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 Writ of Certiorari to the United States Courts 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 property rights cases, 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 that 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. Removal of such actions by federally chartered corporations and the attendant litigation regarding subject matter jurisdiction makes representation of clients more difficult and adds unnecessary complexity and expense to the vindication of state law rights.

SUMMARY OF ARGUMENT

1. The lower court's bright-line rule inferring subject matter jurisdiction in a case

[1] 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.

involving a congressionally chartered corporation, based entirely on a reference to federal courts in the charter, is inconsistent with the role of federal courts. Federal courts are courts of limited jurisdiction. The requirement that a federal court be certain of its own subject matter jurisdiction is of fundamental importance. Plaintiffs in this case assert claims against Fannie Mae that are based entirely on state statutory and common-law causes of action. The court of appeals below held that the district court had subject matter jurisdiction in this case based on a provision in Fannie Mae's congressional charter that authorizes Fannie Mae "to sue and be sued . . . in any court of competent jurisdiction, State or Federal."

That provision expressly addresses no more than Fannie Mae's authority capacity to sue and is, at best, ambiguous as to whether Congress meant also to expand the original jurisdiction of district courts to actions that otherwise belong in state courts. The Ninth Circuit below, however, discerned in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), a bright line rule that the bare mention of federal courts in the sue-and-be-sued provision suffices to create federal subject matter jurisdiction. However, *Red Cross* stated that such a reference *may* be read to confer federal court jurisdiction, not that it was alone sufficient. The mere mention of federal courts—without clarifying indicators such statutory text, legislative history, or a meaningful federal interest—is too opaque to show congressional intent to expand jurisdiction.

Nor is it plausible that Congress would use such an ambiguous and indirect means to expand federal court jurisdiction. The many federally chartered corporations engage in widely diverse

activities that may or may not implicate federal interests. Some are owned in whole or in part by the United States. Government Sponsored Enterprises, including Fannie Mae and Freddie Mac, are privately owned but perform quasi-governmental functions. Finally, Congress has chartered over 100 charitable and nonprofit organizations, most of which do not engage in governmental or quasi-governmental activities at all. A court must not grasp at a reference to federal courts in the federal charter to infer that Congress intended to guarantee easy access to federal court in any case involving such a corporation.

The court below relied on *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). But that case involved a direct attack on the national bank by a hostile state government where state courts could not be relied on to protect federal interests. In the case before this Court, a private corporation faces state law claims by private individuals, a dispute in which state courts can be counted on to administer justice fairly. Indeed, when this Court extended *Osborn* to purely private state-law disputes, Congress intervened by limiting automatic jurisdiction over congressionally chartered corporations to cases where the United States owns more than half the corporation's capital stock. Congress has clearly erased any presumption favoring federal jurisdiction in cases involving federal corporations. It is instead the responsibility of the federal judicial branch to avoid intrusion into state authority except where clearly authorized by Congress.

Additionally, Congress has by now demonstrated that it is fully capable of expressly conferring jurisdiction when it deems the federal interest so requires. In fact, Congress has done so in

the charter for Freddie Mac. That Congress did not similarly extend federal court jurisdiction in favor of Fannie Mae strongly indicates congressional intention to preclude federal court involvement in such actions where federal law does not provide the rule of decision.

As a practical matter as well, courts should avoid inviting an influx of state law cases into federal court unless Congress clearly so intended. Federal courts possess no particular expertise in matters of state law and their resources are required to attend to matters that only federal courts can handle or that they handle better that state courts.

2. Implying federal subject matter jurisdiction over cases that would otherwise be decided by state courts undermines the vital role of state courts in our federalist system. The Founders designed our system of dual sovereigns to afford the greatest protections to the rights and freedoms of the American people. State government can be more responsive to local needs, more accessible to citizen participation, and can serve as "laboratories" in social policy.

State courts play an essential role. They are the primary administrators of criminal and civil justice, the immediate and visible guardians of life and property, and defenders of civil liberties. Indeed, state courts have made significant advances in the securing of state constitutional protections that are different from or broader than those guaranteed by the United States Constitution. State courts are also more reflective of and responsive to the concerns of ordinary citizens due to their broader reliance on trial by jury.

