No. 99-1792

DIECTOR OF REVEUNUE OF MISSOURI
Petitioner.

v.

Co BANK, ACB, AS SUCCESOR TO THE
NATIONAL BANK FOR COPOPERATIVES
Respondent.

BRIEF FOR THE RESPONDENT

Filed OCTOBER 6, 2000

QUESTION PRESENTED

The Court's Order granting the petition for certiorari states:

> The petition for a writ of certiorari is granted limited to the following question: "Does 12 U.S.C. Section 2134, authorize states to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?"

DISCLOSURE UNDER SUPREME COURT RULE 29.6

Neither CoBank, ACB, nor the National Bank for Cooperatives has a parent corporation, and no publicly held company owns ten percent or more of the stock of either entity.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. VI., cl. 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. 2001(a)

> It is declared to be the policy of the Congress, recognizing that a prosperous, productive agriculture is essential to a free nation and recognizing the growing need for credit in rural areas, that the farmer-owned cooperative Farm Credit System be designed to accomplish the objective of improving the income and well-being of American farmers and ranchers by furnishing sound, adequate, and constructive credit and closely related services to them, their cooperatives, and to selected farm-related businesses necessary for efficient farm operations.

12 U.S.C. Section 2134:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now and hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on

such obligations shall be subject to Federal income taxation in the hands of the holder.

12 U.S.C. Section 2141

Charter, powers and operation

a. Charter

The National Bank for Cooperatives or the United Bank for Cooperatives, as the case may be (hereinafter in this part referred to as the "consolidated bank"), established under Section 413 of the Agricultural Credit Act of 1987, shall be a federally chartered instrumentality of the United States and an institution of the Farm Credit System.

b. Powers

The consolidated bank and the board of directors of such bank shall have all of the powers, rights, responsibilities and obligations of the district banks for cooperatives and the Central Bank for Cooperatives and the boards of directors of such banks except as otherwise provided for in this chapter.

c. Operation

The consolidated bank shall be organized and operated on a cooperative basis.

STATEMENT OF THE CASE

This case presents the question whether 12 U.S.C. Section 2134, authorizes states to tax the income of the National Bank for Cooperatives. To answer the question presented, it is important to consider the historical and

legislative context in which the Farm Credit System and the National Bank were established. Accordingly, the following summarizes the history and function of the Farm Credit System and the role of the National Bank for Cooperatives.

The National Bank for Cooperatives and its Role in the Farm Credit System

The National Bank for Cooperatives is a member institution of the Farm Credit System, created by Congress in 1987 with the mandate to provide reliable and affordable credit to eligible agricultural cooperatives. Agricultural Credit Act of 1987, Pub. L. No. 100-233, § 415, 101 Stat. 1568, 1642. The National Bank for Cooperatives is designated by Congress as a "federally chartered instrumentality of the United States." 12 U.S.C. Section 2141(a).

Congress created the Farm Credit System to provide essential credit to agricultural producers and their agricultural cooperatives. 12 U.S.C. Section 2001. At each point in the development of the System, Congress was guided by two concerns – the need to provide a reliable source of agricultural credit, and the need to provide such credit at the lowest possible cost. The Farm Credit System is the single most important lender to American agricultural producers, accounting for one/third of all agricultural loans. H.R. Rep. No. 425, 99th Cong., 1st Sess., 7 (1985).

The institutions of the Farm Credit System, including the National Bank for Cooperatives, operate on a cooperative basis. 12 U.S.C. Section 2141(c).[1] Because they are cooperatives, Farm Credit System institutions do not operate for their own profit but for the benefit of their borrowers. Each institution is obligated by Congress to set interest rates "[a]t the lowest reasonable cost on a sound business basis." 12 U.S.C. Section 2131(a). Income generated by the institutions is used to offset loan losses or is returned to borrowers to reduce their borrowing costs. See the discussion of the System's cooperative operations in *Federal Land Bank v. Kiowa County*, 368 U.S. 146, 151-152 (1961).

The first System institutions, the Federal Land Banks and Federal Land Bank Associations, were formed pursuant to the Federal Farm Loan Act of 1916, 64th Cong., 1st Sess., Ch. 245, § 4, 39 Stat. 360, 362 (1916). They were created to provide long-term credit to farmers. S. Rep. No. 144, 64th Cong., 1st Sess. 2-3 (1916).

Congress recognized that long-term credit was not available from commercial banks but that it was available from other sources. *Id.* Congress also recognized that a

[1] Each borrower is required to purchase stock in a specified amount as a condition of receiving a loan. See e.g. 12 U.S.C. Section 2130. The stock may not be transferred or redeemed except with the Farm Credit System institution's consent. 12 U.S.C. Section 2124(c). The stock is only redeemable at par, i.e., the same price initially paid. 12 U.S.C. Section 2126. Regardless of the amount of stock the borrower must purchase, the borrower generally has only one vote on matters affecting the Farm Credit System institution's operations. 12 U.S.C. Section 2124(d).

federal conduit or bridge was needed to connect long-term investors with the farmers:

> We are asked to furnish the bridge which shall bring them in touch, or rather to grant a franchise to those who will build the bridge if we will construct the approaches. *Such we conceive to be a proper function of the Government.*

Id. (emphasis added).

To connect investors and farmers, the Federal Land Banks were authorized to issue long-term bonds. The bonds were secured by a pool of farm mortgages. By this mechanism, funds became available for long-term loans to individual farmers at a low cost. *Id.* at 4-5.

To further reduce the cost of funds, Congress provided a tax exemption for Federal Land Bank bonds. 64th Cong., 1st Sess., Ch. 245, §§ 21, 26, 39 Stat. 360, 377, 380 (1916). This reduced the interest rate required to induce private investors to invest in Land Bank bonds. Federal sponsorship also helped their marketability. As a later Congress observed, federal sponsorship afforded the Farm Credit System's bonds "a preferred place in the Nation's money markets." H.R. Rep. No. 295, 100th Cong. 1st Sess. 55 (1987).

