No. _____

In the Supreme Court of the United States

MOODY'S CORPORATION;
MOODY'S INVESTORS SERVICE, INC. ,
Petitioners,

v.

FEDERAL HOME LOAN BANK OF BOSTON,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 1631, a federal court which "finds that there is a want of jurisdiction" with respect to any civil action or appeal filed in that court "shall, if it is in the interest of justice, transfer such action or appeal" to the proper federal court. This provision, enacted as part of the Federal Courts Improvement Act of 1982, was intended to allow correction of errors concerning which federal court had statutory subject-matter jurisdiction over an action or appeal. Such misfilings were primarily of concern due to difficulties in interpreting the jurisdiction of specialized federal courts such as the Court of Appeals for the Federal Circuit, which was created by the Improvement Act.

The question presented by this petition is whether Congress intended § 1631 to empower District Courts to direct transfer when the plaintiff has sued a defendant over whom the District Court lacks *personal* jurisdiction, or whether the proper result in such a case is the same as in state court, namely that the court lacking personal jurisdiction over the defendant must dismiss the action.

PARTIES TO THE PROCEEDING

Petitioners Moody's Corporation and Moody's Investors Service, Inc. are defendants in the district court and appellees in the First Circuit. Respondent Federal Home Loan Bank of Boston is plaintiff in the district court and appellant in the First Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Moody's Investors Service, Inc. is a wholly owned subsidiary of Petitioner Moody's Corporation, which is publicly held. The only publicly held corporation that owns 10% or more of the stock of Moody's Corporation is Berkshire Hathaway Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Moody's Corporation and Moody's Investors Service, Inc. (together, "Moody's") respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The First Circuit's opinion is reported at 821 F.3d 102 and reproduced at App. 1-40. The district court's opinions and orders are reproduced at App. 41-65.

JURISDICTION

The First Circuit issued its decision on May 2, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 1631 provides as follows:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

INTRODUCTION

In 1982, Congress passed the Federal Courts Improvement Act, Pub. L. 97-164, 96 Stat. 25 (the "Improvement Act"). Among the primary purposes of the Improvement Act was the creation of the new Court of Appeals for the Federal Circuit, and the channeling of patent-related and other specialized appeals to that court.

The statute at issue in this petition, 28 U.S.C. § 1631, was also a part of the Improvement Act. The concern that prompted its inclusion is clear. Because the web of statutes assigning statutory subject-matter jurisdiction over different claims and appeals to various federal courts could at times be unclear – a problem anticipated (correctly, as it turned out) to be exacerbated by the Improvement Act itself – even the most adept and conscientious litigants could find themselves in the "wrong court." The purpose of § 1631 was to allow federal courts to redirect such misfiled proceedings to the federal court Congress intended – in the words of the Senate report accompanying § 1631's enactment, "to transfer it to a court where subject matter jurisdiction is proper" – rather than to dismiss. In this way, potentially meritorious actions or appeals would not be lost due to good-faith attempts to navigate through potentially confusing jurisdictional statutes.

Such concerns have nothing to do with the instant proceedings. Plaintiff Federal Home Loan Bank of Boston ("FHLBB") did not pick the wrong federal court for its federal claim or pick a federal court at all. Instead it sued Moody's in a state court that lacked personal jurisdiction to act vis-à-vis the defendants. Rather than sue Moody's in New York where personal

jurisdiction would plainly be proper, FHLBB attempted to hale Moody's into FHLBB's home jurisdiction of Massachusetts to face purely state-law claims. It is now uncontested that Massachusetts lacks the constitutional power to exercise jurisdiction over Moody's with respect to the claims in this action. Had this case remained in state court, where it was filed, there is no dispute that the court would have been required to dismiss the claims against Moody's; transferring to New York would not be an option. Further, to the extent FHLBB chose to refile in the appropriate forum, New York, it is the law of New York that would determine whether the statute of limitations would bar such refiled claims, and what effect (if any) to give to the prior, improper filing.

The court of appeals, however, held that, because this action had been removed to federal court, FHLBB could avoid these consequences for its choice of an unconstitutional forum. Instead, the court held that the district court, notwithstanding its lack of personal jurisdiction over Moody's – or, rather, *because* it lacked jurisdiction – had the power to sever the claims against Moody's and transfer them to federal court in New York. The court reached this conclusion by employing an appealingly simple, yet deeply flawed, syllogism: that, since "jurisdiction" *can* mean either subject-matter or personal jurisdiction, 28 U.S.C. § 1631's use of "want of jurisdiction" unambiguously refers to both, *i.e.*, the statute authorizes transfer when a district court determines that it lacks jurisdiction of either variety.

In so interpreting § 1631, the court of appeals failed to appreciate that it was significantly extending the

reach of the statute, with profound consequences that Congress almost certainly did not intend. First, a determination that personal jurisdiction is authorized (including that it is consonant with the Due Process Clause) is a fundamental prerequisite to the exercise of any adjudicatory authority over the defendant. Indeed, as this Court has instructed, in its absence "[a court] can proceed no further and must dismiss the case on that account." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 434 (2007). For a court to do anything other than dismiss – particularly, as here, where its orders affect substantive rights – at a minimum raises serious constitutional concerns. Those same concerns do not arise when it comes to statutory subject-matter jurisdiction. Congress was free to empower federal courts to transfer cases to the forum with statutory subject-matter jurisdiction. Just as Congress can specify that the Federal Circuit has jurisdiction over all patent appeals, it can empower other federal circuits to transfer misfiled cases to Washington. But Congress has no comparable power to authorize a federal court that lacks personal jurisdiction over the defendant to take action vis-à-vis the defendant that may deprive them of an otherwise valid defense to a state-law claim.

Second, the First Circuit's holding creates a significant and undesirable difference between state and federal courts. A plaintiff who attempts to hale a defendant into an improper state court faces dismissal, but one who can manage to get into a federal court in that same state (or where the defendant exercises its right to remove) can be spared the consequences of its strategic litigation choice by simply having the case transferred to a court that may properly exercise

personal jurisdiction over the defendant. At least where federal courts are adjudicating state-law claims, this difference in outcomes violates the principles of *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), and its progeny. It likewise chills defendants from exercising their right to removal. This Court has repeatedly instructed that federal procedural rules and statutes should be interpreted with sensitivity to these principles, but the court of appeals here ignored them entirely.

Even if Congress could constitutionally mandate such fundamental changes, there is simply no indication that it intended to do anything of the sort when it enacted § 1631. The text and context of § 1631 indicate that Congress was concerned with the want of statutory subject-matter jurisdiction. And nothing in the legislative history of the statute remotely suggests that Congress wanted to address the "problem" of plaintiffs suffering the consequences of exorbitant claims of jurisdiction. Congress's use of the unqualified word "jurisdiction" cannot bear the weight that the court of appeals placed upon it.

By holding that § 1631 empowers courts without personal jurisdiction over a defendant to take action against that defendant, the First Circuit joined one side of a division among lower federal courts, a side that effectively treats the absence of personal jurisdiction in the federal courts as no different from improper venue. At the same time, however, this Court has been moving to reinforce the importance of constitutional limits on personal jurisdiction, even in the federal courts. Indeed, it was this Court's holding in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), that

exposed FHLBB's jurisdictional theory as "exorbitant" in this case. By the First Circuit's reasoning, however, the only consequence here (as presumably in *Daimler* itself) is that the same court that lacks constitutional power over the defendant can take action against the defendant that may rob the defendant of an otherwise valid statute of limitations defense. It is doubtful that Congress possesses the power to authorize such transfers, but federal courts plainly should not exercise that power, and confront such constitutional quandaries, without a clear direction to that effect from Congress.

STATEMENT OF THE CASE

Plaintiff Federal Home Loan Bank of Boston originally filed this action in 2011 in the Superior Court of Suffolk County, Massachusetts. The action asserted purely state-law causes of action – fraud, negligence, and deceptive trade practices – against Moody's and approximately ninety other defendants. The claims all arise out of FHLBB's purchase of private-label mortgage-backed securities. App. 5, 57-58.

Certain of Moody's co-defendants removed the action to the United States District Court for the District of Massachusetts, asserting both bankruptcy-related jurisdiction under 28 U.S.C. § 1334(b) and jurisdiction based on the "sue and be sued" clause in FHLBB's charter, *see* 12 U.S.C. § 1432(a).[1] Moody's thereafter consented to the removal. App. 5-6. The

[1] Subsequent to removal, defendants also asserted removal jurisdiction under the Edge Act, 12 U.S.C. § 632. The district court did not reach this issue.

district court (O'Toole, *J.*) denied a motion to remand, holding jurisdiction proper under FHLBB's charter (a holding that the First Circuit subsequently affirmed on appeal). App. 9-15.

Following FHLBB's filing of an amended complaint, Moody's moved in October 2012 to dismiss for failure to state a claim and for lack of personal jurisdiction. App. 6, 58. In opposing Moody's jurisdictional motion, FHLBB expressly limited its argument to a theory of general jurisdiction only. App. 58. Moody's, in turn, argued that this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 546 U.S. 915 (2011), made clear that general jurisdiction required evidence that Moody's – which is incorporated in Delaware and has its principal place of business in New York – was "essentially at home" in Massachusetts, a standard that could not be satisfied merely by the presence of a few employees and Moody's relatively small in-state revenue stream. App. 61-62. The district court denied Moody's motion. App. 6-7, 62-63.

In January 2014, this Court issued its opinion in *Daimler*, making clear that a corporation was not "at home" in a state other than its place of incorporation or principal place of business merely because it had "continuous and systematic" activities there. Indeed, FHLBB's jurisdictional theory was precisely the kind of "exorbitant" exercise that *Daimler* condemned as a violation of due process.

Moody's immediately moved for reconsideration of its motion to dismiss. Apparently recognizing the futility of its jurisdictional position, FHLBB requested that the district court, rather than dismiss, sever the claims against Moody's from the action against the

other defendants and transfer those claims to the Southern District of New York. FHLBB claimed authority for such transfer under either 28 U.S.C. § 1406(a) or 28 U.S.C. § 1631. App. 7-8, 43-44.

The district court granted Moody's motion to dismiss, holding that *Daimler* plainly rendered general jurisdiction improper in Massachusetts. App. 45-47. With respect to FHLBB's request for transfer, the court held that § 1406(a) did not authorize transfer because venue was proper in the District of Massachusetts.[2] App. 52. This holding is correct. *See Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 577-78 (2013) (§ 1406(a) applies only where venue is "wrong" or "improper" under the federal venue statutes).

The district court likewise denied the motion to transfer under 28 U.S.C. § 1631. The court reviewed the split in authority regarding the statute, but came down on the side of what Judge O'Toole referred to as the "textualist-cum-purposivist understanding" that § 1631's reference to "want of jurisdiction" means subject-matter jurisdiction only. App. 49-52.

Following entry of judgment (at FHLBB's request) under Fed. R. Civ. P. 54(b), FHLBB appealed the dismissal to the First Circuit. App. 8-9, 52-53. In an opinion by Circuit Judge Thompson issued May 2, 2016, the court reversed the district court and held that § 1631 did provide authority to transfer where the district court lacked personal jurisdiction. App. 16-34.

The court's opinion rests almost entirely on the conclusion that, because "jurisdiction" can refer to

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[2] Venue was proper under 28 U.S.C. § 1441(a).

subject-matter or personal jurisdiction, the failure of Congress to qualify the phase "want of jurisdiction" is an *unambiguous* reference to both. App. 23-24. Because of this lack of ambiguity, the court's examination of the purpose and legislative history of § 1631 was limited to assuring itself that its construction did not lead to an "absurd" result. App. 33-34 & n.19. Nor did the Court give any consideration whatsoever to the due process and *Erie* concerns raised by its interpretation.

Holding that § 1631 authorized transfer notwithstanding the lack of personal jurisdiction over Moody's, the First Circuit remanded to the district court to determine if transfer was "in the interest of justice." App. 34-35. (As of the filing of this petition, that question has been briefed and the district court is still making its determination.) This timely petition followed.

REASONS FOR GRANTING CERTIORARI

I. The Court of Appeals' Interpretation of § 1631 Raises Serious Questions of Due Process and Ignores *Erie* Principles

A transfer under § 1631 for lack of statutory subject-matter jurisdiction – *e.g.*, between a regional Court of Appeals and the Federal Circuit – is of limited effect. Federal jurisdiction as a whole (*i.e.*, as a constitutional matter) is clearly present; the action or appeal is merely transferred from one regional or specialty federal court to another. And just as Congress can specify which court has statutory subject-matter jurisdiction, Congress has the undoubted

authority to empower the "wrong court" to transfer the case to the "right court."

Extending § 1631 to *personal* jurisdiction as the First Circuit has done, however, dramatically changes this calculus, in two ways. First, whereas courts have long presumed that the Due Process Clause forbids a court without jurisdiction over the defendant to do anything other than dismiss, the First Circuit's interpretation allows that court to cure its lack of constitutional power over the defendant by taking action vis-à-vis the defendant to order a transfer with potentially significant effects on the merits for the defendant. Second, expanding § 1631 in this fashion creates a significant difference in outcomes between state and federal courts, contrary to the principles of *Erie* and this Court's instruction that procedural statutes and rules should be construed, if possible, to be faithful to *Erie*'s "twin aims" of discouraging forum shopping and avoiding inequitable results. It also frustrates a defendant's right to remove an action to federal court, as deciding to remove may come at the cost of the defendant sacrificing a valid statute of limitations defense.

Even assuming Congress may constitutionally effect such a sea change in federal jurisdiction, there is absolutely no indication that it intended such a momentous and counterintuitive result. The First Circuit did not find otherwise, because the court ignored these concerns entirely. But such a fundamental change in the understanding of personal jurisdiction in the federal courts should come from Congress, and this Court should step in to correct those lower courts, such as the First Circuit, that are using

§ 1631 in ways neither intended by Congress nor approved by this Court.

A. Allowing Courts Without Jurisdiction to Transfer Rather than Dismiss Implicates Due Process Concerns

There are few concepts with deeper roots in the law than that a court without personal jurisdiction over a defendant is powerless to alter that defendant's rights and obligations. *See Burnham v. Super. Ct.*, 495 U.S. 604, 608 (1990); 1 Robert C. Casad *et al.*, *Jurisdiction in Civil Actions* § 1.01[2][a] (4th ed. 2015) ("According to traditional doctrine, a court must have jurisdiction of the person of the parties before it can obligate them to comply with its orders."). This principle has not only common-law but constitutional dimensions – *i.e.*, a court altering the substantive rights of a defendant over whom it lacks jurisdiction violates due process. *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("The requirement that a court have personal jurisdiction flows … from the Due Process Clause .... It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.") (quotation omitted); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982) ("The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("Due process requires that the defendant … be subject to the personal jurisdiction of the court."); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011) (plurality op.

of Kennedy, *J.*) ("Due process protects [a defendant's] right to be subject only to lawful authority.").

This Court has stated the principle simply and emphatically: "[I]t is of course true that once a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account." *Sinochem*, 549 U.S. at 434. And while this Court has made clear that there are limited circumstances in which a court may dismiss a case on a nonmerits issue without first definitively ruling that it possesses jurisdiction, *see id.* at 435-36 (court may dismiss on *forum non conveniens* grounds without first determining jurisdiction); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587-88 (1999) (court may dismiss for lack of personal jurisdiction without first determining subject-matter jurisdiction), those cases only involved *dismissals* (which can only benefit the defendant). Such dismissals are a far cry from taking rights-affecting action after a court has definitively determined that it lacks personal jurisdiction over the defendant. Indeed, consistent with the above-quoted language from *Sinochem*, this Court has never held it permissible for a court that has actually determined that it has no personal jurisdiction over the defendant to do anything other than dismiss the action.[3]

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[3] In *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962), this Court approved a transfer, pursuant to 28 U.S.C. §1406(a), between district courts where the transferor court had determined that *venue* was improper under § 12 of the Clayton Act but had not determined that personal jurisdiction was absent (though the transferee court had so subsequently held). *See id.* at 464-67. Not only had the transferor court in that matter not determined that it lacked jurisdiction, but the case involved the Clayton Act, which

Under the interpretation of § 1631 advanced by the First Circuit, by contrast, the district court, concededly lacking personal jurisdiction over Moody's, is empowered to do quite a bit more than merely dismiss. It is empowered to determine if it is proper to sever the claims against Moody's; to make a determination that such claims – had FHLBB chosen to bring them in a separate action – would be within the personal

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provides for nationwide service of process. *See* 15 U.S.C. § 22. Whether jurisdiction under the Clayton Act is truly nationwide, *see, e.g., Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1177-80 (9th Cir. 2004), or is dependent on proper venue, *see, e.g., Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 422-27 (2d Cir. 2005), it is clear that Congress has determined that there is no personal jurisdiction requirement separate from venue. *Goldlawr* did not present the far different situation (presented in this case) where Congress has not authorized nationwide jurisdiction and which involves adjudication of state-law claims.

