No. 14-1132

IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED; KNIGHT CAPITAL AMERICAS L.P., FORMERLY KNOWN AS KNIGHT EQUITY MARKETS L.P.; UBS SECURITIES LLC; E*TRADE CAPITAL MARKETS LLC; NATIONAL FINANCIAL SERVICES LLC; AND CITADEL DERIVATIVES GROUP LLC,

Petitioners,

v.

GREG MANNING; CLAES ARNRUP; POSILJONEN AB; POSILJONEN AS; SVEABORG HANDEL AS; FLYGEXPO AB; AND LONDRINA HOLDING LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

ANDREW J. FRACKMAN
ABBY F. RUDZIN
ANTON METLITSKY
BRAD M. ELIAS
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

WALTER DELLINGER
JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
DEANNA M. RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Merrill Lynch, Pierce, Fenner & Smith, Incorporated

(*Additional counsel listed on inside cover*)

THOMAS R. CURTIN
GRAHAM CURTIN, PA
4 Headquarters Plaza
P.O. Box 1991
Morristown, N.J. 07962

Attorneys for Merrill Lynch, Pierce, Fenner & Smith, Incorporated

DAVID G. CABRALES
CALLI TURNER
GARDERE WYNNE SEWELL LLP
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Tex. 75201

W. SCOTT HASTINGS
LOCKE LORD LLP
2200 Ross Avenue, Suite 2200
Dallas, Tex. 75201

Attorneys for Knight Capital Americas, L.P.

STEPHEN J. SENDEROWITZ
STEVEN L. MEROUSE
DENTONS US LLP
233 S. Wacker Drive
Suite 5900
Chicago, Ill. 60606

JONATHAN S. JEMISON
DENTONS US LLP
101 JFK Parkway
Short Hills, N.J. 57188

Attorneys for Citadel Derivatives Group LLC, n/k/a Citadel Securities LLC

KURT A. KAPPES
GREENBERG TRAURIG LLP
1201 K Street, Suite 1100
Sacramento, Cal. 95814

DAVID E. SELLINGER
GREENBERG TRAURIG LLP
200 Park Avenue
Florham Park, N.J. 07932

*Attorneys for E*TRADE Capital Markets LLC*

MICHAEL G. SHANNON
THOMPSON HINE LLP
335 Madison Avenue
12th Floor
New York, N.Y. 10017

Attorneys for National Financial Services LLC

ANDREW B. CLUBOK
BETH A. WILLIAMS
JEFFREY M. GOULD
DEVIN D. DEBACKER
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005

WILLIAM H. TROUSDALE
BRIAN M. ENGLISH
TOMPKINS, MCGUIRE, WACHENFELD & BARRY LLP
Four Gateway Center
100 Mulberry Street,
Suite 5
Newark, N.J. 07102

Attorneys for UBS Securities LLC

QUESTION PRESENTED

Section 27 of the Securities Exchange Act of 1934 provides that federal courts "shall have exclusive jurisdiction" over "violations of [the Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder." 15 U.S.C. § 78aa(a).

The question presented is:

Whether § 27 of the Securities Exchange Act of 1934 provides federal jurisdiction over state-law claims seeking to establish liability based on violations of the Act or its regulations or seeking to enforce duties created by the Act or its regulations.

PARTIES TO THE PROCEEDING

Petitioners are Merrill Lynch, Pierce, Fenner & Smith, Incorporated; Knight Capital Americas L.P., formerly known as Knight Equity Markets L.P.; UBS Securities LLC; E*TRADE Capital Markets LLC; National Financial Services LLC; and Citadel Derivatives Group LLC, now known as Citadel Securities LLC, defendants below.

Respondents are Greg Manning; Claes Arnrup; Posiljonen AB; Posiljonen AS; Sveaborg Handel AS; Flygexpo AB; and Londrina Holding Ltd., plaintiffs below.

RULE 29.6 STATEMENT

Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") is an indirect wholly owned subsidiary of Bank of America Corporation, a publicly held corporation. No publicly held company holds 10% or more of Bank of America Corporation's stock.

Petitioner Knight Capital Americas L.P. merged into an entity which became Knight Capital Americas LLC on July 1, 2012. Knight Capital Americas LLC became KCG Americas LLC ("Knight") after the market close on December 31, 2013. Knight is a subsidiary of Knight Capital Group, Inc., which is wholly owned by KCG Holdings, Inc., a publicly traded company. Jefferies Group LLC holds 10% or more of KCG Holdings, Inc.'s stock. Jefferies Group LLC is a wholly owned subsidiary of Leucadia National Company, which is a publicly traded holding company.

Petitioner UBS Securities LLC is wholly owned by UBS AG and UBS Americas Inc. UBS Americas Inc. is wholly owned by UBS AG, and over 90% of the stock of UBS AG is held by UBS Group AG, a publicly traded company. Aside from UBS Group AG, UBS AG, and UBS Americas Inc., no other publicly held company holds 10% or more of the stock of UBS Securities LLC. No publicly held company holds 10% or more of the stock of UBS Group AG.

Petitioner ETCM Holdings, Inc. ("ETCM") was the sole member of E*TRADE Capital Markets LLC, formerly known as G1 Execution Services, LLC ("G1"). ETCM owned 100% of G1 until G1 was sold. ETCM retained G1's potential liability for this matter. ETCM is a direct subsidiary of E*TRADE Financial Corporation, a publicly held corporation. No publicly held corporation owns 10% or more of E*TRADE Financial Corporation's stock.

Petitioner National Financial Services LLC ("NFS") is an indirect, wholly owned subsidiary of FMR LLC ("FMR"), which is a privately held corporation. No publicly held corporation owns 10% or more of NFS's or FMR's stock.

Petitioner Citadel Derivatives Group LLC, n/k/a Citadel Securities LLC ("Citadel Securities") has no parent corporation, and no publicly held corporation owns 10% or more of Citadel Securities' stock.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OPINIONS BELOW

The decision of the court of appeals is reported at 772 F.3d 158 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-23a.[1] The district court's opinion is unpublished but is reported at 2013 WL 1164838 and is reprinted at Pet. App. 24a-38a.

JURISDICTION

The court of appeals issued its decision on November 10, 2014. Pet. App. 2a. A timely petition for rehearing and rehearing en banc was denied on January 15, 2015. Pet. App. 40a. The petition for a writ of certiorari was filed on March 17, 2015, and granted on June 30, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 27 of the Securities Exchange Act of 1934 (the "Exchange Act" or "Act") provides in relevant part:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter [i.e., the Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.

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[1] An unopposed motion for leave to dispense with the filing of a joint appendix is currently pending before the Court.

15 U.S.C. § 78aa(a).

INTRODUCTION

In § 27 of the Exchange Act, Congress conferred on federal courts "exclusive jurisdiction of violations of [the Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder." The jurisdictional test established by that language is clear and simple: if the complaint on its face alleges a violation of the Act or its regulations, or seeks to enforce a liability or duty created by the Act or its regulations, then federal courts have exclusive jurisdiction. The complaint here does exactly that, in unambiguous terms—as both the court of appeals and district court concluded and as respondents did not dispute below—thereby giving the federal courts exclusive jurisdiction.

