No. 13-576

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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February 25, 2014

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The Court should grant the petition because this case concerns a question of great importance for our Nation's economy and financial institutions, and the decision below squarely "conflicts with relevant decisions of this Court." Rule 10(c). The Tenth Circuit recognized that 12 U.S.C. §1787(b)(14) is "ambiguous" with respect to whether it displaces statutes of repose, whether it applies to federal claims, and whether it applies to statutory causes of action. Pet.App. 36a, 54a n.21, 59a, 64a. Notwithstanding that ambiguity, the court of appeals held that §1787(b)(14) displaced the absolute three-year repose period in §13 of the Securities Act of 1933. That holding contravened the cardinal rule that implied repeals "will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (quotation marks and alteration omitted). At the same time, it exposed financial institutions to billions of dollars of potential liability for claims that would otherwise be time-barred.

NCUA does not dispute the importance of the question presented. Brief for Respondent in Opposition ("Opp.") 20-21. And its attempt to reconcile the decision below with this Court's precedents on implied repeals falls short. Like the court below, NCUA relies on irrelevant intermediate appellate decisions for the argument that §1787(b)(14) does not implicate the implied repeal doctrine because it creates "a narrow exception" from the three-year repose period of §13. Opp.12 (quoting

Pet. App. 52a). But this Court has "repeatedly" held "that implied amendments are no more favored than implied repeals." *Home Builders*, 551 U.S. at 664 n.8 (collecting cases). This Court's decisions, not stale decisions from courts of appeals, control here. *See United States v. Padilla*, 508 U.S. 77, 78 (1993) (per curiam). NCUA's other merits arguments are similarly unavailing.

The Court should reject NCUA's invitation to defer consideration of this question until a later time in light of the "interlocutory posture" of this case. Opp.20. The Court has not hesitated to grant certiorari in cases involving time bars that arise in an interlocutory posture. Immediate review of a petition involving a statute of repose is particularly warranted, because "an essential aspect of the … statute of repose is the right to be free from the burdens of trial." *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1111 (9th Cir. 2002). Moreover, because of the "intense pressure to settle" occasioned by the lower court's erroneous decision, the delay requested by NCUA could effectively block any review of this important question. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

NCUA also is mistaken when it argues that the Court should not hold this petition for *CTS Corp. v. Waldburger*, No. 13-339. Although the better course would be for the Court to grant this petition immediately and consider it on the merits, at a bare minimum, the Court should hold the petition pending its decision in *Waldburger*. If the Court

adopts the petitioner's arguments in *Waldburger*, such a ruling would require vacatur of the decision below in this case.

I. The Importance Of The Question Presented Warrants Immediate Review.

NCUA does not dispute that this petition implicates claims in approximately four dozen pending cases filed by it, FDIC, and FHFA, collectively involving over *$200 billion* in securities. Nor does NCUA dispute that these claims are barred by the three-year statute of repose in §13 of the 1933 Act, as amended in the Securities Exchange Act of 1934, *unless* §1787(b)(14) (and the corresponding statutes for FDIC and FHFA) displaced that repose statute. This "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006) (Scalia, J., concurring in denial of certiorari).

Nevertheless, NCUA urges the Court to defer addressing this threshold timeliness issue, on the ground that it is presented in "an interlocutory posture." Opp.20. That argument is flawed in three respects. *First*, NCUA ignores that this Court has granted certiorari repeatedly in cases involving time bars that arise in an interlocutory posture. *E.g.*, *CTS Corp. v. Waldburger*, 134 S. Ct. 896 (2014); *Gabelli v. SEC*, 133 S. Ct. 1216 (2013); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414 (2012).

Second, deferring review until after "the entry of final judgment against [petitioners]" (Opp. 21) is particularly inappropriate where the time bar at issue is a statute of repose. Statutes of repose are intended to protect the defendant's "right to be free from the burdens of trial." *Estate of Kennedy*, 283 F.3d at 1111. NCUA's request for delay ignores this "essential aspect" of the statute of repose. *Id.* Instead, NCUA would force petitioners—and dozens of other financial institutions in similar cases—to endure lengthy, costly, complex trials, exposing them to the possibility of massive liability, *before* obtaining this Court's review of the threshold question whether NCUA's claims are untimely.

