No. 14-379

In the Supreme Court of the United States

NOMURA HOME EQUITY LOAN, INC., ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 12 U.S.C. 1787(b)(14), which establishes "the applicable statute of limitations with regard to any action brought by the" National Credit Union Administration Board "as conservator or liquidating agent" for a failed credit union, provides the sole time limit applicable to federal securities-law actions brought against petitioners by the Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-103a) is reported at 764 F.3d 1199. The opinion of the district court (Pet. App. 120a-218a) is reported at 900 F. Supp. 2d 1222.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2014. The petition for a writ of certiorari was filed on October 2, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Credit Union Administration (NCUA) is an independent agency that regulates federally chartered credit unions. 12 U.S.C. 1752a; see, *e.g.*, 12 U.S.C. 1766(a). Among its other duties, the NCUA is responsible in its regulatory capacity for administering the National Credit Union Share Insurance Fund and the Temporary Corporate Credit Union Stabilization Fund (the Funds), which are part of the Treasury and which protect the accounts of credit-union members nationwide. 12 U.S.C. 1782-1784, 1790e. The Funds are supported by deposits, premiums, and assessments paid by credit unions. 12 U.S.C. 1782(c), 1790e(d).

The National Credit Union Administration Board, which manages the NCUA, see 12 U.S.C. 1752a(a), has statutory authority to close credit unions that are insolvent or undercapitalized and to appoint itself as liquidating agent. 12 U.S.C. 1787(a)(1)(A) and (3)(A).[1] As liquidating agent, the NCUA succeeds to "all rights, titles, powers, and privileges of the credit union," 12 U.S.C. 1787(b)(2)(A)(i), including the authority to file suit and to defend actions on the credit union's behalf, 12 U.S.C. 1766(b)(3)(A). The NCUA's recoveries from actions it brings as liquidating agent protect the Funds by offsetting losses that result from an insured credit union's failure. 12 U.S.C. 1787(e).

In the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, Congress established a special time limit that applies to suits brought by the NCUA

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[1] Except where otherwise stated, this brief uses the term "NCUA" to refer to the agency's Board in its capacity as liquidating agent, which is distinct from its capacity as regulator.

as the conservator or liquidating agent of a failed credit union. § 1217(a), 103 Stat. 536-537. That provision, codified at 12 U.S.C. 1787(b)(14) and entitled "Statute of limitations for actions brought by conservator or liquidating agent," states:

> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Board as conservator or liquidating agent shall be—
>
> (i) in the case of any contract claim, the longer of—
>
> (I) the 6-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law; and
>
> (ii) in the case of any tort claim, the longer of—
>
> (I) the 3-year period beginning on the date the claim accrues; or
>
> (II) the period applicable under State law.

12 U.S.C. 1787(b)(14)(A). The statutory period begins to run on "the date of the appointment of the Board as conservator or liquidating agent" or "the date on which the cause of action accrues," whichever is later. 12 U.S.C. 1787(b)(14)(B).

FIRREA included an identical provision applicable to the Federal Deposit Insurance Corporation (FDIC), another federal agency that can take over failed financial institutions and bring suits on their behalf. § 212(a), 103 Stat. 232-233 (12 U.S.C. 1821(d)(14)); see 12 U.S.C. 1821(c). With respect to the FDIC provision, FIRREA's sponsor explained

that the "extended statute of limitations periods" should function to "preserv[e] * * * claims that would otherwise have been lost due to the expiration of hitherto applicable limitations periods." 135 Cong. Rec. 18,866 (1989) (statement of Sen. Riegle); see Pet. App. 80a. The sponsor further observed that those extended periods would "significantly increase the amount of money that can be recovered by the Federal Government through litigation." 135 Cong. Rec. at 18,866 (statement of Sen. Riegle).

2. This case arises from the failure of two large corporate credit unions. Pet. App. 46a. In 2006 and 2007, those credit unions invested $1.74 billion in certain securities that were backed by pools of residential mortgage loans. *Id.* at 55a-57a; see *id.* at 47a-49a. Nearly half of the mortgages suffered significant payment problems, and the credit unions sustained "staggering losses" on their investments. *Id.* at 57a. In March 2009, the NCUA became the conservator of the credit unions, and in October 2010, it became their liquidating agent. *Ibid.*

After investigating the events leading to the credit unions' failure, the NCUA determined that the mortgage-backed securities were "significantly riskier than represented" in the documents accompanying the offering of those securities. Pet. App. 57a (citation omitted). Although the offering documents had represented that "zero or near zero" of the borrowers would be late on their loan payments or default entirely, in fact a significant percentage of them "were all but certain" to do so. *Ibid.* The NCUA also determined that "the offering documents contained materially false and misleading statements about the credit worthiness of the mortgage borrowers and the under-

writing practices used by originators of the mortgages." *Id.* at 58a.