Jurisdiction is not always so simple, but that is no reason to complicate things when it is. There is no reason, for example, to read into § 27 the complex, multifactor jurisdictional test this Court has read into the general "arising under" jurisdictional statute for reasons that have nothing to do with the language and objectives of § 27. And there is certainly no reason to read *out* of § 27 the obvious jurisdictional force of the words "shall have exclusive jurisdiction," as the Third Circuit did in this case.

Absent some compelling reason to conclude otherwise, statutes must be read to mean what they say. Even jurisdictional statutes—*especially* jurisdictional statutes. And § 27 says that there is exclu-

sive federal jurisdiction over respondents' complaint here, because it seeks both a judicial determination that an Exchange Act regulation—Regulation SHO, 17 C.F.R. § 242.200 *et seq.*—was violated and judicial action to enforce the duties imposed by that regulation. The decision below finding no federal jurisdiction should be reversed.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. a. "In the wake of the 1929 stock market crash and in response to reports of widespread abuses in the securities industry, the 73d Congress enacted two landmark pieces of securities legislation": the Securities Act of 1933 (the "Securities Act") and the Exchange Act. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170 (1994). The Exchange Act "is general in scope but chiefly concerned with the regulation of post-distribution trading on the Nation's stock exchanges and securities trading markets." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 752 (1975). The Securities Act, in contrast, "is a far narrower statute chiefly concerned with disclosure and fraud in connection with offerings of securities—primarily . . . initial distributions of newly issued stock from corporate issuers." *Id.*

The Exchange Act's expansive scope reflects the broad national interests the Act serves, as the Act's statement of purpose explicitly sets forth.[2] Entitled "Necessity for regulation," § 2 of the Exchange Act

[2] The Securities Act contains no similar statement.

explains that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest which makes it necessary to provide for regulation and control of such transactions" so as to "remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions." 15 U.S.C. § 78b.

The Act further emphasizes that transactions conducted on exchanges must be subject to national regulation because they (i) "are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected," (ii) "constitute an important part of the current of interstate commerce," (iii) "involve in large part the securities of issuers engaged in interstate commerce," and (iv) "affect the national credit." *Id.* § 78b(1). And because "the prices of securities on such exchanges and markets are susceptible to manipulation and control," the "dissemination of such prices [throughout the United States and foreign countries] gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities." *Id.* § 78b(3); *see id.* § 78b(2). Such fluctuation can cause, among other things, "alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce." *Id.* § 78b(3). The federal government has a strong interest in regulating trading on national exchanges, the Act observes, because "manipu-

lation" and "excessive speculation" can "precipitate[]" and "prolong[]" national economic crises that can subject the federal government to "such great expense as to burden the national credit." *Id.* § 78b(4).

b. The uniquely federal interests the Exchange Act protects are reflected in § 27 of the Act, which confers on federal district courts "exclusive jurisdiction of violations of [the Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder." 15 U.S.C. § 78aa(a).

This Court has recognized that § 27 was "intended . . . to serve at least the general purposes underlying most grants of exclusive jurisdiction: to achieve greater uniformity of construction and more effective and expert application of" the Exchange Act's regulatory scheme. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996) (quotation omitted). Section 27 secures uniformity and expertise in the application of that scheme by eliminating any "danger that state-court judges who are not fully expert in federal securities law will say definitively what the Exchange Act means and enforce legal liabilities and duties thereunder." *Id.*

2. The Exchange Act also established the Securities Exchange Commission ("SEC"), 15 U.S.C. § 78d(a), which has authority to promulgate rules and regulations under the Act. Under that authority, the SEC adopted Regulation SHO, 17 C.F.R. § 242.200 *et seq.*, to regulate "short sales" of equity securities. *See* Short Sales, SEC Release No. 34-50103, 69 Fed. Reg. 48,008 (Aug. 6, 2004).

A "short sale" is "a sale of a security that the seller does not own" or a sale that "is consummated by the delivery of a security borrowed by or on behalf of the seller." "Naked" Short Selling Antifraud Rule, SEC Release No. 34-58774, 73 Fed. Reg. 61,666, 61,667 (Oct. 17, 2008). Investors and traders engage in short selling "for many purposes, including to profit from an expected downward price movement, to provide liquidity in response to unanticipated buyer demand, or to hedge the risk of a long position in the same security or a related security." SEC, Division of Market Regulation: Key Points About Regulation SHO (Apr. 11, 2005).[3]

A short sale normally proceeds as follows: the short seller (1) identifies a security she believes will drop in price or needs to sell for hedging purposes, (2) determines whether the security is available to borrow (i.e., obtains a "locate"), (3) sells the security on the open market, (4) arranges for the security to be borrowed and delivered to the buyer, and (5) purchases a replacement security to be returned at a later date—thereby closing the short seller's position. *See Elec. Trading Grp., LLC v. Banc of Am. Sec. LLC*, 588 F.3d 128, 132 (2d Cir. 2009). The short seller's profit, if any, is the difference between the market price at which she sold the security and the market price at which she purchased the replacement security (less transaction costs and any borrowing fees). *Id.*

Through Regulation SHO, the SEC imposed various conditions on the practice of short selling. The

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[3] *Available at* http://www.sec.gov/investor/pubs/regsho.htm.

conditions relevant here are known as the "locate" and "close out" requirements. *See id.* at 135-36.

Under the locate requirement, when a broker-dealer has not already borrowed the security before executing a short sale order, the broker-dealer must have "reasonable grounds to believe" that the security can be borrowed and delivered at settlement, i.e., three days after the trade. 17 C.F.R. § 242.203(b)(1); *see* SEC, Division of Market Regulation: Key Points About Regulation SHO, *supra* ("Regulation SHO requires a broker-dealer to have reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due before effecting a short sale order in any equity security."). If the broker-dealer is unable to deliver shares at settlement, a "fail to deliver" or "fail" occurs, and the sale is described as a "naked short sale." 73 Fed. Reg. at 61,667. If the fail to deliver remains open for 13 days, the "close out" requirement obliges the broker-dealer to close it out by purchasing "securities of like kind and quantity." 17 C.F.R. § 242.203(b)(3).[4]

The SEC recognizes that naked short selling "in certain circumstances . . . contributes to market liquidity." SEC, Division of Market Regulation: Key Points About Regulation SHO, *supra*. Accordingly, SEC regulations provide that the locate requirement does not apply to short sales executed by "market makers"—entities, like many of the petitioners, responsible for maintaining market liquidity—in con-

[4] In 2008, after the alleged conduct at issue here, Regulation SHO was amended to require fails to deliver to be closed out within one day. *See* 17 C.F.R. § 242.204.

nection with their "bona fide market-making activities," a term the Commission has not defined. 17 C.F.R. § 242.203(b)(2)(iii).

B. Respondents' Complaint

Respondent Greg Manning, the lead plaintiff below, is the founder and former CEO of Escala Group, Inc. ("Escala"), a company traded on the NASDAQ until it was delisted in 2007. The other respondents are former Escala shareholders from various countries around the world. *See* Pet. App. 45a-46a.

Respondents filed suit against petitioners in the Superior Court of New Jersey. Pet. App. 6a, 41a. In their amended complaint, respondents alleged that petitioners—financial institutions that clear and settle securities transactions at the nation's central clearinghouse—"engaged in the unlawful practice of naked short sales of Escala stock by creating, loaning and selling unauthorized, fictitious and counterfeit shares" and by selling or loaning stock "that they did not own, [and] never intended to borrow or locate for delivery to buyers and close-out by settling their trades." Pet. App. 43a, 51a-52a.

