No. 14-1055

IN THE
# Supreme Court of the United States

CRYSTAL LIGHTFOOT, ET AL.,
*Petitioners*,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
*Respondent*.

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

## BRIEF IN OPPOSITION


ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

*Attorneys for Respondent*

## QUESTION PRESENTED

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" concerning the jurisdictional effects of a "sue and be sued" provision in a federal corporation's charter. *Id.* at 257. 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.* (emphasis added). The charter of respondent Fannie Mae provides that Fannie Mae may "sue and … be sued … in any court of competent jurisdiction, State *or Federal*." 12 U.S.C. § 1723a(a) (emphasis added).

The question presented is whether the Ninth Circuit erred in agreeing with the D.C. Circuit—the only other court of appeals to have considered the question—that under *Red Cross*, the express reference to federal courts in the Fannie Mae charter's sue-and-be-sued clause establishes subject matter jurisdiction in cases brought by or against Fannie Mae.

## 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. Cendant Mortgage Corporation, Attorneys Equity National Corporation, and Robert O. Matthews were also defendants below, but are no longer involved in this litigation.

## 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 which has outstanding securities in the hands of the public, and no publicly held corporation owns in excess of ten percent of its outstanding stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**



**STATUTES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

**TABLE OF AUTHORITIES**
**(continued)**

**Page(s)**

## INTRODUCTION

In *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), this Court construed a line of precedents dating back to *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), concerning the jurisdictional effects of "sue and be sued" clauses in federal corporate charters. Those precedents, the *Red Cross* Court held, together establish the following rule: if a sue-and-be-sued provision specifically references federal courts, then it establishes federal jurisdiction over suits by and against the chartered entity, even absent a separate basis for federal jurisdiction, such as a federal question or diversity of citizenship.

That rule resolves this case. Fannie Mae's corporate charter authorizes it to "sue and to be sued … in any court of competent jurisdiction, State *or Federal*." 12 U.S.C. § 1723a(a) (emphasis added). As the Ninth Circuit held below, that language establishes federal jurisdiction under *Red Cross*.

That holding implicates no circuit conflict. The D.C. Circuit, the only other court of appeals to have considered the question, also applied *Red Cross* and held that Fannie Mae's charter grants federal subject matter jurisdiction. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 784 (D.C. Cir. 2008). Petitioners cite several appellate decisions interpreting *other* federal charters as not granting federal jurisdiction, but every cited case was decided before *Red Cross*. To the extent there was a conflict among the courts of appeals concerning whether an explicit reference to federal courts in a sue-and-be-sued clause grants federal jurisdiction, *Red Cross*

resolved it, and petitioners offer no valid basis for overruling that decision.

Finally, this case is in any event a poor vehicle through which to reconsider *Red Cross* or to reinterpret Fannie Mae's charter. The underlying action is the third of five essentially identical, frivolous complaints filed in different courts throughout the country. The courts below properly dismissed the complaint as barred by res judicata and collateral estoppel, as have courts in other jurisdictions where petitioners filed similar complaints. If this Court holds that federal courts lack jurisdiction over this case, it likely would not change the ultimate outcome, as the state court is sure to dismiss petitioners' claims as barred by res judicata and collateral estoppel. To the extent the question presented is worthy of review, the Court should await a case where the answer actually could make a difference in the case.

The petition should be denied.

## STATEMENT OF THE CASE

### A. Statutory And Regulatory Background

Originally established in 1938 in response to the Great Depression, Fannie Mae was created to fulfill an "important public mission[]," 12 U.S.C. § 4501(1), *viz.*, promoting a vibrant secondary mortgage market and making home ownership more accessible for low and middle-income Americans. National Housing Act Amendments of 1938, Pub. L. No. 75-424, 52 Stat. 8, 23 (1938); 12 U.S.C. §§ 1716-1719; *see* S. Rep. No. 102-282, at 9 (1992) (stating that Fannie Mae was "legislatively chartered for public purposes"). Because this mission was a critical component of federal housing policy, Fannie Mae was constitut-

ed as a governmental entity and organized under federal law. 12 U.S.C. § 1716. Its original 1938 charter provided that it could "sue and be sued, complain and defend, in any court of law or equity, State or Federal." National Housing Act, Pub. L. No. 73-479, § 301(c)(3), 48 Stat. 1246, 1253 (1934).

In 1954, with the enactment of the Housing Act of 1954, Fannie Mae was converted to a "mixed-ownership corporation," and the "sue-and-be-sued" provision in its charter was amended to authorize Fannie to "sue and to be sued, and to complain and defend, in any court of competent jurisdiction, State or Federal." Housing Act of 1954, Pub. L. No. 83-560, § 309(a), tit. II, 68 Stat. 590, 620-21 (1954). Notwithstanding these changes to its structure (and others that followed[1]), Fannie Mae retained the same fundamental objective of effectuating federal housing policy by making home ownership more accessible to low and middle-income Americans. *See* S. Rep. No. 102-282, at 25 (noting "the Congressional design in chartering the enterprises as privately owned and managed entities with special, public purposes"); *id.* at 34 (recognizing Fannie Mae's "special relationship with the federal government"); Corporate Governance, 70 Fed. Reg. 17,303, 17,309

[1] In 1968, Fannie Mae was established as a private shareholder owned corporation, Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 802(z)-(ee), 82 Stat. 476, 540-41 (1968), although it remained heavily regulated by the federal government, *see*, *e.g.*, Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, 106 Stat. 3941 (establishing the Office of Federal Housing Enterprise Oversight as Fannie Mae's primary regulator).

