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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E., RESPONDENTS

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

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PETITION FOR A WRIT OF CERTIORARI

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### QUESTION PRESENTED

Whether 36 U.S.C. § 2, which provides that the American National Red Cross has the right "to sue and be sued in courts of law and equity, State or Federal," vests federal courts with original jurisdiction over actions to which the Red Cross is a party, so that the Red Cross may remove to federal court under 28 U.S.C. § 1441(a) and (b) a tort action brought in state court.

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The American National Red Cross respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App., infra, 1a-16a) is not yet reported. The opinions of the district court (App., infra, 18a-30a) are unreported.

**JURISDICTION**

The court of appeals entered its judgment on July 24, 1991 (App., infra, 17a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### STATUTORY PROVISION INVOLVED

Section 2 of the American National Red Cross charter, 36 U.S.C. § 2, provides, in relevant part, that the American National Red Cross "shall have \* \* \* the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States."

### STATEMENT

Respondents, a husband and wife, sued the Red Cross in March 1990 in the Superior Court of Merrimack County, New Hampshire. They alleged that the wife became infected with human immunodeficiency virus (HIV), which causes AIDS, as a result of a transfusion of blood collected by the Red Cross.<sup>1</sup> The Red Cross removed the case to federal district court under 28 U.S.C. § 1441, contending that the court had jurisdiction under 36 U.S.C. § 2. The district court agreed that federal jurisdiction existed and denied respondents' motion to remand the case to state court. The court of appeals reversed despite acknowledging that its decision conflicts with a recent decision of the Eighth Circuit.

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Respondents simultaneously moved to consolidate this case with pending cases against the wife's surgeon and the manufacturer of an allegedly defective surgical stapler. When the Red Cross removed the case to federal court, the state court had not yet ruled on the motion to consolidate.

## A. The Red Cross and Its Charter

This case involves the construction of a provision of the Red Cross charter, as amended in 1947, in light of Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), and subsequent cases. Construction of the 1947 amendments to the charter is aided by an understanding of the background of the Red Cross.

Since 1864, several Geneva Conventions have provided for nonpolitical agencies from various nations to provide relief for the sick and wounded in times of war. See 36 U.S.C. § 1 note; 36 U.S.C. § 3; Department of Employment v. United States, 385 U.S. 355, 359 & n.8 (1966). In 1881, what is now known as the American National Red Cross was formed to serve that function. See 36 U.S.C. § 1 note. The Red Cross was reincorporated several times, culminating in a new congressional charter in 1905. Congress in 1905 "believed that the importance of the work demands a repeal of the present charter and a reincorporation of the society under Government supervision." Ibid. Under the 1905 charter, the Red Cross was formally assigned various peacetime duties in addition to its military-related duties, including disaster relief and prevention. See

36 U.S.C. § 3; Department of Employment, 385 U.S. at 359; Harriman Committee Report 4-5, C.A. App. 101-102.<sup>2</sup>

The 1905 charter empowered the Red Cross "to sue and be sued in courts of law and equity within the jurisdiction of the United States." Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600. That charter unquestionably created original federal jurisdiction over all cases involving the Red Cross, because (the sue-and-be-sued clause aside) all federally chartered corporations at that time were automatically within the jurisdiction of the federal courts. The then-prevailing law of original federal jurisdiction was stated in the Pacific Railroad Removal Cases, 115 U.S. 1 (1885), which held that the fact of federal incorporation, by itself, conferred on the federal courts jurisdiction over all cases involving federally chartered corporations. This grant of federal jurisdiction over all Red Cross cases became less clear in 1925, when Congress overruled

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The Harriman Committee Report, formally entitled Report of the Advisory Committee on Organization (June 11, 1946), was prepared by a distinguished committee appointed by the Chairman of the Red Cross to recommend changes to the charter and by-laws of the Red Cross. See also App., infra, 12a. Its recommendations were the acknowledged basis of Congress's 1947 amendments to the Red Cross charter. S. Rep. No. 38, 80th Cong., 1st Sess. 1 (1947); H.R. Rep. No. 337, 80th Cong., 1st Sess. 6 (1947).

Pacific Railroad by passing what is now 28 U.S.C. § 1349. That statute provides that "[t]he district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock."

It is unclear whether Congress intended Section 1349 to apply to the Red Cross, a non-stock corporation. What is clear, however, is that Congress may confer federal jurisdiction over a corporation by specific charter language notwithstanding Section 1349. In Osborn v. Bank of the United States, supra, the Court held that a sue-and-be-sued clause making specific reference to federal courts conferred federal jurisdiction. The sue-and-be-sued clause at issue in Osborn gave the Bank the right "to sue and be sued \* \* \* in all state courts having competent jurisdiction, and in any circuit court in the United States." 22 U.S. (9 Wheat.) at 817.