In June and November 2011, the NCUA filed suit on behalf of the credit unions against petitioners, a group of financial institutions, alleging violations of state securities law as well as two provisions of federal securities law, 15 U.S.C. 77k and 77*l*(a)(2), relating to the offering of the mortgage-backed securities. Pet. App. 56a, 58a. Petitioners moved to dismiss on multiple grounds, including that the claims were time-barred. *Ibid.* The district court denied that motion in relevant part. *Ibid.*

Petitioners contended that, notwithstanding the special NCUA-specific time limits in Section 1787(b)(14), the NCUA's federal securities-law claims were barred by a time limit enacted in the 1930s and codified in 15 U.S.C. 77m. See Securities Act of 1933, ch. 38, § 13, 48 Stat. 84, as amended by Securities Exchange Act of 1934, ch. 404, § 207, 48 Stat. 908. Section 77m, entitled "Limitation of actions," provides that "[n]o action shall be maintained to enforce any liability created under section 77k or 77*l*(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." Section 77m further provides that "[i]n no event shall any such action be brought to enforce a liability created under" Section 77k "more than three years after the security was bona fide offered to the public, or under" Section 77*l*(a)(2) "more than three years after the sale."

The district court rejected petitioners' argument, holding that Section 77m does not apply to suits brought by the NCUA as a liquidating agent. Pet.

App. 151a-163a. The court observed that, under the plain language of Section 1787(b)(14), "'any action' brought by [the NCUA] is covered by the provisions of" that NCUA-specific statute. *Id.* at 153a. The court reasoned that Section 1787(b)(14)'s "broad" language "should be read to include statutory claims," such as the federal securities-law claims asserted here. *Ibid.* The court rejected petitioners' contention that Section 77m's three-year time limit, which the court considered to be a "statute of repose" that "operates without regard to the date of injury or date of discovery," should apply to suits by the NCUA even if Section 77m's one-year time limit does not. *Id.* at 157a-162a.

3. The district court certified its order for interlocutory appeal. Pet. App. 109a-119a. The court of appeals granted review and affirmed. *Id.* at 43a-103a.

The court of appeals accepted petitioners' argument that the three-year time limit in Section 77m functions as a "statute of repose"—*i.e.*, a "fixed, statutory cutoff date, usually independent of any variable, such as [a] claimant's awareness of a violation," that "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." Pet. App. 61a-62a (internal quotation marks and citations omitted); see *id.* at 61a-63a. The court concluded, however, that this time limit could not bar the NCUA's claims here because Section 1787(b)(14) establishes the only time limitation applicable to suits brought by the NCUA as liquidating agent. *Id.* at 65a. The court of appeals determined that "the plain meaning of the text best supports the conclusion that [Section 1787(b)(14)] supplants all other limitations frameworks, including both the one-year

and three-year" time limits in Section 77m. *Ibid.* The court observed that Section 1787(b)(14) "extends '*the* applicable statute of limitations' for '*any* action brought by' NCUA on behalf of a failed credit union." *Id.* at 66a (quoting 12 U.S.C. 1787(b)(14)(A)). "By using these words," the court of appeals reasoned, "Congress precluded the possibility that some other limitations period might apply." *Ibid.* (quoting *FHFA* v. *UBS Ams., Inc.*, 712 F.3d 136, 142 (2d Cir. 2013)).

The court of appeals rejected petitioners' contention that, because Section 1787(b)(14) uses the term "statute of limitations," the NCUA would still be subject to time limits set forth in a statute of repose. Pet. App. 67a. The court explained that the term "statute of limitations" in Section 1787(b)(14) "refers to the time limits in [Section 1787(b)(14)] itself—subparagraphs (A) and (B)—not the time periods in other statutes that [Section 1787(b)(14)] replaces." *Ibid.* The court characterized petitioners' argument as "at best a strained reading that may be plausible only if the term 'statute of limitations' in [Section 1787(b)(14)] can be (1) understood narrowly and (2) somehow refers to time restrictions contained in statutes other than" Section 1787(b)(14). *Ibid.*

The court of appeals further concluded that petitioners' interpretation of Section 1787(b)(14) should be rejected even "assum[ing] for the sake of discussion" that petitioners' reading was a "plausible" interpretation of the statutory text. Pet. App. 67a-87a. In the context of that further discussion, the court accepted petitioners' argument that the term "'statute of limitations' standing alone can be ambiguous." *Id.* at 77a. The court's "contextual analysis," however, concluded that "the term is used broadly in [Section 1787(b)(14)]

to cover statutory time limits generally, including repose periods." *Ibid.* The court found, *inter alia*, that other provisions in Section 1787 "use the term ['statute of limitations'] in a way that is inconsistent with" a definition that would exclude statutes of repose. *Id.* at 76a.

