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 LEGAL SCHOLARS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICI[1]

Amici are scholars in the fields of securities law and private enforcement of federal law who have closely followed this Court's cases about securities regulation and private rights of action. Amici agree with respondents that Section 14(e) of the Securities Exchange Act of 1934 authorizes a private cause of action for negligence. This brief focuses specifically on whether Section 14(e) creates a private right of action—an issue that petitioners and some of their amici have raised belatedly in this litigation. If the Court reaches that question, amici argue that it should affirm.

Amici are:

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel contributed money to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

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SUMMARY OF ARGUMENT

This Court's recent precedents regarding private rights of action emphasize respect for the separation of powers and judicial restraint. Often, these norms have steered the Court away from recognizing a new implied private right of action, or extending an existing one to an entirely new circumstance. The same considerations, however, dictate a different result with respect to private rights of action that are well-established by judicial precedent. Where Congress contemplated a private right of action in the first instance, courts have uniformly recognized one for decades, and Congress has legislated against that backdrop without abrogating those decisions, this

Court has recognized that it would not promote the separation of powers or judicial restraint to upend the status quo. Indeed, it would be profoundly disruptive.

These considerations apply with full force to established private rights of action under the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (15 U.S.C. § 78a *et seq.*)—including the rights to enforce Sections 10(b), 14(a), 14(e), and their implementing rules. In this case, to the extent the Court is inclined to reach the issue of the implied private right of action, the Court should recognize that such well-established causes of action continue to play an important role in securities regulation, and uphold the private right of action to enforce Section 14(e).

ARGUMENT

Everybody agrees that on a prospective basis it would be better for Congress to speak expressly if it wishes to create a new cause of action. Simultaneously, however, nobody can deny that it would be extremely disruptive for federal courts—having recognized implied rights of action for decades, and having induced Congress to expect that such remedies would be available to injured Americans—to begin overruling all of those decisions in an effort to clean the doctrinal slate. In the short term, grave violations of federal law would occur without any remedy, and it is doubtful whether Congress would ever be able to undo all of the damage.

These concerns about fairness, justice, and stability in the law have correctly prompted this Court to take a cautious and balanced approach to private rights of action. This Court's decisions reflect real reluctance to create new private rights of action, or to

extend existing ones—but also a firm commitment to maintain existing, well-established private rights of action against unfounded challenges. This Court should follow that approach, and in fact nobody seriously argues otherwise.

Taking that as the starting point, the only question in this case is whether the private right of action under Section 14(e) of the Exchange Act, 15 U.S.C. § 78n(e)—which was obviously contemplated by the Congress that enacted the statute, has been uniformly recognized by federal courts since the late 1960s, and has never been modified by Congress since—is the sort of newfangled action that this Court has declined to embrace, or instead the sort of well-established remedy that the Court has consistently maintained. It is clearly the latter, and the Court should therefore affirm.

I. This Court's Precedents Support Maintaining Well-Established Private Rights of Action.

1. There is no doubt that this Court has become less willing to imply new private rights of action. The Court explained why in *Alexander v. Sandoval*, 532 U.S. 275 (2001), which held that there was no private right of action to enforce disparate-impact regulations enacted pursuant to Section 602 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. As the Court recognized, "private rights of action to enforce federal law must be created by Congress," and the "judicial task is to interpret the statute" to determine whether it created a private remedy. 532 U.S. at 286.

In *Sandoval*, the relevant statute (Section 602) authorized federal agencies to issue "rules, regulations,

or orders of general applicability" to enforce Section 601 of the statute, which by its terms prohibited only intentional discrimination. *See* 532 U.S. at 288 (quoting 42 U.S.C. § 2000d-1). The Court determined that this language did not create rights or even regulate conduct; in fact, the language suggested that public enforcement was the proper way to enforce the statute. *Id*. at 289-90. Section 602 was therefore insufficient to authorize a new private right of action for disparate impact claims.