Third, as a practical matter, delayed review will put these financial institutions "under intense pressure to settle." *Rhone-Poulenc*, 51 F.3d at 1298. And "[i]f they settle," then the Tenth Circuit's erroneous ruling—"the ruling that will have forced them to settle—will never be reviewed." *Id.*[1]

Forcing these cases through trials and appeals would disserve not just petitioners and other financial institutions, but also the lower courts that

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[1] This is not idle speculation. Settlement pressure already has thwarted this Court's review of the Second Circuit's erroneous decision regarding FHFA's nearly identical "extender statute" in *FHFA v. UBS Ams. Inc.*, 712 F.3d 136 (2d Cir. 2013). There, the district court designated one defendant's case to resolve whether FHFA's claims were barred by §13. After the question was litigated in the district court and the Second Circuit, that defendant settled, leaving the remaining defendants back in the district court, bound by the Second Circuit's now-unreviewable decision.

repeatedly have certified this threshold question for interlocutory review, and will waste their resources litigating claims that may be time-barred unless this Court grants immediate review.

II. The Decision Below Conflicts With This Court's Precedents On Implied Repeal.

1. NCUA relies on semantics to justify dispatching §13's three-year repose provision without analyzing the Court's implied repeal doctrine. It borrows the appellate court's characterization of §1787(b)(14) as "a separate limitations framework that functions as a narrow exception for actions brought by the NCUA on behalf of failed credit unions.'" Opp.12 (quoting Pet.App. 52a).[2] It is undisputed that, but for §1787(b)(14), §13's three-year repose statute would have terminated NCUA's securities claims years ago. Setting aside its semantics, therefore, NCUA contends that §1787(b)(14) implicitly *displaces* §13. Opp.12-14.

Home Builders makes clear that such semantics do not control whether a subsequent ambiguous statute alters or displaces a pre-existing statute: "It does not matter whether this alteration is characterized as an amendment or a partial repeal"; the implied repeal doctrine applies "to the extent that the new statutory command *displaces* earlier,

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[2] NCUA contends that this "narrow exception" includes not only the State law "contract" and "tort" claims that §1787(b)(14) actually mentions, but also federal statutory claims against numerous financial institutions in dozens of suits concerning $200 billion of securities that it does not.

inconsistent commands, and we have repeatedly recognized that implied amendments are no more favored than implied repeals." 551 U.S. at 664 n.8. (emphasis added). NCUA cannot avoid that settled rule of law merely by pointing to factual differences between *Home Builders* and this case.

For NCUA's argument to prevail, NCUA must establish that "the intention of the legislature to repeal" the three-year repose statute was "clear and manifest." *Id.* at 662. It cannot do so, because the language in §1787(b)(14) is, as the court of appeals acknowledged, "ambiguous." *E.g.*, Pet.App. 36a.

NCUA's argument that the implied repeal doctrine "does not apply" here lacks merit. Opp.12. *First*, like the decision below, NCUA mistakenly relies on intermediate appellate decisions that purport to establish that "a narrow exception" is not subject to the requirements for implied repeal. *Id.* (quoting Pet.App. 52a and citing *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001), *Strawser v. Atkins*, 290 F.3d 720 (4th Cir. 2002), and *Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002)). These decisions are plainly inapposite. Pet.23&n.10. All involve an amendment "clear in its language," made directly to an existing Medicaid statute in a manner that plainly alters that statute. *Greenless*, 277 F.3d at 609. Therefore, they shed no light on this case, which deals with the interplay between unrelated statutes.

Second, NCUA cites *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989),

in support of its argument that a "narrow exception" does not implicate the doctrine of implied repeal. Opp.12-13. But *Argentine Republic* said no such thing. It considered only whether the district court had jurisdiction over a suit against a foreign government under the Alien Tort Statute, or whether jurisdiction was barred under a later statute, the Foreign Sovereign Immunities Act, where the earlier statute was ambiguous as to jurisdiction. *See* 488 U.S. at 436. The later statute "express[ly]" provided that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." *Id.* at 438 (quoting 28 U.S.C. §1604). Because the later statute included an "express provision" barring federal court jurisdiction, this Court naturally held that the implied repeal doctrine did not apply. *Id.* That rationale cannot apply here, where the earlier statute (§13) is clear, and the later statute (§1787(b)(14)) is acknowledged by the court of appeals to be "ambiguous."

