No. 14-51055

In the United States Court of Appeals For the Fifth Circuit

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for Guaranty Bank,

Plaintiff-Appellant,

v.

RBS SECURITIES INCORPORATED,

Defendant-Appellee.

Consolidated with 14-51066

FEDERAL DEPOSIT INSURANCE CORPORATION
as Receiver for Guaranty Bank,

Plaintiff-Appellant,

v.

DEUTSCHE BANK SECURITIES, INCORPORATED;
GOLDMAN SACHS & COMPANY,

Defendants-Appellees.

Appeal from the U.S. District Court for the Western District of Texas, Austin

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MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF APPELLEES' PETITION FOR REHEARING *EN BANC*

Ira D. Hammerman
Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, D.C. 20005

Michael J. Dell
Counsel of Record
Karen S. Kennedy
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
Attorneys for Amicus Curiae *Securities Industry and Financial Markets Association*

INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 27 and 29(b) and Fifth Circuit Rule 29.1, the Securities Industry and Financial Markets Association ("SIFMA"), by and through undersigned counsel, respectfully moves for leave to file the attached *amicus curiae* brief in support of Defendants-Appellees' Petition for Rehearing *en banc*. Pursuant to Fifth Circuit Rule 27.4, the parties have indicated they will not file any opposition to this Motion. Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), and Fifth Circuit Rules 28.2.1 and 29.2, SIFMA hereby incorporates the Certificate of Interested Parties in its attached *amicus curiae* brief.

INTEREST OF *AMICUS CURIAE* AND RELEVANCE OF MATTERS ASSERTED

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.

In this action, the Federal Deposit Insurance Corporation ("FDIC") concedes it did not bring its claims under the Texas Securities Act (the "TSA") within the period allowed by its five-year statute of repose. But when Defendants moved for judgment on the pleadings on those claims because they are barred by that statute of repose, the FDIC opposed the motion based on a provision of 12 U.S.C. § 1821(d)(14) (the "FDIC Extender Statute" or the "Statute"). However, the Statute, which was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), clearly and unambiguously extends only the "statute of limitations" for certain FDIC claims, not the statute of repose. 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 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 TSA's statute of repose governs the FDIC's TSA claims and requires the dismissal of those claims. ROA.14-51055.1761. On August 10, 2015, a panel of this Court reversed. The panel construed the Statute to allow the FDIC to bring claims after the period allowed by the TSA's statute of repose. SIFMA and its members are concerned about this unwarranted elimination of repose and the panel's decision to premise its ruling on its own view of the Statute's purpose.

SIFMA and its members have a strong interest in this case, and the matters asserted in the attached brief are relevant to the disposition of the case, for three principal reasons.

First, the Supreme Court in CTS enunciated clear and categorical principles on the important questions of whether the Congressional extension of the "statute of limitations" for certain state law claims also extends statutes of repose for those claims, and 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 statutory principles have a significant impact on SIFMA's members and the securities markets because they minimize uncertainty, which is the primary purpose of statutes of repose. The panel opinion undermines those principles.

Second, SIFMA and its members rely on the fair, consistent and timely enforcement of federal and state 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. 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

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financial planning and operations. The unwarranted narrowing of such statutes undermines the finality upon which the orderly operation of the markets depends. The panel opinion has the untoward effect.

Third, SIFMA and its members recognize the importance of the application of federal and state securities and other laws as they are written by Congress and state legislatures, not based on subjective assertions of legislative purpose, such as the panel's here, that do not account for the 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.

This case has far-reaching significance for SIFMA's members and for the entire securities industry. The FDIC, the National Credit Union Administration Board and the Federal Housing Finance Agency have commenced numerous actions against financial institutions concerning the sale of residential mortgage backed securities that seek to apply the same or similar extender statutes to permit them to assert federal and state law securities claims based on the same incorrect construction the panel applied in its opinion.

