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When Is The ‘Force’ With A Securities Claim That Is ‘Brought To Enforce’ A Federal Securities Law?

By Michelle Wellnitz*

I.	INTRODUCTION.....	256
II.	A BRIEF HISTORY OF THE SECURITIES AND EXCHANGE ACT.....	260
	A. <i>Development of United States Federal Securities Laws and the Securities and Exchange Commission.....</i>	260
	B. <i>Section 27 of the Securities Exchange Act and Regulation SHO.....</i>	263
	C. <i>The State of Section 27 when Manning was Decided.....</i>	265
III.	THE FACTS OF <i>MERRILL LYNCH PIERCE, FENNER & SMITH INC. V. MANNING</i>	267
IV.	ANALYSIS OF <i>MANNING</i>	273
	A. <i>Justice Kagan’s Majority Opinion.....</i>	273
	B. <i>Justice Thomas’s Concurring Opinion.....</i>	284
V.	CONCLUSION: <i>MANNING’S IMPACT.....</i>	286
	A. <i>Legal Impact.....</i>	287
	B. <i>Broader Impact.....</i>	288

I. INTRODUCTION

The sale of securities in the United States occurs every business day on platforms such as the New York Stock Exchange (NYSE)¹ and the National Association of Securities Dealers Automated Quotations (NASDAQ).² However, because of the trillions of dollars that pour through these stock exchanges on a daily basis, greedy and unscrupulous investors have found ways to take advantage of fluctuating stock prices and have even begun manipulating the prices themselves.³ Amidst such a backdrop, the potential for fraudulent transactions and deceit is rampant. Therefore, the need for oversight is clear.

Imagine that you are an owner of common stock in a publicly traded company on either the NYSE or NASDAQ. Further, imagine that your investment in the stock is over \$2,000,000. Now, everyone is aware that the stock market involves a steep element of risk in that prices can fluctuate at the drop of a hat, and an investor can lose his entire investment overnight.⁴ On the same page, this risk premium provides investors with the potential to reap tremendous profits from the stock market, another fact of which all investors are aware. Millionaires, and even billionaires, have been made at the hands of the stock market. Nonetheless, with such a potential for profits

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¹ About the Intercontinental Exchange and the NYSE, INTERCONTINENTALEXCHANGE.COM, <https://www.intercontinentalexchange.com/about> (last visited Feb. 5, 2017).

² About NASDAQ, Inc., NASDAQ.COM, http://www.nasdaq.com/about/about_nasdaq.aspx (last visited Feb. 5, 2017).

³ Naked Short Selling Antifraud Rule, 73 Fed. Reg. 61666-01 (Oct. 14, 2008) (to be codified at 17 C.F.R. pt. 240).

⁴ Buttonwood, *Risk and the Stock Market*, THEECONOMIST.COM (June 1, 2016), <http://www.economist.com/blogs/buttonwood/2016/06/academics-and-investing>.

comes the potential for fraudulent schemes.⁵ One such scheme is to illegally short sell stock in order to manipulate the stock price of a company.⁶ After manipulating the stock price of a company, crafty financial advisors will then be able to purchase the companies at a much lower price than normal, wait until the price goes back up again, and then sell the stock for a great, but illegal, profit.⁷

Then, imagine that the stock price of the hypothetical company you invested in plummets to zero, and you lose your entire \$2,000,000 investment. You believe that financial institutions and their respective financial advisors have manipulated the stock in just the way described above.⁸ Therefore, you decide to sue the financial institutions. Knowing that your state has Uniform Securities laws in place to protect investors from exactly these sort of transactions, you decide that you want to file the lawsuit in your local state court. However, in light of the fact that you just lost \$2,000,000, you are not exactly flush with cash and therefore decide that you exclusively want your case heard in state court because you do not have the resources to litigate the case in a federal court. In fact, having to litigate in federal court would place a burden on your entire case to the extent that you would not be as effective in litigating. Examples include restrictions on the amount of discovery you are able to perform or the expertise of lawyer you are able to hire, all because of the increased costs of federal court litigation. Therefore, you draft a complaint that only asserts state-created claims.

Nonetheless, the opposing financial institutions, for whatever reasons good or bad, want to remove the case from state court to federal court and file suit to do so. The financial institutions claim that federal courts have jurisdiction over the case because, although you do not explicitly assert a violation of any federal claims, you have referenced a violation of the Exchange Act, which allows federal courts exclusive jurisdiction over suits that simply mention violations of the Exchange Act. Thus, the financial institutions will assert the case should be properly removed to a federal venue. And,

⁵ See *infra* note 41, at 811.

⁶ Naked Short Selling Antifraud Rule, *supra* note 3.

⁷ *Id.*

⁸ See *infra* note 41, at 811.

the state court agrees with their federal question jurisdiction argument.

Knowing very well that your intentions were to litigate the case in state court, you remember specifically drafting your complaint to keep it there. Therefore, you feel disheartened that the state court does not agree with you. Nonetheless, you also feel as though your suit cannot be litigated in a federal venue because it does not involve a federal question for the courts to consider. Therefore, you go through the proper channels and means necessary to challenge the state court's decision and remand your case to state court. Does it matter what the intentions of the financial institutions were in wanting to remove the case to federal court? Perhaps not.

This is what the plaintiffs in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning* allege occurred with their investments and with the exclusive jurisdiction issues the parties faced.⁹ In *Manning*, a group of investors, Manning in particular, lost the entirety of their stock investments in a company called Escala Group.¹⁰ Manning in particular lost \$2,000,000 and alleged that various financial institutions had illegally short-sold shares of Escala's stock in an attempt to manipulate the price of the company's shares.¹¹ After this alleged short selling, Escala's shares plummeted, and that is when Manning and the other plaintiffs lost their investments.¹² Manning and the other investors filed suit in a New Jersey state court, where they alleged in their complaint only state-law created claims in violation of New Jersey's Uniform Securities laws.¹³ However, they did mention, albeit simply mention, how the financial institutions also violated certain provisions of the Exchange Act with their alleged short selling.¹⁴ Thus, the financial institutions moved to remove the case to a federal venue because, as they alleged, the

⁹ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1563–64 (2016).

¹⁰ *Id.* at 1566.

¹¹ *Id.* at 1563.

¹² *Id.* at 1564.

¹³ *Id.* at 1566–67.

¹⁴ *Id.* at 1567.

reference to Exchange Act provisions entailed a federal question and therefore mandated exclusive federal court jurisdiction.¹⁵

The financial institutions were successful in their removal to a federal venue; however, Manning challenged the holding and filed suit to remand the case back to state court.¹⁶ The case eventually made it all the way up to the Supreme Court where the issue was decided as to whether a certain provision of the Exchange Act mandated its litigation in federal court.¹⁷ The Court ultimately held that the consequences of extending an interpretation of the statute's provisions so far as to allow even an implicit reference to the Exchange Act to mandate federal jurisdiction were too great to allow it.¹⁸ And although the Court did not entirely close off the possibility that a complaint that mentions a violation of the Exchange Act could be held to federal jurisdiction, it agreed that Manning's case should be allowed to be litigated in state court.¹⁹ In other words, the Court did not grant exclusive federal court jurisdiction simply over a reference to an Exchange Act provision.²⁰

This case note takes the reader through the history of federal securities laws to broaden the reader's foundational knowledge of the issues presented in *Manning*.²¹ Part III outlines the facts of *Manning* in detail so that the reader can understand the events surrounding the alleged fraudulent short selling and also the events leading up to Manning's subsequent actions.²² Part IV addresses the relevant issues and arguments that are entwined in the Court's holding of *Manning*.²³ Additionally, Part IV provides analysis of the Court's holding and gives insights into the logic of the Court's holding.²⁴ Finally, the impact of the *Manning* holding is addressed in Part V.²⁵

¹⁵ Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562, 1567 (2016).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1567–68.

¹⁹ *Id.* at 1574–75.

²⁰ *Id.* at 1567–68.

²¹ See *infra* Part II.

²² See *infra* Part III.

²³ See *infra* Part IV.

²⁴ See *infra* Part IV.

²⁵ See *infra* Part V.

The conclusion of the note takes on the potential impact that the *Manning* holding will have on both the legal and broader spectrums of society.²⁶

II. A BRIEF HISTORY OF THE SECURITIES AND EXCHANGE ACT

Manning involved an analysis of section 27 of the Securities Exchange Act of 1934.²⁷ The U.S. federal securities laws are a complicated breed and ever-changing.²⁸ As their relevance relies on the shape and atmosphere of the U.S.'s financial markets, their applicability, scope, and enforceability are tied directly to its markets.²⁹ Accordingly, as the U.S. financial markets must evolve in light of technological advances, so too is it necessary that securities laws must evolve.³⁰ Therefore, crucial to understanding the outcome of *Manning* and its further impact is an understanding of the development of U.S. securities laws and where the laws relevant to *Manning* stand today.³¹

A. Development of United States Federal Securities Laws and the Securities and Exchange Commission

Before 1929, although proposals of federal government involvement in the securities market began to appear, they were “never seriously pursued,” and thus there existed essentially zero federal regulation of the U.S. securities markets.³² Rather, during

²⁶ See *infra* Part V.

