No. 18-459

In the Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action based on a negligent misstatement or omission made in connection with a tender offer.

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, who were defendants in the United States District Court for the Central District of California and appellees in the United States Court of Appeals for the Ninth Circuit, are Emulex Corporation; Bruce C. Edwards, Jeffrey W. Benck, Gregory S. Clark, Gary J. Daichendt, Paul F. Folino, Beatriz V. Infante, John A. Kelley, Rahul N. Merchant, Nersi Nazari, and Dean A. Yoost, individual members of Emulex's board of directors; Emerald Merger Sub, Inc.; and Avago Technologies Wireless (USA) Manufacturing Inc.

Respondents are Gary Varjabedian and Jerry Mutza. Although Varjabedian, who is listed as plaintiff-appellant in the caption for the decision below, filed the initial complaint, the district court appointed Mutza as lead plaintiff. Both Mutza and Varjabedian represent the same putative class of former Emulex shareholders. Pet. App. 1a n.1.

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OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 888 F.3d 399. The district court's order dismissing the complaint with prejudice (Pet. App. 27a-57a) is reported at 152 F. Supp. 3d 1226. The order of the court of appeals denying rehearing (Pet. App. 58a-59a) is unreported.

JURISDICTION

The court of appeals entered its opinion on April 20, 2018. Pet. App. 1a. On September 6, 2018, the court of appeals denied a timely petition for rehearing. *Id.* at 58a-59a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, section 1 of the Constitution vests "[a]ll legislative Powers" in Congress. U.S. Const. art 1, § 1.

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The [Securities and Exchange]

> Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

Other pertinent statutory and regulatory provisions are reprinted in an addendum hereto.

INTRODUCTION

This case tests the power of the courts to extend, and to create at all, inferred private rights of action to enforce federal law. As this Court recognized in *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 24-25 (1977), Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), "makes no provision whatever for a private cause of action, such as those explicitly provided in other sections of the [securities laws]." Nevertheless, following the permissive approach articulated in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), for discerning private rights of action, some lower courts have inferred from Section 14(e) a private cause of action for damages and other relief for persons alleging false statements or misleading omissions in connection with a tender offer.

Until recently, every federal court to have inferred such a private cause of action—including five courts of appeals beginning with *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.,* 480 F.2d 341, 360-62 (2d Cir.), *cert. denied,* 414 U.S. 910 (1973)—had held that plaintiffs are required to show that the defendant acted with scienter. The courts had been unanimous in refusing to infer a private remedy under Section 14(e) for mere negligence. In the decision below, however, the Ninth Circuit took the inferred private remedy under Section 14(e) to new heights. It held that the private cause of action it had previously inferred under Section 14(e) requires "only negligence, not scienter." Pet. App. 16a.

That decision was wrong, and should be reversed. Even if one starts from the premise that an inferred private right of action exists under Section 14(e), as the Ninth Circuit did below, there is no basis for *expanding* that cause of action to reach conduct that was taken without scienter. This Court has emphasized that all of the "[c]oncerns with the judicial *creation* of a private cause of action caution against its *expansion*," too. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (alteration in original) (emphasis added) (citation omitted). Extension of an inferred private remedy is only appropriate, therefore, where there is clear, affirmative evidence that Congress intended a broader scope of private liability than the previously recognized cause of action captures.

Here, however, the opposite is true. The text of Section 14(e) says nothing about negligence, even though other provisions of the securities laws demonstrate that Congress knew full well how to express a negligence standard when it wanted one. And that omission is unsurprising, since Section 14(e) was modeled on Rule 10b-5 (17 C.F.R. § 240.10b-5), which, as this Court has held, requires a showing of scienter. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976). Moreover, when Congress expressly authorized private negligence actions under the securities laws, it set out robust procedural protections to guard against their abuse. Section 14(e) has none of those protections. Allowing private negligence actions under Section 14(e) also would circumvent the express cause of action in Section 18 of the Securities Exchange Act of 1934, which applies to alleged misstatements exactly like the one at issue here—but requires more than negligence.

For these reasons and other reasons discussed below, the Ninth Circuit was wrong to *extend* the private cause of action it had previously inferred under Section 14(e) to mere negligence. But the bigger problem is that there is no basis for inferring any private right of action under Section 14(e) at all. As this Court has admonished, "[r]aising up causes of action where statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citation omitted). Nothing in Section 14(e), or in its surrounding provisions, evinces any intent to create a private right of action. Instead, all signs point to the opposite conclusion. Ultimately, therefore, the reason that the Ninth Circuit was wrong to hold that private claims for negligence are actionable under Section 14(e) is that Congress never intended a private remedy under Section 14(e) at all.

In any event, whether viewed from the perspective of extending or creating an inferred private right of action, the Ninth Circuit's decision cannot stand.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY SCHEME

a. In the wake of the 1929 stock market crash that caused the Great Depression, Congress passed two major laws designed to protect the securities markets. The first, the Securities Act of 1933 (1933 Act), regulates disclosures made in connection with the initial distribution and purchase of securities. The second, the Exchange Act of 1934 (1934 Act), regulates subsequent transactions involving securities. *See Ernst & Ernst,* 425 U.S. at 194-95.

The 1933 and 1934 Acts set out numerous requirements for individuals and entities that issue or subsequently trade securities. To supplement these statutory requirements and restrictions, Congress also conferred extensive authority on the Securities and Exchange Commission (SEC) to regulate the securities markets. Pursuant to that authority, the Commission has promulgated regulations governing a host of acts and practices involving securities. The best known of these regulations is Rule 10b-5, which the SEC adopted in 1942 pursuant to Section 10(b) of the 1934 Act.

Rule 10b-5 makes it unlawful, "in connection with the purchase or sale of any security,"

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person.

17 C.F.R. § 240.10b-5.

Congress has also supplemented the securities laws by adding new provisions or changing old ones when such changes became necessary. In 1968, Congress amended the 1934 Act in response to a wave of takeover bids in which offerors pressured shareholders of a target company to tender their shares without disclosing the offeror's interests or plans for the company. *See* S. Rep. No. 90-550, at 2 (1967) (Senate Report). Congress responded to this problem in the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968), by requiring such tender offerors to disclose their identity, background, and the purpose of their purchase, 15 U.S.C. § 78n(d)(1), and by permitting shareholders to withdraw tendered shares within a specified timeframe, *id.* § 78n(d)(5).[1]

To prevent parties from circumventing the new disclosure obligations, Congress also enacted Section 14(e)—quoted above, *supra* at 1—which it "modeled on the antifraud provisions of § 10(b) of the [1934] Act and Rule 10b-5." *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985). This Court has explained that the first sentence of Section 14(e) "prohibits fraudulent acts in connection with a tender offer." *United States v. O'Hagan*, 521 U.S. 642, 667 (1997). The second sentence, added in 1970, directs the SEC to promulgate such rules as are "reasonably designed to prevent[] such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. § 78n(e); *see* Pub. L. No. 91-567, § 5, 84 Stat. 1497, 1497-98 (1970).

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[1] In a tender offer, an acquirer publicly offers to purchase the target's stock directly from shareholders, usually at an above-market price to induce sales. 6A William M. Fletcher *et al.*, *Fletcher Cyclopedia of the Law of Corporations* § 2841.10 (Westlaw Sept. 2018 update). Not all tender offers are hostile; many involve cooperation between the target firm and the acquiring firm, as both sides see an advantage in the transaction and may, as happened in this case, use it as a vehicle for a merger. *See* 8 Robert C. Rosen *et al.*, *International Securities Regulation* § US:103 (Westlaw Nov. 2018 update).

b. Congress also carefully reticulated an enforcement scheme for these requirements.

Congress gave the SEC extensive enforcement authority, including the authority to sue to enjoin violations of the securities laws "[w]henever it shall appear to [it] that any person is engaged or is about to engage in" such a violation. 15 U.S.C. § 78u(d)(1); *see also id.* § 77t(b). The SEC also can seek civil penalties for violations of the securities laws. Violations by individuals involving "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" are subject to penalties up to $100,000, while violations that do not are subject to penalties up to $5,000. *See* 15 U.S.C. § 78u(d)(3)(A)-(B); *id.* § 77t(d)(1)-(2). And the SEC can refer cases to the Attorney General for criminal prosecution of "[a]ny person who willfully violates" the securities laws. *Id.* § 78ff(a); *see also id.* § 77t(b).

Congress also created several express causes of action in the 1933 and 1934 Acts under which private parties may bring damages actions alleging violations of the securities laws. For example:

- Section 11 of the 1933 Act authorizes suit against securities issuers, their officers and directors, and certain agents and underwriters by purchasers of a security who relied on materially misleading statements or omissions in the security's registration statement. 15 U.S.C. § 77k.
- Section 12 of the 1933 Act authorizes suit against the seller of securities by purchasers who were sold a security without an effective registration statement or prospectus, 15 U.S.C. § 77*l*(a)(1), or who

were sold a security by means of a prospectus or other communications containing materially misleading information, *id.* § 77*l*(a)(2).

- Section 9(f) of the 1934 Act authorizes suits against persons who "willfully" engage in certain manipulative or deceptive trading practices by purchasers negatively affected by those manipulative or deceptive practices. 15 U.S.C. § 78i(f).
- Section 16(b) of the 1934 Act authorizes suits by securities holders in the name of the issuer of those securities against officers or directors of the issuer who earn profit by selling stock they have held for less than six months. 15 U.S.C. § 78p(b).
- Section 18(a) of the 1934 Act authorizes suit by purchasers or sellers of securities against any person who makes a false or misleading statement in a filing with the SEC that affects the price at which the security was bought or sold. 15 U.S.C. § 78r(a).

c. In the decades following the 1933 and 1934 Acts, courts inferred additional private causes of action from various provisions of the securities laws.

