

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   MERRILL LYNCH, PIERCE,                   :

4   FENNER & SMITH, INC., ET AL.,                   :

5                           Petitioners                   :   No. 14-1132

6                   v.                   :

7   GREG MANNING, ET AL.                   :

8   - - - - - x

9   Washington, D.C.

10    Tuesday, December 1, 2015

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12                   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 10:07 a.m.

15   APPEARANCES:

16   JONATHAN D. HACKER, ESQ., Washington, D.C.; on behalf

17       of Petitioners.

18   PETER K. STRIS, ESQ., Los Angeles, Cal.; on behalf of

19       Respondents.

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 14-1132, Merrill Lynch,  
5 Pierce, Fenner & Smith v. Manning.

6 Mr. Hacker.

7 ORAL ARGUMENT OF JONATHAN D. HACKER

8 ON BEHALF OF THE PETITIONERS

9 MR. HACKER: Mr. Chief Justice, and may it  
10 please the Court:

11 In language that differs distinctly from the  
12 "arising under" language of Section 1331, Exchange Act  
13 Section 27 confers on the Federal courts exclusive  
14 jurisdiction over all suits brought to enforce any duty  
15 created by the Exchange Act and its regulations. That  
16 language establishes a straightforward test.

17 The Federal court has exclusive jurisdiction  
18 if the suit is brought to enforce Exchange Act duties  
19 even if the suit is also brought to enforce State law  
20 duties.

21 In particular, the words "brought to  
22 enforce" focus on what the plaintiff itself wants the  
23 court to decide, not on what the court would necessarily  
24 have to decide, as 1331 has been read to require.

25 By applying the 1331 test, the Third Circuit

1 not only ignored Section 27's distinct language but also  
2 its distinct policies, which strongly disfavor State  
3 court adjudication of Exchange Act duties and thus are  
4 exactly the opposite of the policies favoring State  
5 court adjudication that underlie the Jackson Pollock  
6 canvas this Court has painted over Section 1331.

7 Respondents, however, begin not with the  
8 necessity rule derived from 1331 but with a much more  
9 aggressive position that Section 27 only creates  
10 jurisdiction over causes of action created by the  
11 Exchange Act itself and thus categorically bars  
12 jurisdiction over State-based causes of action like  
13 those asserted here.

14 JUSTICE ALITO: Now, does your -- does your  
15 test depend solely on what is alleged in the complaint  
16 or what might be proven under a -- a more generally  
17 worded complaint?

18 Suppose the complaint in this case made no  
19 reference to any Federal regulations but -- I'm not that  
20 familiar with the pleading rules in New Jersey, but  
21 suppose they would -- it was, you know, notice pleading  
22 and so there's no reference to the regulations but  
23 they -- they sought to prove their case by arguing that  
24 the New Jersey -- the New -- the rule in New Jersey  
25 should be the same as the Federal regulation. Would

1     that fall within your test?

2                   MR. HACKER:  The way you put it at the very  
3     end, the answer is no.  If the rule in New Jersey is the  
4     same because it's the rule in New Jersey, then that  
5     would not be seeking to enforce an Exchange Act duty.

6                   The answer to the first part of your  
7     question is yes, which is our test does look at the  
8     allegations on the face of the complaint:  Is the  
9     complaint as pleaded seeking to enforce a duty created  
10    by the Exchange Act?

11                  JUSTICE GINSBURG:  So they could amend the  
12    complaint, and then we wouldn't be here, because they  
13    could amend the complaint to say that we're suing under  
14    New Jersey law and New Jersey law mirrors the Federal  
15    law.  It's a matter of New Jersey's choice.

16                  MR. HACKER:  The way I would put it is we  
17    wouldn't have been here if they had written that  
18    complaint to start with, but because removal --  
19    jurisdiction is tested at the time of removal, if they  
20    amended their complaint now, it wouldn't change the fact  
21    that there's Federal jurisdiction based on the face of  
22    the complaint at the time of the -- of removal.

23                  JUSTICE KENNEDY:  Well, is the Court  
24    obligated to do a search of all Federal laws and  
25    regulations to know if this complaint might have a

1 Federal cause of action?

2 MR. HACKER: No. That's why it's important  
3 to look at the face of the complaint. This complaint  
4 exemplifies the kind of complaint that triggers  
5 Section 27 jurisdiction because it's --

6 JUSTICE SCALIA: But what you said --

7 JUSTICE KENNEDY: Let -- let me ask you:  
8 This -- this -- this -- let's assume, as Justice Alito  
9 assumed, that New Jersey is the same as the Federal  
10 system, notice pleading. Can you just tell me as a  
11 matter of practice, do most complaints set forth the  
12 Federal statute under which -- not 1331 but the specific  
13 Federal statute that creates the duty, or do they just  
14 allege the duty?

15 MR. HACKER: Most complaints -- sure. It  
16 depends on the jurisdiction. But certainly in my --

17 JUSTICE KENNEDY: Let's say just under  
18 notice pleading under Federal standards.

19 MR. HACKER: They would almost certainly set  
20 forth the -- the statute under which they're pleading.  
21 They're identifying the duty so that the Court  
22 understands what the nature of the claim is. That's  
23 very common precisely because you don't want the Court  
24 to go looking around for the cause of action, especially  
25 after Twombly and Iqbal.

1 JUSTICE SCALIA: But they -- but they don't  
2 have to do that. As -- as I understand your case, they  
3 don't have to explicitly refer to the Federal statute.

4 MR. HACKER: That's -- that's right in a  
5 limited sense that -- I think this Court would recognize  
6 and has recognized inartful pleading doctrine where, for  
7 example -- if you use this complaint as an example, if  
8 they had just literally whited out, deleted the  
9 references to Reg SHO as such but were clearly  
10 unambiguously pleading violations of its requirements  
11 with the same capital L, Locate, capital C, Close-Out  
12 requirements, you would unmistakably understand the  
13 complaint to be based on violations of the Act -- of the  
14 Exchange Act regulation seeking to enforce those duties.  
15 Then sure, the fact you didn't cite it wouldn't change  
16 the fact.

17 JUSTICE SCALIA: Well, that imposes quite  
18 a -- quite an onerous task upon -- upon the Federal  
19 district court, it seems to me. You -- you have to sift  
20 through the complaint and see if any of the claimed  
21 causes of action under State law mirror a cause of  
22 action that happens to exist under Federal law, without  
23 even the hint that they mention the Federal statute.

24 MR. HACKER: Well, but that -- that only  
25 goes to the question in an artful pleading situation,

1     which in this case doesn't present, and would be, you  
2     know, the next third, fourth, fifth case down the road.

3                 But certainly in -- in -- the defendant, you  
4     know, who moves or seeks jurisdiction, the party seeking  
5     to establish jurisdiction, would have to identify for  
6     the court the defendant's theory as to why the complaint  
7     seeks to enforce Federal duty. So it's not like the  
8     judge has to do it him or herself.

9                 But all of these are hypothetical questions.  
10    We're talking about a complaint here that unambiguously  
11    seeks to enforce duties prescribed --

12                JUSTICE SOTOMAYOR: I just don't understand  
13    how.

14                MR. HACKER: -- about regulation --

15                JUSTICE SOTOMAYOR: Meaning under Pan Am, we  
16    looked at the operative paragraphs of the complaint, not  
17    the general pleadings or background. We looked at what  
18    remedies were sought to determine whether you were  
19    looking to enforce the law. Each of the causes of  
20    action here are under State law. How is that seeking  
21    redress under Federal law?

22                MR. HACKER: A -- a couple of points. First  
23    of all, Pan Am was a well-pleaded complaint-rule case.  
24    The Federal issue didn't appear on the face of the  
25    complaint, so this Court, correctly applying the --



1 an -- uncontroversial applying the well-pleaded  
2 complaint rule, read the complaint, took it for what it  
3 said --

4 JUSTICE SOTOMAYOR: No, it looked at the  
5 operative paragraphs. Why should --

6 MR. HACKER: Right. So --

7 JUSTICE SOTOMAYOR: The operative paragraphs  
8 here are the causes of action.

9 MR. HACKER: But then turning to this  
10 complaint, the -- the -- the court looks at the causes  
11 of action, each of which obviously incorporates,  
12 explicitly incorporates all of the prior conduct alleged  
13 as the basis for the violation of the cause of action  
14 and the -- the prior allegations and the causes of  
15 action themselves.

