No. 14-1055

IN THE
Supreme Court of the United States

CRYSTAL LIGHTFOOT, ET AL.,
Petitioners,

v.

CENDANT MORTGAGE CORPORATION,
DBA PHH MORTGAGE, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENT FANNIE MAE

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QUESTION PRESENTED

Respondent Fannie Mae is a federally chartered corporation. In *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), this Court construed precedents dating back two centuries as establishing a "basic rule" of construction concerning the jurisdictional effects of a "sue and be sued" provision in a federal corporation's charter. *Id.* at 253. Under that rule, when the provision specifically authorizes the organization to "sue and be sued *in federal courts*," the provision "extends beyond a mere grant of general corporate capacity to sue" and affirmatively "confer[s] federal jurisdiction" over suits by and against the organization. *Id.* at 257 (emphasis added).

The questions presented are:

1. Whether Fannie Mae's corporate charter authorizing it "to sue and to be sued, and to complain and to defend, in any court of competent jurisdiction, State or Federal," 12 U.S.C. § 1723a(a), grants federal district courts jurisdiction over suits brought by or against Fannie Mae.

2. Whether *Red Cross* should be overruled.

PARTIES TO THE PROCEEDING

Petitioners are Crystal Lightfoot and Beverly Hollis-Arrington, plaintiffs-appellants below.

The principal respondent and defendant-appellee below is Fannie Mae, also known as the Federal National Mortgage Association. The other respondents are Cendant Mortgage Corporation (doing business as PHH Mortgage), Attorneys Equity National Corporation, and Robert O. Matthews, who were defendants below, but did not participate in the briefing or argument of the jurisdictional question presented here.

RULE 29.6 STATEMENT

Fannie Mae is a publicly traded corporation chartered by the U.S. Congress. It is under the conservatorship of the Federal Housing Finance Agency pursuant to 12 U.S.C. § 4617(a)(1)-(2). It has no parent company, subsidiary, or affiliate that has outstanding securities in the hands of the public, and no publicly held corporation owns in excess of ten percent of its outstanding common stock.

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INTRODUCTION

The Federal National Mortgage Association—Fannie Mae—is a government sponsored enterprise ("GSE") chartered by Congress to effectuate national housing policy. When Fannie Mae was established in 1938, Congress authorized it to sue and be sued "in any court of law or equity, State or Federal." That language conferred jurisdiction on federal courts in all suits by and against Fannie Mae because it expressly authorized Fannie Mae to sue and be sued in federal courts, as confirmed by precedents of this Court dating back more than two centuries. *See Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 257 (1992); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 85-86 (1809).

In 1954, Congress re-chartered Fannie Mae as part of a broader overhaul of federal housing law. Among many other charter revisions, Congress modified the sue-and-sued clause in Fannie Mae's charter to its current form, retaining the critical jurisdiction-conferring reference to suit in "State or Federal" courts. At the same time, however, Congress deleted that reference from the sue-and-be-sued clause of another federal agency—the Federal Savings & Loan Insurance Corporation ("FSLIC")—whose charter it revised in the same 1954 Act.

In 1970, Congress chartered a second housing GSE, the Federal Home Loan Mortgage Corporation—Freddie Mac—with the same public purposes, same statutory powers, and same special relationship with the federal government as Fannie Mae.

Congress also unambiguously conferred federal jurisdiction in all cases involving that GSE.

Against this history of statutory development, this case presents the single question whether Congress intended to strip the original jurisdictional grant out of Fannie Mae's charter in 1954. Petitioners' theory is that by replacing the phrase "court of law or equity, State or Federal" with "court of competent jurisdiction, State or Federal," Congress intended to limit suits by and against Fannie Mae to courts with an independent basis for subject-matter jurisdiction over the suit. That theory is wrong for multiple reasons.

To start, petitioners cannot adequately explain either significant textual feature of the 1954 amendment: its *retention* of the phrase "State or Federal," or its *addition* of the phrase "court of competent jurisdiction." If Congress wanted to eliminate the jurisdictional grant, it needed only to delete the specific reference to suit in "State *or Federal*" courts—just as it did in amending FSLIC's sue-and-be-sued clause in the same 1954 Act. Yet under petitioners' theory, Congress simply left the phrase in Fannie Mae's charter with the intention that it do no work.

Nor does petitioners' theory plausibly account for Congress's addition of the phrase "court of competent jurisdiction." Petitioners' principal contention is that the phrase "court of competent jurisdiction" necessarily refers to a court with independent subject-matter jurisdiction. It does not. As this Court and others have consistently recognized, Congress often uses the phrase "of competent jurisdiction" in

jurisdiction-conferring provisions, where it operates to identify *which* federal courts may hear the action. Indeed, appellate decisions in the 1940s had construed the very same language Congress later used in Fannie Mae's 1954 sue-and-be-sued clause as jurisdiction-conferring language. As that and every other contextual indicator shows, the authorization to sue and be sued "in any court of competent jurisdiction, State or Federal" does not require an independent basis for subject-matter jurisdiction, but ensures that suit is brought in the appropriate federal court.

Petitioners' policy explanation for the phrase "court of competent jurisdiction"—their "path to privatization" theory—is also based on false premises. According to petitioners, Congress added the phrase in the 1954 Act so that when the government's ownership interest in Fannie Mae eventually fell below 50%, there would no longer be "automatic" federal jurisdiction for suits involving Fannie Mae under 28 U.S.C. § 1349, and Fannie Mae would be on equal footing with other private entities. The first problem with that theory is that the 1954 Act also provided that Fannie Mae would *remain* a government agency, even if the government no longer owned a majority of its capital stock. The second problem is that the theory wrongly assumes that Congress would have wanted a privately-owned GSE like Fannie Mae to be treated like any other private entity. But when Congress in 1970 established Fannie Mae's privately-owned sister GSE, Freddie Mac, Congress made clear that suits involving that GSE would be subject to federal jurisdiction. There is no policy or historical basis for inferring that Congress wanted

the federal interests implicated by suits involving Freddie Mac to be protected by federal courts, but did not want the same for the identical interests implicated by suits involving Fannie Mae.

To the contrary, the text and context of Fannie Mae's sue-and-be-sued clause make clear that Congress has always intended the clause to be a grant of federal court jurisdiction over suits involving Fannie Mae. The 1954 Act did not change the clause's jurisdictional character, but confirmed it, by retaining the authorization of suit specifically in federal court, while adding a familiar phrase understood as identifying the appropriate federal courts for suit. That construction makes perfect sense of every word in the provision, every other amendment to the charter, and every policy interest underlying Fannie Mae's function. The judgment below should be affirmed.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. *Fannie Mae's Original Charter*

Fannie Mae fulfills the "important public mission[]" (12 U.S.C. § 4501(1)) of promoting a vibrant secondary mortgage market and making home ownership more accessible for low and middle-income Americans. *See id.* § 1716 et seq.

Fannie Mae was created in 1938 by the Reconstruction Finance Corporation, a New Deal-era federal corporation, pursuant to authority granted in Title III of the National Housing Act of 1934 ("NHA"), Pub. L. No. 73-479, 48 Stat. 1246, as amended by the National Housing Act Amendments of 1938, Pub. L. No. 75-424, § 4, 52 Stat. 23. *See*

Richard W. Bartke, *Fannie Mae and the Secondary Mortgage Market*, 66 Nw. U. L. Rev. 1, 18-19 (1971-1972). Fannie Mae was empowered under § 301(c) of the NHA to "sue and be sued, complain and defend, in any court of law or equity, State or Federal." 48 Stat. 1253.

In 1948, Congress for the first time expressly authorized Fannie Mae as a subsidiary of the Reconstruction Finance Corporation. Act of July 1, 1948, Pub. L. No. 80-864, 62 Stat. 1206. Title III of the NHA became the statutory charter for Fannie Mae and, among other things, continued to empower Fannie Mae "to sue and be sued, complain and defend, in any court of law or equity, State or Federal." 62 Stat. 1208.

There were at the time multiple bases for federal jurisdiction over suits by or against Fannie Mae. *First*, suits by or against federally-chartered corporations majority-owned by the government were deemed to "arise under" federal law. *See* 28 U.S.C. § 1349 (1948); *Fed. Intermediate Credit Bank of Columbia, S.C. v. Mitchell*, 277 U.S. 213, 215 (1928). But jurisdiction on that basis attached only to suits satisfying the then-extant amount-in-controversy requirement of 28 U.S.C. § 1331 (1948). *See Mitchell*, 277 U.S. at 215; *Hood ex rel. N.C. Bank & Trust Co. v. Bell*, 84 F.2d 136, 137 (4th Cir. 1936). *Second*, Fannie Mae was an agency of the United States, 28 U.S.C. § 451 (1948), so it could bring any suit in federal court, *id.* § 1345, and remove to federal court any suit brought against it in state court, *id.* § 1442(a). *Third*, a clause (like Fannie Mae's) authorizing an entity to sue and be sued "in any court of law or equity, State *or Federal*," conferred federal

jurisdiction over *all* suits by or against the entity. *See Red Cross*, 505 U.S. at 257; *D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp.*, 315 U.S. 447, 455 (1942).

2. *The 1954 Act*

a. As part of a larger restructuring of federal housing-related authorities, Congress in 1954 re-chartered and reorganized Fannie Mae by amending Title III of the NHA. Housing Act of 1954 ("1954 Act"), Pub. L. No. 83-560, 68 Stat. 590. The 1954 Act established Fannie Mae as a "constituent agency of the Housing and Home Finance Agency"—later, the Department of Housing and Urban Development ("HUD")—and provided that it "shall maintain its principal office in the District of Columbia and shall be deemed, for purposes of venue in civil actions, to be a resident thereof." *Id.* [§ 302(a)],[1] 68 Stat. 613.

The newly re-chartered entity was governed by a 5-person Board of Directors made up of government officials. *Id.* [§ 308(a)], 68 Stat. 620. In light of the 1954 Act, Fannie Mae was deemed by Congress a "wholly owned Government corporation," 31 U.S.C. § 846 (1964), and its "employees were government personnel within [HUD], and therefore were covered by civil service requirements and retirement laws," *Northrip v. Fed. Nat'l Mortgage Ass'n*, 527 F.2d 23, 31 (6th Cir. 1975) (describing Fannie Mae under 1954 Act).

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[1] Section 201 of the 1954 Act amended Title III of the NHA by repealing the prior Title III and enacting a new one. 68 Stat. 612-22. Bracketed section citations refer to the section number of the newly enacted version of Title III of the NHA.

The 1954 charter divided Fannie Mae's operations into three different functions. Two of those functions—"provid[ing] special assistance" for certain types of mortgage financing and "manag[ing] and liquidat[ing]" Fannie Mae's existing mortgage portfolio, 1954 Act [§ 301], 68 Stat. 612-13—were understood as wholly governmental, and were to be financed entirely with public capital. *See id.* [§ 307(b)], 68 Stat. 619.