In 1933, Congress addressed the need for short-term production loans for farmers and their agricultural cooperatives. Direct federal lending was ruled out because:

> [i]t is too expensive, it cannot be sufficiently flexible to meet local needs, and for other reasons is not a satisfactory method of furnishing essential credit.

H.R. Rep. No. 171, 73d Cong., 1st Sess. 1-2 (1933). Private credit was also ruled out because it was either unavailable or too expensive. Congress noted:

> Such institutions as have been financing agricultural production have charged rates of interest which frequently make the farmer a perpetual debtor of his financing agency.

Id. Congress again turned to the cooperative model and created and capitalized the Banks for Cooperatives and the Production Credit Associations. See Farm Credit Act of 1933, Pub. L. No. 73-98, 48 Stat. 257 (1933). Banks for Cooperatives bonds, like Federal Land Bank bonds, were exempted from tax. Pub. L. No. 73-98, § 63, 48 Stat. 257, 267 (1933).

The Bank for Cooperatives were themselves designated "federally chartered instrumentalities of the United States," and exempted from state and federal taxes, except property taxes. *Id.* Apparently because government tax revenues had been severely depleted by the Depression economy, Congress agreed to authorize taxation of the Banks for Cooperatives during periods in which the federal government had no investment. See, 77 Cong. Rec. H4708 (May 31, 1933).

In 1971, Congress comprehensively revised and reenacted the legislation applicable to the Farm Credit System. Farm Credit Act of 1971, Pub. L. No. 92-181, 85 Stat. 583 (1971). By then, the government's initial investment in the Banks for Cooperatives had been retired. Nonetheless, Congress declared that the Banks for Cooperatives continued to be "federally chartered instrumentalities of

the United States." Pub. L. No. 92-181, § 1.13, 85 Stat. 583, 587 (1971).

A financial crisis struck the Farm Credit System in 1985. A combination of depressed agricultural prices, shrinking export markets, and falling agricultural land values created Depression like conditions for the System's borrowers. H.R. Rep. No. 425, *supra*, at 6. Because the Farm Credit System's statutory mandate is to lend to agricultural borrowers, and only agricultural borrowers, the System began to incur severe losses. In 1985, the System lost $2.7 billion. Farm Credit Admin., 1985 *Annual Report* 17. These losses eroded the Farm Credit System's capital base and raised the cost of issuing System bonds.

Traditionally, the interest rate demanded by the capital markets for Farm Credit System bonds was only 5 to 10 basis points (5/100 to 10/100 of 1 percent) over the rate for comparable United States Treasury obligations. H.R. Rep. No. 425, *supra*, at 7. By 1985, the interest rate premium was more than 1 percent. *Id.* This higher premium cost the System's agricultural borrowers an additional $300 million per year. 131 Cong. Rec. S33405 (Nov. 22, 1985) (Statement of Sen. Helms). Increasing the pressure for federal action to rescue the Farm Credit System was the fact that in early 1986, the Farm Credit System would have to refinance approximately $13 billion of previously issued bonds. Without explicit federal support, it was feared that any refinancing could be done only at prohibitive cost. *Id.*; 131 Cong. Rec. S16710 (Dec. 3, 1985) (Statement of Sen. Helms).

In response to the farm crisis, Congress enacted the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205,

99 Stat. 1678 (1985). To coordinate financial assistance, Congress created the Farm Credit System Capital Corporation (the "Capital Corporation"). Pub. L. No. 99-205, § 103, 99 Stat. 1678, 1680 (1985). The Capital Corporation was given three sources of funds. First, the Farm Credit Administration was authorized to invest approximately $250 million of previously appropriated federal funds in the stock of the Capital Corporation. These funds could then be invested in the stock of distressed System institutions. Pub. L. No. 99-205, § 101, 99 Stat. 1678 (1985). Second, the Capital Corporation was authorized to require the System's solvent Banks and Associations to provide additional funds to assist distressed institutions. Pub. L. No. 99-205, § 103, 99 Stat. 1686 (1985). Third, the Capital Corporation was given a "line of credit" with the United States Treasury. Pub. L. No. 99-205, § 103, 99 Stat. 1683 (1985).

It was Congress's intent that the federal assistance "provide necessary reassurance to the investors of system securities to enable the system to continue to raise adequate funding at affordable cost." 131 Cong. Rec. S16710 (Dec. 3, 1985). Representative Coleman stated that the federal assistance was "critical" and the only means to "calm the fears on Wall Street so that the system can continue to raise sufficient funds to lend and keep borrowing costs and interest rates down." 131 Cong. Rec. H 11524 (Dec. 10, 1985). It was acknowledged that should all investor confidence be lost, "the system would use up its liquidity in only 18 days and then be in default." 131 Cong. Rec. S33405 (Nov. 22, 1985) (Statement of Sen. Helms). In light of this fact Senator Helms stated, "The implications of such a eventuality for agriculture and the

Nation's economy are severe. We cannot responsibly let this situation go unaddressed." *Id.*

The House Agricultural Committee summarized the case for federal assistance:

> Without question, the U.S. agriculture industry cannot afford the disintegration of the Farm Credit System. Moreover, American society has an important stake in the continued viability of the System.

H.R. Rep. No. 425, *supra*, at 11.

As part of Congress's program to centralize financial assistance, all System institutions were made liable to repay the federal government's advances to the Capital Corporation without regard to whether the institutions had themselves received federal assistance. Pub. L. No. 99-205, § 104, 99 Stat. 1687 (1985).[2] While they did not receive direct assistance, the National Bank for Cooperatives and its successor, CoBank, ACB, have contributed more than $350 million to repay federal assistance. *See*, CoBank, ACB, *Annual Reports* submitted to the Farm Credit Administration, 1990 – 1999. Because the Farm Credit Administration's new investments were through the Capital Corporation, Congress also repealed the Farm Credit Administration's authority to invest in individual

---

[2] The joint and several liability for advances made to the Capital Corporation was merely an extension of the joint and several liability previously established for System obligations. "[I]n 1977, consolidated system wide bonds and notes were introduced to combine the financial strength of the System. These securities are the joint and several obligations of all 37 Farm Credit Banks, making each bank individually liable." H.R. Rep. 425, *supra*, at 6.

