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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case No. 14-1055, Lightfoot v. Cendant Mortgage Corporation.

Mr. Rosenkranz.

ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

ON BEHALF OF THE PETITIONERS

MR. ROSENKRANZ: Thank you, Mr. Chief Justice, and may it please the Court:

There is only one natural way to read the language at issue here. A "court of competent jurisdiction" is a court that has an independent source of subject-matter jurisdiction. That is what this Court has held five times those words mean. So let's start with the plain language.

The statute grants Freddie, quote, "The power in its corporate name to sue and be sued in any 'court of competent jurisdiction,' State or Federal." The only reference to jurisdiction in that passage is to say that you don't get to go to any Federal court or any State court, but rather, you have to choose a court, State or Federal, that must be a "court of competent jurisdiction." And the only way to find out whether a court is a "court of competent jurisdiction" is to

1 examine the statutes creating that court and granting it
2 jurisdiction.

3 JUSTICE GINSBURG: Does that include --
4 you -- you said subject-matter jurisdiction, but "is
5 this court competent to hear this controversy" would
6 include personal jurisdiction as well, or are you
7 limiting it to subject-matter jurisdiction?

8 MR. ROSENKRANZ: I -- I am not limiting it
9 to subject-matter jurisdiction over an original action.
10 It has appellate -- it has cert jurisdiction. But no, a
11 court of competent jurisdiction at a minimum has
12 subject-matter jurisdiction, but I think it also has
13 personal jurisdiction.

14 And the -- the cases that my friends rely
15 upon at Fannie that talk about personal jurisdiction are
16 cases in which there was already subject-matter
17 jurisdiction. And this Court held, hold on. Wait a
18 minute. It's not enough just to have subject-matter
19 jurisdiction, which everyone agreed there was in those
20 cases. It needs to be personal jurisdiction.

21 Now, five times this Court has interpreted
22 the words "competent jurisdiction" to mean, quote,
23 "outside" -- "outside sources of jurisdictional
24 authority." That's from Phoenix. Or from Shoshone;
25 this Court held that any reference to competent

1 jurisdiction -- excuse me -- that a reference to
2 competent jurisdiction means, and I quote, "it
3 unquestionably meant that the competency of the court
4 should be determined by rules theretofore prescribed in
5 respect to the jurisdiction of the Federal courts."

6 And Fannie's interpretation simply does not
7 map onto the statutory language that Congress wrote.
8 Look at the sentence. Fannie's interpretation would
9 require the Court to read the phrase "competent
10 jurisdiction" to mean different things depending upon
11 which word modifies it.

12 So Fannie concedes that the clause referring
13 to any "court of competent jurisdiction" State cannot be
14 read as a grant of jurisdiction to every State court. A
15 State court can't take jurisdiction unless you point to
16 a statutory authority for the State.

17 JUSTICE GINSBURG: What did you do -- what
18 does Justice Souter's statement in Red Cross do to your
19 argument? I'm talking about the statement on page 257
20 of Red Cross, "In expressly authorizing suit in Federal
21 court, a provision extends beyond a grant of corporate
22 capacity to sue and suffices to confer a Federal
23 jurisdiction."

24 That seems to say if you authorize suit in
25 Federal court, then that's it. Specifically mentioning

1 Federal court suffices to confer Federal jurisdiction.

2 MR. ROSENKRANZ: Understood, Justice
3 Ginsburg. And I think the way to look at Red Cross is
4 to look at what Red Cross referred to as the rule that
5 Justice Souter was describing. The rule is, and I
6 quote, "A congressional charter's sue-and-be-sued
7 provision may be read to confer Federal jurisdiction if,
8 but only if, it specifically mentions the Federal
9 courts."

10 So you need a mention of Federal courts in
11 order to even have a conversation about whether the
12 "may" is in play. But a reference to Federal courts is
13 not sufficient.

14 And so another way to think about it is,
15 sure, if a clause says, sue or be sued in any court,
16 State or Federal, Red Cross tells us, that, without
17 more, is a grant of Federal jurisdiction.

18 JUSTICE BREYER: It's tough. I mean, I find
19 this pretty tough. I think that there are five major
20 cases: Three are against you; two are for you. Deveaux
21 is for you. Osborn uses the word "incompetent
22 jurisdiction"; it's against you. Not surprising, the
23 Bankers' one comes up the same way as Deveaux, but the
24 D'Oench, Duhme is weaker for you than here.

25 MR. ROSENKRANZ: Well, Your Honor --

1 JUSTICE BREYER: It comes out the other way.
2 And the Red Cross is weaker for you than here, and it
3 comes out the other way. And so what I see going for
4 you is one page of legislative history which says,
5 explicitly, you're right.

6 MR. ROSENKRANZ: No, Your Honor.

7 JUSTICE BREYER: Do you want to deny that
8 legislative history? It helps you, doesn't it?

9 MR. ROSENKRANZ: No, no. I accept the
10 legislative history.

11 JUSTICE BREYER: Right.

12 MR. ROSENKRANZ: But we have a lot more
13 going for us than that. This Court's interpretation of
14 the phrase of "competent jurisdiction" over and over
15 again, three times before this provision -- those words
16 were added to this provision. This Court interpreted
17 that phrase twice in the statutory construction setting
18 and said, it must point to an outside source of
19 authority. And our --

20 JUSTICE BREYER: Well, that's true. But
21 these cases that you're talking about are not directly
22 in point. D'Oench, Duhme is the leading case on this
23 issue, and it used the word "competent jurisdiction."
24 And John Marshall, you know, who is not, say, Justice X,
25 did say that the language, absolutely clear, this

1 means -- because it refers probably to specific courts
2 and isn't just a general statement of courts in
3 general -- this means that they're giving jurisdiction.
4 It's just not just authority to sue and be sued.

5 MR. ROSENKRANZ: Your Honor, I disagree
6 respectfully with how they -- how you've characterized
7 these cases.

8 So Osborn, if you wanted to write a
9 provision that parses the legislative language the way
10 Fannie does, you would write the Osborn provision. It
11 says, sue and be sued in all State courts having
12 competent jurisdiction -- great -- and in a circuit
13 court of the United States. That's how you distinguish
14 State courts.

15 JUSTICE BREYER: I got that one.

16 MR. ROSENKRANZ: Okay.

17 JUSTICE BREYER: D'Oench, Duhme, my God, is
18 the -- that's identical to the Bankers' one. Identical.
19 And they come out the other way, and all that's there is
20 the word "State and Federal" --

21 MR. ROSENKRANZ: So, Your Honor, D'Oench,
22 Duhme says, any court of law or equity, State or
23 Federal. This Court did not analyze this provision in
24 D'Oench, Duhme, and so there's nothing -- we can't
25 figure out what this Court was saying in D'Oench because

1 it was a drive-by jurisdictional reference in a
2 situation in which there was clear Federal jurisdiction
3 because there was an arising-under clause.

4 And then when you --

5 JUSTICE SOTOMAYOR: Now, is there a
6 difference in a sue-to-be -- a right-to-sue provision
7 from a provision creating a cause of action? Let's do
8 the Age Discrimination and Employment Act, which
9 authorizes suit in any Federal district court of
10 competent jurisdiction.