REASONS WHY AN AMICUS BRIEF IS DESIRABLE

SIFMA regularly files *amicus* briefs discussing the importance of statutes of repose and the scope of federal extender statutes. SIFMA filed an amicus brief in this Court in this action before the ruling by the panel that is the subject of the Petition for Rehearing *En Banc.* SIFMA has also filed such briefs in the United States Supreme Court and in the Second, Ninth and Tenth Circuits. SIFMA's familiarity and experience with these issues may be helpful to the Court's evaluation of the Petition for Rehearing *En Banc*. SIFMA has focused the attached brief on arguments that are not as significantly addressed by the Petition, including the importance of the absence of any reference to statutes of repose in the FDIC Extender Statute, the importance of statutes of repose, and the logical flaws in the panel's opinion on these issues. The attached brief adds to and expands on the arguments made in the Petition.

AUTHORITY TO FILE

As explained by then-Judge Alito, "[e]ven when a party is very well represented, an *amicus* may provide important assistance to the court." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3rd Cir. 2002). The federal courts regularly permit parties with various interests to appear as *amici*, reasoning that a "restrictive policy with respect to granting leave to file may [] create at least the perception of viewpoint discrimination."

Neonatology Assocs., P.A., 293 F.3d at 133. Although the Federal Rules of Appellate Procedure are silent, the Advisory Committee Notes contemplate *amicus* briefs: "court may grant permission to file an *amicus* brief in a context in which the party does not file a 'principal brief'; for example, an *amicus* may be permitted to file to support a party's petition for rehearing." Fed. R. App. P. 29 Advisory Committee Note to 1998 Amendments.

CONCLUSION

For the foregoing reasons, SIFMA respectfully requests that its Motion be granted.

August 28, 2015

Respectfully submitted,

/s/ Michael J. Dell

Michael J. Dell
Counsel of Record
Karen S. Kennedy
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
mdell@kramerlevin.com

Counsel for Amicus Curiae the Securities Industry and Financial Markets Association

Of Counsel:

Ira D. Hammerman
Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, D.C. 20005

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing, as submitted in digital form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with McAfee's VirusScan Enterprise 8.8 and, according to the program, is free of viruses. In addition, I certify that no privacy redactions were required under 5th Cir. Rule 25.2.13.

/s/ Michael J. Dell
Michael J. Dell
Counsel for Amicus Curiae the Securities Industry and Financial Markets Association

Dated: August 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August 2015:

I presented *Amicus Curiae's* Motion to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Michael J. Dell
Michael J. Dell
Counsel for Amicus Curiae the Securities Industry and Financial Markets Association

Dated: August 28, 2015

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Ira D. Hammerman
Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, D.C. 20005

Michael J. Dell
Counsel of Record
Karen S. Kennedy
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
Attorneys for Amicus Curiae *Securities Industry and Financial Markets Association*

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that *Amicus Curiae* does not issue stock or have a parent corporation that issues stock.

/S/ MICHAEL J. DELL
MICHAEL J. DELL
Counsel of Record
KAREN S. KENNEDY
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
212-715-9100
mdell@kramerlevin.com
Counsel for Amicus Curiae

August 28, 2015

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is an association of hundreds of securities firms, banks and asset managers, including many of the largest financial institutions in the United States. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA's members operate and have offices in all fifty states. SIFMA has offices in New York and Washington, D.C., and is the United States regional member of the Global Financial Markets Association.[1]

In this action, the Federal Deposit Insurance Corporation ("FDIC") concedes it did not bring its claims under the Texas Securities Act (the "TSA") within the period allowed by its five-year statute of repose. But when Defendants moved for judgment on the pleadings on those claims because they are barred by that statute of repose, the FDIC opposed the motion based on a provision of 12 U.S.C. § 1821(d)(14) (the "FDIC Extender Statute" or the "Statute"). However, the Statute, which was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), clearly and unambiguously extends *only* the "statute of limitations" for certain FDIC claims, not the statute of

[1] This brief was not authored in whole or in part by counsel for any party, and no counsel or party other than *amicus curiae*, its members or its counsel made a monetary contribution to fund the preparation or submission of this brief.

repose. 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 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 TSA's statute of repose governs the FDIC's TSA claims and requires the dismissal of those claims. ROA.14-51055.1761. On August 10, 2015, a panel of this Court reversed. The panel construed the Statute to allow the FDIC to bring claims after the period allowed by the TSA's statute of repose. SIFMA and its members are concerned about this unwarranted elimination of repose and the panel's decision to premise its ruling on its own view of the Statute's purpose.