After the enactment of Section 1349, the Harriman Committee (see note 2, supra) in 1946 recommended that the Red Cross charter be amended to "make it clear that the Red Cross can sue and be sued in the Federal Courts" because "in view of the limited nature of the jurisdiction of the Federal Courts it seems desirable that this right be clearly stated in the charter." Harriman Committee Report 35, 36, C.A. App. 132, 133 (emphasis added). Congress responded to that suggestion by

simply adding the words "State or Federal" to the sue-and-be-sued clause, so that it now entitles the Red Cross "to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." 36 U.S.C. § 2 (emphasis added). Neither the Senate nor the House report comments on the purpose of the amendment beyond endorsing the Harriman Committee Report, but Senator Walter George remarked at a hearing: "I think the purpose of the bill is very clear, and that is to give the jurisdiction in State courts and Federal courts, and I think we had better leave it there." American National Red Cross: Hearing on S. 591 Before the Senate Comm. on Foreign Relations, 80th Cong., 1st Sess. 10 (1947).

The Harriman Committee Report commented on the objectives underlying the whole enterprise of charter revision that was undertaken in 1946-1947. One was "recognition of the national stature of the Red Cross and of the national interests in aid of which the Red Cross now functions." Harriman Committee Report 15, C.A. App. 112. The Report also acknowledged that the Red Cross is an "agency of the Government of the United States" for various purposes. Id. at 20, C.A. App. 117. This Court likewise has noted that, "time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government," such that, despite some acknowledged "respects in which the Red Cross differs from the usual government agency," it is

a "tax-immune instrumentalit[y] of the United States." Department of Employment, 385 U.S. at 359-360; see also United States v. City of Spokane, 918 F.2d 84, 87 (9th Cir. 1990) ("there can be no doubt" that "the Red Cross is an instrumentality of the United States"), cert. denied, 111 S. Ct. 2888 (1991).

The question presented here is whether this important instrumentality of the United States, with a charter that unquestionably provided for removal to federal courts when passed in 1905 and that was subsequently amended to make specific reference to the federal courts, may remove an action to federal court when it is sued in state court in a nondiversity case.

#### **B. Proceedings Below**

The Red Cross removed this case from New Hampshire state court to the federal district court pursuant to 28 U.S.C. § 1441(a) and (b). The district court denied respondents' motion to remand, holding that the sue-and-be-sued clause in the Red Cross charter creates original federal jurisdiction and thus entitles the Red Cross to remove to federal court actions to which it is a party. App., infra, 23a-24a. The court relied on Osborn v. Bank of the United States, supra, in which this Court held that a parallel sue-and-be-sued clause that referred expressly to federal courts did confer federal jurisdiction. Although the district court recognized that "the courts are

divided on this argument" (App., infra, 23a), it adhered to the "better-reasoned rule" finding Osborn applicable to the Red Cross (id. at 24a).

Concerned by the "conflicting decisions on the issue of jurisdiction over Red Cross" (App., infra, 28a), the district court certified the issue under 28 U.S.C. § 1292(b) for an interlocutory appeal to the United States Court of Appeals for the First Circuit in an order dated June 19, 1990. App., infra, 26a-30a. The court of appeals accepted certification on September 13, 1990. See id. at 4a. It then reversed the district court's decision and ordered that the case be remanded to state court if diversity jurisdiction did not provide an independent basis for removal. Id. at 1a-16a.<sup>3</sup>

The court of appeals acknowledged that the question before it was not "easily decided" (App., infra, 15a) and that the Eighth Circuit, among other courts, had found original federal jurisdiction over the Red Cross in Kaiser v. Memorial Blood Center, 938 F.2d 90 (1991) (App., infra, 5a). The court of appeals also acknowledged that "it is easy to imagine that Congress would have conferred federal subject matter jurisdiction in cases by and against the Red Cross had the issue been

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The district court has expressed its intention to allow joinder of nondiverse parties and remand the case to state court if it ultimately is determined that 36 U.S.C. § 2 does not provide original federal jurisdiction. App., infra, 28a.

presented." Id. at 16a. Nevertheless, apparently regarding the Red Cross charter as "ineptly drafted" (ibid.), the court "reach[ed] a different conclusion" (id. at 5a).

The court of appeals found this case closer to Bankers Trust Co. v. Texas & Pacific Railway, 241 U.S. 295 (1916), than to Osborn. App., infra, 7a-9a. In Bankers Trust, this Court held that a sue-and-be-sued clause that referred to "all courts of law and equity within the United States" was not a grant of jurisdiction to federal courts, but merely conferred the capacity to sue and be sued where jurisdiction was otherwise established. Although there is no specific reference to the federal courts at all in that clause (as there was in Osborn and is in the Red Cross charter), the First Circuit read Bankers Trust to turn on the failure of the clause to "mention a particular federal court (i.e., the circuit court)." Id. at 8a (emphasis added); see also id. at 10a. The First Circuit also found in Bankers Trust, and in 28 U.S.C. § 1349, a general rule "that a congressional grant of such jurisdiction should not be implied from ambiguous language." App., infra, 9a.

