No. 14-379

In The Supreme Court of the United States

NOMURA HOME EQUITY LOAN, INC.; WACHOVIA CAPITAL MARKETS, LLC, N/K/A WELLS FARGO SECURITIES, LLC; WACHOVIA MORTGAGE LOAN TRUST, LLC; NOVASTAR MORTGAGE FUNDING CORP.; FINANCIAL ASSET SECURITIES CORP.; RBS ACCEPTANCE INC., F/K/A GREENWICH CAPITAL ACCEPTANCE, INC.; RBS SECURITIES INC., F/K/A GREENWICH CAPITAL MARKETS, INC.,

Petitioners,

v.

NATIONAL CREDIT UNION ADMINISTRATION BOARD, AS LIQUIDATING AGENT OF U.S. CENTRAL FEDERAL CREDIT UNION AND OF WESTERN CORPORATE FEDERAL CREDIT UNION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND FINANCIAL SERVICES ROUNDTABLE IN SUPPORT OF PETITIONERS

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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]

As *advocates for a strong financial future*™, Financial Services Roundtable ("FSR") represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for

[1] Pursuant to this Court's Rule 37.2(a), SIFMA gave at least 10-days' notice to all parties of its intent to file this brief, and has submitted to the Clerk letters of consent from all parties to the filing of this brief. This brief was not authored in whole or in part by counsel for any party, and no counsel or party other than *amici*, their members or their counsel made a monetary contribution to fund the preparation or submission of this brief.

$98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

In this action, the National Credit Union Administration Board ("NCUA") concedes that it did not bring its claims under the Securities Act of 1933 (the "Securities Act") within the period allowed by its statute of repose. Nevertheless, when Petitioners moved to dismiss NCUA's Securities Act claims because they were barred by that statute of repose, NCUA argued that the motion should be denied based on a provision of the Federal Credit Union Act ("FCUA") that clearly and unambiguously extends *only* the "statute of limitations" for state-law contract and tort claims (the "Extender Statute" or the "Statute") and not the Securities Act's statute of repose. The District Court, in a ruling it characterized as "very close," agreed with NCUA's argument but found there was substantial ground for disagreement and certified the decision for review by the Tenth Circuit. On August 27, 2013, the Tenth Circuit affirmed. On June 9, 2014, in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), this Court addressed Section 9658 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), which, in language that is in all material respects substantially similar to the Extender Statute, extends statutes of limitations for state-law tort claims by persons exposed to a toxic contaminant. This Court found that Section 9658 extends *only* statutes of limitations and *not* statutes of repose. One week later, this Court

granted Petitioners' petition for certiorari in this action, vacated the Tenth Circuit's decision affirming the denial of their motion to dismiss, and remanded for further consideration in light of *CTS*. However, the Tenth Circuit's August 19, 2014 decision on remand adhered to its prior ruling and failed to follow this Court's reasoning in *CTS*.

Amici and their members have a strong interest in this Court granting Petitioners' petition for certiorari for five principal reasons:

First, although this Court instructed the Tenth Circuit to reconsider Petitioners' appeal in light of *CTS*, the Tenth Circuit's decision defies and is utterly contrary to *CTS*. *CTS* enunciated clear and categorical principles on the important federal questions whether the Congressional extension of statutes of limitations for certain state law claims also extends statutes of repose for federal claims, and whether the text of a Congressional statute should yield to a lower court's view of the purpose of the statute. The Tenth Circuit's failure to follow those principles has a significant impact on *amici*'s members and the securities markets because of the uncertainty it creates. This Court should definitively settle these issues now.

Second, the Tenth Circuit's disregard of this Court's decision in *CTS* deepens a persistent conflict in the lower courts concerning the application of extender statutes to the Securities Act's statute of repose. As a result, the Securities Act will necessarily fail in its purpose to establish a uniform repose

period. The absence of uniformity on such an important issue of federal law is particularly problematic for *amici*'s members because they are located throughout the United States and operate in multiple jurisdictions. This Court's review is warranted to bring the Tenth Circuit's and other lower courts' sharply divergent construction of the extender statutes and treatment of venerable statutes of repose into alignment with *CTS*. The meaning of federal law should not depend on where suit is filed.