16 The causes of action themselves are all  
17 about what the complaint -- the Respondents describe as  
18 illegal short-selling. That's what causes -- that's  
19 what makes unjustment enrich. That's what makes the  
20 interference of contract tortious. That's what makes --  
21 it's negligent. That's the breach of the duty, is to --  
22 is to -- is to do -- find a Locate.

23 So where in the complaint you find --

24 JUSTICE SOTOMAYOR: Without the Federal law,  
25 would there be a duty under State law not to short sell?

1                   MR. HACKER: Not under this complaint. The  
2 complaint identifies --

3                   JUSTICE SOTOMAYOR: Please go back to answer  
4 my direct question: If there were no Federal law.

5                   MR. HACKER: There is -- the answer is no.  
6 The Third Circuit itself said there is no analogue under  
7 New Jersey law to Regulation SHO. Nothing. Zero in  
8 New Jersey law. Not a statute, not a regulation, not an  
9 administrative guidance, and not a common law --

10                  CHIEF JUSTICE ROBERTS: Well, New Jersey --  
11 New Jersey law certainly prohibits fraud. So is -- are  
12 they doing anything more than saying, we think this  
13 constitutes fraud?

14                  MR. HACKER: They -- they're saying --

15                  CHIEF JUSTICE ROBERTS: "This" being what  
16 the -- the violation -- what you say is the violation of  
17 the Federal law.

18                  MR. HACKER: Right. What they're saying is  
19 fraud or is tortious interference or is negligence or is  
20 unjust enrichment is the failure to get a Locate.

21                  The complaint isn't ambiguous about this.  
22 The complaint explains what a Locate is. It's  
23 prescribed by Regulation SHO.

24                  CHIEF JUSTICE ROBERTS: So do they just have  
25 to expand their allegation and say, okay, we're not

1 going to call it "a Locate," but we think it's fraud  
2 when you're, you know, short-selling this and you're  
3 supposed to have -- and you haven't borrowed this much,  
4 blah, blah, blah? In other words, just creating a  
5 parallel duty -- which I understood you to tell Justice  
6 Alito that would be okay. Instead, they're using a  
7 shorthand, "the Locate." Is that -- is that all the --  
8 the only difference?

9 MR. HACKER: Well, they're -- they're  
10 definitely not just using a -- a shorthand. They're  
11 very explicit about it in defining "Locate," capital L.  
12 That is the gravamen. To use the phrase from this  
13 morning's decision, that is the -- no matter how  
14 packaged, that is the gravamen of the suit here, is a  
15 complaint about failure to get Locates, which is  
16 compensation.

17 JUSTICE GINSBURG: Then why isn't this just  
18 like --

19 MR. HACKER: But --

20 JUSTICE GINSBURG: There are -- there are  
21 many, many instances in which there is a State claim,  
22 say a State claim for negligence, and the negligent  
23 conduct is alleged to be violation of a Federal safety  
24 standard. So it's all about whether the Federal safety  
25 standard was violated, but the claim is a State claim

1 for negligence. You wouldn't say that that is a claim  
2 that has to be brought in Federal court.

3 MR. HACKER: Well -- but the language of  
4 this statute is different. That's the key. In this  
5 Court's Moore decision addressing "arising under," under  
6 1331, the Court addressed exactly that situation. It  
7 was precisely that situation. The State of Kentucky  
8 made it negligence per se to violate the Safety  
9 Appliances Act, and this Court says -- and it used the  
10 exact phrasing that became Section 27 when it said, the  
11 State negligence per se statute incorporated the duty  
12 prescribed by the State. We're seeking to enforce the  
13 duty prescribed in the Act.

14 JUSTICE KENNEDY: So in your -- in your  
15 view, you have to -- if -- if -- if this Court finds  
16 that the section here, Section 27, is the same as  
17 "arising under," you lose?

18 MR. HACKER: Well, no, but for a different  
19 reason. We do think it's actually necessary and the  
20 Third Circuit erred in that respect, but that's not the  
21 question here. The question here -- and we think it's  
22 perfectly clear that the complaint actually -- they  
23 can't prevail under State law unless they establish that  
24 Reg SHO was violated.

25 But -- but our point is --

1 JUSTICE GINSBURG: I'm sorry. Can we go  
2 back? Because I'm not sure I understood your answer to  
3 my question. Are you saying that if a State adopts a  
4 violation of a Federal safety standard as constituting  
5 negligence, that that claim arises under Federal law?

6 MR. HACKER: Not that it arises under  
7 Federal law, but that a suit under that State's standard  
8 says it is a violation of State law to violate Reg  
9 SHO -- for example, if New Jersey law said it is a  
10 violation, it is a -- you know, the statutory tort to  
11 violate Reg SHO, if that was the statute, and you  
12 brought a suit under that statute, you were -- and it  
13 was seeking to enforce the duties created by Reg SHO.  
14 That's why this language is different from "arising  
15 under," because the suit was clearly --

16 JUSTICE KENNEDY: But what's the answer to  
17 Justice Ginsburg's question?

18 MR. HACKER: It would not necessarily be --  
19 it would be -- only be a suit "arising under" if it was  
20 necessary, but under this language, it would be a  
21 Federal court action because that suit would be a suit  
22 seeking to -- brought to enforce duties created by Reg  
23 SHO.

24 JUSTICE KENNEDY: I don't understand.  
25 Necessary for what?

1 MR. HACKER: I'm sorry?

2 JUSTICE KENNEDY: You said that it would be  
3 only a suit if it were -- Federal suit if it were  
4 necessary.

5 MR. HACKER: I'm sorry. It would only be an  
6 arising under action under 1331. That would be --  
7 that's a different statute, a different jurisdictional  
8 statute. Under that statute -- to be clear, that's not  
9 the one we're talking about. Under 1331, this Court has  
10 held, since at least the Smith case, that a State -- an  
11 action brought under State law can be in State court,  
12 even if it's a State cause of action, if resolving a  
13 Federal issue is necessary to resolve the State cause of  
14 action. That's 1331.

15 This statute is markedly and meaningfully  
16 different because it doesn't turn on whether it's  
17 arising under what the cause of action is. What it  
18 turns on is what was the suit brought to enforce. It  
19 was brought to enforce a duty brought by the Exchange  
20 Act.

21 JUSTICE KAGAN: Mr. Hacker, just looking at  
22 the language, I mean, I understand your interpretation  
23 of it, but it seems to me that there's, you know, a --  
24 just as good interpretation which says the opposite. In  
25 other words, you know, what does it mean for a suit to

1 be brought to enforce a liability in a kind of  
2 circumstance you're talking about? In the circumstance  
3 you're talking about, the suit is brought to enforce  
4 State law.

5 Now, it's true that State law might look to  
6 Federal law; State law might incorporate Federal law in  
7 certain ways; State law might have some kind of  
8 relationship to Federal law. But what's the suit  
9 brought to enforce? The suit is brought to enforce  
10 State law.

11 MR. HACKER: A couple of points, though.  
12 Remember, the statute doesn't say is the suit brought to  
13 enforce State law.

14 JUSTICE KAGAN: But State liabilities.

15 MR. HACKER: It's also not said -- said  
16 brought to enforce State liabilities. It says brought  
17 to enforce State liability or -- excuse me, brought to  
18 enforce liabilities or duties created by the Act.

19 If it were liabilities alone, this might be  
20 a different case, because the Exchange Act creates  
21 liabilities by its own terms, and an action brought to  
22 enforce Exchange Act liabilities, basically remedies --  
23 would be, as I say, that might well be a case that  
24 has -- would only be brought under the Exchange Act.

25 But when they added the words "or duties,"

1 clearly they're addressing the same kind of problem that  
2 this Court addressed in Moore when the States -- it was  
3 an emerging issue at the time -- when States were  
4 incorporating explicitly, not just generally looking to,  
5 but explicitly incorporating Federal duties into State  
6 law, and plaintiffs were bringing State causes of action  
7 for negligence, saying that --

8 JUSTICE KENNEDY: And you would say that's a  
9 duty created under this chapter.

10 MR. HACKER: Right, created -- the Reg SHO  
11 in this situation is a duty created --

12 JUSTICE KENNEDY: But why isn't it created  
13 under State law as well?

14 MR. HACKER: Because the -- the cause of  
15 action is created in State law. State law says it is a  
16 violation of State law to violate a duty created by  
17 Federal law. State law doesn't, itself, care about the  
18 content. It's incorporating. It's saying we leave to  
19 the Congress, we leave to the SEC, whatever the  
20 regulatory body is, the content of the law, and we just  
21 say that you can have a cause of action under our State  
22 procedures if you violate duties created by Federal law.  
23 That's the situation.

