No. 14-1055

IN THE

Supreme Court of the United States

CRYSTAL MONIQUE LIGHTFOOT, *et al.*,
Petitioners,

v.

CENDANT MORTGAGE CORPORATION
d/b/a PHH MORTGAGE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") respectfully submits this brief as amicus curiae in support of the Petition for Certiorari in this case.[1] AAJ is a voluntary national bar association whose members primarily represent plaintiffs in personal injury and wrongful death suits, as well as plaintiffs in civil rights, employment rights, and consumer rights actions.

Some clients of AAJ members have state law causes of action against federally chartered corporations and seek to pursue those claims in state courts. AAJ is concerned the lower court's decision in this case will allow federally chartered defendants to override the plaintiff's choice of the state court forum based on the federal charter with little or no evidence that Congress actually intended that result. The uncertainty that is evident in the decisions of federal district courts concerning the correct standard for ascertaining that the court has subject matter jurisdiction makes representation of clients more difficult and adds unnecessary complexity and expense to the vindication of state law rights.

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[1] Timely notice of intent to file this *amicus curiae* brief was provided to counsel for all parties, pursuant to Supreme Court Rule 37.2. All parties have consented to the filing of this *amicus curiae* brief, and copies of the emails granting consent have been filed with the Clerk. The undersigned counsel for *amicus curiae* affirms, pursuant to Supreme Court Rule 37.6, that no counsel for a party authored this brief in whole or in part and no person or entity other than AAJ, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

1. A federal court's application of the correct standard for determining subject matter jurisdiction is a matter of fundamental importance. Jurisdiction is the source of the court's authority and respect for its boundaries keeps the court within constitutional and statutory limits.

A congressional charter that merely authorizes the corporation to sue and be sued in any court does not expand the jurisdiction of any court, though Congress can use such a provision to confer federal jurisdiction over state law claims if it so intends. The Ninth Circuit found such jurisdiction based almost entirely on the provision in its congressional charter authorizing it to sue and be sued "in any court of competent jurisdiction, State or Federal."

The Ninth Circuit discerned in this Court's decision in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), a bright-line rule that such specific mention of federal courts was sufficient to create federal jurisdiction, without clear evidence that Congress so intended. This Court should grant the Petition to address the broader question of whether congressional intent to confer subject matter jurisdiction over state law claims can be reliably gleaned from such oblique text.

Congressionally chartered corporations are many and diverse. The 100 or so such entities range from Government Sponsored Enterprises that perform quasi-governmental functions, to those that behave much like private corporations providing goods and services to the public, to charitable organizations that engage in no governmental activity

at all. It is unlikely that Congress would have consistently used the oblique textual formulation relied upon below as the sole indicator of congressional intent to create federal jurisdiction to decide purely state law causes of action.

2. The Ninth Circuit's decision is not consistent with the precedents of this Court, on which the court below relied. In *Red Cross*, 505 U.S. 247, this Court held that a federal charter that specifically names federal courts *may* confer federal subject matter jurisdiction; this Court did not hold that such language by itself is sufficient to do so.

The Ninth Circuit also erred in relying on *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), for its liberal construction of the charter text in favor of broad federal jurisdiction. *Osborn* was decided in the absence of statutory authorization for general federal question jurisdiction at a time when the national bank faced hostile state governments and was in need of a federal forum for its litigation. Fannie Mae faces only state law claims by private citizens. Moreover, after Congress enacted federal question jurisdiction in 1875, Congress acted to eliminate *Osborn*'s broad rule creating federal jurisdiction in any case in which a congressionally chartered corporation is a party. In addition, Congress has made frequent use of plain and direct language in corporate charters to create federal jurisdiction, making the lower court's inference from mere mention of federal courts less reasonable.

3. The broad, automatic rule of broad federal jurisdiction for congressionally chartered corporations is also inconsistent with the role of federal courts in our system of federalism. Federal

courts are courts of limited jurisdiction. Civil actions are presumed to lie outside the subject matter jurisdiction of the federal courts unless and until the party asserting jurisdiction carries the burden of establishing it. The rule applied by the Ninth Circuit allows the federal court to find jurisdiction by implication from the text of the charter without clear indication that Congress intended to allow federal courts to adjudicate state law claims against the corporation. Such broad jurisdiction adds to the workload of the federal courts and diverts judicial resources to state law disputes in which they have no particular expertise.