SIFMA and its members have a strong interest in this case for three principal reasons.

First, the Supreme Court in *CTS* enunciated clear and categorical principles on the important questions of whether the Congressional extension of the "statute of limitations" for certain state law claims also extends statutes of repose for those claims, and 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 statutory principles have a significant impact on SIFMA's members and the securities markets because they minimize uncertainty, which is the primary purpose of statutes of repose. The panel opinion undermines those principles.

Second, SIFMA and its members rely on the fair, consistent and timely enforcement of federal and state 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. 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 undermines the finality upon which the orderly operation of the markets depends.

Third, SIFMA and its members recognize the importance of the application of federal and state securities and other laws as they are written by Congress and state legislatures, not based on subjective assertions of legislative purpose that do not account for the 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. SIFMA often appears as *amicus curiae* in appeals that implicate these concerns.

This case has far-reaching significance for SIFMA's members and for the entire securities industry. The FDIC, the National Credit Union Administration Board ("NCUA") and the Federal Housing Finance Agency have commenced numerous actions against financial institutions concerning the sale of residential mortgage-backed securities that seek to apply the same or similar extender statutes to permit them to assert federal and state law securities claims based on the same incorrect construction the panel applied in its opinion.

SUMMARY OF ARGUMENT

This case concerns the question whether extender statutes that expressly apply only to "statutes of limitations" should also be applied to statutes of repose for state law claims. Rehearing *en banc* is warranted because the panel failed to construe the FDIC Extender Statute in accordance with its plain language and the Supreme Court's prior rulings, which compel the conclusion that the Statute does not apply to statutes of repose. SIFMA submits this brief to elaborate on the reasons why the petition for rehearing *en banc* should be granted, and why the Statute should not be expanded beyond the limited scope expressly provided by Congress.

The FDIC Extender Statute is unambiguous. It extends only the "statute of limitations" for state law claims brought by the FDIC as a conservator

or receiver. Statutes of repose are not mentioned. Nothing in the Statute extends the statute of repose for any claim.

There is nothing novel about overriding a State's statute of limitations while continuing to give effect to its statute 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 for certain environmental actions under State law, but not the repose period. 134 S. Ct. at 2191. The CERCLA extender provision, Section 9658, extends the statute of limitations for state-law tort claims by persons exposed to toxic contaminants. The Supreme Court, like this Court in *Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005), found that Section 9658 extends *only* the statute of limitations and *not* statutes of repose.

Congress enacted the FDIC Extender Statute only three years after enacting Section 9658. As the District Court correctly found, "a faithful application of [*CTS*]'s logic to the FDIC Extender Statute compels the conclusion the TSA's statute of repose is not preempted, and operates to bar the FDIC's untimely claims." ROA.14.51055.1750. However, the panel substituted its own view that the purpose of the Statute "was to grant the FDIC a three-year grace

period after its appointment to investigate potential claims" (Op. at 17) for the plain language of the Statute and the analysis required by *CTS*.

En banc review is warranted because this is an important case with nationwide implications. If statutes are interpreted based on the assumption that Congress does not understand or forgets critical distinctions between terms — such as the distinction between a statute of limitations and statutes of repose that *CTS* found Congress understood only three years before it enacted the Statute — and based on subjective judicial views of how best to accomplish perceived 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 SIFMA'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. Accordingly, this Court should grant the petition, and upon rehearing should vacate the panel decision and affirm the decision of the District Court.

ARGUMENT

I. THE PANEL DID NOT FOLLOW THE PLAIN LANGUAGE OF THE FDIC EXTENDER STATUTE AND THE SUPREME COURT'S DECISION IN *CTS*

A. The Supreme Court held in *CTS* that a "natural reading" of CERCLA, which extends the "statute of limitations" for certain claims, does not preempt statutes of repose

CTS resolved a division among the lower courts as to whether Congressionally-enacted extender provisions that expressly apply to the "statute of limitations" also displace statutes of repose. The Supreme 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 the "statute of limitations" and contains other textual features inconsistent with applying it to statutes of repose. 134 S. Ct. at 2188. This Court had previously reached the same conclusion that the "plain language" of CERCLA's extender provision preempts state statutes of limitations, but not statutes of repose. *Burlington*, 419 F.3d at 362.