11 How do you deal with the fact that the ADA
12 generally is viewed as limiting jurisdiction to Federal
13 courts?

14 MR. ROSENKRANZ: Well, Your Honor, so the
15 answer is that provision -- excuse me.

16 The ADA has jurisdiction, but not because of
17 that jurisdiction. There is Federal-question
18 jurisdiction under the ADEA. The sue-or-be-sued clause
19 is a clause that provides for the direction as to which
20 courts you go into. And the same is true --

21 JUSTICE SOTOMAYOR: Well, there, I'm
22 presuming they mean personal jurisdiction. So in
23 context, one would read competent jurisdiction there as
24 personal jurisdiction.

25 MR. ROSENKRANZ: Well, Your Honor, I

1 disagree. It is personal and subject-matter
2 jurisdiction. It means, show me where the Court has
3 subject-matter jurisdiction. Easy. There is a Federal
4 question under 1331. Show me where there is personal
5 jurisdiction. Okay. That's where it gets a little bit
6 harder. Make sure that the person is within the
7 confines of the Court.

8 But -- but I would also say just mapping,
9 again, this language or the way Fannie reads it onto the
10 statute, Fannie admits that this grant of -- that this
11 clause that says, "court of competent jurisdiction"
12 State or Federal does not mean a grant of jurisdiction
13 to every Federal court either.

14 The Federal Court of Claims -- excuse me.
15 The Court of Federal Claims does not have competent
16 jurisdiction except if those jurisdictional requirements
17 are otherwise satisfied.

18 And Fannie has never explained how you can
19 take the same language and map it out differently to
20 reach different results depending upon which word it
21 modifies and even different results when it modifies the
22 same word.

23 And the statutory evolution also confirms
24 this. It unfolded in three critical steps.

25 Step 1 was the original enactment. It was

1 before D'Oench. And Congress chose language that, per
2 Justice Breyer's question, it was assured would not
3 grant jurisdiction.

4 Step 2 was 1954. So now D'Oench has been
5 decided. And what did Congress do? It did the opposite
6 of what happened in Red Cross. In Red Cross, remember,
7 there was a provision that didn't match D'Oench, and
8 then Congress takes a left turn and says, we're going to
9 match D'Oench. Here, Congress began with a provision
10 that matched what was later assessed in D'Oench and took
11 a right turn and added the words "competent
12 jurisdiction," which this Court had previously, for
13 example, in Phoenix, defined to mean, quote, "depends on
14 other provisions of law."

15 Step 3 was 1974. After the shift to private
16 entity was consummated, Congress further amended the
17 charter to provide litigants with a source of diversity
18 jurisdiction, because there was no source of Federal
19 jurisdiction after Fannie went private and then was no
20 longer an agency. If there was a source of jurisdiction
21 in this sue-or-be-sued clause, there would be no purpose
22 for diversity jurisdiction. So Congress changed
23 Fannie's charter to say that it is a District of
24 Columbia corporation, quote, "for purposes of
25 jurisdiction and venue."

1 JUSTICE SOTOMAYOR: Well, that's arguably to
2 keep all suits in D.C. as opposed to somewhere; else.

3 MR. ROSENKRANZ: No, Your Honor. "For
4 purposes of venue" doesn't mean all suits are in D.C. It
5 could -- it means that D.C. is a permissible venue, but
6 look to the venue provisions to figure out where the
7 suit is appropriately brought.

8 This was a grant of diversity jurisdiction.
9 Every court that has ever evaluated this language has
10 concluded it's a grant of diversity jurisdiction.
11 Fannie walks into Federal court consistently with the
12 only basis being diversity jurisdiction. So a dozen
13 times since this case was first briefed, and just last
14 Friday, Fannie is still arguing to Federal courts that
15 this is a grant of diversity jurisdiction. You don't
16 need diversity jurisdiction if there is a sue-or-be-sued
17 clause that grants Federal jurisdiction.

18 CHIEF JUSTICE ROBERTS: Well, that's just a
19 belt-and-suspenders point, it seems to me. They can
20 rely on diversity jurisdiction. It's not a concession
21 that they don't have general Federal jurisdiction.

22 MR. ROSENKRANZ: Well -- understood, Your
23 Honor, although compare it to what happened with Ginnie.
24 So -- so Ginnie Mae has Federal jurisdiction, and
25 Congress did not at the same time in 1974 -- now,

1 it's -- it's the same charter. The sue-and-be-sued
2 clause is actually in the same language, not -- not --
3 not same language in separate provisions. Ginnie and
4 Fannie are treated together; one is private, one is
5 public. Ginnie has Federal jurisdiction because it is a
6 Federal agency. Congress in 1974 does not add the
7 diversity provision to Ginnie's charter, only to
8 Fannie's charter. And I do think --

9 JUSTICE BREYER: Go ahead. Finish.

10 MR. ROSENKRANZ: No. No. Please go ahead.

11 JUSTICE BREYER: This is what's really
12 bothering me here, and I don't know if you can help or
13 not. After reading through the cases pretty quickly, I
14 would think you're right, if I were doing this afresh,
15 and particularly when you have that page of legislative
16 history. I mean, somebody wrote that colloquy and gave
17 it to the senators, and they thought, we don't want
18 Fannie to have the right to go into Federal court all
19 the time. We just want them to have the right when they
20 otherwise would be in Federal court.

21 But when I finished reading the cases, going
22 back to Marshall in 1816, I say, oh, you know, there is
23 something of a rule here. It may not make too much
24 sense, but it's even there in D'Oench, Duhme, and --
25 because it's -- actually, I do think it is more even

1 stronger for the other side than -- than this one. And
2 then I get Red Cross and the only thing I can do there
3 is add some old report that sort of seemed to support
4 the result, which is certainly weaker than your page of
5 legislative history here.

6 But I see now it's jurisdiction. And we
7 shouldn't get things too mixed up. They are hard
8 enough. And then that seems to say if you say State and
9 Federal, you -- you see where I'm going?

10 MR. ROSENKRANZ: Yes, Your Honor.

11 JUSTICE BREYER: So I don't know whether to
12 look into it deeply in this particular case where you're
13 going to end up with a result that seems to be different
14 than the other cases, or to say, well, forget it. It
15 was all decided. Keep to the precedent. Forget the
16 page of legislative history. It will be better for the
17 lawyers. And it will be better for the judges. It will
18 be simpler for them.

19 MR. ROSENKRANZ: Yes, Your Honor.

20 JUSTICE BREYER: And that's the dilemma that
21 I'm in.

22 Anything anybody wants to say to help me
23 would be welcome.

24 MR. ROSENKRANZ: Sure, Your Honor. Let
25 me -- let me answer that quickly, because I know my

1 white light is on.

2 And so, look, this is perfectly simple. You
3 need the word "Federal" in order to even have a
4 conversation about Federal jurisdiction. If all you've
5 got is any court, State or Federal, that will be enough.
6 But if Congress, after reading that opinion that you
7 find so powerful, Justice Breyer, says, "court of
8 competent jurisdiction," there is no case out there that
9 is -- that has held that those words, those precise
10 words, "court of competent jurisdiction," means anything
11 other than what this Court has held it means.

12 And in 1954, by the way, Congress was deeply
13 concerned about one thing, which is, Fannie was going
14 private. It was now going to be in the mortgage market.
15 I did a search. There are 60,000 cases that Fannie is
16 involved in, 60,000 cases of which 70 percent are in
17 State court. If all of a sudden this Court says that
18 there is Federal jurisdiction, all of those foreclosure
19 cases are moving tomorrow to Federal court.