²⁷ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1566 (2016).

²⁸ Michael B. de Leeuw, *Why Are There Still So Many State Law Securities Cases?*, in *NEW DEVELOPMENTS IN SECURITIES LITIGATION: LEADING LAWYERS ON ADAPTING TRENDS IN SECURITIES LITIGATION AND REGULATORY ENFORCEMENT*, (Thompson Reuters & Aspatore, 2016).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *What We Do*, U.S. SEC. & EXCH. COMM'N (June 10, 2013), <https://www.sec.gov/about/whatwedo.shtml>. “During the 1920s, approximately 20 million large and small shareholders took advantage of post-war prosperity and set out to make their fortunes in the stock market. It is estimated that of the \$50 billion in new securities offered during this period, half became worthless.” *Id.*

this time, “investors gave little thought” to the potential for abuse of margin financing and unreliable information about the securities they were investing in, and the “systemic risks” that could evolve from such activity.³³ This changed when the stock market crashed in October 1929, resulting in the worst financial crisis in U.S. history, known as the “Great Depression,” in which small investors, large investors, and banks alike lost immense sums of money, stemming from investment in artificially inflated securities.³⁴ Fearing a further collapse and inability to restore the economy, Congress held hearings in order to determine the root cause of the depression and find solutions.³⁵ Ultimately, Congress reached a consensus by finding that a restoration of consumer confidence and the “public[’s] faith in capital markets” was necessary to restore the economy.³⁶

³³ *Id.* Such investors were tempted, and perhaps it is fairly said that they were blinded as well, by the promises of easy credit and “rags to riches” transformations that were unfolding in 1920’s America. *Id.* “There were fundamental structural weaknesses in the American economic system. Banks operated without guarantees to their customers, creating a climate of panic when times got tough. Few regulations were placed on banks and they lent money to those who speculated recklessly in stocks.” Philadelphia Independence Hall Association, *The Great Depression*, USHISTORY.ORG, <http://www.ushistory.org/us/48.asp> (last visited Jan. 2017).

³⁴ *What We Do*, *supra* note 32; see also Public Broadcasting Service Southern California, *Timeline of the Great Depression*, PUBLICBROADCASTINGSERVICE.ORG, <http://www.pbs.org/wgbh/americanexperience/features/timeline/rails-timeline/> (last visited Jan. 2017) [hereinafter PBS Southern California].

³⁵ *What We Do*, *supra* note 32. Franklin D. Roosevelt was elected President in November 1932. PBS Southern California, *supra* note 34. Before a crowd of 100,000 at the Capitol Plaza in Washington, D.C., Franklin Delano Roosevelt was inaugurated. FDR told the crowd, “[t]he people of the United States have not failed. In their need they have registered a mandate that they want direct, vigorous action. They have asked for discipline and direction under leadership. They have made me the present instrument of their wishes. In the spirit of the gift I take it.” FDR announced a four-day bank holiday to begin on Monday, March 6. During that time, FDR promised, Congress would work on coming up with a plan to save the failing banking industry. By March 9, Congress passed the Emergency Banking Act of 1933. By month’s end, three-quarters of the nation’s closed banks would be back in business. On March 12, FDR delivered the first of what came to be known as his “fireside chats.” In his initial “chat,” he appealed to the nation to join him in “banishing fear.” *Id.*

³⁶ PBS Southern California, *supra* note 34.

In 1933, Congress reached its decision and enacted the Securities Act of 1933 in order to “prohibit deceit, misrepresentations, and other fraud in the sale of securities.”³⁷ Less than one year later, it enacted the Securities Exchange Act of 1934, which, along with the Securities Act of 1933, was designed “to restore investor confidence in our capital markets by providing investors and the markets with more reliable information and clear rules of honest dealing.”³⁸ However, the Securities Exchange Act of 1934 is most notable for its creation of the Securities and Exchange Commission (SEC).³⁹ The SEC was established “to promote stability in the markets, to protect investors,” and “to enforce the newly-passed (and thereafter subsequently enacted⁴⁰) securities laws.”⁴¹ The SEC “established a

³⁷ *Id.*; see also *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM’N (Oct. 1, 2013), <https://www.sec.gov/about/laws.shtml>. The Act’s other objective being to “require that investors receive financial and other significant information concerning securities being offered for public sale.” *Id.*

³⁸ *What We Do*, *supra* note 32. “The main purposes of [the Securities Act of 1933 and the Securities Exchange Act of 1934] can be reduced to two common-sense notions:” (1) “Companies publicly offering securities for investment dollars must tell the public the truth about their businesses, the securities they are selling, and the risks involved in investing” and (2) “People who sell and trade securities—brokers, dealers, and exchanges—must treat investors fairly and honestly, putting investors’ interests first.” *Id.*

³⁹ *Id.*

⁴⁰ Subsequently enacted legislation includes: (1) Trust Indenture Act of 1939; (2) Investment Company Act of 1940; (3) Investment Advisers Act of 1940; (4) Sarbanes-Oxley Act of 2002; (5) Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010; and Jumpstart our Business Startups Act. *Id.*

⁴¹ *Id.* President Franklin D. Roosevelt appointed Joseph Kennedy as the SEC’s first Chairman in 1934. *Id.* In addition to a Chairman, the SEC also “consists of five presidentially-appointed Commissioners” who each have “staggered five-year terms.” *Id.* The SEC’s other responsibilities include to: “interpret and enforce federal securities laws; issue new rules and amend existing rules; oversee the inspection of securities firms, brokers, investment advisers, and ratings agencies; oversee private regulatory organizations in the securities, accounting, and auditing fields; and coordinate U.S. securities regulation with federal, state, and foreign authorities.” *Id.*; see also *Informal Bargaining Process: An Analysis of the SEC’s Regulation of the New York Stock Exchange*, 80 YALE L.J. 811 (1971) (synthesizing that the primary responsibility of the SEC is to “oversee [the] operation of the nation’s securities exchanges for the protection of investors, . . . to insure fair dealing in securities, . . . [and] to insure fair administration.”) (internal quotation marks omitted).

new regulatory agency, equipped with the surveillance, rulemaking and enforcement tools of the administrative process, to accomplish these goals.”⁴²

B. Section 27 of the Securities Exchange Act and Regulation SHO

The Securities Exchange Act “identifies and prohibits” specific conduct within the securities market.⁴³ It also gives the SEC the ability to take not only enforcement but also disciplinary action against individuals and corporations that violate the Act’s provisions.⁴⁴ Section 27 of the Securities Exchange Act holds in relevant part that:

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.⁴⁵

Accordingly, “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.”⁴⁶

Regulation SHO was enacted in the wake of the fraudulent accounting scandals of Enron and WorldCom in the early 2000’s.⁴⁷ It was adopted in 2004 by the Securities Exchange Commission in 2004 pursuant to its authority under the Exchange Act.⁴⁸ Compliance with the regulation began in January 2005, and its purpose was to update the SEC’s outdated short sale regulations to address concerns of

⁴² *Informal Bargaining Process: An Analysis of the Sec's Regulation of the New York Stock Exchange*, 80 YALE L.J. 811, 811 (1971).

⁴³ *What We Do*, *supra* note 32.

⁴⁴ *Id.*

⁴⁵ 15 U.S.C. § 78aa(a) (2012).

⁴⁶ *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 370 (1996).

⁴⁷ *Key Points About Regulation SHO*, U.S. SEC. & EXCH. COMM’N (Apr. 8, 2015), <https://www.sec.gov/investor/pubs/regsho.htm>.

⁴⁸ *Manning v. Merrill Lynch Pierce Fenner & Smith Inc.*, 772 F.3d 158, 161 (3d Cir. 2014).

potentially abusive short selling and failures to deliver.⁴⁹ In light of the continued financial scandals of the mid-2000s and the market collapse of 2008, Regulation SHO has been amended several times since 2005 in various attempts to increase investor confidence, promote market stability, and remove certain exceptions previously entwined in the rules.⁵⁰ Among these, “Regulation SHO imposes ‘locate’ and ‘close out’ requirements on broker-dealers in an attempt to minimize fails to deliver.”⁵¹

Relevant to *Manning* is Rule 203(b)(1) and (2) of Regulation SHO, also called the regulation’s “locate requirement,”⁵² as referenced above.⁵³ This locate requirement requires that a broker have a reasonable belief that the equity to be shorted can be borrowed and delivered to a short seller on a specific date before short selling can occur.⁵⁴ Specifically, “before executing a short sale order, a broker-dealer must have ‘reasonable grounds’ to believe that the security can be borrowed and delivered within three days.”⁵⁵ If the broker-dealer’s failure to deliver occurs and persists for thirteen consecutive days, broker-dealers may be required, under the close-out requirement, “to purchase and deliver securities ‘of like kind and quality’” to the other party.⁵⁶

⁴⁹ *Key Points About Regulation SHO*, *supra* note 47.