The third function was to "provide supplementary assistance to the secondary market for home mortgages." *Id.* [§ 301], 68 Stat. 612. Those secondary-market operations were intended to be financed with a mix of federal and private capital. *See id.* [§ 307(b)], 68 Stat. 619. The secondary-market function was initially financed with a purchase of non-voting preferred stock by the Treasury Department. *Id.* [§ 303(a)], 68 Stat. 613-14. That stock was meant to be retired through an anticipated influx of private capital—any mortgage seller was required to purchase non-voting common stock as a prerequisite to selling the mortgage to Fannie Mae. *Id.* [§ 303(b), (c)], 68 Stat. 614.

b. The 1954 Act also changed the charter's original jurisdictional clause authorizing suits by and against Fannie Mae "in any court of law or equity, State or Federal." The amendment retained the specific reference to suit in "State or Federal" court, but replaced the phrase "court of law or equity" with the phrase "court of competent jurisdiction," so the clause now authorized suit "in any court of competent jurisdiction, State or Federal." *Id.* [§ 309(a)], 68 Stat. 620. As the government recognizes (SG Br. 2-3), Congress borrowed the new language from anoth-

er NHA provision authorizing suit by and against the Federal Housing Administration ("FHA") "in any court of competent jurisdiction, State or Federal." Banking Act of 1935, Pub. L. No. 74-305, § 344(a), 49 Stat. 722 (amending Title I of the NHA).

The FHA language had been construed in the 1940s by the Fourth and Third Circuits as conferring jurisdiction on district courts over suits by and against the FHA and thereby avoiding the exclusive jurisdiction of the Court of Claims over certain suits against the FHA. *See Ferguson v. Union Nat'l Bank of Clarksburg, W. Va.*, 126 F.2d 753, 756 (4th Cir. 1942); *George H. Evans & Co. v. United States*, 169 F.2d 500, 502 (3d Cir. 1948). The government, too, has agreed that the FHA language—now codified at 12 U.S.C. § 1702—"plainly" confers jurisdiction. Brief for the Respondents in Opposition at 9 & n.6, *Portsmouth Redevelopment and Housing Auth. v. Pierce* (U.S. No. 83-90) ("by authorizing suit 'in any court of competent jurisdiction, State or Federal,'" the FHA language "[p]lainly … provides a basis for district court jurisdiction" (citing *Ferguson*)).

c. In the same 1954 Act, Congress also amended FSLIC's sue-and-be-sued clause. Before 1954, Congress conferred federal jurisdiction over suits by and against FSLIC by authorizing such suits "in any court of law or equity, State or Federal." NHA § 402(c)(4), 48 Stat. 1256; *see supra* at 5-6. As with Fannie Mae, Congress replaced the phrase "court of law or equity" in the FSLIC charter with the phrase "court of competent jurisdiction." 68 Stat. 633. But unlike with Fannie Mae, Congress *deleted* the reference to suit in "State or Federal" courts, instead substituting language authorizing suits by and against

FSLIC "in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico." *Id.*

d. Petitioners incorrectly assert (Petr. Br. 9) that the 1954 amendment to Fannie Mae's sue-and-be-sued clause would make Fannie Mae subject to the same jurisdictional rules as private entities, once the expected elimination of majority public ownership was complete. To the contrary, under the 1954 Act, Fannie Mae would remain a government agency (within the agency that would later become HUD), even after Treasury's preferred stock was retired, unless and until both the executive and legislative branches took further action to privatize Fannie Mae's secondary market operations. 1954 Act § 303(g), 68 Stat. 615. Accordingly, even though suits by and against Fannie Mae under § 1349 no longer would be available once more than half of its capital stock became privately owned, federal courts still would have jurisdiction over any suit brought by Fannie Mae under 28 U.S.C. § 1345 (1948). And Fannie Mae likewise could remove to federal court any state-court suit brought against it under the federal-agency removal statute. 28 U.S.C. § 1442(a) (1948).

3. *The 1968 Amendment*

Section 303(g) of the 1954 charter provided that new legislation would be necessary to transfer Fannie Mae's secondary-market operations to private investors once Treasury's preferred stock had been redeemed. In 1968, Treasury was still Fannie Mae's majority capital holder. *See* H.R. Rep. No. 90-1585, 1968 U.S.C.C.A.N. 2873, at 2943. The 1968 Con-

gress nevertheless enacted the legislation contemplated in 1954 and re-chartered Fannie Mae as a privately owned, *government-sponsored* corporation. Housing and Urban Development Act of 1968 ("1968 Act"), Pub. L. No. 90-448, Title VII, 82 Stat. 536-46. Fannie Mae's separate, purely governmental functions were transferred to a new entity, the Government National Mortgage Association (Ginnie Mae), which would "remain in the Government." *Id.* § 801, 82 Stat. 536. Congress achieved this division of authority by amending Fannie Mae's charter to apply certain provisions only to Fannie Mae, certain other provisions only to Ginnie Mae, and certain provisions to both of them. *See* 12 U.S.C. § 1716 et seq.

The 1968 amendments did not alter the sue-and-be-sued clause, which remains unchanged to this day, shared by Fannie Mae and Ginnie Mae. 12 U.S.C. § 1723a(a).

Notwithstanding these changes to its structure, Fannie Mae retained its uniquely federal character. It remained the "Federal" National Mortgage Association, with the same public purposes established in 1954. Under the 1968 Act, the President appointed five of Fannie Mae's 15 directors, and could remove any director for cause. 1968 Act § 802(y)(7), 82 Stat. 539. The 1968 Act also gave Fannie Mae an exemption from State taxation, *id.* § 802(aa)(4), 82 Stat. 540, and other perquisites of government sponsorship that it retains to this day, *see*, *e.g., id.* §§ 802(dd), 802(z)(3), 804(a) 82 Stat. 541, 542. The HUD Secretary was vested with "general regulatory power" over Fannie Mae, and empowered to (among other things) make rules and regulations to ensure

"that the purposes of [the NHA] are accomplished," *id.* § 802(ee), 82 Stat. 541.

4. *Freddie Mac's 1970 Charter*

In 1970, Congress established the Federal Home Loan Mortgage Corporation ("Freddie Mac") "as a private corporation to compete with Fannie Mae." *Montgomery Cty., Md. v. Fed. Nat'l Mortg. Ass'n*, 740 F.3d 914, 918 (4th Cir. 2014). The "two companies are virtually identical," *DeKalb Cty. v. Fed. Hous. Fin. Agency*, 741 F.3d 795 (7th Cir. 2013)—they both "carry out their missions by purchasing mortgages originated by third-party lenders, pooling the mortgages into investment instruments, and selling those mortgage-backed securities to raise capital for further purchases," *Montgomery Cty.*, 740 F.3d at 918. Freddie Mac was originally owned by the Federal Home Loan Banks, *see* Emergency Home Finance Act of 1970, Pub. L. No. 91-351, § 303(a), 84 Stat. 452, and became a publicly-traded company in 1989, *see* Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, § 731(c)(2), 103 Stat. 430, 432.

Because Congress was starting with a clean slate, Freddie Mac's charter used different language and organization from Fannie Mae's, *compare* 12 U.S.C. § 1716 et seq. (Fannie Mae charter), *with id.* § 1451 et seq. (Freddie Mac charter), but the substance of the two entities' authorities are understood to be "almost identical." Julia Patterson Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 Mo. L. Rev. 1077, 1082 (2007) (hereinafter Forrester, *Forgotten Benefit*). As both the House and Senate reports ac-

companying Freddie Mac's charter legislation explained, Congress "intended to provide [Fannie Mae] and [Freddie Mac] with the same purchasing authority and limitations so there can be a parallel development of these institutions and so neither would have any competitive advantage over the other." S. Rep. No. 91-761, 1970 U.S.C.C.A.N. 3488 at 3494; H.R. Rep. No. 91-1311 (1970), at 7. The policy parallel includes litigation—as with Fannie Mae, Congress granted federal jurisdiction over suits by or against Freddie Mac, albeit using different language. 12 U.S.C. § 1452(c), (f); *see infra* at 52-53.

5. *The 1974 Amendment*

In 1974, Congress granted Fannie Mae the authority to move its headquarters outside the District of Columbia, authorizing it to be headquartered in the District "or the metropolitan area thereof." 12 U.S.C. § 1717(a)(2)(B). The same amendment provided that Fannie Mae would remain a D.C. corporation "for purposes of jurisdiction and venue in civil actions," no matter where it moved its headquarters. *Id.* This amendment ensured that Fannie Mae would be considered "at home" in the District for purposes of general personal jurisdiction. *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014).

6. *Fannie Mae's And Freddie Mac's Uniquely Federal Mission*

Congress has expressly affirmed both Fannie Mae's and Freddie Mac's "important public missions" "reflected in the statutes and charter Acts establishing" them, and that their "continued ability … to accomplish their public missions is important to providing housing in the United States and the

health of the Nation's economy." 12 U.S.C. § 4501(1), (2). While recognizing their nature as privately owned companies, Congress has made clear that Fannie Mae and Freddie Mac have "an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families in a manner consistent with their overall public purposes, while maintaining a strong financial condition and a reasonable economic return." *Id.* § 4501(7); *see also* 12 U.S.C. § 1716 (Fannie Mae charter statement of purpose); 12 U.S.C. § 1451 note (same for Freddie Mac).

B. Factual Background And Proceedings Below

1. Petitioners either individually or together have filed a total of four federal actions related to this case—two in the Central District of California, one in the District of Columbia, and one in the District of New Jersey—each of which was dismissed either on the merits or on res judicata grounds. *See Hollis-Arrington v. PHH Mortg. Corp.*, 2005 WL 3077853, at *1 (D.N.J. Nov. 15, 2005) (describing actions); *Hollis-Arrington v. PHH Mortg. Corp.*, 205 F. App'x 48, 55 (3d Cir. 2006) (per curiam).

Most relevant here, petitioner Hollis-Arrington filed in June 2001 a federal action in the Central District of California against Cendant Mortgage Corporation (which financed her mortgage), Fannie Mae (which had purchased the mortgage on the secondary market), and Attorneys Equity National Corporation (which had become the property's trustee). That action alleged Cendant and Fannie Mae "violated the Racketeer Influenced and Corrupt Organi-

zations Act ('RICO'), 18 U.S.C. §§ 1962(c) and (d), and federal lending laws by conspiring to issue mortgage loans to unqualified borrowers so that Cendant could acquire the properties by foreclosure." *Hollis-Arrington v. Cendant Mortg. Corp.*, 61 F. App'x 463, 463 (9th Cir. 2003). The district court dismissed the case, and the Ninth Circuit affirmed. *Id.*

2. In 2002, after the Central District of California's dismissal of the action described in the previous paragraph, petitioners together filed this action in California state court. They sued the same parties Hollis-Arrington had sued in the federal action, and made the same allegations of a conspiracy to make loans to non-creditworthy borrowers. JA 27-58.

