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IN THE SUPREME COURT OF THE UNITED STATES

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MERRILL LYNCH, PIERCE, :

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

Petitioners : No. 14-1132

v. :

GREG MANNING, ET AL. :

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Washington, D.C.

Tuesday, December 1, 2015

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:07 a.m.

APPEARANCES:

JONATHAN D. HACKER, ESQ., Washington, D.C.; on behalf
of Petitioners.

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

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P R O C E E D I N G S

(10:07 a.m.)

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

Mr. Hacker.

ORAL ARGUMENT OF JONATHAN D. HACKER

ON BEHALF OF THE PETITIONERS

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

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

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

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

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 sensibility 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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