ASKING THE RIGHT FEDERAL QUESTIONS: *MERRILL LYNCH V. MANNING* AND THE EXCLUSIVE JURISDICTION PROVISION OF THE SECURITIES EXCHANGE ACT

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INTRODUCTION

Suppose you run a small corporation in the business of auctioneering stamps, coins, and other collectibles. Sensing that your corporation's financial prospects are on the decline, large financial institutions drive the price of the company's stock down. Your shareholders sue in state court alleging a breach of state law in manipulating stock prices while also referencing breaches of federal securities law.

Can the defendant financial institutions remove the case to federal court? This question is set to be answered by the Supreme Court in *Manning v. Merrill Lynch*,[1] which deals specifically with whether section 27 of the Securities Exchange Act of 1934 (Exchange Act)[2] allows defendants to remove a case to federal court when the plaintiff brings state-law claims in state court, but references violations of a related *federal* regulation.

Federal question jurisdiction is a murky yet vital area of the law. It impacts the remedies and defenses available to litigants and touches on the balance between the federal and state court systems, and sometimes has implications for the federal-state balance in complex regulatory frameworks, such as the financial regulatory system. And significantly, the Court's stance on this issue has implications beyond the world of securities regulation insofar as the Natural Gas Act and Federal Power Act have exclusive jurisdiction provisions that are essentially identical to that in

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1. Manning v. Merrill Lynch Pierce Fenner & Smith, Inc., 772 F.3d 158, 160 (3d Cir. 2014), *cert. granted,* 135 S. Ct. 2938 (2015).

2. 15 U.S.C. § 78aa (2012).

federal securities law.[3]

In *Manning*, the Supreme Court has an opportunity to resolve several circuit splits at once by deciding how the removal provisions of section 27 should be construed relative to the general federal question jurisdiction statute.[4] More specifically, *Manning* presents two important issues: First, whether section 1331 is coterminous with section 27 of the Exchange Act, so that the requirements of section 1331 must be met before section 27 will operate to divest state courts of jurisdiction, and second, if section 1331 is *not* coterminous with section 27, whether section 27 can serve as an independent basis for exercising jurisdiction here.

This Commentary urges the Court to hold that the requirement of section 1331—that a claim in federal court "arises under" federal law—is a necessary prerequisite to the triggering of any exclusive jurisdiction provision. This holding would prevent wholly state-law claims brought in state court from being removed to federal court, thereby preserving the federal-state balance that Congress intended to create through the Exchange Act.

I. FACTUAL AND PROCEDURAL HISTORY

Greg Manning is a shareholder in Escala Group (Escala), a company that auctioneered stamps and other collectibles.[5] Alleging that certain financial institutions, including Merrill Lynch, engaged in naked short-selling in Escala stock, Manning and other shareholders brought a number of state-law claims in New Jersey state court.[6] Specifically, the shareholders sued for violations of the New Jersey Racketeer Influenced and Corrupt Organizations (RICO) Act based on predicate *state* offenses, as well as for breach of contract and unjust enrichment, among other claims.[7]

The distinction between short sales and naked short sales is critical in *Manning v. Merrill Lynch*. A normal short sale—an attempt to profit from a future decrease in the price of a stock—involves a number of steps:

> The short seller identifies securities she believes will drop in market price, borrows these securities from a broker (prime brokers have the

3. Brief for Petitioners at 26, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning, No. 14-1132 (U.S. Mar. 27, 2015) [hereinafter Brief for Petitioners] ("Further, as discussed above, the jurisdictional issue here is not limited to § 27, but applies equally to the [Natural Gas Act] and the [Federal Power Act].").

4. 28 U.S.C. § 1331 is the general federal question jurisdiction statute.

5. *Manning*, 772 F.3d at 160.

6. *Id*.

7. *Id*.

