No. 16-180

In the Supreme Court of the United States

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

v.

FEDERAL HOME LOAN BANK OF BOSTON,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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As demonstrated in Moody's petition, the extension of 28 U.S.C. § 1631 to transfers for lack of personal jurisdiction is contrary to Congress's intent and engenders serious constitutional difficulties. In enacting § 1631 Congress plainly set out to address a specific problem involving statutory subject matter and cases being filed in the wrong federal court. Congress was not in any way focused on personal jurisdiction. The legislative history bears this out, as does the text, which refers to jurisdictional defects that can and must be raised *sua sponte* throughout the litigation, rather than waivable personal jurisdiction issues.

Both the opposition and the decision below take an unsustainably broad view of § 1631 on the ground that the statute's reference to jurisdiction must mean both subject matter and personal jurisdiction. But this Court has previously rejected that precise argument, *United States v. Morton*, 467 U.S. 822 (1984), and has instructed courts to look to context to determine the reach of the chameleon-like term, "jurisdiction." Here, the context makes plain that Congress intended to empower courts to address defects in statutory subject-matter jurisdiction, not to take actions prejudicing defendants over whom they lack any constitutional power to act.

Respondent's contrary position runs counter to bedrock constitutional values. First, it allows a district court that has determined that it lacks the constitutional power to exercise jurisdiction over a defendant nevertheless to prejudice that defendant's defense on the merits, rather than just dismiss the case against it, contrary to deeply rooted conceptions of due

process. Second, it creates a substantial disparity between state courts and federal courts with respect to the same claim, contrary to the principles of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), not only creating incentives for forum-shopping but also creating serious disincentives for defendants to exercise their removal rights.

Respondents question this case as a vehicle for resolving the important questions about the scope of § 1631. In reality, this case is an ideal vehicle. Because of the posture of this case – a district court dismissal based on the view that § 1631 does not extend to personal jurisdiction and a court of appeals taking the opposite view – the issue concerning the scope of § 1631 is squarely presented and the only issue in the case. If the case is transferred, rather than dismissed, then the constitutional damage will be done, and the chances of this jurisdictional issue being outcome determinative are minimal. Simply put, the question whether § 1631 empowers a court to transfer a case when it lacks personal jurisdiction over the defendant is a threshold question that should be decided at the threshold. It is also a critically important question. It is no small matter to have courts that lack the constitutional power to do anything other than dismiss taking prejudicial actions vis-à-vis the defendant. Fundamental principles of due process and federalism counsel against that result, and this Court should review the First Circuit decision, which gives sanction to this unconstitutional and problematic practice.

I. NEITHER THE TEXT NOR HISTORY OF § 1631 EVINCES AN INTENT TO AUTHORIZE TRANSFERS FOR LACK OF PERSONAL JURISDICTION

FHLBB has no real answer to the overwhelming evidence that Congress was addressing a specific problem with statutory subject-matter jurisdiction and not empowering courts to remedy defects in personal jurisdiction. The history of § 1631 evinces a concern solely for addressing the potential confusion created by the web of statutory subject-matter jurisdiction provisions for the various federal courts.[1] And the text of § 1631 reflects this history by directing courts to act *sua sponte* to address jurisdictional defects whenever they arise. The "mandatory cast of section 1631's instructions," *Ctr. for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 944 (D.C. Cir. 1986) (Ginsburg, *J.*, dissenting), points naturally to subject-matter jurisdiction and is difficult to square with the waivable defense of lack of personal jurisdiction. Pet. 26-27.

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[1] FHLBB's attempts to recast the legislative history of § 1631, Opp. 16-17, only highlight how thoroughly absent is any discussion of personal jurisdiction from that history. Unable to find any actual concern for lack of personal jurisdiction, FHLBB relies on Judge Leventhal's concurrence in *Investment Company Institute v. Board of Governors*, 551 F.2d 1270 (D.C. Cir. 1977), in which he suggested the transfer cover "specifically but not exclusively" instances of filing in the "wrong court." *See id.* at 1283 (Leventhal, *J.*, concurring). This language does not even suggest inclusion of personal jurisdiction. As for Judge Leventhal's counterproposal to the initial draft, Leventhal's concern was the exclusion of specialized courts, not the inability to transfer between two district courts. *See Judicial Housekeeping*, 95th Cong. 387-89 (1978).