⁵⁰ *Id.*

⁵¹ *Manning*, 772 F.3d at 161.

⁵² *Id.*

⁵³ *What We Do*, *supra* note 32, at 9.

⁵⁴ “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. This ‘locate’ must be made and documented prior to effecting the short sale.” *Key Points About Regulation SHO*, *supra* note 47.

⁵⁵ *Manning v. Merrill Lynch Pierce Fenner & Smith Inc.*, 772 F.3d 158, 161 (3d Cir. 2014); *see also* 17 C.F.R. § 242.203(b) (2017).

⁵⁶ *Manning*, 772 F.3d at 161; *see also* 17 C.F.R. § 242.203(b)(3).

C. *The State of Section 27 When Manning was Decided*

When *Manning* entered the Supreme Court, the circuit courts were split over what section 27 granted exclusive jurisdiction over.⁵⁷ At this point, circuit courts had adopted two interpretations of section 27: (1) narrow and (2) broad.⁵⁸ The Second and Third Circuits construed section 27 more narrowly.⁵⁹ Both circuits held that the exclusive jurisdiction provision in section 27 does not provide for an independent basis of jurisdiction.⁶⁰ The Third Circuit heard the precursor case of *Manning*,⁶¹ and the Second Circuit oversaw *Barbara v. New York Stock Exchange, Inc.*,⁶² where both courts ruled in favor of plaintiffs.⁶³

The Ninth and Fifth Circuits construed section 27 more broadly. They held that it creates a more expansive basis for federal question jurisdiction, and it is therefore immaterial whether those

⁵⁷ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016).

⁵⁸ *Id.* at 1579 n.1.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1568.

⁶¹ *See Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 772 F.3d 158, 167–68 (3d Cir. 2014). Where the court held, “[w]e agree with the Second Circuit’s holding in *Barbara* that [section] 27 is coextensive with [section] 1331 for purposes of establishing subject-matter jurisdiction—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.” *Id.*

⁶² *See* 99 F.3d 49 (2d Cir. 1996). “The mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.” *Id.* at 54 (quoting *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986)) (internal punctuation omitted). “Rather, in determining federal question jurisdiction, courts must make principled, pragmatic distinctions, engaging in a selective process which picks the substantial causes out of the web and lays the other ones aside.” *Id.* (citing *Merrell Dow Pharmaceuticals*, 478 U.S. at 813–14). In *Barbara*, plaintiff’s state court complaint referenced factual allegations that the New York Stock Exchange violated its internal rules. *Id.* at 49. Additionally, the court was willing to assume that [plaintiff’s] right to recover under New York law [was] contingent on his proving such violation.” *Id.* at 54. Nonetheless, the court there still held that plaintiff’s claims “could not have been brought in federal court pursuant to section 1331.” *Id.*

⁶³ *Manning v. Merrill Lynch Pierce Fenner & Smith Inc.*, 772 F.3d 158, 158 (3d Cir. 2014); *Barbara*, 99 F.3d at 49.

claims raised under section 27 arose under section 1331.⁶⁴ The Ninth Circuit heard *Sparta Surgical Corp. v. Nat'l Ass'n of Secs. Dealers, Inc.*,⁶⁵ and the Fifth Circuit oversaw the decision of *Hawkins v. Nat'l Ass'n of Secs. Dealers Inc.*⁶⁶ Therefore, the Supreme Court in *Manning* sought to settle the state of the section 27 quandary.⁶⁷

⁶⁴ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1565 (2016). *But see Manning*, 772 F.3d 158. “[W]e disagree with the line of Ninth Circuit cases which have held that there can be jurisdiction under § 27 . . . even when there is not under § 1331 [T]he Ninth Circuit . . . did not consider the Supreme Court’s holding in *Pan American* [But] this Court has faithfully applied *Pan American* to other exclusive jurisdiction provisions.” 772 F.3d 158, 166–67.

⁶⁵ 159 F.3d 1209 (9th Cir. 1998). Similar to *Manning*’s case, “[h]ere, although *Sparta*’s theories [were] posited as state law claims, they [were] founded on the defendants’ conduct in suspending trading and de-listing the offering, the propriety of which must be exclusively determined by federal law.” *Id.* at 1212. “Thus, even though Spar[t]’s remaining claims were ‘carefully articulated in terms of state law, the district court had subject matter jurisdiction.’” *Id.* (quoting *Hawkins v. Nat’l Ass’n of Sec. Dealers Inc.*, 149 F.3d 330, 332 (5th Cir. 1998)). Interestingly, the court in *Sparta* was given the opportunity to analyze an “amended complaint [plaintiffs] filed after removal in which most references to exchange rule violations were deleted” and decide whether this bore upon on the outcome of the case’s jurisdiction. *Id.* at 1213. Nonetheless, the court held that such action was “no moment to us” because “jurisdiction must be analyzed on the basis of the pleadings filed at the time of removal without reference to subsequent amendments.” *Id.*

⁶⁶ 149 F.3d 330 (5th Cir. 1998). “Congress has granted broad subject-matter jurisdiction in the arena of securities regulation.” *Id.* at 331. The court in *Hawkins* held that “all of Hawkins’s claims against the NASD, though carefully articulated in terms of state law, are actions at law seeking to enforce liabilities or duties created by federal securities laws which are governed exclusively by federal courts pursuant to 15 U.S.C. § 78aa.” *Id.* at 332. Therefore, the court held that section 27 governs the jurisdiction of such claims as well. *Id.* “Because there is subject-matter jurisdiction over Hawkins’s claims against the NASD, the district court did not err by denying the motion to remand.” *Id.*

⁶⁷ *Manning*, 136 S. Ct. at 1565; *see also* Circuit Review Staff, *Current Circuit Splits*, 11 SETON HALL CIRCUIT REV. 381 (2015).

III. THE FACTS OF *MERRILL LYNCH, PIERCE, FENNER & SMITH INC. v. MANNING*

Greg Manning (Manning) was a shareholder⁶⁸ of Escala Group Inc. (Escala), a company traded on NASDAQ, holding more than two million shares of Escala's stock.⁶⁹ Manning lost a majority of this investment in Escala when, between 2006 and 2007, the company's share price nosedived.⁷⁰ As a result, Manning, along with six other Escala shareholders, brought suit against Merrill Lynch, Pierce, Fenner & Smith Inc. and several other financial institutions (collectively, Merrill Lynch) for "devaluing Escala during that period through 'naked short sales' of its stock."⁷¹ The SEC regulates short sale securities activity at the federal level.⁷² Specifically, the SEC's

⁶⁸ Greg Manning was also the founder and former Chief Executive Officer (CEO) of Escala Group Inc. *Litigation Release No. 20965 SEC Charges Escala Group, Inc., its Former CEO and CFO with Disclosure and Accounting Fraud Concerning Related Party Transactions with Parent Company Afinsa*, U.S. SEC. & EXCH. COMM'N (April 13, 2015), <https://www.sec.gov/litigation/litreleases/2009/lr20965.htm>. See also *SEC v. Escala Grp, Inc.*, No. 09CIV2646DLC, 2009 WL 2365548 (S.D.N.Y. July 31, 2009).

⁶⁹ *Manning*, 136 S. Ct. at 1565.

⁷⁰ *Id.*

⁷¹ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1566 (2016). "A typical short sale of a security is one made by a borrower, rather than an owner, of stock[, whereby] a person borrows stock from a broker, sells it to a buyer on the open market, and later purchases the same number of shares to return to the broker." *Id.* "Investors who sell stock short typically believe the price of the stock will fall and hope to buy the stock at the lower price and make a profit." *Short Sales*, U.S. SEC. & EXCH. COMM'N (April 13, 2015), <https://www.sec.gov/answers/shortsale.htm>. "In a 'naked' short sale, by contrast, the seller has not borrowed (or otherwise obtained) the stock he puts on the market, and so never delivers the promised shares to the buyer." *Manning*, 136 S. Ct. at 1566. Such "abusive" naked short selling can be used as a manipulative tool "to drive down a company's stock price," as such failures to deliver may "undermine the confidence of investors," and result in "unwarranted reputational damage." *Id.*; *Naked Short Selling Antifraud Rule*, 73 Fed. Reg. 61666-01 (Oct. 14, 2008) (to be codified at 17 C.F.R. pt. 240).