The decision below, however, has the effect of ousting state courts from their responsibility to administer justice in a significant class of cases based entirely on state law, with no showing that meaningful federal interests warrant such an intrusion. Even assuming that the federal court correctly applies state law, the outcome is one decided by judges not selected under the state's system, who are not accountable to the state court's constituency, and who do not speak with the authority of the sovereign state on a matter of state law.

To the extent that state courts are deprived of opportunities to develop state-law protections of personal rights and property rights, the advantages of federalism are thwarted.

3. This Court has already crafted a tool that protects the role and responsibility of state courts in the federal system. The clear statement rule requires simply that if Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intent clear.

Obviously, the actions of Congress may impact the integral functions of state government, including state courts. This Court has retreated from judicially enforced textual protection of state sovereignty under the Tenth Amendment. Rather, the Court has relied on the structural safeguards inherent in the constitutional design: The states can protect their interests through their representation in Congress.

The necessary corollary is that when Congress takes an action that intrudes upon state functions, Congress must speak plainly and unambiguously. In this way, the states are provided fair notice that

legislation affecting their interests is before the Congress, affording them the opportunity to oppose or alter unwanted intrusion into state sovereignty. It also ensures that congressional representatives consider the proposed legislation's impact on the states. And it allows the judicial branch, in interpreting legislation, to avoid unintended encroachments on the authority of the States.

The decision below found an implied expansion of federal subject matter jurisdiction based on an ambiguous statutory reference to federal courts in Fannie Mae's congressional charter. The court's rule evades the very structural protections that this Court has relied upon to safeguard federalism. Congress has shown it can speak clearly when creating original jurisdiction over federally chartered corporations. This Court should require such a clear statement.

ARGUMENT

I. The Lower Court's Inference of Subject Matter Jurisdiction in a Civil Action Involving a Congressionally Chartered Corporation Based Entirely on Congress' Ambiguous Reference to Federal Courts Exceeds the Limited Role of Federal Courts.

A. Bare reference in the charter to federal courts is ambiguous as to congressional intent to create subject matter jurisdiction and does not indicate federal interests warranting the availability of a federal forum.

The requirement that a federal court be certain as to 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 Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). Subject matter jurisdiction and personal jurisdiction "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). Therefore, the requirement that jurisdiction be established as a threshold matter "is inflexible and without exception." 523 U.S. at 95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). *See also* 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.").

Plaintiffs in this case assert claims against the Federal National Mortgage Association ("Fannie Mae"), that are based entirely on state statutory and common-law causes of action. *See* Compl., "Fraud and Deceit," ¶¶ 33-40; "Racial Discrimination" in violation of Cal. Civ. Code § 51 ("Unruh Act"), Compl. ¶¶ 41-47; "Fraud and Quiet Title," in violation of Cal. Civ. Code 2294, Compl. ¶¶ 48-59; "Slander of Title," Compl. ¶¶ 60-64; "Negligent Misrepresentation," Compl. ¶¶ 65-71; "Civil Conspiracy," Compl. ¶¶ 72-75; and "Intentional Infliction of Emotional Distress," Compl. ¶¶ 76-82. The court of appeals below nevertheless held that the district court had subject matter jurisdiction in this case based on a provision in Fannie Mae's charter that authorizes Fannie Mae "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." *Lightfoot v. Cendant Mortgage Corp.*, 769 F.3d 681, 683 (9th Cir. 2014) (quoting 12 U.S.C. § 1723a(a)).

That charter provision expressly addresses no more than Fannie Mae's capacity to sue and "no right is conferred on the [corporation] by the act of incorporation, to sue in the federal courts." *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809). The Ninth Circuit, however, discerned in this Court's decision in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), 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).

In *Red Cross*, this Court concluded from its comparison of the charters in *Deveaux*, 9 U.S. at 85; *Bankers' Trust Co. v. Texas & Pacific Railway,* 241 U.S. 295, 304-05 (1916); 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). This Court did not state that a bare reference to federal courts was itself sufficient to confer new subject matter jurisdiction on federal courts. Indeed, Justice Souter, writing for the *Red Cross* majority, proceeded to inquire from the legislative history of the Red Cross charter whether Congress had in fact intended to create federal jurisdiction. The Court ultimately rejected respondents' more limited view. *Id*. at 260-63. Justice Souter's exercise would have been wholly superfluous and unnecessary if the Court had in fact established a bright line rule.