The court of appeals also distinguished Osborn on the ground that the charter in Osborn gave the Bank the power to "sue and be sued \* \* \* in all state courts having competent jurisdiction, and in any circuit court of the United States." 22 U.S. (9 Wheat.) at 817, quoted in App., infra, 9a (emphasis

added by the First Circuit). The court reasoned that the presence of the phrase "having competent jurisdiction" in the portion of the Osborn charter dealing with state courts, combined with its absence from the portion of the charter dealing with federal circuit courts, justified reading the statute as one conferring jurisdiction on the federal courts. By contrast, the Red Cross charter refers to state and federal courts in a single clause without the phrase "having competent jurisdiction." The court deemed the "parallel" treatment of state and federal courts in the Red Cross charter sufficient to distinguish it from the one at issue in Osborn. Id. at 10a.

The court of appeals finally dismissed the legislative history of the Red Cross charter on the ground that it showed no "clear intent on the part of Congress to confer original jurisdiction." App., infra, 12a. The court acknowledged the reference to "jurisdiction" in the Harriman Committee Report but refused to accord it weight because the word is not used in the formal recommendation, the statutory amendment, or the Senate Report. Id. at 12a-14a. The court also noted that Congress could have made its intention to confer jurisdiction clearer and had in fact done so in other contemporaneous statutes. Id. at 14a-15a.

## REASONS FOR GRANTING THE PETITION

As the First Circuit acknowledged (App., *infra*, 5a), its decision in this case conflicts with Kaiser v. Memorial Blood Center, 938 F.2d 90 (8th Cir. 1991). At the district court level, conflicting decisions are proliferating rapidly, and the need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance, since there are systemic reasons why few of the district court decisions receive appellate review. Moreover, the decision below is erroneous, and the issue that it addresses is important.

### I. THE COURT OF APPEALS' INTERPRETATION OF 36 U.S.C. § 2 CONFLICTS WITH THE EIGHTH CIRCUIT'S INTERPRETATION AND AGGRAVATES THE EXISTING SPLIT OF AUTHORITY IN THE DISTRICT COURTS

In Kaiser, the Eighth Circuit faced the same issue as the First Circuit did in this case. The Eighth Circuit held that the "specific reference to the federal courts" in the Red Cross charter is comparable to the charter language in Osborn and thus confers federal jurisdiction, making removal appropriate. 938 F.2d at 93. The First Circuit expressly rejected the Eighth Circuit's holding. App., *infra*, 5a.

The circuit split promises to fuel the disarray resulting from the district courts' attempts to grapple with this issue. More than 40 district court decisions have interpreted the Red Cross charter, roughly half concluding that it creates federal

jurisdiction and half concluding that it does not.<sup>5</sup> This

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Doe v. Baystate Medical Center, No. CA90-10094-Y (D. Mass. Sept. 4, 1991) (Young, J.); Murphy v. St. Vincent Hospital, No. CA90-12595-Y (D. Mass. Sept. 4, 1991) (Young, J.); Hernandez v. County of Los Angeles, No. 91-3182-SVW(EX) (C.D. Cal. Aug. 27, 1991) (Wilson, J.); Doe v. American Red Cross, No. 91-3114 (E.D. Pa. Aug. 23, 1991) (Ludwig, J.); Doe v. Vanderbilt University, No. 3-91-0244 (M.D. Tenn. July 23, 1991); Goldstein v. American Red Cross, No. 90-CV-60327-AA (E.D. Mich. July 11, 1991) (La Plata, J.); Luckett v. Harris Hospital, 764 F. Supp. 436 (N.D. Tex. 1991); McEvelly v. Rush Presbyterian St. Luke's Medical Center, 765 F. Supp. 434 (N.D. Ill. 1991); Boutar v. American National Red Cross, 1991 U.S. Dist. LEXIS 4590 (D.D.C. Apr. 9, 1991) (Greene, J.); Ray v. American National Red Cross, 1991 U.S. Dist. LEXIS 3963 (D.D.C. Mar. 25, 1991) (Penn, J.); McCool v. American Red Cross, 1991 U.S. Dist. LEXIS 2818 (E.D. Pa. Mar. 6, 1991) (J. Kelly, J.); Carr v. American Red Cross, 1990 U.S. Dist. LEXIS 14728 (E.D. Pa. Nov. 1, 1990) (Waldman, J.); Stuart v. West Jersey Hospital, No. 90-3744 (SSB) (D.N.J. Sept. 28, 1990); Coccia v. American Red Cross, 1990 U.S. Dist. LEXIS 13022 (E.D. Pa. Sept. 28, 1990) (Pollak, J.); Jozdani v. American Red Cross, No. CV 90-2321-WDK (Sx) (C.D. Cal. May 14, 1990) (Keller, J.), permission to appeal denied, No. 90-80232 (9th Cir. Sept. 6, 1990); Torres v. Ortega, No. 89 C 8626 (N.D. Ill. Feb. 16, 1990); Doe v. American Red Cross, No. 89 6282 (TJH) (C.D. Cal. Jan. 11, 1990) (Hatter, J.); Doe v. American Red Cross, No. CV 89-6284 RG (C.D. Cal. Jan. 10, 1990) (Gadbois, J.); Doe v. American Red Cross, 727 F. Supp. 186 (E.D. Pa. 1989) (Pollak, J.); Zaccone v. American Red Cross, No. C88-4458 (N.D. Ohio Dec. 15, 1989); Collins v. American Red Cross, 724 F. Supp. 353 (E.D. Pa. 1989) (Waldman, J.); Leahy v. County of Los Angeles, No. 89-5344 WDK (Gx) (C.D. Cal. Oct. 13, 1989) (Keller, J.); Anonymous Blood Recipient v. William Beaumont Hospital, 721 F. Supp. 139 (E.D. Mich. 1989) (Feikens, J.); Osborne v. Hawkes Hospital of Mount Carmel, No. C-2-89-440 (S.D. Ohio Aug. 25, 1989) (Smith, J.); Vansant v. American Red Cross, No. 88-8275 (E.D. Pa. June 30, 1989) (O'Neill, J.); Smith v. Thomas Jefferson Univ. Hospital, 1989 WL 73776 (E.D. Pa.