It is true that a number of federal courts have extended *Goldlawr* well beyond its facts and have read it to authorize transfer whenever a federal court lacks personal jurisdiction. *See, e.g.*, *Porter v. Groat*, 840 F.2d 255, 257-58 (4th Cir. 1988) (collecting cases). Not only have these courts failed to consider the implications of expanding *Goldlawr* to cases where Congress has not authorized nationwide jurisdiction (and particularly to state-law claims), they rely on the wholly improper inference that because *Goldlawr* deemed § 1406 to be "in accord with the general purpose" of "removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits," 369 U.S. at 466-67, transfer is appropriate to cure *any* such obstacle. *See Porter*, 840 F.2d at 257-58 (transferring to cure statute of limitations issue); *Dubin v. United States*, 380 F.2d 813, 814-16 (5th Cir. 1967) (lack of personal jurisdiction). That some federal courts have improperly viewed *Goldlawr* as settling the issue presented here is one more reason that this Court should step in now and make clear that *Goldlawr* cannot bear the weight that these courts would place on it.

jurisdiction of the requested transferee court;[4] and, finally, if it is "in the interest of justice," to transfer those claims, thus enabling FHLBB to avoid the consequences of the transferee court's law (on, *inter alia*, statute of limitations) that would have attended a refiling.[5] Indeed, FHLBB told the First Circuit that its claims would likely be time-barred if it had to refile, because New York has determined not to allow refiled claims to, in effect, relate back to an earlier filing that was dismissed for lack of personal jurisdiction.[6] The First Circuit's holding allows the district court to override this New York policy and impair or eliminate entirely a potent limitations defense that Moody's would have been entitled to assert.

This is a rather prodigious, and potentially outcome-determinative, list of actions available to a court that concededly has no jurisdiction to act vis-à-vis

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[4] The Third Circuit has held the transferor court's determination that personal jurisdiction is proper in the transferee court to be binding on the transferee court. *See D'Jamoos v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 111 (3d Cir. 2009). Thus, a defendant could find itself deprived of the right to challenge personal jurisdiction in the transferee court by the finding of a court that had no jurisdiction.

[5] Even the "interest of justice" analysis requires, in the First Circuit's view at least, an examination of the relative merits of the parties' positions. *See Britell v. United States*, 318 F.3d 70, 75 (1st Cir. 2003).

[6] Under New York law, a previously dismissed action that is refiled may, under certain circumstances, be considered timely provided that the prior action was itself timely filed and the new action is filed within six months of the prior dismissal. *See* N.Y. C.P.L.R. § 205(a). However, this savings provision expressly excepts cases where the prior dismissal was for lack of personal jurisdiction. *Id.*

the defendant. Such adjudication by a court that has determined it has no jurisdiction runs counter to long-standing norms, as stated by the Court in *Sinochem*. And, at a bare minimum, it raises serious questions of due process.

It should be noted that this brush with unconstitutionality arises solely by treating § 1631 as applying to a want of personal jurisdiction. With respect to subject-matter jurisdiction, § 1631 is applicable only to *statutory* jurisdiction, *i.e.*, compliance with the various statutes by which Congress has divided up the business of the federal courts. Constitutional jurisdictional failures – lack of Article III standing, for example – cannot be the basis for a § 1631 transfer because the statute requires transfer to a federal court "in which the action or appeal could have been brought." Infirmities of constitutional subject-matter jurisdiction would render *all* federal courts improper.

The First Circuit's interpretation of § 1631, moreover, effects a fundamental reduction of the importance of personal jurisdiction in the federal courts. Under the court of appeals' reading, the consequence for filing in a federal court that has no personal jurisdiction is simply transfer to the court that does. Personal jurisdiction becomes, in effect, just another venue provision – indeed, § 1631 becomes to personal jurisdiction exactly what § 1406(a) is to venue.

But venue and personal jurisdiction are different requirements, and serve different purposes. Whereas venue is purely a question of litigational convenience, personal jurisdiction represents a more fundamental limitation on the *power* of a court over the defendant.

See Leroy v. Great Western United Corp., 443 U.S. 173, 180 (1979); *see also Omni Capital*, 484 U.S. at 104; *Ins. Corp. of Ireland*, 456 U.S. at 702 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest."); *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (due process constraints on personal jurisdiction "principally protect the liberty of the nonresident defendant"). And whereas Congress has, for a limited number of federal causes of action, effectively collapsed the distinction by creating nationwide personal jurisdiction, *see, e.g.*, 15 U.S.C. § 22, it has not done so generally, and never with regard to the adjudication of state-law claims. Precisely because Congress knows how to authorize nationwide jurisdiction when it desires, this Court has previously refused to effectively expand the personal jurisdiction of the federal courts without express authorization. *See Omni Capital*, 484 U.S. at 106-07; *Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 627 (1925) ("It is not lightly to be assumed that Congress intended to depart from a long-established policy" and permit nationwide jurisdiction); *see also Arrowsmith v. United Press Int'l*, 320 F.2d 219, 229-30 (2d Cir. 1963) (Friendly, *J.*) (noting Congress's limited use of nationwide service statutes but holding it "quite a different matter from permitting every plaintiff entitled to invoke diversity jurisdiction to escape state policy … by bringing his action in a federal rather than a state court.").

Certainly, this Court has not failed to appreciate the importance of the limitations on the personal jurisdiction of the federal courts. To the contrary, this Court has repeatedly taken steps to re-emphasize the importance of these limits and to rein in "exorbitant"

assertions of jurisdiction, including in federal courts. *See Daimler*, 134 S. Ct. at 751 ("Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority."); *Walden*, 134 S. Ct. at 1126; *see also Goodyear*, 564 U.S. at 918-20; *J. McIntyre*, 564 U.S. at 887.

Thus, at the same time the Court has been emphasizing due process limitations on personal jurisdiction in the federal courts, decisions like that of the First Circuit here do precisely the opposite and lessen the importance of those constitutional constraints. It is doubtful that Congress could expressly command such a result without running afoul of due process. But surely this Court should expect it to say so in no uncertain terms. As discussed *infra* § II, however, Congress has not done so, and certainly did not do so through the vehicle of § 1631.

B. The Court of Appeals' Reading Creates a Significant Disparity Between State and Federal Courts, Contrary to the Principles of *Erie*

Not only does the First Circuit's interpretation of § 1631 have serious due process implications and upset basic presumptions about jurisdiction in the federal courts, it also creates a critical disparity between federal courts and state courts with respect to lack of personal jurisdiction. Those differences, in turn, create artificial disincentives for a defendant to exercise its removal rights when it is haled into a plaintiff's home-state forum. Under longstanding principles of federalism, these disparate outcomes and perverse

incentives are to be avoided unless Congress has clearly dictated otherwise.

It goes without saying that when a plaintiff files a case in a state court that cannot exercise jurisdiction over the defendant, it is dismissed full stop, and the case must be refiled in a proper court. *See, e.g.*, *Foley v. Roche*, 418 N.Y.S.2d 588, 592 (N.Y. App. Div. 1979). Whether a refiled action would be subject to statute of limitations defenses is an issue of state law (i.e., in the jurisdiction in which the case should have been filed initially).

Thus, in this case, had FHLBB's action remained in state court, that court would have dismissed the claims against Moody's outright. Any refiled claims in New York would then be subject to the statute of limitations law of New York, which does not permit an action to effectively "relate back" to a previously dismissed case if that dismissal was for lack of personal jurisdiction. *See* N.Y. C.P.L.R. 205(a). In other words, New York's law reflects a policy of not excusing attempts to hale parties before courts that have no jurisdiction over them.

The First Circuit's interpretation of § 1631 creates a completely different outcome where those same claims are filed in, or (as here) removed to, federal court. The district court is not required to dismiss – in fact, the First Circuit deems there to be a presumption against such dismissal. App. 34. Transfer of this action to the Southern District of New York allows FHLBB to avoid the limitations defense that Moody's would have been able to raise had the case proceeded in state court. And in doing so, that transfer also allows FHLBB to

avoid New York law, thus undermining the policy that underlies it.

Beginning with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court has employed a presumption that a federal district court adjudicating claims under state law – typically, though not exclusively, through diversity jurisdiction – should operate as the functional equivalent of a court of the state in which it sits.[7] *See Hanna v. Plumer*, 380 U.S. 460, 467 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court."); *see also Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980) ("There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity" of federal jurisdiction).

While Congress generally has the power to override this presumption (subject to constitutional limitations), this Court has instructed that procedural statutes (and procedural rules enacted pursuant to this Court's statutory authority) should be construed, wherever

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[7] Jurisdiction in this case was based not on diversity of citizenship but on the "sue and be sued" clause of the FHLBB charter, 12 U.S.C. § 1432(a). The principles of *Erie* are not limited to diversity jurisdiction, however, but extend to any situation where a federal court is adjudicating claims under state law. *See, e.g.*, *In re Exxon Valdez*, 484 F.3d 1098, 1100 (9th Cir. 2007). The First Circuit's interpretation of § 1631, of course, applies equally to federal courts exercising diversity jurisdiction.

possible, to avoid "'engendering substantial variations [in outcomes] between state and federal litigation' which would '[l]ikely … influence the choice of a forum.'" *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001) (quoting *Hanna*, 380 U.S. at 467-68); *see Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996) ("Federal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies."); *Walker*, 446 U.S. at 748-53 (interpreting Fed. R. Civ. P. 3 in order to avoid *Erie* conflict); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37-38 (1988) (Scalia, *J.*, dissenting) ("[I]n deciding whether a federal procedural statute or Rule of Procedure encompasses a particular issue, a broad reading that would create significant disuniformity between state and federal courts should be avoided if the text permits.").

Indeed, this Court applied these principles to interpretation of a federal transfer statute in *Van Dusen v. Barrack*, 376 U.S. 612 (1964). This Court was called upon in *Van Dusen* to interpret 28 U.S.C. § 1404, which allows for transfer due to inconvenient venue – specifically, whether the transfer authorized by § 1404 necessitated a change in law from that of the transferor court to that of the transferee. In answering that question in the negative, the Court determined that its interpretation "fully accords with and is supported by the policy underlying [*Erie*]":

> "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block

> away, should not lead to a substantially different result."
>
> Applying this analysis to § 1404(a), we should ensure that the "accident" of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.

Van Dusen, 376 U.S. at 637-38 (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)).

The interpretation of § 1631 by the court of appeals violates these principles and effectively creates, as to personal jurisdiction, two distinct court systems, even as to state law claims: a state court system, in which a plaintiff must take care to ensure jurisdiction if it wishes to hale a defendant away from where it is at home; and a federal court system, in which any error is simply "cured" by transfer. Neither Congress nor this Court has ever indicated that personal jurisdiction should operate this way. To the contrary, the federal rules expressly make amenability to personal jurisdiction in federal district court largely identical to that of the states in which those courts sit. *See* Fed. R. Civ. P. 4(k)(1)(A); *Walden*, 134 S. Ct. at 1121.

Reading § 1631 in this fashion will do nothing to further the "twin aims" of *Erie* – precisely the opposite, particularly the aim of "discouragement of forum-shopping." *Hanna*, 380 U.S. at 468. Forum shopping will be greatly encouraged by the First Circuit's rule, in two ways: (1) plaintiffs will choose federal over state court to gain access to the more forgiving jurisdictional regime; and (2) once under that regime, plaintiffs will

be empowered to select the most favorable forum possible, comfortable in the knowledge that any overreach on their part will in all likelihood have no consequence other than transfer.

As discussed *infra* § II, there is no indication whatsoever that Congress aimed to create this dichotomy between state and federal courts when it enacted § 1631. The First Circuit did not find to the contrary, because that court ignored this Court's instructions and failed even to consider *Erie* principles in its analysis. This Court should step in now to correct this error, and to restore the unity of state and federal personal jurisdiction doctrine until and unless Congress clearly dictates otherwise.

Moreover, the ruling below will artificially disincentivize defendants from exercising their right to remove actions in federal court. When a plaintiff hales an out-of-state defendant into the plaintiff's home-state court system, the ability of the out-of-state defendant to remove the case to a neutral federal forum is an important right that dates back to the founding and has roots in the grant of diversity jurisdiction. The First Circuit's construction of § 1631 creates significant disincentives for a defendant to exercise that important federal right of removal. If removal to federal court comes at the expense of sacrificing a valid statute of limitations defense, defendants will think twice about removing. But there is absolutely no reason to think that Congress burdened the important federal right of removal by empowering federal courts without personal jurisdiction over the defendant to eliminate a valid defense in a manner that a state court never could.

II. The Court of Appeals Disregarded Sound Principles of Statutory Construction as Instructed by this Court and Reached a Result that Congress Never Intended

The entire history of § 1631 indicates that Congress's concern was for the difficulties faced by a plaintiff in determining the proper federal court in which to file a federal cause of action or appeal (i.e., statutory subject-matter jurisdiction) due to, among other things, the Improvement Act's creation of specialized courts such as the Federal Circuit and the Court of Federal Claims. Indeed, § 1631 has its origins in a 1977 District of Columbia Circuit decision arising from confusion over the proper forum for the review of a federal administrative proceeding. *See Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270 (D.C. Cir. 1977). In a concurring opinion, Judge Harold Leventhal expressed concern about an increasing number of federal law proceedings in which plaintiffs were confused about the proper tribunal in which to file federal actions seeking judicial review. He explained that ambiguities in the relevant statutory provisions had given rise to many "'wrong' court" issues. *Id.* at 1283-84 (Leventhal, *J.*, concurring). Relying on suggestions from legal scholars, Judge Leventhal proposed that the best answer to the problem was the enactment by Congress of a statute that would allow the transfer of a federal proceeding from a forum that was found to lack statutory subject-matter jurisdiction

to a tribunal that properly possessed subject-matter jurisdiction.[8] *Id.*

Over the next few years, several members of Congress endorsed Judge Leventhal's suggestion and, as reflected in § 1631's legislative history, several drafts of a proposed statute were prepared by, or with the assistance of, the judge, legal scholars and legislators – all of which drafts were solely concerned with the "which court" subject-matter jurisdiction problem – with the final version being an edited version of a draft prepared by Judge Leventhal himself.[9]

There is also no doubt that the enacting Congress fully recognized, and shared, an understanding that § 1631 was intended to serve – and also be limited to –

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[8] Judge Leventhal explained further in a letter to Congress during the drafting of § 1631. *See Judicial Housekeeping: Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 95th Cong. 379 (1978) (October 1977 letter from Leventhal to Congressman Kastenmeier) ("[T]he many statutory provisions, and many ways in which they are inserted or amended, will inevitably yield cases where the 'which court' question is doubtful. Sometimes the 'which court' question involves a choice between district court and circuit court. In other cases, … the question may be which circuit court. … My ultimate conclusion is that Congress should permit transfer between any two federal Courts.").