Faced with this indisputable focus by Congress solely on subject-matter jurisdiction, FHLBB rests its case on the claim that the unadorned term "jurisdiction" in § 1631 *unambiguously* refers to both personal and subject-matter jurisdiction. But that argument is squarely foreclosed by this Court's decision in *United States v. Morton*, 467 U.S. 822 (1984). *Morton* did not hold, as FHLBB suggests, that "jurisdiction" must be taken to mean *both* types, personal and subject-matter, absent some limiting context; rather, the Court held that unadorned references to jurisdiction are inherently *ambiguous* such that context must always be consulted to determine Congress's true meaning. *See id.* at 828. Here there is no serious argument that § 1631's context supports any conclusion other than that Congress was clearly focused on addressing statutory subject-matter jurisdiction and not personal jurisdiction.[2]

Lacking any support in the context of § 1631 itself, FHLBB emphasizes that Congress has, in completely unrelated portions of Title 28, specifically used the term "subject-matter jurisdiction." Opp. 10-11. But the fact that Congress sometimes uses more specific terminology and sometimes uses the more general term "jurisdiction" just highlights that the latter is an ambiguous term of "many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

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[2] Given the novel and substantial consequences of allowing transfer where personal jurisdiction is lacking, the silence of the legislative history is not, as FHLBB argues, merely neutral, but is "most eloquent" evidence that these consequences were not intended. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979).

In addition, all the language relied upon by FHLBB was added years *after* § 1631 was enacted. Moreover, while some sections of Title 28 specifically mention "subject-matter jurisdiction," others simply use the term "jurisdiction" even though only subject-matter jurisdiction is intended. *See, e.g.*, 28 U.S.C. § 1291 ("jurisdiction" of courts of appeals over final decisions of the district courts). In short, there is no consistent pattern of Congress always specifying "subject-matter jurisdiction" when it intends to limit it to that type. FHLBB's "natural inference" from the omission of that phrase from § 1631 simply does not arise.

Nor does the inclusion of district courts within the scope of § 1631 imply that personal jurisdiction was intended. The need for transfers to and from the district courts arises because of statutory subject-matter concerns (*e.g.*, transfers between district courts and the Court of Federal Claims). Indeed, FHLBB's question-begging argument on this point is precisely backwards: it is only by first construing § 1631 to reach want of personal jurisdiction that a district court-to-district court transfer is even possible under the statute.

Finally, Congress's goal of avoiding lost claims due to uncertainties concerning statutory subject-matter jurisdiction does not extend to personal jurisdiction. Plaintiffs *always* have at least one clear and certain jurisdiction in which to sue a defendant, *i.e.*, where that defendant is essentially at home. *See* Pet. 29-30. "Uncertainty" only arises when a plaintiff, for its own strategic reasons, seeks to hale a defendant out of its home forum. Congress's desire to relieve plaintiffs from the confusion created by the allocation of

statutory subject-matter jurisdiction in no way implies a similar desire to facilitate plaintiffs' strategic forum choices.

II. ALLOWING TRANSFER WHEN PERSONAL JURISDICTION IS LACKING RAISES SERIOUS DUE PROCESS CONCERNS

As an initial matter, FHLBB incorrectly claims that petitioners have forfeited the ability to raise due process concerns in this Court. That is wrong as a matter of both fact and law. First, Moody's did raise due process concerns below. *See* Moody's Appellee Br., 2015 WL 4055081, at 38-40. Second, this Court has repeatedly made clear that as long as a petitioner has properly presented a *claim* below, it is free to assert before this Court any *argument* in support of that claim. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Moody's has consistently urged that § 1631 be construed not to extend to lack of personal jurisdiction, and the serious due process concerns created by FHLBB's contrary view is not some new claim but just one more reason why the Court should adopt Moody's favored and consistently argued construction.

