effect because it does not mean that it applies to every *claim* asserted in such actions. 12 U.S.C. § 1821(d)(14)(A) (emphasis added).[4]

Congress's distinction in the text of the FDIC Extender Statute between "actions," and "claims" within those actions, demonstrates that it did not treat those words as synonyms. The FDIC Extender Statute refers to and modifies

[4] The FDIC argues that the word "any" has an expansive meaning (Br. 20-21), but that word modifies the word "action," not "claim." The word "any" "must 'be limited' in [its] application 'to those objects to which the legislature intended [it] to apply.'" *Small v. United States*, 544 U.S. 385, 388 (2005). Moreover, "any" "can and does mean different things depending upon the setting." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004). It can "never change in the least [] the clear meaning of the phrase selected by Congress . . . ." *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012). Accordingly, courts commonly interpret its meaning in the context in which the word is used. *See, e.g.*, *Nixon*, 541 U.S. at 132 ("any entity" refers only to private and not public entities). The cases the FDIC cites on this point are not to the contrary. They interpreted the relevant statutory language in accordance with its plain meaning and properly limited the application of the word "any" to the object identified in the statute. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008) ("any" "other law enforcement officers" means "law enforcement officers of whatever kind").

the statutes of limitations for only two types of *claims* — "tort claim[s]" and "contract claim[s]" — and only to the extent those *claims* arise "under State law." *Id.* The text therefore provides no basis to read the FDIC Extender Statute as applying to any other claim. Indeed, Congress did not and could not have intended that the FDIC Extender Statute apply to any other claims because it does not say *how* the statutes of limitations for any other claim should be changed.[5]

Thus, since the FDIC's Securities Act claims here are statutory claims, and indeed *sui generis* statutory claims, not "tort" or "contract" claims, the

[5] The fact that the FDIC Extender Statute refers only to state law "contract" and "tort" claims further demonstrates Congress's intent for a narrow application, because it does not include claims "founded upon" a tort or a contract to which 28 U.S.C. § 2415(a) applies. The absence in the FDIC Extender Statute of such "founded upon" language — which has been held, in the application of Section 2415, to invite analogies between statutory claims and tort or contract claims — reflects Congress's decision to limit the scope of the FDIC Extender Statute to the state common law contract and tort claims to which it refers. *See Johnson v. United States*, 225 U.S. 405, 415 (1912) ("A change of [statutory] language is some evidence of a change of purpose."). Although a statutory claim may be "founded upon" a contract or tort, that does not mean a particular statutory claim is a "tort" or "contract" claim. In fact, numerous courts have ruled to the contrary. *See, e.g.*, *In re Zilog, Inc.*, 450 F.3d 996, 998 (9th Cir. 2006); *Wilson v. Saintine Exploration & Drilling Corp.*, 872 F.2d 1124, 1127 (2d Cir. 1989). Indeed, even courts applying the broader language of Section 2415 have declined to apply it to *sui generis* statutory claims that are not grounded on common law claims. *See, e.g.*, *United States v. Tri-No Enters., Inc.*, 819 F.2d 154, 158-59 (7th Cir. 1987) (claim under Surface Mining Control and Reclamation Act for reclamation fees); *United States v. Palm Beach Gardens*, 635 F.2d 337, 339-40 (5th Cir. 1981) (claim under Hill-Burton Act for recovery of federal funds used in construction of non-profit hospital); *United States v. Lutheran Med. Ctr.*, 680 F.2d 1211, 1214 (8th Cir. 1982) (claim under Community Mental Health Center Act to recover federal grant).