The court of appeals also examined the relevant legislative history, including the statement by FIRREA's sponsor that the language of Section 1787(b)(14) "should 'be construed to maximize potential recoveries . . . by preserving to the greatest extent permissible by law claims * * * that would otherwise have been lost.'" Pet. App. 80a (quoting 135 Cong. Rec. at 18,866 (statement of Sen. Riegle)). The court rejected petitioners' argument that interpreting Section 1787(b)(14) to displace the three-year limit in Section 77m "amount[ed] to a repeal" of that latter time limit. *Id.* at 86a. The court explained that Section 1787(b)(14) "does not repeal" the Securities Act limitations period, but instead "creates a separate limitations framework that functions as a narrow exception for actions brought by NCUA on behalf of failed credit unions." *Id.* at 87a.

The court of appeals also rejected petitioners' separate contention that Section 1787(b)(14) applies only to common-law contract and tort claims. Pet. App. 89a-97a. The court observed that, on its face, the statute "applies to 'any action brought by' NCUA." *Id.* at 90a (quoting 12 U.S.C. 1787(b)(14)). The court concluded that the terms "*any* tort claim" and "*any* contract claim," which are used to describe the relevant time limits, encompass statutory as well as common-law claims. *Id.* at 91a-93a (quoting 12 U.S.C. 1787(b)(14)(A)(i) and (ii)) (emphasis added by court).

The court further explained that "[a]pplying [Section 1787(b)(14)] to statutory claims serves the statute's purpose by providing NCUA sufficient time to investigate and file all potential claims once it assumes control of a failed credit union." *Id.* at 94a.

The court of appeals also noted that Congress had derived the language of Section 1787(b)(14)—including its division of claims into "tort" and "contract" claims—from 28 U.S.C. 2415, "the general or default statute of limitations for claims brought by the United States." Pet. App. 94a-96a. The court observed that "[w]hen Congress drafted [Section 1787(b)(14)], courts had often applied Section 2415 to statutory claims." *Id.* at 95a. Quoting Justice Frankfurter's observation that statutory language that is "obviously transplanted from another legal source * * * brings the old soil with it," the court of appeals concluded that Congress intended Section 1787(b)(14) to operate in the same way. *Ibid.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947), as quoted in *United States* v. *Adame-Orozco*, 607 F.3d 647, 654 (10th Cir.), cert. denied, 131 S. Ct. 368 (2010)).

Finally, the court of appeals rejected petitioners' contention that Section 1787(b)(14) applies only to state-law claims and not to federal-law claims. Pet. App. 97a-102a. The court explained that Section 1787(b)(14) "expressly covers 'any action' and does not expressly exclude any type of claim from its coverage." *Id.* at 98a. The court also recognized that, although Section 1787(b)(14) allows the NCUA to invoke a time limit under "State law" that is longer than the default three- or six-year limit in Section 1787(b)(14) itself, the default time limit "is plainly

not limited to state-law claims." *Id.* at 99a. The court emphasized that Section 1787(b)(14) "sets a limitations period for 'any action' brought by a *federal* agency in its capacity as conservator or liquidating agent of insolvent or undercapitalized *federally* insured credit unions." *Id.* at 99a-100a. The court reasoned that, "[i]f Congress had meant to preserve the NCUA's ability to pursue only state claims, while excluding the many potential federal claims that would enable NCUA to fulfill its mission, it would have said so expressly." *Id.* at 100a. The court additionally observed that, when Section 1787(b)(14) was enacted, "courts routinely applied" 28 U.S.C. 2415, on which Section 1787(b)(14) was modeled, "to federal claims." Pet. App. 100a.

4. Petitioners filed a petition for a writ of certiorari. See 134 S. Ct. 2818 (2014) (No. 13-576). While that petition was pending, this Court decided *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014). That case concerned a provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9658, 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) and (b)(2). The Court held in *CTS Corp.* that Section 9658 does not preempt state statutes of repose. 134 S. Ct. at 2180. The Court subsequently granted the petition for a writ of certiorari in this case, vacated the court of appeals' judgment, and remanded the matter for further consideration in light of *CTS Corp.* *Id.* at 2818.

On remand, the court of appeals reinstated its original decision. Pet. App. 2a; see *id.* at 43a-103a. The court issued a new opinion (*id.* at 4a-42a) that considered the impact of *CTS Corp.* on this case and concluded that this

Court's decision "d[id] not alter [the court of appeals'] original conclusion that NCUA's federal securities claims were timely." *Id.* at 42a. The court observed that "the text and structure" of Section 9658, the provision this Court construed in *CTS Corp.*, are "fundamentally different" from those of Section 1787(b)(14). *Id.* at 19a. Section 9658 "recognizes that time limits in state statutes apply" and creates an "'exception to the regular rule'" by supplying a "federally required commencement date" in certain limited circumstances. *Id.* at 20a (quoting *CTS Corp.*, 134 S. Ct. at 2185) (some internal quotation marks and citations omitted). Section 1787(b)(14), in contrast, "does not establish a narrow 'exception to the regular rule,'" but instead "creates the exclusive time framework for all NCUA enforcement actions and replaces all other time periods." *Id.* at 21a (quoting *CTS Corp.*, 134 S. Ct. at 2185) (some internal quotation marks omitted).