Specifically, the complaint asserts that petitioners engaged in "intentional and persistent violation of *rules and regulations* governing unlawful naked short sales of securities." Pet. App. 44a (emphasis added); *see* Pet. App. 81a (alleging that petitioners violated "*regulatory prohibitions* barring the practice of naked short selling of stock" (emphasis added)).

The only "rule," "regulation," or "regulatory prohibition" governing naked short selling is Regulation SHO, which the complaint invokes in both name and

substance. After noting the difference between what respondents describe as "lawful" short sales and "unlawful," "naked" short sales, Pet. App. 49a-50a, the complaint states that, "in response to pervasive manipulative conduct in the unlawful naked short sales of securities, the [SEC] adopted Regulation SHO." Pet. App. 51a. "The general purpose of Reg SHO," respondents explain, "is to establish uniform 'Locate' and 'Close-Out' requirements and prevent unlawful naked short selling, in which market participants like [petitioners] . . . never intended to borrow or locate for delivery to buyers and close-out by settling their trades." Pet. App. 51a-52a. The complaint then surveys in detail the SEC's stated reasons for promulgating Regulation SHO. Pet. App. 52a-54a.

The complaint's factual allegations assert that petitioners violated the Regulation's locate and close-out requirements when engaging in short sales of Escala stock. Respondents invoke Regulation SHO's locate requirement nearly verbatim in alleging that petitioners perpetrated a scheme of "market manipulation," Pet. App. 43a, by "entering millions of proprietary and customer short sale transactions" without "reasonable grounds to believe that the securities could be borrowed and be available for delivery." Pet. App. 44a; *cf.* 17 C.F.R. § 242.203(b)(1)(ii) (broker or dealer must have "[r]easonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due"). Further, the complaint summarizes part of "the conduct described herein" as "selling Escala stock short at times when [petitioners] neither possessed nor intended to obtain Escala stock to deliver by the Settlement Date."

Pet. App. 85a; *see also* Pet. App. 88a (same). The complaint also quotes various statements by the Financial Industry Regulatory Authority ("FINRA") invoking Regulation SHO by name and alleging that the conduct described in the complaint violated the Regulation's locate requirement.[5]

Respondents allege violations of Regulation SHO's close-out requirement in asserting that petitioners "permitted [fail-to-deliver] transactions to remain unfulfilled." Pet. App. 59a; *see* 17 C.F.R. § 242.203(b)(3) (requiring broker-dealers to "close out the fail to deliver position by purchasing securities" within set number of days).

According to respondents' theory, petitioners' alleged naked short sales in violation of Regulation SHO "increased the pool of tradable shares" of Escala stock and thereby caused respondents' shares to decline in value. Pet. App. 44a. The alleged violations of Regulation SHO establish the basis for alleged liability to respondents under various state-

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[5] The complaint alleges that petitioners concealed violations of the locate requirement by "mis-mark[ing] order tickets to make transactions appear as 'long' sales when in fact, they were short sales," Pet. App. 74a, and then quotes a FINRA opinion describing an alleged concealment as "resulting in . . . significant violations of Reg SHO's locate requirement." Pet. App. 79a. The complaint also alleges that some of the petitioners previously engaged in "the same or similar" schemes alleged in the complaint, citing as examples alleged violations of Regulation SHO, including a FINRA allegation that one petitioner violated the locate requirement, and a FINRA consent order concluding that another petitioner's conduct had resulted in "serious Reg SHO failures across the Firm's equities trading business." Pet. App. 78a; *see* Pet. App. 77a-81a.

law causes of action: statutory claims under the New Jersey RICO Act and common-law claims for unjust enrichment, interference with economic advantage and contractual relations, breach of contract, breach of the covenant of good faith and fair dealing, and negligence. *See* Pet. App. 82a-101a.

C. Removal To District Court

Petitioners removed the suit to the U.S. District Court for the District of New Jersey, asserting federal jurisdiction under § 27 of the Exchange Act and 28 U.S.C. §§ 1331 and 1337. Pet. App. 9a, 26a. Respondents sought remand. Pet. App. 9a, 25a.

The district court denied respondents' motion to remand. Pet. App. 25a. The court began by analyzing the allegations in respondents' complaint. "Notably," the court observed, respondents "do not dispute that the alleged unlawful conduct is predicated on a violation of Regulation SHO." Pet. App. 29a. The court also noted that respondents' complaint cited the fact that certain petitioners have been fined by the SEC and FINRA "for their intentional and persistent violation" of the rules and regulations governing their "unlawful" short selling activities. Pet. App. 29a; *see* Pet. App. 44a.

The district court therefore concluded that "the case at bar is premised upon and its resolution depends on the alleged violation of a regulation promulgated under the Act." Pet. App. 32a. And because "'Section 27 of the Exchange Act confers exclusive jurisdiction upon the federal courts for suits brought to enforce the Act or rules and regulations promul-

gated thereunder,'" § 27 provided federal jurisdiction. *Id.* (quoting *Matsushita*, 516 U.S. at 370).

The district court also held that 28 U.S.C. §§ 1331 and 1337 separately provided federal jurisdiction, applying the test set forth in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Pet. App. 33a. The court reiterated that respondents' claims "are predicated on [petitioners'] alleged naked short sales of Escala stock in violation of SEC Regulation SHO," explaining that respondents would need to "show that the alleged naked short sales were illegal" to prevail on their claims. *Id.* The court further noted that respondents "d[id] not point to a New Jersey law or regulation which similarly prohibits the type of alleged conduct at issue here." Pet. App. 33a-34a.

The district court subsequently certified an interlocutory appeal to the Third Circuit under 28 U.S.C. § 1292(b) to answer "the question of whether remand is appropriate in this case." *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2013 WL 2285955, at *2 (D.N.J. May 23, 2013).

D. Proceedings Before The Third Circuit

The Third Circuit granted respondents' petition to appeal, Pet. App. 5a, 10a, and reversed the district court's decision declining to remand the case.

As a threshold matter, the Third Circuit agreed with the district court that respondents' claims, while nominally asserted under state law, all sought to establish a violation of or enforce a duty created by Regulation SHO. Pet. App. 8a-9a. The court emphasized that the complaint "repeatedly mentions

the requirements of Regulation SHO, its background, and enforcement actions taken against some [petitioners] regarding Regulation SHO." Pet. App. 8a. The court further observed that the complaint "cites data maintained to assist broker-dealers in complying with Regulation SHO's close out requirement, and at times couches its allegations in language that appears borrowed from Regulation SHO." Pet. App. 8a-9a. "There is no question," the court concluded, "that [respondents] assert in their Amended Complaint, both expressly and by implication, that [petitioners] repeatedly violated federal law," i.e., Regulation SHO. Pet. App. 9a.

The Third Circuit nevertheless held that § 27 did not establish jurisdiction over respondents' claims, holding that § 27 does not itself confer federal jurisdiction, but instead operates only to "divest state courts of jurisdiction" over claims that *otherwise* raise federal questions. Pet. App. 22a.