FDIC Extender Statute does not apply to them. *See Wilson v. Saintine Exploration & Drilling Corp*., 872 F.2d 1124, 1127 (2d Cir. 1989) (quoting and agreeing with SEC position that "Section 12(2) does not permit an analogy to tort or criminal law" and "is not derived from tort law principles"); *Burnett v. S.W. Bell Tel., L.P.*, 151 P.3d 837, 843 (Kan. 2007) (claim under ERISA § 510 is not a tort); *Benedetto v. PaineWebber Grp., Inc*., 1998 WL 568328, at *4 (10th Cir. Sept. 1, 1998) (unpublished) (distinguishing securities and tort claims); *Malley-Duff & Assoc., v. Crown Life Ins. Co*., 792 F.2d 341, 353 (3d Cir. 1986) ("civil RICO is truly *sui generis* and that particular claim cannot be readily analogized to causes of action known at common law") *aff'd*, 483 U.S. 143 (1987); *Chevron Chem. Co. v. Voluntary Purchasing Grp. Inc.*, 659 F.2d 695, 702 (5th Cir. 1981) (because the Lanham Act "created a *sui generis* federal statutory cause of action," common law trade dress infringement precedent was not controlling).

The FDIC Extender Statute also should not be read to apply to federal claims because it would defeat the statutory purpose reflected in the plain language of the Statute that there be *two* alternative statutes of limitations applicable to claims covered by the Statute, and would have the perverse effect of *reducing* the FDIC's time to bring some federal claims. The Statute's introductory paragraph states that the statute of limitations for "contract" and "tort claims" — the only claims to which it refers — shall be "the longer of" a new period set forth in subparagraph (I) of the Statute or, pursuant to subparagraph (II), "the period applicable under State law." 12 U.S.C. § 1821(d)(14)(A)(i) & (ii). But subparagraph (II) has no possible application to federal claims because it does not refer to the period applicable under federal law. 12 U.S.C. § 1821(d)(14)(A)(i)(II) & (ii)(II). Thus, the Statute's reference to "the longer of" two applicable periods would make no sense as to federal claims if they were covered.

Furthermore, even if the Statute's reference to "any tort claim" also applied to federal claims, it would not preserve the pre-existing federal statute of limitations for such federal claims when it is longer than the three year alternative provided by subparagraph (A)(ii)(I) of the Statute. Thus, that application would have the perverse effect of *reducing* to three years the FDIC's time to bring actions that would otherwise be governed by longer federal statutes of limitations. *See, e.g.*, *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 143 (1987) (four-year statute of limitations for RICO claims); 15 U.S.C. § 15(b) (four-year statute of limitations for Clayton and Sherman Act claims); 28 U.S.C. § 1658(a) (four-year statute of limitations for federal claims without a specific statute of limitations). There is nothing in the text of FIRREA to support that untoward outcome. For all of these reasons, the more natural and logical reading of the text is that the FDIC Extender Statute does *not* apply to federal claims at all. *CTS*, 134 S. Ct. at 2188.[6]

The distinction between statutory claims created by Congress and state common law contract and tort claims is important to *amici* and their members. When Congress enacts statutes that create new private securities law claims, the legislation reflects a balancing of public policies and competing factors. One of the key legislative determinations is the point at which such claims are deemed to be abolished by the passage of time, regardless of when the plaintiff's injury occurred or was discovered. That determination should not be overruled by statutes of limitations applicable to common law contract and tort claims.

[6] The FDIC has previously argued that the plain meaning of Congress' express limitation of the Extender Statute to "contract claim[s]" and "tort claim[s]" that arise "under State Law" should be ignored based on language in this Court's *UBS* decision and the Tenth Circuit's holding in *Nomura I*. While those pre-*CTS* decisions did reject this express limitation, they did so based on a judicial assessment of Congress's supposed purpose in passing the Extender Statute, the very mode of analysis the Supreme Court clearly rejected in *CTS*. *See UBS*, 712 F.3d at 142 ("It would have made no sense for Congress to have carved out securities claims from the ambit of the extender statute, as doing so would have undermined Congress's intent to restore Fannie Mae and Freddie Mac to financial stability."); *Nat'l Credit Union Admin. Bd. 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 once it assumes control of a failed credit union.").

II. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED TO PRESERVE CONGRESSIONALLY-ENACTED STATUTES OF REPOSE

Statutes of repose in general, and the Securities Act's three-year statute of repose for strict liability in particular, are critical to ensure certainty and finality in the securities industry. *CTS* explained the important rationale behind such statutes: "[s]tatutes 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) (statute of repose "serves the need for finality in certain financial and professional dealings").

