No. 16-463

In the Supreme Court of the United States

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

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

COLLEEN J. BOLES
Assistant General Counsel
KATHRYN R. NORCROSS
Senior Counsel
J. SCOTT WATSON
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether 12 U.S.C. 1821(d)(14), which establishes "the applicable statute of limitations with regard to any action brought by the" Federal Deposit Insurance Corporation (FDIC) "as conservator or receiver," provides the sole time limit applicable to claims brought against petitioners by the FDIC as receiver for a failed bank.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rule:

Statutes and rule—Continued: Page

Statutes and rule—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 16-463

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

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 821 F.3d 372. The opinion of the district court (Pet. App. 30a-42a) is reported at 42 F. Supp. 3d 574.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2016. A petition for rehearing was denied on July 28, 2016 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on October 6, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In response to the 1980s savings and loan crisis, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),

Pub. L. No. 101-73, 103 Stat. 183, "[t]o reform, recapitalize, and consolidate the Federal deposit insurance system, to enhance the regulatory and enforcement powers of Federal financial institutions regulatory agencies, and for other purposes." *Ibid.*; see *FDIC* v. *RBS Sec. Inc.*, 798 F.3d 244, 248 (5th Cir. 2015), cert. denied, 136 S. Ct. 1492 (2016). FIRREA states that the Federal Deposit Insurance Corporation (FDIC) may be appointed as conservator or receiver for an insured federal or state "depository institution" if (*inter alia*) the institution's assets are insufficient to meet its obligations or have been substantially dissipated in violation of law. 12 U.S.C. 1821(c)(1)-(3). As conservator or receiver, the FDIC may "collect all obligations and money due the institution," and may "proceed to realize upon [the institution's] assets" for the benefit of its creditors. 12 U.S.C. 1821(d)(2)(B)(ii) and (E).

FIRREA establishes a special time limit that applies to suits brought by the FDIC as conservator or receiver. That provision, codified at 12 U.S.C. 1821(d)(14) and entitled "Statute of limitations for actions brought by conservator or receiver," states:

> Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver 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. 1821(d)(14)(A). The statutory period begins to run on "the date of the appointment of the [FDIC] as conservator or receiver" or "the date on which the cause of action accrues," whichever is later. 12 U.S.C. 1821(d)(14)(B). Materially identical statutory provisions establish time limits for claims brought by the National Credit Union Administration Board (NCUA) as conservator or liquidating agent, see 12 U.S.C. 1787(b)(14), and by the Federal Housing Finance Agency (FHFA) as conservator, see 12 U.S.C. 4617(b)(12).

FIRREA's sponsor explained that the "extended statute of limitations periods" set forth in Section 1821(d)(14) would "preserv[e] to the greatest extent permissible by law 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). 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" and would "help ensure the accountability of the persons responsible for the massive losses the Government has suffered through the failures of insured institutions." *Ibid.*

2. a. This case arises from the failure of Colonial Bank, a federally insured bank headquartered in Montgomery, Alabama. Pet. App. 3a. Between June and October 2007, Colonial invested approximately $300

million in certain securities that were issued or underwritten by petitioners and were backed by pools of residential mortgage loans. *Ibid.* Colonial suffered substantial losses on those securities. *Ibid.* On August 14, 2009, the Alabama State Banking Department appointed the FDIC as the bank's receiver. *Ibid.* As receiver, the FDIC succeeded to all rights and claims of Colonial.

After investigating claims arising out of the bank's failure, the FDIC discovered that the disclosure documents for the mortgage-backed securities contain a number of false or misleading statements about the credit quality of the underlying mortgage loans. See FDIC C.A. Br. 6-7. Specifically, the FDIC found that the prospectus supplements misrepresented the amount of equity that borrowers had in the houses that secured the mortgage loans, the number of loans that had been issued for owner-occupied properties, and the underwriting standards that had been followed by the originators of the mortgage loans. *Id.* at 7; see Pet. App. 3a-4a. On August 10, 2012, within three years after its appointment as receiver, the FDIC, as the receiver for Colonial, filed suit against petitioners. Pet. App. 3a. The complaint asserted claims under Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. 77k, 77*o*, which impose liability on certain persons for material misstatements or omissions in securities registration statements. Pet. App. 3a.

