Nos. 17-1300 and 17-1302

In the Supreme Court of the United States

DAVID FINDLAY, ET AL., PETITIONERS

v.

FEDERAL HOUSING FINANCE AGENCY

NOMURA SECURITIES INTERNATIONAL, INC., ET AL., PETITIONERS

v.

FEDERAL HOUSING FINANCE AGENCY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
MARK B. STERN
DANIEL TENNY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 12 U.S.C. 4617(b)(12), which establishes "the applicable statute of limitations with regard to any action brought by the" Federal Housing Finance Agency (FHFA) "as conservator or receiver," provides the sole time limit applicable to claims brought against petitioners by FHFA as conservator for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation.

2. Whether Section 12(a) of the Securities Act of 1933, 15 U.S.C. 77*l*(a), which authorizes purchasers of securities to sue "either at law or in equity" to rescind the purchase of a security, creates a cause of action in equity for which the Seventh Amendment does not provide a right to jury trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-143)[1] is reported at 873 F.3d 85. The opinion of the district court on the first question presented (Pet. App. 145-161) is not published in the Federal Supplement but is available at 2014 WL 4276420. The opinion of the district court on the second question presented (Pet. App. 162-

[1] Unless otherwise noted, citations to "Pet." and "Pet. App." refer to the petition and petition appendix in No. 17-1302.

185) is not published in the Federal Supplement but is available at 2014 WL 7229361.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2017. A petition for rehearing was denied on December 11, 2017 (Pet. App. 144). The petitions for writs of certiorari were filed on March 12, 2018 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) are government-sponsored enterprises (GSEs). They participate in the secondary mortgage market by purchasing mortgage loans and related securities to strengthen the housing market and support affordable homeownership. Between 2005 and 2007, Fannie Mae and Freddie Mac purchased large volumes of residential mortgage-backed securities, which are financial instruments that entitle the holder to periodic payments derived from pools of residential mortgage loans that are held by a trust. Many of the mortgages underlying the residential mortgage-backed securities were premised on inaccurate assessments of the mortgagor's ability to repay the loan, the adequacy of the collateral, or both. The role played by these loans in the collapse of the housing market and the economic crisis in 2008 has been well documented. Widespread loan defaults caused the value of the mortgage-backed securities purchased by Fannie Mae and Freddie Mac to plummet. Pet. App. 21-27.

In response to the collapse of the housing market, the resulting economic crisis, and the troubled financial

condition of Fannie Mae and Freddie Mac, Congress enacted the Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654. That statute created the Federal Housing Finance Agency (FHFA) as "an independent agency of the Federal Government." *Id.* § 1101, 122 Stat. 2661 (12 U.S.C. 4511). FHFA is charged with regulating Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. Congress authorized the Director of FHFA to place Fannie Mae and Freddie Mac into conservatorship, 12 U.S.C. 4617(a)(2), and FHFA's Director exercised that authority in September 2008, Pet. App. 45.

HERA established deadlines for suits brought by FHFA in its capacity as conservator. Like the default provisions that generally govern suits brought by the United States, HERA establishes a three-year period for tort actions and a six-year period for contract actions, "[n]otwithstanding any provision of any contract." 12 U.S.C. 4617(b)(12)(A); see 28 U.S.C. 2415 (same limitations periods for suits by the United States). HERA incorporates applicable state limitations periods, but only when they are longer than the three- and six-year periods that otherwise apply. 12 U.S.C. 4617(b)(12)(A).

Of particular note here, HERA also resets the clock on the limitations period for claims that arose before the start of FHFA's conservatorship. Subsection (B) of 12 U.S.C. 4617(b)(12) provides:

> **(B) Determination of the date on which a claim accrues**
>
> For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Agency as conservator or receiver; or

(ii) the date on which the cause of action accrues.

2. Section 12(a)(2) of the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, provides a cause of action for persons who purchased securities that were sold by means of untrue statements or material omissions. See 15 U.S.C. 77*l*(a)(2). Liable parties under that provision, known as "statutory seller[s]," include brokers and other solicitors who facilitate sales in service of their own financial interests or those of the securities owner, even if they do not transfer title. *Pinter* v. *Dahl*, 486 U.S. 622, 643-648 (1988). The Act separately imposes liability on persons who control (through stock ownership, agency, or otherwise) persons who are liable. 15 U.S.C. 77*o*.

The statute authorizes an injured party to "sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." 15 U.S.C. 77*l*(a). In such an action, the defendant may invoke a "loss causation" provision to obtain an offset against return of the injured party's consideration. If the defendant "proves that any portion or all of the amount recoverable * * * represents other than the depreciation in value of the subject security resulting from" the false statement or omission, "then such portion or amount, as the case may be, shall not be recoverable." 15 U.S.C. 77*l*(b).

3. Petitioners sold the GSEs mortgage-backed securities using prospectuses that materially misrepresented the creditworthiness of the loans supporting the

securities. Based on misstatements in those prospectuses, FHFA as conservator instituted this litigation against petitioners under the Securities Act and under Virginia and D.C. analogues known as "Blue Sky" laws. Pet. App. 3-4. At issue here are two pretrial rulings in that litigation.

a. Petitioners argued that FHFA's claims were barred by statutes of repose contained in the Securities Act and in the Virginia and D.C. analogues. In rejecting that contention, the district court relied on the Second Circuit's prior holding that 12 U.S.C. 4617(b)(12) supersedes other time limits that might otherwise apply to claims brought by FHFA as conservator. Pet. App. 150 (citing *FHFA* v. *UBS Americas Inc.*, 712 F.3d 136 (2d Cir. 2013)).