Statutes of repose are particularly important to ensure finality in the context of strict liability claims under the Securities Act. As the Tenth Circuit has explained, the "legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule [in Section 13] was to be absolute." *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1435-36 (10th Cir. 1991) (citation and quotation marks omitted), *judgment vacated on other grounds by Dennler v. Trippet*, 503 U.S. 978 (1992). Indeed, Congress quickly shortened the Securities Act's statute of repose to three years when it realized that the strict liability created by the Act was stifling the economy. 78 Cong. Rec. 8709-10 (1934) ("it is well known that because of this law the issuance of securities has practically ceased").

No less today than 80 years ago, statutes of repose enable financial institutions to free up for productive use capital that might otherwise be tied up indefinitely in reserves to cover potential liability. The Securities and Exchange Commission has extolled the beneficial purposes of the Securities Act's statute of repose: "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." Brief of the SEC, as Amicus Curiae at *8, *P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92 (2d Cir. 2004) (No. 02-7680), 2003 WL 23469697.

Section 13's statute of repose is also critical because it 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). It further prevents strategic delay by plaintiffs, who could otherwise seek "recoveries based on the wisdom given by hindsight" and the "volatile" prices of securities. *Short v.*

Belleville Shoe Mfg. Co., 908 F.2d 1385, 1392 (7th Cir. 1990). Instead, statutes of repose encourage prompt enforcement of the securities laws and serve cultural values of diligence. They also have the benefit of protecting new shareholders, bondholders and management who were not associated with a business at the time of challenged conduct from liability for that conduct.

Allowing the FDIC's claims here to proceed would undercut these important objectives. Long-dead Securities Act claims could be resurrected despite the contrary mandate of its statute of repose. Moreover, potential liability for such resurrected claims in connection with future bank failures may extend virtually indefinitely because claims may not even accrue under the FDIC Extender Statute until the FDIC is appointed as the receiver or conservator of the failed bank, an event that is untethered to any aspect of the alleged wrongdoing and could occur at any time.

The Supreme Court's decision and analysis in *CTS* have put to rest any question whether similar extender statutes apply to statutes of repose. The court below and other courts have recognized this. *See, e.g.*, *FDIC v. Bear Stearns*, 2015 WL 1311300, at *7 (FDIC Extender Statute "does not preempt the statute of repose set forth in Section 13"); *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, No. 12-CV-3279 (C.D. Cal. Dec. 8, 2014) ECF No. 196 ("the [FDIC] Extender Statute does not displace the [federal Securities] Act's statute of repose"); *see also NCUA v. Goldman Sachs & Co.*, 2013 U.S. Dist. LEXIS 181149, at *3 (C.D. Cal. July 11, 2013) (pre-*CTS* decision that 12 U.S.C. § 1787(b)(14) does not displace statutes of repose), *interlocutory appeal pending*, No. 13-56851 (9th Cir.). These courts have recognized the critical importance of statutes of repose and refused to modify the substantive repose rights created by legislatures.

III. THERE IS NO PRESUMPTION IN FAVOR OF THE FDIC

The brief submitted by the NCUA and the FHFA as *amici curiae* argues for a "presumption" in favor of the construction of the FDIC Extender Statute that is proposed by government parties. *See* NCUA/FHFA Brief at 26-27. No such presumption should apply here for several reasons. *First*, the FDIC, as receiver for Colonial Bank, is acting as a private plaintiff and is not entitled in that role to any presumption that may be available to the government. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994) (FDIC steps into the "shoes" of a private plaintiff when it acts as a receiver). *Second*, such a presumption could apply only if the FDIC Extender Statute were ambiguous, but it is *not* ambiguous. Its plain language specifically applies only to "statute[s] of limitations" and does not refer to "statutes of repose" or statutory claims such as the FDIC's claims under the Securities Act. *Third*, a presumption should not be applied here to upset the balance of policy considerations discussed above.

CONCLUSION

For the foregoing reasons, the District Court's decision should be affirmed.

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Respectfully submitted,

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