Third, this case raises an important and recurring issue of federal law. NCUA, the FDIC and the Federal Housing Finance Agency have filed numerous actions against financial institutions concerning the sale of tens of billions of dollars of residential mortgage-backed securities, and seek to apply the same or similar extender statutes to Securities Act claims based on the same incorrect construction that the Tenth Circuit adopted. Pet.App. 227a-239a. Accordingly, if the Tenth Circuit's misreading of the Extender Statute, and failure to follow this Court's express holding in *CTS* concerning statutes of repose is allowed to stand, even for a few years, it will have far-reaching consequences for *amici*'s members and for the securities industry and economy as a whole. The Tenth Circuit's decision drastically expands the circumstances in which *amici*'s members can be exposed to onerous and unpredictable liability in Securities Act lawsuits that Congress intended to preclude with its statute of repose. This case presents an ideal vehicle to resolve

this issue because the pressure to settle similar lawsuits seeking large recoveries could be a roadblock to appeals reaching this Court in other cases.

Fourth, *amici* and their members recognize the importance of applying federal securities and other laws as they are written by Congress, not based on subjective judicial assertions of legislative purpose that do not take account of the often competing objectives that Congress weighs in drafting particular provisions. That is essential to ensure predictability. Predictability is crucial for business planning and the effective and efficient functioning of the markets because it allows participants to understand how to comply with the law and how it will be enforced. This Court should take this valuable opportunity to address this issue, restore the focus to the text of the Extender Statute and correct an interpretation that strays from its plain language and structure and ignores this Court's teaching in *CTS*.

Fifth, *amici*'s members rely on the fair, consistent and timely enforcement of the federal securities laws to deter and remedy wrongdoing. One key component is the consistent application of 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 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. The Tenth Circuit's decision undermines important aspects of the statute of repose that Congress has made a central component of the Securities Act since its enactment in 1933. *Amici*'s members and their investors and customers depend upon statutes of repose in their financial planning and operations. The unwarranted narrowing of such statutes would undermine the predictability upon which the orderly operation of the markets depends.

SUMMARY OF ARGUMENT

This case concerns the question whether extender statutes that expressly apply to statutes of limitations under state law should also be applied to statutes of repose under the Securities Act or other federal statutes. *Amici* support Petitioners' argument that the Extender Statute should be construed in accordance with this Court's prior rulings and its plain language, and thus should not apply to statutes of repose or federal claims.

Congress long ago included in Section 13 of the Securities Act both a statute of limitations and a statute of repose for claims under Sections 11 and 12(a)(2). 15 U.S.C. § 77m.[2] In 1989, Congress enacted

[2] Congress also adopted other statutes of repose in the federal securities laws. *See, e.g.*, 28 U.S.C. § 1658(b)(2) (five-year period for securities fraud claims under Section 10(b) of Exchange Act); 15 U.S.C. § 78i(f) (three-year period for price manipulation claims); 15 U.S.C. § 78p(b) (two-year period for

(Continued on following page)

the Federal Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, which added the Extender Statute to the FCUA, extending "the applicable statute of limitations" for certain claims brought by NCUA. 12 U.S.C. § 1787(b)(14).[3] The Extender Statute is clear and unambiguous. It extends only the "statute of limitations" for state law "contract" and "tort" claims brought by NCUA as a conservator or liquidating agent. Statutes of repose are not mentioned. Nothing extends the statute of repose for any claims, nor the statute of limitations for any federal claims.

Notwithstanding the plain language of the Extender Statute and its limited scope, the Tenth Circuit, in its initial ruling, held the Statute displaced Section 13's statute of repose, implicitly repealing portions of an 80-year-old provision that the Statute never mentions. However, less than a year later this Court held in *CTS* that a substantially similar CERCLA extender provision did *not* displace statutes of repose. This Court then vacated the Tenth Circuit's ruling and remanded for reconsideration in light of *CTS*. On remand, however, the Tenth Circuit adhered to its prior ruling and attempted to distinguish the CERCLA extender statute.