The Third Circuit's construction of § 27 rested on that court's interpretation of *Pan American Petroleum Corp. v. Superior Court of Delaware In & For New Castle County*, 366 U.S. 656 (1961). Pet. App. 19a-20a. In *Pan American*, this Court considered not § 27 of the Exchange Act, but § 22 of the Natural Gas Act, which contains similar exclusive-jurisdiction language. *See* Pet. App. 20a. The Third Circuit recited *Pan American*'s observation that, in § 22, "'[e]xclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are ex-

cluded." *Id.* (quoting *Pan American*, 366 U.S. at 664). The court read that statement to mean that § 22 of the Natural Gas Act could never provide federal jurisdiction where it did not otherwise exist under § 1331 and saw "no reason" to distinguish between § 22 of the Natural Gas Act and § 27 of the Exchange Act. *Id.*

Based on that reasoning, the court of appeals rejected the position (previously adopted by the Fifth and Ninth Circuits) that "there can be jurisdiction under § 27 (and other exclusive jurisdiction provisions) even when there is not under § 1331." Pet. App. 20a. Section 27, the court concluded, "does not provide an independent basis to exercise jurisdiction" over respondents' claims. Pet. App. 22a.[6]

SUMMARY OF ARGUMENT

Respondents' complaint on its face alleges that petitioners violated Regulation SHO and seeks to enforce duties created by that regulation. The district court thus had jurisdiction under § 27 of the Exchange Act. The Third Circuit's and respondents' contrary positions are meritless.

I. Section 27 of the Exchange Act confers exclusive federal jurisdiction over respondents' complaint.

A. Section 27's plain language resolves this case. That provision grants exclusive federal jurisdiction "of violations of" the Exchange Act or regula-

[6] The Third Circuit separately rejected the district court's holding that respondents' complaint satisfied the four-part test identified in *Grable*, 545 U.S. at 314, for establishing federal-question jurisdiction under § 1331. Pet. App. 12a.

tions promulgated under that Act, and of "all suits in equity and actions at law brought to enforce any liability or duty created by" the Act or its regulations. 15 U.S.C. § 78aa(a). Under that language, federal courts have exclusive jurisdiction over a complaint that asserts a violation of the Exchange Act or its regulations as a basis for liability, or seeks judicial enforcement of the duties prescribed by the Act or its regulations. As both lower courts concluded and as respondents did not dispute, respondents' complaint repeatedly alleges that petitioners violated Regulation SHO, a regulation promulgated under the Exchange Act. Those allegations suffice to confer federal jurisdiction under the statute's plain text.

B. Section 27's stated purpose compels enforcement of its plain text. The statute was enacted principally to ensure that the Exchange Act and Exchange Act regulations would be uniformly interpreted by expert federal courts, and not by the courts of 50 different states lacking expertise in applying federal securities laws.

Expert federal adjudication is particularly crucial when, as here, the relevant regulatory scheme incorporates the SEC's careful balancing of technical and complex policy questions. Congress specifically sought to keep such cases in federal court to ensure that Exchange Act questions would be resolved by judges attuned to the national concerns underlying the Exchange Act and SEC regulations enforcing that Act.

II. The Third Circuit ignored § 27's text and purposes and held that § 27 does not grant jurisdiction at all, but instead merely deprives state courts

of jurisdiction when federal jurisdiction would exist under another provision, such as § 1331. That construction is incorrect.

A. The Third Circuit's position is incompatible with the statute's plain text. Section 27 says that federal courts "shall have exclusive jurisdiction" over cases that fall within its scope. Those words can only be read as conferring jurisdiction. In fact, Congress routinely uses the "shall have jurisdiction" formulation in jurisdictional grants throughout the U.S. Code. Adding the word "exclusive" does nothing to alter the provision's jurisdiction-conferring character.

B. The court of appeals' position is also inconsistent with the jurisdictional scheme that existed when § 27 was enacted. In 1934 (and until 1980), the general federal-question statute, now codified in § 1331, contained an amount-in-controversy requirement. This Court has held that § 22 of the Securities Act, the relevant language of which matches the language of § 27, had the effect of granting federal jurisdiction even when the requirements of § 1331 were not satisfied. The same result must apply to § 27, which definitively precludes the Third Circuit's reading.

C. The Third Circuit's position is also contrary to this Court's cases addressing § 27 itself, which have repeatedly described the provision as an affirmative grant of federal jurisdiction. *See Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979); *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964).

D. The court of appeals' contrary conclusion was based on its misreading of this Court's opinion in *Pan American*, which interpreted § 22 of the Natural Gas Act ("NGA"), a provision nearly identical to § 27. The complaint in *Pan American* alleged state-law contract claims; the NGA was raised only as a *defense* to those state-law causes of action. This Court held that under what later became known as the "well-pleaded complaint" rule, § 22 grants jurisdiction only when the basis for jurisdiction appears on the face of the plaintiff's complaint. *Pan American* does not hold or suggest that § 22 does not confer jurisdiction *at all*.

III. In their opposition to certiorari, respondents argued that while § 27 itself may grant federal jurisdiction, the jurisdiction it grants is identical to § 1331. That construction is also incorrect—the two statutes have materially different language with materially different objectives.

Section 27 sets forth a clear and easily administrable jurisdictional rule: federal courts have exclusive jurisdiction when a complaint alleges "violations of" the Exchange Act or its regulations, or seeks to "enforce any liability or duty created by" that Act or those regulations. There is thus no need to adopt a complicated, atextual test to apply that language.

There is, by contrast, a need to apply that kind of test in construing § 1331, because that statute broadly establishes jurisdiction for any suit that "arises under" federal law—language that, read literally, would grant federal jurisdiction whenever "a federal question is 'an ingredient' of the action."

Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 807 (1986) (quoting *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824)). For policy reasons specific to § 1331, this Court has declined to read that language so literally and has instead significantly narrowed its reach. To avoid the likelihood that federal courts will be overrun with cases that can be adjudicated just as well in state court, this Court has held that federal jurisdiction attaches under § 1331 only if (among other things) the federal question is "*necessarily* raise[d]" in the complaint and is "actually disputed and substantial." *Grable*, 545 U.S. at 314 (emphasis added).

Those concerns do not apply in the context of § 27, which is by its terms limited to a very narrow set of cases—those in which the complaint alleges a violation of, or seeks to enforce a duty under, the Exchange Act (without regard to whether those allegations would independently suffice to establish jurisdiction under § 1331). And the core purpose of § 27 was to ensure that such cases are adjudicated exclusively by federal courts, in marked contrast to the background presumption of § 1331 that state and federal courts are equally competent to resolve federal questions.

Congress has used the term "arising under" as a term of art in many jurisdictional grants other than § 1331, and this Court has assumed that when that language appears in other statutes, it incorporates this Court's construction of § 1331. But equally significant is Congress's decision not to use that ubiquitous terminology in § 27. That decision makes clear that Congress did not intend to adopt this Court's

construction of § 1331 and instead chose different and more precise language to establish a different and more precise jurisdictional test. Respecting Congress's plenary authority to establish federal courts' jurisdiction requires enforcing the plain language Congress enacted to establish jurisdiction under § 27.

ARGUMENT

Respondents' complaint on its face alleges violations of Regulation SHO in name and substance as a basis for state-law liability, and it seeks to enforce duties created by the Regulation. The district court thus had jurisdiction over this case under the plain terms of Exchange Act § 27, 15 U.S.C. § 78aa(a).

