No. 14-1055

IN THE
Supreme Court of the United States

CRYSTAL LIGHTFOOT
AND BEVERLY HOLLIS-ARRINGTON,
Petitioners,

v.

CENDANT MORTGAGE CORP., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Andrew H. Friedman
Gregory D. Helmer
HELMER FRIEDMAN, LLP
8522 National Boulevard
Suite 107
Culver City, CA 90232

E. Joshua Rosenkranz
Counsel of Record
Thomas M. Bondy
Kevin Arlyck
Matthew L. Bush
Cynthia B. Stein
Louisa Irving
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Legislative History

INTRODUCTION

Fannie's approach to statutory construction is unconventional, to say the least. Fannie urges this Court to adopt a "rule [that] obviates the need for … scrutiny of [the] text, history, and purpose" of the provision before it. Resp. 27.[1] Fannie does not even contend that it has the better reading of the sue-and-be-sued clause in its charter—and in particular the phrase "court of competent jurisdiction." The most Fannie can muster is that this key phrase "does not *necessarily* refer to a court with independent subject-matter jurisdiction." Resp. 32 (emphasis altered).

Fannie justifies these peculiarities by insisting that this Court has for centuries followed a "rule" that the very utterance of the word "federal" in a sue-and-be-sued provision is "'sufficient' to confer federal subject matter jurisdiction." Resp. 23. But Fannie cannot quote a single sentence from any opinion that actually says this. And it does not actually defend this purported rule. Instead, it asserts that the word "federal" creates a "virtually dispositive" presumption, Resp. 16—a presumption also unjustified by traditional approaches to statutory interpretation and appearing nowhere in any precedent.

There is no reason for the Court to depart from convention here. The text is straightforward: A case involving Fannie does not belong in any particular

---

[1] We cite our Brief for Petitioners, "OB," the Brief for Respondent, "Resp.," Respondent's Brief in Opposition, "Br. Opp.," and the United States' amicus brief, "U.S. Br."

"State or Federal" court, unless it is a "court of competent jurisdiction." That means, at minimum, a court that has subject-matter jurisdiction. Tellingly, Fannie cannot commit to a single reading of this phrase. Instead, it ricochets from saying it *could* mean "personal jurisdiction" to "venue" to "general jurisdiction." That is not the way one ordinarily wins a statutory construction argument.

The history of the clause is also straightforward. Contrary to Fannie's premise, Congress did not start with language that it saw as granting federal jurisdiction. It started with language that it understood to require an independent source of jurisdiction. We know that for sure, because the legislative debate definitively resolved the point when Congress enacted the statute that first provided the power to sue or be sued. Congress reaffirmed this point 20 years later, by amending Fannie's charter to make clear that Fannie can sue and be sued only in a "court of competent jurisdiction."

The text, history, and other conventional tools of statutory construction confirm that Fannie cannot be in district court—or in any other court, "State or Federal"—without satisfying the jurisdictional prerequisites for that court. That is the best reading of this statute. But even under Fannie's unconventional presumption, there is "specific, compelling evidence" that this was Congress's "intent." Resp. 29. The only reasonable conclusion is that Fannie's charter does not confer jurisdiction.

ARGUMENT

I. The Ninth Circuit Applied The Wrong Rule Of Statutory Construction, And Fannie's Alternative Presumption Is No Better.

This case presents three views of how to read a sue-and-be-sued clause in a statute. Fannie does not dispute that the Ninth Circuit adopted an "if 'federal,' then jurisdiction" rule: It looked for a single word—"federal"—and made that dispositive. While insisting that this Court has adopted this "clear rule," Resp. 22, Fannie cannot bring itself to defend it. Instead, Fannie proposes an alternative: Courts should treat that same word as a "virtually dispositive" presumption in favor of jurisdiction. Resp. 16. But neither approach has a basis in law or precedent. Instead, this Court should treat sue-and-be-sued clauses the way it does any statute: discern the best reading of the text, applying traditional tools of statutory construction. If this Court reads *Red Cross* as a command to depart from these traditional norms, it should overrule that case.

A. Both the Ninth Circuit's bright-line rule and Fannie's presumption are wrong.

While ultimately declining to defend it, Fannie purports to find the same "rule" in this Court's precedents that the Ninth Circuit did: "language authorizing suits … specifically in federal court *suffices* to establish federal jurisdiction over such suits." Resp. 22 (emphasis altered). Fannie's argument rests almost entirely on the premise that "this Court has recognized" this rule "for centuries." Resp. 22.