Farm Credit System institutions. Pub. L. No. 99-205, § 101, 99 Stat. 1678 (1985).

As part of the Farm Credit Amendments Act of 1985, Congress amended 12 U.S.C. Section 2134, which deals with taxation of the Banks for Cooperatives. Prior to its amendment, Section 2134 contained three sentences. The first sentence provided:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any State, territorial, or local taxing authority.

The second sentence provided:

> Such banks, their property, their franchises, capital, reserves, surplus, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, territorial, or local taxing authority; except that interest on the obligations of such banks shall be subject only to Federal income taxation in the hands of the holder thereof pursuant to the Public Debt Act of 1941 (31 U.S.C. 742(a)) and except that any real and tangible personal property of such banks shall be subject to Federal, State, territorial, and local taxation to the same extent as similar property is taxed.

The third sentence provided:

> The exemption provided in the preceding sentence shall apply only for any year or part thereof in which stock in the bank for cooperatives is held by the Governor of the Farm Credit Administration.

The Farm Credit legislation introduced in the House on November 20, 1985, made no substantive change to Section 2134. It only amended the third sentence to delete the reference to the "Governor" of the Farm Credit Administration, a position which was eliminated in the proposed legislation. H.R. 3792, 99th Cong., § 205(e)(10), 58 (Nov. 20, 1985).

The Senate, which was considering Farm Credit relief at the same time as the House, passed a bill which made no change to Section 2134. S1884, 99th Cong. (1985), 131 Cong. Rec. S16741-16752 (Dec. 3, 1985). There is no committee report regarding the Senate bill.

After hearings, the House Agricultural Committee reported out a revised bill which proposed to delete all of the third sentence of Section 2134. H.R. Rep. 425, *supra*, 65. On December 10, 1985, the House passed a bill which deleted both the second and third sentences of Section 2134. 131 Cong. Rec. H11506-11530 (Dec. 10, 1985), 131 Cong. Rec. S17757 (Dec. 17, 1985).

The House and Senate then reconciled the two bills and adopted the House version which deleted both the second and third sentences of Section 2134. The reconciled bills passed the Senate on December 17, 1985, and the House on December 18, 1985. 131 Cong. Rec. S17820-17821 (Dec. 17, 1985), 131 Cong. Rec.

H12529-12533 (Dec. 18, 1985). There are no committee reports or floor comments explaining the reason for the decision to delete the second and third sentences of Section 2134.

During 1986, the Farm Credit System lost an additional $1.9 billion. Farm Credit Admin., 1986 *Annual Report* 4. Congress responded by enacting the Agricultural Credit Act of 1987, committing up to $4 billion of federal funds to recapitalize the Farm Credit System. Pub. L. No. 100-233, § 201, 101 Stat. 1597. Congress explained that it was necessary to recapitalize the System because private lenders – as they had also done during the Depression – suspended or significantly cut back their agricultural lending. Congress stated:

> This contraction in the number of institutions willing to supply credit to farmers makes it even more important that the FCS remain a viable source of credit to agriculture during good times and bad.

S. Rep. No. 230, 100 Cong., 1st Sess. 14 (1987).

To further reduce System expenses and loan costs to farmers, Congress authorized the consolidation of System institutions. Pub. L. No. 100-233, § 413(b)(4), 101 Stat. 1639. One such consolidation produced the National Bank for Cooperatives. The National Bank for Cooperatives was formed through the consolidation of ten existing district Banks for Cooperatives and the Central Bank for Cooperatives. The National Bank for Cooperatives succeeded to all of the "powers, rights, responsibilities and obligations" of its predecessor banks. 12 U.S.C. Section 2141(b).

The Proceedings Below

In *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), this Court held that the Tax Injunction Act, 28 U.S.C. Section 1341, barred the lower federal courts from deciding whether states are authorized to tax Farm Credit System institutions. As a result, various Farm Credit System institutions commenced litigation on this issue in the state courts.

In two consolidated cases, *Production Credit Association of Southeastern Missouri, et al. v. Director of Revenue*, and *CoBank, ACB, as Successor to the National Bank for Cooperatives v. Director of Revenue*, 10 S.W.3d 142 (Mo. 2000), the Missouri Supreme Court held that Missouri could not tax the income of Production Credit Associations or the National Bank for Cooperatives. The court held that the institutions are federal instrumentalities, subject to Missouri income tax only if Congress has authorized such taxation. *Id.* at 143. After reviewing the relevant statutes, the court determined that Congress had not authorized Missouri to tax the income of the Production Credit Associations or the National Bank for Cooperatives. *Id.* The Missouri Supreme Court concluded by pointing out that its decision was consistent with decisions rendered by a number of other state courts. *Id.*

Missouri then filed a petition for certiorari with respect to the decision that the National Bank for Cooperatives is exempt from Missouri income tax. Missouri did not appeal the decision regarding the Production Credit Associations.

INTRODUCTORY STATEMENT REGARDING QUESTION PRESENTED

The Court's Order granting the petition for certiorari in this case states:

> The petition for a writ of certiorari is granted limited to the following question: "Does 12 U.S.C. Section 2134 authorize states to tax the income of the National Bank for Cooperatives, a federally chartered instrumentality of the United States?"

120 S. Ct. 2716. Missouri and the United States, as an *amicus* in support of Missouri, have each changed the question presented in an attempt to sidestep the issue of whether Congress has *authorized* the states to tax the National Bank for Cooperatives. Missouri asserts that it may tax the Bank without congressional authorization. Because Missouri has challenged the need for congressional authorization, this brief will review the decisions of this Court which make authorization necessary. The brief then turns to the question presented.