[9] *See, e.g.*, *Judicial Housekeeping: Hearing* at 372 (April 1977 letter from Kastenmeier to Leventhal indicating interest in the latter's recommendations); *id.* 384 (April 1978 letter from Kastenmeier to Leventhal asking the latter to review an early draft of what would become § 1631); *id.* 387-89 (April 1978 letter from Leventhal offering proposed draft).

the purpose of permitting transfers from tribunals that lacked statutory subject-matter jurisdiction to tribunals that possessed statutory subject-matter jurisdiction over civil actions or appeals. A Senate report issued when Congress enacted section 1631 states:

> In recent years, much confusion has been engendered by provisions of existing law that leave unclear which of two or more federal courts[—]including courts at both the trial and appellate level—have subject matter jurisdiction over certain categories of civil actions.
>
> * * *
>
> [This section] adds a new chapter to title 28 that would authorize the court in which a case is improperly filed to transfer it to a court where subject matter jurisdiction is proper.

S. Rep. No. 97–275 at 11, 30 (1987), *reprinted in* 1982 U.S.C.C.A.N. 11, 21, 40. The legislative background of the Improvement Act – of which § 1631 was but a part – further establishes that the statute solely intended to address subject-matter jurisdiction defects. As noted, the Improvement Act also established the Federal Circuit and the Court of Federal Claims, which, legislators (correctly) predicted, could give rise to additional uncertainty as to the proper tribunal for hearing certain types of actions. In the legislative history, these legislators noted that the simultaneous enactment of § 1631 provided a means of addressing subject-matter jurisdiction errors by

litigants, thereby mitigating such risks.[10] Thus, as Professors Wright and Miller have observed, the overall "context of the [Improvement Act] … supports [the] interpretation" that § 1631 "was intended to apply only to situations in which a court lacked subject matter jurisdiction."[11]

The text of § 1631 further demonstrates Congress's intent to limit its application to subject matter

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[10] *E.g.*, S. Rep. No. 97-275 at 20, *reprinted in* 1982 U.S.C.C.A.N. 11, 30 ("Further, the jurisdictional section of the CAFC should be read with [proposed §1631]. This latter section allows any federal court which lacks jurisdiction over a matter to transfer the complaint or appeal to a proper court … This provision, therefore, will allow the CAFC to transfer cases to the proper circuit court, or vice versa."); 127 Cong. Rec. S14,702 (1981) (Sen. Specter) ("[O]ne purpose of [Section 1631] is to permit the transfer of an action or appeal where such has been lodged with the wrong court of appeals . . . It will, therefore, provide for the automatic transfer to the appropriate court of appeals").

[11] 15 Charles Alan Wright, *et al*., *Federal Practice & Procedure* § 3842 (4th ed. 2013). The treatise goes on further to explain:

> The Improvement Act created the Federal Circuit and attempted to mitigate litigants' confusion as to whether they were supposed to file in the "regular" federal courts or in one of the increasing array of specialized courts, such as the then-new Court of International Trade, Court of Federal Claims, or the Federal Circuit. Additionally, the Improvement Act sought to help litigants who sought review of administrative action and who were unsure as to whether they were to file in a district court or an appellate court. All these congressional concerns are related to subject matter jurisdiction and have nothing to do with personal jurisdiction or venue.

Id.

jurisdiction, because it mandates transfer (or dismissal) "whenever" a court finds there is a want of jurisdiction. The provision gives a court the continuing "authority to make a single decision upon concluding that it lacks jurisdiction – whether to dismiss the case or, 'in the interest of justice,' to transfer it to a court . . . that has jurisdiction." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). This "mandatory cast of section 1631's instructions" shows that the provision can refer only to subject-matter jurisdiction, which is a non-waivable consideration that a court must consider *sua sponte* throughout the litigation (i.e., "whenever"). *Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 944 (D.C. Cir. 1986) (Ginsburg, *J.*, dissenting). Whereas courts have no duty to police their personal jurisdiction over parties, and a failure to object at the outset constitutes waiver, "subject-matter delineations must be policed by the courts on their own initiative even at the highest level," *Ruhrgas*, 526 U.S. at 583. Thus, whenever a "court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action," Fed. R. Civ. P. 12(h)(3) – or, now, transfer pursuant to § 1631. *See Ctr. for Nuclear Responsibility*, 781 F.2d at 944 (Ginsburg, *J.*) ("[T]he court's responsibility, with section 1631 on the books, is to determine whether '[t]ransfer to cure [its] want of [subject matter] jurisdiction' would best promote 'the interest of justice.'") (alterations in original). Indeed, it is difficult to see how § 1631's mandate of dismissal or transfer "whenever" jurisdiction is found lacking could apply to the waivable defense of personal jurisdiction.

The Court of Appeals ignored all of the above and reached its conclusion by faulty statutory construction. It reasoned that because "jurisdiction" could mean either subject matter or personal jurisdiction, it should be read to mean both. It found support for its position in the fact that Congress, in certain places in Title 28, placed the qualifier "subject-matter" before "jurisdiction." App. 24-26. This ignores the fact that those other references lack the textual (*e.g.*, "whenever") and contextual indications present in §1631 that make clear that Congress meant want of subject-matter jurisdiction. It also ignores this Court's "hesita[nce] to place too much significance on the location of a statute in the United States Code." *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 376-77 (2004) (stating that "even if we accepted the proposition that Congress intended the term 'arising under' to have the same meaning in § 1658 as in other sections of Title 28, it would not follow that the text is unambiguous.").

More importantly, the Court of Appeals' reading of § 1631 ignored the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (citing *United States v. Morton*, 467 U.S. 822, 828, (1984)); *see also Stafford v. Briggs*, 444 U.S. 527, 535-45 (1980) (declining to read venue statute as expansively as plain language suggested given purpose of law and potentially deleterious effects). Indeed, in *Morton*, this Court stated that "[i]f we were to look at the words 'competent jurisdiction' in isolation, we would concede that the statute is ambiguous," because competent jurisdiction might refer to either subject-matter

jurisdiction or personal jurisdiction. 467 U.S. at 827-28. But the Court then proceeded to look at those words within the context of the statute (followed by an examination of the legislative history), before determining that "competent jurisdiction" referred exclusively to subject-matter jurisdiction in that instance. *Id*. at 828-31. The Court has engaged in similar inquiries when asked to divine what "jurisdiction" is meant to refer to in a specific context, for it is a word with "'many, too many, meanings.'" *Union Pacific R.R. v. Bhd. of Locomotive Engineers*, 558 U.S. 67, 81 (2009); *see, e.g. Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 445 (1946) (finding "jurisdiction" in Rule 82 "must be taken to refer" only to subject-matter jurisdiction).

By its faulty reasoning that "jurisdiction" is an unambiguous reference to both subject-matter and personal jurisdiction, the court of appeals avoided any serious examination of the legislative history and purpose of § 1631. As discussed above, that history shows that Congress was concerned about confusion engendered by the various jurisdictional statutes. There is no similar "confusion" about personal jurisdiction, however, because it is always clear that a defendant may be properly sued in its home court. *See Daimler*, 134 S. Ct. at 760 (general jurisdiction bases "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims."). The only uncertainty arises when a plaintiff, such as FHLBB here, chooses to try to hale a defendant into *plaintiff*'s home jurisdiction (or any other jurisdiction that plaintiff deems desirable). The legislative record, however, is devoid of any suggestion that Congress was concerned

about relieving plaintiffs of the consequences of the "uncertainty" of such strategic choices.

III. Transfers under § 1631 for Lack of Personal Jurisdiction are a Frequently (and Increasingly) Presented Question on Which the Lower Courts are in Disagreement

As discussed above, this Court's intervention is required to correct the First Circuit's error in statutory interpretation, an error that has serious consequences both for due process and for *Erie* concerns. The Court's intervention, moreover, is called for now because the use of § 1631 in this manner is growing, and because the lower courts are split as to whether such use is proper.

Initially, it appears few courts saw § 1631 as providing the cure for personal jurisdiction that the First Circuit has held it to be. In the first five years from its enactment, § 1631 was only utilized twice (as far as can be determined from Westlaw) to transfer a case over which a district court lacked personal jurisdiction. In the past five years, on the other hand, there appear to have been at least 85 such instances. This usage will no doubt only continue to accelerate given the First Circuit's blessing.

Moreover, many courts had previously (and wrongly) utilized the improper venue transfer statute, § 1406(a), to cure personal jurisdiction. Not only did these transfers create the due process and *Erie* problems discussed above, but the language of § 1406(a) does not remotely support such usage. This Court's recent decision in *Atlantic Marine* makes this clear, *i.e.*, that § 1406(a) applies only to venue that is

wrong or improper under the federal venue statutes. *See* 134 S. Ct. at 577. Undoubtedly, some district courts will simply turn to using § 1631 for this same purpose unless the Court steps in now to once again correct an erroneous interpretation of a transfer statute.

Though increasing, the misuse of § 1631 in this fashion is nevertheless the subject of continuing disagreement among the lower courts. Among the Courts of Appeals, the First Circuit joins the Sixth Circuit in considering the issue presented here and holding that § 1631 is not limited to want of subject-matter jurisdiction. *See Roman v. Ashcroft*, 340 F.3d 314, 327-28 (6th Cir. 2003). Three other circuits have held it applicable to personal jurisdiction without appearing to have squarely confronted the issue presented here. *See D'Jamoos v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 109-11 (3d Cir. 2009); *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 761-62 (9th Cir. 1990); *Ross v. Colorado Outward Bound Sch., Inc.*, 822 F.2d 1524, 1526-27 (10th Cir. 1987).

The Second Circuit, on the other hand, also considered the question of the scope of § 1631, and suggested that it disagreed with the Tenth Circuit in *Ross* because "the legislative history of section 1631 provides some reason to believe that this section authorizes transfers only to cure lack of subject matter jurisdiction." *SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 179 n.9 (2d Cir. 2000).[12]

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[12] Two other circuit courts have stated in dicta, and without any apparent analysis, that § 1631 allows transfers for personal jurisdiction. *See Johnson v. Woodcock*, 444 F.3d 953, 954 n.2 (8th

A number of district courts, moreover, have examined the question presented and squarely held that § 1631 only applies where subject-matter jurisdiction is found lacking. *See Rouben v. Parkview Hosp., Inc.*, 2010 WL 4537012, at *2 (S.D. Miss. 2010); *Adams v. Unione Mediterranea di Sicurta*, 2001 WL 823733, at *1-4 (E.D. La. 2001); *Serendip LLC v. Franchise Pictures LLC*, 2000 WL 1277370, at *8 (S.D.N.Y. 2000); *Boswell v. Baton*, 1993 WL 293990, at *1-2 (N.D.N.Y. 1993); *Pares v. Gordon*, 1992 WL 296437, at *1 (S.D.N.Y. 1992). These courts have tended to reach that conclusion by careful analysis of and attention to the legislative history of § 1631. *See, e.g.*, *Adams*, 2001 WL 823733, at *2 ("As this Court finds the term 'jurisdiction', without more, to be something less than crystal clear, it is instructive to examine the legislative history.").

Granting of this petition will resolve this confusion among the lower courts as to the proper scope of § 1631. More importantly, however, this petition presents the opportunity for the Court to rein in a growing expansive interpretation of the statute that, as discussed above, has serious consequences that Congress did not consider or intend.

Cir. 2006), *but see Lopez v. Heinauer*, 332 F.3d 507, 511 (8th Cir. 2003) ("The purpose of [§1631] is to aid parties who might be confused about which court has subject matter jurisdiction"); *Phillips v. Ill. Cent. Gulf R.R.*, 874 F.2d 984, 987-88 (5th Cir. 1989).

IV. This Case Presents a Useful and Rare Opportunity for the Court to Address the Proper Scope of 28 U.S.C. § 1631

This Court has never before had occasion to examine the proper scope of § 1631. The most substantive brush with the statute is this Court's decision in *Christianson*. That decision, however, involved "jurisdictional ping-pong" between the Federal Circuit and the Seventh Circuit due to differing opinions as to the scope of the Federal Circuit's patent appeals jurisdiction. *See* 486 U.S. at 818-19. This, of course, is precisely the type of issue that prompted passage of § 1631 in the first place.[13]

In fact, as far as petitioners can discern, the question of whether § 1631 applies to personal jurisdiction has only once been presented in a petition for certiorari, and that was in a case where the issue had not been raised before or decided by the Court of Appeals. *See Li v. Hock*, 371 Fed. App'x 171 (2d Cir.), *petition for cert. filed*, 2010 WL 3700263, *cert. denied*, 562 U.S. 1030 (2010).

That this Court seldom would have the opportunity to review § 1631 (and the issue presented here regarding its proper scope) is not surprising. Transfers

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[13] Every other encounter by this Court with § 1631 has similarly involved transfers to or from the Federal Circuit. *See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 834 (2002); *United States v. Hohri*, 482 U.S. 64, 76 (1987); *United States v. Mottaz*, 476 U.S. 834, 848 n.11 (1986); *Chula Vista City Sch. Dist. v. Bennett*, 474 U.S. 1098, 1098 (1986); *Pacyna v. Marsh*, 474 U.S. 1078, 1078 (1986); *Ballam v. United States*, 474 U.S. 1078, 1078 (1986).

pursuant to § 1631 are not considered immediately appealable orders, *see, e.g.*, *Subsalve USA Corp. v. Watson Mfg., Inc.*, 462 F.3d 41, 47 (1st Cir. 2006), and appeal following judgment in the transferee court, even if technically available, is likely to be impractical. For all practical purposes, the only opportunity for this Court to review the scope of § 1631 will arise in a case such as this, where the district court has dismissed rather than transfer, and that decision has then been reviewed on appeal.

This petition thus presents a relatively rare chance for this Court to step in and address the misconstruction of 28 U.S.C. § 1631. This Court should respectfully take this opportunity to halt the change in federal personal jurisdiction jurisprudence, and the violation of *Erie* principles, that is created by the decision of the First Circuit here (and courts holding in similar fashion).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 14-2148

[Filed May 2, 2016]

FEDERAL HOME LOAN BANK OF BOSTON,
Plaintiff, Appellant,

v.