> greatest market share), sells the borrowed securities on the open market, purchases replacement securities on the open market, and returns them to the broker—thereby closing the short seller's position. The short seller's profit (if any) is the difference between the market price at which she sold the borrowed securities and the market price at which she purchased the replacement securities, less borrowing fees, brokerage fees, interest, and any other charges levied by the broker.[8]

In contrast, in a naked short sale, "the short seller does not borrow securities in time to make delivery to the buyer within the standard three-day settlement period. As a result, the seller fails to deliver securities to the buyer when delivery is due (known as a 'fail' or 'fail to deliver')."[9]

Although there are several causes of naked short sales, the naked short sale in *Manning* was allegedly "part of a scheme to manipulate the price of a security."[10] And although naked short sales are not *necessarily* illegal under federal law, "some naked short selling schemes may run afoul of federal antifraud laws, as well as Regulation SHO."[11] Using its authority under the Exchange Act, the Securities and Exchange Commission adopted Regulation SHO[12] in 2004 to impose certain restrictions on short sales in an effort to limit naked short sales.[13]

Regulation SHO is vital in *Manning* because the defendants' efforts to establish federal question jurisdiction depend on references to that regulation in the complaint. Although the plaintiffs brought only state-law claims against the defendants, "the Amended Complaint repeatedly mentions the requirements of Regulation SHO, its background, and enforcement actions taken against some Defendants regarding Regulation SHO."[14] In fact, "there is no question that [the shareholders] assert in their Amended Complaint, both expressly and by implication, that Defendants repeatedly violated federal law. Moreover, there is no New Jersey analogue to Regulation SHO."[15] Thus, in the view of the financial institutions, these references to Regulation SHO are crucial: They indicate that the plaintiffs are seeking to enforce a *federal* duty, thereby generating federal question

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8. Elec. Trading Grp. v. Banc of Am. Sec., 588 F.3d 128, 132 (2d Cir. 2009).

9. *Manning*, 772 F.3d at 161 (quoting Amendments to Regulation SHO, Exchange Act Release No. 34-58774, 73 Fed. Reg. 61666, 61667 (Oct. 14, 2008)).

10. *Id*. (citing Amendments to Regulation SHO, Exchange Act Release No. 34-58774, 73 Fed. Reg. 61666, 61667 (Oct. 14, 2008)).

11. *Id*.

12. 17 CFR §§ 242.200–242.204t (2015).

13. *Manning*, 772 F.3d at 161.

14. *Id*.

15. *Id*.

jurisdiction.[16]

Based on this theory, Merrill Lynch and the financial institutions removed the case from the state court to the United States District Court for the District of New Jersey.[17] The shareholders moved for a remand to the state court, and the magistrate judge, finding that the shareholders could succeed on their state-law claims without establishing a violation of Regulation SHO, issued a recommendation to the district court in support of the plaintiffs' motion to remand.[18] The district court, however, rejected this recommendation and refused to remand, finding that the shareholders' success on the state-law claims hinged on their proving a violation of Regulation SHO.[19] The district court then certified an interlocutory appeal on the question of federal question jurisdiction.[20]

The Third Circuit reversed the district court, finding that Regulation SHO was not an element of any of the shareholders' claims.[21] As a result, because "[section] 1331 does not provide a basis to exercise jurisdiction over [the shareholders'] claims," the court held there was no federal question jurisdiction.[22] The court found that section 27 of the Exchange Act—an exclusive jurisdiction provision for claims brought to vindicate a right created by the Exchange Act—would only apply if the claims met the requirements of section 1331.[23] Specifically, it held that "[section] 27 is coextensive with [section] 1331 for purposes of establishing subject-matter jurisdiction."[24] As a result, "the exclusive jurisdiction provision merely serves to divest state courts of jurisdiction. Accordingly, section 27 does not provide an independent basis to exercise jurisdiction over Plaintiffs' claims."[25] Following this decision, the defendants petitioned for a writ of certiorari from the Supreme Court of the United States which was granted on June 30, 2015.[26]

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16. Brief for Petitioners, *supra* note 3, at 15 ("As both lower courts concluded and as [the shareholders] did not dispute, [their] complaint repeatedly alleges that [Merrill Lynch] violated Regulation SHO, a regulation promulgated under the Exchange Act. Those allegations suffice to confer federal jurisdiction under the statute's plain text.").

17. *Manning*, 772 F.3d at 161.

18. *Id*. at 161–62.

19. *Id*. at 162.

20. *Id*.

21. *Id*. at 163.

22. *Id*. at 165.

