SUPREME COURT OF THE UNITED STATES

No. 91–594

AMERICAN NATIONAL RED CROSS, PETITIONER *v.* S. G. AND A. E.

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

[June 19, 1992]

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.

The Court today concludes that whenever a statute granting a federally chartered corporation the "power to sue and be sued" specifically mentions the federal courts (as opposed to merely embracing them within general language), the law will be deemed not only to confer on the corporation the capacity to bring and suffer suit (which is all that the words say), but also to confer on federal district courts *jurisdiction* over any and all controversies to which that corporation is a party. This wonderland of linguistic confusion—in which words are sometimes read to mean only what they say and other times read also to mean what they do not say—is based on the erroneous premise that our cases in this area establish a "magic words" jurisprudence that departs from ordinary rules of English usage. In fact, our cases simply reflect the fact that the natural reading of *some* "sue and be sued" clauses is that they confer both capacity and jurisdiction. Since the natural reading of the Red Cross charter is that it confers only capacity, I respectfully dissent.

Section 2 of the Red Cross Charter, 36 U. S. C. §2, sets forth the various powers of the corporation, such as the power "to have and to hold . . . real and personal estate"; "to adopt a seal"; "to ordain and establish bylaws and regulations"; and to "do all such acts and things as may be neces-sary to . . . promote

[its] purposes."[1] The second item on this list is "the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." *Ibid.* The presence of this language amidst a list of more or less ordinary corporate powers confirms what the words themselves suggest: It merely establishes that the Red Cross is a juridical person which may be party to a lawsuit in an

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[1]Section 2, as amended, provides in its entirety:

"The name of this corporation shall be `The American National Red Cross', and by that name it shall have perpetual succession, with the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to dispose of the same, to accept gifts, devises, and bequests of real and personal estate for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaties of Geneva, August twenty-second, eighteen hundred and sixty-four and July twenty-seventh, nineteen hundred and twenty-nine, and adopted by the several nations acceding thereto; to ordain and establish bylaws and regulations not inconsistent with the laws of the United States of America or any State thereof, and generally to do all such acts and things as may be necessary to carry into effect the provisions of sections 1, 2 to 6, 8, and 9 of this title and promote the purposes of said organization; and the corporation created is designated as the organization which is authorized to act in matters of relief under said treaties. In accordance with the said treaties, the delivery of the brassard allowed for individuals neutralized in time of war shall be left to military authority." 36 U. S. C. §2.

American court, and that the Red Cross—despite its status as a federally chartered corporation—does not share the Government's general immunity from suit. Cf. Fed. Rule Civ. Proc. 17(b) ("The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized"); 4 Thompson on Cor-porations §3161, p. 975 (3d ed. 1927) ("[The power to sue and be sued] is expressly conferred in practically every incorporating act"); *Loeffler* v. *Frank*, 486 U. S. 549, 554–557 (1988) ("sue and be sued" clause waives sovereign immunity).

It is beyond question that nothing in the language of this provision suggests that it has anything to do with regulating the jurisdiction of the federal courts. The grant of corporate power to sue and be sued in no way implies a grant of federal-court jurisdiction; it merely places the corporation on the same footing as a natural person, who must look elsewhere to establish grounds for getting his case into court. Words conferring *authority* upon a *corporation* are a most illogical means of conferring *jurisdiction* upon a *court*, and would not normally be understood that way. Moreover, it would be extraordinary to confer a new subject-matter jurisdiction upon "federal courts" in general, rather than upon a particular federal court or courts.

The Court apparently believes, see *ante*, at 9, n. 8, that the language of §2 is functionally equivalent to a specific reference to the district courts, since no other court could reasonably have been intended to be the recipient of the jurisdictional grant. Perhaps so, but applying that intuition requires such a random butchering of the text that it is much more reasonable to assume that *no* court was the intended recipient. The Red Cross is clearly granted the *capacity* to sue and be sued in *all* federal courts, so that it could appear, for example, as a party in a third-party action in the Court of International Trade, see 28 U. S. C. §1583, and in an action before the United States Claims Court, see Claims Court Rule 14(a) (Mar. 15, 1991). There is simply no textual basis, and no legal basis except legal intuition, for saying that it must *in addition* establish an independent basis of jurisdiction to proceed in those courts, though it does *not* in the district courts.