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short-swing profit claims); 15 U.S.C. § 78r(c) (three-year period for claims under Section 18 of Exchange Act).

[3] The Statutory Provisions section of the Petition for Writ of Certiorari provides the full text of the relevant statutes.

Compelling reasons warrant granting certiorari. The Tenth Circuit's decision on remand is contrary to this Court's holding in *CTS* and the plain language of the Extender Statute. In *CTS*, this Court emphasized that the intent of Congress must be "discerned primarily from the statutory text," that no legislation "pursues its purposes at all costs," and that Congress understood by 1986 (when CERCLA's extender provision was enacted) that statutes of repose are separate and distinct from statutes of limitations. 134 S. Ct. at 2182-83, 2185. Nevertheless, the Tenth Circuit relied on its view of FIRREA's "remedial purpose" to arrive at its strained determination that Congress intended FIRREA's Extender Statute to repeal entrenched statutes of repose even though Congress mentioned only "the applicable statute of limitations." The Tenth Circuit's determination to include federal claims within the scope of the Extender Statute similarly disregards its plain language, which applies only to state-law contract and tort claims, and would have the perverse effect of *shortening* the time for NCUA to assert certain federal statutory claims. Nothing in the text of the Extender Statute supports such an untoward result.

This case presents the Court with a valuable opportunity to halt the improvident erosion of statutes of repose and expansion of extender statutes beyond their express terms by correcting a ruling that impermissibly disregards basic tenets of statutory construction established in *CTS* and other decisions of this Court. If statutes are interpreted based on the

assumption that Congress does not understand critical distinctions between terms (such as between statutes of limitations and statutes of repose), and based on courts' subjective 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 that statutes of repose are strictly enforced.

This Court's review is also needed now to resolve a deep and persistent conflict in the lower courts and to ensure that extender statutes are consistently applied. At least seven District Court rulings outside the Tenth Circuit, including four after *CTS*, have determined whether an extender statute displaces statutes of repose. The vast majority found no displacement of statutes of repose. However, the Tenth Circuit's ruling on remand, and a post-*CTS* District Court decision in the Second Circuit that relies heavily on the Tenth Circuit's flawed analysis, have created considerable uncertainty. The question presented is plainly recurring, important, and should be resolved by the Court.

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ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED BECAUSE THE DECISION BELOW CONFLICTS WITH BOTH THIS COURT'S DECISION IN *CTS* AND THE PLAIN LANGUAGE OF THE EXTENDER STATUTE

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

This Court's grant of certiorari in *CTS* recognized the importance of the question whether extender provisions that expressly apply to statutes of limitations also displace statutes of repose, and that it required resolution by this Court. Prior to *CTS*, lower courts were divided on this question in cases brought under the extender provisions of CERCLA and other statutes, including FIRREA. *See* 134 S. Ct. at 2182 (citing cases); Pet.App. 88a n.20 (same). In *CTS*, this Court held that CERCLA's extender provision does *not* displace statutes of repose. This Court based its ruling primarily on the "natural reading of [CERCLA's] text" which – like the Extender Statute – refers only to statutes of limitation and contains other textual features that are incompatible with its application to statutes of repose. 134 S. Ct. at 2188.

This 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). Indeed, it has been a dominant theme of this 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, 2389, 2390 (2014) (Kagan, J.) (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) (Ginsburg, J.) ("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"); *Taniguchi v. Kan Pac. Saipan, Ltd.,*132 S. Ct. 1997, 1999-2000, 2006 (2012) (Alito, J.) ("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, 1887, 1893 (2012) (Sotomayor, J.) (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, 1890, 1895, 1898 (2011) (Thomas, J.) (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").