The court of appeals thus "reaffirm[ed] [its] original conclusion, which is sufficient to resolve the instant case," that Section 1787(b)(14) "plainly establishes its own exclusive time limits for NCUA enforcement actions and displaces all others, including statutes of limitations and repose." Pet. App. 22a. The court also noted this Court's recognition in *CTS Corp.* that the term "statute of limitations" can sometimes "'refer to any provision restricting the time in which a plaintiff must bring suit'"; that "'Congress has used the term * * * when enacting statutes of repose'"; and that Section 9658's use of the term was accordingly "'instructive but . . . not dispositive'" of whether Section 9658 applied to statutes of repose. *Id.* at 24a-25a (quoting 134 S. Ct. at 2185). Observing that the Court in *CTS Corp.* had "looked to factors specific to CERCLA to conclude § 9658

preempted only state statutes of limitations," the court of appeals examined similar factors in the context of Section 1787(b)(14). *Id.* at 25a. It determined that "none of those factors" altered its previous conclusion that the "surrounding language, statutory context, and statutory purpose" of Section 1787(b)(14) "compel a broad reading of the term 'statute of limitations.'" *Ibid.*

First, the court of appeals observed that, while Section 9658 "exclusively adopts a discovery-based accrual framework and contains no * * * concept of repose," Section 1787(b)(14)'s time limit can begin to run on the date the NCUA was appointed as conservator, which "invokes the concept of repose because it is based on when a specific event occurs, regardless of whether the plaintiff is aware of the injury." Pet. App. 26a-27a. Second, the court observed that, while Section 9658 operates by modifying a single state time "period"—which "'would be an awkward way to mandate the pre-emption of'" both a statute of repose and some other state-law time limit, *id.* at 28a (quoting *CTS Corp.*, 134 S. Ct. at 2187)—Section 1787(b)(14) uses the term "period" only in its definition of the single "exclusive time framework for NCUA actions." *Id.* at 27a-29a. Third, the court observed that, while Section 9658's reference to the time when a "civil action * * * may be brought" suggests a statute-of-limitations-like focus on the accrual of a cause of action, *id.* at 30a-31a (citing *CTS Corp.*, 134 S. Ct. at 2187), Section 1787(b)(14) does not refer to accrual in the same way. *Id.* at 30a-32a. Finally, the court observed that, while Section 9658 has an explicit equitable tolling rule, which does not make sense for a statute of repose, *id.* at 32a (citing *CTS Corp.*, 134 S. Ct. at 2187), Section 1787(b)(14) does not explicitly provide for equitable tolling. *Id.* at 32a.

The court of appeals also reiterated its observations in its original opinion about the statutory context and legislative history of Section 1787(b)(14), which this Court had no occasion to analyze in *CTS Corp.* Pet. App. 34a-41a. The court additionally pointed out that an aspect of Section 9658's legislative history that was a focus of the decision in *CTS Corp.*—the existence of a congressional report that had "acknowledged that statutes of repose were not equivalent to statutes of limitations"—had no analogue in the legislative history of Section 1787(b)(14). *Id.* at 36a-37a (quoting *CTS Corp.*, 134 S. Ct. at 2186).

ARGUMENT

The court of appeals correctly held that 12 U.S.C. 1787(b)(14) provides the sole time limit applicable to suits brought by the NCUA as liquidating agent. That holding does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Section 1787(b)(14) assists the NCUA in recovering funds on behalf of a failed credit union by providing that the NCUA will have at least three years after becoming the conservator or liquidator of the credit union to investigate and file any tort claims on the credit union's behalf. As the court of appeals explained, the statute "establishes '*the* applicable statute of limitations' for '*any* action brought by' NCUA on behalf of a failed credit union." Pet. App. 11a (internal quotation marks and citation omitted); see 12 U.S.C. 1787(b)(14). And by directing that "'the applicable statute of limitations . . . *shall be*'" the one that Section 1787(b)(14) specifies, Congress made clear that Section 1787(b)(14)'s application "is mandatory." Pet. App. 66a (quoting 12 U.S.C.

1787(b)(14)(A)). Congress thus ruled out the possibility that claims covered by Section 1787(b)(14) could be barred by other time limits.

Congress enacted Section 1787(b)(14) as part of FIRREA, in response to a "widespread financial crisis," with the intent to "'prevent the collapse of the [financial] industry, attack the root causes of the crisis, and restore public confidence.'" Pet. App. 79a (brackets omitted) (quoting *United States* v. *Winstar Corp.*, 518 U.S. 839, 844, 856 (1996)). The provisions extending the time for the FDIC and NCUA "to investigate and determine what causes of action [they] should bring on behalf of a failed institution," *FDIC* v. *Barton*, 96 F.3d 128, 133 (5th Cir. 1996), were "of the utmost importance" to that effort, 135 Cong. Rec. at 18,866 (statement of Sen. Riegle). By allowing the government to bring "claims that would otherwise have been lost due to the expiration of hitherto applicable limitations periods," those provisions "significantly increase the amount of money that can be recovered by the Federal Government through litigation" and "help ensure the accountability of the persons responsible for the massive losses the Government has suffered through the failures of insured institutions." *Ibid.* In this case, for example, one of the claims brought by the NCUA would have become time-barred approximately a month after the NCUA became the conservator, well before the NCUA could reasonably have become aware of the claim's existence and filed suit. C.A. App. 44 (NCUA's claims include a sale on April 24, 2006); *id.* at 47 (NCUA became conservator of the relevant credit union on March 20, 2009).