In fact, the language of this provision not only does not distinguish among federal courts, it also does not treat federal courts differently from state courts; the Red Cross is granted the "power" to sue in both. This parallel treatment of state and federal courts even

further undermines a jurisdictional reading of the statute, since the provision cannot reasonably be read as allowing the Red Cross to enter a state court without establishing the independent basis of jurisdiction appropriate under state law. Such a reading would present serious constitutional questions, cf. *Brown* v. *Gerdes*, 321 U. S. 178, 188 (1944) (Frankfurter, J., concurring); *Howlett* v. *Rose*, 496 U. S. 356, 372 (1990); *Herb* v. *Pitcairn*, 324 U. S. 117, 120–121 (1945); *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211, 222–223 (1916); but cf. Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 S. Ct. Rev. 187, 207, n. 84. Since the language of the Red Cross charter cannot fairly be read to create federal jurisdiction but not state jurisdiction, we should not construe it as creating either. *Edward J. DeBartolo Corp.* v. *NLRB*, 463 U. S. 147, 157 (1983); *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500–501 (1979).

I therefore conclude—indeed, I do not think it seriously contestable—that the natural reading of the "sue and be sued" clause of 36 U. S. C. §2 confers upon the Red Cross only the *capacity* to "sue and be sued" in state and federal courts; it does not confer jurisdiction upon any court, state or federal.

I do not understand the Court to disagree with my analysis of the ordinary meaning of the statutory language. Its theory is that, regardless of ordinary meaning, our cases have created what might be termed a "phrase of art," whereby a "sue and be sued" clause confers federal jurisdiction "if, but only if, it specifically mentions the federal courts," *ante*, at 8. Thus, while the uninitiate would consider the phrase "sue and be sued in any court in the United States" to mean the same thing as "sue and be sued in any court, state or federal," the Court believes that our cases have established the latter (but not the

former) as a shorthand for "sue and be sued in any court, state or federal, *and the federal district courts shall have jurisdiction over any such action*." Congress is assumed to have used this cleverly crafted code in enacting the charter provision at issue here, *ante*, at 4–5. In my view, our cases do not establish the cryptology the Court attributes to them. Rather, the four prior cases in which we have considered the jurisdictional implications of "sue and be sued" clauses are best understood as simply applications of conventional rules of statutory construction.

In *Bank of the United States* v. *Deveaux*, 5 Cranch 61 (1809), we held that a provision of the Act establishing the first Bank of the United States which stated that the Bank was "made able and capable in law . . . to sue and be sued . . . in courts of record, or any other place whatsoever," 1 Stat. 192, did not confer jurisdiction on the federal courts to adjudicate suits brought by the Bank. Construing the statutory terms in accordance with their ordinary meaning, we concluded (as I conclude with respect to the Red Cross charter) that the provision merely gave "a *capacity* to the corporation to appear, as a corporation, in any court which would, by law, have cognisance of the cause, if brought by individuals." 5 Cranch, at 85–86 (emphasis added). We expressly noted (as I have in this case) that the Act's undifferentiated mention of all courts compelled the conclusion that the provision was not jurisdictional: "*If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be*," *id.*, at 86 (emphasis added). That statement is immediately followed by contrasting this provision with another section of the Act which provided that certain actions against the directors of the Bank "may . . . be brought . . . in any court of record of the United States, or of either of them," 1 Stat. 194. *That*

provision, we said, "expressly authorizes the bringing of that action in the federal or state courts," which "evinces the opinion of congress, that the right to sue does not imply a right to sue in the courts of the union, unless it be expressed." 5 Cranch, at 86. It is clear, I think, that the reason the Court thought the right to have been "expressed" under the directors-suit provision, but not "expressed" under the provision before it, was *not* that the former happened to mention courts "of the United States." For that would have provided no contrast to the argument against jurisdiction (italicized above) that the Court had just made. Reference to suits "in any court of record of the United States, or of either of them," is no less universal in its operative scope than reference to suits "in courts of record," and hence is subject to the *same* objection (to which the Court was presumably giving a contrasting example) that jurisdiction was indiscriminately conferred on all courts of original jurisdiction and for any and all amounts.