The district court also rejected petitioners' argument that this Court's decision in *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014), had undermined the Second Circuit's prior ruling. The district court discussed (see Pet. App. 148-149) the Tenth Circuit's conclusion that a provision applicable to claims brought by the National Credit Union Administration (NCUA), which is materially identical to 12 U.S.C. 4617(b)(12), superseded statutes of repose that would otherwise apply. *NCUA* v. *Nomura Home Equity Loan, Inc.*, 727 F.3d 1246 (10th Cir. 2013). After this Court vacated the Tenth Circuit's judgment and remanded for reconsideration in light of *CTS Corp.*, see *Nomura Home Equity Loan, Inc.* v. *NCUA*, 134 S. Ct. 2818 (2014), the Tenth Circuit reinstated its decision. *NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (2014), cert. denied, 135 S. Ct. 949 (2015). Concluding that the Tenth Circuit's analysis of the NCUA statute applied equally to

Section 4617(b)(12), the district court in these cases rejected petitioners' argument. Pet. App. 149.

b. The district court also rejected petitioners' argument that they were entitled to a jury trial on FHFA's claims under Section 12(a)(2) of the Securities Act. Under that provision, which authorizes suit by a security-purchaser "either at law or in equity," 15 U.S.C. 77*l*(a), "[w]here a plaintiff still owns the security, its remedy is rescission." Pet. App. 180. Accordingly, the court concluded, the "Section 12(a)(2) claim is most analogous to an equitable action for rescission of contract, known in 18th-century England." *Id.* at 181.

The district court observed that petitioners "d[id] not offer an alternative 18th-century analog for a Section 12(a)(2) claim." Pet. App. 183. Instead, petitioners relied on the loss-causation provision to argue that Section 12(a)(2) provides for legal relief. The court explained, however, that "the loss causation defense renders Section 12(a)(2) relief more, not less, like rescission." *Ibid.* Rescission is designed to repudiate a contract and to return the parties to the status quo, and "Section 12(a)(2)'s loss causation defense does precisely this: if the securities being tendered by FHFA are less valuable than the securities the FHFA received at the time of the purchase agreements for reasons unrelated to defendants' alleged misconduct, then the return of the GSEs' consideration is similarly offset." *Ibid.* Through this mechanism, the court explained, "parties are placed in the *status quo ante*." *Ibid.*

c. Although FHFA had initially brought a claim under Section 11 of the Securities Act, it withdrew that claim before trial. Pet. App. 30. Because no legal claims that would require trial by jury remained, the district court conducted a four-week bench trial. *Ibid.*

After trial, the district court ruled for FHFA. The court concluded that the "Offering Documents [*i.e.*, the prospectuses] did not correctly describe the mortgage loans" underlying the securities bought by the GSEs, and that "[t]he magnitude of falsity, conservatively measured, is enormous." Pet. App. 186. The court awarded $806 million in rescission-like relief designed to "restore[ ] the parties to their positions as of the time the contract was made." *Id.* at 482; see *id.* at 5. The certiorari petitions do not raise any issues relating to the findings of fact or conclusions of law at trial.

2. The court of appeals affirmed. Pet. App. 1-143.

a. With regard to the timeliness of FHFA's claims, the court of appeals explained that it had previously construed 12 U.S.C. 4617(b)(12) to supersede all other time limitations that might otherwise apply. Pet. App. 32-35. The statute's text allows only for a single time limitation, stating that "'*the* applicable statute of limitations with regard to *any* action brought by the FHFA *shall* be' time periods provided in the HERA." *Id.* at 35 (quoting *UBS Americas*, 712 F.3d at 141, in turn quoting 12 U.S.C. 4617(b)(12)) (brackets and ellipsis omitted). The court further explained that this reading serves Congress's purpose of ensuring that FHFA has sufficient time to investigate and develop claims. *Ibid.*

The court of appeals rejected petitioners' argument that this Court's decision in *CTS Corp.* should alter the analysis. The court of appeals noted that it had already rejected that argument with regard to the Securities Act statute of repose in a case involving a materially identical statute that establishes limitations periods for certain suits brought by the Federal Deposit Insurance Corporation (FDIC). Pet. App. 37 (citing *FDIC* v. *First Horizon Asset Sec., Inc.*, 821 F.3d 372 (2d Cir. 2016),

cert. denied, 137 S. Ct. 628 (2017)). With respect to the Virginia and D.C. statutes of repose, the court concluded that *CTS Corp.* did not suggest a different result. *Id.* at 37-44. *CTS Corp.* concerned a provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, that in certain circumstances preempts the "commencement date" of a state "statute of limitations" and replaces it with a "federally required commencement date." 42 U.S.C. 9658(a)(1); see *CTS Corp.*, 134 S. Ct. at 2180. This Court held in *CTS Corp.* that Section 9658 does not have such preemptive effect with respect to a state "statute of repose," a type of time limit that "effect[s] a legislative judgment that a defendant should be free from liability after [a] legislatively determined period of time," regardless of when a particular claim accrued. 134 S. Ct. at 2182-2183 (citations and internal quotation marks omitted); see *id.* at 2180.

The court of appeals explained that, although the provision at issue here and the provision at issue in *CTS Corp.* "both refer to statutes of limitations but neither references statutes of repose," this Court's decision in *CTS Corp.* "confirmed" that "an explicit statutory reference to repose statutes is not a *sine qua non* of congressional intent to pre-empt such statutes." Pet. App. 40. "[W]hile the presence of the term 'statute of limitations' in a federal statute may be 'instructive' of Congress's intended pre-emptive scope," the court of appeals explained, "it is not 'dispositive.'" *Id.* at 40-41 (citing *CTS Corp.*, 134 S. Ct. at 2185).