The court below, by contrast, undertook no inquiry into the intent of Congress regarding Fannie Mae's charter. Indeed, the court's only reference to legislative intent was to state that there was "no indication that Congress intended to eliminate federal question jurisdiction in 1954. . . . Instead, there was silence." 769 F.3d at 685.

The lower court determined that *Red Cross* established a "rule" that "suffices to confer federal jurisdiction" simply by use of the term "federal" court. *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").

The Solicitor General has ably demonstrated that the text and legislative history of Fannie Mae's charter do not support such a bright-line rule and do not support subject matter jurisdiction in this case. Br. for the United States as Amicus Curiae on Pet. for Certiorari 11-17.

Such a bright-line rule is opaque as to congressional intent to expand the subject matter jurisdiction of federal courts, and it is also opaque as to any federal interests that might be at stake which might have persuaded Congress to make a federal forum available.

B. Congressionally chartered corporations vary greatly in the federal interests involved in their activities.

This Court in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), reviewed in detail "the long history of corporations created and participated in by the United States for the achievement of governmental objectives." *Id.* at 386 & 387-91. Well over 100 federally chartered corporations are tasked with widely diverse activities. *See generally* Kevin R. Kosar, Congressional Research Service, *Congressional or Federal Charters: Overview and Enduring Issues* (Apr. 19, 2013), *available at* https://www.fas.org/sgp/crs/misc/RS22230.pdf; A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543, 555-57 (1995).

Some are owned in whole or in part by the federal government. *See* 31 U.S.C. § 9101 (listing 28 such "government corporations"). In addition, seven Government Sponsored Enterprises ("GSEs"),

including Fannie Mae and Freddie Mac, are privately owned but perform "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 GSE's). Finally, Congress has chartered over 100 charitable and nonprofit organizations, including the American Red Cross and the Little League, that do not engage in governmental or quasi-governmental activities at all. *See* 36 U.S.C. §§ 10101-240112; Kevin R. Kosar, Congressional Research Service, *Congressionally Chartered Nonprofit Organizations ("Title 36 Corporations"): What They Are and How Congress Treats Them* (July 14, 2008). The number and types of federally chartered corporations will likely expand. Proposals to federally charter insurance companies, securities firms, and financial services companies have been discussed in Congress. Lund, *supra*, at 325.

It is simply implausible that Congress would use a charter provision that expressly authorizes a corporation to sue or be sued to implicitly expand the jurisdiction of the federal courts. It is doubly implausible that Congress would telegraph such a fundamentally important change by the oddly indirect reference to federal courts in a provision that addresses the authority of the corporation, not the authority of the federal courts.

Federal district courts are "'courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 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)), and the "burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.*

Amicus submits that courts may not infer federal jurisdiction over a congressionally chartered corporation based on a bare reference to federal courts "unless [the] case implicates a meaningful federal interest." Lorretta Shaw, *A Comprehensive Theory of Protective Jurisdiction: The Missing "Ingredient" of "Arising Under" Jurisdiction*, 61 Fordham L. Rev. 1235, 1237 (1993). The fact that Congress referred to federal courts in the sue-or-be-sued provision in Fannie Mae's charter by Congress does not establish such a federal interest that a federal forum must be available for any state-law dispute to which Fannie Mae is a party. Indeed, there are many such cases that do not implicate federal interests at all. *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). It should be the corporation's burden on removal to show either that Congress expressly granted original jurisdiction in district court over actions to which the corporation is a party, or that a "meaningful federal interest" is at stake in the case, supporting a finding that Congress intended to make the federal forum available.

C. Congress has reacted to this Court's prior expansive view of federal jurisdiction in cases involving federally chartered corporations by limiting jurisdiction to cases where federal interests are truly at stake.

The court below viewed *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), as the seminal decision that "made clear 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.