As we have already demonstrated, this Court has never said, much less held, that a reference to federal court "suffices" to establish jurisdiction. OB 43-47. Fannie is unable to quote a single sentence from any of this Court's cases saying so. Instead, Fannie stitches together a few words from each opinion, filling in critical gaps with its own language. Resp. 23-25. For example, Fannie describes *Osborn* as holding that a "*reference to suit* specifically 'in every Circuit Court of the United States' *sufficed to* 'confer[] jurisdiction on the Circuit Courts of the United States.'" Resp. 24 (emphasis added). But the crucial terms—"reference to suit" and "sufficed"—are Fannie's, not this Court's.

Even starker is Fannie's surgery on *Red Cross*. Fannie claims that *Red Cross* 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." Resp. 23 (emphasis added). Those two quoted phrases—"sue and be sued" and "sufficient"—are separated by 50 words in this Court's opinion. 505 U.S. 247, 252 (1992). None of them say anything about "specifically authorizing suit in federal court." *See* OB 41-42.

Ultimately, Fannie concedes that a faithful application of the bright-line rule the Ninth Circuit articulated leads to "absurdity." Resp. 28. Specifically, a charter explicitly authorizing suit in "federal court" does not confer jurisdiction when it indicates that an independent basis for jurisdiction is required. That would be "nonsensical." *Id.* In other words, Fannie concedes that this Court's precedents mean that the

term "federal court" is a *necessary* condition for conferring jurisdiction, but not a *sufficient* one, just as we argue.

For good reason—that is what this Court said in *Red Cross*: "[T]he *rule* [is] that a congressional charter's 'sue and be sued' provision *may* be read to confer federal court jurisdiction *if, but only if*, it specifically mentions the federal courts." 505 U.S. at 255 (emphasis added). Fannie does not dispute that the plain meaning of *this* rule is that a court "may," but need not, read a sue-and-be-sued clause referring to federal courts as conferring jurisdiction.

So Fannie tries a different tack: Even if the word "federal" is not dispositive, its presence in a sue-and-be-sued clause should be presumed to grant federal jurisdiction "absent specific, compelling evidence that Congress had a different intent." Resp. 29. The reference to federal courts, Fannie insists, is "virtually dispositive." Resp. 16.

Of course, this presumption is also made up. This Court has never said anything about a presumption in this context, much less a "virtually dispositive" one. Nor does Fannie offer a principled justification for such a presumption—just that it "obviates the need for … scrutiny of every charter's text, history, and purpose." Resp. 27. But "scrutiny" of a statute's "text" in light of "history" and "purpose" is not a vice to be "obviate[d]." It is the time-honored approach to statutory construction, and Fannie offers no reason to reject it. Nothing in this Court's cases suggests that the "text" of these statutes does not matter or that "his-

tory" and "purpose" are no longer relevant to understanding the text. The rule in this context—as in all instances of statutory construction—is that the Court's function is to discern the *best* reading of the statute, applying all the traditional tools of statutory construction.

B. If this Court reads *Red Cross* as rejecting settled norms of statutory construction, it should overrule the case.

If this Court reads *Red Cross* as adopting the Ninth Circuit's categorical rule or Fannie's substitute presumption, this Court should overrule it. A rule that departs so significantly from the norms that this Court has consistently applied is not worthy of stare decisis.

Although stare decisis "has more force in statutory analysis than in constitutional adjudication," this Court has "never applied [it] mechanically to prohibit overruling … earlier decisions." *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 695 (1978). This Court has "explicitly overruled statutory precedents in a host of cases." *Patterson v. McLean Credit Union*, 485 U.S. 617, 618 (1988) (per curiam) (collecting cases). And Fannie does not dispute that these sue-and-be-sued provisions involve a "rule of procedure that does not alter primary conduct," such that "[t]he role of *stare decisis*" is "reduced." *Hohn v. United States*, 524 U.S. 236, 251-52 (1998).

Accordingly, this Court should not allow the decision in *Red Cross* to stand in the way of interpreting Fannie's charter in accord with its text and history.

II. The Text And History Of Fannie's Sue-And-Be-Sued Clause Make Clear That It Confers Capacity To Sue, Not Jurisdiction.