Opening federal courts to such cases also undermines the role of state courts. It is the responsibility of state courts to apply and develop state law. Undue expansion of federal jurisdiction over state law cases places that responsibility in the hands of a federal judiciary that is not accountable to the citizens of the state. To avoid such undue enlargement of federal jurisdiction, this Court should grant the Petition to make clear that conferring of jurisdiction over state law claims must be supported by a plain statement clearly indicating that Congress intended that result.

ARGUMENT

I. Whether the Lower Court Correctly Determined That It Had Subject Matter Jurisdiction Over State Law Claims Against the Federally Chartered Defendant Is a Question of Great Importance That Should Be Resolved By This Court.

A. Application of the correct standard for determining federal jurisdiction over purely state law claims based on the content of defendant's Congressional charter is an unsettled question that should be resolved by this Court.

It is beyond dispute that the inquiry by a federal court into its own subject matter jurisdiction is a matter of fundamental importance. "Jurisdiction is power to declare the law," and without it, "the court cannot proceed at all in any cause." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). "For a court to pronounce upon the [merits] when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id*. at 101-02. Subject matter jurisdiction, along with personal jurisdiction, are the "jurisdictional bedrocks" that "keep the federal courts within the bounds the Constitution and Congress have prescribed." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999).

For that reason, the question of subject matter jurisdiction is one that "the court is bound to ask and answer for itself, even when not otherwise suggested."

Steel Co., 523 U.S. at 94-95. The requirement that jurisdiction be established as a threshold matter "is inflexible and without exception." *Id.* at 95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

A corporate charter that confers the right to sue and be sued in court creates only the capacity to litigate and does not enlarge the jurisdiction of any court. Fed. R. Civ. P. 17(b). This rule also applies to corporations chartered by Congress. *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); *Bankers Trust v. Texas & Pacific Ry. Co.*, 241 U.S. 295, 305 (1916). Congressional charters, however, may also confer original jurisdiction over all cases involving the corporation. *Osborn*, 22 U.S. at 817. The question presented in this case is whether the specific mention of "federal" court in the "sue and be sued" provision suffices to create federal jurisdiction over state law claims where there is no other evidence or indication that Congress so intended.

Without doubt, the Federal National Mortgage Association ("Fannie Mae"), is tasked with important work in the national economy. Fannie Mae "is a government-sponsored enterprise (GSE) chartered by the United States Congress to support liquidity and stability in the secondary mortgage market . . . by securitizing mortgage loans originated by lenders in the primary mortgage market." New York Times, Federal National Mortgage Association, *available at* http://topics.nytimes.com/top/news/business/companies/fannie_mae/index.html.

The Petition does not question whether federal courts have jurisdiction over claims regarding those activities, which clearly arise under federal law. This case concerns federal jurisdiction over purely state law claims. *See*, *e.g.*, *Colarte v. Fed. Nat'l Mortg. Ass'n*, 689 A.2d 869 (N.J. Super. Ct. Law Div. 1996), *overruled on other grounds*, *Briglia v. Mondrian Mortg. Corp.*, 698 A.2d 28 (N.J. Super. Ct. App. Div. 1997) (negligence action under state law by injured pedestrian who fell on a snow-covered sidewalk adjacent to property owned by Fannie Mae). In this case, plaintiffs asserted state-law claims stemming from foreclosure of their real property. *Lightfoot v. Cendant Mortg. Corp.*, 769 F.3d 681, 682 (9th Cir. 2014).

Nor is it disputed that Congress *can* confer federal subject matter jurisdiction over such claims based on the fact that one party is a federally chartered corporation. The question is whether Congress in fact did so. The Ninth Circuit answered yes, based almost entirely on a charter provision that authorizes Fannie Mae "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." *Id.* at 683 (quoting 12 U.S.C. § 1723a(a)).

The court below relied heavily on this Court's decision in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), in which the Ninth Circuit discerned a bright line rule:

> In *Red Cross*, the Supreme Court gave us a clear rule for construing sue-and-be-sued clauses for federally chartered corporations. The Court held that "a congressional charter's 'sue and be sued'

> provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts."

769 F.3d at 683 (quoting *Red Cross*, 505 U.S. at 255).

The court below construed "in any court of competent jurisdiction, State or Federal" as expressly extending "beyond a mere grant of general corporate capacity to sue, and suffices to confer federal jurisdiction." *Id.* at 684 (quoting *Red Cross*, 505 U.S. at 257). The court inquired no further as to whether Congress actually intended that state law claims be brought in federal court. Indeed, the sole reference to legislative intent was to say there was "no indication that Congress intended to eliminate federal question jurisdiction in 1954 . . . Instead, there was silence." *Id.* at 685.