SUMMARY OF THE ARGUMENT

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court held that states may not tax federal instrumentalities absent congressional authorization. The Court announced two limitations which are relevant to the statutory construction arguments made by Missouri and the United States. The *McCulloch* rule does not apply to interests in federal instrumentalities held by private

investors, and does not apply to the real property of federal instrumentalities.

Over the years the Court extended the *McCulloch* rule to apply to private contractors doing business with the federal government, and to employees of federal instrumentalities. Beginning in the 1930's, the Court began overturning these extensions. See e.g., *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). While returning *McCulloch* to its original reach, the Court reaffirmed *McCulloch's* core holding that federal instrumentalities in the form of fiscal institutions chartered by Congress are immune from state tax absent congressional authorization.

The National Bank for Cooperatives is indisputably a federal instrumentality. Its predecessor Banks for Cooperatives were so designated by Congress in 1933. Pub. L. No. 73-98, § 63, 48 Stat. 267. Their status was reconfirmed by Congress in 1971. Pub. L. No. 92-181, § 1.13, 85 Stat. 587. The National Bank for Cooperatives was designated by Congress as a federal instrumentality in 1987. Pub. L. No. 100-233, § 415, 101 Stat. 1642.

The National Bank for Cooperatives is designated a federal instrumentality because it performs an important governmental function – the provision of essential credit to agricultural cooperatives at the lowest possible cost. This Court has repeatedly confirmed the Farm Credit System's governmental function. See e.g., *Federal Land Bank v. Priddy*, 295 U.S. 229 (1935); *Federal Land Bank v. Bismarck Lumber*, 314 U.S. 95 (1941); *Federal Land Bank v. Kiowa County*, 368 U.S. 146 (1961); and *Memphis Bank &*

Trust Co. v. Garner, 459 U.S. 392 (1983). It is curious that neither Missouri nor the United States discuss these decisions.

Missouri claims that Congress's designation of the National Bank as a federal instrumentality is statutory surplusage. It is not. Congress is presumed to understand the important judicial precedents applicable to its legislation and expects that its enactments will be interpreted in conformity with such precedents. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). By designating the National Bank for Cooperatives a federal instrumentality, Congress made the *McCulloch* rule applicable to the Bank.

The Rural Telephone Bank, which is modeled on the Federal Land Banks, provides a particularly apt illustration of Congress's understanding of the significance of the federal instrumentality designation. Congress made the Rural Telephone Bank exempt from state taxes simply by designating the Rural Telephone Bank an "instrumentality of the United States."

Missouri also claims that the Court's decision in *United States v. New Mexico*, 455 U.S. 720 (1981), announced a new rule which permits Missouri to tax the National Bank for Cooperatives without congressional authorization. Missouri relies upon the Court's statement that an instrumentality is entitled to invoke *McCulloch* only if the activity being taxed is sufficiently connected to the government that it cannot be viewed as a separate activity. *Id.* at 735.

Missouri interprets the Court's statement out of context. The *New Mexico* decision involves private contractors. The statement summarizes the Court's prior

decisions which hold that contractors may be instruments of the federal government with regard to certain activities, but that they are also engaged in separate and distinct activities for profit. It is these separate, private, non-governmental activities to which the Court's statement refers. This understanding is confirmed in the Court's subsequent decision in *Arizona Department of Revenue v. Blaze Construction Co.*, 526 U.S. 32, 37 (1999).

Missouri's reliance on *New Mexico* in this case is wrong for a second reason. All of the activities of the National Bank for Cooperatives are in furtherance of its governmental function – lending to its eligible cooperative borrowers at the lowest possible cost. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941) (rehabilitation of repossessed building in furtherance of core governmental function), *Federal Land Bank v. Kiowa County*, 368 U.S. 146 (1961) (sale of mineral rights at a profit in furtherance of core governmental function), *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983) (Farm Credit System bonds are considered "other obligations of the United States" under 31 U.S.C. Section 742 because they are an integral part of the federal government's efforts to secure credit without state interference). In light of these decisions, the Bank's activities are exempt under the standard enunciated in *United States v. New Mexico*.

On its face, 12 U.S.C. Section 2134 does not authorize states to tax the income of the National Bank for Cooperatives. Absent exceptional circumstances, the Court will not look behind the words of the statute. *Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987). This case presents no reasons for disregarding the statute.

If this Court decides to examine the legislative history regarding the 1985 amendment of Section 2134, the Court should begin with the circumstances facing Congress and its policy goals. Congress enacted the Farm Credit Amendments Act of 1985 in the face of a severely distressed Farm Credit System, the capital market's loss of confidence in System bonds, and crippling borrowing costs for the System's agricultural borrowers.

Congress acted to revitalize the System and drive down borrowing costs by centralizing financial support through the Capital Corporation and by providing a "line of credit" from the United States Treasury to reassure the capital markets of federal financial support. The new federal assistance was provided to the Capital Corporation, which then directed such assistance to System institutions. The Banks for Cooperatives were made jointly liable to repay this assistance, just as if they had received it directly from the United States.

The circumstances facing Congress, the declared policy of reducing loan costs to farmers, and the provision of new federal assistance are consistent with the conclusion that Congress did not intend to authorize the states to tax the Banks for Cooperatives. By contrast, authorizing the states to tax the Banks for Cooperatives would hinder the accomplishment of Congress's goals.

The statutory construction arguments offered by Missouri and United States, as amicus, are meritless. The United States argues that the National Bank for Cooperative's claim of immunity would make the first sentence of Section 2134 (which exempts the Bank's bonds from state tax) surplus language. U.S. Amici 14. This assertion was

answered by this Court when it reviewed the same statutory exemptions applicable to Federal Land Banks. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). The Court pointed out that bonds issued by the Land Banks to private holders would otherwise be taxable even though the Banks themselves are exempt. Thus, the statutory exemption for the bonds is unrelated to the immunity of the Banks.

The United States also asserts that the National Bank for Cooperatives claims immunity from real property taxes. U.S. Amici 19. The National Bank for Cooperatives has never claimed and cannot claim immunity from real property taxes. Real property of federal instrumentalities is subject to state tax absent a separate statutory exemption. *McCulloch*, 17 U.S. (4 Wheat.) at 436.