Lower courts initially inferred a private right of action under Section 10(b) of the 1934 Act and Rule 10b-5. In *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971), this Court "acquiesced" in those decisions. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 n.19 (1979); *accord Ernst & Ernst*, 425 U.S. at 196. This inferred private remedy authorizes private parties to recover damages sustained in reliance on a material misstatement or omission if they can show, among other things, that the speaker acted with scienter—that is, in intentional violation of the securities laws. In *Ernst & Ernst*, this Court rejected the argument that this inferred private right of action could be applied to "negligent conduct." 425 U.S. at 209-10.

In *J.I. Case Co. v. Borak*, this Court inferred a private right to sue for violations of the proxy-solicitation rules contained in Section 14(a) of the 1934 Act, too. 377 U.S. 426, 432 (1964). Drawing from the "purpose of § 14(a)," the Court explained that "[w]e . . . believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 431, 433.

Following *Borak*, some lower courts inferred a private cause of action from Section 14(e) of the 1934 Act—the provision at issue here—as well. *See, e.g.*, *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 946-47 (2d Cir. 1969); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 596 n.20 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974). In *Piper*, this Court refused to recognize a private right of action under Section 14(e) on the part of *tender offerors* whose overtures were frustrated, but reserved decision on whether such a private remedy might be inferred for *shareholders*. 430 U.S. at 38-39. In the wake of *Piper*, some lower courts continued to allow inferred actions by private shareholders under Section 14(e). *See, e.g.*, *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1281 n.7 (9th Cir. 1982).

As this Court's penchant for inferring private rights waned in the decades following *Borak*, however, it has repeatedly refused either to recognize new inferred private rights and remedies under the securities laws, or to expand preexisting ones. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 188 (1994) (refusing to infer aiding and abetting liability under Section 10(b) and Rule 10b-5); *Virginia Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1102 (1991) (refusing to "expand the class of plaintiffs entitled to bring *Borak* actions" under Section 14(a)); *Touche Ross Co.,* 442 U.S. at 576-78 (refusing to infer private right of action under Section 17(a) of the 1934 Act).

d. Private litigation under the securities laws has been prone to abuse. In 1995, Congress enacted the Private Securities Litigation Reform Act (PSLRA) to combat such abuse. Among other reforms, the PSLRA imposes heightened pleading standards designed to "curb frivolous, lawyer-driven litigation." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Section 21D(b)(2) of the PSLRA provides that plaintiffs in federal securities cases must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," 15 U.S.C. § 78u-4(b)(2)(A), a requirement that "unequivocally raise[d] the bar for pleading scienter" when required. *Tellabs,* 551 U.S. at 314, 321 (alteration in original) (citation omitted).

The PSLRA's heightened pleading requirements apply to inferred as well as express causes of action. In enacting the PSLRA, however, Congress made clear that it did *not* intend to ratify the existence of any implied private rights. *See* Pub. L. No. 104-67, § 203, 109 Stat. 737, 762 (1995) ("Nothing in this Act . . . shall be deemed to create or ratify any implied private right of action . . . ."); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 300 (2014) (Thomas, J., concurring in the judgment).

II. FACTS AND PROCEDURAL HISTORY

A. Transaction At Issue

This case arises from a tender offer resulting in the merger of two technology companies in 2015: Emulex, an electronic-equipment producer, and Avago Technologies Wireless (USA) Manufacturing Inc. (Avago), a designer of analog semiconductor devices. JA 183 ¶ 14. On February 25, 2015, Emulex and Avago announced that they had agreed to merge by way of an accepted tender offer. JA 193 ¶¶ 52–53. Under the terms of Avago's offer, one of Avago's subsidiaries offered to pay $8.00 for every share of outstanding Emulex stock, representing a 26.4% premium on Emulex's stock price the day before the merger was announced. JA 178-79, 180-81 ¶¶ 2-3, 7.

Avago initiated its tender offer on April 7, 2015. *See* JA 179 ¶ 4. On the same day, Emulex filed a statement with the SEC, pursuant to 17 C.F.R. § 240.14d-101 Schedule 14D-9, setting out the Emulex board's recommendation to its shareholders regarding Avago's tender offer. *See* JA 217 ¶ 135. This 48-page Recommendation Statement listed nearly a dozen separate reasons for approving the merger, including that Emulex shareholders would receive a premium on their stock. JA 76-81. The Recommendation Statement also included a five-page summary of a "fairness opinion" that Emulex had received from its financial advisor, Goldman Sachs, finding that the $8.00 per share tender offer price was fair. JA 85-97; *see* Pet. App. 30a-31a.

B. This Litigation

The day after Emulex filed its Recommendation Statement with the SEC, Respondents filed a putative federal securities class action in the U.S. District Court for the Central District of California on behalf of themselves and other shareholders, seeking to enjoin the merger. To avoid a prolonged discovery dispute, Emulex provided Respondents with the core documents, including the so-called "Board Book" that Goldman Sachs had compiled in undertaking its fairness analysis of the tender offer. The last page of the Board Book contained a chart, entitled "Selected Semiconductor Transactions," which listed, based on publicly available information, the premiums received in 17 transactions involving semiconductor companies between 2010-2014. Pet. App. 31a; JA 219.

The one-page chart, also known as the "Premium Analysis," Pet. App. 31a, did not contain any qualitative assessment of the transactions listed, and did not compare the transactions with Avago's tender offer. It simply showed that the 26.4% premium on the share price under Avago's tender offer was within the range of transaction premiums identified in these unrelated semiconductor transactions, below the mean and median. *Id.* at 31a, 39a.

After receiving this information (and having failed to secure an order enjoining the merger), Respondents amended their complaint to allege that, by failing to include the Selected Semiconductor Transactions chart in the Recommendation Statement, Emulex and the other petitioners (the companies involved in the transaction and individual directors of Emulex) violated Section 14(e) of the 1934 Act. According to the amended complaint, the omission of the chart "create[d] the materially misleading impression that the premium Emulex's shareholders received was significant, or at the very least in line with premiums obtained in similar transactions." JA 181-82 ¶ 8. The amended complaint sought both damages and an order rescinding the transaction. JA 232-33.

Emulex moved to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that Respondents had failed to adequately plead their Section 14(e) claim, including as to the requisite scienter. Mot. to Dismiss Am. Compl. (C.D. Cal. Oct. 13, 2015), ECF No. 30; *see* JA 12-13. On January 13, 2016, the district court granted the motion and dismissed the amended complaint with prejudice. Drawing from the "wealth of persuasive case law" holding that Section 14(e) requires a showing of scienter, the court rejected Respondents' argument that "only negligence" is required. Pet. App. 36a, 35a. It observed that "*no* federal court has held that § 14(e) requires only a showing of negligence," and concluded that "the better view is that the similarities between Rule 10b-5 and § 14(e) require a plaintiff bringing a cause of action under § 14(e) to allege scienter." *Id.* at 36a.

Applying this standard, the district court found that the amended complaint was insufficient. *Id.* at 38a. As the court explained, "[n]othing in the Recommendation Statement contradicts the information in the [chart]." *Id.* at 28a. Instead, all the chart showed was that "the Emulex premium was below-average for the industry but within a reasonable range of outcomes." *Id.* at 40a. The best explanation for the chart's omission, the district court determined, was not fraud, but rather a basic recognition that the chart's findings were "unremarkable," insignificant, and "minor in the scheme of the voluminous analysis performed by Goldman Sachs." *Id.* at 45a. Thus, the district court concluded that the amended complaint failed to plead facts evincing "a strong inference of scienter," as required by the PSLRA, and ordered the dismissal of Respondents' claims with prejudice. *Id*. at 57a.

C. Decision Below

On appeal, a panel of the Ninth Circuit reversed, holding that, to prevail in an inferred private action under Section 14(e), a plaintiff need prove "only negligence, not scienter." *Id*. at 16a.

The Ninth Circuit recognized that this ruling diverged from decades of precedent—including decisions by the Second, Third, Fifth, Sixth, and Eleventh Circuits—holding that scienter is required. According to the Ninth Circuit, however, these other circuits had erred in focusing on "the shared text found in both Rule 10b-5 and Section 14(e)" reflecting an antifraud focus. *Id*. at 9a. Instead, the Ninth Circuit held, the language in Section 14(e)'s first sentence must be broken down into discrete parts that establish different standards of care: while a claim rooted in the "fraudulent, deceptive, or manipulative" clause requires a showing of scienter, a claim sounding in the "untrue statement" or omission clause requires only negligence. *Id*. at 8a-9a.

The Ninth Circuit also pointed to this Court's decisions in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), and *Aaron v. SEC*, 446 U.S. 680 (1980). It reasoned that, in *Ernst & Ernst,* the Court had observed that the language of Rule 10b-5 (which is similar to the language of Section 14(e)) could be read to require only negligence, even though the Court ultimately held that Rule 10b-5 requires scienter. Pet. App. 10a-11a (citing 425 U.S. at 212). In *Aaron*, meanwhile, this Court held that when the SEC brings an express claim for injunctive relief under Section

17(a)(2) of the 1933 Act, 15 U.S.C. § 77q(a)(2), the SEC need *not* establish scienter. 446 U.S. at 697.

The Ninth Circuit denied Petitioners' petition for rehearing en banc. Pet. App. 58a-59a.[2]

SUMMARY OF ARGUMENT

The Ninth Circuit erred in holding that Section 14(e) of the 1934 Act supports an inferred private right of action based on mere negligence.