The court of appeals further explained that, although both the statute at issue in *CTS Corp.* and the provision at issue here refer to the date on which a claim accrues —a date relevant to statutes of limitations but not to

statutes of repose—they do so in different contexts. Pet. App. 41-42. The provision at issue in *CTS Corp.* refers to the accrual date "in defining the class of state statutes it intended to pre-empt." *Id.* at 42. But 12 U.S.C. 4617(b)(12) refers to accrual "in defining the time limitation the HERA newly created for claims brought by the FHFA." Pet. App. 42. Thus, "the HERA's use of the word 'accrues' tells us that § 4617(b)(12) is *itself* a statute of limitations but does not provide guidance on the question whether § 4617(b)(12) *displaces* otherwise applicable statutes of repose." *Ibid.* (brackets, citation, ellipses, and internal quotation marks omitted).

The court of appeals additionally explained that the provision at issue in *CTS Corp.* constitutes a limited exception to state law, creating a new accrual date but leaving untouched many features of state law, such as the length of the statute of limitations. Pet. App. 42-43. The provision at issue here, "by contrast, provides a comprehensive, singular time limitation for all actions brought by the FHFA." *Id.* at 43. It thus "governs entirely the rules regarding when the FHFA may bring its claims." *Ibid.*

The court of appeals identified other textual and contextual bases for distinguishing between the provision at issue here and the provision at issue in *CTS Corp.* Pet. App. 43-44. First, in enacting the CERCLA provision at issue in *CTS Corp.*, Congress "specifically considered and decided against using language that would explicitly preempt statutes of repose"; but there is "no similar legislative history for Section 4617(b)(12)." *Id.* at 43. Second, the provision at issue in *CTS Corp.* "'describes the pre-empted period in the singular,' which 'would be an awkward way to mandate the pre-emption

of two different time periods.'" *Ibid.* (quoting *CTS Corp.*, 134 S. Ct. at 2186-2187) (brackets omitted). "Section 4617(b)(12)," on the other hand, "applies 'to *any* action brought by the FHFA.'" *Ibid.* (quoting 12 U.S.C. 4617(b)(12)(A)) (brackets omitted). Finally, whereas the *CTS Corp.* statute had a provision for equitable tolling, 12 U.S.C. 4617(b)(12) does not. Pet. App. 43-44.

b. The court of appeals also rejected petitioners' argument that they were entitled to a jury trial. The court observed that a "Section 12 action operates much like an 18th century action at equity for rescission, which extinguished a legally valid contract that had to 'be set aside due to fraud, mistake, or for some other reason.'" Pet. App. 88 (quoting 12A C.J.S. *Cancellation of Instruments* § 1 (Supp. 2017)). Thus, this Court and the Second Circuit "have recognized that a Section 12(a)(2) action is the Securities Act-equivalent of equitable rescission." *Ibid.* (citing *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 576 (1995); *Pinter*, 486 U.S. at 641 n.18; *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940); *Royal Am. Managers, Inc.* v. *IRC Holding Corp.*, 885 F.2d 1011, 1019 n.4 (2d Cir. 1989)).

The court of appeals gave "some credence" to petitioners' argument that the addition of the loss-causation provision in 1995 had altered the nature of the remedy, because the traditional equitable remedy of rescission "required the seller to refund the buyer the full original purchase price in exchange for the purchased item, regardless of its present value." Pet. App. 89. The court also observed that loss causation had been described in terms of proximate cause, which "generally describes the scope of a defendant's legal liability." *Id.* at 90. The court ultimately concluded, however, that the loss-causation offset "did not transform Section 12(a)(2)'s equitable remedy

into a legal one." *Ibid.* The court explained that the statute "has never provided exactly the same relief as 18th century equitable rescission," since it offers a damages remedy for buyers who no longer own the security. *Ibid.* The court concluded that the 1995 alteration of the remedy—this time in favor of sellers—did not prevent the remedy from being an equitable one. *Id.* at 91.

The court of appeals further explained that the similarity of loss causation to proximate cause does not transform the cause of action into a legal one. The loss-causation offset serves a function familiar to equitable rescission: establishing a "mutual accounting that prevents the buyer from reaping an unjust benefit at the expense of the seller." Pet. App. 91. That accounting "restores the parties to the *status quo ante* the securities transaction at issue while ensuring that the terms of the rescission are just (in Congress's view), a hallmark of equitable re[sci]ssionary relief." *Ibid.*

The court of appeals also held that similarities between Sections 11 and 12 of the Securities Act did not support petitioners' argument. The court noted that those provisions "are not identical twins when it comes to the nature of relief each authorizes; indeed, sometimes they are quite different." Pet. App. 92. While Section 11 authorizes only legal "damages," 15 U.S.C. 77k(e), Section 12 offers the equitable rescission at issue here. Pet. App. 92.

The court of appeals also rejected petitioners' argument that the nature of the remedy must be the same for buyers who no longer own the security (and are thus limited to damages) as for buyers, like FHFA, who still own the security. While assuming without deciding that an action for damages under Section 12(a)(2) was a legal remedy, the court observed that "this case does not involve that situation." Pet. App. 93. Instead, "FHFA still owns

and can physically return the Certificates," and FHFA was ordered in the final judgment "to 'deliver' the Certificates to [petitioners] in exchange for the amounts recoverable." *Ibid.* The statute authorizes buyers to sue "either at law or in equity," 15 U.S.C. 77*l*(a), and FHFA chose the latter option. Pet. App. 93.