2. a. Petitioners do not dispute that Section 1787(b)(14) displaces at least *some* potential time limits that might otherwise apply to claims brought by the NCUA. See, *e.g.*, Pet. 26. They contend (Pet. 14-26), however, that Section 1787(b)(14) cannot be the exclusive time limit in a case to which Section 77m's three-year deadline might otherwise apply. Focusing primarily on the fact that the time limit established by Section 1787(b)(14) is denominated a "statute of limitations" (see Pet. 15-18), petitioners argue that it cannot displace the three-year time limit in Section 77m, which can be characterized as a "statute of repose." As the court of appeals recognized, petitioner's argument "confuses what [12 U.S.C. 1787(b)(14)] *does*—sets an all-purpose time frame for NCUA to bring enforcement actions on behalf of failed credit unions—with what it *replaces*—the preexisting time frames to bring 'any action.'" Pet. App. 73a. The term "statute of limitations" in Section 1787(b)(14) simply describes the new time limit *itself*. It does not describe, or narrow, the set of circumstances in which that time limit is applicable.

The court of appeals correctly observed, moreover, that courts (including this Court) have sometimes described Section 77m—entitled "Limitation of actions"—as a "statute of limitations," Pet. App. 85a (citing, *inter alia*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 (1976)); that the term "statute of limitations" can sometimes encompass provisions that contain statutes of repose, *id.* at 68a-71a; and that the context of Section 1787 provides evidence that Congress used the term in that broader sense here, *id.* at 72a-77a. Congress had no reason to believe that the "statute of limitations" it was creating in Section

1787(b)(14) would be viewed as something different from—or subsidiary to—the "Limitation of actions" it had previously created in Section 77m. Indeed, petitioners' position that Section 1787(b)(14) does not displace statutes of repose would impermissibly bifurcate Section 77m. If that position were correct, Section 1787(b)(14) 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). Congress did not render Section 77m—entitled "Limitation of actions"—divisible in that fashion. Rather, this Court has viewed Section 77m as an "indivisible determination by Congress as to the appropriate cutoff point" for certain claims and has recognized 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).

b. Petitioners' reliance on this Court's decision in *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014), is misplaced. The CERCLA provision at issue in that case, 42 U.S.C. 9658, does not create its own singular and exclusive federal time limit, as Section 1787(b)(14) does. Instead, Section 9658 creates a narrow "[e]xception to [s]tate statutes" (while maintaining that "[s]tate law [is] generally applicable") in certain state-law tort suits concerning injuries from hazardous substances, by replacing the "commencement date" of the "applicable limitations period" in such suits with a "federally required commencement date." 42 U.S.C. 9658(a)(1)-(2). Section 9658 defines "applicable limitations period" to mean "the period specified in a statute of limitations during which a civil action [relating to exposure to hazardous substances] may be brought." 42 U.S.C. 9658(b)(2). The "federally required com-

mencement date" is a discovery rule, defined as the date on which the plaintiff "knew (or reasonably should have known)" the cause of his injuries. 42 U.S.C. 9658(b)(4)(A). As this Court observed in *CTS Corp.*, "[u]nder this structure, state law is not preempted unless it fits into the precise terms of the exception." 134 S. Ct. at 2185.

Section 1787(b)(14), in contrast, mandates that "[i]n general," the statute of limitations for "any action" brought by NCUA as conservator or liquidating agent "shall be" the one set forth in Section 1787(b)(14) itself. The Court's conclusion in *CTS Corp.* that Section 9658 does not engraft a discovery rule onto state statutes of repose, 134 S. Ct. at 2185-2189, thus does not compel any particular answer to the distinct question whether Section 1787(b)(14)'s new federal time limit displaces the three-year time limit in Section 77m. First, even assuming *arguendo* that the term "statute of limitations" in Section 1787(b)(14) describes the set of time limits that Section 1787(b)(14) replaces (rather than merely the nature of Section 1787(b)(14)'s own time limit), *CTS Corp.* makes clear that use of the term "statute of limitations" is "instructive, but it is not dispositive" of whether statutes of repose are covered. *Id.* at 2185. The Court observed that the "general usage of the legal terms has not always been precise"; that the term "statute of limitations" is "sometimes used" to "refer to *any* provision restricting the time in which a plaintiff must bring suit"; and that Congress itself, which has never used the term "statute of repose," has "used the term 'statute of limitations' when enacting statutes of repose." *Id.* at 2185-2186 (emphasis added) (citing, *inter alia*, 15 U.S.C. 78u-6(h)(1)(B)(iii)(I)(aa)). Unlike Section 9658, Section

1787(b)(14) was not enacted against a backdrop that included a congressional report distinguishing "statutes of repose" from "statutes of limitations." *Id.* at 2186. Indeed, neighboring provisions of Section 1787 use the term "statute of limitations" in a manner consistent with statutes of repose. Pet. App. 76a (discussing 12 U.S.C. 1787(b)(6)(B), (8)(D) and (d)(4)).