24 JUSTICE SCALIA: I think that's sort of  
25 ambiguous in the statute.



1                   Let's assume you have a State statute and a  
2   Federal statute, both of which impose the same duty.  
3   Okay? And someone brings a suit only under the State  
4   statute; does not -- does not even mention the Federal  
5   statute.

6                   As I understand your case, you would say  
7   that that person is suing to enforce a duty under  
8   Federal law. I would not say that. I would say that  
9   person is seeking to enforce the duty that State law  
10   creates, not the one that Federal law creates.

11                  MR. HACKER: And I agree with you. Our  
12   argument is not -- if there are literally parallel State  
13   duties, the State says if New Jersey tomorrow, or more  
14   importantly, years ago, had promulgated its own Reg SHO  
15   and had its own Locate requirements, its own Close-out  
16   requirements, and there was a State cause of action  
17   saying you violated the New Jersey Reg SHO and you  
18   caused us injury, we wouldn't be here. There might be a  
19   preemption argument that the State can't do that, but  
20   that would not trigger Section 27 jurisdiction, because  
21   you're clearly seeking --

22                  CHIEF JUSTICE ROBERTS: So you would have no  
23   --

24                  MR. HACKER: -- to enforce New Jersey duty.

25                  CHIEF JUSTICE ROBERTS: You would have no

1 case if New Jersey passed a law saying, as a matter of  
2 New Jersey law, we hereby adopt, you know, everything  
3 under the Securities Exchange Act, including, in  
4 particular, Regulation SHO. That is State law. We're  
5 following the Federal law because, you know, we think  
6 it's easier to do that than write up our own securities  
7 code.

8 That's fine with you?

9 MR. HACKER: No. That's a different case,  
10 because there, the New -- New Jersey isn't making its  
11 own politically accountable decision --

12 CHIEF JUSTICE ROBERTS: Yes, it is. It's  
13 saying -- it's saying wherever it says Federal law as --  
14 we just strike that and put in New Jersey law. They can  
15 do that. They can adopt whatever law -- source of law  
16 they want.

17 MR. HACKER: Sure.

18 CHIEF JUSTICE ROBERTS: Even though it's  
19 precisely the same at the same level of detail, you have  
20 to say under your theory that if you sue just under the  
21 New Jersey law, that's okay.

22 MR. HACKER: I don't think so, Your Honor,  
23 because there New Jersey is leaving to Congress and the  
24 SEC to decide what the law is. The duties are always --  
25 under that structure, the duties are always created by

1 Federal law, and then incorporated by the law that says  
2 we'll do whatever the Federal law says.

3 CHIEF JUSTICE ROBERTS: Right.

4 MR. HACKER: The duty is created by the --  
5 by the Exchange Act and its regulations.

6 CHIEF JUSTICE ROBERTS: No, the duty under  
7 New Jersey law is passed by whatever statute they enact  
8 saying we -- us too, we want to do it as well, as a  
9 matter of New Jersey law.

10 MR. HACKER: But they can do it separate.  
11 They can establish their own independent duties.

12 CHIEF JUSTICE ROBERTS: Yeah.

13 MR. HACKER: But when they consciously  
14 choose not to create an independent duty, but to say  
15 that we're going to -- literally, in the hypothetical  
16 you're adopting, they're literally saying we're  
17 incorporating the Federal duty. And in that  
18 situation --

19 CHIEF JUSTICE ROBERTS: And as New Jersey --  
20 as New Jersey law.

21 MR. HACKER: Right. But that's still  
22 seeking -- an action under that law would still be  
23 seeking to enforce a duty created by the Exchange Act  
24 and its regulations, you know, albeit incorporated into  
25 State law. It's a different type of case.

1 JUSTICE KAGAN: But then you're going to be  
2 in a situation where the judge is going to have to try  
3 to figure out whether State law exactly mimics Federal  
4 law, or whether there are minor deviations from Federal  
5 law. And that can't be a good jurisdictional test, can  
6 it?

7 MR. HACKER: Well, all jurisdictional tests  
8 will have, you know, challenges at the margin.

9 JUSTICE KAGAN: I don't think this is a  
10 marginal question. I think this is kind of a, you know,  
11 pretty ordinary question of like, well, what is the  
12 State law doing? Is it exactly -- lots of State laws  
13 exactly mimic Federal law, and lots of them don't.

14 MR. HACKER: I think, in practice, there is  
15 quite a clear margin because States make different  
16 choices in this. If a State wants to say, as plenty do,  
17 that we are just in haec verba incorporating the Federal  
18 standard, then you -- the -- the duty is created by the  
19 Federal standard, and becomes enforceable under State  
20 law.

21 But the duty still is created by Federal  
22 law. States make other clear, distinct choices where  
23 they say we're going to have a fraud law; we're going to  
24 have our own securities laws. New Jersey has its own  
25 securities laws. It could, if it wanted to, adopt a Reg

1 SHO.

2 JUSTICE ALITO: Why couldn't the New Jersey  
3 Supreme Court -- why couldn't the New Jersey Supreme  
4 Court say this is our interpretation of a provision of  
5 the -- the New Jersey Uniform Securities Act, with  
6 respect to short selling, this is what it means, and  
7 without ever referring to Reg SHO, adopt basically the  
8 same or exactly the same rule that is incorporated in  
9 that regulation? Would you say that then an -- that an  
10 action under that provision of the New Jersey Securities  
11 Act would be one seeking to enforce a Federal duty?

12 MR. HACKER: No. I think that would be a  
13 different case where the State is saying, you know, this  
14 seems like a pretty good rule; we're going to adopt it  
15 because we like it, adopt it independently as our own  
16 rule. And in any future case, they might do something  
17 different. As happened in the very New Jersey case, the  
18 Third Circuit cited for the proposition that New Jersey  
19 law sometimes different -- differs from Federal law. It  
20 can, but here, the complaint --

21 CHIEF JUSTICE ROBERTS: But it seems to  
22 me --

23 MR. HACKER: I'm sorry.

24 CHIEF JUSTICE ROBERTS: The only one who  
25 benefits from that are -- are printing companies. You

1 say they can't say, we adopt Regulation SHO as  
2 New Jersey law; they have to actually go ahead and  
3 reprint everything that SHO says, and then it's okay.

4 MR. HACKER: Well, no. It's -- it  
5 definitely is a politically accountable choice if the  
6 New Jersey, you know, wants to go to its -- the --  
7 the -- the people in New Jersey and all the interested  
8 parties and say, we think -- we don't like the way the  
9 SEC has balanced the many competing interests involved  
10 in regulating the market for, in this case, the  
11 electronic market, and short selling in the  
12 United States; we want it done differently in  
13 New Jersey. And all of the competing interest parties  
14 can come and -- and talk to New Jersey about whether it  
15 should -- they should do it that way or not.

16 JUSTICE SCALIA: What if -- what if the  
17 State law says -- and I'm not sure this one doesn't.  
18 What if the State law says, we are adopting the  
19 disposition of the current regulation in, you know, in  
20 -- in 2015; all right? That's all it says. So if that  
21 regulation changes and Federal law changes, State law  
22 would not change. What happens in that situation?

23 MR. HACKER: I mean, that would be an  
24 unusual way for a court to conduct itself, but if it did  
25 that --

1 JUSTICE SCALIA: Why? Why? Why?

2 MR. HACKER: Well, I've never seen it  
3 before.

4 JUSTICE SCALIA: The court likes this  
5 regulation. It doesn't know what this kooky SEC is  
6 going to do in the future. This regulation is okay. So  
7 they put that -- they put that into State law.

8 MR. HACKER: I think that's right if the  
9 court said and made it clear that we find, as a matter  
10 of New Jersey fraud, that under New Jersey fraud law, if  
11 you don't get a Locate in accordance with SEC  
12 requirements --

13 JUSTICE SCALIA: Current SEC requirements.

14 MR. HACKER: Yeah, and that could change.  
15 And it's clear that it's an independent -- independently  
16 created duty, but none of this is at issue here.

17 JUSTICE SOTOMAYOR: Isn't that what the  
18 court is going to do when it hears this action?

19 MR. HACKER: I'm sorry?

20 JUSTICE SOTOMAYOR: Isn't that what the  
21 State court's going to do when it hears this action?  
22 There's nothing about the alleged causes of action --  
23 they allege theft and fraud. So they're going to have  
24 to prove theft and fraud under State law as defined in  
25 the sections that they've cited.

