No. _____

IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.; 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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

ANDREW J. FRACKMAN
ABBY F. RUDZIN
BRAD M. ELIAS
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 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, Inc.

(*Additional counsel listed on inside cover*)

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

Attorneys for Merrill Lynch, Pierce, Fenner & Smith, Inc.

EDWIN R. DEYOUNG
DAVID G. CABRALES
W. SCOTT HASTINGS
JAMES H. BILTON
LOCKE LORD LLP
2200 Ross Avenue, Suite 2200
Dallas, TX 75201
(214) 740-8000

Attorneys for Knight Capital Americas, L.P.

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

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

Attorneys for UBS Securities LLC

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

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

*Attorneys for E*TRADE Capital Markets LLC*

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

Attorneys for National Financial Services LLC

STEPHEN J. SENDEROWITZ
STEVEN L. MEROUSE
DENTONS US LLP
233 S. Wacker Drive
Suite 7800
Chicago, IL 60606
(312) 876-8141

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

Attorneys for Citadel Derivatives Group LLC, n/k/a Citadel 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 Fifth and Ninth Circuits have held that § 27 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. In acknowledged conflict with those decisions, the Third Circuit in this case joined the Second Circuit in holding that § 27 does not itself create federal jurisdiction over state-law claims that otherwise fall within its terms.

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, Inc.; 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 is a publicly traded company that holds 10% or more of KCG Holdings, Inc.'s stock.

Petitioner UBS Securities LLC is wholly owned by UBS AG and UBS Americas, Inc. UBS Americas,

Inc. is wholly owned by UBS AG, and UBS AG has no parent corporation. Aside from 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 AG.

Petitioner ETCM Holdings, Inc. ("ETCM") is the sole member of E*TRADE Capital Markets LLC, now known as G1 Execution Services, LLC ("G1"). ETCM owns 100% of G1. ETCM is a direct subsidiary of E*TRADE Financial Corporation, a publicly held corporation. No publicly held company holds 10% or more of G1'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 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)

STATUTES

RULES AND REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

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 ("App.") at 1a-23a. The district court's opinion is unpublished but is reported at 2013 WL 1164838 and is reprinted at App. 24a-38a.

JURISDICTION

The court of appeals issued its decision on November 10, 2014. App. 2a. A timely petition for rehearing and rehearing en banc was denied on January 15, 2015. App. 40a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 27 of the Securities Exchange Act of 1934 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.

15 U.S.C. § 78aa(a).

INTRODUCTION

The decision below exacerbates an acknowledged circuit conflict on an important and recurring question of federal securities law and federal jurisdiction.

Pursuant to the fundamental objective of the federal securities laws to establish a nationally uniform system for regulating securities transactions, § 27 of the Securities Exchange Act provides that the federal courts "shall have exclusive jurisdiction of violations" of the Act or its regulations, 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).

Consistent with the plain language and purpose of the Act, the Fifth and Ninth Circuits have held that § 27 does just what it says: it confers jurisdiction on federal courts—and only federal courts—over all actions 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. Explicitly acknowledging a direct conflict with those decisions, the Third Circuit in this case joined the Second Circuit in holding that § 27 does not create federal jurisdiction over actions within its scope. Under the rule that governs in the Second and now Third Circuits, an action otherwise within § 27's scope cannot proceed in federal court unless there is some *other*, independent basis for federal jurisdiction. On this view, § 27's sole function is to strip state courts of concurrent jurisdiction over that type of action.

That view is quite incorrect, and it is an error of exceeding importance. A central objective of the Exchange Act is to subject securities transactions to a single, nationwide system of uniform regulation. The Second and Third Circuits' interpretation of § 27 contravenes that essential objective, effectively empowering fifty-one different state-court systems to enforce the Act's standards and duties.