(Apr. 6, 2005) (acknowledging Fannie Mae's "unique mission").

Because Fannie Mae is tasked with effectuating federal policies and achieving federal goals, Congress has ensured that Fannie Mae's structure and operations remain subject to federal oversight. During the period when this case was removed to federal court, Fannie Mae was required, among other things, to submit annual reports to both houses of Congress and various federal agencies and offices. 12 U.S.C. § 1723a(d)(3)(A), 1723a(j), 1723a(m)-(n). Fannie Mae was also required to meet annual housing goals established by the U.S. Secretary for Housing and Urban Development. *See* 12 U.S.C. §§ 4562-64. And Fannie Mae's prior regulator, the Office of Federal Housing Enterprise Oversight ("OFHEO"), enacted numerous federal regulations pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Pub. L. No. 102-550, 106 Stat. 3941, covering a number of topics from executive compensation to Fannie Mae's capitalization, *see* 12 C.F.R. § 1770.1 (executive compensation); *id.* § 1777.1 (capitalization).

Congress expanded the federal government's oversight of Fannie Mae when it enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654 (2008). HERA established the Federal Housing Finance Agency ("FHFA") as Fannie Mae's regulator and granted FHFA's Director authority to place Fannie Mae into conservatorship or receivership. 122 Stat. at 2662, 2734. Pursuant to that authority, FHFA's Director placed Fannie Mae into conservatorship on September 6, 2008. FHFA subsequently has promulgated a

number of regulations similar to those in effect prior to the conservatorship, including the requirement that Fannie Mae meet annual housing goals established by FHFA, *see* 2012-2014 Enterprise Housing Goals, 77 Fed. Reg. 67,535 (2012), as well as new regulations concerning conservatorship in particular, *see*, *e.g.*, 12 C.F.R. § 1237.12 (precluding capital distributions absent FHFA approval).

### B. Factual Background

In August 1999, Cendant Mortgage Corporation ("Cendant") lent petitioner Hollis-Arrington $180,400 secured by a deed of trust on property she owned in West Hills, California. Compl. ¶ 9.[2] Roughly a month later, Cendant sold the loan to Fannie Mae, although Cendant remained the loan's servicer. *Id.* ¶ 10. Fannie Mae subsequently sold the loan back to Cendant because it failed to meet Fannie Mae's credit standards.

The first monthly payment on the loan came due in October 1999. Hollis-Arrington failed to make that payment, or any subsequent payment. *Id.* ¶ 12. She asked Cendant for, and was provided, information about programs to cure the default. Hollis-Arrington sought to enter into a forbearance agreement, and alleges that Cendant led her to believe that a forbearance agreement had been approved. *Id.* ¶ 15. Cendant ultimately rejected the application and initiated foreclosure proceedings.

---

[2] All citations to "Compl." or "DE" (without a corresponding case number) refer to complaint and district court docket entries in the underlying action, unless otherwise noted.

In May 2000, to prevent foreclosure, Hollis-Arrington filed a bankruptcy petition. That petition was dismissed the next month for failure to pay the required filing fees. *See* DE 31-33, No. 00-bk-14478-GM (Bankr. C.D. Cal. 2000). In July 2000, she filed a second bankruptcy petition, which was again dismissed for failing to pay the required filing fees. This time, the court's dismissal order barred Hollis-Arrington from filing another bankruptcy petition for 180 days. *See* DE 27, 28, No. 00-bk-16423-GM (Bankr. C.D. Cal.).

On September 11, 2000, Hollis-Arrington deeded her home to her daughter, petitioner Crystal Lightfoot. *See* Compl. Ex. E, No. 03-cv-02416-TPJ (D.D.C. Nov. 21, 2003). Lightfoot filed her own bankruptcy petition. This petition too was dismissed for failure to make the required payments, and the court barred Lightfoot from filing another bankruptcy petition for 180 days. DE 28, 29, No. 00-bk-18360-AG (Bankr. C.D. Cal. 2000).

Cendant scheduled a new foreclosure sale on November 28, 2000, but continued the sale to January 11, 2001, based on Hollis-Arrington's assurance that she was trying to refinance. Although no refinancing ever occurred, the foreclosure was further delayed by court order in the first lawsuit Hollis-Arrington filed in federal district court in October 2000. *See* DE 25, No. 00-cv-11125-CBM-AJW (C.D. Cal. Jan. 10, 2001); *see also infra* at 7-8. On February 5, 2001, four days after the district court lifted the temporary stay it had granted (DE 44, No. 00-cv-11125-CBM-AJW (C.D. Cal. Feb. 1, 2001)), Lightfoot filed a second bankruptcy case, which was dismissed the next month. Lightfoot was again barred from making a

new bankruptcy filing for 180 days. DE 30, 31, No. 01-bk-10910-AG (Bankr. C.D. Cal. 2001).