1                   MR. HACKER: But -- well, they also allege  
2 unjust enrichment and negligence --

3                   JUSTICE SOTOMAYOR: All of that.

4                   MR. HACKER: Right.

5                   JUSTICE SOTOMAYOR: Now, that might be  
6 something you could object to at trial if they try to  
7 say State law is the same as Federal law and can't prove  
8 it. You then appeal that decision if it's wrong. If  
9 State law is different, you prove it's different. I'm  
10 just not sure what that has to do with the well-pleaded  
11 complaint that -- that they are saying this is a duty  
12 that arises under the theft and fraud provisions of  
13 New Jersey's uniform Securities Act.

14                  MR. HACKER: Right. You won't see that  
15 sentence anywhere in this complaint. It doesn't exist.  
16 What this complaint says is, in paragraph 24, it says  
17 that illegal short selling is short selling that, quote,  
18 "violates securities laws and regulations." That's what  
19 they're complaining about. Short selling defined as  
20 something that violates securities laws and regulations.

21                  JUSTICE SCALIA: Surely they mean the  
22 current regulations, right? And you've just told me  
23 that if the State law applies only to the current  
24 regulation, it is not adopting Federal law, right? So  
25 this complaint is referring to the current regulation.



1 How do you know it's referring to that regulation as it  
2 may change in the future?

3 MR. HACKER: Well, it's -- well, it's  
4 referring to past conduct. So it's saying what you did  
5 injured us --

6 JUSTICE SCALIA: Right.

7 MR. HACKER: -- because you violated the  
8 regulation as it exists today. You committed this  
9 illegal short selling. You didn't get Locates as they  
10 think --

11 JUSTICE SCALIA: Fine.

12 MR. HACKER: -- the SEC would require.

13 JUSTICE SCALIA: Because that regulation is  
14 a good regulation, and it ought to be New Jersey law.  
15 But if that regulation changes, we -- we don't say that  
16 it ought to be New Jersey law.

17 MR. HACKER: Let me try an exercise. If you  
18 eliminated -- all of this suggests that you could just  
19 as easily eliminate all of the references to Reg SHO,  
20 all of the references to capital L, Locate, capital C,  
21 Close-Out, and their complaint would just proceed the  
22 same way it would. And we know that that's not true  
23 because they've got no source -- if they have a  
24 complaint like that that just says, this is fraud, this  
25 is tortious interference, we're unhappy about it because

1     you didn't short sell the way we wish you would, they  
2     would have literally nothing in New Jersey law to cite  
3     to.

4                     JUSTICE BREYER:  Then they'll lose under --  
5     they brought a claim -- look, is it a necessary -- as a  
6     Federal issue, Federal issue is whether what they've  
7     done violates Regulation SHO.  They don't say that  
8     anywhere in the complaint, not even in paragraph 24, but  
9     you cite it, I read.  This is background.  They don't  
10    say anything about it, but is it necessary?  Is it  
11    necessary for them to prevail that they prove a  
12    violation of Regulation SHO?

13                    MR. HACKER:  We think it is, but that's --

14                    JUSTICE BREYER:  What do they --

15                    MR. HACKER:  -- not the question here.

16                    JUSTICE BREYER:  I didn't ask you that.  I  
17    asked what you thought.

18                    MR. HACKER:  We -- we think it is  
19    necessary --

20                    JUSTICE BREYER:  You think it is necessary.

21                    MR. HACKER:  -- but --

22                    JUSTICE BREYER:  Fine.  Fine.  That's all I  
23    want to know.

24                    MR. HACKER:  All right.

25                    JUSTICE BREYER:  Now they presumably think

1 it isn't necessary. Okay?

2 MR. HACKER: Right.

3 JUSTICE BREYER: So if it is necessary and  
4 you're right, then this case should have been brought  
5 under 1331.

6 MR. HACKER: That --

7 JUSTICE BREYER: It wasn't, and we're not  
8 deciding that. So since we're not deciding it, we have  
9 to assume that it is not necessary.

10 MR. HACKER: Correct.

11 JUSTICE BREYER: Okay? If we assume it is  
12 not necessary, if we assume that the conditions for 1331  
13 are not met, and therefore it doesn't get into Federal  
14 court for that reason, why would anyone want a case like  
15 that in Federal court when the States want to adjudicate  
16 it?

17 MR. HACKER: Because Congress wanted it in  
18 Federal court --

19 JUSTICE BREYER: And what is the evidence  
20 that Congress wanted that?

21 MR. HACKER: The language of the statute.

22 JUSTICE BREYER: And all you're left with  
23 is, you say, read the language of the statute, don't  
24 look to the purpose, don't look to surrounding -- don't  
25 look to the surrounding rules of law which actually make

1 very little necessity for this to be in Federal court,  
2 and don't look to anything else. You have your  
3 language.

4 MR. HACKER: Your Honor, I --

5 JUSTICE BREYER: And I agree you have your  
6 language.

7 MR. HACKER: I'm sorry, but --

8 JUSTICE BREYER: You have the language. I'm  
9 not saying you're going to win on the language.

10 MR. HACKER: No, I -- but I couldn't  
11 disagree with you more.

12 JUSTICE BREYER: Okay. Go ahead.

13 MR. HACKER: The language, first of all, I  
14 think is unambiguous in our favor. But we absolutely  
15 believe the objectives and purpose are uniformly in our  
16 favor because what you know, if nothing else, about  
17 Section 27 is that Congress, unlike -- unlike all of the  
18 other jurisdictional statutes that use decidedly  
19 different language, Congress here did not want State  
20 courts to adjudicate duties created --

21 JUSTICE BREYER: So why -- why isn't the SEC  
22 here?

23 MR. HACKER: There's -- I mean, the SEC  
24 makes its own decisions. And I certainly think this  
25 Court cannot decide a case based, not least on what the

1 SEC hasn't said.

2 JUSTICE BREYER: Curious.

3 MR. HACKER: Right. That's for the SEC, but  
4 you know, we would not, I think, construe a statute  
5 based on the absence of the SEC --

6 JUSTICE GINSBURG: You are relying on a  
7 different language. This is not arising under, but the  
8 special language in Section 27. And we have a brief;  
9 it's a public citizen brief that says, well, this is --  
10 this Section 27 is not unusual. It lists about, what is  
11 it, some ten other statutes that are phrased the same  
12 way.

13 MR. HACKER: Right.

14 JUSTICE GINSBURG: So with respect to every  
15 one of those statutes, Public Utilities Holding Company,  
16 Federal Power Act, Connally Hot Oil, the same argument  
17 would apply to those statutes.

18 MR. HACKER: Those are all similarly  
19 narrowly prescribed statutes. And as the public citizen  
20 itself indicates, those were enacted mostly in the New  
21 Deal era when we know, if anything, Congress was looking  
22 to expand opportunities for plaintiffs to get into  
23 Federal court. And it wouldn't be surprising at all  
24 that New Deal statutes would favor Federal court  
25 adjudication of Federal duties.

1 I'd like to reserve --

2 JUSTICE KAGAN: And you think we can reach  
3 that interpretation, even as to the Natural Gas Act  
4 consistent with Pan American?

5 MR. HACKER: Yes. Pan American was purely a  
6 well-pleaded complaint rule case. And the footnote that  
7 the other side relies on, referring to arising under,  
8 was simply saying the fact they used different language  
9 doesn't change the fact the well-pleaded complaint rule  
10 applies as it does on its face, "brought to enforce"  
11 requires the court to look at the face of the complaint.

12 I'd like to reserve my time.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 MR. HACKER: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Stris.

16 ORAL ARGUMENT OF PETER K. STRIS

17 ON BEHALF OF THE RESPONDENTS

18 MR. STRIS: Thank you, Mr. Chief Justice,  
19 and may it please the Court:

20 It is well-settled that jurisdictional  
21 statutes will not be interpreted to intrude on State  
22 judicial authority unless Congress makes its intention  
23 clear.

24 Petitioners ask this Court to interpret  
25 Section 27 of the Exchange Act to strip State courts of

1 jurisdiction, to decide State law-created claims when  
2 such claims have already failed the Grable test. There  
3 is no indication that Congress clearly intended such an  
4 unprecedented intrusion on State court authority.

5 JUSTICE KAGAN: Why do you think, Mr. Stris,  
6 this different language was used in these ten statutes?

7 MR. STRIS: So my -- my best answer is to  
8 mirror, essentially, what our amici public citizen and  
9 the State securities regulators have said, which is at  
10 the time that certainly the '33 Act and the '34 Act were  
11 passed, the Federal question statute had an  
12 amount-in-controversy requirement.