In *Osborn*, Chief Justice John Marshall broadly declared that, because the Bank of the United States 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. *Osborn*, 22 U.S. at 823. This Court has noted that *Osborn* "reflects a broad conception of 'arising under' jurisdiction" that has since been questioned. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492-93 (1983). Amicus suggests that the context of the controversy facing Chief Justice Marshall in *Osborn* indicates that *Osborn* should not dictate 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. *Osborn*, 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.

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, now 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. See also* 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) (The Bank "was the subject of much hatred from local populations and state legislatures . . . [and] needed the security of a federal forum."). As Daniel Webster argued to the Court, the "constitution itself supposes that [state judicial systems] may not always be worthy of confidence, where the rights and interests of the national government are drawn in question." 22 U.S. (9 Wheat.) at 811.

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 private citizens asserting causes of action under state law. There is no good reason why a case stemming from a fall on a snowy sidewalk, *see Colarte*, *supra*, or a foreclosure of real property in

violation of state law, should require a federal forum. What Chief Justice Marshall deemed essential to preserve the federal government's interest from covetous state governments should not be wrenched out of context to accomplish an unnecessary expansion of federal subject matter jurisdiction in a state-law cause of action between private parties.

In fact, Congress itself acted to correct what it perceived as judicial overreaching regarding federal jurisdiction. In *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), this Court, relying on *Osborn*'s broad view of "arising under" jurisdiction, held that any claim against a federally chartered corporation necessarily arose under federal law and could therefore be removed to federal court. *Id.* at 14.

The ensuing years witnessed a flood of cases involving federally chartered corporations asserting ordinary state-law claims in the federal courts or removing such claims from state courts. Alarmed, Congress took steps to relieve the federal courts' workload by restricting subject matter jurisdiction over such cases. 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, Congress enacted the Judges' Bill of 1925, 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 Gov't Nat'l Mortgage Ass'n v. Terry*, 608 F.2d 614, 620-21 n.10 (5th Cir. 1979) ("[S]ection 1349 was passed to diminish the flood of federal litigation that resulted from the *Pacific Railroad Removal* Cases."); *Murphy v. Colonial Fed. Savings & Loan Ass'n*, 388 F.2d 609, 611-12 (2nd Cir. 1967) (purpose of § 1319 was to stem "the flood of litigation to which the federal courts were . . . subjected" as a result of the decision in *Pacific Railroad Removal Cases*); *Crum v. Veterans for Foreign Wars*, 502 F. Supp. 1377 (D. Del. 1980) (the purpose of § 1319 was to lighten the case load of the federal courts); *Latch v. Tenn. Valley Auth.*, 312 F. Supp. 1069, 1073 (N.D. Miss. 1970) (same).

Thus, in the case of government-chartered corporations that are wholly or partially owned by the federal government, where the federal interest in litigating in a federal forum would be clear, Congress has limited original jurisdiction of federal courts to those cases where the interest of the United States is strongest. Expanding federal jurisdiction by implication could no longer be deemed consistent with congressional intent. Chief Justice Stone observed, that it is instead the responsibility of the federal judicial branch to avoid intrusion into state authority except where clearly authorized by Congress:

> The power reserved to the states under the Constitution to provide for the

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[2] 28 U.S.C. § 1349 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.

> determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "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."

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941) (quoting *Healy v Ratta*, 292 U.S. 263, 270 (1934)).

A second reason against implying a grant of subject matter jurisdiction in Congress' oblique reference to federal courts is one that was not available to Chief Justice Marshall: Congress has already demonstrated that it is fully capable of expressly conferring jurisdiction when it deems the federal interest so requires.

For example, 28 U.S.C. § 1345 expressly provides for original jurisdiction in the district courts for suits by federal agencies, and 28 U.S.C. § 1442(a)(1) authorizes such agencies to remove state court actions to U.S. district court. Congress has also provided that certain federally created entities shall be deemed federal agencies for purposes of original jurisdiction and removal under those statutes. One such agency is the Federal Home Loan Mortgage Corporation ("Freddie Mac"), a GSE like Fannie Mae. *See* 12 U.S.C. § 1452(f) (Actions against Freddie Mac "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.").[3] The fact that Congress did not extend similar federal court jurisdiction in favor of Fannie Mae strongly indicates congressional intention to preclude federal court involvement in such actions where federal law does not provide the rule of decision.