20 Thank you, Your Honors.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Ms. O'Connell.

23 ORAL ARGUMENT OF ANN O'CONNELL

24 FOR UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING THE PETITIONERS

1 MS. O'CONNELL: Mr. Chief Justice, and may
2 it please the Court:

3 The government's view is that the rule of
4 Red Cross should not be extended to a statute that
5 authorizes a federally chartered corporation to sue or
6 be sued in a "court of competent jurisdiction."

7 The best reading of that phrase in Fannie
8 Mae's charter is that it authorizes the corporation to
9 sue and be sued in a Federal or State court that is
10 vested with jurisdiction through some other provision of
11 law.

12 We think there is a plausible story for why
13 Congress in 1954 wanted to eliminate the sue-and-be-sued
14 clause as a basis for Federal jurisdiction, but even if
15 you don't find that explanation completely satisfying,
16 the text of the statute should control.

17 The point of the Red Cross rule was to tell
18 Congress, if you use this specific language, this entity
19 may sue or be sued in any court of law or equity, State
20 or Federal, this Court will take that to mean that
21 Congress is creating subject-matter jurisdiction in the
22 Federal courts.

23 In this case, the Court should give Congress
24 the further guidance that if it uses the -- the language
25 "suit is authorized in a State or Federal 'court of

1 competent jurisdiction,'" then that means that you have
2 to look to some other provision of law to see if that
3 court is vested with jurisdiction.

4 JUSTICE SOTOMAYOR: I've done -- or had --
5 my clerk did a study, and there are, that she has been
6 able to identify, eight other statutes that use the
7 "incompetent jurisdiction" language.

8 Are -- are -- A, are you aware of the number
9 of other statutes that are identical to this? And, B,
10 are you troubled by the fact that some of those statutes
11 may not be a private corporation fully the way Fannie
12 Mae is?

13 MS. O'CONNELL: I -- I am aware of those
14 statutes. I have on my list seven that just have the
15 sue-and-be-sued clause, and then no other provision that
16 says, you know, for any purpose -- any suit involving
17 this entity.

18 JUSTICE SOTOMAYOR: We are off by one.

19 MS. O'CONNELL: Right.

20 JUSTICE SOTOMAYOR: But tell me what you
21 mean.

22 MS. O'CONNELL: So, no, I am not troubled by
23 this. In fact, I think this is the reason, two of
24 the -- of the entities are Federal agencies, the
25 Department of Housing and Urban Development and the

1 Department of Veterans Affairs.

2 JUSTICE SOTOMAYOR: So a Federal question
3 would be --

4 MS. O'CONNELL: No, the Federal agencies
5 have the power to bring a suit in Federal court. They
6 also have the power to remove a case from Federal court.
7 But if the Court interpret's Fannie's charter to mean
8 that any case involving Fannie can be brought in a
9 Federal court or can be removed to a Federal court, then
10 all of those cases involving HUD, where HUD is a party
11 or where the VA is a party, those cases can now be
12 brought in Federal court against the agency, and they
13 can also be removed to Federal court when the agency is
14 a party.

15 I'll give you an example that HUD has given
16 to me over time. HUD often likes to litigate these
17 cases in State court. These are mortgage foreclosure
18 cases. They are quintessential State court questions.

19 There can be a case -- and this happens
20 frequently -- where a lender will sue a borrower in
21 State court. HUD may also be named as a defendant if
22 HUD has an interest in the mortgage. HUD may want to
23 leave that case in the State court where the State
24 courts address questions about mortgage foreclosure all
25 the time. They are all State law causes of action, just

1 as in this case.

2 If the Court were to say that the language
3 which is also in HUD's charter, that it can sue or be
4 sued in any State or Federal court of competent
5 jurisdiction means that there is Federal subject matter
6 over that suit, then the private party can now remove
7 the case to a Federal court, creating delay in the
8 resolution of the case which is to the advantage of the
9 borrower in a mortgage foreclosure suit.

10 HUD interprets its own sue-and-be-sued
11 clause to just be a waiver of sovereign immunity and not
12 to -- to authorize Federal subject matter jurisdiction
13 over any case involving HUD.

14 JUSTICE SOTOMAYOR: So those are five
15 statutes that don't -- is not -- are -- don't involve
16 Federal agency, are similar to the HUD and Veterans, the
17 two --

18 MS. O'CONNELL: Yes. They are Federal
19 corporations, federally chartered corporations.

20 JUSTICE SOTOMAYOR: Have all of them read
21 the statute in the same way you have?

22 MS. O'CONNELL: I know that the Seventh
23 Circuit has interpreted the V.A.'s sue-and-be-sued
24 clause to only waive sovereign immunity and not to
25 create Federal subject-matter jurisdiction. I think

1 there is a split in the district courts after Red Cross
2 about the Federal Home Loan Bank's sue-and-be-sued
3 clause.

4 I don't -- the -- we are definitely
5 advocating for the approach that -- in all of those, as
6 in Fannie Mae's charter, that Federal subject-matter
7 jurisdiction is not created by the sue-and-be-sued
8 clause, that you have to --

9 JUSTICE BREYER: I mean, the one that used
10 the word "competent jurisdiction," "having competent
11 jurisdiction," was Osborn.

12 MS. O'CONNELL: Right, but it --

13 JUSTICE BREYER: What do you do about that?

14 MS. O'CONNELL: But in -- in Osborn, I think
15 Mr. Rosenkranz explained, the language in Osborn says,
16 "all State courts having competent jurisdiction and any
17 circuit court of the United States."

18 So I think in that case what the Court said
19 was, Congress clearly wanted to confer jurisdiction on
20 all circuit courts of the United States. It didn't use
21 the language "court of competent jurisdiction" when it
22 referred to the Federal courts. It used that language
23 only with respect to the State courts.

24 D'Oench, Duhme did not use the language
25 "court of competent jurisdiction," Justice Breyer.

1 It's -- the sue-and-be-sued clause at issue in that case
2 was the same as the one in Red Cross, and as
3 Mr. Rosenkranz explained, here, Fannie Mae's charter
4 used to have a sue-and-be-sued clause that looked
5 exactly the same as the FDIC's, which the Court said in
6 D'Oench Duhme conferred Federal jurisdiction, and in
7 1954, Congress changed it to mean something different.

8 One of the main rationales of the court of
9 appeals in this case was that the -- the work that
10 "court of competent jurisdiction" is doing is that it's
11 telling you that you can't file suit in a specialized
12 court, like a State traffic court or a Federal
13 bankruptcy court. Well, the reason why the phrase
14 "court of competent jurisdiction" would tell you to do
15 that is because you've got to look at the statutes
16 authorizing those other specialized courts to see if the
17 suit that's being brought can be brought in that
18 particular court. We are just asking for the same
19 analysis to be done with Federal district courts.

20 JUSTICE SOTOMAYOR: What happens to all the
21 judgments that have been entered, reading this the way
22 the Ninth Circuit did, all the past cases, in that split
23 jurisdiction with district courts going other ways?
24 What happens to those old judgments where there wasn't
25 Federal subject-matter jurisdiction?