MOODY'S CORPORATION; MOODY'S INVESTORS SERVICE, INC.,
Defendants, Appellees,

ALLY FINANCIAL INC., f/k/a GMAC, INC.; BCAP LLC; BARCLAYS CAPITAL, INC.; BEAR STEARNS ASSET BACKED SECURITIES I LLC, f/k/a The Bear Stearns Companies, Inc.; CHEVY CHASE FUNDING, LLC; CITIMORTGAGE, INC.; CITICORP MORTGAGE SECURITIES, INC.; CITIGROUP FINANCIAL PRODUCTS, INC.; CITIGROUP GLOBAL MARKETS REALTY CORP.; CITIGROUP GLOBAL MARKETS, INC.; CITIGROUP MORTGAGE LOAN TRUST, INC.; CITIGROUP, INC.; CREDIT SUISSE (USA), INC.; CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP.; CREDIT SUISSE HOLDINGS (USA), INC.; CREDIT SUISSE SECURITIES (USA) LLC; DB STRUCTURED PRODUCTS, INC.; DB U.S. FINANCIAL MARKET

HOLDING CORPORATION; DLJ MORTGAGE)
CAPITAL, INC.; DEUTSCHE ALT-A)
SECURITIES, INC.; DEUTSCHE BANK)
SECURITIES, INC.; EMC MORTGAGE)
CORPORATION; LANA FRANKS; RICHARD S.)
FULD, JR.; GMAC MORTGAGE GROUP, LLC;)
EDWARD GRIEB; IMH ASSETS CORP.; IMPAC)
FUNDING CORPORATION; IMPAC MORTGAGE)
HOLDINGS, INC.; IMPAC SECURED ASSETS)
CORP.; J.P. MORGAN ACCEPTANCE)
CORPORATION I; J.P. MORGAN CHASE & CO.;)
JP MORGAN SECURITIES HOLDINGS, LLC;)
JPMORGAN ACQUISITION CORP.; JPMORGAN)
CHASE BANK, N.A.; MIT HOLDINGS, INC.;)
RICHARD MCKINNEY; MORGAN STANLEY;)
MORGAN STANLEY & CO., INC.; MORGAN)
STANLEY CAPITAL I INC.; MORGAN STANLEY)
MORTGAGE CAPITAL HOLDINGS, LLC;)
MORTGAGE ASSET SECURITIZATION)
TRANSACTIONS, INC.; MORTGAGEIT)
SECURITIES CORP; MORTGAGEIT, INC.;)
MORTGAGEIT HOLDINGS, INC.; NOMURA)
ASSET ACCEPTANCE CORPORATION;)
NOMURA CREDIT & CAPITAL, INC.; NOMURA)
HOLDING AMERICA, INC.; NOMURA)
SECURITIES INTERNATIONAL, INC.; BARRY J.)
O'BRIEN; CHRISTOPHER M. O'MEARA; RBS)
ACCEPTANCE INC., f/k/a Greenwich Capital)
Acceptance, Inc.; RBS FINANCIAL PRODUCTS,)
INC., f/k/a Greenwich Capital Financial Products,)
Inc.; RBS HOLDINGS USA INC.; RBS)
SECURITIES INC., f/k/a Greenwich Capital)
Markets, Inc.; RESIDENTIAL ACCREDIT)
LOANS, INC.; RESIDENTIAL FUNDING)
COMPANY, LLC, f/k/a Residential Funding)

Corporation; KRISTINE SMITH; STRUCTURED ASSET MORTGAGE INVESTMENTS II INC.; JAMES J. SULLIVAN; SAMIR TABET; THE BEAR STEARNS COMPANIES LLC; UBS AMERICAS, INC.; UBS REAL ESTATE SECURITIES, INC.; UBS SECURITIES, LLC; WAMU CAPITAL CORP.; WELLS FARGO & COMPANY; WELLS FARGO ASSET SECURITIES CORPORATION; WELLS FARGO BANK, N.A.; MARK ZUSY; BANC OF AMERICA FUNDING CORPORATION; BANK OF AMERICA CORPORATION; BANK OF AMERICA, NATIONAL ASSOCIATION; CAPITAL ONE FINANCIAL CORPORATION; CAPITAL ONE, NATIONAL ASSOCIATION; COUNTRYWIDE FINANCIAL CORPORATION; COUNTRYWIDE HOME LOANS, INC.; COUNTRYWIDE SECURITIES CORPORATION; CWALT, INC.; CWMBS, INC.; FITCH, INC.; GOLDMAN, SACHS & CO.; MERRILL LYNCH MORTGAGE INVESTORS, INC.; MERRILL LYNCH & CO., INC.; MERRILL LYNCH MORTGAGE LENDING, INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.; SANDLER, O'NEILL & PARTNERS, L.P.; JOHN DOES 1-50; STANDARD & POOR'S FINANCIAL SERVICES, LLC; THE MCGRAW HILL COMPANIES, INC.,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. George A. O'Toole, Jr., U.S. District Judge]

App. 4

Before

Thompson and Kayatta, Circuit Judges, and Mastroianni,[*] District Judge.

Benjamin Gould, with whom Derek W. Loeser; Amy Williams-Derry; Gary A. Gotto; Lynn L. Sarko; Keller Rohrback L.L.P.; Thomas G. Shapiro; Adam M. Stewart; and Shapiro Haber & Urmy LLP were on brief, for appellant.

Joshua M. Rubins, with whom Ralph T. Lepore, III; Michael T. Maroney; Nathaniel F. Hulme; Holland & Knight LLP; Glenn C. Edwards; James J. Coster; and Satterlee Stephens Burke & Burke LLP were on brief, for appellees.

May 2, 2016

THOMPSON, **Circuit Judge**. The allegations in this case hearken back to the days of the recent financial crisis and the near-collapse of the mortgage-backed securities market. The issues we deal with today, though, are of the technical, legalistic variety: we have to figure out whether the district court erred in finding that it lacks statutory power to transfer this action to another federal court in which personal jurisdiction over certain defending parties may be met. Concluding that the district court does in fact have authority to effectuate such a transfer, we vacate its dismissal order and remand for further proceedings.

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[*] Of the District of Massachusetts, sitting by designation.

WHAT THE CASE IS ABOUT

In April of 2011, appellant Federal Home Loan Bank of Boston ("Bank"), a federally-chartered entity pursuant to 12 U.S.C. § 1432(a) (more on this statute later), filed suit against a slew of defendants in Massachusetts state court. These defendants included appellees Moody's Corporation and Moody's Investors Service, Inc. (collectively, "Moody's"). The Bank's complaint generally alleges that the Bank follows a conservative investment philosophy and that it is only able to purchase mortgage-backed securities that have a triple-A rating. So, whenever it bought a mortgage-backed security the Bank made sure that it had received a triple-A rating from a rating agency like Moody's. Briefly, the Bank alleges that various rating agencies, including Moody's, falsely gave out triple-A ratings to mortgage-backed securities they knew were far riskier than indicated by their pristine ratings. Per the Bank, its unwitting purchase of "low-quality, high-risk" securities -- all of which have since been downgraded to "junk" status -- has caused it to suffer losses on the order of hundreds of millions of dollars.

But none of these allegations matter to us today. The issues we have to contend with, while perhaps not as sexy as fraud claims involving bucketloads of money, are nevertheless of tremendous import to our federal system. What we're talking about today are both flavors of jurisdiction -- subject-matter and personal. So, on we go.

HOW THE CASE GOT HERE

Some of the defendants (but not Moody's) removed the case to the Massachusetts federal district court. In

doing so, they relied on the fact that the Bank is federally chartered to invoke the district court's original jurisdiction.[1] The following day, Moody's -- "appear[ing] specifically for the purpose of removal only and reserv[ing] all defenses as to jurisdiction . . . available to it in this action" -- filed a Notice of Consent to Removal with the district court.

Moody's next moved to dismiss on the ground that the Massachusetts district court lacks personal jurisdiction over it. The details of its legal position are not especially important here. It is enough to note that Moody's asserted that it is incorporated in Delaware, that its headquarters are located in New York, that it has only limited contacts with Massachusetts, and that the ratings the Bank complained about were all prepared by Moody's analysts in New York and issued from its New York headquarters. Based on all this, Moody's argued that the Massachusetts district court may not exercise general or specific jurisdiction over it.[2]

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[1] The Notice of Removal also asserted that the district court had original jurisdiction because the action was "related to" various ongoing bankruptcy cases. As it turns out, we won't need to touch this jurisdictional allegation to resolve the appeal. And so we make no further mention of it.

[2] Federal courts "differentiate[] between general or all-purpose jurisdiction, and specific or case-linked jurisdiction." Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn. 8, 9 (1984)). When a court "exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum [State], the State has been said to be exercising 'general jurisdiction' over the defendant." Helicopteros Nacionales, 466 U.S. at 414 n.9. The proper exercise of "general jurisdiction requires affiliations 'so

The district judge disagreed. He concluded that the contacts Moody's had with Massachusetts were sufficiently extensive to subject it to general jurisdiction in the Commonwealth's courts, and that it was reasonable to exercise personal jurisdiction over it in this case. Having made these findings, the district judge denied the motion to dismiss. And he denied the motion for reconsideration Moody's filed, too.

About two months later, the Supreme Court released its opinion in Daimler AG v. Bauman, 134 S. Ct. 746 (2014), a case which addressed the circumstances in which a court may subject a defendant to general personal jurisdiction. Arguing that the Supreme Court had just limited the reach of a court's jurisdiction, Moody's renewed its motion for reconsideration. The Bank opposed the motion. But as a backup strategy, and relying on 28 U.S.C. § 1631 and 28 U.S.C. § 1406(a), the Bank asked the district judge -- should he conclude that personal jurisdiction is lacking after Daimler AG -- to sever its claims against

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"continuous and systematic" as to render [the foreign corporation] essentially at home in the forum State.'" Daimler AG v. Bauman, 134 S. Ct. 746, 758 n.11 (2014) (alteration in original) (quoting Goodyear Dunlop, 131 S. Ct. at 2851).

On the other hand, when a court "exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum [State], the State is exercising 'specific jurisdiction' over the defendant." Helicopteros Nacionales, 466 U.S. at 414 n.8. "In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." Goodyear Dunlop, 131 S. Ct. at 2851 (internal quotation marks omitted).

Moody's from those against the other defendants and transfer them to the Southern District of New York.

For Moody's, the third time around turned out to be the charm: the district judge agreed with its take on Daimler AG and concluded personal jurisdiction was lacking in Massachusetts. Further, Moody's won a double victory, with the district judge also denying the Bank's motion to sever and transfer its claims against Moody's. In denying this motion, the judge concluded he did not have the power to transfer the claims against Moody's under either statute the Bank relied upon. Accordingly, he dismissed the claims against Moody's for lack of personal jurisdiction, and entered separate and final judgment in favor of Moody's.[3] The

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[3] Because the litigation could continue against other defendants in Massachusetts, the district court entered final judgment as to Moody's under Federal Rule of Civil Procedure 54(b), which allows the district court to "direct entry of a final judgment as to one or more, but fewer than all, . . . parties," but "only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). For entry of a Rule 54(b) judgment to be proper, "[a] district court must first determine that it is dealing with a 'final judgment,'" Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 7 (1980), that "provides an ultimate disposition on a 'cognizable claim for relief,'" Bos. Prop. Exch. Transfer Co. v. Iantosca, 720 F.3d 1, 7 (1st Cir. 2013) (quoting Curtiss-Wright, 446 U.S. at 7). The district court must then determine whether its final decision should be immediately appealable by expressly deciding "whether there is any just reason for delay." Curtiss-Wright, 446 U.S. at 8.

"We review the district court's finality determination and its finding that there is no just reason to delay for abuse of discretion." González Figueroa v. J.C. Penney P.R., Inc., 568 F.3d 313, 317 (1st Cir. 2009). The ruling dismissing all claims against Moody's for lack of personal jurisdiction clearly "dispose[s] of all the rights and

Bank's timely appeal of the dismissal and of the denial of its motion to sever and transfer followed.

SHOULD WE EVEN BE IN FEDERAL COURT? (SUBJECT MATTER JURISDICTION)

Both the Bank and Moody's tell us that this action was properly removed to federal court based on the Bank's federal corporate charter codified at 12 U.S.C. § 1432(a). The Bank cited Lightfoot v. Cendant Mortgage Corp., 769 F.3d 681, 683-87 (9th Cir. 2014), petition for cert. filed, No. 14-1055, 2015 WL 905913 (U.S. filed Feb. 17, 2015), a case in which the Bank says the Ninth Circuit concluded federal subject matter jurisdiction existed based on Fannie Mae's "materially

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liabilities of at least one party as to at least one claim" and so satisfies Rule 54(b)'s finality requirement. State St. Bank & Tr. Co. v. Brockrim, Inc., 87 F.3d 1487, 1489 (1st Cir. 1996). And because the entry of judgment against Moody's rests on purely legal grounds distinct from the factual questions of liability being litigated by the remaining parties, we create no problematic "imbrication between the dismissed [parties] and the surviving [parties]" by hearing an immediate appeal of the final order. Spiegel v. Trustees of Tufts Coll., 843 F.2d 38, 45 (1st Cir. 1998). Indeed, judicial economy weighs in favor of prompt resolution of the jurisdictional issues implicated by this appeal so that the parties can potentially proceed to the merits in an appropriate venue. See Comite Pro Rescate de la Salud v. P.R. Aqueduct & Sewer Auth'y, 888 F.2d 180, 184 (1st Cir. 1989). And so, we conclude the district court did not abuse its discretion in finding no just reason for delaying entry of final judgment as to Moody's. Further, because the district court's proper entry of judgment under Rule 54(b) gives us jurisdiction to hear the Bank's appeal, see 28 U.S.C. § 1921, the Bank's separately-docketed petition seeking leave to take an interlocutory appeal, see Fed. Home Loan Bank of Boston v. Moody's Corp. et al, No. 14-8046 (1st Cir. filed Oct. 10, 2014), shall be denied as moot.

identical charter" to the Bank's own. Moody's does not challenge the Bank's view of Lightfoot.[4]

But "[p]arties cannot confer subject matter jurisdiction on either a trial or an appellate court by indolence, oversight, acquiescence, or consent." United States v. Horn, 29 F.3d 754, 768 (1st Cir. 1994). And we are "powerless to act in the absence of subject matter jurisdiction." Espinal-Dominguez v. Puerto Rico, 352 F.3d 490, 495 (1st Cir. 2003). This court, therefore, has "an unflagging obligation to notice jurisdictional defects and to pursue them on our own initiative." Harrison v. Granite Bay Care, Inc., 811 F.3d 36, 38 (1st Cir. 2016) (quoting Espinal-Dominguez, 352 F.3d at 495).[5]

Our starting point is the applicable statutory language. The Bank is a federally-chartered entity under 12 U.S.C. § 1432(a), which states that each Federal Home Loan Bank "in its [own] name . . . shall have power . . . to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1432(a). To keep things simple, we'll refer to this clause (and others generally like it) as a "sue-and-be-sued" clause.

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[4] Neither party claims that we have diversity jurisdiction under 28 U.S.C. § 1332.

[5] We quizzed the Bank's counsel at oral argument on the basis of federal subject matter jurisdiction. Counsel reiterated the jurisdictional statements set forth in the Bank's brief and requested the opportunity to submit supplemental briefing if the court felt there was any question as to the propriety of federal jurisdiction. We now conclude (without the need for further briefing) that federal subject matter jurisdiction is proper.

The Supreme Court squarely addressed the jurisdictional effect of sue-and-be-sued clauses more than two decades ago in American National Red Cross v. S.G., 505 U.S. 247 (1992) ("Red Cross"). The sue-and-be-sued clause at issue "authorize[d] the [Red Cross] 'to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States.'" Red Cross, 505 U.S. at 248 (quoting 36 U.S.C. § 2 (1988)). Relying on this language, the Red Cross removed to federal court a tort action filed against it in New Hampshire state court. Id. at 248-49.[6] So the question for the Court was whether the sue-and-be-sued clause in the Red Cross's federal charter "confers original jurisdiction on federal courts over all cases to which the Red Cross is a party, with the consequence that the organization is thereby authorized to remove from state to federal court any state-law action it is defending." Id. at 248.

To get the answer, the Court delved into its jurisprudence (dating back to 1809) interpreting sue-and-be-sued clauses applicable to other federally-chartered entities. Id. at 252. Its prior cases, the Court said, "support the rule 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." Id. at 255. Turning to the Red Cross, the Supreme Court found that "[t]he rule established in these [earlier] cases makes it clear that the Red Cross Charter's 'sue and be sued' provision should be read to confer jurisdiction." Id. at 257; see also id. at 268 (Scalia, J. dissenting) (describing the

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[6] The Red Cross also invoked diversity jurisdiction, id. at 249, but the Supreme Court did not address this jurisdictional basis.

majority opinion as assuming that "our cases have created what might be termed a phrase of art, whereby a sue and be sued clause confers federal jurisdiction 'if, but only if, it specifically mentions the federal courts'" (quoting id. at 255 (majority opinion)) (other internal quotation marks omitted)). Because the clause "expressly authoriz[es] the organization to sue and be sued in federal courts," the Court concluded that it "extends beyond a mere grant of general corporate capacity to sue, and suffices to confer federal jurisdiction." Id. at 257.[7]

Getting back to our case, we see that the Bank's sue-and-be-sued clause is similar, but not identical, to the Red Cross's -- the Bank's includes language specifying that it may sue and be sued "in any court of competent jurisdiction, State or Federal." 12 U.S.C. § 1432(a) (emphasis added). The question for us is whether this additional verbiage makes a difference in whether the Bank is authorized to litigate in federal court. Once again, we are not the first court to have considered the issue.

In Lightfoot v. Cendant Mortgage Corp., 769 F.3d 681 (9th Cir. 2014), the Ninth Circuit addressed the sue-and-be-sued clause in Fannie Mae's Federal Charter. Fannie Mae's clause is identical to the Bank's, authorizing it "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State

[7] The Court also pointed out that the statutory grant of original jurisdiction to the federal courts poses no constitutional problem: "Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations." Id. at 264.

or Federal." Id. at 683 (quoting 12 U.S.C. § 1723a(a)). The majority of a divided panel concluded that Red Cross's "rule resolves this case," id. at 684 (citing Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. ex rel. Fed. Nat'l Mortg. Ass'n v. Raines, 534 F.3d 779, 784 (D.C. Cir. 2008)),[8] and found that Fannie Mae's "federal charter confers federal question jurisdiction over claims brought by or against" it, id. at 682.