Finally, the court of appeals rejected the argument that certain defendants (petitioners in No. 17-1300) who had not sold the securities or received the funds could not be subject to a remedy of equitable rescission. Pet. App. 93-94. This Court "has made clear that 'there is no reason to think that Congress wanted to bind itself to the common-law notion of the circumstances in which rescission under Section 12(a)(2) is an appropriately remedy.'" *Id.* at 94 (quoting *Pinter*, 486 U.S. at 647 n.23) (brackets omitted). Instead, the court of appeals explained, Congress elected to make the equitable remedy available against all "statutory sellers," and "all of [petitioners] were statutory sellers." *Ibid.*

ARGUMENT

Petitioners acknowledge that every other court of appeals to address the questions presented has ruled the same way as did the court below. The court's decision is correct, and further review is not warranted.

1. The court of appeals correctly held that the complaint in this case was timely because it was filed within the period prescribed by 12 U.S.C. 4617(b)(12). The court's determination that Section 4617(b)(12) establishes the sole time limit applicable to suits brought by FHFA as conservator is consistent with the unanimous view of all other appellate courts that have considered the issue under virtually identical provisions governing suits by other federal entities. This Court has previously denied petitions for writs of certiorari contending

that the prevailing view of those provisions conflicts with *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014); with the presumption against implied repeals; or with *California Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017). See *Credit Suisse First Boston Mortg. Sec. Corp.* v. *FDIC*, 138 S. Ct. 501 (2017) (No. 17-10); *First Horizon Asset Sec., Inc.* v. *FDIC*, 137 S. Ct. 628 (2017) (No. 16-463); *RBS Sec. Inc.* v. *FDIC*, 136 S. Ct. 1492 (2016) (No. 15-783); *Nomura Home Equity Loan, Inc.* v. *National Credit Union Bd.*, 135 S. Ct. 949 (2015) (No. 14-379). There is no reason for a different result here.

a. To assist FHFA as conservator or receiver in recovering funds on claims from Fannie Mae or Freddie Mac, Section 4617(b)(12) gives FHFA at least three years after its appointment as conservator or receiver to investigate and file any claims on behalf of the GSEs. The statute directs that "*the* applicable statute of limitations with regard to *any* action brought by [FHFA] as conservator or receiver *shall be*" the one that Section 4617(b)(12) specifies. 12 U.S.C. 4617(b)(12) (emphases added). "Such mandatory language 'precludes the possibility that some other limitations period might apply.'" *FDIC* v. *RBS Sec. Inc.*, 798 F.3d 244, 254 (5th Cir. 2015) (quoting *NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1226 (10th Cir. 2014), cert. denied, 135 S. Ct. 949 (2015)) (brackets omitted), cert. denied, 136 S. Ct. 1492 (2016); see *NCUA* v. *RBS Sec., Inc.*, 833 F.3d 1125,1131 (9th Cir. 2016); *FDIC* v. *First Horizon Asset Sec., Inc.*, 821 F.3d 372, 375 (2d Cir. 2016), cert. denied, 137 S. Ct. 628 (2017); see also *FDIC* v. *Rhodes*, 336 P.3d 961, 965 (Nev. 2014) (en banc).

Enacted in response to a widespread financial crisis, HERA authorizes FHFA to "collect all obligations and

money due" to Fannie Mae and Freddie Mac and to take other actions necessary to put those entities in a "sound and solvent condition." 12 U.S.C. 4617(b)(2)(B)(ii) and (D)(i). Congress sought to ensure that claims could be brought on behalf of Fannie Mae and Freddie Mac without regard to limitations periods that might afford the newly appointed conservator insufficient time to evaluate the claims. Congress borrowed language that had been enacted for claims brought by FDIC and NCUA in their capacities as conservator or receiver, for example in response to the 1988 savings and loan crisis. Courts had previously recognized that the FDIC provision was intended to afford the agency "three years from the date upon which it is appointed receiver to decide whether to bring any causes of action held by a failed savings and loan," so that the agency would have adequate time "to investigate and determine what causes of action it should bring on behalf of a failed institution." *FDIC* v. *Barton*, 96 F.3d 128, 133 (5th Cir. 1996); see *FDIC* v. *New Hampshire Ins. Co.*, 953 F.2d 478, 487 n.2 (9th Cir. 1991) (quoting statement of FDIC statute's sponsor that its statute of limitations provisions "should be construed to maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law claims that would otherwise have been lost due to the expiration of hitherto applicable limitations periods") (quoting 135 Cong. Rec. 18,866 (1989) (statement of Senator Riegle)). In enacting 12 U.S.C. 4617(b)(12) in HERA, Congress had every reason to assume that courts would apply it in a similar fashion, taking into account its importance in responding to another financial crisis.

b. Petitioners appear to acknowledge that Section 4617(b)(12) displaces at least *some* potential time limits

that might otherwise apply to claims brought by FHFA. They contend, however, that Section 4617(b)(12) cannot be the exclusive time limit in a case to which the three-year deadline in 15 U.S.C. 77m might otherwise apply. Emphasizing that the time limit established by Section 4617(b)(12) is denominated a "statute of limitations," and that it refers to the date on which a claim accrues, petitioners argue that it cannot displace the three-year time limit in Section 77m, which can be characterized as a "statute of repose." See Pet. 17-19. The term "statute of limitations" in Section 4617(b)(12), however, describes the new time limit itself, not any other time limit that Section 4617(b)(12) might lengthen or supersede. As the court of appeals correctly recognized, the fact that Section 4617(b)(12) "is *itself* a statute of limitations * * * does not provide guidance on the question whether § 4617(b)(12) *displaces* otherwise applicable statutes of repose." Pet. App. 42 (brackets, citation, ellipsis, and internal quotation marks omitted).