Fannie Mae removed the case to federal district court, and petitioners unsuccessfully moved to remand to state court. The district court thereafter dismissed the action on res judicata grounds and subsequently denied petitioners' motion to set aside the judgment under Rule 60(b). JA 19, JA 23-24.

The Ninth Circuit affirmed. JA 114-15. Following a petition for rehearing, however, the court of appeals sua sponte withdrew its earlier memorandum disposition. JA 116-18. The court appointed counsel for petitioners and directed the parties to file new briefs addressing, *inter alia*, "whether the district court had subject matter jurisdiction on the basis of the federal charter of [Fannie Mae]." JA 118.

3. After new briefing and argument, the court of appeals agreed with the D.C. Circuit in *Pirelli Armstrong Tire Corp. Retiree Medical Benefits Trust ex*

rel. Federal National Mortgage Ass'n v. Raines, 534 F.3d 779 (D.C. Cir. 2008), that Fannie Mae's sue-and-be-sued clause "confers federal question jurisdiction over claims brought by or against Fannie Mae." Pet. App. 5a; *see also Fed. Home Loan Bank of Boston v. Moody's Corp.*, 821 F.3d 102, 109 (1st Cir. 2016). The court explained that in *Red Cross*, this Court applied "a line of cases, stretching back to *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)" (Pet. App. 6a), establishing that when "federal charters … 'expressly authoriz[e] the organization to sue and be sued in federal courts ... the provision extends beyond a mere grant of general corporate capacity to sue, and suffices to confer federal jurisdiction'" (*id.* at 7a-8a (quoting *Red Cross*, 505 U.S. at 257)). Under that longstanding rule, the court held, Fannie Mae's charter confers jurisdiction by authorizing suit by and against Fannie Mae in any federal court of competent jurisdiction. The "of competent jurisdiction" phrase does not require a separate basis for subject-matter jurisdiction, the court explained, but instead enforces other jurisdictional requirements, including personal jurisdiction and specialized subject-matter jurisdiction. *Id.* at 12a-14a.

District Judge Stein, sitting by designation, dissented. He agreed that Fannie Mae's sue-and-be-sued clause would confer jurisdiction on federal courts but for the phrase "of competent jurisdiction." *Id.* at 26a. According to Judge Stein, the addition of that phrase in 1954 stripped the provision of its jurisdiction-conferring force (*id.* at 32a-33a), a result confirmed in his view by a subsequent amendment to the charter history (*id.* at 33a-40a).

4. The Ninth Circuit denied petitioners' petition for rehearing en banc without dissent from any active judge. *Id.* at 1a-2a.

SUMMARY OF ARGUMENT

I. A. Under the rule first recognized in *Deveaux*, applied in *Osborn*, and reaffirmed by this Court most recently in *Red Cross*, Congress confers federal jurisdiction over suits by and against federally chartered entities by authorizing them to sue and be sued specifically in federal courts. As a matter of statutory stare decisis, the *Deveaux-Osborn-Red Cross* rule is now amply justified by its own long pedigree. It is also consistent with recognized principles of statutory construction. *First*, the Court's precedents on the issue have given full meaning to every word in a sue-or-be-sued clause, which would have no need to refer specifically to federal courts if it were only addressing general capacity to litigate. *Second*, the Court has recognized that Congress legislates against the backdrop of prior decisions and has enacted charter provisions expecting that an authorization to sue and be sued specifically in federal courts would suffice to establish federal jurisdiction.

B. Petitioners both underread and overread the *Deveaux-Osborn-Red Cross* rule. Authorization to litigate specifically in federal court is not simply one factor "relevant" to the jurisdictional question—it is virtually dispositive. But the rule also does not mean that jurisdiction would be created even by the caricature provision petitioners posit, *viz.*, a statute that mentions federal courts only in an express statement *denying* them jurisdiction.

C. Petitioners contend that *Red Cross* (and, implicitly, its many progenitors) should be overruled, but only if it represents the false caricature they describe. Because it does not, there is no basis for now reading sue-and-be-sued clauses differently from how this Court's decisions have read them for two hundred years. Those decisions are correct, and principles of statutory stare decisis would compel adherence to them in any event.

II. Fannie Mae's sue-and-be-sued clause confers federal jurisdiction under the *Deveaux-Osborn-Red Cross* rule by specifically authorizing suit in federal courts of competent jurisdiction.

A. Fannie Mae's original charter provision was materially identical to Red Cross's provision and thus conferred jurisdiction by authorizing suits by and against Fannie Mae "in any court if law or equity, State or Federal."

B. Congress did not eliminate the jurisdiction-conferring force of that clause by amending it in 1954 to authorize suits by and against Fannie Mae "in any court of competent jurisdiction, State or Federal."

1. Petitioners' reading of the sue-and-be-sued clause impermissibly renders the words "State or Federal" superfluous. By contrast, Fannie Mae's reading gives meaning to every term in the provision.

2. Petitioners' reading also rests on a false premise about the meaning of "court of competent jurisdiction." Their entire argument assumes that the phrase necessarily refers to a court with *subject-matter* jurisdiction. But Congress has routinely con-

ferred subject-matter jurisdiction—before and since 1954—by authorizing suit specifically in federal courts "of competent jurisdiction." Those statutes cannot be reconciled with petitioners' understanding of the phrase.

3. In fact, two federal appellate decisions contemporaneous with the 1954 amendment to Fannie Mae's charter had construed the FHA's sue-and-be-sued clause—which, like Fannie Mae's charter, appeared in the NHA, and authorized suit "in any court of competent jurisdiction, State or Federal"—as conferring subject-matter jurisdiction on the district courts. When Congress used the same FHA language in amending Fannie Mae's charter, it would reasonably have expected Fannie Mae's provision to be construed the same way.

4. As in other jurisdiction-conferring provisions, Congress's use of the phrase "court of competent jurisdiction" in Fannie Mae's sue-and-be-sued clause is not surplusage, because it has legal effects other than requiring suit in a court with independent subject-matter jurisdiction. As this Court held just before the 1954 Act was adopted, this language requires suit in a court that has personal jurisdiction. The same language in the FHA statute also had been construed as conferring jurisdiction while avoiding exclusive jurisdiction in the Court of Claims, an issue that could have arisen for Fannie Mae as well. And the language ensured that venue would remain in D.C. federal court, resolving a potential ambiguity created by a separate venue-related provision in the 1954 Act.

5. Petitioners' theory of the 1954 amendment, by contrast, fails to provide a plausible account of its legal effect. Under their theory, Congress expected Fannie Mae to lose access to federal courts under § 1349 once its level of government ownership dropped below 50%. By amending the sue-and-be-sued clause, petitioners hypothesize, Congress ensured that Fannie Mae at that point would be on equal footing with private corporations. The problem with that theory is that Fannie Mae remained a federal agency under the 1954 Act regardless of the government's capital position, and thus continued to have access to federal courts. *See* 28 U.S.C. §§ 1345 (federal-agency suit), 1442(a) (federal-agency removal). The amendment to the sue-and-be-sued clause could not have been intended to put Fannie Mae on equal footing with private corporations.

6. Finally, the meaning of the 1954 amendment to Fannie Mae's sue-and-be-sued clause is confirmed by amendments to two *other* sue-and-be-sued clauses in the same 1954 Act. Most notably, the Act amended the FSLIC sue-and-be-sued clause by deleting the reference to *federal* court, and replacing the provision with the *general* capacity-to-sue language this Court had previously held *not* to confer jurisdiction. The only explanation for deleting the word "federal" from FSLIC's provision was to deprive it of its jurisdiction-conferring force. Congress's decision not to amend Fannie Mae's provision the same way, but instead to retain the specific authorization for suit in *federal* court, confirms that Congress did not intend to eliminate the provision's jurisdiction-conferring force.

C. Petitioners' construction of Fannie Mae's charter is not only wrong on its own terms, but it cannot be squared with Fannie Mae's unique federal purpose, which was not altered when Fannie Mae became a privately owned GSE as a result of the 1968 Act. And petitioners' reading would place Fannie Mae in a less favorable position in terms of access to federal court than Freddie Mac, another private, government sponsored enterprise crucial to federal housing policy, even though Congress explicitly intended the two GSEs to have the same powers and obligations so that neither would have a competitive advantage over the other. Petitioners do not and cannot identify any policy reason Congress would have wanted Freddie Mac to have greater access to federal courts than Fannie Mae. Petitioners instead focus on differences in Freddie Mac's charter language, but that language does not compel differential treatment of the entities.

D. Petitioners' remaining arguments lack merit.

1. Petitioners cite the 1974 charter amendment authorizing Fannie Mae to move out of the District of Columbia while remaining a D.C. corporation for purposes of jurisdiction and venue. Petitioners believe the amendment was enacted to ensure diversity-of-citizenship jurisdiction, which would have been unnecessary if Fannie Mae already had plenary access to the federal courts. But Congress's actions in 1974 shed no light on the meaning of its 1954 enactment. Neither the text nor the legislative history of the 1974 amendment refers to diversity jurisdiction, and the reference to jurisdiction in the 1974 amendment can readily be explained as an effort to ensure that Fannie Mae would be treated as a D.C.

corporation for purposes of general personal jurisdiction even if it moved its headquarters to Maryland or Virginia.

2. Petitioners argue that the sue-and-be-sued clause should be read in light of § 1349, which states that district courts "shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress." The same argument was rejected in *Red Cross* for the same reason it should be rejected here: jurisdiction is not based on the ground that Fannie Mae is federally chartered, but on the ground that Fannie Mae is specifically authorized to sue and be sued in federal court.

3. Finally, petitioners contend that Fannie Mae's sue-and-be-sued clause should be construed only as a general corporate-capacity provision, rather than as jurisdiction-conferring, to avoid doubts about whether Congress possesses constitutional authority to vest jurisdiction in that manner. But the Court (through Chief Justice Marshall) expressly held in 1824 in *Osborn* that Congress *does* have such authority. *Red Cross* reaffirmed that holding, explicitly rejecting the constitutional concern petitioners proffer now.

ARGUMENT

This Court has recognized for two centuries that Congress may confer federal jurisdiction over suits by and against federally-chartered entities by specifically authorizing suit in federal court. Fannie Mae's charter implements that rule through familiar jurisdiction-conferring language that authorizes suits by and against Fannie Mae in any federal court of com-

petent jurisdiction. Petitioners' entire argument rests on the single premise that the phrase "of competent jurisdiction" necessarily requires some independent basis of subject-matter jurisdiction. It does not. Jurisdiction-conferring statutes *routinely* use the phrase to ensure that suit is brought in the proper federal court. The phrase serves the same function here, as the text and history of Fannie Mae's charter make clear, and as the courts of appeal have consistently recognized, *see supra* at 14-15. The judgment should be affirmed.