b. Petitioners moved to dismiss the complaint on several grounds, including that it was untimely. Pet. App. 4a. Petitioners contended that, notwithstanding the FDIC's compliance with the time limits in Section 1821(d)(14), the FDIC's federal securities-law claims were barred by a time limit enacted in the 1930s and

codified in 15 U.S.C. 77m. See Pet. App. 31a-32a; see also Securities Act of 1933, ch. 38, Tit. I, § 13, 48 Stat. 84, as amended by Securities Exchange Act of 1934, ch. 404, Tit. II, sec. 207, § 13, 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 * * * 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." 15 U.S.C. 77m. 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." *Ibid.*; see 15 U.S.C. 77*o*(a) (imposing liability "to the same extent" as Section 77k).

While petitioners' motion to dismiss was pending, the Second Circuit in *FHFA* v. *UBS Americas, Inc.*, 712 F.3d 136 (2013), construed the "materially identical" statute that sets forth special time limits for suits brought by the FHFA as conservator. Pet. App. 4a; see *UBS*, 712 F.3d at 140-144. Emphasizing that the special statutory time limit established "'*the* applicable statute of limitations with regard to *any* action brought by [FHFA] as conservator or receiver,'" the court construed that provision to "supplant[] any other time limitations that otherwise might have applied," including Section 77m. *UBS*, 712 F.3d at 143-144 (citation omitted; first set of brackets in original); see *id.* at 140-144 & n.1; Pet. App. 4a. Petitioners recognized that *UBS*'s holding controlled the interpretation of the same language in the FDIC-specific timing statute, and they withdrew their motion without prejudice to possible reassertion of their timeli-

ness argument at a later date. Pet. App. 4a-5a. The district court denied the remainder of petitioners' motion to dismiss. *Id.* at 5a.

c. After this Court issued its decision in *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014), petitioners reasserted their timeliness argument in a motion for judgment on the pleadings. Pet. App. 5a.

CTS Corp. 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); see *CTS Corp.*, 134 S. Ct. at 2180. The 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" by "bar[ring] any suit that is brought after a specified time since the defendant acted," regardless of when the claim accrued. 134 S. Ct. at 2182-2183 (citations and internal quotation marks omitted); see *id.* at 2180.

The district court granted petitioners' motion. Pet. App. 30a-42a. It viewed Section 77m's three-year time limit as a statute of repose and believed that *CTS Corp.* compelled the conclusion that the special time limit for actions by the FDIC as receiver, 12 U.S.C. 1821(d)(14), does not allow the FDIC to bring such actions after the expiration of that three-year period. Pet. App. 30a-42a.

3. The court of appeals vacated the district court's judgment and remanded for further proceedings. Pet. App. 1a-18a.

Observing that the CERCLA provision at issue in *CTS Corp.* (Section 9658) and the FDIC time limit (Section 1821(d)(14)) are "structured and worded in fundamentally different ways," Pet. App. 8a-9a, the court of appeals adhered to its earlier decision in *UBS* and held that the special time limit displaces Section 77m, *id.* at 2a-3a. The court noted that "Section 9658 does not purport to create an entirely new statute of limitations framework for state toxic tort actions," but instead "provides a limited '[e]xception to State statutes,' * * * which otherwise remain 'generally applicable.'" *Id.* at 11a (brackets in original) (quoting 42 U.S.C. 9658(a)(1) and (2)). "By contrast," the court explained, Section 1821(d)(14) "establishes for 'any' action brought by the FDIC as conservator or receiver, the length of the limitations period, as well as the time at which the period begins to run." *Id.* at 11a-12a. Section 1821(d)(14)'s different structure, the court continued, "suggests that Congress intended [it] to supersede any and all other time limitations, including statutes of repose." *Id.* at 12a. In light of "the differences in the statutes," the court found "much of *CTS*'s reasoning" to be "simply inapplicable" to Section 1821(d)(14). *Ibid.*