division of authority exists not only between different judicial districts, but sometimes within a single judicial district itself. Whether a case is litigated in state or federal court thus depends not only on the state in which it is brought, but also on the fortuity of which judge within a federal district receives the case once it is removed.<sup>6</sup>

There is no realistic prospect for resolution of this far-reaching conflict without a decision by this Court. Any appellate decision hereafter will simply side with the Eighth Circuit or side with the First Circuit and, at best, shift the weight of authority in one direction or the other from its current rough equipoise. Moreover, the question will rarely

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Aug. 7, 1989) (Fullam, C.J.); Okoro v. Children's Hospital, 1988 WL 168531 (D.D.C. July 12, 1988) (Greene, J.); Griffith v. Columbus Area Chapter of the American Red Cross, 678 F. Supp. 182 (S.D. Ohio 1988) (Graham, J.); Roche v. American Red Cross, 680 F. Supp. 449 (D. Mass. 1988) (Keeton, J.); Jeanne v. Hawkes Hospital of Mount Carmel, 1988 WL 168542 (S.D. Ohio Jan. 29, 1988) (Graham, J.); Walton v. Howard University, 683 F. Supp. 826 (D.D.C. 1987) (Penn, J.).

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In the Central District of California, for example, Judges Byrne, Pfaelzer, and Ideman have held that the Red Cross charter confers federal jurisdiction, but Judges Hatter, Gadbois, Keller, and Wilson have held that it does not. In the Eastern District of Michigan, Judge Gilmore has found jurisdiction; Judges Feikens and La Plata have found none. See notes 4 & 5, supra.

even make it to the appellate level, as the current disproportion between appellate decisions (two) and trial-level decisions (more than 40) attests.

District court decisions to remand a case to state court are, ordinarily, "not reviewable on appeal or otherwise" (28 U.S.C. § 1447(d)), and the standards for certification of interlocutory appeals under 28 U.S.C. § 1292(b) are exacting. See App., infra, 27a. Those factors combine to make appellate decisions of this issue a rarity. The First and Eighth Circuits, as noted, have decided the issue, and the Fifth Circuit has recently accepted the issue on interlocutory appeal in Doe v. Kerwood, No. 91-9101 (July 19, 1991). The D.C. Circuit, on the other hand, has rejected a district court's effort to certify the issue without first deciding it (Ray v. American National Red Cross, 921 F.2d 324 (1990) (per curiam)), and the Ninth Circuit, citing 28 U.S.C. § 1447(d), has rejected a district court's effort to certify the issue after deciding that the case should be remanded (Jozdani v. American Red Cross, No. 90-80232 (Sept. 6, 1990) (unpublished order)).

As a result of the difficulty of securing appellate review, trial courts will rarely get guidance from the federal courts of appeals on this issue, and the opportunities for this Court to

review the issue will be few. This case presents such an opportunity, and the Court should take it.