13 Now, I understand that my friend, Mr.  
14 Hacker, points out in his reply that there's a current  
15 statute, 28 U.S.C. 1337, that was enacted in 1948. It  
16 had a predecessor statute, 28 U.S.C. 41(8) that was  
17 enacted in 1911 that removed the amount-in-controversy  
18 requirement for cases involving interstate commerce.

19 And one would think, because it's the case  
20 today, that that would apply to securities. But as best  
21 we can understand from our research, in the years that  
22 are relevant, 1911 to the time of the '33 Act and '34  
23 Act, it was not interpreted that way.

24 So there was essentially an  
25 amount-in-controversy requirement for securities cases.

1 So I think, if I were to --

2 JUSTICE GINSBURG: The amount in controversy  
3 wasn't very high. And wouldn't most cases of this  
4 character easily meet it?

5 MR. STRIS: I don't know that that's true,  
6 Justice Ginsburg. But more importantly to -- to your  
7 question --

8 JUSTICE GINSBURG: If it was \$3,000,  
9 something like that?

10 MR. STRIS: Well --

11 JUSTICE GINSBURG: Or even less?

12 MR. STRIS: If we're attempting to ascertain  
13 why Congress would choose to use this language instead  
14 of other language, I would submit that any  
15 amount-in-controversy requirement, if they felt they  
16 didn't want that for purposes of Federally-created  
17 claims -- so this is going to segue into my first  
18 point -- we think the most natural reading of Section 27  
19 is as a creation test.

20 And so if that's what --

21 JUSTICE SCALIA: \$3,000 is probably a lot of  
22 money today.

23 MR. STRIS: I'm sorry?

24 JUSTICE SCALIA: \$3,000 is probably a lot of  
25 money today.



1 MR. STRIS: Well, I don't --

2 JUSTICE SCALIA: Would you like to have  
3 3,000 1934 dollars?

4 MR. STRIS: Yeah. I -- I -- I don't want to  
5 get into any debate --

6 CHIEF JUSTICE ROBERTS: That's a yes-or-no  
7 question, counsel.

8 (Laughter.)

9 MR. STRIS: I would like any money that  
10 anyone on the Court or in the courthouse would like to  
11 give me, and I'll be taking collections after -- after  
12 the argument.

13 JUSTICE KENNEDY: If -- if -- if your answer  
14 is correct, why do they need to use the term  
15 "exclusive"? Why don't they just -- just -- just --

16 MR. STRIS: So let me --

17 JUSTICE KENNEDY: -- there is jurisdiction  
18 in Federal court. That -- why -- that doesn't explain  
19 the -- the use of the word "exclusive."

20 MR. STRIS: No, no. But I think it does.  
21 So -- so this particular statutory language is found in  
22 eleven statutes. In some of them, they used the term  
23 "exclusive jurisdiction"; in -- in others, they did not.

24 What follows exclusive jurisdiction is  
25 essentially a creation test that -- which I'll explain

1 in a moment. The fact that they chose to confer  
2 exclusive jurisdiction here just means that, when there  
3 was a cause of action that was created by the  
4 Exchange Act, they wanted it to be in Federal court.

5 So -- so let me -- let me get to the spirit  
6 of -- of the answer, which is why I think that there's  
7 good reason to believe that exclusive jurisdiction in  
8 the statute is limited to causes of action that are  
9 created by the Act itself.

10 So my friend Mr. Hacker concedes, I think  
11 reasonably, that if someone sues under a parallel State  
12 duty, that that is only a duty under -- that's a lawsuit  
13 that's brought to enforce only a duty under State law.  
14 I was pleased to hear that, because I think that is the  
15 most natural reading of -- of the language.

16 Our position is that the result is no  
17 different if a State accomplishes the same thing through  
18 the expedience of incorporating or referencing Federal  
19 law.

20 And I want to be clear on this point. Our  
21 position is not that the plain meaning of the statute  
22 compels that interpretation. I'll be the first to say  
23 that one could theoretically read the -- the language  
24 brought to enforce a liability or duty created by the  
25 Act or its regulations the way that my -- my friend

1 suggests. One could. But I think it starts to break  
2 down and not really make much sense if we look at what's  
3 missing from Section 27.

4 Here's what's missing: There is no Federal  
5 jurisdiction over Exchange Act counterclaims, which  
6 means that State court --

7 JUSTICE SOTOMAYOR: Over --

8 MR. STRIS: I'm sorry. Over Exchange Act  
9 counterclaims. So that means that Congress was willing  
10 to have State courts adjudicate claims that were created  
11 by the Act itself.

12 There is no exclusive jurisdiction over  
13 Exchange Act defenses. And most notably, that would  
14 include preemption. And in the mine-run of preemption  
15 cases -- and I'm going to get to this in a little bit --  
16 not only is the State court determining what the  
17 Exchange Act says, but it's doing it for the purpose of  
18 assessing whether there is a conflict between State and  
19 Federal law.

20 It's really important that those two things  
21 are missing from the statute, because I find it very  
22 difficult to believe that a Congress that was not  
23 concerned about State courts adjudicating those cases  
24 somehow would be very concerned about a State court  
25 adjudicating a State law-created cause of action that

1 happened to implicate a Federal duty or a liability.

2 When we look at the language and we take it  
3 in context, I think it just --

4 JUSTICE ALITO: But Congress must have --

5 JUSTICE KAGAN: I -- go ahead, please.

6 JUSTICE ALITO: Congress must have had in  
7 mind a certain category of claims that it did not want  
8 adjudicated in State court, correct?

9 MR. STRIS: I agree.

10 JUSTICE ALITO: All right. So you seem to  
11 be saying that the category of claims they did not want  
12 adjudicated in State court are only these: Those in  
13 which the plaintiff is asking for the enforcement of a  
14 Federal duty, and there is no comparable State duty at  
15 that time, and the State court is unwilling to recognize  
16 a comparable State duty in the context of that  
17 litigation.

18 So these are essentially cases in which the  
19 State is basically hostile to the Federal duty. And  
20 those are the only cases that Congress did not want to  
21 have adjudicated in State court.

22 Am I -- have you gone wrong in that?

23 MR. STRIS: I -- I don't think you've gone  
24 wrong, but I think that that position is firmly  
25 supported by history, if we look at the context.

1                   And let me explain what I mean.

2                   So at the time the Exchange Act was passed,  
3   there were only three express rights of action, and they  
4   were very minor. There was no private right of action  
5   under 10(b); there was a market manipulation of a 9(a),  
6   short-swing profits; and a third one that I don't  
7   recall.

8                   So if we look at the context, we have a  
9   history of States regulating securities. We have a  
10   parallel provision in the Exchange Act, Section 28, that  
11   this Court in Matsushita acknowledged, expressly  
12   endorsed the fact that States were going to continue to  
13   regulate.

14                  So I think the Congress that passed the '34  
15   Act was thinking the following: They were thinking we  
16   have a very narrow window of claims that are created by  
17   this Act. And for those, a 9(a) straightforward market  
18   manipulation claim, for -- for -- for wash sales. We  
19   don't want State courts adjudicating those, because  
20   those are very technical. We want exclusive  
21   jurisdiction over those claims.

22                  And I think that's the extent of what  
23   Congress intended in passing this provision.

24                  Now --

25                  JUSTICE GINSBURG: Supposing that you had

1 brought this claim specifically to enjoin violations of  
2 this SHO regulation. So that's your complaint. Court,  
3 please enjoin the defendant from violating SHO.

4 MR. STRIS: Well, I think as a factual  
5 matter, Justice Ginsburg, that couldn't happen because  
6 the conduct would have already occurred. But I won't  
7 resist the hypothetical.

8 I think -- I think the hypothetical you're  
9 asking reveals the most difficult part of our plain-text  
10 interpretation, which is assume a State statute that  
11 seeks to enjoin what is only a federally-created duty.  
12 I don't know that that would come up, but it could,  
13 theoretically.

14 Our position would be that that is still  
15 best interpreted as a lawsuit brought to enforce a duty  
16 or a liability created by State law, because the -- the  
17 State has decided by reference to have the duty being  
18 don't violate the -- the -- the Federal standard that  
19 you would get the injunction for.

20 And I think, in the real world, what we're  
21 seeing are, at best, States that are creating parallel  
22 provisions that incorporate duties and liabilities  
23 merely because it's an expedient. And so I think  
24 that -- I guess before I move on -- you know,  
25 administrative simplicity is a -- is a major virtue in

1 any jurisdictional statute. I know the Court has said  
2 that before. Without any strong evidence to interpret  
3 Section 27 as anything other than a creation test, I  
4 think that's the best result.