If this Court takes a traditional approach to interpreting Fannie's charter, the outcome cannot be in doubt. The plain text of the sue-and-be-sued clause grants Fannie nothing more than the capacity to bring suit (or be sued) in state and federal courts that otherwise have jurisdiction. But we also prevail under Fannie's presumption, as the charter's text and history supply "specific, compelling evidence" that Congress did not intend it to confer jurisdiction—including an explicit disavowal of Fannie's reading on the Senate floor. This conclusion is reinforced by comparing Fannie's charter to Freddie Mac's.

A. The text limits jurisdiction rather than granting it.

1. We start with the text—a topic Fannie puts off until page 29 of its brief. Fannie concedes that the charter "obviously" would not grant federal jurisdiction if it said: "Fannie Mae may sue and be sued in federal court only if another statute independently confers subject-matter jurisdiction." Resp. 28 (quoting OB 40). But that is essentially what the clause says (rearranging only to conform to natural diction): "[Fannie] shall have power … to sue and to be sued … in any court … State of Federal," only if it is a "court of competent jurisdiction." The latter phrase is most naturally read to mean what this Court has long recognized it to mean: a court that has an "outside source[] of jurisdictional authority." *Califano v. Sanders*, 430 U.S. 99, 106 n.6 (1977); *see* OB 21-22. Even

Fannie acknowledges this Court's view that the phrase "a court of 'competent jurisdiction' [is] usually used to refer to subject-matter jurisdiction." *United States v. Morton*, 467 U.S. 822, 828 (1984); *see* Br. Opp. 25. If Congress's intention was to communicate that federal courts have automatic jurisdiction over any suit involving Fannie, it was not at all natural to limit the text with a requirement that any federal court must be a "court of competent jurisdiction."

Fannie repeatedly argues that a "court of competent jurisdiction" "does not *necessarily* refer to a court with independent subject-matter jurisdiction." Resp. 32 (emphasis altered); *see* Resp. 31, 33 n.4, 39. One cannot ordinarily prevail by demonstrating that the text Congress chose "does not necessarily" mean what it seems to say. One must prove a better reading, and Fannie notably does not suggest its reading is superior as a matter of plain English.

Instead, Fannie cycles through a series of possible alternative meanings. But while purporting to "give[] clear meaning to the phrase 'court of competent jurisdiction,'" Resp. 32, Fannie refuses to commit to any one reading. The reason is that none of Fannie's alternatives is sensible.

Fannie starts by positing that the term "*can* in context refer to a court with personal jurisdiction." Resp. 33 (emphasis added). But Congress knows how to specify "personal jurisdiction" if it wants. *See, e.g.*, 28 U.S.C. § 1330; *id.* § 2467; 48 U.S.C. § 2166. And Fannie never explains why Congress would have thought it necessary to specify that personal jurisdiction was required. It's always required. *See Int'l Shoe*

Co. v. Washington, 326 U.S. 310, 316 (1945). Moreover, that cannot logically be what it means here. Just plug in Fannie's proposed meaning and you get: Congress vested jurisdiction "in any court with personal jurisdiction, State or Federal." That is obviously wrong. The Court of Federal Claims and state courts in Texas (where Fannie has a major office) both have personal jurisdiction over Fannie. But Congress could not have intended that they would have subject-matter jurisdiction over *this* suit, as a natural reading of Fannie's alternate language would require.

So Fannie shifts to the suggestion that "court of competent jurisdiction" refers to "venue." That too makes no sense. First, Congress also knows how to say "venue." Second, plug in Fannie's words, and you get: Congress vested jurisdiction "in any court of proper venue, State or Federal." Venue for this suit likely would be fine in Los Angeles traffic court, but Congress cannot grant that court subject-matter jurisdiction. Third, Fannie's argument for why Congress would have focused on venue is incoherent. Fannie contends that Congress sought to cure a "potential conflict" with a provision designating Fannie a District of Columbia resident "for purposes of venue in civil actions." Resp. 44 (quoting Housing Act of 1954). Fannie hypothesizes that Congress thought this "conflicted with the then-existing sue-and-be-sued clause, which allowed suit in '*any* court of law or equity.'" *Id.* That is highly unlikely, and in any event Fannie does not explain how substituting "*any* court of competent jurisdiction" solved the problem.