⁷² *Manning*, 136 S. Ct. at 1565. Most short sales are legal, however, abusive short sale practices are illegal. *Key Points About Regulation SHO*, *supra* note 47. "For example, it is prohibited for any person to engage in a series of transactions in

Regulation SHO, issued under the Exchange Act, outlines the rules and regulations governing the short sale of securities.⁷³

In his complaint, Manning alleged that “Merrill Lynch facilitated and engaged in naked short sales of Escala stock” by “participat[ing] in ‘short sales at times when it neither possessed, nor had any intention of obtaining, sufficient stock’ to deliver to buyers.”⁷⁴ Manning charged that such conduct violated provisions of the New Jersey Racketeer Influenced and Corrupt Organizations (RICO) Act, New Jersey Uniform Securities Law, and the New Jersey common laws of negligence, unjust enrichment, and interference with contractual relations.⁷⁵ Specifically, Manning alleged that Merrill Lynch violated section 2C:41-1 of New Jersey’s RICO Act and made it unlawful for any individual to receive income derived from racketeering activity,⁷⁶ which here referred to fraud in the offering, sale, and purchase of securities.⁷⁷ Manning predicated the RICO Act violation on violations of sections 49:3-49, 2C:20-2, and 2C:20-4 of the New Jersey Uniform Securities Law, which cover fraudulent securities activity.⁷⁸ These sections make it unlawful for an individual to engage in theft by taking or by deception.⁷⁹ Therefore,

order . . . to depress the price of a security Thus, short sales effected to manipulate the price of a stock are prohibited.” *Id.*

⁷³ *Manning*, 136 S. Ct. at 1565. Regulation SHO was adopted in 2004 “to address problems associated with persistent fails to deliver securities and potentially abusive ‘naked’ short selling.” *Naked Short Selling Antifraud Rule*, 73 FR 61666-01 at 61667.

⁷⁴ *Manning*, 136 S. Ct. at 1566.

⁷⁵ *Id.*

⁷⁶ *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-4466, 2013 WL 1164838, at *3 (D.N.J. March 20, 2013); N.J. Stat. Ann. § 2C:41-1, 2(a) (West 2016).

⁷⁷ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1565 (2016); N.J. Stat. Ann. § 2C:41-1(p) (West 2016).

⁷⁸ *Manning*, 2013 WL 1164838 at *3. *See generally* N.J. Stat. Ann. §§ 49:3-49, 2C:20-2, 2C:20-4 (West 2016). “‘Fraud’ . . . shall include . . . [t]he gaining of, or attempt to gain, directly or indirectly, through a trade in any security, a commission, fee or gross profit so large and exorbitant as to be unconscionable, unreasonable or in violation of any law . . . of the Securities and Exchange Commission.” N.J. Stat. Ann. § 49:3-49(e), (e)(3).

⁷⁹ *See* N.J. Stat. Ann. §§ 49:3-49, 2C:20-2, 2C:20-4 (West 2016). “A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely: a. Creates or reinforces a false impression, including false

Manning argued that Merrill Lynch violated the state law when it engaged in racketeering activity through its alleged fraudulent offerings and sales of Escala's stock and received income directly from such activity.⁸⁰

The complaint, however, did not set forth any claims under federal securities laws or rules,⁸¹ and Manning therefore filed it exclusively in New Jersey state court in May 2012.⁸² Although Manning's complaint did not bring any claims under federal securities laws, it did refer explicitly to Regulation SHO's locate requirement⁸³ when it outlined the state law violations in that it "describe[ed] the purposes of that rule[,] catalogu[ed] past accusations against Merrill Lynch for flouting its requirements[,] . . . [and] suggest[ed] that Merrill Lynch had again violated that regulation⁸⁴ in addition to infringing New Jersey law."⁸⁵ Among this was the fact that it appeared that Plaintiffs had used actual word-for-word language from Regulation SHO's written rule.⁸⁶ As the Third Circuit put it, "[t]here [was] no question that Plaintiffs assert[ed] in their Amended Complaint, both expressly and by implication, that

impressions as to law, value, intention or other state of mind" N.J. Stat. Ann. § 2C:20-4. "Theft constitutes a crime of the second degree if: (f) It is in breach of an obligation by a person in his capacity as a fiduciary and the amount involved is \$50,000 or more." N.J. Stat. Ann. § 2C:20-2(f).

⁸⁰ *Manning*, 136 S. Ct. at 1565.

⁸¹ *Id.*

⁸² *Id.*; see also *Manning*, 2013 WL 1164838 at *1.

⁸³ Manning alleged that Merrill Lynch violated Regulation SHO's locate requirement which, among certain exceptions, "compels short sellers to have reasonable grounds to believe that a stock can be borrowed before selling it short." *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-4466, 2013 WL 1164838, at *3 (D.N.J. March 20, 2013).

⁸⁴ "Although Plaintiffs' causes of action are all brought under state law, the Amended Complaint repeatedly mentions the requirements of Regulation SHO, its background, and enforcement actions taken against some Defendants regarding Regulation SHO. It also . . . couches its allegations in language that appears borrowed from Regulation SHO." *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 772 F.3d 158, 161 (3d Cir. 2014).

⁸⁵ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1566–67 (2016).

⁸⁶ *Manning*, 772 F.3d at 161. Further, plaintiffs plead that "Defendants violated the trading rules and regulations requiring that they actually deliver shares . . . to settle short sale transactions." *Id.*

Defendants repeatedly violated federal law. Moreover, there [was] no New Jersey analogue to Regulation SHO.”⁸⁷ Accordingly, Merrill Lynch removed the case to a Federal District Court in July 2012⁸⁸, asserting federal jurisdiction on two grounds: (1) Federal question jurisdiction under 28 U.S.C. § 1331 and (2) Section 27 of the Exchange Act via Regulation SHO.⁸⁹

However, preferring a state court venue, Manning moved to remand the case to state court in August 2012.⁹⁰ He argued that neither one the federal statutes Merrill Lynch proposed gave the federal court authority to adjudicate a collection of state-law claims, namely, because they were a collection of state-law claims.⁹¹ Specifically, Manning referenced *Fairfax Financial Holdings Ltd. V. S.A.C. Capital Management, LLC*, in which plaintiffs alleged securities violations under the same New Jersey RICO Act laws as Manning, after defendants, a financial securities firm, allegedly distributed corrupt and materially misleading equity research about plaintiff’s business status.⁹² Accordingly, plaintiffs in *Fairfax* filed their complaint in New Jersey state court and just as in *Manning*, defendants removed the case to federal court under the same section 27 arguments as the defendants in *Manning*, and plaintiffs sought to remand it back to state court.⁹³ The court in *Fairfax* granted plaintiff’s motion to remand the case to state court and held that such

⁸⁷ *Id.*

⁸⁸ *Manning*, 2013 WL 1164838 at *1.

⁸⁹ *Manning*, 136 S. Ct. at 1567. “The district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder.” 15 U.S.C. § 78aa(a).

⁹⁰ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567 (2016); *see also* *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-4466, 2013 WL 1164838, at *1 (D.N.J. March 20, 2013). It is worth noting that on December 31, 2012, the Magistrate Judge issued a Report and Recommendation which suggested that Manning’s motion to remand be granted because Plaintiffs “may succeed on their New Jersey RICO claims . . . and state common law claims . . . without establishing liability under federal law, the Amended Complaint, on its face, does not raise necessarily a substantial issue of federal law.” *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 772 F.3d 158, 162 (3d Cir. 2014).

⁹¹ *Manning*, 136 S. Ct. at 1565.

⁹² No. 06-CV-4197, 2007 WL 1456204, at *1 (D.N.J. May 15, 2007).