I. CONGRESS CONFERS JURISDICTION OVER SUITS BY AND AGAINST FEDERALLY-CHARTERED ENTITIES BY SPECIFICALLY AUTHORIZING SUIT IN FEDERAL COURT

Congress has always expressly authorized, and continues to authorize, Fannie Mae to sue and be sued *in federal court specifically*. *See supra* at 4-6; 12 U.S.C. § 1723a(a) (Fannie Mae can sue and be sued "in any court of competent jurisdiction, State or Federal"). Since 1809, this Court has recognized that language authorizing suits by and against federally chartered entities specifically in *federal* court suffices to establish federal jurisdiction over such suits. Petitioners seek to cast doubt on the meaning and vitality of that clear rule, but Congress has followed it for centuries, as it did in Fannie Mae's charter. There is no reason this Court should now disrupt or confuse two centuries of straightforward statutory precedent.

A. The *Deveaux-Osborn-Red Cross* Rule Is Clear, Settled, And Correct

In *Red Cross*, this Court addressed a provision in the American Red Cross's charter authorizing it "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." 505 U.S. at 248 (quotations and citation omitted). The question was whether that provision "confer[red] 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.* This Court emphasized that it did not answer that question on "a clean slate." *Id.* at 252. Rather, since the Republic's early years, the Court had on "several occasions ... consider[ed] whether the 'sue and be sued' provision of a particular federal corporate charter conferred original federal jurisdiction over cases to which that corporation was a party." *Id.* And those early cases consistently held that when the "sue and be sued" provision specifically authorized suit *in federal courts*, rather than in courts generally, the authorization was "sufficient" to confer federal subject-matter jurisdiction. *Id.*

The first case was *Deveaux*, which held that a provision authorizing the first Bank of the United States "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any place whatsoever" did *not* confer independent federal jurisdiction. 5 Cranch at 85. This generally stated power to sue and be sued, Chief Justice Marshall's opinion explained for the Court, "is conferred by every incorporating act, and

is not understood to enlarge the jurisdiction of any particular court." *Id.* The Court *contrasted* that provision with a different provision that subjected the Bank's president and directors to suit and "expressly authorize[d] the bringing of that action *in the federal or state courts*." *Id.* at 86 (emphasis added). That difference reflected Congress's intention that a generic right to sue "does not imply a right to sue in the courts of the union, unless it be expressed." *Id.*

In *Osborn*, the Court considered a revised sue-and-be-sued clause written into the charter of the second Bank of the United States. That clause now authorized the Bank to "sue and be sued … in all State Courts having competent jurisdiction, *and in any Circuit Court of the United States*." 9 Wheat. at 817 (emphasis added). Contrasting that clause with the first Bank's provision, which merely granted "a general capacity in the Bank to sue, without mentioning the Courts of the Union," the Court (again per Chief Justice Marshall) held that the new reference to suit specifically "in every Circuit Court of the United States" sufficed to "confer[] jurisdiction on the Circuit Courts of the United States." *Id.* at 817-18.

The third case was *Bankers Trust Co. v. Texas & Pacific Railway Co.*, 241 U.S. 295 (1916), which considered a charter authorizing the Texas & Pacific Railroad "to sue and be sued … in all courts of law and equity within the United States," *id.* at 303. Recognizing that Congress had "framed" the provision "in the light of" *Osborn* and *Deveaux*, this Court observed that the language had "the same generality and natural import" as the language in *Deveaux* because instead of authorizing suit specifically in fed-

eral court, it provided "only a general capacity to sue and be sued in courts of law and equity whose jurisdiction as otherwise defined was appropriate to the occasion." *Id.* at 304-05.

The fourth case was *D'Oench, Duhme*, which held that federal district courts had jurisdiction under the FDIC's charter because it authorized the FDIC to sue and be sued "in any court of law or equity, State or Federal." 315 U.S. at 455. *D'Oench, Duhme* also noted in a footnote a separate statutory basis for federal jurisdiction, *id.* at 455 n.2, but as this Court explained in *Red Cross*—and contrary to the argument petitioners repeat at length here, Petr. Br. 45-47—that "footnote did not … raise any doubt that the Court held federal jurisdiction to rest on the terms of the 'sue and be sued' clause." *Red Cross*, 505 U.S. at 254.

The *Red Cross* Court read the foregoing precedents as together putting Congress "on prospective notice of the language necessary and sufficient to confer jurisdiction." 505 U.S. at 252. When a federal charter "expressly authoriz[es] the organization to sue and be sued in federal courts," the Court emphasized, the provision "extends beyond a mere grant of general corporate capacity to sue, and suffices to confer federal jurisdiction." *Id.* at 257. Given the foundation of that "basic rule" (*id.* at 253) in two centuries of precedent, petitioners' complaint that the rule "defies the ordinary tools of statutory construction" (Petr. Br. 3) is of course irrelevant. *Cf. Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1270 (2012) (Kagan, J., concurring). But the complaint is misplaced in any event, for the rule also follows from at

least two recognized principles of statutory construction.

First, the rule gives independent meaning to each term in the sue-or-be-sued clause. *See Bailey v. United States*, 516 U.S. 137, 146 (1995). The Court's precedents recognize that when Congress intends a sue-and-be-sued clause to operate only as a grant of corporate capacity, it is enough to grant the power to sue generally, in any court, without specifying the particular courts in which suit is authorized. *See Deveaux*, 5 Cranch at 85-86; *Bankers Trust*, 241 U.S. at 304-05. But when Congress *does* specify the type of court in which suit can be brought, it must mean to do something *more* than merely recognize a general capacity to sue—i.e., to invest the identified courts with authority to hear such suits. *See Deveaux*, 5 Cranch at 85-86; *Osborn*, 9 Wheat. at 817-18; *Red Cross*, 505 U.S. at 257.

The point is well illustrated by *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), a case petitioners cite as "reject[ing] the argument that a statute providing for suit 'in a court of competent jurisdiction' granted automatic jurisdiction in the federal courts." Petr. Br. 22. Petitioners ignore the *reason* the Court rejected that argument: the provision "did not in express language prescribe either a Federal or a state court, and did not provide for exclusive or concurrent jurisdiction." 177 U.S. at 506. If the provision had expressly authorized suit in federal court, the Court made clear that authorization would have been entitled to jurisdictional force. *Id.*

Second, the rule recognizes that Congress is presumed to be aware of this Court's prior interpreta-

tions of statutory language, and to adopt those interpretations in enacting similar language. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-98 (1979); *United States v. Merriam*, 263 U.S. 179, 186 (1923). By the time Fannie Mae was established in 1938 and its charter was codified in 1948, this Court's precedents had already "placed Congress on prospective notice of the language necessary and sufficient to confer jurisdiction" in a sue-and-be sued clause—Congress simply needed to authorize suit specifically in federal court. *Red Cross*, 505 U.S. at 252. Petitioners' resistance to that rule is based on nothing more than "implicit dissatisfaction with this Court's construction of the charter provisions at issue" in its prior cases. Brief for United States as Amicus Curiae at 20, *Red Cross*, *supra* (No. 91-594).

B. Petitioners Misconstrue The *Deveaux–Osborn-Red Cross* Rule

Petitioners seek to minimize the *Deveaux-Osborn-Red Cross* rule, arguing that an express authorization to sue in federal court is merely "relevant" to the jurisdictional inquiry. Petr. Br. 5. Not so. According to *Red Cross* and the precedents on which it is based, if Congress wants to confer jurisdiction through a sue-and-be-sued clause, it is both "necessary *and sufficient*" to authorize suit in federal courts specifically. 505 U.S. at 252 (emphasis added); *see id.* at 257 (authorizing charter entity to sue-and-be-sued specifically in federal court "suffices to confer federal jurisdiction"); *see also id.* at 265 (Scalia, J., dissenting) (reading majority opinion as creating categorical rule). The rule thus obviates the need for the kind of exhaustive scrutiny of every charter's text, history, and purpose that would be re-

quired if every charter were interpreted on a clean slate.

On the other hand, the rule obviously does not mean, as petitioners' caricature would have it, that a charter clause grants federal jurisdiction when it explicitly does *not* grant jurisdiction. Petitioners' nonsensical example illustrates the absurdity of their point: "Fannie Mae may sue and be sued in federal court *only if* another statute independently confers subject-matter jurisdiction." Petr. Br. 40 (quotation omitted); *see* SG Br. 22. This example would indeed require an independent basis for jurisdiction, but any Congress that sought to achieve that objective would simply do what Congress has *always* done: authorize the entity to sue and be sued in *any* court, *without* specifying federal courts. That petitioners must resort to a fanciful hypothetical only confirms the vitality of the *Deveaux-Osborn-Red Cross* rule in any practical applications.

C. Statutory Stare Decisis Principles Preclude Overturning The *Deveaux-Osborn-Red Cross* Rule

The petition presents the question whether *Red Cross* should be overruled, but petitioners now argue that it should be overruled only if it represents the caricature petitioners imagine: a sue-and-be-sued clause that mentions federal courts *always* creates jurisdiction, *even if* the clause expressly states that it should *not* be construed as conferring jurisdiction. Petr. Br. 51-52. Because *Red Cross* holds no such thing, petitioners implicitly concede that it should not be overruled.

This Court in any event "does not overturn its precedents lightly." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). And "*stare decisis* carries enhanced force when a decision"—such as *Red Cross*—"interprets a statute," *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409, (2015), because "Congress remains free to alter what [the Court has] done," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). The *Deveaux-Osborn-Red Cross* rule is correct on its own terms, as shown above. *See supra* at 23-27. But even if there were doubt, principles of statutory stare decisis would preclude overruling it now, for the reasons set forth more fully in the amicus brief of the American Red Cross.

II. THE STATUTORY TEXT, CONTEXT, HISTORY, AND PURPOSE CONFIRM THAT FANNIE MAE'S CHARTER CONFERS JURISDICTION ON FEDERAL DISTRICT COURTS

Under the *Deveaux-Osborn-Red Cross* rule, the Fannie Mae charter provision authorizing it to sue and be sued specifically in federal court constitutes a grant of jurisdiction absent specific, compelling evidence that Congress had a different intent. *See supra* Part I. Here, however, all available evidence confirms the charter's jurisdictional character.

