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 *AMICUS CURIAE* OF PHILLIP GOLDSTEIN IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is a stockholder of Pershing Square Holdings, Ltd., ("PSH"), a company that was sued along with other parties in the U.S. District Court for the Central District of California by stockholders of Allergan in two class action lawsuits entitled *In Re Allergan, Inc. Proxy Violation Securities Litigation*, Case No. 8:14-cv-2001-DOC, and *In re Allergan, Inc. Proxy Violation Derivatives Litigation*, Case No. 2:17-cv-04776-DOC, ("the Allergan lawsuits") alleging violations of, among other things, Section 14(e) of the Securities Exchange Act of 1934, the same statute that Emulex is alleged to have violated in this case. After the District Court declined to dismiss the case on the asserted ground that there is no private right of action to enforce Section 14(e), the parties settled for a total of $290 million, of which PSH paid $86.4 million. *Amicus curiae* seeks to do away with such lawsuits in the future by persuading this Court to declare categorically that there is no private right of action to enforce Section 14(e).

[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question presented is: "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." That question can be bifurcated into two questions:

1. Whether Section 14(e) of the Securities Exchange Act of 1934 supports an inferred private right of action. ("the Threshold Question")

2. If so, whether the Ninth Circuit correctly held, in express disagreement with five other courts of appeals, that such inferred private right of action may be based on a negligent misstatement or omission made in connection with a tender offer. ("the Conditional Question")

I submit that the briefs by (1) the Chamber of Commerce of the United States as *amicus curiae* supporting a writ of certiorari, and (2) the petitioners on the merits demonstrate that there is no basis to infer that Congress intended to permit private parties to enforce Section 14(e). Although this Court may resolve this case in favor of the petitioner by a "no" answer to either question, the purpose of this brief is to persuade

it that it should not avoid answering the Threshold Question.[2]

ARGUMENT

I. Every Federal Court has a Duty to Determine Whether a Plaintiff has Standing.

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231 (1990)) (internal quotation marks omitted). This "special obligation [of every federal court] to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review' [is not waived] even though the parties are prepared to concede it." *FW/PBS, supra*, at 231 (internal citations omitted). Further, defects in subject matter jurisdiction require correction regardless of whether the error was raised in a lower court. *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908).

[2] I take no position on whether this Court should also answer the Conditional Question.

A. Neither the District Court nor the Circuit Court Determined That Congress Intended to Create a Private Remedy for a Violation of Section 14(a).

The District Court did not address the Threshold Question and dismissed the case based upon its finding that the answer to the Conditional Question is "no." On appeal, the Circuit Court reversed that finding after dispatching the Threshold Question with a single sentence: "It is undisputed that Section 14(e) provides for a private right of action to challenge alleged misrepresentations or omissions in connection with a tender offer."[3] The Circuit Court did not cite any basis for that conclusion.

B. This Court Should Answer the Threshold Question.

A vigorous debate occurred in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) as to whether, as the majority opinion held, "[t]he requirement that jurisdiction be established as a threshold matter . . . is

[3] The Circuit Court did not indicate who would have an opportunity to dispute that conclusion. In addition, by contrast, immediately preceding that sentence, the Circuit Court wrote that "it would be [incorrect] to imply a remedy under Section 14(d)(4) [because that would be contrary to the guidance in] *Alexander v. Sandoval*, 532 U.S. 275, 289, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ('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.')" It did not explain why it did not apply the same reasoning to assess whether a private remedy under Section 14(e) is available.

inflexible and without exception." (Internal citation omitted.) Justice Breyer took a less absolute stance: "I [] agree [with Justices O'Connor and Kennedy] that federal courts often, and typically should, decide standing questions at the outset of a case [except] when doing so would cause serious practical problems." Justice Stevens, concurring in the judgment (and joined by Justice Souter on this point), asserted that, when this Court is faced with the questions of whether constitutional standing (injury in fact, causation, and redressability) and/or statutory standing are lacking, "we have the power to decide the statutory question first." Here, (1) the Threshold Question can be readily answered by a straightforward reading of Section 14(e) in context and thus causes no practical problems, and (2) constitutional standing is not at issue. Consequently, it is reasonable to infer that no justice that participated in *Steel Co.* would argue that, regardless of whether an alleged omission or misstatement must be fraudulent or merely negligent to constitute a statutory violation, if there is an easily answered question as to whether *any* private party has statutory standing to enforce the statute, this Court should not do so.