The Court acknowledged, however, that courts should recognize implied private rights of action in at least two contexts. First, the Court indicated that existing implied private rights of action should not be revisited. For example, the Court held that the implied private right of action to enforce Section 601 was "beyond dispute." *Sandoval*, 532 U.S. at 280. As support, the Court noted that it had acknowledged this right of action in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and that subsequent legislation—which effectively "ratified" the private right of action, even though it did not codify it—had been enacted against that backdrop. 532 U.S. at 279-80.

Second, the Court recognized that when Congress enacts or reenacts statutory text "that courts had previously interpreted to create a private right of action," courts can consult that context when interpreting the text, and infer that Congress intended the statute to create a private right of action. *Sandoval*, 532 U.S. at 288. The Court cited two relevant examples. First, in *Cannon*, the Court observed that Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, "was patterned after Title VI of the Civil Rights Act of

1964," which "had already been construed" by the lower courts "as creating a private remedy." 441 U.S. at 694, 696. The Court reasoned that it was "always appropriate to assume that our elected representatives, like other citizens, know the law"—and to conclude that Congress would have "expected its enactment to be interpreted in conformity" with judicial precedents that formed the "contemporary legal context" around the 1972 statute. *Id*. at 696-97, 699. This was so even under "the strict approach followed in our recent cases" regarding implied rights of action. *Id*. at 698.

The Court's second example was *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982), which upheld an implied private right of action to enforce the Commodity Exchange Act (CEA), ch. 369, 42 Stat. 998 (7 U.S.C. § 1 *et seq.*). In *Merrill Lynch*, the Court explained that "[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue . . . we must examine Congress' perception of the law that it was shaping or reshaping." 456 U.S. at 378. When Congress overhauled the CEA in 1974, an implied private right of action was already "part of the 'contemporary legal context'" because it had been recognized by many lower courts, and this Court had "assumed that the remedy was available" *Id*. at 380, 381. Congress did not codify this private right of action, but it did not eliminate the relevant statutory language either. The Court held that "[i]n that context, the fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied

a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy." *Id*. at 381-82.

In these situations, the Court held that it was proper for courts to presume that Congress understood the text it was enacting to create a private right of action, and that it would therefore thwart Congress's intent for a court to interpret the statute to reach the opposite result.

2. In the years since *Sandoval*, the Court has generally been reluctant to infer implied private rights of action. There have, however, been notable exceptions that prove the doctrine of implied private rights of action remains an important feature of federal law.

In *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 171 (2005), the Court held that the implied private right of action to redress discrimination on the basis of sex under Title IX (recognized in *Cannon*) extended to retaliation claims. The Court reasoned that "Congress enacted Title IX just three years after" *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which held that the prohibition of racial discrimination in 42 U.S.C. § 1982 included a prohibition against retaliation. 544 U.S. at 176. The Court thus concluded that *Sullivan* "provides a valuable context for understanding" Title IX, and that Congress would have "expected its enactment of Title IX to be interpreted in conformity with" that decision. *Ibid.* (quotation marks and alterations omitted). Because *Sullivan* had interpreted discrimination to encompass retaliation, the Court in *Jackson* held that Title IX's prohibition of discrimination did, too. The Court rejected the

argument that its decision was inconsistent with *Sandoval*, reasoning that its conclusion followed from the "statute's text" and Congress's intent—not freewheeling judicial policymaking. *Id*. at 178.

In *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008), the Court, in a 7-2 decision, reached the same result with respect to 42 U.S.C. § 1981. The Court explained that even though Section 1981 did not mention retaliation, the statute had historically been interpreted to be consistent with Section 1982—which the Court in *Sullivan* had found to prohibit retaliation. The Court also noted that "since 1991, the lower courts have uniformly interpreted § 1981 as encompassing retaliation actions." 553 U.S. at 451. The Court thus reasoned that considerations of statutory *stare decisis* supported finding a cause of action for retaliation in Section 1981 as well:

> *Sullivan*, as interpreted and relied upon by *Jackson*, as well as the long line of related cases where we construe §§ 1981 and 1982 similarly, lead us to conclude that the view that § 1981 encompasses retaliation claims is indeed well embedded in the law. That being so, considerations of *stare decisis* strongly support our adherence to that view. And those considerations impose a considerable burden upon those who would seek a different interpretation that would necessarily unsettle many Court precedents.