This case exemplifies the problem, which makes the case an ideal vehicle for resolving it. Both courts below held that respondents' claims, while framed as state-law causes of action, are based on alleged violations of, and seek to enforce duties created by, the SEC's Regulation SHO, which specifies the circumstances under which securities transactions known as "short sales" and "naked short sales" are permissible, and when they are not. The district court held that because respondents' claims were based on alleged violations of Regulation SHO, § 27 establishes federal jurisdiction and thus the case was properly removed from state court. The Third Circuit agreed with the district court that respondents' claims fall within § 27, but held that § 27 did not provide jurisdiction over them because § 27 itself *never* creates jurisdiction. As a result, the standards and duties prescribed by Regulation SHO will now be subject to interpretation by a state-court judge, enforcement by a state-court jury, and review by a state court of appeals formally bound only by state-court precedents on Regulation SHO (of which there are none, of course). That outcome could not be more at odds with the objective of § 27, and with the purpose of federal securities laws more generally.

As intolerable as that result is, it could stand uncorrected for years unless the Court grants certiorari now. On the one hand, remand orders following the Second and Third Circuits' interpretation of § 27 generally will be unappealable under 28 U.S.C. § 1447(d), while on the other hand, orders denying remand under the Fifth and Ninth Circuits' rule will be interlocutory and unappealable for that reason. This case presents a unique opportunity for review because it avoids both problems: the district court denied remand and then certified its order for interlocutory appeal. The Court will not soon see another case with proper appellate jurisdiction presenting the question of § 27's jurisdictional effect. This is the ideal case for review of that important question.

Certiorari should be granted.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

1. The Securities Exchange Act of 1934 (the "Exchange Act" or "Act") was enacted "[i]n the wake of the 1929 stock market crash and in response to reports of widespread abuses in the securities industry." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170 (1994). The 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).

Section 27 of the Exchange Act provides that federal district courts "shall have 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). "Congress intended § 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" the Exchange Act and the rules and regulations promulgated thereunder. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 383 (1996) (internal quotation marks omitted).

2. The Exchange Act established the Securities Exchange Commission (the "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.*, which governs short sales of equity securities. *See* Short Sales, SEC Release No. 34-50103, 69 Fed. Reg. 48,008 (July 28, 2004).

"Short selling involves a sale of a security that the seller does not own or a sale which 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). A short sale normally proceeds as follows: the short seller (1) "identifies securities she believes will drop in market price," (2) "borrows these securities from a broker," (3) "sells the borrowed securities on the open market," (4) "purchases replacement securities on the open market," and (5) "returns them to the broker—thereby closing the short seller's position." *Elec. Trading Grp., LLC v. Banc of Am. Secs. 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 borrowed securities and the market price at which she purchased the replacement securities, less [transaction costs]." *Id.* Usually, borrowed securities are delivered within three days when the sale transaction is settled. "Naked" Short Selling Antifraud Rule, 73 Fed. Reg. at 61,667 n.7.

In a "naked" short sale, by contrast, the "seller does not borrow or arrange to borrow securities in time to make delivery to the buyer within the standard three-day settlement period." *Id.* at 61,667. "As a result, the seller fails to deliver securities to the buyer when delivery is due." *Id.* This is known as a "fail" or "fail to deliver." *Id.*

While the SEC prohibits "abusive" naked short selling, neither naked short selling generally nor fails to deliver are illegal. *See* SEC Division of Market Regulation: Key Points About Regulation SHO (Apr. 11, 2005). Instead, the SEC has imposed limits on naked short sales and fails to deliver through Regulation SHO and other rules. *See* "Naked" Short Selling Antifraud Rule, 73 Fed. Reg. at 61,667.

Among other things, Regulation SHO imposes "locate" and "close out" requirements on broker-dealers in an attempt to minimize fails to deliver. *See Elec. Trading Grp.*, 588 F.3d at 135-36. The locate requirement requires a broker-dealer, before executing a short-sale order, to have "reasonable grounds to believe" that the security can be borrowed and delivered within three days. 17 C.F.R. § 242.203(b)(1)(ii). If a fail to deliver nonetheless oc-

curs and persists for thirteen days, the close-out requirement calls for broker-dealers to purchase and deliver "securities of like kind and quantity." 17 C.F.R. § 242.203(b)(3).[1] These general locate and close-out requirements are subject to certain exceptions. 17 C.F.R. § 242.203(b)(2)(i)-(iv); *id.* § 242.203(b)(3)(i)-(vii). Regulation SHO's locate requirement, for example, does not apply to short sales executed by market makers in connection with their bona fide market-making activities. *See id.* § 242.203(b)(2)(iii); SEC Division of Market Regulation: Key Points About Regulation SHO ("in certain circumstances, naked short selling contributes to market liquidity").