1 MS. O'CONNELL: I would think that if --

2 JUSTICE SOTOMAYOR: If we read things the
3 way you want us to read them.

4 MS. O'CONNELL: I would think if those cases
5 are already finished that res judicata would -- you
6 know, their -- those cases would still stand on their
7 own. But I think going forward, if the Court were to
8 say there is no subject-matter jurisdiction, those cases
9 could no longer be -- be brought in Federal court or
10 removed to Federal court.

11 JUSTICE SOTOMAYOR: How could you have
12 res judicata if you never had subject-matter
13 jurisdiction?

14 MS. O'CONNELL: So -- so you're talking
15 about a case where --

16 JUSTICE GINSBURG: You can bring up
17 subject-matter jurisdiction straight up the ladder, but
18 you can't when you --

19 MS. O'CONNELL: Once the case is --

20 JUSTICE GINSBURG: -- haven't brought it up
21 to final judgment and you're trying to use it
22 collaterally.

23 MS. O'CONNELL: I -- correct. If -- if
24 these cases are -- I mean, if -- if these cases are
25 still going on, then, yes, you could bring up

1 subject-matter jurisdiction, I believe. If the cases
2 are over there is no way that I know of to reopen the
3 case and bring that up.

4 JUSTICE GINSBURG: I forgot the name of the
5 ancient case that -- that said even subject matter, as
6 wholly as it is, when you've gone -- when you have a
7 final judgment you've got -- done everything on direct
8 review, then you can't collaterally review.

9 MS. O'CONNELL: Correct. Thank you, Justice
10 Ginsburg.

11 (Laughter.)

12 MS. O'CONNELL: The -- the words "court of
13 competent jurisdiction" in the statute tell you to look
14 at the statutes authorizing that court to see if you
15 could bring a claim there. And we are just asking for
16 the same rule in the Federal district courts.

17 JUSTICE BREYER: I mean, I guess language
18 that hurts you is "any court of law, equity, State, or
19 Federal." I mean, that's the D'Oench, Duhme one, and
20 they say that puts you in Federal court. And you -- you
21 want to say, we found eight statutes, and they say
22 "competent jurisdiction," and we'd love them to be in
23 State court; we want them to be in State court.

24 Have you found any that say just something
25 like "in any court of law, in equity, State, or

1 Federal," and you want them to be in Federal court?

2 MS. O'CONNELL: Well, those -- those can be
3 in Federal court, per the Court's decisions in D'Oench,
4 Duhme and in Red Cross. If that's the way --

5 JUSTICE BREYER: But what we have to say is,
6 once you added these words "in any competent
7 jurisdiction," what they did, those words took the case
8 out of Federal court unless it's some other basis for
9 getting there and require you to go to State court, and
10 to subtract words -- God, it's -- I mean, as a matter of
11 the English language, it just seems a little tough.

12 MS. O'CONNELL: No, no. I think as a matter
13 of an English language that's our strongest point.

14 JUSTICE BREYER: It is.

15 MS. O'CONNELL: That natural reading of that
16 phrase, a "court of competent jurisdiction" means that
17 you have to look somewhere else to determine if the
18 court is a competent jurisdiction -- is a "court of
19 competent jurisdiction."

20 The Court has observed that about various
21 statutes --

22 JUSTICE BREYER: I see. I see.

23 MS. O'CONNELL: -- and -- and we are just
24 asking for the same rule to be applied to the Federal
25 district courts.

1 The Respondents refer to the Federal
2 district courts as courts of general jurisdiction, but
3 just like a Federal bankruptcy court, the Federal
4 district courts are courts of limited jurisdiction. You
5 cannot typically bring a pure State law claim in a
6 Federal district court unless there is complete
7 diversity of citizenship and the requisite amount in
8 controversy.

9 So that language, "court of competent
10 jurisdiction," should just tell you, look at the
11 statutes authorizing the Federal court and check whether
12 this suit is authorized to be brought there.

13 There's a few other textual points that I
14 think reinforce the point we are trying to make. One is
15 that Section 1349 should be an important point of
16 reference. Congress established a general rule that
17 having a government charter is not enough to confer
18 Federal subject-matter jurisdiction unless the United
19 States owns 50 percent of the corporation's stock, and
20 when you have a privately owned corporation like Fannie
21 Mae, you should be looking for a pretty clear indication
22 from Congress that they wanted to confer subject-matter
23 jurisdiction.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MS. O'CONNELL: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Brooks.

2 ORAL ARGUMENT OF BRIAN P. BROOKS

3 ON BEHALF OF THE RESPONDENTS

4 MR. BROOKS: Thank you, Mr. Chief Justice,
5 and may it please the Court:

6 The Red Cross decision reaffirmed a strong
7 and long-standing rule going back through D'Oench,
8 Duhme, all the way to Osborn, which sets a baseline for
9 Congress to follow when it chooses to pursue Federal
10 policy through the corporate form.

11 Now, when Congress expressly provides that a
12 federally chartered corporation like Fannie Mae may sue
13 and be sued in Federal court, that confers jurisdiction
14 under D'Oench, Duhme, Red Cross, Osborn, and -- and
15 their prodigy.

16 Congress can obviously displace that rule if
17 it wants to. There are a lot of ways Congress can do
18 that. One way would be to eliminate the word "Federal,"
19 as Congress did in 1954 in the very same statute that
20 rechartered Fannie Mae for another agency. But adding
21 the words "competent jurisdiction" is pretty weak tea as
22 a solution for abolishing jurisdiction that otherwise
23 existed, particularly given the history of what was
24 going on.

25 JUSTICE GINSBURG: Why is competent

1 jurisdiction -- you -- you have a court. Does it have
2 competent jurisdiction? Is there basis for
3 subject-matter jurisdiction or personal jurisdiction?
4 That's what competent jurisdiction means.

5 MR. BROOKS: Right. So -- so, Your Honor,
6 what competent jurisdiction means here has to be
7 understood in light of the whole phrase. And
8 Petitioners' case, as you just heard it presented, is
9 all about the idea that the only phrase is "competent
10 jurisdiction." That is not the whole phrase.

11 The whole phrase is, "competent
12 jurisdiction, State or Federal." That entire phrase had
13 been interpreted three times in three different
14 appellate decisions in the 1940s for a sister housing
15 agency in the same statute, and that is the language
16 that Congress adopted for Fannie Mae in 1954. Each of
17 those appellate decisions at that time, every one of
18 them, held that the full phrase "court of competent
19 jurisdiction, State or Federal," conferred jurisdiction.
20 I'm talking about the Ferguson case, the George H. Evans
21 case, and the Seven Oaks case.

22 Congress in 1954 would have had no idea that
23 the language it was borrowing from another agency in the
24 same statute that had been repeatedly interpreted would
25 restrict Fannie Mae's access to Federal court, and that

1 history shows the distinction.

2 JUSTICE SOTOMAYOR: But why didn't they do
3 the same thing in Ginnie Mae?

4 MR. BROOKS: Well, Ginnie --

5 JUSTICE SOTOMAYOR: They chose very
6 different language, so doesn't that show a conscious
7 act.

8 MR. BROOKS: Well, Justice Sotomayor, let me
9 make sure I understand the question, because Ginnie Mae
10 historically has had the identical language to Fannie
11 Mae. Now, FSLIC, the Federal Savings and Loan Insurance
12 Corporation, they changed their language in the '54
13 statute to remove the word "Federal." We think the
14 reason for that was that FSLIC, as understood at that
15 time, was truly a Federal agency.