Second, petitioners are wrong in suggesting (Pet. 18-21) that Section 1787(b)(14) "invokes the concept of accrual" in a manner inconsistent with the displacement of statutes of repose. In *CTS Corp.*, this Court noted that the time periods modified by Section 9658 were defined as periods "during which a civil action * * * may be brought." 134 S. Ct. at 2187 (quoting 42 U.S.C. 9658(b)(2)) (some internal quotation marks and citations omitted). The Court reasoned that this definition did not naturally describe statutes of repose, which are "not related to the accrual of any cause of action." *Ibid.* (citation omitted). Unlike Section 9658, however, Section 1787(b)(14) does not define the time limits it *affects* by reference to accrual. Instead, Section 1787(b)(14)'s only references to accrual are in the definition of the time period that Section 1787(b)(14) *itself* defines. See 12 U.S.C. 1787(b)(14)(A)(i)(I), (ii)(I) and (B). That definition does not impose any limitations on the alternative time limits that Section 1787(b)(14) displaces. The starting point for Section 1787(b)(14)'s own time limit, moreover, is not invariably defined by reference to the accrual of a claim, but is sometimes defined by the date on which the NCUA became conservator or liquidator of the failed credit union—a starting point unrelated to accrual and thus akin to a statute of repose. Pet. App. 26a & n.11; see 12 U.S.C. 1787(b)(14)(B)(i).

Third, petitioners are likewise wrong in interpreting (Pet. 21-23) Section 1787(b)(14)'s language as authorizing the displacement of only a single time period—which petitioners presume to be a non-repose period—for each claim to which it applies. In *CTS Corp.*, this Court relied in part on statutory language suggesting that Section 9658 was intended to modify only one time limit, rather than multiple time limits, as an indication that it was not intended to apply to a statute of repose in addition to another time limitation. 134 S. Ct. at 2186-2187. No similar argument is available here. Although Section 1787(b)(14) refers in certain places to a single time limit, that is the time limit that Section 1787(b)(14) *itself* defines, not (as in *CTS Corp.*) some *other* time limit that the statute might displace. Petitioners presumably would acknowledge that, if a claim covered by Section 1787(b)(14) were otherwise subject to two overlapping time limits, neither of which was a repose period (say, a general time limit for certain claims and a shorter time limit for suits against particular types of defendants), Section 1787(b)(14) would displace both. By the same token, Section 1787(b)(14) could displace both a statute of repose and another time limit that is not a statute of repose.

Fourth, contrary to petitioners' contention (Pet. 24), the fact that Section 1787(b)(14) applies to "any action" does not prevent it from superseding statutes of repose. In *CTS Corp.*, the Court found that Section 9658's definition of the state time limits it modified as periods during which "a 'civil action' under state law 'may be brought'" did not naturally encompass statutes of repose, which might sometimes operate to preclude a suit from *ever* being brought. 134 S. Ct.

at 2187 (quoting 42 U.S.C. 9658(b)(2)). Section 1787(b)(14), however, does not include the phrase "may be brought." And Section 1787(b)(14)'s reference to "any action" is not analogous to Section 9658's reference to a "civil action," because it does not appear in a definition of the time limits that Section 1787(b)(14) replaces. Rather, the term "any action" gives Section 1787(b)(14)'s own time limit a broad scope by making clear that it applies in every action brought by the NCUA.

Finally, petitioners overlook important differences between the history and purposes of Section 9658 and those of Section 1787(b)(14). The Court in *CTS Corp.* emphasized that Congress, in enacting Section 9658, had declined to adopt a specific recommendation that it "repeal * * * statutes of repose as well as statutes of limitations." 134 S. Ct. at 2186. The Court inferred that Congress's failure even to "refer[] to statutes of repose as a distinct category" made it "proper to conclude that Congress did not exercise the full scope of its pre-emption power." *Ibid.* The Court similarly stressed that Congress had enacted Section 9658 as an "'[e]xception' to the regular rule" that the state time limits would control. *Id.* at 2185 (quoting 42 U.S.C. 9658(a)(1)). Here, in contrast, Congress enacted Section 1787(b)(14) specifically to ensure that the NCUA would have adequate time to pursue claims to which it succeeded on behalf of failed credit unions. Pet. App. 79a-80a; *id.* at 35a-36a. And there is no evidence that Congress intended the new, longer, time limit it established for NCUA actions—enacted in the context of recovering from one of the Nation's worst financial crises—to be frustrated by the application of preexisting shorter deadlines.