A. Fannie Mae's Original Sue-And-Be-Sued Clause Unambiguously Conferred Federal Jurisdiction

As established in 1938, Fannie Mae was authorized to "sue and be sued, complain and defend, in any court of law or equity, State or Federal." NHA § 301(c)(3), 48 Stat. 1253. And when Congress codi-

fied Fannie Mae's charter in 1948, Congress employed the same language, *see supra* at 5, which was materially identical to language Congress used in amending the Red Cross charter in 1947, and to language this Court held to confer federal jurisdiction just five years before that in *D'Oench, Duhme*. *See Red Cross*, 505 U.S. at 260 ("[T]he fact that our opinion in *D'Oench, Duhme* was handed down before the 1947 amendment to the Red Cross Charter indicates that Congress may well have relied on that holding to infer that amendment of the Red Cross Charter's 'sue and be sued' provision to make it identical to the FDIC's would suffice to confer federal jurisdiction. Congress was, in any event, entitled to draw the inference." (citation omitted)). Even the dissent below conceded that Fannie Mae's original charter "inarguably gave Fannie Mae access to the federal courts." Pet. App. 33a.[2]

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[2] The government observes that there were other grounds for federal jurisdiction over suits involving Fannie Mae (SG Br. 24), but the other potential grounds did not cover *all* such suits, because suits below the § 1331 minimum amount-in-controversy were not covered under § 1349, and could not be removed under § 1442. *See supra* at 5-6. In any event, it is not unusual for Congress to establish more than one basis for jurisdiction over the same action. *Compare* 28 U.S.C. § 1331 (jurisdiction for cases "arising under" federal law), *with id.* § 1337 (jurisdiction for actions "arising under any Act of Congress regulating commerce"). Indeed, there were multiple bases for federal jurisdiction as to Fannie Mae before 1968, *see supra* at 4-9, and in the FDIC's charter as discussed in *D'Oench, Duhme*, 315 U.S. at 455 & n.2; *see also Red Cross*, 505 U.S. at 254; *infra* at 52-53 (discussing Freddie Mac's redundant jurisdictional provisions), 34-36 (discussing jurisdictional redundancy in Fair Labor Standards Act).

B. The 1954 Charter Amendments Reaffirmed The Charter's Jurisdiction-Conferring Nature

The 1954 amendment to Fannie Mae's charter did not eliminate the jurisdictional grant in the sue-and-be-sued clause, but confirmed it.

The 1954 Act replaced the reference to courts of "law or equity" and authorized suit by and against Fannie Mae "in any court *of competent jurisdiction*, State or Federal." 12 U.S.C. § 1723a(a) (emphasis added). According to petitioners, the addition of the italicized language transformed the sue-and-be-sued clause from a grant of jurisdiction to a mere grant of general corporate capacity, on the theory that "court of competent jurisdiction" necessarily refers to a court with an independent basis for exercising subject-matter jurisdiction. Petr. Br. 21; *see* SG Br. 17.

Petitioners are wrong. It was and is common for Congress to confer jurisdiction by authorizing suit in federal courts "of competent jurisdiction." Every other contextual indicator confirms that Congress followed that routine course in amending Fannie Mae's charter.

1. *Petitioners' Reading Would Impermissibly Render Statutory Language Superfluous*

To start, purely as a textual matter, petitioners' construction of the 1954 amendment is impermissible because it renders the words "State or Federal" superfluous. If the amended sue-or-be-sued clause was supposed to operate solely as a grant of general capacity, there was no reason to identify "State or Federal" courts in particular as courts available for

suit—it would have sufficed simply to authorize suit in any "court of competent jurisdiction," just as Congress did in the provision at issue in *Shoshone*, 177 U.S. at 506.[3] Petitioners' interpretation gives no meaning to "State or Federal," but Fannie Mae's does: the word "Federal" confers federal jurisdiction, and the word "State" makes clear that the federal jurisdiction conferred is not exclusive but concurrent. *Cf. id.*

As the following sections show, Fannie Mae's interpretation *also* gives clear meaning to the phrase "court of competent jurisdiction," while petitioners' does not.

2. *The Phrase "Court Of Competent Jurisdiction" Is Common In Jurisdiction-Conferring Provisions*

In addition to rendering the phrase "State or Federal" surplusage, petitioners' interpretation of Fannie Mae's sue-or-be-sued clause misunderstands the phrase "court of competent jurisdiction." According to petitioners, a provision authorizing suit in a court "of competent jurisdiction" must refer to a court with independent subject-matter jurisdiction. But a reference to a court "of competent jurisdiction" does *not* necessarily refer to a court with independent subject-matter jurisdiction, and there is overwhelming contextual evidence that it does not do so here.

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[3] Indeed, Congress *did* omit the "State or Federal" phrase from another federal charter's sue-and-be-sued clause in the very same 1954 Act that amended Fannie Mae's charter. *See supra* at 8-9; *infra* at 47-48.

As a general matter, this Court has recognized that the phrase "court of competent jurisdiction" can in context refer to a court with personal jurisdiction rather than independent subject-matter jurisdiction. *See United States v. Morton*, 467 U.S. 822, 828 (1984). Significantly, this Court held in 1952—just before Congress amended Fannie Mae's charter—that another statutory reference to a "court of 'competent jurisdiction'" referred *not* to subject-matter jurisdiction, but to the court's personal jurisdiction. *Blackmar v. Guerre*, 342 U.S. 512, 516 (1952). That contemporaneous, on-point precedent should be enough to rebut petitioner's contention that Congress *must* have understood the phrase "court of competent jurisdiction" as referring to a court with independent subject-matter jurisdiction. And the principal authorities cited by petitioners—*Ex parte Phenix Ins. Co.*, 118 U.S. 610 (1886), and *Califano v. Sanders*, 430 U.S. 99 (1977)—do nothing to establish such a categorical rule.[4]

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[4] In *Phenix*, the Court observed that a statute stating that a trustee could be appointed by a "court of competent jurisdiction" did not "purport to confer jurisdiction" but "depend[s] on other provisions of law." 118 U.S. at 617. But the provision there did not name federal courts specifically, and the trustee-appointment obviously implicated no uniquely important role for federal courts. In *Sanders*, the Court merely observed in a footnote that the Administrative Procedure Act's reference to a "court of competent jurisdiction" "*seem[s]* to look to outside sources of jurisdictional authority," and that the text of that and other provisions is thus "*ambiguous* in providing a separate grant of subject-matter jurisdiction." 430 U.S. at 106 n.6 (emphasis added). If anything, that observation refutes petitioners' theory that a "court of competent jurisdiction" necessarily refers to a court with independent subject-matter jurisdiction.

There is more. In particular, courts in the years just before 1954 routinely interpreted statutes that included the phrase "court of competent jurisdiction" as conferring jurisdiction without requiring an independent basis for subject-matter jurisdiction. And Congresses both before and after 1954 used the same language in other jurisdiction-conferring provisions.

Fair Labor Standards Act. The Fair Labor Standards Act ("FLSA") states that a FLSA suit "may be maintained ... in any Federal or State court of competent jurisdiction," 29 U.S.C. § 216(b); before 1954 it stated that such an action "may be maintained in any court of competent jurisdiction," *id.* (1952). This Court stated in 1942 that jurisdiction over FLSA actions was conferred *both* by § 216(b)'s predecessor *and* by the jurisdictional statute now codified as 28 U.S.C. § 1337. *See Williams v. Jacksonville Terminal Co.*, 315 U.S. 386, 390 (1942). Other courts agreed. *See Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3, 6 (3d Cir. 1943) ("We think the effect of this provision is to allow a suitor to proceed in federal court regardless of citizenship of the litigants and amount involved or to sue in a state court at his convenience."); *Mizrahi v. Pandora, Frocks Inc*, 86 F. Supp. 958, 959 (E.D.N.Y. 1949); *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451, 452 (D. Neb. 1942). Courts interpreting § 216(b) as a jurisdictional grant construed the "court of competent jurisdiction" phrase to "mean that an action may be maintained in a court of general jurisdiction whether federal, state or territorial." *Mizrahi*, 86 F. Supp. at 959; *see Booth*, 44 F. Supp. at 452.

The government says that it is "unclear" whether *Williams* actually *held* that § 216(b) constituted an

independent grant of jurisdiction. SG Br. 29 n.3. But to determine what Congress in 1954 would reasonably have thought the phrase "of competent jurisdiction" meant, what matters is what this Court explicitly *said it meant*—not whether the Court's statement technically qualified as a "holding." Given the multiple contemporaneous judicial constructions of § 216(b)'s language as conferring jurisdiction, Congress was certainly "entitled to draw the inference" that its use of the same language would be construed the same way. *Red Cross*, 505 U.S. at 260

The government itself has also construed § 216(b)'s plain language as a jurisdictional grant, asserting in *Breuer v. Jim's Concrete of Brevard*, Inc., 538 U.S. 691 (2003), that § 216(b) "confers jurisdiction on federal courts over FLSA claims." Brief for the United States as Amicus Curiae at 5, *Breuer*, *supra* (No. 02-337). The Court agreed, holding that § 216(b) established federal jurisdiction over the suit, 538 U.S. at 694, with no suggestion that the phrase "court of competent jurisdiction" required an independent basis for subject-matter jurisdiction. The government now says that its brief in *Breuer* should be disregarded because it did not "analyze" whether its statement was accurate (SG Br. 29 n.3), and that this Court's jurisdictional holding in *Breuer* likewise can be ignored because there were other potential bases for federal jurisdiction (*id.* at 29). The government is wrong about this Court's opinion in *Breuer*,[5] but even if it were true that both the gov-

[5] The Court in *Breuer* unambiguously held that § 216(b) *itself* sufficed to establish jurisdiction, and that § 1331 merely provided an *alternative* jurisdictional basis for suit. 538 U.S. at 694.

ernment and this Court in *Breuer* simply construed § 216(b) as jurisdictional based on its plain language, without detailed analysis, that would only confirm Fannie Mae's point: the 1954 Congress, too, would reasonably have construed the same plain language as jurisdictional in amending Fannie Mae's charter.

Exclusive Federal Jurisdiction Provisions. In the late-nineteenth and early-twentieth centuries, the only basis for federal jurisdiction in actions arising under federal law was the general federal-question jurisdiction statute. Act of Mar. 3, 1887, ch. 372. 24 Stat. 552. But that provision was from the beginning and until 1980 subject to an amount-in-controversy requirement. *Id.* Another statute, currently codified at 28 U.S.C. § 1337, allowed for jurisdiction "arising under any law regulating commerce" regardless of the amount in controversy, but was not enacted until 1911, and was in any event understood at the outset to apply only to suits under the Interstate Commerce Act. *See Murphy v. Colonial Fed. Sav. & Loan Ass'n*, 388 F.2d 609, 614 (2d Cir. 1967) (Friendly, J.). Accordingly, absent an independent grant of jurisdiction, federal courts had no authority to hear suits arising under federal law but falling below the minimum value.