Thus, Fannie shifts again: Maybe "court of competent jurisdiction" "mean[s] that an action may be

maintained in a court of *general jurisdiction* whether federal, state or territorial." Resp. 34 (internal quotation marks omitted); *see* Resp. 44 & n.6. Congress allegedly wanted to avoid "implicating the Court of Claims' exclusive jurisdiction" over certain types of suits. Resp. 42-43. But once again, Fannie offers zero evidence Congress actually had this concern, and it is doubtful it would have chosen this remedy if it had.[2] Moreover, inserting a phrase meaning "general jurisdiction" would mean that the suit could *only* be brought in such a court (since the charter grants no power to appear anywhere else). So Fannie cannot

---

[2] Fannie's argument is premised entirely on two 1940s Court of Appeals cases holding that the Court of Claims did not have exclusive jurisdiction over suits against the Federal Housing Administration and two related agencies. *See* Resp. 39-41(citing *George H. Evans & Co. v. United States*, 169 F.2d 500, 502 (3d Cir. 1948) and *Ferguson v. Union Nat'l Bank of Clarksburg*, 126 F.2d 753, 755-57 (4th Cir. 1942)). Contrary to Fannie's suggestion, the courts' conclusion had nothing to do with the fact that the FHA was empowered to "sue and be sued in any court of competent jurisdiction." 12 U.S.C. § 1702. Nor did the courts clearly hold that this provision otherwise conferred jurisdiction on the district courts. As the Government explains, the courts may have believed that jurisdiction was proper because the controversies arose under federal law. U.S. Br. 31. And many courts—including the Third Circuit—have since held that § 1702 does *not* confer jurisdiction. *See Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174, 181 (8th Cir. 1978) (citing *Reconstruction Fin. Corp. v. MacArthur Mining Co.*, 184 F.2d 913 (8th Cir. 1950)); *Lindy v. Lynn*, 501 F.2d 1367, 1368 (3d Cir. 1974); *C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 903 F.2d 114, 118 (2d Cir. 1990); *Indus. Indem., Inc. v. Landrieu*, 615 F.2d 644, 647 (5th Cir. 1980). It is therefore unlikely that Congress had these cases in mind when it inserted "of competent jurisdiction" into Fannie's charter.

bring a huge contract claim against the federal government in the Court of Federal Claims or fight a parking ticket in traffic court? That cannot be.

Perhaps to address this problem, at times Fannie shifts to the vague assertion that "court of competent jurisdiction" is designed "to ensure that suit is brought in the *proper federal court*," *e.g.*, Resp. 22 (emphasis added), or the "appropriate federal court," *e.g.*, Resp. 3. But that interpretation fails as well, because "proper court" doesn't tell us anything. What is a "proper court," if not a court that meets all (not some) of the jurisdictional requirements (personal and subject matter)? In the end, Fannie cannot escape the plain fact that "of competent jurisdiction" is best read to mean "with an independent source of subject-matter jurisdiction."

2. Fannie's only other textual argument concerns the phrase "State or Federal." It argues that "[i]f Congress wanted to eliminate the jurisdictional grant" in Fannie's charter, it would have deleted that phrase, rather than inserting "court of competent jurisdiction." Fannie adds that, "under petitioners' theory, Congress simply left the phrase in … with the intention that it do no work." Resp. 2. Fannie is wrong on both counts.

The first argument depends on the assumption that Congress believed the charter had a jurisdictional grant to "eliminate" in 1954. As we demonstrate below (§ II.B), that is not the case. But even accepting the premise, "omit[ting] the word 'Federal' from the statute" was not the only—or even the most natural—way to achieve that goal, Resp. 47 (citation

omitted), for reasons we have already explained, OB 28-29, 31-32.[3]

Fannie is also incorrect that our reading "renders the words 'State or Federal' superfluous." Resp. 31. As the chair of the Senate subcommittee responsible for the original charter language explained, "the reason for using the words 'State or Federal'" is that this was "the language usually used in setting up corporations." 73 Cong. Rec. 11,973, 12,008 (1934). In that era, the phrase was ubiquitous in sue-and-be-sued clauses. *See, e.g.*, Pub. L. No. 65-121, § 6, 40 Stat. 506, 507 (1918) (War Finance Corporation); Pub. L. No. 72-2, § 4, 47 Stat. 5, 6 (1932) (Reconstruction Finance Corporation); Pub. L. No. 72-304, § 12, 47 Stat. 725, 735 (1932) (Federal Home Loan Banks); Pub. L. No. 73-22, § 203, 48 Stat. 74, 93 (1933) (Corporation of