Missouri and the United States also claim that Congress would not have made an important change to the states' authority to tax the Banks for Cooperatives without explanation and in the form of a conforming amendment. This claim assumes that Congress made an important change to the states' authority. It did not. For over fifty years the states have been prohibited from taxing the Banks when federal funds are invested in the Banks. With the new federal support provided in 1985, Congress simply conformed Section 2134 to the fact of that new federal assistance.

Missouri and the United States argue that because Congress enacted statutory exemptions for other Farm Credit System institutions, it must have intended that the Banks for Cooperatives are taxable. When Congress intends Farm Credit System institutions to be taxable, it

uses explicit language. See 12 U.S.C. Section 2214. This argument also ignores the example of the Rural Telephone Bank which is exempted from state tax without a separate statutory exemption.

All parties agree that the state taxability of the National Bank for Cooperatives is a matter for Congress, and Congress alone. Congress, understanding the significance of the federal instrumentality designation, has acted and has not authorized states to tax the income of the National Bank for Cooperatives.

ARGUMENT

In *McCulloch v. Maryland*, this Court established the rule that entities created by Congress to perform a governmental function are exempt from state taxation absent congressional authorization. Such entities are exempt because state taxation interferes with the performance of their governmental function. This case presents a straightforward illustration of the reason for this rule. The National Bank for Cooperatives was created by Congress to provide loans to its agricultural cooperative borrowers at the lowest possible cost. Because it is a cooperative, state taxes are necessarily passed on to its borrowers through higher costs.

A federal instrumentality may have characteristics of a private business without losing its immunity from state taxation. The instrumentality at issue in *McCulloch*, the Second Bank of the United States, was essentially a private, for-profit entity. It had full banking powers, its stock was primarily owned by private individuals who

controlled the board of directors, and it operated for the profit of those private shareholders. Nonetheless, Chief Justice Marshall concluded that it was a public corporation created for public purposes. *Osborn v. Bank of United States*, 22 U.S. 738, 860 (1824).

While a federal instrumentality is itself immune from state taxation, *McCulloch* also held that investments in the federal instrumentality held by private parties are taxable. The Court stated: "[t]ax may be imposed on the interests which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State." *McCulloch*, 17 U.S. (4 Wheat.) at 436. The real property of a federal instrumentality is also subject to tax. Exemption "does not extend to a tax paid on the real property of the bank, in common with other real property within the state." *Id.* The statutory construction arguments offered by Missouri and the United States ignore these aspects of *McCulloch*.

I. Fiscal Institutions Chartered by Congress Are Federal Instrumentalities and Immune from State Taxation Absent Congressional Authorization

Over the years, this Court extended *McCulloch* to contractors doing business with the federal government and employees of federal instrumentalities. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), is acknowledged as the case which initiated the return of *McCulloch* to its core principle. *United States v. New Mexico*, 455 U.S. at 731. *James v. Dravo* involved the taxability of a federal contractor. In the course of its opinion, the Court stated:

> The tax is not laid upon an instrumentality of the Government. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of the United States*, 9 Wheat. 738; *Gillespie v. Oklahoma*, 257 U.S. 501; *Federal Land Bank v. Crosland*, 261 U.S. 374; *Clallam County v. United States*, 163 U.S. 341; *New York ex rel. Rogers v. Graves*, 299 U.S. 401. Respondent is an independent contractor.

James v. Dravo, 302 U.S. at 149.

Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939), is the leading case on the taxation of federal employees. *Graves v. O'Keefe* involved the state taxation of an employee of a federal instrumentality. Before concluding that the employee was subject to state tax, the Court stated:

> [a]ll activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. *McCulloch v. Maryland*, 4 Wheat. 316, 432; *Van Brocklin v. Tennessee*, 117 U.S. 151, 158-159; *South Carolina v. United States*, 199 U.S. 437, 451-452; *Helvering v. Gerhardt*, 304 U.S. 405, 412-415.

306 U.S. at 477. Thus, while the Court denied immunity to an employee of a federal instrumentality, the Court again reaffirmed the core holding of *McCulloch*.

In contrast to its decisions regarding contractors, et al., the Court has repeatedly affirmed the applicability of *McCulloch* to federal instrumentalities in the form of fiscal institutions chartered by Congress. In *First Agricultural National Bank of Berkshire County v. State Tax Commission*,

392 U.S. 339 (1968), the Court pointed out that a long line of its decisions:

> [h]as firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national banks.

Id. at 340, and that:

> As recently as 1966, Mr. Justice Fortas, speaking for a unanimous Court, thought this ancient principle so well established that he used national banks as an example in holding the American Red Cross immune from state taxation.

Id. at 340-341. Because Congress had clearly not authorized the state tax in question, the Court did not address the state's argument that national banks, in their modern guise, are no longer federal instrumentalities. *Id.* at 341. In subsequent cases the Court has addressed this question and reaffirmed that national banks are federal instrumentalities. See e.g. *Marquette National Bank v. First of Omaha Corp.*, 439 U.S. 299, 307 (1978): "Omaha Bank is a national bank; it is an [instrumentality] of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States."

One point in the *Agricultural National Bank* decision deserves additional comment. In deciding that Congress had not authorized the challenged state tax, the Court pointed out that Congress legislated with full knowledge of the judicial precedents which hold that states may only impose those taxes authorized by Congress. *Agricultural National Bank*, 392 U.S. at 343.

In recent years, the lower federal courts have relied upon the *Agricultural National Bank* decision to find that other federally chartered fiscal institutions are entitled to invoke the *McCulloch* rule. *United States v. State Tax Commission*, 481 F.2d 963, 969 (1st Cir. 1973) (federal savings and loan associations); *Federal Land Bank of Wichita v. Board of County Commissioners*, 788 F.2d 1440, 1441 (10th Cir. 1986) (federal land banks); and *United States v. Michigan*, 851 F.2d 803, 807 (6th Cir. 1988) (federal credit unions). These decisions confirm the uniform understanding that fiscal institutions chartered by Congress are entitled to invoke the *McCulloch* rule.