Deveaux establishes not, as the Court claims, the weird principle that mention of the federal courts *in a "sue and be sued" clause* confers jurisdiction; but rather, the quite different (and quite reasonable) proposition that mention of the federal courts in a provision *allowing a particular cause of action to be brought* does so. The contrast between the "sue and be sued" clause and the provision authorizing certain suits against the directors lay, not in the mere substitution of one broad phrase for another, but in the fact that the latter provision, by authorizing particular actions to be *brought* in federal court, could not reasonably be read *not* to confer jurisdiction. A provision merely conferring a general *capacity* to bring actions, however, cannot reasonably be read to *confer* jurisdiction.[2]

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[2]The Court believes that *Deveaux*'s statement that

This reading of *Deveaux* is fully consistent with our subsequent decision in *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (1824), which construed the "sue and be sued" clause of the second Bank's charter as conferring jurisdiction on federal circuit courts. The second charter provided that the Bank was "made able and capable, in law . . . to sue and be sued . . . in all state courts having competent jurisdiction, and in any circuit court of the United States," 3 Stat. 269. By granting the Bank power to sue, not in all courts generally (as in *Deveaux*), but in *particular* federal courts, this suggested a grant of jurisdiction rather than merely of capacity to sue. And that suggestion was strongly confirmed by the fact that the Bank was empowered to sue in state courts "having competent jurisdiction," but in federal circuit courts *simpliciter*. If the statute had jurisdiction in mind as to the one, it must as to the other as well. Our opinion in *Osborn* did not invoke the "magic words" approach adopted by the Court today, but concluded that the charter language "admit[ted] of but one interpretation" and could not "be made plainer by explanation." 9 Wheat., at 817.

In distinguishing *Deveaux*, *Osborn* noted, and apparently misunderstood as the Court today does, that case's contrast between the "express grant of jurisdiction to the federal Courts" over suits against directors and the "general words" of the "sue and be sued" clause, "which [did] not mention those Courts." *Id.*, at 818. All it concluded from that, however, was

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"the right to sue does not imply the right to sue in the courts of the union *unless it be expressed*," 5 Cranch, at 86 (emphasis added), is somehow inconsistent with my analysis. *Ante*, at 8, n. 6. Quite the opposite is true: The Court's simple statement that the grant of jurisdiction must "be expressed" is obviously a call, not to reach for the cryptograph, but to discern the plain meaning of the statutory language.

that *Deveaux* established 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." *Ibid.* There does not logically follow from that the rule which the Court announces today: that *any* grant of a general capacity to sue *with* mention of federal courts will suffice to confer jurisdiction. The Court's reading of this

language from *Osborn* as giving talismanic significance to any "mention" of federal courts is simply inconsistent with the fact that *Osborn* (like *Deveaux*) did not purport to confer on the words of the clause any meaning other than that suggested by their natural import.

This reading of *Deveaux* and *Osborn* is confirmed by our later decision in *Bankers Trust Co.* v. *Texas & Pacific R. Co.*, 241 U. S. 295 (1916). There we held it to be "plain" that a railroad charter provision stating that the corporation "shall be able to sue and be sued . . . in all courts of law and equity within the United States," 16 Stat. 574, did not confer jurisdiction on any court. 241 U. S., at 303. Had our earlier cases stood for the "magic words" rule adopted by the Court today, we could have reached that conclusion simply by noting that the clause at issue did not contain a specific reference to the federal courts. That is not, however, what we did. Indeed, the absence of such specific reference *was not even mentioned* in the opinion. See *id.*, at 303–305. Instead, as before, we sought to determine the sense of the provision by considering the ordinary meaning of its language in context. We concluded that "Congress would have expressed [a] purpose [to confer jurisdiction] in altogether different words" than these, 241 U. S., at 303, which had "the same generality and *natural import* as did those in the earlier bank act [in *Deveaux*]," *id.*, at 304 (emphasis added). Considered in their context of a listing of corporate powers, these words established that

> "Congress was not then concerned with the jurisdiction of courts but with the faculties and powers of the corporation which it was creating; and evidently all that was intended was to render this corporation capable of suing and being sued by its corporate name *in any court of law or equity—Federal, state, or territorial*—whose jurisdiction as otherwise competently defined was

adequate to the occasion." *Id.*, at 303 (emphasis added).

That paraphrasing of the railroad charter, in terms that would spell jurisdiction under the key the Court adopts today, belies any notion that *Bankers Trust* was using the same code-book.[3]

The fourth and final case relied upon by the Court is *D'Oench Duhme & Co.* v. *Federal Deposit Ins. Corp.*, 315 U. S. 447 (1942). In that case, we granted certiorari to consider whether a federal court in a nondiversity action must apply the conflict-of-laws rules of the forum State. We ultimately did not address that question (because we concluded that the rule of decision was provided by federal, rather than state law, see *id.*, at 456), but in the course of setting forth the question presented, we noted that, as all parties had conceded, the jurisdiction of the federal district court did not rest on diversity:

> "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.' Sec. 12 B, Federal Reserve Act; 12 U. S. C. §264(j).[2]
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> "[2]That subdivision of the Act further provides: `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 . . . .'"