Even if the term "statute of limitations" shed light on which time limits Section 4617(b)(12) was intended to displace, the result in this case would be the same. The term "statute of limitations" can sometimes encompass provisions that contain statutes of repose. See *CTS Corp.*, 134 S. Ct. at 2185 (observing, *inter alia*, that "Congress has used the term 'statute of limitations' when enacting statutes of repose"); see also *Nomura*, 764 F.3d at 1227-1229. Indeed, Section 77m itself is entitled "Limitation of actions" and has sometimes been described as a "statute of limitations." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 (1976); see *Nomura*, 764 F.3d at 1234.

Congress therefore had no reason to believe that the "statute of limitations" it was creating in Section

4617(b)(12) would be viewed as something different from—or subsidiary to—the "Limitation of actions" it had previously created in Section 77m. Indeed, petitioners' argument that Section 4617(b)(12) does not displace "statutes of repose" would impermissibly bifurcate Section 77m. If that view were correct, Section 4617(b)(12) would displace one of the time limits in Section 77m (the one-year-from-discovery time limit), but not the other (the three-year-from-sale limit). That result would be inconsistent with this Court's description of Section 77m as an "indivisible determination by Congress as to the appropriate cutoff point" for certain claims, and with the Court's recognition that it "would disserve that legislative determination to sever the two periods." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 362 n.8 (1991).

Petitioners' reliance (Pet. 18-19) on the prefatory clause "[n]otwithstanding any provision of any contract," 12 U.S.C. 4617(b)(12)(A), is also misplaced. That language simply clarifies that, although Section 4617(b)(12) is *itself* a statute of limitations, it is exempt from the usual rule that applicable limitations periods may be shortened by agreement.

c. Petitioners assert that, by invoking its prior decision in *FHFA* v. *UBS Americas Inc.*, 712 F.3d 136 (2d Cir. 2013), the court of appeals ignored "the distinctions that the later-decided *CTS* [*Corp.*] and *ANZ* [*Securities*] drew between statutes of limitations and statutes of repose." Pet. 20. But even in *UBS Americas*, the court recognized that a distinction exists between statutes of limitations and statutes of repose—though it also recognized that the terms were sometimes used imprecisely. 712 F.3d at 142-143. This Court

made the same observation in *CTS Corp.* 134 S. Ct. at 2185.

In any event, the decision below addressed *CTS Corp.* at length, Pet. App. 39-43, in a discussion that petitioners largely ignore. The court of appeals explained that the law at issue in *CTS Corp.* "provides that state law will be the default rule for time limitations and that a federal commencement date will operate as a limited 'exception' to that rule." *Id.* at 39. Section 4617(b)(12), "by contrast, provides a comprehensive, singular time limitation for all actions brought by the FHFA." *Id.* at 43; see *ibid.* (Section 4617(b)(12) "governs entirely the rules regarding when the FHFA may bring its claims.").

The court of appeals also identified other relevant differences between the two schemes. When it enacted the provision at issue in *CTS Corp.*, Congress "considered a report that recommended language providing for explicit pre-emption of state statutes of repose, but chose not to include the proposed language in the final statute." Pet. App. 39; see *CTS Corp.*, 134 S. Ct. at 2186 (relying on Congress's decision not to adopt the report's language). "There is no similar legislative history for Section 4617(b)(12)." Pet. App. 43. The court also noted that the CERCLA provision at issue in *CTS Corp.*, 42 U.S.C. 9658, does not create an exclusive federal time limit, as Section 4617(b)(12) does. See Pet. App. 43. Section 4617(b)(12) mandates that the statute of limitations for "any action" brought by the FHFA as conservator or receiver "shall be" the one set forth in Section 4617(b)(12) itself. This Court's holding that Section 9658 does not engraft a discovery rule onto state statutes of repose, *CTS Corp.*, 134 S. Ct. at 2185-2189, thus does not govern the determination whether Section

4617(b)(12)'s new time limit displaces the repose period in the Securities Act. Pet. App. 43.

Petitioners' reliance (Pet. 16-17) on this Court's recent decision in *ANZ Securities* is similarly misplaced. Petitioners do not attribute to *ANZ Securities* any relevant proposition of law that was not already established in *CTS Corp.* Although this Court made clear in *ANZ Securities* that Section 77m's three-year deadline is a "statute of repose" and thus "displaces the traditional power of courts to modify statutory time limits in the name of equity," 137 S. Ct. at 2055, the Court did not suggest that Section 77m bars actions as to which Congress has specified a special exclusive time limit—as it has done in Section 4617(b)(12). Nor does *ANZ Securities* address or otherwise support petitioners' narrow construction of Section 4617(b)(12) itself.

The court of appeals' decision thus was not premised on a misunderstanding of the distinction between statutes of limitations and statutes of repose. Rather, it was premised on a proper understanding of Section 4617(b)(12), and of material distinctions between that provision and the CERCLA provision at issue in *CTS Corp.*

d. Petitioners contend (Pet. 21-22) that reading Section 4617(b)(12) to supersede the three-year time limit in Section 77m would violate the interpretive principle disfavoring repeals by implication. As the Tenth Circuit recognized with respect to the statute's NCUA analogue, however, Section 4617(b)(12) "does not repeal [Section 77m], implicitly or otherwise," but instead "creates a separate limitations framework that functions as a narrow exception for actions brought by [FHFA] on behalf of" entities for which it is the conservator or receiver, in this instance Fannie Mae and Fred-

die Mac, *Nomura*, 764 F.3d at 1235. The general principle disfavoring repeals by implication does not apply in this circumstance. See *ibid.* (citing *Strawser* v. *Atkins*, 290 F.3d 720, 733 (4th Cir.), cert. denied, 537 U.S. 1045 (2002); *Greenless* v. *Almond*, 277 F.3d 601, 608 (1st Cir.), cert. denied, 537 U.S. 814 (2002); *Harris* v. *Owens*, 264 F.3d 1282, 1296 (10th Cir. 2001), cert. denied, 535 U.S. 1097 (2002)). The Court has declined to rely on the presumption against implied repeals where, as here, the earlier statute would continue to have "the same effect" in all situations not specifically addressed by the later enactment. See, *e.g.*, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).