23. *Id*. at 167–68.

24. *Id*.

25. *Id*.

26. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning, 135 S. Ct. 2938 (2015).

II. LEGAL BACKGROUND

As a constitutional matter, Article III of the U.S. Constitution allows federal courts to exercise jurisdiction over "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[27] Similarly, the general federal question jurisdiction statute, 28 U.S.C. § 1331, provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[28] However, section 1331 jurisdiction is more limited than the Constitution itself allows.[29] Thus, under section 1331, a state-law claim must include a federal ingredient as a necessary component in order for federal question jurisdiction to be found, even though the Constitution itself would allow for significantly broader federal jurisdiction.[30]

The extent of federal jurisdiction under section 1331 is not at issue in *Manning v. Merrill Lynch*. If it were, the court would apply the test laid out in *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*,[31] which stipulates that federal question jurisdiction "over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress."[32] Applying the test, the Third Circuit found that no federal issue was necessarily raised, and that issue has not been raised on appeal.[33]

Thus, rather than the proper application of *Grable*, the most important legal questions in *Manning* are: (1) Whether section 1331 is coterminous with section 27 of the Exchange Act, so that the requirements of section 1331 must be met before section 27 will operate to divest state courts of jurisdiction, and (2) If section 1331 is *not* coterminous with section 27, whether the requirements of section 27 have been met here.

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27. U.S. CONST. art. III, § 2.

28. 28 U.S.C. § 1331 (2012).

29. *Compare* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (constitutional limits on federal subject matter jurisdiction) *with* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) (statutory limits on federal subject matter jurisdiction).

30. Brief for Respondents at 24, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning, (No. 14-1132) (U.S. Oct. 23, 2015) [hereinafter Brief for Respondents] (noting that "federal jurisdiction requires that the federal ingredient be a necessary component of a state-law claim.").

31. 545 U.S. 308 (2005).

32. *Manning*, 772 F.3d at 163.

33. *Id*. ("Because we conclude that no federal issue has been necessarily raised here, we need not decide whether the other three Grable requirements are met.").

A. Is Section 1331 Coterminous with Section 27 of the Exchange Act?

There is a significant circuit split over whether the requirements of section 1331 must be met before section 27 will create federal question jurisdiction over a state-law claim.[34] In deciding the answer, courts have largely focused on a Supreme Court decision interpreting the jurisdictional provision of the Natural Gas Act.[35] The jurisdictional provision in section 27 of the Exchange Act is essentially identical to the one in the Natural Gas Act.[36]

Pan American involved a contract dispute between producers of natural gas and their buyer, a natural gas pipeline company.[37] The contracts at issue stipulated the prices at which the pipeline company would buy the natural gas, but "a state commission subsequently issued an order fixing the minimum price for gas *above* the prices originally agreed to by the contracting parties."[38] The state commission's order was eventually overturned, but the pipeline company had paid the natural gas producers at the above-contract-price minimum rate, so it brought breach of contract claims in Delaware state court in order to regain the money it had paid above the contract price.[39]

In the defendant gas producers' view, removal to federal court was proper because the parties had filed the contract prices with the federal government pursuant to the Natural Gas Act, which implied that the plaintiffs were trying to enforce a duty created by the Natural Gas Act—the duty to charge the rates that were filed, no more and no less.[40] Eventually, the case reached the Supreme Court, which held there was no general federal question jurisdiction because, as a suit for breach of contract, it was based on state rather than federal law.[41]

Going further, the Court held that the exclusive jurisdiction provision of the Natural Gas Act did not operate as an independent basis of federal jurisdiction because "'[e]xclusive jurisdiction' is given [to] the federal

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34. The Second Circuit has held that the jurisdictional requirement of section 1331 is coterminous with section 27. *See* Barbara v. N.Y. Stock Exch., Inc., 99 F.3d 49, 55 (2d Cir. 1996). The Ninth Circuit, on the other hand, has held that section 27 provides an independent basis for federal jurisdication. *See* Cal. ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 841 (9th Cir. 2004).