3. There is no New Jersey analog to Regulation SHO. *See* App. 5a, 9a. The state has not attempted to regulate short sales of securities on the national markets, and it is unlikely New Jersey could do so given the SEC's extensive regulation in this area. *See Levitin v. PaineWebber, Inc.*, 159 F.3d 698, 705-07 (2d Cir. 1998) (holding that, to the extent state-law provision could be read to regulate short sales on the national markets, it was preempted).

B. State And District Court Proceedings

1. 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

[1] 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.

various countries around the world. *See* App. 45a-46a.

Respondents filed suit against petitioners in the Superior Court of New Jersey. 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." *Id.* at 43a, 51a.

Specifically, respondents alleged that petitioners' short sales were unlawful because petitioners "lack[ed] reasonable grounds to believe that the securities could be borrowed and be available for delivery." App. 44a. That allegation mirrors the language of Regulation SHO. *See* 17 C.F.R. § 242.203(b)(1) (prohibiting proprietary or customer short-sale transactions "unless the broker or dealer has . . . [r]easonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due"). Respondents further alleged that petitioners failed to properly "clear out" fails to deliver securities resulting from the short sales. App. 58a. That conduct, too, is addressed by Regulation SHO. *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). New Jersey

law, by contrast, does not address "locate" and "close out" requirements for short sales.

According to respondents' theory, petitioners' alleged naked short sales "increased the pool of tradable shares" of Escala stock, which, respondents say, caused their shares to decline in value. App. 44a.

Based on their naked-short-selling and counterfeit-share allegations, respondents asserted various state-law claims against petitioners: 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* App. 82a-101a.

2. Petitioners removed the suit to the United States 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. App. 9a, 26a. Respondents sought remand. *Id.* at 9a, 25a.

3. The district court denied respondents' motion to remand. 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." *Id.* at 29a. The court also noted that respondents' complaint relied on the fact that certain petitioners have been fined by the SEC and the Financial Industry Regulatory Authority ("FINRA") "for their intentional and persistent violation" of the rules and regulations governing their

"unlawful" short selling activities. *Id.* at 29a; *see id.* at 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." 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 promulgated thereunder,'" the court held that § 27 provided federal jurisdiction. *Id.* (quoting *Matsushita Elec. Indus.*, 516 U.S. at 370).

The district court also held that 28 U.S.C. §§ 1331 and 1337 provided federal jurisdiction, applying the test set forth by this Court in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). App. 33a. In doing so, the court reiterated that respondents' claims "are predicated on [petitioners'] alleged naked short sales of Escala stock in violation of SEC Regulation SHO" and 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." *Id.* at 33a-34a.

Noting "substantial ground for difference [of opinion]" regarding the jurisdictional issues raised in this case, the district court 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).

C. Proceedings Before The Third Circuit

1. The Third Circuit granted respondents' petition to appeal, App. 5a, 10a, and reversed the district court's decision holding that there was federal jurisdiction over respondents' claims.

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. 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." *Id.* at 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." *Id.* at 8a-9a. The court concluded that "[t]here is no question that Plaintiffs assert in their Amended Complaint, both expressly and by implication, that Defendants repeatedly violated federal law," i.e., Regulation SHO. *Id.* at 9a.

The Third Circuit nevertheless held that § 27 did not establish jurisdiction over respondents' claims. Expressly "disagree[ing]" with decisions of the Fifth and Ninth Circuits, App. 20a & n.9, the court of appeals held 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. *Id.* at 22a.[2]

The Third Circuit's construction of § 27 rested on the court's interpretation of *Pan American Petroleum Corp. v. Superior Court of Delaware for New Castle County*, 366 U.S. 656 (1961), which, in the court's view, "all but answered" the question whether § 27 itself provides federal jurisdiction. 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* 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 excluded." *Id.* 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 "disagree[d]" with the decisions of the Fifth and

---

[2] The Third Circuit separately held that respondents' complaint did not on its face "necessarily raise" a federal question under § 1331, applying the four-part test identified in *Grable*, 545 U.S. at 314. App. 12a. That question is distinct from the question whether § 27 itself creates jurisdiction over a state-law claim that asserts a violation of or seeks to enforce a duty created by Regulation SHO.