The decision below also creates conflicts that go beyond Red Cross cases. The theory of the decision below is that an instrumentality of the United States whose sue-and-be-sued clause mentions the federal courts, but "makes no reference to the jurisdiction of specific courts, either state or federal" (App., infra, 10a), cannot remove a case to federal court on the basis of original jurisdiction created by that clause. The Red Cross is not the only instrumentality of the United States whose sue-and-be-sued clause meets that description. For example, 12 U.S.C. § 1702 provides that the Secretary of Housing and Urban Development may "sue and be sued in any court of competent jurisdiction, State or Federal." The First Circuit necessarily would construe that clause as a mere grant of capacity to the Secretary, not a grant of jurisdiction to the federal courts. Yet the Fourth Circuit has held that "section 1702 \* \* \* confer[s] subject matter jurisdiction in the federal district court." Portsmouth Redevelopment & Housing Authority v. Pierce, 706 F.2d 471, 475, cert. denied, 464 U.S. 960 (1983). Agreeing with that conclusion, the Solicitor General has advised this Court: "Plainly, Section 1702, by authorizing suit 'in any court of competent jurisdiction, State or Federal,' provides a

basis for district court jurisdiction \* \* \*." Brief for the Respondents in Opposition at 9, Portsmouth Redevelopment and Housing Authority v. Pierce, No. 83-90. The decision below therefore contradicts not only the Eighth Circuit's holding with respect to the Red Cross charter, but also the view of both the Fourth Circuit and the federal government. The Court should grant certiorari to review these important conflicts.

## II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

This Court's decisions teach how a sue-and-be-sued clause in a federal charter is to be interpreted: a specific reference to the federal courts is construed as a grant of jurisdiction. The First Circuit embraced a more complicated analysis that requires "mention [of] a particular federal court" (App., infra, 8a (emphasis added)) in order to find jurisdiction, but that approach finds no support in this Court's decisions. Moreover, the First Circuit erroneously disregarded the evidence of Congress's intent to provide jurisdiction in this charter.

A. This Court has ruled consistently that an express reference to the federal courts in a federal corporation's sue-and-be-sued clause creates federal jurisdiction over actions involving that corporation. The seminal and still controlling case is Osborn v. Bank of the United States, supra. In that case, the Bank's charter allowed it "to sue and be sued \* \* \* in all State Courts having competent jurisdiction, and in any circuit court of the United States." 22 U.S. (9 Wheat.) at 817

(emphasis added). This Court held that the provision "admit[ted] of but one interpretation" (ibid.), namely that the charter "confers jurisdiction on the circuit court of the United States, if congress can confer it" (id. at 818). In reaching that decision, the Court distinguished an earlier case involving the Bank's predecessor, Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809), on the ground that the charter in Deveaux referred only to "courts of record" (id. at 85) and did not specify the federal courts. The words that Chief Justice Marshall chose to distinguish between Deveaux and Osborn are important, for they reflect that it was the reference to the federal courts generally, not the reference to a specific federal court, that influenced the Court's decision:

Whether this decision [Deveaux] be right or wrong, it amounts only to a declaration, that 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. To infer from this, that words expressly conferring a right to sue in those courts, do not give the right, is surely a conclusion which the premises do not warrant.

22 U.S. (9 Wheat.) at 818 (emphasis added). Thus, Osborn established the principle that reference to the federal courts in a sue-and-be-sued clause creates federal jurisdiction.

In the Pacific Railroad Removal Cases, supra, this Court went well beyond Osborn by holding that the mere fact of federal incorporation creates federal jurisdiction over cases involving the corporation. Congress reacted by withdrawing federal jurisdiction based solely on a railroad's federal incorporation

(Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 803), and in 1925 extended that withdrawal to all federally chartered stock corporations (see 28 U.S.C. § 1349). The court below erred, however, in concluding (App., infra, 6a-7a) that Congress's nullification of Pacific Railroad undermined the holding of Osborn. To the contrary, Congress in no way limited Osborn's vitality. The relevant holding in Osborn is grounded strictly in the charter language that referred to the federal courts, not in the fact that the Bank was federally chartered.

Subsequent case law confirms the validity of distinguishing between jurisdiction based on charter language and jurisdiction based on the fact of federal incorporation. In Bankers Trust Co. v. Texas & Pacific Railway, this Court again construed charter language that empowered a railroad to sue and be sued "in all courts of law and equity within the United States" but did not specify the federal courts. 241 U.S. at 302 (emphasis added). Because the language suffered from "the same generality" as the language in Deveaux, this Court held that the charter did not create federal jurisdiction. Id. at 304-305. The case does not, as the court of appeals suggested (App., infra, 8a-9a), rest on any general rule that ambiguous statutes will be construed not to grant jurisdiction or that mention of a specific federal court is required. It simply interprets a statute that is wholly unlike the Red Cross charter and instead like the statute construed in Deveaux.