5 JUSTICE KAGAN: Can I ask you to describe  
6 your complaint? In other words, Mr. Hacker has a  
7 certain characterization or description of your  
8 complaint, and the -- and the -- the role played in your  
9 complaint by the regulation. So if you had to describe  
10 your complaint, and particularly, what role does this  
11 regulation play in your claims under State law?

12 MR. STRIS: I understand, Justice Kagan.

13 So I think there's been some  
14 misunderstanding of what we're alleging. We are not  
15 relying on Reg SHO for any theory of liability, and  
16 here's why: We're bringing a straight-up  
17 market-manipulation claim. And what that means is we're  
18 suggesting that the naked short-selling that happened  
19 was not just a technical infraction, not just a  
20 technical violation of Reg SHO, but was done with the  
21 purpose of depressing sales prices -- or prices of the  
22 security. That's an analogue to a 10b-5 action.

23 And so if we look at paragraph 30 of our  
24 complaint -- this is on pages 53-A to -- to 54-A -- we  
25 make clear that the relevant provision of New Jersey law

1 is substantially similar to the Federal securities law.

2 We're referring to 10(b). When -- when the  
3 Uniform Securities Act was promulgated in 1956,  
4 Section 101, which New Jersey adopted, mirrors 10(b).

5 If you're going to bring a claim under  
6 Federal law, you're not suing under Reg SHO.  
7 Manipulative short-selling existed well before Reg SHO.  
8 It's a standard. You're basically saying someone is  
9 taking a short position. They're injecting inaccurate  
10 information into the market because they have taken a  
11 position that's larger than normal supply and -- and  
12 demand would -- would bear, given the size of the public  
13 float. They've chosen to do that because they think  
14 it's going to drive prices down and they're going to  
15 make more money.

16 You don't need to prove all of that to get a  
17 violation of Reg SHO. Reg SHO was enacted by the SEC  
18 because this was a problem. What Reg SHO does is it  
19 allows the SEC to take enforcement action and to fine  
20 people that engage in conduct that is likely to  
21 constitute market manipulation.

22 The point of it is not to punish market  
23 manipulation. The point is to try and stop people from  
24 doing it in the first place.

25 To put it -- to put it differently --



1 CHIEF JUSTICE ROBERTS: Well, I just -- yes.  
2 I mean, but there are parts of your complaint that go in  
3 much greater detail and focus on the Federal Rules.  
4 I -- I think Paragraph 33 says, you know, as set forth  
5 in detail herein, the defendants violated the trading  
6 rules and regulations requiring that they actually  
7 deliver shares they owed to the DTCC to settle  
8 short-sale transactions.

9 That's a duty imposed by Federal law.

10 MR. STRIS: This is a very important point,  
11 Mr. Chief Justice. We mention this in detail for a very  
12 specific reason. It has nothing to do with our theory  
13 of liability. It was us attempting to get in front of  
14 the inevitable preemption defense, which happens. These  
15 short-selling cases get litigated -- get litigated in  
16 State court. A very significant one is on page 25 of  
17 the blue brief, note 8. It's in California State court,  
18 overstock.

19 In these cases, the -- the largest defense  
20 that's asserted in State court is, we complied with Reg  
21 SHO. We complied with the Federal Rules. So if State  
22 law gives you a remedy, it must be conflict preempted.  
23 So --

24 JUSTICE ALITO: Well, along these lines,  
25 look -- look at Count 9, 100a of Appendix to the

1     Petition.  "Each defendant --

2                     JUSTICE SCALIA:  What page is that?

3                     JUSTICE ALITO:  100a.

4                     "Each defendant enterprise owed plaintiffs a  
5     duty of care in their capacity as gatekeepers of the  
6     market.  Each depend -- each defendant enterprise  
7     breached the duty of care that they owed to the  
8     plaintiffs to report suspicious transactions and naked  
9     short sales."

10                    Where does that -- doesn't that come right  
11     from Reg SHO?

12                    MR. STRIS:  Look, I'm not going to suggest,  
13     Justice Alito, that Reg SHO isn't relevant as a  
14     background proposition.  We're in a regulated market, so  
15     of course, the -- the -- the landscape that exists is  
16     going to implicate Federal rules.  The relevant question  
17     is:  Jurisdiction can't be sustained on a theory that we  
18     haven't advanced, right?

19                    JUSTICE ALITO:  But that doesn't seem to --  
20     that doesn't seem to be relying on Reg SHO as a  
21     background proposition.  You say that they breached a --  
22     this is a claim for negligence, requires a breach of a  
23     duty, and you say the duty that they breached is a duty  
24     that's created by Reg SHO.

25                    MR. STRIS:  I -- I -- I would characterize

1     it a little bit differently.  Here -- here's what I  
2     would say.  I would say that if market manipulation  
3     requires that someone do something that injects  
4     inaccurate or artificial information into the market,  
5     that's the theory of a market manipulation claim.  
6     You're messing with natural supply and demand forces.

7                 Of course, any theory of market  
8     manipulation, including under State law, would have to  
9     reference and talk about the ground rules, because the  
10    ground rules that are set up by the SEC are what set up  
11    the market's normal expectations of traditional supply  
12    and demand forces.  So it would really tie our hands to  
13    say that any time you talk about someone doing something  
14    that is inconsistent with the regulatory scheme, you  
15    can't bring a State law claim that is truly a State law  
16    claim, because if you're trying to allege that  
17    there's --

18                JUSTICE BREYER:  That isn't what it's  
19    saying.  It's saying they breached the duty of care that  
20    they owed to the plaintiffs to report suspicious  
21    transactions of naked short sales.  That's the  
22    allegation under negligence.

23                What duty of care?  A duty of care imposed  
24    by New Jersey law?  What New Jersey law?

25                MR. STRIS:  New --

1 JUSTICE BREYER: Or is it a duty of care  
2 imposed by SHO?

3 MR. STRIS: It's a duty of care, Justice  
4 Breyer, imposed by New Jersey State law.

5 JUSTICE BREYER: Which State law?

6 MR. STRIS: New Jersey Statute 49:3-49.  
7 It's found on pages 84a to 87a of the -- the Petition  
8 Appendix, and what it does is it's the section of 101 of  
9 the Uniform Securities Act that mirrors 10b-5.

10 JUSTICE BREYER: And so the exact words  
11 there that the duty of care is referring to are what?

12 MR. STRIS: I believe it says --

13 JUSTICE BREYER: If you know.

14 MR. STRIS: -- you can't engage in deceptive  
15 or manipulative conduct. What we --

16 JUSTICE BREYER: I see what you're saying.

17 MR. STRIS: What we attempted to do here --  
18 we may lose on this point in State court.

19 JUSTICE BREYER: Okay. I -- I have a bigger  
20 -- a question that I can't get -- I can't figure out,  
21 and so I would like your help.

22 Let's go through this. Let's suppose, for  
23 present purposes, that as I read through your complaint,  
24 I find words -- it's not the words we just said, but  
25 similar words somewhere, and I sink -- think, but there

1 is nothing under New Jersey law unless New Jersey picks  
2 up SHO. All right?

3 Why isn't that good enough on that matter to  
4 get them into Federal court in arising under cases?

5 MR. STRIS: Okay. So if -- if we're out of  
6 the world, and you've rejected my creation argument --

7 JUSTICE BREYER: I'm doing it for argument  
8 because --

9 MR. STRIS: Yes.

10 JUSTICE BREYER: -- I'm really concerned  
11 about I can't clarify in my mind the difference between  
12 somebody being thrown out in an arising under case, and  
13 yet getting back in under Section 27. That's what  
14 doesn't make too much sense to me. If this is  
15 necessary -- the Federal issue is necessary for the  
16 plaintiffs to win, there's arising under jurisdiction.  
17 Then I don't know what to do with the word "exclusive."  
18 But all that seems not to be in the case.

19 MR. STRIS: Well --

20 JUSTICE BREYER: So -- so then, if -- if it  
21 is not sufficient to get in under arising under, why in  
22 heaven's name should it be to get in under 27?

23 MR. STRIS: Well, I mean, obviously, I'm not  
24 going to resist, but what I would --

25 JUSTICE BREYER: You're not going to resist

1 my conclusion, but you see, it's -- it's -- I -- I need  
2 clarification, because I'm not sure I've thought it  
3 through correctly.

4 MR. STRIS: So here -- here's my best  
5 attempt to clarify. I think -- let me throw away the  
6 facts for a minute. In other words, I think there's no  
7 theory that we've pled that satisfies even their  
8 standard, but let me throw that away. Let me assume the  
9 best case for them, that we've relied on Federal duties  
10 and try and put it through those -- the -- the -- the  
11 legal question that you've asked.