Instead of being guided by the plain language of the Extender Statute, its textual similarities to CERCLA's and this Court's teaching concerning that language in *CTS*, the Tenth Circuit relied on generalized pronouncements about FIRREA's remedial purpose to override the Statute's plain text. This Court rejected such reasoning in *CTS*, however, and reaffirmed the fundamental principle that "Congressional intent is discerned primarily from the statutory text." 134 S. Ct. at 2185. This Court held that the Fourth Circuit erred by "invoking the proposition that remedial statutes should be interpreted in a liberal manner [and] treat[ing] this as a substitute for a conclusion grounded in the statute's text and structure." *Id*. As this Court explained, "almost every statute might be described as remedial in the sense that all statutes are

designed to remedy some problem" and "no legislation pursues its purposes at all costs." *Id.*, quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (*per curiam*). *See also 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.").

The Tenth Circuit's application of the Extender Statute to Section 13's statute of repose impermissibly disregards the plain text of the Statute. The Extender Statute, like the extender provision at issue in *CTS*, refers many times to "statute[s] of limitations" but nowhere to "statute[s] of repose." *CTS* explained the "critical distinction" between these two concepts, and concluded that Congress was well aware of the difference by 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 [FIRREA]." *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 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. More recently, Judge Stanton similarly concluded in *FDIC v. Chase Mortgage Finance Corp.*, 2014 WL 4354671, at *4 (S.D.N.Y. Aug. 29, 2014), that "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, this Court's strict statutory construction in *CTS* applies with equal or greater force here. Congress, in making a similar choice to refer only to statutes of limitations in the Extender Statute, did *not* intend to displace statutes of repose.

Other textual similarities between the Extender Statute and the CERCLA extender statute further mandate a result consistent with *CTS*: *First*, the Extender Statute provides that the "statute of limitation" may begin to run on "the date on which the cause of action *accrues*." 12 U.S.C. § 1787(b)(14)(B) (emphasis added). *CTS* held the CERCLA statute similarly implicates the concept of "accrual," and that

it is relevant only to statutes of limitations, not repose. 134 S. Ct. at 2187. *CTS* therefore teaches that for this additional reason the Extender Statute does not apply to statutes of repose. *See FDIC v. Chase Mortgage Finance Corp.*, 2014 WL 4354671, at *4 ("The concept of accrual, which is central to the [FDIC extender statute], is wholly absent from the 1933 Act's statute of repose.").

Second, the Extender Statute, like CERCLA's, "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. Section 1787(b)(14) makes "the applicable statute of limitations" the longer of the period mandated by the statute or "the period applicable under State law," just as 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). As the Court explained in *CTS*, the statute'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." 134 S. Ct. at 2187.

Third, the Extender Statute, like CERCLA's, refers to existing actions. It defines "the applicable statute of limitations" for certain claims "in any *action* brought by" NCUA. 12 U.S.C. § 1787(b)(14) (emphasis added). This 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, the Tenth Circuit should have concluded, consistent with *CTS*, that the similar language of the Extender Statute was designed "to encompass only statutes of limitations, which generally begin to run after a cause of action accrues." *Id.*

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

The Tenth Circuit also incorrectly applied the Extender Statute to federal claims and statutory claims, even though the plain language of the Statute refers only to state-law contract and tort claims. In doing so, the court relied heavily on the fact that the prefatory language of the Extender Statute states it applies "with regard to any action brought by" NCUA. The court chose to construe this language broadly in light of the court's perception of the "purpose and history" of the Statute. Pet.App. 96a. The court also observed that 28 U.S.C. § 2415 – the default statute of limitations for claims brought by the United States "founded upon" a tort or contract when no other federal statute of limitations applies – has been broadly construed to cover both statutory and common law claims. For multiple reasons, neither rationale supports the court's failure to apply the plain language of the Statute in accordance with the principles established by this Court in *CTS* and other rulings.

The Extender Statute's statement that it applies to "any *action* brought by" NCUA does not mean that it applies to every *claim* asserted in such actions. 12 U.S.C. § 1787(b)(14) (emphasis added). Congress's distinction in the statutory text between "actions" and "claims" within those actions demonstrates that it was not treating those words as synonyms. The Statute refers to and modifies 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.* Thus, the text provides no basis to read the Statute as applying to any other claim. Accordingly, since NCUA's Securities Act claims here are neither "tort claims" nor "contract claims," the 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").