16 Fannie Mae, by contrast, as counsel says,
17 was transitioning into a new structure, right? There
18 would eventually be private ownership. And the idea
19 here, if anything, shows we think the opposite of what
20 the Petitioners mean here. They wanted to adopt the FHA
21 language, the language that had been interpreted in the
22 '40s, and, again, at the time of the '54 Act there had
23 been no case which had held that language didn't confer
24 jurisdiction.

25 Now, counsel mentioned five cases of this

1 Court that have interpreted the phrase "competent
2 jurisdiction." What this Court needs to understand
3 about those cases is the number of those five cases that
4 interpreted "competent jurisdiction" together with the
5 phrase "State or Federal" is zero. No case, not
6 Shoshone, not Phoenix, not Califano v. Sanders, looked
7 at the two phrases together.

8 And when counsel argues that the phrase
9 "competent jurisdiction" needs a separate source of
10 jurisdiction, they are right. The separate source of
11 jurisdiction is the phrase "State or Federal" if the
12 Court's rule in Red Cross means anything.

13 JUSTICE GINSBURG: Well, your -- your
14 position then is competent jurisdiction -- as long as
15 you have the word "Federal" -- "State" or "Federal,"
16 you're home free. So it doesn't -- the words "of
17 competent jurisdiction" doesn't mean anything. They
18 don't -- it's the use of the word "Federal" that gets
19 you into Federal court. And "of competent
20 jurisdiction," they just tagged along those words, and
21 they don't mean anything.

22 MR. BROOKS: Well, actually, Your Honor, in
23 the context of the late New Deal era, the words
24 "competent jurisdiction" meant a lot. They just don't
25 mean what the Petitioners say they mean. Right?

1 So the three things we think competent
2 jurisdiction was doing in the contemporary history of
3 the New Deal of the '40s and early '50s was -- these was
4 these three things.

5 So the first thing was, there was a very
6 vigorous debate in the appeals courts about the nature
7 of these new New Deal entities in terms of whether they
8 were limited by the Tucker Act and could only be heard
9 in the court of claims, or whether they could be heard
10 generally in the district courts. This was the precise
11 question presented in *Ferguson*, a case, I might add,
12 that the Solicitor General has previously interpreted in
13 briefing to this Court as conferring jurisdiction under
14 these exact same words. That was the SG's briefing in
15 the *Portsmouth* case. Okay?

16 But what "competent jurisdiction" in this
17 context was held to mean at that time was the direction
18 that general jurisdiction courts, and not only
19 specialized jurisdiction courts, could hear the case.
20 The way the Fourth Circuit put it in *Ferguson* at the
21 time was that it would be puzzling if this exact phrase,
22 later barred for *Fannie Mae*, could be heard in any State
23 court, but in Federal court, only in the Court of
24 Claims. And that issue was resolved.

25 The second thing --

1 JUSTICE GINSBURG: Well, the court said
2 "general jurisdiction," right?

3 MR. BROOKS: They -- they certainly did.

4 JUSTICE GINSBURG: "General jurisdiction,"
5 instead of saying "of competent jurisdiction" when
6 "competent" generally means -- is this -- the -- the
7 sue-and-be-sued clause gives the corporation capacity to
8 sue and be sued, but competent jurisdiction is addressed
9 to the Court.

10 Does this Court have authority to proceed in
11 this category of cases?

12 MR. BROOKS: Yes, Your Honor. So the way we
13 think all these things work together is, first of all,
14 as I say, the entire phrase, "court of competent
15 jurisdiction," State or Federal, had been unanimously
16 held to confer subject-matter jurisdiction. Right?
17 Those are the cases we talked about, and there were no
18 cases to the contrary at the time.

19 And the understanding of what "competent
20 jurisdiction" was adding was twofold. First of all,
21 from Congress's perspective at the time, I think it's
22 fair to say they weren't thinking about much, because
23 the 1954 Act was a 150-page comprehensive reform of
24 Federal housing policy having very little to do with
25 jurisdiction.

1 And we think what happened is they simply
2 borrowed a phrase that had been unanimously held to
3 confer jurisdiction, and they put it in for Fannie Mae.
4 There was no other reason to think they meant anything
5 different from that.

6 But we also know that less than two years
7 before the 1954 charter for Fannie Mae was adopted, this
8 Court looked at the phrase "competent jurisdiction" on a
9 standalone basis and said that all it referred to at
10 that time in that context was personal jurisdiction.

11 That doesn't mean that's what "competent
12 jurisdiction" means always. But what we think it means
13 is when coupled with the words "State" or "Federal," it
14 means personal jurisdiction courts of general
15 jurisdiction.

16 Now, Justice Sotomayor earlier asked the
17 question about how many statutes had sue-and-be-sued
18 clauses like ours. We have the same count, Your Honor,
19 that your clerk has. We have nine total, including
20 Fannie Mae.

21 JUSTICE SOTOMAYOR: We now have three
22 versions, but that's okay.

23 (Laughter.)

24 MR. BROOKS: I'm going to go with nine.

25 (Laughter.)

1 MR. BROOKS: But here's what else we know.
2 The number of statutes that have the phrase "competent
3 jurisdiction" alone, based on some Lexis research very
4 early this morning, is 781. So if the phrase "competent
5 jurisdiction" together with "State" or "Federal" exists
6 only nine times, but "competent jurisdiction" as a
7 generic matter occurs 781 times, that's the rule that we
8 urge on this Court today.

9 The rule is, when combined with the grant of
10 jurisdiction embodied in the word "Federal" under Red
11 Cross, you have the personal jurisdiction and general
12 jurisdiction holdings of other cases. You have the
13 grant of subject-matter jurisdiction per Red Cross and
14 its progenitors, and that becomes the jurisdictional
15 rule that is very clean.

16 Now --

17 CHIEF JUSTICE ROBERTS: If -- I'm sorry.

18 MR. BROOKS: So Your Honor, I was going
19 to -- go ahead.

20 CHIEF JUSTICE ROBERTS: Your friend on the
21 other side scares me when he says there are 60,000 cases
22 that are going to be added to the Federal docket.

23 Do you have an answer to that?

24 MR. BROOKS: I have many answers to that,
25 Your Honor, but the easiest answer is this.

1 The easiest answer is no --

2 JUSTICE KENNEDY: Don't tell us we're not
3 working hard enough.

4 (Laughter.)

5 MR. BROOKS: I do recall, Justice Kennedy,
6 that once upon a time, the Court took 150 cases a year.
7 Maybe foreclosures could be among them.

8 JUSTICE KENNEDY: They were easier cases.

9 MR. BROOKS: Perhaps I should sit down.

10 (Laughter.)

11 MR. BROOKS: Your Honor, the easiest answer
12 to that is that it's undisputed in this case that
13 Freddie Mac -- whatever one thinks of the Fannie Mae
14 charter, Freddie Mac has clear, undisputed
15 belt-and-suspenders jurisdiction. Freddie Mac has
16 almost as many foreclosures as Fannie Mae has. There
17 has been no race to the Federal courthouse.