Lightfoot then transferred 50% of the property back to Hollis-Arrington (Compl. ¶ 102, No. 03-cv-02416-TPJ (D.D.C. Nov. 21, 2003)), who filed her third bankruptcy petition on March 22, 2001. Cendant at that point obtained "in rem" relief from the automatic stay in order to proceed with foreclosure, which was scheduled for June 29, 2001. DE 33, No. 01-12579-GM (Bankr. C.D. Cal.). Despite Hollis-Arrington's attempt to seek a stay in her second suit in federal district court, the foreclosure sale was finally held that day. Compl. ¶¶ 61-72, No. 03-cv-02416-TPJ (D.D.C. Nov. 21, 2003). Harold Tennen and Ed Feldman bought the property at the sale and, through state court action, evicted Hollis-Arrington in September 2001. *Id.* ¶¶ 80-81. They subsequently sold the property to Robert O. Matthews. Compl. ¶ 5.

**C. Related Actions**

This appeal arises from the third of at least five suits filed by petitioners in connection with the foreclosure of the property. In the first suit, which Hollis-Arrington filed against Cendant in the Central District of California on October 18, 2000, she alleged that Cendant had "fraudulently promised to provide her with a forbearance agreement after she fell delinquent but reneged and foreclosed on the property instead." *Hollis-Arrington v. PHH Mortg. Corp.*, 2005 WL 3077853, at *2 (D.N.J. Nov. 15, 2005). The district court granted Cendant's motion for summary judgment, DE 102, No. 00-cv-11125-CBM-AJW (C.D. Cal. July 15, 2002), and the Ninth

Circuit affirmed, *Hollis-Arrington v. Cendant Mortg. Corp.*, 61 F. App'x 462 (9th Cir. 2003).

In June 2001, while the first case was pending, Hollis-Arrington filed a second action against Cendant, Fannie Mae, and Attorneys Equity National Corporation, again in the Central District of California. This time, her theory was that "that Cendant Mortgage Corporation and the Fannie Mae Corporation violated the Racketeer Influenced and Corrupt Organizations 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 (9th Cir. 2003). In May 2002, the district court dismissed the case, DE 131, at 7, No. 01-cv-05658 (C.D. Cal. May 28, 2002), and the Ninth Circuit affirmed, *Hollis-Arrington*, 61 F. App'x at 463.

After the district court dismissed Hollis-Arrington's complaint in the second suit, she and her daughter, Crystal Lightfoot, filed this case in Los Angeles Superior Court on July 18, 2002. They sued the same parties Hollis-Arrington had sued in the second action, and made the same allegations of a conspiracy to make loans to non-creditworthy borrowers. *PHH Mortg. Corp.*, 2005 WL 3077853, at *3. The district court granted motions by Cendant and Fannie Mae to dismiss on res judicata grounds, and subsequently denied a motion to reopen the judgment under Rule 60(b). The Ninth Circuit affirmed. *See infra* at 9-13 (detailing the full procedural history of this litigation).

Hollis-Arrington subsequently filed a fourth action in federal court in the District of Columbia. *Hollis-Arrington v. PHH Mortg. Corp.*, 205 F. App'x 48, 50 (3d Cir. 2006) (per curiam) (discussing No. 03-cv-02416-TPJ (D.D.C. 2003)). The district court granted defendants' motion to dismiss on res judicata grounds, DE 41, No. 03-cv-02416-TPJ (D.D.C. Feb. 17, 2004), and the Court of Appeals for the D.C. Circuit affirmed, Order, *Hollis-Arrington v. Fannie Mae*, No. 04-5068, at 2 (D.C. Cir. Nov. 15, 2004).

Finally, petitioners filed a fifth suit in federal court in New Jersey. *PHH Mortg. Corp.*, 2005 WL 3077853, at *3. The defendants moved to dismiss on a variety of grounds, including res judicata, and the district court granted the motion. *Id.* at *5-12. The Court of Appeals for the Third Circuit affirmed. *PHH Mortg. Corp.*, 205 F. App'x at 55; *see id.* at 52-53 ("res judicata bars suit against . . . Fannie Mae").

**D. Proceedings Below**

1. As noted above, petitioners filed this case in Los Angeles Superior Court after the similar complaint Hollis-Arrington had previously filed in federal district court was dismissed. On August 22, 2002, Fannie Mae removed the case to federal district court. On August 26, 2002, petitioners filed an application to remand, which was denied on September 5, 2002.