II. The National Bank for Cooperatives Is a Fiscal Institution Chartered by Congress, and Is by Express Designation and its Governmental Function a Federal Instrumentality Immune from State Taxation Absent Congressional Authorization

Congress designated the National Bank for Cooperatives a "federally chartered instrumentality of the United States". 12 U.S.C. Section 2141(a). The Banks for Cooperatives enjoy a similar designation. 12 U.S.C. Sections 2121 and 2134. These congressional designations establish the Banks' right to invoke the immunity of the *McCulloch* rule.

Congress designated the National Bank for Cooperatives a federal instrumentality in recognition of the governmental function performed by the Bank and the rest of the Farm Credit System. This Court has repeatedly confirmed that the Farm Credit System performs an important governmental function by providing reliable credit to

agricultural producers at the lowest possible cost. Two of the Court's decisions are particularly instructive.

In *Federal Land Bank v. Kiowa County*, 368 U.S. 146 (1961), the issue was whether mineral interests held by the Federal Land Bank for profitable disposition were exempt from tax. The taxing authority claimed that such profit making activities are not part of the Land Bank's governmental function. The Court responded:

> The purpose of the Federal Farm Loan Act and its subsequent amendments was to provide loans for agricultural purposes at the lowest possible interest rates. One method of keeping the interest rate low is to authorize the federal land bank to make a profit to be distributed to the shareholders in the form of dividends.

Id. at 151-152. This decision confirms the governmental role performed by the Farm Credit System, and confirms that the generation of profits to reduce borrower interest costs is integral to the performance of the system's governmental activity. See also *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941) (same regarding repair of repossessed property).

The second case, *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), involves the scope of 31 U.S.C. Section 742. This statute codifies the *McCulloch* rule as applied to obligations of the United States and provides in relevant part:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

Id. at 395. The question before the Court was whether Tennessee could include bonds issued by the U.S. Treasury and the Farm Credit System in the measure of a tax on commercial banks. Concluding that Tennessee could not, the Court first repeated that Farm Credit System Banks are federal instrumentalities:

> There are 37 Farm Credit Banks: 12 Federal Land Banks, 12 Federal Intermediate Credit Banks, and 13 Banks for Cooperatives. They are federal instrumentalities designed to provide a reliable source of credit for agriculture.

Id. at 395. The Court then held that Farm Credit System bonds are "other obligations of the United States":

> The exemption established in § 742 applies not only to Treasury notes and bills, but also to the obligations of such instrumentalities of the United States as Federal Farm Credit Banks. Cf. *Smith v. Davis*, 323 U.S. 111, 117 (1944) ("other obligations" must be interpreted "in accord with the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit").

Id. at 396. The Court concluded that:

> [O]ur cases have made no distinction between the obligations of the United States Treasury and the obligations of the Federal Credit Banks.

Id. This decision highlights the essential governmental credit function performed by the Farm Credit System.

In light of *Kiowa County* and *Memphis Bank & Trust*, the Court's statement in *Arkansas v. Farm Credit Services of Central Arkansas*, that the interests of the Farm Credit System are not "coterminous with those of the Government," 520 U.S. at 821, should be understood to describe the relationship of the Government and the Farm Credit System for purposes of federal court jurisdiction. This statement should not be interpreted to apply for purposes of an exemption from state taxation.

Despite the Court's repeated recognition of the governmental role played by the Farm Credit System, Missouri claims that Congress's designation of the System's institutions as federal instrumentalities is mere surplusage.[3] This view is fundamentally disrespectful of Congress. Congress is presumed to understand the important judicial precedents applicable to its enactments. Congress also expects that legislation which it enacts will be interpreted in conformity with such precedents. *Cannon v. University of Chicago*, 441 U.S. 677, 698-699 (1979).

---

[3] The United States attempts to minimize the federal instrumentality designation by claiming that Congress has awarded that designation "scores" of times. U.S. Amici 21. Except for Farm Credit System institutions, there are only four federally chartered corporations which are currently designated as federal instrumentalities: the Rural Telephone Bank, 7 U.S.C. Section 941(c); the Federal Financing Bank, 12 U.S.C. Section 2283; the Commodity Credit Corporation, 15 U.S.C. Section 714; and the United States Enrichment Corporation, 42 U.S.C. § 2279a (1994 ed.), repealed effective on date of privatization, Pub. L. No. 104-134, 110 Stat. 1321.

For over 150 years, this Court has repeatedly confirmed that fiscal institutions like the National Bank for Cooperatives are federal instrumentalities and exempt from state taxation unless Congress provides otherwise. Congress understands that when it designates one of its creations as a federal instrumentality, it automatically exempts the instrumentality from state taxation unless a separate enactment overrides the exemption.

A particularly apt illustration of this understanding is the Rural Telephone Bank. In 1971, Congress authorized the formation of the Rural Telephone Bank to provide financing for the construction of rural telephone systems. 7 U.S.C. Section 941. The Rural Telephone Bank is modeled on the Federal Land Banks. S. Rep. No. 21, 92d Cong., 1st Sess. (1971). The legislative history states that the Rural Telephone Bank has:

> Exemption from U.S., State, and local taxes (with authority, but no obligation, to make payments in lieu of taxes on real and tangible personal property previously subject to such taxes).

S. Rep. No. 21, *supra*, at 1. The relevant statutory provision, 7 U.S.C. Section 941(c), does not contain a separate state tax exemption. Section 941(c) states only that: "The telephone bank shall be deemed to be an instrumentality of the United States . . . " and goes on to authorize payments in lieu of property taxes.[4] Congress understands that it is only necessary to designate the Rural

[4] 7 U.S.C. Section 941(c) states: Status; payment in lieu of property taxes. The telephone bank shall be deemed to be an instrumentality of the United States, and shall, for the purposes of jurisdiction and venue, be deemed a citizen and resident of the District of Columbia. The telephone bank is authorized to make payments to State, territorial, and local governments in lieu of property taxes upon real property and tangible personal property which was subject to State, territorial, and local taxation before acquisition by the telephone bank. Such payment may be in the amounts, at the times, and upon such terms as the telephone bank deems appropriate but the telephone bank shall be guided by the policy of making payments not in excess of the taxes which would have been payable upon such property in the condition in which it was acquired.