⁹³ *Fairfax*, 2007 WL 1456204 at *1.

was appropriate because provisions of the Exchange Act were the basis of plaintiff's causes of action but merely supported them.⁹⁴

However, the District Court did not see eye to eye with Manning's *Fairfax* arguments and held that his case was distinguishable from *Fairfax*.⁹⁵ The court held that because Manning's complaint made explicit reference to Regulation SHO and its causes of action were predicated upon violations of its locate requirement, Manning's complaint fell under the purview of section 27 and therefore under the domain of its exclusive jurisdiction rules.⁹⁶ The District Court also held that giving federal courts jurisdiction over Manning's case "would not disturb the congressionally approved balance of federal and state judicial responsibilities" because solving Manning's case only involved determining whether the "complained of conduct [was] consistent with [Merrill Lynch's] obligations under the Exchange Act and regulations promulgated thereunder."⁹⁷

The court further held that Manning's state-law claims simply "arose under" violations of Regulation SHO and that therefore, the crux of the case was still subject to section 27's federal jurisdiction.⁹⁸ The court distinguished this case from *Fairfax* in that in *Fairfax*, plaintiff's state-law claims of harassment of employees and defamation were drawn in conjunction with alleged violations of lawful short selling and "dissemination of corrupt and materially misleading equity research regarding the plaintiff's business

⁹⁴ *Id.* "Section 27 does not grant . . . exclusive jurisdiction because Plaintiffs' action is not an action brought to enforce the securities laws. Rather, Plaintiffs' allegations that Defendants violated provisions of the Exchange Act merely support Plaintiffs' state causes of action." *Id.*

⁹⁵ *Id.*

⁹⁶ *Manning*, 2013 WL 1164838 at *4. "[T]he *Fairfax* decision is distinguishable here because, unlike *Fairfax*, this case is premised upon enforcement of the federal Exchange Act and corresponding rules and regulations." *Id.*

⁹⁷ *Manning*, 2013 WL 1164838 at *6.

⁹⁸ *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-4466, 2013 WL 1164838, at *6 (D.N.J. March 20, 2013). "Indeed, Plaintiffs do not point to a violation of New Jersey's securities law. In the case at bar, the essence of the Amended Complaint is that violation of Regulation SHO and other federal regulations gave rise to a number of state claims." *Id.*

condition.”⁹⁹ In other words, the court held that Manning’s state-law claims were nominal in comparison to the bigger picture that was the violations of the federal securities laws under the Exchange Act and Regulation SHO.¹⁰⁰ Accordingly, the District Court denied Manning’s motion to remand.¹⁰¹

Still seeking to have his case heard in state court, Manning appealed the District Court’s decision shortly afterwards.¹⁰² His petition to appeal was granted in August 2013.¹⁰³ The Third Circuit ultimately reversed the District Court’s holding and remanded Manning’s case to state court.¹⁰⁴ The Third Circuit first rejected Merrill Lynch’s § 1331 federal jurisdiction argument because “all [of] Manning’s claims were ‘brought under state law’ and none ‘necessarily raised’ a federal issue.”¹⁰⁵

Relying on the Supreme Court’s construction of another nearly identical jurisdiction provision,¹⁰⁶ the Third Circuit also rejected Merrill Lynch’s section 27 argument because it concluded that

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* “The case at bar is premised upon and its resolution depends on the alleged violation of a regulation promulgated under the [Exchange] Act” *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 12-4466, 2013 WL 1164838, at *4 (D.N.J. Mar. 20, 2013).

¹⁰² *Manning v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 772 F.3d 158, 162 (3d Cir. 2014).

¹⁰³ *Id.* The Third Circuit noted that it took on Manning’s case because of the “substantial ground for difference [of opinion] here, as evinced by the different outcome reached by this Court and [the] Magistrate Judge . . . in this case” *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Manning v. Merrill Lynch Pierce Fenner & Smith Inc.*, 136 S. Ct. 1562, 1568 (2016).

¹⁰⁶ *See Pan Am. Petroleum Corp. v. Superior Court of Del. In & For New Castle Cty.*, 366 U.S. 656, 662-64. The *Pan American* court decided whether a state court had jurisdiction over a private contract suit brought in state court between two natural gas companies. *Id.* at 657-58. The dispute regarded natural gas, which is regulated and governed by the Natural Gas Act, which provides that “[t]he District Courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter . . . and of all suits in equity and actions at law brought to enforce any liability or duty created by . . . this chapter” *Id.*; 15 U.S.C. § 717u (2012). This jurisdictional language is nearly identical to that of the jurisdictional language of section 27 of the Exchange Act. *Compare* 15 U.S.C. § 717u (2012), *with* 15 U.S.C. § 78aa(a) (2012).

section 27 “covers only those cases involving the Exchange Act that would satisfy the ‘arising under’ test of the federal question statute.”¹⁰⁷ The Third Circuit held that “[b]ecause the District Court lacked jurisdiction of Manning's suit under § 1331, so too it was not the exclusive forum under [section] 27.”¹⁰⁸

After the Third Circuit’s reversal of the District Court’s decision, Merrill Lynch petitioned for certiorari to the Supreme Court in 2015.¹⁰⁹ Oral arguments were heard on December 1, 2015 and Merrill Lynch’s petition was ultimately granted in May 2016.¹¹⁰ The sole issue that was to be determined by the Supreme Court was whether section 27 of the Exchange Act committed Manning’s case to federal court.¹¹¹

IV. ANALYSIS OF *MANNING*

A. Justice Kagan’s Majority Opinion

Justice Kagan began her opinion by criticizing both Manning and Merrill Lynch’s interpretations of section 27’s jurisdictional language.¹¹² Merrill Lynch argued that the plain language of section 27 required “an expansive understanding of its scope” and, therefore, encompassed complaints that either explicitly or implicitly asserted that a defendant breached an Exchange Act duty.¹¹³ In that case, Merrill Lynch argued that such a suit was ‘brought to enforce’ the federal regulation it references and thus, a federal court would have exclusive jurisdiction over it.¹¹⁴ Such a broad reading of section 27’s language would encompass complaints bearing only state law claims and therefore those complaints that seek relief solely under state

¹⁰⁷ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567 (2016); *see also Pan Am.*, 366 U.S. at 664 (“There is a clear distinction between a case and a question arising under the [federal] laws.”).

¹⁰⁸ *Manning*, 136 S. Ct. at 1567.

¹⁰⁹ *Id.* at 1565.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016).

¹¹⁴ *Id.*

law.¹¹⁵ Clearly then, this broad interpretation would encompass Manning’s complaint.¹¹⁶ Justice Kagan, however, defeated Merrill Lynch’s broad interpretation of section 27 by bringing the reader’s attention to the definitions of ‘brought,’ ‘to,’ and ‘enforce’ as used in section 27.¹¹⁷ Referencing Black’s Law Dictionary, ‘brought’ means “commenced,” ‘to’ is a word “expressing purpose or consequence,” and ‘enforce’ means to “give force or effect to.”¹¹⁸ Therefore, in the context of section 27, “brought to enforce” means that federal jurisdiction is conferred when the purpose of a complaint is to give effect to an Exchange Act requirement.¹¹⁹ This is in contrast to a complaint that simply mentions a duty established by the Exchange Act but whose purpose is not to give effect to that duty.¹²⁰

To put this analysis into context and further highlight the flaws of Merrill Lynch’s expansive scope, Justice Kagan asked the reader to consider an example.¹²¹ Imagine a “simple state-law action for breach of contract” in which the plaintiff also alleged that the defendant’s conduct violated the Exchange Act.¹²² If Merrill Lynch’s view were adopted, federal courts would have exclusive jurisdiction over this hypothetical suit.¹²³ However, the flaw, Justice Kagan asserted, was that the hypothetical suit was brought to enforce state contract law, not the Exchange Act.¹²⁴ This is because the hypothetical plaintiff would be able to get the entirety of the relief he seeks by showing simply the breach of a contract, without proving

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* “The district courts 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) (emphasis added).

¹¹⁸ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016).

¹¹⁹ *Id.*

¹²⁰ “[A] natural reading of [section] 27’s text does not extend so far.” *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1569.

¹²⁴ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569 (2016).

any violation of federal securities law.¹²⁵ The logic here is clear if one envisions a situation in which Justice Kagan's hypothetical and its parties went to trial. At trial, the plaintiff would be able to prevail on his or her breach of contract claim, and thereby receive the state law relief he or she seeks, without ever having to mention the alleged Exchange Act violation, let alone prevail on that allegation.

Justice Kagan's state law breach of contract claim analogy emphasizes the problems an expansive interpretation poses for section 27.¹²⁶ In her example, the unwary individual who has been harmed by a breach of contract, files a complaint in state court seeking relief under the state's contract laws, and who mentions or even references a violation of the Exchange Act in the complaint, would be forced to litigate his or her claim in federal court if it was removed by the other party from state court. Such an interpretation begins to infringe on both the rights of parties to sensibly choose and the reasonable expectations of where their desired locations of litigation.¹²⁷

On the same page, Justice Kagan then considered Manning's far more restrictive interpretation as "one going beyond what he needs to prevail."¹²⁸ Manning argued that federal courts have exclusive jurisdiction only over those suits in which the claims asserted are created by the Exchange Act.¹²⁹ That is, only if a right of action created by the Exchange Act is asserted in the complaint.¹³⁰ Only then, Manning argued, can it be properly said that a suit is 'brought to enforce' duties and liabilities of the Exchange Act.¹³¹ However, Justice Kagan did not see eye to eye with Manning either on his interpretation.¹³² Instead, she argued that a jurisdictional

¹²⁵ *Id.* "The suit, that is, can achieve all it is supposed to even if issues involving the Exchange Act never come up." *Id.*

¹²⁶ *Id.* at 168.