35. Pan American Petrol. Corp. v. Super. Ct. of Del., 366 U.S. 656 (1961).

36. Brief for Respondents, *supra* note 30, at 39.

37. Brief of Amici Curiae Nat. Gas Supply Ass'n at 17, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning, No 14-1132 (U.S. Sept. 10, 2015).

38. *Id*.

39. *Id*.

40. *Id*. ("The natural gas producers argued that, if the former, the claims were subject to the 'exclusive jurisdiction' provision of the Natural Gas Act.")

41. Pan Am. Petroleum Corp. v. Super. Ct. of Del., 366 U.S. 656, 663 (1961).

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 excluded."[42] In effect, the Court indicated that the requirements of section 1331 must be satisfied before the exclusive jurisdiction provision could be triggered.[43] And this is the case even though the exclusive jurisdiction provision of the Natural Gas Act does *not* use the term "arising under," which Congress often uses to signal the applicability of section 1331 analysis.[44] Thus, *Pan American* suggests that section 1331 must be satisfied before an exclusive jurisdiction provision will operate to divest state courts of jurisdiction.

Nevertheless, courts have disagreed on the applicability of *Pan American* to cases involving the exclusive jurisdiction provision of the Exchange Act. The Third Circuit and the Second Circuit have both held that section 1331 must be satisfied for the exclusive jurisdiction provision of the Exchange Act to be triggered.[45] On the other side, the Ninth Circuit has distinguished *Pan American* and held that the exclusive jurisdiction provision of the Exchange Act is an independent basis of jurisdiction.[46]

B. Is Section 27 an Applicable, Independent Source of Federal Jurisdiction?

Assuming that section 27 is an independent grant of jurisdiction, the parties in *Manning* still disagree over whether the requirements of section 27 are actually met. Section 27 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 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.[47]

Thus, by bringing state-law claims that reference a federal regulation adopted pursuant to the Exchange Act, are the plaintiffs seeking either to recover from a violation of the Exchange Act or to enforce a "liability or

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42. *Id*. at 664.
43. *See id*.
44. *See id*. at 665 n.2.
45. Manning v. Merrill Lynch Pierce Fenner & Smith, Inc., 772 F.3d 158, 167 (3d Cir. 2014) ("We agree with the Second Circuit's holding in *Barbara* that § 27 is coextensive with § 1331 for purposes of establishing subject-matter jurisdiction—the exclusive jurisdiction provision merely serves to divest state courts of jurisdiction.").
46. California *ex rel*. Lockyer v. Dynegy, Inc., 375 F.3d 831, 843 n.10 (9th Cir. 2004).
47. Securities Exchange Act of 1934, 15 U.S.C. § 78aa(a) (2012).

duty created by [the Act]?"[48]

The Supreme Court addressed this question in *Matsushita Electric Industrial Co. v. Epstein*.[49] In that case, shareholder-plaintiffs challenged a merger through state-law claims filed in Delaware state court, and later through federal claims based on violations of section 27 in federal court.[50] Eventually, the defendant won the federal case, and while that was on appeal, the parties in state court settled, agreeing that those who did not opt out would waive all claims, including those asserted in the California federal action.[51] The Supreme Court received the case on appeal from the Ninth Circuit, and held that:

> While [Section] 27 prohibits state courts from adjudicating claims arising under the Exchange Act, it does not prohibit state courts from approving the release of Exchange Act claims in the settlement of suits over which they have properly exercised jurisdiction, i.e., suits arising under state law or under federal law for which there is concurrent jurisdiction. In this case, for example, the Delaware action was not "brought to enforce" any rights or obligations under the Act.[52]

Thus, in *Matsushita*, the Court gave deference to the state courts' resolution of the claims, despite the fact that section 27 could have been read broadly to preclude the state court from resolving those claims.

However, the Court also noted that "Congress intended [Section] 27 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 that law.'"[53] This reasoning favors the defendant financial institutions in *Manning* because this purpose of section 27—greater uniformity in financial regulation—would be most easily realized by allowing for total federal jurisdiction whenever a federal issue is potentially broached, thereby shutting out state courts and preventing departures from the federal interpretation. As a result, *Matsushita* gives both sides in *Manning* ammunition to argue that their interpretation of section 27 is correct, whether broad (to grant federal question jurisdiction over plaintiffs' claims) or narrow (to keep the way to federal court shut).

