No. 15-783

In the Supreme Court of the United States

RBS SECURITIES, INC., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR GUARANTY BANK

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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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 "as conservator or receiver," provides the sole time limit applicable to claims brought against petitioners by the FDIC as receiver for a failed bank.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 798 F.3d 244. The orders of the district court (Pet. App. 46a-93a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 2015. A petition for rehearing was denied on September 11, 2015 (Pet. App. 94a-95a). The petition for a writ of certiorari was filed on December 10, 2015. 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, "to 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." 103 Stat. 183; see Pet. App. 8a-9a. 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 "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); see Pet. App. 6a-8a.

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).[1]

FIRREA's sponsor explained that the "extended statute of limitations periods" set forth in Section 1821(d)(14) would "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. 11a. 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 "help ensure the accountability of the persons responsible for the massive losses the Government has suffered through the failures of insured institutions." 135 Cong. Rec. at 18,866 (statement of Sen. Riegle).

2. This case arises from the failure of Guaranty Bank (Guaranty), a federally chartered savings association in Austin, Texas. Pet. App. 2a-3a. In 2004 and 2005, Guaranty invested approximately $850 million in certain securities that were backed by pools of residential mortgage loans and were underwritten and

[1] Materially identical statutory provisions establish time limits for claims brought by the National Credit Union Administration as conservator or liquidating agent, see 12 U.S.C. 1787(b)(14), and by the Federal Housing Finance Agency as conservator, see 12 U.S.C. 4617(b)(12); see also Pet. App. 12a nn.8-9.

sold by petitioners. *Ibid.* Guaranty suffered losses on the securities. On August 21, 2009, Guaranty failed, and the Office of Thrift Supervision appointed the FDIC as the bank's receiver. *Id.* at 3a.

After investigating the events leading to the bank's failure, the FDIC determined that the offering documents for the mortgage-backed securities had made a number of false or misleading statements about the securities and the "credit quality of the mortgage loans that backed them." Pet. App. 4a. The FDIC found that the documents were false or misleading with respect to "such material facts as the loan-to-value ratios of the mortgage loans, the extent to which appraisals of the properties * * * were performed in compliance with professional appraisal standards, the number of borrowers who did not live in the houses that secured their loans * * * , and the extent to which the entities that made the loans disregarded their own standards in doing so." *Ibid.*

On August 17, 2012, fewer than three years after its appointment as receiver, the FDIC filed suit as receiver for Guaranty against petitioners. Pet. App. 3a (describing "two separate suits"). As relevant here, the FDIC asserted violations of the Texas Securities Act. *Id.* at 3a-4a.

Petitioners moved for judgment on the pleadings, contending that the state-law claims were untimely under Texas law notwithstanding the special FDIC-specific time limits in Section 1821(d)(14)(B). Pet. App. 48a. The Texas provision on which petitioners relied, which is entitled "statute of limitations," states that "[n]o person may sue" under the Texas Securities Act "more than five years after the sale" of the securities at issue. Tex. Rev. Civ. Stat. Ann. art. 581-

33(H)(2)(b); see *id.* art. 581-33(H)(2)(a) (stating that "[n]o person may sue" more than "three years after discovery of the untruth or omission, or after discovery should have been made by the exercise of reasonable diligence"). Petitioners contended that, although the five-year period had not run as to the FDIC's claims on the date when the FDIC was appointed as receiver, it had expired before the FDIC filed suit—and, in the case of one claim, had expired less than a week after the appointment. Pet. App. 5a n.4; 14-51055 C.A. ROA 14.

The district court dismissed the FDIC's state-law claims as untimely under Texas law. Pet. App. 46a-93a. The court ruled that, because the Texas provision is a statute of repose, rather than a statute of limitations, Section 1821(d)(14) does not supersede it. *Id.* at 50a, 68a-69a. The court relied on *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014), in which this Court held that the operation of a state statute of repose is unaffected by a provision of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) that in certain circumstances replaces the "commencement date" of a state "statute of limitations" with a "federally required commencement date." 42 U.S.C. 9658(a)(1) and (b)(2); see 134 S. Ct. at 2180; see also, *e.g.*, Pet. App. 58a-65a.