B. The panel failed to follow the plain language of the FDIC Extender Statute, which also applies only to "the applicable statute of limitations"

The panel's application of the FDIC Extender Statute's provision for "the applicable statute of limitations" to preempt the TSA's statute of repose is inconsistent with the text of the Statute, which does not refer to statutes of repose, and the holdings in *CTS* and *Burlington*. The panel violated the first rule of

statutory construction, 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).

There is no dispute that the TSA contains a statute of repose. Article 581-33(H)(2)(b) states claims can "in no event" be brought "more than five years after the sale" of the securities at issue. *Williams v. Khalaf*, 802 S.W.2d 651, 654 n.3 (Tex. 1990). This Court has ruled that a statute of repose "abolishes the cause of action." *Servicios-Expoarma, C.A. v. Indus. Mar. Carriers, Inc.*, 135 F.3d 984, 989 (5th Cir. 1998). "Unlike a statute of limitations, 'a statute of repose creates a substantive right to be free from liability after a legislatively determined period.'" *Burlington*, 419 F.3d at 363.

There is also no dispute that the FDIC Extender Statute, like the extender provision at issue in *CTS*, refers many times to the "statute of limitations" but never to statutes of repose. *CTS* explained the "critical distinction" between those two concepts, and concluded Congress was well aware of the difference when it enacted the CERCLA extender statute in 1986, yet chose not to refer to statutes of repose. 134 S. Ct. at 2187.

As the District Court correctly found, that awareness "can fairly be imported to Congress three years later when it enacted" the FDIC Extender Statute.

ROA.14-51055.1760. *Accord In re Countrywide Fin. Corp. Mortg.-Backed Secs. Litig.*, 966 F. Supp. 2d 1031, 1037, 1039 (C.D. Cal. 2013) (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."); *FDIC v. Chase Mortg. Fin. Corp.*, 42 F. Supp. 3d 574, 579 (S.D.N.Y. 2014) ("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.") Thus, the Supreme Court's strict statutory construction in *CTS* applies with equal or greater force here. Congress, in making the same choice in the Statute to refer only to the "statute of limitations," did *not* intend to displace statutes of repose.[2]

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[2] The panel cites cases from other circuits that have held that the FDIC Extender Statute and similar statutes preempt state statutes of repose (Op. at 9-10), but those cases are not persuasive. In *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015), which involved an NCUA extender statute 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. The court mistakenly relied on generalized pronouncements about FIRREA's remedial purpose to override the NCUA extender statute's plain text. 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 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. Finally, the Second Circuit's decision in *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 712 F.3d 136 (2d Cir. 2013), was issued *before CTS* and thus does not reflect its teaching.

C. The panel substituted its own view of the purpose of the Statute for the language enacted by Congress

The panel's decision gives short shift to Congress's omission of any reference to statutes of repose in the Statute. Instead the panel grounds its decision on flawed logic. For example, the panel reasons that "[t]he text of the FDIC Extender Statute indicates that it prescribes a new mandatory statute of limitations for actions brought by the FDIC as receiver" and "[s]uch mandatory language 'preclude[s] the possibility that some other limitations period might apply' to shorten the three-year minimum period the statute sets out." (Op. at 17, quoting *Nomura II*) But the fact that a statute of limitations is mandatory does not make it applicable to statutes of repose. As the Supreme Court recently explained, most federal statutes of limitations contain similar "mandatory" language. *United States v. Wong*, 135 S. Ct. 1625, 1634 (2015). The use of "shall be" or similar language in a statute of limitations is therefore "of no consequence," and does not prevent a time limit from being an "ordinary, run-of-the-mill statute of limitations." *Id.* The Statute itself says nothing that supports the panel's conclusion that "excluding repose periods from this ambit would circumvent that mandatory language." (Op. at 18)

The panel's reasoning is based on its view that Congress could not have wanted to "provid[e] the FDIC with less than three years from the date of its appointment as receiver to bring claims." (*Id.*) But Congress did not say that in

the Statute either. Had Congress wanted to say that, and to preempt statutes of repose, it would have been easy enough to do so. Similarly, the panel states "[t]he FDIC Extender Statute did not create a new statute of limitations merely for the ordinary reasons." (Op. at 23) However, once again, the Statute does not say that. Instead, the panel substitutes its own view of the purpose.