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48. *Id*.
49. 516 U.S. 367 (1996).
50. *Id*. at 370.
51. *Id*. at 370–71.
52. *Id*. at 381.
53. *Id*. at 383 (quoting Murphy v. Gallagher, 761 F.2d 878, 885 (2d Cir. 1985)).

III. HOLDING

The Third Circuit began its decision in *Manning v. Merrill Lynch* by assessing whether the "arising under" standard set forth in section 1331 was met.[54] The court stated that although the plaintiffs' complaint alleged only state-law claims, "[t]here is no question that Plaintiffs assert in their Amended Complaint, both expressly and by implication, that Defendants repeatedly violated federal law."[55] Nevertheless, the court held that "Regulation SHO is not an element of any of Plaintiffs' claims. The claims, therefore, could be decided without reference to federal law."[56] And because federal law was not "necessarily raised," the plaintiffs' claims failed to "arise under" section 1331, per the test set forth in *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*.[57]

By contrast, the district court had found that a federal issue *was* necessarily raised because New Jersey law does not expressly regulate short sales, so "the claims were necessarily predicated on the violation of Regulation SHO."[58] The Third Circuit subsequently overruled the district court on this point, concluding that New Jersey could interpret the general antifraud provisions in its state law—which the plaintiffs claimed had been violated—more broadly, so that fraud for the purposes of New Jersey state law encompassed the naked short sales at issue in *Manning*.[59]

Next, the Third Circuit considered whether section 27 of the Exchange Act "might nonetheless provide a more expansive basis for federal-question jurisdiction" through its exclusive jurisdiction provision.[60] After noting the circuit split on the issue, the Third Circuit wrote that "the Supreme Court all but answered this question" in *Pan American Petroleum Corp. v. Superior Court of Delaware*.[61] Relying on the Supreme Court's holding that in the Natural Gas Act, exclusive jurisdiction "is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts,"[62] the Third Circuit held that section 27 of the Exchange Act will only be triggered if the federal courts already have federal question jurisdiction under section 1331.[63]

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54. Manning v. Merrill Lynch Pierce Fenner & Smith, Inc., 772 F.3d 158, 163 (3d Cir. 2014).
55. *Id.* at 161.
56. *Id.* at 163.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 165, 66.
61. *Id.* at 166.
62. *Id.* (quoting Pan Am. Petrol. Corp. v. Super. Ct. of Del., 366 U.S. 656, 664 (1961)).
63. *Id.* at 167.

IV. ARGUMENTS

There are two key legal issues in *Manning v. Merrill Lynch*. First, whether section 1331 must be satisfied before federal courts can gain exclusive jurisdiction over the claims under section 27. And second, if section 1331 does *not* have to be satisfied for section 27 to apply, whether section 27 actually covers the claims at issue here.

A. The Shareholders' Arguments

In keeping with the Third Circuit's decision, the shareholders argue that their claims must satisfy the requirements of section 1331 before section 27 will create federal jurisdiction over them.[64] In the shareholder's words, the view of the financial institutions constitutes a "monumental departure from the traditional rules of federal jurisdiction. It is a bedrock presumption that state-law claims must (at a minimum) *necessarily* raise a federal issue to create jurisdiction."[65] The shareholders cite *Pan American Petroleum Corp. v. Superior Court of Delaware*, in which the Supreme Court concluded that "the meaning of 'brought to enforce any liability or duty created' was no broader than the meaning of 'arising under' in 28 U.S.C. § 1331."[66]

In addition, the shareholders argue that, even if section 1331 need not be satisfied to trigger section 27, the plain text of section 27 does not cover the state-law claims at issue here. Specifically, they argue that "Section 27 is textually limited to suits brought to enforce liabilities and duties '*created by [the Exchange Act],*' not liabilities and duties *created by state law*. A suit asserting claims under state law, invoking state-created rights and remedies, is not a suit brought to *enforce* federal law."[67] Thus, the shareholders argue that because they are seeking to enforce liabilities created by New Jersey state law, section 27 is inapplicable.