I. Because the Constitution commits the lawmaking power to Congress, private rights of action, just like substantive federal law itself, must be created by Congress. Although there was a time when the Court freely inferred private rights, it has since made clear it has "sworn off th[at] habit." *Sandoval*, 532 U.S. at 287. That course correction has had two effects. First, the Court has consistently refused to *create* new inferred private rights of action, and second, the Court has consistently refused to *extend* the scope of private rights that had been previously inferred. Each of those fundamental restraints demands reversal of the Ninth Circuit's decision here.

II. Even accepting the Ninth Circuit's baseline premise that an inferred private remedy exists under Section 14(e), the Ninth Circuit erred in extending that inferred remedy to mere negligence.

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[2] Respondents also brought claims under Sections 14(d)(4) and 20(a) of the 1934 Act. The district court held that the former claim should be dismissed on the ground that Section 14(d)(4) does not create a private right of action. Pet. App. 55a. The Ninth Circuit affirmed that ruling, *id.* at 18a-19a, and it is not at issue here. The parties agree that Respondents' Section 20(a) claim, which seeks to hold the individual directors of Emulex liable for any federal securities violation as "controlling persons," rises or falls with their Section 14(e) claim. *Id.* at 6a & n.2, 19a.

A. The text of Section 14(e) lacks any affirmative indication of a negligence remedy. That omission is particularly telling because Congress plainly knew how to express a negligence regime when it wanted to—*e.g.*, by referring to concepts of "reasonable care," as it did in Section 12(a) of the 1933 Act. At the same time, Section 14(e) *does* have language unmistakably linked with intentional conduct—*e.g.*, "fraudulent," "deceptive," and "manipulative." "Untrue statement[s]" and "misleading" omissions also go hand-in-hand with intentional deceptions. But in any event, those words must be read in context, informed by Congress's nearby use of "fraudulent," "deceptive," and "manipulative," which put them in an antifraud light as well. None of this is surprising. Section 14(e) was modeled on the antifraud provisions of Section 10(b) of the 1934 Act and Rule 10b-5, which, all agree, require scienter. *Ernst & Ernst*, 425 U.S. at 212-14.

B. The surrounding provisions of the securities laws powerfully confirm that Congress did not intend a private negligence remedy under Section 14(e). When Congress wanted to create a cause of action for negligence, it did so—expressly. And when it did, it imposed significant procedural restrictions on such actions that are inapplicable to Section 14(e), such as providing for recovery of attorney's fees and costs for baseless claims. Moreover, extending an inferred private right of action under Section 14(e) to negligence would nullify other express causes of action. For example, permitting Respondents here to sue for negligence via an implied private right under Section 14(e) would effect an end run around the express cause of action established by Section 18 of the 1934 Act, which applies to alleged inaccuracies in documents like Recommendation Statements but does not permit recovery for negligence.

C. This Court's conclusion that Section 17(a) of the 1933 Act permits recovery for negligence in an action brought by the SEC does not compel a different reading of Section 14(e) when it comes to the scope of any inferred private right of action. *See Aaron*, 446 U.S. at 697. Because *Aaron* involved claims brought by the SEC under an express cause of action, *Aaron* did not confront the unique concerns with creating or extending inferred private remedies. The text of Section 17(a) and Section 14(e) also differs in ways that suggest that scienter is required under Section 14(e). For example, the prohibitions in Section 17(a) are delineated as separately numbered subparagraphs, which counteracts the force of the associated-words canon; Section 14(e), by contrast, contains a single sentence in which prohibited conduct is strung together. In any event, because Section 14(e) was modeled on Rule 10b-5, the better fit for this case is *Ernst & Ernst*, not *Aaron*, and *Ernst & Ernst* confirms that scienter is required.

D. The practical consequences of expanding an inferred private cause of action under Section 14(e) to negligence also compel rejection of the Ninth Circuit's decision. As this Court has recognized, vexatious litigation driven by efforts to extract settlements of even baseless claims is already a problem in this area. Allowing plaintiffs' lawyers to bring negligence class actions under Section 14(e) in connection with mergers and acquisitions would just supercharge that dynamic—and hike the "merger tax" that private securities litigation has already imposed on such transactions. Moreover, allowing private claims for negligence under Section 14(e) also would create new classes of potential defendants, including investment bankers and stock analysts. Such litigation would introduce a new set of potential abuses.

III. The Ninth Circuit's decision to create an inferred private right under Section 14(e) for negligence also fails because, as a matter of first principles, there is no basis for inferring a private right of action under Section 14(e) at all, no matter *what* conduct Section 14(e) covers.

A. Imagining an inferred private right of action for negligence under Section 14(e) just underscores that the lower courts never should have inferred any private right of action under Section 14(e) in the first place. Indeed, after this Court held in *Aaron* that Section 17(a)(2) of the 1933 Act proscribes negligent conduct, lower courts that had inferred a private right of action under Section 17(a) reconsidered their past decisions and concluded that there was no justification for inferring a private right of action under Section 17(a) at all. The same conclusion would follow here for Section 14(e), if it were read to cover negligent misstatements or omissions.

B. Section 14(e) also readily flunks the two requirements that this Court has looked to in deciding whether Congress intended to create a private right of action. First, Section 14(e) lacks the "rights creating" language this Court has held is critical to the recognition of private rights. Instead of focusing on the benefitted class, the statute is framed as a general prohibition. Second, and in any event, Section 14(e) evidences no intent whatsoever to create a private remedy. Instead of authorizing (or even alluding to) private enforcement action, Section 14(e) authorizes the *SEC* to undertake an enforcement role. Moreover, as discussed, the securities laws make quite clear that, when Congress wanted to create a private enforcement mechanism, it did so expressly.

C. Neither the fact that Section 14(e) was enacted amidst the judicial heyday for inferring private rights nor the fact that lower courts have previously inferred a private right of action under Section 14(e) provides any basis for this Court to recognize any inferred right here. This Court has refused to apply any less demanding standard for determining whether a private right may be inferred based on when the underlying statute was passed. Nor is there any basis to water down the inquiry just because lower courts have already inferred a private right under Section 14(e). That is particularly true given that no lower court that has inferred such a right has subjected Section 14(e) to the rigors of this Court's modern precedent. "Grandfathering" private rights that have been inferred by the lower courts is just as baseless as creating inferred private rights to begin with.

The Ninth Circuit's decision should be reversed.

ARGUMENT

I. THE CONSTITUTION SHARPLY LIMITS JUDICIAL AUTHORITY TO CREATE OR EXTEND PRIVATE CAUSES OF ACTION

The Constitution assigns the "legislative Powers" to Congress. U.S. Const. art. I, § 1. Like the creation of "substantive federal law itself," therefore, "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1413 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("Deciding that, henceforth, persons like A who engage in certain conduct will be liable to persons like B is, in every meaningful sense, just like enacting a new law. And in our constitutional order the job of writing new laws belongs to Congress, not the courts.").

For the better part of the twentieth century, the lower courts, and even this Court itself, struggled to heed this limit. Indeed, far from policing this constitutional limit, the Court took a "hospitable attitude towards implied rights of action." *Thompson v. Thompson,* 484 U.S. 174, 190 (1988) (Scalia, J., concurring in the judgment). No case better exemplifies that attitude than *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). There, the Court inferred a private right of action under Section 14(a) of the 1934 Act. *Id.* at 427. Although the Court readily acknowledged that Section 14(a) "makes no specific reference to a private right of action," *id.* at 432, it saw it as its "duty" to infer such remedies as are necessary to effectuate the purposes of the Act, *id.* at 433.

In the decades that followed, however, this Court came to reject this understanding of the role of the judiciary as fundamentally inconsistent with the Constitution's delegation of lawmaking power (solely) to Congress. And so the Court changed course. As Justice Scalia wrote for the Court in *Sandoval*, the Court "abandoned [*Borak*'s] understanding in *Cort v. Ash*, 422 U.S. 66, 78 (1975) . . . and ha[s] not returned to it since. . . . Having sworn off the habit of venturing beyond Congress's intent, we will not accept [an] invitation to have one last drink." 532 U.S. at 287. Instead, the Court held, "private rights of action to enforce federal law must be created by Congress," not by the courts, "no matter how desirable [they] might be as a policy matter." *Id.* at 286-87.

That course correction has manifested itself in two important (and related) ways: First, the Court has consistently refused to *create* any new inferred private causes of action that its earlier cases did not already establish, and, second, the Court has consistently refused to *extend* previously recognized inferred causes of action any further than they already reach. *See, e.g.*, *Jesner*, 138 S. Ct. at 1402 (noting that the "Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law"); *Thompson,* 484 U.S. at 190 (Scalia, J., concurring in the judgment) (citing cases illustrating this trend).[3]

The Court's refusal either to create new inferred private rights or to expand ones that had been inferred in the "bad old days" is hardly surprising. All of the "[c]oncerns with the judicial *creation* of a private cause of action caution against its *expansion*," too. *Janus Capital Grp., Inc. v. First Derivative*

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[3] *See also, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) ("Given the notable change in the Court's approach to recognizing implied causes of action, . . . the Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." (citation omitted)); *Wilkie v. Robbins*, 551 U.S. 537, 549-50 (2007) (refusing to infer private cause of action "for retaliating against the exercise of ownership rights"); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (refusing to infer private cause of action against private entities for violating constitutional rights while acting under color of federal law); *see also Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 296 (1993) (Thomas, J., dissenting) ("In the absence of any compelling reason to allow contribution in private 10b-5 suits, we should seek to keep the breadth of the 10b-5 action from 'grow[ing] beyond the scope congressionally intended" (alteration in original) (quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991))).

Traders, 564 U.S. 135, 142 (2011) (alteration in original) (emphasis added) (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008)); *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991) ("Assessing the legitimacy of any such *extension* [of the scope of an inferred cause of action] calls for the application of [the same] fundamental principles governing recognition of a right of action implied by a federal statute . . . ." (emphasis added)).