Likewise, the panel states that "[t]he [S]tatute does not address the preexisting limitations periods being displaced because they are irrelevant." (Op. at 18) But Congress did not say that either. Rather, Congress carefully limited the scope of the Statute to the creation of a new "statute of limitations," and did not change the applicable statutes of repose with respect to any action. The panel's statement that "the extender statute describes what it creates and not what it displaces" (Op. at 21) can be true only if Congress's reference to "the applicable statute of limitations" and failure to refer to statutes of repose are overlooked. By referring only to the "statute of limitations," Congress did very clearly describe what the Statute displaced — namely, only "the applicable statute of limitations."

Nor does the Statute's reference to "the period applicable under State law" support the panel's conclusion. (Op. at 19) That "period" clearly refers to the to "the applicable statute of limitations." Had Congress wanted to add statutes of repose it would have referred to them.

The panel observes that *CTS* recognized that Congress has on occasion used the term "statute of limitations" "in a less formal way." 134 S. Ct. at 2185. (Op. at 20) But there is nothing in the Statute that shows that Congress had any such intent here. The panel simply assumes that outcome.

The panel's statement that "the [S]tatute's structure demonstrates Congress's clear intent to preempt state statutes of repose" (Op. at 27) also rests on the panel's assumption that that "[t]he statute begins by setting out its new, exclusive federal limitations period." (*Id*. at 28) In other words, the panel again assumes the outcome — that the Statute's reference to "the applicable statute of limitations" includes the applicable statute of repose. Similarly, the panel's statement that "the FDIC Extender Statute sets out a new federal rule that functions as the default" (*id*.) begs the question whether the new rule applies to statutes of repose.

In short, the panel, rather than applying the plain language of the FDIC Extender Statute in accordance with the Supreme Court's logic in *CTS,* found that the purpose of the Statute was to grant the FDIC a "new" and "mandatory" three-year period in which to bring claims, and that purpose could best be achieved by preempting "any limitations period that would interfere with that reprieve — whether characterized as a statute of limitations or as a statute of repose." (Op. at 17) That reasoning is simply untenable because it overlooks not

only the first principle of statutory construction described above — that the language of the Statute most control absent a clearly expressed legislative intention to the contrary — but also the fundamental nature of the legislative process.

D. The panel overlooked the nature of the legislative process and that no legislation pursues its purposes at all costs

When Congress crafts complex legislation, it balances competing policy goals. For example, CERCLA was concerned with the goals of environmental remediation, addressing public health threats, and holding persons responsible for hazardous waste. FIRREA was intended, among other things, "to reform, recapitalize, and consolidate the Federal deposit insurance system," and 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).

The Supreme Court in *CTS* rejected the argument that such 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

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Rodriguez v. United States, 480 U.S. 522, 526 (1987)). Indeed, the Supreme Court has repeatedly emphasized 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)," plaintiffs in securities fraud class actions are not required to prove materiality at the class-certification stage even though "certain 'policy considerations' militate in favor of requiring precertification proof of materiality").[3] This Court has also stressed the importance of this approach to statutory construction. *See Burlington*, 419 F.3d at 362 ("In

[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, 1883, 1884 (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. U.S. 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").

cases involving statutory construction, a court begins with the plain language of the statute. A court assumes that the legislative purpose of a statute is expressed by the ordinary meaning of the words used.”).

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).

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 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).

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 judicial speculation about how best to accomplish Congressional policy concerns infringes 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.”).

For these reasons, SIFMA urges that rehearing *en banc* be granted to consider whether the construction of the FDIC Extender Statute should begin and end with its plain and unambiguous language. Failure to follow express statutory language would create great uncertainty as to how laws will be interpreted and enforced.