[3] Fannie similarly falls short in arguing that "State or Federal" must be a grant of jurisdiction because Congress did not include that phrase in other 1954 amendments. Resp. 47-49. For example, Fannie cites no case holding that FSLIC's pre-1954 charter conferred jurisdiction, such that removing "State or Federal" was jurisdictionally meaningful. HLBB's charter did not even have a sue-and-be-sued clause before 1954, so the absence of "State or Federal" in the amendment is even less noteworthy. *See* 12 U.S.C. § 1464(d) (1952). Far more important (for reasons already discussed, OB 23-25), Congress *added* language providing that the district courts "shall have jurisdiction" over specific HLBB suits—strong evidence that Congress would have used similarly direct language had it wanted to confer federal jurisdiction in Fannie's charter. Housing Act of 1954, Pub. L. No. 83-560, § 503(2), 68 Stat. 590, 635. In any event, both clauses *did* authorize suit in all courts state or federal; they just used slightly different formulations, authorizing HLBB, for example, to "sue and be sued … in any court of competent jurisdiction in the United States or its territories." *Id.*

Foreign Security Holders); Pub. L. No. 73-43, § 4(a), 48 Stat. 128, 129 (1933) (Home Owners' Loan Corporation); Pub. L. No. 73-66, § 8, 48 Stat. 162, 172 (1933) (FDIC).

In any event, contrary to Fannie's assertion, Congress might well have thought that mentioning both "State and Federal" courts served an important purpose. Referring to state courts would make clear that the sue-and-be-sued clause waived sovereign immunity in those courts. *See Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 580 (1946); *Minnesota v. United States*, 305 U.S. 382, 388-89 (1939). And once Congress specified state courts, it would have needed to specify federal courts too, lest it leave the impression that it was intentionally omitting federal courts from the waiver.

B. The charter's history confirms that the sue-and-be-sued clause does not grant jurisdiction.

Instead of starting with the text, Fannie starts with a fallacy: that Congress "inarguably gave Fannie Mae access to the federal courts" in its original charter. Resp. 30 (internal quotation marks omitted). Fannie then adds a second mistake: that Congress did not definitively reject that reading of Fannie's charter when it added the "of competent jurisdiction" limitation in 1954. Resp. 31. We address each in turn.

1. Fannie starts its account of the sue-and-be-sued clause's history in 1938. Resp. 29. But the story actually begins in 1934, when Congress first authorized the creation of national mortgage associations in

the National Housing Act. That was where Congress first declared that these associations would have the power "[t]o sue and be sued, complain and defend, in any court of law or equity, State or Federal." Pub. L. No. 73-479, § 301(c), 48 Stat. 1246, 1253. In that same statute, Congress provided that a national mortgage association like Fannie would be "deemed a citizen of the State in which its principal office is located." *Id.* As Fannie acknowledges, "citizen" is a "diversity term-of-art." Resp. 55. This specification would have been meaningless if the sue-and-be-sued clause automatically conferred federal jurisdiction.

There is additional "specific, compelling evidence," Resp. 29, that Congress did not intend the sue-and-be-sued clause to grant jurisdiction. During the floor debate about this provision, Senator Logan worried that "the words 'State or Federal'" in the clause might be read as "conferring upon these corporations the right to go into the Federal courts although the matter may be purely a State matter." 73 Cong. Rec. at 12,008. Senator Bulkley, the chairman of the subcommittee responsible for the bill, assured him that this interpretation "was not so intended." *Id.* Instead, he explained, "this part of the bill is merely prescribing the corporate capacity, and *not conferring a right to go into a Federal court where it would not otherwise exist*." *Id.* (emphasis added).

As if to anticipate the very argument Fannie makes here, Senator Logan restated his concern, predicting: "Some one [*sic*] will claim that the bill gives the right to go into the Federal court when otherwise there would be no right." *Id.* Senator Bulkley reas-

sured him again by pointing to the Reconstruction Finance Corporation's charter, which contained "the same provision referring specifically to State or Federal courts." *Id.* "I do not think," Senator Bulkley assured his colleague, "it has been interpreted as a specific right to get Federal jurisdiction. *It is intended merely as a designation of corporate capacity*." *Id.* With that, Senator Logan was satisfied—if the language meant only that "the association may go into the Federal courts if the facts justify it," he found it "unobjectionable." *Id.* "That is what it is intended to mean," Senator Bulkley confirmed for a third time. *Id.* Less than two weeks later, Congress passed the Act, with the clause's language unchanged. 48 Stat. at 1253.