3. Petitioners challenge the court of appeals' decision on two other grounds, neither of which has merit.

a. Petitioners contend (Pet. 27-29) that 12 U.S.C. 1787(b)(14) does not apply to federal statutory claims, but instead applies only to state-law tort or contract claims. That contention cannot be squared with Section 1787(b)(14)'s express application to "*any action* brought by the Board as conservator or liquidating agent." 12 U.S.C. 1787(b)(14) (emphasis added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)).[2] In addition, other portions of Section 1787 appear to employ the term "any action" to encompass both federal and state claims. See, *e.g.*, 12 U.S.C 1787(b)(5)(F)(ii) (providing that filing of claim with the liquidating agency "shall not

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[2] Petitioners' brief assertion (Pet. 29) that the decision below "run[s] afoul" of this Court's decision in *Jones* v. *Bock*, 549 U.S. 199 (2007), is unfounded. In *Jones*, this Court construed a statute providing that "'[n]o action shall be brought' unless administrative procedures are exhausted." *Id.* at 220 (quoting 42 U.S.C. 1997e(a)). The Court held that Section 1997e(a) should be applied claim-by-claim, so that exhausted claims could proceed even if filed simultaneously with unexhausted claims. See *id.* at 220-224. Similarly here, the statute of limitations in Section 1787(b)(14) should be applied separately to each claim asserted by the NCUA as conservator or liquidating agent, so that some claims in a particular suit may be timely (and therefore should be allowed to go forward) even though other claims in the same suit are time-barred. *Jones* does not cast doubt on the court of appeals' conclusion that the Section 1787(b)(14) limitations period governs all claims within a suit like this one. Indeed, it was undisputed in *Jones* that the exhaustion requirement for an "action" was applicable to every claim, such that "no unexhausted claim may be considered." *Id.* at 220.

prejudice any right of the claimant to continue any action which was filed before the appointment of the liquidating agent"); 12 U.S.C. 1787(b)(8)(E)(ii) (similar); 12 U.S.C 1787(b)(13)(D)(i) (providing that courts generally shall not have jurisdiction over "any claim or action" of a certain type); see also *United States* v. *Castleman*, 134 S. Ct. 1405, 1417 (2014) (discussing "the rule of thumb that a term generally means the same thing each time it is used").

Petitioners are mistaken in asserting that Section 1787(b)(14)'s reference to "tort" and "contract" claims limits the scope of "any action" to suits arising under state law. Because the term "tort" has long been understood to encompass all non-contractual legal wrongs, Pet. App. 92a & n.23 (citing *Black's Law Dictionary* 1335 (5th ed. 1979)), the terms "tort claim" and "contract claim" together encompass any possible claim that the NCUA might bring in an "action" as liquidating agent. And a claim can sound in "tort" or "contract" even if it is conferred by statute. See, *e.g.*, *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) ("[T]here can be no doubt that claims brought pursuant to [42 U.S.C. 1983] sound in tort."); *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974) ("A damages action under the [Fair Housing Act] sounds basically in tort."); *Schillinger* v. *United States*, 155 U.S. 163, 169 (1894) (considering patent infringement to be a "tort"); *United States* v. *P/B STCO 213*, 756 F.2d 364, 374 (5th Cir. 1985) (concluding that certain statutory claims were quasi-contractual and thus covered by 28 U.S.C. 2415(a)'s six-year statute of limitations for contract claims); *United States* v. *Limbs*, 524 F.2d 799, 802 (9th Cir. 1975) (same for a claim under a different statute).

Section 1787(b)(14) was modeled on 28 U.S.C. 2415, Pet. App. 95a, which also established deadlines for commencing "tort" and "contract" suits. "When Congress drafted [Section 1787(b)(14)], courts had often applied Section 2415 to statutory claims," *ibid.*, and had "routinely applied Section 2415 to federal claims," *id.* at 100a. Congress presumably expected Section 1787(b)(14) to have similar application. *Id.* at 95a; cf. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 589-590 (2010) (recognizing that Congress generally intends to incorporate existing judicial interpretations of statutory language when it places that language in a new statute). And, contrary to petitioners' contention (Pet. 27-29), Section 1787(b)(14)'s references to "State law" do not suggest that the term "any action" excludes federal-law claims. The references to state law simply ensure that Section 1787(b)(14) does not displace state-law limitations periods that are longer than the periods set forth in Section 1787(b)(14) itself. 12 U.S.C. 1787(b)(14)(A)(i)(II) and (ii)(II). Nothing in the statute suggests that Congress "meant to preserve the NCUA's ability to pursue only state claims, while excluding the many potential federal claims that would enable NCUA to fulfill its mission." Pet. App. 100a.

