No. 16-463

In the Supreme Court of the United States

FIRST HORIZON ASSET SECURITIES, INC., ET AL.,
PETITIONERS,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

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The Government urges this Court to deny certiorari (Br. 8, 19) because of the lack of a circuit conflict, largely ignoring the actual reason for review: the Second Circuit's divided holding that FIRREA's extender provision displaces the Securities Act's repose provision is exceptionally important. See Pet. 3-4, 27-33. Over the dissent of Judge Barrington Parker, the Second Circuit swept away a substantive right to repose that has been central to the Securities Act of 1933 for more than eight decades. This is the "changed circumstance" the Government (Br. 19-20) ignores: the Second Circuit has now issued a decision governing pending claims based on more than *$32 billion* in securities, with billions more certain to be at stake when federal banking agencies bring such claims after future market downturns. To put that $32 billion number in perspective, it is greater than the annual gross national product of approximately half the world's countries; it is roughly the size of the combined Deepwater Horizon, Enron, and WorldCom settlements; and it is more than four times the total of the 100 largest jury verdicts in the United States last year.[1]

[1] U.S. Dep't of Justice, *U.S. and Five Gulf States Reach Historic Settlement with BP to Resolve Civil Lawsuit Over Deepwater Horizon Oil Spill*, https://www.justice.gov/opa/pr/us-and-five-gulf-states-reach-historic-settlement-bp-resolve-civil-lawsuit-over-deepwater; Juan A. Lozano, *Enron Investors to Share $7.2 Billion*

Beyond these massive financial implications, the Government does not dispute that, by virtue of the Securities Act's venue provision, federal agencies will be able to bring all of their future claims in the Second Circuit and effectively eliminate the Act's substantive right to repose. As a result, if the decision below is permitted to stand, it may be the last word on this issue. The FDIC, FHFA, and NCUA will be able to pursue near-strict liability under the Securities Act, while disregarding the outer bound on such liability that was a critical part of Congress's compromise. Given the extraordinary stakes, this case plainly presents "an important question of federal law that has not been, but should be, settled by this Court" rather than the divided panel below. S. Ct. R. 10(c).

Unable to dispute the issue's importance, the Government devotes most of its argument (Br. 9-19) to the merits. Its defense misses the point. No one disputes that "'the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver shall be' the one that Section 1821(d)(14) specifies." Br. 9 (quoting 12 U.S.C. 1821(d)(14)(A); emphasis omitted). That language prevents application of "some other limitations period," *ibid.* (quotation marks omitted), but does not address the displacement of any applicable *repose* period. The Government has no answer to that basic textual point and instead makes (Br. 9-11) the very interpretive errors that this Court rejected in *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014). The Gov-

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Settlement, WASH. POST, Sept. 10, 2008; *Judge OKs $6.1B in WorldCom Settlements*, FOX NEWS, Sept. 21, 2005; *Chart: The 2015 Top Verdicts*, NAT'L L.J., Apr. 25, 2016.

ernment's arguments only confirm the direct conflict between the panel majority's decision and *CTS*.

I. THE GOVERNMENT DOES NOT DISPUTE THAT THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO THE ECONOMY.

A. Since 1934, Section 13 of the Securities Act has uniformly required claims under Section 11 of that Act to be brought within three years of the offering or sale of the relevant security. Pet. 7-8 & n.3. Section 13's outer time limit is "an unqualified bar on actions instituted" after three years, "giving defendants total repose." *Merck & Co., Inc.* v. *Reynolds*, 559 U.S. 633, 650 (2010). But the panel majority's decision eliminates that repose period for securities claims brought by the FDIC, FHFA, and NCUA, needlessly creating a conflict between FIRREA and the Securities Act. Just as in *CTS*, where the plaintiffs' claims were subject to both CERCLA's statute of limitations and North Carolina's statute of repose, the court of appeals should have held that the FDIC's claims here are subject to both FIRREA's statute of limitations *and* the Securities Act's statute of repose. At a minimum, the question of how to reconcile those federal statutes warrants this Court's attention.