The presumption against implied repeals reflects "a belief that Congress, focused as it usually is on a particular problem, should not be understood to have eliminated without specific consideration another program that was likely the product of sustained attention." *Greenless*, 277 F.3d at 608-609 (quoting Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 475 (1989)); see *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974). That rationale has little force in cases like this one, where the earlier statute (here, Section 77m) will continue to govern in all but the narrow circumstances (an action by FHFA in its capacity as conservator or receiver) that Congress specifically addressed when it enacted the later statute (Section 4617(b)(12)). See *Greenless*, 277 F.3d at 608-609. The clear purpose and natural effect of Section 4617(b)(12) is to ensure that FHFA suits filed within the statutory deadline will be treated as timely, even if they would otherwise have been time-

barred by other provisions of law. That partial displacement of provisions like Section 77m is scarcely "implied"; it is Section 4617(b)(12)'s unambiguous purpose.

Petitioners focus (Pet. 21) on this Court's decision in *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644 (2007), which invoked the canon disfavoring implied repeals. But the result that the court of appeals reached here does not resemble the "amendment" rejected in *Home Builders*, which would have "partially overrid[den] every federal statute mandating agency action" to include an additional requirement. *Id.* at 664 & n.8. And even in *Home Builders*, the canon disfavoring implied repeals was not held to dictate a particular result, but instead contributed to an ambiguity that the Court resolved by deferring to the responsible federal agency. *Id.* at 666. In this case, any ambiguity that the implied-repeal canon might create would be resolved by the interpretive rule that "statutes of limitations are construed narrowly" when they are asserted "against the government," which is "given the benefit of the doubt if the scope of the statute is ambiguous." *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 95-96 (2006).

Contrary to petitioners' assertion (Pet. 22), the government's theory would not allow FHFA to bring claims that were already time-barred when FHFA assumed its role as conservator. HERA's predecessors were not construed to revive stale claims. See *FDIC* v. *Dawson*, 4 F.3d 1303, 1306-1307 (5th Cir. 1993) (citing cases), cert. denied, 512 U.S. 1205 (1994). Consistent with those precedents, the court below recognized that "any FHFA claim that was time-barred by" Section 77m when FHFA assumed conservatorship "remained time-

barred under HERA." Pet. App. 45.[2] The court therefore extensively analyzed whether the claims were time-barred at that time, concluding that they were not (a holding that petitioners do not challenge here). *Id.* at 52-59.

e. Contrary to petitioners' argument (Pet. 23-24), Section 4617(b)(12) preempts statutes of repose in state Blue Sky laws. Every appellate court that has considered the issue under analogous extender statutes has reached that conclusion. See *RBS Sec. Inc.*, 798 F.3d at 245-246; *Nomura*, 764 F.3d at 1209; *Rhodes*, 336 P.3d at 963.

Those decisions are consistent with the general interpretive principles this Court has applied in construing express-preemption provisions in other federal statutes. If a federal provision's text clearly demonstrates Congress's intent to supplant state law, a presumption against preemption does not dictate a different result. See, *e.g.*, *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 85-86 (1994) (stating that, "[i]n answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision," and identifying a statute analogous to the one at issue here as a provision that "specifically create[s] special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver"); see also *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) ("The purpose of Congress is the ultimate touchstone in every pre-emption case.") (citation and internal quotation

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[2] HERA does provide for the revival of certain state-law claims "arising from fraud, intentional misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the regulated entity." 12 U.S.C. 4617(b)(13). Such claims are not at issue here.

marks omitted); *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Congress's intent that Section 4617(b)(12) should have preemptive scope is not disputed. Thus, having ruled that the text and structure of Section 4617(b)(12) demonstrate Congress's intent to preempt state statutes of repose, the court of appeals rightly declined to use any presumption as an interpretive aid.

f. As petitioners recognize (Pet. 25-26), the decision below accords with the decisions of all other courts of appeals that have construed either Section 4617(b)(12) or its NCUA or FDIC analogue. See *RBS Sec.*, 833 F.3d at 1128; *RBS Sec. Inc.*, 798 F.3d at 255; *Nomura*, 764 F.3d at 1203; see also *Beckley Capital Ltd. P'ship* v. *DiGeronimo*, 184 F.3d 52, 57 (1st Cir. 1999) (reasoning that, under the FDIC analogue, a suit by the FDIC would not be barred by a one-year state time limit, whether or not that time limit was a typical "statute of limitations," but finding that rule inapplicable where suit was brought by the FDIC's assignee); *Rhodes*, 336 P.3d at 963. This Court has denied four previous petitions for writs of certiorari that raised essentially the same arguments as this one (though those petitions were filed at an interlocutory stage of the relevant cases). See *Credit Suisse*, 138 S. Ct. 501 (No. 17-10); *First Horizon*, 137 S. Ct. 628 (No. 16-463); *RBS Sec.*, 136 S. Ct. 1492 (No. 15-783); *Nomura*, 135 S. Ct. 949 (No. 14-379).