Additionally, the shareholders argue that the historical context of securities regulation and policy implications of allowing federal jurisdiction over purely state-law claims should guide the Court's analysis. In particular, the plaintiffs emphasize the role historically played by states in securities regulation, as it was against the "backdrop of established state regulation that Congress passed the Securities Act of 1933 . . . and the Securities Exchange Act of 1934."[68]

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64. Brief for Respondents, *supra* note 30, at 26 n.18.
65. *Id*. at 46.
66. *Id*. at 39 (quoting Pan Am. Petrol. Corp. v. Super. Ct. of Del., 366 U.S. 656, 665 n.2 (1961)).
67. *Id*. at 31.
68. *Id*. at 4.

And later, Congress stripped states of jurisdiction over all federal securities *class actions* when it passed the Securities Litigation Uniform Standards Act of 1998 (SLUSA), but SLUSA notably did *not* "preempt all state laws prohibiting fraud or market manipulation in connection with federally regulated securities."[69] Thus, Congress must have wanted those state-law actions to be available in state court, because SLUSA could have been written to simply strip states of jurisdiction over *all* securities cases implicating federal issues, rather than just the class actions.[70] In sum, the shareholders argue that section 1331 must be satisfied before section 27 of the Exchange Act can be triggered, and even if section 27 is triggered, it does not cover the state-law claims at issue here, so the shareholders should be able to make their state-law claims in a state court without fear of removal.

B. The Financial Institutions' Arguments

In the view of the financial institutions, section 27 stands on its own as a jurisdictional grant apart from section 1331, and it clearly applies to the shareholders' complaint, which has, after all, referenced violations of Regulation SHO. According to the financial institutions, "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."[71] Thus, they argue that section 27 operates as an independent grant of jurisdiction.[72]

The financial institutions note that because section 27 includes no reference to section 1331, "Section 27's plain language resolves this case."[73] They distinguish *Pan American* on this front by arguing that the Court was really applying an early version of the well-pleaded complaint rule—which requires a federal issue to be raised on the face of a well-pleaded complaint for federal question jurisdiction to be found—because after all "the complaint in *Pan American* alleged state-law contract claims; the [Natural Gas Act] was raised only as a *defense* to those state-law causes of action."[74] Further, the financial institutions claim section 27 clearly

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69. *Id*. at 7–8 (citing Merrill Lynch Pierce Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 87 (2006)).

70. *See id*. at 8 (noting that because Securities Litigation Uniform Standards Act of 1998 does not preempt state law, "the dual state-federal regulatory regime contemplated by the Depression-era Congress continues to this day.").

71. Brief for Petitioners, *supra* note 3, at 2.

72. *Id*.

73. *Id*. at 14.

74. *Id*. at 17.

covers the shareholders' claims here because the complaint alleged violations of Regulation SHO, and "nothing in section 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 shareholders' claims."[75]

In addition, the financial institutions argue that policy considerations, such as the value of a more uniform and less burdensome regulatory framework, support their interpretation of section 27. Specifically, they note that establishing section 27 as an independent source of federal jurisdiction—so that federal courts have exclusive jurisdiction over any claim alleging violations of a federal regulation pursuant to section 27—would further Congress's goals of uniformity and expertise in application by judges, because only federal judges would construe the financial regulatory framework.[76]

V. ANALYSIS

The Court should hold for the shareholders. The text of section 27, read by itself, may favor the financial institutions' arguments regarding the applicability of section 1331 insofar as it does not reference that statute. However, this is the world of jurisdictional statutes, where an out-of-context, plain-text reading often says little about the law. After all, "arising under" in Article III has a different meaning from "arising under" in section 1331.[77]

In jurisdictional jurisprudence, precedents and considerations of federalism do much to inform the text. An empirical analysis of the Roberts Court from 2005–2008, for example, shows that statutory interpretation cases involving jurisdictional statutes only referenced plain-text arguments 36% of the time, compared to 58.3% of the time for environmental statutes and 54.7% for criminal statutes.[78] By contrast, cases involving jurisdictional statutes referenced precedent-based arguments 66% of the time, compared to 25% for environmental statutes and 26.4% for criminal statutes.[79] Thus, the Roberts Court appears to favor precedent-based

75. *Id*. at 22.

76. *Id*. at 5.