Ninth Circuits holding that "there can be jurisdiction under § 27 (and other exclusive jurisdiction provisions) even when there is not under § 1331." App. 20a; *see id.* at 20a n.9. The court instead "agree[d]" with the Second Circuit's holding "that § 27 is coextensive with § 1331 for purposes of establishing subject-matter jurisdiction." App. 22a; *see Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49, 55 (2d Cir. 1996). Section 27, the court concluded, "does not provide an independent basis to exercise jurisdiction" over respondents' claims. App. 22a.

2. Petitioners timely filed a petition for rehearing and rehearing en banc, which was denied. App. 40a.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to resolve a direct, acknowledged conflict between the Second and Third Circuits, on the one hand, and the Fifth and Ninth Circuits on the other, on a frequently recurring federal securities law question of great importance.

I. THE THIRD CIRCUIT'S HOLDING THAT § 27 DOES NOT PROVIDE FEDERAL JURISDICTION CONFLICTS WITH OTHER CIRCUIT DECISIONS AND IS INCONSISTENT WITH DECISIONS OF THIS COURT

A. A Direct, Acknowledged Conflict Exists Among Circuit Decisions On The Question Presented

Both the Third Circuit below and the Second Circuit have acknowledged the existence of a circuit

conflict regarding whether § 27 can provide federal jurisdiction where § 1331 does not. *See* App. 18a-19a; *NASDAQ OMX Grp., Inc. v. UBS Secs., LLC*, 770 F.3d 1010, 1030 (2d Cir. 2014).

1. The Fifth and Ninth Circuits have held that § 27 itself creates federal jurisdiction, regardless whether § 1331 separately applies.

In *Hawkins v. National Association of Securities Dealers, Inc.*, 149 F.3d 330 (5th Cir. 1998), the Fifth Circuit held that § 27 provided federal jurisdiction without conducting any analysis under § 1331. *Id.* at 331-32. The plaintiff in *Hawkins* brought state-law claims alleging that the National Association of Securities Dealers ("NASD," which is now FINRA) was biased against him, failed to properly administer an arbitration proceeding, and conspired with the defendant to deprive him of a fair arbitration. *See id.* at 330-31.

The Fifth Circuit noted that, to the extent the plaintiff's claims alleged "that the NASD breached duties it owed to [him] in its role as arbitrator, those duties arise from the NASD Code of Arbitration Procedure, which is a body of rules approved by the Securities Exchange Commission and promulgated under 15 U.S.C. § 78s." *Id.* at 331-32. Likewise, the court reasoned, to the extent the plaintiff claimed that "the NASD conspired with" or "failed to adequately supervise" the defendant, the plaintiff had "alleged violations of 15 U.S.C. §78*o*-3, the statute which allows the registration of the NASD as a self-regulating exchange, and 15 U.S.C. § 78s(g), which requires the NASD to enforce compliance with applicable securities statutes, rules, and regulations." *Id.*

at 332. The court therefore concluded that the plaintiff's claims, "though carefully articulated in terms of state law," sought "to enforce liabilities or duties created by federal securities laws which are governed exclusively by federal courts" under § 27. *Id.* As a result, there was federal jurisdiction over those claims. *See id.*

The Ninth Circuit reached the same conclusion on materially identical facts in *Sparta Surgical Corp. v. National Association of Securities Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998). In *Sparta*, the plaintiff asserted only state-law claims, but alleged that the defendant's conduct violated NASD rules. *See id.* at 1211. The Ninth Circuit held that, because the plaintiff's complaint "sought relief based upon violation of exchange rules, subject matter jurisdiction was specifically vested in the federal district court under the Exchange Act." *Id.*

Section 27, the court correctly explained, "unequivocally 'confers exclusive jurisdiction upon the federal courts for suits brought to enforce the Act or rules and regulations promulgated thereunder.'" *Id.* at 1211-12 (quoting *Matsushita Elec. Indus.*, 516 U.S. at 370). And the plaintiff's theories, while "posited as state law claims," were "founded on the defendants' conduct in suspending trading and delisting the offering, the propriety of which must be exclusively determined by federal law." *Id.* at 1212. The plaintiff had "specifically alleged violation of exchange rules, a matter committed exclusively to federal jurisdiction," and "[w]hen a plaintiff chooses to plead what 'must be regarded as a federal claim,' then 'removal is at the defendant's option.'" *Id.* at

1213 (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 399 (1987)).