The Third Circuit and respondents resist that conclusion, articulating different reasons. In the Third Circuit's view, § 27 is not a grant of jurisdiction at all. In respondents' view, § 27 does grant jurisdiction, but only the *same* jurisdiction that is conferred by § 1331. Both positions are incorrect.

I. SECTION 27 CONFERS EXCLUSIVE FEDERAL JURISDICTION OVER RESPONDENTS' COMPLAINT

A. The Plain Terms Of § 27 Grant Exclusive Federal Jurisdiction Over The Complaint Because It Seeks To Establish A Violation Of Regulation SHO And To Enforce Duties Created By Regulation SHO

Section 27 states that the federal district courts "shall have exclusive jurisdiction of violations of [the

Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Act] or the rules and regulations thereunder." 15 U.S.C. § 78aa(a). Because respondents' complaint unambiguously asserts violations of Regulation SHO as a basis for liability and seeks to enforce the duties created by Regulation SHO, federal courts have exclusive jurisdiction over the complaint under § 27.

As both courts below recognized, respondents repeatedly allege that petitioners violated Regulation SHO—and especially that regulation's "locate" and "close-out" requirements—when engaging in short sales of Escala stock. For example, respondents allege that petitioners:

- Engaged in "intentional and persistent violation of rules and regulations governing unlawful naked short sales of securities." Pet. App. 44a.
- Violated "regulatory prohibitions barring the practice of naked short selling of stock." Pet. App. 81a.
- Engaged in "manipulation of the market" by "entering millions of proprietary and customer short sale transactions" without "reasonable grounds to believe that the securities could be borrowed and be available for delivery," Pet. App. 44a—an almost verbatim recitation of the conduct Regulation SHO's locate requirement prohibits, *see* 17 C.F.R. § 242.203(b)(1)(ii) (broker or dealer must have "[r]easonable grounds to believe that the secu-

rity can be borrowed so that it can be delivered on the date delivery is due").

- Sold "Escala stock short at times when [petitioners] neither possessed nor intended to obtain Escala stock to deliver by the Settlement Date," Pet. App. 85a, 88a, contrary to Regulation SHO's locate requirement.
- Violated Regulation SHO's "close-out" requirement by "permitt[ing] [fail-to-deliver] transactions to remain unfulfilled." Pet. App. 59a; *see* 17 C.F.R. § 242.203(b)(3) (requiring broker-dealers to "close out the fail to deliver position by purchasing securities of like kind and quantity" within set number of days).
- Engaged in conduct FINRA explicitly alleged to be a violation of Regulation SHO. *See supra* at 10 & n.5.

Those allegations fall squarely within the plain terms of § 27. Respondents allege "violations of [the Exchange Act] or the rules and regulations thereunder," 15 U.S.C. § 78aa(a), because they repeatedly allege that petitioners violated Regulation SHO. The complaint also seeks "to enforce . . . dut[ies] created by [the Act] or the rules and regulations thereunder," *id.*, because respondents' complaint seeks to hold petitioners liable for violating the "locate" and "close-out" duties of Regulation SHO. The fact that respondents seek to enforce those duties through state-law causes of action does not matter, because the statute applies broadly to "*all* suits in equity and actions at law brought to enforce" duties created by the Exchange Act or its regulations. *Id.* (emphasis

added). Section 27 by its express terms thus grants federal courts exclusive jurisdiction over respondents' complaint.

To be clear, nothing in § 27's language states or suggests that jurisdiction attaches only if the Regulation SHO violations and duties alleged in the complaint are *necessary* elements of respondents' claims. The language instead provides that when a violation or duty of the Act or its regulations is *asserted*, a federal court is the only court that can decide whether the alleged violation occurred or the duty was breached. It is accordingly irrelevant that other grounds also may provide a basis for liability—§ 27's text bars a state court from even considering whether the asserted violation occurred or the asserted duty was breached, because those matters are subject to the exclusive jurisdiction of the federal court. The presence of those allegations in a state-court complaint justifies removal, even if the complaint also asserts other possible bases for liability. *Cf. City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164-65 (1997) (once removability of one or more claims is established, federal court assumes supplemental jurisdiction over otherwise non-removable claims pursuant to 28 U.S.C. § 1367).[7]

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[7] A perfect (and common) example is a state-law RICO claim alleging an Exchange Act violation among other predicate acts. Several district courts have incorrectly remanded such cases, leaving adjudication of the predicate Exchange Act violation to the state courts in direct contravention of § 27. *See, e.g.*, *Raser Techs., Inc. v. Morgan Stanley & Co.*, 2012 U.S. Dist. LEXIS 189029, at *4-5 (N.D. Ga. Oct. 30, 2012); *Fairfax Fin.*

The plain, unambiguous language of § 27 should be the end of the matter. It is true in any case that the Court's analysis "begins with the language of the statute," and when "the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (quotation omitted). But it is especially important to read § 27's text as written, given the settled "rule favoring clear boundaries in the interpretation of jurisdictional statutes." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124, 1131 (2015). "Simple jurisdictional rules . . . promote greater predictability," which is "valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). The plain text of § 27 provides a simple rule with clear boundaries: if the complaint on its face asserts a violation of the Act or its regulations or seeks to enforce a duty thereunder, the complaint is subject to the exclusive jurisdiction of the federal courts.

B. Section 27's Purposes Confirm The Exclusive Federal Jurisdiction Over Respondents' Complaint

Section 27's purposes confirm the plain meaning of its text. The Exchange Act is not just another federal law subject to the usual principles of jurisdiction. It was enacted to "protect[] the integrity and efficient operation of the market for nationally traded securities," and the "magnitude of the federal interest" in such matters "cannot be overstated." *Mer-*

Holdings, Ltd. v. S.A.C. Capital Mgmt., LLC, 2007 WL 1456204, at *5 (D.N.J. May 15, 2007).

rill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U.S. 71, 78 (2006). Congress included § 27 in the Act specifically to protect the uniquely federal interests underlying the Act by promoting "greater uniformity of construction and more effective and expert application of" the Act and its regulations. *Matsushita*, 516 U.S. at 383 (quotation omitted); *see Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985) ("Exclusive federal jurisdiction over violations of the 1934 Act was motivated by a desire to achieve greater uniformity of construction and more effective and expert application of that law.").

Allowing respondents' complaint to proceed in state court would contravene those statutory objectives as much as it would the statutory text. In *Matsushita*, this Court held that it would be consistent with § 27's uniformity objective for a state court to approve a settlement that released Exchange Act claims "because the state court does not adjudicate the Exchange Act claims," but instead merely "evaluates the overall fairness of the settlement." 516 U.S. at 383. The opposite is true here: the state court is specifically being asked to determine whether petitioners violated an Exchange Act regulation, which would permit—indeed, require—*every* state court faced with a similar complaint to interpret the meaning and scope of Exchange Act regulations. Accordingly, there is here (unlike in *Matsushita*) a real "danger that state-court judges who are not fully expert in federal securities law will say definitively what the Exchange Act [or Exchange Act regulations] mean[] and enforce legal liabilities and duties thereunder." *Id.* That is, after all, exact-

ly what respondents want the New Jersey courts to do.