The majority addressed the dissenting judge's position that the phrase "court of competent jurisdiction" -- added to the statute in a 1954 amendment -- meant that Congress intended to confer on Fannie Mae only the capacity to sue and be sued (as opposed to ordaining original jurisdiction in the federal courts). See id. at 684. The majority observed that the statute conferred subject matter jurisdiction on the federal courts even before the 1954 amendment, and it concluded that if Congress had wanted to eliminate such jurisdiction in 1954, "it logically would have omitted the word 'Federal' from the statute."[9] Id. at 685 (quoting Pirelli, 534 F.3d at 786). The majority also determined that the addition of the phrase "of competent jurisdiction" (1) "makes clear that state courts of specialized jurisdiction -- such as family courts and small-claims courts -- need not entertain

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[8] In Pirelli, a majority of a panel of the D.C. Circuit had also concluded that "Fannie Mae's sue-and-be-sued clause confers federal subject-matter jurisdiction." Pirelli, 534 F.3d at 788.

[9] Recall that the post-1954-amendment statute read "to sue and be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal." Lightfoot, 769 F.3d at 683 (emphasis added) (quoting 12 U.S.C. § 1723(a)).

suits that do not satisfy those courts' jurisdictional requirements," id. at 686, and (2) "makes clear that the sue-and-be-sued clause does not require federal courts of specialized jurisdiction -- such as bankruptcy courts -- to hear suits falling outside those courts' jurisdiction," id. at 686-87 (citing Pirelli, 534 F.3d at 785).[10]

We see no principled reason why Red Cross's rule should not apply in the same way to the Bank's charter as the Lightfoot and Pirelli majorities found it applied to Fannie Mae's. Just like the Red Cross and Fannie Mae charters, the Bank's includes language that is "necessary and sufficient" to confer federal jurisdiction,

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[10] We have reviewed the opinions of the dissenting justices in Red Cross, along with the dissent in Lightfoot and criticism by the concurring judge in Pirelli. It appears to us that each dissent or concurrence is motivated in large part by dissatisfaction with the rule fashioned by the majority of the Supreme Court in Red Cross. See, e.g., Red Cross, 505 U.S. at 267 (Scalia, J. dissenting) (positing, based on the Red Cross's charter, that "[w]ords conferring authority upon a corporation are a most illogical means of conferring jurisdiction upon a court, and would not normally be understood that way" (emphasis omitted)); Pirelli, 534 F.3d at 795 (Brown, J., concurring in the judgment) (describing the majority, in interpreting Red Cross as setting forth a rule that a "sue-and-be-sued clause creates jurisdiction simply because it mentions the federal courts," as fashioning and applying a "silly test" not enshrined by Red Cross (emphasis omitted)); see also Lightfoot, 769 F.3d at 691 (Stein, J., dissenting) (arguing that Red Cross "did not announce any new rule of law," or establish a "magic-words test that ends all inquiry the moment we come across the word 'federal'" in a sue-and-be-sued clause).

But our role is not to opine on the wisdom of Supreme Court precedent. Instead, we are to determine whether that precedent applies in a particular case and, if so, apply it.

and we agree with the Ninth Circuit that the additional phrase, "of competent jurisdiction," does not take away that jurisdiction. Rather, it delineates which federal courts may adjudicate claims involving the Bank.

Moreover, Congress made numerous amendments to the Bank's charter statute (12 U.S.C. § 1432(a)) in 1999, but it left the sue-and-be-sued clause unchanged. Certainly by 1999 Congress was well-aware of the language the Supreme Court in Red Cross considered "necessary and sufficient to confer jurisdiction" on the federal courts. Cf. Castañeda v. Souza, 810 F.3d 15, 34 (1st Cir. 2015) (en banc) (noting we "assume that Congress is aware of existing law when it passes legislation" and that it is also aware of judicial interpretations of its statutes (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990))). Logically, had Congress desired to strip the federal courts of jurisdiction to hear and decide claims involving the Bank, it would have done so in 1999 when it passed amendments that reworked the very same section containing the sue-and-be-sued clause. That it did not do so speaks volumes, we think. Cf. Pirelli, 534 F.3d at 786 (declining to conclude that Congress "attempted a bank shot" in amending Fannie Mae's charter by adding "of competent jurisdiction" when it could have simply deleted the word "Federal" had it wanted to strip away original federal jurisdiction). Accordingly, we find that the Bank's claims arise under federal law and that the district court had subject matter jurisdiction over the Bank's claims against Moody's.

CAN THIS CASE BE SENT SOMEWHERE ELSE? (TRANSFER UNDER 28 U.S.C. § 1631)

1. Overview and Standard of Review

We now reach the question of which federal court should decide the Bank's claims.[11] The statute at issue is titled "[t]ransfer to cure want of jurisdiction," and it provides the following:

> Whenever a civil action is filed in a court as defined in section 610 of this title[12] or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed

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[11] The parties agree that, in light of Daimler AG v. Bauman, 134 S. Ct. 746 (2014), Moody's is not subject to personal jurisdiction in Massachusetts in connection with this litigation. Given that lack of personal jurisdiction is a waivable defense, see, e.g., Vázquez-Robles v. CommoLoCo, Inc., 757 F.3d 1, 3 (1st Cir. 2014), we need not address the issue sua sponte (as we did with subject matter jurisdiction). So we will simply assume the parties are right.

[12] Section 610 defines the word "courts" to "include[] the courts of appeals and district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Federal Claims, and the Court of International Trade." 28 U.S.C. § 610.

> for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631 (emphasis added).

The district judge concluded that this statute permits transfer only in cases where the court lacks subject matter jurisdiction. Since the problem in this case is a lack of personal jurisdiction, the judge dismissed the Bank's claims against Moody's.[13]

Determining the scope of a court's authority to transfer the Bank's claims under § 1631 presents a question of law we review de novo. See Hannon v. City of Newton, 744 F.3d 759, 765 (1st Cir. 2014). In a nutshell, the Bank says that the statute is broad enough to permit transfer where there is no personal jurisdiction, while Moody's defends the district court's narrower view that it only applies where there is no subject matter jurisdiction. Because each side relies to such a great extent on Congress's purposes in enacting § 1631, along with its legislative history, we'll begin there to put their arguments in context. This will also serve as a springboard for our own analysis.

We discussed the history of § 1631 in Britell v. United States, 318 F.3d 70 (1st Cir. 2003). Congress enacted the statute in the wake of Investment Co. Institute v. Board of Governors of the Federal Reserve System, 551 F.2d 1270 (D.C. Cir. 1977), a case in which

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[13] The judge also denied the Bank's fallback request to transfer under 28 U.S.C. § 1406(a), and we'll explain later why we don't need to reach this statute in today's opinion.

the Court of Appeals for the D.C. Circuit "acknowledged an ambiguity involving which of two courts had appellate jurisdiction" over a particular type of claim. See Britell, 318 F.3d at 73. The D.C. court opined that, in the future, counsel should simply "file petitions in both courts . . . if there is any doubt" about which one has appellate jurisdiction. See id. at 73-74 (quoting Inv. Co. Inst., 551 F.2d at 1282). Believing the court's suggestion to be a waste of resources (both for the parties and the judicial system as a whole), Judge Harold Leventhal authored a concurring opinion in which he "express[ed] the hope" that Congress would enact "a general statute permitting transfer between district courts and courts of appeals in the interest of justice." Inv. Co. Inst., 551 F.2d at 1283 (Leventhal, J. concurring).

As Moody's points out, Congress went to work on a legislative fix. A 1981 Senate Report regarding the proposed legislation that eventually became 28 U.S.C. § 1631 reveals that it

> would authorize the court in which a case is improperly filed to transfer it to a court where subject matter jurisdiction is proper. . . . This provision is broadly drafted to allow transfer between any two federal courts. Although most problems of misfiling have occurred in the district and circuit courts, others have occurred in the Court of International Trade and the Temporary Emergency Court of Appeals. Some others may occur in the Court of Appeals for the Federal Circuit. The broadly drafted provisions of Section [1631] will help avoid all of these situations.

S. Rep. No. 97-275, at 30 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 40 (emphasis added). A second passage from the Report mentions subject matter jurisdiction, too:

> In recent years much confusion has been engendered by provisions of existing law that leave unclear which of two or more federal courts [--] including courts at both the trial and appellate level -- have subject matter jurisdiction over certain categories of civil actions. The problem has been particularly acute in the area of administrative law where misfilings and dual filings have become commonplace. The uncertainty in some statutes regarding which court has review authority creates an unnecessary risk that a litigant may find himself without a remedy because of a lawyer's error or a technicality of procedures.

Id. at 11, reprinted in 1982 U.S.C.C.A.N. at 21 (emphasis added).

Moody's also tells us that § 1631 was passed as part of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 ("Improvement Act"), which established the Federal Circuit and "which, legislators believed, could give rise to yet additional risks of uncertainty as to the proper tribunal for hearing certain types of actions." Appellees' Br. at 25. Against this backdrop, Moody's says in its brief, Congress explained that § 1631 would allow the newly-created Court of Appeals for the Federal Circuit "to transfer cases to the proper circuit court, or vice versa," Appellees' Br. at 25-26 n.16 (quoting S. Rep. No. 97-275, at 20, reprinted in 1982 U.S.C.C.A.N. at 30), and

that "one purpose" of § 1631 was "to permit the transfer of an action or appeal where such has been lodged with the wrong court of appeals," id. (quoting 127 Cong. Rec. S14683-723, at 702 (daily ed. Dec. 8, 1981)).

In addition, Moody's directs our attention to additional information about the drafting process it says should bear on our interpretation of the statute. Moody's quotes a letter from Judge Leventhal to a Congressman that it construes as advocating for a statute that would only allow transfer power in cases lacking subject matter jurisdiction. Moody's also tells us that "[e]arly versions of § 1631" -- which we take to mean pre-enactment drafts -- resembled a then-extant statute that allowed the federal Court of Claims, when faced with an action over which the federal district courts have exclusive jurisdiction, to transfer the action to an appropriate district court. Moody's sees the early similarity between § 1631 and this narrow transfer mechanism as a further indication that Congress only intended § 1631 to address subject matter jurisdiction.

Needless to say, the Bank sees things differently. First, it emphasizes that we should not even be looking at legislative history "because 'Congress's authoritative statement is the statutory text, not the legislative history,'" Appellant's Br. at 33 (quoting Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1980 (2011) (internal quotation marks omitted)), and here the text says it all, and says it clearly. But in any event, the Bank argues, neither Judge Leventhal's concurrence nor the legislative history precludes a finding that § 1631 may be used to correct defects in subject matter or personal jurisdiction.

The Bank points out that Judge Leventhal "urged Congress to enact 'a general statute permitting transfer between district courts and courts of appeals in the interest of justice, including specifically but not exclusively those instances when complaints are filed in what later proves to be the "wrong" court.'" Appellant's Br. at 35 (quoting Inv. Co. Inst., 551 F.2d at 1283 (Leventhal, J. concurring) (emphases the Bank's)). According to the Bank, Judge Leventhal's references to a "general statute" and its application "specifically but not exclusively" to cases filed in the "wrong" court demonstrate that he had more on his mind than just subject matter jurisdiction. The Bank also says the phrase "the wrong court" could just as easily apply to a court that lacks personal jurisdiction as it does to a court lacking subject matter jurisdiction. And, responding to Moody's contention that Judge Leventhal's involvement in the drafting process showed that he advocated a narrow statute, the Bank points to a law review article that it says discusses how Judge Leventhal more broadly "emphasized [to Congress] the need to provide for transfer between any two federal courts." Appellant's Br. at 36 (quoting Jeffrey W. Tayon, The Federal Transfer Statute: 28 U.S.C. § 1631, 29 S. Tex. L. Rev. 189, 199 n.58 (1987)).

The Bank takes a similar tack when it comes to other legislative history materials. It says that even if Congress specifically discussed transfers for lack of subject matter jurisdiction, the actual statute it enacted is broader and unambiguously applies wherever either jurisdictional defect is present. And, in the Bank's view, the legislative history does not contradict the plain text of the statute Congress actually passed. So it says we can apply the statute as

written and at the same time respect congressional intent.

2. Our Take

While the parties have presented us with a bevy of arguments based on their detailed look at § 1631's interesting and involved history, we start our analysis from a different point. Indeed, as the Bank reminds, "[o]ur interpretive task begins with the statute's text." United States v. Godin, 534 F.3d 51, 56 (1st Cir. 2008). At this opening stage, we must examine the "plain meaning of the words," id., both in the "specific context in which that language is used, and the broader context of the statute as a whole," Yates v. United States, 135 S. Ct. 1074, 1082 (2015) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)); see also Godin, 534 F.3d at 56.

"If the meaning of the text is unambiguous our task ends there," Godin, 534 F.3d at 56, and we must "enforce [the statute] according to its terms" so long as the result "required by the text is not absurd," In re Rudler, 576 F.3d 38, 44 (1st Cir. 2009) (internal quotation marks omitted); see also In re Jarvis, 53 F.3d 416, 419 (1st Cir. 1995) ("If possible, a statute should be construed in a way that conforms to the plain meaning of its text."). When a statute is unambiguous, "we consider Congress's intent only to be certain that the statute's plain meaning does not lead to 'absurd' results." Rudler, 576 F.3d at 44-45 (quoting Lamie v. United States, 540 U.S. 526, 534 (2004)). But see Kloeckner v. Solis, 133 S. Ct. 596, 607 n.4 (2012) (stating that "even the most formidable argument concerning [a] statute's purposes could not overcome the clarity we find in [that] statute's text").

i. Statutory Text

In applying these teachings, we focus first on the text. And in doing so, we immediately see that § 1631's plain language talks about "jurisdiction" and "want of jurisdiction." It does not further delineate whether "jurisdiction" is meant to refer to subject matter jurisdiction, personal jurisdiction, or both. This lack of specificity very nicely and reasonably lends itself to an interpretation that it includes both well-known jurisdictional flavors. Compare Intera Corp. v. Henderson, 428 F.3d 605, 620-21 (6th Cir. 2005) (the unmodified "jurisdiction" in Federal Rule of Civil Procedure 41(b) covers personal jurisdiction), with Havens v. Mabus, 759 F.3d 91, 98 (D.C. Cir. 2014) (Rule 41(b) also covers subject matter jurisdiction).

Certainly, the fact that the phrase "want of jurisdiction" appears without any qualifier does not obviously limit its reach to subject matter jurisdiction alone: for that to be the case, we would expect the statute to read "want of subject matter jurisdiction." Since it doesn't say that, the statute on its face does not plainly restrict a federal court's authority to transfer an action to those cases in which it lacks subject matter jurisdiction.

And, significantly, "want of jurisdiction" is a phrase with an established meaning; Black's Law Dictionary defines "want of jurisdiction" as "[a] court's lack of power to act in a particular way or to give certain kinds of relief." Want of Jurisdiction, Black's Law Dictionary (10th ed. 2014). Black's goes on to explain that, where there is a want of jurisdiction, "[a] court . . . may lack authority over a person or the subject matter of a lawsuit." Id. This definition is consistent with -- indeed,

it mirrors -- the Supreme Court's use of the phrase. Milliken v. Meyer, 311 U.S. 457, 462 (1940) ("Where a judgment rendered in one state is challenged in another, a want of jurisdiction over either the person or the subject matter is of course open to inquiry."). Therefore, we conclude that "want of jurisdiction" encompasses both personal and subject matter jurisdiction. It follows that § 1631's plain text supports a finding that its reference to "want of jurisdiction" embraces both types of jurisdiction and permits a federal court to order transfer where it lacks either.[14]

Furthermore, the "broader context of the statute as a whole," Yates, 135 S. Ct. at 1082 (internal quotation mark omitted), supports a more expansive reading of "jurisdiction." This is because Congress has placed the qualifier "subject-matter" before "jurisdiction"

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[14] Contrary to what Moody's asserts, we do not believe the fact that § 1631 applies to a wide range of courts and scenarios in which it is more common that any "want of jurisdiction" will be a lack of subject matter, as opposed to personal, jurisdiction renders the statute ambiguous. Nobody disputes, after all, that § 1631 covers cases in which subject matter jurisdiction is lacking, and we have just explained how the statute's plain text does not limit its application to that particular jurisdictional defect.