3. The court of appeals reversed. Pet. App. 1a-45a.

The court of appeals accepted petitioners' argument that the five-year time limit in Texas law functions as a "statute of repose"—*i.e.*, a provision that "puts an outer time limit on the right to bring a civil action" and measures the relevant time period "not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." Pet. App. 15a (quoting *CTS Corp.*, 134 S. Ct. at 2182) (internal quotation marks omitted); see *id.* at 16a, 21a. The court concluded, however, that Section 1821(d)(14) "preempts all limitations periods, whether characterized as statutes of limitations or as statutes of repose," that conflict with Congress's decision to "grant the FDIC a three-year grace period after its appointment as receiver to investigate potential claims." *Id.* at 2a, 21a; see *id.* at 12a & nn.8-9 (noting that "[e]very circuit" that has considered the scope of Section 1821(d)(14) or the virtually "identical" statutes covering other agencies has agreed, as has the Supreme Court of Nevada). In reaching that conclusion, the court of appeals carefully analyzed and relied on this Court's decision in *CTS Corp. Id*. at 12a-21a; see *id.* at 22a (stating that *CTS Corp.* does not "even suggest" that Section 1821(d)(14) fails to preempt a state statute of repose); *ibid.* (stating that "many of the considerations that the Court found disfavored preemption in *CTS* suggest preemption when applied to" Section 1821(d)(14)).

The court of appeals found the text of Section 1821(d)(14) to be clear. The court observed that the language allowing the FDIC to bring a tort claim up to three years after its appointment as receiver is "mandatory" and cannot be "circumvent[ed]." Pet. App. 22a. The court rejected the contention that, because Section 1821(d)(14) uses the term "statute of limitations," the FDIC remains subject to time limits set forth in a statute of repose. The court explained that the term as used in Section 1821(d)(14) "does not refer to the limitations periods being displaced, but rather the new, mandatory federal period being created," *id.* at 23a—a usage that "contrasts sharply with the usage of the term in the CERCLA provision at issue in *CTS [Corp.]*." *Ibid.*; see *id.* at 24a-25a ("That Congress used the term 'statute of limitations' * * * to describe the new, federal limitations period, but used the broader term 'the period applicable under State law' to describe state limitations periods, suggests * * * that Congress meant to pull all state limitations periods," even if characterized as statutes of repose, "into the [federal] statute's ambit."). The court also observed that the term "statute of limitations" is often used to refer to statutes of repose, see *id.* at 25a-26a, and that—"[i]n contrast to the situation in *CTS [Corp.]*"—nothing in the history of Section 1821(d)(14) suggests that Congress intended separate treatment of such statutes, *id.* at 26a; see *id.* at 27a-28a; see also *id.* at 28a-34a (identifying a number of further distinctions between the text of the CERCLA provision at issue in *CTS Corp.* and the text of Section 1821(d)(14)).

The court of appeals further held that the structure of the federal statute "demonstrates Congress's clear intent to preempt state statutes of repose." Pet. App. 34a. The court explained that, in contrast to the CERCLA provision at issue in *CTS Corp.*, the structure of Section 1821(d)(14) makes state law "the exception, not the rule." *Id.* at 35a. That is because "'the period applicable under State law' does not apply unless it fits the precise terms of the statute, namely that it extend more than three years from the date of the FDIC's appointment as receiver." *Ibid.* (citation omitted). By setting "application of the federal period as the default rule," the court concluded, Congress indicated a "broader preemptive intent." *Id.* at 37a.

Finally, the court of appeals relied in part on the purpose of Section 1821(d)(14)(B): to give the FDIC "at least three years to investigate and pursue claims" and "certainty" that the period would not be truncated. Pet. App. 41a-42a.[2] The court found it "highly unlikely that Congress would have preempted a statute of limitations that would cut off a potential claim the day after the FDIC's appointment as receiver, but be perfectly content with that same result so long as it was caused by a statute characterized as a statute of 'repose.'" *Ibid.* (emphasis omitted); see *id.* at 29a. The court also distinguished *CTS Corp.*'s discussion of legislative purpose, explaining that both interpretations proffered in that case would have served CERCLA's purposes to some extent whereas only one interpretation of Section 1821(d)(14) would advance Congress's aims. *Id.* at 43a-44a; see *id.* at 43a (petitioner's construction "would have Congress playing at roulette").