In late August, while the remand briefing was ongoing, defendants Fannie Mae, Cendant, and Matthews filed motions to dismiss on res judicata grounds. On February 20, 2003, the district court granted Cendant's and Fannie Mae's motion to dismiss, concluding that all three elements of res judi-

cata were satisfied. First, "[p]laintiffs have already prosecuted two prior actions concerning the same loan process and eventual foreclosure of their property. ... Thus, the same rights and interests are at issue in the instant case as were adjudicated in the previous actions." DE 59 at 8. Second, "the requirement that the earlier actions result in a final judgment on the merits is met" because "[u]nder federal law, final judgments have preclusive effect under res judicata regardless of the pendency of appeal." DE 59 at 9. Third, the parties were so similar that their interests were adequately represented in the original suit. DE 59 at 10. The court also granted defendants' motion on the alternative ground that petitioners' claims were barred by collateral estoppel.

On June 4, 2003, petitioners filed a motion to set aside the judgment as to all defendants other than Attorneys Equity, and on August 29, 2003, the district court denied the motion. DE 79, at 1. Although judgment had not been entered against Attorneys Equity, petitioners filed a notice of appeal, and on December 15, 2003, the Ninth Circuit summarily affirmed. SER-7-8.[3] This case was removed from the district court's active docket and remained dormant for more than five years.

2. On April 7, 2009, petitioners filed a motion in the district court to restore this case to the court's active calendar for the purpose of entering final judgment pursuant to Federal Rule of Civil Procedure 54(b). On October 21, 2009, the district court

[3] Citations to "SER" refer to the Supplemental Excerpts of Record filed in the Ninth Circuit below.

entered judgment in favor of Cendant, Fannie Mae, and Matthews, "consistent with" its prior order granting the defendants' motions to dismiss. Pet. App. 41a. On May 27, 2010, the district court ordered petitioners to show cause no later than June 10, 2010, why the action should not be dismissed with prejudice as to Attorneys Equity based on res judicata. Petitioners did not respond by the required deadline, and on June 11, 2010, the court entered judgment for Attorneys Equity on res judicata grounds.

That same day, petitioners moved to set aside the judgment pursuant to Rule 60(b). On September 27, 2010, the district court denied petitioners' motion to set aside the judgment. The district court first held that it lacked jurisdiction over the motion because petitioners failed to file it within a year after entry of judgment. The court held that "[a]lthough [it] did not initially enter a judgment on a separate document as required by Federal Rule of Civil Procedure 58(a), Petitioners demonstrated their belief that the February 20, 2003 order was a final judgment." DE 117 at 7. "Because the parties treated the order of dismissal as a judgment, the Court finds that, for purposes of Rule 60(b)(3), judgment was entered as to these defendants on July 21, 2003, which was 150 days from the date of entry of the February 20, 2003 order of dismissal." *Id.*

The court also rejected petitioners' motion on the merits, explaining that "[p]laintiffs have failed to present clear and convincing evidence that Defendants' attorneys perpetrated fraud upon the Court, that the judgment was unfairly procured, or that the evidence was not previously available to petitioners.

Indeed, the evidence was clearly discoverable prior to the filing of the Rule 60(b) Motion because the documents are public records and plaintiffs presented the same facts to the Court more than seven years ago." DE 117 at 8. The court also rejected petitioners' request for "'an independent action for the court to set aside the judgment for "fraud upon the court."'" DE 117 at 9. Construing the request as one for relief under Rule 60(b)(6), the court held that there was "no basis for this extraordinary relief." *Id.* Petitioners appealed.

3. On appeal, the Ninth Circuit issued a memorandum order, holding that "[t]he district court did not abuse its discretion by denying plaintiffs' Rule 60(b) motion to set aside the judgment because plaintiffs failed to establish any ground for relief." *Lightfoot v. Cendant Mortg. Corp.*, 465 F. App'x 668, 669 (9th Cir. 2012). The court of appeals also held that "[t]he district court had removal jurisdiction because state claims filed to circumvent the res judicata impact of a federal judgment may be removed to federal court." *Id.*

On January 20, 2012, petitioners petitioned for panel rehearing and rehearing en banc. On April 13, 2012, the court of appeals sua sponte withdrew its earlier memorandum disposition and denied as moot petitioners' petition for rehearing and rehearing en banc. The Court appointed pro bono counsel for petitioners and directed the parties to file either replacement or supplemental briefs. The Court directed that "[i]n addition to any other issues the parties address in their briefs, they shall address whether the district court had subject matter jurisdiction on the basis of the federal charter of [Fannie

Mae]." DE 32 at 2, No. 10-56068 (9th Cir. Apr. 13, 2012).

4. After new briefing and argument, the court of appeals held that Fannie Mae's sue-and-be-sued clause "confers federal question jurisdiction over claims brought by or against Fannie Mae." Pet. App. 5a. That result, the court held, followed from the "clear rule" established by this Court in *American National Red Cross v. S.G.*, 505 U.S. 247 (1992), "for construing sue-and-be-sued clauses for federally chartered corporations." Pet. App. 5a.