This case tests both the expansion and, ultimately, creation of inferred private rights. Because the Ninth Circuit considered this case against the baseline of its prior precedent recognizing an inferred private right of action under Section 14(e) for conduct involving scienter, the court (and parties) focused below on whether that inferred private right could be *extended* to mere negligence. As explained in Part II of this brief, even accepting that baseline premise, the Ninth Circuit erred in expanding its inferred right under Section 14(e) to cover negligence. But there is an even more fundamental problem with the Ninth Circuit's decision: As explained Part III of this brief, there is no basis for creating any inferred private right of action under Section 14(e) to begin with. Either way, the Ninth Circuit's decision cannot stand.

II. THE NINTH CIRCUIT ERRED IN EXTENDING ITS PREVIOUSLY INFERRED PRIVATE RIGHT OF ACTION UNDER SECTION 14(e) TO NEGLIGENCE

Lower courts first inferred a private right of action under Section 14(e) more than forty years ago, while the free-wheeling era of inferring private rights epitomized by *Borak* was in full swing. Until the

Ninth Circuit's decision in this case, however, every court that had inferred a cause of action under Section 14(e) held that it required scienter. Even assuming the existence of an inferred private right of action under Section 14(e) requiring scienter (an issue to which we return in Part III below), the Ninth Circuit erred in holding that this inferred right of action could be extended to reach mere negligence.[4]

A. The Text Of Section 14(e) Does Not Support, Much Less Compel, Inference Of A Private Negligence Remedy

This Court has held that "'affirmative' evidence of congressional intent must be provided *for* an implied remedy, not against it, for without such intent 'the essential predicate for implication of a private remedy simply does not exist.'" *Sandoval*, 532 U.S. at 293 n.8 (citation omitted). As a result, an inferred cause of action may not be extended "beyond the ambit" previously recognized, unless there is affirmative evidence that the broader "scope [was] congressionally intended." *Virginia Bankshares, Inc.*, 501 U.S. at 1102. That inquiry centers on the text of the statute that Congress actually enacted.

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[4] As explained below, the Ninth Circuit not only extended the private right of action that it had previously inferred under Section 14(e) in cases like *Polinsky v. MCA Inc.*, 680 F.2d 1286, 1291 (9th Cir. 1982), to a broad new range of conduct (negligence), but, in doing so, it also created a whole new class of potential defendants. *See infra* at 33-34. Indeed, by going from scienter to negligence the Ninth Circuit effectively created a new private cause of action under Section 14(e) altogether.

1. Section 14(e) lacks any affirmative evidence of a negligence standard

The first thing that is apparent on the face of Section 14(e) is that it does not explicitly specify a negligence standard. It sets out, in a single sentence, a substantive proscription against various kinds of false and deceptive acts—namely, making "any untrue statement of a material fact," "omit[ting] to state any material fact necessary in order to make the statements made . . . not misleading," "fraudulent . . . acts or practices," "deceptive . . . acts or practices," "or manipulative acts or practices." 15 U.S.C. § 78n(e). To state the obvious, Congress did not express any intent to proscribe "negligence" in any respect.

Also missing from Section 14(e) is the kind of "reasonableness" language that Congress used elsewhere in the securities laws, which is often associated with negligence. For example, Section 12(a) of the 1933 Act refers to one who "did not know, and in the exercise of reasonable care could not have known, of [the] untruth or omission" that gave rise to the securities law violation in question. 15 U.S.C. § 77*l*(a)(2); *see also id.* § 77k(c) (using "reasonableness" standard for purposes of Section 11). There is nothing like that in Section 14(e).

As this Court has recognized, these provisions (among others) show that Congress knows how to adopt "a negligence standard" when it wants to. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976). The fact that Congress did not use such language in Section 14(e) is thus a strong, if not conclusive, sign that Congress did not intend to adopt a negligence standard for Section 14(e). *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 177 (1994) ("If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text."); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) ("When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly.").

The fact that Section 14(e) proscribes "untrue statement[s]" and "misleading" omissions, as well as "fraudulent, deceptive, or manipulative acts," does not compel a different reading. Nothing about proscribing an "untrue statement" or "misleading" omission inherently bespeaks negligence. And that is particularly true where, as here, Congress omits the kind of "reasonableness" language that it uses when it does intend a negligence standard. The use of "untrue statement" or "misleading" omission, standing alone, does not *rule out* a negligence standard. But at best, this language—in isolation—is neutral as to what standard of care applies. It provides no affirmative evidence that Congress actually intended to reach negligence.[5]

In short, there is no affirmative evidence that Congress intended a negligence standard.

2. *Instead, the text indicates that Congress intended to require scienter*

In fact, the language that Congress used in Section 14(e) affirmatively indicates that Congress intended a scienter, and not a negligence, standard.

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[5] In fact, as explained below, Congress's use of "untrue" and "misleading" is consistent with Congress's focus on fraudulent—*i.e.*, intentional—conduct. *See infra* at 26.

Notably, while Section 14(e) omits language associated with negligence, it *has* language unmistakably linked with a scienter standard: Not only the word "fraudulent," but also "deceptive" and "manipulative"—terms that this Court has held "connote[] intentional or willful conduct designed to deceive or defraud investors," which is "a type of conduct quite different from negligence." *Ernst & Ernst*, 425 U.S. at 199. In *Ernst & Ernst* this Court pointed to the use of such language in Section 10(b) as evidence that Congress did *not* intend a negligence standard. *Id.* at 198-99, 212. There is no reason to reach a different conclusion here.

"Untrue" and "misleading" can likewise be used to refer to intentional deception as distinct from merely negligent mistakes. While there are alternative definitions, "untrue" can mean "Dishonest," and "misleading" can mean "deceptive. "Untrue, adj. and adv.," OED Online (Dec. 2018), https://www.oed.com/view/Entry/219141 (last accessed Feb. 16, 2019); "Misleading, adj.," OED Online (Dec. 2018), https://www.oed.com/view/Entry/119745 (last accessed Feb. 16, 2019). Those definitions are consistent with requiring scienter, and fit naturally with the surrounding language in Section 14(e).

The Ninth Circuit did not dispute that Congress's use of words like "fraudulent," "deceptive," and "manipulative" indicates a scienter standard. But it believed that "untrue" and "misleading" must be read in isolation and given their broadest possible meaning. Rather than read the first sentence of Section 14(e) to share a common scienter standard, therefore, it walled off what it called the "first clause" of the sentence—encompassing the prohibition on "untrue statements" and "misleading" omissions—

from what it called the "second clause" of the sentence—encompassing the "fraudulent," "deceptive," and "manipulative" language. Pet. App. 8a, 12a, 24a.[6] It conceded that "a heightened showing of culpability is required" under "the second clause," but held that "a lesser showing of culpability will suffice" for "the first clause." *Id.* at 24a.

The Ninth Circuit's effort to hermetically seal the "first clause" of Section 14(e) violates two cardinal canons of statutory construction. The first is the "whole-text canon," "which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). The Ninth Circuit's refusal to read the first sentence of Section 14(e) *as a whole,* and to read the sentence's "first clause" in light of the "second clause," and vice versa, is a classic violation of this canon.

Second, and relatedly, the Ninth Circuit violated the "associated-words canon." *See id.* at 196. This is the rule that words generally are "known by the company [they] keep[]," *Yates v. United States*, 135 S.

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[6] The Ninth Circuit added numerical subdivisions of its own to divide up the sentence, as follows:

> It shall be unlawful for any person [1] to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, *or* [2] to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer . . . .

Pet. App. 8a (quoting 15 U.S.C. § 78n(e) (alterations in original)).

Ct. 1074, 1085 (2015) (plurality); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). This canon is especially strong where, as here, all of the words are set out in a single sentence with no structural divisions that might suggest Congress had in mind materially different concepts. The use of commas and "or" does not qualify as such a division, because commas and "or" are used with synonymous concepts just as they are used with disjunctive concepts (as their use between "fraudulent, deceptive, or manipulative" in Section 14(e) underscores).

Thus, while "untrue" and "misleading" *could* be read in the abstract to mean simply "not accurate," that is not the best reading of those words in the context in which they appear in Section 14(e). Instead, in light of the rest of the sentence, "untrue" is better given its definition of "dishonest," and Congress's use of "misleading" is better given its definition of "deceptive"—both of which suggest intentional deceptions rather than negligence. *See supra* at 26. Reading Section 14(e) in that way, its single conduct-regulating sentence contains a single state-of-mind requirement—scienter.[7]

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[7] The second sentence of Section 14(e) only reinforces that conclusion. That sentence grants the SEC rulemaking authority to "define, and prescribe means reasonably designed to prevent, such acts and practices as are *fraudulent, deceptive, or manipulative*." 15 U.S.C. § 78n(e) (emphasis added). Because that sentence was enacted two years after the first sentence (*see supra* at 6), it lacks the same interpretive force as the use of similar words in the first sentence of Section 14(e) itself. But the second sentence nevertheless underscores that Section 14(e) is focused on conduct that typically entails scienter. The legislative history of the Williams Act itself—which enacted the first sentence of Section 14(e)—also reinforces this conclusion. Both of the Committee Reports to that Act describe the conduct

Respondents themselves have conceded (BIO 15) that if one divides the first sentence of Section 14(e) into a "first clause" and a "second clause," as the Ninth Circuit did, then "[t]he first clause . . . does not expressly require . . . *any* specific state of mind." And given that no one in this case has seriously suggested that Section 14(e) imposes a strict liability standard, that lack of any alternative *mens rea* language is telling: All agree that either a scienter standard or a negligence standard must apply to all violations of Section 14(e), all agree that Section 14(e) includes terms that expressly require a scienter standard, and *no one* contends that Section 14(e) contains terms that expressly authorize a negligence standard. Given those three undisputed points, it is easy to see how every other court to have ever addressed the question concluded that scienter is required for claims under Section 14(e), no matter which clause applies.