¹²⁷ *Id.*

¹²⁸ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569 (2016). It is worth noting that although Justice Kagan criticized both Manning and Merrill Lynch's arguments, she stated, "Manning's view of the text's requirements [was] better than Merrill Lynch's" *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

interpretation based on which laws create the cause of action¹³³ “veer[ed] too far in the opposite direction.”¹³⁴ Under Manning’s view, state courts have jurisdiction over a complaint that asserts only state-created claims, even if the success of those claims rely on proving that an Exchange Act duty was breached by the defendant.¹³⁵ However, as highlighted by Justice Kagan’s example, this logic is necessarily unsound.¹³⁶

For example, take Justice Kagan’s second hypothetical and envision a situation in which a plaintiff files a complaint in state court that asserts only state-created claims but such claims in dispute make illegal any violation of the Exchange Act.¹³⁷ There, it would be necessary to prove a violation of the Exchange Act in order to prove a violation of the state law, even though the filing party seeks state-created relief.¹³⁸ In this example, logic compels that such a suit necessarily falls within the scope of section 27 because it is the duty that the federal courts have jurisdiction over judgments affect and ruling on federal laws such as the Exchange Act.¹³⁹ Even without using Black’s Law Dictionary, such a reading does not fall within the meaning of ‘brought to enforce’ as the phrase is used in section 27.¹⁴⁰

Justice Kagan’s state-created claims analogy emphasizes the problems that a restrictive interpretation poses for section 27 as well.¹⁴¹ In that scenario, an informed and crafty individual could allege harm under a state-created claim as a guise for harm that was actually suffered under the Exchange Act.¹⁴² In doing so, the individual would have deprived the federal courts of a suit, which was rightfully theirs to handle.¹⁴³ As will be discussed further below,

¹³³ *Id.* (citing *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)).

¹³⁴ *Id.*

¹³⁵ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569 (2016).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See* 15 U.S.C. § 78aa(a).

¹⁴¹ *Manning*, 136 S. Ct. at 1568.

¹⁴² *Id.*

¹⁴³ *Id.*

such a result would interfere with the balance between the jurisdiction of the federal and state courts. Therefore, Justice Kagan held that Manning's view could not stand.¹⁴⁴

At the time the Court wrote the *Manning* opinion, there were nine other federal jurisdictional provisions with wording nearly identical to that of section 27.¹⁴⁵ Accordingly, Justice Kagan then dove into and explained the Court's existing jurisdictional test for classes of suits brought to enforce duties "arising under" federal law.¹⁴⁶ This "arising under" standard, as set forth in the context of § 1331 is a test that courts apply to determine the validity of jurisdiction.¹⁴⁷ In doing so, she explained that the Court has found such an "arising under" threshold satisfied in either of two circumstances: (1) "[W]hen federal law creates the cause of action asserted"¹⁴⁸ and (2) When a state-law claim "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state power."¹⁴⁹ The first circumstance represents the restrictive view that Manning argued.¹⁵⁰ The second circumstance represents a small and special category of cases where 'arising under' jurisdiction

¹⁴⁴ *Manning*, 136 S. Ct. at 1568. The suit, "even though asserting a state-created claim, is also 'brought to enforce' a duty created by the Exchange Act." *Id.* at 1569.

¹⁴⁵ *Id.* at 1568; see Securities Act of 1933, 15 U.S.C. § 77v(a); Federal Power Act of 1935, 16 U.S.C. § 825p; Connally Hot Oil Act of 1935, 15 U.S.C. § 715i(c); Natural Gas Act of 1938, 15 U.S.C. § 717u; Trust Indenture Act of 1939, 15 U.S.C. § 77vvv(b); Investment Company Act of 1940, 15 U.S.C. § 80a-43; Investment Advisers Act of 1940, 15 U.S.C. § 80b-14(a); International Wheat Agreement Act of 1949, 7 U.S.C. § 1642(e); Interstate Land Sales Full Disclosure Act of 1968, 15 U.S.C. § 1719.

¹⁴⁶ *Manning*, 136 S. Ct. at 1569. As noted above, § 1331 "provides federal jurisdiction of all civil actions 'arising under' federal law." *Id.* This was the same test the Third Circuit utilized in coming to its holding. *Id.* at 1570.

¹⁴⁷ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569 (2016).

¹⁴⁸ *Id.* This was the view that Manning's interpretation of section 27 highlighted. *Id.*

¹⁴⁹ *Id.* at 1570. (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)) (internal quotation marks omitted).

¹⁵⁰ *Id.*

can still lie even where state law is the origins of the claim.¹⁵¹ Thus, Justice Kagan stated that the Court agreed with the Third Circuit in that “[section] 27’s jurisdictional test matches the one we have formulated for § 1331 If (but only if) such a case meets the ‘arising under’ standard, [section] 27 commands that it go to federal court.”¹⁵²

Extrapolating further on her explanation of the Court’s jurisdictional test, Justice Kagan next relied on the Court’s rationale in *Pan American*¹⁵³ and *Matsushita Electric Industrial Co. v. Epstein*.¹⁵⁴ Also addressing section 27, *Matsushita* involved a suit similar to Manning’s in that it was a state-law action, brought in state court, for breach of fiduciary duties brought against Matsushita Electric Industrial’s corporate directors.¹⁵⁵ Plaintiffs’ complaint sought relief only for breaches of the state-law duty, however, in supporting the claims, plaintiffs alleged that the directors’ conduct violated federal securities laws.¹⁵⁶ Thus, the Court addressed whether the state court could approve a class action settlement releasing, “in addition to the state claims actually brought, potential Exchange Act claims that [section] 27 would have committed to federal court.”¹⁵⁷ The *Matsushita* Court held that the state court could do so because section 27 conferred exclusive federal jurisdiction for suits arising under the Exchange Act.¹⁵⁸ The Court reasoned that the suit fell outside of section 27’s grant of exclusive jurisdiction because the “cause pleaded . . . remained a state common-law action.”¹⁵⁹

¹⁵¹ *Id.* (quoting *Gunn v. Minton* 133 S. Ct. 1059, 1064 (2013)) (internal quotation marks omitted).

¹⁵² *Manning*, 136 S. Ct. at 1570.

¹⁵³ *Id.*

¹⁵⁴ 516 U.S. 367 (1996).

¹⁵⁵ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016). Justice Kagan noted that the suit in dispute in *Matsushita* “closely resembled Manning’s in its mix of state and federal law” *Id.* at 1574.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1573.

¹⁵⁸ *Id.* Justice Kagan noted that the Court in *Matsushita* stated this reasoning “not once, not twice, but three times.” *Id.*

¹⁵⁹ *Id.* (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 382 (1996)) (internal quotation marks omitted). As the Court rejected the suit because

With the Court's majority opinion conclusion that section 27 covers only suits that arise under the Exchange Act, Justice Kagan argued the policy reasoning supporting the holding.¹⁶⁰ This took the form of "twin goals": (1) "respecting state courts" and (2) "providing administrable standards."¹⁶¹ Under the first goal, Justice Kagan argued that the Court's reading, "serves the goals we have consistently underscored in interpreting jurisdiction statutes" in that it "gives due deference to the important role of state courts in our federal system."¹⁶² Justice Kagan emphasized that by keeping state-law actions like Manning's in state court, the Court's "deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes" helps to "maintain the constitutional balance between state and federal judiciaries."¹⁶³

Justice Kagan makes a valid public policy argument here because it truly is in fact one of the characteristics that makes American court system different from other country's system. Such is evident in the checks and balances system integral to our political executive ladders. However, the fact that this checks and balances system extends not only to our political hierarchy but also to our court system highlights the importance of checks and balances to America. State courts are given exclusive jurisdiction by the legislature on certain matters and federal courts are likewise given exclusive jurisdiction over certain matters. And the reason for such a separation is built on the found of checks and balances. There are matters that were simply designed for state courts to interpret for various reasons, whether because of expertise or other reasons. Likewise, there are reasons for giving federal courts jurisdiction over specific legislature. Therefore, departing from such a separation

it "was not brought to enforce" any rights or obligations under the [Exchange] Act," Justice Kagan noted that the *Matsushita* Court "thus rejected the very position Merrill Lynch takes here" *Manning*, 136 S. Ct. at 1574.

¹⁶⁰ *Id.*

¹⁶¹ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1576 (2016).

¹⁶² *Id.* at 1573. "Out of respect for state courts, this Court has time and again declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires." *Id.*

¹⁶³ *Id.* (quoting *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 380 (1959)).

would be inconsistent with the views that the American court system values.