On the only occasion when this Court has confronted a sue-and-be-sued clause that refers specifically to the federal courts but not to any particular federal court, it has found the clause to be a grant of jurisdiction. In D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 455 (1942), the Court wrote:

The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued "in any court of law or equity, State or Federal."

In an accompanying footnote, the Court noted that the quoted Act "further provides" that actions in which the FDIC is a party shall be deemed to arise under federal law, yet the Court made no comment on the significance of that fact. Id. at 455 n.2. The fact that the Court regarded as having jurisdictional importance was the one quoted in the text, i.e., that the statute -- exactly like the Red Cross charter -- authorized suit "in any court of law or equity, State or Federal."

Justice Jackson, concurring, stated even more explicitly that the "arising under" language found in the majority's footnote had a substantive purpose (i.e., directing the courts to fashion a federal common law) and that jurisdiction itself was conferred by the statute's reference to the federal courts:

This case is not entertained by the federal courts because of diversity of citizenship. It is here because a federal agency brings the action, and the law of its being provides, with exceptions not important here, that: "All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise

under the laws of the United States: . . ." That this provision is not merely jurisdictional is suggested by the presence in the same section of the Act of the separate provision that the Corporation may sue and be sued "in any court of law or equity, State or Federal."

315 U.S. at 467-468 (emphasis added and footnote omitted). The court below attempted to distinguish D'Oench on the theory that the "arise under" clause, not the sue-and-be-sued clause, was the jurisdiction-conferring feature of the statute. App., infra, 10a-11a. But, as the passages just quoted show, the First Circuit's reading of the case is not faithful to this Court's reasoning.

The court of appeals ignored the clear import of these precedents in ruling that 36 U.S.C. § 2 does not create federal jurisdiction. Indeed, the court dismissed the Red Cross charter's specific reference to federal courts -- Congress's chosen method of conferring federal jurisdiction on corporations -- as having no "talismatic significance." App., infra, 7a. Regardless of how the significance of the reference is characterized, Osborn's holding that such a reference constitutes an express grant of federal jurisdiction is surely controlling. Unlike the First Circuit, the Eighth Circuit recognized Osborn's authority and held that a reference to federal courts confers federal jurisdiction. Kaiser v. Memorial Blood Center, supra.

B. Resort to legislative history in this case should be unnecessary because of the clear reference to the federal courts in the Red Cross charter, which brings it within the rule of Osborn and D'Oench. Nevertheless, the legislative history strongly supports the Red Cross's position. The court of appeals sought to circumvent the legislative history (App., infra, 12a-15a), but its effort to do so -- particularly its reliance on a comparison to other statutes -- is unconvincing.

The Red Cross charter amendments were passed just five years after D'Oench and contained language almost identical to that which this Court found to be jurisdiction-conferring in the FDIC charter. One must, of course, presume that Congress intended those words to have the meaning that this Court had given them in similar legislation. Cannon v. University of Chicago, 441 U.S. 677, 695-698 (1979); see also Bowen v. Massachusetts, 487 U.S. 879, 896 (1988). But it is not necessary to rely on a presumption alone, for both the Harriman Committee Report, and one of the few Members of Congress who ever commented on this uncontroversial legislation, expressly stated its purpose to be jurisdictional. See p. 5, supra. Furthermore, the "national stature" and governmental nature of the Red Cross were driving forces behind the 1947 charter amendments (ibid.), and those policies support a construction of the charter that allows the Red Cross to remove lawsuits from state to federal court.

The court of appeals dismissed these explicit references to "jurisdiction" on the curious ground that they were not repeated elsewhere. App., infra, 12a-14a. The court found it significant, for example, that "the Senate Report makes no mention of the jurisdictional point whatsoever." Id. at 14a. But the Senate Report is just two pages long (less than one full page of text) and says virtually nothing more than that the legislation incorporates the uncontroversial recommendations of the Harriman Committee Report. S. Rep. No. 38, 80th Cong., 1st Sess. (1947). In relying on a tenuous negative inference from that document and similar sources, the First Circuit was grasping at straws. See Harrison v. PPG Industries, Inc., 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

The court below relied more heavily on the theory that Congress could have used more specific language to grant jurisdiction, and did so in a couple of statutes passed shortly after the amendment of the Red Cross charter. App., infra, 14a-15a. The negative inference from Congress's failure to use more specific language fails, however, because the language Congress chose lends itself equally if not more poorly to the interpretation the court of appeals attributed to it. Congress

could have used clearer language had it intended to achieve that result and did so in at least one contemporaneous statute.

The court of appeals was forced to conclude that the 1947 amendments to the Red Cross charter had the effect of "confering only the power to sue." App., infra, 12a. But adding the words "State or Federal" to the 1905 charter was clearly unnecessary to achieve that end. The charter already empowered the Red Cross "to sue and be sued in courts of law and equity within the jurisdiction of the United States." Federal courts surely had been courts of law within the jurisdiction of the United States between 1905 and 1947. There was thus no need to single them out for this limited purpose when the charter was amended.