77. *Compare* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (constitutional limits on federal subject matter jurisdiction) *with* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) (statutory limits on federal subject matter jurisdiction).

78. Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 283 (2010).

79. *Id*. at 281.

arguments over text-based arguments in the context of jurisdictional statutes.

Ultimately, the precedential considerations weigh strongly in favor of the shareholders. After all, the Court in *Pan American Petroleum Corp. v. Superior Court of Delaware* clearly required some sort of analysis under section 1331 before the relevant exclusive jurisdiction provision was triggered, even if that section 1331 analysis took the form of what later became the well-pleaded complaint rule, as the financial institutions argue.[80] And in any case, considerations of precedent and jurisprudential policy indicate that the requirements of section 1331 should be met before section 27's exclusive jurisdiction provision operates, as it "is a bedrock presumption that state-law claims must (at a minimum) *necessarily* raise a federal issue to create jurisdiction."[81] To hold otherwise is to force a plaintiff like Manning—who has pled only state-law claims, who wants to be in a state court to pursue those claims, and who needs to prove no violation of any federal rule or regulation to succeed—to be subject to the rules and defenses of the federal court system, simply because the defendant expects a more favorable outcome there. That result is against both precedent and common sense.

Additionally, the shareholders have the better argument on statutory interpretation and policy grounds. The policy argument boils down to a conflict between uniformity in regulation and federalism: Should the defendants be subject to a more uniform, federal-level regulatory system even though the plaintiffs only pled claims established by the New Jersey state legislature?[82] As a matter of statutory interpretation, the federalism concerns should outweigh any perceived policy need for uniformity. After all, Congress clearly envisioned a role for the states even after the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934, given that those laws "largely preserved and supplemented existing state authority over the securities markets."[83]

If Congress had wanted to preempt those state laws and grant federal courts exclusive jurisdiction over all securities fraud claims, it could have. It did not. And more recently, when Congress granted the federal courts exclusive jurisdiction over securities fraud class actions through SLUSA, it

80. Brief for Petitioners, *supra* note 3, at 32.

81. Brief for Respondents, *supra* note 30, at 46.

82. *Compare id.* at 51–52 (advocating for federalism in favor of denying exclusive jurisdiction) *with* Brief for Petitioners, *supra* note 3, at 24–25 (advocating for uniformity in favor of finding exclusive jurisdiction).

83. Brief for Respondents, *supra* note 30, at 4.

could have extended that exclusive jurisdiction to all securities fraud actions.[84] It did not, and the Court should not act as if it *had* by granting federal question jurisdiction here. Of course, this is an argument based on congressional inaction, but at a certain point (and surely we have passed it), repeated congressional inaction over the course of nearly a century in the context of a robust federal-state securities regulation system should be read for what it is: the conscious incorporation of state law into a complex regulatory framework.

CONCLUSION

Corporations, investors, and financial institutions should operate in a clear and transparent regulatory environment: Whether a given transaction will be regulated by a state or federal regulator should not be a surprise, and whether a claim can be brought in a state rather than federal court should be equally unsurprising. As of now, this latter issue—whether federal question jurisdiction will obtain in a given case—is too often a surprise, and a wasteful one insofar as the inquiry requires courts to engage in a murky and contested analysis to decide which courts should later hear the *actual substance* of the case. Fortunately, *Manning v. Merrill Lynch* affords the Court an opportunity to set the bounds of federal question jurisdiction, so that plaintiffs and defendants in cases potentially involving exclusive jurisdiction provisions will know where they can—and cannot—see each other in court.

In *Manning*, the Court will decide a case in which a plaintiff has brought state-law claims in a state court, in which no federal issue is necessarily raised by the complaint. Federal question jurisdiction is often a messy business, but the question can be easily answered here: Section 1331 should be held to be coterminous with section 27, so that its requirements must be satisfied before section 27 will operate. Holding in this way will maintain Supreme Court precedent, support the system of federalism in securities regulation laid out by Congress, and ensure that federal courts do not take the exclusive jurisdiction that Congress could have granted to them, but has not. In this case the shareholders want to bring their state-law claims in a state court. That should be their right.

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84. *Id.* at 7–8.