b. Petitioners also contend (Pet. 29-30) that reading Section 1787(b)(14) to supersede the three-year time limit in Section 77m would violate the principle that "repeals by implication are not favored." Pet. 29-30 (quoting *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). The court of appeals correctly explained, however, that Section 1787(b)(14) "does not repeal [Section 77m], implicitly or otherwise." Pet. App. 87a. Instead, Section 1787(b)(14) "creates a sep-

arate limitations framework that functions as a narrow exception for actions brought by the NCUA on behalf of failed credit unions." *Ibid.* The court of appeals identified decisions in three other circuits holding that the general principle disfavoring repeals by implication does not apply in such a circumstance. See *Ibid.* (citing *Harris* v. *Owens*, 264 F.3d 1282, 1296 (10th Cir. 2001), cert. denied, 535 U.S. 1097 (2002); *Strawser* v. *Adkins*, 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)). This Court has likewise declined to rely on that principle where, *inter alia*, the earlier statute would continue to have "the same effect" in all situations not directly contemplated by the later enactment. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).

As the First Circuit has explained, the presumption against implied repeals "is a product of * * * 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 Pet. 32 (similar) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974)). That rationale has considerably less force in cases like this one, where the disputed question is whether the earlier statute (here, Section 77m) should continue to govern in the narrow and precise circumstance (an action by the NCUA in its capacity as conservator or liquidating agent) that Congress specifically addressed when it enacted the later

statute (Section 1787(b)(14)). See *Greenless*, 277 F.3d at 609. The clear purpose and natural effect of Section 1787(b)(14) is to ensure that NCUA suits filed within the statutory deadline will be treated as timely, even if they would otherwise be time-barred by other provisions of law. That partial displacement of provisions like Section 77m is scarcely "implied"; it is Section 1787(b)(14)'s unambiguous purpose.

Contrary to petitioners' suggestion (Pet. 32-33), this Court's decision in *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644 (2007), did not require the court of appeals to apply the principle disfavoring implied repeals in the particular circumstances of this case. In *Home Builders*, the Court addressed a statute under which a federal agency was required to approve a certain type of application if nine statutory criteria were satisfied. *Id.* at 649. The Court considered, and ultimately rejected, the argument that a second statute "effectively operate[d] as a tenth criterion." *Ibid.* The Court observed that construing the second statute in that manner would "effectively repeal the mandatory and exclusive list of criteria" in the first statute; "replace it with a new, expanded list" in every instance; and "result in the implicit repeal of many additional otherwise categorical statutory commands." *Id.* at 662, 664. The Court determined that "the statutory language—read in light of the canon against implied repeals—does not itself provide clear guidance" about whether the first or second statute was controlling, *id.* at 666, and it deferred to the agency's reasonable harmonization of the conflicting statutory mandates, *id.* at 673.

Petitioners focus (Pet. 32) on the Court's statement in *Home Builders* that "implied amendments are no

more favored than implied repeals." 551 U.S. at 664 n.8. 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 (emphasis added). 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 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).

4. Petitioners do not assert that the circuits are divided on the question presented. Consistent with the decision below, the Second Circuit recently held that a materially identical statute applicable to the Federal Housing Finance Agency (FHFA) displaced the three-year time limit in Section 77m. See *FHFA* v. *UBS Ams., Inc.*, 712 F.3d 136, 140-145 (2013). In reaching that decision, the court correctly rejected many of the same arguments that petitioners have raised here. The Second Circuit concluded that 12 U.S.C. 4617(b)(12), which is substantively identical to Section 1787(b)(14), applies to both state and federal claims and that it supersedes other time limits regardless of whether they are characterized as statutes of repose. *UBS*, 712 F.3d at 141-145; see *Beckley Capital Ltd. P'ship* v. *DiGeronimo*, 184 F.3d 52, 57 (1st Cir. 1999) (reasoning that, under the FDIC analogue to Section

1787(b)(14), a suit by the FDIC would not be barred by a one-year state time limit, whether or not that state time limit was a typical "statute of limitations," but finding that rule inapplicable where suit was brought by the FDIC's assignee).

Petitioners suggest that this Court's intervention is warranted because the question presented will affect "40 actions against dozens of financial institutions." Pet. 33. But the possibility that the issue will be considered by additional circuits in short order counsels against, rather than in favor of, immediate review by this Court. Further circuit-court review of the question presented will allow other courts of appeals to consider what effect, if any, this Court's recent decision in *CTS Corp.* should have on the interpretation of Section 1787(b)(14) and similar statutes.

Immediate review by this Court would be especially premature in this case, which presents the question in an interlocutory posture, "a fact that of itself alone furnishe[s] sufficient ground for the denial of the application." See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). Petitioners could still prevail on remand, including on different statute-of-limitations arguments. See Pet. App. 59a-60a n.9. And if they ultimately are found liable, they can raise their timeliness arguments—together with any other claims that may arise during the proceedings—in a single petition for a writ of certiorari following the entry of final judgment against them. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider

questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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