Id. at 451-52. The Court also rejected the argument that in the years since *Sullivan*, the Court's approach to statutory interpretation had veered toward textualism and away from the sort of purposive

analysis utilized in *Sullivan* itself. The Court explained that even if this was true, it did not matter:

> [E]ven were we to posit for argument's sake that changes in interpretive approach take place from time to time, we could not agree that the existence of such a change would justify reexamination of well-established prior law. Principles of *stare decisis*, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends.

Id. at 457. Importantly, the Court reached these conclusions even though it had never previously recognized a private right of action for retaliation under Section 1981. It was enough that the lower courts had done so, and that this Court's other decisions interpreted Section 1981 consistently with Section 1982.

These recent cases stand for the proposition that, even after *Sandoval*, the Court should not hesitate to imply a private right of action when judicial precedent interpreting analogous statutes supports that result. In these situations, it is apparent that Congress would have understood the text it was enacting to create a private right of action.

3. In addition to these cases, which have actually extended private rights of action, the Court has also maintained well-established private rights of action. The best examples are private rights of action under the Exchange Act, such as the right under Section

10(b) (15 U.S.C. § 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5), and also under Section 14(a) (15 U.S.C. § 78n(a)) and Rule 14a-9 (17 C.F.R. § 240.14a-9). These are discussed in greater detail in Part II, *infra*. But those are not the only examples. In fact, the Court has generally refrained from overruling the holdings of any of its old private-right-of-action cases, even though it has stepped away from their reasoning.

For present purposes, the key point is that the Court's maintenance of existing private rights of action is fully consistent with its recent precedents. The Court has explained that its approach to private rights of action is rooted in the separation of powers and judicial restraint. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 165 (2008). These are laudable goals, and maintaining existing private rights of action advances them by preserving the predictable status quo and allowing Congress to modify it if necessary. An aggressive effort to eliminate existing private rights of action, by contrast, would frustrate Congress's settled expectations and either result in gaps in Congress's laws, or force a flurry of unnecessary legislative activity.

Maintaining existing private rights of action also makes sense for all of the reasons that *stare decisis*—and especially statutory *stare decisis*—requires the Court to stay the course even if it might decide a case differently on a blank slate. It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (quoting

Payne v. Tennessee, 501 U.S. 808, 827 (1991)). And it leaves the right to act where it belongs—with Congress—which "can correct any mistake it sees." *Ibid*. Importantly, "[t]hat is true . . . whether [the Court's prior] decision focused only on statutory text or also relied . . . on the policies and purposes animating the law" and indeed, "even when a decision has announced a 'judicially created doctrine' designed to implement a federal statute." *Ibid*. (citation omitted).

II. Private Rights of Action Under the Exchange Act, Including the Right to Sue Under Section 14(e), Are Well-Established and Should Be Maintained.

This Court's approach strongly supports leaving existing private rights of action under the Exchange Act—including the private right of action under Section 14(e)—intact. Implied private rights of action under the Exchange Act have been recognized for decades. Even as this Court's precedents have shifted away from implying new private rights of action, the Court has never questioned that these rights continue to play a critically important role in the regulation of securities transactions.[2]

1. Start with the easiest example: nobody disputes that the implied right of action to enforce Section 10(b) and Rule 10b-5—which prohibit fraud in connection

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[2] In addition to Section 14(e), this section discusses Sections 10(b) and 14(a), and their implementing rules. We do this because these sections are closely related, and therefore the most pertinent sections for present purposes. The argument in this brief applies, however, to any well-established private right of action, whether under the securities law or otherwise.

with the purchase and sale of securities—is well-established, and its maintenance is therefore fully consistent with this Court's decision in *Sandoval* and its progeny. Petitioners admit (at 51) that statutory *stare decisis* protects this cause of action, the United States acknowledges (at 30-31) that "such actions serve as an important adjunct to government enforcement suits," and the Chamber of Commerce likewise concedes (at 4) that Rule 10b-5 actions should remain available.