Congress during this period enacted several provisions establishing exclusive federal jurisdiction over actions under particular federal statutes regardless of the amount in controversy. These statutes functioned as jurisdictional grants because they provided the only basis for federal jurisdiction and because they precluded state-court jurisdiction. And the statutes often conferred jurisdiction by authoriz-

ing suits in federal courts "of competent jurisdiction."

For example, § 9 of the Interstate Commerce Act authorized "any person" with an injury under the Act either to bring an agency complaint or to sue for damages exclusively "in any district or circuit court of the United States of competent jurisdiction." Ch. 104, § 9, 24 Stat. 382 (1887). Because the provision authorized suit by "any person" and included no amount-in-controversy requirement, it was recognized as a grant of exclusive federal jurisdiction. *See Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 128-29 (1915). Congress enacted an identically worded provision as part of the Communications Act of 1934, *see* 47 U.S.C. § 207, which has also been construed as a grant of jurisdiction, *see Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 461 (11th Cir. 2012); *see also* Packers and Stockyards Act of 1921, Pub. L. No. 67-51, § 308, 42 Stat. 165 (codified at 7 U.S.C. § 209) (allowing any injured person to sue for "the full amount of damages sustained in consequence of such violation," and authorizing plaintiff to sue "in any district court of the United States of competent jurisdiction").

Housing and Rent Act of 1947. As originally enacted, § 205 of the Housing and Rent Act of 1947, 61 Stat. 199, provided that certain suits "may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation." Courts had split over whether that provision itself grants jurisdiction, or whether an independent basis for jurisdiction was required such that federal-court jurisdiction would exist only if the amount-in-controversy were satisfied. *See*

Schuman v. Greenberg, 100 F. Supp. 187, 189 (D.N.J. 1951) (noting circuit conflict).

Congress in 1951 resolved that conflict by amending the provision to authorize suit "in any Federal court of competent jurisdiction regardless of the amount involved, or in any State or Territorial court of competent jurisdiction." 65 Stat. 147. Even though the amended provision included the "of competent jurisdiction" language, it unambiguously granted federal jurisdiction by authorizing federal suits that could not otherwise be heard by federal courts. *See Schuman*, 100 F. Supp. at 189.

Post-1954 Provisions. Since 1954, Congress has continued to confer jurisdiction by authorizing suit in federal (and state) courts "of competent jurisdiction." *See*, *e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 164 (1981) (stating that 29 U.S.C. § 633a(c), which authorizes suit "in any Federal district court of competent jurisdiction" for ADEA claims against the government, "conferred jurisdiction over ADEA suits upon the federal district courts"); 29 U.S.C. § 722 (authorizing action "in any State court of competent jurisdiction or in a district court of the United States of competent jurisdiction without regard to the amount in controversy"). Congress has also enacted numerous provisions authorizing specific suits by the United States or federal agencies in federal district courts "of competent jurisdiction." *See* 15 U.S.C. § 687 (action "shall be determined and adjudged by a court of the United States of competent jurisdiction" in suit "brought by the United States at the instance of the Administration or the Attorney General"); *accord* 12 U.S.C. § 501a; 12 U.S.C. § 622; 12 U.S.C. § 1782(d); 12 U.S.C. § 1817; 15 U.S.C. §

687; 15 U.S.C. § 689m(b). The "of competent jurisdiction" language in those statutes would be superfluous if it required an independent basis for subject-matter jurisdiction, because there is federal jurisdiction over every government suit under 28 U.S.C. § 1345.

3. *The 1954 Act Language Was Identical To Another NHA Provision Contemporaneously Construed By Appellate Courts As Conferring Subject-Matter Jurisdiction On Federal Courts*

While the examples above show that Congress as a general matter would not necessarily have understood "court of competent jurisdiction" as nullifying the preexisting jurisdictional grant, there is also compelling evidence that Congress affirmatively understood that it was using jurisdictional language in the 1954 Act.

As the government concedes (SG Br. 2-3), the 1954 charter amendment—which revised Title III of the NHA—used language identical to a provision in Title I of the NHA that authorized the FHA to "sue and be sued in any court of competent jurisdiction, State or Federal." 49 Stat. 722 (codified at 29 U.S.C. § 1702). In the 1940s, two federal appellate courts had held that there was "no question" but that the NHA Title I provision conferred jurisdiction on federal district courts to hear suits by and against the FHA. *Ferguson*, 126 F.2d at 756; *see George H. Evans*, 169 F.2d at 502. Specifically, those courts held that suits against the FHA that would otherwise be subject to the Court of Claims' exclusive jurisdiction—because they were contract-based suits against the United States for money damages of more than

$10,000, 28 U.S.C. § 1491 (1948)—could be brought in district court because the NHA sue-and-be-sued provision specifically vested the district court with jurisdiction. *Ferguson*, 126 F.2d at 756; *George H. Evans*, 169 F.2d at 502.

The government says the courts in *Ferguson* and *George H. Evans* may have believed that there was an alternative basis for federal jurisdiction (e.g., that federal contract actions arise under federal law). SG Br. 31. This misses the point. The question was not whether there was federal jurisdiction at all—there was—but whether jurisdiction was exclusive in the Court of Claims. SG Br. 31-32. The *Ferguson* and *George H. Evans* courts held it was not, because the FHA provision specifically conferred jurisdiction on the district courts—even though the provision had the same "court of competent jurisdiction" language Congress would soon employ in Fannie Mae's identical provision.

The government also asserts that there is "no reason to believe that the 1954 Congress was aware of those two decisions or intended to incorporate those courts' approach" when amending Fannie Mae's charter. SG Br. 31. Of course there is: both provisions appear in the NHA, and Congress's amendment to Fannie Mae's charter used language identical to the FHA provision construed in the 1940s appellate decisions. SG Br. 2-3. The rule that Congress is presumed to be aware of and adopt prior appellate interpretations of related statutes, *see Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 589-90 (2010), thus applies fully here.

The 1940s appellate courts in any event are not the only authorities that have read the NHA Title I provision that way. The *government itself* has represented to this Court—citing *Ferguson*—that the provision "*[p]lainly* … provides a basis for district court jurisdiction," because it "authoriz[es] suit 'in any court of competent jurisdiction, State or Federal.'" Brief for the Respondents in Opposition at 9 & n.6, *Portsmouth Redevelopment and Housing Auth. v. Pierce* (U.S. No. 83-90) (emphasis added).

When Congress used the FHA language in amending Fannie Mae's sue-and-be-sued clause, Congress was entitled to read that language the same way it was read by contemporaneous judicial decisions and the same way the government itself has read it.

4. *The Phrase "Court Of Competent Jurisdiction" Is Not Superfluous If It Does Not Refer To A Court With Independent Subject-Matter Jurisdiction*

Petitioners contend that if replacing "court of law or equity" with "court of competent jurisdiction" did not eliminate the jurisdictional effect of Fannie Mae's sue-and-be-sued clause, then the change had no legal effect at all. Petr. Br. 28-29; SG Br. 23. Petitioners are wrong—the phrase "court of competent jurisdiction" does not lack legal effect in a jurisdiction-conferring provision like Fannie Mae's.

a. As shown above, Congress has used the phrase "court of competent jurisdiction" repeatedly in jurisdiction-conferring statutes, and the phrase is not understood in those statutes as lacking legal effect. *See supra* at 33. Rather, this Court has held that

the phrase can operate to ensure that suit is heard in a court with adequate *personal* jurisdiction. *See Morton*, 467 U.S. at 828. And indeed, this Court held that the phrase was used exactly that way in *Blackmar*, 342 U.S. at 516, just two years before Congress used the same phrase in amending Fannie Mae's clause. *See supra* at 33. Congress was entitled to assume the language would have the same effect in Fannie Mae's jurisdiction-conferring clause.

b. As also discussed above, appellate courts had recently construed the same language as jurisdiction-conferring for suits against the FHA. And the particular issue in those decisions was an issue that also could have arisen in suits against Fannie Mae. Congress thus would have reasonably understood that adopting the same language would have the same result.

The issue was the Court of Claims' exclusive jurisdiction over damage suits for more than $10,000 against federal agencies like FHA and Fannie Mae. In fact, the issue could have been especially complicated for Fannie Mae because of other features in the 1954 Act. Under that Act, Fannie Mae remained an "agency" within the department that would later become HUD, under federal control. *See supra* at 6, 9. But Congress also split its operations into three, and sought to finance one of those operations (secondary-market activities) with a mix of public and private capital, leaving the other two operations subject solely to public financing. *See supra* at 7. That structure created a potential for difficult jurisdictional questions. There would have been federal jurisdiction over certain suits by or against Fannie Mae at the time—as a federal agency, it was author-

ized to sue in and remove suits to federal court, and as a government-owned corporation, there was federal-question jurisdiction over suits satisfying the requisite amount in controversy. *See supra* at 5-6, 9. But the Court of Claims had exclusive jurisdiction over damages suits for more than $10,000 against the "United States," 28 U.S.C. § 1491 (1948), which was understood to mean suits in which "the judgment sought would expend itself on the public treasury." *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quoting *Land v. Dollar*, 330 U.S. 731, 738 (1947)). It would have been difficult to identify which suits against Fannie Mae fell within that exclusive jurisdiction, since not all would implicate the public fisc given Fannie Mae's mixed capital structure. The language Congress adopted in 1954 avoided that difficulty, because it had *already* been judicially construed as granting jurisdiction to district courts without implicating the Court of Claims' exclusive jurisdiction.

The government responds that even without the phrase "of competent jurisdiction," the provision would have avoided jurisdiction in the Court of Claims. SG Br. 18. But the government's only counter-example is the Red Cross sue-and-be-sued clause, which never had the same language, because the Red Cross *never had the same issue*—it was never a federally funded agency. And as the government itself acknowledges, Congress sometimes chooses language to "simply confirm[] what would in any event be the most natural reading of the relevant law." SG Br. 19. It would have been reasonable for Congress, in the course of generally overhauling the housing statutes, to import the FHA language into Fannie

Mae's charter simply to confirm that suits against Fannie Mae should be treated the same as suits against the FHA for purposes of the Court of Claims' exclusive jurisdiction.[6]

c. The phrase "court of competent jurisdiction" also clarified the effect of another change in the 1954 Act related to venue. As part of that Act, Congress provided that Fannie Mae "shall maintain its principal office in the District of Columbia and shall be deemed, for purposes of venue in civil actions, to be a resident thereof." 1954 Act [§ 302(a)], 68 Stat. 613. But the new venue limitation potentially conflicted with the then-existing sue-and-be-sued clause, which allowed suit in "*any* court of law or equity." 62 Stat. 1208 (emphasis added).