Third, NCUA does not even mention *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). *See* Pet.17. *Radzanower* addressed the impact of the 1934 Act's broad venue provision on the existing National Bank Act ("NBA"), which limited venue in suits against national banks to the district in which they are established. 426 U.S. at 149-50. The 1934 Act made no mention of the NBA; applying the 1934 Act's broad venue provision, however, would displace the NBA's venue provision. *Radzanower* rejected the argument that the 1934 Act implicitly repealed or amended the NBA's venue provision for securities claims against national banks because the

1934 Act and the NBA were not irreconcilable. *Id.* at 153-58. Thus, *Radzanower* instructed that an implied repeal is permissible only when two statutes "cannot mutually coexist." *Id.* at 155; *accord Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) (holding that the 1973 Rail Reorganization Act did not impliedly repeal existing Tucker Act remedy because there was no "positive repugnancy" between them "that cannot be reconciled"). Here, there is no question that §13 and §1787(b)(14) can coexist without reading the later statute as impliedly repealing the earlier one: it is undisputed that §1787(b)(14) displaces the statutes of limitations that would otherwise govern state contract and tort claims.

Moreover, there are good reasons why Congress would have chosen to displace those statutes of limitations without affecting the statute of repose in §13. Section 13 has served vital commercial interests for 80 years. Those interests include assuring "the accuracy of [corporate] disclosure," avoiding "depriving investors of information," and avoiding "deter[ing people] from serving on boards of directors." *See* Pet.14-15 (citing SEC Amicus Curiae Br. 28-29, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991)). NCUA cannot summarily dismiss the importance of these interests. *See* Opp.15. Nor must §1787(b)(14) and its sibling statutes be interpreted to guarantee NCUA, FDIC, or FHFA that they can take their time bringing claims and still prevail. As this Court told FDIC in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994),

"there is no federal policy that the fund should always win" in actions under FIRREA.

2. NCUA's arguments based on the text and history of §1787(b)(14) are unpersuasive, particularly because they do not identify any evidence that Congress intended that statute to displace the three-year statute of repose in §13.

NCUA first focuses on out-of-context statutory snippets. It argues §1787(b)(14) "provides '*the* statute of limitations' for '*any* action' by the NCUA as liquidating agent...." Opp.15 (NCUA's emphasis). From this, it leaps to the unsupported conclusion that §1787(b)(14) "*replaces* … the preexisting time frames," Opp.16 (NCUA's emphasis), without explaining why this new "statute of limitations" would replace distinct repose statutes. NCUA thus avoids rather than answers the central question: whether "statute of limitations" includes statutes of repose. The text indicates that it does not.

Section 1787(b)(14) is a classic accrual-based statute of limitations, not a statute of repose, and it never says that it displaces statutes of repose. Significantly, the statute begins: "*Notwithstanding any provision of any contract*, the applicable statute of limitations with regard to any action brought by the Board...." *Id.* (emphasis added). It does *not* say "Notwithstanding any provision of *any law*...," similar to other subsections in §1787. *E.g.,* 12 U.S.C. §§1787(a)(2); 1787(c)(8)(F); 1787(e)(1); 1787(f)(1). Without those words, §1787(b)(14) says absolutely nothing about replacing statutes of repose.

The legislative history of §1787(b)(14) also weighs strongly against a finding of implied amendment of §13. FIRREA expressly modified other aspects of federal law, including provisions of the 1934 Act.[3] But neither the text nor history of §1787(b)(14) make any mention of federal law. They certainly do not suggest an intent to alter Congress's "indivisible determination" that securities claims are subject to a two-part cut-off scheme. *Lampf*, 501 U.S. at 362 n.8.