3. The Court's interpretation of Section 10(b) and Rule 10b-5 strongly supports this reading

The conclusion that the text of Section 14(e) supports a scienter standard is all the more compelling in light of this Court's decision in *Ernst & Ernst*, interpreting the similar language in Rule 10b-5. 425 U.S. at 212-14. There, this Court stated that, while "[v]iewed in isolation[,] the language of

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covered by Section 14(e), including its prohibition of material misstatements and omissions, under the heading of "*fraudulent* transactions." *See* H.R. Rep. No. 90-1711, at 11 (1968) (emphasis added); Senate Report at 10 (same). And this Court itself has previously observed that the first sentence of Section 14(e) "prohibits fraudulent acts in connection with a tender offer." *United States v. O'Hagan*, 521 U.S. 642, 667 (1997).

subsection (b) [of Rule 10b-5], . . . could be read as proscribing . . . any type of material misstatement or omission . . . whether the wrongdoing was intentional or not," the *better* reading of subsection (b) was that it "was intended to apply only to activities that involved scienter." *Id.* at 212. Since Section 14(e) was "modeled on the antifraud provisions of . . . Rule 10b-5," *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985), it follows that Congress intended Section 14(e) to apply only to conduct that involved scienter, too.

The Ninth Circuit dismissed the significance of *Ernst & Ernst* by pointing out that Rule 10b-5 "is a regulation promulgated under Section 10(b) of the Exchange Act, which allows the SEC to regulate *only* 'manipulative or deceptive device[s].'" Pet. App. 11a-12a (quoting 15 U.S.C. § 78j(b)). But that proves the point: The SEC, knowing that it was limited to addressing only "manipulative or deceptive device[s]," chose to use the "untrue" and "misleading" language of Rule 10b-5 in order to accomplish that purpose. Congress then used that Rule targeting intentional conduct as the "model[]" for Section 14(e). *Schreiber*, 472 U.S. at 10. And there is no indication whatsoever that, in modeling Section 14(e) on Rule 10b-5, Congress intended to use the same words to capture a far broader set of inaccurate statements or omissions—*i.e.*, ones that were merely negligent.[8]

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[8] Respondents have never argued that the SEC exceeded its rulemaking authority by promulgating subparagraph (b) of Rule 10b-5, on the theory that subsection (b), like the parallel language in Section 14(e), extends to mere negligence. And the only result that would be more radical than extending the previously inferred cause of action under Section 14(e) to negligence would be holding that Rule 10b-5(b)—one of the most

B. The Structure And Surrounding Provisions Confirm That Congress Did Not Intend A Private Negligence Remedy

Under *Sandoval* and the other cases discussed above, the lack of clear textual support for the extension of any inferred cause of action alone requires reversal of the Ninth Circuit's decision. But, in any event, the structure and surrounding provisions of the securities laws independently confirm that the Ninth Circuit overreached.

1. Where Congress authorized private suits based on negligence, it provided additional procedural protections absent from Section 14(e)

In rejecting the argument that the inferred private right of action under Section 10(b) of the 1934 Act should be extended to merely negligent conduct, this Court looked to the surrounding provisions of the securities laws to help it answer the question. *See Ernst & Ernst,* 425 U.S. at 206-11. Several things stood out to the Court there—and the same considerations apply with equal force here.

First, "[e]ach of the provisions of the 1934 Act that expressly create civil liability, except those directed to specific classes of individuals such as directors, officers, or 10% beneficial holders of securities, contains a state-of-mind condition requiring something more than negligence." *Id.* at 209 n.28 (citations omitted); *id.* (discussing the express liability provisions in 15 U.S.C. § 78i(e) (1976) (former

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commonly invoked enforcement tools under the federal securities laws—is *ultra vires*, and thus, invalid.

Section 9(e), now codified at Section 9(f), 15 U.S.C. § 78i(f))), *id.* § 78r (Section 18), *id.* § 78t (Section 20)).

Second, when Congress did want to create a cause of action based on negligence (as it did in the 1933 Act), it did so expressly. For example, the express cause of action established by Section 11 of the 1933 Act explicitly sets forth a "due diligence" defense, which, "[i]n effect, . . . is a negligence standard." *Id.* at 207-08 (discussing 15 U.S.C. § 77k(b)(3)(B)(i) (1976)). From this, the Court found that "[t]he express recognition of a cause of action premised on negligent behavior . . . stands in sharp contrast to the language of § 10(b), and significantly undercuts the Commission's argument" in favor of a negligence standard for Section 10(b). *Id.* at 208.

And *third*, Congress subjected each of these express causes of action for negligence to "significant procedural restrictions." *Id.* at 208-09 (citation omitted). A plaintiff suing under Section 11 of the 1933 Act based on alleged negligent misstatements in a registration statement, for example, can be required to provide a bond sufficient to cover the opposing party's anticipated costs, including attorney's fees, and can be required to pay those costs (including attorney's fees) if the court later determines that the suit was "without merit." 15 U.S.C. § 77k(e). The same goes for a plaintiff suing under Section 12 of the 1933 Act based on alleged negligent misstatements in a prospectus. These protections were added "to deter actions brought solely for their potential settlement value" under the express causes of action covering negligence. *Ernst & Ernst*, 425 U.S. at 210 n.30.

In *Ernst & Ernst,* the Court concluded that, in light of these express procedural limitations, "the judicially created private damages remedy under

§ 10(b)—which has no comparable restrictions—cannot be extended, consistently with the intent of Congress, to actions premised on negligent wrongdoing." *Id.* at 210 (footnote omitted). Each of those factors applies equally to the private right of action inferred here under Section 14(e) and, thus, bolsters the conclusion that a negligence standard would be inconsistent with the intent of Congress.

And there is an additional contrast here. When Congress allowed recoveries for negligent misstatements elsewhere in the securities laws, it expressly limited the type of statements covered or the class of defendants subject to the claim. Claims under Section 11, for example, are limited to inaccuracies in a single document—the registration statement—that need only be filed with the SEC upon issuance of new securities. *See* 15 U.S.C. § 77k(a). Claims under Section 12(a)(2), meanwhile, can only be brought against one class of defendants: the person from whom the plaintiff purchased the security; purchasers in the open market cannot sue based on a claim that inaccurate statements affected the price at which they bought securities from, or sold securities to, other people. *Id.* § 77*l*(a)(2).[9]

Section 14(e), by contrast, applies to *all* statements made "in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation," and contains no requirement that the defendant have been personally

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[9] Similarly, under Section 17(a)(2) of the 1933 Act, the SEC can sue for negligent violations only by defendants who used a misleading statement or omission "to obtain money or property." 15 U.S.C. § 77q(a)(2); *see infra* at 36-37.

involved in the purchase or sale transaction at issue. 15 U.S.C. § 78n(e). By its terms, therefore, Section 14(e) could be invoked to challenge a fairness opinion issued by an investment banker, investment advice by a stock analyst, or even an allegedly inaccurate news story about the terms of a proposed merger by a financial journalist or TV commentator.

Historically, damages claims based on such things have not been viable even in circuits that have recognized an inferred cause of action under Section 14(e) because of the need to prove scienter. If this Court were to embrace an inferred cause of action extending to any negligently inaccurate statements made in connection with a tender offer, however, such suits—and, perhaps more importantly, the *threat* of such suits in the face of unfavorable coverage—would be fair game. As Judge Friendly observed in analogous circumstances, the implications of such a regime would be "frightening." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 866-67 (2d Cir. 1968) (concurring), *cert. denied*, 394 U.S. 976 (1969).

2. Allowing private recoveries under Section 14(e) based on negligence would circumvent the express cause of action in Section 18 of the 1934 Act

In *Ernst & Ernst*, this Court also expressed concern that extending the inferred private right of action under Section 10(b) to suits based on negligence would cause suits that *could* have been brought under the express causes of action in the securities laws to instead be brought under the inferred cause of action, "and thereby nullify the effectiveness of the carefully drawn procedural restrictions on these express actions." 425 U.S. at 210. Again, the same is true for Section 14(e).

And this case is a perfect example. Respondents allege that Petitioners "caus[ed] a materially incomplete and misleading [Recommendation Statement] to be filed with the SEC." JA 178 ¶ 2. Respondents assert that as a result of the allegedly misleading Recommendation Statement, they sold their Emulex shares to Avago for less than they otherwise would have. JA 180-82 ¶¶ 7-8. But Section 18 of the 1934 Act establishes an express private cause of action for just such claims. *See* 15 U.S.C. § 78r(a) ("Any person" who makes a false or misleading statement in any "document filed pursuant to this chapter or any rule or regulation thereunder . . . shall be liable to any person . . . who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages . . . .").

Yet, Respondents chose to sue instead under the inferred cause of action that the Ninth Circuit had derived from Section 14(e). One can surmise several reasons why. At the outset, Section 18 claims are subject to procedural protections similar to those that apply to claims under Section 11 and 12 of the 1933 Act, while Section 14(e) claims are not. *See* 15 U.S.C. § 78r(a) (district court may "assess reasonable costs, including reasonable attorneys' fees," in action under Section 18). And more substantively, Section 18 expressly forecloses liability based on mere negligence. *See Ernst & Ernst*, 425 U.S. at 211 n.31; *see also* 15 U.S.C. § 78r(a) (no liability if defendant "acted in good faith and had no knowledge that such statement was false or misleading").