Justice Cardozo has stated, based on Congress' reaction, that *Osborn*'s broad pronouncement regarding federal jurisdiction was no longer a guiding principle. *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936). Indeed, this Court has come to regard the *Pacific Railroad Removal Cases* as "unfortunate." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 n.50 (1959).

Instead, this Court stated that in ascertaining federal jurisdiction in such cases "the federal nature of the right to be established is decisive—not the source of the authority to establish it." *Gully*, 299 U.S. at 114 (quoting *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 483 (1933)). The proper inquiry for a federal court

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[3] The congressional authorization for the Federal Reserve similarly 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 expressly 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). Creating federal jurisdiction by implication from an ambiguous reference in the charter is unwarranted where Congress has shown it can speak explicitly and directly.

on the question of subject matter jurisdiction is not simply whether Congress mentioned federal courts in the "sue or be sued clause," but whether the statutory text or legislative history indicate that Congress recognized that meaningful federal interests warranted the availability of a federal forum for state-law causes of action.

D. Conservation of federal judicial resources counsels caution in opening the doors to federal courts to cases based solely on state law.

This principle also serves very 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." Maloan, *supra*, at 760. *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 diverts federal judicial resources needed for federal law issues to preside over actions based purely on state law in which district courts possess no particular expertise. As Judge Friendly warned, the federal judicial branch must guard against "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." Henry J. Friendly, *Federal Jurisdiction: A General View* 141 (1973). As one district judge has stated:

> This court is not convinced, however, that federal district courts should automatically hear all cases in which federal law is remotely, if at all, involved. . . . Such a rule would convert the federal district court from a court of limited jurisdiction, carefully defined by Congress, to a court of general jurisdiction hearing many cases in which state law would predominate.

Latch, 312 F. Supp. at 1076.

Perhaps more important for the interests of justice is the obvious fact that federal courts are not experts in state law. As aptly stated by Judge Friendly, "All such cases [in which state law is unclear] are pregnant with the possibility of injustice." Friendly, *supra*, at 143.

II. The Lower Court's Inference of Subject Matter Jurisdiction in a Civil Action Involving a Congressionally Chartered Corporation Based Entirely on Congress' Ambiguous Reference to Federal Courts Erodes the Vitally Important Role of State Courts in Our Federalist System.

In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), Justice O'Connor's majority opinion featured a compelling essay on the on the importance of preserving the states' role:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a

> heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id. at 458. She added that the "'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties,'" *Id*. (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Thus, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id*. *See United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing *Gregory* as setting forth the "first principles" of federalism).

State courts play an essential role in this plan. The Founders gave to the states "the one transcendent advantage [of] the ordinary administration of criminal and civil justice." *Federalist No*. 17 (Dec. 5, 1787) (Alexander Hamilton). A state court is "the immediate and visible guardian of life and property." *Id*. Indeed, state courts have served the "historic role as the primary defenders of civil liberties and equal rights." J. Skelly Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 Hastings Const. L. Q. 165, 188 (1984).

The decision below, however, has the effect of ousting state courts from their responsibility to administer justice in causes of action based entirely on state law, with no showing that meaningful federal interests warrant such an intrusion. 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). She stated convincingly,

> 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. *See also* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3502 (Rev. ed. 1971) ("[E]xpansion of the jurisdiction of the federal courts diminishes the power of the states.").

Former Colorado Supreme Court Justice Rebecca Love Kourlis wisely observed: "For most Americans, Lady Justice lives in the halls of state courts," *quoted in* Jennifer Walker Elrod, *Don't Mess with Texas Judges: In Praise of the State Judiciary*, 37 Harv. J.L. & Pub. Pol'y 629, 635 (2014).

One reason state courts are more reflective of and responsive to the concerns of ordinary citizens is their broader reliance on the jury, which John Adams called "the heart and lungs of liberty." Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 Tex. Tech L. Rev. 303, 308 (2012). "[S]tate courts conduct[]about 46,200 civil jury trials per year. . . . By contrast, the federal courts conduct [only] about 2,100

civil jury trials per year." Elrod, *Don't Mess with Texas Judges*, *supra*, at 638.