Specifically, the court explained that in *Red Cross*, this Court recognized "a line of cases, stretching back to *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), that made clear that a sue-and-be-sued clause for a federally chartered corporation confers federal question jurisdiction if it specifically mentions federal courts." Pet. App. 6a (citing *Red Cross*, 505 U.S. at 252-56). Under that clear "rule," when "federal charters, like those of the Red Cross and of Fannie Mae, '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.'" Pet. App. 7a-8a (quoting *Red Cross*, 505 U.S. at 257). The court concluded: "As the Court of Appeals for the D.C. Circuit has already held, that rule resolves this case." Pet. App. 8a (citing *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust ex rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 784 (D.C. Cir. 2008)).

District Judge Stein, sitting by designation, dissented, principally arguing that the majority's posi-

tion fails to give meaning to the term "any court of competent jurisdiction" in the sue-and-be-sued clause. *See* Pet. App. 26a ("Absent the 'of competent jurisdiction' proviso, this clause would clearly confer jurisdiction on the federal courts."); Pet. App. 26a-32a. The dissent contended the "plain language" of that proviso required reading Fannie Mae's charter as merely allowing Fannie Mae to sue and be sued in any court that independently has jurisdiction over the action. Pet. App. 26a.

The majority rejected that position. The majority noted that the dissent's "plain language" argument relied on several court of appeals decisions reading a "court of competent jurisdiction" proviso in other federal charters as suggesting that the federal charter was not an independent grant of jurisdiction. Pet. App. 26a-27a (citing *C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 903 F.2d 114, 118 (2d Cir. 1990); *Lomas & Nettleton Co. v. Pierce*, 636 F.2d 971, 973 (5th Cir. 1981); *Bor-Son Bldg. Corp. v. Heller*, 572 F.2d 174, 181 (8th Cir. 1978); *Lindy v. Lynn*, 501 F.2d 1367, 1368 (3d Cir. 1974)). "But all of these cases," the court explained, "predate *Red Cross*." Pet. App. 14a.

The majority further explained that before 1954, Fannie Mae's charter allowed it to sue and be sued "in any *court of law or equity*, State or Federal," but replaced the italicized words with "court of competent jurisdiction" in 1954. Pet. App. 8a. The dissent acknowledged that before 1954, the statute vested federal courts with jurisdiction, but argued that Congress stripped the provision's jurisdiction-conferring power in the 1954 amendment. Pet. App. 32a-33a. The majority responded that "[t]here is no

indication that Congress intended to eliminate federal question jurisdiction in 1954 by replacing the phrase 'court of law or equity' with the phrase 'court of competent jurisdiction.'" *Id.* at 9a. "If Congress wanted to eliminate the grant of federal question jurisdiction from Fannie Mae's charter," the court observed, "it is highly unlikely that it would have done so in the way the dissent suggests." Pet. App. 9a, 11a. Instead, the court explained, the distinction between law and equity was all but an "anachronism" by 1954, and thus "the most likely explanation for replacing the phrase 'court of law or equity' with 'court of competent jurisdiction' is that Congress was simply modernizing Fannie Mae's charter" by deleting that anachronism. Pet. App. 10a

The court accordingly held that the district court had properly exercised jurisdiction in this case, and affirmed the district court's judgment on the merits for the reasons stated in its prior opinion. Pet. App. 21a.

5. Petitioners sought rehearing en banc. The Ninth Circuit denied the petition without dissent, with only District Judge Stein recommending the petition be granted. Pet. App. 1a-2a.

## REASONS FOR DENYING THE PETITION

The petition should be denied. *Red Cross* squarely holds that where, as here, a federal corporate charter's sue-and-be-sued clause specifically mentions suit in federal court, the clause establishes federal jurisdiction over suits by and against the chartered entity. 505 U.S. at 257. There is no circuit conflict on the meaning and application of *Red Cross*. There is also no reason to overrule *Red Cross*—a

statutory precedent that Congress is free to overrule at any time—and this case would be a poor vehicle for doing so in any event.

### A. The Decision Below Is Correct

1. *Centuries-Old Precedents Hold That A Federal Charter's Explicit Reference To Suit In Federal Court Establishes Federal Jurisdiction*

Petitioners principally contend that this Court should grant certiorari because the decision below is "inconsistent" with this Court's precedent. Pet. 6-11. Petitioners are wrong. The Ninth Circuit's decision is not only consistent with, but is compelled by, a two-century-old line of this Court's precedents culminating in *Red Cross*.

*Red Cross* involved 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 noted that it did "not face a clean slate" in considering the question. *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 the critical question in those early cases, the Court emphasized, was

whether the "sue and be sued" provision specifically mentioned the federal courts; where it did, the Court held that the provision conferred federal subject matter jurisdiction. *Id.*

The first case in this line was *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), 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 court jurisdiction. This generally stated power to sue and be sued, the Court explained, "is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court." *Id.* at 85-86. By way of contrast, the Court pointed to a different provision, which subjected the president and directors in their individual capacity 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 v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), 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, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, *and in any Circuit Court of the United States*." *Id.* 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 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.