The court of appeals accepted that the three-year time limit in Section 77m is a "statute of repose." See, *e.g.*, Pet. App. 2a. The court also recognized that Section 1821(d)(14), like Section 9658, "uses the term 'statute of limitations' (rather than 'statute of repose'), and uses it in the singular." *Id.* at 13a. The court explained, however, that Section 9658 uses the term to "describ[e] the *existing* period that is *modified*" by Section 9658's operation, whereas Section 1821(d)(14) uses the term to "refer[] to the *new* limitations period

that is *created*" by Section 1821(d)(14) itself. *Id.* at 13a-14a. The court also observed that "Congress has never used the expression 'statute of repose' in a statute codified in the United States Code," and that the three-year time limit in Section 77m "is located in a section of the Code entitled 'Limitation of actions.'" *Id.* at 13a (quoting 15 U.S.C. 77m). The court additionally rejected the argument that its interpretation of Section 1821(d)(14) "violate[d] the presumption against repeals by implication." *Id.* at 17a.

Judge Parker dissented. Pet. App. 18a-29a. In his view, the court of appeals' decision "fail[ed] * * * to adequately account for" the "differences between statutes of limitation and statutes of repose." *Id.* at 19a.

ARGUMENT

The court of appeals correctly held that 12 U.S.C. 1821(d)(14) establishes the sole time limit applicable to suits brought by the FDIC as receiver. That holding does not conflict with any decision of this Court or of another court of appeals. To the contrary, it is consistent with the unanimous view of all of the other appellate courts, including the Fifth, Ninth, and Tenth Circuits, that have considered the issue under Section 1821(d)(14) or under virtually identical provisions governing suits by other federal entities. This Court has previously denied petitions for writs of certiorari contending that the circuits' interpretation of those provisions conflicts with *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014), and with the presumption against implied repeals. See *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). The same result is warranted here.

1. Section 1821(d)(14) assists the FDIC as receiver in recovering funds on claims of a failed bank by giving the FDIC at least three years after its appointment as receiver or conservator to investigate and file any tort claims on the receivership's behalf. The statute directs that "*the* applicable statute of limitations with regard to *any* action brought by the [FDIC] as conservator or receiver *shall be*" the one that Section 1821(d)(14) specifies. 12 U.S.C. 1821(d)(14)(A) (emphases added). As all of the courts of appeals to have considered Section 1821(d)(14) and its analogues have recognized, "[s]uch 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) (brackets omitted) (quoting *NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1226 (10th Cir. 2014), cert. denied, 135 S. Ct. 949 (2015)) (citation omitted), cert. denied, 136 S. Ct. 1492 (2016); see *NCUA* v. *RBS Sec., Inc.*, 833 F.3d 1125, 1131 (9th Cir. 2016); Pet. App. 4a; see also *FDIC* v. *Rhodes*, 336 P.3d 961, 965 (Nev. 2014) (en banc).

Congress enacted Section 1821(d)(14) as part of FIRREA, in response to a widespread financial crisis, with the aim of "preventing the collapse of the [financial] industry, attacking the root causes of the crisis, and restoring public confidence." *United States* v. *Winstar Corp.*, 518 U.S. 839, 856 (1996) (plurality opinion). The provision extending the time for the FDIC to investigate and determine what causes of action to bring in its capacity as conservator or receiver for a failed institution was "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," that provision "significantly increase[s] the amount of money that can be recovered by the Federal Government through litigation" and "help[s] ensure the accountability of the persons responsible for the massive losses the Government has suffered through the failures of insured institutions." *Ibid.*

2. Petitioners' view (Pet. 16, 20-21) that Section 1821(d)(14) does not "create" a new time limit, but instead "draws a narrow exception to existing statutes of limitations," cannot be squared with the statutory text. Section 1821(d)(14) is not framed as an exception to, or a modification of, existing time limits. It is instead a comprehensive, freestanding time limit, prescribing what "the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver shall be." 12 U.S.C. 1821(d)(14). Section 1821(d)(14) defines that time limit as either a specified three- or six-year window, or the "period applicable under State law," whichever is longer. 12 U.S.C. 1821(d)(14)(A)(i)-(ii). The fact that the federal time limit may be *defined as* the "period applicable under State law," when that gives the FDIC more time to file its claims, 12 U.S.C. 1821(d)(14)(A)(i)(II) and (ii)(II), does not support petitioners' suggestion (Pet. 20) that Section 1821(d)(14) "simply lengthens certain existing state statutes of limitations." Whichever of the specified periods applies, the time limit in Section 1821(d)(14) is defined by federal law.