On the merits, FHLBB does not dispute that the First Circuit's holding allows the district court here – a court all concede lacks personal jurisdiction over Moody's – to take an action that, in FHLBB's view, will eliminate the statute of limitations defense that Moody's would otherwise be able to assert. For a court to take such actions vis-à-vis a defendant that it lacks the constitutional power to reach violates deeply rooted notions of due process. *See* Pet. 11-15. That is why this

Court's precedents teach that "once a court determines that jurisdiction is lacking, it can proceed no further and must dismiss the case on that account." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 434 (2007).

FHLBB insists that *Sinochem*'s caution extends only to cases where the court lacking jurisdiction adjudicates the merits. Opp. 20-21. But the concern extends to any situation where the court takes an action with substantive consequences for the defendant. While *Sinochem* thus allows a court to choose between two different bases for dismissal, it warns against taking any action other than dismissal if doing so will prejudice a defendant over whom the court lacks constitutional power.

Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), is not to the contrary and cannot be read, as FHLBB asserts, as holding that "personal jurisdiction is irrelevant to the power to transfer." Opp. 20. *Goldlawr* involved a statute (the Clayton Act) as to which Congress had determined that personal jurisdiction was appropriate in any federal district. The Court there had no occasion to consider the much different situation presented here, involving state law claims as to which jurisdiction of the district court is effectively coextensive with the state in which it sits. Moreover, *Goldlawr* is a sparsely reasoned decision that pre-dates much of this Court's modern case law concerning personal jurisdiction. Nothing in *Goldlawr* remotely justifies a court that lacks personal jurisdiction over the defendant in taking actions vis-à-vis the defendant that affect (and may eviscerate) substantive rights. If *Goldlawr* has led some lower courts to take a contrary

view, that is all the more reason for this Court to grant plenary review.

FHLBB finds it "difficult to understand" why extension of § 1631 to personal jurisdiction is of greater concern than subject-matter jurisdiction. Opp. 21. But the difference is clear: defects involving standing and constitutional subject-matter jurisdiction apply in all federal courts, thus transfer under § 1631 only implicates *statutory* subject-matter jurisdiction, which does not raise any concern about Congress acting beyond its constitutional power to create and allot the subject-matter jurisdiction of the federal courts as a whole. *See* Pet. 3-4, 14-15.

These due process concerns are exacerbated by the fact that defendants have no immediate recourse to appeal. Pet. 33-34. Indeed, the lack of a more fully developed circuit split reflects the fact that many district court cases exercise outcome-affecting power over defendants over whom they have no constitutional power, and add insult to injury by doing so in a non-appealable order.[3] Thus, the procedural posture of this case – in which the District Court correctly dismissed and gave rise to an appealable order – highlights the need for this Court to seize this opportunity for review.

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[3] The lack of a more well-developed circuit split does not alter the reality that the lower courts are in considerable disagreement over the proper scope of § 1631 as detailed in the petition. The prospect of courts operating beyond their constitutional power under the Due Process Clause is a sufficiently serious concern that this Court has granted certiorari even in the absence of a circuit split. *See, e.g., Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The considerable division and confusion among lower courts thus only strengthens the case for review here.

III. THE FIRST CIRCUIT'S CONSTRUCTION CREATES A SIGNIFICANT DISPARITY BETWEEN STATE AND FEDERAL COURTS, CONTRARY TO *ERIE* PRINCIPLES

FHLBB cannot contest that its interpretation of § 1631 creates a significant disparity between state and federal courts when confronting a defendant over whom they lack constitutional authority. State courts must dismiss such actions, with any refiled action subject to the policies of the proper forum state. The same action brought in (or removed to) federal court, however, can be transferred to the appropriate district court, thus circumventing the policies of the transferee state and eliminating any consequences that would flow from dismissal and refiling.