The Petition enumerates the division among federal courts on this issue. The D.C. Circuit has concluded, like the Ninth Circuit, that the Fannie Mae charter creates federal jurisdiction over any suit, including purely state-law actions, brought by or against Fannie Mae. *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 784 (D.C. Cir. 2008). Numerous federal district courts have arrived at contradictory conclusions. *See* Pet. 18-20 (collecting cases).

Amicus agrees that this Court should grant the Petition in order to resolve the differences among federal courts. Amicus would also call to this Court's attention the broader issue presented by the Ninth Circuit's use of the word "federal" in a talismanic fashion to automatically create federal subject matter

jurisdiction. Federally chartered corporations are a numerous and diverse group whose activities may be quasi-governmental or not related to governmental responsibilities at all. It is unlikely that Congress used this fairly general term with precisely the same meaning in their various charters. The lower court's reliance on a single word or phrase in the charter without clear evidence that Congress intended to expand federal jurisdiction over state law claims will affect litigants far beyond the parties to this case.

B. Federally chartered entities are many and diverse.

The position of federally chartered corporations may be viewed as "exceptional" and deserving of their own rules with respect to access to federal courts. *Gully v. First Nat'l Bank*, 299 U.S. 109, 114 (1936). There are well over 100 such entities, including such large and vitally important corporations, like Fannie Mae, as well as others that engage in no governmental activities at all. Lorretta Shaw, *A Comprehensive Theory of Protective Jurisdiction: The Missing "Ingredient" of "Arising Under" Jurisdiction*, 61 Fordham L. Rev. 1235, 1237 (1993).

A Congressional Research Service study charts the wide diversity of activities of federally chartered corporations. *See* Kevin R. Kosar, Congressional Research Service, *Congressional or Federal Charters: Overview and Enduring Issues*, at 3 (Apr. 19, 2013), *available at* https://www.fas.org/sgp/crs/misc/RS22230.pdf. They include seven "highly controversial Government Sponsored Enterprises (GSEs), including Fannie Mae and Freddie Mac. Though purportedly private entities, these corporations were formed to perform governmental or

quasi-governmental functions." Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 Fla. St. U. L. Rev. 317, 324 (2009); *see* 12 U.S.C. §§ 4501-4642 (detailing the powers of GSEs).

There are, in addition, government chartered corporations that are wholly or partially owned by the federal government. *See* 31 U.S.C. § 9101 (listing 28 such "government corporations"). In *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), this Court reviewed in detail "the long history of corporations created and participated in by the United States for the achievement of governmental objectives" beginning with the first and second national banks. *Id.* at 386. This Court's description reveals that even this subset of federally chartered corporations range from those that are deemed to be federal government agencies, such as the Federal Deposit Insurance Corp., to non-agencies that are nonetheless "government entities" for purposes of individual constitutional rights, such as Amtrak, and those that operate most like private corporations providing goods and services to the public, such as the Tennessee Valley Authority. *See Lebron*, 513 U.S. at 387-91 & 399; and *see generally*, A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543, 555-57 (1995).

In addition, Title 36 of the United States Code includes the charters of over 100 charitable and non-profit organizations, including the American Red Cross and the Little League. *See* 36 U.S.C. §§ 10101-240112. *See generally* Kevin R. Kosar, Congressional Research Service, *Congressionally Chartered Nonprofit Organizations ("Title 36 Corporations"):*

What They Are and How Congress Treats Them (July 14, 2008).

It is also likely that the number and types of federally chartered corporations will continue to expand. There has been discussion "regarding the federal chartering of insurance companies and agencies, and legislation to provide for such chartering has been introduced in both houses." Lund, *supra*, at 325. Proposals have also been made for federal chartering of securities firms and financial services firms, which would be "functionally identical to the comparable state corporations with which they compete for business and investment." *Id.*

It is unlikely that Congress, in chartering so many corporations with such widely varied governmental involvement employed a consistent, yet oblique textual formula to signal its intent to create a right of access to federal courts to decide purely state law causes of action in which there is no diversity.

Amicus submits that the appropriate standard for ascertaining federal jurisdiction in such cases is "an important question of federal law that has not been, but should be, settled by this Court," or, alternatively, that the Ninth Circuit decided this important federal question "in a way that conflicts with relevant decisions of this Court." *See* S. Ct. R. 10(c).