Replacing that language with "any court of competent jurisdiction" eliminated the potential conflict, because contemporaneous courts had held that this language did not "broaden the scope" of generally

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[6] Further, it is not clear that the government's argument would have prevailed in 1954. Courts at that time understood the phrase "court of competent jurisdiction" to refer to "a *court of general jurisdiction* whether federal, state or territorial," *Mizrahi*, 86 F. Supp. at 959 (emphasis added), which is why the phrase avoided the Court of Claims' exclusive jurisdiction. Rather than omit the phrase used in the FHA provision and provoke disputes over the Court of Claims' exclusive jurisdiction, it would have made sense to adopt the full FHA language and expect the same treatment for suits against Fannie Mae.

This understanding of the "of competent jurisdiction" terminology as referring to a court of general jurisdiction also ensured that "state courts of specialized jurisdiction—such as family courts and small-claims courts—need not entertain suits that do not satisfy those courts' jurisdictional requirements." Pet. App. 13a-14a; *cf. Testa v. Katt*, 330 U.S. 386 (1947).

applicable venue provisions. *Mizrahi*, 86 F. Supp. at 959 (construing FLSA provision); *see also Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1110 n.5 (D.C. Cir. 1974); *McDaniel v. IBP, Inc.*, 89 F. Supp. 2d 1289, 1292 (M.D. Ala. 2000). Altering the Fannie Mae charter's jurisdictional grant to authorize suit in any federal court "of competent jurisdiction" ensured that the separate 1954 change in Fannie Mae's residency for venue purposes would be given effect.

5. *Petitioners' Reading Depends On The Erroneous Premise That The 1954 Amendment Eliminated Fannie Mae's Access To Federal Courts Upon Privatization*

Petitioners' only explanation for the 1954 amendment is that Congress sought to ensure that the sue-and-be-sued clause did *not* grant jurisdiction, so that Fannie Mae would have the same access to federal courts as other private entities once the government's capital position dropped below 50%. Petr. Br. 24-25; SG Br. 13.

The premise of that argument is demonstrably wrong. Congress did revamp Fannie Mae's structure in 1954 with the expectation that Treasury's preferred investment in Fannie Mae would drop below 50% and eventually be extinguished. *See supra* at 7. But because the 1954 Act also deemed Fannie Mae a federal "agency" controlled entirely by the government, *see supra* at 6,[7] federal courts *still* would have had jurisdiction over suits by Fannie Mae, 28 U.S.C.

[7] When Congress spun Ginnie Mae off from Fannie Mae in 1968, Congress declared that Ginnie Mae would "*remain* in the Government," 1968 Act § 801, 82 Stat. 536 (emphasis added), whereas Fannie Mae would finally become privately owned.

§ 1345 (1948), and over suits filed against Fannie Mae in state court that Fannie Mae chose to remove, *id.* § 1442(a). Moreover, two of Fannie Mae's three core functions under the 1954 Act were wholly governmental and were never slated for privatization. *See supra* at 7.

Thus, contrary to petitioners' theory, the 1954 amendment to the sue-and-be-sued clause would *not* have put Fannie Mae in the same position as ordinary private entities. Rather, the 1954 Act explicitly recognized that Fannie Mae would not be privatized *absent further legislation*: § 303(g) of the 1954 charter directed that once Treasury's preferred shares were redeemed, the Executive Branch should propose legislation to transfer Fannie Mae's secondary-market operations to private investors, while retaining Fannie Mae's two governmental functions within the federal government. *See supra* at 7. Moreover, petitioners' theory of Congress's purpose in amending the sue-and-be-sued clause in 1954 makes no practical sense: if Congress wanted to put Fannie Mae on an equal footing with other private entities when Fannie Mae actually became a private corporation, Congress more sensibly would have done so in the 1968 law that actually made Fannie Mae a private corporation. But the 1954 amendment simply could not have placed Fannie Mae in the same position as private entities, which refutes petitioners' only theory of that amendment's purpose.

6. *If Congress In 1954 Wanted To Alter The Jurisdictional Effect Of The Charter, It Would Have Used The Same Language It Used In Other Provisions Of The Same 1954 Act*

Petitioners also have no answer to Judge Kavanaugh's observation that if "Congress in 1954 did not want to continue to confer federal jurisdiction in Fannie Mae cases, it logically would have omitted the word 'Federal' from the statute, not attempted a bank shot by adding the words 'of competent jurisdiction.'" *Pirelli*, 534 F.3d at 786.

And indeed, Congress did exactly that in two other provisions of the 1954 Act. *First*, Congress deleted the phrase "State or Federal" from the sue-and-be-sued provision of the FSLIC charter, while adding the "of competent jurisdiction" phrase. FSLIC's original sue-and-be-sued clause—identical to Fannie Mae's pre-1954 clause—was an unambiguous grant of jurisdiction. *See supra* at 8-9. The 1954 Act eliminated the jurisdictional grant by deleting the specific reference to suit in "Federal or State" court, substituting language this Court had previously held to constitute only a general right to sue.[8] "The fact that Congress chose to keep that all-important word

[8] 68 Stat. 633 (authorizing suits by and against FSLIC "in any court of competent jurisdiction in the United States or its Territories or possessions or the Commonwealth of Puerto Rico"); *see Shoshone*, 177 U.S. at 506 (distinguishing non-jurisdictional provision generally granting authorization to sue "in a court of competent jurisdiction" from jurisdictional provision that "in express language prescribe[d] either a Federal or a state court"); *Bankers Trust*, 241 U.S. at 304-05 (Congress understood that under *Deveaux* and *Osborn*, general grant of capacity to sue did not confer jurisdiction).

[Federal] in the Fannie Mae statute but to delete it from the FSLIC statute is compelling evidence that Fannie Mae's 'sue-and-be-sued' provision was meant to ensure continuing federal jurisdiction in Fannie Mae cases." *Pirelli*, 534 F.3d at 787.

The government responds that the phrase "State or Federal" was deleted from the FSLIC statute—but not Fannie Mae's—to make clear that FSLIC could sue and be sued in courts in the Territories and in Puerto Rico. SG Br. 26. The government cites nothing to support that theory, and it rests on the dubious assumption that courts in those jurisdictions did not already constitute "State" courts. If that were true, then by *retaining* the phrase "State or Federal" in Fannie Mae's charter, Congress effectively ensured that Fannie Mae could not (and still cannot) be sued in Puerto Rico or territorial courts, even though the 1954 Act specifically authorized Fannie Mae to enter into contracts with entities in Puerto Rico and the territories and to "conduct its business" there. 1954 Act [§ 308(a)], 68 Stat. 620. That statutory construct obviously makes no sense. The better explanation is that the phrase "State or Federal" was eliminated from FSLIC's statute but retained in Fannie Mae's because Congress wanted "to ensure continuing federal jurisdiction in Fannie Mae cases." *Pirelli*, 534 F.3d at 787.

Second, the 1954 Act also omitted any specific reference to federal courts in the sue-and-be-sued clause added for the Home Loan Bank Board. Petitioners inexplicably find the Home Loan Bank Board's provision "instructive" because it authorizes suit "in any court of competent jurisdiction in the United States or its territories," while also expressly

granting federal district courts limited jurisdiction only to hold hearings and issue equitable relief. Petr. Br. 24-25 (quoting 68 Stat. 635). As petitioners understand it, if the Home Land Bank's sue-and-be-sued clause itself "conferred subject matter jurisdiction … the express jurisdictional provision[] that Congress added would be superfluous." Petr. Br. 25.

Petitioners have it backwards. Congress did *not* confer jurisdiction through the Home Loan Bank Board's sue-and-be-sued clause because it did not authorize suit specifically in federal court, which is precisely why the separate, limited jurisdiction-conferring provision was necessary. More precisely, Congress had to omit any reference to federal courts from the sue-and-be-sued clause because otherwise it would have constituted a *general* grant of federal jurisdiction that conflicted with the *limited* grant of jurisdiction that Congress intended. The Home Loan Bank Board provision certainly is instructive, but its lesson is the opposite of petitioners' understanding.

In the end, petitioners provide no tenable explanation for why Fannie Mae's 1954 charter specifically authorizes suit in federal court, whereas FSLIC's and the Home Loan Bank Board's charters—enacted as part of the same statute—do not. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation omitted). That principle further confirms that Fannie Mae's sue-and-be-sued clause constitutes a grant of federal jurisdiction.

C. Congress Granted Federal Courts Jurisdiction Over Cases Involving Fannie Mae and Freddie Mac Due To The GSEs' Uniquely Federal Purpose

1. Congress's decision to grant federal courts jurisdiction over cases involving Fannie Mae is consistent with Fannie Mae's "special, public purpose[],"and its "special relationship with the federal government." S. Rep. No. 102-282 (1992), at 25, 34. As Congress has expressly stated, Fannie Mae has an "important public mission[]," "reflected in the statutes and charter Act[] establishing" it, to "facilitate the financing of affordable housing for low- and moderate-income families in a manner consistent with [its] overall public purposes, while maintaining a strong financial condition and a reasonable economic return." 12 U.S.C. § 4501(1), (2), (7); *see supra* at 12-13.

Despite Fannie Mae's important role in federal housing policy, petitioners insist that Congress "wanted Fannie [Mae], once privatized, to be treated as any other private entity." Petr. Br. 28. But Fannie Mae is not like "any other private entity"—it is a government-sponsored enterprise with a congressionally mandated public mission, *see supra* at 4, 12-13. It is hardly surprising that Congress would seek to protect Fannie Mae's federal mission by allowing federal courts to hear suits with the potential to affect that mission.

Indeed, Congress's actions in related contexts show that it does not consider private ownership a barrier to federal jurisdiction for entities serving important public policy objectives. For instance, Con-

gress granted federal jurisdiction over suits by and against the second Bank of the United States, *Osborn*, 9 Wheat. at 817-18, even though the Bank was 80% privately owned, Act of April 10, 1816, ch. 44, 3 Stat. 266 (preamble).

An even closer privately-owned analog is Freddie Mac, which "was established by Congress in 1970 as a private corporation to compete with Fannie Mae," *Montgomery Cty.*, 740 F.3d at 918, and which is "almost identical" to Fannie Mae in its functions and purposes, Forrester, *Forgotten Benefit*, at 1082. Congress invested both entities with materially identical powers "so neither would have any competitive advantage over the other." S. Rep. No. 91-761, 1970 U.S.C.C.A.N. 3488 at 3494; H.R. Rep. No. 91-1311 (1970), at 7. And Congress specifically established multiple grounds for jurisdiction over suits involving Freddie Mac, *see infra* at 52-53, conclusively refuting petitioners' assumption that privatization is inconsistent with special access to federal court.

2. Petitioners cannot and do not proffer any policy rationale for allowing Freddie Mac more favorable access to federal court than Fannie Mae. They instead say that the different language used in Freddie Mac's charter compels the different result. It does not, for multiple reasons.