II. There are Good Reasons to Answer the Threshold Question Now.

A. Answering the Threshold Question Now Promotes Judicial Efficiency.

No federal court should waste resources on a suit seeking a private remedy for a violation of a statute if there is no evidence that Congress intended to create

one. Here, no heavy lifting is required for this Court to eliminate such wasted resources.

B. Answering the Threshold Question Now Will Promote Justice.

In the Allergan lawsuits, the District Court, in an order denying a motion to dismiss, found that "the case law indicates that § 14(e) contains a private right of action" based solely upon "the Ninth Circuit's guidance on this issue" despite the fact that such "guidance" did not address Congressional intent. Had it applied the methodology this Court first set forth in *Alexander v. Sandoval*, 532 U.S. 275 (2001) to determine Congressional intent, it would have dismissed the cases. That flawed ruling cost the defendants $290 million. This Court should answer the Threshold Question now to preclude similar injustices in the future.

C. This Court Should Reinforce the Obligation of the Lower Courts to Faithfully Apply *Sandoval*.

In *Sandoval* and its progeny, this Court has made it clear that a federal court should not infer a private right of action unless it determines that Congress "unambiguously" intended to confer such a right on an aggrieved person.[4] The Ninth Circuit has properly considered Congressional intent in other

[4] *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)

(post-*Sandoval*) cases.[5] Yet, neither the Ninth Circuit in this case nor the District Court in the Allergan lawsuits applied *Sandoval*.

Another example of a Circuit Court giving short shrift to *Sandoval* is footnote 9 in *Hallwood Realty Partners, LP v. Gotham Partners, LP*, 286 F.3d 613, 618 (2d Cir. 2002), a lawsuit brought by a company against a security holder to enforce § 13(d) of the Securities and Exchange Act. In relevant part, that footnote reads:

> In declining to hold that issuers may obtain damages, we in no way intend to cast doubt on the continued validity of [*GAF Corp. v. Milstein*, 453 F.2d 709, 720 (2d Cir.1971)] with respect to injunctive relief. Notably, the Supreme Court has not sought to reconsider the existence of causes of action, such as the right to injunctive relief recognized in *GAF Corp.*, that were implied under the now dubious analysis of [*J. I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964)].

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[5] See, e.g., *Northstar Financial Advisors, Inc. v. Schwab Investments*, 615 F.3d 1106, (2010) (no private cause of action under § 13(a) of the Investment Company Act of 1940); *In re Digimarc Corp. Derivative Litigation*, 549 F.3d 1223 (2008) (no private cause of action under § 304 of the Sarbanes-Oxley Act); *Logan v. U.S. Bank National Association*, 722 F.3d 1163 (2013) (no private cause of action under § 702(a) of the Protecting Tenants at Foreclosure Act); *Segalman v. Sw. Airlines Co.*, 895 F.3d 1219 (9th Cir. 2018) (no private cause of action under the Air Carrier Access Act of 1986).

Sandoval made clear that *Borak* was wrongly decided and firmly established binding guidance that is applicable to *every* federal statute and every federal court. Since this Court has never considered the analysis in *GAF Corp*. (which relied solely on *Borak*), there is no reason to "reconsider" it. The Second Circuit's rationalization for clinging to a "now dubious" pre-*Sandoval* precedent seems disingenuous and specious.

This Court should take this opportunity to remind lower courts of their obligation to determine *in every instance* in which a private party seeks to enforce a federal statute whether Congress intended to create a private remedy – and to dismiss such a lawsuit if it finds that Congressional intent is lacking.

CONCLUSION

For the foregoing reasons, this Court should answer the Threshold Question.

Dated: February 26, 2019

Respectfully submitted,

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