The Ninth Circuit's expanded, inferred private right of action under Section 14(e) for mere negligence thus allows an end run around the limits that Congress imposed on the express cause of action it created for the alleged wrongdoing here.

C. *Aaron v. SEC* Does Not Compel Extending Any Inferred Cause Of Action Under Section 14(e) To Negligence

Notwithstanding the foregoing evidence that Congress did not intend an inferred private remedy for negligence under Section 14(e), the Ninth Circuit believed that a decision of this Court (*Aaron*, 446 U.S. 680) interpreting a different provision (Section 17(a) of the 1933 Act) compelled it to recognize such an inferred private right. Pet. App. 13a. It was incorrect.

Aaron arose from a suit by the SEC under the express cause of action established by Section 20(b) of the 1933 Act for injunctive relief. 15 U.S.C. § 77t(b) (1976). The Commission claimed that, in undertaking a sales campaign for securities, Aaron had violated Section 17(a) of the 1933 Act as well as Section 10(b) of the 1934 Act and Rule 10b-5. The question was whether the SEC was required to establish scienter before an injunction could issue to prevent further violations of those provisions. 446 U.S. at 682. In light of *Ernst & Ernst,* the Court held that scienter was required under Section 10(b) and Rule 10b-5, *id.* at 689-96, but it held that negligence was sufficient under Section 17(a)(2) and (3), *id.* at 696-701.

Section 17(a) contains three separately numbered subparagraphs—(1), (2), and (3)—and addresses "untrue statement[s]" and "misleading" omissions in subparagraph (2), separately from the provision addressing "any device, scheme, or artifice to defraud" set out in subparagraph (1). *See* Add. 9 (reprinting Section 17(a), 15 U.S.C. § 77q(a)). In *Aaron,* the Court concluded that "Congress drafted § 17(a) in such a manner as to compel the conclusion that scienter is required under one subparagraph"—the first one—"but not under the other two." 446 U.S. at 697.

According to the Ninth Circuit, this Court's conclusion that the SEC need not prove scienter in order to obtain an injunction against violations of subparagraph (2) of Section 17(a) compels the conclusion that a private plaintiff need not prove scienter in order to recover damages in an implied right of action brought under "the first clause of Section 14(e)" of the 1934 Act, because both provisions use the words "untrue statement" and "misleading" omission. *See* Pet. App. 12a-13a. But that analysis overlooks three key distinctions between this case and *Aaron,* any one of which calls for a different result.

First, while similar in some respects, the language of Section 14(e) and Section 17(a) differ in an obvious respect. Not only are the clauses jumbled, but when Congress drafted the conduct-regulating portion of Section 14(e) it used a single sentence—and omitted the numbered subparagraphs that this Court emphasized in *Aaron*. *See supra* at 27-28; *see also, e.g.*, *Aaron*, 446 U.S. at 697 (emphasizing "subparagraph[]" structure of Section 17(a)); *United States v. Naftalin,* 441 U.S. 768, 773-74 & n.5 (1979) (pointing to "the use of separate numbers to introduce each subsection" in Section 17(a)). The omission of numerical subparagraph dividers in Section 14(e) strengthens the case for reading its first sentence as a whole and in light of its focus on fraudulent acts.

Second, the history of these provisions differs, too. Congress enacted Section 17(a) in 1933—before there was a Rule 10b-5. By contrast, Section 14(e), which was enacted in 1968, was "modeled on the antifraud provisions of § 10(b) and Rule 10b-5." *Schreiber,* 472 U.S. at 10. That chronology is significant because, as the Court recognized in *Ernst & Ernst*, Section 10(b) and Rule 10b-5 require a showing of scienter; if Congress modeled Section 14(e) on Rule 10b-5, then it presumably intended the same scienter requirement. As the Court noted in *Aaron,* however, it was not bound by that "precedential authority" (*Ernst & Ernst*) in construing Section 17(a). 446 U.S. at 695.[10]

And *third*, the nature of the actions in this case and *Aaron* differ in a fundamental respect as well. *Aaron* involved an express cause of action entitling the SEC to injunctive relief in the public interest. It was enough in *Aaron*, therefore, that the text of Section 17(a)(2) did not specifically demand a showing of scienter. *Id.* at 696. The Court had no need to look for the "'affirmative' evidence of congressional intent" that it demands before extending an *inferred* cause of action to a new category of conduct. *Sandoval*, 532 U.S. at 293 n.8 (citation omitted); *see supra* at 19-22. Nor did *Aaron* need to consider the contrasts with the express causes of action predicated on negligence that the Court had relied on in *Ernst & Ernst* when

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[10] Respondents claim this argument is "iron[ic]," because "Rule 10b-5 was modeled after Section 17." BIO 18 n.9. But in *Ernst & Ernst* and *Aaron,* this Court itself has already recognized a difference between Rule 10b-5 and Section 17 when it comes to scienter. That difference will persist no matter how this case is decided. And the relevant point here is that Congress modeled Section 14(e) on Rule 10b-5, not Section 17. *See Schreiber*, 472 U.S. at 10. There is no evidence that, in basing Section 14(e) on Rule 10b-5, Congress meant to reach much more broadly than the SEC had in Rule 10b-5.

deciding whether to extend the inferred cause of action under Section 10(b) to negligent conduct. *See supra* at 31-34. That different context sheds an entirely different light on the issue here.

To the extent there is any anomaly between holding that Section 14(e)—like Section 10(b) and Rule 10b-5—requires scienter and Section 17(a)(2) does not, it is a product of the different language, structure, and history of these provisions as well as this Court's precedent. *See Aaron,* 446 U.S. at 702-03 (Burger, C.J., concurring). There is no basis to expand any inferred private right of action under Section 14(e) based on the different question answered in *Aaron* as to the express cause of action there. And if this case must fit into any box, it should be *Ernst & Ernst,* not *Aaron*, given that Section 14(e) was modeled on Section 10(b) and Rule 10b-5, and *Ernst & Ernst* involved an implied right of action.

D. Practical Considerations Counsel Strongly Against Extending Any Inferred Cause Of Action Under Section 14(e)

Finally, the "practical consequences" of expanding any inferred private cause of action under Section 14(e) to negligence also warrant rejection of the Ninth Circuit's rule. *Stoneridge Investment Partners,* 552 U.S. at 163; *see Virginia Bankshares, Inc.,* 501 U.S. at 1104; *Blue Chip Stamps,* 421 U.S. at 737.

Because an inferred private action is like "a judicial oak which has grown from little more than a legislative acorn," this Court has recognized that it would be "disingenuous" to suggest that the *boundaries* of such a private cause of action, once created by a court, can only be limited by statutory text. *Blue Chip Stamps*, 421 U.S. at 737. If Congress did not write down the cause of action in the first place, then it cannot be expected to have written down the responsible limits of that cause of action, either, and "[i]t is therefore proper that we consider . . . what may be described as policy considerations" in deciding where to cut off the judicial creation. *Id.*

As in *Stoneridge Investment Partners,* expanding the inferred private right of action that lower courts have recognized under Section 14(e) would create "a new class of defendants," and new "risks" associated with that litigation. 552 U.S. at 163-64. As discussed above, because Section 14(e) by its terms applies to *all* statements made in connection with a tender offer, extending an inferred private right of action to negligence would permit private suits against anyone who analyzes or simply comments on transactions, including investment bankers, stock analysts, and even financial journalists. *See supra* at 33-34. Such litigation would raise a host of new issues.

Extending an inferred private right of action under Section 14(e) to negligent conduct also would exacerbate problems that already exist. As this Court has long recognized, "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general," including the filing of "nuisance" suits with "little chance of success" brought for their "settlement value," and discovery abuses. *Blue Chip Stamps,* 421 U.S. at 739-41. Efforts to "extort settlements from innocent companies" (*Stoneridge Inv. Partners*, 552 U.S. at 163-64) through such actions have only grown more sophisticated, and more prevalent, over time.

The risk of vexatious litigation is particularly great when it comes to public company mergers and acquisitions, where plaintiffs' lawyers who make it past the motion to dismiss stage can extract a "merger tax" by threatening to hold up a deal with prolonged litigation, even if that litigation is almost certain to eventually end in defeat. *See* U.S. Chamber Institute for Legal Reform, *The Trial Lawyers' New Merger Tax* 1 (2012), http://bit.ly/newmergertax. Indeed, from 2010 to 2017, there was a five-fold increase in class actions asserting Section 14 claims. *See* Cornerstone Research, *Securities Class Action Filings—2017 Year In Review* 21 (2018), http://bit.ly/Cornerstone2017YIR (showing "M&A Filings" and "Section 11" filings).[11]

Allowing plaintiffs to assert claims for negligence under Section 14(e) would just supercharge this abusive dynamic. Not only would a negligence standard extend the reach of Section 14(e), but courts have held that "negligence is not a state of mind," and that securities complaints premised on negligence therefore need not satisfy the PSLRA's heightened pleading requirements. *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009). Under a negligence-based inferred cause of action, therefore, it would be far easier for plaintiffs to use generalized allegations about what defendants *should have* disclosed to hold up major corporate transactions and extract ever-greater settlements from companies that have done nothing wrong and just want to go about their business. This Court has previously refused to extend judicially created causes of action under the securities

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[11] By contrast, the number of claims brought under Section 11 actually *dropped* during that period to a total of 24 cases in 2017. Cornerstone Research, *supra*, at 21. That is no doubt due in part to the protections discussed above that make plaintiffs who assert meritless negligence claims under Section 11 potentially subject to attorney's fee awards. *See supra* at 32.

laws in ways that would enable such abuses, *see Blue Chip Stamps*, 421 U.S. at 739-45, and should decline to undertake such an expansion again here.