2. Given how Congress understood the original sue-and-be-sued clause, Fannie is wrong to couch the inquiry in this case as to whether "the 1954 amendment to Fannie Mae's charter … *transformed* the sue-and-be-sued clause from a grant of jurisdiction to a mere grant of general corporate capacity." Resp. 31 (emphasis added). But even if, contrary to Senator Bulkley's assurances, the original language could be properly read as a grant of federal jurisdiction, the 1954 amendment squarely negated any such inference—by specifying that Fannie could sue and be sued only in courts "of competent jurisdiction."

As our opening brief explains (at 27-29), Congress likely added this phrase for two complementary reasons. First, in 1942, this Court's opinion in *D'Oench, Duhme & Co. v. FDIC* suggested that language in the FDIC's charter similar to Fannie's pre-existing charter language might confer jurisdiction. *See* 315 U.S.

447, 455 (1942). *But cf.* OB 45-47 (explaining that this reading of *D'Oench* is mistaken). Fannie ignores this fact entirely.

The second reason is that, by 1954, Congress wanted to ensure that, once privatized, Fannie would enjoy no special access to the federal courts. OB 27-29. Fannie concedes that Congress set it on the path to privatization in 1954. Resp. 45. But it argues that the result would not have effected an immediate change in Fannie's jurisdictional status "absent further legislation," because Fannie was still "a federal 'agency'" amenable to federal jurisdiction. Resp. 45-46 (emphasis omitted).

Fannie misses the point. Because Congress knew that the transition would occur "gradually," H.R. Rep. No. 83-2271, at 81 (1954) (Conf. Rep.), there was no urgency in removing all plausible grants of jurisdiction at once. As Fannie acknowledges (at 45 n.7), Congress eliminated Fannie's status as an agency—and therefore the only remaining basis of automatic jurisdiction—before privatization was complete.

3. Another 20 years later, in 1974, Congress again confirmed that Fannie's sue-and-be-sued clause does not confer jurisdiction, by amending Fannie's charter to ensure that general diversity jurisdiction principles would apply to suits involving Fannie. OB 35-37. As in 1934, doing so would have been pointless if the federal courts already had automatic jurisdiction over Fannie.

Fannie's attempt to explain away this fact is unavailing. It first contends that 12 U.S.C.

§ 1717(a)(2)(B) is irrelevant because it does not use the word "citizen." Resp. 54-55. That is yet another "magic words" test—and one that the 1934 version passes easily. *See supra* 13-14. Moreover, that nuance has not prevented every other court that has considered the question from concluding that § 1717(a)(2)(B) establishes Fannie's citizenship for purposes of diversity jurisdiction. OB 37-38. Fannie ignores those cases, and cites none to the contrary.

Fannie also does not deny that *it* has cited § 1717(a)(2)(B) as establishing its citizenship for diversity jurisdiction. Contrary to its protestations, Resp. 57 n.10, it has repeatedly invoked § 1717(a)(2)(B) as the *only* ground for jurisdiction, including at least six times since we filed our opening brief in this case.[4]

Fannie fares no better in arguing that the 1974 amendment reveals nothing about the sue-and-be-sued clause because "[p]ost-enactment legislative history" is "not a legitimate tool of statutory interpretation." Resp. 54 (quoting *Bruesewitz v. Wyeth LLC*, 562

[4] Notice of Removal at 2-3, *Witte v. Fed. Nat'l Mortg. Ass'n*, 4:16-cv-03052 (S.D. Tex. Oct. 14, 2016), Dkt. 1; Notice of Removal at 2, *McFerren v. Fed. Nat'l Mortg. Ass'n*, 5:16-cv-02365-JRA (N.D. Ohio Sept. 23, 2016), Dkt. 1; Notice of Removal at 2, *Brunzos v. Nationstar Mortg., LLC*, 1:16-cv-00513-S-PAS (D.R.I. Sept. 13, 2016), Dkt. 1; Notice of Removal at 2-3, *Elzein v. Fed. Nat'l Mortg. Ass'n*, 2:16-cv-13185-AC-RSW (E.D. Mich. Sept. 2, 2016), Dkt. 1; Notice of Removal at 2, *Putty v. Fed. Nat'l Mortg. Ass'n*, 3:16-cv-02562-D (N.D. Tex. Sept. 7, 2016), Dkt. 1; Notice of Removal at 4-5, *Van Dyk v. Quicken Loans, Inc.*, 2:16-cv-05463-ES-SCM (D.N.J. Sept. 8, 2016), Dkt. 1.