Further, Justice Kagan argued that the Court's reluctance to endorse broad interpretations actually grows stronger when confronted with a statute that mandates, rather than permits, federal jurisdictions.¹⁶⁴ This is because, although a grant of exclusive federal jurisdiction indicates a congressional intent for federal laws to have a construction of greater uniformity and expert application that is more effective, Justice Kagan argued that "'greater' and 'more' do not mean 'total.'"¹⁶⁵ And thus, in deciding the critical question of "how far such a grant extends," the Court "will not lightly read the statute to alter the usual constitutional balance"¹⁶⁶

Justice Kagan once again makes a valid argument that is cohesive with her argument of congressional intent as a whole.¹⁶⁷ It is simply disparate from the foundation on which America's political system was built so that no branch of government would have complete and total control over one area without having another branch of government being able to have a say. The same holds true for America's court system in that although Congress promulgated legislation, which clearly requires parties litigate certain issues in federal court, such legislation does establish federal court as the sole venue.¹⁶⁸ Although one might argue that such logic appears to be based on wanting flexibility of the courts, it may be better argued that the desired intent was to allow for changes and unanticipated situations, as has presented itself in Manning's case.¹⁶⁹

Standing firm on her position on congressional intent, Justice Kagan concluded that Congress likely considered that some complaints brought to state court would intermingle state and federal questions.¹⁷⁰ This contemplation can be seen with Congress's

¹⁶⁴ *Id.* Justice Kagan noted that this is particularly the case when "the construction offered would place in federal court actions bringing only claims created by state law" *Id.* at 1574–75.

¹⁶⁵ *Id.* at 1574 (citing *Matsushita*, 516 U.S. at 383).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1574 (2016).

passing of 15 U.S.C. § 78bb(a)(1) of the Exchange Act, which states, “nothing in this chapter shall affect the jurisdiction of the securities commission . . . of any State over any security or any person.”¹⁷¹ With such language, Justice Kagan argued, “Congress specifically affirmed the capacity of such courts to hear state-law securities actions.”¹⁷² She further elaborated that the statute’s presence within the Exchange Act necessarily means that Congress predicted that state-law issues would coincide, overlap, or intersect with those under the Exchange Act itself.¹⁷³ Therefore, Justice Kagan concluded that, it is far less troubling for a state court to hear a suit involving federal and state-law issues than to restrict such courts to only state-law issues.¹⁷⁴

Under the second goal of providing administrable standards, the Court’s reading produced a more straightforward, administrable, and thus adoptable standard than Merrill Lynch’s.¹⁷⁵ Justice Kagan explained that the Court’s holding in *Manning* would become the prevailing case law for courts to determine the jurisdiction of claims that encompass issues arising from federal statutes containing the language “brought to enforce.”¹⁷⁶ With this in the reader’s mind, she explained that “administrative simplicity” is a “major virtue”¹⁷⁷ in jurisdictional statutes because the “arising under” test¹⁷⁸ is familiar to courts and judges alike.¹⁷⁹ By contrast, no court had interpreted Merrill Lynch’s broad standard before and therefore its adoption would necessarily force “courts to toggle back and forth between it and the arising under standard.”¹⁸⁰ Justice Kagan argued that the

¹⁷¹ 15 U.S.C. § 78bb(a)(2) (2012).

¹⁷² *Manning*, 136 S. Ct. at 1574. “[F]or example, it is hardly surprising in a suit like this one, alleging short sales in violation of *state* securities law, that a plaintiff might say the defendant previously breached a *federal* prohibition of similar conduct.” *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1575.

¹⁷⁷ *Id.* at 1574 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1575. Such an “existing body of precedent gives guidance whenever borderline cases crop up.” *Id.*

¹⁸⁰ *Id.* (internal quotation marks omitted).

result from such an untested approach would disserve both parties and courts, as it would “undermine consistency and predictability in litigation.”¹⁸¹

As discussed below, consistency is an integral part of the American court system and thus makes Justice Kagan’s argument quite sound.¹⁸² Predictability and consistency are important public policy rationales, which are representative of congressional intent reflected in legislation.¹⁸³ One of the fundamental reasons for this is because consistency and predictability reduce the cost of administration, an integral part of legislative intent.¹⁸⁴ Additionally, these twin characteristics also reduce court congestion, which is a major concern in American courts.¹⁸⁵

Justice Kagan’s last reason for adopting the Court’s interpretation instead of Merrill Lynch’s broad, untested approach is taken up in her most cynical paragraph.¹⁸⁶ She states that Merrill Lynch’s rule is “simple for plaintiffs to avoid”¹⁸⁷ because a plaintiff desiring a state court venue will simply “purge his complaint of any references to federal securities law, so as to escape removal.”¹⁸⁸ This would do little to change how the plaintiff would present his case at trial but would, unfortunately, simply make the complaint less informative.¹⁸⁹ Neither of these scenarios does anyone a favor because a complaint devoid of any reference of federal securities laws (in order to guarantee the a plaintiff can bring his suit into state court) provides neither the judge nor opposing party with relevant benefits.¹⁹⁰ In fact, such a scenario may even result in increased administration costs that a judge would have to be on the lookout for such a

¹⁸¹ *Id.*

¹⁸² *See infra*, Part V.

¹⁸³ *Manning*, 136 S. Ct. at 1574.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 1575. “[O]r else, excruciating for courts to police.” *Id.*

¹⁸⁸ *Id.* at 1574.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

complaint in order to ascertain the plaintiff's true intentions and then be able to make a decision thereafter.¹⁹¹

In the alternative, Merrill Lynch argued that instead of facilitating uninformative complaints, judges should be allowed to “go behind the face of a complaint to determine whether it is the produce of ‘artful pleading.’”¹⁹² However, as Justice Kagan critiqued, the Court itself had no idea how any other court would be able to make a sure determination and that such a system runs counter to the Court's tradition that “[j]urisdictional tests are built for more than a single dispute.”¹⁹³ Justice Kagan makes a valid point here in countering Merrill Lynch's artful pleading argument.¹⁹⁴ One of the keys to Supreme Court rulings is consistency. Looking at the cases that make it to the Supreme Court, one will find that they are typically issues that have divided circuits and resulted in circuit splits. It seems almost counterintuitive then that the Supreme Court would make a ruling knowing that it will result in confusion and inconsistency among the lower courts. As Justice Kagan argues, how would lower courts know how to “go behind the face of a complaint” to identify whether it is the product of artful pleading by the parties?¹⁹⁵ It seems that the only correct answer is that the lower courts would not know how to spot artful pleading, and therefore they would haphazardly apply their own tests at their own discretion. At least for the sake of administrative costs, a view as restrictive as Manning's clearly cannot be the proper choice. Further, this may then take parties down the path of attempting to fraudulently manipulate complaints and legal documents.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* Merrill Lynch unsuccessfully tried to assure the Court that although just a determination would not arise in its case, it would arise in “the next third, forth, [and] fifth down the road.” *Id.* (internal quotation marks omitted). “That Merrill Lynch's threatens to become either a useless drafting rule or a tortuous inquiry into artful pleading is one more good reason to reject it.” *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1575 (2016).

B. Justice Thomas's Concurring Opinion

While all the Court's Justices agreed that Manning's suit should be remanded to state court, Justice Thomas and Justice Sotomayor did not agree with the majority's reason why.¹⁹⁶ Justice Thomas, with whom Justice Sotomayor joined, wrote that he would rest that conclusion on section 27 itself as opposed to the § 1331 "arising under" standard that the majority rested upon.¹⁹⁷ Justice Thomas focused on the plain language of section 27 and reasoned that because the statute does not use the phrase "arising under," the arising under test should be used as its standard of jurisdiction.¹⁹⁸ Justice Thomas makes a logical argument here.¹⁹⁹ In fact, it may be the case for many readers that as they have been reading through Justice Kagan's analysis section above,²⁰⁰ they were wondering why the Court was so focused on § 1331's language when the crux of both party's arguments was based on the language of section 27,²⁰¹ let alone the fact that the Court then applied the jurisdictional standard test under § 1331.²⁰² It would appear difficult to justify the Court's decision to place such an emphasis on its § 1331 standard. However, perhaps it is the test's long-standing reputation as being the go-to test for questions of jurisdiction that makes it appropriate here also, in the Court's eyes at least.²⁰³ Whatever the Court's reason may have been, it is what it ruled, and therefore although Justice Thomas articulates a sound argument, it is only the concurring argument.²⁰⁴

Further, he also noted that section 27's language does not provide a sound basis for adopting the arising-under standard.²⁰⁵ He

¹⁹⁶ *Id.* at 1575–76. "I agree that this suit belongs in state court, but I would rest that conclusion on the statute before us, § 27 of the Securities Exchange Act." *Id.*

¹⁹⁷ *Id.* at 1576–77.