On top of that, the panel majority's decision extinguishes a critically important substantive right. Unlike the heightened showing for securities fraud under Section 10(b) of the Securities Exchange Act, Section 11 of the Securities Act imposes near-strict liability for material misstatements or omissions in offering documents. The Government does not dispute that Congress established the three-year repose period to counterbalance the *in terrorem* nature of Section 11 liability. As Judge Parker explained in dissent, "[f]ew compromises in the securities laws are as integral to the operation of the nation's capital markets as this [one]." Pet. App. 28a; see SIFMA Amicus Br. 23-24. The Government dismissively characterizes the repose provision as "a time limit enacted in the 1930s," Br. 4, but the fact that issuers and underwriters have relied on the limit for more than 80 years as protection against stale Section 11 liability only strengthens the case for review.

B. In addition to the need to reconcile FIRREA and the Securities Act, immense liability hangs in the balance. In this and other pending actions, the FDIC, FHFA, and NCUA seek billions of dollars in damages for losses on securities issued by financial institutions (and billions more in prejudgment interest). Pet. 28-29. If Judge Parker and seven district and state court judges are right that the agencies' claims are time-barred, there would be no need to consume further judicial resources litigating over securities issued a decade or more ago. When "enormous potential liability * * * turns on a question of federal statutory interpretation, [that] is a strong factor in deciding whether to grant certiorari," a point the Government does not dispute. *Fid. Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari).

C. The Government also does not dispute that the question presented is prospectively important, because the Securities Act's venue provision will allow the FDIC, FHFA, and NCUA to bring future claims stemming from the failure of any financial institution in the Second Circuit and thus avoid the Securities Act's statute of repose. Pet. 30-31. These agencies continue to place financial institutions in conservatorship or receivership; they have done so numerous times in 2016 alone.[2] Every time they do so, by virtue of the decision below, the agencies are free to bring claims that are barred by statutes of repose and thereby avoid any future circuit conflict. This circumstance cries out for this Court's review.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

A. The panel majority's decision cannot be squared with *CTS*.

The Government does not address the fact that the FIRREA extender provision, like CERCLA, "refers to a 'statute of limitations' in four separate places (with a fifth reference in the heading)," but "says nothing about extending, displacing, or altering any statutes of repose." Pet. App. 24a-25a (Parker, J., dissenting). The Government instead emphasizes that "'*the* applicable statute of limitations with regard to *any* action brought by the [FDIC] as conservator or receiver *shall be*' the one that Section 1821(d)(14) specifies." Br. 9 (quoting 12 U.S.C. 1821(d)(14)(A)).[3] Petitioners agree. In any action brought by the FDIC

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[2] See FDIC, *Failed Bank List*, http://www.fdic.gov/bank/individual/failed/banklist.html; NCUA, *Supervisory Actions - (Closed Credit Unions) in 2016*, http://www.ncua.gov/services/Pages/closed-credit-unions/2016.aspx.

[3] In *United States* v. *Kwai Fun Wong*, 135 S.Ct. 1625 (2015), this Court rejected the Government's reliance on mandatory language such as "shall be" as evidence that Congress had some broader purpose in mind. As this Court recognized, similar mandatory language is found in "most such statutes, and we have consistently found it of no consequence." *Id.* at 1632.

on behalf of a failed bank, FIRREA provides "the applicable statute of limitations" for state-law contract and tort claims. What the Government cannot explain is how that statutory language impliedly displaces any applicable statute of *repose*. The Government's arguments are at odds with *CTS*.

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

a. The Government wrongly asserts that, unlike CERCLA, FIRREA's extender provision creates "a comprehensive, freestanding time limit." Br. 10. Section 1821(d)(14) states that in any action brought by the FDIC as conservator or receiver, if the agency alleges contract or tort claims, "the applicable statute of limitations * * * shall be" the longer of a specified three- or six-year window, or the "period applicable under State law." 12 U.S.C. 1821(d)(14)(A)(i)-(ii). By its terms, FIRREA does nothing more than displace any statute of limitations that would be shorter than three years (for tort claims) or six years (for contract claims). The statutory text simply does not support the Government's argument: that FIRREA's extender provision somehow replaces all existing time limits, including statutes of repose. Pet. App. 12a.

To try to avoid *CTS*, the Government argues (Br. 10, 13-14) that FIRREA creates a new federal statute of limitations, whereas CERCLA merely carves out an exception to state limitations periods. The argument is both wrong and irrelevant. CERCLA and FIRREA each provide a limitations framework by setting rules that displace some state laws while preserving others. FIRREA thus creates a narrow exception to shorter limitations periods for state-law contract or tort claims when those claims are brought by the FDIC as conservator or receiver. See *NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1235 (10th Cir. 2014) ("[T]he Extender Statute * * * functions as a narrow exception for actions brought by [the conservator].").

In any event, it does not matter whether FIRREA's extender provision is labeled as a new federal limitations period or a modification of state limitations periods. Either way, FIRREA affects nothing more than the operation of any applicable statutes of limitations. Remarkably, the Government argues that "[t]he fact that Section 1821(d)(14) 'is *itself* a statute of limitations, and not a statute of repose * * * provides no guidance on the question whether [it] *displaces*'" any statute of repose. Br. 12 (quoting Pet. App. 15a). This makes no sense. The type of provision Congress established dictates what that provision replaces. Establishing a default federal statute of limitations does not require (or even suggest) setting aside any statutes of repose. It requires setting aside only any shorter statute of limitations. And even if the panel majority and the Government were right that FIRREA itself "provides no guidance," then the presumption against implied repeal would resolve Congress's silence. *Infra*, pp. 9-10.

b. The Government alternatively argues (Br. 12) that the term "statute of limitations" can sometimes refer broadly to both limitations and repose provisions. That argument fails for two independent reasons. First, in *CTS*, the Government contended—and this Court accepted—that in the 1986 amendments to CERCLA, Congress relied on the "recognized line between statutes of limitations, which are considered procedural, and statutes of repose, which are substantive limits on liability." U.S. Amicus Br. at 28-29, *CTS*

Corp., *supra* (No. 13-339); see *CTS*, 134 S. Ct. at 2186. Congress plainly understood that same distinction three years later in 1989 when it enacted FIRREA. Second, the Government points to nothing in FIRREA's text or structure indicating that Congress used the term "statute of limitations" in a less precise sense.[4] Absent such evidence, *CTS* instructs that the term should be given "its primary meaning" as referring only to limitations, not repose. *Id.* at 2185. Or as Judge Parker put it, FIRREA "means exactly what it says." Pet. App. 19a; *id.* at 25a, 28a-29a.

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

Because the Government contends that FIRREA "provides no guidance" whether it displaces statutes of repose, the Government's argument rests at bottom on FIRREA's legislative purpose. Br. 3, 9-10, 15. This Court rejected that approach in *CTS*, holding that it was "error" to treat CERCLA's purpose "as a substitute" for "the statute's text and structure." 134 S. Ct. at 2185. The Second Circuit committed precisely that error in its pre-*CTS* decision in 2013 in *FHFA* v. *UBS Americas Inc.*, 712 F.3d 136, 142 ("Congress enacted HERA's extender statute to give [the agency] the time to investigate and develop potential claims"), and the panel majority repeated the error by merely "defer[ring] to" *UBS*. Pet. App. 15a.

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[4] The Government points (Br. 15) to a single post-enactment statement by a single Senator that FIRREA's extender provision always should be interpreted in the Government's favor. That statement says nothing about whether Congress used the term "statute of limitations" in its looser sense.

But "no legislation pursues its purposes at all costs." *CTS*, 134 S. Ct. at 2185 (quotation marks omitted). By its terms, FIRREA's extender provision serves its purpose of allowing the FDIC more time by lengthening the one-year limitations period in Section 13 of the Securities Act to three years. The Government points to no evidence that Congress intended to go further and extinguish Section 13's separate three-year repose period.

B. The panel majority's decision cannot be squared with the presumption against implied repeals.

1. When it wants to distinguish CERCLA and *CTS*, the Government frames FIRREA as a "comprehensive" time limit that is not "an exception to, or a modification of, existing time limits." Br. 10; see Br. 13-14. But when it comes to the presumption against implied repeals, the Government says that FIRREA is merely "a narrow exception" to the Securities Act's repose period "for actions brought by the [FDIC] on behalf of failed banks." Br. 17 (quoting *Nomura*, 764 F.3d at 1235). This is all semantics. On the Government's and the panel majority's reading of Section 1821(d)(14), FIRREA suspends the Securities Act's repose provision for certain claims brought by the FDIC. That is an "implied amendment[]" resulting in a "partial repeal." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007). To accomplish that result, Congress had to speak clearly—a standard that even the panel majority and the Government do not contend Section 1821(d)(14) satisfies. The notion that "Congress, without ever saying so, passed a statute of limitations that somehow eliminated a widely relied on and widely applied

statute of repose violates the presumption against implied repeals." Pet. App. 26a (Parker, J., dissenting).

2. The Government contends (Br. 17-18) that the presumption does not apply when the earlier-enacted statute would remain largely intact following the later enactment, but this Court has applied the presumption in that circumstance. See, *e.g.*, *Cook Cty., Ill.* v. *U.S. ex rel. Chandler*, 538 U.S. 119, 133 (2003); *TVA* v. *Hill*, 437 U.S. 153, 189-193 (1978). Further, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), does not help the Government because the Court's discussion there was purely "hypothetical" given the "lack of certainty as to whether" the earlier statute addressed the same subject as the later one. *Id.* at 436-437. The Government's additional assertion that Congress's "unambiguous purpose" was to ensure that FDIC suits would not be "time-barred by other provisions of law" (Br. 18) begs the question. Congress did not want the FDIC's tort and contract claims to be barred by shorter limitations periods, but the Government points to no evidence that Congress also intended to eliminate substantive rights, including the Securities Act's right to repose. As Judge Parker recognized, courts "are not at liberty to infer displacement from silence." Pet. App. 27a.

III. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

The interplay between FIRREA and the Securities Act was undisputedly pressed and passed upon below, and is squarely presented here. The Government maintains that the fact that this case involves a federal rather than state statute of repose "does not make it a better vehicle than prior cases." Br. 20. But because this case requires reconciling two federal statutes, it implicates only the presumption against implied repeals (which is an accepted canon of statutory interpretation), not the presumption against preemption (which was a source of disagreement in *CTS*).

The fact that this petition is interlocutory does not make this case an inappropriate vehicle. The potential liability in these cases produces enormous pressure to settle, particularly once defendants are stripped of their repose defense. Only one action brought by the FDIC, FHFA, and NCUA over residential mortgage-backed securities has gone to trial, see Pet. 30, and the factual development there had no effect on the purely legal question of whether the agency's securities claims were time-barred. In short, there is nothing to be gained from further factual development; the Government simply wants to avoid this Court's review.

* * *

In *CTS*, the Government argued that Congress, by using the term "statute of limitations," had "hewed to a recognized line between statutes of limitations, which are considered procedural, and statutes of repose, which are substantive limits on liability." U.S. Amicus Br. at 28-29. That argument is inconsistent with the Government's argument here that Congress used the same term three years later to silently abrogate an important repose provision in the Securities Act. To be sure, the Government wants to have its cake and eat it, too. It asserted in its *CTS* brief that federal extender provisions "apply to the exclusion of any other time limitation." *Id.* at 22-23. But the Government's argument, from *CTS* through the present, has rested on a *non sequitur*: that because FIRREA establishes a "limitations period," "Congress intended the Extender Statute to supersede any and all other time limitations, including statutes of repose." Pet. App. 12a. Indeed, the plaintiffs in *CTS* made the same argument with respect to CERCLA and "[this] Court rejected it." *Id.* at 24a (Parker, J., dissenting). Just as in *CTS*, FIRREA's text, structure, and history show that when it refers to "the applicable statute of limitations," Congress "could only have meant a statute of limitations." *Id.* at 25a. Given the many billions of dollars at stake, this Court should review the panel majority's contrary conclusion.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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