U.S. 223, 242 (2011)). That statement is about "legislative history"—specifically, a committee report. The 1974 amendment was actual legislation that amended the very charter at issue here. This Court has "repeatedly recognized" that, unlike post-enactment legislative history, "subsequent *legislation* reflecting an interpretation of an earlier Act *is entitled to great weight* in determining the meaning of the earlier statute." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 349 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (emphasis added); *see South Carolina v. Regan*, 465 U.S. 367, 378 n.17 (1984).

C. Comparing Fannie's charter to Freddie's confirms that it is not a grant of automatic federal jurisdiction.

Our opening brief presents Freddie's charter as a textbook illustration of how Congress grants jurisdiction when that is what it intends. OB 24. Fannie agrees, noting "Congress's emphatic decision" to expressly confer jurisdiction in multiple different ways in Freddie's charter. Resp. 52-53. Fannie admits that its own charter does none of these things. Resp. 53.

Fannie asserts that any inference arising from this difference "is necessarily weak, because the two relevant provisions were not considered or enacted together." Resp. 51 (internal quotation marks omitted). But on the next page, Fannie insists that "Congress intended … that Freddie Mac would possess essentially the same powers and functions as Fannie Mae." Resp. 52. So surely the drafters were looking at Fannie's charter when drafting Freddie's.

In an odd reversal of the normal rules of statutory construction, Fannie faults us for "focus[ing] on differences in Freddie Mac's [and Fannie's] charter language" without "identify[ing] any policy reason Congress would have wanted Freddie Mac to have greater access to federal courts than Fannie Mae." Resp. 20. But when Congress chooses language that treats two similar entities differently, its textual choice is operative even when unexplained.

In any event, there *is* an explanation for the differential treatment. When Congress created Freddie, it specified that Freddie's board of directors would be composed of members of the Federal Home Loan Bank Board, Pub. L. No. 91-351, § 303(a), 84 Stat. 450, 452 (1970), an independent agency whose members were appointed by the President, 12 U.S.C. § 1437(b) (1970); Reorganization Plan 3 of 1947, 12 Fed. Reg. 4981 (July 26, 1947). And Congress had already indicated that the Board itself had special access to federal jurisdiction. *See* 12 U.S.C. § 1425b(c) (1970); OB 24-25. By contrast, under the 1968 amendments pertaining to Fannie, a controlling two-thirds of its board was to be elected by private shareholders. Pub. L. 90-448, § 802(y), 82 Stat. 476, 539 (1968). Congress could readily have seen Freddie as having a more "uniquely federal purpose" than Fannie. Resp. 50 (bold omitted).

III. Unrelated Statutes Do Not Alter The Plain Meaning Of Fannie's Charter.

Fannie devotes large swaths of its brief (at 34-39) to a discussion of various unrelated statutory provisions, in an effort to demonstrate that, under certain

circumstances, the phrase "of competent jurisdiction" *could* be compatible with a congressional grant of jurisdiction. But none of the provisions clearly confers jurisdiction, and even if they did, none is a sue-and-be-sued clause. So they are of limited utility in determining what Fannie's charter means.

A. Fannie starts with § 216(b) of the Fair Labor Standards Act (FLSA), which created a cause of action under federal law to recover unpaid wages. Resp. 34-36. At the relevant time (before 1954), that provision said that such suits "may be maintained in any court of competent jurisdiction." 29 U.S.C. § 216(b) (1952). Fannie maintains that this Court has held that § 216(b) granted jurisdiction to the federal courts—and Congress would have expected similar language in Fannie's charter also to be jurisdictional.

For support, Fannie cites a single sentence in *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942). That is not what *Williams* held. Rather, it stated in passing that "[j]urisdiction of the action was conferred by [the predecessor to 28 U.S.C. § 1337], *and* by § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b)." 315 U.S. at 390 (emphasis added). The former provided that district courts had jurisdiction over actions arising under statutes regulating commerce. Read most naturally, all *Williams* held was that suit was properly brought in federal court because § 216(b) provided a cause of action in *any* "court of competent jurisdiction" (not specifically federal court) and § 1337's predecessor provided "competent" federal jurisdiction. Notably, Fannie does not dispute that "it is 'unclear' whether *Williams* actually held that § 216(b) constituted an independent grant

of jurisdiction." Resp. 34-35 (emphasis omitted); *see* U.S. Br. 29 n.3. That being so, Congress cannot be presumed to have adopted the view that the language it used in an unrelated provision, for a different purpose, must be read that way.[5]

Even if § 216(b) were properly construed as a jurisdictional provision, it does not follow that the same must be true of Fannie's charter. It is easier to argue that Congress conferred jurisdiction by referring to federal court in a provision creating a specific cause of action than it is to reach the same result regarding a clause merely conferring capacity to sue. *See Red Cross*, 505 U.S. at 269-70 (Scalia, J., dissenting).