18 JUSTICE GINSBURG: But there is a specific
19 statute that makes that crystal clear. And if we -- if
20 Congress wanted Fannie Mae, which it was going private,
21 to be treated the same way as Freddie Mac, then why
22 didn't it say the same thing for Fannie Mae as it
23 said --

24 MR. BROOKS: Well, so, Your Honor, we know a
25 couple of things that Congress thought about Freddie

1 Mac. But just let me make sure I've closed off on the
2 Chief Justice's question, which is the fact that there's
3 no race to the Federal courthouse on foreclosures for
4 Freddie Mac tells you what you need to know about Fannie
5 Mae, its sister organization.

6 Now, Justice Ginsburg, the issue about
7 Freddie Mac is severalfold. So the first thing we know
8 is when Freddy was created in 1970, the legislative
9 history in both the House Report and the Senate Report
10 make crystal clear that Congress's intention was to
11 create an entity that had identical powers that would
12 develop in parallel and that would have no advantage
13 over Fannie Mae. We know that was their intention in
14 drafting it.

15 Now, the words were unquestionably
16 different, just as the words in the Red Cross charter
17 were different from the words in the Second Bank of the
18 United States charter, and yet the outcome was the same.

19 The reason the words were different at the
20 time is because Congress had the luxury, in 1970, of
21 writing in a blank slate. So Congress sat down, without
22 60 years of history, without the need to extricate a
23 legacy agency from Ginnie Mae with a privatization
24 scheme over six different amendments, and to simply sit
25 down and say, this is what we think the GSE should look

1 like.

2 JUSTICE BREYER: I just want you to -- to
3 talk at some point -- I mean, there is a page of
4 legislative history, which could not be more clear. It
5 says exactly what the government says. It says -- they
6 are -- they are asked, does it -- if we did this, aren't
7 we giving these corporations -- I mean, Fannie -- the
8 right to go into a Federal court, although the matter
9 may be purely a State matter? That's not what we
10 intended. All we intended -- then they say, well, you
11 know, they have to look to see whether it's really a
12 State case or whether it's really a Federal case.

13 I mean -- and the words "competent
14 jurisdiction" do -- she says do that. That is their
15 natural meaning. I hadn't quite taken that in, but --
16 but it is -- it is their natural meaning that, what's
17 the point of having these here if the statute without
18 them would grant jurisdiction to go into Federal court
19 if you want?

20 MR. BROOKS: Well, Justice Breyer, on the --

21 JUSTICE BREYER: Let me give you that --
22 what do I do? Maybe you could just say you shouldn't
23 look at legislative history. I'm not prepared to say
24 that. What -- what should I do?

25 MR. BROOKS: Justice Breyer, two -- two

1 points.

2 So first of all, on the -- on the natural
3 reading, I would just urge that the natural reading of
4 "competent jurisdiction" standing alone is different
5 from the natural reading of "competent jurisdiction"
6 State or Federal. And there is no case, I emphasize,
7 that holds those words together, don't confer
8 jurisdiction.

9 But now, on the question about what was --
10 you know, how to understand the colloquy in 1934, there
11 is one respect in which that colloquy could be clearer.
12 And that respect is if the colloquy related to the
13 statute that created Fannie Mae. That would make it
14 clearer.

15 But as it turns out, the 1934 statute that
16 counsel cites in the briefing was not the statute that
17 created Fannie Mae, and so it's not that much more
18 probative than if it had been the legislative history of
19 an utterly unrelated statute. Okay?

20 In 1934, in the Housing Act, Congress
21 authorized the creation of entirely different private
22 mortgage associations which never came into being. The
23 sort of hope in the middle of the Depression in 1934 was
24 that private capital would come into the market pursuant
25 to that statute in places, if you read the rest of the

1 legislative history, in places like Houston, Texas, and
2 Chicago, and New York, and would start creating
3 liquidity to solve the problem.

4 So in 1938, a new statute was passed. That
5 was the same year, I might add, that Senator Bulkley,
6 the Senator whose legislative history is quoted, lost
7 his re-election campaign.

8 JUSTICE BREYER: For this reason.

9 (Laughter.)

10 MR. BROOKS: We -- we -- we can only assume,
11 or perhaps hope.

12 But in any case, 1938 was a different
13 statute. The congressional charter for Fannie Mae, that
14 wasn't even created in 1938. The congressional charter
15 for Fannie Mae that's being reviewed today was created
16 in 1948, one year after the Red Cross charter was
17 adopted, and six years after D'Oench, Duhme. And the
18 language adopted in 1948 was the D'Oench, Duhme
19 language.

20 So somebody has to prevail, either the
21 Supreme Court unanimously in D'Oench, Duhme, or the
22 failed Senator Bulkley. We -- we think the answer is
23 most likely this Court in D'Oench, Duhme followed in Red
24 Cross.

25 CHIEF JUSTICE ROBERTS: The -- the Federal

1 courts -- may be stepping back a bit. There are courts
2 of limited jurisdiction. And to get into them you have
3 to carry, I think, a significant burden to establish
4 their right to be there.

5 Now, I think you have to do more than win
6 51/49, given a presumption against Federal jurisdiction.
7 Do you think -- I suspect you think you do win by more
8 than 51/49, but that seems to me that is a consideration
9 that we need to take into account.

10 MR. BROOKS: So, Chief -- Mr. Chief Justice,
11 there's no question that the courts are limited
12 jurisdiction courts, and we should look at
13 subject-matter jurisdiction with a careful eye.

14 Having said that, this fundamentally is a
15 case about statutory construction. It's about what did
16 Congress mean to do in 1954. That's really all it's
17 about. I don't think there's a serious question but
18 that under Article III --

19 JUSTICE GINSBURG: But there's so many ways
20 that you could -- if you want to make sure that this
21 entity gets into Federal court all the time, what
22 Congress did with Freddie Mac is said, Freddie Mac will
23 be deemed to be a Federal agency for jurisdictional and
24 removal purposes.

25 Now, that is very clear. It means it can

1 come into Federal court to sue. It means it can remove
2 if it's sued in State court.

3 This, compared to "court of competent
4 jurisdiction" -- which, as I go back to competent
5 jurisdiction, competence refers to the ability of the
6 Court, which consists of two things: subject matter and
7 personal.

8 MR. BROOKS: So, Your Honor, let me begin
9 where you ended, if I might, and just say that this
10 Court has repeatedly held that the word -- the phrase
11 "competent jurisdiction" again, standing alone, okay,
12 has multiple different meanings depending on context.

13 In the United States v. Morton in 1984, this
14 Court held that it sometimes refers to subject-matter
15 jurisdiction and sometimes refers to personal
16 jurisdiction citing cases.

17 In the earlier case law of Blackmar v.
18 Guerre, which was the case decided just two years before
19 our statute was decided, it said that in that context,
20 the phrase only referred to personal jurisdiction.

21 So I think the only way to harmonize all of
22 these cases is to say that where competent jurisdiction
23 is included in a phrase that has the Red Cross
24 language/Osborn/D'Oench, Duhme, it means all of the
25 other things that "competent jurisdiction" normally

1 means: personal jurisdiction, courts of general
2 jurisdiction, et cetera. And that's what the case law
3 holds.

4 But the most --

5 JUSTICE GINSBURG: That's because this
6 Court's competence is general competence, which is
7 subject matter, and it's specific competence, which is
8 personal.