Further, we are not persuaded by Moody's when it says that § 1631's mandatory directive that a court "shall" transfer if it be in the interest of justice to do so implies that Congress intended the statute to cover subject matter jurisdiction alone. The fact that a court has no duty to sua sponte notice a lack of personal jurisdiction even where no party has raised the issue -- unlike its obligation to do so with subject matter jurisdiction -- is in no way inconsistent with Congress's expressed intent to require a presumption in favor of transfer once a court has found (through the usual means) that it lacks personal jurisdiction.

elsewhere throughout Title 28. See, e.g., 28 U.S.C. § 1390(a) (providing that "the term 'venue' refers to the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general"); id. § 1447(c) (setting forth procedural requirements to file a "motion to remand [a removed] case on the basis of any defect other than lack of subject matter jurisdiction"); id. § 1447(e) (laying out procedural options when "after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction"); see also id. § 1738B(c)(1)(A)-(B) (referring separately to subject matter and personal jurisdiction in the context of child support orders).[15] Clearly then, Congress knows how to,

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[15] Moody's points to these two provisions in § 1738B and asks why it is that, if the unqualified use of "jurisdiction" refers to both kinds, Congress went to the trouble of differentiating between "subject matter jurisdiction" and "personal jurisdiction" since referring to "jurisdiction" alone would have sufficed? The answer is that Congress's desire, expressed in certain other statutes, to explicitly specify that both personal and subject matter jurisdiction are included when it uses the word "jurisdiction" does not mean that it must do so on each and every occasion in order to avoid drafting an ambiguous statute. Cf. Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 132 S. Ct. 1670, 1682 (2012) ("[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute . . . .").

Moody's could, of course, use this logic to argue that Congress's explicit indication in certain instances that it's only talking about subject matter jurisdiction does not mean that it has to be this specific everywhere in order to limit other statutes' applicability to subject matter jurisdiction. But we think Congress's specificity in the context of statutes which, by their nature, could not sensibly be read to refer to personal jurisdiction (even without placing

through the use of plain language, limit the word "jurisdiction" to subject matter or personal jurisdiction when it wants to. That it chose not to do so in § 1631 further supports reading the term broadly to encompass both. Simply put, we see no ambiguity.

But, in a further attempt to convince us its interpretation of § 1631 is correct, Moody's refers to a statement in a well-respected treatise, Federal Practice and Procedure, that "the overall 'context of the [Improvement Act] supports [the] interpretation' that § 1631 'was intended to apply only to situations in which a court lacked subject matter jurisdiction.'" Appellees' Br. at 26 (quoting 15 Charles Alan Wright, et al., Federal Practice and Procedure § 3842 (4th ed. 2008) (alterations and emphases the Appellees')). Moody's goes on to quote the treatise at length regarding the impetus behind Congress's enactment of the Improvement Act, of which § 1631 was a part:

> The Improvement Act created the Federal Circuit and attempted to mitigate litigants' confusion as to whether they were supposed to file in the "regular" federal courts or in one of the increasing array of specialized courts, such as the then-new Court of International Trade, Court of Federal Claims, or the Federal Circuit. Additionally, the Improvement Act sought to

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"subject matter" before "jurisdiction"), see, e.g., 28 U.S.C. §§ 1390(a), 1447(c), (e), actually lends import to Congress's failure to include such a qualifier in a statute that, like § 1631, contains no such inherent textual or logical limitations. In other words, the lack of specificity in a statute that could logically refer to subject matter jurisdiction, personal jurisdiction, or both cuts in favor of attributing a broad meaning to the word "jurisdiction."

> help litigants who sought review of administrative action and who were unsure as to whether they were to file in a district court or an appellate court. All these congressional concerns are related to subject matter jurisdiction and have nothing to do with personal jurisdiction or venue.

Id. at 26 n.17 (quoting Wright, supra, § 3842 (emphasis the Appellees')). The authors chalk up the use of language embracing both personal and subject matter jurisdiction to "a case of clumsy drafting," and they divine from the legislative history "clear" signals that § 1631 "was intended to apply only to situations in which a court lacked subject matter jurisdiction." Wright, supra, § 3842. The treatise also justifies departing from the plain text by dubbing the statute "ambiguous."[16]

With all due respect to the distinguished authors, we do not agree with their analysis on this point. First, we've already said that we see no ambiguity in the statutory language, and Black's provides a clear definition indicating that "want of jurisdiction" includes both personal and subject matter jurisdiction. The treatise -- which even recognizes Black's broad definition -- does not explain how it is that a phrase defined in this way is ambiguous, and none of our prior

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[16] In its reply brief, the Bank points out that even the treatise authors allow that "[t]he textual argument for extending Section 1631 to situations in which a court lacks personal jurisdiction is certainly strong" in light of Black's Law Dictionary's expansive definition of "want of jurisdiction." Appellant's Reply at 9 n.3 (quoting Wright, supra, § 3842).

cases give any indication that either "jurisdiction" or "want of jurisdiction" is ambiguous. Moreover, we believe the absence of limiting language in § 1631 simply demonstrates that Congress intended to enact a statute with a broad reach: "the fact that a[n] [unambiguous] statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)). Accordingly, Moody's reliance on Federal Practice and Procedure does not cause us to change our view of § 1631's unambiguous language.

ii. Caselaw and Other Considerations

Sticking with the statutory language discussion a moment longer, we note the parties have not cited, nor have we located, any case in which we have restricted the definition of either "jurisdiction" or "want of jurisdiction" to refer to subject matter jurisdiction only. In fact, we have on occasion said there is a "want of jurisdiction" in cases where the court lacked personal jurisdiction over a party. See United Elec., Radio and Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085-91, 1099 (1st Cir. 1992) (discussing the lack of personal jurisdiction over a defendant, and later referring to "the trial court's want of jurisdiction"); see also Evans Cabinet Corp. v. Kitchen Int'l, Inc., 593 F.3d 135, 147 n.19 (1st Cir. 2010) (using the term "want of jurisdiction" interchangeably with "personal jurisdiction" in its discussion of the Supreme Court's Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), opinion); Sunview Condo. Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962, 965 (1st Cir. 1997) (reviewing the district

court's dismissal for lack of personal jurisdiction under the rubric of a "[w]ant of [j]urisdiction"). Thus, our past references to a "want of jurisdiction" are unquestionably broad enough to include both personal and subject matter jurisdiction. Cf. United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661-62 (1st Cir. 1990) (finding that, where "there is no claim of lack of personal jurisdiction, and [because] it is clear that the [lower] court had subject matter jurisdiction," there was no want of jurisdiction). Therefore, our caselaw is not inconsistent with our reading of § 1631's plain language as permitting transfer where a court lacks either personal or subject matter jurisdiction.

Moreover, our interpretation of § 1631's scope is consistent with that of the other circuits that have considered the issue.[17]

In Roman v. Ashcroft, 340 F.3d 314 (6th Cir. 2003), the Sixth Circuit, noting that § 1631 "does not refer to any specific type of jurisdiction," looked at Congress's intent in enacting the statute and "conclude[d] that the statute applies to federal courts identifying any jurisdictional defect, regardless of whether it involves personal or subject matter jurisdiction." 340 F.3d at 328. It then found that § 1631 applied to permit

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[17] In citing out-of-circuit authority, Moody's points to a string of district court cases, including a couple from the district of Massachusetts. The reasoning in these cases does not dissuade us from our analysis of § 1631's plain language, purposes, and legislative history. We also note, by the way, that no other federal appellate court has explicitly found the statutory text to be ambiguous, and the parties have not directed us to any district court decision to that effect either.

transfer in a case where the district court lacked personal jurisdiction over a party. Id.

The Tenth Circuit came out the same way in Ross v. Colorado Outward Bound School, Inc., 822 F.2d 1524 (10th Cir. 1987). The court found that, "[i]n harmony with the intent of Congress, this section has been broadly construed since its enactment." Ross, 822 F.2d at 1527 (collecting cases). Thus, it held that "[t]he correct course" for a federal district court to follow when it lacks personal jurisdiction is to consider transferring the action pursuant to § 1631. Id. And the Third Circuit reached a similar result in Island Insteel Systems, Inc. v. Waters, 296 F.3d 200 (3d Cir. 2002), stating (albeit without analysis)[18] that a district court "ha[s] authority" under § 1631 to transfer an action over which "it lack[s] in personam jurisdiction." 296 F.3d at 218 n.9.

Two other circuits have implied, without explicitly holding, that § 1631 permits transfer when there is a want of personal jurisdiction. See Johnson v. Woodcock, 444 F.3d 953, 954 n.2 (8th Cir. 2006) ("[W]e affirm the district court's dismissal [for lack of personal jurisdiction] even though the court was empowered by 28 U.S.C. § 1631 to transfer the action to another court to cure the lack of jurisdiction."); Gray & Co. v. Firstenberg Mach. Co., 913 F.2d 758, 761-62 (9th Cir.

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[18] Moody's argues that we should not find these out-of-circuit cases to have any persuasive value because those courts did not engage in a sufficiently detailed or rigorous analysis. But when a court is of the mind that a particular issue is "easy," it is not at all surprising that its analysis may be brief, and so mere brevity should not be taken as indicating a lack of attention paid to a particular issue.

1990) (per curiam) (concluding that the district court lacked personal jurisdiction over the defendants and remanding for the court to consider whether transfer under § 1631 would be "in the interest of justice"). Cf. Dornbusch v. Comm'r, 860 F.2d 611, 612 (5th Cir. 1988) (per curiam) (noting, in a case involving improper venue rather than a lack of personal jurisdiction, that § 1631's legislative history is "fully consistent with . . . a broad, nontechnical reading of" that statute).

We also note that, though the Sixth Circuit in Roman identified a "circuit[] . . . split" with some circuits finding § 1631 permits transfer only where subject matter jurisdiction is lacking, Roman, 340 F.3d at 328 (citing cases), we hesitate to condone that characterization. Our canvassing of the circuits indicates that, to date, no circuit has explicitly found or held that the statute is so limited. The Second Circuit has come the closest, but it addressed the issue in what can only be characterized as dicta and even there did not take a definitive stance. See Songbyrd, Inc. v. Estate of Grossman, 206 F.3d 172, 179 n.9 (2d Cir. 2000) (discussing how a court that lacks personal jurisdiction may appropriately transfer a case pursuant to 28 U.S.C. § 1404 or § 1406, and noting that "the legislative history of section 1631 provides some reason to believe that this section authorizes transfers only to cure lack of subject matter jurisdiction").

The other circuits that have touched upon § 1631 have not had occasion to decide whether it permits transfer when personal jurisdiction is lacking. See In re Carefirst of Md., Inc., 305 F.3d 253, 257 n.2 (4th Cir. 2002) (explicitly stating the court "need not decide whether section 1631 extends to cases where only

personal jurisdiction is lacking"); Carpenter-Lenski v. Ramsey, No. 99-3367, 2000 WL 287651, at *2 (7th Cir. Mar. 14, 2000) (unpublished) (acknowledging uncertainty over the scope of § 1631 but saying that "[w]e have not addressed this issue, and need not reach it in this case"); Bond v. Ivy Tech State Coll., 167 F. App'x 103, 106-07 (11th Cir. 2006) (per curiam) (unpublished) (affirming district court's dismissal based on lack of personal jurisdiction and upholding its finding that the interest of justice did not require transfer under § 1631 without reaching the question of whether § 1631 authorizes transfer where personal jurisdiction is lacking); Hill v. U.S. Air Force, 795 F.2d 1067, 1070-71 (D.C. Cir. 1986) (per curiam) (affirming dismissal for lack of personal jurisdiction and concluding that the district court did not abuse its discretion in failing to sua sponte transfer "an individual claim" under § 1631 where neither party requested transfer and where a related suit was already pending in a district where personal jurisdiction could be obtained over the defendant).

So, at the end of the day, we see that our interpretation of § 1631 is in line with those few courts of appeals to have considered the statute's scope and, as such, is consistent with the weight of authority. Moreover, a broad construction is consistent with § 1631's purpose and goals, which we discussed in Britell. Though Britell did not involve the particular jurisdictional issue we confront today (that panel was called upon to analyze when a transfer would be "in the interest of justice"), its discussion of the animating policy considerations behind the statue's enactment is illuminating.

After examining much of the same legislative history that the parties here brought to our attention, the Britell panel concluded that Congress passed § 1631 to (1) make sure that "a litigant [does not] find himself without a remedy because of a lawyer's error or a technicality of procedure [that results from] uncertainty in some statutes regarding which court has review authority," and (2) eliminate the need to engage in the "wasteful and costly" practice of filing in multiple jurisdictions in case one court ended up not having jurisdiction. 318 F.3d at 74 (alterations in original) (quoting S. Rep. No. 97-275, at 11 (1982), reprinted in 1982 U.S.C.C.A.N. 11, 21). Accordingly, the statute "protects litigants against both statutory imprecision and lawyers' errors" and "offers a practical alternative" -- i.e., transfer when jurisdiction is wanting -- "to the prophylactic, but inordinately wasteful, precaution of double filing." Id. And, we observed, the statute "furthers the salutary policy favoring the resolution of cases on the merits." Id. (citing cases). These considerations, we said, lead to "[t]he conclusion that transfer, rather than dismissal, is the option of choice . . . ." Id.

Even though the jurisdictional concerns at issue here differ from the issues of concern to the Britell court, we think the policy considerations Britell identified are nonetheless applicable to this appeal. Indeed, we have previously noted that "we [were] inclined to read § 1631 as allowing for transfers where a federal court lacks any type of jurisdiction (including personal jurisdiction)." Cimon v. Gaffney, 401 F.3d 1, 7 n.21 (1st Cir. 2005). Thus, we think interpreting § 1631 broadly to permit transfer when there's a lack of either personal or subject matter jurisdiction serves to

advance the legislative purposes we identified in Britell.[19]

WHERE DOES THE CASE GO NEXT?

Our conclusion that § 1631 permits transfer where personal jurisdiction is lacking does not mean the Bank automatically gets its requested transfer. Still to be determined is whether transfer is "in the interest of justice," a question the district judge did not reach.[20]

We, however, discussed what is meant by "in the interest of justice" in Britell. We determined that § 1631's plain text and legislative history establish a rebuttable presumption in favor of transfer, Britell, 318 F.3d at 73, and "[o]nly if an inquiring court determines that a transfer is not in the interest of justice is the presumption rebutted," id. at 74. We listed specific factors cutting in favor of (and others against) transfer, id. at 74-75, and we indicated that transfer may be warranted where "an action or appeal has obvious merit and the filing period has expired" in the putative transferee court's district, id. at 75.

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[19] There is one loose end to tie up. Because we conclude that § 1631 is not ambiguous, we consult legislative history in accordance with our obligation to ensure that applying it as written will not lead to an "absurd result[]." Rudler, 576 F.3d at 44-45. Recalling the parties' extensive discussion of this topic, we conclude it is not absurd to interpret § 1631 as permitting transfer in a case where personal jurisdiction is lacking.

[20] Another requirement of the statute, that the proposed transferee court be one "in which the action or appeal could have been brought at the time it was filed or noticed," 28 U.S.C. § 1631, is not at issue in this appeal.

Because the district court did not consider the "interest of justice" in the first instance, we think remand is warranted. True, we made the "interest of justice" call ourselves in Britell. See id. at 75-76. But the question in Britell was whether an appeal that had admittedly been filed in the wrong appellate court (the First Circuit) should be transferred to a different appellate court that would have had jurisdiction (the Court of Appeals for the Federal Circuit). Id. at 71. There was no question as to the propriety of the district court's jurisdiction. Section 1631 thus had nothing to do with the case until the appeal was docketed here, and so we handled the inquiry ourselves as the potential transferor court.