Subjecting federal rights and issues to state-court adjudication will always "decrease uniformity—and therefore predictability—in the[ir] development." Martin H. Redish & John E. Muench, Adjudication of Federal Causes of Action in State Court, 75 Mich. L. Rev. 311, 312 (1976). But as *Matsushita* recognizes, the "danger" of non-expert adjudication is especially acute for highly technical and complex securities regulations like Regulation SHO.[8] Expert federal courts are crucial in this context not only because they are experienced in interpreting federal statutes and regulations, but because they are "sensitive to the national concerns underlying them." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 670 (1978) (Brennan, J., dissenting). Cases (like this one) implicating the SEC's regulation of short selling on na-

[8] A decision exemplifying the problems with state-court adjudication of Exchange Act questions is *Overstock.Com, Inc. v. Goldman Sachs & Co.*, No. A135682 (Cal. App. Nov. 13, 2014), http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=1&doc_id=2016756&doc_no=A135682. The state court in that case accepted jurisdiction over a complaint asserting violations of Regulation SHO as the basis for state-law liability and, after discussing at length the substance of the Regulation, slip op. 9-10, held that a state-court jury must decide whether certain parties were engaged in "bona fide market making" as required by Regulation SHO—a term the SEC itself has not defined—and whether the defendant's delegation of delivery obligations to others was "reasonable," again as required by Regulation SHO, 17 C.F.R. § 242.203(b)(2). *See* slip op. 49-50. The whole point of § 27 is to ensure that such difficult questions concerning the scope of Exchange Act regulations are resolved by federal courts.

tional exchanges provide a perfect example of why a federal adjudicator "sensitive to the national concerns" underlying those regulations is so crucial.

On respondents' telling, a "naked" short sale—i.e., a short sale where the "seller does not own, and does not borrow or arrange to borrow the securities in time to make delivery to the buyer"—results in the creation of "counterfeit shares," or "fictitious and/or phantom share[s] of stock." Pet. App. 50a-51a. Respondents invoke this inflammatory language to create for non-expert state judges and jurors the impression that the conduct at issue is inherently deceitful and harmful.

But the SEC itself has explicitly rejected the misleading narrative the complaint seeks to articulate. Naked short sales do not create "phantom" or "counterfeit" shares, the SEC has explained, because such sales have "no effect on an issuer's total shares outstanding." SEC, Division of Market Regulation: Responses to Frequently Asked Questions Concerning Regulation SHO.[9] The SEC likewise has emphasized that naked short selling "is not necessarily a violation of the federal securities laws or the Commission's rules," but actually is beneficial when it "contributes to market liquidity." *Id.* And facilitating the liquidity-promoting benefits of naked short selling is precisely why the SEC has determined that Regulation SHO's locate requirement does not apply to market makers engaged in "bona fide market-

[9] *Available at* https://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm.

making activities," *see supra* at 7-8, which includes many petitioners here.

Congress specifically restricted jurisdiction over cases like this to federal courts because adjudicating suits seeking to establish violations of regulations like Regulation SHO—in which the SEC has carefully weighed (and continues to weigh) the costs and benefits of certain trading practices to arrive at a properly balanced solution—requires expert *federal* decisionmakers well-versed in interpreting and applying federal regulatory schemes, with particular sensitivity to the uniquely national interests balanced in those schemes.

State courts, of course, are considered competent to decide most questions of federal law. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876). But not all such questions. In a limited set of circumstances, Congress has concluded that state courts are not well-equipped to conduct the careful application of the sensitive federal interests raised and has committed such cases exclusively to the jurisdiction of federal courts.[10] This is such a case. Because the complaint on its face unambiguously asks a court to apply the Exchange Act and its regulations to petitioners' conduct, the complaint must be adjudicated in federal court.

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[10] Other grants of exclusive federal jurisdiction include, for example, 15 U.S.C. § 717u (Natural Gas Act); 18 U.S.C. § 2338 (Anti-Terrorism Act); 29 U.S.C. § 1132 (ERISA); 28 U.S.C. § 1333 (admiralty); and 28 U.S.C. § 1334 (bankruptcy).

II. CONTRARY TO THE COURT OF APPEALS' HOLDING, § 27 IS AN INDEPENDENT GRANT OF JURISDICTION

Rejecting the straightforward analysis set forth above, the Third Circuit held that § 27 does not grant jurisdiction at all, but "merely serves to divest state courts of jurisdiction" that might otherwise exist under § 1331 and therefore "does not provide an independent basis to exercise jurisdiction over [respondents'] claims." Pet. App. 22a. That holding is demonstrably incorrect.

A. The Text Of § 27 Plainly Confers Jurisdiction

Section 27 states that the federal courts "shall have exclusive jurisdiction" of suits alleging violations of the Exchange Act or regulations promulgated under that Act, or seeking to enforce liabilities or duties created by that Act or those regulations. 15 U.S.C. § 78aa(a). That language is an unambiguous grant of jurisdiction. Congress frequently uses the phrase "shall have jurisdiction" to create federal jurisdiction—indeed, that phrase cannot reasonably be construed any other way. *Compare* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."), *with Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015) ("Section 1291 gives the courts of appeals jurisdiction over

appeals from 'all final decisions of the district courts of the United States.'").[11]

The only difference between § 27 and these other provisions is that § 27 includes the modifier "exclusive." According to the Third Circuit's analysis, the word "exclusive" somehow *undoes* the grant of federal jurisdiction achieved by the phrase "shall have jurisdiction." But if anything, adding the word "exclusive" merely underscores Congress's strong interest in ensuring federal-court supervision over claims that fall within the provision's scope—not only are such claims subject to federal jurisdiction, they are subject *only* to federal jurisdiction.

B. The Context Of § 27's Enactment Confirms That It Is A Jurisdictional Statute

The context in which § 27 was enacted confirms the obvious meaning of its text. At the time the Exchange Act was adopted, the general federal-question jurisdiction provision (now codified at 28 U.S.C. § 1331) included an amount-in-controversy requirement, which was not eliminated until 1980.

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[11] *See also* 7 U.S.C. § 1642(e) ("The district courts of the United States shall have jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder."); 15 U.S.C. § 378(a) ("The United States district courts shall have jurisdiction to prevent and restrain violations of this chapter and to provide other appropriate injunctive or equitable relief, including money damages, for the violations."); 33 U.S.C. § 1232(d) ("The United States district courts shall have jurisdiction to restrain violations of this chapter or of regulations issued hereunder, for cause shown.").

See Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006). Section 27, by contrast, never included any such requirement. If § 27 did not grant federal jurisdiction independent of § 1331, then any claim implicating the Exchange Act—even including a claim specifically pleading a cause of action under the Act—could not have been heard in federal district court unless the claim also satisfied § 1331's amount-in-controversy requirement.