Because FHFA became conservator for the GSEs in 2008, most cases stemming from the conservatorships in which HERA's extender statute would be relevant have already worked their way through the courts. The question presented here therefore is one of diminishing practical importance. This Court has already denied review in cases involving analogous FDIC and NCUA

statutes that have greater continuing significance, and there is no reason for a different result here.

2. The court of appeals correctly held that rescission under Section 12(a)(2) of the Securities Act is an equitable remedy that may be awarded after a bench trial. Petitioners identify no circuit conflict or other basis for this Court's review.

a. Section 12(a) of the Securities Act authorizes buyers of securities to sue "either at law or in equity" to rescind their purchases. 15 U.S.C. 77*l*(a). Petitioners contend that an action for rescission under Section 12(a)(2) necessarily constitutes an action at law for which the Seventh Amendment gives them a right to trial by jury. The authorities on which petitioners rely demonstrate the error of their analysis.

As one commentator on whom petitioners rely (Pet. 30) explains, at common law, a party seeking to rescind its contract could "satisfy the requirements of a unilateral rescission and then bring an action at law," or the party could instead "seek rescission in equity." Hugh S. Koford, *Rescission at Law and in Equity*, 36 Cal. L. Rev. 606, 606 (1948) (Koford). The action at law would proceed "in quasi contract," based on a "promise implied in law to return the consideration paid," because the "contract no longer exists, it having been terminated by the prior rescission." *Id.* at 606-607. Where there has been no unilateral attempt to rescind, however, "the aid of a court of equity is necessary, since there is no implied contract upon which to base an action at law." *Id.* at 607; see Restatement (First) of Restitution § 65 cmt. d (1937) ("[I]n equity * * * there need be no offer to restore antecedent to the proceedings."); see also Pet. 30-31 (relying on Restatement).

The action contemplated by Section 12(a)(2) of the Securities Act does not proceed as a quasi-contractual remedy after a contract has been unilaterally rescinded. Rather, the relief sought is equitable rescission, in the form of a court order that, upon tender of the security, the defendant will be compelled to return the proceeds of the sale. In this case, "the FHFA still owns and can physically return the Certificates as it would be required to do on an equitable rescission claim." Pet. App. 93. FHFA did not unilaterally rescind the contract before bringing suit. Instead "in issuing its final judgment, the District Court ordered the FHFA to 'deliver' the Certificates to [petitioners] in exchange for the amounts recoverable." *Ibid.* That is a classic equitable rescission.

This Court has long made clear, and courts of appeals have long accepted, that rescission under Section 12(a)(2) is an equitable remedy. In *Deckert* v. *Independent Shares Corp.*, 311 U.S. 282 (1940), the Court declared it "well established" that "a suit to rescind a contract induced by fraud and to recover the consideration paid may be maintained in equity, at least where there are circumstances making the legal remedy inadequate." *Id.* at 289. The Court thus concluded, in a lawsuit that was brought under the provision at issue here and whose "principal objects" were "rescission" and "restitution of the consideration paid," that the suit "state[d] a cause for equitable relief." *Id.* at 288-289.

In *Pinter* v. *Dahl*, 486 U.S. 622 (1988), this Court similarly observed that "Section 12 was adapted from common-law (or equitable) rescission, which provided for restoration of the status quo by requiring the buyer to return what he received from the seller." *Id.* at 641

n.18 (citation omitted). While noting that the statute diverges from the common law insofar as "it permits the buyer who has disposed of the security to sue for damages," the Court explained that this "damages calculation results in what is the substantial equivalent of rescission." *Ibid.* Here, the court of appeals did not decide whether a suit invoking the damages remedy in a case where the relevant securities have been sold could be considered an equitable action; it merely noted that the rescission remedy for an entity that still owned the security was an equitable remedy. Pet. App. 93. That conclusion follows directly from this Court's discussion in *Pinter*. See *Randall* v. *Loftsgaarden*, 478 U.S. 647, 655 (1986) ("§ 12[(a)](2) prescribes the remedy of rescission except where the plaintiff no longer owns the security.").

b. Petitioners' contrary arguments lack merit. Petitioners identify (Pet. 28-29) certain similarities between the elements of a claim under Section 12(a)(2) and the elements of a claim under Section 11, see 15 U.S.C. 77k. But as petitioners acknowledge, the Seventh Amendment inquiry hinges primarily on the remedy, not on the elements of the cause of action. See Pet. 28 (citing *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 42 (1989)). Petitioners also acknowledge that Section 11 authorizes a legal action not by virtue of the elements of the cause of action, but because it "authoriz[es] recovery of 'damages' only." Pet. 29 (citing 15 U.S.C. 77k(e)). Because the remedy under Section 12(a)(2) is equitable rescission, not damages, any similarities to Section 11 are immaterial. See Pet. App. 92 (noting remedial differences between the two provisions).

Petitioners also rely (Pet. 29) on the elements of a Section 12(a)(2) cause of action. As noted above, the

"more important" inquiry relates to the remedy, which is an equitable one. *Granfinanciera*, 492 U.S. at 42. And even on its own terms, petitioners' argument is flawed. The traditional cause of action at law was an action in quasi-contract premised on a unilateral rescission effected *before* the litigation began. See Koford 606-607. Here, by contrast, FHFA asked the court to rescind the contract, based on proof that petitioners had made misrepresentations in violation of the securities laws, and to order the return of the relevant shares. The action therefore closely tracks one for equitable rescission. See Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 244 (1933) ("The common-law remedy of rescission" includes "cases where restoration of the status quo is effected, where the buyer returns what he received from the seller.").