II. THE PANEL OVERLOOKED THE IMPORTANCE OF STATE LEGISLATURE-ENACTED STATUTES OF REPOSE AND IMPORTANT FEDERALISM PRINCIPLES

The panel, in applying its own view of how best to accomplish its own perception of the purpose of the FDIC Extender Statute, referred to the importance of certainty to the FDIC (Op. at 23), but did not address the enormous importance of the certainty provided by state legislature-enacted statutes of repose. Statutes of repose in general, and the TSA's statute of repose in particular, are critical to ensure certainty and finality in the securities industry. And federalism principles strongly disfavor preemption of the TSA statute of repose.

CTS explained the important rationale behind statutes of repose: “[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 also enable financial institutions to free up for productive use capital that might otherwise be tied up indefinitely in reserves to cover potential liability. In the context of federal securities claims, for example, the Securities and Exchange Commission has extolled the beneficial purposes of the applicable 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*, P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92 (2d Cir. 2004) (No. 02-7680), 2003 WL 23469697, at *8.

Statutes of repose for securities claims are also critical because they protect 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). They further prevent 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.

It is clear that the Texas legislature, by including a statutory repose period, intended the TSA to provide businesses with these same types of assurances and benefits. *See, e.g.*, *Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283, 286-87 (Tex. 2010) ("In recognizing the absolute nature of a statute of repose, we have explained that 'while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.'"); *Burlington*, 419 F.3d at 363-64.

Allowing the FDIC's TSA claims here to proceed would undercut these important state law objectives. Long-dead TSA claims could be resurrected despite the 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 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.

In light of these important state law objectives, and Texas's exercise of its traditional powers to define and limit causes of action created under its own state law, traditional federalism principles make a finding of preemption of the TSA statute of repose particularly inappropriate here. As this Court has explained, "The power to supplant state law is an extraordinary power in a federalist system," which "radically alters the balance of state and federal authority." *White Buffalo Ventures, LLC v. University of Texas*, 420 F.3d 366, 370 (5th Cir. 2005). "[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). The "case for federal pre-emption is particularly weak" where, as here, Congress has indicated "its awareness of the operation of state law in a field of federal interest." *CTS*, 134 S. Ct. at 2188. Congress knew that FIRREA, like CERCLA, does not create a complete remedial scheme, and that under FIRREA the FDIC stands in the shoes of failed banks in asserting state law claims.

SIFMA strongly urges that to the extent that the Statute is to be interpreted in accordance with its perceived purpose, and not simply its plain and unambiguous language as required by Supreme Court precedent, principles of federalism and the purpose of preserving critically important substantive repose rights created by state legislatures should be a paramount consideration in arriving

at an understanding why Congress chose not to refer to statutes of repose in the Statute.

CONCLUSION AND PRAYER

For the foregoing reasons, the Court should grant Appellees' petition for rehearing *en banc* or, as Appellees request in the alternative, should grant panel rehearing and vacate the panel's opinion.

August 28, 2015

Respectfully submitted,
/s/ Michael J. Dell
Michael J. Dell
Counsel of Record
Karen S. Kennedy
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100
mdell@kramerlevin.com

Counsel for Amicus Curiae the Securities Industry and Financial Markets Association

Of Counsel:

Ira D. Hammerman
Kevin Carroll
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1101 New York Avenue, NW
Washington, D.C. 20005

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,122 words, exclusive of the corporate disclosure statement, table of contents, table of citations, certificate of service, certificate of digital submission and this certificate of compliance, which are exempted by Fed. R. App. 32(a)(7)(B)(iii).

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/s/ *Michael J. Dell*
Michael J. Dell
Counsel for Amicus Curiae the Securities Industry and Financial Markets Association

Dated: August 28, 2015

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I hereby certify that a copy of the foregoing, as submitted in digital form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with McAfee's VirusScan Enterprise 8.8 and, according to the program, is free of viruses. In addition, I certify that no privacy redactions were required under 5th Cir. Rule 25.2.13.

/s/ *Michael J. Dell*
Michael J. Dell
Counsel for Amicus Curiae the Securities Industry and Financial Markets Association

Dated: August 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of August 2015:

I presented *Amicus Curiae's* Brief to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Michael J. Dell*
Michael J. Dell
Counsel for Amicus Curiae the Securities Industry and Financial Markets Association

Dated: August 28, 2015