II. The Decision Below, That Use of "Federal" in the Congressional Charter Was Sufficient to Create Federal Jurisdiction Over Plaintiffs' State Law Claims, Is Not Consistent With This Court's Decisions.

A. *Red Cross* did not establish a bright-line rule that specific mention of federal courts in the "sue and be sued" provision was sufficient to create federal subject matter jurisdiction with no clear evidence of Congressional intent.

The court below, purporting to follow this Court's lead in *Red Cross*, looked to "a line of cases, stretching back to *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), which stated that a sue-and-be-sued clause for a federally chartered corporation confers federal question jurisdiction if it specifically mentions federal courts." *Lightfoot*, 769 F.3d at 683 (citing *Red Cross*, 505 U.S. at 252 and *Osborne*, 22 U.S. (9 Wheat.) at 817-18).

In *Red Cross*, this Court concluded from its comparison of the charters in *Osborn*; *Deveaux*, 9 U.S. at 85; *Bankers' Trust Co.,* 241 U.S. at 304-05; and *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 455 (1942), that "a congressional charter's 'sue and be sued' provision *may* be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." 505 U.S. at 255 (emphasis added). In short, this Court found that mention of federal courts is necessary, *but not sufficient* to create federal jurisdiction. The Court then proceeded to inquire whether Congress in fact intended to create federal jurisdiction. *Id.* at 258-64. Although the dissent

asserted that the majority was engaging in "magic words" jurisprudence, *id.* at 265 (Scalia, J., dissenting), the majority was quick to emphasize that the Court's readings of the charters "represented our best efforts at divining congressional intent retrospectively." *Id.* at 252.

The Ninth Circuit, by contrast, held that *Red Cross* established a "rule" that "suffices to confer federal jurisdiction" and resolves this case. *Lightfoot*, 769 F.3d at 684. *See also id.* at 690 (Stein, J., dissenting) (stating that the majority applied a rule of "automatic federal subject matter jurisdiction").

B. *Osborn* does not control this case.

The court below viewed *Osborn* as the seminal decision establishing a bright-line rule "that a sue-and-be-sued clause for a federally chartered corporation confers federal question jurisdiction if it specifically mentions federal courts." *Lightfoot*, 769 F.3d at 683.

There is no doubt that Chief Justice John Marshall broadly declared that, because the Bank could only sue as authorized by its congressionally-enacted charter, any such suit "literally, as well as substantially" arises under the laws of the United States for purposes of Article III. 22 U.S. at 823. This Court has recognized that *Osborn* "reflects a broad conception of 'arising under' jurisdiction" that has been questioned. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492-93 (1983). However, the context of the controversy facing Chief Justice Marshall in *Osborn* has little bearing on the proper scope of federal jurisdiction in this case.

In *Osborn,* the state of Ohio, defying this Court's decision in *M'Culloch v. Maryland*, 17 U.S. (1 Wheat.) 316 (1819), levied a ruinous annual tax on the second National Bank. State officials seized some $100,000 from the Bank's office in Chillicothe, Ohio. 22 U.S. at 832-36. The Bank sued the state officials in federal court, seeking to recover the seized funds and enjoin the collection of the tax, alleging that the seizure violated the federal Constitution. *Id*. at 859-60.

The Bank's cause of action clearly arose under federal law. However, at that time there was no general authorization for federal courts to hear cases arising under federal law. Congress first authorized general federal question jurisdiction in the Judiciary Act of 1875. *See* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331). Yet, the Bank of the United States "was sadly in need of a federal haven for its litigation." Harry Shulman & Edward C. Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 Yale L.J. 393, 405 (1936). "The Government was interested as an owner in the Bank and the Bank was performing governmental service [but] the Bank was the object of great popular hatred and of measures of reprisal by many state legislatures." *Id*. The Bank was a fledgling federal corporation that "was the subject of much hatred from local populations and state legislatures [and] needed the security of a federal forum." Michael T. Maloan, *Federal Jurisdiction and Practice: The American National Red Cross and the Interpretation of "Sue and Be Sued" Clauses*, 45 Okla. L. Rev. 739, 759 (1992).

Fannie Mae does not face those historical exigencies. The corporation is not facing hostile state

governments eager to use state courts to block the federal government's actions and drain its funds. Fannie Mae faces only state law causes of action by private citizens. There is no compelling reason why a case stemming from a fall on a snowy sidewalk or a foreclosure of real property in violation of state law should require a federal forum. What was "statesmanship" on the part of Chief Justice Marshall should not be wrenched out of context to accomplish an unnecessary expansion of federal subject matter jurisdiction. Maloan, *supra*, at 760.