Those admissions are necessary because, for decades, this Court has acknowledged this private right of action. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) ("Although section 10(b) does not create an express private cause of action, we have long recognized an implied private cause of action to enforce the provision and its implementing regulation."); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011); *Stoneridge*, 552 U.S. at 165 (describing the "implied right of action" as "a prominent feature of federal securities regulation"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (stating that because "a private right of action under § 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years," the "existence of this implied remedy is simply beyond peradventure"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (noting that the Court had followed the "overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist"); *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) ("It is now

established that a private right of action is implied under §10(b)").

This private right of action has also been ratified by Congress. In *Stoneridge*, this Court acknowledged that by enacting the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, Congress "ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action." 552 U.S. at 165. In *Herman & MacLean*, it applied a similar analysis to the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97. *See* 459 U.S. at 385-86 ("In light of this well-established judicial interpretation [permitting Section 10(b) actions even when express remedies were available under other provisions], Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action."). That analysis echoes the reasoning of *Sandoval*, which recognized that Congress ratified *Cannon* by legislating without overturning it, and of *Merrill Lynch*, which held that Congress's decision to overhaul the CEA without repealing legislation that had been construed to create a private right of action constituted strong evidence of an intent to preserve that right of action.

Indeed, in its recent decision in *Halliburton*, the Court not only reaffirmed the existence of the Section 10(b) and Rule 10b-5 private right of action, it held that principles of statutory *stare decisis* compelled upholding the existing scope of that cause of action—specifically the presumption of reliance. *See* 573 U.S. at 274-75. The Court thus distinguished between expansions of the private right of action—which are disfavored under current doctrine—and the maintenance of such a cause of action, which is

strongly favored under this Court's precedents. *Id*. at 275-77.

2. Similarly, the private right of action to enforce Section 14(a) and Rule 14a-9, recognized by this Court in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), is well-established and remains vital today. Section 14(a) makes it unlawful for any person to solicit or permit the use of his or her name to solicit a proxy, consent, or authorization in respect of any security in violation of SEC rules. Rule 14a-9 implements Section 14(a) by providing that:

> No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

17 C.F.R. § 240.14a-9(a).

Although much of *Borak*'s reasoning has been rejected, this Court has never overruled its holding—and has in fact repeatedly reaffirmed the existence of this private right of action. *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095 (1991) (discussing elements of a private Section 14(a) cause of action);

TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 441 (1976) (same); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 377 (1970) (same); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 171 (1994) (acknowledging private right of action to enforce Section 14(a)); *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 299 n.3 (1993) (Thomas, J., dissenting) (same); *Herman & MacLean*, 459 U.S. at 380 n.9 (same); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979) (same); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 25 (1977) (same); *Sec. Inv'r Prot. Corp. v. Barbour*, 421 U.S. 412, 423 (1975) (same).

Congress similarly has not sought to abrogate *Borak*. On the contrary, it has repeatedly amended the statutory scheme without doing so. For example, the PSLRA—which "ratified" the implied private right of action under Section 10(b)—applies to actions under Section 14(a) and Rule 14a-9 as well. *See, e.g.*, *N.Y.C. Emps.' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1022 (9th Cir. 2010), *overruled on other grounds by Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012) (en banc); *Little Gem Life Scis. LLC v. Orphan Med., Inc.*, 537 F.3d 913, 916 (8th Cir. 2008); *Bond Opportunity Fund v. Unilab Corp.*, 87 F. App'x 772, 773 (2d Cir. 2004). The legislative history of the PSLRA likewise noted that, like actions under Section 10(b), private causes of action under Section 14(a) "have long been recognized as a necessary supplement to actions brought by the Commission and as an essential tool in the enforcement of federal securities laws." S. Rep. No. 104-98, at 37 (1995) (additional views of Sens. Sarbanes, Bryan, and Boxer) (quoting former SEC

Chair Richard Breeden) (internal quotation marks omitted).