The Ninth Circuit adhered to that interpretation of § 27 in *Lippitt v. Raymond James Financial Services*, 340 F.3d 1033 (9th Cir. 2003). In *Lippitt*, the court held that a state-law claim that did not seek "enforcement of any [securities] rule or regulation" fell outside the scope of § 27. *Id.* at 1037. But in reaching that conclusion, the court explained that "if [the plaintiff] were asserting a violation of an SRO rule, then . . . this would be a matter of exclusive federal jurisdiction, and therefore removal would be proper." *Id.* at 1042 (citing § 27); *see also Sacks v. Dietrich*, 663 F.3d 1065, 1068-69 (9th Cir. 2011); *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839-43 (9th Cir. 2004).

Numerous district court decisions outside the Fifth and Ninth Circuits have adopted the same interpretation of § 27. *See, e.g.*, *Shimoda-Atl., Inc. v. Fin. Indus. Regulatory Auth., Inc.*, 2008 WL 2003160, at *3-4 (W.D. Ark. May 8, 2008); *Whitehall Wellington Invs., Inc. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 2000 WL 1846129, at *4 & nn.4-5 (S.D. Fla. Dec. 7, 2000); *Lowe v. NASD Regulation, Inc.*, 1999 WL 1680653, at *3 (D.D.C. Dec. 14, 1999).

2. In direct, acknowledged conflict with the foregoing precedents, the Third Circuit below held that § 27 does not provide federal jurisdiction where there is not already jurisdiction under § 1331. App. 22a. Section 27, the Third Circuit said, is merely "coextensive with § 1331 for purposes of establishing subject-matter jurisdiction" and serves only to "divest state courts of jurisdiction" over cases within its

scope. *Id.* The court therefore concluded that "§ 27 does not provide an independent basis to exercise jurisdiction" over respondents' claims, *id.*, even though respondents alleged that petitioners "repeatedly violated" a federal securities regulation, *id.* at 9a.

In reaching that conclusion, the Third Circuit "agree[d]" with the Second Circuit's decision in *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49 (2d Cir. 1996). App. 22a. In *Barbara*, the Second Circuit limited § 27's scope to claims for which federal jurisdiction would already exist under § 1331—"claims created by the [Exchange] Act or by rules promulgated thereunder." 99 F.3d at 55. The court specifically rejected the notion that § 27 also reaches "claims created by state law." *Id.*; *see also Fairfax Fin. Holdings Ltd. v. S.A.C. Capital Mgmt., LLC*, 2007 WL 1456204, at *5 (D.N.J. May 15, 2007) ("agree[ing]" with *Barbara*); *Raser Techs., Inc. v. Morgan Stanley & Co.*, 2012 U.S. Dist. LEXIS 189029, at *14 (N.D. Ga. Oct. 30, 2012) (limiting § 27's scope to suits expressly brought under the Exchange Act).[3]

3. The circuit conflict expanded by the Third Circuit's decision even goes beyond § 27. Two other statutes—the Natural Gas Act ("NGA") and the Fed-

[3] It is not clear that the Second Circuit would follow the approach adopted in *Barbara* if it considered the issue anew today. The Second Circuit has limited *Barbara*'s application in more recent cases and has thus far avoided reconsidering the effect of § 27 by finding jurisdiction under § 1331. *See NASDAQ*, 770 F.3d at 1030; *D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93, 100-04 (2d Cir. 2001). *Barbara* therefore remains controlling in the Second Circuit.

eral Power Act ("FPA")—include "exclusive jurisdiction" provisions nearly identical to § 27, *see* 15 U.S.C. § 717u (NGA § 22); 16 U.S.C. § 825p (FPA § 317), and a nearly identical circuit conflict has arisen over the interpretation of those provisions as well.