Telephone Bank as an "instrumentality of the United States" to establish the state tax exemption. Congress understands that designating the National Bank for Cooperatives a "federally chartered instrumentality of the United States" has the same effect.

III. The Decision in *United States v. New Mexico* Does Not Permit States to Tax the National Bank for Cooperatives Without Congressional Authorization

Missouri's principal argument is that the Court's decision in *United States v. New Mexico* announced a new contraction of the *McCulloch* rule which makes the National Bank for Cooperatives subject to state taxation without regard to congressional authorization. Pet. Br., 16. Missouri misreads the *New Mexico* decision.

New Mexico involved the taxation of government contractors. The opening line states:

> We are presented here with a recurring problem: to what extent may a State impose taxes on contractors that conduct business with the Federal Government?

New Mexico, 455 U.S. at 722. The United States itself denied that the contractors involved were federal instrumentalities. *Id.* at 725. The opinion focuses exclusively on the Court's prior cases involving federal contractors. *Id.* at 730-735. *Arizona Dept. of Revenue v. Blaze Construction Co.*, 526 U.S. 32 (1999), confirms that the *New Mexico* decision is directed at government contractors, not federal instrumentalities. The Court stated in discussing *New Mexico*: "the contractors could not be considered agencies or instrumentalities of the Federal Government." 526 U.S. at 37.

The statement in *New Mexico* that:

> tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned

455 U.S. at 735, is also directed at contractors. This statement simply reaffirms the Court's prior holdings that federal contractors engage in "a separate and distinct taxable activity." *Id.* at 735, citing *United States v. Boyd*, 378 U.S. 39, 44 (1964). Contractors, even if they are instrumentalities for certain purposes, are taxable with respect to their own proprietary activities.

Even if the *New Mexico* decision did announce a new rule, the National Bank for Cooperatives comes within that rule. Congress created the Farm Credit System to perform the governmental function of providing reliable low-cost credit to agricultural producers and their cooperatives. See 12 U.S.C. Sections 2001, 2131(a). Congress

acted because such credit was not available from private sources. S. Rep. No. 144, *supra*, at 2-3 (1916), H.R. Rep. No. 171, *supra*, at 2 (1933), S. Rep. No. 230, *supra*, at 14 (1987).

This Court's decisions concur. The Farm Credit System's governmental function is to provide reliable credit to farmers at the lowest possible cost. *Kiowa County*, 368 U.S. at 151-152. The generation of profits is an integral part of that function. *Id.*, see also *Bismarck Lumber Co.*, 314 U.S. at 100. As a cooperative, any income redounds to the benefit of its borrowers in the form of lower costs. *Kiowa County*, 368 U.S. at 151-152. Farm Credit System bonds are considered "other obligations of the United States" for purposes of 31 U.S.C. Section 742, because they are part of the federal government's credit operations. *Memphis Bank & Trust*, 459 U.S. at 396. In sum, the National Bank for Cooperatives' activities are governmental and entitled to immunity under *McCulloch* and *New Mexico*. To read *New Mexico* otherwise conflicts with the Court's longstanding recognition of the instrumentality status of Farm Credit System institutions and the governmental function that they perform.

IV. 12 U.S.C. Section 2134 is Unambiguous and Does Not Authorize States to Tax the National Bank for Cooperatives

As amended in 1985, 12 U.S.C. Section 2134 provides:

> Each bank for cooperatives and its obligations are instrumentalities of the United States and as such any and all notes, debentures, and other obligations issued by such bank shall be exempt,

> both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now and hereafter imposed by the United States or any State, territorial, or local taxing authority, except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder.

On its face, 12 U.S.C. Section 2134 does not authorize states to tax the National Bank for Cooperatives. Neither Missouri nor the United States claims otherwise. They argue only that various rules of statutory construction *imply* that Congress intended to authorize the states to tax the Banks for Cooperatives.

Where a statute is unambiguous, this Court ordinarily refuses to look behind the statutory language:

> Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981).

Burlington Northern R.R. Co. v. Oklahoma Tax Commission, 481 U.S. 454, 461 (1987). This case presents no circumstances which justify further judicial inquiry. Section 2134 should be understood and interpreted according to its terms – no state authorization to tax.

Missouri suggests that *Mayo v. United States*, 319 U.S. 441 (1943), permits this Court to determine that Congress has impliedly authorized states to tax the National Bank for Cooperatives when Congress is silent on the question of authorization. Missouri is mistaken.

In *Mayo*, the Court stated:

> The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 578.

319 U.S. at 447. The cited language from *Shaw v. Gibson-Zahiser Oil Corp.* is:

> What governmental instrumentalities will be held free from state taxation, though Congress has not expressly so provided, cannot be determined apart from the purpose and character of the legislation creating them.

276 U.S. at 578. *Shaw* points out that certain instrumentalities are sufficiently connected to the government that "nothing short of an express declaration by Congress would have subjected them to state taxation" and explains that national banks are included in this category. *Id.* at 578-579. *Shaw* recognizes that federally chartered fiscal institutions like the national banks are categorically exempt from state tax when Congress is silent. *Mayo* should be similarly interpreted. Because Congress is silent, the National Bank for Cooperatives is categorically exempt from state taxation.

If the Court concludes that it is appropriate to explore Congress's intent regarding the 1985 amendment to Section 2134, the examination should focus, as *Mayo* directs, on "the setting of the applicable legislation and the particular exaction." *Mayo*, 319 U.S. at 441. The 1985 amendment was adopted against the backdrop of a Farm Credit System threatened by increasing losses, H.R. Rep.