The Tenth Circuit relied on the fact that the terms "tort claim" and "contract claim" have been construed broadly in the context of Section 2415. That reliance is misplaced. Section 2415 acts as a gap-filler for claims by the United States for money damages when the law otherwise provides no limitations period for claims "founded upon a tort" or "founded upon any contract." 28 U.S.C. § 2415(a). FIRREA, by contrast, was not a gap-filler and the Extender Statute was drafted accordingly: instead of using the broader phrase "founded upon" a tort or contract, the

Statute refers only to "tort claim[s]" and "contract claim[s]" under state law. 12 U.S.C. § 1787(b)(14). The absence of "founded upon" language – which has been found to invite analogies, when applying Section 2415, between statutory claims and tort or contract claims – demonstrates Congress's intent to limit the scope of the 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 a "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).

The Extender Statute also should not be read to apply to federal claims because that would render a portion of the Statute meaningless. The Statute's introductory paragraph states that "the longer of" subparagraphs (I) or (II) should apply and thus contemplates that there are *two* alternative periods applicable to the claims covered by the Statute. 12 U.S.C. § 1787(b)(14)(A)(i) & (ii). But subparagraph (II) – which refers only to "the period applicable under State law" and not to Federal law – has no possible application to federal claims. 12 U.S.C. § 1787(b)(14)(A)(i)(II) & (ii)(II). Thus, the reference in the introductory language to a choice between two

applicable periods would make no sense if federal claims were covered. The more "natural reading" of the text is that the Extender Statute does *not* apply to federal claims at all. *CTS*, 134 S. Ct. at 2188.

Since the Extender Statute does not state that for federal claims the statute of limitations is "the longer of" the pre-existing statute of limitations or the alternative provided by the Statute, its application to federal claims would also have the perverse effect of *reducing* to three years NCUA's time to bring actions under federal statutes of limitations that are longer than three years. *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. In contrast, the Extender Statute expressly leaves in place state statutes of limitations that are longer than the minimum periods it provides.

Finally, the Tenth Circuit's finding that the Extender Statute is "potentially ambiguous" as to whether it displaces Section 13's statute of repose, Pet.App. 65a, makes its conclusion that the Statute displaces Section 13's statute of repose untenable for the additional reason that "repeals by implication are not favored and will not be presumed unless the 'intention of the legislature to repeal [is] clear and

manifest.'" *Nat'l Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). An ambiguous statute cannot be sufficiently "clear and manifest" to support an implied repeal. Furthermore, this Court has explained that it is "inappropriate to reach the harsh result of imposing [ ] liability without fault on the basis of unclear language." *Foremost-McKesson, Inc. v. Provident Secs. Co.*, 423 U.S. 232, 252 (1976). "If Congress wishes to impose such liability, we must assume it will do so expressly or by unmistakable inference." *Id.* Yet the Tenth Circuit's decision would create such liability without such Congressional language by eliminating the Securities Act's three year statute of repose for NCUA's Section 11 and 12 claims which impose strict liability for inadvertent and non-fraudulent conduct.

II. THIS COURT'S REVIEW IS NEEDED TO PRESERVE CONGRESSIONALLY-ENACTED STATUTES OF REPOSE, TO RESOLVE A DEEPENING CONFLICT, AND TO ENSURE THE UNIFORM APPLICATION OF THE EXTENDER STATUTE AND SIMILAR EXTENDER PROVISIONS

Statutes of repose in general, and Section 13's statute of repose for strict liability claims 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"). The Department of Justice's *CTS* amicus brief very recently underscored the importance of repose:

> The absolute nature of statutes of repose, and their definitive starting point, work together to afford providers of essential services with an assurance that no lawsuit can be filed after the passage of a fixed amount of time, regardless of the timing of the injury to the plaintiff or its discovery. . . . Statutes of repose address the concern that defendants could thus be exposed to liability indefinitely for actions in the distant past, regardless of the length of the statute of limitations.