Indeed, Congress itself made clear that the broad scope of federal jurisdiction established in *Osborn* was no longer appropriate after Congress authorized general federal jurisdiction in the Judiciary Act of 1875. In *Union Pacific Railway Co. v. Myers*, 115 U.S. 1 (1885) (*Pacific Railroad Removal Cases*), this Court adhered to *Osborn's* broad view of "arising under" jurisdiction and held that state law tort claims against federally chartered railroads could be removed by the railroads to federal court. *Id*. at 14.

The ensuing years witnessed a "flood" of cases involving federally chartered corporations in the federal courts. Congress eventually acted to stem this flood. In 1882 Congress eliminated automatic federal question jurisdiction in cases involving national banks. Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163. In 1915, Congress eliminated automatic federal question jurisdiction over suits involving federally chartered railroads. Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 803, 805. Finally, in 1925 Congress enacted Act of Feb. 13, 1925, ch. 229, § 12, 43 Stat. 936, 941, now codified at 28 U.S.C. § 1349, which eliminated automatic federal question jurisdiction for all other federally chartered corporations, except those in

which the federal government owns a controlling interest.[2] *See generally* Lund, *supra*, at 332-33; *see also Gov't Nat'l Mortg. Ass'n v. Terry*, 608 F.2d 614, 620-21 (5th Cir. 1979) ("[S]ection 1349 was passed to diminish the flood of federal litigation that resulted from the Pacific Railroad Removal Cases.").

As Justice Cardozo later indicated, following these enactments, *Osborn*'s broad pronouncement regarding federal jurisdiction was no longer a guiding principle. *Gully*, 299 U.S. at 113. This Court, moreover, has come to regard its adherence in the *Pacific Railroad Removal Cases* to *Osborn*'s broad pronouncement as an "unfortunate decision." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 n.50 (1959).

C. Congress knows how to confer federal subject matter jurisdiction by plain and direct statutory language.

An additional tool for ascertaining the intent of Congress to confer federal subject matter jurisdiction is one that was not available to Chief Justice Marshall. Congress has over the years repeatedly demonstrated its ability to create such jurisdiction using language that is direct and explicit. The

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[2] That statute provides :

> The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock.

congressional authorization for the Federal Reserve, for example, provides:

> [A]ll suits of a civil nature at common law or in equity to which any Federal Reserve bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such suits

12 U.S.C. § 632. That provision by its express language extends the district court's jurisdiction to state law causes of action. *Fed. Reserve Bank of Atlanta v. Thomas*, 220 F.3d 1235, 1244 (11th Cir. 2000). Another example is the charter provision Congress enacted for the Federal Home Loan Mortgage Corporation ("Freddie Mac"), a cousin to Fannie Mae:

> [A]ll civil actions to which the corporation is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions.

12 U.S.C. § 1452(f). Where Congress as not made such express provision for subject matter jurisdiction over state law claims, there is nowadays no basis for a district court to infer that Congress impliedly did so merely by referencing capacity to sue and be sued in federal court.

Congress has also demonstrated its ability to tailor "sue and be sued" provisions to define the scope of federal subject matter jurisdiction with far greater precision than the automatic formulation employed by

the court below. For example, Congress provided that all civil suits to which the Federal Deposit Insurance Corporation is a party shall be deemed to arise under the laws of the United States, except that certain actions "in which only the interpretation of the law of such State is necessary, shall not be deemed to arise under the laws of the United States." 12 U.S.C. § 1819(b)(2). *See also* 36 U.S.C. § 220505(b)(9) (conferring original jurisdiction over any civil action against the U.S. Olympic Committee "solely relating to the corporation's responsibilities under this chapter").

This Court should grant the Petition to make clear that *Red Cross* held that specific mention of federal courts in the charter's "sue and be sued" provision *may* create federal jurisdiction to decide state law claims, only if there is clear evidence that Congress so intended. The Court should further make clear that the broad scope of federal jurisdiction over cases involving congressionally chartered corporations enunciated in *Osborn* is no longer a guiding principle.

III. The Lower Court's Broad, Automatic Rule of Federal Jurisdiction Is Not Consistent with the Role of Federal Courts in the Federalist System.