Furthermore, if Congress intended only to make clear the Red Cross's capacity to sue in state and federal courts, it could just as easily have given the Red Cross merely the power "to sue and be sued, to complain and to defend in any court of competent jurisdiction," without explicit reference to the federal courts; and that is precisely what Congress did in reincorporating the Export-Import Bank of the United States on June 9, 1947, just a month after it amended the Red Cross charter. Act of June 9, 1947, ch. 101, § 1, 61 Stat. 130 (current version at 12 U.S.C. § 635(a)(1)). In short, Congress could have been clearer in achieving the result that the court of appeals postulated, just as it could have been clearer in

conferring jurisdiction. The question presented must be answered by analyzing the language that Congress did use in the light of governing precedents, not by drawing negative inferences from the language that Congress could have used.

The court of appeals, moreover, misquoted in a significant way the statute that it regarded as the best evidence that the 1947 Congress did not intend a statute worded like 36 U.S.C. § 2 to grant jurisdiction. In August 1947, Congress passed a statute clearly conferring on federal district courts jurisdiction over cases in which the Federal Crop Insurance Corporation sues or is sued, and the court of appeals asserted that "Congress so amended the F.C.I.C. charter despite the presence of the language 'sue and be sued in any court, state or federal' in the corporation's original charter." App., infra, 14a.<sup>7</sup> The actual language in the original FCIC charter, however, was quite different: "The Corporation \* \* \* may sue and be sued in its corporate name in any court of competent jurisdiction, State or Federal." Act of Feb. 16, 1938, ch. 30, § 506, 52 Stat. 73

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The court of appeals relied further on language in the charter of the Commodity Credit Corporation, also enacted after the amendments to the Red Cross charter, that conferred exclusive original jurisdiction on the federal courts. App., infra, 14a-15a (citing Act of June 29, 1948, ch. 704, § 4, 62 Stat. 1070). The court failed to appreciate that Congress naturally would use different language to create exclusive rather than concurrent jurisdiction.

(emphasis added). The "of competent jurisdiction" language -- which is absent from the Red Cross charter -- introduces a potential ambiguity that Congress may have wished to clarify, since it might be read to presuppose that jurisdiction is determined by some body of law other than the sue-and-be-sued clause itself.<sup>8</sup> Since no such ambiguity has ever appeared in the Red Cross charter, the 1947 amendment of the FCIC charter cannot form the basis for any inference about the meaning of the 1947 amendment of the Red Cross charter, and the court of appeals erred by drawing such an inference.

The inference that the court of appeals would draw is wrong for the additional reason that it inverts the proper time sequence that should guide the interpretation of the Red Cross charter. Courts must look to "the state of the law at the time the legislation was enacted," and not to subsequently enacted laws, to interpret the meaning of statutory language. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 378 (1982) (emphasis added). When Congress reincorporated the Red Cross in 1905, the Pacific Railroad doctrine was still valid, and thus the mere fact of federal incorporation conferred federal jurisdiction on cases involving the Red Cross.

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As noted above, however, the Fourth Circuit has held as recently as 1983 that even this language confers federal jurisdiction.

Therefore, it is evident that Congress originally intended to extend federal jurisdiction to the Red Cross.

After the passage of 28 U.S.C. § 1349 in 1925, however, it appeared that jurisdiction could no longer be predicated solely on federal incorporation. Congress thereafter amended the Red Cross charter to refer specifically to the federal courts in its sue-and-be-sued clause. This brought the Red Cross charter into line with the unbroken line of precedent holding such references to constitute an express grant of federal jurisdiction.

Accordingly, both the language of the statute, construed in light of law existing when it was passed, and the legislative history contradict the court of appeals' decision. This Court should grant the Red Cross's petition to resolve the conflict in the circuits and correct the First Circuit's error.

### **III. THE QUESTION PRESENTED IS IMPORTANT**

Justice Scalia has observed that "[n]othing is more wasteful than litigation about where to litigate." Bowen v. Massachusetts, 487 U.S. at 930 (dissenting opinion); see also Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 818-819 (1988). With the lower federal courts hopelessly divided on whether the Red Cross may automatically remove cases from state to federal court, and the only two appellate courts to decide the issue in disagreement, no end to the widespread litigation of this issue is in sight unless this Court grants

certiorari. Cases may continue to be erroneously remanded to state court, or (if our position turns out to be wrong) cases may proceed to trial in federal courts that have no jurisdiction; either way, the waste of resources would be great. A decision by this Court would relieve the burden on the lower federal courts that must continue to grapple with this issue, and on the Red Cross.