In *Red Cross*, the Court read *Deveaux* and *Osborn* as together establishing "the basic rule" that "a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it *specifically mentions the federal courts*." *Red Cross*, 505 U.S. at 255 (emphasis added); *see id.* at 257 ("The rule established in these cases makes it clear that the Red Cross Charter's 'sue and be sued' provision should be read to confer jurisdiction."). Under this "basic rule," the Court explained, when a federal charter explicitly authorizes the chartered entity "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 257.[4]

As the Ninth Circuit correctly held, the *Deveaux-Osborn-Red Cross* rule "resolves this case." Pet. App. 8a. From the first day, Congress has always authorized Fannie Mae to sue and be sued *in federal court specifically*. *Compare* National Housing Act, Pub. L. No. 73-479, § 301(c)(3), 48 Stat. 1246, 1253

[4] The Solicitor General filed an amicus brief in *Red Cross* articulating the position ultimately adopted by the Court. *See* Br. for United States as Amicus Curiae Supporting Pet'rs, *Am. Nat'l Red Cross v. S.G.*, 1992 U.S. S. Ct. Briefs LEXIS 115, at *5-6 (this Court's decisions since at least 1824 have "established a clear rule that congressional charters provide for original jurisdiction in the federal courts whenever they specifically grant a right to sue and be sued in federal courts").

(1934) (predecessor entity can be "sue and be sued, complain and defend, in any court of law or equity, State or Federal") *with* 12 U.S.C. § 1723a(a) (Fannie Mae can sue and be sued "in any court of competent jurisdiction, State or Federal"). There is no ambiguity about the controlling charter language or its jurisdictional effect.

Petitioners' argument to the contrary cannot escape *Red Cross*. According to petitioners, "there is nothing in the statutory text that indicates that Congress intended Fannie Mae's 'sue and be sued' provision to confer original jurisdiction with the federal courts." Pet. 26. Yes, there is: the explicit reference to suit in federal court reflects precisely that congressional intent, as *Red Cross* squarely holds.

Petitioners also cite *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), which holds that a provision merely authorizing suit "in a court of competent jurisdiction" did not itself confer federal jurisdiction. *Id.* at 506-07. The petition itself acknowledges the glaring distinction between that provision and the Fannie Mae charter provision: "the inclusion of the phrase 'State or Federal.'" Pet. 8. That distinction makes all the difference under *Red Cross*.[5]

---

[5] Petitioners also rely on *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939), but that case is entirely inapposite. *Keifer* held that a federal corporation entitled "to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal," was not protected by sovereign immunity from suit. *Id.* at 392-93. That holding had nothing to do with the text of the federal charter—the question before the Court was "not a textual problem," but rather turned on background principles of sovereign immunity. *Id.* at 389. More important, it is true but irrelevant that the Court "did not

Petitioners also assert that two of this Court's cases—*Minnesota v. United States*, 305 U.S. 382 (1939), and *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946)—"could be interpreted to mean that, in order for Congress to ensure that a litigant is able to bring a case in either state or federal court, it *must* include the phrase 'in any court of competent jurisdiction, *State or Federal*.'" Pet. 11. Even if those cases were subject to that interpretation, petitioners' view of the significance of the words "State or Federal" was specifically considered and rejected in *Red Cross*. The *dissent* in *Red Cross* would have held, as petitioners now submit, that the "addition of the words 'State or Federal' eliminates the possibility that" Red Cross's charter "might be read to limit the grant of capacity to sue in federal court." 505 U.S. at 275 (Scalia, J., dissenting) (emphasis omitted). The Court, of course, disagreed, instead holding that the charter's specific reference to federal courts served to grant federal courts subject matter jurisdiction over suits by and against the Red Cross. *Id.* at 257. The same rule applies to Fannie Mae's charter.

Petitioners all but admit that *Red Cross* compels the result here. They describe that case as holding that "the inclusion of the word 'Federal' in the Red Cross congressional charter conferred original jurisdiction in the federal courts." Pet. 14. And they correctly observe that the "the Ninth Circuit relied

---

hold that the language also conferred jurisdiction," Pet. 7, since that question was not before the Court—the only question was whether Congress had "endow[ed] [the] governmental corporation with the government's immunity." 306 U.S. at 389.

heavily on the 'bright-line' rule state by this Court in *Red Cross*." Pet. 30.

Rather than quarrel seriously with the application of *Red Cross* to the facts here, petitioners suggest that the Court should "review its decision in *Red Cross*." Pet. 31. But they offer no basis for doing so other than the "the reasons set forth" in the dissent in that case more than two decades ago. *Id.* This Court, of course, "does not overturn its precedents lightly." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). To the contrary, "any departure" from stare decisis "demands special justification," *id.* (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)), which certainly requires more than "retreads of assertions [the Court has] rejected before," *id.* at 2037. And "*stare decisis* carries enhanced force when a decision, like [*Red Cross*], interprets a statute," *Kimble v. Marvel Entm't, LLC*, No. 13-720, slip op. at 8 (U.S. June 22, 2015), because "Congress remains free to alter what [the Court has] done." *Patterson v. McLean Credit Union*, 491 U.S. 169, 173 (1989); *see Bay Mills*, 134 S. Ct. at 2037 (declining to overrule prior precedent on tribal immunity because, *inter alia*, "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity").