¹⁹⁸ *Id.* "[The Exchange Act] statute does not use the phrase 'arising under' or provide a sound basis for adopting the arising-under standard." *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1576–77 (2016).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1577.

articulated that instead, section 27's "brought to enforce" language necessarily established a straightforward test whereby section 27 confers exclusive federal jurisdiction over suits if the "complaint alleges a claim that necessarily depends on a breach of a requirement created by the [Exchange] Act, [section] 27."²⁰⁶ Therefore, because Manning's complaint did not allege any such claims,²⁰⁷ the concurring Justices should have concluded that his complaint did not meet their straightforward section 27 test and remanded the case to state court.²⁰⁸ Once again, Justice Thomas's argument is perhaps what some readers were also thinking when reading Justice Kagan's majority opinion. That is, why not simply use the straight forward and plain language of section 27's text, which articulates that only those complaints, which have claims that were 'brought to enforce' provisions of the Exchange Act should be designated exclusive federal jurisdiction?²⁰⁹ Perhaps the majority did consider this plain language test, but with no precedent set before on this specific issue of section 27, they did not want to involve the Court in an inconsistent, as Merrill Lynch argued, test.²¹⁰

Justice Thomas's concurring opinion is broken into three sections, each of which criticize a particular reasoning of the majority: (1) statutory interpretation and structure, (2) interpretation

²⁰⁶ *Id.* at 1576. This represents Justice Thomas's reading of "brought to enforce" in that he focused on his conclusion that section 27 "provides federal jurisdiction where a suit is 'brought to enforce' Exchange Act requirements." *Id.* "Put differently, under [section] 27 a suit belongs in federal court when the complaint requires a court to enforce an Exchange Act duty or liability." *Id.*

²⁰⁷ *Id.* "[A]nd because no other statute confers federal jurisdiction." *Id.*

²⁰⁸ *Id.* "[A] suit belongs in state court when the complaint asserts purely state-law causes of action that do not require binding legal determinations or a judgment on the merits of an Exchange Act breach." *Id.* (quoting *Matsushita*, 516 U.S. at 382) (internal quotations marks and punctuation omitted). Such a suit is "not brought to enforce any rights or obligations under the [Exchange] Act, and thus does not fall within [section] 27's scope." *Id.* (quoting *Matsushita*, 516 U.S. at 381) (internal quotations marks omitted).

²⁰⁹ *Id.* "[Section 27's] language establishes a straightforward test: If a complaint alleges a claim that necessarily depends on a breach of a requirement created by the Act, section 27 confers exclusive federal jurisdiction over that suit. Because the complaint here does not allege such claims—and because no other statute confers federal jurisdiction—this suit should return to state court." *Id.*

²¹⁰ *Id.*

of *Pan American* and *Matsushita*, and (3) supporting goals.²¹¹ First, Justice Thomas argued that “[a] natural reading of [section] 27’s text preserves the dual role for federal and state courts that Congress contemplated, and it confirms that mere allegations of Exchange Act breaches do not alone deprive state courts of jurisdiction.”²¹² He further extrapolated that Congress’s logic for doing so is sound because federal courts are necessarily more familiar with the intricate laws of federal securities.²¹³ Therefore, he asserted that the exclusive territory of the federal courts to adjudicate Exchange Act claims is not usurped when state courts hear cases whose complaints do not resolve the merits of rights or liabilities of the Exchange Act,²¹⁴ but rather, simply plead only state-law claims.²¹⁵

V. CONCLUSION: *MANNING*’S IMPACT

Beyond the immediate effect the Supreme Court’s holding in *Manning* had on the direct parties involved in the case, its holding also has both legal and broader impacts. This part of the case note will discuss both of those potential holdings.

²¹¹ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1577, 80–81 (2016). “The Third Circuit was correct to remand this suit to state court. Respondents’ complaint does not seek ‘to enforce any liability or duty created by’ the Exchange Act or its regulations.” *Id.* at 1577.

²¹² *Id.* at 1576. Therefore, “[a] natural reading promotes the uniform interpretation of the federal securities laws that Congress sought to ensure when it gave federal courts ‘exclusive jurisdiction’ over federal securities-law suits.” *Id.* at 1577–78.

²¹³ *Id.* at 1578.

²¹⁴ See also Seth Taylor, *Asking the Right Federal Questions: Merrill Lynch v. Manning and the Exclusive Jurisdiction Provision of the Securities Exchange Act*, 11 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 303, 304 (2016). (“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”).

²¹⁵ *Manning*, 136 S. Ct. at 1577–78.

A. Legal Impact

First and foremost, the clear legal impact of the Court's holding in *Manning* is that it clarifies section 27's exclusive grant of jurisdiction, namely, that section 27 grants federal jurisdiction only over complaints that assert a violation of the Exchange Act.²¹⁶ In other words, complaints that have been 'brought to enforce' a duty created by the Exchange Act.²¹⁷ As explained above,²¹⁸ there are approximately nine other federal statutes with jurisdictional provisions nearly identical to the language of section 27's jurisdictional provision.²¹⁹ Therefore, the immediate legal impact of the *Manning* decision is the implication it has on these nine other statutes.²²⁰ In this way, the outcome of issues revolving around questions of jurisdiction for these statutes should be resolved in the same manner that *Manning's* section 27 issue was resolved.²²¹ Namely, that the governing court should apply § 1331's straight forward 'arising under' test to determine if federal courts have jurisdiction over the matter.²²²

What the above paragraph entails is clarification for parties filing suit under these federal statutes.²²³ Further, with clarification comes consistency in that because the Supreme Court has articulated its decision on the matter, other courts throughout the nation must follow suit. This will result in reduced costs of administration because, at least ideally, no other suits based on questions of federal jurisdiction under federal statutes with 'brought to enforce' language will end up in the limbo that *Manning* and *Merrill Lynch* found themselves in.²²⁴ Thus, resources will not have to be devoted and directed from the Supreme Court in order to litigate similar issues

²¹⁶ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1575 (2016).

²¹⁷ *Id.* at 1568.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1570 (2016).

²²³ *Id.*

²²⁴ *Id.*

presented in *Manning*. It is arguable that any party would be able to see the benefits that would also result from a reduction of the already clogged American court systems. In this way, other issues will be able to be litigated, as space within those courts will be freed up.²²⁵

Additionally, as some have argued, the Court's holding in *Manning* appears to preserve the established value of the American court systems to keep intact the "federal-state balance."²²⁶ This balance, which Congress has intended to create through legislation such as the Exchange Act, is an integral part of the American court systems.²²⁷ Therefore, it is important to emphasize that, despite some parties arguing the opposite, the Court's holding in *Manning* provides judges and scholars alike with clarity in an area that was otherwise murky at best.

B. Broader Impact

Beyond the direct effect the Court's decision in *Manning* has had on the parties involved in the suit, namely Manning and Merrill Lynch, and its impact on the legal community, it also will have a broader impact that effects more than just legal interpretation and case precedent. And this broader impact will come in the form of venue shopping and artful pleading. Although Justice Kagan struck down Merrill Lynch's argument that if the Court adopted a restrictive view of section 27's jurisdictional provision, plaintiffs would begin to artfully draft their complaints to ensure the venue of their choice, it may be argued that Merrill Lynch was correct.²²⁸ In light of the *Manning* decision, it is more than likely true that plaintiffs will be able to carefully craft their complaints to avoid federal jurisdiction if that is what they desire.²²⁹

²²⁵ *Id.*

²²⁶ Taylor, *supra* note 214, at 303.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Mark A. Kornfeld, *Trends and Recent Developments in Securities Class Actions and Regulatory Enforcement Proceedings*, Aspatore 2016 WL 2989432, at *1, 8 (2016). "[A] decision failing to find [federal] jurisdiction likely would increase the number of artfully pleaded state court claims as plaintiffs seek to avoid federal jurisdiction." *Id.*

However, although some would argue that such a result would be “contrary to the spirit of legislation designed to have high stakes securities claims,”²³⁰ it is my opinion that such a result is simply unavoidable but not a consequence. The truth of the matter is that plaintiffs and defendants alike have been crafting their complaints and other legal documents to ensure that their intentions will be fulfilled by the court. Therefore, it should perhaps be argued that an artful pleading argument should not be considered a valid defense for either party.²³¹ Regardless of the holding of any court decision it is arguable that the result will be so called artful pleading by whatever party can take advantage of such pleading. However, simply because it may be the case that a party can manipulate its complaint to achieve the desired result for itself and client, does not mean that doing so is wrong or immoral, so long as it is legal, especially when it is a small corporation that is simply trying to litigate its claims in state court.²³²

²³⁰ *Id.*

²³¹ *Id.*

²³² Taylor, *supra* note 214, at 304.