This private right of action thus exhibits the same qualities as the Section 10(b) and Rule 10b-5 action: it has long been recognized by the courts, and Congress has not abrogated it despite repeatedly amending the legislative scheme.

3. These arguments apply fully to the private right of action to enforce Section 14(e). As explained by respondents, the point of Section 14(e) was to complement Section 14(a)'s regulation of proxy solicitations by implementing similar rules regulating cash tender offers.

Section 14(e)'s text resembles Rule 10b-5 and Rule 14a-9, modified to apply to tender offers. At the time of its enactment, as part of the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968), it provided:

> 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.

15 U.S.C. § 78n(e) (Supp. IV 1968).

In 1968, Congress would have intended this language to create a private right of action. Section 14(e) was "modeled on the antifraud provisions of

§ 10(b) of the Act and Rule 10b-5," *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 10 (1985), and by 1968, the private right of action under Section 10(b) and Rule 10b-5 was already clearly established. *See Blue Chip Stamps*, 421 U.S. at 730 (explaining that the cause of action to enforce Section 10(b) and Rule 10b-5 was first recognized in 1946, and consistently thereafter). Section 14(e) was also supposed to complement Section 14(a)—and it was enacted four years after this Court decided *Borak*, recognizing the private right of action for Section 14(a) and Rule 14a-9. *Cf. Jackson*, 544 U.S. at 176-77 (finding it important that Title IX was enacted three years after *Sullivan*). Thus, Congress would have believed that Section 14(e) gave rise to a private cause of action, too. *See Sandoval*, 532 U.S. at 288 (noting that an inference of intent is available when Congress enacts or reenacts the same "statutory text that courts had previously interpreted to create a private right of action"); *Cannon*, 441 U.S. at 694 (finding it significant that Title IX was "patterned after" Title VI, which had a private right of action); *see also CBOCS West*, 553 U.S. at 451-52 (maintaining conformity between Section 1981 and Section 1982).

Courts agreed. As with Sections 10(b) and 14(a), lower courts quickly and uniformly recognized a private cause of action to enforce Section 14(e). *See, e.g.*, *Sargent v. Genesco, Inc.*, 492 F.2d 750, 769 (5th Cir. 1974) ("Although section 14(e) does not expressly provide for a private right of action, courts have uniformly implied one."); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 596 n.20 (5th Cir. 1974) (following the "overwhelming weight of authority" holding that "a private right of action may be inferred from Section

14(e)"). While courts debated the precise contours of the cause of action, none found that it did not exist.

While this Court has not yet formally recognized a cause of action under Section 14(e), it has strongly suggested that an implied private right of action for harmed investors does exist. In *Piper*, the Court considered whether a company making a tender offer had standing to bring claims under Section 14(e). 430 U.S. at 42. The Court explained that "where congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute." *Id.* at 25. And while the Court found that unsuccessful tender offerors were not part of the particular class intended to be protected by Section 14(e), following a lengthy review of the legislative history of Section 14(e), as well as the Court's related jurisprudence holding that Section 14(a) supported an implied private right of action for injured investors, the Court concluded that the "legislative history thus shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." *Id.* at 35; *see also Schreiber*, 472 U.S. at 8, 10 (analogizing Section 14(e) to Section 10(b), and holding that private cause of action therefore did not apply absent a misrepresentation or omission). The Court's analysis in *Piper* therefore directly indicates that an implied right of action under Section 14(e) was intended to be available to injured investors.