The more than 40 decided AIDS-related cases that have addressed the jurisdictional issue are among the many such cases that have been brought against the Red Cross. The court of appeals expressly cited the "importance of the jurisdictional issue" and the "increasing litigation" involving transfusion-associated AIDS as its reasons for granting the interlocutory appeal in this case. App., infra, 2a. Substantial resources have been and will continue to be devoted to this preliminary, procedural issue until it receives definitive resolution. Those resources necessarily are diverted not only from other important work of the courts, but also from other important work of the Red Cross itself.

Both Congress and this Court have recognized the importance of the services performed by the Red Cross. Congress reincorporated the Red Cross in 1905 to introduce direct federal supervision of and representation in the national organization because it "believed that the importance of the work" performed

by the Red Cross demanded increased participation by the federal government. 36 U.S.C. § 1 note. This Court too has adverted to the "wide variety of functions indispensable to the workings of our Armed Forces around the globe, and \* \* \* to the States in time of need" that the Red Cross fulfills. Department of Employment, 385 U.S. at 359 (footnotes omitted). The Red Cross's blood services program, directly at issue in the increasing litigation, plays a central role in the performance of these crucial services. Indeed, in a recent opinion resolving the same question presented here in the same general context of AIDS-related litigation resulting from a blood transfusion, Judge Ideman of the Central District of California traced the relationship of the blood program to the national purposes for which the Red Cross was chartered and concluded that "[t]hose purposes may be thwarted if local or regional needs or prejudices are allowed to bring undue pressure on the Red Cross[,] \* \* \* [which] could easily be brought to bear in trial situations in a local forum." Reisner v. Regents of the University of California, slip op. 4-6.

Resolution of the jurisdictional issue by this Court -- and a decision favoring the federal forum -- is also necessary in order to promote uniformity in the decision of certain federal questions that will arise repeatedly in AIDS-related tort suits as a result of the Red Cross's status as a federal instrumentality. Trial courts will need to decide, for example, whether

the Red Cross shares the federal government's immunity from punitive damages and from jury trial demands.<sup>10</sup> Whatever the correct resolution of those questions may be, they are federal questions that should receive federal determination. Cf. International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S. Ct. 1700, 1709 (1991) (complex issues of federal immunity may "need[] the protection of a federal forum"). Yet those questions will be entrusted to the state courts roughly half the time -- on a virtually random basis -- unless this Court grants certiorari and reverses the decision of the court of appeals.

Finally, review of the decision below is important because of the cloud it places over the jurisdictional provisions of statutes applicable to other federal agencies, officials, and instrumentalities. As already noted (p. 16, supra), the Solicitor General regards a sue-and-be-sued clause that refers to "any court of competent jurisdiction, State or Federal," as a grant of jurisdiction to the federal district courts. Other stat-

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See Lehman v. Nakshian, 453 U.S. 156, 168 (1981); In re Young, 869 F.2d 158 (2d Cir. 1989) (United States Postal Service, as a federal instrumentality with a sue-and-be-sued clause, has immunity from jury trial demands); Jones-Hailey v. TVA, 660 F. Supp. 551 (E.D. Tenn. 1987) (same as to TVA).

utes, including those applicable to the Pension Benefit Guarantee Corporation, the Federal National Mortgage Association, and the Government National Mortgage Association, also contain that language or language sufficiently similar to be affected by the decision below (and do not contain language deeming all questions to arise under federal law).<sup>11</sup> Furthermore, Justice Jackson has cited 12 U.S.C. § 1432, applicable to Federal Home Loan Banks, as a jurisdiction-conferring statute indistinguishable from that of the FDIC. D'Oench, Duhme, 315 U.S. at 468 n.5 (concurring opinion). If the court below is right in demanding "mention [of] a particular federal court" (App., infra, 8a) to find jurisdiction, however, then the Solicitor General and Justice Jackson are wrong, and the previously assumed basis for federal jurisdiction over these entities is absent. This Court should resolve the uncertainty created by those conflicting views.

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12 U.S.C. § 1723a(a) (GNMA and FNMA); 29 U.S.C. § 1302(b)(1) (PBGC). The statute applicable to GNMA and FNMA, like 12 U.S.C. § 1702 and the pre-1947 FCIC statute, grants the power to sue and be sued "in any court of competent jurisdiction, State or Federal." The "of competent jurisdiction" language weakens the case for construing the statute as a grant of original federal jurisdiction (see p. 17, supra), yet statutes containing that language have been so construed. If that construction is proper, it follows a fortiori that the Red Cross charter, which lacks such language, confers jurisdiction.

In sum, the authorities are in substantial disarray on a matter of importance to the courts, to the Red Cross, and to other components of the government. This case presents a rare opportunity for this Court to address the disputed jurisdictional issue and to bring much-needed certainty and uniformity to this area. Therefore, the Court should grant the petition.

#### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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