Petitioners appear to acknowledge (Pet. 21) that, if Section 1821(d)(14) "creates a wholly new federal statute of limitations," then it displaces at least *some* potential time limits that might otherwise apply to claims brought by the FDIC. See, *e.g.*, Pet. 16. They

contend (Pet. 14-27), however, that Section 1821(d)(14) cannot be the exclusive time limit in a case to which Section 77m's three-year deadline might otherwise apply.[1] Focusing primarily on the fact that the time limit established by Section 1821(d)(14) is denominated a "statute of limitations," petitioners argue that it cannot displace the three-year time limit in Section

---

[1] In a footnote outside the argument section of the petition, petitioners suggest (Pet. 12 n.4) in passing that Section 1821(d)(14) "does not apply to federal claims" at all. That suggestion lacks merit. See *Nomura*, 764 F.3d at 1236-1242 (rejecting that argument in context of identically worded NCUA statute). First, that contention cannot be squared with the provision's application to "any action brought by the [FDIC] as conservator or receiver." 12 U.S.C. 1821(d)(14)(A). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (citations omitted). Second, because the term "tort" has long been understood to encompass all non-contractual legal wrongs, see, *e.g.*, *Black's Law Dictionary* 1335 (5th ed. 1979), the terms "tort claim" and "contract claim" together encompass any possible claim that the FDIC might bring in an "action" as receiver. 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 [42 U.S.C. 1983] claims * * * sound in tort."); *Schillinger* v. *United States*, 155 U.S. 163, 169 (1894) (describing patent infringement as a "tort"). Third, the FIRREA time limit was modeled on 28 U.S.C. 2415, which also referred to "tort" and "contract" time limits. See *Nomura*, 764 F.3d at 1221. "When Congress drafted [FIRREA], courts had often applied Section 2415 to statutory claims," *id.* at 1239 (citing cases), and had "routinely applied Section 2415 to federal claims," *id.* at 1241. Congress presumably expected Section 1821(b)(14) to have similar application. *Id.* at 1239; cf. *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 588-590 (2010) (recognizing that Congress generally intends to incorporate existing judicial interpretations of statutory language when it places that language in a new statute).

77m, which can be characterized as a "statute of repose." The term "statute of limitations" in Section 1821(d)(14), however, describes the new time limit *itself*, not any other time limit that Section 1821(d)(14) might lengthen or supersede. The fact that Section 1821(d)(14) "is *itself* a statute of limitations, and not a statute of repose * * * provides no guidance on the question whether [it] *displaces* otherwise applicable statutes of repose." Pet. App. 15a.[2]

Even if the term "statute of limitations" were relevant to determining which time limits Section 1821(d)(14) 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"); *Nomura*, 764 F.3d at 1227-1229. Indeed, Section 77m—entitled "Limitation of actions"—has itself sometimes been described as a "statute of limitations." See *Nomura*, 764 F.3d at 1234 (citing, *inter alia*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 210 (1976)).

Congress had no reason to believe that the "statute of limitations" it was creating in Section 1821(d)(14) 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 1787(b)(14) does not displace

---

[2] Petitioners' reliance (Pet. 17-18) on the prefatory clause "[n]otwithstanding any provision of any contract," 12 U.S.C. 1821(d)(14)(A), is similarly misplaced. That language simply clarifies that, although Section 1821(d)(14) is itself a statute of limitations, it is exempt from the usual rule that applicable limitations periods may be shortened by agreement.

"statutes of repose" would impermissibly bifurcate Section 77m. If that view 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). 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).

3. Petitioners contend (Pet. 15-24) that the decision below conflicts with this Court's decision in *CTS Corp.* That argument lacks merit.