This Court's precedents concerning an analogous provision in the Securities Act, however, make clear that federal courts *could* hear cases asserting Exchange Act claims, even when they did not satisfy § 1331. Section 22 of the Securities Act allows for concurrent state and federal jurisdiction, but its operative jurisdiction-conferring language matches § 27's: "The district courts of the United States and the United States courts of any Territory *shall have jurisdiction* . . . ." 15 U.S.C. § 77v(a) (emphasis added). That language, this Court has held, suffices *on its own terms* to "confer[] jurisdiction . . . upon the District Court irrespective of the amount in controversy" required to satisfy § 1331. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 289 (1940); *see Wilko v. Swan*, 346 U.S. 427, 431 (1953). The same conclusion necessarily applies under § 27: its materially identical jurisdictional language confers jurisdiction irrespective of whether § 1331's requirements are satisfied. Section 27, in other words, is a grant

of jurisdiction independent of § 1331, contrary to the Third Circuit's conclusion.[12]

C. This Court's Precedents Uniformly Describe § 27 As A Grant Of Jurisdiction

Consistent with § 27's text and context, this Court's precedents uniformly refer to § 27 as an independent jurisdictional grant. In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the Court held that the district court "had jurisdiction under [§ 27] to adjudicate the question whether § 10(b) applies to [the defendant's] conduct." *Id.* at 254. Similarly, in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), the Court observed that "Section 27 grants jurisdiction to the federal courts." *Id.* at 577. And in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Court stated that § 27 "specifically grants the appropriate District Courts jurisdiction over 'all suits in equity and actions at law brought to enforce any liability or duty created' under the Act." *Id.* at 431. None of these precedents suggests that § 1331 must be separately satisfied before federal jurisdiction attaches.

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[12] The fact that Congress enacted § 27 in part to avoid § 1331's amount in controversy requirement does not suggest that Congress otherwise intended to import the rest of § 1331's jurisdictional requirements. Had Congress so intended, it would have simply used § 1331's language while omitting the amount in controversy requirement. The fact that Congress used altogether different language demonstrates that Congress intended an altogether different test. *See infra* Part III.

D. *Pan American* Is Not To The Contrary

The Third Circuit's conclusion that § 27 does not itself create jurisdiction relied almost entirely on this Court's decision in *Pan American*. Pet. App. 19a-20a. The Third Circuit simply misread that decision (which no party had cited in briefing).

Pan American involved § 22 of the Natural Gas Act, which—as discussed above, *supra* at 13—has the same jurisdictional language as Exchange Act § 27. But unlike here, where respondents' complaint on its face both asserts violations of Regulation SHO and seeks to enforce duties created by Regulation SHO as a basis for state-law tort liability, the complaint in *Pan American* did not invoke or depend on any violation of federal law as the basis for state-law liability. 366 U.S. at 662-64. Instead, the plaintiff asserted only state-law breach-of-contract claims, and the NGA issues arose solely as a defense to the alleged contractual breaches. *See id.*

The defendant objected to state-court jurisdiction on the basis of NGA § 22's "exclusive jurisdiction" language, but this Court held—applying what later became known as the "well-pleaded complaint" rule—that federal jurisdiction attaches only when the federal issue appears on "the face of the complaint," regardless whether the "defendant is almost certain to raise a federal defense." *Id.* at 663. The "exclusive jurisdiction" language of NGA § 22 did not alter that long-settled rule, the Court explained: "'Exclusive jurisdiction' is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdic-

tion because of which state courts are excluded." *Id.* at 664.

The Third Circuit misread that passage to mean that an "exclusive jurisdiction" provision never creates federal jurisdiction—even when the complaint raises the precise issue subject to exclusive jurisdiction. *See* Pet. App. 20a. Read in context, however, the cited passage merely confirms that an "exclusive jurisdiction" provision does not overcome the long-settled rule requiring that jurisdiction be assessed from the face of a well-pleaded complaint, without regard to potential issues that may be raised solely in a defense. Indeed, that rule is reflected in the statutory language, under which exclusive federal jurisdiction turns on what is alleged in the complaint itself—i.e., "violations of" the NGA or "all suits in equity and actions at law *brought to enforce* any liability or duty created by" the NGA. 15 U.S.C. § 717u (emphasis added); *see id.* § 78aa(a) (same for Exchange Act).

Because respondents' complaint here on its face asserts violations of Regulation SHO as a basis for liability and seeks to enforce duties created by that regulation, the rule applied in *Pan American* creates no barrier to federal jurisdiction in this case.

III. CONTRARY TO RESPONDENTS' ARGUMENT, JURISDICTION UNDER § 27 IS NOT MERELY COEXTENSIVE WITH § 1331 "ARISING UNDER" JURISDICTION

In their opposition to certiorari, respondents argued that while § 27 may confer jurisdiction, the jurisdiction it grants just happens to coincide with the

jurisdiction separately granted—with completely different language—by the general federal-question statute, 28 U.S.C. § 1331. *See* Opp. 18 (§ 27 jurisdiction is "coextensive with, and not broader than, § 1331"); *see also Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49, 55 (2d Cir. 1996) (same). Respondents therefore argue that § 27 applies only to claims "arising under" the Exchange Act or its regulations, as that phrase has been interpreted in this Court's general federal-question jurisdiction jurisprudence. Opp. 17-18. That position is not only contrary to the text and purposes of § 27, it is also at odds with the language of § 1331 and the principles governing jurisdiction under that provision.

This Court of course "must not give jurisdictional statutes a more expansive interpretation than their text warrants, but it is just as important not to adopt an artificial construction that is narrower than what the text provides." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005) (citation omitted). As noted above, *supra* at 23, jurisdictional statutes in particular must be construed in accordance with the "rule favoring clear boundaries in the interpretation of jurisdictional statutes." *Brohl*, 135 S. Ct. at 1131.

The rule established by § 27's plain text could hardly be clearer: whether the complaint on its face asserts a violation of the Act or its regulations or seeks to enforce a duty thereunder. Given that simple, easily administrable statutory test, there is no need for a complicated, multi-factor-laden inquiry into whether the complaint is one that "arises under" the Exchange Act, as would be required if Congress

had employed the distinct, jurisdictional term-of-art language of § 1331. *See Grable*, 545 U.S. at 313-14.

The textual difference between the two statutes is a difference that matters. *Cf. Consumers Imp. Co. v. Zosenjo*, 320 U.S. 249, 253 (1943) (Congress "used different language here because it had a different purpose to accomplish"). In contrast to the clear and simple jurisdictional rule stated in § 27, § 1331 on its face broadly establishes "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." That broad language has never been construed according to its plain terms, but instead "has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the [statute's] function as a provision in the mosaic of federal judiciary legislation." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959).

In particular, while § 1331's language mirrors the language in Article III of the Constitution, this Court has—for policy reasons unique to § 1331—always "construed the statutory grant of federal-question jurisdiction as conferring a more limited power." *Merrell Dow*, 478 U.S. at 807; *see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494-95 (1983). The central concern is that a natural reading of § 1331 would grant federal courts jurisdiction in "all cases in which a federal question is 'an ingredient' of the action," *Merrell Dow*, 478 U.S. at 807 (quoting *Osborn*, 22 U.S. (9 Wheat.) at 823), which would threaten to "swamp the lower federal courts,"

13D Charles Alan Wright, Arthur R. Miller, et al., Federal Practice & Procedure § 3562 (3d ed.). Accordingly, for jurisdiction to attach under § 1331, this Court has held that the federal question must not only be an "ingredient" of the action, it also must be "necessarily raise[d]" by the complaint and must be an "actually disputed and substantial" issue. *Grable*, 545 U.S. at 314.