Finally, petitioners suggest (Pet. 32-33) that Congress's addition to Section 12 of a loss-causation provision, 15 U.S.C. 77*l*(b), which allows a plaintiff's recovery to be offset "to the extent the plaintiff's loss was caused by something other than the alleged misstatement or omission," converted the remedy from an equitable to a legal one. Pet. 33. Petitioners assert (*ibid.*) without citation that "limiting the value of any rescission to a measure of damages would have been anathema in equity." But as a decision on which petitioners rely (Pet. 30) explained, "it is in equity to procure the declaration of a rescission on whatever terms may be just." *Marr* v. *Tumulty*, 175 N.E. 356, 358 (N.Y. 1931) (Cardozo, C.J.). Petitioners do not explain why equity would force defendants to absorb losses for which they were not responsible. And even if a loss-causation offset were categorically unavailable in an action for equitable rescission, that would not "st[and] as a barrier to considering

Section 12(a)(2)'s rescission-like remedy equitable for purposes of the Seventh Amendment." Pet. App. 91. "Section 12 was adapted from common-law (or equitable) rescission," and the remedy it authorizes remains "the substantial equivalent of rescission," even though Section 12 "differs" in some respects from the contours of the "source material." *Pinter*, 486 U.S. at 641 n.18.

c. Petitioners in No. 17-1300 suggest that they are entitled to a jury trial because they did not transfer title to the securities, instead merely controlling others who transferred title or actively solicited the sale. 17-1300 Pet. 22-24. That argument also lacks merit.

Under the Securities Act, a defendant who controls an entity that sells a security based on misrepresentations is equally responsible, along with the seller, for returning "the consideration paid for such security." 15 U.S.C. 77*l*(a); see 15 U.S.C. 77*o*. There is no reason to believe that Congress intended such a remedy to be rescissionary as to the entity that sold the security, yet non-rescissionary for the defendant that directed the sale. In any event, equitable principles do not support petitioners' argument. "There is authority at common law * * * for granting a plaintiff rescission against a defendant who was not a party to the contract in question, in particular, against the agent of the vendor." *Pinter*, 486 U.S. at 647 n.23 (citing cases); see *Gordon* v. *Burr*, 506 F.2d 1080, 1083 (2d Cir. 1974) ("[T]he New York courts have long held rescission applicable against a defrauder not in privity of contract with the victim of the fraud."); 506 F.2d at 1083-1084 (citing cases from New York and other jurisdictions); cf. *Marr*, 175 N.E. at 357 (authorizing rescission of share-transfer, even though not all shares were returned, because "[e]quity is not crippled at such times by an inexorable formula").

Petitioners' reliance (17-1300 Pet. 22-24) on this Court's decision in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), is also misplaced. There, the Court considered whether the equitable remedy of restitution extended to a cause of action seeking not "to restore to the plaintiff particular funds or property in the defendant's possession," but rather "the imposition of personal liability for the benefits that [the plaintiffs] conferred upon [the defendants]." *Id.* at 214. The Court explained that imposition of such "personal liability * * * for a contractual obligation to pay money" was a legal remedy "not typically available in equity." *Id.* at 210. Here, by contrast, FHFA did not obtain a generalized monetary judgment against petitioners, but rather an order relieving FHFA from ownership of securities purchased in transactions tainted by misrepresentations in violation of the securities laws. FHFA accordingly is not required to obtain from petitioners the precise funds that were paid for the securities; rather, FHFA seeks only reimbursement, out of available funds, in exchange for relinquishing the *specific* securities purchased. Insofar as a securities plaintiff seeks "rescissionary relief" of that type, "there is nothing incongruous about forcing a broker or other solicitor to assume ownership of the securities." *Pinter*, 486 U.S. at 647 n.23. Forcing petitioners to assume ownership of particular securities, sold by entities they controlled, is an equitable remedy.

d. Petitioners do not and could not plausibly assert that the question presented has divided the courts of appeals. Indeed, they do not identify any court that has accepted their argument. Instead, petitioners assert (Pet. 33-34) that this Court's review is warranted because the right to trial by jury is an important right.

Petitioners further contend (Pet. 34) that, because the Securities Act "impose[s] strict (or near-strict) liability," "[i]n many Securities Act cases, * * * the critical question is not what happened but whether what happened was reasonable—and even if it was not, what amounts can be deducted as unrelated to the misstatement or omission." Those arguments provide no sound basis for this Court's review.

Petitioners do not explain why strict liability, to the extent it applies, tends to focus a factfinder's attention on questions of reasonableness. Although petitioners "did not opt to prove that the statements in the Offering Documents were truthful," Pet. App. 186, it is far from clear that defendants in other securities cases will similarly forgo any attempt to prove that their representations were accurate. As to the allegedly heightened need for jury consideration of reasonableness, moreover, the court of appeals concluded in this case—in a finding that petitioners do not challenge—that "no reasonable jury could find that [petitioners] exercised reasonable care." *Id.* at 81.

In any event, petitioners offer no support for their assertion that the jury-trial right is more important in the context of reasonableness review (or of offsets of losses) than in other contexts. Petitioners' lone citation for that assertion (Pet. 34) is a law review article, which they quote only partially. In its entirety, the relevant sentence states that "[t]he inconveniences of jury trial were accepted precisely because in important instances, *through its ability to disregard substantive rules of law*, the jury would reach a result that the judge either could not or would not reach." Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 671 (1973) (emphasis added).

There is no sound reason to believe that this rationale applies here, or that a special category of Seventh Amendment jurisprudence governs Section 12 securities-law cases.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
MARK B. STERN
DANIEL TENNY
Attorneys

MAY 2018