Conversely, on the question whether extending the inferred cause of action to reach the conduct in question is "[]necessary to ensure fulfillment of Congress's purposes in adopting the Act," *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977) (citation omitted), experience readily establishes that the answer is a "no." For the first half-century of Section 14(e)'s existence, no court had ever extended an inferred cause of action under that provision to negligent conduct, and yet there is no evidence that the purposes of Section 14(e) were unfulfilled.

Accordingly, practical considerations also weigh heavily against extension of an inferred private right of action under Section 14(e) to mere negligence.

III. EVEN MORE FUNDAMENTALLY, THE NINTH CIRCUIT NEVER SHOULD HAVE INFERRED ANY RIGHT OF ACTION UNDER SECTION 14(e) TO BEGIN WITH

For the foregoing reasons, the Ninth Circuit erred in expanding the private right of action that court had previously inferred under Section 14(e) to negligence. But the Ninth Circuit's decision rests on an even more fundamental error: There is no basis for inferring a private right of action under Section 14(e) for any conduct, regardless of whether it involves scienter or negligence. Contemplating an inferred private right of action for negligence just underscores that no cause of action should have been inferred at all. Although the Ninth Circuit panel in this case was obligated by its prior precedent to recognize an inferred private right of action under Section 14(e) as a baseline for deciding this case, this Court certainly is not.[12]

A. If Section 14(e) Really Did Proscribe Negligent Conduct, Then It Plainly Could Not Be Privately Enforceable

Whatever foundation lower courts thought they could find in the 1970s for an inferred private right under Section 14(e) requiring scienter, the entire house comes crumbling down if one adds the weight of a negligence standard to the mix.

As this Court held in *Ernst & Ernst*, the "procedural limitations" Congress imposed on "each of the [Act's] express civil remedies" "indicate that [a] judicially created private damages remedy . . . which has no comparable restrictions—cannot be extended . . . to actions premised on negligent wrongdoing."

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[12] Respondents claim that Petitioners waived the argument that a cause of action may not be implied at all under Section 14(e) by failing to raise it below. BIO 28. Not so. Petitioners raised the argument in their petition for rehearing en banc before the Ninth Circuit, which was the earliest opportunity that the Ninth Circuit could have resolved the issue in Petitioners' favor in light of existing precedent. *See* Pet. for Rehearing En Banc 14 (9th Cir. May 4, 2018), ECF No. 63; *see also Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (a panel is bound by the circuit's prior decisions unless they are "clearly irreconcilable" with "intervening higher authority"). Petitioners then renewed the argument at the certiorari stage as an explicit part of their broader contention that there is no inferred private right for negligence (if there is no inferred private right at all, then there is, of course, no private right for negligence). *See* Pet. i, 20; Cert. Reply 10. The points are simply "separate *arguments* in support of a single claim," *Yee v. City of Escondido,* 503 U.S. 519, 535 (1992)—that there is no inferred private right of action covering the conduct alleged in the complaint. Likewise, both arguments are plainly included within the Question Presented.

425 U.S. at 210 (footnote omitted). Thus, if the Ninth Circuit was correct that Section 14(e) is intended to apply to "negligent wrongdoing," then it becomes unmistakably clear that Congress did not intend the provision to be privately enforceable at all.

That is precisely the conclusion the courts of appeals have reached with respect to the provision the Ninth Circuit offered as the closest analogue to Section 14(e)—Section 17(a) of the 1933 Act. Before this Court's decision in *Aaron*, several courts of appeals had inferred a private right of action under Section 17(a), usually by analogy to Section 10(b). After this Court held in *Aaron* that Section 17(a)(2) and (3) applied to negligent conduct, however, lower courts revisited their precedent and held that, with negligence in the mix, there could be no inferred right of action under Section 17(a) at all.

As the Second Circuit explained, "*Aaron* broke the link between rule 10b-5 and § 17(a)" by holding that, "unlike an action under rule 10b-5, in an action [under Section 17(a)] the SEC did not have to establish scienter." *Finkel v. Stratton Corp.*, 962 F.2d 169, 175 (2d Cir. 1992). "Accordingly," the court reasoned, "we can no longer justify the private right of action under § 17(a) on the ground that rule 10b-5 provides the same cause of action anyway." *Id.* Stripped of this rationale, the court held that it could not imply any private right under Section 17(a). *Id.*

The Fourth, Seventh, and Ninth Circuits all reached the same result using the same reasoning—each overturning their prior precedent and holding that there is no implied right of action under Section 17(a). *See Newcome v. Esrey*, 862 F.2d 1099, 1101 (4th Cir. 1988) (overruling *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975)); *In re Washington Pub. Power Supply*

Sys. Sec. Litig., 823 F.2d 1349, 1354 (9th Cir. 1987) (overruling *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808 (9th Cir. 1981)); *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 943 (7th Cir. 1989).[13]

Ironically, then, if it were accepted, the Ninth Circuit's view that Section 14(e) extends to negligence would knock out a linchpin on which the inferred private right of action rested. Just as the lower courts recognized with respect to Section 17(a), if Section 14(e) really did proscribe negligent wrongdoing, as the Ninth Circuit held, then any basis for implying a private right of action under Section 14(e) would collapse: The upshot of rejecting a standard under which "scienter is required" for "private plaintiffs" is that "there is no private right of action under [Section 14(e)]" at all. *Finkel*, 962 F.2d at 175.

B. This Court's Recent Precedent Clearly Forecloses Inference Of A Private Right Of Action Under Section 14(e)

In any event, there is no basis for inferring any private right of action under Section 14(e) in light of the demands of this Court's modern test for determining whether implied private rights exist. This Court has already recognized that Section 14(e), on its face, "makes no provision whatever for a private cause of action." *Piper v. Chris-Craft Indus., Inc.*, 430

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[13] Five other courts of appeals have likewise concluded that there is no inferred private cause of action under Section 17(a). *See Maldonado v. Dominguez*, 137 F.3d 1, 7 (1st Cir. 1998); *Deviries v. Prudential-Bache Sec., Inc.*, 805 F.2d 326, 328 (8th Cir. 1986); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 819 (10th Cir. 1990); *Currie v. Cayman Res. Corp.*, 835 F.2d 780, 784 (11th Cir. 1988); *Landry v. All Am. Assurance Co.*, 688 F.2d 381, 385 (5th Cir. 1982).

U.S. 1, 24 (1977). And Section 14(e) plainly flunks the rigorous analysis that this Court applies today in deciding whether to infer a private right of action.

The "judicial task" today "is limited solely to determining whether Congress intended to create the private right of action asserted by [the plaintiffs]." *Sandoval*, 532 U.S. at 286; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). "To recognize an implied cause of action," a court must "conclude that Congress *intended* to provide a cause of action even though Congress did not expressly say as much in the text of the statute." *Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1097-98 (D.C. Cir. 2017) (Kavanaugh, J.). That is a "high bar." *Id.* at 1098; *see Thompson*, 484 U.S. at 192 (Scalia, J., concurring in the judgment). The inquiry into whether Congress intended a private cause of action it did not express thus begins with a healthy dose of skepticism and, indeed, a presumption against such an implied right. *See* Scalia & Garner, *supra*, at 313-17.

This Court has set forth a two-part test that a plaintiff must meet in order to pass that bar and demonstrate that Congress intended to create a private right of action it did not actually express: first, the statute must "display[] an intent to create a private right" through the use of "rights-creating language"; and, second, the overall legislative scheme must indicate that Congress wished that private right to be enforceable by "a private remedy." *Sandoval*, 532 U.S. at 286, 288. Respondents cannot make *either* necessary showing as to Section 14(e) here.

1. Section 14(e) lacks "rights-creating" language

"'[T]he question whether Congress . . . intended to create a private right of action [is] *definitively answered in the negative*' where 'a statute by its terms grants no private rights to any identifiable class.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002) (first alteration added) (emphasis added) (citation omitted). "For a statute to create . . . private rights, its text must be 'phrased in terms of the persons benefited.'" *Id.* at 284 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979)). "Statutes that focus on the person *regulated* rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval*, 532 U.S. at 289 (emphasis added) (citation omitted).

Section 14(e) flunks this test. Instead of focusing on the "benefited class," Congress "framed the statute simply as a general prohibition." *Washington Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d at 1354 (quoting *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 772 (1981)). Section 14(e) by its terms only "proscribes certain conduct," *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 19 (1979); it thus focuses entirely "on the person regulated," not the person benefited. *Sandoval*, 532 U.S. at 289. Section 14(e) accordingly lacks the "'rights-creating' language so critical to the Court's analysis in" the few cases where it has recognized an implied right. *Id.* at 288. That by itself is sufficient to conclude that no private right of action may be inferred under Section 14(e).[14]

2. *Section 14(e) reflects no congressional intent to create a private remedy*

"[E]ven where a statute is phrased in . . . explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to . . . also [create] a private *remedy*.'" *Gonzaga*, 536 U.S. at 284; *see also Sandoval*, 532 U.S. at 290. Respondents cannot make that additional showing here. Indeed, the fact that Congress has created other enforcement mechanisms for remedying violations under Section 14(e) is sufficient to establish that Congress did not "intend[] to authorize by implication additional judicial remedies for private citizens." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487-88 (1996) (citation omitted).

Section 14(e) creates an alternative remedial scheme itself. Its second sentence instructs the SEC to "define, and *prescribe means* reasonably designed to prevent" the conduct made unlawful. 15 U.S.C. § 78n(e) (emphasis added). Section 14(e) is thus "phrased as a directive to federal agencies" to address

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[14] The fact that Section 14(e) ultimately "protect[s] [a] class of shareholder-offerees," *Piper*, 430 U.S. at 38, is not enough. Practically *all* statutes have some class of persons that they benefit, but very few statutes create private rights of enforcement by implication. *See Transamerica,* 444 U.S. at 24 ("[T]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf."); *Touche Ross*, 442 U.S. at 578 ("[T]he mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf.").

the proscribed conduct—a context where, this Court has said, there is "far less reason to infer a private remedy in favor of individual persons." *Sandoval*, 532 U.S. at 289 (citations omitted).