Thus while the Court nominally reserved any opinion about whether the private right of action extends to shareholders, 430 U.S. at 42 n.28, viewed in context, this statement is a clear suggestion that the

private right of action exists: the Court included it to clarify that its holding did not extend to shareholder-offerees, and thereby blunt the force of the dissent. *See ibid.* The dissent, in turn, had observed that "[n]o one seriously questions the premise that Congress implicitly created a private right of action when it enacted § 14(e) in 1968," nor "that the members of the class which Congress was especially interested in protecting may invoke that private remedy and, further, that the shareholders of a target corporation are members of that class." *Id*. at 55 (Stevens, J., dissenting). The majority never quarreled with any of that—in fact, it sought to assuage the concern with its footnote.

Against the backdrop of these decisions, Congress repeatedly amended the Exchange Act—but left the pertinent language in Section 14(e) untouched. In 1970, after the lower courts had already recognized a private right of action, Congress added explicit rulemaking authority to Section 14(e). *See* Pub. L. No. 91-567, § 5, 84 Stat. 1497, 1497-98 (1970). That amendment substantially strengthened the statute—and it did not modify the preexisting text, which Congress understood to create a private right of action. This is "evidence that Congress affirmatively intended to preserve that remedy." *Merrill Lynch*, 456 U.S. at 381-82. Congress also did not modify the private right of action when it made substantial amendments to the Exchange Act in 1975. *See supra* p.13. The PSLRA also applies to actions under Section 14(e). *See, e.g.*, *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1167 (9th Cir. 2009); *In re Dig. Island Sec. Litig.*, 357 F.3d 322, 328 (3d Cir. 2004). Thus, in the same way that Congress ratified the private right of action under Section 10(b),

it ratified the private right of action under Section 14(e). *See Stoneridge*, 552 U.S. at 165.

Petitioners and their amici argue that Section 14(e) is not entitled to the same treatment as causes of action under Sections 10(b) and 14(a) because *this Court* has never recognized a cause of action under Section 14(e). But that is not the standard this Court has laid out and adhered to. The lower courts have uniformly recognized this right of action for decades. Just as Congress is presumed to understand the common law and legislate against that backdrop, *see, e.g.*, *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991), it is presumed to comprehend a consensus among the lower federal courts. Indeed, the Court said precisely that in *Cannon*, 441 U.S. at 696-98, and in *Merrill Lynch*, 456 U.S. at 380—both cited in *Sandoval* as examples where context mattered, 532 U.S. at 288. In *CBOCS West*, too, this Court placed weight on the lower courts' consensus. 553 U.S. at 451. In each of these cases, even though this Court had not previously recognized a private right of action, it held that lower court decisions informed Congress's understanding of the text it was enacting.

To the extent this Court's precedents are instructive, all of the relevant precedents support maintaining the Section 14(e) cause of action. This Court has recognized implied causes of action under closely analogous provisions: Sections 10(b) and 14(a), and their implementing rules. In *CBOCS West*, the Court extended the cause of action under Section 1981 to encompass retaliation claims because of 1960s-era precedent finding a similar cause of action under Section 1982, determining that the result was compelled by statutory *stare decisis*. *See* 553 U.S. at

451-52. The analogy between Section 14(e) and other well-established causes of action under the Exchange Act are at least as strong, and so this Court's cases finding private causes of action under Sections 10(b) and 14(a) should have the same force here.

Finally, it does not matter, for present purposes, that lower courts initially interpreted Section 14(e) to require scienter, as opposed to negligence. As respondents explained in the brief in opposition, these courts did not analyze Section 14(e)'s first clause, and so there was no consensus that this clause required scienter. BIO 7. In any event, as this Court has recognized, the scope of an existing private right of action is a matter of statutory interpretation that turns on the meaning of the text Congress enacted. *See Jackson*, 544 U.S. at 178. That text encompasses negligent misrepresentations, Resp. Br. 9-25, and the Court should construe the statute accordingly.

4. In sum, the maintenance of private causes of action under the Exchange Act is fully consistent with this Court's precedents. When, as here, a private right of action has been in place for 50 years, it would upset settled expectations and frustrate congressional intent to eliminate it. Of course, as with any statutory question, Congress remains free to modify the scope or availability of any private right of action as it sees fit. This Court should leave the job of altering the status quo to Congress.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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