A. The decision below is inconsistent with the role of federal courts with limited and clearly defined jurisdiction.

Federal district courts are, of course, "'courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v.*

Minton, --- U.S. ----, 133 S. Ct. 1059, 1064 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). An action is presumed to lie outside this limited jurisdiction. *Kokkonen*, 511 U.S. at 377 (citing *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799)). The "burden of establishing the contrary rests upon the party asserting jurisdiction." *Id*. *See also* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3522, at 62 (1984) (The "party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of the federal court. The presumption is that the court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists."). This presumption assures that the scope of the federal courts' jurisdiction "is carefully guarded against expansion by judicial interpretation." *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951).

A charter provision authorizing the corporation to "sue and be sued" in court addresses no more than the entity's capacity to sue and does not overcome this presumption. *See Deveaux*, 9 U.S. at 85-86. Adding the word "federal" does not clearly and plainly indicate that Congress intended that federal courts have subject matter jurisdiction over any state-law case in which the federally chartered corporation is a party.

Indeed, "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). *See also* Maloan, *supra*, at 759 (noting the "clear thrust of congressional policy in recent years . . . toward limiting federal jurisdiction to those situations where federal law controls").

That policy is grounded in pragmatic concerns. As one commentator explained, "Federal dockets are overcrowded, and the last thing federal judges need is to be further saddled with cases grounded entirely on state law." *Id*. *See also Luckett v. Harris Hosp.-Fort Worth*, 764 F. Supp. 436, 441 (N.D. Tex. 1991) (expressing concerns that broader federal jurisdiction for congressionally chartered corporations would open a "floodgate" of state law cases); *Collins v. Am. Red Cross*, 724 F. Supp. 353, 358 (E.D. Pa. 1989) (similar).

The influx of such cases represents a diversion of federal judicial resources to deal with actions based purely on state law in which district courts possess no particular expertise. As Professor Cooper urged in a symposium addressing supplemental jurisdiction over state law cases, "federal courts must first husband their resources to dispose of the matters that establish federal jurisdiction." Edward H. Cooper, *An Alternative and Discretionary § 1367*, 74 Ind. L.J. 153, 155 (1998). *Cf*. Henry J. Friendly, *Federal Jurisdiction: A General View* 141 (1973) (Warning that broad diversity jurisdiction threatens "the diversion of judge-power urgently needed for tasks which only federal courts can handle or which, because of their expertise, they can handle significantly better than the courts of a state.").

B. The broad rule of automatic federal jurisdiction in cases involving state law actions by or against federally chartered entities undermines the role of state courts.

It is a truism that "the proper allocation of authority between United States and state courts" is a matter of "perennial concern." Felix Frankfurter,

Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499, 506 (1928). Undue expansion of the scope of federal jurisdiction to include cases involving only issues of state law necessarily intrudes upon the role of state courts in our federalist system. *See* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3502 ("[E]xpansion of the jurisdiction of the federal courts diminishes the power of the states.").

Even the appropriate application of state law in diversity cases raises federalism concerns. As one scholar points out, despite the fact that the federal court correctly interpreted state law, "it remains true that the rule applied in federal court did not in fact constitute a sovereign command of the state at the time the federal court rendered its decision." Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459, 1505 (1997). The Chief Judge of the Third Circuit has pointed out that federal court adjudication of state law claims results in "unavoidable intrusion of the federal courts in the lawgiving function of state courts." Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1675 (1992).

> When federal judges make state law—and we do, . . . judges who are not selected under the state's system and who are not answerable to its constituency are undertaking an inherent state court function.

Id. at 1687. For that reason, Chief Justice Stone observed, it is the responsibility of the federal judicial

branch to avoid intrusion into state authority except where clearly authorized by Congress:

> Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Sheets, 313 U.S. at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

Congress can, of course, confer subject matter jurisdiction on federal courts within the bounds of Article III. In the context of federal preemption of state law, this Court made clear that the sovereignty of the states is "more properly protected by the procedural safeguards inherent in the structure of the federal system," that is, by their representation in Congress. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). The corollary to that principle, Justice O'Connor later pointed out, is that "we must be absolutely certain that Congress intended" to displace state law. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

Similarly, where a federally chartered corporation contends that federal district courts have subject matter jurisdiction over any state-law claim by or against the corporation, the federal court should require a "plain statement" that Congress intended such a result. *See id.*

This Court should grant the Petition to address unsettled issues with respect to federal subject matter jurisdiction over state law actions by or against federally chartered corporations, to correct erroneous

interpretation of this Court's prior decisions in *Red Cross* and *Osborn*, and to require that extensions of federal jurisdiction over state law causes of action be supported by plain and unambiguous evidence that Congress intended that result.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Date: May 22, 2015

Respectfully submitted,

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