After *Red Cross* was decided, Congress could have rewritten any federal charter with language like the Red Cross's charter, including Fannie Mae's, to restrict its jurisdictional effect. Indeed, Congress enacted a host of provisions altering Fannie Mae's oversight structure in 2008, *see supra* at 4-5, yet did nothing to restrict the scope of federal jurisdiction created by its charter under *Red Cross*. *See Bay*

*Mills*, 134 S. Ct. at 2038 ("Since [the prior decision], Congress has continued to exercise its plenary authority over tribal immunity, specifically preserving immunity in some contexts and abrogating it in others, but never adopting the change Michigan wants.").

2. *The Particular History Of Fannie Mae's Charter Confirms That It Grants Subject Matter Jurisdiction*

Even beyond a straightforward application of the *Deveaux-Osborn-Red Cross* rule, the specific history of Fannie Mae's charter further confirms that it grants federal courts subject matter jurisdiction over any suit brought by or against Fannie Mae.

Before 1954, Fannie Mae's charter provided that it could "sue and be sued, complain and defend, in any court of law or equity, State or Federal." National Housing Act, Pub. L. No. 73-479, § 301(c)(3), 48 Stat. 1246, 1253 (1934). Petitioners do not mention this history, but there is no question that this pre-1954 statute conferred federal jurisdiction—this Court held in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), that the FDIC's identically worded charter granted federal jurisdiction, *id.* at 455, which is why even the dissent below conceded that Fannie Mae's original charter "inarguably gave Fannie Mae access to the federal courts." Pet. App. 33a.

The only question here accordingly is whether Congress intended to *eliminate* jurisdiction in 1954, when it amended Fannie Mae's charter to replace the phrase "in any court of law or equity" with the phrase "in any court of competent jurisdiction." The

answer is no, as the Ninth Circuit and D.C. Circuits have recognized.

This Court's precedents have always recognized that when a sue-and-be-sued clause does *not* refer to federal courts, an intent to create federal jurisdiction cannot be inferred. *See*, *e.g.*, *Osborn*, 9 Wheat. at 818 ("a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in those courts"). Given that clear, longstanding rule, 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. Indeed, Congress did exactly that in the same year it added the "of competent jurisdiction" language to Fannie Mae's charter, deleting the word "Federal" from the "sue-and-be-sued" provision of the Federal Savings and Loan Insurance Corporation ("FSLIC") statute. Pub. L. No. 83-560, § 501(1), 68 Stat. 590, 633 (1954) (amending Pub. L. No. 73-479, § 402(c)(4), 48 Stat. 1246, 1256 (1934)). "The fact that Congress chose to keep that all-important word 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.

That conclusion is confirmed by the complete silence in the 1954 amendment's legislative history on the matter. That amendment made numerous changes to the charter as part of an effort to partially privatize Fannie Mae. But while the legislative history of the 1954 amendment "went into great de-

tail explaining the provisions of the 1954 amendments designed to privatize Fannie Mae," it "never once mentioned [the] sue-and-be-sued-clause." Pet. App. 16a. Such silence would be more than a little surprising if the 1954 amendment to the sue-and-be-sued clause had the dramatic effect petitioners posit. "Eliminating the charter's grant of federal question jurisdiction would have imposed a severe new restraint on Fannie Mae's ability to litigate in federal court." Pet. App. 9a. And "[g]iven the important practical effect of eliminating federal question jurisdiction under Fannie Mae's sue-and-be-sued clause, we should expect the House or the Senate to have said something if they intended a change of that sort. Instead, there was silence." Pet. App. 10a; *see Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark.")

The fact that Congress retained the jurisdiction-conferring character of the sue-and-be-sued provision after Fannie Mae's partial privatization is hardly surprising. Even though Congress in 1954 reduced the level of public ownership in Fannie Mae, Fannie Mae remained (and remains) a uniquely federal enterprise—a federally chartered corporation with the important national purpose of assuring that home ownership is accessible for low and middle-income Americans. There is no reason to infer that Congress secretly wanted to deprive Fannie Mae of access to federal courts.

This statutory history answers petitioners' (and the Ninth Circuit dissent's) contention that following *Red Cross* would render the term "court of competent jurisdiction" superfluous. Pet. 28; Pet. App. 31a. As

the majority below explained, replacing "court of law and equity" with "court of competent jurisdiction" "served the purpose of eliminating an anachronistic reference to courts of law and equity," just as "Congress had recently done in other statutes." Pet. App. 10a, 12a.[6] Petitioners insist that the term "competent jurisdiction" is superfluous under the Ninth Circuit's reading because that term itself only refers to subject matter jurisdiction, and thus has no function if the charter itself grants subject matter jurisdiction. Pet. 27. Yet just two years before the 1954 amendment, this Court interpreted the term "court of 'competent jurisdiction'" in a federal entity's corporate charter as assuring that suit could only be brought against the entity where there was *personal* jurisdiction, i.e., "that review must be in that district where the [defendant] can be served." *Blackmar v. Guerre*, 342 U.S. 512, 516 (1952). More generally, this Court has explained that while the "concept of a court of 'competent jurisdiction'" has "usually" been "used to refer to subject-matter jurisdiction," it "has also been used on occasion to refer to a court's jurisdiction over the defendant's person," *United States v. Morton*, 467 U.S. 822, 828 (1984), which is exactly how Congress used that term here.