Here, our concern is whether, in the interest of justice, the district court should transfer the Bank's claims against Moody's to the Southern District of New York. It is, therefore, appropriate for us to remand to the district court for it to answer this question.[21]

DISPOSITION

For the reasons discussed above, the district court's order dismissing the Bank's claims against Moody's is **vacated** and this matter **remanded** for further proceedings consistent with this opinion. Costs to the Bank.

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[21] We are mindful of the Bank's resort to 28 U.S.C. § 1406(a) as an alternative vehicle for transfer. Given that § 1631 carries a presumption in favor of transfer (which might not be the case with other statutes), we need not address § 1406(a) today.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 14-2148

[Filed May 2, 2016]

FEDERAL HOME LOAN BANK OF BOSTON,
Plaintiff, Appellant,

v.

MOODY'S CORPORATION; MOODY'S INVESTORS SERVICE, INC.,
Defendants, Appellees,

ALLY FINANCIAL INC., f/k/a GMAC, INC.; BCAP LLC; BARCLAYS CAPITAL, INC.; BEAR STEARNS ASSET BACKED SECURITIES I LLC, f/k/a The Bear Stearns Companies, Inc.; CHEVY CHASE FUNDING, LLC; CITIMORTGAGE, INC.; CITICORP MORTGAGE SECURITIES, INC.; CITIGROUP FINANCIAL PRODUCTS, INC.; CITIGROUP GLOBAL MARKETS REALTY CORP.; CITIGROUP GLOBAL MARKETS, INC.; CITIGROUP MORTGAGE LOAN TRUST, INC.; CITIGROUP, INC.; CREDIT SUISSE (USA), INC.; CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP.; CREDIT SUISSE HOLDINGS (USA), INC.; CREDIT SUISSE SECURITIES (USA) LLC; DB STRUCTURED PRODUCTS, INC.; DB U.S. FINANCIAL MARKET HOLDING CORPORATION; DLJ MORTGAGE CAPITAL, INC.; DEUTSCHE ALT-A SECURITIES, INC.; DEUTSCHE BANK SECURITIES, INC.; EMC MORTGAGE

CORPORATION; LANA FRANKS; RICHARD S. FULD, JR.; GMAC MORTGAGE GROUP, LLC; EDWARD GRIEB; IMH ASSETS CORP.; IMPAC FUNDING CORPORATION; IMPAC MORTGAGE HOLDINGS, INC.; IMPAC SECURED ASSETS CORP.; J.P. MORGAN ACCEPTANCE CORPORATION I; J.P. MORGAN CHASE & CO.; JP MORGAN SECURITIES HOLDINGS, LLC; JPMORGAN ACQUISITION CORP.; JPMORGAN CHASE BANK, N.A.; MIT HOLDINGS, INC.; RICHARD MCKINNEY; MORGAN STANLEY; MORGAN STANLEY & CO., INC.; MORGAN STANLEY CAPITAL I INC.; MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS, LLC; MORTGAGE ASSET SECURITIZATION TRANSACTIONS, INC.; MORTGAGEIT SECURITIES CORP; MORTGAGEIT, INC.; MORTGAGEIT HOLDINGS, INC.; NOMURA ASSET ACCEPTANCE CORPORATION; NOMURA CREDIT & CAPITAL, INC.; NOMURA HOLDING AMERICA, INC.; NOMURA SECURITIES INTERNATIONAL, INC.; BARRY J. O'BRIEN; CHRISTOPHER M. O'MEARA; RBS ACCEPTANCE INC., f/k/a Greenwich Capital Acceptance, Inc.; RBS FINANCIAL PRODUCTS, INC., f/k/a Greenwich Capital Financial Products, Inc.; RBS HOLDINGS USA INC.; RBS SECURITIES INC., f/k/a Greenwich Capital Markets, Inc.; RESIDENTIAL ACCREDIT LOANS, INC.; RESIDENTIAL FUNDING COMPANY, LLC, f/k/a Residential Funding Corporation; KRISTINE SMITH; STRUCTURED ASSET MORTGAGE INVESTMENTS II INC.; JAMES J. SULLIVAN; SAMIR TABET; THE BEAR STEARNS COMPANIES LLC; UBS)

AMERICAS, INC.; UBS REAL ESTATE SECURITIES, INC.; UBS SECURITIES, LLC; WAMU CAPITAL CORP.; WELLS FARGO & COMPANY; WELLS FARGO ASSET SECURITIES CORPORATION; WELLS FARGO BANK, N.A.; MARK ZUSY; BANC OF AMERICA FUNDING CORPORATION; BANK OF AMERICA CORPORATION; BANK OF AMERICA, NATIONAL ASSOCIATION; CAPITAL ONE FINANCIAL CORPORATION; CAPITAL ONE, NATIONAL ASSOCIATION; COUNTRYWIDE FINANCIAL CORPORATION; COUNTRYWIDE HOME LOANS, INC.; COUNTRYWIDE SECURITIES CORPORATION; CWALT, INC.; CWMBS, INC.; FITCH, INC.; GOLDMAN, SACHS & CO.; MERRILL LYNCH MORTGAGE INVESTORS, INC.; MERRILL LYNCH & CO., INC.; MERRILL LYNCH MORTGAGE LENDING, INC.; MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.; SANDLER, O'NEILL & PARTNERS, L.P.; JOHN DOES 1-50; STANDARD & POOR'S FINANCIAL SERVICES, LLC; THE MCGRAW HILL COMPANIES, INC.,

Defendants.

JUDGMENT

Entered: May 2, 2016

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's

order dismissing Federal Home Loan Bank of Boston's claims against Moody Corporation and Moody's Investors Service, Inc., is vacated, and this matter remanded for further proceedings consistent with the opinion issued this day. Costs to Federal Home Loan Bank of Boston.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Hon. George A. O'Toole
Robert Farrell, Clerk, United States District Court for the District of Massachusetts
Thomas G. Shapiro
Adam M. Stewart
Derek W. Loeser
Amy Christine Williams-Derry
Benjamin Gould
Joseph F. Ryan
James R. Carroll
Gary R. Greenberg
Kevin G. Kenneally
Patrick T. Voke
Michael Ross Gottfried
William Jason Trach
William T. Hogan III
Bruce E. Falby
Richard H. Klapper
Michael T. Tomaino Jr.
Matthew A. Martel
Joseph B. Sconyers
Turner Pearce Smith
Michael T. Maroney

Joshua M. Rubins
Elizabeth Marlene Mitchell
Ralph T. Lepore
Nathaniel F. Hulme
James J. Coster
Glenn Charles Edwards
Michael C. Moran
Edmund Polubinski III
Daniel Jacob Schwartz
Stephen D. Poss
Kathy B. Weinman
Azure M. Abuirmeileh
J. Matthew Goodin
Richard E. Briansky
Amy B. Hackett
Richard M. Zielinski
Floyd Abrams
Patrick Thomas Clendenen
Susan Buckley
Tammy L. Roy
Peter J. Linken

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 1:11-10952-GAO

[Filed October 23, 2014]

Federal Home Loan Bank of Boston, Plaintiff,	)
v.	)
Ally Financial, Inc. et al, Defendants.	)

AMENDED JUDGMENT OF DISMISSAL

O'Toole D.J.

In accordance with the Court's Opinion and Order (dkt. no. 422) dated 9/30/2014, granting the Defendants' Motions (dkt. nos. 381 and 383) for Reconsideration it is hereby ORDERED that the claims against the rating agency defendants, The McGraw-Hill Companies, Standard & Poor's Financial Services, Moody's Investors Service, Inc., and Moody's Corporation, be and hereby are dismissed. Entry of final judgment is certified Under Rule 54(b) of the Federal Rules of Civil Procedure pursuant to the Court's Opinion and Order.

10/23/2014
Date

By the Court,

/s/Christopher Danieli
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 11-10952-GAO

[Filed September 30, 2014]

FEDERAL HOME LOAN BANK OF BOSTON, Plaintiff,	)
v.	)
ALLY FINANCIAL, INC. et al., Defendants.	)

OPINION AND ORDER
September 30, 2014

O'TOOLE, D.J.

The Federal Home Loan Bank of Boston ("the Bank") alleged in its Amended Complaint that the rating agency defendants, The McGraw-Hill Companies, Standard & Poor's Financial Services, Moody's Investors Service, Inc., and Moody's Corporation, understated the risk and overstated the creditworthiness of certain Private Label Mortgage-Backed Securities ("PLMBS") sold to it. The rating agency defendants moved to dismiss for lack of personal jurisdiction. In an Order (dkt. no. 292) issued on September 30, 2013, I found that the defendants'

contacts with Massachusetts were sufficiently continuous and systematic to justify the exercise of general personal jurisdiction over them. The rating agency defendants now move for reconsideration of this Order in light of a subsequent Supreme Court decision, Daimler AG v. Bauman, -- U.S. --, 134 S. Ct. 746 (2014). The plaintiff protests that Daimler is distinguishable but also argues that if this Court finds that it lacks personal jurisdiction over the rating agency defendants, the claims against them should be severed and transferred to the Southern District of New York, where personal jurisdiction over them would exist.

I. Legal Standard

In this Circuit, "interlocutory orders from which no immediate appeal may be taken . . . 'remain open to trial court reconsideration' until the entry of judgment." Nieves-Luciano v. Hernandez-Torres, 397 F.3d 1, 4 (1st Cir. 2005) (quoting Geffon v. Micrion Corp., 249 F.3d 29, 38 (1st Cir. 2001)). However, in light of the competing interests of "the need for finality" and "the duty to render just decisions," a motion to reconsider an interlocutory order should be granted "only when the movant demonstrates (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error of law in the first order." Davis v. Lehane, 89 F. Supp. 2d 142, 147 (D. Mass. 2000). Here, the rating agency defendants point to Daimler, decided January 14, 2014, as an intervening change in controlling law.

II. General Jurisdiction

The Court's prior Order considered whether the exercise of personal jurisdiction over the defendants was proper under the Massachusetts long-arm statute and the Due Process Clause of the Constitution. I found that the defendants regularly did business in Massachusetts, satisfying the long-arm statute. M.G.L. ch. 223A, § 3(d). Further, I assessed that the plaintiff had met its burden of establishing that the defendants had "certain minimum contacts with [the State]" and, therefore, the suit did not "offend traditional notions of fair play and substantial justice." Goodyear Dunlop Tires Operations, S.A. v. Brown, -- U.S. --, 131 S. Ct. 2847, 2853 (2011) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1954)). The defendants were sufficiently "at home in the forum State," making the exercise of general jurisdiction over them proper. Id. at 2851.

Prior to the Supreme Court's decision in Daimler, an inquiry into whether general jurisdiction could be exercised over out-of-state corporate defendants hinged on the plaintiff's ability to assert that the defendant's in-state activities were adequately substantial. See Int'l Shoe Co., 326 U.S. at 318. General jurisdiction could be found to exist where the defendant engaged in "'continuous and systematic activity, unrelated to the suit, in the forum state.'" United States v. Swiss Am. Bank, 274 F.3d 610, 618 (1st Cir. 2001) (quoting United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1088 (1st Cir. 1992)). In Goodyear, the Supreme Court emphasized that reliance on general jurisdiction would only be appropriate when the corporation's contacts were so "'continuous and

systematic' as to render [it] essentially at home in the forum State." 131 S. Ct. at 2851 (quoting Int'l Shoe Co., 326 U.S. at 317).

In Daimler, the Supreme Court explained that

> Goodyear made clear that only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. "For an individual, the paradigm forum for the exercise is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."

134 S. Ct. at 760 (quoting Goodyear, 131 S. Ct. at 2853-54) (noting that a corporation's place of incorporation and principal place of business are paradigm forums for general jurisdiction). The Supreme Court further clarified that "the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business'" would be "unacceptably grasping." Daimler, 134 S. Ct. at 761 (internal citation omitted).

Prior to Daimler, the inquiry under Goodyear was "whether [a] corporation's 'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'" Id. at 761 & n.19 (quoting Goodyear, 131 S. Ct. at 2851) ("We do not foreclose the possibility that in an exceptional case a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." (internal citation omitted)). The analysis was not

focused "solely on the magnitude of the defendant's in-state contacts" but was rather a holistic consideration of "a corporation's activities in their entirety, nationwide and worldwide." Daimler, 134 S. Ct. at 762 n.20. "A corporation that operates in many places can scarcely be deemed at home in all of them." Id.

The Daimler decision requires a tighter assessment of the standard than perhaps was clear from Goodyear. I agree with the rating agency defendants that under the analytical framework expressed in Daimler, it is clear that they are not subject to personal jurisdiction in Massachusetts under a general jurisdiction approach. Although they do have significant "continuous and systematic" contacts with Massachusetts, including corporate activities in Massachusetts generating significant revenue, these defendants have similarly substantial contacts with dozens of other states. They are not incorporated in Massachusetts, nor do they have their principal places of business here. There is also no indication that this is an "exceptional case" under Daimler such that general jurisdiction should be extended beyond these paradigmatic forums. Accordingly, the prior Order (dkt. no. 292) finding personal jurisdiction proper is VACATED.

III. Severance and Transfer

The plaintiff argues, pursuant to 28 U.S.C. § 1631 and/or § 1406(a), that the interest of justice requires that the claims against the rating agency defendants be severed and transferred, rather than dismissed.

There is little doubt of the authority of the Court to order the severance of claims and parties as a prelude

to a transfer order. See Fed. R. Civ. P. 21; see also Acevedo-Garcia v. Monroig, 351 F.3d 547, 558 (1st Cir. 2003).

Whether there can or should be a transfer order is a more complicated question. Several different statutes authorize the transfer of civil actions in various circumstances. Two of the more commonly invoked are 28 U.S.C. § 1404(a) (authorizing a transfer of venue "[f]or the convenience of parties and witnesses, in the interest of justice") and § 1406(a) (authorizing transfer of a case "laying venue in the wrong district . . . to any district or division in which it could have been brought"). The former is generally regarded as a statutory formulation of the forum non conveniens doctrine; the latter is, on its face, a mechanism for correcting venue choice errors.

Despite its textual limitation to venue-related issues, however, Section 1406(a) has commonly been cited by courts as authorizing an interdistrict transfer to cure a want of personal jurisdiction over a defendant in the transferor district. See, e.g., Incline Energy, LLC v. Penna Group, LLC, 787 F. Supp. 2d 1140, 1144 (D. Nev. 2011) ("Because it furthers the purpose of judicial economy, a case may be transferred under § 1406(a) even where venue is proper but where there is no personal jurisdiction over the defendant in the transferor jurisdiction."[1]); W. Inv. Total Return Fund

[1] Incline Energy cites Goldlawr v. Heiman, 369 U.S. 463 (1962), as authority for this statement, but in that case venue was determined to have been *improper* in the original district. The case

Ltd. v. Bremner, 762 F. Supp. 2d 339, 341 (D. Mass. 2011) (transferring case for lack of personal jurisdiction under Section 1406(a) and 28 U.S.C. § 1631 without deciding whether venue is proper); Intermor v. Walt Disney Co., 250 F. Supp. 2d 116, 121 (E.D.N.Y. 2003) (transferring action for lack of personal jurisdiction under Section 1406(a) without addressing issue of venue).

Section 1406(a) is a fallback provision for the plaintiff. In the first instance it invokes a different transfer statute, 28 U.S.C. § 1631, which provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed . . . .

As the parties' papers reflect, there is substantial disagreement among courts about whether this provision permits transfer when *either* subject matter jurisdiction *or* personal jurisdiction is lacking, or only when subject matter jurisdiction is lacking. Compare Ross v. Colo. Outward Bound Sch., Inc., 822 F.2d 1524, 1526 (10th Cir. 1987) (holding that Section 1631 is "the

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illustrates a tendency to regard § 1406 as authorizing transfer when either venue or personal jurisdiction is the defect in the original district, despite the textual reference only to venue.

proper vehicle for the transfer of this action" where personal jurisdiction is lacking) with SongByrd, Inc. v. Estate of Grossman, 206 F.3d 172, 179 n.9 (2d Cir. 2000) ("The Tenth Circuit has ruled that authority to transfer for lack of personal jurisdiction is provided by 28 U.S.C. § 1631, but the legislative history of section 1631 provides some reason to believe that this section authorizes transfer only to cure lack of subject matter jurisdiction." (internal citations omitted)). Adherents to the former view take essentially a textualist approach: the statutory phrase "want of jurisdiction" ordinarily indicates that jurisdiction is lacking for any reason, including for lack of jurisdiction over the person of a defendant. United States v. Am. River Transp., Inc., 150 F.R.D. 587, 591 (C.D. Ill. 1993) ("It is clear that the plain language of the provision addresses the need for a lack of jurisdiction but fails to articulate the type of jurisdiction to which it refers."). Adherents to the latter, purposivist view appeal to the legislative history and the circumstances that led Congress to enact Section 1631. McTyre v. Broward Gen. Med. Ctr., 749 F. Supp. 102, 105 (D.N.J. 1990) ("Although section 1631, on its face, makes no distinction between subject matter jurisdiction and personal jurisdiction, the legislative history indicates that the section was only intended to apply in cases where no subject matter jurisdiction exists in the transferor court."); cf. Britell v. United States, 318 F.3d 70, 73-74 (1st Cir. 2003) (taking note of legislative history of § 1631). It may be added that, given the wide range of courts referred to in Section 1631, including not only first-instance courts where issues of personal jurisdiction are primarily prominent but also appellate and administrative forums where subject matter jurisdictional issues are more common, there is some *textual* support for

thinking that the statutory objective was to ameliorate a "You want the court next door" problem rather than a "We're powerless over your opponent" problem.

The First Circuit has noted the controversy but so far has expressly declined to rule definitively on it. See Alicea v. Machete Music, 744 F.3d 773, 790 n.17 (1st Cir. 2014) ("[W]e need not address either of the two questions left unresolved in Cimon v. Gaffney, 401 F.3d 1 (1st Cir.2005): whether § 1631 'provides for transfers only where a federal court lacks subject matter jurisdiction, or whether it also applies where other types of jurisdiction are lacking, including personal jurisdiction,' and whether § 1631 permits 'the transfer of some but not all claims in an action,' so that the court could have transferred the claims against the other defendants but not the claims against the UMG defendants." (internal citations omitted)). One reason for the absence of a definitive ruling may be that a transfer order relying on Section 1631 is not immediately appealable, Subsalve USA Corp. v. Watson Mfg., Inc., 462 F.3d 41, 48 (1st Cir. 2006), so that the right occasion for resolving the question directly has not yet presented itself.

Plainly the matter is not free from doubt, but on balance I side with what may be called the textualist-cum-purposivist understanding of Section 1631 – that it addresses only the want of subject matter jurisdiction – rather than the pure textualist view – that the absence of a modifier means that any want of jurisdiction is addressed. At least one of my colleagues has reached a similar conclusion. Pedzewick v. Foe, 963 F. Supp. 48, 49-50 (D. Mass. 1997). Accordingly, the plaintiff's request to have the claims against the rating

agency defendants transferred under the authority of Section 1631 is DENIED.

Regarding whether Section 1406(a) authorizes a transfer under the circumstances, the parties' switch their respective adherence or opposition to a strictly textual understanding of the statute. The plaintiff asserts that although Section 1406(a) only explicitly mentions improper venue as a basis for transfer, in reality lack of personal jurisdiction is also a permissible reason. As noted above, there are cases that have taken that view. In turn, the rating agency defendants, opponents of a strictly textual reading of § 1631, now urge that only venue is mentioned in § 1406(a) and therefore only venue may be a reason for transfer. (Venue is unquestionably proper here under 28 U.S.C. § 1391(b).)

Where venue is *improper*, a case may be transferred under Section 1406(a) to a district where venue is proper notwithstanding the fact that a defendant was not subject to personal jurisdiction in the original transferor district. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962). What remains uncertain, as a matter of doctrine if not practice, is whether Section 1406(a) may be a vehicle for transfer when venue is *proper* in the original district, as here – that is, where there is no venue defect calling for correction.

For these reasons, I will deny the plaintiff's motion to sever and transfer the claims against the rating agency defendants and will instead order those claims dismissed for want of personal jurisdiction over those defendants. I will further order that a separate final judgment enter as to the dismissal of the claims against those defendants pursuant to Rule 54(b) of the

Federal Rules of Civil Procedure, there being no just reason to delay and, to the contrary, a good reason to permit an immediate appeal to clarify what is as yet unclear. Finally, I state that if for some reason it were to be determined that the entry of a separate judgment under Rule 54(b) was erroneous in the circumstances, I would state my opinion that there are controlling questions of law regarding the transfer statutes discussed herein as to which there is, as noted, a substantial difference of opinion, making an immediate appeal under 28 U.S.C. § 1292(b) appropriate.

IV. Conclusion

For the reasons stated herein, the defendants' Motions (dkt. nos. 381, 383) for Reconsideration are GRANTED. The plaintiff's Motion (dkt. no. 385) to Sever and Transfer is DENIED. The claims against the rating agency defendants shall be DISMISSED for lack of personal jurisdiction.

Judgment of dismissal shall enter forthwith pursuant to Rule 54(b).

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION 1:11-10952-GAO

[Filed September 30, 2014]

Federal Home Loan Bank of Boston, Plaintiff,	)
v.	)
Ally Financial, Inc. et al, Defendants.	)

JUDGMENT OF DISMISSAL

O'Toole D.J.

In accordance with the Court's Opinion and Order (dkt. no. 422) dated 9/30/2014, granting the Defendants' Motions (dkt. nos. 381 and 383) for Reconsideration it is hereby ORDERED that the claims against the rating agency defendants, The McGraw-Hill Companies, Standard & Poor's Financial Services, Moody's Investors Service, Inc., and Moody's Corporation, be and hereby are dismissed.

9/30/2014
Date

By the Court,

/s/Christopher Danieli
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 11-10952-GAO

[Filed November 26, 2013]

FEDERAL HOME LOAN BANK OF BOSTON, Plaintiff,	)
v.	)
ALLY FINANCIAL, INC., et al., Defendants.	)

ORDER
November 26, 2013

O'TOOLE, D.J.

After careful review of the parties' submissions, the Court declines to reconsider its Opinion and Order (dkt. no. 292) denying the motion (dkt. no. 194) to dismiss for lack of personal jurisdiction by Moody's Investors Service, Inc., and Moody's Corporation. In moving for reconsideration, Moody's offers no new arguments or legal principles that the Court has not already considered. The Motion (dkt. no. 302) for Reconsideration by Moody's is DENIED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 11-10952-GAO

[Filed September 30, 2013]

FEDERAL HOME LOAN BANK OF BOSTON, Plaintiff,	)
v.	)
ALLY FINANCIAL, INC., et al., Defendants.	)

OPINION AND ORDER
September 30, 2013

O'TOOLE, D.J.

This action arises from the sale of over $5.7 billion in Private Label Mortgage-Backed Securities ("PLMBS") by certain defendants to the plaintiff, Federal Home Loan Bank of Boston ("the Bank"). The Bank alleges that the rating agency defendants, The McGraw-Hill Companies, Standard & Poor's Financial Services, Moody's Investors Service, Inc., and Moody's Corporation, knowingly engaged in practices that caused the AAA ratings assigned to PLMBS purchased by the Bank to vastly understate their risk and

overstate their creditworthiness.[1] The Bank asserts claims of fraud, negligent misrepresentation, and violation of Massachusetts General Laws Chapter 93A, Section 11. The defendants have moved to dismiss for lack of personal jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(2). The Bank contends that the exercise of general jurisdiction is proper because of these defendants' contacts with Massachusetts.

I. Legal Standard

Personal jurisdiction may be exercised over an out-of-state defendant under either specific jurisdiction or general jurisdiction. General jurisdiction, relied on by the Bank here, exists "when the litigation is not directly founded on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state." United States v. Swiss Am. Bank, 274 F.3d 610, 618 (1st Cir. 2001) (quoting United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1088 (1st Cir. 1992)).

It is up to the plaintiff to demonstrate that personal jurisdiction exists, and a plaintiff may do so by making a prima facie showing of the propriety of the exercise of personal jurisdiction over a defendant. Id. at 618-19. Under the prima facie inquiry, a district court may accept as true properly supported proffers of facts by the plaintiff. Id.

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[1] The McGraw-Hill Companies, Standard & Poor's Ratings Services, and Standard & Poor's Financial Services LLC will be referred to hereafter collectively as "S&P." Moody's Investors Service, Inc. and Moody's Corporation will be collectively referred to as "Moody's."

Determining whether personal jurisdiction is proper involves two steps. The plaintiff must have satisfied both the requirements of the Massachusetts long-arm statute, Mass. Gen. Laws ch. 223A, § 3, as well as "the strictures of the Constitution." Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 144 (1st Cir. 1995) (quoting Pritzker v. Yari, 42 F.3d 53, 60 (1st Cir. 1994)).

The Massachusetts long-arm statute authorizes jurisdiction over a defendant that has "caus[ed] tortuous injury in the commonwealth by an act or omission outside this commonwealth if [it] regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth." Mass. Gen. Laws ch. 223A, § 3(d).

Under the Due Process Clause of the Constitution, personal jurisdiction exists where a defendant exhibits "minimum contacts" with the forum state "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2848 (2011); accord Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). Courts "concentrate on the quality and quantity of contacts between the potential defendant and the forum." Swiss Am. Bank, Ltd., 274 F.3d at 619 (internal quotation marks omitted).

II. Discussion

Using the prima facie inquiry, I rely on the following proffered facts:

A. S&P

The McGraw-Hill Companies, Inc. is a New York corporation that maintains an office at 420 Boylston Street in Boston, Massachusetts, and is registered to do business in Massachusetts. Through its credit rating division Standard & Poor's Ratings Services, The McGraw-Hill Companies provides global credit ratings, indices, and risk evaluation to investors, corporations, governments, financial institutions, investment managers, and advisors. Standard & Poor's Ratings Services operates an office at 225 Franklin Street in Boston, Massachusetts, and is registered to do business in Massachusetts. The McGraw-Hill Companies, Inc. has since transferred certain assets and properties associated with its Standard & Poor's division to Standard & Poor's Financial Services LLC.

In 2011 The McGraw-Hill Companies derived $184 million in revenue from Massachusetts sales, $118 million of which is attributable to Standard & Poor's Financial Services LLC. Together, the two pay taxes in Massachusetts, have leased three business properties in Massachusetts, and have retained over 200 employees in Massachusetts each year since at least 2005. Between 2007 and 2012 S&P rated over 12,000 municipal bonds issued by Massachusetts, its agencies, and Massachusetts cities and towns. The rating process sometimes involves meetings and investigations in Massachusetts. S&P also conducts seminars and training sessions periodically in Massachusetts.

S&P's contacts with Massachusetts are "continuous and systematic," rendering it essentially "at home in the state." See Goodyear, 131 S. Ct. at 2851. S&P has established a physical presence in Massachusetts by

renting multiple office spaces and employing a significant workforce, and it has earned hundreds of millions of dollars as a result of its business in Massachusetts. Such contacts are substantially greater than those that the First Circuit has previously deemed insufficient to establish general jurisdiction. Cf. Glater v. Eli Lilly & Co., 744 F.2d 213, 215 (1st Cir. 1984) (determining general jurisdiction did not attach to an Indiana corporation that conducted business, advertised, and employed eight sales representatives in New Hampshire); Noonan v. Winston Co., 135 F.3d 85, 93 (1st Cir. 1998) (holding that jurisdiction did not exist over a foreign company that for two years sent an employee to Massachusetts to photograph the plaintiff and was compensated $585,000).

S&P argues that a relatively small percentage of its employees work in Massachusetts and that its corporate operations occur elsewhere. The enormity of S&P's operations does not eclipse the fact that it has three physical office locations in Massachusetts with over 200 employees, it engages in rating Massachusetts agencies, and its employees attend meetings at the offices of Massachusetts clients. Especially in light of the substantial revenue it derives from Massachusetts, S&P has sufficient contacts in Massachusetts to support the exercise of personal jurisdiction without offending due process.

B. Moody's

Moody's Investors Service, Inc. is a Delaware corporation that occupies office space at 175 Federal Street in Boston, Massachusetts, and was, until recently, registered to do business in Massachusetts. Moody's Investors Service, Inc., a wholly-owned

subsidiary of defendant Moody's Corporation, provides credit ratings and research. Moody's Corporation provides research, data, and analytical tools, as well as risk management software. Moody's has three or four employees in Massachusetts, pays taxes in Massachusetts, and has leased office space in Boston since at least 2005. Moody's markets its subscription-based ratings products to Massachusetts residents, and it averaged $23 million in revenue from Massachusetts customers annually from 2006 through 2011. It rated over 12,000 municipal bonds issued by Massachusetts, its agencies, and its cities and towns between 2007 and 2012.

Moody's errs in stating that for general jurisdiction to exist "a forum must effectively function as a corporation's base." (Defs.' Mem. in Supp. of Mot. to Dismiss at 3 (dkt. no. 195).) Rather, the test remains whether a defendant "has certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Goodyear, 131 S. Ct. at 2853 (alteration in original) (internal quotation marks omitted) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

Moody's emphasizes that only three or four of its employees work in Massachusetts, and that they lack the capacity to produce or release any of Moody's opinions or publications. Moody's also argues that less than two percent of its business is derived from Massachusetts sales, but neither of those facts is dispositive.

According to the Bank's proffer, Moody's has rated over 12,000 municipal bonds issued by Massachusetts,

its agencies, and its cities and towns between 2007 and 2012. The Bank represents that Moody's, in annually rating the Bank's creditworthiness, visits the Bank's headquarters in Boston and performs detailed reviews of Bank records, and does so for other Massachusetts entities that it rates as well. Moody's also advertises its products in Massachusetts, leases office space in Massachusetts, holds training sessions and seminars in Massachusetts, and gains substantial revenue from Massachusetts.

Further, a finding of general jurisdiction is appropriate when "it is proper to infer an intention to benefit from and thus an intention to submit to the laws of the forum State." J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011). Both Moody's and S&P have benefitted from significant systematic and continuous contacts with Massachusetts.

C. Reasonableness Analysis

Even where continuous and systematic contacts have been established, the exercise of jurisdiction must still be shown to be reasonable under the so-called "Gestalt factors." Swiss Am. Bank, Ltd., 274 F.3d at 618-19. This analysis focuses on five factors: (1) the defendant's burden of appearing; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the common interests of all sovereigns in promoting substantive social policies. EIQnetworks, Inc. v. BHI Advanced Internet Sol'ns, Inc., 726 F. Supp. 2d 26, 35 (D. Mass. 2010) (citations omitted).

For the burden to be unreasonable it would have to appear that "exercise of jurisdiction in the present circumstances is onerous in a special, unusual, or other constitutionally significant way." Nowak v. Tak How Invs., Ltd., 94 F.3d 708, 718 (1st Cir. 1996) (internal quotation marks omitted). Given that Moody's and S&P both retain offices in Massachusetts, attend to business at the offices of their Massachusetts clients, and are already represented by local and national counsel in this action without undue hardship, they have failed to show any unusual burden.

Massachusetts has a demonstrable interest in "providing its residents with a convenient forum for redressing injuries inflicted by out of state actors." Burger King v. Rudzewicz, 471 U.S. 462, 473 (1985). The Bank also has an interest in litigating in Massachusetts as all of its witnesses, documents, and materials are located in Boston, and the rest of the claims that stem from the same occurrence are being brought in Massachusetts. Further, a plaintiff's choice of forum should be given deference. Sawtelle v. Farrell, 70 F.3d 1381, 1395 (1st Cir. 1995). Finally, a sovereign interest exists in Massachusetts' exercise of jurisdiction over S&P and Moody's, as states have an interest in redressing harms inflicted on their citizens and providing a convenient forum in which they may seek relief.

III. Conclusion

For the foregoing reasons, Moody's Motion to Dismiss (dkt. no. 194) and S&P's Motion to Dismiss (dkt. no. 212) are DENIED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge