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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BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITION FOR REHEARING EN BANC

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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.

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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 incorporates its Statement of Interest in its motion to file this brief.[1]

SIFMA submits this brief to elaborate on the reasons why the petition for rehearing *en banc* should be granted, and why the FDIC Extender Statute (the "Statute") should not be expanded beyond the limited scope expressly provided by Congress. *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 Corp. v. Waldburger*, 134 S. Ct. 2175 (2014), 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

[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.

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*

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 N. & Santa Fe Ry. Co. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005).

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 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. 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.

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.[2]

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

[2] 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)

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."

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 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.[3]

[3] 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 again simply assumes that outcome.

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 "the applicable statute of limitations." Had Congress wanted to add statutes of repose it would have referred to them.

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.

When Congress crafts complex legislation, it balances competing policy goals. 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 *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)).

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. It is clear that the Texas legislature, by including a statutory repose period, intended the TSA to provide businesses with

these 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.

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. As the District Court correctly found (ROA.14-51055.1761), this *CTS* reasoning should have barred preemption here. 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. But the panel opinion did not address this.

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.

September 3, 2015

Respectfully submitted,
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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 2,243 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).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2010 in a proportionally spaced typeface, namely Times New Roman 14 point font.

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Dated: September 3, 2015

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.

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Dated: September 3, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September 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.

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