9 MR. BROOKS: Correct. That's exactly right.
10 And, again, because this is a case about Congress'
11 intention in adopting a statute, what is critical to
12 understand is when Congress borrowed this language that
13 had pre-existed for the Federal Housing Administration
14 for 20 years and grafted it onto Fannie Mae in its
15 verbatim entirety, every case that had interpreted that
16 language had held it was sufficient to confer
17 subject-matter jurisdiction so strongly that in the
18 Seven Oaks case in 1948 in the Fourth Circuit just six
19 years before our statute, the Fourth Circuit said that
20 those words were no more restrictive than the phrase "in
21 any United States District Court." That's the tapestry
22 on which Congress was weaving at the time.

23 Now, let me address, if I might just
24 briefly, the policy issue. We talked about the text and
25 the history. But counsel spent a few moments talking

1 about this privatization concept and how it would be
2 that what must have happened in the '50s was Congress
3 was going to treat Fannie Mae like any other private
4 company and deprive it of special access to the Federal
5 courts.

6 The presumption behind that argument is
7 that, naturally, Congress would never want a privately
8 owned company to have special access, except we know
9 from the Second Bank of the United States in Osborn that
10 there are times when a privately owned company is
11 sufficiently important, it can have special access. The
12 Second Bank was 80 percent owned by private
13 shareholders.

14 Fast-forward two centuries to 1970, we know
15 that Freddie Mac was created entirely privately owned at
16 its inception with clear and undisputed access to the
17 Federal courts, admittedly with different language, of
18 course, because it was writing in a different era and
19 writing on a different slate without all the baggage
20 that Fannie Mae had gone through. But there's no
21 question that privately owned instrumentalities when
22 pursuing a federally important purpose like housing can
23 qualify under these circumstances.

24 But the other problem with their theory if
25 it fails as a theoretical matter is that it also fails

1 in its mechanism. The truth is this: Congress did not
2 privatize Fannie Mae in 1954. On the contrary, even
3 when Fannie Mae became privately owned, under the 1954
4 Act, it remained a Federal government agency and it
5 still had special access to the Federal courts under
6 1345.

7 So if there had been a conscious legislative
8 judgment to take Fannie out of the Federal courts at
9 that time, they surely would have had to do the work of
10 taking away its agency status.

11 JUSTICE GINSBURG: It shouldn't matter to
12 the Federal court. They can be there if there is
13 diversity or if the claim arises under Federal law.

14 MR. BROOKS: That's true, Your Honor. That
15 exact issue, however, I might point out, was raised
16 specifically in Red Cross. It was a point of discussion
17 in the Red Cross oral argument before this Court that
18 Red Cross had repeatedly moved on diversity grounds.
19 And that issue was pointed out in the opinion as not
20 being particularly relevant. Lots of companies remove
21 on lots of grounds all the time.

22 And by the way --

23 JUSTICE GINSBURG: But Red Cross didn't have
24 the competence language. It was just any court, State
25 or Federal.

1 MR. BROOKS: That's true. But the point I
2 was making is that the fact of diversity jurisdiction
3 didn't have some negative implication for other sources,
4 and, indeed, the Freddie Mac charter is very powerful
5 evidence that that shouldn't matter.

6 Freddie Mac -- talk about belt and
7 suspenders -- has a charter which says, sue and be sued
8 in State or Federal court. It also says, Freddie --
9 Freddie doesn't say competent jurisdiction.

10 But what else Freddie says is Freddie says
11 that Freddie shall be deemed an agency for 1345
12 purposes. It separately says Freddie shall have
13 statutory authorization to remove, notwithstanding the
14 limitations of 1442. So Freddie has four distinct
15 grounds for getting to Federal court.

16 JUSTICE SOTOMAYOR: So why didn't they do
17 that for Fannie Mae?

18 MR. BROOKS: Because we -- I mean, it's hard
19 to know the subjective intentions, Justice Sotomayor, of
20 the Framers of our charter. But the original charter
21 language was written in the '30s and '40s. It was
22 written at a time when we were connected with multiple
23 other agencies. We were part of the Department of
24 Housing and Urban Development. We comprised what became
25 Ginnie Mae. And our language was an attempt to do

1 essentially removal surgery, to separate us from this
2 big accretion of language over decades.

3 Freddie Mac didn't have that problem. So
4 Freddie Mac is what one would do if you were starting
5 from scratch.

6 I will say, I am reminded of Justice Kagan's
7 colloquy in the last argument, though, about what would
8 happen to a Hill staffer looking at the 1954 statute.
9 And I'm trying to imagine what would happen to the poor
10 Hill staffer if he came and he said, well, listen.
11 We -- we'd like to change Fannie Mae's language. We
12 want to add this competent jurisdiction language.

13 Now, that's only been looked at three times
14 before, and all of those cases said that confers
15 jurisdiction. But we think that was just dicta or
16 perhaps wrong, and so we would go ahead and use it as a
17 way of removing jurisdiction.

18 That doesn't sound plausible any more in
19 this case than it did in the prior case to me, given
20 what the case law backdrop was of the time.

21 Now, if I might, I'd like to say one point
22 about the Freddie Mac issue, because, obviously, you
23 know, we are sister companies. Obviously, Freddie Mac
24 has different language. The question is, is this a good
25 thing for our side? Is it a bad thing for our side?

1 Our view basically is Congress said what it
2 meant in the 1970 reports, House and Senate. It said
3 that companies were supposed to be parallel. They were
4 supposed to have no advantages over each other and have
5 all the same powers.

6 The question for this Court is: Why would
7 Congress -- although it used a different language across
8 multiple powers -- why would it have wanted Freddie Mac
9 to have the same mortgage acquisition powers, the same
10 securitization powers, the same tax exemptions and SEC
11 exceptions, the same access to treasury lines of credit,
12 but have different Federal court litigating powers?
13 There's no answer to that.

14 And all we know is that in terms of the
15 Federal interest in access to the Federal courts, what
16 we know is that Fannie is the same as Freddie Mac, only
17 much, much bigger. So it doesn't make a lot of sense to
18 imagine that a \$3 trillion dollar company, the largest
19 company in the United States by assets, creating housing
20 across the country just like Freddie Mac would have been
21 intended not to be protected by Federal court
22 jurisdiction.

23 JUSTICE BREYER: Did you look it up? I
24 mean, is there -- did you try to find out where this
25 language really came from? I mean, somebody wrote it.

1 It didn't just have computers write it. I mean, there
2 is a human being who wrote it.

3 MR. BROOKS: Yeah.

4 JUSTICE BREYER: But who? Where did he come
5 from? Who did he work for? Does anybody know?

6 CHIEF JUSTICE ROBERTS: He was fired.

7 JUSTICE BREYER: He was fired.

8 MR. BROOKS: It's possible it was a former
9 staffer for Senator Buckley, although I certainly hope
10 not.

11 Your Honor, the -- here is what we know. We
12 know the language pre-existed. We know it wasn't
13 created in nineteen --

14 JUSTICE BREYER: Are those words,
15 "competent" -- you know, in any "court of competent
16 jurisdiction" --

17 MR. BROOKS: "State or Federal."

18 JUSTICE BREYER: Yeah, "State or Federal."
19 You know, I've got that point. I just want to know who
20 did this.

21 MR. BROOKS: If I find them, I will let you
22 know.

23 Your Honor, here's what we do know: We know
24 the language was not de novo in 1954. We know it was
25 written in the '30s for the Federal Housing

1 Administration. That's what we know. That's where the
2 phrase first came from. And we know that that language
3 had been repeatedly held to mean one thing, and Congress
4 had no indication it could have meant anything else. We
5 know from Ferguson, from George H. Evans, and from the
6 Seven Oaks case at a minimum, okay, that that phrase,
7 "competent jurisdiction," State or Federal, conferred
8 jurisdiction.