State courts are fully capable of protecting the rights of their citizens. Indeed, one of the most significant advances in the past half century in the securing of individual protections has been the rejuvenation of state constitutional rights that are different from or broader than those guaranteed by the Constitution of the United States, a development that many state supreme court justices have celebrated. *See*, *e.g.*, Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 Sw. L.J. 951 (1982); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John's L. Rev. 399 (1987); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379 (1980); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 Tex. L. Rev. 1081 (1985); Sandra Day O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 Wm. & Mary L. Rev. 801 (1981); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 Tex. L. Rev. 977 (1985); Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 Val. U. L. Rev. 421 (1996); Robert F. Utter, *The Practice of Principled Decision-making in State Constitutionalism: Washington's Experience*, 65 Temp. L. Rev. 1153 (1992).

Additionally, a celebrated value of federalism is the ability of states to serve as "laboratories" in social policy. *See Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). To

the extent that courts are deprived of opportunities to develop state-law protections of personal rights and property rights, this aim of federalism is thwarted.

III. This Court Should Extend Its "Clear Statement" Doctrine to the Purported Creation of Federal Subject Matter Jurisdiction in Cases Otherwise Governed by State Law.

This Court has already crafted a tool that protects the role and responsibility of state courts in the federal system. The clear statement rule provides that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *Scanlon*, 473 U.S. at 242).

The Court gave substantive content to the Tenth Amendment protection of the states in *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), holding that certain essential functions of a state are so "integral" to statehood that they may not be supplanted by federal law. "This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce." *Id.* at 842.[4]

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[4] This Court suggested in *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 633 (1874), that, even if the commerce clause allowed it, "Congress may not have the power to authorize the Supreme Court to supplant state courts as the authoritative declarers of law within their jurisdictions by functioning as a court of last resort with respect to state common law and statutory law." Ernest A. Young, *State Sovereign Immunity and the Future of*

The Court overruled *National League of Cities* a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The *Garcia* Court did not dismantle federalism. Rather the majority concluded that the states can fully protect their interests through their representation in Congress. *Garcia* reasoned that the states "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552.

The necessary corollary to that principle, Justice O'Connor subsequently pointed out, is that Congress must speak plainly when intruding on state authority:

> Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.

Gregory, 501 U.S. at 464. This Court has long insisted that when Congress legislates "in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S.

Federalism, 1999 Sup. Ct. Rev. 1, 79 n.120 (1999) (quoting Laurence H. Tribe, *American Constitutional Law* § 5-20, at 380 (2d ed. 1988)).

218, 230 (1947). *See also Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice*, 331 U.S. 218); *United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

The clear statement rule provides fair notice to the states that legislation affecting their interests is before the Congress, affording them the opportunity to oppose or alter the intrusion into state sovereignty. It also ensures that congressional representatives consider the proposed legislation's impact on the states. By this means, the judicial branch avoids "unintended encroachment on the authority of the States." *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *see also New York v. United States*, 505 U.S. 144, 181 (1992) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); *see generally* John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399 (2010).

Additionally, requiring that Congress spell out its intent to alter or enlarge federal jurisdiction invites Congress to tailor the scope of federal jurisdiction to closely conform to the federal interests at stake with far greater precision. For example, Congress has 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)(D)(iii). Similarly, 36 U.S.C. § 220505(b)(9) confers original

jurisdiction over any civil action against the U.S. Olympic Committee "solely relating to the corporation's responsibilities under this chapter." Such carefully tailored grants of subject matter jurisdiction should be encouraged by this Court.

To allow federal subject matter jurisdiction to supersede the ordinary responsibility of state courts to decide matters of state law based on an ambiguous statutory reference by Congress evades the very protections of states that *Garcia* relied upon. It deprives the states of the opportunity to contest intrusion by the federal government into a central facet of state sovereignty. At the same time, it allows Congress to use ambiguity "as a cloak for its failure to accommodate the competing interests [in] the federal-state balance." Tribe, *supra*, at § 5-8, p. 317. Congress has shown it can speak clearly when creating original jurisdiction over federally chartered corporations. This Court should require such a clear statement.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed.

Date: August 23, 2016 Respectfully submitted,

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