NCUA is similarly mistaken when it relies upon the words "any action" in §1787(b)(14)'s introductory language to argue that the statute reaches federal claims. As *Jones v. Bock* holds, the "any action" language is essentially boilerplate, and recourse must be had to the operative provisions of a statute of limitations, which apply on a claim-by-claim basis. 549 U.S. 199, 220-21 (2007). Moreover, that §1787(b)(14) applies in "any action" brought by NCUA does not mean that it applies to *every claim* in every action brought by NCUA. The operative subsections establish that the statute addresses only those "contract" and "tort" claims in "any action" brought by NCUA with a limitations "period applicable under State law." No provision is made for claims that do *not* have a limitations "period applicable under State law," *i.e.,* federal claims. Congress easily could have written §1787(b)(14) to

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[3] Although FIRREA modified the 1934 Act, it left untouched that Act's amendment reducing §13's repose period to three years. *See* Pub. L. No. 73-291, §207; Pub. L. No. 101-73, §744(u).

displace "the period applicable under *Federal or* State law." Indeed, Congress used "Federal law" multiple times in other subsections of §1787. *E.g.*, 12 U.S.C. §§1787(c)(1); 1787(f)(1); 1787(k)(4)(d). In §1787(b)(14), however, it did not.

Further, NCUA's attempt to stretch §1787(b)(14) to cover statutory claims also fails. The cases it cites do not address the sorting of statutory claims into contract or tort categories for statute of limitations purposes and thus do not support its argument. Opp.18. Nor does NCUA's analogy to the federal catchall statutes of limitations, 28 U.S.C. §§2415 and 2416, support its argument. Opp.18. To the contrary, Congress rejected an earlier version of §1787(b)(14) that expressly incorporated those statutes, in favor of the current version, which does not. S.774, 101st Cong., §212(14). Significantly, §2415 specifically incorporates existing statutes of limitations and repose; it therefore provides no basis for determining what §1787(b)(14) displaces.

III. The Court Should Grant Immediate Review Or, At A Minimum, Hold The Case For *Waldburger*.

Because of the importance of the question presented, and the square conflict between the decision below and this Court's precedents, the Court should grant certiorari and immediately proceed to the merits of this petition. This case is sufficiently different from *Waldburger*—which concerns whether a provision of CERCLA, 42 U.S.C. §9658, repeals state statutes of repose—that it deserves to be considered on its own merits.

Indeed, even if the Court affirms the Fourth Circuit's ruling in *Waldburger* that §9658 displaces state statutes of repose, that ruling will not require affirmance in this case. *First*, the text of the CERCLA provision is different from the text of §1787(b)(14) in material respects. *See* Pet.34. *Second*, the CERCLA provision was enacted in 1986; §1787(b)(14) was enacted in 1989. Even if this Court holds that a reference to "statutes of limitations" in a 1986 statute includes statutes of repose, it would not follow that this was true in 1989. By 1989, the distinction between the terms "statute of limitations" and "statute of repose" was even more deeply rooted. *E.g.*, *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987) (distinguishing limitations and repose statutes); *Luzadder v. Despatch Oven Co.*, 834 F.2d 355, 358 (3d Cir. 1987) (same).[4] *Third*, *Waldburger* will only address whether the CERCLA provision preempts *state* statutes of repose. It will not consider whether the provision meets the high standard for impliedly repealing an existing federal statute of repose, *i.e.* the issue presented here.

Therefore, this Court should grant certiorari in this case now without awaiting the *Waldburger* decision. At an absolute minimum, however, the

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[4] The differences between 1979's Fifth Edition of Black's Law Dictionary, cited in *Waldburger v. CTS Corp.*, 723 F.3d 434, 441, 448-50, (4th Cir. 2013) and the Sixth Edition, published in 1990, evidence this shift. The Sixth Edition reflects the law's "change and development" by providing separate definitions for "Statute of Limitations" and "Statute of Repose," explaining that the latter "is distinguishable from statute of limitations…." Black's Law Dictionary iii, 1411, 927 (6th ed. 1990).

Court should hold this petition pending a decision in *Waldburger*, because a *reversal* in that case could require vacatur here. The petitioner in *Waldburger* contends that the plain meaning of the phrase "statute of limitations" did not extend to statutes of repose as of 1986. *See* Petition for Writ of Certiorari at 22-24. If this Court accepts that argument, it will require vacatur of the Tenth Circuit's decision in this case, which reached the conclusion "that 'statute of limitations' did not have a consistent, clearly distinct meaning in 1989." Pet.App.30a.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

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