The CERCLA provision at issue in *CTS Corp.*, 42 U.S.C. 9658, does not create an exclusive federal time limit, as Section 1821(d)(14) does. Instead, Section 9658 creates a narrow "[e]xception to [s]tate statutes" (while affirming 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 the term "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 commencement 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). The Court in

CTS Corp. held that, "[u]nder this structure, state law is not pre-empted unless it fits into the precise terms of the exception." 134 S. Ct. at 2185.

Section 1821(d)(14), in contrast, mandates that the statute of limitations for "any action" brought by the FDIC as receiver "shall be" the one set forth in Section 1821(d)(14) itself. 12 U.S.C. 1821(d)(14). 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 1821(d)(14)'s new time limit displaces the repose period in the Securities Act.

First, even assuming *arguendo* that the term "statute of limitations" in Section 1821(d)(14) describes the set of time limits that it replaces (rather than merely the nature of Section 1821(d)(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. 134 S. Ct. at 2185. The Court explained 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, which has never used the term "statute of repose" in any enacted law, has "used the term 'statute of limitations' when enacting statutes of repose." *Id.* at 2185-2186 (citing, *inter alia*, 15 U.S.C. 78u-6(h)(1)(B)(iii)(I)(aa)). And while Section 9658 was enacted against a backdrop that included a congressional report distinguishing "statutes of repose" from "statutes of limitations," *id.* at 2186, Section 1821(d)(14) was not. Rather, the legislative history of

Section 1821(d)(14) evidences an intent that its language "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." 135 Cong. Rec. at 18,866 (statement of Sen. Riegle).

Second, petitioners are wrong in suggesting (Pet. 19) that, in light of *CTS Corp.*, Section 1821(d)(14) must be read 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 1821(d)(14) refers in certain places to a single time limit, that is the time limit that Section 1821(d)(14) *itself* defines, not (as in *CTS Corp.*) some *other* time limit that the statute might displace. Pet. App. 13a-14a. Petitioners presumably would acknowledge that, if a claim covered by Section 1821(d)(14) were otherwise subject to two overlapping time limits, neither of which was a repose period (*e.g.*, a general time limit for certain claims and a shorter time limit for suits against particular types of defendants), Section 1821(d)(14) would displace both. By the same token, Section 1821(d)(14) could displace both a statute of repose and another time limit that is not a statute of repose.

Third, petitioners are likewise wrong in relying on *CTS Corp.* to suggest (Pet. 19-20) that Section

1821(d)(14) refers to 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)) (internal quotation marks omitted). The Court explained 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 1821(d)(14) does not refer to accrual in defining the time limits it *affects*. Instead, Section 1821(d)(14) refers to accrual only in defining the time period that Section 1821(d)(14) *itself* establishes. See 12 U.S.C. 1821(d)(14)(A)(i)(I), (ii)(I), and (B). The starting point for Section 1821(d)(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 FDIC became receiver of the failed bank. See 12 U.S.C. 1821(d)(14)(B)(i).

Fourth, *CTS Corp.* does not support petitioners' contention (Pet. 21) that Section 1821(d)(14) is simply a "narrow exception[]" to state law rather than a "new federal statute of limitations." The characterization of Section 9658 as an "exception" derives from the particular text and operation of that provision, one subsection of which includes a caption that "characterizes pre-emption as an '[e]xception' to the regular rule," *CTS Corp.*, 134 S. Ct. at 2185 (brackets in original) (quoting 42 U.S.C. 9658(a)(1)); another subsection of which bears "the heading 'State law generally applicable'" and "provides the rule that 'the statute of limitations established under State law shall apply,'" *ibid.* (quoting 42 U.S.C. 9658(a)(2)); and under which

only one aspect of a state statute of limitations—its "'commencement date'"—"is subject to pre-emption," *ibid.* (quoting 42 U.S.C. 9658(b)(2)). Section 1821(d)(14), in contrast, comprehensively defines what "the applicable statute of limitations" for "any action brought by the [FDIC] as conservator or receiver shall be." 12 U.S.C. 1821(d)(14)(A).[3]

4. Petitioners also contend (Pet. 24-27) that reading Section 1821(d)(14) 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 1821(d)(14) "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 the [FDIC] on behalf of failed [banks]," *Nomura*, 764 F.3d at 1235. The general principle disfavoring repeals by implication does not apply in such a 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)). This Court has declined to rely on that principle where, *inter alia*, the earlier

---

[3] Petitioners' citation (Pet. 17 n.5) of *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015), for the proposition that mandatory language in a time-limit provision is "of no consequence," reflects a misunderstanding of that decision. The Court in that case held that a statutory deadline's use of mandatory language does not imply that the provision is "jurisdictional," *id.* at 1632-1633; but it did not hold or suggest that such language should be ignored altogether.