First, and as a threshold matter, any inference from the differences in language between the Fannie Mae and Freddie Mac charters is necessarily weak, because "the two relevant provisions were not considered or enacted together." *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008). The differences between the Fannie Mae and FSLIC sue-and-be-sued claus-

es—which *were* considered and enacted together—have obvious jurisdictional significance. *See supra* at 47-48. The Fannie Mae and Freddie Mac jurisdictional provisions—which were enacted 16 years apart—do not.

Second, because the Freddie Mac charter was written on a clean slate in 1970, *much* of its structure and text differs substantially from the Fannie Mae charter—not just the jurisdictional language. *See supra* at 11-12. Yet Congress intended, as courts have recognized, that Freddie Mac would possess essentially the same powers and functions as Fannie Mae. *See supra* at 12. The difference in the jurisdictional provisions follows the same pattern—Congress simply used different language to reach the same result. Indeed, Freddie Mac's charter includes no fewer than four provisions saying in different ways that federal courts have jurisdiction over suits involving Freddie Mac:

- Freddie Mac can "sue and be sued, complain and defend, in any State, Federal, or other court," 12 U.S.C. § 1452(c);
- Freddie Mac is "deemed to be an agency included in sections 1345 and 1442 of Title 28," *id.* § 1452(f)
- any actions to which Freddie Mac is a party "shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of all such actions, without regard to amount or value," *id.*; and

- Freddie Mac may remove any suit filed against it in state court, *id.*

Congress's emphatic decision to say essentially the same thing four different ways in Freddie Mac's charter does not mean that Congress was insufficiently clear when it said the same thing once in Fannie Mae's.

There is no basis in policy or the historical record for inferring that Congress wanted the courts to treat Freddie Mac and Fannie Mae differently. To the contrary, Congress wanted them to have the same rights and obligations, so that neither would have any market advantage over the other. *See supra* at 12. Petitioners' reliance on the grants of jurisdiction in Freddie Mac charter to construe Fannie Mae's charter as not granting jurisdiction would directly undermine the overall policy equivalence Congress clearly intended.

D. Petitioners' Remaining Arguments Are Meritless

1. *The 1974 Amendment To Fannie Mae's Venue Provision Does Not Support Petitioners' Reading Of The "Sue-And-Be-Sued" Clause*

Petitioners rely on a later 1974 amendment to a different Fannie Mae-related provision, which provided that Fannie Mae "shall be deemed, for purposes of jurisdiction and venue in civil actions, to be a District of Columbia corporation." 12 U.S.C. § 1717(a)(2)(B); *see* Petr. Br. 35-38; SG Br. 20-21. They contend that this provision was meant to establish Fannie Mae as a D.C. "citizen," as required to give Fannie Mae access to federal courts under the

diversity-of-citizenship statute, *see* 28 U.S.C. § 1332(a), and that Congress would not have made that change if Fannie Mae already had access to federal courts under the sue-and-be-sued clause.

Even if Congress's action in 1974 could shed light on the meaning of its earlier enactment, *but cf. Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."), petitioners' theory misconstrues the 1974 amendment's text, context, and history. In fact, the amendment had nothing to do with subject-matter jurisdiction.

The 1974 provision was adopted to address essentially the same D.C.-venue issued addressed in the 1954 Act. Before 1974, Fannie Mae's headquarters were required to be in the District of Columbia, and it was "deemed, for purposes of venue in civil actions, to be a resident thereof." 1954 Act [§ 302(a)], 68 Stat. 613. Fannie Mae lobbied for authority to move its headquarters outside the District, and the 1974 law granted that authority, allowing Fannie Mae to be headquartered in D.C. "or the metropolitan area thereof." 12 U.S.C. § 1717(a)(2)(B). But Congress made a conforming change to the same provision to ensure that Fannie Mae would be deemed a D.C. corporation "for purposes of jurisdiction and venue in civil actions," *id.*, even if its headquarters moved outside District boundaries. *See Bauman*, 134 S. Ct. at 754 (general personal jurisdiction over corporation in state where corporation is "at home"). The provision was not about subject-matter jurisdiction, but about keeping Fannie Mae

"at home" in D.C., wherever it might eventually reside. *Id.*; *see supra* at 12.

Petitioners' theory that the provision was actually about diversity-of-citizenship is also inconsistent with the provision's text. When Congress intends to deem a federally chartered corporation to be a "citizen" of a particular jurisdiction for diversity purposes, Congress uses the diversity term-of-art "citizen" specifically.[9] The government argues that labelling Fannie Mae a "District of Columbia corporation" achieves the same end because under the diversity-of-citizenship statute, a corporation is considered a citizen of the state "by which it has been incorporated." SG Br. 21 (quoting 28 U.S.C. § 1332(c)(1)). But Fannie Mae was not incorporated by the District of Columbia but by Congress, and if Congress wanted to ensure diversity jurisdiction despite that deficiency, it would have done what it ordinarily does and deemed Fannie Mae a "citizen" of the District. Congress's failure to do so indicates that Congress

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[9] *See*, *e.g.,* 7 U.S.C. § 941(c) ("The telephone bank ... shall, for the purposes of jurisdiction and venue, be deemed a citizen and resident of the District of Columbia."); 12 U.S.C. § 1464(x) ("In determining whether a Federal court has diversity jurisdiction … the Federal savings association shall be considered to be a citizen only of the State in which such savings association has its home office."); 12 U.S.C. § 2258 ("Each institution of the [Federal Farm Credit] System shall for the purposes of jurisdiction be deemed to be a citizen of the State, commonwealth, or District of Columbia in which its principal office is located."); 28 U.S.C. § 1348 (national banking associations "deemed citizens of the States in which they are respectively located"); 47 U.S.C. § 614(b) ("The Fund shall maintain its principal office in the District of Columbia and shall be deemed, for purposes of venue and jurisdiction in civil actions, to be a resident and citizen thereof.").

was serving some objective other than securing federal diversity jurisdiction, such as establishing venue and personal jurisdiction. According to petitioners, "if Congress intended to refer *only* to personal jurisdiction, it would not have used a word that encompasses *both* personal and subject matter jurisdiction." Petr. Br. 38 (emphasis added). But Congress had no reason to *avoid* a common term referring to both personal and subject-matter jurisdiction, especially given that federal subject-matter jurisdiction *already* existed in suits by or against Fannie Mae. So long as the term encompassed personal jurisdiction, it served Congress's objective.

Petitioners also note that the 1974 Congress did not alter Ginnie Mae's venue provision to track the changes to Fannie Mae's charter, speculating that no comparable amendment was necessary because Ginnie Mae, as a federal agency, already had the automatic access to federal courts that Fannie Mae lacked. Petr. Br. 37. The reason for the differential treatment is much simpler: no change to Ginnie Mae's venue provision was necessary because the 1974 Act did not allow Ginnie Mae to move its headquarters outside the District. Ginnie Mae to this day is required to "maintain its principal office in the District of Columbia." 12 U.S.C. § 1717(a)(2)(A).

Finally, even if the language of the 1974 amendment *did* have the effect of designating Fannie Mae a D.C. "citizen," there is no indication that this effect was anything more than incidental. It could not be more clear that the relevant amendment was adopted to permit Fannie Mae to move its headquarters

outside the District, and not to address a perceived jurisdictional imperative.[10]

2. *Section 1349 Is Irrelevant To The Interpretive Question Here*

Petitioners contend that Fannie Mae's charter should be read in light of what they call "the default rule" Congress established in § 1349, i.e., that the "district courts shall not have jurisdiction of any civil action by or against a corporation upon the ground that it was incorporated by or under an Act of Congress." 28 U.S.C. § 1349; *see* Petr. Br. 25. That provision is inapposite here because the basis for federal jurisdiction is *not* the fact that Fannie Mae "was incorporated by or under an Act of Congress." The basis for jurisdiction instead is that Congress expressly authorized suits by and against Fannie Mae to be heard in federal courts of competent jurisdiction. Section 1349 is beside the point.

Petitioners' reliance on § 1349 is also contrary to *Red Cross*, where the Court expressly held that § 1349 was "irrelevant" to the jurisdictional effect of Red Cross's sue-and-be-sued clause. 505 U.S. at 260 n.12. The Court noted a controversy in lower courts about § 1349's application to federal entities (like the Red Cross) without any capital stock. *Id.* at 251 & n.3. Had § 1349 carried the weight petitioners place

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[10] Petitioners suggest that Fannie Mae's occasional past invocations of diversity jurisdiction establish that jurisdiction cannot be available under the sue-and-be-sued clause. Petr. Br. 37. *Red Cross* rejected the same argument. 505 U.S. at 262 n.14. And rightly so: any prudent removal petition or jurisdictional statement will identify all potentially applicable grounds for jurisdiction.

on it, the Court would have been compelled to decide whether § 1349 applied to the Red Cross before construing its sue-and-be-sued clause. But the Court instead did "not address this question," because "the 'sue and be sued' provision of the Red Cross's Charter suffices to confer federal jurisdiction independently of the organization's federal incorporation." *Id.* at 251 n.3. The same is true here.[11]

3. *The Canon Of Constitutional Avoidance Does Not Apply Here*

Finally, petitioners argue that the "imperative to avoid constitutional difficulty" counsels against construing Fannie Mae's charter as conferring jurisdiction, because that conclusion would "raise[] the thorny question whether Congress actually has the power under Article III to confer jurisdiction on the federal courts over all manner of Fannie suits, however trivial, simply because Fannie is a congressionally chartered corporation." Petr. Br. 52. But if there were ever such a "thorny question," it was definitively answered by Chief Justice Marshall almost two hundred years ago. As "long ago as *Osborn*," the Court observed in *Red Cross*, "this Court held that Article III's 'arising under' jurisdiction is broad

[11] *Red Cross* (and every other relevant precedent) similarly forecloses petitioners' argument (Petr. Br. 20) that the sue-and-be-sued clause should not be read as a jurisdictional grant because it appears in a list of corporate powers rather than as a separate jurisdictional provision. The same was true for *every* sue-and-be-sued clause construed by this Court as conferring jurisdiction. *See* Act of May 8, 1947, Pub. L. No. 80-47, § 3, 61 Stat. 81 (Red Cross); Act of April 10, 1816, ch. 44, § 7, 3 Stat. 269 (second Bank of the United States); Banking Act of 1935, Pub. L. No. 74-305, § 101, 49 Stat. 692 (FDIC).

enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations," 505 U.S. at 264 (citing *Osborn*, 9 Wheat. at 823-28), and the Court has "consistently reaffirmed the breadth of that holding," *id.* (citing cases). The *Red Cross* Court thus concluded that "[w]e would be loath to repudiate such a longstanding and settled rule, on which Congress has surely been entitled to rely." *Id.* Petitioners have offered no plausible basis for a different result here.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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September 2016