In *Lockyer*, the Ninth Circuit applied its decision in *Sparta* construing § 27 to FPA § 317 and held that § 317 likewise confers federal jurisdiction on claims within its terms. *See Lockyer*, 375 F.3d at 839-43. And at least one district court within the Ninth Circuit has applied *Sparta* and *Lockyer* to reach the same conclusion for NGA § 22. *See Pacificorp v. Northwest Pipeline GP*, 2010 WL 3199950, at *5-6 (D. Or. June 23, 2010), *report and recommendation adopted*, 2010 WL 3219533 (D. Or. Aug. 9, 2010).

The Seventh Circuit similarly recognized in *Northeastern Rural Electric Membership Corp. v. Wabash Valley Power Associates, Inc.*, 707 F.3d 883 (7th Cir. 2013), that FPA § 317 provides an independent basis for federal jurisdiction, although the court ultimately concluded that § 317 was not satisfied on the particular facts of that case. *Id.* at 892.

In conflict with those decisions, the Sixth Circuit held in *Columbia Gas Transmission, LLC v. Singh*, 707 F.3d 583 (6th Cir. 2013), that NGA § 22 does not supply federal jurisdiction where there is not otherwise federal jurisdiction under § 1331. *Id.* at 591 (NGA § 22 "does not create the cause of action or substantial federal interest required for federal-

question jurisdiction").[4]

Viewed together with the decisions construing Exchange Act § 27, the decisions addressing FPA § 317 and NGA § 22 expand the circuit conflict from an evenly divided four circuits to an evenly divided six: the Fifth, Seventh, and Ninth Circuits all correctly recognize that the materially identical "exclusive jurisdiction" provisions of these statutes create jurisdiction even when the requirements of § 1331 are not separately satisfied, whereas the Second, Third, and Sixth Circuits all hold that the provisions do not confer jurisdiction independent of § 1331.

This case, in short, presents a broad and direct circuit conflict on the same jurisdictional issue affecting three separate federal regulatory regimes. It is difficult to imagine a more compelling basis for certiorari.

B. The Third Circuit's Holding Is Inconsistent With This Court's Precedents

The conflict over § 27 (and the similar provisions of other statutes) has arisen not *because* of any lack of clarity in this Court's own precedents, but *despite* a perfectly consistent pattern of referring to § 27 as a jurisdiction-creating statute.

---

[4] The Third Circuit in this case cited the Sixth Circuit's earlier decision in *Marel v. LKS Acquisitions, Inc.*, 585 F.3d 279 (6th Cir. 2009), as consistent with the Second Circuit's holding in *Barbara*. *See* App. 18a-19a n.6. But in *Marel* the federal issue arose only "as a possible defense to a state law claim." 585 F.3d at 280. *Marel* accordingly did not answer the question of whether § 27 provides federal jurisdiction where, as here, a federal securities-law issue is presented *on the face of the complaint*. *See also infra* at 24-25.

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), for example, the Court observed that the district court "had jurisdiction under 15 U.S.C. § 78aa [§ 27] to adjudicate the question whether § 10(b) applies to [the defendant's] conduct." *Id.* at 254.[5] Similarly, in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), the Court stated 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 observed 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.

The Third Circuit's decision in this case cannot be reconciled with any of those decisions. In the Third Circuit's view, § 27 does not "grant" anything to federal courts, but merely takes concurrent jurisdiction from state courts. *See* App. 22a. On that view, a federal court cannot "have jurisdiction" under § 27, but only under § 1331 or some other jurisdiction-conferring statute. The chasm between the Second and Third Circuits' construction of § 27 and this Court's longstanding, contrary understanding of the provision warrants review.

---

[5] In *United States v. Yousef*, 750 F.3d 254 (2d Cir. 2014), the Second Circuit recognized that in *Morrison* "subject-matter jurisdiction was established by [§ 27], which grants district courts original jurisdiction over federal securities law claims." *Id.* at 261-62. The court did not acknowledge the tension between that observation and its earlier decision in *Barbara*.

II. THE SECOND AND THIRD CIRCUITS' VIEW THAT § 27 DOES NOT PROVIDE FEDERAL JURISDICTION IS INCORRECT

A. Section 27's Plain Language Creates Federal Jurisdiction

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).