Moreover, the securities laws also establish no fewer than "*eight* express liability provisions" governing the circumstances in which Congress intended to authorize private enforcement. *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 296 (1993) (emphasis added); *see supra* at 7-8 (listing examples). Likewise, Congress created express causes of action that allow the SEC to seek to enjoin violations of Section 14(e), impose civil penalties for those violations, and even impose *criminal* sanctions for them. *See* 15 U.S.C. §§ 77t(b), 78u(d)(3)(A), 78ff(a); *see also supra* at 7.

"In view of these express provisions, . . . it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action'" under Section 14(e). *Transamerica*, 444 U.S. at 20 (citation omitted); *see Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (holding that the "presumption that a remedy was deliberately omitted" is "strongest" when Congress has enacted a detailed enforcement scheme). The statutory context for Section 14(e) thus confirms that Congress did not intend a private right of action—in addition to the express enforcement mechanisms it established—to pursue violations of Section 14(e).

C. There Is No Basis To Recognize, Or Acquiesce In, An Inferred Private Right Based On The History Of Section 14(e)

The fact that Section 14(e) was enacted during a time when this Court *was* in the business of inferring private rights of action does not support a different conclusion. In *Sandoval*, this Court rejected precisely such an argument in refusing to infer a private right of action under Section 602 of Title VI of the Civil Rights Act, explaining that "legal context matters only to the extent it clarifies text." 532 U.S. at 288. In doing so, the Court emphasized that "[n]ot even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak* have we applied *Borak*'s method for discerning and defining causes of action." *Id.* at 287. To the contrary, this Court has subjected each new assertion of an inferred cause of action under the securities laws to the rigorous standards that the Court's modern decisions establish for creating or extending inferred private rights. *See, e.g.*, *Stoneridge Inv. Partners*, 552 U.S. at 165; *Janus*, 564 U.S. at 141-42; *Sandoval,* 532 U.S. at 288.

There is also no basis to acquiesce in lower courts decisions inferring a private right under Section 14(e). When this Court acquiesced in the lower courts' inference of an implied private right under Section 10(b) and Rule 10b-5 in *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971), "[s]uch acquiescence was 'entirely consistent' with [*Borak*]," the governing precedent at the time. *Musick, Peeler & Garrett,* 508 U.S. at 299 (Thomas, J., dissenting). Likewise, the lower court decisions inferring a private right under Section 14(e) took root in a day when *Borak's* permissive approach to inferring private rights still governed. But no court of appeals recognizing an inferred private right under Section 14(e) has ever subjected it to the rigorous analysis demanded by *Sandovol. See id.* at 300 ("How a particular private cause of action may have emerged should not weaken our vigilance in the subsequent interpretation and application of that action.”).

Nor does this Court’s precedent recognizing an inferred private right of action under Section 10(b) and Rule 10b-5 require this Court to recognize an inferred private right under Section 14(e). Although the rigors of statutory *stare decisis* would stand in the way of subjecting the inferred private right under Section 10(b) and Rule 10b-5 to a fresh look under this Court’s modern precedent, no such considerations apply to Section 14(e). Indeed, the only other time the question of an inferred private right for plaintiffs like Respondents here received this Court’s attention, this Court pointedly reserved the issue. *See Piper*, 430 U.S. at 42 n.28 (“Whether shareholder-offerees . . . have an implied cause of action under § 14(e) is not before us, and we intimate no view on the matter.”).

Now that the issue is back before the Court, the Court should hold that there is no inferred private right of action under Section 14(e)—period.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Section 11 of the Securities Act of 1933

15 U.S.C. § 77k

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having

prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the

Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was

no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

* * *

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

* * *

Section 12 of the Securities Act of 1933

15 U.S.C. § 77*l*

§ 77*l*. Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2), if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

Section 17(a) of the Securities Act of 1933

15 U.S.C. § 77q

§ 77q. Fraudulent interstate transactions

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a)(78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * *

Section 20 of the Securities Act of 1933

15 U.S.C. § 77t

§ 77t. Injunctions and prosecution of offenses

(a) Investigation of violations

Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Action for injunction or criminal prosecution in district court

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, the Commission may, in its discretion, bring an action in any district court of the United States, or United States court of any Territory, to enjoin such acts or practices, and upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this subchapter. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

* * *

(d) Money penalties in civil actions

(1) Authority of Commission

Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 77h-1 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(2) Amount of penalty

(A) First tier

The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B) Second tier

Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(I) the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

* * *

(e) Authority of court to prohibit persons from serving as officers and directors

In any proceeding under subsection (b), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 77q(a)(1) of this title from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title or that is required to file reports pursuant to section 78*o*(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

* * *

Section 9 of the Securities Exchange Act of 1934

15 U.S.C. § 78i

§ 78i. Manipulation of security prices

(a) Transactions relating to purchase or sale of security

It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security other than a government security, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with 1 or more other persons, a series of transactions in any security

registered on a national securities exchange, any security not so registered, or in connection with any security-based swap or security-based swap agreement with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or a security-based swap agreement with respect to such security, to induce the purchase or sale of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(4) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to make, regarding any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based

swap agreement with respect to such security, for the purpose of inducing the purchase or sale of such security, such security-based swap, or such security-based swap agreement any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which that person knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a broker, dealer, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the security, a security-based swap, or security-based swap agreement with respect to such security, to induce the purchase of any security registered on a national securities exchange, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any 1 or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security other than a government security for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or

appropriate in the public interest or for the protection of investors.

(b) Transactions relating to puts, calls, straddles, options, futures, or security-based swaps

It shall be unlawful for any person to effect, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors—

(1) any transaction in connection with any security whereby any party to such transaction acquires—

(A) any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so;

(B) any security futures product on the security; or

(C) any security-based swap involving the security or the issuer of the security;

(2) any transaction in connection with any security with relation to which such person has, directly or indirectly, any interest in any—

(A) such put, call, straddle, option, or privilege;

(B) such security futures product; or

(C) such security-based swap; or

(3) any transaction in any security for the account of any person who such person has reason to believe has, and who actually has, directly or indirectly, any interest in any—

(A) such put, call, straddle, option, or privilege;

(B) such security futures product with relation to such security; or

(C) any security-based swap involving such security or the issuer of such security.

(c) Endorsement or guarantee of puts, calls, straddles, or options

It shall be unlawful for any broker, dealer, or member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

(f) Persons liable; suits at law or in equity

Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

* * *

Section 10(b) of the Securities Exchange Act of 1934

15 U.S.C. § 78j

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

[1] So in original. Probably should be followed by a comma.

Section 14 of the Securities Exchange Act of 1934

15 U.S.C. § 78n

§ 78n. Proxies

(a) Solicitation of proxies in violation of rules and regulations

(1) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

(2) The rules and regulations prescribed by the Commission under paragraph (1) may include—

(A) a requirement that a solicitation of proxy, consent, or authorization by (or on behalf of) an issuer include a nominee submitted by a shareholder to serve on the board of directors of the issuer; and

(B) a requirement that an issuer follow a certain procedure in relation to a solicitation described in subparagraph (A).

* * *

(e) Untrue statement of material fact or omission of fact with respect to tender offer

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

* * *

Section 16(b) of the Securities Exchange Act of 1934

15 U.S.C. § 78p

§ 78p. Directors, officers, and principal stockholders

* * *

(b) Profits from purchase and sale of security within six months

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement or a security-based swap involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

* * *

Section 18 of the Securities Exchange Act of 1934

15 U.S.C. § 78r

§ 78r. Liability for misleading statements

(a) Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc.

Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

* * *

(c) Period of limitations

No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

Section 21 of the Securities Exchange Act of 1934

15 U.S.C. § 78u

§ 78u. Investigation and actions

(a) Authority and discretion of Commission to investigate violations

(1) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while a participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem

necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

* * *

(c) Judicial enforcement of investigative power of Commission; refusal to obey subpena; criminal sanctions

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Injunction proceedings; authority of court to prohibit persons from serving as officers and directors; money penalties in civil actions

(1) Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm or a person associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

(2) AUTHORITY OF COURT TO PROHIBIT PERSONS FROM SERVING AS OFFICERS AND DIRECTORS.—In any proceeding under paragraph (1) of this subsection, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who violated section 78j(b) of this title or the rules or regulations thereunder from acting as an officer or director of any issuer that has a class of securities registered pursuant to section 78*l* of this title or that is required to file reports pursuant to section 78*o*(d) of this title if the person's conduct demonstrates unfitness to serve as an officer or director of any such issuer.

(3) MONEY PENALTIES IN CIVIL ACTIONS.—

(A) AUTHORITY OF COMMISSION.—Whenever it shall appear to the Commission that any person has violated any provision of this chapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 78u-3 of this title, other than by committing a violation subject to a penalty pursuant to section 78u-1 of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(B) AMOUNT OF PENALTY.—

(i) FIRST TIER.—The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (I) $5,000 for a natural person or $50,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation.

(ii) SECOND TIER.—Notwithstanding clause (i), the amount of penalty for each such violation shall not exceed the greater of (I) $50,000 for a natural person or $250,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(iii) THIRD TIER.—Notwithstanding clauses (i) and (ii), the amount of penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(aa) the violation described in subparagraph (A) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(bb) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

* * *

(5) EQUITABLE RELIEF.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

* * *

17 C.F.R. § 240.10b–5

§ 240.10b–5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.