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 any other court of appeals. Rather, it is consistent with the unanimous view of all the appellate courts, including the Second and Tenth Circuits, that have considered the issue under Section 1821(d)(14) or virtually identical provisions governing suits by other federal entities. Last Term the Court denied a petition for certiorari seeking review of a Tenth Circuit

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[2] One member of the panel declined to join that portion of the opinion. Pet. App. 40a n.*.

decision construing a parallel provision, see *Nomura Home Equity Loan, Inc.* v. *NCUA*, No. 14-379, 135 S. Ct. 949 (cert. denied Jan. 12, 2015), and the same result is warranted here.

1. a. Section 1821(d)(14) assists the FDIC in recovering funds on behalf of a failed bank by providing that the FDIC will have at least three years after its appointment as receiver or conservator to investigate and file any tort claims on the bank's behalf. As the court of appeals explained, by directing that "the applicable statute of limitations * * * shall be" the one that Section 1821(d)(14) specifies, Congress made clear that Section 1821(d)(14)'s application is "mandatory." Pet. App. 22a (quoting 12 U.S.C. 1821(d)(14)(A)). Congress thus ruled out the possibility that claims covered by Section 1821(d)(14) could be barred by other time limits.

Congress enacted Section 1821(d)(14) as part of FIRREA, in response to a widespread financial crisis, with the intent 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); see Pet. App. 8a-11a. The provision extending the time for the FDIC "to investigate and determine what causes of action" to "bring on behalf of a failed institution," *FDIC* v. *Barton*, 96 F.3d 128, 133 (5th Cir. 1996), 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.*

In this case, for example, under petitioners' theory, one of the claims brought by the FDIC would have become time-barred less than a week after the FDIC became the bank's receiver. See p. 5, *supra*. That is well before the FDIC could reasonably have discerned the claim's existence and filed suit.

b. Petitioners do not dispute that Section 1821(d)(14) displaces at least *some* potential time limits that might otherwise apply to claims brought by the FDIC. They contend, however, that Section 1821(d)(14) cannot create the exclusive time limit for a case in which the Texas statute's five-year deadline might otherwise apply. Focusing primarily on the fact that the time limit established by Section 1821(d)(14) is denominated a "statute of limitations" (see Pet. 23-27), petitioners argue that it does not displace the five-year time limit in the Texas statute, which they call a "statute of repose." But as the court of appeals explained (*e.g.*, Pet. App. 33a), petitioners' argument confuses what Section 1821(d)(14) *does* (establishes the time frame within which the FDIC must bring suit) with what it *replaces* (other time frames to bring "any action"). The term "statute of limitations" in Section 1821(d)(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.

Petitioners argue (Pet. 24) that, "when FIRREA says 'statute of limitations,' it has to mean the state law that is subject to preemption." That is incorrect. When Section 1821(d)(14) refers to a state-law period, it refers generally to *any* "period applicable under state law," and not to a "statute of limitations" in particular. Congress's distinct uses of the term "statute of limitations" and the phrase "period applicable under state law" demonstrate that "Congress meant to pull all state time limits into [Section 1821(d)(14)'s] ambit." Pet. App. 24a-25a.

Even if the term "statute of limitations" were relevant to determining what Congress intended to displace under Section 1821(d)(14), the result in this case would be the same. The Texas legislature denominated the state-law provision that petitioners seek to enforce a "Statute of Limitations" without mentioning the word "repose." Pet. App. 28a; see *Pitman* v. *Lightfoot*, 937 S.W.2d 496, 528 (Tex. App. 1996) (five-year period under Texas securities law is a "limitations period"). Congress has frequently used the term "statute of limitations" to encompass provisions that contain statutes of repose. Pet. App. 27a. "[E]ven if Congress understands the conceptual distinction, the term 'statute of repose' has not entered Congress's formal lexicon," *id.* at 28a; and the larger statutory context reinforces the conclusion that Section 1821(d)(14) uses the term "statute of limitations" in its broader sense, *id.* at 29a. Thus, even if the term "statute of limitations" in Section 1821(d)(14) were read to refer to the state-law deadlines that FIRREA preempts, it would encompass the Texas-law time limit on which petitioners rely.