9 Here's what else we know: We know that in
10 briefing before this Court in the '80s, looking at this
11 exact language at Section 1702 of the National Housing
12 Act, the Solicitor General filed a brief in opposition
13 to certiorari in this Court in the Portsmouth
14 Redevelopment case. And in that brief citing Ferguson,
15 the Solicitor General's office said that phrase creates
16 jurisdiction in the district courts. Okay? That's what
17 we know. That has always been the understanding.

18 And if we didn't have that history and we
19 didn't have that case law, we might write it differently
20 on a blank slate. But writing 200 years after Osborn
21 and in the wake of all of that New Deal era case law, we
22 know what it means.

23 The disruption that would be created in the
24 markets, would this Court suddenly reverse the lower
25 courts -- and there are multiple of them all coming to

1 the same result, at least three in the courts of
2 appeals -- and hold that Freddie Mac has different
3 powers than Fannie Mae has would be significant?

4 CHIEF JUSTICE ROBERTS: Well, there is a
5 reason -- your -- your friend on the other side suggests
6 there was a reason for treating them differently, which
7 is that the board -- the Freddie board is -- consists of
8 Federal officers, while the idea, of course, is that
9 Fannie's board, two-thirds of it does not.

10 MR. BROOKS: Right. But the Fannie board,
11 unlike the Freddie board, was one-third appointed by the
12 President of the United States until conservatorship in
13 2008, and at the same time had the same special Treasury
14 access, the same tax exemptions, the same SEC
15 registration exemptions. I mean, Your Honor, there is
16 no material policy different between these two agencies,
17 and again, we have the legislative history that shows an
18 intent to treat these the same.

19 I will say that since 1974, every GSE
20 statute, and there have been many, have simultaneously
21 imposed identical amendments to both the Fannie Mae and
22 the Freddie Mac charter. So since Freddie was created,
23 Congress has never treated one differently, not in the
24 '70s and not today. So there's no plausible reason why
25 they would have wanted these treated differently.

1 CHIEF JUSTICE ROBERTS: Do you know why they
2 have that different structure on the board of directors?

3 MR. BROOKS: Well, again, Your Honor, and
4 it's interesting, I've actually personally spoken to
5 some of the original Fannie Mae directors from the late
6 '60s, okay? They were all former government officials,
7 because Fannie was, in '68, being extricated from its
8 Federal agency role.

9 Freddie Mac was a clean sheet of paper.
10 Freddie Mac was created the way that the Congress of
11 1970 would have wanted it. Fannie Mae wasn't. Fannie
12 Mae was inherited from generations earlier and had to be
13 torn apart from Ginnie Mae. That's why the original
14 board of the private Fannie Mae in 1968 consisted of
15 Paul Volcker, who at the time was a former HUD
16 Undersecretary. It consisted of a former general
17 counsel of HUD. They were all Federal officials at that
18 time, and it took multiple years before they could be
19 extricated. There is just a history here, which makes
20 it different.

21 But I would re-emphasize, Fannie Mae is the
22 largest participant in the largest market in the U.S.
23 economy. Holding that Fannie Mae has different powers
24 and lesser powers than Freddie Mac has, simply because
25 the language of the '50s and a complicated history

1 differed a little bit from the language of the '70s,
2 would be a significant policy shift that we would argue
3 isn't justified by either history or policy or text.

4 If there are no further questions, thank
5 you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Rosenkranz, three minutes.

8 REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ

9 ON BEHALF OF THE PETITIONERS

10 MR. ROSENKRANZ: Thank you, Your Honor.

11 Just a couple of points.

12 First, Justice Breyer wanted to know: What
13 do you do when the language points one way and the cases
14 seem to point another? I would -- I'd dispute the "the
15 cases seem to point another," but my direct answer is:
16 This Court has never gone wrong by going with the
17 language, and in those previous cases, what the Court
18 was trying to do in each case was go with the language,
19 right down to Red Cross where the operative principle
20 was: What did this very language mean last time this
21 Court addressed it?

22 Justice Breyer, you also asked: Which is
23 simpler for lawyers? Now -- now, Fannie doesn't dispute
24 that our reading is a natural reading of the language.
25 Fannie doesn't even dispute that it's the most natural

1 reading. Instead, its entire argument revolves around
2 this proposition that it might actually mean other
3 things, but I still don't know what Fannie thinks it
4 means.

5 Fannie says it could mean personal
6 jurisdiction. It could mean -- it could mean venue. It
7 could mean general jurisdiction. Plug each of those
8 words into the statute, and it just doesn't parse. But
9 the bottom line is you need to commit to what that
10 meaning is, and this Court can't go wrong by
11 interpreting those words to mean what this Court has
12 said of competent jurisdiction.

13 JUSTICE KAGAN: Well, suppose it means
14 personal jurisdiction. Why doesn't it parse?

15 MR. ROSENKRANZ: Okay. So now the statute
16 says, Fannie can sue or be sued in any court that has
17 personal jurisdiction over the parties, State or
18 Federal.

19 Well, the Federal Court of Claims has
20 personal jurisdiction over Fannie, but this was not a
21 grant of jurisdiction, because the -- the whole idea is
22 that this now turns into a grant of Federal
23 subject-matter jurisdiction. It's not a grant of
24 jurisdiction to Fannie.

25 So what about the court of appeals cases

1 that Mr. Brooks has addressed? Those cases did not
2 interpret the phrase of "competent jurisdiction," and
3 they were not about Federal jurisdiction. Everyone
4 understood in those cases, Ferguson and so on, that
5 there was Federal jurisdiction. The question was
6 whether something about the Tucker Act trumped district
7 court jurisdiction to move the cases to the Federal
8 court -- excuse me, to the Court of Federal Claims.

9 JUSTICE SOTOMAYOR: Isn't that USG's
10 position in Portsmouth?

11 MR. ROSENKRANZ: Well, Your Honor, I can't
12 explain the position that the government has taken, but
13 the government has said that those were also kind of
14 drive-by jurisdictional references in cases that simply
15 did not involve the question of what is the source of
16 Federal jurisdiction.

17 If I may, one last point on Fannie and
18 Freddie. Why -- why did Congress treat them
19 differently? The answer is different era, 32 years
20 apart, and better lobbyists. Freddie was being
21 supported and pressed by the Federal Home Loan Board,
22 what used to be called the Home Loan Bank Board. They
23 were ardent that Fannie was going to stop protecting
24 Federal interests. They wanted an advantage.

25 So Congress said, we are not giving them any

1 advantage. But case after case has held that, of
2 course, Freddie has jurisdiction. And if I may, just
3 one more sentence, but the vast majority of cases have
4 held, before this case came along -- the vast majority
5 of cases have held that there was no automatic
6 jurisdiction for Fannie.

7 Thank you, Your Honors.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 12:02 p.m., the case in the
11 above-entitled matter was submitted.)

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