Brief for the United States, as Amicus Curiae, at 12-13, *Waldburger v. CTS Corp.*, 723 F.3d 434 (4th Cir. 2013) (No. 12-1290, ECF No. 20).

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), 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 SEC 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*, P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92 (2d Cir. 2004), 2003 WL 23469697, at *8.

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 also 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, the statute of repose encourages prompt enforcement of the securities laws and serves cultural values of diligence. It has the additional 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.

The Tenth Circuit's construction of the Extender Statute to displace Section 13's statute of repose undercuts these important objectives. If the Tenth Circuit's ruling stands, long-dead Securities Act claims can be resurrected despite the contrary mandate of the statute of repose. Moreover, potential liability for such resurrected claims in connection with future credit union failures may extend virtually indefinitely because claims may not even accrue under the Extender Statute until NCUA is appointed as liquidator or conservator of the failed credit union, an event that is untethered to any aspect of the alleged wrongdoing and could occur at any time.

This Court's decision and analysis in *CTS* should have put to rest whether similar extender statutes apply to statutes of repose, such as the three-year statute of repose in Section 13 of the Securities Act. Nevertheless, the split persists and is deepening among the lower courts. Like the Tenth Circuit below,

Judge Cote in the Southern District of New York ruled in *FHFA v. HSBC North America Holdings Inc.,* 2014 WL 4276420 (S.D.N.Y. Aug. 28, 2014), that the nearly identical extender provision of the Housing and Economic Recovery Act, 12 U.S.C. § 4612(b)(12), displaces Section 13's statute of repose, citing the Second Circuit's pre-*CTS* decision in *FHFA v. UBS Americas, Inc.*, 712 F.3d 136 (2d Cir. 2013). The next day, Judge Stanton of the same Court, reconsidering in light of *CTS* his prior denial of a motion to dismiss, held the analogous FDIC extender statute, 12 U.S.C. § 1821(d)(14), does *not* displace Section 13's statute of repose. *FDIC v. Chase Mortgage Finance Corp.*, 2014 WL 4354671, at *4. In the Western District of Texas, Judge Sparks reached the same conclusion as Judge Stanton. *FDIC v. Goldman Sachs & Co.*, 2014 WL 4161567 (W.D. Tex. Aug. 18, 2014) (FDIC extender statute does not apply to statutes of repose, citing *CTS)*. Other courts reached the same conclusion prior to *CTS*. *See NCUA v. Goldman Sachs & Co.,* No. 2:11-cv-6521-GW-JEM (C.D. Cal. July 11, 2013) (Wu, J.) (§ 1787(b)(14) does not displace statutes of repose), ECF No. 159, interlocutory appeal pending, No. 13-56851 (9th Cir.); *In re Countrywide Fin. Corp.*, 966 F. Supp. 2d 1031 (C.D. Cal. 2013) (Pfaelzer, J.) (FDIC extender statute does not displace state law statutes of repose).

The uncertainty resulting from the Tenth Circuit's ruling, the potential application of that decision to other similar extender provisions, and the continuing conflict on this issue in the lower courts has a destabilizing effect on the efficient functioning

of the securities markets, as it eliminates predictability and undermines the ability of industry participants to act based on reasoned assumptions concerning the meaning of the law. This Court should act now to resolve this growing conflict, to halt the erosion of statutes of repose, and to ensure the uniform application of the Extender Statute and similar extender provisions. The securities laws are "an area that demands certainty and predictability." *Pinter v. Dahl,* 486 U.S. 622, 652 (1988). Unclear rules are "not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). Such rules "can have ripple effects" across the financial markets, "increas[ing] costs incurred by professionals" which then "may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute." *Id.* at 189.

CONCLUSION

For the foregoing reasons, and those stated in the petition for writ of certiorari, this Court should grant the writ.

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Respectfully submitted,

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