12 I think one way to resolve this is to take  
13 the simple approach, which is what I advocated first,  
14 and to say, look, if it's just enforcing a State law  
15 cause of action, even if it incorporates Federal law,  
16 that's all 27 does, and you're done. I understand the  
17 premise of your question is let's say you've rejected  
18 that, and we're thinking, you know what, maybe some  
19 State-law claims fall within the sweep of Section 27;  
20 how do we think about this?

21 Here's what I would say. I would say that  
22 whether this is an arising under statute or not, it has  
23 to incorporate what I'll call a Federal necessity  
24 requirement, because that's a longstanding rule that's  
25 part and parcel of the well-pleaded complaint rule. And

1 if you look at Pan American, for example. Let's say I  
2 accept what my friend Mr. Hacker says that it's dicta,  
3 they weren't saying it's arising under statute, they  
4 applied -- this Court applied the well-pleaded complaint  
5 rule without looking at the text of the statute at all.  
6 It's a sensible thing to say that when Federal  
7 jurisdiction over State-law claims is predicated on the  
8 Federal character, there being a Federal issue, that we  
9 use the well-pleaded complaint rule.

10 It's also similarly sensible that the  
11 well-pleaded complaint rule would have an adjunct which  
12 is Federal necessity, and that's precisely what the  
13 Court said in Christianson. And I'll quote the Court:  
14 "The well-pleaded complaint rule focuses on claims, not  
15 theories, and just because an element that's essential  
16 to a particular theory might be governed by Federal  
17 patent law does not mean the entire monopolization claim  
18 arises under patent law."

19 Now, to the second half of your question,  
20 which is, well, how does that -- how do they map  
21 together? Well, then the question becomes how did we  
22 allegedly use this Federally? Do we use it in our RICO  
23 claim as one of several predicate acts? That's all  
24 that's ever been alleged until today. I was surprised  
25 to hear a suggestion that -- well, I shouldn't say until

1     today; until the briefing in this Court.

2                     In the lower court, the suggestion was that  
3     we relied on a Federal duty because it was somehow being  
4     snuck in as a -- an additional predicate of our RICO  
5     claim. I resist that cause -- that claim. If you go  
6     and look at the pages, we allege three --

7                     JUSTICE BREYER: Right, something. And --  
8     and don't tell me I'm right if you think it favors you,  
9     because maybe it does favor you, but I've got -- there  
10    will be other cases, you know, so sympathize a little  
11    with my problem.

12                    MR. STRIS: Okay.

13                    JUSTICE BREYER: I'm looking for a way to  
14    see if we really have to answer all these difficult  
15    questions that have been raised, which are pretty tough.  
16    And so I was thinking, look, here's what you look to.  
17    Judge, see if it is a necessary thing, and if so,  
18    whether it falls under 1331. Okay? If it's an arising  
19    under claim under 1331, kick it out of State court and  
20    send it to Federal court.

21                    But if it isn't an arising under claim  
22    because it isn't necessary to winning for the plaintiff,  
23    forget about it. Keep it in State court. I don't care  
24    whether it's -- don't -- don't worry about whether the  
25    State passed it this way, or the State legislature



1     referenced it by numbers or referenced it by -- don't  
2     worry about all that stuff. Just decide one question.

3             MR. STRIS: So --

4             JUSTICE BREYER: Does it meet the four  
5     criteria for arising under? If so, kick it out. If  
6     not, keep it.

7             MR. STRIS: So, Justice Breyer, here are my  
8     -- here are my thoughts on this. I think that the  
9     Grable --

10            JUSTICE GINSBURG: May I just clarify? I  
11     thought it was conceded there was no arising under  
12     jurisdiction.

13            JUSTICE BREYER: That's true. I'm not  
14     looking in this case. I'm looking for the general rule.

15            MR. STRIS: That -- that's how -- that's how  
16     I understood -- that's how I understood the question.

17            And so as to the general rule, here are my  
18     thoughts. The -- 1331 still exists. 1331 is powerful,  
19     and we can call it Jackson Pollock all we want, but it's  
20     been adopted, it exists, and it's applied by courts. So  
21     I think that there is a very small distinction between  
22     incorporating it here or not. There is a distinction,  
23     exclusivity versus -- versus nonexclusivity, I  
24     understand that; but my point is the simplest way of out  
25     this morass, I think, is to say we want a simple,

1     administratable rule and we only look to 27 to confer  
2     jurisdiction over Exchange Act-created claims, and we  
3     have, as a backdrop, 1331.

4                     Now, if you resist that, Justice Breyer, and  
5     you don't like that and you say, okay, well, what's the  
6     second-best option? There -- there's -- there's two,  
7     and I don't really need to advocate one as opposed to  
8     the other because we win under both, but I'll throw them  
9     out there.

10                    One is to say we don't have to call this an  
11     arising under statute. We don't have to reach the  
12     difficult question of, well, was -- was that what Pan  
13     American was holding; did they -- did Congress intend to  
14     incorporate 1331 wholesale in all of its elements?  
15     There -- there's a simple way out, which is to say the  
16     notion of Federal necessity -- this is the one question  
17     that you were saying -- does not inhere in the words  
18     "arising under." It inheres in the well-pleaded  
19     complaint rule, which is a backdrop presumption which  
20     should apply to any type of congressional grant of -- of  
21     Federal jurisdiction over State law claims unless  
22     Congress says otherwise.

23                    So I think that's the second-best option.  
24     You say, okay, it's not only a creation test. Section  
25     27 can reach some State law-created claims, but they

1 must be necessary.

2                   And there's a long jurisprudence of this  
3 Court. It's in the arising under context of what it  
4 means to be necessary. And then you don't have the  
5 difficulty of trying to look to whether it's  
6 substantial, doing a Federalism balance. You would  
7 essentially assume if it's something that trigger -- is  
8 triggered by an exclusive jurisdiction provision of the  
9 Exchange Act, it must be substantial; it must fit the  
10 Federalism balance.

11                   JUSTICE KAGAN: Mr. Stris, I guess I don't  
12 understand why you're resisting just say saying this  
13 language ought to be interpreted in the same way as  
14 arising under jurisdiction is interpreted. And it's  
15 true they're different words, but it's at least as good  
16 an interpretation of these words that they essentially  
17 refer to what the arising under test refers to, which  
18 after all -- I mean, the arising under test doesn't  
19 really have a whole lot to do with the language arising  
20 under anymore.

21                   MR. STRIS: No, that's true.

22                   JUSTICE KAGAN: So -- so why isn't that just  
23 sort of the simplest thing to do is, we have a test,  
24 it's a four-part test, and this language seems to fit  
25 that test pretty well, and that's what we should do, we

1     should just have one test.

2                   MR. STRIS: Well, so Justice Kagan, I won't  
3     resist too hard because obviously we win under that --  
4     under that outcome. I resist a -- I resist a little  
5     bit, and I'll tell you why.

6                   Certainly I can defend that proposition, and  
7     we did in our -- in our briefing. There -- there is a  
8     solid basis to do that. The Court interpreted  
9     materially identical language that way in Pan American,  
10    as we pointed out in our brief Section 22 of the  
11    Securities Act, which uses materially identical  
12    language. Then in the removal bar equates that language  
13    with arising under. I could defend that proposition. I  
14    just don't think it's the most natural reading of the  
15    language.

16                  If you're asking me honestly, like what do I  
17    think Congress intended? I -- I believe that they  
18    intended "brought to enforce" duties or liabilities  
19    created under -- under the Act to mean the three narrow  
20    categories of Federally created causes of action in  
21    1934. I think that's what the statute meant. I don't  
22    think Congress has done anything since then to change  
23    that.

24                  If you look to SLUSA in 1998 where there was  
25    this serious concern on the part of Congress of what was

1   happening in terms of State law-created causes of  
2   action, the initial bill that was proposed would have  
3   preempted all State law-created causes of action. It  
4   didn't go very far. Instead, Congress said, no, we're  
5   going to restrict this to covered class actions.

6               So if -- if you're -- if we're trying to  
7   find what I think is the most intellectually honest  
8   reading of the language, and consistent with the  
9   history, I actually don't think it's adopting arising  
10   under, but I certainly could defend it as a reasonable  
11   interpretation of the language in the context.

12              JUSTICE ALITO: So in light of SLUSA, the  
13   issue that's before us would apply only in individual  
14   actions and small class actions?