FHLBB argues that *Erie* does not preclude such an outcome. But the point is not that *Erie* precludes Congress from creating such a disparity in treatment between state and federal courts; it is that such an intent should not be lightly presumed, and procedural rules and statutes should be interpreted to avoid substantial state/federal non-uniformity if the text fairly permits. *See* Pet. 19-21.

FHLBB cannot dispute that there is no indication whatsoever in the legislative history of § 1631 that Congress even considered, much less intended, the state/federal disparity that the First Circuit's reading of §1631 engenders. And while FHLBB insists that the "plain meaning" of § 1631 trumps any *Erie*/federalism concerns, it cannot seriously contend that § 1631 expressly precludes petitioners' favored, *Erie*-compliant

reading of the text.[4] This Court's precedents therefore clearly counsel against the reading that the First Circuit has adopted.

FHLBB further insists that, because courts retain the discretion to deny transfer in the interest of justice, the *Erie* aim of avoiding forum-shopping is not implicated. Opp. 23. But even assuming this discretion is exercised more than rarely, the possibility of transfer still is a better outcome than the certainty of dismissal which awaits plaintiffs in state court. That disparity creates a significant incentive for plaintiffs attempting to hale a defendant out of its home forum to do so in federal court if at all possible.

Moreover, FHLBB does not even address the reality that the First Circuit's construction of § 1631 creates significant disincentives for defendants to exercise their right to removal – a right recognized from the inception of the federal judiciary as an important protection for out-of-state defendants. *See* Pet. 22. Once again, there is no indication, in either the text of § 1631 or its history, that Congress intended to alter parties' incentives in this substantial manner or was even aware of this consequence.

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[4] In *Shady Grove Orthopedic Assocs, P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), the Court stated it would not "contort" the text of a federal procedure rule in the name of *Erie* concerns. *See id.* at 405-06. But it surely does not "contort" the text of § 1631 to limit it to subject-matter jurisdiction, nor can it be said that § 1631 is capable of "only one reasonable reading," *id.* at 405 n.7.

IV. THIS IS THE APPROPRIATE CASE IN WHICH TO REVIEW THE SCOPE OF § 1631

FHLBB complains that the petition is interlocutory, but that is not a jurisdictional consideration in federal cases generally, and is entitled to no weight when it comes to a threshold issue like § 1631's application to personal jurisdiction. This threshold issue is best addressed at the threshold and will be difficult to address in any other posture. As noted, a decision to transfer generally does not give rise to an appealable order. There was an appealable order here only because the District Court correctly concluded that § 1631 does not extend to personal jurisdiction, a decision the First Circuit has now reversed by taking the opposite position. While a district court could believe that § 1631 extends to personal jurisdiction defects (or be bound to that view by the First Circuit decision), and nonetheless dismiss the case based on case-specific concerns about the "interest of justice," such a case would focus on case-specific factors, rather than the broader legal issues. Thus, the procedural posture of this appeal counsels in favor, not against, this Court's review.[5]

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[5] FHLBB argues that an appeal to the Second Circuit would be available to Moody's on the § 1631 issue after judgment. Opp. 24. However, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), would likely require the Second Circuit to follow, as law of the case, the determination by the First Circuit that § 1631 allows transfer. *See id.* at 816-19. FHLBB offers no persuasive reason why this Court should pass up the opportunity to review the scope of § 1631 now in favor of letting the parties litigate for years, only to have the Court review the statute post-judgment.

Moreover, the importance of this issue counsels in favor of immediate review. The prospect of a District Court that concededly lacks jurisdiction taking further action – whether ordering a prejudicial transfer or ordering extensive briefing about the "interests of justice" – rather than entering an order of dismissal is a troubling one. Thus, what is truly in the interest of justice is for this Court to clarify once and for all whether a court that lacks jurisdiction over a defendant under the Due Process Clause nonetheless has the power to transfer the defendant's case. The decision below plainly asserts that counterintuitive power and just as plainly merits this Court's review.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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