The 1954 addition of the phrase "competent jurisdiction" accordingly makes perfect sense for reasons having nothing to do with the elimination of federal jurisdiction, whereas retaining the specific

---

[6] Moreover, the "competent jurisdiction" proviso also assures that the sue-and-be-sued provision is not read to grant courts of specialized jurisdiction—such as bankruptcy courts or the Court of Claims, or specialized state courts—the authority to hear suits by or against Fannie Mae. *See* Pet. App. 13a.

reference to federal courts could only mean that Congress intended the sue-and-be-sued clause to continue to confer federal jurisdiction.

### B. There Is No Circuit Conflict Concerning The Question Presented

Because the result below is compelled not only by the rule announced in *Red Cross* but by the specific statutory history of Fannie Mae's corporate charter, it is unsurprising that the only other court of appeals to have considered the question presented has agreed with Ninth Circuit below. *See Pirelli*, 534 F.3d at 784.

Petitioners admit that *Pirelli* is the only other circuit decision addressing the question whether the Fannie Mae charter establishes federal jurisdiction over suits by and against Fannie Mae. Pet. 17-18. Petitioners nonetheless insist that a circuit conflict exists, based solely on earlier decisions considering the language of *other* federally chartered corporations. Pet. 17-18 (citing *W. Sec. Co. v. Derwinski*, 937 F.2d 1267 (7th Cir. 1991); *C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 903 F.2d 114 (2d Cir. 1990); *Lomas & Nettleton Co. v. Pierce*, 636 F.2d 971 (5th Cir. 1981); *Lindy v. Lynn*, 501 F.2d 1367 (3d Cir. 1974)). But as the Ninth Circuit recognized, "all of these cases predate *Red Cross*." Pet. 14a. Petitioners cite no post-*Red Cross* circuit decision holding that *any* federal corporate charter specifically referencing federal courts does not confer federal subject matter jurisdiction.

It is true that federal *district* court decisions have disagreed over whether Fannie Mae's charter confers federal subject matter jurisdiction. Pet. 18-20. But

the courts of appeals are fully capable of resolving that conflict without this Court's intervention. Should a court of appeals ever ignore *Red Cross* and create a circuit conflict over the jurisdictional effect of Fannie Mae's charter language, this Court can resolve the conflict when it arises. There is no need for review at this time.

### C. This Case Is A Poor Vehicle Through Which To Resolve The Question Presented

Finally, this case presents a poor vehicle for reconsidering *Red Cross* and evaluating Fannie Mae's charter language, because petitioners' underlying case is utterly without merit. Petitioners have filed the same frivolous complaint in five different courts—including four times in the federal courts they now seek to avoid—and the courts below had no trouble dismissing this particular suit on res judicata and collateral estoppel grounds. *See supra* at 7-10. Even if this Court were to hold that the district court lacked jurisdiction to enter that judgment, there is no doubt that the state trial court would dismiss the complaint on the same grounds, as several other courts have done. *Id.* If this Court is to resolve the question presented, it should do so in a case where the answer would make a difference in the litigation.

Moreover, the procedural posture of this case casts doubt on whether petitioners could obtain even a remand to state court, regardless how this Court resolves the question presented. The only question that the Ninth Circuit considered on the merits in the current appeal was whether the district court

abused its discretion in denying petitioners' Rule 60(b) motion to reopen the judgment. *Lightfoot*, 465 F. App'x at 669; *see also* Pet. App. 21a (after concluding that the district court possessed jurisdiction, affirming on the merits "for the reasons stated in our previous unpublished disposition"). Thus, even if the Court were to resolve the question presented in petitioners' favor, petitioners may be required on remand to satisfy Rule 60(b) to obtain any relief. Petitioners are not entitled to Rule 60(b) relief for several reasons.

First, Rule 60(b) motions "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). Here, petitioners did not move under Rule 60(b) until *more than seven years* after judgment was entered against them as to Fannie Mae. *See* DE 117 at 7.

Second, the only basis for relief under Rule 60(b) in light of a favorable decision from this Court as to the question presented would be that the "judgment is void" for lack of subject matter jurisdiction. Fed. R. Civ. P. 60(b)(4). Petitioners never even sought that relief from the district court. *See* DE 117. And even if they had, Rule 60(b)(4) would not entitle them to relief. "Federal courts considering Rule 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). Even if the Ninth and D.C. Circuits were wrong about the jurisdictional question presented here, there is obviously an "arguable basis" for jurisdiction under Fannie Mae's corporate charter. Thus, to the

extent petitioners are limited to relief under Rule 60(b), they are not entitled to any such relief.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ANTON METLITSKY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

June 2015