Id., at 455.

The Court relies heavily on this case, which it views as holding that a statute granting a corporation the

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[3]The Court's protest, *ante*, at 9, n. 9, that its interpretive rule should not be applied to *Bankers Trust*'s paraphrase of the railroad charter at issue in that case is a frank confession that that rule has no relation to ordinary principles for discerning meaning in the English language—*i. e.*, it has no relation to the very principles that we have consistently purported to apply in this area.

power "to sue or be sued in any court of law or equity, State or Federal" establishes jurisdiction in federal district courts. *Ante*, at 6–7. Even if the quoted language did say that, it would be remarkable to attribute such great significance to a passing comment on a conceded point. But in my view it does not say that anyway, since the footnote must be read together with the text as explaining the single basis of jurisdiction (rather than, as the Court would have it, explaining two separate bases of jurisdiction in a case where even the explanation of one is *obiter*). The language quoted in the footnote is not, as the Court says, from "another part of the same statute," *ante*, at 7, but is the continuation of the provision quoted in the text. See 12 U. S. C. §264(j) (1940 ed.). And the complaint in *D'Oench Duhme* expressly predicated jurisdiction on the fact that the action was one "aris[ing] under the laws of the United States," Tr. of Record in *D'Oench Duhme & Co.* v. *Federal Deposit Ins. Corp.*, O. T. 1941, No. 206, p. 3. The language in this case is a thin reed upon which to rest abandonment of the rudimentary principle (followed even in other "sue and be sued" cases) that a statute should be given the meaning suggested by the "natural import" of its terms, *Bankers Trust*, *supra*, at 304.

Finally, the Court argues that a jurisdictional reading of the Red Cross Charter is required by the canon of construction that an amendment to a statute ordinarily should not be read as having no effect. *Ante*, at 16. The original "sue and be sued" clause in the Red Cross charter did not contain the phrase "State or Federal," and the Court argues that its reading—which gives decisive weight to that addition—is therefore strongly to be preferred. *Ibid.* I do not agree. Even if it were the case that my reading of the clause rendered this phrase superfluous, I would consider that a small price to pay

for adhering to the competing (and more important) canon that statutory language should be construed in accordance with its ordinary meaning. And it would seem particularly appropriate to run the risk of surplusage here, since the amendment in question was one of a number of technical changes in a comprehensive revision. Ch. 50, §3, 61 Stat. 80, 81 (1947).

But in any event, a natural-meaning construction of the "sue and be sued" clause does not render the 1947 amendment superfluous. The addition of the words "State or Federal" eliminates the possibility that the language "courts of law and equity *within the jurisdiction* of the United States" that was contained in the original charter, see ch. 23, §2, 33 Stat. 600 (emphasis added), might be read to limit the grant of capacity to sue to *federal court*. State courts are not within the "jurisdiction" of the United States unless "jurisdiction" is taken in the relatively rare sense of referring to territory rather than power. The addition of the words "State or Federal" removes this ambiguity.

The Court rejects this argument on the ground that there is "no evidence of such an intent," *ante*, at 16, n. 15. The best answer to that assertion is that it is irrelevant: To satisfy the canon the Court has invoked, it is enough that there be a reasonable construction of the old and amended statutes that would explain why the amendment is not superfluous. Another answer to the assertion is that it is wrong. As the Court notes elsewhere in its opinion, *ante*, at 14, n. 13, one of the only comments made by a member of Congress on this amendment was Senator George's statement, during the hearings, that the purpose of the provision was to confirm the Red Cross's capacity to sue in *state* court. See Hearings on S. 591 before the Senate Committee on Foreign

Relations, 80th Cong., 1st Sess., 11 (1947).[4]

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Because the Red Cross charter contains no language suggesting a grant of jurisdiction, I conclude that it grants only the capacity to "sue or be sued" in a state or federal court of appropriate jurisdiction. In light of this conclusion, I find it unnecessary to reach the constitutional question addressed in Part V of the Court's opinion. I would affirm the judgment of the Court of Appeals.

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[4]The Court points out that Senator George also stated, in response to a question whether foreign courts should be covered by the amendment, that the purpose of the bill was "to give the jurisdiction in State courts and Federal courts, and I think we had better leave it there." *Ante*, at 14, n. 13. Rather than concluding (as seems obvious) that Senator George was speaking with imprecision in using the phrase "give the jurisdiction," the Court draws the far less likely conclusion that Senator George was flatly contradicting himself in what he said only a few minutes later. *Ibid.*