15              MR. STRIS: That's -- that's exactly right.  
16   And I think maybe I'll -- maybe I'll close with this. I  
17   think that's very important from the perspective of just  
18   sensitivity and policy, which is the following.

19              One of the things that -- that animated the  
20   Private Securities Litigation Reform Act was the concern  
21   that lawyers were driving litigation and not clients.  
22   And that's why, for example, one of the things that went  
23   into the PSLRA was a requirement of who the most  
24   appropriate plaintiff is. That doesn't happen when you  
25   have cases like this, when you have the CEO of a company

1     who holds 2.1 million shares who's bringing a claim.

2                     And so not only was it not the point of  
3     Congress in 1933 and 1934 to invade the province of  
4     State courts, if we look at the entire history of  
5     purposes and -- and Congress trying to say, well, we  
6     have some concerns about what State courts are doing,  
7     there has never been an express concern about State  
8     courts enforcing State law in individual actions like  
9     this one.

10                    For the Court to hold otherwise would be  
11     unprecedented because you would be stripping State  
12     courts of the type of jurisdiction that they've had  
13     since the time of the Exchange Act. 10(b) of the  
14     Exchange Act itself was predicated on common law deceit  
15     and fraud and a whole history of what was occurring in  
16     State courts. And I just don't think there's any way to  
17     read Section 27 that's workable from the Court's  
18     jurisdictional precedents, but it's also sensible in  
19     terms of what the dual system of securities regulation  
20     is trying to do.

21                    And so if there are no further questions.

22                    JUSTICE ALITO: Well, just out of curiosity,  
23     why is it so important for your client not to be in  
24     Federal district court?

25                    MR. STRIS: So I think there's a few

1 reasons. The first is his lawyer's practice in State  
2 court. They're familiar with the procedures; that's  
3 where they want to be.

4 The second is the -- the procedures are  
5 better. I mean, it's not a surprise that a lot of  
6 securities plaintiffs want to be in State court. In  
7 some instances they want to be there because the law is  
8 more robust. There's no scienter requirement. You can  
9 bring a Holder claim. That's actually not the case here  
10 because New Jersey law happens to parallel so we don't  
11 have those benefits. But we want to be able to take a  
12 RICO claim where we're trying to take a new area.

13 These naked short selling cases, they're  
14 new. You know, the Overstock case that's happened, we  
15 would prefer a State forum for our State law-created  
16 claims to convince a State court that this is actionable  
17 and, you know, it should warrant punitive damages. And  
18 I think we have every right to do that as -- as the  
19 master of our complaint.

20 JUSTICE GINSBURG: You said that you could  
21 prevail in this case without showing any violation of  
22 the SHO regulation. So could you explain how you could  
23 prevail even if you don't show a violation.

24 MR. STRIS: Right. So I -- I would put it  
25 slightly differently. If I said that, you know, I think

1     that's -- it's imprecise.

2                     Any act of market manipulation in the  
3     context of naked short selling will necessarily violate  
4     Regulation SHO, but every violation of Regulation SHO is  
5     not market manipulation.

6                     What Regulation SHO does is it sets a floor.  
7     And if you engage in certain conduct, you -- you short a  
8     stock, you haven't borrowed it, you have no reason to  
9     believe you've borrowed it, the SEC can fine you under  
10    statutes where there's no prior right of action. That  
11    doesn't make out a market manipulation claim -- claim,  
12    Justice Ginsburg. To prove market manipulation, you  
13    have to go a step further. You have to show that that  
14    was done intentionally to try and depress the value of  
15    the stock.

16                    So the point I was trying to make is if  
17    there were an analogue to our State law claim, it's not  
18    Reg SHO, it's 10b-5. And -- and the idea that you can't  
19    bring a parallel 10b-5 action in State court and have  
20    the State court adjudicate it, that's never been the  
21    law. But they're -- they're essentially trying to do an  
22    end run around that analysis by suggesting that somehow  
23    Reg SHO is what we are trying to enforce.

24                    Reg SHO is not relevant for that purpose.  
25    Reg SHO doesn't help us. Even under Federal law we



1 wouldn't have a private right of action. Section 9(d)  
 2 of the Exchange Act, there's no private right of action  
 3 for that. Section 10a-1 of the Exchange Act. These are  
 4 the ones that deal with naked short selling. No private  
 5 right of action. Has to be 10(b).

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Three minutes, Mr. Hacker.

8 REBUTTAL ARGUMENT OF JONATHAN D. HACKER

9 ON BEHALF OF THE PETITIONERS

10 MR. HACKER: Mr. Chief Justice, and may it  
 11 please the Court:

12 The Respondents' argument has a problem with  
 13 the language, both of their own complaint and with the  
 14 language of the statute.

15 The complaint could not be clearer that,  
 16 while it's true there are references to market  
 17 manipulation, what they're trying to establish is market  
 18 manipulation by the mere fact that there were not  
 19 Locates that complied with a Reg SHO. That's what  
 20 created what they call counterfeit shares. That, in and  
 21 of itself, forgetting intent, is also what diluted the  
 22 shares and caused their problems. That's clear from  
 23 paragraph 33. It's clear in paragraph 86 and 87. What  
 24 they talk about are violations of the rules and  
 25 regulations that caused them harm.

1           They would also like to establish a market  
2 manipulation, I'm sure, if they could prove intent and  
3 all of that. But the whole point of -- of the complaint  
4 here is to say -- is to hope they can get in front of a  
5 jury and judge who will agree with them that those mere  
6 regulations of Reg SHO in and of themselves establishes  
7 the State torts that they are pursuing. It's perfectly  
8 clear in those paragraphs, and through the rest of the  
9 complaint. I don't think there's any ambiguity  
10 whatsoever.

11           Nor is there ambiguity in the plain text of  
12 the statute. The first argument they make is that it  
13 effectively incorporates the Holmesian view that it has  
14 to be a cause of action created by the Act itself.

15           The -- Section 27 answers that question. It  
16 doesn't say that jurisdiction is established for -- over  
17 causes of action established by the Exchange Act. That  
18 would have been the way that Congress would have said  
19 it. If they meant to say there is jurisdiction over  
20 causes of action established by the Act, Congress would  
21 have said that. It didn't say anything like that. What  
22 it said was very much essentially the opposite or  
23 something very different, which is suits brought to  
24 enforce duties prescribed by -- created by the Act.  
25 It's about the substantive source of the -- the source

1 of the --

2 JUSTICE SOTOMAYOR: I'm sorry. I always  
3 thought violations had to do with criminal law. And the  
4 whole structure of this provision talks first -- in the  
5 first half of the first sentence it talks about  
6 violations of the law. The second sentence parallels  
7 it, says criminal. The second half of the first  
8 sentence talks about all suits in equity at actions at  
9 law, or actions at law.

10 MR. HACKER: But --

11 JUSTICE SOTOMAYOR: I don't know that --

12 MR. HACKER: -- those are all civil actions.  
13 It's clearly talking about civil actions. The reference  
14 to "violation" itself talks about suits in civil  
15 actions for violations --

16 JUSTICE SOTOMAYOR: It talks about criminal  
17 proceedings.

18 MR. HACKER: Right. It -- it -- it  
19 encompasses -- the language also encompasses criminal  
20 proceedings, but the references to suits brought to  
21 enforce liabilities or duties is unambiguously about a  
22 civil proceeding, and the other side doesn't disagree  
23 with that.

24 But let me turn to the last point,  
25 Justice Breyer's argument and I think Justice Kagan's,

1     that, well, maybe it's just the same thing as 1331.  
2     That too is contrary to the text of the statute because  
3     1331 has been construed -- it also doesn't have the  
4     textual requirement -- as having this necessity  
5     component precisely because if you don't have a  
6     necessity component, then you're taking away from State  
7     courts cases that State courts are competent to  
8     adjudicate.

9                 We know that Congress had literally the  
10    opposite premise here, that they didn't want State  
11    courts adjudicating, as Respondents' counsel's conceded,  
12    a certain class of cases.

13                What class of cases is that? The statute  
14    tells us the answer. It's those that are suits brought  
15    to enforce duties. For example, a RICO case with two  
16    predicate acts: One is a violation of Reg SHO; one is a  
17    violation of State law. It is unambiguously clear that  
18    that is brought to enforce the duty prescribed by Reg  
19    SHO, and in that circumstance, that kind of case,  
20    Congress wanted to proceed solely in Federal court.

21                CHIEF JUSTICE ROBERTS: Thank you, counsel.

22                The case is submitted.

23                (Whereupon, at 11:08 a.m., the case in the  
24    above-entitled matter was submitted.)

25

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