Petitioners also fault the court of appeals (Pet. 23-24) for what they deem "heav[y]" reliance on the "mandatory" language that Section 1821(d)(14) uses when it describes the new federal time limit. But while that language was only a part of the court's reasoning, it does indicate that Section 1821(d)(14) supersedes any statute of repose that sets a time limit shorter than the minimum period prescribed by Section 1821(d)(14) itself. Although other statutory provisions relating to time limits contain the word "shall," see Pet. 23, Section 1821(d)(14)'s use of that word establishes that the time limit for an FDIC action *must* be longer than the "period applicable under state law" if the applicable state-law deadline is (in the case of a tort action) less than three years after the FDIC's appointment as conservator or receiver. Petitioner's citation (Pet. 24) to *United States* v. *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 *Wong* 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.

Finally, petitioners characterize (Pet. 25-27) the Fifth Circuit's careful opinion as applying a presumption in favor of preemption or turning on an analysis of statutory purpose. Neither characterization is correct. In a detailed analysis that petitioners largely fail to address, the court scrutinized the text and structure of the statute, distinguished Section 1821(d)(14) from other statutory schemes, and concluded that Section 1821(d)(14)'s meaning is clear. While the court correctly understood the statutory purpose to bolster its conclusion, that understanding did not drive its analysis—as demonstrated by the fact that the panel member who declined to join the section of the opinion discussing the statute's purpose nevertheless agreed that Section 1821(d)(14) supersedes the state-law time limit on which petitioners rely.

2. a. Petitioners contend (Pet. 20-27) that the decision below conflicts with this Court's decision in *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014). 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). 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 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. 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 1821(d)(14)'s new federal time limit displaces the five-year time limit in Texas law. See Pet. App. 35a-36a. First, even assuming *arguendo* that the term "statute of limitations" in Section 1821(d)(14) describes the set of time limits that Section 1821(d)(14) 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 (emphasis added) (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.

Second, petitioners are wrong in suggesting (Pet. 22) 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. 29a-31a. 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—especially because, "as a practical matter," once the most stringent time limit under state law has run, there is effectively "no 'second' limitations period" at all. *Id.* at 31a.

Third, petitioners are likewise wrong in relying on *CTS Corp.* to suggest (Pet. 22) 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), (A)(ii)(I), and (B). That definition does not restrict the set of alternative time limits that Section 1821(d)(14) displaces. 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. Pet. App. 33a-34a; see 12 U.S.C. 1821(d)(14)(B)(i).

Fourth, contrary to petitioners' suggestion (Pet. 7, 25 n.1), the fact that Section 1821(d)(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 1821(d)(14), however, does not include the phrase "may be brought." And Section 1821(d)(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 description of the time limits that Section 1821(d)(14) replaces. Rather, the term "any action" gives Section 1821(d)(14)'s own time limit a broad scope by making clear that it applies in every suit brought by the FDIC as receiver or conservator. See Pet. App. 32a.

Finally, petitioners overlook important differences between the history and purposes of Section 9658 and those of Section 1821(d)(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 1821(d)(14) specifically to ensure that the FDIC would have adequate time to pursue claims to which it succeeded on behalf of failed banks. Pet. App. 29a, 40a-45a. And there is no evidence that Congress intended the new time period it established for FDIC 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.

b. Contrary to petitioners' argument (Pet. 16-20), the decision below is 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 Section 1821(d)(14) as a provision that "specifically create[s] special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver"); *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 marks omitted); *Cipollone* v. *Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992). Here, having ruled that the text and structure of Section 1821(d)(14) manifest "Congress's clear intent to preempt state statutes of repose," Pet. App. 34a; see, *e.g.*, *id.* at 45a, the court of appeals rightly declined to use any presumption as an interpretive aid, *id*. at 45a n.14.[3]

3. a. Petitioners do not assert that the circuits are divided on the question presented. Consistent with the decision below, the Second and Tenth Circuits have held that materially identical statutes applicable to the Federal Housing Finance Agency (FHFA) and the National Credit Union Administration Board (NCUA) displace shorter time limits even if those

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[3] Petitioners assert (Pet. 18) that the presumption against preemption "is at its apex" under the circumstances of this case. That is incorrect. Specifying the time period during which a federal entity may bring a federally authorized suit is "hardly 'a field which States have traditionally occupied.'" *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (citation omitted); see generally *B.P. Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 100 (2006) ("[T]he traditional rule exempt[s] proceedings brought by the sovereign from any time bar."); *United States* v. *California*, 507 U.S. 746, 757-758 (1993) (discussing *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940)). Moreover, petitioners' argument is premised on the questionable assumption that, in the absence of Section 1821(d)(14), the time limit applicable here would arise from state law rather than from the federal time limits generally applicable to suits by federal entities. See *NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1239 (10th Cir. 2014) ("Before FIRREA, [28 U.S.C.] 2415 governed claims brought by NCUA and FDIC."), cert. denied, 135 S. Ct. 949 (2015).

limits are characterized as statutes of repose. The Supreme Court of Nevada has reached the same conclusion with respect to Section 1821(d)(14). See Pet. App. 12a; see also note 1, *supra*.