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 *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974). That rationale has little 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 circumstance (an action by the FDIC in its capacity as conservator or receiver) that Congress specifically addressed when it enacted the later statute (Section 1821(d)(14)). See *Greenless*, 277 F.3d at 608-609. The clear purpose and natural effect of Section 1821(d)(14) is to ensure that FDIC 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 1821(d)(14)'s unambiguous purpose.

Petitioners focus (Pet. 24) on the Court's statement in *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644 (2007), that the presumption against implied repeals applies also to "implied amendments" that effect "partial repeal[s]." *Id.* at 664 n.8. 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 (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" in circumstances where 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).

4. As petitioners recognize (*e.g.*, Pet. 2), the decision below accords with the decisions of all other courts of appeals that have addressed the interpretation of either Section 1821(d)(14) or its NCUA or FHFA analogues. See *NCUA* v. *RBS Sec., Inc.*, 833 F.3d at 1128; *FDIC* v. *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 Section 1821(d)(14), 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 twice denied petitions for writs of certiorari that raised essentially the same arguments as this one. See *RBS Sec., Inc.* v. *FDIC*, 136 S. Ct. at 1492; *Nomura*, 135 S. Ct. at 949. Petitioners identify no changed

circumstance that would warrant a different result here.

Petitioners enumerate "four reasons" (Pet. 2) that the absence of a circuit conflict should not dissuade this Court from granting review. Those arguments are unsound. First, for reasons discussed above, petitioners are wrong to suggest (Pet. 2-3) that review is necessary in order to ensure that the courts of appeals are properly applying *CTS Corp.* Second, petitioners do not suggest that the number or scope of actions presenting this issue has increased since the Court denied certiorari on the question earlier this year, and their own submission suggests otherwise. See Pet. 29 (list of cases, all of which were filed years ago).

Third, the fact that "further percolation" (Pet. 4) of the issue has resulted in a Second Circuit decision that adheres to uniform precedent in other circuits counsels against, not in favor of, this Court's review. See Sup. Ct. R. 10. In the absence of a circuit conflict, any disagreements among individual district courts or other judges (Pet. 2) do not require this Court's intervention. See Sup. Ct. R. 10. And the fact that this case involves a displaced federal time limit, rather than a displaced state time limit, see Pet. 4, does not make it a better vehicle than prior cases. *Nomura* likewise involved Section 77m, see 764 F.3d at 1203, and there is no sound basis for construing Section 1821(d)(14) to distinguish between the two situations, cf. *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005) (rejecting suggestion "that judges can give the same statutory text different meanings in different cases"). Finally, petitioners' suggestion that the government has made an "about-face" (Pet. 4) is incorrect. In its brief in *CTS Corp.*, the government explained the distinc-

tions between the situation here and the situation in that case, see U.S. Amicus Br. at 22-23, *CTS Corp.*, *supra* (No. 13-339), and every circuit to address the question has agreed with those distinctions.

Further review would be especially unwarranted in this particular case because the question arises in an interlocutory posture, "a fact that of itself alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). The fact that rejection of petitioners' threshold time-limitation argument necessitates further litigation (Pet. 30) does not meaningfully differentiate this case from others in which litigants have sought this Court's review of interlocutory rulings. Petitioners may still prevail on remand, 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.

IAN HEATH GERSHENGORN
Acting Solicitor General

COLLEEN J. BOLES
Assistant General Counsel
KATHRYN R. NORCROSS
Senior Counsel
J. SCOTT WATSON
Counsel
Federal Deposit Insurance Corporation

DECEMBER 2016