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

MR. BROOKS: They -- they certainly did.

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

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

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

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

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

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

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

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

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

(Laughter.)

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

(Laughter.)

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

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

Now --

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

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

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

Do you have an answer to that?

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

The easiest answer is no --

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

(Laughter.)

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

JUSTICE KENNEDY: They were easier cases.

MR. BROOKS: Perhaps I should sit down.

(Laughter.)

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

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

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

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

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

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

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

like.

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

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

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

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

MR. BROOKS: Justice Breyer, two -- two

points.

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

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

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

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

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

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

JUSTICE BREYER: For this reason.

(Laughter.)

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

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

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

CHIEF JUSTICE ROBERTS: The -- the Federal

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

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

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

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

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

Now, that is very clear. It means it can

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

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

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

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

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

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

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

But the most --

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

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

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

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

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

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

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

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

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

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

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

And by the way --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. BROOKS: Yeah.

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

CHIEF JUSTICE ROBERTS: He was fired.

JUSTICE BREYER: He was fired.

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

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

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

MR. BROOKS: "State or Federal."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If there are no further questions, thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Rosenkranz, three minutes.

REBUTTAL ARGUMENT OF E. JOSHUA ROSENKRANZ

ON BEHALF OF THE PETITIONERS

MR. ROSENKRANZ: Thank you, Your Honor. Just a couple of points.

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

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

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

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

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

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

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

So what about the court of appeals cases

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

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

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

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

So Congress said, we are not giving them any

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

Thank you, Your Honors.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

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