Those courts have correctly rejected many of the same arguments that petitioners raise here. In *FHFA* v. *UBS Americas Inc.*, 712 F.3d 136 (2d Cir. 2013), which was decided before this Court's decision in *CTS Corp.*, the Second Circuit concluded that 12 U.S.C. 4617(b)(12) supersedes state and federal time limits regardless of whether they are characterized as statutes of repose. See 712 F.3d at 141-144. The court stated that "[g]iving the words of [Section] 4617(b)(12) their plain meaning, and considering the provision as a whole, we conclude that a reasonable reader could only understand it to apply to both the federal and state claims in this case." *Id.* at 142; see *id.* at 143 (explaining that "the term statute of limitations" can be used to "refer to statutes of repose"); 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).

In *NCUA* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199 (10th Cir. 2014), cert. denied, 135 S. Ct. 949 (2015) (*Nomura*), which was decided on remand from this Court for further consideration in light of *CTS Corp.*, see 134 S. Ct. 2818, the Tenth Circuit held that 12 U.S.C. 1787(b)(14)(A) "supplants all other limitations frameworks, including" a time limit set forth in 15 U.S.C. 77m that the court accepted as a "statute of repose." 764 F.3d at 1226. 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," *ibid.* (quoting 12 U.S.C. 1787(b)(14)(A)), and reasoned that Congress had thereby "precluded the possibility that some other limitations period might apply," *ibid.* (quoting *UBS Americas, Inc.*, 712 F.3d at 142). The court also 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." *Id.* at 1227. The court found its conclusion to be supported by a "contextual analysis," which showed that the term "statute of limitations" is "used broadly in [Section 1787(b)(14)] to cover statutory time limits generally, including repose periods," and by an examination of relevant legislative history, see *ibid.*

In *FDIC* v. *Rhodes*, 336 P.3d 961 (Nev. 2014) (en banc), the Supreme Court of Nevada held that Section 1821(d)(14) superseded a state statute that requires a deficiency-judgment action to be brought within six months after the date of a foreclosure sale. See *id.* at 962-963. The court concluded that "[t]he plain meaning of the FDIC extender statute clearly and manifestly mandates that its six-year time limitation governs the timeliness of the FDIC's deficiency-judgment action if that time limitation is longer than 'the period applicable under State law,'" regardless of "whether the state statute is a statute of limitations or repose." *Id.* at 963 (quoting 12 U.S.C. 1821(d)(14)(A)). The court characterized a contrary reading of Section 1821(d)(14) as "unreasonable." *Id.* at 965; see *id.* at

965-966 ("[T]he statute's phrase 'statute of limitations' expressly identifies the time limitation set by the FDIC extender statute itself; the phrase does not refer to the time limitations in other state statutes that the FDIC extender statute displaces."). The Nevada Supreme Court extensively discussed and distinguished this Court's decision in *CTS Corp.*, noting that the decision "relied on statutory language that is not present in the FDIC extender statute." *Id.* at 966; see *id.* at 967.

Petitioners suggest (Pet. 29) that there is "discord" among the courts of appeals on issues that are "related" to the question presented. That suggestion is baseless. No "discord" exists when courts use slightly different forms of words to express the same conclusion, compare Pet. App. 35a (stating that the default statute of limitations for the FDIC is federal), with *NCUA* v. *Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1266 (10th Cir. 2013) (explaining that the analogous NCUA statute "functions as a narrow exception" to otherwise applicable time limits because the statute alters the rule for only one federal plaintiff), vacated and remanded, 134 S. Ct. 2818 (2014), or resolve different interpretive questions in a consistent way, compare Pet. App. 26a (addressing whether the period *displaced* by Section 1812(d)(14)(A) is necessarily a "statute of limitations"), with *NCUA* v. *Barclays Capital, Inc.*, 785 F.3d 387, 393 (10th Cir. 2015) (addressing whether the period *established* by a statute analogous to Section 1812(d)(14)(A) is a "statute of limitations" that can be tolled). In any event, a decision of this Court addressing the question presented here would not resolve any disagreement that might exist about any other aspect of Section 1821(d)(14) (or a similar provision), such as exactly how its accrual rules should be applied. See Pet. 29.

b. Petitioners contend (Pet. 13-14, 29, 33-34) that clarification is needed because a handful of district courts have reached a different conclusion than the court of appeals did here. But any conflict between the decision below and district-court decisions in other cases would not warrant this Court's review. See Sup. Ct. R. 10.