None of the policy reasons justifying the narrow construction of § 1331 has anything to do with § 27. Accordingly, § 27 can be enforced according to its plain language, which does not limit jurisdiction to complaints that *necessarily* require adjudication of an Exchange Act issue. *See supra* at 22.

Concerns about overburdening federal courts do not apply to § 27. Those concerns arise in the context of § 1331 because it is "the catchall federal-question provision," *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1977), but § 27 is directed to only a single, comparatively limited set of cases based on a single statute and its implementing regulations.

And for that small set of cases, Congress certainly was not concerned that *too many* would be heard in federal court—to the contrary, Congress wanted *all of them* to be heard in federal court. The background presumption underlying the narrow interpretation of § 1331 is that state courts are competent to resolve most federal questions. *See supra* at 27; *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (noting "the presumption that state courts enjoy concurrent jurisdiction"). But the *opposite* presumption applies under § 27, the very premise of

which is that state courts are not competent to adjudicate the meaning and application of the Exchange Act and its implementing regulations. *See supra* at 27. It would flip that presumption on its head to interpret § 27 as incorporating sub silentio the same narrow, complicated, and atextual jurisdictional inquiry this Court has read into § 1331 on the premise that state courts are an appropriate forum for resolving federal questions.

Although the phrase "arising under" has been construed narrowly for policy reasons specific to § 1331, the phrase long ago became a jurisdictional term of art Congress has invoked in multiple statutes, *see*, *e.g.*, 28 U.S.C. §§ 157, 1295, 1334, 1337, 1338, 1339, 1340, 1441, 1445, 1491, 1505, including in provisions enacted before the Exchange Act, *see*, *e.g.*, 28 U.S.C. § 41(4), (5), (6), (7), (8) (1934) (granting federal jurisdiction over actions "arising under" "any law related to the slave trade," "any law providing for internal revenue," "the postal laws," "the patent, the copyright, and the trademark laws," and "any law regulating commerce"). These other statutes are read to be coextensive with § 1331 for sound reasons of "[l]inguistic consistency," *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988), and Congress's use of that term-of-art phrase "is strong evidence that Congress intended to borrow the body of decisional law that has developed under 28 U.S.C. § 1331 and other grants of jurisdiction to the district courts over cases 'arising under' various regulatory statutes," *Coastal States Mktg., Inc. v. New England Petroleum Corp.*, 604 F.2d 179, 183 (2d Cir. 1979) (quoted in *Holmes Grp., Inc. v.*

Vornado Air Circulation Sys., Inc., 535 U.S. 826, 833 (2002)); *see Christianson*, 486 U.S. at 808.

Congress's conspicuous decision not to use § 1331's "arising under" formulation in § 27, by contrast, is equally strong evidence that Congress did not intend to incorporate the body of law narrowly construing that phrase, but intended the different and more precise language of § 27 to establish a different and more precise jurisdictional test. As the Court has emphasized, "the many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts." *Romero*, 358 U.S. at 379 n.51. Congress has the exclusive and plenary authority to determine the jurisdiction of lower federal courts, *see* U.S. Const. art. III, § 1; *Cary v. Curtis*, 44 U.S. 236, 245 (1845), and when Congress rejects the ubiquitous "arising under" formulation and uses different language establishing a distinct jurisdictional test, courts must respect and enforce that decision.

Finally, there is no merit to respondents' suggestion that this Court in *Pan American* categorically equated the jurisdictional language used in § 27 with the distinct term-of-art phrase "arising under." In opposing certiorari, respondents cited dictum in a footnote observing that jurisdiction under the NGA was *implicitly* limited to cases "'arising under' the Natural Gas Act." 366 U.S. at 665 n.2. That dictum, however, was relevant only to the Court's invocation of the well-pleaded complaint rule, which has no application here. *See supra* at 33. The Court's statement also was not based on the distinct language of

§ 22, but solely on legislative history specific to the NGA. *See* 366 U.S. at 665 n.2. (citing "authoritative Committee Reports"). The footnote, in fact, specifically acknowledges that § 22's *language* does not incorporate the limitations of "arising under" jurisdiction. *Id.* Section 27 includes no comparable legislative history suggesting that a similar implied limitation should be read into its broad language. *See Matsushita*, 516 U.S. at 383. And in any event, it may have made sense at the time to say that NGA § 22 was coextensive with § 1331, but that equivalence no longer holds. When *Pan American* was decided, "arising under" jurisdiction was defined more broadly than it is now, and encompassed *any* claim that "depends upon the construction or application" of federal law, so long as the federal claim was "not merely colorable." *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921). But since *Pan American* was decided, "arising under" jurisdiction has been scaled back substantially. *See Grable*, 545 U.S. at 312-13 (*Smith*'s "generous statement of the scope" of federal-question jurisdiction "has been subject to some trimming"). The question today is whether the distinct language of § 27 must be construed as incorporating the limitations that have been read into the particular language of § 1331 for policy reasons specific to that statute. The answer plainly is no, as this brief has shown.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

DAVID G. CABRALES
CALLI TURNER
GARDERE WYNNE SEWELL LLP
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Tex. 75201
(214) 999-4359

W. SCOTT HASTINGS
LOCKE LORD LLP
2200 Ross Avenue
Suite 2200
Dallas, Tex. 75201
(214) 740-8000

Attorneys for Knight Capital Americas, L.P.

ANDREW B. CLUBOK
BETH A. WILLIAMS
JEFFREY M. GOULD
DEVIN D. DEBACKER
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

Attorneys for UBS Securities LLC

WALTER DELLINGER
JONATHAN D. HACKER
(*Counsel of Record*)
jhacker@omm.com
DEANNA M. RICE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ANDREW J. FRACKMAN
ABBY F. RUDZIN
ANTON METLITSKY
BRAD M. ELIAS
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

THOMAS R. CURTIN
GRAHAM CURTIN, PA
4 Headquarters Plaza
P.O. Box 1991
Morristown, N.J. 07962
(973) 292-1700

Attorneys for Merrill Lynch, Pierce, Fenner & Smith, Incorporated

WILLIAM H. TROUSDALE
BRIAN M. ENGLISH
TOMPKINS, MCGUIRE, WACHENFELD & BARRY LLP
Four Gateway Center
100 Mulberry Street
Suite 5
Newark, N.J. 07102
(973) 622-3000

Attorneys for UBS Securities LLC

KURT A. KAPPES
GREENBERG TRAURIG LLP
1201 K Street
Suite 1100
Sacramento, Cal. 95814
(916) 442-1111

DAVID E. SELLINGER
GREENBERG TRAURIG LLP
200 Park Avenue
Florham Park, N.J. 07932
(973) 360-7900

*Attorneys for E*TRADE Capital Markets LLC*

MICHAEL G. SHANNON
THOMPSON HINE LLP
335 Madison Avenue
12th Floor
New York, N.Y. 10017
(212) 344-5680

Attorneys for National Financial Services LLC

STEPHEN J. SENDEROWITZ
STEVEN L. MEROUSE
DENTONS US LLP
233 S. Wacker Drive
Suite 5900
Chicago, Ill. 60606
(312) 876-8141

JONATHAN S. JEMISON
DENTONS US LLP
101 JFK Parkway
Short Hills, N.J. 57188
(973) 912-7188

Attorneys for Citadel Derivatives Group LLC, n/k/a Citadel Securities LLC

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