That language encompasses the claims asserted in respondents' complaint. As the Third Circuit recognized, respondents' complaint "both expressly and by implication" alleges, as the basis for liability under state law, that petitioners "repeatedly violated federal law"—specifically, Regulation SHO, an SEC regulation promulgated under the Exchange Act. App. 9a. The court of appeals further observed that there is no state-law analog of Regulation SHO on which respondents' state-law claims could rest. *Id.* Respondents' claims thus unambiguously seek to obtain relief for a violation of Regulation SHO and to enforce the duties created by Regulation SHO. Under the plain terms of § 27, the federal courts have "exclusive jurisdiction" over those claims.

Congress frequently uses the phrase "shall have jurisdiction" to create federal jurisdiction—indeed, it is impossible to construe that phrase any other way. *Compare* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final deci-

sions 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.'").[6] The sole difference in § 27 is the inclusion of the modifier "exclusive" before "jurisdiction." Under the Second and Third Circuits' interpretation, the addition of the word "exclusive" somehow *undoes* the grant of federal jurisdiction achieved by the common phrase "shall have jurisdiction." That construction makes no sense at all. If anything, adding the word "exclusive" only underscores Congress's interest in ensuring federal-court supervision over claims that fall within the provision's scope—such claims not only are subject to federal jurisdiction, but they are subject *only* to federal jurisdiction.

The specific jurisdictional language reflected in § 27 is different from, and broader than, the general "arising under" language of § 1331, confirming that § 27 is *not* "coextensive with § 1331," as the Third

---

[6] *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.").

Circuit held. App. 22a. Section 27 broadly encompasses "*all* suits in equity and actions at law brought to enforce *any* liability or duty created by" the Exchange Act or its regulations. The question thus is not whether the claim is sufficiently federal in character to say that it "arises under" federal law, but simply whether the claim seeks to enforce an Exchange Act liability or duty. If so, the federal court "shall have . . . jurisdiction" over it, and "exclusive" jurisdiction to boot. The language of § 27 could not be clearer.

B. Construing § 27 In Accordance With Its Plain Language Also Advances Its Purposes

The Third Circuit's approach is not only irreconcilable with the statutory text, but also undermines § 27's central purpose: "'to achieve greater uniformity of construction and more effective and expert application of that law.'" *Matsushita Elec. Indus.*, 516 U.S. at 383 (quoting *Murphy v. Gallagher*, 761 F.2d 878, 885 (2d Cir. 1985)).

This case concerns short sales of securities on the national market, which are subject to comprehensive regulation under Regulation SHO. Under the guise of state-law claims, respondents accuse petitioners of engaging in naked short sales that violate Regulation SHO. Respondents are thus attempting to use state law to enforce duties imposed by the Exchange Act and regulations promulgated thereunder, and they are seeking to do so in state court, where state-court judges and juries will decide whether petitioners have violated the federal standards on which respondents' claims rely. This is exactly the type of

situation § 27 was intended to prevent. Indeed, the "danger" presented where state-court judges "who are not fully expert in federal securities law" endeavor to interpret and enforce those laws, *Matsushita Elec. Indus.*, 516 U.S. at 383, is particularly acute here, where the federal regulation at issue—Regulation SHO—is highly technical and complex.

C. The Third Circuit Misconstrued This Court's Decision In *Pan American*

The Third Circuit largely ignored § 27's language and purpose, relying instead on this Court's decision in *Pan American*, which the court deemed dispositive. *See* App. 19a-20a. *Pan American*, however, is not on point at all, much less dispositive.

Pan American involved NGA § 22, which—as discussed above, *supra* at 17-19—has the same jurisdictional language as Exchange Act § 27. But unlike here, where respondents asserted state-law claims premised on violations of Regulation SHO, the complaint in *Pan American* alleged a state-law claim for breach of contract that did *not* invoke any violation of federal law as the basis for liability. 366 U.S. at 662-64. Instead, federal issues under the NGA arose only as a *defense* to the alleged state-law breach of contract. *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 can arise only when the federal issue appears on "the face of the complaint," regardless of whether the "defendant is al-