Petitioners also overstate the support for their position in the district courts, and they omit important information about some of the decisions they cite. In asserting that courts have disagreed with the court below by "concluding that the extender provisions *do not preempt* statutes of repose" (Pet. 13, 34 n.2), petitioners point to *FDIC* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. A-14-CA-126, 2014 WL 4161561 (W.D. Tex. Aug. 18, 2014)—a decision of the district court in this very case, see Pet. App. 46a, which was reversed by the court of appeals' judgment. Petitioners also point (Pet. 13, 34 & n.2) to two decisions in the Southern District of New York, see *FDIC* v. *Chase Mortg. Fin. Corp.*, 42 F. Supp. 3d 574 (S.D.N.Y. 2014), and *FDIC* v. *Bear Stearns Asset Backed Sec. I LLC*, 92 F. Supp. 3d 206 (S.D.N.Y. 2015), that declined to follow the Second Circuit's decision in *UBS Americas*, 712 F.3d at 140-145. The Second Circuit held oral argument in one of those cases on October 8, 2015, however, and presumably will decide in the near future whether to adhere to its prior holding. See 2d Cir. 14-3648 Docket entry No. 154; see also 2d Cir. 15-1037 Docket entry No. 119 (holding appeal in abeyance pending ruling in No. 14-3648). Petitioners also rely (Pet. 13, 34 n.2) on decisions within the Central

District of California, see *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 966 F. Supp. 2d 1031 (C.D. Cal. 2013), and *NCUA* v. *Goldman Sachs*, 11-cv-6521 Docket entry No. 88 (Mar. 15, 2012), but the Ninth Circuit heard oral argument on the issue addressed in those cases on December 8, 2015. See 9th Cir. 13-56620 Docket entry No. 76; see also 9th Cir. 13-56851 Docket entry Nos. 86-87 (noting that *NCUA* v. *Goldman Sachs* was also argued on December 8, 2015, but that the parties in that case have reached an agreement in principle to settle).

The Second and Ninth Circuits thus can be expected to decide in the near future what (if any) effect this Court's decision in *CTS Corp.* has on the interpretation of Section 1821(d)(14) and similar provisions. If those courts of appeals join their sister circuits in ruling that the federal provisions supersede time limits characterized as statutes of repose, the district-court-based disagreement on which petitioners rely will no longer exist.

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." *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). The court of appeals reversed a judgment in petitioners' favor and remanded for further proceedings, see Pet. App. 45a, and petitioners could still prevail on remand on any of a number of grounds. If petitioners ultimately are found liable, they can raise their timeliness arguments—together with any other issues 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).

4. Petitioners identify other considerations that they claim favor immediate review by this Court, virtually all of which were also advanced in the unsuccessful petition for certiorari in *Nomura*, No. 14-379 (cert. denied Jan. 12, 2015). Compare, *e.g.*, Pet. 27-35, with *Nomura* Pet. 33-36. Petitioners also assert (Pet. 32) that this case "presents a more compelling and urgent question than *Nomura Home Equity*" because it involves preemption of a state-law (rather than federal-law) statute of repose. The argument lacks merit. Petitioners identify no reason that the proper interpretation of Section 1821(d)(14) should vary depending on whether state or federal law is being displaced. And while petitioners contend that "this case raises serious federalism concerns," *ibid.*, petitioners do not dispute that Section 1821(d)(14) displaces at least some state time limits in suits brought by the FDIC as receiver or conservator. The question whether Section 1821(d)(4)'s preemptive force extends to state statutes of repose neither implicates "traditional state prerogatives," *ibid.*; see note 3, *supra*, nor impinges on the rights of state entities, see Pet. 31 (citing *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 536 (2002), and *Gregory* v. *Ashcroft*, 501 U.S. 452, 455 (1991)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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