B. Next up is § 205 of the Federal Housing and Rent Act of 1947, Resp. 37-38, but it actually disproves Fannie's position. Much like the FLSA provision at issue in *Williams*, § 205 provided a cause of action to enforce statutory rights. And also like the FLSA provision, the original version of § 205 provided that any such claim could be brought "in any Federal, State, or Territorial Court of competent jurisdiction." Pub. L. No. 80-388, 61 Stat. 193, 199. Again, Fannie maintains that Congress understood this language to be a grant of jurisdiction, and would have read Fannie's sue-and-be-sued clause the same way.

To the contrary, at the time Congress incorporated similar language into Fannie's charter, the

---

[5] Fannie also cites a 2003 case, *Breuer v. Jim's Concrete of Brevard, Inc.*, which has no bearing on what Congress thought in 1954 and, like *Williams*, merely identified an alternate basis for jurisdiction. 538 U.S. 691, 694 (2003).

lower courts had split on whether § 205 operated as a grant of jurisdiction. While some courts held that it did, others held that the provision authorized only suits that had some *other* jurisdictional basis. *See, e.g.*, *Fields v. Washington*, 173 F.2d 701, 702-03 (3d Cir. 1949). In the latter camp, that meant that some colorable claims did not meet 28 U.S.C. § 1331's then-existing amount-in-controversy requirement and would not be heard at all. *See id.* at 703. Congress solved the problem a few years later by amending the statute to allow suit "in any Federal court of competent jurisdiction *regardless of the amount involved*." Defense Production Act Amendments of 1951, Pub. L. No. 82-96, § 205(c), 65 Stat. 131, 147 (emphasis added).

Contrary to Fannie's contention, this history does not show that Congress knew that the words "federal" plus "of competent jurisdiction" signaled automatic federal jurisdiction. Just the opposite: It shows that, just three years before the 1954 amendment, Congress understood that those words would *not* do the trick by themselves. Instead, ordinary jurisdictional rules applied, and to allow for jurisdiction it had to explicitly plug the gap in § 1331 jurisdiction.

C. Finally, Fannie cites a series of statutes—passed both before and after 1954—authorizing actions to enforce federal law (mainly by federal agencies) *exclusively* in federal court. Resp. 36-37, 38-39. There is no basis to read these statutes as grants of jurisdiction, or to believe Congress viewed them that way, because federal jurisdiction always existed for each, either under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1337 (regulation of commerce), or 28

U.S.C. § 1345 (suits by agencies). *See, e.g., United States v. Norwood Capital Corp.*, 273 F. Supp. 236, 238-39 (D.S.C. 1967) (jurisdiction over suit by the Small Business Administration is proper under § 1345 and 15 U.S.C. § 687(d)).

Fannie seems to think that Congress must have believed the provisions enacted before 1954 conferred jurisdiction because, at that time, § 1331 had an amount-in-controversy requirement. Resp. 36-37. As we have just seen, when Congress wants to eliminate that requirement, it generally does so explicitly. *See supra* 22. And Fannie offers no evidence that Congress believed that any of the pre-1954 provisions conferred jurisdiction, nor any opinion of this Court interpreting them as such. For example, *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.* held only that § 9 of the Interstate Commerce Act excludes state courts from asserting jurisdiction, 237 U.S. 121, 128-29 (1915); federal courts already had jurisdiction under 28 U.S.C. § 1337.

Even if Congress did think these provisions conferred jurisdiction, the same would not be true of Fannie's charter. In those statutes, Congress created substantive rights and deemed them enforceable *only* in federal court. In that circumstance, it might be appropriate to posit that Congress intended every suit it authorized to be brought in federal court; otherwise, Congress would have authorized suits with no forum. *Cf. Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 520-23 (1990).

Fannie's charter is entirely different: It provides no substantive federal rights—only the capacity to

sue and be sued—and allows any lawsuit that does not belong in federal court to be brought in state court. There is therefore no good reason to read Fannie's charter as Fannie suggests, and many reasons not to.

CONCLUSION

The Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

E. Joshua Rosenkranz
Counsel of Record
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Date: October 19, 2016