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

The Third Circuit misread that passage to mean that an "exclusive jurisdiction" provision does not create federal jurisdiction when the face of the complaint raises exactly the federal issue over which federal courts are to have exclusive jurisdiction—here, enforcement of a duty created by an Exchange Act regulation. *See* App. 20a. Read in context, however, the cited passage merely confirms that an "exclusive jurisdiction" provision does not overcome the long-settled well-pleaded complaint rule requiring that jurisdiction be assessed based on the claims asserted by the plaintiff on the face of the complaint. Because respondents' complaint here on its face *does* assert violations of Regulation SHO as the basis for liability, the rule applied in *Pan American* creates no barrier to federal jurisdiction in this case. The Third Circuit's contrary conclusion was incorrect.

III. THE QUESTION PRESENTED IS A RECURRING ISSUE OF NATIONAL IMPORTANCE, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT

The question presented is a recurring issue of national importance. The numerous circuit and district court decisions already cited demonstrate the fre-

quency with which the issue arises. And its significance is commensurate with the importance of the federal securities laws' core objective of subjecting securities transactions to a uniform national regulatory system.

The Third Circuit's decision, if left to stand, will seriously disrupt that system. It will encourage forum shopping by plaintiffs who would dress up alleged violations of federal securities law in state-law garb. The decision below will also permit state courts within the Third Circuit to insert themselves into the regulation of trade settlement and clearing for securities transactions executed on national exchanges. As a result, participants in the national securities markets will be required to look to the varied precedents of the states to determine what rules and standards may apply to their trading activities. The decision below will thus generate substantial uncertainty and confusion for market participants—the opposite of what Congress intended.

Further, as discussed above, the jurisdictional issue here is not limited to § 27, but applies equally to the NGA and the FPA. Like the Exchange Act and securities regulation, those laws reflect a judgment by Congress that the interstate allocation and transportation of energy requires a nationally uniform regulatory system—an objective thwarted when federal regulatory standards and duties become enforceable in state courts through state-law vehicles.

Finally, this case presents an ideal vehicle for resolving the jurisdictional controversy and restoring the uniformity Congress intended in the Exchange Act and other statutes. The Third Circuit below rec-

ognized that there is "no question" that respondents' complaint alleged that petitioners "repeatedly violated" Regulation SHO. App. 9a. The question whether § 27 provides federal jurisdiction is thus clearly and cleanly presented here. If this Court were to disagree with the Third Circuit and hold that § 27 does provide federal jurisdiction, the Third Circuit's recognition that respondents have alleged violations of federal securities regulations would necessarily lead to the conclusion that there is federal jurisdiction over respondents' claims. It was only by holding that § 27 requires a separate, independent basis for federal jurisdiction that the Third Circuit was able to deny federal jurisdiction in this case.

If the Court declines to address the question presented in this case, the circuit conflict is likely to fester for years without presenting another opportunity for this Court to intervene and establish a uniform federal rule. Application of the Third Circuit's reading of § 27 will result in remand of cases raising federal securities-law issues as a predicate for state-law liability, and there is ordinarily no appellate review of a remand order based on a lack of jurisdiction. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."); *see Kircher v. Putnam Funds Trust*, 547 U.S. 633, 648 (2006) (holding that § 1447(d) bars appellate review of remand orders in cases removed under SLUSA). It will thus be difficult to obtain review of future decisions applying the Third Circuit's holding in this case. Now is the time, and this is the case, to determine conclusively whether § 27 means what it says.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWIN R. DEYOUNG
DAVID G. CABRALES
W. SCOTT HASTINGS
JAMES H. BILTON
LOCKE LORD LLP
2200 Ross Avenue
Suite 2200
Dallas, TX 75201
(214) 740-8000

Attorneys for Knight Capital Americas, L.P.

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

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

*Attorneys for E*TRADE Capital Markets 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
BRAD M. ELIAS
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000

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

Attorneys for Merrill Lynch, Pierce, Fenner & Smith, Inc.

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

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

Attorneys for UBS Securities LLC

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

Attorneys for National Financial Services LLC

STEPHEN J. SENDEROWITZ
STEVEN L. MEROUSE
DENTONS US LLP
233 S. Wacker Drive
Suite 7800
Chicago, IL 60606
(312) 876-8141

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

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

March 17, 2015