No. 425, *supra*, at 6-7, rising interest rates which made credit unaffordable to many farmers, *Id.*, the capital market's loss of confidence in the System's bonds, H.R. Rep. No. 425, *supra*, at 7, recognition that U.S. agriculture could not afford the disintegration of the Farm Credit System, H.R. Rep. No. 425, *supra*, at 11, and finally, recognition of the need for a federal guarantee to assure the System's survival. H.R. Rep. No. 425, *supra*, at 12.

Congress responded by reorganizing the System's finances to assure that all resources would be available to support distressed System institutions and by providing a federal "line of credit". Pub. L. No. 99-205, § 103, 99 Stat. 1683. These actions were intended to stabilize the System and drive down borrower loan costs. It was in the process of resolving these problems that Congress amended Section 2134.

Prior to the 1985 amendment, Section 2134 authorized the states to tax the Banks for Cooperatives during periods in which the government did not own stock. It is implausible that in 1985, Congress intended to broaden this prior limited authorization and permit states the unfettered right to tax the Banks for Cooperatives. The Farm Credit System was in crisis and the rates which it was required to charge its borrowers were unsupportable. New federal assistance was provided through a "line of credit" and later a $4 billion appropriation. Pub. L. No. 100-233, § 201, 101 Stat. 1597. While the new federal support was provided indirectly through the conduit of the Capital Corporation, this fact is of no significance. The Banks for Cooperatives were liable to repay this support in the same manner as if they had received it directly.

Thus, the circumstances of the 1985 amendment support the conclusion that Congress fully intended to deny the states the right to tax. Denying the states the right to tax the Banks for Cooperatives is fully consistent with Congress's policy goals. It would reduce the drain on System funds, reduce borrower costs, and increase the funds available to repay the Treasury.

Missouri, and the United States, ignore the context in which Section 2134 was amended. They rely, instead, on abstract rules of statutory construction to discern congressional intent. For example, the United States argues that if Banks for Cooperatives are immune under *McCulloch*, the exemption for the Banks for Cooperatives' bonds in Section 2134 is statutory surplusage. U.S. Amici 14. This argument was answered by the Court in *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941). There the Court examined Section 26 of the Farm Credit Act of 1933, which contained identical statutory exemptions for the Federal Land Banks and Land Bank bonds. Congress explained that there is no relationship between the two statutory exemptions. The Court stated:

> The additional exemptions granted to farm loan bonds and first mortgages executed to the land banks are proper additions to the general exemption of § 26. The bonds may be held by private persons, and, of course, the general exemption of § 26 would not extend to them.

314 U.S. at 100. The Court's analysis is consistent with *McCulloch's* holding that while a federal instrumentality is itself exempt, "[t]ax may be imposed on the interests

which the citizens of Maryland may hold in this institution." *McCulloch*, 17 U.S. (4 Wheat.) at 436. Thus, a determination that the states are not authorized to tax the Banks does not make the bond exemption surplusage.

The United States and Missouri also claim that the National Bank for Cooperatives' reading of Section 2134 would make it exempt from real property taxes and that Congress cannot have intended such a result. Pet. Br. 25-26, U.S. Amici 19. This claim is unfounded and has been so since *McCulloch*. That decision specifically stated that immunity "does not extend to a tax paid on the real property of the bank, in common with other real property within the state." *McCulloch*, 17 U.S. (4 Wheat.) at 436.

Missouri and the United States also claim that Congress would not have made an important change in the states' authority to tax the Banks for Cooperatives without some comment. Pet. Br. 24, U.S. Amici 15-16. There are two answers to this claim. First, Congress did not make an important change in the law. For over 50 years, the Farm Credit Act provided that the states were not authorized to tax the Banks for Cooperatives during periods of federal investment. New federal support was provided in 1985. By amending Section 2134, Congress simply conformed the statute to the fact of such new federal investment.

There is a further reason for the lack of commentary on the amendment to Section 2134 – a lack of time. Due to the crisis facing the Farm Credit System, Congress considered the Farm Credit legislation "under the unusual circumstances of a limited time agreement, and without the customary process of the committee markup and

report." 131 Cong. Rec. S16710 (Dec. 3, 1985) (Statement of Sen. Helms). The legislation to rescue the Farm Credit System was introduced on November 20, 1985, and passed less than one month later. Given the time constraints, it is not surprising that Congress did not provide a specific explanation of the amendment to Section 2134.

Missouri and the United States similarly claim that the amendment to Section 2134 was described by Congress as a "conforming" amendment and thus must have been viewed as insignificant. Pet. Br. 24, U.S. Amici 15. This is simply a variation on the previous argument and the answer is the same. Congress conformed Section 2134 to the fact of new federal investment.

Missouri and the United States finally allege that because Congress gave statutory state tax exemptions to other institutions of the Farm Credit System, it must have meant to deny such exemptions to the Banks for Cooperatives. Pet. Br. 23-24, U.S. Amici 18. When Congress wishes to make a System institution subject to state tax, it does so expressly. In 12 U.S.C. Section 2211, Congress authorized the creation of Farm Credit System service corporations. In 12 U.S.C. Section 2214, Congress provided that the service corporations would be subject to state tax, except franchise taxes. Similarly, Missouri and its amici ignore the example of the Rural Telephone Bank which is state tax exempt without a statutory exemption. These examples negate any claim that Congress silently intended the Banks to be taxable.

In the end, none of these abstract canons of construction supports the conclusion that the plain terms of Section 2134 should be disregarded. All that they amount to

is the assertion that Congress must have intended to authorize the states to tax the Banks for Cooperatives because it did not specifically prohibit such taxation. This turns the *McCulloch* rule on its head. In amending Section 2134, Congress intended to, and did, deny the states the authority to tax the Banks for Cooperatives, and their successor, the National Bank for Cooperatives.

CONCLUSION

For the reasons stated, the decision of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

RICHARD A. HANSON
Counsel of Record
THEODORE R. BOTS
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, IL 60606-5096
(312) 984-7799